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Torts -- Blasting -- Basis of Liability: Negligence, Trespass or Absolute Liability

John Bryan Whitley

Until such time as a new set of rules or statutes is adopted, however, the situation with respect to contribution pleading practice appears to be as follows:

(1) where the plaintiff sues some but not all of the joint tort-feasors, an original defendant may have the others joined upon a plea for contribution against them;[29]

(2) where the plaintiff sues all of the joint tort-feasors, but one or more successfully demurs to the complaint and the plaintiff fails to amend or appeal, the remaining defendants, assuming they have adequate time, may have the defendants, who were dismissed on demurrer, brought back into the action upon a plea for contribution;[30]

(3) where the plaintiff sues all of the joint tort-feasors, even though plaintiff takes a voluntary, or suffers an involuntary nonsuit as to one of them, the remaining defendants cannot preclude his dismissal by pleading a cross-claim for contribution, but are relegated to a separate action in order to settle the issue of contribution.[31]

HIRAM A. BERRY

Torts—Blasting—Basis of Liability: Negligence, Trespass or Absolute Liability

No less than twenty-five years have elapsed since the problem of damages caused by blasting operations has reached the North Carolina Supreme Court. During this period, however, much litigation has arisen in this area of tort law elsewhere in the country, and a reasonable prediction would be that the next case in North Carolina will result in a new development in the law of this state.

The prime question facing the courts in this field concerns the proper basis of liability for harm occasioned by the use of explosives in blasting. Theoretically, there are three theories open to those courts which remain uncommitted on this issue. They are: (1) recovery should always depend upon proof of negligence or fault; (2) the action should be one of trespass following the common law concept of strict liability for trespass to land; and (3) the defendant

[29] Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

[30] Yandell v. National Fireproofing Corp., 239 N.C. 1, 79 S.E.2d 223 (1953); Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949).

[31] Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); Greene v. Charlotte Chem. Labs., Inc., 254 N.C. 680, 120 S.E.2d 82 (1961).

should be absolutely liable on the ground that public policy demands that he stand as an insurer of any injury resulting from the operation of an extrahazardous activity.

As a practical matter, it is generally agreed that an action of trespass may be maintained where rocks and debris are thrown upon the plaintiff's land[1] or against his person[2] by blasting. The majority of jurisdictions,[3] recently joined by South Carolina[4] and West Virginia,[5] also impose liability, irrespective of negligence, when the plaintiff's domain is damaged by concussion waves and ground vibrations.[6] A minority of states,[7] however, require proof of negli-

[1] *E.g.*, Asheville Constr. Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Hay v. Cohoes Co., 2 N.Y. 159 (1849). *Contra,* requiring proof of negligence, Bennett v. Texas-Illinois Gas Pipeline Co., 113 F. Supp. 788 (E.D. Ark. 1953); Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A.2d 786 (1958).

[2] *E.g.*, Welz v. Manzillo, 113 Conn. 674, 155 Atl. 841 (1931); Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900); Wells v. Knight, 32 R.I. 432, 80 Atl. 16 (1911). *Contra,* requiring negligence, Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892).

[3] California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wisconsin.

[4] Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960), discussed in Note, 10 CATHOLIC U.L. REV. 98 (1961). In the only other blasting case in South Carolina, the court found sufficient evidence of negligence to carry the case to the jury. Harris v. Simon, 32 S.C. 593, 10 S.E. 1076 (1890). In a later case involving vibration damage caused by pile driving, the court said the *Harris* case apparently required proof of negligence in the blasting cases. Momeier v. Koebig, 220 S.C. 124, 129, 66 S.E.2d 465, 467 (1951). The court in *Wallace* said that since the sole concern of the *Harris* appeal was the sufficiency of negligence, the case was distinguishable, no negligence being alleged here, and dismissed the reference to the *Harris* rule in the *Momeier* decision as dictum. 237 S.C. at 355, 117 S.E.2d at 361-62.

