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*Harold W. Tice*

In the District Court of Appeal  
SECOND APPELLATE DISTRICT  
State of California

CHARLES A. SUMMERS,

*Plaintiff,*

vs.

HAROLD W. TICE and ERNEST SIMONSON,

*Defendants.*

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

*Respondents.*

vs.

HAROLD W. TICE (defendant),

*Appellant.*

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

APPELLANT'S OPENING BRIEF ON APPEAL  
OF HAROLD W. TICE, DEFENDANT.

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APPELLANT'S OPENING BRIEF ON APPEAL  
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## The Issues on This Appeal.

This is a case of a hunting accident.

The plaintiff's complaint alleges that on November 20, 1945, plaintiff and defendants were hunting quail on an open range near Welton, California, each being armed with a shotgun and that when the plaintiff was about 200 feet from the defendants, each of the defendants simul-

taneously discharged his shotgun negligently causing bird-shot to become lodged in the plaintiff's right eye and in the plaintiff's upper lip.

Plaintiff further alleged in paragraph V:

“That plaintiff is in doubt as to the person from whom he is entitled to redress and therefore has joined both defendants in this action with the intent that the question as to which of the defendants is liable, and to what extent, may be determined by this Court.” [Clk. Tr. p. 2.]

Plaintiff alleged that as a direct and proximate result of the negligence of the defendants and each of them he lost his right eye and was seriously damaged.

The allegations as to negligence were denied by the defendant Tice. The allegations as to negligence were also denied by the defendant Simonson.

In an amended answer the defendant Simonson set forth the contributory negligence on the part of the plaintiff.

The case was tried before a judge *pro tem.*, John A. Holland.

The judge failed to make any finding in conformity to the issue raised by the fifth paragraph of the plaintiff's complaint.

The judge found that the defendants were each armed with 12-gauge shotgun loaded with birdshot, size 7½. [Clk. Tr. p. 15, lines 5-7.]

The court found that the plaintiff and defendants placed themselves in a triangular position upon the hill and that each of the defendants knew of the whereabouts of the plaintiff. [Clk. Tr. p. 16, lines 2-7.]

The court found that the defendant Tice flushed quail which flew between the plaintiff and the defendants; that the defendant Tice shot at the quail in the direction of plaintiff and that Tice knew the plaintiff was in that direction and that defendant Simonson also shot at the quail. [Clk. Tr. p. 16, par. VIII.]

The court found each of the defendants guilty of gross negligence in firing a gun in the general direction of the plaintiff.

The court found the defendants and each of them were approximately 75 yards from the plaintiff at the time of the shooting; that the defendants and each of them went to where the plaintiff was and found that the said plaintiff had received *a birdshot pellet* in the right eye and *another birdshot pellet* in his upper lip. [Clk. Tr. p. 17.]

The court made the following finding:

“XIII.

That as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot 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.” [Clk. Tr. p. 17.]

“XIV.

That it was necessary to remove the right eye of plaintiff and the plaintiff did suffer great pain and was confined to the hospital at Sawtelle for a period of two days less than a month and also was confined to San Diego Hospital for a period of eighteen days and the Court finds that the said injuries suffered by the said plaintiff were the result of the gross negligence of the defendants, and each of them.” [Clk. Tr. pp. 16 and 17.]

The court concluded that plaintiff was entitled to a judgment of \$10,000 from each of the defendants and judgment was thereupon entered in that sum, from which this appeal is taken.

The amount of damages for loss of the eye was evidently the basis for the award and damage for the loss of the eye was included in the judgment against each defendant, although the loss of the eye could not have been caused by each defendant because as appears both from the evidence and the findings but *one pellet* entered the eye. It was, therefore, impossible both in law and in fact that defendants should both be liable for the loss of the plaintiff's eye. This was recognized by the pleader in drawing the plaintiff's complaint, but disregarded by the court.

The defendant Tice contends that the judgment must be reversed because of failure on the part of the court to make a specific finding on paragraph V as to which of the defendants is liable in this action, in that the evidence conclusively shows that plaintiff's eye was not destroyed by shots from each of the guns of the defendants, but only by one shot which could have been fired only by one of the defendants. The defendant Tice further contends that the evidence is insufficient to support a judgment against him, in that the evidence does not show that any shot fired by him, even if he negligently fired, proximately resulted in any injury to the plaintiff's eye, and finally the defendant contends that the judgment cannot be sustained, because of the failure to find the amount of the damage resulting from the alleged negligent act of the defendant Tice separately from the amount of the damage resulting from the negligent act of the defendant Simonson.

To put the question raised on this appeal in a little different way; it is the contention of the defendant Tice that the evidence conclusively establishes the injury to plaintiff's eye was caused as the result of a shot fired by one only of the two defendants and that this issue was presented to the court by the pleadings and that since the court did not determine this issue, the judgment against this defendant was erroneously entered and that the evidence is so conjectural and speculative as to whether this appealing defendant caused the loss of plaintiff's eye that the judgment against this defendant is wholly unsupported by the evidence and must be reversed.

#### The Evidence.

The plaintiff's surgeon testified that he removed one birdshot from the plaintiff's lip. [Rep. Tr. p. 4, line 24.]

