5-1-1968

Torts - Liability for Concussion Damages from Blasting

Albert A. Gordon

rule excluding testimony as to the mental processes of the jurors. It is hoped that the Florida courts will soon resolve the present uncertainty with a clear and precise pronouncement liberalizing the rules on reception of jurors' testimony.

ALAN S. BECKER

TORTS — LIABILITY FOR CONCUSSION DAMAGES FROM BLASTING

Plaintiffs brought an action to recover for damage to their property allegedly caused by concussion from defendant's blasting operations. Count Two of the amended complaint, which sought recovery under a theory of strict liability, was dismissed. On appeal from final judgment for the defendant, the Second District Court of Appeal, *held,* reversed and remanded: "[O]ne lawfully engaged in blasting is liable, irrespective of negligence, for personal injuries or property damage sustained either as a result of casting material on adjoining land or as a result of concussion." *Morse v. Hendry Corp.,* 200 So.2d 816, 817 (Fla. 2d Dist. 1967).

It is almost unanimously held that one who by exploding dynamite causes rocks to be thrown upon neighboring land is absolutely liable on the basis of trespass to land.[1] However, where the damage is caused, not by flying debris, but by concussion of the atmosphere or vibration of the earth, there is a split of authority. The instant case, one of first impression in Florida as to the issue of liability for concussion damage,[2] places Florida among the solid majority of jurisdictions holding the defendant strictly liable.[3]

Two arguments have been advanced to support the minority position that there be a showing of negligence. The first is that no cause of action may be recognized by the courts unless it is one for which some form of action was available at the common law.[4] At the common law, the only two forms of action that would have been available for recovery for damage to real property caused by blasting were trespass and trespass on the case.[5] However, concussion was not considered to be a physical invasion of the real property.[6] Rather, damage caused by such incursions

1. 2 HARPER AND JAMES, THE LAW OF TORTS, § 14.6 at 813 (1956).

2. The court had another issue to consider. Count one of the amended complaint, seeking recovery on a third-party beneficiary theory, was also dismissed by the trial court. That dismissal was likewise reversed.

3. For an exhaustive treatment of the subject see Annot., 20 A.L.R.2d 1372 (1951).

4. *See* J. SMITH, LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING. THE RULE OF THE FUTURE. 33 HARV. L. REV. 542 (1920).

5. *See* W. PROSSER, THE LAW OF TORTS, § 7 at 28 (3d ed. 1964).

6. J. SMITH, *supra* note 4.

were treated as "consequential"[7] and recovery was available only in trespass on the case, not in trespass. Today this distinction, which has been denounced as a marriage of procedural technicality with scientific ignorance,[8] is rejected in all but seven or eight jurisdictions.[9]

The second argument is clearly set forth in the leading case of *Booth v. Rome W. & O.T. Ry.*:[10] a rule imposing strict liability would be contrary to public policy as it would operate as a deterrent to the improvement and development of property.[11]

Under the majority position the courts do not require a showing of negligence but have imposed strict liability under one of three theories: the rule of *Rylands v. Fletcher*;[12] "absolute nuisance"; or the rule of the Restatement of Torts.[13]

Under the rule of *Rylands v. Fletcher*[14] the emphasis is upon the use to which the land is being put. Strict liability is imposed when the abnormally dangerous activity of blasting is not a natural one for the locale where conducted.[15] Similarly, when blasting is labeled an "absolute nuisance"[16] and recovery is permitted without any intent on the part of the defendant to do harm or without a showing of negligence, there has been a general recognition by the courts that the relation of the activity to its surroundings is to be the controlling factor.[17]

The Restatement of Torts ignores the relation of the activity to its surroundings and places its emphasis upon the type of activity being conducted. The defendant is held strictly accountable for damage that he

---

7. *See* Jenkins v. A.G. Tomasello & Son, 286 Mass. 180, 189 N.E. 817 (1934) where the court stated that at the common law one carrying on blasting operations was liable for all *direct* injuries to the person or property of another, but absent negligence, there was no liability for *consequential* harm caused by concussion.

8. W. PROSSER, *supra* note 5, § 77 at 529.

9. *Id.*

10. 140 N.Y. 267, 35 N.E. 592 (1893).

11. The court in *Booth* stated: "Public policy is promoted by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this." Booth v. Rome W. & O.T. Ry., 140 N.Y. 267, 281, 35 N.E. 592, 596 (1893).

12. 159 Eng. Rep. 737 (1865), *reversed in* Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), *affirmed in* Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

13. W. PROSSER, *supra* note 5, § 77.

14. *Id.* at 522:

> In short, what emerges from the English decisions as the "rule" of Rylands v. Fletcher is that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.

15. *Id.* at 527.

16. *Id.* at 528.

