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In this period of prosperity more private capital is available for construction of all kinds. Also, vast sums of public funds are being appropriated for all types of construction, particularly highway construction. For example, the National System of Interstate and Defense Highways alone will involve the construction of 41,000 miles of highway, and is designed to connect and serve all major urban centers in the United States. It is probably the largest peacetime engineering project ever undertaken by man. An estimated three-fourths of a million parcels of land, approximately 1,500,000 acres, will be condemned for highway right-of-way over the fifteen-year construction period. See U. S. Dept. of Commerce, Bureau of Public Roads, Manual for Highway Serverance Studies 1, 1960.

Approximately twice the amount of property will be needed for other federal-aid highway systems. In addition to the new Interstate System, there exists the ABC program of federal aid for the improvement of highways and streets by states; it comprises a primary system of major routes and a secondary system of feeder roads together with their urban connections. U. S. Dep't. of Commerce, Release No. G61-176, Oct. 10, 1961.

Increased activity in construction of highways, buildings and other projects means increased use of blasting operations. More instances of injury to person and damage to property are the natural consequence. When actions are brought for these injuries and damages in the Virginia courts, what should be the basis of liability?

In other American jurisdictions the courts are unanimous in holding that blasting results in strict liability without proof of negligence when tangible objects are thrown upon the plaintiff's land or where they strike his person. Where the damage is the result merely of concussion or vibration,

some few courts continue to adhere to the ancient procedural distinction between trespass and case, and regard the injury as an "indirect" one, for which case has to be brought, and no recovery can be had except on the basis of negligence. This distinction, however, is rejected by the great majority of the courts and by the text authorities.

There are only three reported Virginia cases involving blasting. The earliest case is *Simmons and Winch* v. *McConnell,* 86 Va. 494 (1890). Defendants, operators of a rock quarry, fired a blast which threw a fragment of stone weighing some twenty-five pounds onto the yard of O striking and killing the plaintiff's intestate who was a social visitor in O's yard. A judgment in favor of the plaintiff was affirmed on appeal. The basis of the defendants' liability is not entirely clear. From a study of the record and briefs on appeal, it would appear that the case was submitted to the jury on the theory of negligence and that negligence was found by the jury to be present.

The opinion of the Court of Appeals devotes one paragraph to the issue of whether liability in blasting cases is founded on strict liability or on a finding of negligence. There are five citations of authority. Three of these are not in point, and are of no help in resolving this issue. *Thompson, Negligence* (1880) 113 deals with the problem but is not conclusive. The only decisive authority cited is *Colton* v. *Onderdonk,* 69 Cal. 155, 10 P. 395 (1886) which has been a leading American case for the past seventy-five years. With apparent approval of the holding in that case, the Virginia court said:

> *Colton* v. *Onderdonk,* 69 California, 155, says that blasting on a lot contiguous to another is an unreasonable, unusual and unnatural use of property, which no care or diligence can excuse from actual damages; and that the defendant was mistaken in supposing that, if he used care and skill, he had a right to do an act which was intrinsically dangerous, and would, necessarily, probably, or naturally, result in damages. 86 Va. 494, 499.

At this point in the opinion one would conclude that the Virginia court had adopted the rule of strict liability, which is the unanimous view elsewhere. However, the court continued:

> A simple and inexpensive device, easily handled, and which had been previously used by Welch, their predecessor, would have saved Mrs. McConnell's life. All that defendants need to have done was to cover the blast with some timbers. 86 Va. 494, 499.

This last statement would indicate that the court had adopted the view requiring the proof of negligence. These two statements, however, are not necessarily in conflict. Perhaps the court felt that strict liability should be the rule but, since the defendants were obviously negligent, *a fortiori* the finding of liability should be affirmed. The court might have had this in mind when it stated that the instructions given were "in the most favorable light for the defendants". While negligence was present in this case, it may be noteworthy that nowhere did the court say negligence was necessary.

This question was not again presented to the Court of Appeals until sixty-four years later in *Pope* v. *Overbay,* 196 Va. 288, 83 S.E. 2d 365 (1954). Plaintiff alleged that damage had been caused to his buildings by vibrations set up by defendant's blasting operations in his nearby quarry. The defendant denied that the alleged damage resulted from the blasting in his quarry. The trial court submitted the case to the jury under an instruction of strict liability. The jury found for the defendant. The Court of Appeals agreed that:

> It was for the jury to say, in the light of all the evidence, whether the damage of which the plaintiff complains was attributable to vibrations from the defendant's blasting operations. Having decided the clear-cut issue in favor of the defendant, their verdict should not [be] disturbed. 196 Va. 288, 294, 83 S.E. 2d. 365, 368.

Having disposed of the case on the factual issue of causation,

the Court of Appeals found it unnecessary to pass on the correctness of the trial court's instruction on strict liability. Thus, the uncertainty of the earlier case continued.

The most recent case involving liability for blasting came before the court in *Young and Sons* v. *Kirk*, 202 Va. 176, 116 S.E. 2d 38 (1960). Again, damage to buildings was claimed as a result of vibrations set up by blasting operations. The plaintiff had deeded a part of his land to the state for highway construction and the deed of conveyance also "released all claims for damage incurred in construction of the highway except that caused by negligence". 202 Va. 176, 181, 116 S.E. 2d 38, 42. The trial court, therefore, properly instructed the jury that proof of negligence was essential to plaintiff's recovery. On appeal the court recognized the conflict in decisions as to whether or not liability may be imposed for damage caused by vibrations from blasting irrespective of negligence, and then, giving as a reason the release provisions of the deed, the court said:

> Here we need not and do not determine whether liability for damages resulting from blasting may be incurred irrespective of negligence. 202 Va. 176, 181, 116 S.E. 2d 38, 42.

Of course, this case does not hold that liability in blasting cases is based on negligence rather than on strict liability. The court held that the evidence was insufficient to sustain the allegation of negligence.

Simmons and Winch has not been overruled by or cited in any subsequent blasting case though it was cited in the briefs of counsel in both *Pope* and *Young and Sons*. The basis of liability for injury or damage caused by blasting seems to be an open question in Virginia. How should the court decide between the competing views when the next case arises? It should adopt the rule of strict liability,—if that is not already the Virginia law. The writer submits that, on authority and reason, the rule of strict liability is the better view, and that it should be applied where the injury or damage is caused by vibrations as well as by tangible objects.