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*Feb. 15, 16, 19.

*Oct. 2

DAVID COOK *(Defendant)* .....APPELLANT;

AND

ROBERT LEWIS *(Plaintiff)* .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Hunting accident—Jury's finding that plaintiff shot by one of two defendants but unable to say by which one—Whether finding of absence of negligence was perverse—Onus.

The respondent while hunting was shot in the face by bird-shot. The appellant and a member of his party of three hunters admitted discharging their guns in the vicinity practically at the same time but not at the same bird. Appellant's party had agreed to divide the bag evenly. The jury found that the respondent had been shot by one of these two hunters but were unable to say by which one. They also found that the injuries were not caused by the negligence of either. The action was dismissed by the trial judge but the Court of Appeal for British Columbia ordered a new trial.

Held (affirming the judgment appealed from) (Locke J. dissenting), that the finding of the jury exculpating both defendants from negligence was rightly set aside.

Per Rand J.: The jury should have been instructed that if the victim, having brought guilt down to one or both of two persons, could bring home to either or both of them the further wrong of having impaired his remedial right of establishing liability, then the legal consequence would be that the onus would be shifted to the wrongdoer to exculpate himself.

Per Estey, Cartwright and Fauteux JJ.: The proper verdict would have been reached had the jury been instructed that once the plaintiff had proven that he was shot by one of the defendants the onus was then on such defendant to establish absence of both intention and negligence; and that if the jury found themselves unable to decide which of the two shot the plaintiff, because in their opinion both shot negligently in his direction, both defendants should be found liable.

Per Locke J. (dissenting): Since neither of the defendants was liable for the negligence of the other, in the absence of a finding as to which of them had shot the plaintiff, the action was properly dismissed. Since the answers declared the inability of the jury to say which of the defendants had fired the shot which caused the injury, no question arose as to whether the finding that neither of the defendants had been negligent was perverse.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) setting aside the dismissal of the action by the trial judge and ordering a new trial.

(1) [1950] 4 D.L.R. 136.

*PRESENT: Rand, Estey, Locke, Cartwright and Fauteux JJ.

G. N. Shaver K.C. and *F. S. Cunliffe K.C.* for the appellant.

A. Leighton and W. G. Burke-Robertson for the respondent.

RAND J.:—I agree with the Court of Appeal (1) that the finding of the jury exculpating both defendants from negligence was perverse and it is unnecessary to examine the facts on which that conclusion is based.

There remains the answer that, although shots from one of the two guns struck the respondent, the jury could not determine from which they came. This is open to at least four interpretations: first, believing that only one discharge could have inflicted the injuries, they found it difficult to decide which testimony, whether that of Cook or Aikenhead, was to be accepted, the evidence of each, taken at its face, excluding guilt; or that the shots from both guns having been fired so nearly at the same time and to have been aimed so nearly at the same target, it was impossible for them to say which struck the eye: or that they were unable to say whether the situation was either of those two alternatives: or finally, that they were not unanimous on any one or more of these views.

It will be seen that there is one feature common to the first three: having found that either A or B had been the cause of injury to C, the jury declare that C has not satisfied them which of the two it was. It is then a problem in proof and must be considered from that standpoint.

A cause may be said to be an operating element which in de facto co-operation with what may be called environment is considered the factor of culpability in determining legal responsibility for damage or loss done to person or property. But in that determination the practical difficulty turns on the allocation of elements to the one or other of these two divisions of data. In considering the second and third possibilities in this case, the essential obstacle to proof is the fact of multiple discharges so related as to confuse their individual effects: it is that fact that bars final proof. But if the victim, having brought guilt down to one or both of two persons before the court, can bring home to either of them a further

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wrong done him in relation to his remedial right of making that proof, then I should say that on accepted principles, the barrier to it can and should be removed.

The Court of Appeal of England has laid down this principle: that if A is guilty of a negligent act toward B, the total direct consequences of that act are chargeable against A notwithstanding that they arise from reactions unforeseeable by the ordinary person acting reasonably; *Polemis* v. *Furness Withy* (1). In that case, the presence of benzine was known, but that a spark could occur in the fall of a plank into the hold sufficient to set off an explosion, although a potentiality of the total circumstances, was outside the range of anticipation; a falling plank might do some damage to the ship, but would not ordinarily be associated in the impact on wood or iron with fire, and, a fortiori, with sparking explosive fumes.

Similarly would that result follow where, instead of an unforeseen potentiality, an element is introduced into the scene at the critical moment of which or its probability the negligent actor knows or ought to have known. That element becomes, then, one of the circumstances in reaction with which the consequences of his act manifest themselves, among which, here, is the confusion of consequences. If the new element is innocent, no liability results to the person who introduces it; if culpable, its effect in law remains to be ascertained.

