Waking the Neighbors: Determining a Landowner's Liability for Rowdy Tenants Under Louisiana Law

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I. INTRODUCTION

It is a typical night on Bourbon Street. Beer, beads, and bedlam fill the French Quarter. Miles away from the action, the owner of one Bourbon Street establishment sleeps quietly in his home. Little does he know that he may be incurring liability for the raucous behavior of his tenant who runs a rowdy French Quarter bar.

In *Yokum v. 615 Bourbon St.*, a unanimous Louisiana Supreme Court determined that a landowner—lessor may be liable for the damage caused by his tenant—lessee under Louisiana Civil Code article 667. The tenant in *Yokum* managed a bar on Bourbon Street, and his neighbors filed suit against the landowner for damages and injunctive relief for the alleged excessive noise emanating from the property. The court held that landowners can be held liable for damage caused to their neighbors when the landowners' tenant is responsible for the nuisance-creating activity, provided the owner knew or should have known that the activity would cause harm. This decision noticeably shifted the law in Louisiana and could significantly impact landowner–tenant relationships and the future of lease agreements in Louisiana.

In addition to addressing issues of liability surrounding the landowner–tenant relationship, the *Yokum* court also tackled a confused area of Louisiana law regarding liability for nuisances. In the past, some Louisiana courts have used common law nuisance principles to impose liability on defendants and justify injunctions against certain conduct. Other courts have analyzed such cases under a purely property law-oriented approach using the articles

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1. *977 So. 2d 859* (La. 2008).
2. *Id.* at 862.
3. *Id.* at 876.
667–669, which govern predial servitudes,\(^6\) while still others have analogized these articles to, or used them in combination with, the tort principles of article 2315.\(^7\) In 1996, the Louisiana Legislature dramatically changed Louisiana tort law, in part by amending several articles to eliminate strict liability and create a more fault-based system.\(^8\) The legislature revised article 667 as part of this reform, instilling a negligence standard for liability of a landowner into article 667.\(^9\)

If the Louisiana Supreme Court is to maintain Louisiana’s fault-based approach consistent with the 1996 tort reform, then the interpretation of article 667 in \textit{Yokum} was overbroad; instead, this Comment argues that article 667 should only apply to the owner of the land if the owner is actually responsible for the existence of the nuisance-causing activity. To reach this end, Part II analyzes both United States common law and Louisiana interpretations of nuisance and their approaches to landowner–tenant liability when such nuisances occur on leased premises. Part III introduces the \textit{Yokum} case, which is Louisiana’s most recent interpretation of article 667 with respect to nuisance. Part III also highlights the potential problems with the \textit{Yokum} decision and addresses how courts should approach the issue in the future. In doing so, Part III analyzes the Louisiana Civil Code, Louisiana jurisprudence, and doctrine, while comparing Louisiana’s approach to that of the common law.

II. BACKGROUND: WHAT IS A NUISANCE AND WHO SHOULD BE LIABLE FOR IT?

Tort legal scholars Prosser and Keeton describe nuisance as the following:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming

\(^6\) See \textit{Yokum}, 977 So. 2d 859; Fontenot \textit{v. Magnolia Petroleum Co.}, 80 So. 2d 845 (La. 1955); Devoke \textit{v. Yazoo \& Miss. Valley R.R. Co.}, 30 So. 2d 816 (La. 1947); Burke \textit{v. Beshoff Realty Co.}, 196 So. 2d 293 (La. App. 4th Cir. 1967).


\(^8\) Maraist \& Galligan, \textit{supra} note 5, at 339.

\(^9\) \textit{Id.} at 342.
advertisement to a cockroach baked in a pie. There is a
general agreement that it is incapable of any exact or
comprehensive definition.\textsuperscript{10}

Because Louisiana has borrowed from the common law’s
interpretation of nuisance, it is appropriate to examine the
concept’s development in that system.

\textit{A. United States Common Law Approach to Nuisance}

Two very different lines of interpretation regarding what
constitutes a nuisance explain the confusion that Professors Prosser
and Keeton describe. One line, known as private nuisance,
narrowly defines “nuisance” as the invasion of interests in the use
or enjoyment of land.\textsuperscript{11} The other line, known as public nuisance,
defines the term broadly, extending to virtually any form of
annoyance or inconvenience interfering with common public
rights.\textsuperscript{12} This Comment focuses on private nuisances occurring on
leased premises.

Common law courts\textsuperscript{13} have been fairly uniform in defining
“private nuisance” as an unreasonable activity or condition on the
defendant’s land that substantially or unreasonably interferes with
the plaintiff’s use and enjoyment of his land.\textsuperscript{14} The interference
can be (a) intentional and unreasonable, or (b) unintentional and
otherwise actionable under the rules controlling liability for
negligence, reckless conduct, or abnormally dangerous conditions
or activities.\textsuperscript{15} Although “nuisance,” in its broadest sense, is
defined as the “equivalence to a dangerous condition which may
cause harm, inconvenience, or damage to another,”\textsuperscript{16} typical

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\addcontentsline{toc}{section}{Notes}

1984).
11. \textit{Id.}
12. \textit{Id.; see also Mandell v. Pivnick, 125 A.2d 175 (Conn. Super. Ct. 1956)}
(describing the distinction between conceptions of public and private nuisance).
13. For the purposes of this Comment, “common law” refers to United
States common law.
7.2 (3d ed. 2000); \textit{see also} County of Westchester v. Town of Greenwich, 76
F.3d 42 (2d Cir. 1996); Louisville Ref. Co. v. Mudd, 339 S.W.2d 181 (Ky.
1932); Morin v. Johnson, 300 P.2d 569 (Wash. 1956).
15. \textit{Restatement (Second) of Torts} § 822 (1979).
16. Lucas v. Brown, 82 F.2d 361, 363–64 (8th Cir. 1936); \textit{see also} Cornwell
‘everything that endangers life or health or obstructs the reasonable and
comfortable use of property.’” (quoting Barnes v. Graham Va. Quarries, Inc.,
132 S.E.2d 395 (Va. 1963))).
\end{flushleft}
private nuisance agents are noise, dust, smoke, odors, other airborne or waterborne contaminants, vermin, insects, and vibrations.\textsuperscript{17}

Most nuisance cases involve an attempt by a plaintiff to obtain an injunction or damages for harm done by a neighboring landowner.\textsuperscript{18} Sometimes, however, like in \textit{Yokum}, the person creating the nuisance is not the landowner, but instead is a tenant of the property. When a tenant’s actions cause harm to a third party, most American jurisdictions adhere to the “traditional view” of landowner–tenant liability.\textsuperscript{19} This view holds that the landowner is generally not liable, with some exceptions.\textsuperscript{20} Under this view, the owner is under no obligation to look after the leased premises or keep it in repair; nor is he responsible for persons injured on the premises or for conditions that develop during the tenant’s occupancy.\textsuperscript{21} Similarly, he is not responsible for the tenant’s activities upon the land after the transfer, even when those activities create a nuisance.\textsuperscript{22}

