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Liabilities of Joint Tort-Feasors

Bert Cornelius Fuller
Cornell Law School

T H E S I S

LIABILITIES OF JOINT TORT-FEASORS

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by

Bert Cornelius Fuller, A. B.

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C O N T E N T S

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Who are Joint Tort-Feasors.

It is a familiar doctrine that joint wrong-doers may be sued jointly, or severally and that one may be compelled to pay all the damages caused by their joint act. This is quaintly put by Littleton thus, "When divers doe a trespass the same is joynt or severall at the will of him to whom the wrong is done". (Coke upon Littleton, Butler & Hargreave's Notes, Sec. 376). At the time Littleton wrote, this rule was of comparatively easy application, since the interests of the business world were not so complex as now. The vast increase of corporations doing business in distant places, our easy means of communication enabling persons a thousand miles apart to be in constant communication, and the tremendous transportation of passengers and merchandise all tend to make the application of the rule difficult, in that it is often not easy to determine who are, and who are not joint wrong-doers.

The editor (73 Am. Dec. 137) lays down this rule for determining the question, "All persons who command, instigate, promote, encourage, advise, cooperate in, aid or abet the com-

mission of a trespass by another or who approve of it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass, and are each liable as principals to the same extent, and in the same manner as if they had performed the wrongful act themselves." This rule, while it covers all those cases in which the wrong-doer is p personally engaged in the trespass, does not help us in the border-line cases where the parties omit some duty whereby they become liable, or where each separately puts in motion someforce which subsequently combines with another and the combined forces are the proximate cause of an injury. But it is in these very cases that the real difficulty arises, in the words of the editor in (A.S.R. 250) "The only portion of the law upon the subject, about which there seems to be any difficulty or doubt relates to the cases in which a person has been injured by distinct negligent acts, or omissions, of which two or more persons were guilty, but who were not partners nor co-owners nor engaged in any common design or enterprise".

These border-line cases may be roughly divided into, perhaps two classes, first, where the parties fail in some duty, and thus become liable, and second, where the acts of the parties are separate and distinct when committed, but they sub-

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sequently combine and become proximate cause of the injury.

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Of the first class the case of Sim[illegible] v. Everson (124 N. Y. 319) is a very good illustration. The defendants in this case owned three lots in severality, and on these three lots three brick stores; the front of these stores consisted of one thick brick wall into which the partitions separating the stores were built. These stores were burned, and this front wall, about sixty feet high was left standing together with parts of the partition walls. Shortly after the fire this front wall began to bulge, and it continued so to do until it fell, and killed the plaintiff's intestate, who was passing along the street. The court held that the defendants were jointly liable.

In Klauder v. McGrath(35 Pa. St. 128) arising on a similar state of facts the court held the several defendants liable in the following language. "Where the keeping of the wall safe was a common duty, and a failure to do so was a common neglect, the rule often recognized in that when an injury has resulted from the concurrent negligence of several persons they are jointly responsible." See also Peckham v. Burlington (Brayt. Vt. 134)

The second class is illustrated by several well reasoned cases which may be divided into (a) those where the separate

and independent acts have united in putting some new force or agent into motion which has caused theinjury. (b) Where the separate and independent acts have created a condition which acted upon by a force of nature, has done harm. (c) Where the separate and concurrent acts of negligence of the parties together caused injury.

(a) Stone v. Dickinson (5 Allen, 29) well illustrates this division. Here nine different creditors separately got out writs, and gave them to the same officer and he, acting upon them arrested the plaintiff. The arrest was illegal, and upon the plaintiff suing the defendants the question came up whether they were jointly liable. The parties did not act in concert but the arrest and imprisonment was the result of the several writs which were sued simultaneously by the officer employed by each individual. The court held the defendants jointly liable, saying: "Pre-concert or knowledge is not essential to the commissionof a joint trespass. It is the fact that they all united in the wrongful act, or set on foot the agency by which it was committed, that renders them jointly liable to the person injured. (See also Colegrove v. New Haven & N.Y.& Harlem Ry. Cos. (20 N. Y. 492) for a dictum to the same effect.