What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.

(1) [1921] 3 K.B. 560.

The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.

On the first interpretation, the answer of the jury was insufficient as a return. Their duty was to determine the facts from the evidence laid before them as best they could on the balance of probabilities, and it could not be evaded in the face of such divergent testimony either because of a tender regard for distasteful implications or for any other reason. The jury might have reached a deadlock from which there was no escape: but with the proper direction as to onus, that would have been obviated. The result is that there has been no verdict on an essential question, and the judgment based upon the answer cannot stand.

Although counsel were quite willing that questions be put, it seems evident that they had no part in formulating them; and I cannot but think that to ask ". . . are you able to decide by which one" was unfortunate because it opened to the jury a means of escape from an unpleasant duty, and it implied that it would be proper for them to answer as they did: they ought to have been asked to find from which gun came the shots that did the harm. Even without the direction as to onus, they should have been sent back to endeavour to complete their findings.

If, next, the answer means, as it may, that lack of unanimity was the frustrating factor, there is again a fatal incompleteness of findings, because of which, likewise, the judgment cannot stand.

The remaining interpretations fall within the considerations already expressed. The dominating fact is a confusion of causal factors and consequences resulting in what was, in substance, a small shower of flying shot. In dealing with such a situation, we must keep in mind that the task of the Court is to determine responsibility, not cause, but obviously for that purpose cause as ordinarily

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conceived is a controlling factor. Ultimately, it is cause in a juridical sense that we are to find. In the judicial process, also, auxiliary mechanisms have been adopted which experience has vindicated, such as, for example, onus, estoppel, presumption. Although the facts here, in their precise form, have not, then, previously been presented to the courts of either this country or England, they are such as to which onus is properly invoked.

The risks arising from these sporting activities by increased numbers of participants and diminishing opportunity for their safe exercise, as the facts here indicate, require appropriate refinements in foresight. Against the private and public interests at stake, is the privilege of the individual to engage in a sport not inherently objectionable. As yet, certainly, the community is not ready to assume the burden of such a mishap. The question is whether a victim is to be told that such a risk, not only in substantive right but in remedy, is one he must assume. When we have reached the point where, as here, shots are considered spent at a distance of between 150 feet and 200 feet and the woods are "full" of hunters, a somewhat stringent regard to conduct seems to me to be obvious. It would be a strange commentary on its concern toward personal safety, that the law, although forbidding the victim any other mode of redress, was powerless to accord him any in its own form of relief. I am unable to assent to the view that there is any such helplessness.

Liability would, a fortiori, be the legal result if the acts of several were intended to be co-operative for a common object or if the act of one was so aided or abetted or induced by the act or conduct of another that it could be said to have had the will and the influence of that other behind it; and in determining that fact, the usual understandings between hunters in relation to the existence of conditions that would make shooting in a particular situation dangerous, are relevant.

Assuming, then, that the jury have found one or both of the defendants here negligent, as on the evidence I think they must have, and at the same time have found that the consequences of the two shots, whether from a confusion in time or in area, cannot be segregated, the onus on the guilty person arises. This is a case where each hunter

would know of or expect the shooting by the other and the negligent actor has culpably participated in the proof-destroying fact, the multiple shooting and its consequences. No liability will, in any event attach to an innocent act of shooting, but the culpable actor, as against innocence, must bear the burden of exculpation.

These views of the law were not as adequately presented to the jury as I think they should have been.

I would, therefore, dismiss the appeal with costs. The motion to quash for want of jurisdiction is dismissed with costs.

The judgment of Estey, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.—This is an appeal by David Cook, one of the defendants, from a judgment of the Court of Appeal for British Columbia (1) setting aside the judgment pronounced at the trial in favour of the defendants and directing a new trial. The other defendant, Akenhead, does not appeal.

The evidence is conflicting as to many matters and, as I have reached the conclusion that the order of the Court of Appeal (1) directing a new trial should be upheld, I will make no further reference to the evidence than is necessary to indicate the points at issue.

On the 11th of September, 1948, the plaintiff was hunting with his brother John Lewis and one Dennis Fitzgerald in the vicinity of Quinsam Lake on Vancouver Island. It was the opening day of the hunting season for blue grouse and deer and it was said that the country in which they were hunting was full of hunters. The defendants, accompanied by John Wagstaff, then sixteen years of age, were hunting grouse together. They were using a dog which belonged to Akenhead. They had agreed to divide their bag evenly.