This traditional view flows in large part from two fundamental principles of landowner–tenant law. The first is the doctrine of \textit{caveat emptor}.\textsuperscript{23} Under this rule, the buyer (or in this case the tenant) purchases at his peril\textsuperscript{24} and is subject to any defects or encumbrances on the land that he could have obtained knowledge of had he made a reasonable investigation.\textsuperscript{25} A second fundamental principle of property law establishes that the lease of land is equivalent to a sale of the premises for the term of the lease.\textsuperscript{26} The

\begin{itemize}
  \item[17.] STOECKE & WHITMAN, \textit{supra} note 14, \S 7.2.
  \item[18.] \textit{See, e.g.,} Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963).
  \item[19.] STOECKE & WHITMAN, \textit{supra} note 14, \S 6.46.
  \item[20.] PROSSER & KEETON ON TORTS, \textit{supra} note 10, \S 63; STOECKE & WHITMAN, \textit{supra} note 14, \S 6.46; \textit{see also} Tetzlaff v. Camp, 715 N.W.2d 256, 263 (Iowa 2006); Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975); \textit{RESTATEMENT (SECOND) OF PROPERTY} §§ 17.1–7 (1977); \textit{RESTATEMENT (SECOND) OF TORTS} §§ 355–362 (1965).
  \item[21.] STOECKE & WHITMAN, \textit{supra} note 14, \S 6.46.
  \item[22.] Lucas v. Brown, 82 F.2d 361, 363–64 (8th Cir. 1936); STOECKE & WHITMAN, \textit{supra} note 14, \S 6.46.
  \item[23.] \textit{Id.} The doctrine of \textit{caveat emptor} refers to a maxim of the common law, “let the buyer beware.” \textit{BALLENTINE’S LAW DICTIONARY} 183 (3d ed. 1969).
  \item[24.] 50A C.J.S. \textit{Judicial Sales} \S 61 (2008).
  \item[25.] \textit{RESTATEMENT (SECOND) OF TORTS}, \textit{supra} note 20, \S 356 cmt. a; STOECKE & WHITMAN, \textit{supra} note 14, \S 6.46; \textit{see also} Klimkowski v. De La Torre, 857 P.2d 392, 394 (Ariz. Ct. App. 1993) (“A landowner . . . generally is not responsible for a tenant’s acts in creating or maintaining a nuisance upon the leasehold after the landlord transfers possession to the tenant. This rule rests upon the principle that property law regards a lease as equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier
tenant acquires an estate in the land for the duration of the lease and becomes the possessor, subject to all responsibilities of one in possession for what occurs on the land.\textsuperscript{27} The owner surrenders both possession and control of the land and retains only a reversionary interest, such that the owner has no right to enter without permission of the tenant.\textsuperscript{28} As a result, under the traditional view, it is a substantial burden to impose liability on a landowner when he had no right of entry or power to abate the nuisance.\textsuperscript{29}

There are multiple exceptions to the traditional rule under which the landowner may be found liable for injuries caused by conditions on the leased premises.\textsuperscript{30} The landowner is liable to the tenant and others for personal injuries that occur in “common areas” when the owner fails to use reasonable care in maintaining those areas.\textsuperscript{31} A landowner may also be liable if there is a concealed or “latent” defect that exists on the property when the lease begins and that defect is known or reasonably should be known to the landowner.\textsuperscript{32} An owner can also be held liable to third persons in some jurisdictions for personal injuries that are caused by conditions the landowner promised but failed to repair or was negligent in repairing.\textsuperscript{33} Finally, a landowner who leases premises that are to be used for admission to the public may be

during the lease.” (citation omitted)); Tetzlaff v. Camp, 715 N.W.2d 256, 260 (Iowa 2006) (“Property law regards a lease as equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier during the lease.”).

\textsuperscript{27} PROSSER AND KEETON ON TORTS, supra note 10, § 63; STOEBUCK & WHITMAN, supra note 14, § 6.46.

\textsuperscript{28} PROSSER AND KEETON ON TORTS, supra note 10, § 63.

\textsuperscript{29} See, e.g., Lucas v. Brown, 82 F.2d 361, 363–64 (8th Cir. 1936); see also Midland Oil Co. v. Thigpen, 4 F.2d 85, 92 (8th Cir. 1924) (“In such case it may be said . . . that the landlord permitted the tenant to create the nuisance, but not in a sense as to render him liable.’ . . . ‘Merely permitting another to commit a nuisance does not render one liable for its consequences.” (quoting Maenner v. Carroll, 46 Md. 193, 216 (Md. 1877) and Langabaugh v. Anderson, 67 N.E. 286, 291 (Ohio 1903))).

\textsuperscript{30} STOEBUCK & WHITMAN, supra note 14, § 6.46.


\textsuperscript{32} Casey v. Estes, 657 So. 2d 845 (Ala. 1995); City of Yuma v. Evans, 336 P.2d 135 (Ariz. 1959); Borders, 532 P.2d 1366; Freitag v. Evenson, 375 P.2d 69 (Or. 1962).

liable to members of the public who are injured by a defective condition that exists at the time of leasing.\(^{34}\)

Some common law jurisdictions take a different approach and reject the traditional view in order to find liability based upon the ordinary negligence doctrine.\(^{35}\) For example, in 1973, the Supreme Court of New Hampshire declared in Sargent v. Ross that a landowner is liable to the tenant or others for injuries on or about the premises if the owner fails to exercise the general tort duty of reasonable care in all circumstances.\(^{36}\) In Sargent, a small child who was the guest of a tenant died when she fell off of an outside stairway leading to the tenant's apartment.\(^{37}\) The child's parents claimed that the landowner was negligent in having a stairway that was too steep.\(^{38}\) In holding for the parents, the court announced that legal liability should henceforth be based upon the doctrine of ordinary negligence, not the traditional rule with the traditional exceptions.\(^{39}\) The Sargent court said that questions of control, latent defects, and common areas are only factors to be considered.\(^{40}\) Although the majority of states still adheres to the traditional doctrine, the Sargent opinion has attracted a following in several jurisdictions.\(^{41}\)

A shift in public policy has for some years made landowner-tenant law more favorable to residential tenants and less favorable to landowners, which has caused the number of exceptions to the traditional rule to grow.\(^{42}\) This shift is due in part to the fact that the doctrine of *caveat emptor* is weakening.\(^{43}\) Liability has also increased for landowners due to the tide turning against the enforceability of exculpatory clauses in residential leases, which

\(^{34}\) Hayes v. Richfield Oil Corp., 240 P.2d 580 (Cal. 1952); Hamilton v. Union Oil Co., 339 P.2d 440 (Or. 1959). Another exception to the general rule is that a landowner can be subject to liability for a nuisance caused by an activity carried on upon the land during a lease if: the landowner would be liable if he had carried on the activity himself, and (a) at the time of the lease the landowner consents to the activity or knows or has reason to know that it will be carried on, and (b) he knows or should know that it will necessarily involve or is already causing the nuisance. *RESTATEMENT (SECOND) OF TORTS, supra* note 15, § 837.

\(^{35}\) STOECK & WHITMAN, *supra* note 14, § 6.46.

\(^{36}\) 308 A.2d 528, 534 (N.H. 1973).

