Diminution of Property Values as Compensable Damage Absent Fault or Physical Damage

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existence of two "spouses," each asserting a claim to the proceeds of the wrongdoer's liability insurance, could encourage increased litigation and make early settlement in such cases impossible.

These potential problems, however, perhaps are outweighed by the difficulty involved in formulating a test for determining the civil effects of a putative marriage. Justice Barham's expansive language in *King* indicates that, in the absence of a rational standard for making this determination, the putative spouse shall be accorded the right of all of the benefits enjoyed by a legal spouse, "civil effect" or not.

Ryland Percy

## DIMINUTION OF PROPERTY VALUES AS COMPENSABLE DAMAGE ABSENT FAULT OR PHYSICAL DAMAGE

Plaintiffs sued the owner of a high pressure gas pipeline, operated within fifteen feet of their property, for $30,000 damage to property value due to the alleged danger resulting from the proximity of the pipeline. The plaintiffs did not allege negligent construction or maintenance nor make any claims of actual physical damage or discomfort. The trial court sustained defendant's exception of no cause of action and the court of appeal affirmed. The Louisiana Supreme Court held that allegations of diminution of property values caused by the nearby presence of ultra-hazardous activities state a cause of action under Civil Code article 667 even absent assertions of physical damage. *Hero Lands Co. v. Texaco, Inc.*, 310 So. 2d 93 (La. 1975).

Traditionally, recovery in Louisiana for non-physical damage to property as a result of works or activities on neighboring estates has been limited to cases in which a neighboring proprietor was at fault, that is, guilty of negligence, intentional misconduct or abuse of right.1 Whereas recovery under Louisiana Civil Code article 2315 has encompassed both physical and non-physical damage,2 recovery the surviving spouses. Cf. *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98 (1846).  

under article 667, in the absence of some type of fault, has been restricted to actual physical damage. Article 667 seems to provide a remedy for any damage caused by works on a neighboring estate, limited only by the requirement of article 668 that a proprietor tolerate "inconveniences." However, Louisiana courts have restricted recovery under article 667 to physical damage either by simply refusing to grant relief under that article when the plaintiff has suffered only non-physical damage or by finding that non-physical damage constitutes only an inconvenience. Thus the courts have consistently refused to compensate diminution of property values caused by the mere presence nearby of such activities as fuel storage, funeral parlors and cemeteries, railroads, and other potentially harmful or obnoxious operations.

3. E.g., Moss v. Burke & Trotti, Inc., 198 La. 76, 87, 3 So. 2d 281, 285 (1941): "In the absence of legal zoning prohibition any business establishment may be established or located in a residential district, however it may affect property values, unless by its very nature, its operation shall physically annoy the inhabitants" (emphasis supplied).

4. E.g., Morris v. Putsman, 166 La. 14, 116 So. 577 (1928) (dust, smoke, noise and increased fire and lightning hazards caused by nearby railroad held to be "inconveniences"); Hill v. Chicago, St. L. & O. R. R., 38 La. Ann. 599 (1886) (smoke, soot, noise, jarring of houses as well as diminution of property values caused by nearby railroad held to be "inconveniences").

5. Beauvais v. D. C. Hall Transport, Inc., 49 So. 2d 44 (La. App. 2d Cir. 1950); Galouye v. A. R. Blossman, Inc., 32 So. 2d 90 (La. App. 1st Cir. 1947). In Galouye, the court affirmed the lower court's denial of a permanent injunction against defendant's maintenance of butane storage tanks since defendant was no longer operating its plant negligently. Plaintiff also introduced evidence that his property had depreciated more than $3000 due to the presence of the plant. The court awarded $1000 without specifying the basis of the award. Professor Yiannopoulos correctly asserts that "the opinion as a whole,... the discretionary nature of the award, and the amount of compensation, support the conclusion that the basis of reparation was plaintiff's inconvenience and mental suffering" caused by defendant's negligent operations. Yiannopoulos, Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669, 34 LA. L. REV. 475, 513 (1974).


The common law deals with the problem in terms of "nuisance," an interference with the use and enjoyment of land. For such an interference to be actionable at common law, it must be substantial and unreasonable under the circumstances. The gravity of the harm to the plaintiff or his property must be weighed against the social utility of the defendant's conduct; thus whether diminution of property values caused by the presence of nearby activities provides the basis of a cause of action at common law depends on the circumstances of each case. Only if the activity causing the diminution is a "nuisance per se" will it give rise to responsibility "without regard to the care with which it is conducted or the circumstances under which it exists." Common law courts have regularly held that nearby activities such as pipelines, storage of explosives and fuel, and power lines are not nuisances per se.

