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Torts--Injury to Property--Blasting

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STUDENT NOTES

TORTS—INJURY TO PROPERTY—BLASTING

Defendant was engaged in the construction of a tunnel under a city street. Vibrations and concussions produced by blasting with dynamite damaged plaintiff's residence by shaking the plastering and paper from the walls. Plaintiff sued to recover damages. In the instructions submitted to the jury by the trial court the only issues were whether the methods used by defendant were reasonable under the circumstances and whether the quantities of explosives used were reasonably necessary The jury returned a verdict for the defendant, and judgment was entered on the verdict. The Kentucky Court of Appeals affirmed the judgment, holding that in the absence of negligence on the part of the defendant, there was no liability for damage caused by concussions produced by blasting. *Williams* v. *Codell Const. Co.*, 253 Ky. 166, 69 S. W (2d) 20 (1934).

This case is the most recent in Kentucky dealing specifically with the subject of liability for blasting.[1] Chief Justice Rees, speaking for the Court, said:

> "In this jurisdiction the rule has been adopted that, if one, in blasting on his own lands or upon the lands of another with the owner's consent, invades the premises of his neighbor by throwing stones and debris thereon, he is liable for the resulting injury, but for any injury resulting from the mere concussion of the atmosphere, sound, or otherwise, there is no liability, unless it is shown that the work was done negligently and that the injury was the result of negligence and not the result of blasting according to the usual methods and with reasonable care."[2]

The Kentucky Court has consistently held that debris and concussion cases are distinguishable in that in the former the defendant's blasting operations result in a direct trespass upon the plaintiff's land,[3] while in the latter the injury is indirect and the damage is

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[1] However, see Rogers v Gibson, 267 Ky 32, 37, 101 S. W (2d) 200, 202 (1937), citing the principal case in upholding a permanent injunction abating a nuisance.

[2] Williams v Codell Const. Co., 253 Ky. 166, 169, 69 S. W (2d) 20, 21 (1934)

[3] Rogers v Gibson, 267 Ky. 32, 37, 101 S. W (2d) 200, 202 (1937), Williams v. Codell Const. Co., 253 Ky 166, 69 S. W (2d) 20 (1934), Adams' Admr. v Callis & Hughes, 253 Ky. 382, 69 S. W (2d) 711 (1934), Hunt-Forbes Const. Co. v Martt, 247 Ky. 376, 57 S. W (2d) 37 (1933), Combs v. Codell Const. Co., 244 Ky 772, 52 S. W (2d) 719 (1932), Campbell v. Adams, 228 Ky 156, 14 S. W (2d) 418 (1929), State Corp. v Shell, 216 Ky. 57, 287 S. W 210 (1926), Adams & Sullivan v Sengel, 177 Ky. 535, 197 S. W 974 (1917), Allegheny Coke Co. v. Massey, 163 Ky 792, 174 S. W 499 (1915), Lex. & E. R. R. v. Baker,

consequential.[4] This is the historical distinction between the actions of trespass and case at common law.[5]

In regard to the statement that the damage caused by concussion is consequential, it seems that the Court means that the damage, though distinctly traceable to the defendant's tort, did not immediately follow his act.[6] The Term, "consequential damage," has never served any useful purpose except in marking a distinction between damage formerly recoverable in an action of trespass as compared with that formerly recoverable in an action of case,[7] and it is merely a remnant of an obsolete system of procedure.[8] Physical invasion of the property of another does not necessarily imply an actual entering of his property or casting upon that property any particular thing or substance. The employment of a force which, when put in operation, extends its effect into the property of another is certainly an invasion of the owner's rights.[9] Whether the injury caused by the force is a direct or indirect invasion of the plaintiff's property is immaterial.[10] There is no tenable distinction between debris and concussion cases, and the same rule of liability should apply to both.[11]

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156 Ky. 431, 161 S. W 228 (1913), Langhorn et al. v. Turman, 141 Ky 809, 33 S. W 1008 (1911), Hieber v Central Ky. Traction Co., 145 Ky 108, 140 S. W 54 (1911), Note (1935) 23 Ky L. J. 672.

[4] Hunt-Forbes Const. Co. v. Martt, 247 Ky. 376, 57 S. W (2d) 37 (1933), Campbell v. Adams, 228 Ky. 156, 14 S. W (2d) 418 (1929), Gibson v. Womack, 218 Ky. 626, 291 S. W 1021 (1927), Hieber v. Central Ky. Traction Co., 145 Ky. 108, 140 S. W 54 (1911) See Jefferson Co. v. Pohlman, 243 Ky. 556, 79 S. W (2d) 344 (1932) and Brooks-Calloway Co. v Carroll, 235 Ky. 41, 29 S. W (2d) 592 (1930).