\(^{37}\) *Id.* at 529.

\(^{38}\) *Id.* at 529–30.

\(^{39}\) *Id.* at 534.

\(^{40}\) *Id.*


\(^{42}\) STOECK & WHITMAN, *supra* note 14, § 6.46.

\(^{43}\) *Id.*
waive a landowner’s legal liability for tort injury.44 Both court decisions and statutes have either invalidated such clauses or restricted their operation based on public policy grounds and the unequal bargaining power of tenants.45 When one considers the expansion of the exceptions to the traditional doctrine, along with the adoption by several jurisdictions of the Sargent approach, it becomes clear that landowner immunity from tort liability is not as strong as it once was.46

B. Louisiana’s Approach to Nuisance

The common law concept of “nuisance” has made its way into Louisiana law, having a similar meaning in Louisiana as in common law jurisdictions.47 The manner in which Louisiana courts deal with liability in landowner-tenant relationships, however, is different from the common law approach. In most cases, Louisiana courts do not apply the traditional common law view; instead, several Louisiana Civil Code articles govern the liability of landowners.

1. Legislation

In Louisiana, the sources of civil responsibility of landowners fall primarily under two broad areas of law: the rules of property law and the law of delictual obligations.48 A landowner’s duties under property law are found in Title IV of the Louisiana Civil Code. Articles 667, 668, and 669 establish certain limitations on

45. STOEBUCK & WHITMAN, supra note 14, § 6.46.
46. “Louisiana jurisprudence recognizing nuisance actions is consistent with common law notions of nuisance.” JOHN M. CHURCH, WILLIAM CORBETT & TOM RICHARD, TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES 504 (2007); see also Robichaux v. Huppenbauer, 245 So. 2d 385 (La. 1971) (“[N]oxious smells, rats, flies and noise may constitute an actionable nuisance although produced and carried on by a lawful business, where they result in material injury to neighboring property or interfere with its comfortable use and enjoyment by persons of ordinary sensibilities.”); Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800, 804 (La. App. 4th Cir. 1971) (“Nuisance is a very comprehensive term which is not and should not be the subject of technical definitions or rigid rules. The law in this area should be expansive so as to provide for fair and reasonable results under all of the circumstances of each individual case.”).
the scope and extent of the right of ownership in immovable property. These limitations are qualified as predial legal servitudes. A predial servitude is a charge on a servient estate for the benefit of a dominant estate, wherein the owner of the servient estate is obligated to abstain from doing something on his estate. A legal servitude is a limitation imposed on owners of immovable property established by law for public policy reasons.

Louisiana courts use the vicinage articles to govern the corresponding rights and obligations arising from the relationships of neighboring proprietors. The original version of article 667 states that “[a]lthough a proprietor may do with his estate whatever he pleases, still he cannot 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 permits a landowner to engage in works that merely cause some inconvenience, so long as the neighbor’s buildings are not damaged by the works. Article 669 indicates that inconveniences resulting from the emission of smoke or odors may be tolerated or suppressed, depending on police regulations and customs. These articles illustrate an attempt to achieve a balance between the conflicting interests of landowners represented by two ancient civilian maxims: neminem laedit qui suo jure utitur (the exercise of a right does not give rise to civil responsibility) and sic utere tuum ut alienum non laedas (use your property in such a manner as not to injure that of another).

The other source of civil responsibility of landowners is the law of delictual obligations. A landowner, like any other person, may be responsible to others if he has committed a tort or an act that gives rise to responsibility under the law of delictual

49. A.N. Yiannopoulos, Predial Servitudes § 33, in 4 Louisiana Civil Law Treatise 95 (3d ed. 2004).
50. Id.
57. Yiannopoulos, supra note 48, at 195.
Article 2315 declares that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This article contemplates responsibility founded on fault (namely negligence), intentional conduct, or abuse of right. This article also sets a significant limitation on the right of ownership insofar as landowners are concerned because a landowner must act as a reasonable man of ordinary prudence. This means that if a landowner does not take the requisite precautions in the exercise of his right of ownership, he is responsible for the damage he causes.

When it comes to the basis for determining liability for nuisances created by owners or tenants of immovable property, Louisiana courts have not drawn a clear line between fault based on property rules and fault based on delictual obligations. Jurisprudence illustrates significant overlap of the two obligations in cases involving property owners who cause a nuisance. This was not always the case, as some courts have tried to distinguish the concept of a predial servitude obligation under article 667 with that of a delictual obligation. For example, in the 1947 case of Devoke v. Yazoo & Mississippi Valley Railroad Co., the Louisiana Supreme Court stated that an action under article 667 "is not one in tort, but, rather is one that springs from an obligation imposed upon property owners by operation of law." Louisiana legal scholar Joseph Dainow also emphasized the difference between delictual responsibility and responsibility based on articles 667–669. He wrote that liability for damages caused by the violation of a servitude is part of a property relationship and not a matter of torts. However, in a number of decisions, Louisiana courts have combined the analysis of articles 667 or 669 with article 2315 to conclude that "the violation of the duty set out by article 667 constitutes ‘fault’ within the meaning of article 2315."

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60. Id.
62. Yiannopoulos, supra note 48, at 197.
63. YIANNOPOULOS, supra note 49, § 27.
64. Id.
65. See supra note 7.
66. See supra note 6.
67. 30 So. 2d 816, 821 (La. 1947).
69. Id. at 439.
70. Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125, 129 (La. App. 4th Cir. 1965); see also Butler v. Baber, 529 So. 2d 374, 379–80 (La. 1988); King v. Western Club, Inc., 587 So. 2d 122, 123–24 (La. App. 2d Cir. 1991) ("Since Article 667 imposes a legal servitude upon the proprietor in favor
multiple Louisiana cases, courts have imposed liability for fault under article 2315 by analogy to the conduct required by articles 667–669.\(^7\) For example, the Louisiana Supreme Court in *Inabnet v. Exxon Corp.* in 1994 explained that "judicial decisions have clarified that conduct by a proprietor violative of Articles 667–669 may give rise to delictual liability, without negligence, as a species of fault within the meaning of La. Civ. Code art. 2315."\(^7\)

Louisiana courts have also used the vicinage articles to place liability on landowners who cause damage to neighbors by engaging in "ultrahazardous activity."\(^7\) The Louisiana Supreme Court in *Langlois v. Allied Chemical* held that a company was liable for an injury caused by highly poisonous gas that had leaked—even in the absence of negligence—because the storage of the dangerous poisonous gas was an "ultrahazardous activity."\(^7\) The *Langlois* court characterized the defendant's actions as a violation of article 669 but explained that such a violation can also constitute fault under article 2315.\(^7\) Subsequently, in *Butler v. Baber*, the Louisiana Supreme Court similarly imposed absolute liability upon a dredger who damaged plaintiff's oyster beds, despite the fact that no "ultrahazardous activity" occurred.\(^7\) The court indicated that all that is necessary to establish liability under article 2315 is a violation of article 667, and the latter article is violated if one uses an interest in land in a manner that causes damage to another.\(^7\) Again, Louisiana courts blurred the distinction between property law and tort law by stating that a violation of one of the vicinage articles constitutes fault under article 2315.

