Butler v. Baber: Absolute Liability for Environmental Hazards

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Butler v. Baber:1 Absolute Liability for Environmental Hazards

An oyster lessee sued a mineral lessee for damage to his oyster crop caused by the mineral lessee’s dredging operations. The Louisiana Supreme Court, with Justice Dixon writing for the majority, held the mineral lessee “absolutely” liable2 under Civil Code article 6673 for the damage to the oyster beds.4

The State of Louisiana granted an oyster and a mineral lease on essentially the same property in Wilkson Bay. The mineral lessee, Baber, wanted to drill a well on the land in his lease. To move the necessary equipment to his well site, he arranged to have a canal dredged. Baber obtained all necessary permits and purchased a right-of-way from the oyster lessee, Butler. The canal was dredged, and the well drilled. The drilling proved unsuccessful, and Baber had the canal plugged and backfilled. When Butler returned to harvest oysters shortly after the canal was plugged, he found his oysters either dead or dying. Even though Butler had the canal designed to minimize damage to the oyster beds, several inches of silt were suffocating the oysters.

Butler sued the consultant who designed the canal and Baber5 under two theories of recovery: negligence under article 23156 and strict liability

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1. 529 So. 2d 374 (La. 1988).

2. Absolute liability is where liability is imposed by simply establishing that the plaintiff was injured and that the tortfeasor’s act was the cause in fact of the plaintiff’s injury. Butler, 529 So. 2d at 378; Kent v. Gulf States Util. Co., 418 So. 2d 493, 498 (La. 1982); Lombard v. Sewerage and Water Bd., 284 So. 2d 905, 912, 913 (La. 1973). This should be distinguished from strict liability, which at one time referred to analysis used in absolute liability, but now represents a cause of action in which the plaintiff must prove, in addition to damage and cause in fact, that the activity or object was an unreasonable risk of harm. Entrevia v. Hood, 427 So. 2d 1146 (La. 1983); Loescher v. Parr, 324 So. 2d 441 (La. 1976). See also infra notes 65-66 and accompanying text for examples of applications of the two doctrines.

3. See infra note 82 for the text of article 667.

4. This interpretation was recently supported in Street v. Equitable Petroleum Corp., 532 So. 2d 887 (La. App. 5th Cir. 1988), which held that an oil company was absolutely liable for oil spilled from an oilwell production facility that damaged a neighboring camp.

5. Both dredgers settled before trial and were not considered in the suit. Butler v. Baber, 512 So. 2d 653, 654 (La. App. 4th Cir. 1987).

under article 667. Both the trial court and the appellate court\(^7\) found that Butler failed to prove the negligence of Baber.\(^8\) The appellate court also rejected Butler's strict liability claim under article 667, finding that co-extensive lessees cannot be considered neighbors.\(^9\) The supreme court affirmed the lower courts' disposition of the negligence claim; however, on the article 667 claim, the supreme court reversed and found Baber, but not the consultant, absolutely liable under article 667.\(^{10}\)

**The Opinion**

The *Butler* decision is best characterized in the language of the late Professor Joseph Dainow "the court achieved a result which might well seem to be the right and equitable one in the administration of justice, but an analysis of its opinion leaves one in unavoidable confusion."\(^{11}\) There are three basic reasons the *Butler* opinion causes such confusion. First, the *Butler* opinion is cryptic, based on largely individual analyses of seven prior Louisiana Supreme Court decisions with no apparent conclusion.\(^{12}\) Second, these decisions conflict with one another, and the court offers little guidance on which opinion or theory to use to interpret article 667. Finally, the vagueness of the opinion is compounded by the conflicts already existing in both prior jurisprudence and doctrine, in which no single theory of interpretation has won acceptance.\(^{13}\)

This note will first present an analysis and summary of the *Butler* opinion. Based on this analysis, the note discusses the implications of the *Butler* opinion's interpretation of article 667. The final section analyzes other possible theories of interpretation of article 667, and its companion articles 668 and 669, and suggests an alternative framework of interpretation that could have provided the same results as *Butler* as well as a consistent framework for future decisions involving article 667.

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7. *Butler*, 512 So. 2d at 658.
8. *Butler*, 529 So. 2d at 377.
9. 512 So. 2d at 659.
10. 529 So. 2d at 377.
12. The court did not consider any jurisprudence before 1971 contending all previous cases were based on common law nuisance, *Butler*, 529 So. 2d at 377, even though many cases prior to 1971 contained civilian interpretations of article 667. See, e.g., article 667 interpreted using French doctrine regarding abuse of right and the obligations of neighborhood, Higgins Oil & Fuel Co. v. Guaranty Oil Co., 45 La. 233, 236-50, 82 So. 206, 207-12 (1919); article 667 construed with article 2315, Egan v. Hotel Gruenwald Co., 129 La. 163, 173, 55 So. 750, 753 (1910), Mayer v. Ford, 12 So. 2d 618, 621 (La. App. 1st Cir. 1943); and article 667 interpreted using doctrine of *sic utere*, Hauck v. Brunet, 50 So. 2d 495, 497 (La. App. Orl. 1951).
13. For discussion see infra text accompanying notes 74-81.
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ANALYSIS OF THE OPINION

The Butler opinion does not clearly articulate a single theory by which to interpret article 667, and much of the analysis the court concluded is disguised in its discussion of seven prior cases. Nevertheless, the language of the opinion and the holdings of the cases discussed seem to present four significant points about article 667. First, a breach of the duty imposed by article 667 is a type of “fault” under article 2315, and any resulting action for damages is based on article 2315. Second, the duty of article 667 protects any possessor or owner of an immovable from damage caused either by the possessor or owner of a nearby or adjoining immovable or by that person’s agents directly involved in the injury-producing activity. Third, article 667 imposes absolute liability. Finally, an action under article 667 is not restricted to ultrahazardous activities, and damage from any activity relating to land triggers liability.

Article 667 as a Duty under Article 2315

After Butler it remains unsettled whether article 667 alone may be the basis for an action, or whether article 667 merely expresses a type of fault under article 2315. Both the jurisprudence and commentators in Louisiana are in conflict. This is not without importance. If article 667 creates separate action, the courts would not be restricted by the tort rules developed under article 2315. Courts would be free, for example, to create individual prescriptive periods, and burdens of proof for article 667.


15. For example, the Louisiana Legislature almost passed a bill that would have eliminated strict liability for things under Civil Code articles 2315, 2317, and 2322. However, the bill contained no reference to article 667, and would not have limited absolute or strict liability under 667. La. S. 686, 1988 Reg. Sess.
The *Butler* opinion, nevertheless, stresses the necessity to bring an action based on article 667 through article 2315. The court's interpretation of article 667 and 2315 together is consistent with the framework for interpreting delictual actions adopted by the Louisiana Supreme Court in *Langlois v. Allied Chemical Corp.* Under the *Langlois* interpretation the term "fault" in article 2315 is interpreted broadly to include all types of delictual liability including strict and absolute liability. All actions based on fault must be brought through article 2315. Other code articles and statutes only create duties that, when breached, constitute fault under 2315. Article 667, under this view, would likewise create a duty within article 2315. Any action for damages as a result of the breach of duty of article 667 would be brought through article 2315.

