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**Absolute Liability—Blasting—Damages by Concussion And Vibration**

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CASE COMMENTS

ABSOLUTE LIABILITY—BLASTING—DAMAGES BY CONCUSSION AND VIBRATION.—Plaintiff brought an action to recover for damages to his property allegedly caused by vibrations from defendant's blasting. Defendant filed a motion to dismiss upon the ground that no negligence had been alleged in the declaration and that, therefore, no cause of action had been set forth. Held, that, inasmuch as blasting is inherently dangerous, the plaintiff need not allege negligence, and that the defendant is absolutely liable for the damages sustained. Motion to dismiss overruled. Fairfax Inn v. Sunnyhill Mining Co., 97 F. Supp. 991 (N.D. W. Va. 1951).

In deciding the case, the court did not refer to another case in the southern district of West Virginia with almost identical facts which held the defendant absolutely liable for injury resulting from blasting. Britton v. Harrison Const. Co., 87 F. Supp. 405 (S.D. W. Va. 1948). In the absence of West Virginia law concerning the question of liability for damages caused by vibrations and concussions from blasting, the court attempted to interpret prior West Virginia decisions in an effort to discern a trend of reasoning which might be adopted by the Supreme Court of Appeals. However, the court, seemingly, was swayed more by a numerical majority of
states holding for absolute liability, and a decision in point by Judge Augustus N. Hand in *Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 512 (2d Cir. 1931), than by any “trend” in West Virginia decisions.


With few exceptions, the various state courts have adopted the view that one whose blasting throws rock or debris on plaintiff's land is answerable in trespass for damages caused, irrespective of negligence. However, there is a conflict of authority when the problem concerns indirect invasions, that is, where damages arise solely from concussions and vibrations transmitted through the strata or through the air. According to one view, so long as recovery is permitted for rocks thrown on plaintiff's land, there is no valid reason why the same rule of absolute liability should not also apply to damages from such concussions and vibrations. The contrary view requiring a showing of fault, is feebly supported by reasoning that the necessity of blasting in order to adapt the defendant's premises to a lawful use is required by a public policy which favors full development of land. See exhaustive citations collected in 22 Am. Jur. 179 (1939) and 92 A.L.R. 741 (1934). The *Restatement of Torts*, §§ 519, 523 (1939) has taken the view that defendant should be held absolutely liable for such ultrahazardous activities as blasting, regardless of whether the invasion is direct or indirect. Such a view seems to reach a socially desirable result because no amount of care and precaution can make it reasonably certain that damages will not result, and because the
resulting harm is almost certain to be serious. See Harper, Torts § 202 (1933). However, the position has been taken that in the modern law of negligence there are available the means of satisfying in the vast majority of cases, the interests that the doctrine of absolute liability was invoked to satisfy; namely, that if proper stress is laid on the test of "due care under the circumstances," it is apparent that liability based upon negligence will ordinarily be sufficient to carry the case to the jury. Smith, Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future, 33 Harv. L. Rev. 542, 554 (1920); accord, Salmond on Torts v (4th ed., 1916); Pollack's Law of Torts 505, 511, 671 n.s. (10th ed. 1916); 1 Street, Foundations of Legal Liability 84, 85 (1906); Booth v. Rome, W. & O. Terminal Ry., 140 N.Y. 267, 35 N.E. 592 (1893); Whitla v. Ippolito, 102 N.J.L. 354, 131 Atl. 873 (1926).

Admitting the latter view to be true in theory, it is little consolation to a plaintiff whose house has been destroyed by the defendant's blasting to be told that because the defendant used due care, there can be no recovery. Further, in the great majority of instances, the defendant will be a business enterprise capable of protecting itself by indemnity insurance or by passing on the cost of such liability to its customers; whereas, the plaintiff is usually an individual who cannot shift to others the cost of repairs to his damaged property, and, he is not ordinarily insured against such losses.

In view of the extensive blasting in the state's expanding strip-mining industry, the instant decision and the prior holding in the Britton case, should indicate to that industry and others a possible additional cost of operation to be considered in estimating future expenses; and it should, at the same time, provide the general public with adequate protection against such ultrahazardous activities.

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