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Torts—Blaster's Liability for Concussion Damages

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imputation of fraud is lacking, a mere disparagement of goods or trade libel results, necessitating a pleading of special damages for a good cause of action.[58]

The law is clear on the matter, but specific fact situations in different cases have resulted in opposite results, as in the case at bar, where the facts stated a cause of action, and the *Drug Research*[59] case, where the complaint was insufficient. However, in the latter decision, the majority and dissent, in examining the complaint, differed as to the reasonable susceptibility of the meaning of the purported libelous magazine article. On its face, the article referred to a product and to the misleading advertising practices of its distributor, not to the manufacturer. In dismissing the action, the majority felt that a fair reading of the entire article indicated, as a matter of law, no defamation of the business methods of the plaintiff manufacturer.

As in the *Drug Research* case, the plaintiff in the *Harwood* case was not specifically mentioned in the defamatory language. Although, traditionally the plaintiff had the burden of pleading in the colloquium extrinsic facts to show that the language referred to him, the complaint is satisfied by a mere averment that it was said of and concerning him.[60] The absence of a reference to the plaintiff merely gave rise to an ambiguity, which the Court held, as a matter of law, could convey a defamation of the plaintiff.[61] Whether it in fact did was properly for the jury to decide.

Thus, an assault on a product is not necessarily a libel on those who manufacture it, although it may be depending on the fair and reasonable import of the defamatory language used.

E. J. S.

BLASTER'S LIABILITY FOR CONCUSSION DAMAGES

The majority of the states today impose absolute liability for damage occasioned by the use of explosives,[62] the doctrine having its foundation in the now classic English case of *Rylands v. Fletcher*,[63] which imposed absolute liability upon one who engages in a "non-natural activity" on his land. However, a minority, which includes New York,[64] still distinguishes between damage resulting from physical trespass on the land, for which liability without fault is imposed, and concussion damage, wherein the negligence of the blaster must be pleaded and proven.[65]

Historically, the distinction arises from common law forms of pleading

58. See Marlin Fire Arms v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).
59. Supra note 51.
60. N.Y. Rules Civ. Prac., Rule 96.
61. See First Nat. Bank of Waverly v. Winters, supra note 55 at 50, 121 N.E. at 460.
62. For a complete analysis of the jurisdictions following the majority and minority rules see Annot., 20 A.L.R.2d 1372 (1951).
63. L.R. 3 H.L. 330 (1868).
64. Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901).
65. It should be noted that the New York rule is somewhat mitigated by the doctrine of nuisance in a case where the concussion damage is recurrent and prolonged. Here negligence need not be shown and due care and lawfulness of the operations generally are not defenses. See 1 N.Y. Jur. "Adjoining Landowners" § 12 (1958).

where a physical invasion of the premises gave rise to an action of trespass, while the remedy for an indirect injury lay in an action on the case. Adherence to this distinction is defended as matter of public policy on the ground that to require proof of negligence before allowing recovery will encourage land owners to develop and improve their property and fully utilize their land, which benefits society as a whole.[66]

An opportunity for a re-examination of New York's position was recently presented to the Court of Appeals in the cases of *Schlansky v. Augustus V. Riegel Inc.*,[67] a consolidation of two actions, where, on appeal, it was urged that New York change its position and abolish the old distinction between a direct injury and concussion damage.

The case was tried in the County Court of Westchester County on a negligence theory and the jury returned a verdict for plaintiffs. The trial judge, however, set aside the verdict and ordered a new trial on the basis that plaintiffs had failed to prove any specific acts of negligence on the part of the contractor. Plaintiffs appealed to the Appellate Division,[68] which affirmed the trial court's finding of no negligence and dismissed the complaints.

The fact situation is typical and uncomplicated. Defendant contractor was blasting in the course of constructing a manufacturing plant on land adjoining plaintiffs' properties, the site of the blasting being about forty feet or more from each home. The homeowners made several complaints that the vibrations were causing damage to their homes but the contractor continued the blasting. On one occassion, the contractors' representative was present in plaintiff's home when a blast occurred which shook the walls and caused a large crack to appear in the plaster on the ceiling.

