Civil Liability for Abuse of Right: Something Old, Something New...

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I. INTRODUCTION

The doctrine of abuse of right is an integral part of the Louisiana civilian tradition that rests on jurisprudence, the legal literature, and scattered provisions of the Louisiana Civil Code.¹ The phrase “abuse of right” cannot be found in Louisiana legislation but the doctrine of abuse of right provides the foundation of, and is clearly implied in, civil code provisions governing a variety of legal institutions.²

This article traces the sources and evolution of the doctrine of abuse of right in Louisiana legislation and jurisprudence, seeks to determine the state of the doctrine in judicial decisions, and attempts to synthesize the premises underlying legislative texts and decided cases.

II. SOURCES OF THE LOUISIANA ABUSE OF RIGHT DOCTRINE

The Louisiana Civil Code was adopted in 1808 and was revised in 1825 and 1870.³ The redactors followed the model of the French Civil Code in the structure and organization of the subject matter, but they also relied heavily on


the Justinian legislation, Spanish legal texts, and doctrinal materials of the French and Spanish legal traditions.

Since 1976, the Louisiana Civil Code has been undergoing a title by title revision that remains incomplete. In the on-going revision, the redactors employed the comparative method and have not hesitated to adopt institutions and rules from the central European legal tradition, found in the civil codes of Germany, Switzerland, and Greece. Institutions of the common law that prevail in sister states were also considered and on rare occasions were even codified—but in conformity with civilian methodology and legislative technique. There are no provisions in the Louisiana Civil Code establishing a general doctrine of abuse of right. However, unlike other nineteenth century civil codes that have followed the French model, the Louisiana Civil Code has had, since 1808, a set of provisions that establish liability for abuse of the right of ownership in the framework of vicinage. These are Articles 667, 668, and 669 of the Louisiana Civil Code, reproduced here for purposes of discussion and easy reference:

Art. 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.

Art. 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 neighbors' house, because this act occasions only an inconvenience, but not a real damage.

Art. 669. Regulation of inconvenience

If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude

6. See Yiannopoulos, supra note 1. See also King v. Western Club, Inc., 587 So. 2d 122, 123 (La. App. 2d Cir. 1991) (“Article 667 adopts the principle that a legal right can be exercised in such a manner as to constitute a legal abuse. An abusive use of a legal right may be enjoined or may give rise to damages.”).
established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

These provisions derive from the treatise of Domat, *Les lois civiles dans leur ordre naturel.* However, it appears that the redactors of the Louisiana Civil Code of 1808 used the text of Domat to express an idea that was common to the civilian sources they had considered, including the *Siete Partidas.* Indeed, Partida 3, tit. 32, las 13, declared:

For as was said by the ancient sages, although a man has the power to do what he pleases, upon his ground, yet he ought to do such in a manner as to cause no damage to any other person.

This is indeed a fundamental principle of the civilian tradition and an application of the unexpressed premise of liability for abuse of the right of ownership. Revision of Articles 667-669 of the Louisiana Civil Code was undertaken in a 1977 projet for the law of predial servitudes. Article 661 of that projet dealt with abuse of the right of ownership:

**Art. 661. Abnormal use of property**

An act, activity, or work of a property owner that, under the circumstances existing when it is done, exceeds the normal exercise of the right of ownership constitutes an abuse of the right.

An abuse of the right of ownership that may cause damage to another or deprive him of the enjoyment of his property subjects the property owner to civil responsibility.

Article 662 of the same projet dealt with liability for excessive emissions of impoderabilia that go beyond the scope of abuse of right:

**Art. 662. Unreasonable use of estate**

An unreasonable use of an estate that causes damage to property or excessive discomfort to persons of normal sensibilities by the diffusion of

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9. 1 Louis Moreau-Lislet and Henry Carleton, *The Laws of Las Siete Partidas* 440 (1820). It is significant, perhaps, that the translators cited in this connection: “C. art. 15 p. 130” of the relatively young Louisiana Civil Code of 1808.

10. Quite independent from Domat and from other writers in France and in other civil law jurisdictions, Pothier declared, “Vicinage obliges the neighbors 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.” Robert J. Pothier, *De la Société No. 235, 4 Oeuvres de Pothier* 330 (Bugnet ed. 1861). One may assert, therefore, that Articles 667-669 of the Louisiana Civil Code, though literally reproducing the text of Domat, derive from the common reservoir of the civilian tradition.

smoke, dust, vapor, noise, heat, vibrations, odors, and the like, may be enjoined. Damages may be recovered without regard to defendant's negligence.

Whether the use of an estate is unreasonable is determined in light of the nature of the neighborhood, governmental regulations, local customs, and the attending circumstances.

These provisions encountered opposition in the legislative process and were excised from the bill that became law. As a result, an amorphous and innominate abuse of right doctrine is still found in the Romanist tradition and in scattered provisions of the Civil Code. In the 1984 revision of the law of conventional obligations, the abuse of right doctrine underlies the foundation and expanded requirements of good faith, but express reference to "abuse of right" was meticulously avoided.

III. EVOLUTION OF THE ABUSE OF RIGHT DOCTRINE IN LOUISIANA JURISPRUDENCE

A. An Overview

The abuse of right doctrine made its debut in Louisiana jurisprudence in 1919. In a landmark opinion, Justice Provosty, one of Louisiana's great jurists, formulated the tenets of liability for abuse of the right of ownership on the basis of civil code provisions and French authorities. The plaintiff in that case had drilled an oil-

12. It is widely believed that the provisions of the project intended to codify the abuse of ownership doctrine were opposed by Louisiana utility companies. Draft Article 662, providing for injunctive relief without regard to threat of irreparable harm, was regarded as particularly ominous by defense interests. For another explanation, see Tête, supra note 1, at 71 n.93. The author states that he opposed the adoption of an express abuse of ownership provision because the redactor's explanatory comments included the statement: "Generally, there is an abuse of the right of ownership when a landowner uses his property contrary to the social and economic purpose for which the law recognizes the right of ownership in immovable property." This statement, in the opinion of the author, echoed Article 1 of the Civil Code of the Russian Soviet Socialist Republic. In reality, the statement merely reflected the formulation of the abuse of right doctrine in Article 281 of the Civil Code of Greece.


14. See, e.g., D. 39.3.1.12; id. 6.1.38: "malitiis non est indulgentum"; Gaius, Institutes I.52: "male enim nostro jure uti non debemus," translated in 1 Zulueta, The Institutes of Gaius 17 (1946) as "we ought not to abuse our lawful right"; Domat, Les lois civiles dans leur ordre naturel, Book II, tit. VIII, Section 3, No. 9, 1 Œuvres de Domat 478 (ed. Rémy 1828). See also Ulpian, Digest, Book I, tit. 1, law 10: "juris praecepta sunt haec: honeste vivere, alterum non-laedere, suum quique tribuere" (the precepts of the law are these: to live honorably, to harm no one, and to attribute to each his own).

15. See Tête, supra note 1, at 63-72.

producing well on his property and the defendant had drilled on adjacent property another oil well that failed to produce oil. When the dry hole was abandoned, defendant did not take measures to plug the well. As a result, plaintiff's oil production was significantly diminished. Amicable demands for the plugging of the well remained unanswered, and plaintiff instituted an action seeking damages.

