

5-31-2013

## We Want Our Lives Back Too: Expanding Absolute Liability to Include a Recovery for the Victims of Ecological Catastrophes

Prentice L. White

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjel>

---

### Recommended Citation

White, Prentice L. (2013) "We Want Our Lives Back Too: Expanding Absolute Liability to Include a Recovery for the Victims of Ecological Catastrophes," *Seattle Journal of Environmental Law*. Vol. 3: Iss. 1, Article 4.

Available at: <https://digitalcommons.law.seattleu.edu/sjel/vol3/iss1/4>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal of Environmental Law by an authorized editor of Seattle University School of Law Digital Commons.

# We Want Our Lives Back Too: Expanding Absolute Liability to Include a Recovery for the Victims of Ecological Catastrophes

*Prentice L. White*<sup>†</sup>

## TABLE OF CONTENTS

I. Introduction .....	101
A. The Human Costs .....	103
B. The Social Costs .....	106
C. The Call for Change .....	108
II. Human Rights Due Diligence—Why is it Not First and Foremost in the Corporate Makeup of Our Society? .....	108
III. Louisiana’s Proposed Response to the Oil Spill .....	112
IV. Conclusion .....	121

## I. INTRODUCTION

When April 20, 2011, arrived, several national news stations recognized the date as the anniversary of the world’s most devastating man-made disaster in history. Just one year earlier, every news<sup>1</sup> station in the country—and many European news stations—descended onto the Louisiana coast for the purpose of discussing the explosion aboard BP’s Deepwater Horizon’s oil platform in the Gulf of Mexico. The Deepwater Horizon was less than fifty miles away from the coast line, but the explosion shown brighter than fireworks in a midnight sky.

If any Louisiana citizen wanted to have their fifteen minutes of fame, all they had to do was drive to Venice, Louisiana, and select any one of the news reporters sitting or standing on the beach. Hotel rooms were sold out. The number of men and women dressed in neon orange

---

<sup>†</sup> Prentice L. White is an Assistant Professor of Law at Southern University Law Center (Baton Rouge, Louisiana), and is a former New Orleans prosecutor. He is currently a member of the Louisiana Appellate Project, which is a state agency that handles criminal appeals for indigent defendants in Louisiana and he is part of the CJA Panel of contract attorneys for the Middle and Western Districts of Louisiana.

1. See Damien Cave, *In Campaign, That Gulf Spill Covers Nation*, N.Y. TIMES, June 30, 2010, at A1; see also Alessandra Stanley, *So Sayeth the Anchorman*, N.Y. TIMES, June 22, 2010, at C1.

and draping the Louisiana coastline with booms<sup>2</sup> resembled an AT&T commercial showing how much coverage the AT&T mobile phones have in the United States. The Gulf of Mexico waters had turned black from the hundreds of thousands of gallons of crude spewing into the gulf.<sup>3</sup> Marine life could be seen trying to avoid the oil, but to no avail. Cable news stations continuously monitored the live feed of the blow-out valve,<sup>4</sup> and reporters interviewed Plaquemine Parish President Billy Nungesser more times<sup>5</sup> than they interviewed President Barak Obama during the 2008 Presidential Elections.

In fact, President Obama declared it to be the worst environmental disaster in the United States history.<sup>6</sup> President Obama later ordered Interior Secretary Ken Salazar to conduct a comprehensive review of the blowout valve and to report, within a thirty-day period, “what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and productions operations on the outer continental shelf.”<sup>7</sup> Generally speaking, it could have been much worse had it not been for BP’s unusually deep pockets,<sup>8</sup> and its ability to fully compensate individuals injured from the oil spill.<sup>9</sup> While BP was able to mitigate some of the costs, this disaster will impact gulf residents for years to come. This section will introduce these impacts by sharing three unique stories. It will then discuss the social costs attributed to a disaster of this magnitude. Finally, this section calls for action from Louisiana’s legislature to create a deterrent to promote responsible corporate practice and to protect residents from a known danger.

---

2. See Campbell Robertson, *Efforts to Repel Gulf Spill Are Described as Chaotic*, N.Y. TIMES, June 15, 2010, at A1.

3. The Oil Pollution Act of 1990, as enacted, imposes strict liability for vessel spills upon the “owner” and “operator” of the discharging vessel, but not the cargo owner. See 33 U.S.C. § 2702 (2008).

4. Shaila Dewan, *In First Success, A Tube Captures Some Leaking Oil*, N.Y. TIMES, May 17, 2010, at A1.

5. Campbell Robertson & Elisabeth Rosenthal, *Officials Voice Anger Touring Shores Fouled by Slicks and Tar Balls*, N. Y. TIMES, May 21, 2010.

6. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT 173 (2011) (quoting President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>)).

7. Jonathan C. Augustine, *A National Model for Disaster Recovery: Growing Green Jobs in the Age of Energy Efficiency*, 37 T. MARSHALL L. REV. 179, 193 (2012) (quoting Hornbeck Offshore Servs. v. Salazar, 696 F. Supp. 2d 627, 630 (E. D. La. 2010)).

8. Jad Mouawad, et al., *For BP, A Toll Likely to Extend Beyond the Cleanup*, N.Y. TIMES, June 15, 2010, at B1.

9. See W. Kip Viscusi & Richard J. Zeckhauser, *Deterring and Compensating Oil-Spill Catastrophes: The Need for Strict and Two-Tier Liability*, 64 VAND. L. REV. 1717 (2011).

### A. The Human Costs

A year after this horrible event, all that could be found on this once vibrant beach area were three lonely people. Standing inches away from the water stood a middle-aged man wearing a white T-shirt, a pair of blue jeans and knee-high white rubber boots. This man, whom we shall refer to as Jim, had been a Louisiana shrimper since he was thirteen. Jim had later started his own fishing<sup>10</sup> business after his father was diagnosed with cancer. Jim's family had been fishing and catching shrimp along the Louisiana coasts for over three generations.<sup>11</sup> Before, the BP Oil Spill, Jim was able to accumulate a yearly salary of approximately \$35,000, but once the State of Louisiana<sup>12</sup> prohibited him and other shrimpers from fishing in the waters because of the oil spill, Jim's income plummeted to less than \$700 a month for both May and June of 2010. Jim joined the crew<sup>13</sup> of clean-up<sup>14</sup> workers BP hired to clean<sup>15</sup> the shoreline, but the income he received was barely<sup>16</sup> enough to cover his family's basic living expenses—not including the mortgage on his shrimp boat.

In July 2010, Jim defaulted on the boat mortgage. He later used some of his savings to pay his monthly expenses and forfeited his eldest son's chance of going to college that fall. The money he received from BP was less than what he expected. Considering that his business was primarily in cash revenues,<sup>17</sup> it was difficult for him to prove to the BP

---

10. See *An Economy on Pause in the Gulf*, N.Y. TIMES, May 16, 2010 (demonstrating economic activities prevalent in the gulf prior to the spill).

11. See Katy Muldoon, *Northwesterners Rush to Help Mitigate the Environment Disaster Unfolding in the Gulf*, THE OREGONIAN, May 22, 2010, [http://www.oregonlive.com/environment/index.ssf/2010/05/northwesterners\\_rush\\_to\\_help\\_m.html](http://www.oregonlive.com/environment/index.ssf/2010/05/northwesterners_rush_to_help_m.html).