10. Id. at 580, 581; Yiannopoulos, supra, note 5 at 492.
11. As Prosser notes, "[t]he world must have factories, smelters, oil refineries, noisy machinery, and blasting, as well as airports, even at the expense of some inconvenience to those in the vicinity, and the plaintiff may be required to accept and tolerate some not unreasonable discomfort for the general good." PROSSER at 597-98.
12. Some of the factors to be considered are: (1) the gravity of the harm; (2) the character of the harm, physical damage or personal discomfort; (3) the social value of the activity; (4) availability of precautions to the defendant.
13. "[A] nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surrounding." Kays v. City of Versailles, 224 Mo. App. 178, 180, 22 S.W.2d 182, 183 (Kansas City Ct. of App. 1929).
14. Yiannopoulos, supra, note 5 at 492. Since the Louisiana Supreme Court held in Hero Lands that the plaintiffs could recover if they could prove property depreciation and did not hold that the plaintiffs must prove that the operation of the pipeline was unreasonable under the circumstances, it held, in effect, that if the operation of a high-pressure gas pipeline is an ultrahazardous activity, it is a "nuisance per se." This is contrary to the repeated holdings of Louisiana courts that "[a] lawful business is never a nuisance per se." Canone v. Pailet, 160 La. 159, 162, 106 So. 730, 731 (1926); e.g., Graver v. Lepine, 161 La. 97, 100, 108 So. 138, 139 (1926).
15. See Boller v. Texas Eastern Transmission Corp., 87 F. Supp. 603 (E. D. Mo. 1949); East Texas Oil Refining Co. v. Mabee Consolidated Corp., 103 S.W.2d 795 (Tex. Civ. App. 1937) ("The operation of a pipe line properly constructed, carrying a highly combustible and inflammable liquid, is not a nuisance per se, and recovery for damages resulting from the construction or operation of same becomes a question of negligence or not . . ."). See also Benton v. City of Elizabeth, 39 A. 683 (N.J. 1898) (mere fact that insurance
Although Louisiana Civil Code article 667 has no counterpart in the French or Spanish codes utilized by the redactors, the doctrinal writers may be looked to for evidence of the common principles historically underlying the civil law's regulation of neighborhood. For example, Planiol indicates that a proprietor is not responsible for the damage occasioned by the "normal" exercise of his right, assuming he does not act solely for the purpose of harming his neighbor. Mazeaud and Tunc state that a landowner is not responsible for the damage he causes his neighbor if he confines his activity within the material limits of his property. Thus they conclude that a landowner may not recover for diminution of property values caused by the mere presence of industry on neighboring land. Aubry and Rau summarize, with language that seems directly applicable to the facts of the instant case, "Works or operations which do not cause a positive damage to the neighbor . . . for instance, they simply increase certain risks to which an immovable is subject (especially fire risk) or deprive him of advantages he has enjoyed—can not lead to a damage judgment."

In the instant case, the Louisiana Supreme Court concluded that the only issue presented was whether the allegations of the petition were sufficient in law to establish that rates on nearby property were increased did not render a pipeline a nuisance.


17. Johnson v. Dallas Power & Light Co., 271 S.W.2d 443 (Tex. Civ. App. 1954). Defendant constructed a power line within fifty feet of plaintiff's property and thereby reduced the value of plaintiff's property by $15,000. There were no allegations of negligence or actual physical harm. The court denied relief. "It is a rule of long standing that in the absence of nuisance, of negligence, or physical harm there is ordinarily no liability for diminution in adjoining land values resulting from the lawful use of one's own land." 271 S.W.2d at 444.


the plaintiffs were damaged by the installation of the pipeline.\textsuperscript{22} The court stressed the petition's allegations of danger and the opinions of real estate appraisers that property values in the vicinity of a gas pipeline are depreciated. While recognizing that inconveniences caused by a neighboring owner's activities must be tolerated,\textsuperscript{23} the court concluded that the damage contemplated by article 667 need not be an injury caused by a physical invasion:

The problem is one which involves the nature of the intrusion into the neighbor's property, plus the extent or degree of damage. No principle of law confines this damage to physical invasion of the neighbor's premises—an extrinsic injury, as it were. The damage may well be intrinsic in nature. . . .\textsuperscript{24}

Although the court applies the "damage vs. inconvenience" weighing test of articles 667 and 668 of the Civil Code, it eliminates the important proviso added by the earlier jurisprudence that non-physical injury is not a compensable damage, but is, in the language of the Code, an "inconvenience."\textsuperscript{25} Apparently, the nature of the intrusion, or cause of the injury, would be only one consideration to be taken into account by the fact finder in determining whether the injury constitutes a "damage." Therefore, that the injury is non-physical is no longer determinative of whether it is an "inconvenience";\textsuperscript{26} mere diminution of property values may constitute compensable damage.\textsuperscript{27}

