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past and present state of the law prevents North Carolina from reaching the somewhat embarrassing position of the minority rule of applying two rules in the same jurisdiction through an adherence to common law reasoning, *i.e.*, that unlike rock and debris, concussion waves and earth vibrations are not direct applications of force constituting trespass to land.

A quick reading of the decisions imposing absolute liability for concussion and vibration damage could possibly lead to the conclusion that the rule is based upon an extension of the common law theory of strict liability for trespass to land, *i.e.*, that air waves and ground vibrations are physical invasions equivalent to rock and debris;³³ and that, therefore, the door is closed to the adoption of the rule in North Carolina. A careful investigation of the cases, however, reveals that absolute liability is really a rule founded upon public policy which could easily be adopted by our court³⁴ upon the reasoning that the extrahazardous nature of blasting demands that the defendant stand as an insurer of the possibility of injury, which, in many instances, cannot be eliminated by the greatest of care.³⁵

JOHN BRYAN WHITLEY

Torts—Family Purpose Doctrine—Application to Other Instrumentalities

The family purpose doctrine has been applied by a minority of jurisdictions in cases involving the negligent operation of automobiles furnished for the use and enjoyment of the family.¹ *Grindstaff*

³³ *E.g.*, Beckstrom v. Hawaiian Dredging Co., 42 Hawaii 353 (1958); Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960); Brown v. L. S. Lunder Constr. Co., 240 Wis. 122, 2 N.W.2d 859 (1942).

³⁴ Recently the North Carolina Supreme Court quoted and applied RESTATEMENT, TORTS § 166 (1938), which provides: "Except where the actor is engaged in an extrahazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." Schloss v. Hallman, 255 N.C. 686, 691, 122 S.E.2d 513, 517 (1961). *Quaere* whether the court will apply this rule to a non-negligent and unintentional explosion and hold absolute liability?

³⁵ *E.g.*, Fairfax Inn, Inc. v. Sunnyhill Mining Co., 97 F. Supp. 991 (N.D. W. Va. 1951); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951).

¹ *E.g.*, Durso v. A. D. Cozzolino, Inc., 128 Conn. 24, 20 A.2d 392 (1942); Wells v. Lockhart, 258 Ky. 698, 81 S.W.2d 5 (1935); Linch v. Dobson, 108 Neb. 632, 188 N.W. 227 (1922).

*v. Watts*² raised the question whether it applied to cases involving the operation of motorboats. A minor child ran his father's motorboat into a boat in which plaintiff was riding. Plaintiff brought action against both father and son for injuries received when he was thrown into the water and struck by the boat. Both defendants moved for nonsuit at the close of plaintiff's evidence. The father's motion was sustained, but the son's was denied. Plaintiff appealed the granting of the father's motion, the sole question being whether the family purpose doctrine applied. The North Carolina Supreme Court held that it did not apply.

It was noted that the family purpose doctrine developed as an instrument of social policy to afford greater protection for motorists in this country. Growing numbers of motor vehicles on our highways and the ever increasing loss of life and property demanded protection. Liability imposed by conventional principles of agency was thought to be inadequate.³

Although the court was aware of the "marked increase in the use of motor-boats in recent years"⁴ and that "danger to life, limb and property from their use proportionately increased,"⁵ it felt that in the absence of legislative action, the family purpose doctrine should not be extended to instrumentalities other than motor vehicles operating on public highways.

All other jurisdictions which have been faced with the problem of extending the doctrine to other instrumentalities are in accord with this decision.⁶ Two courts have refused to apply the doctrine to bicycles negligently ridden by minor children on the ground that bicycles did not create an alarming social problem like that created

² 254 N.C. 568, 119 S.E.2d 784 (1961).

³ See Note, 38 N.C.L. REV. 249 (1960).

⁴ 254 N.C. at 574, 119 S.E.2d at 784.

⁵ *Ibid.*

⁶ *Meinhardt v. Vaughn*, 159 Tenn. 272, 17 S.W.2d 5 (1929), discussed in Notes, 43 HARV. L. REV. 133 (1929); 8 TENN. L. REV. 44 (1929). This case was cited by the court in the principle case as extending the family purpose doctrine to motorcycles. The trial court did apply the doctrine. However, on appeal the Tennessee Supreme Court said it was not necessary to apply it because a conventional principal and agent relationship existed.

