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L.A. 20651

In the District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

CHARLES A. SUMMERS,

Plaintiff,

vs.

HAROLD W. TICE and ERNEST SIMONSON,

Defendants.

No. 16002.

CHARLES A. SUMMERS (plaintiff) and ERNEST SIMONSON (defendant),

Respondents,

vs.

HAROLD W. TICE (defendant),

Appellant.

No. 16005.

CHARLES A. SUMMERS (plaintiff) and HAROLD W. TICE (defendant),

Respondents,

vs.

ERNEST SIMONSON (defendant),

Appellant.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY
HON. JOHN A. HOLLAND, JUDGE.

BRIEF OF RESPONDENT SUMMERS.

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TOPICAL INDEX

PAGE

Statement of facts 2

Statement of questions involved 4

Argument 5

Question No. I. Where two hunters, in pursuit of a common purpose, in the presence of each other, negligently fire shotguns loaded with identical birdshot, in the general direction of a third hunter, whose presence and whereabouts are known to both, are they jointly and severally liable for the resulting injury, although it cannot be definitely determined whose birdshot actually pierced the third hunter's eye? 5

Question No. II. Does it constitute contributory negligence, as a matter of law, for a hunter to separate himself from a hunting party, where he keeps the other members of the party advised of his whereabouts and remains within their vision? 11

Conclusion 12

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Benson v. Ross, 106 N. W. 1120, 143 Mich. 452	7
Boston A. & R. Co. v. Shanly, 107 Mass. 568	10
Boyd v. Oddous, 97 Cal. 510	11
Brown v. Thayer, 212 Mass. 392, 99 N. E. 237	9
Buchel v. Gray Bros., 115 Cal. 421	11
Carraher v. San Francisco Bridge Company, 100 Cal. 177	11
Frazzini v. Cable, 114 Cal. App. 444	5
Glueck v. Scheld, 125 Cal. 288	5, 11
Martin v. Farrell, 72 N. Y. Supp. 934	9
McLellan v. St. Paul M. & M. Ry. Co., 58 Minn. 104	9
Oliver v. Miles, 110 So. 666, 144 Miss. 852, 50 A. L. R. 357	6, 7, 8
Reg. v. Salmon (Eng.), L. R. 6 Q. B., Div. 79	8
Reyher v. Mayne, 10 P. (2d) 1109, 90 Colo. 586	7
Rudd v. Byrnes, 156 Cal. 636	5, 11
Ushirohira v. Stuckey, 52 Cal. App. 526	10

TEXTBOOKS

5 American Law Reports, p. 609	8
68 Corpus Juris, p. 74, par. 87	6
4 Restatement of the Law of Torts, p. 438, par. 876	8

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Appellant.

BRIEF OF RESPONDENT SUMMERS.

Statement of Facts.

Plaintiff and the two defendants were hunting near Welton, California. [Rep. Tr. p. 15, lines 12-16.] In the late afternoon, they came upon a place very similar in contour to the Hollywood Bowl. [Rep. Tr. p. 16, line 1.] There were no other parties hunting in the immediate vicinity at the time. [Rep. Tr. p. 21, lines 7-11.] The defendants were located at the bottom of a hill and plaintiff was at the top. [Rep. Tr. p. 16, lines 6-10.] Plaintiff had informed the defendant Simonson he was going up to the top of the hill. [Rep. Tr. p. 67, lines 1-2.] At the time of the shooting hereinafter mentioned, defendant Tice was facing the plaintiff. [Rep. Tr. p. 91, line 3.] All had agreed that there would be no shooting unless a bird was in the air and all knew they were in the clear. [Rep. Tr. p. 73, lines 10-12.] Defendant Tice was shooting a Winchester 12-gauge pump gun and defendant Simonson was shooting a 12-gauge Remington pump gun. [Rep. Tr. p. 71, lines 17-22.] Plaintiff had on a red hunting hat. [Rep. Tr. p. 89, line 11.]

Just before the accident in which plaintiff was hit, the defendants had changed their ammunition from No. 6 to No. 7½ shot. [Rep. Tr. p. 168, lines 12-16.]