Recent Louisiana jurisprudence shows a trend toward interpreting article 667 with article 2315. This is not to say that, even after *Butler*, there is no room for an interpretation of article 667 that would allow an independent action for damages. The supreme court in *Butler* made numerous references to *Langlois*, but never expressly held that article 667 creates no independent action. Furthermore, three of the cases...

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16. Cases cited that interpret article 667 with article 2315 include: Dean v. Hercules, Inc., 328 So. 2d 69, 72 (La. 1976); Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93, 99 (La. 1975) (Barham, J., concurring); Langlois v. Allied Chem. Corp., 258 La. 1067, 1083, 249 So. 2d 133, 139 (1971). The following are examples of quotes from *Butler*: "[a] violation of 667 may constitute delictual action based on fault under 2315." 529 So. 2d at 380. "[a] violation of article 667 is most closely associated with an action for damages based on article 2315. It can be said that a violation of article 667 constitutes fault within the meaning of article 2315." Id. at 380. "Fault" in the sense of *Langlois* encompasses more than negligence, and violation of 667 constitutes fault." Id. at 381.

17. 258 La. 1067, 1083, 240 So. 2d 133, 130 (1971).

18. *Langlois*, 258 La. 1076-77, 249 So. 2d at 137. This interpretation was first suggested by Professor Stone. Stone, Tort Doctrine in Louisiana: The Materials for the Decision of a Case, 17 Tul. L. Rev. 159, 207-08 (1942) and adopted by the Orleans Court of Appeal in Hauck v. Brunet, 50 So. 2d 495, 497 (La. App. Orl. 1951). This interpretation was also followed in Gulf Insurance Co. v. Employers Liability Assurance Corp., 170 So. 2d 125 (La. App. 4th Cir. 1965).

19. See infra notes 25-27 and accompanying text.

20. See supra note 16.

21. The Louisiana Supreme Court has never held that claims under article 667 must be brought through article 2315, only that they were similar to tort actions under article 2315. Louisiana courts have continued to consider suits under article 667 as actions based on property law. See, e.g., *Lombard*, 284 So. 2d at 912; Chaney v. Travelers Ins. Co., 259 La. 1, 14, 240 So. 2d 181, 186 (1971). Even in *Dean*, 328 So. 2d at 72 (citing *Langlois*, 258 La. 1067, 259 So. 2d 133), which was supposed to have settled the controversy regarding the nature of an action under article 667, the supreme court left the door open for continuing to bring actions based on article 667 alone. "An action for damages for a violation of article 667 is most closely associated with an action for damages based on C.C. 2315 et seq. Indeed, it can be said that a violation of article 667 constitutes fault within the meaning of article 2315."
discussed in the opinion, Chaney v. Travelers Insurance Co., \textsuperscript{22} Hilliard v. Shuff\textsuperscript{23} and Lombard v. Sewerage & Water Board, \textsuperscript{24} recognized actions for damages or injunction based exclusively on article 667.

Even though Butler \textsuperscript{25} does not clearly preclude an independent right of action under article 667, the better view, based on a close examination of the Butler opinion, is that there is no independent action. The Butler court first stressed interpreting article 667 with article 2315 in its discussion of Justice Barham's concurrence in Lombard v. Sewerage & Water Board: "the court [in imposing liability under article 667] should use 2315, analogizing 668-669 or 2315 and 2317."\textsuperscript{26} Further, in the court's discussion of Dean v. Hercules, Inc., the court reiterates the delictual nature of an action under article 667: "a violation of article 667 is most closely associated with an action for damages based on article 2315," and "[i]t can be said that a violation of article 667 constitutes fault within the meaning of article 2315."\textsuperscript{27} Finally, Justice Dixon in his conclusion refers to Langlois again and states that "fault under 667 is the damage done to neighboring property, and relief under 667 in the sense of Langlois encompasses more than negligence, and violation of 667 constitutes fault."\textsuperscript{28}

\textit{Parties Liable Under Article 667

In addition, to reaffirming that article 667 must be applied through article 2315 in an action for damages, the Butler court expanded the scope of the term "proprietor" and "neighbor" used in article 667.\textsuperscript{29} Article 667 governs the activities of a "proprietor" that harm his "neighbor."\textsuperscript{30} A "neighbor" is simply a nearby or adjoining proprietor who is harmed by the "proprietor's" actions.\textsuperscript{31} By definition, "proprietor" means the actual owner of a legal right to property.\textsuperscript{32} But the courts and commentators in Louisiana have favored a less restrictive application

\begin{footnotes}
22. 529 La. 1, 15, 249 So. 2d 181, 186 (1971).
25. Butler, 529 So. 2d at 378; see also id. at 379 (citing Hero Lands Co., 310 So. 2d at 99): "He said that violation of 667 may constitute delictual action based on fault which does not require proof of negligence."
26. 529 So. 2d at 379.
27. Id. at 381.
28. 529 So. 2d 381 (quoting Langlois, 258 La. at 1080, 249 So. 2d at 138).
29. For text of article 667, see infra note 82.
30. Butler, 529 So. 2d at 381. This is consistent with prior interpretations of article 667. See, e.g., Yiannopoulos, Civil Responsibility, supra note 14, at 223-24. See also infra note 116.
\end{footnotes}
of the term. The Butler court supported this broad interpretation, liberally defining "proprietor" as the owner of a real right and any of his agents who were directly involved in the injury-producing activity.

The court in Butler concentrated most of its discussion on the various interpretations of "proprietor" in the cases and emphasized a liberal definition several times in the opinion. The court stated that a "proprietor is not limited to owners" and that "the trend has been toward an expansion of the classes of those who are entitled to recovery as well as an expansion of the classes from whom recovery can be had."

The court specifically included tenants and lessees in its definition, as well as agents of the possessor or landowner. In its conclusion, however, the court restricted the meaning of proprietor to include only agents who were directly involved in the injury-producing activity. The court suggested that to be held liable under article 667, the nature of the relationship between the agent and a landowner must have been the

32. The word "proprietor" need not be limited to "owner." Any person assuming the position of owner, usufructuary, possessor in good or bad faith, or lessee, may qualify as proprietor by virtue of an expansive interpretation. Moreover, the proprietor may be liable not only for his own acts but also for the acts of others, such as servants either by virtue of directly applicable provisions of the Civil Code (arts. 2317-24) or by virtue of a contractual relationship.

33. Butler, 529 So. 2d at 381.

34. Id. at 379 (citing Lombard, 284 So. 2d at 914).

35. Id. at 381 (citing Langlois, 248 La. at 1080, 249 So. 2d at 138). The court cites as authority Yiannopoulos, Obligations of Vicinage, supra note 14, at 477, and Yiannopoulos, Civil Responsibility, supra note 14, at 210, even though Yiannopoulos concluded that "[articles 667 and 668 were apparently intended to apply to relations among landowners exclusively . . . [reserving] [article 669 . . . to all persons using immovable property."

36. The court noted that "a tenant had a right of action to enjoin objectionable aspects of an operation conducted on neighboring property where that operation threatened the health and comfort of the tenant." Butler, 529 So. 2d at 379 (citing State ex rel. Violet v. King, 46 La. Ann. 78, 14 So. 423 (1894)). See also Butler, 529 So. 2d 379 (citing Salter v. B.W.S. Corp., 290 So. 2d 821, 824 (La. 1974)).