(b)As an example I will cite Slater v. Mercereau (64 N. Y. 138), the facts of which were substantiall these. The de-

fendant was one of several contractors at work on a building adjoining the plaintiff's premises. One of the duties of the defendant was to put up a water-spout to carry the water from the roof to the sewer. This he did so negligently as not to accomplish its purpose. Another firm of contractors, Moore & Bryant, building the vault and sidewalk in front of the building, did this also very negligently. The result was that upon there coming a heavy rainstorm large quantities of surface water from the street and the roof of the building flowed over on to plaintiff's premises, soaked into the basement, where he had goods stored, and injured them.

It was found by the referee that the damages were caused by the negligent way in which the water-spout, and the vault and sidewalk, had been constructed. The question before the court was whether the defendant would be held for all the damages, and it was held in the affirmative. The court said?"It is true the defendant and Moore and Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, each contributing toward it, and although the acts were each alone and of itself might not have caused the entire injury, under the circumstances presented there is no good reason why each

should not be liable for the damages caused by the different acts of all. The water from both sources commingled together, and became one body concentrating at the same locality, soaking through the wall into plaintiff's premises and injuring plaintiff's property; and it cannot be said that the water which the defendant's negligence caused to flow upon the plaintiff's premises, and which became a portion of all whichcame there did not produce the damage complained of. The water through which each of the parties were instrumental in injuring the plaintiff was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it could be claimed that each caused a separate and distinct injury for which each one is separately responsible."

In Kansas City v. Slangstrom (36 Pac. R. 706) decided in 1894, the cause of action arose from two parties obstructing a stream, so that it over-flowed plaintiff's premises, and although they acted separately and independently, the court said "The acts of either one would have occasioned injury, and as both contributed in obstructing the stream a joint liability arises against them."

The test in all these cases for determining whether there is a joint liability or not seems to be the one adopted by the

court in Consolidated Machine Co. v. Keifer (134 Ill. 481), "Whether or not the negligence of each directly contributed in producing the injurious result."

The cases which lay down the doctrine, that where the separate and concurrent acts of the two or more parties cause a single injury to a third person those causing the injury may be held jointly or severally, have arisen outof collisions caused by the negligence of the servants of common carriers. Such was the case of Colegrove v. New Haven and Harlem Ry. Cos. (20 N. Y. 492) It was held in that case that the two companies were jointly liable, the court saying, "Had the collision set in motion a third body which in its movement had come in contact with, and produced the same evil to the plaintiff, no good reason can be assigned against their joint liability, such a case is in principle like the one under consideration."

The case of Cuddy v. Horn (46 Mich.596) was another case of colkision, plaintiff's intestate having been killed in the collision between two steamboats, the collision being caused by the negligence of those in charge of the steamboats. The court held that the proprietors of the two steamboats were jointly liable, and said in the course of the opinion,"An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The

injury done in the case resulted from the collision caused by the contemporaneous acts of the two separate wrong-doers, who not acting in concert yet by their simultaneous acts put in motion the agencies, which together caused the single injury, and for this the injured party could receive but a single compensation." Seein addition Grand Trunk Ry. Co. v. Cummings (106 U. S. 700).

The result of the cases summed up would seem to be this.

That aside from the cases where all are actively engaged in the joint commission of an injury, which cases are clear and cause no trouble, there are two classes of joint-tort-feasors:

First, where two or more persons are under a joint duty to perform some act, a failure to perform the same causing injury, will make those under the obligation, liable as joint tort-feasors.

Second, two or more parties are liable as joint tort-feasors, even though their acts when committed were entirely separate and distinct, if those acts united in putting some new force or agent into motion, or created a condition which acted upon by a force of nature has done harm, or the acts while separate and distinct were concurrent acts of negligence which together caused the injury, providing however, that that the acts so combined are the proximate cause of the inju-

ry complained of. Where, however, the several acts committed each give rise to a separate cause of action when done, but the results of these several torts unite, and as a consequence do further injury, then the partyes in fault cannot be held as joint wrong-doers, but each one is liable only for the damages which can be traced to the tort committed by him.

This is well brought out by the two cases of Chipman v. Palmer (77 N. Y. 51) and Little Schuylkill Navigation, Railroad and Coal Co. v. Richard's Administrator (57 Pa. St. 142) In Chipman v. Palmer the facts were these, the plaintiff was keeping a boarding house on the banks of a stream, there were also anumber of other hotels and boarding houses situated higher up on the stream.