While the parties were in a somewhat triangular position, plaintiff at the top of the hill, sitting on a rock two or three feet high [Rep. Tr. p. 26, lines 9-15], and the defendants at the base of the hill some 70 yards distant [Rep. Tr. p. 27, lines 13-17], a bird arose, concerning which the defendant Tice testified:

"I had had the bird flush out from back of me, and I whirled, I was hunting away from Mr. Summers and I whirled to see where this bird was, and that made me face right towards Mr. Simonson and Mr. Summers, made me look facing right towards them." [Rep. Tr. p. 90, line 26, to p. 91, line 4.]

The bird was flying about ten feet off the ground. [Rep. Tr. p. 96, line 11.] The plaintiff, while facing both of the defendants, with his body erect [Rep. Tr. p. 47, lines 10-16], heard two shots simultaneously and received a pellet wound in the right eye and one in the upper lip. [Rep. Tr. p. 16, lines 14-20.] The two shots heard by the plaintiff did not come from the same gun. [Rep. Tr. p. 51, lines 11-14.] Mr. Simonson testified concerning the shooting: "Mr. Tice fired first and I fired right after him." [Rep. Tr. p. 61, line 24.] He further testified that from the position in which Mr. Tice was standing and the direction in which he was shooting, it would be possible for a pellet of his to have struck Mr. Summers [Rep. Tr. p. 207, lines 18-24]; that he could not say whose shot struck Summers. It might have been the shot of either Simonson or Tice. [Rep. Tr. p. 200, lines 1-7.] At the time of the shooting, Mr. Tice's gun was pointed in the general direction of the side of the hill where plaintiff, Summers, was located. [Rep. Tr. p. 179, lines 6-9.] Tice, himself, testified that Summers "was on top of the rock prior to the last shot." [Rep. Tr. p. 96, lines 3-4.] As the result of the shooting, it was necessary to remove the right eye of plaintiff. [Rep. Tr. p. 5, lines 4-5.]

Statement of Questions Involved.

In the opinion of the writer of this brief, there are only two questions involved on this appeal, as follows:

I.

Where two hunters, in pursuit of a common purpose, in the presence of each other, negligently fire shotguns loaded with identical birdshot, in the general direction of a third hunter, whose presence and whereabouts are known to both, are they jointly and severally liable for the resultant injury, although it cannot be definitely determined whose birdshot actually pierced the third hunter's eye?

II.

Does it constitute contributory negligence, as a matter of law, for a hunter to separate himself from a hunting party, where he keeps the other members of the party advised of his whereabouts and remains within their vision?

ARGUMENT.

Question No. I.

Where Two Hunters, in Pursuit of a Common Purpose, in the Presence of Each Other, Negligently Fire Shotguns Loaded With Identical Birdshot, in the General Direction of a third Hunter, Whose Presence and Whereabouts Are Known to Both, Are They Jointly and Severally Liable for the Resulting Injury, Although It Cannot Be Definitely Determined Whose Birdshot Actually Pierced the Third Hunter's Eye?

It has been found by our Supreme Court that "One who causes injury to another by discharging a firearm must, in order to excuse himself from liability, show that he was absolutely without fault."

Rudd v. Byrnes, 156 Cal. 636;

Frazzini v. Cable, 114 Cal. App. 444.

The trial court properly found both defendants "guilty of gross negligence in firing a gun in the general direction of plaintiff, knowing full well the place where the said plaintiff was located." [Clk. Tr. p. 16, lines 20-23.] Counsel for appellant Tice do not argue the insufficiency of the evidence of negligence and discover no prejudice in the finding of gross negligence. (See Opening Brief of appellant Tice, p. 19.) Counsel for appellant Simonson do not argue with particular zeal that Simonson was not guilty of negligence.

In *Glueck v. Scheld,* 125 Cal. 288, our Supreme Court said:

> "A party who is engaged in manipulating a loaded pistol should use great care in such manipulation; and

> the fact that this pistol was pointed in the general direction of the deceased, with knowledge of defendant that it was loaded with the further knowledge by him of the location of the deceased at that time, and in view of the further fact that it was being manipulated in a manner which was likely to cause it to be fired, are matters which taken together are amply sufficient to stamp the conduct of the defendant as negligent to a great degree."

The only serious question involved is whether the Court was justified in holding the defendants jointly and severally liable, although only one particle of birdshot pierced the plaintiff's eye.

The question is one for which there seems to be no precise precedent in California.