Suit was commenced and two causes of action were pleaded: first, that the amount of explosives used was excessive and in contravention of a local ordinance, and was therefore negligence per se; second, that the use of an unnecessarily violent charge is negligence under the prevailing rule formulated in the case of *Booth v. Rome, W. & O.T.R.R. Co.*[69] Plaintiffs produced an explosives expert who testified in response to a hypothetical question that, in his opinion, considering the resultant damages he had observed, the charge used was excessive, and exceeded the amount of dynamite required "To start the

66. A typical expression of the social policy reasoning can be found in Booth v. Rome, W. & O.T.R.R. Co., 140 N.Y. 267, 35 N.E. 592 (1893), the leading New York case on concussion damages, wherein, Chief Judge Andrews states:

> To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. 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.

67. 9 N.Y.2d 493, 215 N.Y.S.2d 52 (1961).

68. 11 A.D.2d 787, 204 N.Y.2d 154 (2d Dep't 1960).

69. Supra note 66.

earth."[70] The homeowners themselves testified as to the "tremendous" and "terrifying" blasts. Defendants' records were subpoened as to date, times and quantity of charge used, but the contractors' representative testified that no records were kept, and that he was unable to give any information on his own knowledge.

As to the first cause of action, this Court upheld the Appellate Divisions' dismissals as proper, since insufficient evidence was offered to sustain the finding that the ordinance had in fact been violated. However, the Court, relying upon *Brown v. Rockefeller Center*[71] reversed the Appellate Division and reinstated the jury verdict for plaintiff on the second negligence claim. The Court held that the combination of the homeowners' testimony and the expert's opinion made out a prima facie case. Despite urging by the plaintiff for reconsideration of the New York Rule and an extension of absolute liability to concussion cases, this Court held that the question was not properly before it, since the case was tried and a verdict rendered on a negligence theory, and that had become the law of the case and could not be considered on appeal.

Defendant argues that the mere testimony of plaintiffs that the blast was excessively violent, and the opinion of an expert, unfamiliar with the techniques actually used and the type of rock subject to the blast, did not make out a prima facie case. Defendant cites *Holland House Co. v. Baird*,[72] where there was also expert testimony that the blasting could have been done without causing damage and with a lesser amount of explosives. In the latter case the Court held that no negligence had been proven without a showing of how the work had actually been done and proof that a different method would not have occasioned the same damage.

The Court, however, relies on *Brown v. Rockefeller Center Inc.*[73] as supporting the verdict on a negligence theory. In the latter case, recovery was allowed without proof of the specific acts constituting negligence on the part of the contractor, negligence being inferred from the blast itself. However, defendant seems to sufficiently distinguish this from the present case, for, in the *Brown* case, there was one tremendous blast resulting in extensive damage, which certainly creates a justifiable inference that the blasting was negligently done.

On the law, it appears to the writer that the defendant has presented the stronger case, and that the weight of authority would seem to demand more evidence of the specific acts of negligence on the part of the contractor on which recovery might be based.

It appears, however, that the Court is becoming increasingly sensitive to

70. The meaning of this phrase is supplied in the testimony of plaintiff's blasting expert as "to initiate fractures through the rock, and loosen the rock so it can be taken from the earth."

71. 289 N.Y. 729, 46 N.E.2d 348 (1942).

72. Supra note 64.

73. Supra note 71.

the difficulties involved in the proof of this type of a negligence claim. Since the evidence is usually peculiarly within the control of the alleged tortfeasor, necessity dictates that there be more reliance on an inference of negligence from the resultant damage. The basic problem has been long recognized, as shown from the following 1916 Appellate Term case:

> the mere fact that a blasting causes injury upon adjacent premises gives rise to no presumption that the blasting was negligently performed. . . . Nevertheless it seems quite certain to me that, where the testimony of the results and surrounding circumstances of a blast is so strong that, under ordinary circumstances, such a result could not have occurred unless the blasting was negligently performed, a prima facie case of negligence is made out.[74]

Gradually the Court is relaxing the requirement of the additional evidence needed to support the inference. While the doctrine of *res ipsa loquitur* has not been strictly applied,[75] the law seems to be headed in that direction.

The instant case furnishes a clear example of the problem and the extent to which this Court will relax the degree of proof required to establish the prerequisite finding of negligence on which to base a recovery.