In an elaborate opinion, the court concluded that plaintiff had stated a cause of action in its petition for damages. After discussion of French doctrine and jurisprudence that had already recognized abuse of the right of ownership as grounds for civil responsibility in the framework of vicinage, Justice Provosty concluded:

[C]ases like the present one are not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them, by diagnosing them, to use the expression of Baudry-Lacantinerie and Chaveau, with the aid and guidance of two principles, that the owner must not injure seriously any right of his neighbor, and, even in the absence of any right on the part of the neighbor, must not in an unneighborly spirit do that which, while of no benefit to himself causes damage to the neighbor.18

[17] In France, as in Louisiana, the doctrine of abuse of right was first developed by courts in the framework of the law of vicinage and was later extended to other fields. See Catala and Weir, supra note 1, at 226-27. Courts in France have imposed on landowners responsibility without negligence for damage caused to neighbors, without the benefits of provisions corresponding with Articles 667-669 of the Louisiana Civil Code of 1870. See 3 Marcel Planiol et George Ripert, Traité pratique de droit civil français 450 (2d ed. Picard 1952); 2 Jean Carbonnier, Droit civil 190 (5th ed. 1967). See also George Ripert, Abus ou relativité des droits, 49 Rev. Cr. de législation et de jurisprudence 33 (1929); George Ripert, La règle morale dans les obligations civiles 195 (3d ed. 1935). In the United States, common-law courts have developed the notions of ultrahazardous activities and nuisance to reach comparable results. See W. Prosser, Torts, §§ 78, 90 (4th ed. 1971).

[18] Higgins Oil & Fuel Co., 145 La. at 246, 82 So. at 211. It is interesting from the comparative law point of view that in Japan, as in France, courts developed an abuse of right doctrine for the resolution of conflicts in the neighborhood without the benefit of provisions corresponding with Articles 667-669 of the Louisiana Civil Code of 1870. See Kazuaki Sono and Yasuhiro Fujioka, The Role of the Abuse of Right Doctrine in Japan, 35 La. L. Rev. 1037, 1049 (1975). By virtue of a 1947 amendment, Article 1(3) of the Civil Code of Japan has expressly adopted the abuse of right doctrine.
This conservative and rather narrow conception of the abuse of right doctrine was too much of a novelty in Louisiana. At the time, the civilian tradition was in serious retreat, and any abuse of right theory was expected to be short-lived under the onslaught of common-law influences and extremely individualistic notions of "ownership" and "right." If one had a right, one could use it to the fullest extent without limitations imposed by morals or social conscience. Accordingly, the exercise of a right could not entail delictual liability.\(^9\) Such a liability was imposed only when a person, in the absence of right or privilege, caused damage to another through his fault.

Justice Provosty's opinion was largely ignored\(^{20}\) by courts and writers for almost half a century. By the beginning of the third quarter of the twentieth century, however, a virulent renaissance of the civilian tradition was sweeping juridical thinking in the state\(^{21}\) and the abuse of right doctrine was rediscovered by the Louisiana Supreme Court in *Hero Lands Co. v. Texaco, Inc.*\(^{22}\) An oil company had constructed on its right of way servitude a high pressure pipeline for the transmission of natural gas. The pipeline was located along the boundary of adjoining property at a distance of fifteen feet. The owner of the adjoining property filed suit against the oil company seeking damages for the diminution of the value of his property, caused by the location of the pipeline in close proximity to the boundary. Since plaintiff had not accused defendant of negligence, intentional misconduct, or operation of the pipeline in violation of Article 669 of the Louisiana Civil Code, the trial court sustained defendant's exception of no cause of action, and the court of appeal affirmed. The Louisiana Supreme Court, however, reversed. In a per curiam opinion, the court explained its judgment overruling defendant's exception of no cause of action: "[W]e have remanded for trial on the merits to determine if the proof in support of these allegations entitles plaintiff to

\(^{19}\) See, e.g., *Hill v. Chicago, St. L. & N.O. RR.*, 38 La. Ann. 599 (1886); *Hardin v. Huckabay*, 6 La. App. 649 (2d Cir. 1927). See also *Woods v. Turbeville*, 168 So. 2d 915, 916 (La. App. 2d Cir. 1964) ("So long as a person does not violate any statute he has a right to use his property as he sees fit."); *Allen v. Albright*, 151 So. 2d 554 (La. App. 2d Cir. 1963) ("A person has a right to use his property in any way he sees fit."). Gaius, D. 50.17.55: "Nullus videtur dolo facere qui jure suo utitur."

\(^{20}\) It has been suggested that the Louisiana Supreme Court applied the abuse of right doctrine in a contractual setting for the first time in *Onorato v. Maestri*, 173 La. 375, 137 So. 67 (1931). In this case, a real estate broker sought to recover a commission on a lease he had negotiated for the defendant-lessee. The Louisiana Supreme Court, without express reference to the abuse of right doctrine, denied protection to the lessor who had the right to cancel the lease and thus avoid the payment of the broker's commission because the defendant had exercised that right in order to deprive the broker of what was due to him in a manner contrary to good faith. The court relied on provisions governing fulfillment of conditions. The *Higgins* opinion was not cited. In *Lawton v. Smith*, 146 So. 461 (La. App. 2d Cir. 1933), the court implicitly adopted the theory of abuse of right. It held that equity prevents a first mortgagee from exercising his choice in such a way as to injure the second mortgagee without benefit to himself.


\(^{22}\) 310 So. 2d 93, 99 (La. 1975).
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recovery of damages for the fault of defendant under the theory of abuse of right as expressed by Louisiana Civil Code articles 667 and 668. 23 In a concurring opinion, Justice Barham declared:

[T]he majority here recognizes that Louisiana adopts as a general theory or principle of law that in all areas of legal relationships a legal right can be exercised in such a manner as to constitute a legal abuse. An abusive use of a legal right may be enjoined or may give rise to damages.24

Justice Barham also suggested that the abuse of ownership theory found in Article 667 of the Louisiana Civil Code "by analogy and extension . . . can be applied to contractual, delictual, and legal relations other than ownership of property."25 This suggestion was followed by the court in Morse v. J. Ray McDermott & Co.26 Plaintiff, a former employee who had been laid off by the defendant during an economic downturn, had participated in certain deferred compensation plans. These plans provided for forfeiture of a worker's interest upon termination of the employment unless the employer, at its discretion, waived the forfeiture. McDermott opted not to waive and caused Morse to forfeit the deferred compensation. In a suit by Morse for the recovery of benefits under the plans, the court held for the plaintiff. In the reasons for judgment, the court declared:

[T]he exercise of a right (here, to discharge an employee while opting not to waive the nontermination requirement) without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance . . . .

Thus, the otherwise permissible exercise of a legal right to discharge, in the situation where the employer has the discretion to obviate the harsh forfeiture consequence and chooses not to do so, is transformed from a legal right to an abuse of that right.27

Two years later, in a leading decision, the Louisiana Supreme Court engaged in a scholarly discussion of the abuse of right doctrine and established certain criteria for its application.28 Plaintiff, a lessor, sought to evict a lessee on the ground that the lessee had sublet the property without the lessor's consent. The defendant answered that this was no ground for eviction because the plaintiff had abused his right to withhold consent to the sublease. The court found for the plaintiff:

23. Id. at 100.
24. Id. at 99.
25. Id.
26. 344 So. 2d 1353 (La. 1977) (on rehearing).
27. Id. at 1369.
The withholding of consent to a sublease was for a relatively brief period of time, not done for the sheer sake of exercising the right, but done for the purpose of attempting to carry on actual good faith negotiations for cancellation of the lease, in which the lessor had a serious and legitimate interest under the circumstances . . . 29

Subsequently, in another case in which the lessor had allegedly abused his right to consent to a sublease, the court held for the defendant and articulated four criteria, at least one of which must be met for liability under the Louisiana doctrine of abuse of right. 30 These criteria have been constantly and ceremoniously repeated in Louisiana decisions that may have achieved the status of a jurisprudence constante: 31

To justify the application of the doctrine of "abuse of rights," one of the following must exist:
(1) the exercise of rights exclusively for the purpose of harming another or with the predominant motive to cause harm;
(2) the non-existence of a serious and legitimate interest that is worthy of judicial protection;
(3) the use of the right in violation of moral rules, good faith or elementary fairness; or
(4) the exercise of the right for a purpose other than that for which it was granted. 32

In the following discussion, attention will be focused upon the application of these criteria in Louisiana decisions in the fields of property, conventional obligations, special contracts and torts.

B. Property

1. Abuse of Ownership as Fault

Quite apart from the law of delictual obligations under which a landowner or other occupier of land may be liable to neighbors or other persons on grounds

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29. Id. at 1015.
30. Trushinger v. Pak, 513 So. 2d 1151, 1154 (La. 1987). The court declared:
The Abuse of Rights doctrine has been applied only when one of the following conditions is met: (1) if the predominant motive for it was to cause harm; (2) if there was no serious or legitimate motive for refusing; (3) if the exercise of the right to refuse is against moral rules, good faith, or elementary fairness; (4) if the right to refuse is exercised for a purpose other than that for which it is granted.
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of negligence and intentional misconduct, a landowner or other occupier of land may also incur liability under Articles 667-669 of the Civil Code. Such liability may be grounded on fault, including negligence, intentional misconduct, and abuse of right, or it may be grounded on unblameworthy acts that constitute an abnormal or excessive use of property. In the latter case, the liability of the landowner or other occupier of land exceeds the scope of the abuse of right doctrine.


The essence of the causes of action, which arise under Civil Code articles 667, 668, 669, and perhaps 2315 as an abuse of right . . . is that the defendants conducted activities on the premises which unreasonably inconvenienced and personally injured the members of the class for which the defendants are strictly liable . . . .

For environmental protection, see Salter v. B.W.S. Corp., 290 So. 2d 821 (La. 1974).

35. Article 2315 of the Louisiana Civil Code, corresponding with Article 1382 of the French Civil Code, contemplates responsibility founded on intentional misconduct, negligence, and abuse of right. See Yiannopoulos, supra note 34, §§ 26-27 at 87-88; Planiol et Ripert, supra note 17, at 451; 3 Henri Mazeaud et André Tunc, Traité de la responsabilité civile 640-85 (6th ed. 1965). See also King v. Western Club, Inc., 587 So. 2d 122 (La. App. 2d Cir. 1991). In an action for injunction and damages on account of excessive noise generated by the loud music of a club, the court declared:

"Fault" as used in Article 2315 is not limited to negligent acts and intentional misconduct. It does encompass the abuse of right theory which is something less than intentional misconduct. Defendant, Western Club, operated lawfully and in accordance with its government permit but damages nevertheless occurred to its neighbors. Since Article 667 imposes a legal servitude upon the proprietor in favor of its neighbor, a breach of that servitude is subject to an action for damages under LSA-C.C. Art. 2315.

Cf Tête, supra note 1, at 71 ("[A]buse of right is recognized as a delictual concept whose scope must be decided on a case-by-case basis.").

36. See infra text at notes 40-43. In State Through DOTD v. Chambers Inv. Co., 595 So. 2d 598, 604-05 (La. 1992), the court declared,

We are not prepared to say that, in all cases, a landowner must prove an abuse of right of ownership before he may suppress or recover for a violation of Article 667 by a neighbor. But we think that in a case, such as the present one, in which there is no allegation or evidence of personal injury or physical damage to property, it is consistent with the principles of the Civil Code and our jurisprudence to require proof of the presence of some type of excessive or abusive conduct to hold a landowner responsible under Article 667.

37. According to one view, the notion of abuse of right includes abnormal and excessive acts. See Julio Cueto-Rua, supra note 1, at 982-984; Albert Mayrand, Abuse of Rights in France and Quebec, 34 La. L. Rev. 993 (1974); Vera Bolgar, Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine, 35 La. L. Rev. 1015 (1975). It is preferable, however, to confine the abuse of the right of ownership to blameworthy acts. Non-blameworthy acts may engage civil responsibility on other grounds. See Yiannopoulos, supra note 34, §§ 26-28. For Louisiana decisions imposing liability for abnormal use of property, see Merco Lands, Inc. v. Hutchinson, 306 So. 2d 856 (La. App. 3d Cir. 1975); Androwski v. Ole McDonald's Farms, Inc., 407 So. 2d 455 (La. App. 1st Cir. 1981), writ denied, 409 So. 2d 666 (1982).
Determination of whether a landowner has committed a fault in the exercise of his ownership does not depend on the nature of his act but on his conduct. A landowner must act as a reasonable man of ordinary prudence; if he does not take the requisite precautions in the exercise of his right of ownership, he is responsible for the damage he causes. In this context, the abuse of right of ownership is a blameworthy act, an act that a careful and prudent person would not undertake.

What constitutes an abuse of the right of ownership is “not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances.” Generally, there is an abuse of right when a landowner uses his property with the intent to harm another, without any serious or legitimate interest, against good faith, or contrary to the social and economic purposes for which the law recognizes the right of ownership in immovable property.

2. Liability for Unblameworthy Acts

The foundation of the liability of an occupier of land on negligence, intentional misconduct, and abuse of right grounded on traditional ideas of fault may be too narrow in light of contemporary conditions. Quite frequently, commercial and industrial establishments emit smoke, odors, noise, heat, vapor, and vibrations that cause damage or annoy persons in the neighborhood. These emissions may be entirely unavoidable. The landowner or other occupier of land may have complied with laws and regulations and may have taken all the requisite measures to avoid excessive emissions. Under these circumstances, the occupier of land may not be reproached for negligence, intentional misconduct, or abuse of right. His activities are lawful and socially desirable as they contribute to the general welfare. Nevertheless, courts have held landowners and other occupiers of land responsible for the damage and inconvenience that their operations cause.

This species of responsibility, corresponding with the common law notion of nuisance, occupies an area all its own and goes beyond the idea of abuse of right grounded on fault. According to another view, however, this species


40. Cf. Planiol et Ripert, supra note 17, at 462; Mazeaud et Tunc, supra note 35, at 709.
of responsibility may also be explained on grounds of abuse of right and fault. When a use of property involves predictable risks, one who reaps the benefits ought to compensate neighboring landowners for the damage or inconvenience that they have suffered. Responsibility in such a case rests on a broadened conception of fault. Fault is not found in the noxious act, which may well be the exercise of a right, but in the refusal to pay compensation for harms suffered by neighbors.41

Last century, Rudolph Jhering expressed the idea that “everything appertaining to ordinary life is permitted . . . . One is not allowed, however, to exceed the normal measure of what is tolerable.”42 Simply stated, one who does not use his property in accordance with the prevailing conditions at the time and place is civilly responsible because, by making an abnormal use, he has destroyed the equilibrium that existed among the neighboring estates.43

Whether a particular use of property is abnormal or exceptional is a question of fact.44 Determination is made in light of all the circumstances, including the character of a particular neighborhood, the destination of each immovable, prior use, existing economic conditions, the nature and extent of damage or inconve-


43. See Carbonnier, supra note 17, at 189; Planiol et Ripert, supra note 17, at 464; see also Swiss Civ. Code art. 684, which imposes responsibility on a landowner who exceeds “the limits of tolerance due by neighbors, in view of the local usage, and the situation and nature of the immovables.” Cf. BGB § 906; Greek Civ. Code art. 1003. Nicholas, supra note 41.