He testified that there was a small shot in the plaintiff's eye. [Rep. Tr. p. 5, line 3.] The pellet in the eye penetrated above the pupil near the center. [Rep. Tr. p. 11, lines 17-21.]

The plaintiff testified that the shot removed from the eye was delivered to him. [Rep. Tr. p. 30, lines 6-8.] He testified that the shot taken out of the eye looked to him like a 6 or 7½.

The pellets were handed to plaintiff in a piece of cotton with a piece of gauze wrapped around it. [Rep. Tr. p. 32, lines 5-7.]

The plaintiff was unable to produce these pellets at the time of trial. He said he could not find them when he looked for them at his home. [Rep. Tr. p. 135, line 23, to p. 136, line 7.]

Plaintiff said that if he had 7½ or 8 lying side by side he could tell them apart. [Rep. Tr. p. 30, lines 7-17.] A 6 shot is larger than a 7 or 8. The smaller the number the larger the shot. He did not ascertain the size of the shots after they were handed to him by the doctor. [Rep. Tr. p. 31, lines 20-24.]

Plaintiff had both 7½ and 6 size shot. [Rep. Tr. p. 32, line 15.]

The defendant Tice testified that Simonson was shooting a No. 8 low base shell while he was shooting a Peters High Velocity 6. [Rep. Tr. p. 70, lines 14-21.]

Roy Weatherby, a student of ballistics and an expert on firearms, called by the defendant Tice, testified that a No. 6 shot weighs 1½ grains, No. 7½ shot weights one grain and No. 8 shot weighs almost ⅞ of a grain. [Rep. Tr. p. 145, line 16, to p. 146, line 4.] The heavier the pellet the farther it will travel. That the 7½ and 6 are so close in weight that the difference in distance is negligible. [Rep. Tr. p. 146, lines 17-20.]

The defendant Simonson said that as nearly as he could remember all of the hunters changed from a No. 6 to 7½ pellet when they started to hunt the birds. [Rep. Tr. p. 168, lines 17-20.] He also said definitely that he was using No. 7½. [Rep. Tr. p. 188, line 7.]

The plaintiff admitted that he did not remember the makes or names of any kinds of shells that were used by hunters other than himself. On this point he testified as follows:

“Q. By Mr. Gale: The point, Mr. Summers, was that each of the defendants, and yourself included, had different makes of shells, is that right? A. That I couldn't say positive, all I know is the size and the

kind of shells that I had, and I just faintly remember that some of them were different velocities shells that they talked about. I don't remember distinctly in my mind of having noticed any particular differences in the makes of them." [Rep. Tr. p. 59, lines 9-17.]

The plaintiff's testimony as to how the accident happened was as follows:

"A. Yes, that morning, why we could not hunt until 10 o'clock and we had got up there in the hunting ground around I would say 8:30, and we drove around looking at the prospective places where the birds might be, and while we were waiting for the season to open, why I mentioned to Mr. Tice and Mr. Simonson that the cover there was rather thick in spots and we should be very careful about shooting through the brush, and that none of us should shoot unless we saw a bird in the air; and we had hunted various spots there that morning, and I think about 4 o'clock in the afternoon we came upon a place very similar to this Los Angeles bowl in the contour of the terrain, I would say, and we discovered in there approximately 50 birds, quail, and after we had scattered them and got them, each one of us had two or three birds apiece, we started hunting out the singles, and Mr. Tice and Mr. Simonson were down near the base of the hill, and I walked up in a kind of curved direction toward the top, or in that direction, and we were all shooting, birds were flying every direction, and I had sat down for a moment, a kind of rest after climbing up the hill, and the birds were coming up my way, I got up and walked I imagine about 25 feet or so from where I was sitting, and I had been looking in a general direction at Mr. Tice and Mr. Simonson, but there was a bird coming that way, and I heard two shots almost together, simultaneously, and I got shot in the eye, in the face.

Q. Which eye? A. In the right eye, and one in the upper lip, near the center."

On cross-examination by counsel for the defendant Tice, plaintiff testified that he was a poor judge of distance; that the distance between him and Tice was probably between 60 and 70 yards. It "could have been closer, I don't know." [Rep. Tr. p. 24, lines 16-18.] He said that 20 minutes before he was shot he had met Simonson and told him that he was going up on the hill. [Rep. Tr. p. 25, lines 6-9.]

The plaintiff said that he saw the defendants before he was shot but could not determine which direction they were going; that he was 20 or 30 feet higher than they were. [Rep. Tr. p. 26, line 25, to p. 27, line 12.]

The plaintiff did not see the gun from which the shots came which hit him. [Rep. Tr. p. 28, lines 16-26.]

While the plaintiff was sitting on a rock (which was just before he was shot) there were some shots fired below but he could not tell by whom these shots were fired. [Rep. Tr. p. 29, lines 11-15.]

The plaintiff further testified:

"Q. Now you say you recall distinctly that you did not hear any shots immediately preceding the time you were injured? A. I said that I had been hearing shots, yes, we were all shooting, and I heard two shots simultaneously just as I felt this slug in my face.