12. In *Hurton Portland Cement Co. v. Detroit*, 362 U. S. 440 (1960), the United States Supreme Court upheld a local air pollution ordinance which regulated emissions from vessels on navigable waters. The Supreme Court also noted that the local ordinance was designed to free from pollution the very air that people breathe clearly and such legislation was within the realm of the state's police power.

13. John LeLand, *Cleanup Hiring Feeds Frustration in Fishing Town*, N.Y. TIMES, June 27, 2010, at A12.

14. Jad Mouawad & John Schwartz, *Rising Cleanup Costs and Numerous Lawsuits Rattle BP's Investors*, N.Y. TIMES, June 2, 2010, [http://www.nytimes.com/2010/06/02/us/02liability.html?\\_r=0](http://www.nytimes.com/2010/06/02/us/02liability.html?_r=0).

15. See NIEHS Activities Related to the Gulf Oil Spill: *Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 111th Cong. (2010) (Statement of Aubrey Keith Miller, M.D., MPH Senior Medical advisor, National Institute of Environmental Health Services, National Institutes of Health, U. S. Department of Health and Human Services), [hereinafter Health Effects] (stating that workers involved in cleanup have reported the highest levels of exposure and the most acute symptoms, when compared to subjects exposed in different ways).

16. See John LeLand, *supra* note 13.

17. See Fay Pappas, Note, *Gulf Coast Blowout: How the BP Oil Spill is Corroding Communities And What Attorney's & Policymakers Must Do to Stop It*, 22 U. FLA. J. L. & PUB. POL'Y 229 (2011) (classifying these cash-based businesses as Renewable Resource Communities

claims representatives that he earned much more than what he could prove on his tax returns and his other receipts. Kenneth Feinberg and his team gave Jim a difficult time in assessing his claim for damages.<sup>18</sup> Jim's shrimp boat was later repossessed. His wife got a waitressing job in Jefferson Parish to help the family. Disappointing his children and destroying his family's fishing heritage made Jim suicidal and dependent on various psychiatric<sup>19</sup> medications. When the oil spill happened and BP was experiencing severe problems with cutting off the blowout valve, the fear among Jim and his fellow fishermen was staggering.<sup>20</sup>

About twenty feet south of where Jim was sat Margaret, a co-owner of a twenty-unit hotel in Venice, Louisiana, who was sitting on the sand, letting the wind blow through her partially gray hair. Next to her was Margaret's husband, Robert, of thirty years. During the week of the explosion, Robert and Margaret had been painting the rooms of the hotel in anticipation of the sport fishermen and college students on spring break who normally visit the gulf in the late spring. Instead of vacationers, Margaret and Robert welcomed hundreds of national and international journalists, as well as a host of reporters from cable news networks to cover the BP Oil Spill. They even leased a room or two to several BP executives who came to Louisiana to establish BP's presence for public relations purposes.

What they expected to be a mediocre weekend actually tripled their accounts receivable. In fact, they received more during the first three weeks of the oil spill than the first six months of last year's profit margin. Suddenly, the oil started to wash ashore in May 2010, and began invading Louisiana's beaches and precious marshlands. The reporters were fearful of what diseases or illnesses they might contract being so close to the contaminated waters. BP's claims adjusters were checking out and Margaret's regular patrons were canceling their vacation plans to Louisiana. The short-term profit did not make up for the huge losses that

---

because these Gulf Coast communities have very little occupational variety outside of commercial fishing other than the businesses directly supported by the fishing industry; such as processing plants and local restaurants).

18. See Terry Carter, *Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Resolution?*, ABA JOURNAL, Jan. 1, 2011 (stating that "[t]he BP oil spill looks to be Feinberg's most problematic challenge to date. It is difficult to assay the future of the Gulf's health, and thus the livelihoods of tens or hundreds of thousands, and resulting ripple effects elsewhere"—especially the cash-only economy that predominates the small-scale commercial fishing industry).

19. See Health Effects, *supra* note 15 (arguing that clean-up workers reported higher levels of generalized anxiety disorder, post-traumatic stress disorder, and depressive symptoms).

20. See Pappas, *supra* note 17, at 245 (discussing Dr. Arwen Podesta, a psychiatrist at Tulane University in New Orleans, who described the behavior of these Louisiana fisherman following Hurricane Katrina and the BP Oil Spill as "teetering on the edge of wellness" and "decompensating into severe depression and resurgence of PTSD" from Katrina).

came later. Pretty soon, Margaret and Robert had exhausted their unprecedented profits. Desperate for money to take care of his wife, Robert joined one of the cleanup crews,<sup>21</sup> hoping to accelerate<sup>22</sup> the progress of getting the beaches clean and welcoming vacationers back to Louisiana, but the cleanup crews faced their own challenges.

Many residents described the smell of crude oil in the Gulf as overpowering.<sup>23</sup> Some feared that the parish's drinking water would also be compromised. In fact, Robert had been working for the cleanup crew for only three weeks, before he developed a respiratory<sup>24</sup> infection in his lungs from inhaling the fumes from the crude oil washing ashore the Louisiana beaches. Soon, Margaret found herself abandoning their hotel to care for her ailing husband. Watching the man who once seemed unstoppable turn into someone who could not walk from the kitchen to the bedroom without becoming exhausted was heartbreaking. The couple invested so much in their hotel that if something happened to her husband, Margaret would be bankrupt in less than five years. Margaret regularly came to the beach to pray because she feared<sup>25</sup> her entire financial life was coming to an end and she wanted to remember why she and her husband chose Venice, Louisiana, to start their business—the beautiful sunsets and the Gulf of Mexico's hypnotizing waters.

Walking past Margaret was a young woman in her twenties who was sobbing uncontrollably. She was wearing a faded men's college sweatshirt and a pair of pajama pants. Standing in the spring sunshine, anyone could see the dazzling diamond engagement ring on her left hand. This young woman's sadness did not stem from a crumbling business or an irreparable career, instead, Jenny was mourning the loss of her fiancé who was killed aboard the Deepwater Horizon in April 2010. They were scheduled to be married two months after the explosion. But

---

21. See Muldoon, *supra* note 11.

22. See Press Release, Gulf Coast Senators Introduce Resolution Urging BP to Use Local Products and Services in Oil Spill Activities, Government Press Releases (July 15, 2010) [hereinafter GULF COAST SENATORS] (stating that BP would be wise to use the fishermen, hoteliers, restaurateurs, and other local residents to assist in the taking the edge off the economic disaster this spill has caused to this region).

23. See Heath Effects, *supra* note 15 (quoting Dr. Miller's testimony wherein he stated that "the oil nearest the source of a spill contains higher levels of some volatile and more toxic components, such as benzene, toluene, and xylene").

24. *Id.*

25. See Pappas, *supra* note 17, at 244 (indicating that Dr. Irwin Redlender, the President and Center Director of the Children's Health Fund, conducted a survey of 1200 Gulf Coast residents in Louisiana and Mississippi, and discovered that there existed "a persistent and overwhelming level of anxiety among families living near the coast that is driven by both medical symptoms in their children as well as substantial level of psychological stress") (citing Debbie Elliot & Marisa Penaloza, BP Spill Psychological Scars Similar to Exxon Valdez, Nat. Pub. Radio (Dec. 1, 2010) <http://www.npr.org/2010/12/01/131694848/bp-spill-psychological-scars-similar-to-exxon-valdez>).

now, all Jenny has to remember her fiancé are pictures, a few of his college sport shirts, and a host of memories she wakes up to every morning.