It is said that Cook, Akenhead and Wagstaff were proceeding approximately in line, Cook being on the left, Akenhead in the centre and Wagstaff to the right. The dog, which was some little distance ahead of them, came to a point and at about that moment Fitzgerald, who had come into view on Cook's left, called out a warning and

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pointed towards a clump of trees which was ahead of Cook and Akenhead and in which at that moment the plaintiff was. Cook heard Fitzgerald's call but did not hear what he said. He thought that Fitzgerald was pointing at the dog and was calling attention to the fact that the dog was on point. Akenhead states that he did not hear Fitzgerald's call. Momentarily after this, a covey of some four or five grouse flew up a short distance in front of the dog. Akenhead says that he fired at the bird which was farthest to the right, leaving the other birds to Cook. Cook says that he fired at a bird straight ahead of him. They appear to have fired almost simultaneously. Immediately afterwards there was a scream from the clump of trees, mentioned above, and the plaintiff appeared. He had received several shot in his face, one of which caused the loss of an eye. John Lewis accused Cook of having shot his brother. Some discussion followed in which both Cook and Akenhead asserted that they had not fired in the direction of the trees in which the plaintiff was hit.

It was the theory of the plaintiff that either Cook or Akenhead or both of them had shot him and that each was liable even if only one of them had fired the shot which struck him. The theory of the defendant Cook was that he had fired only one shot and had fired in such a direction that it was quite impossible that any shot from his gun could have struck the plaintiff. He also stated that there had been a third shot fired almost simultaneously with those fired by himself and Akenhead and suggested that an unidentified third person had fired the shot which injured the plaintiff. His counsel disclaimed before the jury any suggestion that Akenhead had shot the plaintiff.

Akenhead's position at the trial was that he had fired to the right, that he could not have shot the plaintiff and that if it was either of them it was Cook and not he who had done so.

The action was tried before Wood J. with a special jury. The learned judge directed the jury to bring in a general verdict. Some time after the jury had retired they returned to the court room to ask some questions and following a short discussion between the Court and counsel it was

decided to put questions to the jury. The questions put and the jury's answers are as follows:—

1. Q. Was the Plaintiff shot by either of the Defendants?
A. Yes.

2. Q. If so by which one of them? (no answer).

3. Q. If the Plaintiff was shot by one of the Defendants are you able to decide by which one?
A. No.

4. Q. Were the Plaintiff's injuries caused by the negligence of either of the Defendants?
A. No.

5. Q. Damages
Special (Nothing filled in).
General (Nothing filled in).

The jury brought in these answers at 6.40 p.m. on a Friday. Counsel for the defendant Cook moved for a dismissal of the action and counsel for the plaintiff submitted that the answer negativing negligence was perverse and that the plaintiff was entitled to a verdict. The learned trial judge stated that he would hear argument on a later date and thereupon dismissed the jury.

At the opening of the argument on the following Wednesday counsel for the plaintiff said:—

First of all I think the jury was dismissed too quickly. I was on my feet intending to argue and to request your lordship to send the jury back, and re-instruct them on certain points I will deal with now, and have them reconsider them in view of certain instructions which I think would have been appropriate in view of the first answer, that is when they found one or other of the defendants fired the shot. That created a condition of affairs that made further instructions proper. Of course we were all tired. It was the end of the day, everybody wanted to get away, and the jury was out before anybody realized what was happening.

and argued that the trial judge should himself direct a new trial. At the conclusion of the argument the learned trial judge dismissed the action, with costs.

The judgment of the Court of Appeal was delivered by Sidney Smith J.A. He rejected the appellant's argument that Cook and Akenhead were joint tortfeasors and that judgment should be entered against both. He expressed the view that the jury should not have had much trouble in deciding which of the two defendants was the guilty party and continued,—

However, having held (rightly as I think) that one of the defendants shot the plaintiff, the jury acted perversely in finding that neither was

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negligent, and I think the plaintiff is entitled to a new trial. *McCannell* v. *McLean* (1937) S.C.R. 341, followed in *B.C. Electric* v. *Protopappas* (1946) 4 D.L.R. 1. I have given thought to the question whether we should try to narrow the issues on the new trial; but I have concluded that it is impracticable to do so, and that we should order a new trial simpliciter; the appellant to have his costs of this appeal, the costs of the first trial to follow the result of the second.

From this judgment the defendant Cook appeals to this Court. Notice of his appeal was served upon Akenhead but Akenhead does not appeal.

Counsel for the appellant before us did not attack the first answer of the jury, that the plaintiff was shot by either Cook or Akenhead. He submitted that the answer to Question 3 was a finding that the Plaintiff had not satisfied the onus of proving that Cook shot him and that on the evidence a jury acting reasonably might properly so find, that there was evidence on which the jury might properly find, as they did in answer to Question 4, that the plaintiff's injuries were not caused by the negligence of either of the defendants and that either of such findings was sufficient to support the judgment dismissing the action.