Q. You did hear two shots just as you received the wound? A. They were pretty close together, it sounded like.

Q. You were looking in their direction at the time, weren't you? A. I was looking in that general direction.

Q. You could all see each other, 60 or 70 yards, you had clear vision? A. I could see them.

Q. Were you watching for birds, do you recall were you turned around? A. Yes, I was watching for birds, because there were birds flying all around there, and I don't know whether you ever hunted or not, but you can just at one glance get a general view of what is going on, you know that there are fellows down below you. If you see a bird coming towards you you are interested in that bird, because primarily that is what you are there for.

Q. You say you heard two shots just immediately preceding your injury, were you or were you not looking directly at Mr. Tice and Mr. Simonson at that time? A. I was looking in their general direction, yes.

Q. But you don't know which one fired either one of those shots, or both of them, is that it? A. If I had seen a gun pointing toward me I would have turned my head.

Q. How far apart would you say Mr. Simonson and Mr. Rice were at that time? A. Well, I can't say exactly, I could just give an approximation, I don't know, I would say probably maybe 50 feet, maybe further than that, I don't know.

Q. Were they moving, walking? A. We were always moving.

Q. Which direction were they going? A. I can't say which direction they were going, I don't know which direction they were going, if they were going away from me or toward me, all I know is I could see them down there." [Rep. Tr. p. 41, line 8, to p. 42, line 25.]

On cross-examination by counsel for the defendant Simonson the plaintiff testified that the brush was about waist high; that the rock was about one-fourth of the way to the top of the hill [Rep. Tr. p. 44, lines 5-17]; that he was about 25 feet from the rock and standing up when he was hit. [Rep. Tr. p. 50, lines 4-7.] That the defendant Tice had a pump gun and the defendant Simonson had a pump gun and only one shot at a time can be fired from a pump gun. [Rep. Tr. p. 51, lines 8 to 14.]

That he had been working back and forth on the hill probably one-half hour prior to his injury and was in full view of Mr. Simonson and Mr. Tice; he could see them. [Rep. Tr. p. 52, lines 18-23.]

In addition to the foregoing testimony which the plaintiff gave in his own behalf and the testimony of his doctor as to the nature of his injury, the plaintiff called defendants Simonson as his witness under Code of Civil Procedure, section 2055, who at that time testified only (1) that Mr. Tice fired his gun before the plaintiff called out that he had been hit and also the witness fired his gun before the plaintiff was shot, (2) that Mr. Tice fired first and the witness Simonson fired right after him, (3) that Mr. Tice was to the left of the witness and fired to the right and the witness fired straight ahead, (4) that the plaintiff was not within his vision at the time he fired.

A motion for a nonsuit was made and denied.

The defendant Tice testified that previous to the accident he had been working up through a draw; flushed a couple of birds, took a shot at them and looked for one of them that he had thought he had shot down. These two shots were in a direction away from the plaintiff. [Rep. Tr. p. 67, line 23, to p. 68, line 2.]

He described the events immediately before the accident as follows:

“A. Then I crossed this second draw and started to work down the edge of the hill, to look for the bird that I thought I had knocked down, and as I worked across this draw, the first thing I heard, I heard a bird fly out from under my feet, that I evidently had practically walked on, passed in the brush, and I turned around to see what these wings were, and I hollered down to Simonson, I said, ‘Ernie!’ and I showed him this bird as it sailed down, and I could not take a shot at that bird, because I would have had to shoot down hill, right into the face of Simonson.

Q. All right, what then? A. As the bird sailed down, the bird veered off to the right of Simonson, and Simonson took a shot at it. The bird veered over toward the edge of the hill, and as the bird flew past he whirled and took another shot up the side of the hill.

Q. When was the last time that you shot your gun just prior to the time the plaintiff was injured?

A. Approximately three to five minutes.

Q. Then what happened, after what you have related, what was the next thing you heard or saw?

A. When I whirled to see this bird that had flown out from under my feet, at that time as I turned, I was facing towards Simonson and towards Mr. Summers. At that time Mr. Summers was not in view. After Mr. Simonson had taken two shots at this bird, about that time Mr. Summers called down, I had come up in sight of this rock on the side of the hill, and he called down, he says, ‘Ernie, come and get me, I am shot!’

Q. You say Summers was not in view? A. At the time of the first shot.

Q. At the time of the first shot? A. No.

Q. The first shot by Simonson? A. That is right." [Rep. Tr. p. 68, line 4, to p. 69, line 12.]

The defendant Tice was specific that he only had Peters High Velocity shells. [Rep. Tr. p. 70, line 23.] He was shooting a 6. [Rep. Tr. p. 70, line 25, to p. 71, line 1.]

The defendant Tice testified to five conversations in which the defendant Simonson admitted that the shot which injured the plaintiff came from his gun. The first of these conversations was when the plaintiff was being taken back to the automobile from the place where he was injured. The second conversation was with Deputy Sheriffs in Mohave where the plaintiff was first given medical treatment. The third conversation was in the plaintiff's house. The fourth and fifth conversations were at the hospital. As there was a conflict in the evidence concerning these conversations we shall only state in detail the conversation which was in part admitted by defendant Simonson, which occurred at the Sheriff's office.