17. *Id. See also* Alonso v. Hills, 95 Cal. App. 2d 778, 783, 214 P.2d 50, 54 (1950). In that case the court said that blasting in populated surroundings or in the vicinity of dwelling places or places of business would render the actor strictly liable. But, "[B]lasting in remote places where there is little danger of injury is not considered a 'nuisance per se' and is actionable only when negligence (or tortious intent) is alleged and proved."

causes while engaging in an "ultrahazardous" activity, provided that the harm results from that which makes the activity ultrahazardous.[18] The Restatement defines such an activity as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care," and "is not a matter of common usage."[19]

In the instant case it is not clear upon which of the available theories strict liability was imposed. The court merely adopted as its holding a general statement of the rule of strict liability as set forth in Corpus Juris Secundum.[20] However, in its dicta, the court's characterization of blasting as an "ultrahazardous" endeavor[21] would make it appear that the court possibly had in mind the rule of the Restatement of Torts.

The extent to which one in the lawful conduct of his affairs should be liable for injuries to another involves an adjustment of conflicting interests.[22] The rule in *Booth v. Rome W. & O.T. Ry.*[23] resolves the conflict in favor of the party initiating the harm.[24] Implicit in this position is the idea that the social advantage to be gained by the use of blasting in the improvement and development of property outweighs the risk of damage to neighboring land through concussion and vibration. Consequently, the interests of the neighboring landowner are sacrificed without compensation for the so-called good of society.

It is submitted that the majority position of strict liability provides the more equitable solution. While it may be true that the defendant has exercised the utmost care, nevertheless, it was he who set the destructive force in motion.[25] Therefore it should be the defendant and not the innocent plaintiff, whose only relation to the explosion is that of injury[26] who should bear the loss. While it is true that society may deprive the individual citizen of his property by the proper exercise of its power of eminent domain,[27] certainly the courts should not sanction the destruction of a person's property by another individual or a business enterprise

18. § 519 (1938).
19. § 520 (1938).
20. 35 C.J.S., *Explosives* § 8a at 275.
21. Morse v. Hendry Corp., 200 So.2d 816, 817 (Fla. 2d Dist. 1967).
22. *See* Louden v. The City of Cincinnati, 90 Ohio St. 144, 152, 106 N.E. 970, 972 (1914).
23. 140 N.Y. 267, 35 N.E. 592 (1893).
24. In *Booth*, the court stated that:
> [T]o exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of one for the benefit of the other.

Booth v. Rome W. & O.T. Ry., 140 N.Y. 267, 281, 35 N.E. 592, 596 (1893).
25. *See* Johnson v. Kansas City Terminal Ry., 182 Mo. App. 349, 355, 170 S.W. 456, 457 (1914), where the court in disapproving of the distinction drawn between direct physical invasion and concussion said "By whatever means it intrudes it is nonetheless a trespasser, *and the person who calls it into being cannot be heard to excuse himself on the plea that he needed its service in his own affairs.*" (emphasis added).
26. *See* Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931).
27. *See* Watson v. Mississippi Power Co., 174 Iowa 23, 156 N.W. 188 (1916).

without compensation simply because the endeavor is one of a "great magnitude and general public interest."[28] There may be instances where the risk of damage to neighboring land from blasting may be outweighed by the social desirability of improving the land. But this is no justification for depriving the neighboring landowner of his property without compensation. Although the risks created may be incident to desirable social and economic activity, common notions of fairness require the defendant to make good for any harm that results.[29] Indeed, it is precisely this type of situation which gave rise to the doctrine of strict liability.[30]

Perhaps the reason why there were no prior Florida decisions in this area was because of Florida's agricultural background, sparse population, lack of extensive rock strata, basically flat terrain and the dearth of industrialization.[31] However, Florida's rapid industrial growth will make more commonplace the use of explosives, thereby increasing the risk of concussion and vibration damage to neighboring property.[32] The ruling in the instant case has extended the protection of the courts to the owners of such property.

ALBERT A. GORDON

WHAT IS "FIT TO EAT"—THE REASONABLE EXPECTATION TEST

Plaintiff was injured while consuming a dish of maple walnut ice cream ordered in defendant's restaurant. The ice cream contained a concealed piece of walnut shell which punctured plaintiff's gums and fractured several teeth. Plaintiff sued, alleging a breach of implied warranty and negligence by the restaurant. The trial court granted defendant's motion for a summary judgment stating that the walnut shell was a natural part of the food product and its presence would not afford a basis of recovery. On appeal to the Fourth District Court of Appeal, *held,* reversed and remanded: The test to be applied is what is "reasonably expected" by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation, and the question of what is reasonably to be expected is properly left to the jury. *Zabner v. Howard Johnson's, Inc.*, 201 So.2d 824 (Fla. 4th Dist. 1967).

The duty of a restaurant to provide the public with food that is

28. *Id.* at 34, 156 N.W. at 192.

29. 2 HARPER AND JAMES, THE LAW OF TORTS, § 14.6 at 816 (1956).

30. *Id.* at 815.

31. Brief for Appellant at 13, Morse v. Hendry Corp., 200 So.2d 816 (Fla. 2d Dist. 1967).

32. It seems logical that this is what the court in the instant case had in mind when, in discussing the use of explosives, it said "[I]t is time we examine its use in light of the industrial development of this state." 200 So.2d 816, 817 (Fla. 2d Dist. 1967).