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Governmental Immunity for Public Contractors Engaged in Blasting

reason for granting immunity from tort liability to charities. The Supreme Court of Appeals of West Vrginia is to be commended for abrogating this archaic doctrine, and the highest courts of Virginia and other states which still adhere to the immunity doctrine are urged to follow West Virginia and not wait for legislative action.

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GOVERNMENTAL IMMUNITY FOR PUBLIC CONTRACTORS ENGAGED IN BLASTING

In *V. M. Green & Co. v. Thomas*[1] the Supreme Court of Appeals of Virginia recently decided the question, novel in Virginia, whether a contractor performing a contract with the state is strictly liable for concussion damage resulting from blasting.[2] Defendant contractor, being sued for damages to plaintiff's home, was performing a contract with the state for the construction of an interstate highway. There was ample evidence to show that vibrations and concussions from six dynamite blasts supervised by a "certified blaster" caused damage to plaintiff's home four hundred and seventy-four feet away. Plaintiff's theories of liability were negligence and strict liability. The plaintiff, unable to establish negligence, contended that defendant should be held strictly liable. The trial court instructed the jury to find for the plaintiff "irrespective of negligence" if they believed defendant's blasting was the "direct and proximate" cause of the damage. The jury returned a verdict for the plaintiff and defendant appealed, assigning this instruction as error. The Supreme Court of Appeals reversed and entered judgment for defendant.

The Supreme Court of Appeals based its decision of non-liability almost entirely upon the question of the contractor's right to share the immunity of the state and omitted any discussion of strict liability for concussion damage.[3] In support of its decision that defendant was entitled to immunity, the court cited five cases from other jurisdic-

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[1]205 Va. 903, 140 S.E.2d 635 (1965).

[2]Previous Virginia decisions are distinguishable. Infra note 9.

[3]The court cited B. G. Young & Sons, Inc. v. Kirk, 202 Va. 176, 182, 183, 116 S.E.2d 38, 42, 43 (1960), as authority for the proposition that the burden is on the plaintiff to prove that the defendant did some specific act of negligence and that the doctrine of res ipsa loquitur would not apply in such a case. But the question of liability irrespective of negligence was not before the court in Kirk, and the plaintiff had conceded the application of res ipsa loquitur. Id. at 42.

tions.[4] Although these cases held that there was immunity, they are all distinguishable from the principal case. Two are not blasting cases;[5] two involving blasting suggest that in those jurisdictions liability for concussion damage must be based upon nuisance or negligence theories to the exclusion of strict liability;[6] and in the last, also involving blasting, the court seemed to consider the work as having been done by the government.[7]

There are only three other reported Virginia cases in which recovery for blasting concussion damage has been sought,[8] and in all three cases damages were denied for reasons other than the rejection of strict liability.[9] None has decided whether liability may be imposed for concussion damage irrespective of negligence.[10] Only one of these cases, *B.G. Young & Sons, Inc. v. Kirk*,[11] involved a defendant who

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[4]Supra note 1, at 637.

[5]Chargois v. Grimmett & James, 36 So. 2d 390 (La. App. 1948) (land grading for drainage project); Valley Forge Gardens, Inc. v. Morrissey, 385 Pa. 477, 123 A.2d 888 (1956) (damage caused by erosion of a fill).

[6]In Nelson v. McKenzie-Hague Co., 192 Minn. 180, 256 N.W. 96 (1934), plaintiff brought suit upon a private nuisance theory for damage caused to his property by concussions started by defendant's blasting under a state contract for the construction of a bridge. The court held the statute defining a private nuisance inapplicable to a contractor constructing a bridge under a contract with the state. In Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892), plaintiff sought damages for injury to his property caused by vibrations from defendant contractor's blasting, alleging that blasting constituted a nuisance. Recovery was denied because defendant had the authority of the United States to do the work carefully and there was no showing of any negligence.

[7]In Pumphrey v. J. A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959), defendant contractor caused concussion damage to plaintiff's property by blasting performed under a contract with the United States and supervised by government authorities. It was stipulated that defendant had not been negligent, and the case was argued on a strict liability theory. The court agreed that Iowa followed the strict liability theory in blasting cases, but granted the defendant governmental immunity, relying heavily upon the fact of the strict supervision by the government and its approval of the blasting specifications, which were made a part of the contract. Discussion of this case in 12 Stan. L. Rev. 691, 693 (1960), indicates that another objection to Pumphrey is that the court failed to apply federal law, and that other federal decisions do not grant immunity in such a situation.

[8]Barnes v. Graham Virginia Quarries, Inc., 204 Va. 414, 132 S.E.2d 395 (1963); B. G. Young & Sons, Inc. v. Kirk, supra note 3; Pope v. Overbay, 196 Va. 288, 83 S.E.2d 365 (1954).

