2-1-1953

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case involving a parent seeing the negligent killing of her children, our court will allow recovery for such mental anguish and resulting illness of the parent.

JOHN RANDOLPH INGRAM

Torts—Independent Tort Feasors—Joint and Several Liability

A recent Texas decision1 has evidenced once again the difficulty which has faced the court over the years in deciding whether the acts of two or more wrongdoers are such as to make them jointly and severally liable for the damages resulting from their combined acts. There A, an oil company, and B, a salt water disposal company, negligently permitted their respective pipe lines, running adjacent to plaintiff’s land, to break on or about the same day. Salt water from B’s pipes and a salt water-oil mixture from A’s pipes flowed into a stream, thence emptying into plaintiff’s fishing lake, killing the fish and causing other damage. The court held the two companies liable jointly and severally as joint tort feasors although there had been no unity of purpose or design, and each had acted independently in conducting its business.

The cases presenting the problem of joint and several liability may be analyzed into two major categories: (1) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one being in itself insufficient to produce the injury, and (2) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one alone being sufficient to produce the injury.

The general rule applied to factual situations typifying the first category is that causes of action arising from the acts of independent tort feasors each of which inflicts some damage, absent concert of action and common intent, create no joint and several liability but each is responsible only for that portion of the injuries due to his negligence.2


With the exception of Kansas3 and Oklahoma,4 this rule has been most frequently applied by all jurisdictions in the pollution, diversion, obstruction, or flooding of a stream by various independent proprietors.5


of which the principle case is an example. The fact that it may be difficult to ascertain the damages caused by the wrongful act of each to the aggregate result does not affect the rule, or make anyone liable for the acts of others,\(^6\) the theory being that the uniting and mingling of the separate torts do not make them joint.\(^7\) However, the courts have, in this species of litigation, generally allowed such independent tort feasors to be joined in an equitable action for injunction although not for damages.\(^8\)

Some jurisdictions have made an exception to the general rule when the acts of the defendants, although separate and distinct as to time and place, culminate in producing a public nuisance which injures the person or property of another. Here tort feasors are held jointly and severally liable although they are not considered joint tort feasors.\(^9\) North Carolina has gone to liberal limits in applying this exception through an application of an implied concert of design doctrine whereby such independent tort feasors are held jointly and severally liable if they knew

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\(^{b}\) On the theory that it is not the injury but the wrongful act which creates liability see Dickens v. Yates, 194 Iowa 910, 188 N. E. 948 (1922); Johnson v. Fairmont, 188 Minn. 451, 247 N. W. 572 (1933).


\(^{d}\) West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879 (1904) (decided on the theory that if one places himself in opposition to the entire community by performing acts which in combination with the independent wrongful acts of others creates a public nuisance, he is in no position to assert he should not be held responsible except for the actual loss his acts have occasioned); Valparaíso v. Moffitt, 12 Ind. App. 259, 39 N. E. 909 (1895); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891). Contra: Tackaberry Co v. Sioux City Service Co., 154 Iowa 358, 132 N. W. 945 (1911) (holding such a distinction too fine to be made); Mansfield v. Brister, 76 Ohio St. Rep. 270, 81 N. E. 631 (1906); Mitchell Realty Co. v. West Allis, 184 Wis. 352, 199 N. W. 390 (1924).

However, where the negligence of a municipality and an individual combine to produce a danger to travelers on a public street, highway or sidewalk, there is generally joint and several liability. Hill v. Way, 117 Conn. 359, 168 Atl. 1 (1933); Waller v. Ross, 100 Minn. 7, 110 N. W. 252 (1907); Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502 (1925); Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548 (1899); Starcher v. South Penn. Co., 81 W. Va. 587, 95 S. E. 28 (1918). But see Brown v. Louisburg and Ponton, 126 N. C. 701, 36 S. E. 166 (1900).
or should have known that their independent acts would create a nuisance.\textsuperscript{10} The courts have also alleviated some of the harshness of the general rule by finding joint and several liability where the independent negligent acts of two or more persons combine to produce a single injury if it is impossible to apportion the amount of damage resulting from the individual acts.\textsuperscript{11} Likewise, the courts have generally held tort feasors jointly liable for libel,\textsuperscript{12} slander,\textsuperscript{13} assault and battery,\textsuperscript{14} and alienation of affections,\textsuperscript{15} provided that conspiracy or unity of purpose is alleged and proved.