Counsel for the respondent contended that under the circumstances disclosed in the evidence Cook and Akenhead should both have been found liable regardless of which of them fired the shot which struck the plaintiff, that the Court of Appeal rightly held that the finding of the jury that there was no negligence was perverse, that the failure of the jury to find that Cook fired the shot which struck the plaintiff was perverse, that the jury were wrongly charged as to the onus of proof, that the jury ought not to have been discharged by the learned trial judge but should have been sent back with further instructions to endeavour to determine which of the two fired the shot which struck the plaintiff and that the new trial was ordered by the Court of Appeal in a proper exercise of its discretion.

It is first necessary to consider the finding of the jury in their answer to the fourth question, that the plaintiff's injuries were not caused by the negligence of either of the defendants, for obviously if this finding stands the action must fail. In my opinion the Court of Appeal were right in deciding that this finding should be set aside.

With the greatest respect, I think that the learned trial judge did not charge the jury correctly in regard to the onus of proof of negligence. While it is true that the plaintiff expressly pleaded negligence on the part of the defendants he also pleaded that he was shot by them and in my opinion the action under the old form of pleading would properly have been one of trespass and not of case. In my view, the cases collected and discussed by Denman J. in *Stanley* v. *Powell* (1), establish the rule (which is subject to an exception in the case of highway accidents with which we are not concerned in the case at bar) that where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault." In my opinion *Stanley* v. *Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

Owing to the fact that as Akenhead has not appealed the order directing a new trial must stand so far as he is concerned, I do not find it necessary to discuss whether a jury, properly instructed as to onus, could have absolved him from negligence if they had found that it was he who shot the plaintiff. I think that if the jury found that it was Cook whose shot struck the plaintiff there was no evidence on which, acting judicially, they could have absolved him from negligence. No doubt there was evidence given by Cook which the jury were entitled to believe which negatived negligence on his part but such evidence was equally effective to negative the possibility of his having shot the plaintiff, and the jury's answers to questions 1 and 3 read together shew that they cannot have accepted this evidence. The evidence of Cook, himself, appears to me to indicate that in his opinion to have shot in the direction of the clump of trees where the plaintiff was would clearly have been negligent; indeed, he says that it would have been a crazy thing to do.

For these reasons, I respectfully agree with the Court of Appeal that the jury's answer to question 4 should be set aside.

(1) (1891) 1 Q.B.D. 86.

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This, however, is not enough to dispose of the appeal. It is necessary to consider the answer to the 3rd question in which the jury have indicated that they were unable to find which of the two defendants did fire the shot which did the damage.

The general rule is, I think, stated correctly in Starkie on Evidence, 4th Edition, 860, quoted with approval by Patterson J.A. in *Moxley* v. *The Canada Atlantic Railway Company* (1):

> Thus in practice, when it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

This rule, I think, is also applicable to civil actions so that if at the end of the case A has proved that he was negligently injured by either B or C but is unable to establish which of the two caused the injury, his action must fail against both unless there are special circumstances which render the rule inapplicable.

The respondent argues that such circumstances exist in this case. It is said that Akenhead and Cook were joint tortfeasors being engaged in a joint enterprise under such circumstances that each was liable for the acts of the other. Reliance is placed on the fact that they were hunting together and had agreed to divide the bag evenly.

I am unable to find any authority for the proposition that the mere fact that a party of persons are hunting together and have agreed to divide the bag renders each liable for the tortious acts of all the others. The American case of *Summers* v. *Tice* (2), relied upon by the respondents is, I think, properly distinguished in the reasons for judgment of Sidney Smith J.A. The decisive finding of fact in that case was that both of the defendants had shot in the direction of the plaintiff when they knew his location. There is no such finding in the case at bar. It is not, I think, necessarily implicit in the jury's findings that one of the two defendants shot the plaintiff but that they can not decide which.

The judgments of the Court of Appeal in *The Koursk* (3), are of only limited assistance as in that case both the

(1) (1887) 14 O.A.R. 309 at 315. (2) (1948) 5 A.L.R. (2nd) 91.
(3) [1924] P. 140.

Clan Chisholm and the *Koursk* had been found guilty of negligence causing the sinking of the *Itria* and the question was not whether both of them were liable but whether their liability was joint or several. At page 155 Scrutton L.J. says:—

> The substantial question in the present case is: What is meant by "joint tortfeasors?" and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.

The judgments of Bankes and Sargent, LL.JJ. contain similar expressions.