These had been accustomed to empty refuse and sewerage into the stream, and as a result it became contaminated to such an extent as to bec ome a nuisance,. As a consequence a portion of plaintiff's boarders left. Plaintiff sued defendant, one of these who emptied sewerage into the stream for the whole damages caused by the loss of her boarders, urging that all who contributed to the fouling of the water were liable as joint tort-feasors. The court held that they were not joint tort-feasors saying the injury "was occasioned by the discharge of sewerage from the premises of the defendant and

other owners of lots into the creek, separately and independently of each other. The right of action arises from the discharge into the stream and the nuisance is only a consequence of the acts. The liability commences with the act of the defendant upon his own premises, and this act is separate, and independent of, and without any regard to the acts of others, the defendant's act being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act."

In Little Schuylkill Co. v. Richards the facts were as follows A number of mine owners had deposited coal dirt, and refuse from their respective mines, on the banks, and in the stream upon which Richards had his mill. This dirt, and refuse washed down filled the dam and destroyed the water power by which the mill was run. The judge in the court below charged the jury that,"If at the time the defendants were engaged in throwing the coal-dirt into the river about ten miles above the dam, the same thing was being done at the other collieries and the defendants knew of this, they were liable for the combined result of all the series of deposits from the mines above from 1851 to 1858", the period during which the dam was filled Upon appeal this charge was held erroneous, "The fallacy lies

said the court, "in the assumption that the deposit of the dirt by the stream in the basin is the foundation of the liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action rises upon the act of throwing the dirt into the stream, this is the tort while the deposit below is only a consequence. Therefore the liability began above with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. This tort was several when it was committed and it is difficult to see how it afterward became joint because its consequences united with other consequences. The reunion of consequences did not increase his injury. If the dirt were deposited mountain high by the stream his dirt filled only its own space, and it was made neither more nor less by the accretions."

In Blaisdell v. Stephen (14 Nev. 15) it appeared that the defendants had permitted waste water to flow from their respective premises into a natural slough or channel through which it finally reached plaintiff's drain ditch, and injured it upon a certain occasion. It was held that they were not joint tort-feasors because as the court said, "In this case the right of action arises, if at all, upon the act of allowing the waste water to run into the slough from the land of

the defendants. This is the tort. The damage to the drain ditch below is only a consequence." For further cases on the subject see Miller v. Highland Ditch Co. (87 Cal. 430), Bard v. Casey (26 Pa. St. 482), City of Detroit v. Chaffee (37 N. W. Rep. 882), Sellick v. Hall (47 Conn. 260) .

While at law in cases like Blaisdell and Stephens, and the other cases cited above, the defendants causing the consequential injury, cannot be sued as joint tort-feasors, yet there is abundant authority that they may all be joined as defendants in a suit in equity for the purpose of obtaining an injunction against them.

The Mining Debris Case (8 Sawyer , U. S. Cir.,628);

Hillman v. Newington (57 Cal. 56)

People v. Gold Run etc. Co. (66 Cal. 138);

Blaisdell v. Stephen (14 Nev. 17);

Goodyear v. Schaefer (57 Md. 1);

Thorp v. Brumfitt (8 L. R. Ch. App. 656);

Lamberton v. Mellish (L. R. 1894 3 Ch. 163).

C H A P T E R II.

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What amounts to a Satisfaction for a Joint Wrong.

This question becomes very important where the injured party wishes to proceed against several of the joint wrong-doers, or having sued one and finding him worthless wishes to get compensation from another.

The courts are all agreed that suit can be brought against all or any number of the trespassers, and prosecuted until the injured party has obtained satisfaction. But right at this point there is a wide divergence of opinion as to what constitutes satisfaction. The general doctrine in this country is at variance with the law as developed in England. The early cases in that country do not seem to be altogether clear on the point but the case of Brown v. Wootten (Cro. Jac. 73) started a line of decisions which established squarely the proposition that a judgment in an action against one of several joint tort-feasors is a bar to an action against others for the same cause, although such judgment remains wholly unsatisfied.

The grounds upon which these decisions have been placed are two in number, first on the ground of public policy to

prevent multiplicity of suits, and second the legal maxim, transit in rem judicatum, the cause of action is changed into matter of record, which is of a higher nature and the inferior remedy is merged in the higher"".

King v.Hoare,(13 Mees/ & Welsb. 493)

Brinsmead v. Harrison (L. R. 7 C. P. 547).