37. "From the foregoing jurisprudence, it is clear that article 667 applies to lessees. There is no reason that co-lessees of the same or adjacent property cannot be neighbors under the language of article 667." Butler, 529 So. 2d at 381.

38. Id.

39. Robert Waldron, however, and Robert Waldron, Inc., [the consultant who designed the canal] are neither "neighbors" nor "proprietors" of any sort. Unlike Boh Brothers (the construction contractor) in the Lombard case, and Jenkins Construction Company in the Chaney case, Waldron's activity did not destroy or damage the oyster beds. Waldron was employed by Baber to collect information for him and advise him.

Id. at 381.
cause-in-fact of the damage. The court also stated that once the proprietor relationship is established, all "proprietors" are solidarily liable.

Breach of 667 Imposes Absolute Liability

The Butler court interpreted article 667 as imposing absolute liability. Under this view, any neighbor damaged by a breach of article 667 recovers simply by proving cause-in-fact and damages. The court cited several cases that support this interpretation of article 667. Most importantly, the court cited the reasoning of the Lombard v. Sewer and Water Board decision as being the "proper analysis for cases under [article] 667." The Lombard opinion contains a clear statement of the elements necessary to prove a claim under Louisiana law for absolute liability: "[I]f causation and damage are established, [the] defendants must be held responsible under principles announced in Article 667 of the Civil Code." Liability does not depend on the reasonableness and prudence of the defendant's conduct. As Justice Dixon stressed in the court's conclusion, "[r]elief under 667 requires, therefore, only that damages and causation be proved."

40. This is similar to the analysis proposed by the Fifth Circuit in Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985). In Perkins, the court held there were three requirements for absolute liability under article 667.
1. The activity must be an activity relating to land or to other immovables.
2. The activity itself must be the cause in fact and the defendant must have engaged directly in the injury producing activity.
3. The activity must not require the substandard conduct of a third party to cause injury.

41. "[A]gents of the proprietor, such as contractors and representatives, are solidarily liable with the proprietor if his activity causes damage to a neighbor." Butler, 529 So. 2d at 378 (citing Chaney v. Travelers Ins. Co., 259 La. 1, 14, 249 So. 2d 181, 186 (1971)). The court reinforces this conclusion later stating, "non proprietors are solidarily liable under 667." Id. (citing Lombard, 284 So. 2d at 914).

42. See supra note 2 for the definition of absolute liability.

43. The language of article 667, as well as much of the jurisprudence in Louisiana, supports this interpretation. Article 667 states "[the proprietor] can not make any work on [his estate] which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

44. Cases cited in the opinion that interpret article 667 as imposing absolute liability include: Hero Lands Co., 310 So. 2d at 97; Chaney v. Travelers Ins. Co., 259 La. 1, 15, 249 So. 2d 181, 186 (1971).

45. Butler, 529 So. 2d at 378.

46. Lombard, 284 So. 2d at 912. For an example of a Louisiana definition of absolute liability, see Kent, 418 So. 2d at 498, "Louisiana courts have imposed an absolute liability which virtually makes the enterpriser an insurer . . . and the injured party recovers simply by proving damage and causation."

47. Butler, 529 So. 2d at 381. The court also states: "Fault under 667 . . . requires, therefore, only that damage and causation be proved." Id. at 381, and "under 667, there is recovery despite reasonableness and prudence if the work causes damage." Id. at 379 (citing Hero Lands Co., 310 So. 2d at 97).
Article 667 is not Limited to Ultrahazardous Activities

The Butler opinion, however, does not define what activities result in absolute liability. The court implies that liability under article 667 may be based on any activity that causes harm to neighboring property. Although Butler does not define "neighbor," language used by the court suggests that the "neighbors" must be on the same or adjacent property. "There is no reason that co-lessees of the same or adjacent property cannot be neighbors under the language of article 667." Butler, 529 So. 2d at 381. But the court also recognizes that neighbor may be interpreted liberally: "the trend has been toward an expansion of the classes of those who are entitled to recovery as well as an expansion of the classes from whom recovery can be had." Id. at 381. See also Stone, supra note 14, at 711.

To be a "neighbor" one need not be an adjoining landowner; as article 651 [no longer in the code] says "it suffices that they [the lands] be sufficiently near, for one to derive benefit from the servitude on the other." It seems clear that the plaintiff must be one whose interest has been invaded by the defendant's conduct, but the nature of the interest required is not clear. . . . [I]t seems clear that the plaintiff must have a property interest, but again we may ask: is it necessary that "proprietor" mean "owner"?

49. Article 667 when cited in conjunction with article 669 has been applied to non-ultrahazardous activities. See, e.g., Rodrigue v. Copeland, 475 So. 2d 1071, 1075 (La. 1985); Bornstein v. Joseph Fein Caters, 255 So. 2d 800, 806 (La. App. 4th Cir. 1972).

50. See, e.g., Fontenot v. Magnolia Petroleum Co., 227 La. at 877, 80 So. 2d at 849 ("It has been universally recognized that when, as here, the defendant, though without fault, is engaged in a lawful business, conducted according to modern and approved methods and with reasonable care, by such activities causes risk or peril to others, the doctrine of absolute liability is clearly applicable."). See also Stewart v. City of Pineville, 511 So. 2d 26, 29-30 (La. App. 3d Cir. 1988) ("[B]ecause the construction and activity conducted by the City of Pineville was not ultra-hazardous, the damage to their property although real, is not compensable based on [article 667]"); Elnagger v. Fred H. Moran Constr. Corp., 468 So. 2d 803 (La. App. 1st Cir. 1985); Schulingkamp v. Board of Levee Commrs' of Orleans, 425 So. 2d 913, 914 (La. App. 4th Cir. 1983) ("Art. 667 does not support the judgment against [Defendant]. Unless [Defendant's] use of his property constituted ultra hazardous activity, it was incumbent upon Plaintiff to prove negligence on [Defendant's] part in order to recover.").

The author is aware of only one case where article 667 was applied to a non-ultrahazardous activity, Andrews v. Ole McDonald's Farms, Inc., 407 So. 2d 455 (La. App. 1st Cir. 1982). However, Andrews involved damage from the overflow of a sewerage oxidation pond that arguably could be considered an ultra-hazardous activity. See Restatement (Second) of Torts §§ 519, 520 (1977) and F. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986).