Louisiana legal scholar A. N. Yiannopoulos asserts an easy explanation as to why Louisiana courts have expressed divergent views regarding the nature of responsibility under article 667.\(^7\) Courts hunt for a particular theory in cases in which theory is

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71. See *Inabnet v. Exxon Corp.*, 642 So. 2d 1243 (La. 1994); *Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905 (La. 1973); *Langlois v. Allied Chem. Corp.*, 249 So. 2d 133 (La. 1971); *supra* note 70.

72. 642 So. 2d at 1251.

73. *Langlois*, 249 So. 2d 133.

74. *Id.* at 139.

75. *Id.* at 140.

76. 529 So. 2d 374 (La. 1988).

77. *Id.* at 379–80.

78. Yiannopoulos, *supra* note 48, at 207–08.
essential for the resolution of a particular controversy.\textsuperscript{79} For example, Louisiana courts have qualified actions as “delictual” in order to explain the application of the one-year liberative prescription period,\textsuperscript{80} to exclude a public body’s liability under the doctrine of sovereign immunity,\textsuperscript{81} or to hold responsible persons other than landowners.\textsuperscript{82} On the other hand, courts qualified a particular action as a matter of property law to justify the imposition of strict liability at a time when liability under article 2315 was thought to rest exclusively on negligence\textsuperscript{83} or to limit application of strict liability to landowners only.\textsuperscript{84} Thus, in the past there were important differences in the outcome of certain cases depending upon whether a court applied tort law or property law.

The legislative tort reform of 1996,\textsuperscript{85} however, blurred even more the distinction between the predial servitude and the delictual obligation owed by a landowner to neighbors. In this reform act, the legislature extensively revised Louisiana tort law, in large part to scale back the use of absolute and strict liability that had become prevalent in Louisiana jurisprudence.\textsuperscript{86} The legislature amended tort articles 2317, 2322, 2321, and, not surprisingly, article 667, which courts used for years to impose delictual liability on landowners vis-à-vis article 2315.\textsuperscript{87} The amended law now requires plaintiffs to prove negligence in most situations that formerly would have given rise to strict or absolute liability.\textsuperscript{88} Amended article 667 now provides:

> Although a proprietor may do with his estate whatever he pleases, still he cannot 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. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for

\textsuperscript{79} Id.
\textsuperscript{80} See, e.g., Craig v. Montelepre Realty Co., 211 So. 2d 627 (La. 1968); Gullatt v. Ashland Oil & Ref. Co., 243 So. 2d 820 (La. App. 2d Cir. 1971).
\textsuperscript{81} See, e.g., Klein v. Dep’t of Highways, 175 So. 2d 454 (La. App. 4th Cir. 1965).
\textsuperscript{84} See, e.g., Burke v. Besthoff Realty Co., 196 So. 2d 293 (La. App. 4th Cir. 1967).
\textsuperscript{85} 1996 La. Acts No. 1.
\textsuperscript{86} Maraist & Galligan, supra note 5, at 339.
\textsuperscript{87} Id. at 342; see supra Part II.B.1.
\textsuperscript{88} Maraist & Galligan, supra note 5, at 342.
damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives. 89

The amended article 667 clearly articulates that the only ultrahazardous conditions recognized in Louisiana are “pile driving” and “blasting with explosives.”90 This shifts the basis of liability for any other activity for damages under article 667 from a form of absolute liability to one of negligence.91 Interestingly, although article 667 is a vicinage article that governs predial servitudes, the significant substantive language regarding knowledge—including “could have been prevented,” “reasonable care,” and “res ipsa loquitur”—is the same language used in article 2317.1 and in the amendments to articles 2321 and 2322, which are articles that govern tort law.92 These amendments were geared toward tort reform, but the legislature amended a property article to achieve the goal of eliminating strict liability for certain tortious behavior. Professor Yiannopoulos has described the amendment to article 667 as “hasty,”93 perhaps because article 667 now reads very similarly to the articles governing general tort duties. This blurs the distinction between the predial servitude traditionally owed by landowners to their neighbors and the delictual obligation to act reasonably under all circumstances, which applies to all citizens.

90. Id.
91. Maraist & Galligan, supra note 5, at 364.
92. Id.; see, e.g., LA. CIV. CODE art. 2317.1 (2008) (“The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.”).
93. YIANNÔPOULOS, supra note 49, § 31.
2. Jurisprudence

While Louisiana diverges from the common law analysis in its statutory application of nuisance law, some Louisiana courts have been more amenable to following the common law’s jurisprudential approach in determining liability for nuisances occurring on leased premises, which generally holds harmless the landowner when the tenant creates the nuisance. Early Louisiana jurisprudence shows an interpretation very similar to that of the common law approach, imposing liability under the vicinage articles by analogizing to the common law precepts of nuisance. For example, in *Robichaux v. Huppenbauer*, the Louisiana Supreme Court stated that articles 667–669 have “been employed by this [c]ourt together with the common-law theory of nuisance to grant relief where a use of property causes inconvenience to a neighbor.” In *Kuhl v. St. Bernard Rendering & Fertilizing Co.*, the Louisiana Supreme Court released a landowner from liability when his tenant’s business caused a nuisance. In 1955, a Louisiana appellate court reaffirmed this position in *Arrington v. Hearin Tank Lines* when it relieved a landowner of liability for damage occurring during tank unloading operations that were entirely in the control of another. The court stated that “[m]ere lawful ownership alone is not sufficient to create liability. It is the negligent use of the property which requires the owner to respond in damages.” Despite the fact that neither of these cases relied on article 667, these decisions exemplify how Louisiana courts support the idea that the landowner is not liable for a nuisance that he neither created nor maintained on his land.

On the other hand, when analyzing nuisance issues under article 667, some Louisiana courts have held that the landowner alone can be liable for a nuisance, even when the tenant creates or maintains it. This conclusion is based on the interpretation of the term “proprietor” in article 667. According to traditional civilian notions, tenants cannot be regarded as “proprietors” within the literal meaning of articles 667 and 668 because the rights arising from leases are personal rather than real; therefore, real rights are

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94. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 16.03 (2d ed. 2004).
95. 245 So. 2d 385, 389 (La. 1971).
96. 41 So. 3d 361 (La. 1906).
97. 80 So. 2d 167 (La. App. 2d Cir. 1955).
98. *Id.* at 173.
conferred only on the landowner and cannot be transferred.\textsuperscript{100} The Louisiana Fourth Circuit Court of Appeal in \textit{Burke v. Besthoff} followed this traditional approach in a case where a tenant rented property for the operation of a trash disposal service.\textsuperscript{101} Tenants of the adjoining property sued the tenant and the landowner for vibrations from the operation that caused surface cracks in structures on their property.\textsuperscript{102} On appeal, the court concluded that the tenant could not be held liable under article 667 because he was not the proprietor or owner of the property, thereby finding liability solely on the landowner of the property.