In recent years a vast number of cases have arisen which involved injury to third persons or damage to their property due to the concurring negligence of drivers of automobiles—another instance where the negligence of one is not sufficient to produce the entire injury.\textsuperscript{16} Here also, the weight of authority has departed from the general rule by hold-

\textsuperscript{10} This point was discussed but not applied in Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); In Lineberger v. Gastonia, 196 N. C. 445, 146 S. E. 79 (1929), the leading case on this point in North Carolina, each defendant emptied sewage into a stream above plaintiff’s land. See also Moses v. Morgantown, 192 N. C. 102, 133 S. E. 421 (1926).


\textsuperscript{12} Howe v. Bradstreet Co., 135 Ga. 564, 69 S. E. 1082 (1911) (no joint liability where the libel of one is republished by another); Soubien v. Brown, 188 Ind. 554, 123 N. E. 802 (1919) (person who composes and reduces to writing a libelous article and publishes it or if another gets possession of it, either with or without his consent, and publishes it, such publication makes the original composer liable for all damages occasioned by the publication, the two being jointly and severally liable); Montgomery v. Dennison, 363 Pa. 255, 69 A. 2d 520 (1949).

\textsuperscript{13} Horn v. Russ, 72 Ariz. 132, 231 P. 2d 756 (1951); Yocum v. Husted, 185 Iowa 119, 167 N. W. 663 (1918); Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026 (1909); Rice v. McAdams, 149 N. C. 29, 62 S. E. 774 (1908); Blake v. Smith, 19 R. I. 476, 34 Atl. 995 (1896); Standsberry v. McKenzie, 192 Tenn. 638, 241 S. W. 2d 600 (1951); Kellar v. Jones, 63 W. Va. 139, 59 S. E. 939 (1907).

\textsuperscript{14} Glenn v. Chennowth, 71 Ariz. 271, 226 P. 2d 165 (1952); Dickson v. Yates, 194 Iowa 910, 188 N. W. 948 (1922) (distinguishes between the terms “concurrent” acts and joint” acts, the latter implying the idea of an intent uniting the parties in a common act or purpose). Acts may be concurrent with those of another, but with no unity of intent. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764 (1920); Schafer v. Ostmann, 148 Mo. App. 644, 129 S. W. 63 (1910) (based on the theory that assault and battery is a wilful tort); Garret v. Garret, 228 N. C. 530, 46 S. E. 2d 302 (1948).

\textsuperscript{15} Heisler v. Heisler, 151 Iowa 502, 131 N. W. 676 (1911); Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574 (1906). These courts distinguish between intentional and negligent torts.

\textsuperscript{16} These cases usually arise from two factual situations—a person is struck and injured as a result of the negligence of one driver and immediately thereafter is injured through the negligence of a second driver before he can be removed to a place of safety; or a passenger is injured in a collision between the car in which he is riding and a second vehicle—both drivers being negligent.
It is immaterial that the conduct of one driver was seriously wrongful while that of the other was mere negligence if the negligence of each was the proximate, concurring cause of the injury; for the negligence of one will not be allowed to exonerate the negligence of the other.\textsuperscript{18}

Unique fact situations have arisen in the second category of cases presenting the problem of joint and several liability, \textit{viz}, where the acts of two or more wrongdoers combine to produce a single injury, the act of one alone being sufficient to produce the entire injury. The general rule, however, appears to be that the tort feasors are jointly and severally liable since apportionment is usually impossible.\textsuperscript{19} The theory is that none of the wrongdoers should complain since he would have caused the same damage had the other defendants not been involved.\textsuperscript{20}

For example, the general rule has been applied in the few cases litigated involving the spread of fires originating through the separate negligent acts of two or more wrongdoers, the fires in the course of their spread combining to cause injury to the plaintiff's property.\textsuperscript{21} Here the parties have been held jointly and severally liable on the theory that if the defendant's negligence is a substantial and material factor in causing injury, then he is liable notwithstanding the fact that the negligence of the other with which his negligence combined would have caused the injury anyway.\textsuperscript{22}