As to this conversation the defendant Tice testified as follows:

"A. When the two sheriffs came in, Mr. Williams said to me, he said, 'What's your name?' And I said, 'Well, I am not the man that shot him,' and he said, 'That makes no difference.' He says, 'In a case like this,' he says, 'we have to have the names of all parties concerned.' So I said, 'My name is Harold W. Tice and my address is 3359 Cudahy, Huntington Park.' Then he turned to Simonson and said, 'What is your name?' And he said, 'My name is,' and he gave his address, he said, 'Are you the man that shot him?' He says, 'Yes.' He said, 'Well, how did it happen?' He said, 'It was strictly a fluke hunting

shot accident, Tice flushed a bird from the draw, it flew down towards me, I took a shot at it, and as I whirled I shot up the hill, and my second shot hit Summers.' Then he turned to Summers and he said his name was Charles W. Summers and that his address was on National Boulevard. Then Roberts said to Mr. Williams, he says, 'Do you have all the information necessary to make the report?' And Mr. Williams said, 'Yes, I do,' and so they said, 'Well, as long as it is an accident, we have all that is necessary.'

Q. Did Mr. Summers hear all the conversation?

A. Yes, Mr. Summers heard all the conversation, and as I remember it, the sheriff asked Mr. Summers if that is how it happened. He said, 'It was strictly a hunting accident.'” [Rep. Tr. p. 75, line 21, to p. 76, line 19.]

As to the conversations with the Deputy Sheriffs, Edward J. Williams, a Deputy Sheriff, testified:

“The next party I asked was Mr. Simpson, or Simonson, and he gave me his name and address and told me that he was the one that had fired the shot, and that it was accidental. At that time I asked Mr. Summers what his name was and he gave me his name and address and I asked all three of the men at that time if that statement was correct, that it was an accidental shooting, and they said, 'Yes, sir.'” [Rep. Tr. p. 108, lines 3-10.]

This witness on cross-examination admitted that Simonson did not say, “I had shot him,” but that he had fired a shot. [Rep. Tr. p. 112, lines 13-22.]

On redirect examination he testified:

“A Mr. Simonson said that he was the one that had fired the shot.” [Rep. Tr. p. 113, lines 9-10.]

On recross-examination he said he was refreshing his recollection from his report.

Glenn Roberts, Deputy Sheriff, also testified that Mr. Simonson said "he was the one that shot the shot." [Rep. Tr. p. 116, lines 3-4.]

The report was not actually typed up by these deputies but was prepared in their office. [Rep. Tr. p. 118, lines 14-19.] The report was admitted in evidence as Plaintiff's Exhibit 1.

Defendant Tice testified that the plaintiff said, "We will try to keep in line and not shoot at any birds that weren't in the air, and that we knew that we were in the clear." [Rep. Tr. p. 93, lines 1-3.] He admitted that the parties were not in line at the time of the accident.

The defendant Simonson testified concerning the conversation with the deputies from the Sheriff's office, as follows:

"A. I would not recall which one talked to me. Mr. Roberts was the one, I believe it was Mr. Roberts that took my name, I am not certain of that.

Q. What did Mr. Roberts say, what did you say?

A. They went over to Mr. Tice first and started to ask his name, and Tice says, 'You don't want my name,' he says, 'I have not got nothing to do with this, I didn't shoot him.'

Q. Then what was said? A. So then he said, 'It doesn't make any difference, I have got to have your name,' so Tice gave him his name.

Q. Was there anything else said? A. The officer then came over and asked me my name and I gave him my name, and he said, 'Did you do the shooting?' And I said, 'I was there.' Mr. Tice said, 'Well, he is the one that shot him.'

Q. What did you say? A. I didn't say anything.

Q. What did Mr. Summers—was there any conversation with Mr. Summers? A. They took Mr. Summers' name, and Summers, about that time when Tice made that remark says, 'Well, it doesn't make any difference,' he says, 'it is an accident,' he said, 'there is nobody to blame.'" [Rep. Tr. p. 178, lines 1-24.]

He also testified:

"Q. Now, calling your attention to the time of the conversation between yourself and Officer Williams, did you at that time tell Mr. Williams that you shot Mr. Summers? A. I did not.

Q. What did you say? A. He asked me if I shot, if I was there and if I had done any shooting. I said, 'Yes.'" [Rep. Tr. p. 186, lines 3-9.]

Much of the transcript was taken up with testimony as to the conversations which we have mentioned and also as to whether or not the plaintiff was standing or sitting upon a rock at about the time he was shot and whether he had been engaged in disemboweling a rabbit. In no conversation shown by the testimony did the defendant Tice ever make an admission that he fired the shot which injured the plaintiff. In no conversation was he ever charged with so doing. We deem the testimony as to the conversations immaterial to any issue on this appeal. It is, however, important to state the testimony given by the defendant Simonson concerning the events immediately before and at the time of the accident and with a statement of this testimony we shall close our presentation of the evidence.

A conversation took place between the plaintiff and the defendant Simonson before the hunters arrived at the loca-

tion described by the plaintiff at the opening of the trial as a contour similar to the Los Angeles Bowl. In this conversation Simonson testified that the plaintiff was to go up around the hill and Simonson and Tice were to follow to stir up the birds; that Simonson waited until he saw the plaintiff on the location about six or seven minutes later. [Rep. Tr. p. 170, lines 13-26.]

