Michigan Law Review

Volume 49 | Issue 6

1951

TORTS-STRICT LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES

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TORTS—STRICT LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES—Plaintiff brought action for damage to his land caused by concussion and vibration resulting from defendant's blasting operations in the construction of a public highway. Defendant demurred for failure to state a cause of action in that plaintiff did not properly plead negligence. *Held,* demurrer sustained. Fault is a requisite to liability. *Reynolds v. W. H. Hinman Co.,* (Me. 1950) 75 A. (2d) 802.

The overwhelming majority of American courts are committed to the proposition that fault is not necessarily a requisite to liability for damage caused by blasting.[1] This rule is rooted in social philosophy. Even when the utmost care is exercised, some risk is present during blasting operations. Therefore, it is thought desirable that persons engaged in such an ultra-hazardous activity be made to bear the risk of loss to others which their activity creates.[2] By this process of economic manipulation the loss which initially falls upon the nearby property owners is shifted to the person doing the blasting and then distributed by him through insurance.[3] Many courts distinguish between damage caused by the entry of tangible substance upon plaintiff's land and damage resulting from vibration or concussion.[4] This distinction had its origin in the difference

[1] Hay v. Cohoes Co., 2 N.Y. 159 (1849); Britton v. Harrison Const. Co., (D.C. W.Va. 1948) 87 F. Supp. 405; Federoff v. Harrison Const. Co., 362 Pa. 181, 66 A. (2d) 817 (1949); Alonso v. Hills, (Cal. 1950) 214 P. (2d) 50; HARPER, TORTS §202 (1933); PROSSER, TORTS 446 et seq. (1941); 1 TORTS RESTATEMENT §165 (1934); 3 TORTS RESTATEMENT §§519-24 (1938). See HOLMES, THE COMMON LAW 103 (1881).

[2] ". . . the possible harm is of such a serious nature that sound social policy demands that the actor assume the risk." HARPER, TORTS §202 (1933).

Plaintiffs must show legal causation. Madsen v. East Jordon Irr. Co., 101 Utah 552, 125 P. (2d) 794 (1942).

[3] ". . . the merit in the result reached by these cases may be found in the social desirability of requiring industries engaged in dangerous activities to distribute loss by providing insurance." 45 HARV. L. REV. 594 at 595 (1932). See also 61 HARV. L. REV. 515 at 520 (1948).

[4] Booth v. Rome, 140 N.Y. 267, 35 N.E. 592 (1893); Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Balinski v. A. Capone & Sons, Inc., (N.J. 1949) 63 A. (2d) 810; O'Regan v. Verrochi, 325 Mass. 391, 90 N.E. (2d) 671 (1950). See Smith, "Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future," 33 HARV. L. REV. 542 (1920); 19 MINN. L. REV. 322 (1935).

between trespass and case.[5] Since trespass would not lie for consequential damage, negligence had to be alleged to make out a cause of action for damage caused by vibration or concussion. The decision of the principal case could be sustained upon this ground were it not that the distinction itself is no longer tenable in view of modern procedure.[6] However, the Maine court places its decision upon a broader ground, viz., that fault is a requisite to liability. To support this position, the court draws heavily upon a historical analysis of of the cases tending away from strict liability. It does not appear that history evidences such a tendency, for whether the trend has been away or toward strict liability depends upon the particular segment of history under analysis.[7] Indeed, the doctrine of strict liability for ultra-hazardous activities is a modern development and not a vestige of medieval lore.[8] The court further suggests that plaintiff has misconceived his action, that the broadened concept of the negligence[9] action aided by the doctrine of res ipsa loquitur[10] will enable plaintiffs to recover in most of these cases. Implicit in this suggestion is a belief that plaintiffs should recover in most of these cases. If that is so, why not base the decision upon the underlying policy favoring greater socialization of risk[11] rather than tenaciously cling to the theory that there is no liability without fault—a theory already so permeated with exception[12]

[5] See HARPER, TORTS §204 (1933).

[6] ". . . it can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." HOLMES, THE COMMON LAW 80 (1881).

Some courts hold concussion to be a technical trespass. See Smith, "Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future," 33 HARV. L. REV. 542 at 546 et seq. (1920).

[7] The history of the theory that fault is a requisite for liability appears to be cyclical. ". . . early forms of legal procedure were grounded in vengeance. . . . Vengeance imports a feeling of blame. . . ." HOLMES, THE COMMON LAW 2, 3 (1881). Later, during the medieval period, ". . . a man was held to act at his peril, and accident was no defense." COOLEY, TORTS, 2d ed. §12 (1930). After Brown v. Kendall, 6 Cush. (60 Mass.) 292 (1851), it was ordinarily held that there is no liability without fault. For a return to strict liability, consider workmen's compensation legislation. The law of master and servant has undergone a similar fluctuation. See Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. REV. 315 (1894). See Ames, "Law and Morals," 22 HARV. L. REV. 97 (1908) for an analysis of history as progressive. As to the value of historical analysis, see Holmes, "The Path of the Law," 10 HARV. L. REV. 457 (1897).

[8] PROSSER, TORTS 446 (1941). *Contra*, Smith, "Tort and Absolute Liability—Suggested Changes in Classification," 30 HARV. L. REV. 241 at 328 (1917). "The modern doctrine that in certain exceptional cases a man acts at peril is a survival of the time when *all* a man's acts were done at his peril."

[9] The Maine court does not imply that blasting is negligence per se. This accords with most authorities. See HARPER, TORTS §202 et seq. (1933).

[10] It does not seem that res ipsa loquitur is applicable where harm is possible in spite of the precaution taken. But see Smith, "Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future," 33 HARV. L. REV. 543 at 553 (1920); also, Thayer, "Liability Without Fault," 29 HARV. L. REV. 801 (1916).

[11] See Bohlen, "The Rule in Rylands v. Fletcher," 59 UNIV. PA. L. REV. 298 (1911).

[12] For example, Workmen's Compensation Acts, respondeat superior, non-delegable duties, imputed negligence, and the sale of impure food and drugs. See Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235 (1914).

as to be more an exercise in classification[13] than a key to decision. The trend of decisions in these cases represents a resolution of the conflicting interests between landowner and entrepreneur in favor of land owners.[14] When industrial and commercial enterprise is struggling for survival, there is much merit in a cautious imposition of liability upon it. This fosters growth. But when the economy is settling, protection of other elements of society should be emphasized. Thus the landowner becomes entitled to greater protection, and losses to others incident to ultra-hazardous activities should become a part of the cost of conducting the activity.

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[13] See Smith, "Tort and Absolute Liability—Suggested Changes in Classification," 30 HARV. L. REV. 241 (1917).

[14] See Bohlen, "The Rule in Rylands v. Fletcher," 59 UNIV. PA. L. REV. 298 (1911).