The restriction of article 667 liability to ultra-hazardous activities was also recognized in Malone, The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts, 26 La. L. Rev. 510, 516 (1966): "Although the Louisiana courts have paid lip service to a literal acceptance of article 667 on several occasions, it is significant that in every instance where this has occurred there either was involved an ultra-hazardous activity that would have called for strict liability under the commonly accepted doctrine of ultra-
cited in the opinion imply that liability under article 667 should be limited to ultrahazardous activities.\textsuperscript{51} It is widely recognized that article 667's duty is based on the doctrine of \textit{sic utere},\textsuperscript{52} and the \textit{Butler} court seems to accept this interpretation.\textsuperscript{53}

The doctrine of \textit{sic utere} represents a legal obligation on proprietors to use their property so that the use does not injure their neighboring property owners.\textsuperscript{44} However, the \textit{sic utere} doctrine provides little guidance regarding exactly what activities are prohibited. Since the \textit{Butler} court did not explicitly contradict the past interpretations limiting article 667 to ultrahazardous activities, it could be argued that the court intended to continue restricting article 667 to ultrazazardous activity. This limitation could be argued consistently with the \textit{Butler} facts, because similar acts to the dredging, such as constructing a canal on dry land, has been held to be ultrazazardous.\textsuperscript{55} Dredging could also meet the Second Re-

\textsuperscript{51} This inference was present in three of the seven cases cited interpreting article 667: \textit{Hero Lands Co.}, 310 So. 2d at 100 (denial of rehearing) (the liability of a natural gas company whose pipelines restricted development on neighboring property); \textit{Lombard}, 284 So. 2d at 912-13 (damages caused by heavy construction during the building of an underground canal); Hilliard v. Shuff, 260 La. 384, 389-90, 256 So. 2d 127, 129 (1972) (storage of gasoline and diesel fuel). See, e.g., \textit{Lombard}, 284 So. 2d at 912-13 (citing \textit{Fontenot v. Magnolia Petroleum Co.}, 227 La. 866, 80 So. 2d 845 (1955)) (“[W]hen, as here, the defendant, though without fault, is engaged in a lawful business, conducted according to modern and approved methods and with reasonable care, by such activities causes risk or peril to others the doctrine of absolute liability is clearly applicable.”

\textsuperscript{52} The full phrase of \textit{sic utere} is \textit{Sic utere ut alienum non laedes—Use your own property in such a manner as not to injure that of another}. Black's Law Dictionary 1238 (5th ed. 1979). See, e.g., cases cited infra note 52. \textit{Fontenot v. Magnolia Petroleum Co.}, 227 La. 866, 80 So. 2d 845 (1955); \textit{Hauck v. Brunet}, 50 So. 2d 495 (La. App. Orl. 1951). For commentators, see, e.g., Dainow, supra note 11, at 228; Malone, The Work of the Louisiana Supreme Court for the 1956-1957 Term—Torts, 18 La. L. Rev. 63, 66 (1957); Yiannopoulos, Civil Responsibility, supra note 14, at 209; Yiannopoulos, Obligations of Vicinage, supra note 14, at 482.

\textsuperscript{53} The court in \textit{Butler} does not discuss the \textit{sic utere} doctrine and only obliquely refers to it. The court found that the codification of the \textit{sic utere} doctrine deals with obligations much broader than the obligations arising from servitude.\textsuperscript{4} \textit{Butler}, 529 So. 2d at 308 (citing \textit{Dean v. Hercules, Inc.}, 328 So. 2d 59 (La. 1976) and Yiannopoulos, Civil Responsibility, supra note 14, at 203. Nevertheless, all the cases cited in the opinion that discuss the origin and nature of article 667 are unanimous in their support of interpreting article 667 as an expression of the doctrine of \textit{sic utere}. \textit{Dean}, 328 So. 2d at 71; \textit{Hero Lands Co.}, 310 So. 2d at 97; \textit{Lombard}, 284 So. 2d at 912; \textit{Chaney v. Travelers Ins. Co.}, 259 La. 1, 15, 249 So. 2d 181, 185 (1971).

\textsuperscript{54} \textit{Chaney}, 259 La. at 15, 249 So. 2d at 186.

\textsuperscript{55} Article 667 was held applicable to: the digging of a canal using heavy construction equipment, \textit{Chaney}, 251 La. at 4, 249 So. 2d at 182; and the construction of a ditch
statement of Torts definition of an ultrahazardous activity, although this is unlikely.66 Interpreted this way, the decision would not be a dramatic expansion of liability. Absolute liability under article 667 would still be limited to ultrahazardous activity. Wetland dredging would simply be a new classification of an ultrahazardous activity.

On the other hand, the opposite interpretation—that article 667 imposes absolute liability whether or not the activity is ultrahazardous—could be strongly argued from the Butler opinion. The opinion does not expressly limit article 667 to ultrahazardous activities.67 Moreover, the dredging involved in this case is possibly not an ultrahazardous

and underground canal, Lombard, 284 So. 2d at 906, 907. Of course, the dredging of a canal in an isolated marsh area may pose significantly lower risks than heavy construction in an urban area. Further, the accumulation of silt may be outside the scope of the risk of heavy vibrations that imposed the ultra-hazardous duty on heavy construction in the first place.

56. Restatement (Second) of Torts §§ 519, 520 (1977).

Sec. 519. General Principle
(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Sec. 520. Abnormally Dangerous Activities
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Using section 520's analysis there are two main problems in classifying the dredging as an abnormally dangerous activity. One, the dredging may not encompass a high degree of risk in isolated marsh areas. Two, the last factor, (f), may be difficult to prove since the activity must not be commonly used or of significant value to the community and surrounding area, and dredging canals for oil production is very important to south-east Louisiana.

57. Ultra-hazardous activities has been defined as activities in which the risk may be altogether reasonable and still high enough that the party ought not undertake the activity without assuming the consequences. Such activities include pile driving, storage of toxic gas, blasting with explosives, crop dusting with airplanes and the like, in which the activity can cause injury to others, even when conducted with the greatest prudence and care.

activity. The dredging of a canal in an isolated marsh area poses significantly lower risks than heavy construction in an urban area, the context within which absolute liability was earlier imposed by the court. This fact suggests a distinction from the earlier cases. If Mr. Baber's dredging was not ultrahazardous, then the Butler court has enormously expanded article 667 liability. At least one lower court in a post-Butler case used this exact line of reasoning to find liability.

**Impact of the Butler Decision**

In some senses, the Butler opinion is an affirmation of existing interpretations of article 667. The classification of article 667 as delictual in nature, the liberal definitions of "proprietor" and "neighbor," and the imposition of absolute liability were all recognized principles of article 667 before Butler. What is unclear, however, is the scope of activities imposing absolute liability.

There are two possible interpretations of the Butler opinion. First, the case might be interpreted as doing no more than classifying wetland dredging operations as an ultrahazardous activity, and hence subjecting these activities to absolute liability under pre-existing principles. If this interpretation is correct, the Butler decision will have little impact; only those who dredge canals would have increased liability. The case would barely affect the existing law in Louisiana. However, as noted previously, this interpretation is unlikely.

The second possible interpretation of the opinion is more disturbing. The Butler court may have established a new basis of absolute liability in Louisiana, independent of the recognized action for ultrahazardous activities. In Butler, the supreme court seems to have turned to a more literal reading, in some respects, of article 667. This new approach would impose absolute liability on proprietors for any activity on their land that causes damage to a neighboring landowners. This interpretation of article 667 would create a new basis of liability that parallels with

58. Street v. Equitable Petroleum Corp., 532 So. 2d 887, 889 (La. App. 5th Cir. 1988).
59. For discussion of the determination of ultra-hazardous liability, see infra notes 62-63 and accompanying text.
60. Street, 532 So. 2d at 889 ("Although caselaw exists which supports defendants' contention that the article only applies to ultrahazardous activities, the Butler case does not buttress that limitation . . . [I]t was nowhere indicated that the dredging operations were inherently dangerous or ultrahazardous.").
61. See supra text accompanying notes 55-56 for a discussion of whether dredging of a canal constitutes an abnormally dangerous activity.
62. See supra text accompanying notes 55-56.
63. For the definition of proprietor, see supra note, 28-34 and accompanying text.
64. See supra note 48.
other bases of liability including: negligence under Civil Code articles 2315 and 2316, strict liability for garde of things under Civil Code article 2317, and strict liability for ruin of buildings under Civil Code article 2322.