While the plaintiff was standing on the rock Mr. Tice shot twice and the plaintiff hollered down that Tice did not get the birds. [Rep. Tr. p. 171, lines 6-16.]

Right after this the plaintiff got down from the rock and the birds arose to the right of Mr. Tice. [Rep. Tr. p. 172, lines 14-21.] He then described the accident as follows:

“A. That bird rose to the right of Mr. Tice and wheeled and come straight toward me.

Q. Where were you at that particular time? A. I was in my same position, right here (indicating). I had not moved, I was standing there smoking a cigarette, and the bird rose right in here and flew straight up toward me. Mr. Tice took one shot at it, I took the next shot at it, I cocked my gun for another shot and I remembered I was feeling around to where I had seen Mr. Summers the last time, and I held my fire, because I saw the rock but I didn't see Summers up there, so I held my fire until the bird got clear in this position, and fired only—fired one more shot and stood there, never moved, because I didn't get the bird, but as near as I can remember approximately three to five minutes, I heard Mr.

Summers holler down that he had been shot, to come on up here, and I hollered back to him, 'Are you kidding?' I could not believe who shot him, or how he could have got shot." [Rep. Tr. p. 172, line 23, to p. 173, line 14.]

According to the testimony of this witness the distance between each of the hunters was about 105 yards. [Rep. Tr. p. 175, lines 4-5.]

This witness also testified:

"Q. You heard the witness testify to the effect that you stated that you shot in the direction of Mr. Summers, but could not understand how any shot from your gun would strike Summers, did you make such a statement? A. I made that statement to Mr. Summers and Mr. Tice at one time.

Q. What did you say? A. We were debating as to who shot who, how he got shot. I said, 'Well, I can't see how I could have possibly shot you, because I didn't shoot in your direction.'" [Rep. Tr. p. 187, lines 7-16.]

On cross-examination by the attorney for defendant Tice, Mr. Simonson was asked whether he heard two shots in rapid succession when the plaintiff was near the rock. In this connection he testified:

"A. The three of them were fairly close together, the last shot was a delay shot, because I let the bird get clear out of line of any danger of shooting at anybody.

Q. Two close together and one a little time after that? A. That is right.

Q. By the Court: At the time Mr. Tice shot, was the bird in your view? A. Yes, your Honor.

Q. What was the approximate location of the bird at the time Mr. Tice shot at him? A. It was almost directly to the right of him.

Q. Show me on your diagram. A. Mr. Tice being down in here, the bird he flushed to the right of him I would say approximately 15 or 20 feet, the bird got up in the air and wheeled and come right toward me, so as the bird got up here Mr. Tice took one shot at it; the bird flew toward me so he didn't shoot the second time; the bird was coming to me and I fired directly; the bird wheeled, went up over this hill and I fired the second shot off in here (indicating).

Q. How far do you think the bird was from the rock at the time you fired? A. I would say close to 75 yards.

Q. Was it in line with the rock or do you know?  
A. Which shot now?

Q. The one that Mr. Tice fired. A. Well, Mr. Tice's position was practically part of a triangle, with the bird being right in the center here (indicating)."  
[Rep. Tr. p. 196, line 2, to p. 197, line 4.]

He testified that the plaintiff's level was 30 to 35 feet above Mr. Tice but the bird was 20 to 25 feet from the ground. [Rep. Tr. p. 198, lines 9 to 15.]

The defendant Simonson testified that when the plaintiff was shot the defendant Tice arrived at the plaintiff's side "very shortly, less than a minute, maybe a minute" after

Simonson himself had got there, having traveled about 100 yards [Rep. Tr. p. 204, lines 7-12]; he had steeper ground to go over.

The ballistic expert called by defendant Tice testified that in a No. 7½ shell there are 340 pellets and in a No. 6 shell there are 270; that at 100 yards there would be a 50 feet scatter of the pellets, the bulk, however, of the BB's being in the center of the scatter and this would mean that there would be 25 feet of scatter on each side of the center of the target. [Rep. Tr. p. 155, line 18, to p. 156, line 1.]

We have stated all of the evidence tending to show that the defendant Tice was negligent and that his negligence was the proximate cause of the injury to the plaintiff. While the preponderance of the evidence shows only an accident, yet, because of certain deficiencies of the record as to a determination of the direction in which the shots were fired, immediately before the injury, we have decided not to argue the insufficiency of the evidence of negligence on the part of the defendant Tice, and assuming the lesser is contained within the greater, we can discover no prejudice in the finding of gross negligence, although only at most ordinary negligence is shown. The insufficiency of the evidence as to any injury *proximately caused* by the negligence of the defendant Tice and as to the nature of that injury so caused leaves the judgment without support as to the defendant Tice and requires a reversal.

I.