[9]In Pope v. Overbay, supra note 8, the court upheld the jury's finding that there was no casual connection between the damage and the blasting; in B. G. Young and Sons, Inc. v. Kirk, supra note 3, the court relied upon a release by the plaintiff; and in Barnes v. Graham Virginia Quarries, Inc., supra note 8, the case was decided upon a nuisance theory and plaintiff was unable to prove a casual connection between blasting and damage.

[10]Ibid.

[11]Supra note 3.

was a state blasting contractor, and there the question of governmental immunity was not presented. *Kirk* is cited in the principal case for the proposition that the plaintiff must prove that the defendant or an employee was negligent in order to recover for concussion damage to his property,[12] but in *Kirk* the question whether liability for blasting damage may be incurred irrespective of negligence was never before the court since the plaintiff had released all claims for damage incurred in the construction of the highway except those resulting from negligence or departure from the plans referred to in the deed.[13]

The questions whether Virginia imposes strict liability for blasting and whether a state blasting contractor is entitled to share the state's immunity from suit had never been decided by the Supreme Court of Appeals of Virginia before the principal case. The Supreme Court of Appeals avoids the first question and answers the second, holding that a non-negligent state contractor whose blasting causes injury to another's property is entitled to share the state's immunity.

No case has been found which fails to impose liability on any contractor for *negligently* caused blasting concussion damage, *nor* has any case been found which extends governmental immunity to such a contractor. As to the non-negligent state contractor, there are two conflicting decisional approaches. The first is the imposition of liability upon the state blasting contractor irrespective of negligence (based upon one of several theories),[14] and the other is the extension of the states' governmental immunity to the state blasting contractor.[15] The first approach leads, rather obviously, to liability, and the second results in excusing from liability. When a court is presented with a factual situation similar to the principal case, it should first determine whether the state blasting contractor would be liable if he were not working for the state. If the court decides that liability would otherwise exist, it must then determine whether the contractor should be excused from liability because of his status as a state contractor.

As to the initial determination of the liability of the state blasting contractor if he were not performing a contract with the state, there is a division of authority as to liability absent negligence. A minority of jurisdictions[16] hold that there is no liability for such non-

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[12]Supra note 1, at 637.

[13]B. G. Young & Sons, Inc. v. Kirk, supra note 3, at 42.

[14]Infra notes 19, 20, 21, 22.

[15]Infra note 23, at 827-28.

[16]Ledbetter-Johnson Co. v. Hawkins, 267 Ala. 458, 103 So. 2d 748 (1958); Rost v. Union Pac. R.R., 95 Kan.. 713, 149 Pac 679 (1915); Williams v. Codell Constr. Co., 253 Ky. 166, 69 S.W.2d 20 (1934); Albison v. Robbins & White, Inc., 151 Me. 114, 116 A.2d 608 (1955); Dalton v. Demos Bros. Gen. Contractors, Inc., 334 Mass. 377,

negligently caused damage. These courts are clinging to the common law distinction between trespass and trespass on the case,[17] and consider the concussion injury indirect for which there is no liability without proof of negligence. This distinction has been denounced as a marriage of scientific ignorance and procedural technicality[18] and has been rejected by the majority of courts.

A majority of jurisdictions impose liability for blasting concussion damage absent negligence on the part of the blasting contractor without distinguishing between damage from flying objects and damage from concussion waves.[19] These courts rely upon various theories in granting compensation. One is that a vibration is just as much a trespass as a rock hurled upon the land,[20] because both involve invasion of the property. Nuisance is another theory the courts use to impose liability.[21] A third theory used to impose liability is the doctrine of strict

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135 N.E.2d 646 (1956); Wadleigh v. City of Manchester, 100 N.H. 277, 123 A.2d 831 (1956); Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901); Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A.2d 786 (1958). A Kentucky court recently questioned the distinction between trespass and trespass on the case, but concluded not to reexamine it. Aldridge-Poage, Inc. v. Parks, 297 S.W.2d 632 (Ky. 1956). See 46 Ky. L.J. 636 (1958) for a discussion of this case.

[17]See Prosser, Torts § 7 (3d ed. 1964) for a general discussion.

[18]Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359 (1951); Smith, Liability for Substantial Physical Damage to Land by Blasting, 33 Harv. L. Rev. 542, 667 (1920); Note, 10 Colum. L. Rev. 465 (1910); Note, 19 Minn. L. Rev. 322 (1935); 16 Texas L. Rev. 126 (1937).