A hypothetical will illustrate the problem. Suppose a diseased tree on the defendant's land fell onto the plaintiff's property and damaged his car. Assume the plaintiff could prove damages, cause in fact, and that harm was within the scope of the risk. The plaintiff would have three possible bases for establishing liability. Pre-Butler law provided the injured party a number of theories of recovery. First, the plaintiff could allege negligence. To recover, he would have to establish that a reasonable man under the circumstances would have recognized the hazard of the tree and avoided it. Second, the plaintiff could allege strict liability under article 2317. In this instance he would only have to prove that the condition of the diseased tree presented an unreasonable risk of harm under the circumstances. Under previous law this would be the limit of the plaintiff's theories for recovery.

Under the broad interpretation of article 667 described in Butler, however, the plaintiff could also allege absolute liability under article 667. All the plaintiff would be required to prove is that the activity in question was on the defendant's land, that the injury occurred, and that the tree falling was the cause-in-fact of the injury. Unlike the other theories, this theory provides no opportunity for individual policy considerations in deciding whether or not to impose liability.

This is completely different than the absolute liability that has been applied in the past for ultrahazardous activities. Absolute liability had been imposed previously because the activities by their nature involved an extremely large element of risk. Society allowed these activities because they provided social benefit; but, because of their high degree of risk the courts predetermined the risk-utility balance of the conduct (the activity per se posed an unreasonable risk of harm) and automatically imposed liability where there was proof of damage and causation.

No similar policy justification supports extending absolute liability to all activities. If absolute liability under article 667 is imposed on any

65. This is based on the fact situation in Loescher v. Parr, 324 So. 2d 441 (La. 1976).
66. See, e.g., Entrevia v. Hood, 427 So. 2d 1146 (La. 1983) for a discussion of the difference between negligence and strict liability.
68. See, e.g., Kent, 418 So. 2d 493.
activity relating to land, there will never be any consideration of the utility of the conduct in question. Liability will be imposed whether the act is risky or not. Any person conducting a land-related activity, no matter what the utility or the significance, will have to consider this absolute liability both in evaluating the economic worth of a planned activity and deciding whether to conduct this activity at all.

This interpretation would have a great impact on environmental law in Louisiana. As mentioned, the owner of land and any possessor would be solidarily liable for damage if it relates to any activity on their land. The impact of this rule, in conjunction with the Butler interpretation of article 667 liability, would be enormous. For example, a business would be liable for any of its discharges into the water or air that caused harm, even if they were reasonable under the circumstances and the business had obtained the required necessary permits and authority. Railroads would be absolutely liable for any discharge from trains that caused harm to neighboring property, even if the trains were not owned by the railroad, but only transited their tracks. A timber lessee and his lessor would be liable for increased erosion on neighboring property as a result of his timber operations, even if they were conducted in accordance with the highest standards. A farmer would be liable for any run-off from his land that carried fertilizers and other agricultural chemicals harming neighboring property. In each situation regardless of how careful or reasonable the actors were, they would be liable for any damages on neighboring property as a result of their activities.

No commentator or opinion has ever favored so broad an interpretation of article 667. While the wisdom of this policy choice is outside the scope of this paper, the court does not justify why it imposed liability solely on possessors of land and their agent, without establishing a similar duty for other activities. The Butler opinion may be the beginning of expending liability without fault to all activities in Louis-

69. See supra note 47.
70. See, e.g., Malone, supra note 52, at 65, 66: "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 unguarded announcement is certain to rise to plague it in later controversies . . . . 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 for those which it will not be so imposed. Art. 667 provides no such leeway." See also Yiannopoulos, Civil Responsibility, supra note 14, at 212.
71. "Is article 667 to be taken at its literal face value as an arbitrary pronouncement that landowners are subject to unqualified liability for any work done upon their land that happens to injure a 'neighbor'? Is there some fatal magic in land ownership that calls for a radical shift in the spectrum of liability and ignores the normal requirement that losses are to be shifted only upon the shoulders of the blameworthy?" Malone, supra note 52, at 515.
If the supreme court wishes to expand absolute liability in Louisiana, it should do so clearly and consistently. Then all members of society and the legislature would have a chance to consider the consequences of such a policy and intelligently accept or reject it.

**OTHER POSSIBLE INTERPRETATIONS OF ARTICLE 667**

The *Butler* opinion, like most cases interpreting article 667, is ambiguous in its holding regarding article 667, and this note's analysis is only a suggested explanation. It is unclear whether the court intended such a broad expansion of absolute liability under article 667. But regardless of whether the court intended to expand absolute liability in Louisiana or merely to reaffirm prior jurisprudence limiting absolute liability to ultrahazardous activities, there needs to be some clear and consistent framework to guide future decisions involving article 667. This section will review past interpretations of article 667 in order to arrive at the best possible interpretation, both practically and theoretically, in light of the implications of *Butler*.

**History of Article 667**

The muddle of the *Butler* opinion is by no means unique in the history of jurisprudence and commentary interpreting article 667. In Louisiana, enterprise liability has been defined as imposing liability on "the person or entity that caused risk to the public through some enterprise . . . [so that they are] responsible for the damage caused by the enterprise." Olsen v. Shell Oil Co., 365 So. 2d 1285, 1292 n.3 (La. 1978). Enterprise liability is already imposed for ultra-hazardous activities and workmen's compensation among others. For ultra-hazardous activities, see Kent v. Gulf States Util. Co., 418 So. 2d at 498; Sampay v. Morton Salt Co., 482 So. 2d 752, 757 (La. App. 1st Cir. 1985).

The courts of this state have floundered from one theory to another to no theory at all in determining the right to recover for damages caused to neighboring property by a hazardous or unusual activity or by the use of a dangerous instrumentality or material . . . Sometimes article 667 was cited in conjunction with the theory and sometimes not." Reymond v. State Dept. of Hwys., 255 La. 425, 439, 231 So. 2d 375, 389 (1970). This ambiguity resulted in some appellate courts refusing to determine the basis of an action grounded upon article 667. In Androwski v. Ole McDonald's Farms, Inc., 407 So. 2d 455, 459 (La. App. 1st Cir.), writ denied, 409 So. 2d 666 (1982), the first circuit declined to determine whether an action for the overflow of a sewerage oxidation pond was based on article 667 as a legal servitude or was based on article 667 as a type of fault in article 2315. Likewise, the third circuit declined to determine the character of an action for damages resulting from crop-dusting. Russel v. Windsor Properties, Inc., 366 So. 2d 219 (La. App. 3d Cir. 1978). "Further we conclude that we need
the past, the courts' development of theories interpreting article 667 has been result oriented. This approach led to the development of several theories of interpretation. The courts have interpreted article 667 as:

- a law of property and a servitude,
- a law of delictual obligations representing an abuse of right,
- a type of fault for delictual actions under article 2315,
- a type of fault under article 2315 restricted to ultrahazardous activities,
- a quasi-contract imposing a duty of vicinage,
- a law of common law nuisance, and
- an expression of *sic utere*.