The Supreme Court of Mississippi had occasion to decide the question in *Oliver v. Miles,* 110 So. 666, 144 Miss. 852, 50 A. L. R. 357. In that case the parties were engaged in hunting jointly and both fired across a public highway. One of the shots fired, struck a boy on the highway in the eye, resulting in its loss and necessitating its removal. The Supreme Court of Mississippi held that both parties were negligent; that they were in pursuit of a common purpose; that each did an unlawful act in the pursuance thereof, and that each was liable for the resulting injury to the boy, although no one could say definitely who actually shot him.

The subject generally is discussed in Volume 68, *Corpus Juris,* paragraph 87, page 74, under the heading "Several Liability and Negligence of Illegal Use, Sale, Gift, Loan

or Manufacture of Weapons," and more particularly under the subheading "Joint and Several Liability." It is there said:

> "Where several persons, while engaged in a joint enterprise or acting in concert, participate in the negligent or wrongful use of weapons, resulting in injury to another, all are jointly and severally liable, although it may be impossible to determine who inflicted the particular injury."

A number of cases are cited in support of this legal principle. I cite from the footnotes as follows:

> "Where men hunting together, both fired and injured a person on public highway, they were jointly and severally liable."

Oliver v. Miles, 110 So. 666, 144 Miss. 852, 50 A. L. R. 357.

> "Where three persons were acting in concert in shooting at a mark, using a rifle by turns, and were not only negligent in doing so but were violating a city ordinance, they were all liable as joint tortfeasors, and it was not incumbent on the plaintiff to prove which one of the three actually fired the shot which caused the injury."

Benson v. Ross, 106 N. W. 1120, 143 Mich. 452.

> "Where both defendant trespassers were acting in concert and both shot some of plaintiff's decoy geese, judgment was held properly rendered against both, although only one fired the shot that wounded plaintiff."

Reyher v. Mayne, 10 P. (2d) 1109, 90 Colo. 586.

"Reason for Rule—'To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.'"

Oliver v. Miles, 110 So. 666, 668, 144 Miss. 852, 50 A. L. R. 361.

I also find another case mentioned in 5 *A. L. R.* at page 609. It is an English case and denominated, in *Reg. v. Salmon,* L. R. 6 Q. B. Div. 79. The decision reads in substance as follows:

"The evidence showed that the three defendants had placed a target in a tree near a house, and were firing at it with a rifle. It appeared that the gun would probably have been effective at any distance up to a mile, and that the path of the bullet would cross three highways. Four or five shots were fired, one of which struck and killed a boy in a tree in his father's garden, nearly 400 yards from the target. Stephens, J., concurring with the court in the confirmance of judgment of manslaughter said: 'I am of the opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of everyone to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger.'"

In Volume 4 of *"Restatement of the Law of Torts,"* paragraph 876, page 438, we find the following illustration under the heading "Persons Acting in Concert":

"A and B are members of a hunting party. Each of them, in the presence of other, shoots across a public road at an animal, this being negligent as to per-

> sons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is liable to C."

The nearest analogy to the question involved in this case is that involved in cases where it is sought to hold persons engaged in racing upon the highway jointly liable for an injury caused by one of the racers.

In *Brown v. Thayer,* 212 Mass. 392, 99 N. E. 237, it was held that the owners of two automobiles, being driven at a negligent rate of speed and racing with each other, were jointly or severally liable for the death of a pedestrian who was struck by one of the automobiles, the Court saying:

> "The principle is settled by our decisions that where two or more tort feasors by concurrent acts of negligence which, although disconnected, yet in combination inflict injury, the plaintiff may sue them jointly or severally, although he can have but one satisfaction in damages."

In *Martin v. Farrell,* 72 N. Y. Supp. 934, several parties wrongfully turned certain horses into a field where another horse was pasturing. The latter horse was injured. It was held that all persons participating in the act were joint wrongdoers, and recovery might be had against one or all.

In *McLellan v. St. Paul M. & M. Ry. Co.,* 58 Minn. 104, two fires had been set, one by the defendant and one by another party. These fires apparently mingled and after their union destroyed plaintiff's property. Both defendant and the other party were held jointly liable.

