Supreme Court of California, in Bank.
SUMMERS
v.
TICE et al.
L. A. 20650, 20651.

Nov. 17, 1948.
Rehearing Denied Dec. 16, 1948.

Gale & Purciel, of Bell, Joseph D. Taylor, of Los Angeles, and Wm. A. Wittman, of South Gate, for appellants.

Werner O. Graf, of Los Angeles, for respondent.

CARTER, Justice.

Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and ****2** face as the result of bring struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 1/2 size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to 'keep in line.' In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

First, on the subject of negligence, . . . [t]here is evidence that both defendants, at about the same time or one immediately after the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court. * * *

* * *

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tort feasors, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries—the shooting by Tice or that by Simonson. * * *

Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and 'That as a direct and proximate result of the shots fired by defendants, and each of them, a ****3** bridshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip.' * * * It thus determined that the negligence of both defendants was the legal cause of the injury—or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from

one or the other only.

It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could have caused the injury. * * * *Oliver v. Miles*, Miss., 110 So. 666 * * * . The same rule has been applied in criminal cases * * * , and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person. * * * These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept and the more reasonable basis appears in *Oliver v. Miles*, supra. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated * * * : 'We think that * * * each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.*' (Emphasis added.) 110 So. p. 668. * * * Dean Wigmore has this to say: 'When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. * * * The real reason for the rule * * * is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ****4** ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert. * * * ' Wigmore, Select Cases on the Law of Torts, sec. 153. * * *

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. * * *

The foregoing discussion disposes of the authorities cited by defendants * * * stating the general rule that one defendant is not liable for the independent tort of the other defendant, or that ordinarily the plaintiff must show a causal connection between the negligence and the injury. * * *

* * *

****5** Cases are cited for the proposition that where two or more tort feasors acting independently of each other cause an injury to plaintiff, they are not joint tort feasors and plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each. * * * In view of the foregoing discussion it is apparent that defendants in cases like the present one may be treated as liable on the same basis as joint tort feasors, and hence the last cited cases are distinguishable inasmuch as they involve independent tort feasors.

In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of [the] defendants to absolve himself if he can—relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to

redress. The wrongdoers should be left to work out between themselves any apportionment. * * * Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independant tort feasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not a position to complain of uncertainty. * * *

* * * We have seen that for the reasons of policy discussed herein, the case is based upon the legal proposition that, under the circumstances here presented, each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

END OF DOCUMENT