[5] Wendt v. Yant Const. Co., 125 Neb. 277, 249 N. W 599 (1933) HARPER, TORTS (1933) 406, 409; PROSSER, TORTS (1941) 79, 80, 81, 454; Note (1935) 19 Minn. L. Rev 322, 323.

[6] Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future* (1920) 33 Harv. L. Rev 542, 545.

[7] Smith, *Reasonable Use of One's own Property as a Justification for Damage to a Neighbor* (1917) 17 Col. L. Rev 383, 388.

[8] Smith, *supra* note 6.

[9] Watson v Miss., etc. Co., 174 Iowa 23, 156 N. W 88 (1916), cited with approval by Smith, *supra* note 6, at 547.

[10] Hickey v. McCabe, 30 R. I. 346, 75 Atl. 404 (1910), Prosser, *op. cit. supra* note 5, at 80, 81.

[11] Fitzsimmons & Connell Co. v Braun, 199 Ill. 390, 65 N. E. 249 (1902), Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N. E. 970 (1914) ("It is a distinction without a difference."), Longtin v Persell, 30 Mont. 306, 76 Pac. 699 (1904), Wendt v. Yant Const. Co., 125 Neb. 277, 249 N. W 599 (1933) and cases cited; Harper, *op. cit. supra* note 5, at 410; Prosser, *op. cit. supra* note 5, at 80 ("This distinction has been denounced repeatedly as a marriage of legal technicality with scientific ignorance "), Smith, *supra* note 6, at 548; Note (1935) 23 Ky. L. J. 672, 674; Note (1935) 19 Minn. L. Rev 322, 323.

The Kentucky Court of Appeals has expressly rejected the doctrine of absolute liability[12] as pronounced in *Rylands* v. *Fletcher*[13] and therefore appears to be generally committed to the principle of liability based on fault. If the Court is to adhere to its approval of this principle, consistency would seem to require that it also reject the doctrine of absolute liability in debris cases and apply to them the general rule that the defendant shall be liable only when he has been guilty of negligence.

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THE EFFECT OF MENTAL DEFECTS, LESS THAN INSANITY, ON THE STANDARD OF CARE REQUIRED OF DEFENDANTS IN CIVIL NEGLIGENCE CASES

In order to determine whether or not the defendant in a tort action has been guilty of negligence, the courts have set up the standard of a reasonable man. If the act of the defendant falls below the standard of care which a reasonable man would have exercised under the same circumstances, the defendant is guilty of negligence.[1] We find certain divisions in the class of people who are measured by this rule, and in certain instances, deviations from it. For example, the class of normal, average persons constitutes the norm. This class is measured by the standard of the reasonable man. Above this norm are physicians and other skilled persons, who are measured by a different standard of care,[2] and also persons with extremely acute and above average physical characteristics.[3] Below the norm are children,[4] persons with physical defects,[5] and at the very bottom of the scale, insane persons.[6] Between the latter class and the norm another group could be placed, namely, persons who have mental defects which do not amount to legal insanity. For instance, a person may be dull with subnormal intelligence. As a result, his memory may be bad, his reactions slow, or his perceptions and reasoning faulty. Or yet, in this same class might be found

[12] Rogers v. Bond Bros., 279 Ky. 239, 130 S. W (2d) 22 (1939), Long v L & N R. R., 128 Ky. 26, 107 S. W 203 (1908), Morgan's Admr. v. Louisville Electric Light Co., 122 Ky. 476, 91 S. W 703 (1906) Triple State Natural Gas, etc. Co. v. Wellman, 114 Ky. 79, 70 S. W 49 (1902).

[13] L. R. 3 H. L. 330 (1868).

[1] *Restatement, Torts* (1934) Sec. 283.

[2] Physicians are required to use the degree of care of the average physician practicing in the same or similar locality. Note (1941) 29 Ky. L. J. 223.

[3] A person with above average physical characteristics is required to use greater care than the normal person because of that fact. *Restatement, Torts* (1934) Sec. 289, comment h.

[4] A child is required to use the care of a child of his same age, intelligence, and experience. Note (1941) 29 Ky. L. J. 334.

[5] Persons with physical defects are required to use ordinary care. Note (1941) 30 Ky. L. J. —.

[6] Insane persons are liable for their torts and are required to use ordinary care. Cooley, *Torts* (4th ed. 1932) Sec. 65.