Can it be said that the facts of the case at bar fall within the definition of joint tortfeasors, quoted above, from the judgment of Scrutton L.J.—"two persons who agree on common action in the course of, and to further which, one of them commits a tort?" It is argued that Cook and Akenhead agreed on common action, that is to go out hunting together and to divide the bag, and that it was in the course of this and in furtherance of it that the shot which injured the plaintiff was fired by one or other of them. The difficulty of applying this definition to the facts of the case at bar is pointed out by Sidney Smith J.A. To do so would bring about the result that every member of a party going out together, with a lawful common object, social or sporting, which could be carried out without negligence, would be vicariously liable for the negligence of any member of the party. So far as I have been able to ascertain, such a liability has not been held in any reported case to exist at common law.

There was, I think, no evidence in the case at bar on which it could be found that the relationship of principal and agent or of master and servant or of partners existed between Akenhead and Cook. They were engaged in a lawful pursuit. Neither had any reason to anticipate that the other would act negligently. Neither had in fact either the right or the opportunity to control the other. Neither appears to have assisted or encouraged the other to commit a breach of any duty owed to the plaintiff. It is argued,

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however, that *Summers* v. *Tice* (*supra*) should be followed and that under the principles stated in that judgment the jury might properly have found both Akenhead and Cook liable for the plaintiff's injury if in their view of the evidence both of them fired in the direction of the clump of trees in which the plaintiff in fact was, under such circumstances that the conduct of each constituted a breach of duty to the plaintiff. I have not been able to find any case in the courts of this country, or of England in which consideration has been given to certain propositions of law laid down in *Summers* v. *Tice*. The underlying reason for the decision appears to me to be found in the following quotation from the case of *Oliver* v. *Miles* (1):

> . . . We think that . . . each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.*

The judgment in *Summers* v. *Tice* reads in part as follows:—

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

I do not think it necessary to decide whether all that was said in *Summers* v. *Tice* should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons given in that case, that if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3.

(1) (1926) 144 Miss. 852.

I agree with my brother Rand that the wording of question 3 was unfortunate and that the jury's answer to it is susceptible of several interpretations, one being that some members of the jury, but not all, were satisfied as to the identity of the defendant whose shot struck the plaintiff. If this be the right interpretation it would mean that the jury had failed to reach an agreement.

It may be that at the new trial no question of the application of the rule laid down in *Summers* v. *Tice,* will arise. I respectfully agree with the Court of Appeal that the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff.

In my respectful opinion the perverse finding on the question of negligence following the insufficient direction on the question of onus, the failure of the jury to reach a finding as to who fired the shot which struck the plaintiff and the failure of the learned trial judge to send them back for reconsideration of this question with the added direction indicated above, made it proper for the Court of Appeal to direct a new trial.

In my view the order of the Court of Appeal directing a new trial was not made in the exercise of a judicial discretion in the sense in which that term is used in s. 38 (now s. 44) of the *Supreme Court Act,* but rather on the Court's view that there existed sufficient grounds in law to entitle the plaintiff to have the judgment set aside and a new trial directed. I think, therefore, that we have jurisdiction to entertain the appeal.

The submission contained in the appellant's factum, that in the event of the appeal failing we should direct separate trials, was withdrawn at the hearing and I, of course, express no opinion in regard to it.

I would dismiss the appeal and the motion to quash the appeal, both with costs.

LOCKE J. (dissenting):—The respondent was on the morning of September 11, 1948, hunting, in company with his brother and one Fitzgerald in the vicinity of Quinsam Lake on Vancouver Island, when he suffered a gun shot wound in respect of which he claimed to recover damages from the appellant and one Akenhead. After a trial before

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Wood, J. and a special jury the learned trial judge dismissed the action. The respondent appealed and the Court of Appeal (1), considering that the jury had acted perversely in finding that neither of the defendants were negligent, directed a new trial. The defendant Cook alone appeals to this Court from that judgment.

There was a great divergence between the accounts given by the respective parties of the facts leading up to the accident. According to the respondent, he was hunting grouse in a cut over area in which there were some scattered clumps of trees about one mile distant from Quinsam Lake when he saw three men who later proved to be Cook, Akenhead and a young boy by the name of Wagstaff, also engaged in hunting, approaching downhill from his right at a distance of about 75 yards. Having seen a grouse fly into a clump of small trees, Lewis moved in a westerly direction towards it. According to him, as he was walking towards the trees, Fitzgerald shouted something which Lewis thought was intended as a warning to the other hunting party of his presence. Proceeding into the trees and at a place where the other hunters were apparently not visible to him, he was struck in the face by a number of pellets of shot and suffered grave injuries. According to Jack Lewis, the respondent's brother, the area was "very open country, a little bit of shrubbery here and there, a few small snags lying down. It was quite clear except for these few small fir trees off to our left." He also had gone towards these small fir trees when he saw the other party approaching and heard Fitzgerald call out something to them. Almost immediately afterwards he heard two shots fired and heard his brother scream and going in to the clump of trees found him at a place some 30 to 35 yards distant from where Cook was standing. Fitzgerald who also said that the respondent and his party approached them travelling downhill said that the three approaching hunters had a pointer dog ranging in front of them and that when they got fairly close:—