### *B. The Social Costs*

Jim, Margaret, and Jenny represent three categories of gulf coast residents whose lives were forever changed by the BP Oil Spill. Five months after the spill, BP capped its massive gusher at the bottom of the Gulf, but the Louisiana coastline was still saturated from the hundreds of thousands of gallons of crude oil from the oil rig that was positioned approximately forty-one miles off the Louisiana coast.<sup>26</sup> Marine animals were either contaminated or killed by the brown-colored sludge that ascended 5,000 miles from the floor of the Gulf of Mexico. Men and women have seen their life savings evaporate. Students were forced to withdraw from college and return home to help their parents and grandparents pay their mortgages/rent and utilities. Some have even taken their lives due to the enormous amount of stress and anxiety from this horrible accident. The stories of these three people were not included for dramatic effect, but were instead included in an effort to give a full appreciation<sup>27</sup> of the human cost of the BP oil spill, so the reader can fully appreciate of the realities of what the BP Oil Spill had done to the lives of Louisiana's residents, its wildlife, and its coastline.<sup>28</sup>

Now, in the aftermath of the BP Oil Spill, it is incumbent on the State of Louisiana to protect its citizenry by incorporating policies to ensure that its residents will not have to experience such a hardship and will have the financial resources to recover from future disasters.<sup>29</sup> Simply because the oil is not floating on the surface of the water does not mean that the threat is over or that the harm has been minimized.<sup>30</sup> Over

---

26. See Jay Reeves, *America Moves On From Spill: Coast Feels Abandoned*, HUFFINGTON POST, Oct. 9, 2010, [http://www.huffingtonpost.com/2010/10/09/america-moves-on-from-spi\\_n\\_756928.html](http://www.huffingtonpost.com/2010/10/09/america-moves-on-from-spi_n_756928.html).

27. *Id.* (declaring that there is nothing more unsettling about the worst man-made disaster in U. S. history than the nation's short attention span and their desire to hear something different or to talk about the next big thing).

28. See Krissah Thompson, *As Gulf Cleanup Continues, BP Will Also Struggle to Clean Up Its Brand*, WASH. POST, Aug. 19, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081803063.html?hpid=topnews> (writing that David Kotok, chief investment officer for Cumberland Advisors, says that BP will pay out at least \$50 billion in fines, lawsuits, and settlements related to the oil spill, but has little to no idea how BP would initiate a brand comeback after this type of disaster).

29. Melinda Deslatte, *Lawmakers Rant Futilely about Oil Spill*, ASSOCIATED PRESS, June 20, 2010, [http://www.pddnet.com/news/2010/06/analysis-lawmakers-rant-futilely-about-oil-spill?qt-most\\_popular=0](http://www.pddnet.com/news/2010/06/analysis-lawmakers-rant-futilely-about-oil-spill?qt-most_popular=0).

30. See Reeves, *supra* note 26.

the last two years since the BP Oil Spill, many Louisiana residents have entered into a heightened panic during the hurricane seasons because of the possibility that oil sediments from the spill could be moved onto Louisiana's wetlands and beaches.<sup>31</sup>

For this reason, policies that promote a culture of corporate responsibility would be instrumental in guarding the public against high levels of mental stress, unemployment, and loss of life that spread profusely in southeast Louisiana in the years following the BP explosion. Louisiana lawmakers must promote policies and legislation that will not only provide additional avenues of recovery for those injured by corporate carelessness, but also broadcast to other companies (both present and future) that corporate responsibility<sup>32</sup> will forever be at the forefront of all commercial activity within Louisiana's borders. Whatever policies, statutes, regulations, or bills are introduced to shield Louisiana from any future threats, it must include a human rights due diligence component. After all, what happened on April 20, 2010, was definitely a human rights violation because BP overlooked,<sup>33</sup> disregarded, and/or neglected to consider the impact its business decisions would have on the economy, the wildlife, the coastline, and the mental stability of Gulf Coast residents—especially the residents of the State of Louisiana.<sup>34</sup> Many of the Gulf Coast communities have their livelihoods inextricably linked to the environment. Communities in southwest Louisiana face particularly serious challenges with overcoming the effects of the oil spill due to the persistent language and cultural barriers between the Cajun descendants and Vietnamese refugees who have settled in the area.<sup>35</sup>

---

31. See Amy Wold, *Isaac's Impact on BP Oil Unknown*, THE ADVOCATE, Sept. 1, 2012, <http://theadvocate.com/home/3777018-125/isaacs-impact-on-bp-oil> (discussing the apprehension many state administrators felt regarding the possibility of Hurricane Isaac stirring up the more than one million barrels of oil buried in the sediments of the Gulf of Mexico with its 100 mile-per-hour winds).

32. See *Langlois v. Allied Chemical Corp.*, 249 So. 2d 133 (La. 1971), (indicating that the storage of dangerous and highly poisonous gas by the defendant corporation was an activity which, even when conducted with the greatest of care and prudence, could still cause damage to others in the neighborhood based upon the possible consequence that gas could escape and cause harm).

33. See Thompson, *supra* note 28 (David Kotok, the chief investment officer for Cumberland advisors notes that there is a "human and psychological factor that is impossible to measure" and "BP" becomes the identification of the perpetrator of the trauma and it's a long-term relationship damaged").

34. David Segal, *Should BP's Money Go Where the Oil Didn't?*, N.Y. TIMES, Oct. 24, 2010, at BU1.

35. See Mireya Navarro, *Spill Takes Toll on Gulf Workers' Psyches*, N. Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/17/us/17human.html?scp=3&sq=impact%20of%C20BP%C20oil%C20spill%C20on%20fisherman&st=cse>.



### C. The Call for Change

This Article attempts to introduce an idea for Louisiana legislators to consider as a proactive measure in protecting Louisiana citizens from the negligent and reckless behavior of corporations that have decided to engage in commercial activity within the state. This Article suggests that Louisiana should expand the scope of its absolute<sup>36</sup> liability statute (Article 667 of the Louisiana Civil Code) to address some of the problems our citizens have experienced while enduring the BP Oil Spill debacle in the spring of 2010.

The theory underlying the doctrine of absolute liability is that while abnormally dangerous activities may not be illegal and may even have beneficial results, these activities should pay their own way. Thus, even though an individual [or a juridical person] who is engaged in an activity such as blasting or flying an airplane cannot with utmost care and skill prevent some accidents, he should[,] nevertheless, be responsible to those that are injured as a result of his activities. Absolute liability then, is the price to be paid for the privilege of engaging in abnormally hazardous activities.<sup>37</sup>

This Article will address the need for the state legislature to make a drastic response by reviewing cases around the country where corporations have been held civilly liable for the consequences that resulted from their negligent acts. This Article will also discuss why expanding the state's absolute liability statute is appropriate—both socially and fiscally.

## II. HUMAN RIGHTS DUE DILIGENCE—WHY IS IT NOT FIRST AND FOREMOST IN THE CORPORATE MAKEUP OF OUR SOCIETY?

Louisiana is no stranger to natural and man-made disasters.<sup>38</sup> In addition to battling a number of natural disasters such as Hurricanes Katrina and Rita, Louisiana citizens have had to combat man-made

---

36. See W. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON TORTS 505-16, 974-75 (5th ed. 1984) (defining absolute liability based on the presumption that certain activity is extra-hazardous; therefore, the participant in this hazardous activity is saddled with the burden of being liable for any damage he causes).