**Failure to Find on an Issue Made by the Pleadings  
Which Is Necessary to Support the Judgment or  
Which Is a Defense to the Action Is Reversible  
Error.**

The pleading shows the defendants Tice and Simonson were not sued for a joint tort. It is alleged that the parties were all hunting quail, that the defendants had shotguns and that the defendants simultaneously fired their guns negligently so that some shot entered plaintiff's eye and upper lip. [Clk. Tr. p. 12, pars. II-IV.] The fact the acts occurred simultaneously does not make the tort a joint tort. The torts are as separate as though the guns had been successively discharged which in fact is what the evidence shows (even that of the plaintiff) happened. When two automobiles collide and a passenger is injured it is because of the fact the acts joined in the result which makes the acts a joint tort. This is the ordinary case of a joint tort. Where a condition is negligently created, and as a result of some second negligent act a party is injured, the party who created the condition as well as the second negligent actor are joint tort feasons because the conduct of each results in the injury. This is illustrated by the two cases of *Holahan v. McGrew*, 111 Cal. App. 430 and 443, in the first of which recovery was allowed against a contractor who had negligently constructed a canopy over the sidewalk so that a timber was displaced and injured the plaintiff, when a projecting portion of the canopy was hit by a bus, and in the second case the bus company was also held liable for the same injury. It was the concurrent effect of the negligent acts which caused the injury. Here the effect of defendant Tice's shots would have been the same, if shot at any other time.

It was not the concurrent effect, but the separate effect of the shots from the respective guns which injured the plaintiff.

Where there is no connection between successive torts injuring the same person, the torts are independent. This may be illustrated by the case of *Kraft v. Smith*, 24 Cal. (2d) 124, in which it was alleged that one defendant physician was negligent in his treatment on June 15, 1940, and another defendant physician was negligent on June 24, 1940, and the court, at page 130, said:

“Certainly neither defendant is liable for any injury caused by the independent tort of his co-defendant, to which he himself did not proximately contribute.”

The separateness of acts occurring almost, if not precisely, at the same time is illustrated by *California Orchard Co. v. Riverside Portland Cement Co.*, 50 Cal. App. 522, in which dust from California Portland Cement Co.'s mills, as well as dust from the defendant's mills, settled upon the plaintiff's orange trees and it was said at page 524 that the fact the dust commingled from the acts of the two parties did not make the defendant a joint tortfeasor with the California Portland Cement Company. X

The pleader in the present case recognized that he was pleading separate torts by his allegations in paragraph V. Whether he could have maintained in this action suit against both defendants under Code of Civil Procedure, section 427, without the allegations of paragraph V we do not have to determine, because paragraph V is a sufficient allegation to permit the defendants to be tried together. (See *Kraft v. Smith*, 24 Cal. (2d) 24, interpreting Code of Civil Procedure, section 379c.)

The allegations of paragraph V raised the issue as to *which* of the two defendants was responsible for the injury suffered by the plaintiff. The court did not decide that issue. The court found both defendants jointly liable for all the damages suffered by the plaintiff. For this error the judgment must be reversed.

The issue as to which defendant was liable is vital to the defendant Tice who contends that the shot which injured the plaintiff in the only substantial respect in which the court found the plaintiff was injured, namely, the loss of an eye [see Findings, Clk. Tr. p. 17, par. XIV], was fired by the defendant Simonson.

A judgment must be reversed for failure to find on a determinative issue.

*Wilcox v. West*, 45 Cal. App. (2d) 267 at 276;

*Edgar v. Bank of America*, 50 Cal. App. (2d) 827.

In *Hall v. Kaufman*, 30 Cal. App. (2d) 283, the judgment was reversed for failure to find on the issue of contributory negligence.

In *Krum v. Malloy*, 22 Cal. (2d) 132, the judgment was reversed for failure of the court to find on the essential issue of the driver's permission for the owner to operate his car.

Although the evidence showed the torts of the respective defendants were not joint, the court treated the case as though a joint tort had been both alleged and established and made findings accordingly. The court made no separate findings as to the negligent act of defendant Tice and the damage caused by his act. The court did not find which defendant put out the plaintiff's eye. For failure to find which defendant is responsible to the plaintiff for loss of his eye the judgment must be reversed.

II.

**The Evidence That the Defendant Tice's Negligence Proximately Caused the Injury to Plaintiff's Eye Is Wholly Speculative and Conjectural and Insufficient to Support the Judgment Against Him.**

Evidence that the act of a defendant caused the plaintiff's injury is necessary to support a judgment against that defendant.

In *Ross v. Railways Co.*, 47 Cal. App. 753, the court said "By proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out."

Where the plaintiff's case rests on circumstantial evidence the mere fact that the circumstances are consistent with the plaintiff's theory of the defendant's liability is insufficient; the circumstances relied upon, when weighed with the evidence opposed to them must have more convincing force to substantiate the plaintiff's theory so that it results from the evidence that the greater probability is in favor of the plaintiff who has the burden of proof.

Almost the exact language used in the last sentence is used in the case of *Albert v. McKay & Co.*, 53 Cal. App. 325, a case in which the plaintiff contended the decedent was killed after placing himself within dangerous machinery by the negligent starting of the machinery and the defendant contended that the machinery was in full operation when the decedent placed himself in the position of danger. The plaintiff relied upon a broken watch as showing that the machinery was not in motion when the decedent commenced his work. Holding that the proof was insufficient and for other reasons connection with the

violation of his duty by the decedent the court reversed a judgment for the plaintiff.