44. See McGee v. Yazoo & Mississippi Valley R.R., 206 La. 121, 133, 19 So. 2d 21, 25 (1944). See also infra note 106; Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385 (1971); Borgnemouth Realty Co. v. Gulf Soap Corp., 212 La. 57, 31 So. 2d 488 (1947); Crump v. Carnahan, 155 La. 648, 99 So. 493 (1924). In Merco Lands, Inc. v. Hutchinson, 306 So. 2d 856 (La. App. 3d Cir. 1975), a landowner brought suit to enjoin the construction of an oxidation pond on neighboring property near his boundary. He contended that since a regulation of the Louisiana State Board of Health prohibited the location of water wells within 50 feet of an oxidation pond, the construction of the pond near his boundary would deprive him of the use of a portion of his property for water wells that he planned to drill. The court held that plaintiff was entitled to injunctive relief under both Article 667 of the Louisiana Civil Code and Article 3601 of the Code of Civil Procedure. The case illustrates the proposition that Article 667 imposes civil responsibility not only for abuse of the right of ownership but also for an abnormal use of property that, strictly speaking, may not be regarded as abusive. One may wonder whether the result would be the same if plaintiff had sought to enjoin the drilling of a water well near his boundary on the ground that he would thereby be deprived of the use of a portion of his property for the location of an oxidation pond that he intended to construct. Cf. Androwski v. Ole McDonald’s Farms, Inc., 407 So. 2d 455 (La. App. 1st Cir. 1981), writ denied, 409 So. 2d 666 (1982) (action for damages).
nience suffered by neighbors, and the availability or cost of techniques of correction.

3. Louisiana Jurisprudence

Louisiana decisions in the field of property law recognize the abuse of right doctrine as a source of civil responsibility but, under the oft repeated formula, the scope of the doctrine is limited. A landowner abuses his ownership, the courts declare, when he uses his property intentionally for the purpose of causing damage to a neighbor without benefit to himself. According to Louisiana jurisprudence, a landowner does not abuse his ownership when he uses his property negligently. See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, cert. denied, 287 U.S. 661, 53 S. Ct. 220 (1932); Adams v. Grigsby, 152 So. 2d 619 (La. App. 2d Cir.), writ refused, 244 La. 662, 153 So. 2d 880 (1963). In such a case, however, a landowner may incur liability under the law of delictual obligations. See La. Civ. Code art. 2315.

45. See supra note 22; Hero Lands Co., 310 So. 2d 93. According to Louisiana jurisprudence, a landowner does not abuse his ownership when he uses his property negligently. See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, cert. denied, 287 U.S. 661, 53 S. Ct. 220 (1932); Adams v. Grigsby, 152 So. 2d 619 (La. App. 2d Cir.), writ refused, 244 La. 662, 153 So. 2d 880 (1963). However, the erection of a fence on his property that serves a lawful purpose.46 Moreover, a landowner does not abuse his ownership when he inconveniences his neighbors by "reasonably necessary" construction activities on his property.47 These are annoyances that a neighbor must tolerate rather than an abuse of the right of ownership. However, the erection by a landowner of above ground tanks for the storage of volatile fuel emitting flammable fumes near the boundary is an abuse of the right of ownership.48

No reported decision has been found in which a Louisiana court has held a particular act or activity to be an abuse of ownership solely by reference to the doctrine of abuse of right. Ordinarily, Louisiana courts award damages or issue injunctions under the authority of Articles 667-669 of the Louisiana Civil Code without express reference to the abuse of right doctrine. In such case, however, the imposition of civil responsibility is often justified by the unexpressed realization that under the established facts the defendant had abused his

46. See McCoy, 175 La. 487, 143 So. 383; Adams, 152 So. 2d 619.
47. See Williams v. Beverly, 160 So. 2d 291 (La. App. 1st Cir. 1964). However, the erection of a fence on his property that serves a lawful purpose. See Parker v. Harvey, 164 So. 507 (La. App. 2d Cir. 1935).
50. See Yiannopoulos, supra note 34, §§ 49, 52, 61, 62. The liability under Articles 667-669 of the Louisiana Civil Code is not predicated upon negligence or intentional misconduct. To recover, plaintiff need only prove defendant's violation of the obligations of neighborhood, damage, and a causal relationship between defendant's conduct and the damage. Id. § 39. An abusive exercise of right of ownership ought to be enjoined without balancing equities. Such a process is appropriate in case of violation of duties imposed by Article 669. Cf. Young V. International Paper Co., 179 La. 803, 155 So. 231 (1934); Busby v. International Paper Co., 95 F. Supp. 596 (W.D. La. 1951).
ownership. It follows that examples of acts and activities that constitute abuse of the right of ownership are found in the rich jurisprudence dealing with the obligations of neighborhood rather than in decisions applying the doctrine of abuse of right.

In light of the foregoing, civil responsibility for abuse of the right of ownership rests directly on Articles 667-669 of the Louisiana Civil Code. However, the general doctrine of abuse of right is needed to explain the foundation underlying those articles and to set the limits beyond which the exercise of the right of ownership engages civil responsibility.

C. Conventional Obligations and Contracts

It is now common practice for counsel in Louisiana to add a count of abuse of right in a petition seeking redress in matters of conventional obligations and contracts. In response, courts routinely recite the four criteria for abuse of right as if they were articles of faith and typically conclude that, under the circumstances and the evidence adduced at the trial, there has been no abuse of right. The doctrine of abuse of right is thus largely honored by lip service rather than as grounds for the recovery of damages or injunctive relief. It is rare, indeed, that a Louisiana court has found an abuse of right in the framework of the law of obligations and contracts.

Yet, there is no reason for alarm. The following survey of Louisiana jurisprudence demonstrates that Louisiana courts have generally dispensed justice adequately and have reached commendable results in accordance with contractual provisions and by direct application of the governing provisions of the Louisiana Civil Code governing conventional obligations and contracts. Because the notion of good faith in the 1984 revision of the law of conventional obligations and contracts embodies the premises of the abuse of right doctrine, Louisiana courts have been reaching the same results that could also be achieved by application of the abuse of right doctrine.

1. Leases

Litigants have frequently sought relief in the framework of the lessor-lessee relationship on grounds of abuse of right. For example, tenants have claimed that the lessors abused their rights when they did not consent to a proposed

51. See Redmann, supra note 1: (T)he abuse of rights doctrine provides an alternative cause of action in many factual settings in the contract area. Plaintiffs in Louisiana, having discovered the doctrine, are becoming more creative in its application. Defendants are using the doctrine in defense to a plaintiff's attempt to enforce a contractual right and are asserting claims under the doctrine as counter claims.