[5] Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622 (W. Va. 1961). Adoption of the rule of absolute liability by the West Virginia court was largely predetermined by two federal decisions. 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); and earlier state cases containing strong undertones of strict liability. Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S.E. 554 (1914); Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126 (1911).

[6] *E.g.*, Fairfax Inn, Inc. v. Sunnyhill Mining Co., *supra* note 5; Garden of the Gods Village v. Hellman, 133 Colo. 286, 294 P.2d 597 (1956); Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954); Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958). See generally Annot., 20 A.L.R.2d 1372 (1951); RESTATEMENT, TORTS §§ 519-20 (1938).

[7] Alabama, Arkansas, Kansas, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, New York, and Texas.

gence[8] in the latter situation unless a nuisance is shown.[9]

Courts imposing absolute liability rely upon one or all of the following theories: (1) air waves or ground vibrations constitute trespass;[10] (2) one who carries on an ultrahazardous activity must be held absolutely responsible because of the possibility of risk;[11] (3) one must not use his property so as to injure that of another;[12] (4) these cases fall within the rule of *Rylands v. Fletcher;*[13] or (5)

[8] *E.g.,* Ledbetter-Johnson v. Hawkins, 267 Ala. 458, 103 So. 2d 748 (1958); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); Dalton v. Demos Bros. Gen. Contractors, Inc., 334 Mass. 377, 135 N.E.2d 646 (1956); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[9] Central Iron & Coal Co. v. Vandenheuk, 147 Ala. 546, 41 So. 145 (1906) (rock quarry); Benton v. Kerman, 127 N.J. Eq. 434, 13 A.2d 825 (Ct. Ch. 1940) (rock quarry); Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944) (rock quarry), *rehearing denied,* 294 N.Y. 654, 60 N.E.2d 385 (1945).

[10] "One [vibration or concussion] is as much a trespass as the other [rock or debris]." Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 626 (W. Va. 1961). See also Johnson v. Kansas City Terminal R.R., 182 Mo. App. 349, 170 S.W. 456 (1914); Hickey v. McCabe & Bihler, 30 R.I. 346, 75 Atl. 404 (1910).

[11] The theory is that by engaging in the ultrahazardous activity, the defendant necessarily exposes others to danger. A possibility of risk arises from the dangerous character of the enterprise, which the defendant should assume because he has introduced it into the community. 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). It should be noted, however, that the risk here is not necessarily an unreasonable one giving rise to a likelihood or probability of injury, *i.e.,* negligence. The reasonably prudent man would proceed with the blasting, but stand as an insurer of any consequences resulting from its dangerous nature. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT § 15 (1951); ELDREDGE, MODERN TORT PROBLEMS 40 (1941); 2 HARPER & JAMES, TORTS § 14.7 (1956); HOLMES, THE COMMON LAW 154 (1881); RESTATEMENT, TORTS § 520(a), comment *a* (1938).

The above cases further state the generally accepted idea that even absolute liability must be based upon some foreseeability of harm. See RESTATEMENT, TORTS § 519 (1938). This foreseeability qualification to absolute liability led Dean Prosser to conclude that the better rule would be to impose absolute liability in urban or densely populated areas and require proof of negligence in rural or relatively uninhabited localities. PROSSER, TORTS § 59 (2d ed. 1955). This is apparently the law in California. See Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (Dist. Ct. App. 1950). Several other cases have also discussed this dual concept. See particularly Boonville Collieries Corp. v. Reynolds, 163 N.E. 627 (Ind. App. Ct. 1960) (reversing judgment for failure to allege nature of surroundings).

[12] McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 981 (Dist. Ct. App. 1935); Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914); Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960). See also BIGELOW, TORTS 466 (8th ed. 1907); Annot., 20 A.L.R.2d 1372, 1374 (1951).