[19]Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886); Garden of the Gods Village, Inc. v. Hellman, 133 Colo. 286, 294 P.2d 597 (1956); Scranton v. L. G. De Felice & Son, 137 Conn. 580, 79 A.2d 600 (1951); Opal v. Material Serv. Corp., 9 Ill. App. 2d 433, 133 N.E.2d 733 (1956); Enos Coal Min. Co. v. Schuchart, 243 Ind. 692, 188 N.E.2d 406 (1963); Central Exploration Co. v. Gary, 219 Miss 757, 70 So. 2d 33 (1954); Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958); Bluhm v. Blanck & Gargaro, Inc., 62 Ohio App. 451, 24 N.E.2d 615 (1939); City of Muskogee v. Hancock, 58 Okla. 1, 158 Pac. 622 (1916); Bedell v. Goulter, 199 Ore. 344, 261 P.2d 842 (1953); Federoff v. Harrison Constr. Co., 362 Pa. 181, 66 A.2d 817 (1949); Hickey v. McCabe & Bihler, 30 R.I. 346, 75 Atl. 404 (1910); Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960); Whitney v. Ralph Myers Contracting Corp., 146 W. Va. 130, 118 S.E.2d 622 (1961); Brown v. L. S. Lunder Constr. Co., 240 Wis. 122, 2 N.W.2d 859 (1942).

[20]The language used by courts in denouncing the distinction relied upon in the minority jurisdictions is exemplified by the statement made by Judge Given in Whitney v. Ralph Myers Contracting Corp., supra note 19, at 626: "One [rocks and debris] is as much a trespass as the other [concussions or vibrations]. The damage caused a plaintiff are [sic] as real in one case as in the other." See Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956); Hickey v. McCabe & Bihler, 30 R.I. 346, 75 Atl. 404 (1910); Brown v. L. S. Lunder Constr. Co., 240 Wis. 122, 2 N.W.2d 859 (1942).

[21]Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Crino v. Campbell, 68 Ohio App. 391, 41 N.E. 2d 583 (1941); Gossett v. Southern Ry., 115 Tenn. 376, 89 S.W. 737 (1905). The basis for liability under the nuisance doctrine is the judicial determination that the rights and interests of another have been invaded, and not

liability based upon the ultrahazardous nature of blasting.[22]

Once a court determines that there would be liability if the non-negligent blaster were a private contractor, it must then determine the effect of the doctrine of governmental immunity upon the contractor's liability.

It is generally held that a non-negligent public contractor is not liable for " 'incidental injuries necessarily involved in the performance of the contract.' "[23] The purpose of this principle is to protect a contractor from suit when he does some act which is a necessary and inherent feature of his contract with the state, and not to protect him from suit when his activities in carrying out his contract inadvertently and unnecessarily cause injury to an innocent third party. The principle seems to be a circular way of stating that a negligent contractor is not entitled to immunity, since when the damages are not necessarily incident to the contract performance, the contractor has necessarily been negligent.

The general principle is easily stated, but the courts differ as to its application. The Supreme Court of Appeals of Virginia cites the "necessary incident" principle and holds that the principal case falls within its meaning.[24] However, in *Whitney v. Ralph Myers Contracting Corp.*,[25] which was almost identical to the principal case,[26] the West Virginia court held the public contractor liable for concussion damage resulting from blasting irrespective of negligence and refused to grant immunity.[27] The court held that the principle is not appli-

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the fact that a certain act has been committed. Restatement, Torts, scope and introductory note to chapter 40 (1939). Liability may be predicated upon an intentional invasion of another's rights, or a negligent invasion, or conduct which is not normal to the surrounding and which falls within the principle of strict liability. Prosser, Torts § 88, at 595 (3d ed. 1964). The interference with the other's interest must be substantial and it must be unreasonable in comparison with the utility of the defendant's conduct. Id. at 602. The court must weigh the conflicting interests of each party in making its determination of whether a nuisance exists, and social interests are important factors in determining the utility of the defendant's conduct. Restatement, Torts § 826, comment b (1939); Prosser, Torts § 90, at 618 (3d ed. 1964).

[22]E.g., Richard v. Kaufman, 47 F. Supp. 337 (E.D. Pa. 1942); Antinozzi v. D. V. Frione & Co., 137 Conn. 577, 79 A.2d 598 (1951); Brown v. L. S. Lunder Constr. Co., 240 Wis. 122, 2 N.W.2d 859 (1942).

[23]43 Am. Jur. Public Works & Contracts § 83, at 827 (1942). This is quoted in full in the principal case. V. N. Green & Co. v. Thomas, supra note 1, at 637.

[24]V. N. Green & Co. v. Thomas, supra note 1, at 637.

[25]146 W. Va. 130, 118 S.E.2d 622 (1961).

[26]Plaintiff was a landowner whose property had been damaged by concussions from defendant's blasting operations which were undertaken pursuant to a contract with the state for the construction of a highway.