52. See supra text at note 31. See Tete, supra note 1, at 71-77.

53. See Armstrong and LaMaster, supra note 1.
sublease of the property, and a lessor has claimed that his tenant abused the right the tenant had to sublease the property. Typically, in eviction proceedings, tenants have claimed that the lessors abused the right to evict. Despite the frequent invocation of the doctrine, however, Louisiana courts have not yet applied it to litigation between lessors and lessees. Courts were able to reach plausible results by application of the law governing conventional obligations in general and leases in particular or by reference to provisions of the lease contract.

2. Insurance

The doctrine of abuse of right has been frequently invoked in cases involving disputes between insurance companies and insured persons, but no case has been found in which relief was granted on grounds of abuse of right. In a leading decision, an employee covered by his employer's accident and health insurance plan was involved in a non-work related automobile accident that left him a quadriplegic. Then, the employer terminated the employment contract, and the employer's group insurer terminated the injured employee's coverage, all in accordance with governing contractual provisions. Subsequently, the insurer sought a declaratory judgment that it had the right to terminate coverage, and the injured employee defended on the ground that the termination of the coverage by the insurer would be an abuse of right. The Louisiana Supreme Court reiterated its position that the abuse of right doctrine should only be used in limited circumstances, because a broad application would result in abrogation of legally protected rights. Having considered each of the four criteria which, according to settled jurisprudence, would have justified application of the abuse

54. See Truschinger v. Pak, 513 So. 2d 1151 (La. 1987) (holding that lessor's refusal to consent to a proposed sublease was not an abuse of right); Cox v. Kirkpatrick, 404 So. 2d 999 (La. App. 1st Cir. 1981) (accord).
55. See 210 Baronne St. Ltd. Partnership v. First Nat'l Bank of Commerce, 543 So. 2d 502 (La. App. 4th Cir.), writ denied, 546 So. 2d 1219 (1989) (holding tenant did not abuse the right he had to sublease the property).
58. See G.L.'s Club of Slidell, Inc., 504 So. 2d 967.
59. See Illinois Cent. Gulf R.R., 368 So. 2d 1009; New Hope Gardens, Ltd., 530 So. 2d 1207; Hebert, 387 So. 2d 693.
of rights doctrine, the court concluded that none was present in the case under consideration. The court was sympathetic to the plight of the defendant but refused to extend the doctrine beyond the limits that historically have warranted its application.

The decision is an example of judicial restraint rather than indifference. A liberal court might have applied the doctrine of abuse of right by stressing "fairness," "social responsibility," and "moral duties" and, on such grounds, it could have estopped the insurer from exercising the right to terminate coverage. Such a decision, however, would have compromised the sanctity of contracts and would be an unwarranted exaggeration of the abuse of right doctrine.

In another case, an insurance company denied death benefits under a life policy, and the surviving spouse of the insured instituted action claiming that the denial of coverage constituted an abuse of right. The court found that the insurance company did not act arbitrarily or without just cause in denying death benefits because the deceased had never become eligible for insurance coverage by the terms of the employer's group insurance plan. The court concluded that allowing the insurance company to exercise the right to deny coverage "was not against moral rules, good faith, or elementary fairness." Hence, there was no abuse of right. In still another case, plaintiffs alleged that the cancellation of a homeowner's policy by the insurer was "a tort, an abuse of right, for which they are entitled to damages for mental anguish and the increased cost of the insurance they secured." The court sustained defendant's exception of no cause of action because "the facts alleged in the petition suggested nothing more than a legitimate business reason for the cancellation."

In Cataldie v. Louisiana Health Service and Indemnity Co., the insurer canceled an individual medical expense policy covering a continuing illness and the insured filed suit seeking judgment that the cancellation was invalid. Although the conduct of the insurance company appeared to be abusive under the circumstances, the Louisiana Supreme Court rendered judgment for the plaintiff on grounds "of contract and statutory law" rather than the doctrine of abuse

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61. See supra text at note 31.
63. Id. at 221.
65. Id. at 269.
66. Id. at 270.
67. 456 So. 2d 1373 (La. 1984).
68. Id. at 1377. See also Lambert v. Maryland Casualty Co., 418 So. 2d 553 (La. 1982). Plaintiffs claimed that the defendant surety had abused its rights under an indemnity contract by freezing funds and causing plaintiff's bankruptcy. The trial court found that defendant had acted in bad faith and without legal right, but the court of appeal reversed. The Louisiana Supreme Court affirmed the reversal, stating that defendant had negotiated at arm's length for the right it exercised and that it had a serious and legitimate interest in exercising it. Cf. Travelers Indem. Co. v. Hunt,
of right. In Great Southwest Fire Insurance Co. v. CNA Insurance Co., the Louisiana Supreme Court found that an excess liability insurance carrier had stated a cause of action for recovery from the primary carrier on grounds of subrogation to the right of the insured against the primary carrier. Then, the court added gratuitously:

In a proper case, it may be possible for the excess carrier to recover directly from the primary insurer for damage caused by an abuse of right . . . . But this would require the pleading and proof of other factors in addition to or in lieu of the failure to perform in good faith alleged in the present case.

3. Lender Liability

Lender liability in Louisiana is normally grounded in breach of contract or in tort. However, such liability may also be found in abuse of right. This matter has been discussed in the jurisprudence, but no case has been located in which the court awarded damages on grounds of abuse of right. In one case, a debtor sought damages from the lending institution for injury to his business and trade reputation caused by a letter that an officer of the institution wrote to a third person. The court dismissed a demand that was based on abuse of right for the reason that the lending institution did not have the right to dispatch the letter, and, therefore, “by definition the theory of abuse of right cannot prevail.”

In another case, a debtor claimed that the lending bank abused its right by putting him in default for non-payment of a promissory note and thereby causing

371 So. 2d 342 (La. App. 4th Cir.), writ denied, 374 So. 2d 657 (1979). In this case, a surety instituted action seeking recovery under the terms of an indemnity contract. Defendant claimed that no indemnity was due because the surety had abused its rights by defending a lawsuit in pursuit of its own interests rather than for the benefit of defendant. The court observed that defendant’s argument appeared to be based on the doctrine of abuse of right and focused attention on the criterion of the purpose for which a right is granted. After careful analysis, the court rendered judgment for plaintiff. There was no evidence that plaintiff had conducted litigation in pursuit of his own interests and contrary to the purpose for which the right had been granted to him.

69. Cf. Breland v. Louisiana Hospital Servs., 468 So. 2d 1215 (La. App. 1st Cir. 1985). In this case, plaintiff sought judgment invalidating the cancellation of a medical expense policy. After distinguishing Cataldi and holding that plaintiff was entitled to payments under the policy on grounds of abuse of right, the court, on rehearing, vacated the decision because plaintiff had not pleaded abuse of right at trial and the defendant should have had the opportunity to defend on this issue. The case was remanded for additional evidence on the issue of whether the defendant had a serious and legitimate interest to cancel the policy.

70. 557 So. 2d 966 (La. 1990).

71. Id. at 971.

72. See Kramer, supra note 1; Weldon v. Republic Bank, 414 So. 2d 1361 (La. App. 2d Cir. 1982).


74. Id. at 1122.
his financial ruin. The debtor alleged specifically that the bank abused its right by failing to produce certain documents which would have established the fact that the bank subjected plaintiff to unequal treatment. The court held for the defendant, finding no abuse of lender’s rights. In other cases, the courts found no abuse of right in a bank’s failure to demand additional security prior to the foreclosure of a mortgage or in the enforcement of a note by executory process that was improper for lack of authentic evidence.