In *Boston A. & R. Co. v. Shanly,* 107 Mass. 568, two substances manufactured by different manufacturers, dangerously explosive in combination with each other, were sent to a customer by a common carrier. While they were being transported, an explosion occurred, injuring the property of the plaintiff. It was held that the manufacturers were jointly liable to the plaintiff.

None of the cases cited by appellants herein are in point. All of them involve a situation in which the defendants acted independently of each other and there was no concert or unity of design between them.

In the case at bar, the acts of the defendants were concurrent as to time and place. The defendants were in pursuit of a common purpose, namely, to kill a single bird which had arisen between the parties. The defendants united together into setting into operation a single, destructive and dangerous force, namely, a hail of birdshot, emanating from two guns, which produced the injury. They breached a common duty owing by both, namely, the duty of exercising at least ordinary care, if not more than ordinary care, to prevent the infliction of injury.

The necessities of the case require that both be held liable for the damage suffered by plaintiff and respondent.

Ushirohira v. Stuckey, 52 Cal. App. 526.

Question No. II.

Does It Constitute Contributory Negligence, as a Matter of Law, for a Hunter to Separate Himself From a Hunting Party, Where He keeps the Other Members of the Party Advised of His Whereabouts and Remains Within Their Vision?

The trial court specifically found that the plaintiff was not guilty of contributory negligence. [Clk. Tr. p. 16, lines 23-25.] Both of the defendants had been advised of the whereabouts of the plaintiff. He was in plain view and wearing a red hat. [Clk. Tr. p. 18, lines 8-11.]

The question of contributory negligence was passed upon by the Court, upon conflicting evidence and reasonable inferences of fact, and the trial court's decision is conclusive.

Buchel v. Gray Bros., 115 Cal. 421;

Carraher v. San Francisco Bridge Company, 100 Cal. 177;

Boyd v. Oddous, 97 Cal. 510;

Glueck v. Scheld, 125 Cal. 288;

Rudd v. Byrnes, 156 Cal. 636.

Conclusion.

The complaint in this action specifically sets forth that the defendants, and each of them, simultaneously discharged a shotgun so carelessly, negligently and recklessly as to cause some of the birdshot to become lodged in plaintiff's eye, and that because of the carelessness and negligence of the defendants, and each of them, plaintiff suffered damage in the sum of $25,000.00. [Clk. Tr. p. 1, line 24, to p. 2, line 18.]

We believe the evidence amply sustains the finding of negligence, that it warrants a finding that plaintiff was not guilty of contributory negligence, and that under the law both defendants were held jointly and severally liable for the injury sustained by plaintiff.

Respectfully submitted,

WERNER O. GRAF,

Attorney for Respondent Charles A. Summers.

STATE OF CALIFORNIA, } ss.
County of Los Angeles. }

No.

Leonard C. Myers, being duly sworn, says: That he is a citizen of the United States, over the age of eighteen years, a resident of Los Angeles County, California, and not a party to the within cause; Affiant's business address is ~~405 So. Hill Street~~, Los Angeles, California; Affiant served copies of the attached document, to-wit:

124 West 4th St.

Brief of Respondent Summers 2nd Civil Nos. 16002-16005

upon each of the following named persons at the addresses set opposite their respective names, to-wit:

W. J. Purciel and G.M. Gale, 4459 Gage Ave., Bell, Cal.

Wm. A. Wittman, and Jos. A. Taylor, 8179 Seville Ave., South Gate, Cal.

by placing a copy thereof in envelopes addressed to each of the above named persons at their office addresses hereinbefore set opposite their respective names. Said envelopes were then each sealed and postage fully prepaid thereon and thereafter on Nov. 12, 1947 deposited in the United States Mails at Los Angeles, California. There is either delivery service by United States Mail at the place so addressed or regular communication by mail between the place of mailing and the place so addressed. Each of said addresses of said respective persons is the last address given by said persons upon any documents filed in this cause and served upon the party on whose behalf this service is made.

Leonard C. Myers

Subscribed and sworn to before me

this 12th day of November, 1947

Myra C. Knapp

Notary Public, in and for the County of Los Angeles, State of California.

The Myers Legal Press, Los Angeles, Phone MUtual 4961

Received copy of the within for the judge who tried the case this 12th day of November, A. D. 1947.

EARL LIPPOLD, *County Clerk.*

By L. L. Mutsu, *Deputy.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of November, A. D. 1947.

Affidavit of Service within