> There was one man closer to me than the others, quite some distance. I didn't bother about the other men, I just watched this one man, I hollered to him to be careful, something to that effect. He seemed to hear me, looked towards me. Practically, at the same time, or just after a few seconds, two shots were fired, one by this man and one by somebody else in his company, which I didn't know then, and a scream at the same time practically.

(1) [1950] 4 D.L.R. 136.

Fitzgerald says that his shout was directed to the man closest to him who turned out to be Cook. He was not clear as to whether he had shouted loud enough to attract Akenhead's attention. A discussion which ensued made it clear that Cook and Akenhead had both fired: Wagstaff had not. Neither the respondent or his brother saw these shots being fired: Fitzgerald appears to have done so but gave no evidence as to the direction in which they were fired.

According to Akenhead, an experienced hunter who had for many years hunted birds in that part of Vancouver Island, he, in company with the appellant, was walking in line in a westerly direction some thirty feet or so apart along a side hill, with Akenhead's dog ranging about forty yards ahead of them when the dog pointed, and as they continued towards him four birds got up, two going to the left, one ahead and one to the right. He said that the birds did not get up from the trees from which the respondent later appeared but from the ground to the right, or north from the trees, and said that he shot off to the right of the dog and not in Lewis' direction. Questioned as to whether he had heard anyone call out before this shot he said that he had not. He said that in accordance with a long-standing arrangement between them when a covey got up, being on the right he would fire at the birds going to the right and Cook those to the left, saying that they had hunted together for years and also that it was their custom to divide up the bag equally between them. Cook, also an experienced hunter, agreed with Akenhead that there were always a great many hunters in that area on the opening day of grouse hunting, and as to the direction in which the three of them were walking and that it was along a side hill and not down hill, as stated by the plaintiff. He said that as they moved along he saw a man off to his left, (who later turned out to be Fitzgerald) who called out to him and pointed to the dog. According to Cook, Fitzgerald had not shouted and he did not hear what he said but having spoken he moved on, apparently in a westerly direction, and when he looked again the man had disappeared. According to his evidence, he thought this man was moving in the same direction as his own party and he himself then continued towards the

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west when a bird got up straight ahead of him at which he fired. His recollection was that in all there were three shots fired and that his was the first and that it was after the last shot that he heard the respondent scream. Cook said that he did not seen anyone else in the immediate neighbourhood before the shooting other than the man who proved to be Fitzgerald, but that after hearing the respondent's cry the latter appeared from the woods to his left and claimed that he (Cook) had shot him. Immediately thereafter he said Fitzgerald came running along from a point close to where he had first seen him. Cook claims that he denied having anything to do with it, saying that he had shot straight ahead in front of him, and added:—

I could not have shot him because I saw a man a little while back. I said I knew the man was in there somewhere, I would not have shot there because I knew a man was there.

Cook having said this on direct examination, the learned trial judge then said:—

You say you knew there was a man in there somewhere? I must have missed something. I didn't think you had seen him before.

whereupon counsel for the appellant said that Cook was referring to Fitzgerald; this was followed by further questions:—

The Court:

Q. It was only Fitzgerald you had seen, assuming it was Fitzgerald?—A.This man I first saw as he was going in the trees, he was walking down as we were rounding (sic) along this hillside. I presumed he would keep in line as he was walking.

Mr. Cunliffe:

Q. Is that the man that came and said something you didn't hear?—A. Yes that is the man. I didn't see him after he got in the trees.

The Court:

Q. You knew that Fitzgerald, assuming it was Fitzgerald, was in there some place?—A. Yes. Q. You said "I knew a man was in there because I had seen him before." You had not seen Cook before?

Mr. Cunliffe: You mean Lewis, this is Cook.

The Court: Yes.

Q. You didn't know there were two people there?—A. No I didn't know there were two people. I figured that this man that was shot was the man I had already seen that spoke, he had come down behind the trees.