In *Chapman v. Title Ins. & Trust Co.*, 68 Cal. App. (2d) 745, the court said:

“In order to warrant a judgment for negligence the complainant must supply more proof than that which raises a conjecture, a suspicion, or a speculation that the alleged tortfeasor had committed a wrongful act.”

In *Prichard v. Southern Pacific Co.*, 9 Cal. App. (2d) 701, a judgment of nonsuit was affirmed because of lack of evidence to prove that the cause of the accident was the defendant's negligence. The deceased was a fireman on a locomotive and when the locomotive needed to take on water the deceased pulled the spout over a manhole in the tender by means of a hook, which he engaged in a ring dangling from the spout. The deceased was seen falling from the locomotive tender with his hands in the air and the hook was found by his side. When asked as to the cause of the accident he said, “The hook slipped.” The court said it might be inferred either that the deceased was using the hook to push the water spout or that the hook slipped from its position on top of the tender and the decedent fell to the ground in an effort to grasp it or that the decedent was leaning his weight on the hook when it slipped and precipitated him from the tender. Under these circumstances it was decided that the proximate cause of the accident was a matter of speculation and conjecture.

In *Osborne v. Imperial Irr. Dist.*, 8 Cal. App. (2d) 622, the minor daughter of the plaintiff was found drowned in a canal operated by the defendant and it was necessary for her in order to go to the house furnished to the plaintiff to cross a portion of the canal structure which had no guard rail, at least on the south side, but there was no evidence that the child fell as a result of this dangerous condition. In reversing a judgment for the plaintiff the court said:

“In the ordinary case, it is as necessary for a plaintiff to show that the defendant’s negligence was a cause of the injury as it is to show that the defendant was guilty of negligence and this element must rest upon proof and not be left to a mere surmise or guess.”

In *Christensen v. Los Angeles Electrical Supply Co.*, 112 Cal. App. 629, the decedent was run over by a Ford automobile after being knocked down by the defendant’s truck. The court pointed out that the decedent was the victim of two independent and totally distinct casualties. That the first did not set in motion the second and for a failure to show whether the decedent’s death was caused by the defendant’s truck or by the Ford automobile which subsequently run over the deceased, judgment for plaintiff was reversed.

In *Hernandez v. Southern California Gas Co.*, 213 Cal. 384, the defendant admitted that the plaintiff was injured as a result of an explosion of gas but contended that the gas which exploded was not the defendant’s gas. After

X reviewing the evidence the court concluded it could not decide that no negligence as a matter of law was shown. "However," says the court, "it is clear that the defendant's negligence was not shown to have been the cause of the injury." Judgment for the plaintiff was reversed.

Substituting "shot" for "gas" this case is very similar to the *Hernandez* case. There is no evidence that the single shot found in the plaintiff's eye was from the defendant Tice's gun.

In this case there was but a single pellet or shot found in the plaintiff's eye. If we were able to weigh the evidence, such as the testimony concerning the type of shot used by defendant Tice (size 6) and the type of shot used by defendant Simonson (size 7½) and the relative number of shots in each shell (270 in No. 6 and 340 in No. 7½), together with the evidence of the close proximity of time of the shots by Simonson to the injury of the plaintiff, together with the fact that Tice only fired one shot and Simonson fired two, together with the admission by Simonson that his shot was "the shot," we should argue that the defendant Simonson and not the defendant Tice was the one whose shot caused the injury to the plaintiff's eye. We may not do this on appeal.

But the plaintiff has not shown, as against the defendant Tice, any evidence that his shot rather than the shot from Simonson's gun was the shot which put out plaintiff's eye. The court has not found that it was Tice's shot which damaged plaintiff's eye and it is at least possible that the reason for the failure to so find was because

of lack of evidence. It would be impossible for the shot which put out plaintiff's eye to have come from both guns.

Since it is exactly as reasonable to infer from the evidence that the shot which destroyed the plaintiff's eye came from the defendant Simonson's gun as that it came from the defendant Tice's gun the plaintiff has not sustained his burden of proof as far as the defendant Tice is concerned, but has left the cause of the destruction of his eye to conjecture and surmise.

The fact that the plaintiff's eye must have been injured by a shot either from defendant Tice's gun or from the defendant Simonson's gun does not assist the plaintiff. We may show this by assuming there were ten hunters instead of only two and that all of the hunters fired their guns within a short time of an injury to the plaintiff, but that only one shot from one gun injured the plaintiff. If the course pursued by the court is proper, it would follow that all those who join in hunting are jointly and severally liable for the negligence of any of their number which results in an injury. This would make hunters liable for negligence merely from an association in hunting and would in effect result in making all hunters insurers against an accident to any one of their party. No authority for such result is to be found and it is contrary to common sense and the authorities.

So far as the defendant Tice is concerned the present judgment, resting as it does solely on conjecture and speculation as to whether Tice's shot destroyed the plaintiff's eye, must be reversed.

III.