37. Major Fred K. Morrison, *Absolute Liability Under the Federal Tort Claims Act*, 60 MIL. L. REV. 53, 55 (1973).

38. See generally J. Steven Picou, *When The Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L. J. 68, 70-71 (2009) (distinguishing technological disasters from natural disasters through association with anthropogenic causes such as careless, irresponsible, or reckless behavior. "Most often such behavior results from a technological system failure or the lack of organizational vigilance in the operation and management of toxic production, transportation, and containment systems. Technological disasters occur when systems thought to be under human control fail, resulting in the toxic contamination of the biophysical environment").

environmental disasters caused by businesses. Because Louisiana citizens have historically been responsible for a disproportionate amount of cost as a result of these man-made disasters, Louisiana law should incorporate a mechanism to protect the financial interests of its state's citizens. The following cases illustrate how corporations have caused disastrous consequences from their abuse of power in Louisiana.

In *Davis v. Insurance Co. of North America*,<sup>39</sup> a temporary worker for Independent Tank Cleaning Services (Independent) was severely injured while cleaning a tanker that was delivered to Independent by Schneider National Bulk Carriers, Inc., (Schneider).<sup>40</sup> Both Independent and Schneider claimed no accountability for the plaintiff's injuries. Specifically, both Independent and Schneider (defendants) alleged that Davis (plaintiff) caused his own injuries (victim's fault) by using a leaf blower to extract the flammable fumes from the tanker. On the other hand, Davis argued that Schneider was at fault for failing to take reasonable measures to protect Davis from the risk of harm.<sup>41</sup> Davis's workers' compensation carrier intervened in the lawsuit, seeking reimbursement from one, or both, of the defendants.

Ultimately, the district court released both defendants from liability by granting their summary judgment motions. The plaintiff attempted to hold Schneider accountable under Louisiana's absolute liability statute, which is found in Article 667 of the Louisiana Civil Code.<sup>42</sup> The plaintiff alleged that because Schneider engaged in ultra-hazardous<sup>43</sup> activity, it should be held accountable for any, and all, injuries he sustained.<sup>44</sup> The First Circuit disagreed, concluding that the activity the plaintiff was involved in at the time of his injuries was not ultrahazardous—even though the storage of toxic gases was listed as an example of ultrahazardous activity.<sup>45</sup> The Fifth Circuit concluded that neither defendant engaged in ultrahazardous activity because Independent cleaned the tanks in question on a routine basis, and a professional cleaning company had cleaned the tanks prior to Independent.

---

39. See *Davis v. Ins. Co. of N. Am.*, 94-0698 (La. App. 1 Cir. 3/3/95); 652 So. 2d 531.

40. *Id.* at 534.

41. *Id.* at 535.

42. Under the Louisiana statute establishing limitations on use of property, strict liability is limited to ultra-hazardous activities of pile driving and blasting with explosives, and otherwise liability requires a showing of knowledge and negligence. See LA. CIV. CODE ANN. art. 667 (2012); see also *TS & C Invs., LLC v. BEUSA Energy, Inc.*, 637 F. Supp. 2d 370, 380 (W. D. La. 2009).

43. See *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498 (La. 1982).

44. See *Davis*, 652 So. 2d at 535.

45. For an activity to be labeled "ultra-hazardous" it must be one that can cause injury to others, even when conducted with the greatest prudence and care. See *Udike v. Browning-Ferris, Inc.*, 808 F. Supp. 538 (W.D. La. 1992).

In *TS & C Investments v. BEUSA Energy, Inc.*,<sup>46</sup> TS & C Investments (plaintiffs), representing themselves and the other residents in Iberville Parish, filed a punitive class action lawsuit complaint against BEUSA Energy (defendant), alleging damages for loss of business, loss of economic opportunity, nuisance, and mental anguish resulting from an oil well blowout that closed Interstate 10.<sup>47</sup> The plaintiffs' cause of action against the defendant rested totally on economic damages and did not involve any physical or property damages, which are necessary under Article 667 of the Louisiana Civil Code. Using the *Erie*<sup>48</sup> doctrine regarding a plaintiff's claim for purely economic damages under Article 667, the federal district court noted that Louisiana jurisprudence previously concluded that a party may not recover for economic loss not associated with physical damage or proprietary damage.<sup>49</sup>

Examples of corporate mismanagement and abuse are endless. With more and more corporations trying to obtain optimum wealth and monopoly status against their competitors, it is not surprising that the general public is regularly overlooked. The argument was that the United States, with its enormous amount of activity, armed forces, space exploration, Atomic Energy Commission, crime-fighting activities, and endless construction projects, should be immune from absolute liability.<sup>50</sup> However, to shield the federal government from this risk would emasculate the purpose of the Federal Tort Claims Act, and force the public to bear this horrendous burden.<sup>51</sup>

The overwhelming interest of most domestic corporations is to increase their profit margin and to decrease their tax liability. Simply canvassing recent national newspapers and cable news stations can tell you how most Americans feel about today's corporate climate. From the Wall Street debacle to the near congressional deadlock that took place during the debt-ceiling debate in the summer of 2011; the public's distrust<sup>52</sup> of government is ever-growing<sup>53</sup> and could jeopardize this

---

46. See *TS & C Invs.*, 637 F. Supp. 2d at 370.

47. *Id.*

48. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that a federal court interpreting a state law must look to the final decisions of that state's highest court to determine the merits of the plaintiff's complaint); see also *TS & C Invs.*, 637 F. Supp. 2d at 374.

49. See *TS & C Invs.*, 637 F. Supp. 2d at 376.

50. The discretionary function exception was the basis for denying liability to the federal government for the Texas City Disaster in the United States case of *Dalehite v. United States*, 346 U.S. 15, 57-9 (1953).

51. See *Dalehite*, 346 U.S. 15.

52. See Thompson, *supra* note 28.

53. See Matthew Cardinale, *Gulf Spill Galvanizes Activist Community*, INTER PRESS SERVICE (June 30, 2010), <http://ipsnorthamerica.net/news.php?idnews=3167>.

nation's economic recovery unless corporations make basic human rights a priority.<sup>54</sup>

If these corporate citizens fail to prioritize human rights in their agenda, then perhaps corporate criminal<sup>55</sup> liability may become an option for deterrence.<sup>56</sup> Some scholars caution against an overuse of the penal code to punish corporate offenders because prosecuting corporations can cause: (1) employees to lose a source of income; (2) shareholders and consumers to carry the burden of huge fines in the form of lower dividends and higher prices; (3) basic business practices to be confused with criminal activity; and (4) individual actors (corporate CEOs) to be shielded from personal<sup>57</sup> responsibility or walking away from criminal prosecution under the cloak of corporate impunity.<sup>58</sup>

David Kotok, the Chief Investment Officer for Cumberland Advisors, stated that BP, following the April 2010 disaster, would have to do something more than just fix the damage from the oil spill. BP would have to do something positive, something huge, and it would have to do it for a rather long time before the public would be willing to forgive.<sup>59</sup> Therefore, inserting a human rights due diligence component into Louisiana's corporate statutes and business culture is essential.