\textsuperscript{17} Reed v. Mai, 171 Kan. 169, 231 P. 2d 227 (1951); Kapla v. Lehti, 225 Minn. 325, 30 N. W. 2d 685 (1948); Stark v. Turner 154 Neb. 268, 47 N. W. 2d 569 (1951) (passenger injured in a collision); Gelisme v. Vignale, 11 N. J. Super. 481, 178 A. 2d 602 (1951); Downing v. Dillard, 55 N. Mex. 267, 232 P. 2d 140 (1951) (passenger injured in a collision); Bechtler v. Bracken, 218 N. C. 515, 11 S. E. 2d 721 (1940) (passenger killed in a collision); Myers v. Southern Public Utilities Co., 208 N. C. 293, 180 S. E. 694 (1935) (pedestrian injured when two vehicles collided); West v. Collins Baking Co., 208 N. C. 526, 181 S. E. 551 (1935) (plaintiff's intestate struck and injured as a result of the negligence of the driver of a car, and while attempting to arise was struck and further injured by a truck driven by the co-defendant). See also White v. Carolina Realty Co., 182 N. C. 536, 109 S. E. 564 (1921).

\textsuperscript{18} See note 17 supra.

\textsuperscript{19} Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726 (1905) (nitroglycerin soaked into a floor causing an explosion, and at the same time a nearby wagon loaded with gunpowder exploded); Corey v. Havener, 182 Mass. 250, 65 N. E. 69 (1903) (two motorcyclists passed simultaneously on either side of a wagon, the noise frightening plaintiff's horses). See also Gendel, \textit{Torts: Concurrent But Independent Wrongdoers: Joint Liability for Entire Damages}, 19 CAL. L. REV. 630 (1931).


\textsuperscript{21} Anderson v. Minneapolis, 146 Minn. 450, 179 N. W. 45 (1920) (defendant's fire combined with a fire of unknown origin); McClellan v. St. Paul Ry., 58 Minn. 104, 59 N. W. 978 (1894) (defendant's fire combined with that set by another); Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239 (1913) (defendant's fire combined with that originating on property of third person); Cook v. Minneapolis, 98 Wis. 624, 74 N. W. 561 (1898) (defendant's fire combined with a fire having no responsible origin).

\textsuperscript{22} Anderson v. Minneapolis, 146 Minn. 450, 179 N. W. 45 (1920); McClellan v. St. Paul Ry., 58 Minn. 104, 59 N. W. 978 (1894).
In line with the general rule in this category the courts have generally found joint and several liability, in the absence of showing whose act caused the injury, where two or more persons are guilty of similar acts of misconduct one of which alone causes the injury. This question has arisen most frequently in instances where the wrongdoers were using firearms in the course of a hunting expedition or while otherwise engaged in the negligent use of the weapons.\textsuperscript{28} The theory of the holdings is not that they were acting in concert, but that to hold otherwise would be to exonerate both from liability although each is negligent and the injury resulted from such negligence.\textsuperscript{24}

An attempt has been made to extend the rule applied in the firearms cases in order to impose joint and several liability where there is but one single injury and one single act of negligence committed by the defendants, and the proof is not clear as to which is guilty of the single negligent act. In the few cases giving rise to this question the courts have held that there can be no joint and several liability but that it must be determined whose was the negligent act.\textsuperscript{25}

In conclusion, with regard to the positions which the courts have taken in the more common joint tort feasor situations, it seems that the area in which a more liberal attitude towards holding joint and several liability is most needed is in that class of cases illustrated by the Texas case,\textsuperscript{26} where the majority hold “separate liability” and thus impose the almost impossible task upon the injured party of proving the proportionate damage chargeable to each defendant’s act.\textsuperscript{27} Realizing that to place such a burden on the injured party is to leave him remediless, the Texas court has seen fit to break away from the majority in an attempt to substitute greater justice for precedent,\textsuperscript{28} and directly overrules the prior

\textsuperscript{28} Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948) (plaintiff and two defendants were hunting when the defendants shot at the same time in the plaintiff’s direction); Brown v. Thayer, 212 Mass. 392, 99 N. E. 237 (1912) (the defendants were engaged in racing their automobiles and passed one on each side of a wagon); Benson v. Ross, 143 Mich. 452, 106 N. W. 1120 (1906); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938) (action against one constable for shooting the plaintiff while he was fleeing where it was admitted that another constable also shot). Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926) (two hunters fired across the highway hitting a traveler).