Again the appellant said that he knew the man was on his left and that he had told Lewis that if it had been his

shot that struck him it would have killed him, since they were so close. Later, when cross-examined, he said that the only man of the other party of whose presence in the neighbourhood he was aware was Fitzgerald, that he had gone into the trees off to his left, that the birds which he saw get up did not come from the trees but rose from the ground ahead of him.

The meaning of much of the evidence of this witness was obscure: thus when cross-examined as to the discussion which took place between him and Lewis after the accident he said:—

> I was not excusing myself. I was explaining to Mr. Lewis it could not have been me, because, I said, I knew there was a man on the right side of those trees. It could not have been my partner, he would not shoot in there. That would be a crazy thing to do. Also I was too close to him. If I had shot it would have killed him.

Further questions by the learned trial judge cleared up this statement to this extent that the man to whom he referred was Fitzgerald who, he insisted, he had only seen directly to his left and who, he thought, was proceeding in a parallel direction to that in which he and his associates were walking. What he meant by the expression "on the right side of those trees" was not cleared up. Presumably the "partner" referred to Akenhead, though why it "would be a crazy thing" for the latter to have shot into the trees, if in truth he did not know there was anyone there, is not explained. In a statement given to the police authorities on the day of the accident the appellant, after saying that he had seen a man off to his left who disappeared behind some fir trees, stated that:—

> The young fellow who I thought I had seen go behind the fir trees came out with blood streaming down his face and accused me of having shot him.

The only other material evidence dealing with the occurrence appears to be that of the boy Wagstaff who saw Fitzgerald when he was speaking to Cook and saw the former point towards the dog and said that while Fitzgerald appeared to speak he could not hear what was said. He thought he had heard three or four shots before the injured man cried out. He had only seen one of the hunters in Lewis' party before the shots were fired and did not see either Cook or Akenhead shoot. He also stated that the

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birds which were flushed did not come out of the clump of trees where Lewis was, but flew up from the ground about twenty feet distant from the trees.

The cause of action pleaded against both defendants was for damages alleged to have been caused:—

> solely by the negligent conduct of the defendants in recklessly discharging their guns in the direction of the plaintiff, knowing that the plaintiff was in that vicinity, or alternatively, without first making sure that there was no one in the line of fire.

The learned trial judge in charging the jury explained to them that the claim was founded in negligence and that the burden of proof lay upon the plaintiff. Having said that negligence was the absence of reasonable care under all the circumstances, he specifically directed their attention to the question as to whether it was negligent under the circumstances then existing to fire into a thicket or clump of trees without first making sure that there was no one there, having in mind that there were a great many people shooting on the opening day, and that Cook at least knew that Fitzgerald was somewhere amongst the trees. Questions were submitted to the jury and were answered as follows:—

Q. Was the plaintiff shot by either of the defendants?

A. Yes.

Q. If so, by which one? (No answer)

Q. If the plaintiff was shot by one of the defendants are you able to decide by which one?

A. No.

Q. Were the plaintiff's injuries caused by the negligence of either of the defendants?

A. No.

Q. Damages. (Not answered).

Wood, J. then dismissed the jury and after argument on the following day dismissed the action against both of the defendants.

In the Court of Appeal it was contended for the plaintiff that in the circumstances disclosed in the evidence Cook and Akenhead were each liable for the negligence of the other, apparently on the theory that they were joint tort-feasors or joint adventurers and reliance was placed on an American decision of *Summers* v. *Tice* (1), but this contention was not sustained. Sidney Smith, J.A. however,

(1) (1948) 5 A.L.R. (2nd) 91.

who delivered the judgment of the Court, considered that having held that one of the defendants shot the plaintiff the jury acted perversely in finding that neither was negligent and that the plaintiff was entitled to a new trial.

While Cook's evidence was that he heard three shots fired and Wagstaff said that he had heard three or four before the injured man cried out and Cook and Akenhead each fired but once, it is apparently common ground that Wagstaff did not shoot and there is no evidence of either Fitzgerald or Jack Lewis firing, or of there having been any other hunters nearby who might have shot and injured the respondent. None of the witnesses for the respondent saw the direction in which Cook and Akenhead fired and both of the latter swore that they had fired in a direction which would have rendered it impossible for the shot to strike Lewis. The jury clearly did not accept the statement of one or other of the defendants on this aspect of the matter, since they found that the plaintiff had been shot by one of them. The task faced by the jury in this case was a difficult one. They had been informed by the learned trial judge that the plaintiff alleging negligence the burden was on him "to prove his case and to prove that on a preponderance of evidence. It is not the same as in a criminal case, where the Crown must prove its case beyond a reasonable doubt." In *Cottingham* v. *Longman* (1), Duff, J. (as he then was), said that the burden resting upon the plaintiff is to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case and referred to what had been said as to this in *Grand Trunk Railway* v. *Griffith* (2), where the nature of proof upon which a jury is entitled to act in civil cases was fully discussed. That the jury understood the matter in this way is, I think, clear from their answer to the first question where in the face of the denials of the parties they drew the inference from the proven facts that one or other of them had injured the plaintiff. On the argument before us, it was contended for the respondent that in the circumstances there was a presumption of fault against the defendants and that the onus was on them to prove by affirmative evidence that they had

(1) (1913) 48 Can. S.C.R. 542 at 545.