The range of the various interpretations is due partially to the unique history of article 667 and accompanying articles 668 and 669. Articles 667 through 669 were derived from a series of articles by the French

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74. Yiannopoulos, Civil Responsibility, supra note 14, at 207. See also Reymond, 255 La. at 439, 231 So. 2d at 380: "This fluctuation (the change in theories) has often been noted . . . with criticism of one theory or another, but the results reached in the cases allowing recovery under these theories have been generally approved."


78. Schexnayder v. Bunge Corp. 508 F.2d 1070 (5th Cir. 1975).

79. Craig v. Montelepre Realty Co., 252 La. 502, 518, 211 So. 2d 627, 633 (1968) (Barham and McCalab, J.J., concurring); Loesch v. R.P. Farnsworth & Co., 12 So. 222 (La. App. Orl. 1943). Vicinage has been defined as "obl[ig]ing the neighbor to use their estates in such a manner as to cause no damage to their neighbors. This rule must be understood in the sense that, although one is at liberty to do with his estate whatever he pleases, still one can do nothing which may cause injury to the neighbor." Yiannopoulos, Civil Responsibility, supra note 14, at 202 (citing R. Pothier, Traite du Contrat de Societe No. 235, 4 Oeuvres de Pothier 330 (Bugnet ed. 1861)).


82. The text of articles 667 through 669 is as follows:

**Article 667. Limitations on use of property**

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.

**Article 668. Inconvenience to neighbor**

Although one be not at liberty to make any work by which his neighbor’s buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbor’s house, because this act occasions only an inconvenience, but not a real damage.

**Article 669. Regulation of inconvenience**
commentator Domat, that were not present in the Code Napoleon.\textsuperscript{83} These articles form a cohesive unit that provides the rights and limitations of a landowner in the use of his immovable property.\textsuperscript{84} However, because articles 667 through 669 were not present in the French Civil Code, there was little organized doctrine to provide Louisiana courts in interpreting them.\textsuperscript{85}

\textit{Alternate Theories of Interpretation}

As noted earlier, the Butler court interpreted the duty of article 667 as a specific expression of a delictual obligation under article 2315. Another delictual theory of interpretation is the common law doctrine of nuisance. Nuisance theory, which is analogous to liability under article 669,\textsuperscript{86} applies a reasonableness test to determine whether particular conduct should incur liability.\textsuperscript{87} An activity is held to be a nuisance after balancing the utility of the conduct and the nature of the competing land uses of the surrounding area.\textsuperscript{88} Originally, the common law theory

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\textsuperscript{84} Yiannopoulos, Civil Responsibility, supra note 14, at 204-05. Generally, article 667 provides that a landowner may do anything he wants on his land, but that he may not conduct any activity that causes "damage" to another's property. Article 668 further explains article 667 by distinguishing "damage" from mere "inconvenience," which must be tolerated by the neighboring landowners. Article 669, the last article in the series, provides that even if the activity only causes an inconvenience, the landowner may not conduct the activity if it is inconsistent with the surrounding land use or local law. Id. See also Dean v. Hercules, Inc., 328 So. 2d 69, 72 (La. 1976).

\textsuperscript{85} Stone, supra note 14, at 708.

\textsuperscript{86} Id. at 1075; Yiannopoulos, Civil Responsibility, supra note 14, at 216-20. For text of article 669 see supra note 82.

\textsuperscript{87} W. Prosser & W. Keeton, supra note 67, § 88, at 626.

\textsuperscript{88} "In determining whether an activity or work occasions real damage or mere inconvenience, a court is required to determine the \textit{reasonableness of the conduct in light of the circumstances}. This analysis requires consideration of factors such as the character of the neighborhood, the degree of the intrusion and the effect of the activity on the health and safety of the neighbors." Rodrigue, 475 So. 2d at 1077 (emphasis added). "The activities of a man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and gravity of harm, and a consideration of individual and societal rights and obligations." Langlois, 258 La. at 1084, 249 So. 2d at 140. This is the same analysis as common law. See F. Harper, F. James & O. Gary, supra note 50 at 90; W. Prosser & W. Keeton, supra note 67, § 88, at 626-27.
of nuisance was used in lieu of article 667. Later, nuisance theory was incorporated into some Louisiana courts' interpretations of article 667, even though it has been recognized that nuisance should be distinguished from article 667.

It is unnecessary to interpret article 667 as representing the doctrine of nuisance. Nuisance actions can be maintained under article 669. Also, the theory of nuisance does not impose an absolute duty. Nuisance theory balances competing land uses based on consideration of the character of the neighborhood, the circumstances surrounding the activity or structure, and the reasonableness of the conduct. This is inconsistent with article 667, which only requires that the plaintiff prove damages and cause in fact. Nuisance theories should be employed only in actions brought under article 669, not article 667.

Another major line of cases interpret article 667 outside of tort law. One such interpretation describes article 667 as an expression of *sic utere*, which creates an independent action for damages separate from article 2315. Under the *sic utere* interpretation, article 667 creates a

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89. See, e.g., McGee v. Yazoo & M. V. Ry. Co., 206 La. 121, 19 So. 2d 21 (1944), action for damages resulting from smoke and soot from railways. See also Butler, 529 So. 2d at 377 ("[p]rior to the translation of the French commentators by the Louisiana Law Institute and the subsequent commitment to the interpretation of the Civil Code without reference to common law doctrine, article 667 was interpreted in terms of common law nuisance, . . .").


91. The Fifth Circuit upheld jury instructions regarding the application of article 667 based on common law nuisance. The court recognized that a nuisance-type balancing test should be confined to actions under article 669, but allowed the instructions anyway concluding "Louisiana cases, however, and the case before us, mix these elements [of absolute liability and nuisance]. It is therefore correct to say that the jury instructions were confusing only insofar as Louisiana law itself is unclear on this point." Schexnayder v. Bunge Corp., 508 F.2d 1069, 1076 (5th Cir. 1975).

92. For discussion, see supra note 88.


94. See infra note 128.

95. There is broad agreement under all of the different interpretations that article 667 encompasses the general principles of the doctrine of *sic utere*, but the independent basis of an action for damages remains disputed. See also supra notes 52-53.

96. This was first expressed in Fontenot v. Magnolia Petroleum Co, 227 La. 866, 80 So. 2d 845 (1955) (defendant held liable for damage as a result of seismic blasting). The principle of *sic utere* was enunciated without citing article 667, in Tucker v. Vicksburg, S. & P. Ry. Co., 125 La. 689, 697, 51 So. 689, 691 (1910): "The principle of the common
legal servitude that limits the rights of ownership.\(^97\) A violation of the servitude imposed by article 667 that causes damages is considered a violation of a legal obligation, giving the injured party direct remedies for injunction and damages.\(^98\) Some interpretations even recognize there may be parallel actions in tort and property for the same breach.\(^99\)

Another nontort interpretation imposes a quasi-contractual duty on landowners not to use their land in such a way as to cause damage to their neighbors. Under this view, article 667 imposes a personal obligation that creates a quasi-contract between neighboring proprietors.\(^100\) Relying on articles 667 and 2292, courts have held that the “proprietor” has an action based on quasi-contract, which prescribes in ten years.\(^101\)

Neither the *sic utere* or the quasi-contract interpretation is consistent with the nature of an action brought under article 667. Articles 667 through 669 create rights and duties that are best interpreted under tort law. Article 667, and articles 668 and 669, create duties against causing harm and have been interpreted as imposing liability for damages. This is very similar to delictual actions under article 2315. Further, the prescriptive period\(^102\) and burden of proof\(^103\) for delicts have already been applied to actions brought under article 667. In addition, a delictual interpretation would be consistent with the *Langlois* framework, which interprets all tort actions through article 2315.