Professor John Ruggie, a business professor at the Harvard University Kennedy School of Business and the United Nations Special Representative on Business and Human Rights (SRSG), coined the term *human rights due diligence* to describe what companies should do to meet their responsibility, to respect human rights, and to demonstrate to others that they do.<sup>60</sup>

---

54. *Id.*

55. See Faisal A. Shuja, *Federal Criminal Issues Presented by the British Petroleum Oil Spill*, 9 LOY. MAR. L. J. 115 (2011) (stating that the Department of Justice will bring criminal charges against BP for endangering the marine ecosystem of the Gulf of Mexico).

56. See Don Stuart, *Punishing Corporate Criminals With Restraint*, 6 CRIM. L. F. 219, 240 (1995) (indicating that "most state corporate criminal liability is based on legislative enactment of the relevant provisions of the American Law Institute's Model Penal Code . . . [which] provides for corporate liability respecting three forms of wrongful conduct: (1) regulatory offenses; (2) failures to perform specific duties imposed by law, and (3) penal law violations").

57. See EDWIN HARDIN SUTHERLAND, *WHITE COLLAR CRIME* (1949).

58. See Morrison, *supra* note 37, at 60 (stating that engaging in an abnormally dangerous activity is not actually wrongful until an injury results, which ultimately makes the activity sufficiently wrongful and the actor understandably liable).

59. See Thompson, *supra* note 28.

60. See John Sherman, *Whose Risk Is It? Viewing Corporate Catastrophe Through a Human Rights Lens*, 6 No. 4 In-HOUSE PERSP. 9 (2010) (citing John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/HRC/14/27 (9 April 2010), available at [www.reports-and-materials.org/Ruggie-report-2010.pdf](http://www.reports-and-materials.org/Ruggie-report-2010.pdf) [hereinafter *Protect, Respect and Remedy*]).

BP's history<sup>61</sup> of committing felony violations<sup>62</sup> in its safety procedures, storage, extraction, and manufacturing of its oil products provides sufficient evidence for the Department of Justice to issue a criminal indictment<sup>63</sup> for the Gulf Oil Spill.<sup>64</sup> The purpose of imposing criminal penalties against corporate giants like BP is to protect the environment (including wildlife) and to insure the purity<sup>65</sup> of the nation's waters. Congress specifically passed the Clean Water Act,<sup>66</sup> the Endangered Species Act,<sup>67</sup> the Marine Mammal Protection Act,<sup>68</sup> and the Oil Pollution<sup>69</sup> Act to impose criminal liability and protect the environment.<sup>70</sup>

### III. LOUISIANA'S PROPOSED RESPONSE TO THE OIL SPILL

Regardless of whether corporations decide to change their agenda or not, the state of Louisiana must set in motion progressive and bold ideas to protect its citizenry and close off any potential opportunities for other commercial juggernauts, like BP, to come upon its shores and contaminate its wildlife and its unique way of life. With this in mind, this Author proposes that our state legislators consider amending Article 667 of the Louisiana Civil Code to include oil drilling as a third category of ultrahazardous activity that could expose a landowner, lessee, lessor, or corporation to damages. In fact, deepwater drilling provides a timely case study of how to structure liability for an economic activity that can cause catastrophic loss. The activity of deepwater drilling can exceed the injurer's financial resources, and without imposing some form of liability, the tort liability system can be diluted from creating incentives for safety<sup>71</sup> and it may limit compensation for the injured.<sup>72</sup>

---

61. See Joe Nocera, *BP Ignored the Omens of Disasters*, N.Y. TIMES, June 18, 2010, at B1.

62. See John Collins Rudolf, *BP Station Owners Face Long Road to Recovery*, N.Y. TIMES, Aug. 10, 2010, at B1.

63. See generally *United States v. BP Products N. Am., Inc.*, 610 F. Supp. 2d 655, 670 (S. D. Tex. 2009).

64. See Shuja, *supra* note 55, at 117-18.

65. See 33 U.S.C. § 1342(a)(1) (2006).

66. 33 U.S.C. § 1251.

67. 16 U.S.C. § 1531 (2006).

68. 16 U.S.C. § 1361.

69. COMM. ON ENV'T AND PUB. WORKS, S. REP. NO. 101-94, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (declaring that the two-fold mission of the OPA was to: (1) coordinate existing state and federal law addressing the problem of oil pollution; and (2) establish a comprehensive liability scheme that "internalized" the costs of clean-up and compensation within the oil industry).

70. 33 U.S.C. §§ 2701-2761.

71. See Marva Jo Wyatt, *Financing the Clean-Up: Cargo Owner Liability for Vessel Spills*, 7 U.S.F. MAR. L. J. 353 (1995) (stating that without a threat of liability, there exist no real incentives for the oil industry to prevent spills).

Louisiana Civil Code Article 667 provides the following:

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 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*<sup>73</sup> 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.<sup>74</sup>

It is obvious that the legislature intended to hold the tortious neighbor accountable for his fellow neighbor's injuries under either negligence (i.e. fault) or under absolute<sup>75</sup> liability, which does not require a finding of fault. It is unfortunate that the language in Article 667 limits the description of absolute liability to pile driving and blasting with explosives.<sup>76</sup> Oil drilling and oil exploration in general are a combination of qualifying activities. This Author suggests that this fact presents a unique opportunity for the Louisiana legislature to consider<sup>77</sup> amending the list of ultrahazardous activities.

Every theory of tort liability from intentional torts to strict liability can be found within Article 2315 or the several articles drafted by the legislature derived from Article 2315. It is the fountainhead of Louisiana's tort law. However, the legislature nestled the principles of products liability and absolute liability under Title 9 section 2800 of the Louisiana Revised Statutes and Civil Code Article 667, respectively. This Author's proposal to amend Article 667 to address the issues that arose during the BP Oil Spill came as a result of reviewing the language

---

72. See Viscusi & Zeckhauser, *supra* note 9, at 1719.

73. Kenneth Culp Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 791 (1956) (stating that *res ipsa loquitur* presumes that, without negligence, there would not have been an injury).

74. See LA. CIV. CODE ANN. art. 667 (2012).

75. See Wyatt, *supra* note 71, at 371 (stating that "the goal of absolute liability is compensation as opposed to punishment").

76. *Id.*

77. See Raphael Brothers v. Cerophyl Laboratories, 30 So. 2d 116 (La. 1947).

in Article 667 and seeing the similarities between pile driving and blasting with explosives, the two activities that qualify as ultrahazardous, and oil drilling.

Several civilian scholars have noted that if ultrahazardous activities were to include any land-related activity, the floodgates of litigation would be opened, and every conceivable incident that resulted in a landowner being harmed from his neighbor's use of his property would be an absolute liability<sup>78</sup> situation.<sup>79</sup>

For example, in *Kent v. Gulf States Utilities Company*,<sup>80</sup> the family of a deceased 18-year-old employee of a Baton Rouge contracting company filed a wrongful death<sup>81</sup> action against the decedent's employer and the electrical utility company that serviced the power line that electrocuted the decedent.<sup>82</sup> The decedent's employer settled with the family prior to trial, and the jury found the remaining defendant (the electric company) liable for \$3 million. The jury also found the decedent's employer liable for a percentage of the harm caused in failing to properly supervise the decedent prior to the accident. The appellate court affirmed the finding of liability for the contracting company, but it reversed the finding of liability for the electrical utility company.<sup>83</sup> The appellate court opined that the decedent's use of a highly dangerous method of placing grooves in the newly poured concrete street surface was indicative of his negligence. The decedent's actions constituted contributory negligence and barred any recovery he could claim from the utility company.