More recent courts have stretched the definition of “proprietor” to include not only the owner of the property, but also those persons holding rights derived from the landowner.\textsuperscript{104} In \textit{Lombard v. Sewerage & Water Board of New Orleans}, the Louisiana Supreme Court found the state municipality liable under article 667 for damage done to the plaintiffs even though the Water Board of New Orleans was not technically the owner of the property.\textsuperscript{105} The court held that the term “proprietor” need not be limited to “owner.”\textsuperscript{106} In 1994, the fourth circuit in \textit{Inabnet} held a tenant liable under article 667, citing \textit{Lombard}'s expansive interpretation of “proprietor.”\textsuperscript{107}

In \textit{Borenstein v. Joseph Fein Caterers, Inc.}, the fourth circuit took a fresh approach in defining “nuisance” and determining liability.\textsuperscript{108} The plaintiff, Borenstein, sued a neighboring tenant for allegedly harboring a raised planter and a large vine that grew along the common wall, which caused moisture that deteriorated the base of the wall and damaged the roof.\textsuperscript{109} Borenstein sued the tenant for abatement of the nuisance and damages.\textsuperscript{110} While the court found that the vine and the planter were enjoineable nuisances, it refused to find the tenant liable because the vine and the planter were on the premises before the tenant entered the

\begin{itemize}
  \item 100. Yiannopoulos, supra note 49, § 45.
  \item 101. 196 So. 2d at 295.
  \item 102. Id.
  \item 103. Id. at 297–98.
  \item 104. Inabnet v. Exxon Corp., 642 So. 2d 1243, 1251 (La. 1994).
  \item 105. 284 So. 2d 905, 914 (La. 1973).
  \item 106. Id. The court stated that “[a]ny 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.” Id.
  \item 107. 642 So. 2d at 1251; see Ferdinand F. Stone, \textit{Tort Doctrine in Louisiana: The Obligations of Neighborhood}, 40 Tul. L. Rev. 701, 711 (1966).
  \item 108. 255 So. 2d 800 (La. App. 4th Cir. 1971).
  \item 109. Id. at 803.
  \item 110. Id. at 802.
\end{itemize}
Instead, the court held that "[t]he nuisance is a condition, and the person legally liable for the nuisance is the person actually responsible for the existence of the condition." 112

In sum, early Louisiana jurisprudence determined that a tenant alone could be liable for creating a nuisance, 113 but conflicting cases established that, if liability is determined under article 667, only a landowner could be held liable as proprietor. 114 Subsequent to Burke, courts expanded the notion of "proprietor" in article 667 to include tenants. 115 Finally, in Borenstein, the court suggested that either a landowner or a tenant can be liable under article 667, and liability depends on which of them is responsible for the creation and maintenance of the nuisance. 116 Questions still remained, however, as to whether a landowner can be liable for the nuisance activities of his tenant. 117

III. FILLING THE GAP: HOW YOKUM HAS CHANGED THE LAW

In Yokum, the Louisiana Supreme Court finally examined the issue of liability for nuisances arising on leased premises and filled the gap left by earlier cases. 118 Plaintiffs, the Yokums, were neighbors to 615 Bourbon Street, the property owned by defendants, 615 Bourbon Street, L.L.C. 119 In 2003, the owner executed a commercial lease of the property with O'Reilly

111. Id. at 804–06.
112. Id. at 806.
116. Borenstein, 255 So. 2d at 806.
117. See Pinello v. Reed, 559 So. 2d 988 (La. App. 4th Cir. 1990). A neighbor sued a landowner, alleging that continuous barking of the tenant's dog constituted a nuisance. Id. at 989. The Fourth Circuit Court of Appeal stated that Louisiana jurisprudence regarding nuisance does not specifically answer the question of whether or not a property owner may be held liable for the activities of his or her tenant. Id. at 990. However, instead of making a decision on the issue, the court remanded the case for a trial on the merits. Id.; see also King v. Western Club, Inc., 587 So. 2d 122 (La. App. 2d Cir. 1991). A neighbor sued both the landowner and the tenant for loud noise that the plaintiff claimed constituted a nuisance. Id. at 123. The trial court refused to hold the landowner liable, and the issue was not raised on appeal. Id.
118. Yokum v. 615 Bourbon St., L.L.C., 977 So. 2d 859 (La. 2008).
119. Id. at 861.
Properties, who operated a bar known as The Rock.\textsuperscript{120} Later that year, the Yokums sent a letter to both the bar manager and to the landowner complaining of excessive noise emanating from the bar, which interfered with the Yokums' privacy and ability to use and enjoy their property.\textsuperscript{121} The Yokums sent a second letter in 2005 to the bar manager only and then filed suit against the landowner alleging that the excessive noise constituted a nuisance.\textsuperscript{122} Among other claims, the Yokums asserted that the landowner was in violation of articles 667 and 669 because the owner was a "proprietor," had knowledge of the noise nuisance emanating from its premises, and took no action to cease and desist or to reduce the noise.\textsuperscript{123}

The trial court granted summary judgment in favor of 615 Bourbon Street, L.L.C., who argued that the Yokums' petition contained no allegations whatsoever that would impose liability on 615 Bourbon Street, L.L.C., in its capacity as landowner of the premises.\textsuperscript{124} The fourth circuit affirmed the decision.\textsuperscript{125} The appellate court found no Louisiana cases imposing liability on a landowner under article 667 for the acts of its tenant and refused to do so in this case.\textsuperscript{126} The appellate court also relied on Borenstein and, under that reasoning, concluded that the tenant–operator of the bar was actually responsible for the excessive noise; thus, there was no basis in the law for holding the landowner liable under article 667.\textsuperscript{127}

The Louisiana Supreme Court reversed and remanded the fourth circuit decision, determining that article 667, which sets forth limitations imposed upon the ownership of the land, is directly applicable to a landowner–lessor.\textsuperscript{128} The court found that the clear language of article 667 provides that if the landowner knows or, in the exercise of reasonable care, should know of any damage incurred by a neighboring landowner, the owner may be held liable.\textsuperscript{129} The court explained that just because the landowner utilizes his right as a property owner to lease his property, his responsibilities and obligations set forth under article 667 as owner

\textsuperscript{120}Id. at 862.
\textsuperscript{121}Id.
\textsuperscript{122}Id. at 862–63.
\textsuperscript{123}Id. at 864.
\textsuperscript{124}Id. at 865–66.
\textsuperscript{125}Id. at 868.
\textsuperscript{126}Yokum v. 615 Bourbon St., L.L.C., 960 So. 2d. 1283, 1285 (La. App. 4th Cir. 2007), rev’d, 977 So. 2d 859 (La. 2008).
\textsuperscript{127}Id.
\textsuperscript{128}Yokum, 977 So. 2d at 871, 875.
\textsuperscript{129}Id. at 874.
of the land are not eradicated. The court reasoned that, under the court of appeal’s rationale, even a landowner with full knowledge of the potentially harmful effects of his tenant’s activities on the property would have little or no responsibility to protect the public and his neighbors from his tenant’s harmful activities.