[13] "We think that the true rule of law is, that the person who for his own

a nuisance is found.[14]

The minority of jurisdictions reply that (1) concussion or vibration damage is merely consequential, less than a physical invasion of the plaintiff's premises, and therefore the action is properly and historically one of trespass on the case as opposed to trespass;[15] (2) one has a right to the fullest reasonable use of his property, and blasting is a lawful and reasonable use;[16] and (3) public policy demands proof of negligence.[17]

It should be manifest that this distinction drawn between rock-debris and concussion-vibration damage is unsound and that the basis of liability should not turn upon the form of the force producing the injury. Both emanate from the same source and oftentimes damage caused by sudden vacuums in the air or waves through the earth is much greater than that resulting from rocks passing

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purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape . . . ." Fletcher v. Rylands, L.R. 1 Ex. 265, 279 (1866), *aff'd,* Rylands v. Fletcher, L.R. 3 H.L. 330, 339-40 (1868). The rule has been applied to the explosion of stored combustibles. Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931); Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 54 N.E. 528 (1899); and to blasting. Miles v. Forest Rock Granite Co., 34 L.T.R. 500 (K.B. 1918); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886). See PROSSER, *The Principle of Rylands v. Fletcher,* in SELECTED TOPICS ON THE LAW OF TORTS 135 (1953).

[14] *E.g.,* Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Beecher v. Dull, 294 Pa. 17, 143 Atl. 498 (1928); Gossett v. Southern Ry., 115 Tenn. 376, 89 S.W. 737 (1905).

[15] *E.g.,* Ledbetter-Johnson v. Hawkins, 267 Ala. 458, 103 So. 2d 748 (1958); Dalton v. Demos Bros. Gen. Contractors, Inc., 334 Mass. 377, 135 N.E.2d 646 (1956); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893). *Contra,* Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931); Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 570, 79 A.2d 591, 595 (1951): "The old technical rules of common-law pleading with their finespun distinctions between forms of action no longer obtain." See also 2 HARPER & JAMES, TORTS § 14.7 (1956); PROSSER, TORTS § 59 (2d ed. 1955); RESTATEMENT, TORTS § 158, comment *h* (1938).

[16] Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Booth v. Rome, W. & O. Terminal R.R., *supra* note 15. The absolute liability decisions agree with this proposition, but require one who carries on such activities to assume the risk of all consequences resulting therefrom.

[17] *E.g.,* Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893), reasoning that the rule of strict liability impedes the development and improvement of property. *Contra,* Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 569, 79 A.2d 591, 595 (1951): "Considerations of public policy do not require immunity from liability for damages caused by concussion or vibration any more than from liability for damages caused by flying debris."

through the plaintiff's roof. As the absolute liability decisions often state, the distinction is nothing more than a holdover of the difference recognized at common law between the actions of trespass and trespass on the case although forms of action are now abolished under modern code pleading.[18]

Although the blasting problem has arisen in North Carolina no less than a dozen times,[19] beginning with *Blackwell v. Lynchburg & D. R.R.*[20] seventy years ago, the court has never explicitly said that proof of negligence is essential to recovery or that the theory of absolute liability is unavailable.[21] It is true that in the prior

[18] See note 15 *supra.*

[19] Sparks v. Tennessee Mineral Products Corp., 212 N.C. 211, 193 S.E. 31 (1937); Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 739 (1925); Cobb v. Atlantic Coast Line Ry., 175 N.C. 130, 95 S.E. 92 (1918); Wiggins v. Hiawassee Valley Ry., 171 N.C. 773, 89 S.E. 18 (1916); Arthur v. Henry, 157 N.C. 438, 73 S.E. 211 (1911); Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911); Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910); Settle v. Southern Ry., 150 N.C. 643, 64 S.E. 759 (1909); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N.C. 536, 42 S.E. 983 (1902); Gates v. Latta, 117 N.C. 189, 23 S.E. 173 (1895).