4. Employment Contracts

As might be expected, the abuse of right doctrine has been invoked in employment disputes, and especially in cases involving claims of retaliatory discharge. An attorney filed suit claiming damages for a termination of employment that allegedly constituted an abuse of the employer’s rights. After careful review of the record, the court concluded that the petition did not state a cause of action for abuse of right. The plaintiff had no contract of employment, had resigned from his job, and had failed to prove that the defendant, without any benefit to itself, fired him or forced him to resign merely to cause harm. In another case, discharged workers claimed that their rights were abused by the employer’s imposition of mandatory urinalysis. The court dismissed the action on the ground that the employer, a distributor of natural gas which is a highly volatile substance, had a legitimate interest in instituting a drug-testing program.

In one case, the Louisiana Supreme Court instructed a claimant how to amend his pleadings in order to state a cause of action under the doctrine of

76. Id. at 113:
For a bank to file suit on a promissory note which is, by its own terms, past due, does not constitute an abuse of rights. One of the primary functions of a banking institution is to conduct its financial affairs in a responsible manner so as to remain solvent. In order to do so, it may exercise its contractual rights against individuals who have borrowed money from it.

Upon the showing made, we cannot say that Palowsky has demonstrated relevancy and good cause for the production of the records pursuant to his theory of abuse of rights.

78. See Fidelity Bank and Trust Co. v. Hammons, 540 So. 2d 461, 466 (La. App. 1st Cir.), writ denied, 544 So. 2d 402 (1989). The court declared, “Fidelity did not seek to enforce the note via executory process with the intent of harming Hammons. The intent of Fidelity was to enforce the obligations by seizing and selling the security for the debt. The trial judge properly refused to award Hammons damages for abuse of right.”
80. Id. at 669.
abuse of right. A worker had voluntarily left employment with the defendant, but nine months later needed his former employer's written consent for the transfer of a foreign work permit to another employer. The trial court and the court of appeal sustained defendant's exception of no cause of action on a finding that the former employer had no duty to give written consent. The Louisiana Supreme Court agreed that plaintiff had failed to state a cause of action in his petition but reversed the dismissal in order to allow plaintiff the opportunity to amend the petition by stating a cause of action for abuse of right. In the opinion of the court, even if the former employer had the right not to consent to plaintiff's employment with another employer, "the exercise of that right, without any benefit to Oceanic (and, of course, the latter requirement of absence of benefit would have to be proved) might constitute an actionable abuse of rights which would support an award of damages."  

5. Other Obligations

Abuse of right has also been held up as a potential basis for liability in a variety of situations. For example, it has been suggested that the doctrine of abuse of rights may be utilized for the resolution of disputes involving at will franchise termination. Louisiana courts, however, have resolved such disputes within the confines of the governing agreements and provisions of the law of obligations stressing good faith and fair dealing.

Dicta in judicial decisions suggesting liability on grounds of abuse of right abound, but holdings are missing. Courts have suggested that it may be an abuse of a third person's right to make a payment for the purpose of causing harm to the interests of the debtor, that the publication of facts from courts' records that are open for public inspection may constitute an abuse of right, that the withdrawal of a tender offer may be an abuse of the offeror's right to withdraw the offer, and that the rejection of an offer by a contractor to do a job was an abuse of right.

Abuse of right has also been invoked in cases involving obligations of fiduciaries. In Vuskovich v. Thorne, a co-owner and trustee of other co-owners sought to partition the property held in indivision. Defendants, however, argued that the demand for partition was an abuse of right and a breach of fiduciary duties owed by the co-owner in his capacity as trustee. The Louisiana
Supreme Court noted that a partition by licitation often results in harsh consequences to the co-owner in the less favored economic position but held that this “does not constitute a ground for denial of the right to partition.”

D. Torts

Abuse of right has been invoked to establish delictual liability in a number of cases. In one case, the court itself suggested by way of dicta, that a merchant, by acting unreasonably, may abuse his right to cause the arrest of a suspected shoplifter and that, in such a case, “the injured party may have a civil action against the merchant for damages.” In a suit against the manufacturer of a semi-automatic rifle that was used in a murderous attack, survivors of the victims sought to ground liability on abuse of right, strict liability, and ultra-hazardous activity, but the court found no abuse of right in the marketing of weapons and ammunition. When a customer brought suit against a brokerage firm seeking damages partly on grounds of abuse of right as a result of the manner in which the broker informed plaintiff that he was no longer welcome on the premises, the court held for the defendant.

90. Id. at 1077. In McInnis v. McInnis, 618 So. 2d 672 (La. App. 2d Cir. 1993), grandparents had settled a trust in favor of a grandchild as a principal beneficiary and had retained the right to revoke the trust. When the grandparents exercised the right to revoke, the parents of the minor beneficiary, as administrators of his property, filed action against the grandparents seeking judgment that the revocation of the trust was invalid. In an amended petition, plaintiffs alleged that the sole motivation behind the revocation decision was the settlors’ decision “to inflict emotional and mental distress upon the McInnises,” that the revocation constituted an abuse of right, and that defendants should answer for any harm so caused by their actions. The court correctly held that the doctrine of abuse of right was not applicable in this case: “For a settlor to exercise his power to revoke a trust does not constitute an abuse of rights with respect to third parties.” Id. at 676. The court explained: “cases dealing with this civilian concept typically concern the limited situation involving the holder of a contractual right and a litigant against whom that right has been directly but nonetheless, it is alleged, harmfully exercised.” Id.

92. Addison v. Williams, 546 So. 2d 220, 226 (La. App. 2d Cir.), writ denied, 550 So. 2d 634 (1989). The court declared,

The defendant manufacturers’ motive was economic, not to cause harm to the plaintiffs. That motive was serious and legitimate. The manufacture and sale of guns has never been considered immoral. None of plaintiffs’ allegations permit a conclusion that defendants’ right to manufacture a legal product was exercised for any purpose other than for business and economic gain.

Plaintiffs cite no cases where the abuse of rights doctrine has been applied in a tort or products liability case. The doctrine does not apply here and does not afford plaintiffs a cause of action.


Our review of the conduct of all parties in light of the foregoing jurisprudence reveals nothing which would sanction the application of the abuse of rights doctrine.

Our review of the record reveals that the actions of the defendants were not undertaken with a motive to harm Mr. Muslow, but resulted from a legitimate business motive to
Finally, the doctrine of abuse of right was invoked in a case to anchor delictual liability on a surviving spouse's refusal to delay the funeral of the deceased spouse for one hour and thus allow daughters and grandchildren of the deceased sufficient time for travel and timely arrival for the funeral. The court found that the funeral was scheduled two days after death, that it was not unduly hurried, that it was not performed in secrecy, and that "the refusal of the surviving spouse to delay for one hour the funeral service is not such an action that could give rise to a cause of action under an abuse of rights doctrine." Accordingly, defendant's exception of no cause of action was sustained.