The blaster here had made it virtually impossible for the homeowners to establish negligence in his operations by simply failing to keep records.

Since the injured party rarely can testify to anything but the size of the blast itself, and an expert to no more than an inference from the damage, this usually is the plaintiff's only evidence, unless, through the defendant's witness, he is able to prove that the amount of explosives used was excessive or the procedures followed were not the generally accepted ones. As a result of this decision, plaintiff needs to prove barely more than his own damage to present a jury question.

What then remains of the New York rule? Although the verbal distinction remains between absolute liability for a physical invasion of the premises and a negligence requirement for concussion damage, in practical application, the blaster is rapidly approaching liability without fault in both situations.

When the doctrine of *res ipsa loquitur* is applied to raise a presumption of negligence from the damage itself, as seems to have been in this case, the burden shifts to the contractor to prove the contrary, and this is often impossible. The courts speak in terms of "an unnecessarily violent charge" or "more explosive than demanded to accomplish the result." The writer submits that with modern techniques of precision blasting, it is almost always possible to accomplish the desired result with a lesser charge.[76] However, it is highly im-

74. Kaninsky v. Purcell & Gilfeather, Inc., 158 N.Y. Supp. 165, 166 (Sup. Ct. 1916).
75. 1 N.Y. Jur. "Adjoining Landowners" § 12 (1958).
76. Plaintiff cites in his brief the following quotation from the Supervising Inspector of Blasting for the Division of Fire Prevention of New York City found on page 36 of the "New Yorker" for Oct. 15, 1955:

> "The skill of it! A good blaster could blow the fillings out of your teeth and never so much as jar the rest of you."

practical in the course of construction work to be constantly blasting with an absolute minimum charge. Yet, the Court holds that this can constitute negligence on which to base a recovery. This appears to the writer to signal the beginning of the end of New York's adherence to the minority rule, and to a fictional finding of negligence which amounts to absolute liability unless it can be clearly shown that the damage was caused by unforeseeable circumstances.

P. C. B.

SUIT BY UNEMANCIPATED INFANT AGAINST NEGLIGENT PARENT

In *Badigian v. Badigian*,[77] an action for negligence was brought by a mother in behalf of her three-year-old son against the father. The plaintiff alleged that the defendant left his automobile unlocked and that the child entered it, released the brake, and was hurt attempting to leap from the moving vehicle. Granting defendant's motion for summary judgment, the trial court dismissed the complaint for insufficiency, and the Appellate Division affirmed.[78] The Court of Appeals, in a six to one decision, upheld the dismissal, reemphasizing the parent-child immunity doctrine, firmly established in two previous decisions.[79] Having conceded that, perhaps, "special provision should be made for cases where disability extends beyond infancy," the majority felt that such an innovation rightly belonged to the Legislature and that, moreover, insurance companies, having relied on the existing law, did not contemplate in their rates such an increase in liability by extending protection to an unemancipated child of the policyholder.

Traditionally, New York has followed the rule that an unemancipated infant cannot maintain an action against his parent for negligently inflicted injuries.[80] It would appear that the reason underlying this precept is predicated on public policy, since it is claimed that litigation of this nature tends to disturb the legally-sanctioned cordial relationship of family unity and to shake the very foundation of parental authority. Where insurance shields the parent from liability, the reason seems to disappear, since the real party in interest is the insurance company. Certainly, absorption of the loss by the insurer in no way disrupts familial tranquility. Those opposed to allowing such a suit argue that fraud and collusion, perhaps even a parent profiting by his own wrongdoing, might occur, but a careful investigation concerning the claim would seem to overcome this difficulty.

Negligence cases of this nature in New York center primarily around automobile accidents and are litigated in all probability solely because the

77. 9 N.Y.2d 472, 215 N.Y.S.2d 35 (1961).
78. 10 A.D.2d 835, 200 N.Y.S.2d 352 (1st Dep't 1960).
79. Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928). This was a case of first impression, but the court chose to write merely a memorandum report, probably because there was no basis in the common law for a suit of this nature. Of little significance is the fact that Cardozo, C. J., Crane, J., and Andrews, J., dissented, since no ground for dissent is mentioned. See also Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942).
80. Ibid.