[27]Supra note 25.

cable to such a situation because the concussion damages that resulted were not necessarily inherent in the exact performance of the contract.[28]

Whitney holds that the immunity principle applies only to cases where the damage which results is " 'direct or consequential,' and which may result 'as a necessary incident from the performance of the contract,' "[29] as where the defendant has graded a portion of the plaintiff's land pursuant to a contract which expressly required that such land be graded.[30] In the principal case there is no evidence that the resulting damage was necessary to the performance of the contract, rather it seems clear that it was not.[31] Following the logic of *Whitney,* it appears that the principal case is mistaken in applying the immunity principle.

Several problems arise from the decision in the principal case. Perhaps the most notable is that by denying immunity to negligent state contractors engaged in blasting activities, yet granting immunity to non-negligent state contractors so engaged, the court draws an artificial distinction between negligence liability and strict liability for ultrahazardous activities.[32] Plaintiff's injury is the same in either case, and in each, liability is predicated upon the actor's creation of foreseeable risk of harm. The creation of these foreseeable risks of harm, whether by negligent or ultrahazardous activity, should incur liability when injury results.[33] Thus, the considerations which deny immunity to negligent state contractors should also deny immunity to non-negligent state contractors and subject them to strict liability. It is the ultrahazardous nature of their non-negligent activity which should be the basis of liability.

Another problem in extending governmental immunity to this situation is that it places the burden of loss upon the innocent vic-

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[28]Id. at 630-31.

[29]Supra note 25, at 630. In so holding the court said, "To conclude otherwise would, in effect, permit a contractor ... to shake down residences of every individual citizen within eighteen hundred feet of any highway where such construction is in progress, though not necessary or incidental to the work required to be performed, without liability." Id. at 631.

[30]Chargois v. Grimmett & James, supra note 5.

[31]There is no evidence that plaintiff's land was specifically designated in the contract for any damages, nor does the contract indicate that dynamite was the only reasonable means of performing the contract.

[32]There is really no clear dividing line between the two theories. Gregory, supra note 18; Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433 (1957).

[33]12 Stan. L. Rev. 691, 694 (1960); Restatement, Torts § 519 comment b (1938).

tim rather than upon the one engaging in the blasting.[34] It is highly inequitable to place the inevitable loss upon the one who had no knowledge or control over the ultrahazardous activity. A sounder policy of loss allocation places the economic burden upon the operator of the ultrahazardous activity by holding him strictly liable for any damage that results from such activity. The ultrahazardous operator is the one who stands to benefit from his activities, and it is he, rather than one who had nothing to do with operating the ultrahazardous activity, who should assume the risk.[35] Thus the initial loss would be placed upon the one who profits from the ultrahazardous activity and would ultimately, through price adjustment in the contract with the state, be distributed among the public which is benefitted by the government improvements. In short, why should the plaintiff in the principal case finance to a greater extent than other taxpayers the building of an interstate highway?[36]

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[34]In Exner v. Sherman Power Constr. Co. a contractor stored dynamite at a construction site which exploded and damaged a nearby house. In holding the contractor liable, the court said that blasting was an activity which entailed liability without fault and there was no reason to distinguish between accidental explosions of stored dynamite and intentional explosions. In placing the burden on the contractor the court said, "[W]hen a person engages in such a dangerous activity, useful though it be, he becomes an insurer .... [and] the owner of the business, rather than a third person who has no relation to the explosion, other than that of injury, should bear the loss." 54 F.2d 510, 514 (2d Cir. 1931). Accord, Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591, 595 (1951).

[35]"Defendant is not regarded as engaging in blameworthy conduct. He is creating hazards to others, to be sure, but they are ordinary and reasonable risks incident to desirable industrial activity. Sound social policy, however, requires that the defendant make good the harm that results even though his conduct is free from fault." 2 Harper & James, § 14.6 at 816 (2d ed. 1956).

[36]Plaintiff might have attempted to recover on the basis of an unlawful taking by the state, but his chances of recovery on that theory would have been remote. The United States Supreme Court has ruled that to constitute a taking under the Fifth Amendment, the injury must be a direct result of the authorized state project and must constitute an appropriation of the plaintiff's land. United States v. Causby, 328 U.S. 256, 261-62 (1946); Gibson v. United States, 166 U.S. 269, 275-76 (1897). It is likely that the concussion damage would not be considered a direct result of the project, and, since the plaintiff did not allege that he had been substantially ousted and deprived of the beneficial use of his land, it is doubtful that the injury would be considered an appropriation.

Another means plaintiff might have used to attempt recovery is the equal protection of the laws clause of the Fourteenth Amendment. Although most cases arising under the clause have been based upon some sort of racial discrimination or upon discriminatory legislation directed at certain classes of persons, there may be some merit in the assertion that the plaintiff has been denied the equal protection of the laws. The equal protection clause applies to all persons similarly situated, and when there are rational grounds for doing so, persons may be grouped into classes with certain rights attaching to each. Graves v. Minnesota, 272 U.S. 425 (1926); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Plaintiff might argue that the refusal to grant him recovery would result in his paying more than