\textsuperscript{24} See note 23 supra.

\textsuperscript{26} Louisville Gas & Electric Co. v. Nall, 178 Ky. 33, 198 S. W. 745 (1917) (question as to which defendant’s employees left a floor in a dangerous condition); Haley v. Calef, 28 R. I. 332, 67 Atl. 323 (1907) (a bridge connecting two towns, each town responsible for keeping its side in safe condition, was defective and caused plaintiff’s injury).

\textsuperscript{27} See note 5 supra.

\textsuperscript{28} “Our courts seem to have embraced the philosophy, inherent in this class of decisions, that it is better that the injured party lose all his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused. If such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter.” Landers v. East Texas Salt Water Disposal Co., 248 S. W. 2d 731 (Tex. 1952).
leading Texas case on this point. 29 It is submitted that if the acts result in separate and distinct injuries, then each wrongdoer should be liable only to the extent of the damage caused by his acts. But if the combined results, though absent concert of design, result in a single and indivisible injury, the liability should be entire. The true distinction should be made between injuries which are divisible and those which are indivisible. 30

R. DAPHENE LEDFORD

Trusts—Constructive Trust—Breach of Oral Agreement Between Persons in Confidential Relationship

In the majority of those American jurisdictions requiring trusts of land to be in writing to be enforceable, 1 mere refusal or failure of a grantee of land upon an oral trust to carry out the terms of the trust is not a sufficient basis for a constructive trust to prevent unjust enrichment. 2

Where, however, it is found that such a refusal or failure constitutes the breach of a confidential relationship between the grantee and the grantor, these courts have not hesitated to declare the grantee a constructive trustee. 3 In an A-to-B-for-A situation, B is said to hold on

29 Sun Oil Co. v. Robicheaux, 23 S. W. 2d (Tex. 1930).
30 Jackson, Joint Torts and Several Liability, 17 Tex. L. Rev. 399, 420 (1939).

1 About two-thirds of the American states have statutes similar to the seventh section of the early English Statute of Frauds. In at least two others, the trust section is assumed to be a part of the common law. The parol evidence rule or the contracts section has prevented enforcement of oral trusts in some of the remaining jurisdictions.

"However inequitable and morally apprehensible it may be that property conveyed upon an express oral trust should be retained in violation of the agreement, a trust may not, under those circumstances, be ingrafted upon a deed absolute in its terms, because if that were the rule deeds would no longer be valuable as muniments of title." Silvers v. Howard, 106 Kan. 762, 768, 190 Pac. 1, 4 (1920).

The leading case in the A-to-B-for-A situations is Patton v. Beecher, 62 Ala. 579, 593 (1878), in which the court said, "In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation." For similar view, see Reynolds v. Reynolds, 121 Conn. 153, 183 Atl. 394 (1936); Goff v. Goff, 98 Kan. 201, 158 Pac. 26 (1916); Henderson v. Murray, 108 Minn. 76, 121 N. W. 214 (1908); Brown v. Murray, 94 N. J. Eq. 125, 118 Atl. 534 (Ch. 1922); Kane v. Kane, 134 Ore. 79, 291 Pac. 785 (1930); Broadway Building Co. v. Salaña, 47 R. I. 263, 132 Atl. 527 (1926); Pacheco v. Mello, 139 Wash. 566, 247 Pac. 927 (1927).


In some jurisdictions, the rule that equity will raise a constructive trust upon the mere refusal of a grantee to perform an oral trust for the benefit of the grantor or a third person has been adopted by statute. See Uniform Trusts Act, § 16; N. C. GEN. STAT. § 36-39 (1950).

"The reason for the rule is that, when a person assumes a confidential relation-