[20] 111 N.C. 151, 16 S.E. 12 (1892). Plaintiff's intestate, who had granted an easement to defendant railroad, was struck and killed by a flying rock while standing in his yard some distance from where defendant contractors were blasting. The court affirmed a judgment for plaintiff, holding the contractors negligent in failing to cover the blast or to give timely notice thereof. Other cases have required a showing of negligence where blasting is conducted on an easement granted by plaintiff on the theory that he is compensated for all reasonable, necessary and natural incidents of the work contemplated when he accepts the consideration. This acceptance bars his right to proceed in trespass. Gordon v. Elmore, 71 W. Va. 195, 76 S.E. 344 (1912); Watts v. Norfolk & W. R.R., 39 W. Va. 196, 19 S.E. 521 (1894). The North Carolina court in *Blackwell* said: "[T]he prudent use of such an agency [blasting] . . . is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessity incident to the privilege. But where damage is done to the land of the owner adjacent to that within the condemned boundary, *if it result from managing or handling explosive material carelessly or unskillfully . . . the corporation is answerable in a new action.* . . . We do not think that the privilege of throwing stones through the air two hundred or more yards and beyond the right of way . . . passes . . . as a necessary incident to the easement." 111 N.C. at 153-55, 16 S.E. at 14-15. (Emphasis added.) Although the court did not expressly say that an action in trespass could not be maintained, it seems clear from the above that after the condemnation proceeding the defendant could only be held answerable on a charge of negligence. The *Blackwell* case has been repeatedly cited in later decisions, none of which involved easements, as supporting the requirement of negligence. The distinction, once laid down, was apparently overlooked in subsequent cases. See, *e.g.*, Sparks v. Tennessee Mineral Products Corp., 212 N.C. 211, 193 S.E. 31 (1937). See also language in Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911), which implies that if plaintiff had not consented to the use of a quarry, he might have proceeded in trespass.

[21] There is no statute directly in point, but N.C. GEN. STAT. § 14-284.1

cases involving damage caused by rock and debris[22] as well as in the single opinion dealing with concussion and vibration,[23] the court, without exception,[24] has proceeded upon negligence.[25] The explanation apparently lies in the fact that the court simply followed the theory of plaintiffs' pleadings and proof. It would be refreshing to see the next plaintiff's attorney phrase his complaint in terms of absolute liability, or at least plead in the alternative with negligence, and put it to the test of demurrer or a motion to strike.

In projecting upon the possibility that North Carolina will join the majority of states applying absolute liability to all blasting, it will be seen that the court has already taken a preliminary step in this direction. Because of the dangerous character of the enterprise, one who desires to carry on blasting activities may not escape liability through an independent contractor[26] or, as held in one case, a lessee.[27] It has also been held that not ordinary care but a high degree of diligence is required of one conducting blasting operations.[28] How-

(c) (1953), concerning the sale and storage of explosives, provides: "All persons having dynamite or other powerful explosives in their possession or under their control shall at all times keep such explosives in a safe and secure manner . . . ." *Quaere* whether this language points to any basis of liability for damage caused by blasting?

[22] *E.g.*, Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906).

[23] Settle v. Southern Ry., 150 N.C. 643, 64 S.E. 759 (1909).

[24] However, in a federal case arising in North Carolina involving injury to plaintiff's railroad bed by rock and debris, it was held that: "There can be no doubt . . . that where one . . . throws rock or debris on the property of another, he is liable for the damage done, on the principle that he is guilty of trespass, and quite irrespective of the question of his negligence." Asheville Constr. Co. v. Southern Ry., 19 F.2d 32, 34 (4th Cir. 1927).

[25] The court has, however, expressed doubt as to whether proof of negligence is necessary. Wiggins v. Hiawassee Valley Ry., 171 N.C. 773, 775, 89 S.E. 18, 19 (1916): "We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify the submission of the issues to the jury"; Arthur v. Henry, 157 N.C. 393, 402, 73 S.E. 206, 210 (1911): "The plaintiff was entitled to recover damages, if the defendant threw stones upon his land without his consent, and if he consented to the use of the quarry [operated on defendant's adjoining tract], he could also recover if the work was negligently done."