Being that *Kent* was decided before the 1996 amendments to Article 667 of the Civil Code, the Louisiana Supreme Court considered the argument that transmitting electricity<sup>84</sup> for public consumption was

---

78. In *Langlois v. Allied Chemical Corporation*, 249 So. 2d 133 (La. 1971), the Louisiana Supreme Court held that a fireman was entitled to receive damages from the defendant corporation after he suffered personal injuries from the inhalation of gasses that escaped from the defendant chemical corporation. The *Langlois* court noted that the defendant corporation's ultrahazardous activities were the storage and transportation of a gas known as antimony pentachloride, which emanated from a ruptured pipe on the defendant corporation's premises.

79. See John C. Anjier, *Butler v. Baber: Absolute Liability for Environmental Hazards*, 49 LA. L. REV. 1139 (1989) (offering a host of scenarios in which a land-owner can hold another landowner accountable for harm caused by the other neighbor's use of his property. "For example, a business would be liable for any of its discharges into the water or air that caused harm, even if they were reasonable under the circumstances and the business had obtained the required necessary permits and authority").

80. See *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 493 (La. 1982).

81. See LA. CIV. CODE ANN. art. 2315.5 (2012).

82. *Kent*, 418 So. 2d at 563.

83. *Id.* at 570.

84. Electrical companies are not insurers of the safety of the public. See 29 C.J.S. *Electricity* § 38 (2013); see also *Bosley v. Cent. Vt. Pub. Serv. Corp.*, 255 A.2d 671 (Vt. 1969).

another category of absolute liability, similar to pile-driving, storage of toxic gas, crop dusting, and blasting with explosives. The court began its analysis with the well-established understanding that absolute liability is not contingent on an actor's substandard conduct. The Louisiana Supreme Court made it clear that absolute liability does require evidence of damages and causation.

Accordingly, the court ruled that liability would not attach to the utility company because causation could not be established without a showing that the decedent's electrocution resulted from the utility company's activity of transmitting electricity through the high-powered lines directly above the area where he was working. In addition, the court could not find any precedence for imposing absolute liability on transmitting electricity for public consumption.<sup>85</sup>

Unlike *Kent*, the damage to Louisiana coastline citizens from the oil spill requires the state to take bold and, perhaps, unorthodox measures to protect residents and to ensure that Louisiana will do whatever is necessary to protect human rights.

When this Author initially proposed amending Article 667 to include oil drilling activities as a third example of ultra-hazardous activities, there were some who sprinkled a healthy dose of skepticism over the idea, calling the proposed amendments unnecessary since Louisiana's tort statutes were more than sufficient to address any potential harm endured. Some critics even concluded that a property article, like Article 667, would not add much assistance to those persons harmed by the BP Oil Spill. They further stated that jurists were capable of finding an appropriate remedy for those Louisiana citizens injured by BP's recklessness.

While Louisiana jurists do not lack skill or analytical talent, there is a continuing threat that our courts will not consider Louisiana property<sup>86</sup> laws as addressing this type of issue. Instead, the courts will begin to settle upon alternative theories of liability to address the plaintiff's injuries.<sup>87</sup> It is necessary that the legislature intervene to provide consistency in the law as well as aggressively recompense the plaintiff for his harm for two key reasons—(1) the grand nature of the 2010 BP Oil Spill and (2) the similarities between oil drilling and the two specified examples of ultra-hazardous activities.

---

85. See Annotation, *Applicability of Rule of Strict Liability to Injury from Electrical Current Escaping from Powerline*, 82 A.L.R. 3d 218 (1978).

86. See Wex S. Malone, *Work of Appellate Courts-1969-1970: Torts*, 31 LA. L. REV. 231, 239 (1971) (stating that Art. 667, being a rule of property, not of tort, did not lend itself well to the purpose of deciding which harms and annoyances should be accepted by society without recourse, and which enterprises should be made to bear liability for their activities without qualification).

87. See Morrison, *supra* note 37, at 66.



First, the 2010 BP Oil Spill was one of the most costly man-made disasters in this country's history. Thousands of miles of Louisiana beaches were damaged by crude oil that washed onto its borders.<sup>88</sup> Hundreds of families lost their businesses. Stories of suicides and suicidal ideations became the *soup of the day*. National and international news stations were positioned all over the Plaquemine Parish, Louisiana and kept a running tab on the amount of oil spewing from the damaged blowout valve. BP pointed the finger of accountability at TransOcean<sup>89</sup> and TransOcean turned the focus to Haliburton.<sup>90</sup> Haliburton and Transocean then retaliated, stating that BP was solely responsible for the explosion, which caused the death of eleven oil workers and the spillage of over four million gallons of crude oil into the Gulf of Mexico.<sup>91</sup> While the BP Oil Spill deserves the unyielding attention of our state legislature, to suggest that Louisiana's current tort law is sufficient to address the wrongs committed by this multi-billion dollar foreign company is appalling and contemptible.

Secondly, absolute liability<sup>92</sup> is a reasonable avenue of recovery for any injured plaintiff who has been temporarily or permanently harmed by the drilling operations of an oil company. The oil-drilling process is very similar to pile-driving and blasting with explosives. The Louisiana legislature<sup>93</sup> must make its response swift, direct, and unavoidable. Further, absolute liability does not hinge upon the negligent behavior of the actor, but instead hinges on the fact that harm was caused.<sup>94</sup>

---

88. See Viscusi & Zeckhauser, *supra* note 9, at 1744 (stating that the oil spill has led to a substantial drop in tourism; even though BP had dedicated a substantial amount of its financial resources towards rejuvenating Gulf Coast vacationers to return to Gulf Coast beaches, the fact remains that consumer confidence is not compensable under current law).

89. See Campbell Robertson & Matthew L. Wald, *The Tangled Question of Liability*, N.Y. TIMES, May 6, 2010, at A20; John M. Broder, *Ruling Favors Owner of Rig In Gulf Spill*, N.Y. TIMES, Jan. 27, 2012, at B4.

90. See Barry Meir & Clifford Krauss, *Spill Inquiry Again Puts Haliburton Into Spotlight*, N.Y. TIMES, Oct. 29, 2010, at A20.

91. *Id.*

92. See *Lombard v. Sewerage & Water Board of New Orleans*, 284 So. 2d 905 (1973) (stating that [a]ny activity, which causes damage to a neighbor's property, obliges the actor to repair the damage, even though his actions are prudent by usual standards. It is not the manner in which the activity is carried on which is significant; it is the fact that the activity causes damage to a neighbor, which is relevant).

93. See Pappas, *supra* note 17, at 251 (asserting that some states have encouraged attorneys to participate (pro bono) in community-driven mediation programs to between the economically-injured residents and the harm-causing companies so that litigation would be thwarted and the attorneys could receive annual pro bono hours as compensation).

94. "The doctrine of *sic utere tuum ut alienum non laedas* requires an owner to use his property in such a manner as not to injure another." *Mossy Motors, Inc., v. Sewerage & Water Bd. of New Orleans*, 98-0495 (La. App. 4 Cir. 5/12/99); 753 So. 2d 269, 274 (citing LA. CIV. CODE ANN. art. 667 (2012) and *Haworth v. L'Hoste*, 95-0714 (La. App. 4 Cir. 11/30/95); 664 So. 2d 1335, writ denied 670 So. 2d 1235).