A. Problems with the Yokum Decision

The Yokum court held that under article 667, a landowner can be liable for the works or activities of his tenant if the owner knows or should know that those activities will cause damage and that the damage could be prevented through the exercise of reasonable care. This jurisprudential standard is overbroad because it is inconsistent with the clear language of article 667, it does not apply prior jurisprudential interpretations of that article, and it fails to recognize important policy considerations.

1. Interpreting Article 667

The Yokum court failed to apply the clear language of article 667. It is important to note that article 667 reads, “[The] proprietor . . . is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage . . . .” In Yokum, in order to determine that the landowner–proprietor could be liable for the works of his tenant, the court changed the wording from his works to “the ‘works’ on his property.” If the clear language of article 667 is used, then the landowner’s duty to exercise reasonable care should only apply to his works, meaning the works or activities that the owner has carried out upon the land, thus excluding other works. The reasonable care standard should not apply to any works on his land, or works of his tenant.

Furthermore, the Yokum court failed to follow the approach set out in Borenstein, which requires that liability rest on the person responsible for the existence of the condition that constitutes the nuisance. Along with Borenstein, several other Louisiana cases involving fires have all held that article 667 should only be applied

130. Id. at 876.
131. Id.
132. Id. at 874.
134. Yokum, 977 So. 2d at 874 (emphasis added).
when the landowner himself is careless in his use of his land.\textsuperscript{137} For example, in \textit{Terre Haute Plantation, Inc. v. Louisiana & Arkansas Railway Co.}, plaintiffs sued a railroad for damages as a result of a fire that partially destroyed their sugarcane crop.\textsuperscript{138} Because it could find no evidence proving that the railroad employees started the fire, the fourth circuit refused to hold the railroad liable.\textsuperscript{139} Instead, it held that article 667 applies “only where the proprietor is carrying on some activity on his property which causes damage to his neighbor.”\textsuperscript{140} The court said that to hold otherwise would cast liability on every landowner on whose property a fire starts and spreads to neighboring lands, regardless of the actual cause of the fire.\textsuperscript{141}

The fourth circuit reaffirmed this point in \textit{Watson v. City of New Orleans}, a case in which neighbors sued a landowner for damages caused by a fire originating in a wooden shed on the landowner’s premises.\textsuperscript{142} The tenant’s child accidentally started the fire while playing with matches.\textsuperscript{143} In refusing to hold the landowner liable, the court said, “We are satisfied that under Article 667 a neighboring landowner must prove more than the mere fact that the fire originated on defendant’s property. He must show that it was the result of a use or activity conducted on the property by the owner.”\textsuperscript{144} The court further noted, “We find no support in the opinion to justify the imposition of liability on a neighboring landowner where he does nothing but collect rent. A contrary conclusion would be an unwarranted expansion of existing jurisprudence.”\textsuperscript{145}

Although these cases analyzed article 667 in the context of fires and not nuisances, the interpretation used by the fourth circuit is still persuasive because the issues presented are similar. Both cases analyzed situations in which activities upon the land caused harm to neighbors through the tenant’s own fault and through no fault of the landowner. Thus, this interpretation can and should be

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{138} 210 So. 2d at 567.
\item \textsuperscript{139} \textit{Id.} at 568.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} 593 So. 2d at 791.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.} at 792.
\item \textsuperscript{145} \textit{Id.}
\end{enumerate}
\end{footnotesize}
used in instances where courts use article 667 to determine the liability of a landowner for the nuisance activities of his tenant.

2. Policy Problems

In Yokum, the Louisiana Supreme Court made the decision that a landowner should not have immunity from liability for harm caused by his tenant’s works or activities.¹⁴⁶ The court was correct in determining that a general immunity should not exist because there are limited instances in which a landowner should bear responsibility for the nuisance caused by his tenant. For example, a general immunity might encourage landowners to engage in business on their own properties under the names of separate corporate entities and claim immunity for the conditions about which they not only had knowledge, but which they encouraged and from which they profited.¹⁴⁷ Additionally, if a general immunity existed, a landowner could ignore the same foreseeable and preventable harm that is perpetuated through a series of tenants, thus forcing neighbors to seek abatement of the same type of abusive activities over and over again.¹⁴⁸ This Comment is not arguing for a general immunity for landowners, but is instead arguing that liability should be based on fault. Under the fault-based approach taken by the Borenstein court, landowners may be held liable in the two situations presented above. In both of those situations, the landowner knows or should know, before the lease agreement is finalized, that the tenant will create the nuisance. At that time, the landowner is in a position of power to avoid the nuisance by refusing to rent the property or by instilling a clause in the lease agreement preventing the tenant from participating in the nuisance-creating activity. In failing to do so, the landowner is partially responsible for the existence of the nuisance and is therefore blameworthy under the fault-based analysis.

Unlike the examples presented above, in most cases, like in Yokum, the tenant is a party unrelated to the landowner, and the tenant has sole possession of the land during the term of the lease. Because the landowner usually relinquishes control of the land while the tenant maintains the ownership rights and responsibilities, the landowner is not in the position to abate a

¹⁴⁶ Yokum v. 615 Bourbon St., L.L.C., 977 So. 2d 859, 876 (La. 2008).
¹⁴⁸ Original Brief on the Merits on Behalf of Plaintiffs/Applicants, Peterson M. Yokum and Polly Elizabeth Anderson at 15, Yokum, 977 So. 2d 859 (No. 2007-C-1785).
nuisance that the tenant creates. Furthermore, if a court determines that the landowner should not be held liable, the plaintiff is not without remedy. It is important to note that in typical nuisance cases, the plaintiff seeks an injunction to stop the harmful activity. The tenant is in a better position to abate the nuisance when he is the party that creates it. Instead of suing the landowner, the plaintiff can, and should, take legal action against the tenant because the tenant is the party maintaining the disturbance.

The holding of Yokum also failed to foresee its potentially negative impacts on future landowner–tenant relationships. If the landowner is to be held liable for the tortious behavior of his tenant, sophisticated landowner–lessors will likely take more steps to protect themselves. They may do this in several ways. In the contractual terms of the lease, a landowner can prohibit activities that are illegal or productive of nuisances. Therefore, in a case where a tenant creates a nuisance that is not necessarily unlawful, the landowner would be in a better position to evict the tenant for violating a term of the lease. This may sound simple enough, but eviction proceedings can be difficult and time-consuming. A landowner can also protect himself by requiring indemnity and insurance from his tenants. Additionally, a landowner can maintain more control over the leased premises by placing a clause in the lease agreement stating that the landowner has the right to exercise control over the tenant’s actions in regard to his use of the land. Such a requirement, however, may require landowners to be very invasive in exercising control over that tenant’s behavior, which is uncommon in contemporary landowner–tenant relationships. This requirement could also backfire and put the landowner in a lose-lose situation; while it allows the landowner to maintain more control over his tenant’s activities, it also puts more liability on him in the event that his tenant does something harmful to third persons. If the lease agreement has such a clause attached to it, it may automatically make the landowner liable in tort for any of the tenant’s actions that prove harmful to third parties because the owner had the authority to abate but failed to do so. All of these suggested extra steps taken by the property owner, and the

149. See supra Part II.A.
150. Amicus Curiae Brief on the Merits on Behalf of French Quarter Citizens, Inc. et al., supra note 147, at 3.
152. Amicus Curiae Brief on the Merits on Behalf of French Quarter Citizens, Inc. et al., supra note 147, at 3.
additional tort liability, may increase the cost of lease agreements and could skew the rental market in the state as compared to other states. It may also force landowners to become invasive watchdogs of their tenants’ behavior. Perhaps these and other issues are not all negative effects—some might argue that it is in the best interest of injured plaintiffs to always have the option to sue the landowner—but they are effects nonetheless; *Yokum*, as it stands, has the potential to significantly change the landowner-tenant relationship in Louisiana.