This survey indicates that litigants invoked the doctrine of abuse of right to establish delictual liability in cases in which, under the facts and the law of the torts, defendant could not be held liable for intentional misconduct, negligence, or even without regard to negligence. The reluctance of Louisiana courts to expand the horizons of delictual liability by application of the abuse of right doctrine may simply be the realization that the existing law is sufficient to meet the societal demand for delictual liability.

IV. ABUSE OF RIGHT AND EQUITY

The abuse of right has been termed an "equitable doctrine or remedy." The statement requires comment.

It is correct to state that under the Louisiana Civil Code, the abuse of right is an equitable doctrine in the Aristotelian sense, that is, a correction of the harshness of the positive law. However, it is incorrect to consider the abuse of right as resort to equity under Article 4 of the Louisiana Civil Code, that is, as a rule fashioned by the court for the resolution of disputes in the absence of positive law or custom. In the first place, the abuse of right doctrine is a

provide services for their currently active customers. Certainly this motive is entitled to judicial protection. The plaintiff has failed to prove that the defendants acted unfairly or that they misused their rights in this case.

Id. at 1022.

95. Id. at 378. Cf. Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390 (E.D. La. 1992). The well-known chef brought suit alleging that the defendants used an actor bearing resemblance to him in coffee commercials and sought relief on several grounds, including the doctrine of abuse of right. In denying defendants' motion to dismiss, the court declared that plaintiff alleged sufficient facts to support a showing of violation of the Louisiana law governing abuse of right and, therefore, the complaint stated a cause upon which relief may be granted.
98. See La. Civ. Code art. 4, as revised in 1987. Cf. La. Civ. Code art. 21 (1870). See also Hogan v. Hogan, 549 So. 2d 267 (La. 1989). The court stated by way of dicta that resort to general principles and doctrines of law, such as abuse of rights, unjust enrichment, and equity is made "in exceptional cases." Id. at 273.
principle of justice that is inherent, even though only imperfectly expressed, in the Louisiana Civil Code.\(^9\) Second, the doctrine presupposes the existence of a right, an interest recognized by law, and is inapplicable in the absence of a right.\(^{100}\)

The statement that the abuse of right is an equitable doctrine may be a fertile ground for confusion in Louisiana because of creeping common-law influences. Courts may take this statement to mean that the abuse of rights doctrine may be applied in conformity with Chancery precedents. Indeed, several decades ago, question arose as to whether Article 21 of the Louisiana Civil Code of 1870, the predecessor of the present Article 4, had imported into Louisiana law the doctrines of the Chancery Court, such as the "unclean hands" doctrine and the requirement of irreparable harm for injunctive relief.\(^{101}\) The Louisiana Supreme Court settled the matter by stressing the constitutional bar to the wholesale reception of a foreign law and other inhibiting factors found in the body of the civil law and declared that when the law is silent or insufficient, the court is free to decide what is equitable from any source, including Chancery precedents.\(^{102}\) It is hoped that the old dispute will not resurface.

The qualification of the abuse of right as an equitable doctrine may subvert its function as a correction of law by focusing attention on the limitations imposed on the court by Article 4 of the Civil Code. As a matter of fact, statements may be found in Louisiana jurisprudence that the abuse of right doctrine is inapplicable when a dispute is resolved by an express provision of law or contract.\(^{103}\)

Rather uncritically, certain Louisiana decisions have been explained as denying application of the abuse of right doctrine on the ground of the "unclean hands" doctrine and as standing for the proposition that the abuse of right doctrine may only be invoked by a blameless party.\(^{104}\) If this were so, the

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104. See Redmann, supra note 1, at 975-76. The author discussed the following cases: Lambert v. Maryland Casualty Co., 418 So. 2d 553 (La. 1982); Illinois Cent. Gulf R.R. v. International Harvester, 368 So. 2d 1009 (La. 1979); Cox v. Kirkpatrick, 404 So. 2d 999 (La. App. 1st Cir. 1981); Housing Auth. v. Hebert, 387 So. 2d 643 (La. App. 3d Cir.), writ refused, 394 So. 2d 275, writ not considered, 396 So. 2d 882 (1980).
court would be prevented from undertaking any balancing process in the presence of blameworthy conduct. In reality, the cases cited for the proposition were matters in which courts engaged in a balancing process of the conduct of both parties, which was indeed required for a finding of an abuse of right under the circumstances. Focusing simply on results, a common law jurist might, of course, have concluded that the court applied the "unclean hands" doctrine under which the outcome would have been the same.

It has also been said that the abuse of right, as an equitable doctrine, applies when one of the parties labors under a greatly unequal bargaining power and that the courts appear to require a "disadvantageous position" for the doctrine to apply. Of course, there is no such requirement for application of the abuse of right doctrine in Louisiana, and cases may be explained as involving evaluation of relevant factors for the determination of the question of abuse of right as a fact.

In the field of property law, injunctive relief is available as a matter of right, that is, even if there is no threat of irreparable harm. The qualification of the abuse of right as an equitable doctrine, however, may result in confusion and in denial of injunctive relief, despite a palpable abuse of right, on the ground that a monetary award is an adequate remedy. Fortunately, the question of the subsidiarity of injunctive relief was not raised in American Waste.

105. See Redmann, supra note 1, at 977. The author cited Sanborn v. Oceanic Contractors, Inc., 448 So. 2d 91 (La. 1984); Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1977); Breland v. Louisiana Hospital Servs., 468 So. 2d 1215 (La. App. 1st Cir. 1985); Maurin-Ogden-1978 Pinhook Plaza, 430 So. 2d 747; Cox, 404 So. 2d 999. These cases have been discussed in text supra.

106. The question of whether a landowner has abused his right of ownership is one of fact. Androwski v. Ole McDonald's Farms, Inc., 407 So. 2d 455 (La. App. 1st Cir.), writ denied, 409 So. 2d 666 (1982). It would seem, however, that the question of which act or activity constitutes an abuse of right is a question of law. The question of whether the holder of a right has by his act or activity committed an abuse of right is a question of fact.

107. See Poole v. Guste, 261 La. 1110, 1126, 262 So. 2d 339, 345 (1972):

The defendant's argument is based upon limitations to the remedy of equity recognized in common law jurisdictions, based on the historical use in them of injunctions by the chancery court where the damage-remedy in the regular courts was inadequate. . . . These doctrines are not necessarily applicable to Louisiana, with its different procedural background, and where the injunction has historically been recognized as a remedy available to protect possession of property.

See also Boatner v. Henderson, 5 Mart. (n.s.) 186 (La. 1826).


109. See Poole, 261 La. at 1128, 262 So. 2d at 345 ("Article 667, make[s] inappropriate any consideration here of whether such a balancing of the equities is ever permissible to deny an owner protection of his property right by, in effect, granting his offending neighbor the right to pay damages instead of terminating such neighbor's continuing disturbance."). See also King v. Western Club, Inc., 587 So. 2d 122 (La. App. 2d Cir. 1991) ("An abuse use of a legal right may be enjoined or may give rise to damages."); Merco Lands, Inc. v. Hutchinson, 306 So. 2d 856 (La. App. 3d Cir. 1975).
Civil Liability for Abuse of Right

and Pollution Control Co. v. Jefferson Davis Parish Sanitary Landfill Commission. Plaintiff sought a preliminary injunction to prevent the termination of an interim agreement on the ground that the termination would constitute an abuse of right. After a careful review of the evidence, the court held that defendant's motive in terminating the agreement was the legitimate exercise of a right of the defendant and dismissed the action. There was evidence that the defendant had serious and legitimate business and financial reasons for terminating the agreement and no evidence that the defendant intended to cause harm to plaintiff or that the defendant "exercised its right to terminate the agreement for a purpose other than that for which the termination right was granted."