The English doctrine has never obtain much recognition in this country. In Livingston v. Bishop (1 Johns. 290) decided in 1806, Chancellor Kent after a thorough examination of the authorities held that Brown v. Wootton was not in accordance with the earlier English authorities and refused to follow it. He said,"If there can be but one recovery it is vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried may be used by way of plea puis darrien continuance to defeat the other actions that are in arrears. The more rational rule appears to be that where you elect to bring separate actions for a joint trespass you may have separate recoveries and but one satisfaction, and that the plaintiff may elect de melioribus damnis, and issue his execution accordingly; and that where he has made his election he is concluded by it, and that if he should afterwards proceed against the other defendants they should be relieved on payment of their costs."

In Sheldon v. Kibbe (3Conn. 214) Hosmer Ch. J., after discussinga and quoting from the opinion of Chancellor Kent in Livingston v. Bishop (supra) said, "The common law founded as it isupon reason, and allowing nothing that is nugatory much less that is pernicious, will sanction no inutility or absurdity. Now what can be more absurd than to authorize the pendency and proceeding of twenty separate actions against persons concerned in a joint trespass, and after the accumulation of vast expense to hold thatthe first judgment bars the other suits."

It remained after the decision of these two cases for the United States Supreme Court to complete the overthrow of the English doctrine in this country, which it did in the case of Lovejoy v. Murray (3 Wall. 1), after a thorough examination of the authorities both English and American, and in the following language: "If we turn from the examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment without satisfaction is no bar to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning." - - - - - - - - - - "We are therefore of the opinion that nothing short of satisfaction can make good

a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser who is not party to the first judgment."

The general American doctrine now is that different suits may be brought and prosecuted until the plaintiff obtains a real satisfaction. Osterhaut v. Roberts(8 Conn. 43)

Lovejoy v. Murray (3 Wall, 1);

Sheldon v. Kibbie (3 Conn. 214);

Livingston v. Bishop (1 J. R. 290).

But it is held in some few states that final judgment and execution or an order for an execution against one of several joint trespassers is a discharge of all the others.

Allen v. Wheatley (3 Blackf. 332);

Fleming v. McDonald (50 Ind. 278);

White v. Philbrick, (5 Me. 147);

Page v. Freeman (19 Mo. 421);

Boardman v. Aler (13 Mich. 77).

When, however, the injured party gives a release to one of several joint tort-feasors the universal doctrine is that all are discharged, this doctrine goes as far back as Littleton who says,"When divers doe a trespasse the same is joynt or severall at the will of him to whom the wrong is done, yet if he release to one of them all are discharged." (Coke upon Lit-

tleton, (Butler and Hargreaves' notes) 376)

Cocke v. Jenmor (Hob. 66);

Ayer v. Ashmead (31 Conn. 447);

Brown v. Marsh (7 Vt. 327);

Knickerbocker v. Culver (8 Conn. 111);

Ruble v. Freeman (2 Hun. & Humf. 38);

Spurr v. N. Hud. Ry. Co. (28 At. Rep. 528).

It seems that the proper method to pursue if a person wishes to settle with one tort-feasor without losing his rights against the other is to covenant not to sue, since the courts have held that this does not operate as a release.

Miller v. Fenton (11 Paige, 18)

Duck v. Mayeu (L. R. , Q. B. Div. 1892, Vol. 2)

C H A P T E R III.

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Can there be Indemnity between Joint Tort-Feasors?

It is a familiar maxim of the law that there can be no contribution or redress between joint tort-feasors. Declared for the first time in the case of Merryweather v. Nixon (8 T. R. 186) decided in 1799, it has been repeated over and over - again by the courts, and applied often blindly to facts which should never have come under the rule. The rule itself it seems to me is but an application of a general doctrine that where two parties arein pari delicto the court will not interfere to help either party but will leave them just where it finds them. This is well illustrated by the case of Atkyns v. Johnson (43 Vt. 78). The plaintiff in this action was publisher of a newspaper and brought the action upon an agreement in writing made by defendant, that if plaintiff would p publish in his newspaper an article entitled "A Jack at all trades exposed" the defendant would save him harmless from the consequence thereof. The article proved to be a libel, and the judgment was recovered against plaintiff for thepublication thereof, which judgment he was obliged to pay. It was held by the court that the parties were joint wrong doers, and that the agreement could not be enforced. Pierpont , C. F.,