B. How Future Courts Should Analyze the Issue

The fourth circuit in *Borenstein* held that the person responsible for the existence of the nuisance should be the person liable for the harm that the nuisance inflicts. This fault-based approach to the problem is consistent with Louisiana tort law and with the common law approach to landowner tort liability.

1. Learning from Louisiana Tort Law

Looking to the jurisprudential interpretations of Louisiana’s general negligence standard regarding tortious action, represented by article 2315, gives insight into the proper interpretation of article 667. First, the common law has determined that to cause a nuisance is a tort and that private nuisance liability should be a matter of tort law. This interpretation has support in Louisiana doctrine, jurisprudence, and the Civil Code. Professor Wex Malone has consistently argued that article 667 imposes delictual responsibility and that its location in the part of the Civil Code dealing with property institutions is “anomalous.” He has also argued that article 667 ought to be disregarded, or at least be given a very limited interpretation, because the general law of torts can more effectively take care of all matters of delictual responsibility. Additionally, prior to the 1996 legislative tort

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revision, Louisiana courts used article 667 by analogy in cases to find a violation of article 2315. The revision of article 667 in the 1996 legislative session was itself part of a “tort reform,” and the article’s new language has brought article 667 even more in line with traditional language of delictual obligations. Therefore, because the amendment eliminated the strict liability of landowners and replaced it with a negligence standard, a traditional negligence analysis is now proper when determining liability for nuisances.

Negligence is the failure to exercise reasonable care under the circumstances. There are four general requirements to prove negligence: duty, breach, causation, and damages. The plaintiff must establish that the defendant owes him a duty to exercise reasonable care and that the defendant breached that duty. The plaintiff also must prove that the plaintiff suffered damages and that there was a causal relationship between the defendant’s action or inaction and the plaintiff’s damages. Under this approach, in a landowner-tenant situation such as that presented in Yokum, the first requirement is always met because, under article 667, a landowner owes a duty to exercise reasonable care toward his neighbors. Thus, in Yokum, the landowner owed a duty of reasonable care to his neighbors even though he executed a lease of his land. The second requirement of breach determines whether the defendant acted reasonably. This is where it is again important to point out that the plain language of article 667 states that “[the] proprietor . . . is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage . . . .” Reading the clear language of article 667, the landowner’s duty to exercise reasonable care should only apply to his works; he should not owe a duty of reasonable care regarding the works of his tenant because it is not an element of the landowner’s obligation to his neighbor. This approach is also consistent with the typical approach to torts in Louisiana, which requires that “every act that

159. See supra Part II.B.1.
160. See supra Part II.B.1.
161. MARAIST & GALLIGAN, supra note 94, § 3.01.
162. Id.
163. Id.
164. Id.
165. Yokum v. 615 Bourbon St., L.L.C., 977 So. 2d 859, 876 (La. 2008).
166. MARAIST & GALLIGAN, supra note 94, § 3.03.
168. See id.
causes damage to another obliges him by whose fault it happened to repair it."\textsuperscript{169}

In cases where the landowner did not create the nuisance himself, proving the causal relationship between the landowner’s action (or inaction) and the plaintiff’s damages is also challenging. In Louisiana, as well as most other jurisdictions, cause is divided into two categories: cause-in-fact and legal cause.\textsuperscript{170} The first element questions whether the defendant’s negligent act was a cause-in-fact of the plaintiff’s damages; that is, whether the defendant’s action had a proximate relation to the harm that occurred, and whether that relation was substantial in character.\textsuperscript{171} In cases such as \textit{Yokum}, it may be possible for a fact-finder to determine that the landowner’s inaction in abating the nuisance may have been a cause of the damages suffered by the plaintiff. However, the second part of the causation analysis asks, as a matter of policy and fairness, “does society want to allow this plaintiff to recover from this defendant for these particular damages arising in this particular manner?”\textsuperscript{172} In \textit{Yokum} the question must be asked, does society want to allow a neighbor to recover damages from an absent landowner when the tenant is responsible for the harmful nuisance? The 1996 legislative revision eliminated strict liability of landowners under article 667 (except for pile driving and blasting with explosives), and the article now requires a landowner to be negligent in his use of the land in order to be liable.\textsuperscript{173} There is also no Louisiana jurisprudence that supports the idea that a landowner should be vicariously liable for the acts of its tenants.\textsuperscript{174} Therefore, in most cases, it is likely unfair to place liability upon a landowner who had no connection to the activities carried on by his tenant that caused a nuisance. In such a case, clearly, the tenant is the proximate cause of the disturbance.

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\textsuperscript{169} LA. CIV. CODE art. 2315 (2008) (emphasis added).
\textsuperscript{170} MARAIST & GALLIGAN, supra note 94, § 3.04; see also Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 689–90 (E.D. La. 2006) (citing Butler v. Baber, 529 So. 2d 374, 378 (La. 1988)).
\textsuperscript{172} MARAIST & GALLIGAN, supra note 94, § 3.04.
\textsuperscript{173} LA. CIV. CODE art. 667 (2008); Maraist & Galligan, supra note 5, at 364.
\textsuperscript{174} See Lombard, 284 So. 2d at 912 (“T]he proprietor is likewise responsible not only for his own activity, but also for that carried on by his agents, contractors and representatives with his consent and permission. This liability which the law imposes attaches also to the agent or contractor, who, as in this case, becomes solidarily liable with the proprietor if his activity causes damage to a neighbor.”). Note that tenant is not listed.
\end{flushleft}
because he created it; thus, the Borenstein approach requires that he be liable, and this approach is consistent with Louisiana tort law.

2. Learning from the Common Law

Louisiana’s civilian tradition creates a unique method for analyzing the liability in landowner-tenant relations, and it is important to look to the Civil Code articles to determine the solution to problems. The approach taken by common law jurisdictions is in no way binding on Louisiana courts; nevertheless, the common law remains a useful resource to Louisiana courts by exemplifying solutions to problems faced in other states similar to those faced in Louisiana. It is especially relevant to look at the approach taken by other jurisdictions when Louisiana courts are faced with new issues, such as the issue presented in Yokum, which is whether a landowner may be liable for the nuisance-creating activity of his tenant.