(2) (1912) 45 Can. S.C.R. 380.

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exercised due care, but clearly this contention cannot be supported. There were here no circumstances which could, in my opinion, raise any such presumption.

The answers to Questions 2 and 3 are decisive that upon the evidence the jury could not find which one of the defendants had fired the shot which caused the damage. The claim against Cook was, therefore, left in this position that either he or Akenhead had fired the shot which injured the unfortunate plaintiff, and upon such a finding it was clearly impossible to enter a verdict against him unless he was liable for the act of Akenhead, whether the claim pleaded sounded in negligence or in trespass. As I understand the contention of the respondent, it is that since Cook and Akenhead were hunting together, using the same dog, under an arrangement whereby the bag would be divided equally between them, each was liable for the negligence of the other. Thus, if but one of them had fired, both would be liable. As pointed out in Clerk and Lindsell on Torts, 10th Ed. p. 100, an agent who commits a tort on behalf of his principal and the principal are joint tortfeasors, as are the servant who commits a tort in the course of his employment and his master, and an independent contractor and his employer in those cases in which the law holds the employer absolutely liable. The learned author further says that so are persons whose respective shares in the commission of a tort are done in furtherance of a common design, but that mere similarity of design on the part of independent actors causing independent damage is not enough. There must be concerted action towards a common end. A similar passage in the seventh edition of Clerk and Lindsell, it may be noted, was quoted with approval by Sargant, L.J. in *The Koursk* (1). The facts in the present matter do not, however, in my opinion, support a claim upon this basis. Cook and Akenhead were merely hunting in each other's company: there was no common design in the sense that that expression is used in the passage quoted: they were rather each pursuing their own design of shooting grouse, as they were lawfully entitled to do. I am unable to understand how the fact that, like most hunters, they at the end of the day divided up the bag, the more fortunate sharing his luck with the other,

(1) [1924] P. 140, 159.

can be a basis for any legal liability. There was here no joint venture but rather individual ventures carried on by these hunters in each other's company and I see no ground upon which one could be held responsible for the negligence of the other. I agree with the conclusion of Sidney Smith, J.A. on this aspect of the matter.

In my opinion, this is decisive of the present appeal since, in the absence of a finding that the respondent was shot by Cook and since the latter is not liable if the damage was caused by the act of Akenhead, the action was properly dismissed. In the judgment appealed from, however, a new trial has been ordered on the ground that the jury's answer to the fourth question was perverse, in view of the finding that it was one or other of the defendants who fired the shots causing the damage. With great respect, it appears to me that in view of the failure of the plaintiff to obtain a finding from the jury as to which fired the shot, this question did not arise. A finding that one or other of the defendants was negligent would clearly not have furthered the matter in view of the answer to the third question. If it were necessary to decide the matter I would, however, come to a different conclusion than that reached by the Court of Appeal. In my opinion, it cannot be said that the answer made to the fourth question was so unreasonable and unjust as to justify an appellate court in concluding that the jury could not have been acting judicially (*C.N.R.* v. *Muller* (1): Duff, C.J.C. at p. 769; Lamont, J. at pp. 772-3).

The respondent's case is that Cook is liable, even though it was not his act but that of Akenhead which caused the damage. As to the latter his evidence, which the jury may well have accepted, was to the effect that he had not heard Fitzgerald call out to Cook and did not know when he fired that there was anyone in the clump of trees. The jury may have believed these statements and since the learned trial judge had expressly directed their attention to the question as to whether to fire into a clump of trees without first making certain that no person was there was in itself a negligent act, I am quite unable to understand how it could be said that a finding that even if Akenhead did fire in to the trees he was not negligent, could be set

(1) [1934] 1 D.L.R. 768.

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aside as perverse. As to Cook he had sworn, as had Akenhead, that he did not fire in to the trees where Lewis was, but off to the right where no damage could result and it appears to me that if the jury accepted this statement it could not properly be said that a finding that he was not negligent was perverse.

This appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored. The motion to quash the appeal made on behalf of the respondent should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *F. S. Cunliffe & Company.*

Solicitors for the respondent: *Leighton, Meakin & Weir.*