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\item \textsuperscript{22} Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93, 97 (La. 1975).
\item \textsuperscript{23} Id. at 98.
\item \textsuperscript{24} Id. To support this conclusion, the court cites \textit{Salter v. B.W.S. Corp.}, 290 So. 2d 821 (La. 1974) and Justice Barham's dissenting opinion in \textit{Hilliard v. Shuff}, 260 La. 384, 391, 256 So. 2d 127, 130 (1971). While Justice Barham's dissent does support this assertion, the holding in \textit{Salter} should be closely analyzed. In that case, the Louisiana Supreme Court, refusing to enjoin all disposal by the defendant of chemical wastes on its land, only commanded it to dispose of the waste in compliance with standards recommended by its experts. The court did not enjoin an intrinsic injury; in fact it may have allowed one since the mere fact of disposal of chemical waste on defendant's property may have diminished plaintiffs' property values.
\item \textsuperscript{25} See note 4 and text at note 4, \textit{supra}.
\item \textsuperscript{26} Apparently, a nonphysical intrusion would require a greater degree of injury than a physical invasion to be classified as creating "damage." See text at note 24, \textit{supra}.
\item \textsuperscript{27} The supreme court also said that plaintiffs' allegations that Texaco, with knowledge of the hazards involved, deliberately installed the pipeline
The court limited its opinion, in a per curiam denying rehearing, by stating that it had not held that diminution of property values caused by the presence of ordinary constructions on neighboring property is compensable damage, but only that allegations of land value depreciation caused by the maintenance of an ultra-hazardous construction on defendant’s property state a cause of action. While the instant case may indeed deal with an ultra-hazardous activity, the court itself gave no reason why its analysis should be limited only to such activities. In fact, the per curiam does not rule out the possibility that allegations of depreciation of property values caused by ordinary constructions or activities on a neighbor’s property may state a cause of action for damages. However, limitation to ultra-hazardous activities is essential if the decision is to be manageable. Even with this limitation, the ruling too drastically curtails the rights of ownership. For example, the decision may retard construction of new oil storage or refining plants if their proprietors are held liable

where it did to avoid paying what it would have been required to pay under conventional acquisition or expropriation “may, if adequately supported by convincing evidence, support an action for abuse of rights under Article 2315 of the Civil Code.” Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93, 98 (La. 1975). As Professor Yiannopoulos points out, “According to Louisiana jurisprudence, a landowner abuses his right when he uses his property intentionally for the purpose of causing damage to a neighbor without benefit to himself.” Yiannopoulos, supra, note 1 at 219 n.124. It would seem a light burden for Texaco to show that it did not place the pipeline where it did for the purpose of injuring the plaintiffs and that it receives a benefit from the operation of the pipeline. See Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919); Adams v. Grigsby, 152 So. 2d 619 (La. App. 2d Cir. 1963).

28. 310 So. 2d at 100.

29. For the purpose of rendering this decision, the court simply assumed that the operation of a high-pressure gas pipeline is an ultra-hazardous activity because of the reference in the petition to four specific explosions described in The Wall Street Journal in July 1969 occurring between 1965 and 1969. Thus on the merits, plaintiffs will have to prove that the pipeline is, in fact, an ultra-hazardous activity, actual depreciation, and the causal connection between the two.

30. “We have not held that allegations of damage based upon a depreciation of land value because of ordinary constructions and activities on a neighbor’s property necessarily state a cause of action. The opinion has held that allegations that the maintenance of an ultra-hazardous construction on defendant’s servitude has caused them damage does under the factual allegation state a cause of action.” 310 So. 2d at 100.

31. For an example of one of the unlimited ways activities on one person’s land may depreciate the value of a neighbor’s, see Latchis v. John, 117 Vt. 110, 85 A.2d 575 (1952) (establishment of a fruit stand). See also text at note 34, infra.
for diminution of all surrounding property values due to the fear of explosion. Secondly, should the need for nuclear energy plants be established, their construction might be practically prevented by this decision since the property depreciated by the presence of such activity will, in all probability, be enormous. Since “[a]n activity is said to be ‘ultra-hazardous’ if it ‘necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the utmost care, and is not a matter of common usage,’ ”32 even necessary activities carried on in the most approved fashion will be restricted. For example, in *Salter v. B.W.S. Corp.*,33 the Louisiana Supreme Court allowed the defendant to dispose of chemical waste on its property if it complied with standards recommended by its experts. As the disposal of chemical waste may very well involve a risk that cannot be eliminated by the utmost care, a landowner now would be forced to compensate his neighbors for the diminution of their property values caused by the necessary activity of waste disposal even if he used the most modern techniques available and did not cause any physical damage.

The court’s decision to expand liability in this area may have been motivated by the apparent inequity of allowing one landowner to use his property in such a manner as to cause his neighbor’s property to decline in value. But viewed in the larger sense, an unlimited number of socially useful and necessary activities cause neighboring property values to depreciate. For example, clearing one’s property to erect a dwelling may very well deprive a neighbor of shade and scenery, but the resulting depreciation should not be compensable. As one writer has said, “If all damage were compensable, the prerogatives of ownership would be drastically curtailed.”34

By recognizing liability for diminution of property values without physical intrusion or damage, the decision in *Hero Lands*, even if limited to ultra-hazardous activities or works, goes considerably beyond previous decisions in marking the perimeter of compensable injury. In so doing, it too severely restricts a landowner’s freedom by potentially retarding certain dangerous but socially useful activities.

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33. 290 So. 2d 821 (La. 1974).
34. Yiannopoulos, *supra*, note 1 at 216.