Considering the amount of mental, physical, and economic harm experienced by Louisiana citizens who have lost loved ones or have lost their family's businesses, it is appropriate for oil drilling giants, like BP, to pay for all harm resulting from their negligent conduct.<sup>95</sup> This Article also addresses those oil-drilling corporations that have insufficient resources to cover the most extreme outcomes. Otherwise, the federal or state governments would become the general insurers for those firms least capable of handling these low-probability, high-loss situations.<sup>96</sup>

Theoretically, legislative bodies are the preferred institution to initiate reform of any area of the law...[m]oreover, legislatures can accomplish comprehensive reform through a single statutory enactment; unfortunately, modern legislatures have developed powerful inertial forces that render them impotent to make comprehensive changes in the law that will adversely affect vested interests.<sup>97</sup>

This Author, along with the countless other Louisiana residents who have been intimately or remotely affected by the spill, cannot be satisfied with a simple injunction or any kind of recovery that emanates from the current language found in Article 667 of the Louisiana Civil Code. An amendment to this article is necessary and imperative. Since absolute liability is a hybrid of both strict liability and negligence concepts, it is unreasonable for any civilian scholar or legislator to oppose the idea of encapsulating<sup>98</sup> oil drilling as a third category of ultra-hazardous activity<sup>99</sup> in Louisiana. Ultra-hazardous activity has been uniquely classified as those activities that are capable of causing injuries to others, even when conducted with the greatest degree of prudence and care.<sup>100</sup> The other factors engraved into our understanding of ultra-hazardous

---

95. See GULF COAST SENATORS, *supra* note 22, (declaring resources from the fishing, tourism, shipping, and energy exploration industries account for over \$200 billion in economic activity each year).

96. See Viscusi & Zeckhauser, *supra* note 9, at 1721.

97. See Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917 (1985); see also Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1196-99 (1981).

98. This Author recognizes that several courts across the country have rejected, over the years, the idea of expanding absolute liability to certain activities notwithstanding the dangers. See, e.g., *Bosley v. Cent. Vt. Pub. Serv. Corp.*, 255 A.2d 671 (Vt. 1969) (declaring that Supreme Court of Vermont would not invoke the doctrine of absolute liability against a public service corporation due to electrical burns a young boy received when he came in contact with that corporation's electrical wires).

99. See *Street v. Equitable Petroleum Corp.*, 532 So. 2d 887 (La. 1988) (applying the *Butler v. Baber* principle, stating that "667/2315" liability may be imposed without proof that an activity (storage/spillage of oil) is ultra-hazardous).

100. See *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 549 (5th Cir. 1987), *cert. denied* 485 U.S. 1034 (1988); see also *Hawkins v. Evans Cooperage Co., Inc.*, 766 F. 2d 904, 907 (5th Cir. 1985).

activity are the extremely lucrative nature and catastrophic effects that can result from the activity.<sup>101</sup> For BP, the economic incentives to drill resulted in risky behavior that devastated the Louisiana coastline.

In a case dealing with ultra-hazardous activity, *Mossy Motors, Inc. v. Sewerage & Water Board of New Orleans*,<sup>102</sup> a New Orleans car dealership filed suit against the Sewerage & Water Board of New Orleans (SWB), its contractor, and its engineer for structural damage and business-related interruption.<sup>103</sup> The dealership sustained structural damage as a result of the demolition and replacement of an underground concrete structure that was adjacent to the dealership.<sup>104</sup> SWB and its agents conducted deep well pumping or dewatering<sup>105</sup> at this particular site, which not only caused the water table in the area to be lowered,<sup>106</sup> but also caused settlement or subsidence of the ground that compromised the structural integrity of the dealership's buildings.<sup>107</sup> To add validity to its argument, the dealership presented evidence reflecting that SWB could have used less dangerous measures to remove the contaminated soil<sup>108</sup> near the dealership. However, the method of removal selected by the defendant agency was imprudent, impracticable, and dilatory.<sup>109</sup>

The similarities between the dewatering process in *Mossy Motors* and the oil drilling operations performed by BP at its Deepwater Horizon site in April 2010 are clear: SWB was negligent (i.e. strictly liable),<sup>110</sup> or at fault, because it selected a process of sediment removal that it knew, or should have known, would damage nearby structures. Prior to its amendment in 1996, Article 667 would have held SWB accountable for the damage caused by the dewatering process, and the degree<sup>111</sup> of

---

101. See *Ainsworth*, 829 F.2d at 549-50.

102. See *Mossy Motors, Inc., v. Sewerage & Water Bd. of New Orleans*, 98-0495 (La. App. 4 Cir. 5/12/99); 753 So. 2d 269.

103. *Id.* at 273.

104. *Id.*

105. Dewatering is a process involving the pumping out of underground water from a construction site. See *id.* at 274.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. See Prentice L. White, *When Theory Met Practice: Teaching Tort Law from a Practical Perspective*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 311, 339 (2008) (stating that "a claim under strict liability, in its purest form, occurs when the defendant's negligence is presumed because of his legal relationship to the [negligent person or the defective thing] that first caused the unreasonable risk of harm").

111. See *Mossy Motors*, 753 So. 2d at 276 (indicating that "the new definition by amendment defines ultrahazardous activity legislatively, but, under the pre-amendment law, it was an easy leap between pile-driving, explosives and dewatering").

care used by the landowner would not have exonerated<sup>112</sup> it from civil liability.<sup>113</sup>

In *Yokum v. 615 Bourbon Street, LLC*,<sup>114</sup> the Louisiana Supreme Court granted certiorari for the purpose of reversing<sup>115</sup> the appellate court's ruling that a commercial owner and lessor is not liable under Civil Code Article 667 for excessive noise associated with loud music played in the owner, or lessor's, establishment. The appellate court determined that the plaintiffs did not sufficiently establish a cause of action against the named lessor (defendant) in this particular case. Plaintiffs complained that they had been subjected to loud and on-going live entertainment<sup>116</sup> conducted at the bar that the defendant leased to another commercial entity. Plaintiffs sent letters to the establishment, hoping to resolve the issue without court intervention, but with no success.

The appellate court found that the defendant was not legally responsible for the excessive loud music coming from the commercial establishment because the lessor had leased the property to a third party, and it was the third party who caused the harm.<sup>117</sup> More specifically, the appellate court found that the lease agreement between the defendant and his lessee mentioned that if the lessee used the property in any manner that would tend to injure, depreciate, or otherwise be classified as unlawful, the lease agreement would be considered breached and would exonerate the lessor from liability. The Louisiana Supreme Court discussed at length that the language of the relevant statute, La. Civil Code Art. 667, directs the restrictions and limitations on the right of use of immovable property that may deprive a neighbor of the liberty of using or enjoying his or her property.<sup>118</sup> However, the Louisiana Supreme Court needed to reconcile whether these owners/proprietors/lessors can be held accountable for *any* use violations on their property by their lessees (natural or juridical) when the

---

112. See Mack E. Barham, *The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana*, 44 LA. L. REV. 1171, 1172 (1984) (declaring that "[i]n traditional common law jurisdictions, strict liability has generally been imposed when the activity giving rise to liability falls into the broad categories of either ultrahazardous activity or some type of product liability").