V. The Nature and Function of the Abuse of Right Doctrine

If the abuse of a right were merely a tort, the law of delictual obligations would suffice and the doctrine of abuse of right would be dispensable as surplusage. Intentional misconduct, negligence, and liability without regard to negligence would provide the grounds for the recovery of damages caused whether by the abusive exercise of a right or in the absence of a right.

The abuse of a right, however, is not necessarily a tort. The function of the abuse of right doctrine in civil law systems is to soften the harshness of the positive law and of contractual provisions in light of society's concerns that transcend individual interests. It has been aptly observed that the doctrine of abuse of right "occupies the intersection of positive law and morals" and that the central philosophical problem presented by the doctrine of abuse of right is the "reconciliation of individual freedom with community cohesion."

In its function as a corrective device, the doctrine of abuse of right presupposes the existence of a right that may properly be exercised only within certain bounds prescribed by law. When such bounds are not

111. Id. at 546.
112. Herman, supra note 1, at 748.
113. Id. at 759.
114. An utterly individualistic notion of right, such as the one maintained by Windscheid, leaves no room for abuse of right. See 1 Bernhard Windscheid, Pandekten § 37 (1891). Jhering's definition of right as interest protected by the law stresses purpose and sets outer limits for the exercise of rights. See 3 Rudolf von Jhering, Geist des römischen Rechts § 60, at 328 (1877). Regelberger's definition of right as the authority of the will that is recognized by the law for the satisfaction of protected interests, also leaves room for the operation of an abuse of right doctrine. See 1 Ferdinand Regelsberger & George S. Maridakis, General Principles of the Law of Pandects 14, at 99 (1935) (in Greek).
115. There may be gaps between the spirit or purpose of the law and its letter with respect to the exercise of a right, namely, acts or activities tending to realize the content of the right. However, the law often sets the outer limits, the maximum of the space that a person may utilize in the exercise of its rights. When these limits are transcended, there is an abuse of right.
prescribed by express provision of law, they must be determined by the courts case by case in light of a number of factors, including the presence or absence of intent to harm, the existence or lack of a serious and legitimate interest, good faith or bad faith, and consideration of the purpose for which a right is recognized by the law.\textsuperscript{116} These criteria then provide the requisite elements for a working definition of abuse of right as the exercise of a right either with the intent to harm another, or without any serious legitimate interest, contrary to good faith or contrary to the purpose for which the right is recognized by the law.\textsuperscript{117}

This definition may not satisfy all concerns\textsuperscript{118} but is preferable to a "can't be done" approach. We should not give up the effort to define the abuse of right even if we were to admit that the debate over the meaning of abuse of right and the desirability of the application of the doctrine is generated by irreconcilable "views of human nature and social responsibility."\textsuperscript{119} Moreover, we should not be deterred by the knowledge that "there are broad divergences among civilians and civil law courts concerning the proper scope and limits"\textsuperscript{120} of the abuse of right doctrine.

Definitions do not decide cases and do not resolve issues such as the imposition of civil responsibility for a negligent, or even non-negligent, abuse of

\textsuperscript{116} The existence of inherent limitations of rights may spawn abuses of the notion of abuse of right. See Tête, supra note 1, at 78 ("[T]here is a possibility that the notion of abuse of right could be stretched to undermine the fundamental institutions of a free economic order, property and contract."). This is the persisting question of who shall guard the guardians, but it is no reason to do away with the abuse of right doctrine. Eventually, the limits of the doctrine's application will be found within the confines of the entire legal system.

\textsuperscript{117} See Yiannopoulos, supra note 34, at 90; Cueto-Rua, supra note 1, at 983. The reference to "social and economic purpose" as part of the definition of abuse of right has been criticized by Professor Tête. See Tête, supra note 1, at 82. According to the author, these criteria, "when used alone, may be taken to imply utter disregard of the subjective will, whether of the individual citizen or of the legislator." Id.

\textsuperscript{118} Professor Tête has vigorously maintained that an abuse of right is nothing but the converse of good faith. See Tête, supra note 1, at 65, 77:

The Obligations Revision contains significant provisions which, when taken together, constitute an implicit definition of abuse of right. This definition flows from the extension of the civilian concept of "good faith," by means of the notion of "public policy," to the point where good faith becomes in substance a prohibition against an abuse of right.

... The concept of abuse of right as the converse of good faith preserves the link between our contemporary civil code and the very roots of the Romanist legal tradition. It permits the extension of the concept of "good faith" to permit the cautious recognition of tort duties of result as well as those of due diligence and prudence. It seems to provide something of a structure within which the judiciary may make policy decisions and articulate them in terms of the rule of law.

\textsuperscript{119} Herman, supra note 1, at 748. The author described his essay as "an unsuccessful search for a coherent framework by which to analyze the doctrine of 'abuse of rights.'"

\textsuperscript{120} See Cueto-Rua, supra note 1, at 971.
right. In this respect, Louisiana jurisprudence is inconclusive. On the one hand, courts have imposed liability under Articles 667-669 of the Civil Code without regard to negligence, but, on the other hand, they have refused recovery grounded on allegations of a negligent abuse of right.\textsuperscript{121} It should follow, however, from the nature of the abuse of right doctrine as a correction of law that civil responsibility is imposed without regard to the state of mind of the person who exercises a right.\textsuperscript{122} In theory, therefore, responsibility may attach to intentional as well as negligent and non-negligent acts that may constitute an abuse of right.\textsuperscript{123}

Upon conclusion, the abuse of right doctrine is no license for the judiciary to subvert positive law or contracts negotiated at arm's length. It is a doctrine that has been sparingly applied by Louisiana courts, with sensitivity toward law, custom, and the sanctity of contractual obligations,\textsuperscript{124} for the setting aside of an abuse, for preventing a future abuse, or for the compensation for losses caused by the abuse of a right.

\textsuperscript{121} According to Louisiana jurisprudence, it is clear that a willful abuse of the right of ownership gives rise to a claim for damages. See McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936) (willful drainage of common subterranean gas reservoir; exception of no cause of action overruled). A negligent abuse of the right of ownership, however, may not give rise to a claim for damages. McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932) (negligent drainage of common subterranean gas reservoir; exception of no cause of action sustained).

\textsuperscript{122} In this situation, it is not the will or intent of the holder of the right that counts, but the results of his acts. In this situation, a balancing of interests is necessary for the determination of the questions of the type of redress that should be accorded, namely, an award of damages, restoration of a previous situation, or injunctive relief for the future. See Nestor E. Kouraki, Abuse of Right 61 (1978) (in Greek).

\textsuperscript{123} See Tete, \textit{supra} note 1, at 72 ("There are some circumstances where a person who, in the course of exercising a right, has inadvertently caused damage to another would be in bad faith, in effect at fault, in failing to repair the damage even though not caused by negligence.").

\textsuperscript{124} Cf. McInnis v. McInnis, 618 So. 2d 672, 676 (La. App. 2d Cir. 1993) ("Because the 'abuse of rights' approach would render unenforceable a party's otherwise judicially protected rights, the doctrine is sparingly invoked in Louisiana.")).