Article 667 has been also construed as imposing absolute liability only for ultrahazardous activities. These decisions, however, used article and of the civil law, as well as the rules of morality, teaches that one should not use his own to the detriment of his neighbor.” Article 667 was also interpreted as an expression of *sic utere* in *Hauck v. Brunet*, 50 So. 2d 495, 496-97 (La. App. Orl. 1951), although the court then applied article 667 with article 2315.

Later cases supporting this interpretation include *Lombard v. Water and Sewer Bd.*, 284 So. 2d 905, 912 (La. 1973) (liability for digging underground canal); *Chaney v. Travelers Ins. Co.*, 259 La. 1, 249 So. 2d 181 (1971) (liability for dredging canal); and *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957) (liability for crop-dusting). Ironically, these later cases developed concurrently with the *Langlois* interpretation, which interpreted article 667 and article 2315 together.


98. See supra note 14.

99. See *Hero Lands Co.*, 310 So. 2d at 99 (Barham, J., concurring); Yiannopoulos, Civil Responsibility, supra note 14, at 223. See also Yiannopoulos, supra note 32, at 186. The required elements for a cause of action for damages under article 667 may be the same whether in tort or in property. See supra note 63.

100. *Loesch v. R. P. Farnsworth*, 12 So. 2d 222 (La. App. Orl. 1943). The Orleans Court of Appeals held that an action for damage from non-negligent pile-driving arose ex contractu and was a violation of a quasi-contract. See also *Craig v. Montelepre Realty Co.*, 252 La. 502, 518, 211 So. 2d 627, 633 (1968) (Barham and McCaleb, J.J., concurring).

101. *Craig*, 211 So. 2d at 633.


667 to circumvent earlier decisions that had excluded strict and absolute liability from article 2315.\textsuperscript{104} Since \textit{Langlois} expanded the definition of fault in article 2315 to include absolute liability, liability for ultrahazardous activities can be based on article 2315, and there is no reason to limit article 667 to ultrahazardous activities.

In place of article 667, the courts can use article 2315 alone to establish liability for ultrahazardous activities, using prior decisions based on article 667 as guidelines in establishing whether an activity is ultrahazardous or not. The Louisiana Supreme Court has already followed this trend in \textit{Kent v. Gulf States Utilities Co.},\textsuperscript{105} which addressed the criteria for absolute liability for ultrahazardous activities without mentioning article 667.\textsuperscript{106} Because article 667 is no longer necessary to establish a duty for ultrahazardous activities, the courts can now apply article 667 free of the restrictions of ultrahazardous liability.

Two possible interpretations of article 667 remain. The first of these is the interpretation of the \textit{Butler} court, which would impose absolute liability for all activities that relate to land. The second is the doctrine of abuse of right, which would impose liability only for those activities that have no "serious or legitimate purpose."\textsuperscript{107} The first of these has already been criticized; there has been no analysis of the effects of imposing absolute liability on landowners, possessors, tenants, and their agents for any and all activities on their land that happen to cause damage to neighboring landowners. Neither does the \textit{Butler} court provide any justification for such a rule.

The abuse of right theory, by contrast, could be used to provide a consistent theoretical framework for acting under article 667 in the future. The abuse of right theory could be used to provide a more limited interpretation of article 667, which would not expand liability and would be consistent with existing jurisprudence and doctrine. An abuse of right is the exercise of a legal right that exceeds the social and economic purposes for which the law recognizes that right.\textsuperscript{108} If the defendant cannot show any "serious and legitimate purpose" in exer-

\begin{notes}
\item[104] Yiannopoulos, Civil Responsibility, supra note 14, at 215.
\item[105] \textit{Kent v. Gulf States Util. Co.}, 418 So. 2d 493, 498 (La. 1982). The case, nevertheless, is not inconsistent with interpreting article 667 as a basis of ultrahazardous liability since the court did not discuss the basis of liability and only provided a factual test for determining whether an activity was ultrahazardous or not. \textit{Kent}, 418 So. 2d at 498. Further, the cases on which the court based their opinion were all related to article 667. See, e.g., \textit{Perkins v. F.I.E. Corp.}, 762 F.2d 1250, 1262 (5th Cir. 1985).
\item[106] \textit{Kent}, 418 So. 2d at 498.
\item[107] Yiannopoulos, Civil Responsibility, supra note 14, at 219-20. See also Cueto-Rua, Abuse of Rights, 35 La. L. Rev. 965, 992-93 (1975).
\item[108] Yiannopoulos, Civil Responsibility, supra note 14, at 198.
\end{notes}
cising his right, or the exercise of the right exceeds its purpose, and the exercise of this property right causes harm to another, then the defendant is liable for damages.

Abuse of right has been used to interpret article 667 as early as 1919. Moreover, the doctrine is consistent with the language and history of the article. Abuse of right also has been well recognized by the courts and commentators in Louisiana. Further, this doctrine is a civilian concept that is used in almost all civil law systems, and the experience of other civilian jurisdictions could provide guidance in future applications of article 667. Although abuse of right is also recognized as establishing a duty under article 2315, this should not prevent the

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111. Id. The court in Butler addresses this theory, but does not use it to interpret article 667. In the court's discussion of Salter v. B.W.S. Corp., 290 So. 2d 821 (La. 1974), the court, noting that Justices Barham and Tate concurred, held that "667 is designed to protect property from the abuse of right of ownership." Butler, 529 So. 2d at 379. Also in Hero Lands Co., 310 So. 2d at 98, which is discussed in Butler, the court ultimately held that an action originally based on article 667, was supportable as "an action for abuse of rights under article 2315 of the Civil Code."
112. Higgins Oil & Fuel Co., 145 La. at 246, 82 So. at 211.
113. The articles represent a duty fundamental to civilian law: “[A]lthough one is at liberty to do with his estate whatever he pleases, still one can do nothing which may cause injury to the neighbor.” Yiannopoulos, Civil Responsibility, supra note 14, at 202 (citing Ulpian, D. 1.1.10) and 219. This interpretation has been supported in several Louisiana Supreme Court cases. See, e.g., Higgins Oil & Fuel Co., 145 La. at 246, 82 So. at 211; Salter v. B.W.S. Corp., 290 So. 2d 821, 825 (La. 1974) (Barham and Tate, J.J., concurring).
114. See, e.g., Schexnayder v. Bunge Corp., 508 F.2d 1064, 1075 (5th Cir. 1975) ("Articles 667 and 668 establish reciprocal rights and duties of neighboring landowners in accordance with the civilian concept of abuse of right."); Salter v. B.W.S. Corp., 290 So. 2d 821, 825 (La. 1974) (Barham and Tate, J.J., concurring); Higgins Oil & Fuel Co., 145 La. at 246, 82 So. at 211; Androwski v. Ole McDonald's Farms, Inc., 407 So. 2d 455, 459 (La. App. 1st Cir.), writ denied, 409 So. 2d 666 (1982); Stone, supra note 14, at 710; Yiannopoulos, Civil Responsibility, supra note 14, at 218, 219.
115. Cueto-Rua, supra note 107, at 971.