[26] Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 737 (1925); Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910).

[27] Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911).

[28] Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906). Other cases, not directly involving blasting but concerning the use of explosives in general, have stated the standard to be the highest or utmost care. Stephens v. Blackwood Lumber Co., 191 N.C. 23, 131 S.E. 314 (1926); Barnett v. Cliffside Mills, 167 N.C. 576, 83 S.E. 826 (1914); Wood v. McCabe & Co., 151 N.C. 457, 66 S.E. 433 (1909). See Note, 39 N.C.L. REV. 294 (1961), which submits that there is only one standard of care and no degrees thereof.

ever, if the rule should emerge that proof of negligence is the preferable theory, it seems feasible that the plaintiff injured by blasting should be afforded the benefit of the rule of *res ipsa loquitur*.[29] Our court has invoked the rule in cases involving explosions other than by blasting,[30] and there is substantial authority supporting its application in concussion-vibration cases in other jurisdictions.[31]

Should North Carolina adopt the rule of absolute liability, it can fairly be predicted that the rule will not be reached through the avenue of ancient reasoning derived from the common law action of trespass *quare clausum fregit* that trespass to land subjects the defendant to liability regardless of fault. This is so not only because North Carolina in the past has proceeded on the theory of negligence rather than trespass even in cases of rock-debris invasion, but also because recent decisions indicate that this timeworn proposition is no longer the law in this jurisdiction.[32] In a very real sense, the

[29] "When the thing [which causes injury] is shown to be under the management of the defendant . . . and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (Ex. 1865), quoted with approval in Harris v. Mangum, 183 N.C. 235, 238, 111 S.E. 177, 178 (1922).

[30] Howard v. Texas Co., 205 N.C. 20, 168 S.E. 832 (1933) (filling station); Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922) (boiler); Modlin v. Simmons, 183 N.C. 63, 110 S.E. 661 (1922) (automobile); Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920) (gasoline storage plant).

[31] Vattilana v. George & Lynch, Inc., 154 A.2d 565 (Del. Super. Ct. 1959); Marlowe Constr. Co. v. Jacobs, 302 S.W.2d 612 (Ky. Ct. App. 1957); Hoyt v. Amerada Petroleum Corp., 69 So. 2d 546 (La. Ct. App. 1953); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); McKay v. Kelly, 229 S.W.2d 117 (Tex. Civ. App. 1950).

[32] For the modern proposition that strict liability for trespass to land derived from the common law action of trespass *quare clausum fregit* is outmoded and that proof of negligence should be required where defendant's act is unintentional, see PROSSER, TORTS § 13 (2d ed. 1955); RESTATEMENT, TORTS § 166 (1938). This seems to be the law in North Carolina. In Newsom v. Anderson, 24 N.C. 42 (1841), action in trespass *quare clausum fregit* was held proper where defendant felled a tree, the top thereof falling on plaintiff's land; trespass *vi et armis* was held applicable where defendant, who was beating a drum in the highway, caused plaintiff's team to run away. Loubz v. Hafner, 12 N.C. 185 (1827). *But see* a later case denying recovery where defendant's automobile left the road and crashed into plaintiff's building. Finding the accident unavoidable, the court cited both of the above cases, saying: "Neither shows unavoidable accident or sudden emergency *but damage resulting from negligence.* It must also be remembered that forms of action have been abolished . . . ." Smith v. Pate, 246 N.C. 63, 66, 97 S.E.2d 457, 459 (1957). (Emphasis added.) For a recent case to the same effect on substantially the same facts, see Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961), discussed in 40 N.C.L. REV. 586 (1962).

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 court[34] 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).