The common law approach treats nuisances as a tort and determines that under most circumstances, a landowner has no control over the conduct of the tenant or the persons upon the leased land while the tenant is in possession. Therefore, the landowner is not ordinarily responsible for the tortious acts of the tenant or third persons. Examples of this methodology can be seen in states nationwide. In a Connecticut case, a tenant’s dog escaped and attacked a woman as she walked along a public sidewalk near the tenant’s apartment. The appellate court held that the landowner owed no duty to the woman to prevent a nuisance because the tenant did not own a dog when the lease began, and at no time did the tenant seek the landowner’s permission to maintain a dog in the apartment. Thus, because the woman failed to prove the landowner’s knowledge of the existence of a dangerous activity at the inception of the lease, the court refused to hold him liable. A recent Illinois appellate court came to a similar conclusion when a guest slipped on loose carpeting on

175. The author could find no cases from common law jurisdictions with fact patterns particularly similar to the Yokum case. Nevertheless, the cases presented are representative of how the common law would likely approach such a fact pattern.
176. Stoebuck & Whitman, supra note 14, § 7.2.
177. See supra Part II.A.
179. Id. at 255.
180. Id. at 264.
the stairs of a leased premise. The court held that the landowner was not liable for injuries caused by defective conditions in the premises that were under the tenant’s control.

Restatement (Second) of Torts (the “Restatement”) section 837 states an exception to this general rule of no liability. A landowner can be subject to liability for nuisance-creating activity carried on by tenants if, at the time of the lease, he knows that that activity will be carried on and that the activity involved will necessarily cause a nuisance. The recent Iowa Supreme Court decision of Tetzlaff v. Camp exemplifies this exception. In that case, a tenant farmed a portion of the owner’s land and routinely applied manure from a hog finishing facility on the property. Neighbors complained to the landowner about the manure spreading and later filed suit against both the landowner and the tenant, alleging nuisance. The district court granted summary judgment in favor of the landowner, finding that the owner did not substantially control or participate in the nuisance activity. The Iowa Supreme Court reversed, finding that the landowner’s unique level of involvement with both the tenant and the complaining homeowner generated enough factual issues so that summary judgment was not appropriate. The court took into account the facts that the landowner knew of the tenant’s manure-spreading activities and the neighbors’ corresponding complaints before the lease started. The landowner continued to renew the tenant’s lease (and thereby endorsed the tenant’s manure-spreading procedures) despite the neighbors’ repeated complaints. The court held that, at the expiration of a lease, if a landowner knows that a nuisance exists, he then has the ability to stop it by refusing renewal of the lease or by adding restrictive terms in the lease agreement. If he fails to do so and renews the lease, then he may be liable for the continuance of the nuisance.

183. RESTATEMENT (SECOND) OF TORTS, supra note 15, § 837.
184. 715 N.W.2d 256 (Iowa 2006).
185. Id. at 257.
186. Id. at 257–58.
187. Id. at 258.
188. Id. at 263.
189. Id.
190. Id.
191. Id.
192. Id.
If the Restatement view is applied to the Yokum case, the landowner would not be held liable for the acts of his tenants unless he knew or should have known, *at the time the lease was signed*, that the tenant’s loud music would cause a nuisance to the neighbors. This exception is appropriate because, prior to signing the lease agreement, the landowner is in a position to do something about the nuisance-creating activity, such as refusing to enter into the lease or instilling a clause in the agreement preventing the nuisance-creating activity (as opposed to after the lease is signed when the landowner has less authority over the tenant or power to abate his lawful actions). Although the landowner in Yokum likely knew or should have known that the tenant would operate a bar that played music, it is not likely that he knew or should have known the music would cause a nuisance. Bourbon Street is internationally renowned as a loud and wild hotspot. Neighbors to Bourbon Street establishments should be fully aware of the tendency for there to be bars on that street that play loud music.

Using the *Borenstein* fault-based approach, Louisiana courts would likely come to the same conclusion as that based upon the Restatement approach. *Borenstein* calls for liability to be placed on the person(s) responsible for the existence of the condition.193 If the landowner has knowledge prior to signing the lease agreement that the tenant will create a nuisance and does nothing to prevent it, then the landowner is partially responsible for its existence. Therefore, it would be fair to hold the landowner liable for the damage caused to neighbors by the nuisance. If Louisiana courts use this approach in future nuisance cases, there will be no absolute immunity for landowners. The same foreseeable and preventable harm will not be perpetrated through a series of tenants without liability resting on the landowner if courts used the *Borenstein* fault-based approach. In that circumstance, the landowner will have knowledge of the nuisance-creating activity between leasing agreements, at a time when he has the power to abate it, thereby making him partially responsible for the existence of the condition. Thus, the *Borenstein* approach would achieve results consistent with those achieved under the common law approach.

**IV. CONCLUSION**

Imagine that it is three o’clock on a Sunday morning when Mike gets a phone call from one of his old neighbors, Al. Al complains that Mike’s tenants, three college-aged boys renting

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Mike’s old house, are having a wild party. Mike calls his old house and asks his tenants to settle down. A week later, Mike gets a similar phone call. This time, Al says that Mike’s tenants have continued to play loud music and have people over late into the night, and they have begun to throw beer cups over Al’s fence into his yard. Mike is awoken again two weeks later by Al claiming that the tenants have broken his fence. Al demands compensation from Mike, and he insists that Mike control his tenants. Mike asks Al not to call his house again. He tells Al to handle the situation himself and that he should call the police on the tenants if need be. Al gets angry and says that he has had enough. He says he plans to sue Mike over this controversy.

Should Al sue Mike? Would a court find Mike liable for the nuisance activities of his tenants and the damage they have done? Under the *Yokum* analysis, the answer is quite possibly “yes.” The Louisiana Supreme Court in *Yokum* held that, under article 667, a landowner may be liable for the acts of his tenant if he knew or, in the exercise of reasonable care, should have known about them. Arguably, after the first phone call, Mike knew of the risk that his tenants’ behavior would be a nuisance to Al. However, in applying the *Yokum* standard to future cases, such as the one between Al and Mike, Louisiana courts should be wary of imposing liability on landowners for the tortious acts of tenants. The *Yokum* standard is overbroad because it is not in line with the actual language of article 667, nor is it consistent with prior jurisprudence interpreting article 667 or the approach taken by common law courts. The *Yokum* decision also neglected to address the significant impact it could have on the future of the landowner-tenant relationship in Louisiana. For example, if Mike had known that he could be liable for the acts of his college-aged tenants, he might have demanded higher rental payments or a larger deposit. Perhaps he would have taken out additional insurance, or he may have been more discriminatory in choosing a worthy tenant. Clearly, knowledge of such additional liability risk has the potential to raise the lease rates in Louisiana.

The *Yokum* court also neglected to address the significant overlap between the use of article 667 and article 2315 in Louisiana jurisprudence. Because these two articles have been

194. *Yokum* v. 615 Bourbon St., L.L.C., 977 So. 2d 859, 874 (La. 2008).
used in combination, and because article 667 has been amended to include a negligence standard, article 667 should have a similar interpretation as that of article 2315. Under this fault-based analysis, the landowner should only be liable for the nuisance if he is at least in part responsible for the creation or maintenance of the condition. Mike and landlords in similar positions should not bear liability for the tortious activities of their tenants when they have no involvement with those activities. Thus, the ultimate question that must be answered is, was Mike the actor responsible for the harm done to Al, and is it fair to hold him liable?

Gina Palermo*

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