The essence of the causes of action, which arisen under Civil Code article 667, 668, 669 and perhaps 2315 as an abuse of right . . . is that the defendants conducted activities on their premises which unreasonably inconvenienced and personally injured the members of the class for which the defendants are strictly liable.
courts from imposing a special abuse of right duty on "proprietors" under article 667.

Under the abuse of right interpretation, article 667 limits a landowner's rights by proscribing the exercise of a right that has no "serious or legitimate purpose" or "where it exceeds the social and economic purposes for which the law recognizes the right of ownership." A breach of this duty would constitute "fault" and actions for damages would be based on article 2315. Under this interpretation, liability under article 667 would be only based on abuse of rights and would be independent of ultrahazardous liability. Liability for ultrahazardous activities would be based on article 2315 alone.

Under the abuse of rights interpretation, the Butler court's definition of "proprietor" could still be used. It is necessary, however, to define to whom proprietors owe this duty. The term "neighbor" in article 667 should be interpreted to include any possessor of land who is adjacent to the defendant's land or whose damages are within the scope of the risk of the defendant's conduct. A "proprietor" would only be found liable if his act in fact caused harm to a neighbor and the proprietor had no serious or legitimate purpose or exceeded the social or economic purpose in exercising the particular right of ownership. There would be no restriction of article 667 to any particular activity, as long as it was conducted by a "proprietor" on his immovable property. If an abuse of right caused damage, the plaintiff would have a remedy for damages based on Civil Code article 2315.

The abuse of right theory could also be applied consistently with the broad holding of Butler. According to some commentators, the abuse of right doctrine can be extended to include the duty to "not injure seriously any right of his neighbor." This would comport with...
article 668, which distinguishes between acts that cause real damage and acts that only cause inconveniences,124 and would also be consistent with the holding in Butler. Any act of the proprietor that caused serious injury to his neighbor would be considered an abuse of right, and the neighbor could collect damages by showing cause-in-fact and injury.

**Article 668**

In addition to interpreting article 667, the accompanying articles, 668 and 669 must be defined, because the articles as a whole provide the limits and rights of a proprietor's activities on their immovable property. Article 668 distinguishes between a proprietor's acts that cause damage and those acts that only cause inconvenience. In conjunction with the abuse of rights theory of article 667, article 668 should be interpreted as differentiating legitimate exercises of rights that cause only inconvenience and abuse of rights that cause real damage. Because of the absolute duty imposed by article 667, article 668 is necessary to provide the courts with some discretion to allow "proprietors" to exercise rights of ownership even if the actions have no purpose and cause inconvenience.125

**Article 669**

The final article in the series, article 669, limits the rights and obligations of the "proprietor" even further by prohibiting activities that are not abuse of rights, or only cause inconvenience, but nevertheless are inconsistent with prevailing land use.126 The duty of article 669 should be interpreted similar to nuisance theory, which is consistent with the jurisprudence in Louisiana.127 Acts that would not be considered an abuse of right under article 667 could be considered a nuisance if the actions were inconsistent with surrounding land use or zoning regulations. As with article 667, a breach of article 669 would constitute "fault" under article 2315, and could entitle the plaintiff to damages.128

To avoid confusion between articles 667 and 669,129 the duties of article 669 should clearly be distinguished from the duties of article

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125. Under Louisiana Civil Code article 477 "[o]wnership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."
126. Yiannopoulos, Civil Responsibility, supra note 14, at 220.
128. See Langlois, 258 La. at 1083, 249 So. 2d at 137.
129. See, e.g., Schexnayder, 508 F.2d at 1076.
This confusion between the different nature of actions under articles 667 and 669 is probably responsible for much of the ambiguity regarding the interpretation of article 667.

Application of the Suggested Framework

Under the suggested traditional abuse of rights framework, using the facts in Butler, liability could have been established under three different theories. First, using the abuse of rights duty imposed by article 667, Butler could have claimed damages under article 2315. Butler could have proved Baber abused his rights to dredge the canal by either proving that Baber had no serious or legitimate interest in dredging the canal by the particular method used or by proving that Baber exceeded the social and economic purposes of his mineral lease and canal right-of-way by dredging in a manner that produced excessive amounts of silt.

Second, Butler could have also alleged liability under article 2315 for ultrahazardous activities and attempted to prove to the court that dredging should be classified as an ultrahazardous activity pursuant to the factors enunciated in Kent v. Gulf States Utilities Co. and Perkins v. F.I.E. Corp. Finally, under article 669 Butler could have attempted to prove that the particular type and manner of dredging the canal was inconsistent with prevailing land use, constituting fault under article 2315.

Conclusion

Although there are many possible frameworks for interpreting articles 667, 668, and 669, the suggested framework was designed to follow the language of the Civil Code articles as closely as possible and provide

130. The distinction between articles 667 and 669 has been well recognized. See Yiannopoulos, Civil Responsibility, supra note 14, at 207, and Yiannopoulos, Obligations of Vicinage, supra note 14, at 477. See also Perkins v. F.I.E. Corp., 762 F.2d 1250, 1255 (5th Cir. 1985); Schexnayder v. Bunge Corp., 508 F.2d 1069, 1075 (5th Cir. 1975); Salter v. B.W.S. Corp., 290 So. 2d 821 (La. 1974) (Tate and Barham, J.J., concurring); Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385, 392 (1971) (Barham, J., concurring); Reymond v. State Dept. of Hwys., 255 La. 425, 443, 231 So. 2d 375, 382 n.6 (1970); Stewart v. City of Pineville, 511 So. 2d 26, 28-29 (La. App. 3d Cir. 1987). Article 669 provides a balancing or reasonableness test corresponding to common law nuisance, Yiannopoulos, Obligations of Vicinage, supra note 14, at 477, while under article 667 all that is necessary is to prove damages and cause in fact. Lombard, 284 So. 2d at 914.

131. A good example of this confusion is present in Rodrigue v. Copeland, 475 So. 2d 1071 (La. 1985). In Rodrigue, the supreme court applied a nuisance balancing test, citing article 667 in conjunction with articles 668 and 669. Id. at 1078-79.

132. 418 So. 2d 493 (La. 1982).

133. 762 F.2d 1250 (5th Cir. 1985). For discussion, see supra notes 105-106 and accompanying text.
a rule of law that furthers societal goals of risk-spreading and risk deterrence without deterring conduct that is beneficial to society. As enunciated, the abuse of right interpretation could be used to limit absolute liability in Louisiana to only ultrahazardous activities. Abuse of right is also consistent with expanding the application of article 667 to all land-related activities and could be used as the theoretical basis of Butler. What is important is that the paradigm is clear and flexible enough to be applied consistently to different fact situations, creating realistic and rational expectations of the liability associated with particular behaviors. A clear framework would also provide a solid foundation for subsequent legislative or jurisprudential modification rationally based on changing societal objectives.

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