**Where Separate Injuries Result From Acts of Independent Tort Feasors, the Damages Must Be Segregated Under Appropriate Findings and a Judgment Against Both for the Entire Damage Suffered by the Plaintiff Is Reversible Error.**

The court found that the plaintiff's eye was lost by the negligence of the *defendants*—both of them. This finding is utterly unsupported by the evidence. There was no dispute as to the fact testified to by the plaintiff and his doctor that a single shot penetrated plaintiff's eye. We have set forth, above, all the material evidence on this point. There was evidence that the plaintiff's lip was also injured by a single shot. Disregarding the speculative basis upon which any judgment against the defendant Tice is based, it is conceivable that the respondents (plaintiff and Simonson) may try to support the judgment on the theory that one shot was from Tice's gun and the other from Simonson's. It is to show the fallacy of such argument that we make the present contention.

The injury to the eye and to the lip have different consequences and the results are separable. The injury to the eye is so much more serious than to the lip that the court in its findings made no specific mention of the result of the lip injury in the findings.

The plaintiff is entitled to judgment against this defendant only for the injury caused by the negligence of this defendant. The finding that the eye was lost and that the lip was injured, each injury being caused by a single birdshot [Finding XIII, Clk. Tr. p. 17] requires a finding as to which defendant shot the shot which destroyed the eye and which defendant fired the shot which

injured the lip. A joint judgment against each defendant for separate damage caused by each defendant cannot be supported. This contention is supported by the authorities cited.

In *California Orchard Co. v. Riverside Portland Cement Co.*, *supra*, the court said that defendant was liable only for such proportion of the total damage resulting from the dust emitted by its plant and that of another company as was caused by its own acts.

In *City of Oakland v. Pacific Gas & E. Co.*, 47 Cal. App. (2d) 444 at 449, it was said:

“When several parties successively and independently contribute to a total damage, no recovery may be had unless the evidence shows what part of the damage each caused.”

See, also, *Slater v. Pacific American Oil Co.*, 212 Cal. 648, and *Wade v. Thorsen*, 5 Cal. App. (2d) 706.

The rule is applicable to personal injuries as well as property damage. See quotation from *Kraft v. Smith*, *supra*. See, also, *Cordi v. Garcia*, 56 Cal. App. (2d) 584.

In order to support a judgment against this defendant it will be necessary to have a finding made as to what damage was caused by this defendant's negligent act of shooting a gun. If the court should find that the shot which injured the plaintiff's eye was not from this defendant's gun, in view of the trivial injury to the lip, it is clear that a judgment for \$10,000 could not be sustained, even assuming a finding is also made that this defendant fired the shot which injured the plaintiff's lip. The absence of a finding that it was this defendant's shot which caused the damage to the plaintiff by reason of the loss of his eye requires a reversal of the present judgment.

Conclusion.

To sustain the present judgment would be to violate long settled rules of evidence and procedure. The defendant Tice was never called upon by the pleadings to defend himself from a joint tort. The issue against which the defendant was called to defend was the issue of whether he or the other defendant had injured the plaintiff and to what extent. To permit a judgment under the evidence in this case against this defendant for the sum of \$10,000 to stand would mean that, in a hunting case, the mere presence of the hunters named as defendants might create liability, however innocent of wrong these hunters might be. The fact a defendant is also present, among others, when a shot is fired which does injury, is certainly insufficient to establish liability. We respectfully urge that under the settled principles of law applicable to this case, the judgment in favor of the plaintiff and against the defendant Tice must be reversed.

Respectfully submitted,

JOSEPH D. TAYLOR and  
WM. A. WITTMAN,

*Attorneys for Defendant Harold W. Tice.*

AFFIDAVIT OF SERVICE BY MAIL

IN THE

DISTRICT COURT OF APPEAL

*Second* APPELLATE DISTRICT

STATE OF CALIFORNIA

*Charles A. Summers*  
Plaintiff

*vs.*  
*Harold W. Tice et al*  
Defendant

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } SS.

*Robert M. Parker Jr.*, being first duly sworn, deposes and says:  
That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for *Joseph W. Taylor*

who *is* the attorney for the *appellant* in this action; that this affiant is of the firm of Parker & Company, 241 East Fourth Street, who are the printers and agents in this matter for said attorney, and have their offices in the City of Los Angeles, State of California.

That on the *18<sup>th</sup>* day of *July*, 194*7*, affiant served the within *appellant's Opening Brief* on the *Surprentent* in this action, by placing a true copy thereof in an envelope addressed to the attorney of record for said *Respondent* at the business/residence address of said attorney, as follows: *Warner C. Quail, 912 W. 1st St., Los Angeles, Calif.*

*Walter E. Gage - Old City*  
and also served a true copy on \_\_\_\_\_

County Clerk of \_\_\_\_\_ County, at the county seat of said county, by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the place so addressed or there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me this *18<sup>th</sup>* day of *July*, 194*7*.

*Marquette L. Crupper*  
Notary Public,

In and for the County of Los Angeles, State of California.

My Commission Expires January 3, 1948.

Received copy of the within for the judge who  
tried the case this 18th day of July,  
A. D. 1947.

J. F. MORONEY, County Clerk.  
By W. M. Parker, Deputy.

Service of the within and receipt of a copy  
thereof is hereby admitted this 18th day of  
July, A. D. 1947.

affidavit Enclosed