113. See *Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905, 912 (La. 1973) (stating that under Article 667, the [Sewerage & Water Board] would be liable for damages to the plaintiff's property caused by its construction activities, no matter how prudently they were done).

114. See *Yokum v. 615 Bourbon St., LLC*, 2007-1785 (La. 2/26/08); 977 So. 2d 859.

115. *Id.*

116. *Id.* at 862.

117. *Id.* at 869.

118. *Id.* at 872.

violations derive from the permission of these owners.<sup>119</sup> In essence, the Louisiana Supreme Court correctly held that Article 667 permitted an expansion of liability on the proprietor or owner even in situations where the owner only indirectly contributed<sup>120</sup> to his neighbor's harm. Consequently, the Louisiana Supreme Court also opined that the term "work," as used in the article, encompassed not only constructions made on the property, but also harmful and injurious activities held on the property when the landowner knew, or should have known, of the resulting injury or harm.<sup>121</sup>

Likewise, this Author asserts that the Louisiana Supreme Court should implement the same logic to expand the language of Article 667 to include oil drilling activities because these activities can be injurious<sup>122</sup> to adjacent neighbors/landowners and because including this third category of prohibited activities would not do an injustice to the overall scope of Article 667. As mentioned earlier, oil drilling is a hybrid<sup>123</sup> of both blasting with explosives and pile driving, which the legislature has separately defined as potentially injurious activities and therefore when combined should also be classified as a potentially injurious activity.<sup>124</sup> The rationale for this proposition might not be universal,<sup>125</sup> as the rule of absolute liability<sup>126</sup> has been contingent upon the locality of the incident or on the population of the area where the incident occurred. While enjoying and using one's commercial or residential property is both necessary and essential to our state's economy, it is also dangerous to assume that such a right should inherently be considered limitless. However, oil drilling is an activity that is dangerous<sup>127</sup> and potentially destructive to the men and women

---

119. See *Inabnet v. Exxon Corp.*, 642 So. 2d 1243, 1251 (La. 1994) (citing *Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905, 912 (La. 1973); Ferdinand F. Stone, *Tort Doctrine in Louisiana: The Obligations of Neighborhood*, 40 TUL. L. REV. 701, 711 (1966)).

120. See *Yokum*, 977 So. 2d at 875.

121. *Id.*

122. See *Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 186 (La. 1971) (stating that "it is not the manner in which the activity is carried on which is significant; it is the fact that the activity causes damage to a neighbor which is relevant").

123. See Craig C. Freudenrich, *How Oil Drilling Works*, ENERGY CAPITAL GROUP, <http://www.encapgroup.com/drilling/> (last visited Mar. 18, 2013) (discussing how oil drilling works and how oil is extracted from the ocean floor).

124. Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339, 364 (1966) (criticizing the specific list of qualifying activities for absolute liability, commends the legislature for using language that would give it some flexibility to include new and unanticipated situations).

125. See Jeremiah Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 HARV. L. REV. 667 (1920).

126. See 3 SHEARMAN & REDFIELD ON NEGLIGENCE § 688 a (6th ed. 1913).

127. See Viscusi & Zeckhauser, *supra* note 9, at 1743 (indicating that BP filed several lawsuits against other corporations in an effort to recoup some of the money that it has had to pay to those

who work on these oil platforms and should be treated as such by the Louisiana legislature.

#### IV. CONCLUSION

In conclusion, oil drilling can harm marine life, people's lives, and the state's welfare, so the activity should not be beyond legislative redress. The proposed amendment is a simple, yet necessary, legislative measure that should be a part of our state's ongoing<sup>128</sup> human rights due diligence process.<sup>129</sup> Undeniably, BP has to do more than mitigate the disastrous effects of the oil spill by offering support to Gulf Coast businesses. In fact, BP must fully compensate each and every resident who has a viable claim against it.<sup>130</sup> Further, BP must extend its recovery efforts to the State of Louisiana in order to protect and shelter Louisiana's wildlife and coastlines.

The ecological effects from the BP Oil Spill are still being examined<sup>131</sup> and studied, but the mental and economic effects<sup>132</sup> from this disaster are forever visible in the eyes of Louisiana's citizens. It is in the eyes of the children who lost their parents on the Deep Water Horizon. It is in the eyes of the wives who are now widows. It is in the eyes of distraught family members who are still coping with the reality of a loved one committing suicide because of the unrecoverable loss of financial security. The duty to protect our citizens from harm not only lies on BP's corporate<sup>133</sup> doorstep, but it should also be found in the policies that are proposed, debated, and signed on the floor of our

---

Gulf Coast residents who have been harmed in the oil spill. BP filed a tort claim against the manufacturer of the blowout preventer and it filed another suit against Halliburton for fraud and misconduct).

128. See *Langlois v. Allied Chem. Corp.*, 249 So. 2d 133, 1080 (La. 1971) (declaring that the "trend has been toward an expansion of the classes of those who are entitled to recovery as well as an expansion of the classes from whom recovery can be had"); see also *Kennedy v. Phelps*, 10 La. Ann. 227 (La. 1855); see also *City of New Orleans v. Lambert*, 14 La. Ann. 247 (La. 1859); see also *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (La. 1968).

129. See generally *Sherman*, *supra* note 60.

130. See *GULF COAST SENATORS*, *supra* note 22, (Senator Thad Cochran (R-Miss.) demanded that BP adhere to a 'good neighbor' policy, meaning that it should first look to utilize Gulf Coast residents and resources as it begins to heal these communities by using an extensive, multi-year ecological and economic recovery operation).

131. See Brent K. Marshall, et al., *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 LAW & POL'Y 289, 291 (2004) (emphasizing the fact that technological disasters produces an enduring pattern of economic, cultural, social and psychological harm).

132. See Felicity Barringer, et al., *Seeking Answers on Oil Spill as Questions Mount*, N.Y. TIMES, June 25, 2010, [http://www.nytimes.com/2010/06/26/us/26primerWEB.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/26/us/26primerWEB.html?pagewanted=all&_r=0).

133. See *Nocera*, *supra* note 61.

legislature.<sup>134</sup> It has been argued that some legislatures are incapable of adjusting to the changing tide of our present society because state legislatures are faced with complicated and complex issues with insufficient expertise. It has also been stated that the government bodies have an inherent inability to foresee or to respond to problems that may arise in the future.<sup>135</sup> Such explanations should not be lodged against the Louisiana legislature, as our state has become the nation's spokesperson for disasters.

Trial courts should retain a reasonable amount of discretion when determining if an activity qualifies as ultrahazardous, but it is the legislature that has been vested with the authority to expand Article 667 to include oil drilling as an activity that has the potential<sup>136</sup> of causing an enormous risk of harm that is either temporal or generational.<sup>137</sup>

---

134. See Sherman, *supra* note 60, at 283 (articulating that the state's duty to protect against third party abuse, including abuse from a corporate citizen or foreigner, is grounded in international human rights law; it is a standard of conduct, and while state are not held responsible for corporate-related human rights abuses *per se*, said states may be considered as having breached their obligations where they fail to take appropriate steps to prevent, investigate and even punish those abuses when they occur).

135. See Pierce, *supra* note 97, at 919; see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695 (1975); see also Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 720 (1969).

136. See generally *Udike v. Browning-Ferris, Inc.*, 808 F. Supp. 538 (W.D. La. 1992).

137. See generally Maraist & Galligan, *supra* note 124.