Two cases, *Lashbrook v. Patten*, 62 Ky. 317 (1864), and *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N.W. 922 (1886), have been cited as applying the family purpose doctrine to horse drawn vehicles before the days of automobiles. However, in both of these cases a conventional master and servant relationship can be found. See *Foster v. Farra*, 117 Ore. 286, 298, 243 Pac. 778, 782 (1926); Note, 6 So. CAL. L. REV. 340, 342 (1933).

by automobiles.⁷ Minnesota is the only jurisdiction, other than North Carolina, in which the question of the application of the doctrine to motorboats had been raised.⁸ The court in the principle case quoted from the Minnesota case and relied upon the reasoning of that decision. The Minnesota court stated:

Considering the wide expanse of the water surface of our lakes and rivers and the comparatively small number of motorboats thereon, which do not move in lanes or proscribed routes, a situation is not presented justifying, much less requiring as a matter of public policy, the extension of the family car doctrine to cover them.⁹

The family purpose doctrine is an extension of the principle of respondeat superior and is not founded on the idea that automobiles are inherently dangerous instrumentalities.¹⁰ The theory of the doctrine is that some member of the family has made it his "business" to provide an automobile for the use of himself and other members of the family. Therefore, when a member of the family uses the family car for his own purpose it is held that his purpose is the "business" of the one furnishing the automobile.¹¹ Logically, if "business" is to be defined so broadly, the nature of the instrumentality should be immaterial, and the doctrine should apply to any instrumentality furnished to members of the family for their use and convenience. Many courts have utilized this reasoning in refusing to adopt the family purpose doctrine. One court, referring to the Minnesota motorboat case, stated:

Minnesota says that a son driving the family car for his own pleasure is the agent of the father. . . . But the son is not

⁷ Pflugmacher v. Thomas, 34 Wash. 2d 687, 209 P.2d 443 (1949); Calhoun v. Pair, 197 Ga. 703, 30 S.E.2d 180 (1944).

⁸ Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932), discussed in Notes, 16 MINN. L. REV. 870 (1932); 31 MICH. L. REV. 132 (1932); 6 So. CAL. L. REV. 340 (1933).

⁹ 185 Minn. at 360, 241 N.W. at 38.

¹⁰ Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951); Robertson v. Aldridge, 185 N.C. 292, 116 S.E. 742 (1923); Note, 38 N.C.L. REV. 249 (1960).

¹¹ In reaching such a conclusion the court in Watkins v. Clark, 103 Kan. 629, 176 Pac. 131 (1918), said: "The deduction was facilitated by employment of the fine art of definition—putting into the definition of the term 'business' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.'" *Id.* at 631, 176 Pac. at 131.

the agent of the father if it is a motorboat instead of an automobile, even though the motorboat be furnished for the pleasure of the son. When one considers contradictions such as this, it becomes apparent that the Family Purpose Doctrine is not as much an extension of the principles of master and servant as an attempt to fix liability on one able to meet it.¹²

Perhaps it would have been better if liability under the doctrine had never been based on the theory of agency. If the courts had frankly stated that public policy required the adoption of the doctrine, they would not be haunted today by the inconsistency of their logic when refusing to apply the doctrine to new instrumentalities. But since social and economic considerations do not require an extension of the doctrine to motorboats, it is submitted that the decision of the North Carolina court in the principal case is correct.

However, it appears inconsistent to insist on legislative action before extending the doctrine to other instrumentalities in light of the fact that the doctrine was first adopted by the court.¹³ The court did not require such action when it was faced with the great social impact brought about by the advent and ever increasing use of the automobile. Certainly, if the social and economic demands, once presented by the automobile, should call for an extension of the doctrine to other instrumentalities, the court should not fail to heed this call.

SAMUEL S. WOODLEY, JR.

Wills—Anti-Lapse Statutes—Adopted Children as Issue

In *Headen v. Jackson*¹ testatrix bequeathed all her property, which consisted solely of personalty, to her four children and her granddaughter, share and share alike. One of the children predeceased testatrix and left as her only survivor an adopted child.

After the testatrix's death the question arose whether the adopted child could be substituted as beneficiary in his mother's place and thereby prevent any lapse of the bequest. In a declaratory judgment action to determine the adopted child's rights, the lower court

¹² *Sare v. Stetz*, 67 Wyo. 55, 74-75, 214 P.2d 486, 493 (1950), citing Note, 16 NOTRE DAME LAW. 394, 396 (1941).

¹³ The court in the principle case stated: "In this State [the doctrine] is not the result of legislative action, but is a rule of law adopted by the Court." 254 N.C. at 571, 119 S.E.2d at 787.

¹ 255 N.C. 157, 120 S.E.2d 598 (1961).