Volume 7
Issue 3 *Survey of Southwestern Law for 1952*

Article 13

January 1953

Torts

Clarence J. Eden

TORTS

IMPLIED WARRANTY — BOTTLED BEVERAGES

Louisiana. In the recent case of *Le Blanc v. Louisiana Coca-Cola Bottling Co.*[1] the question arose whether or not the doctrine of implied warranty should be applied when a foreign substance is found in a bottled beverage. The drink was purchased from a sub-vendor, and a housefly was found in the bottle when the contents were half consumed. The trial court rendered judgment for plaintiff, but the court of appeal reversed and rendered judgment for defendant bottling company on the basis that the plaintiff had failed to prove by a preponderance of evidence the absence of mishandling by middlemen. The supreme court reversed the decision of the court of appeal and affirmed the judgment of the trial court on the basis that a prima facie case had been made out and the element of mishandling by middlemen is a matter of defense.

The question had been decided differently by a number of the Louisiana courts of appeal,[2] and Judge Hawthorne in his dissenting opinion pointed out the cases which have held that the doctrine of implied warranty is not applicable when the drink is sold in a capped bottle.[3] The court of appeal followed such view, and it held that the doctrine of *res ipsa loquitur* was the only basis on which the plaintiff could recover and that it was necessary for her to establish that the bottled drink had not been tampered with or improperly handled after it left the bottler's possession.[4] It recognized the doctrine of implied warranty, but it was of the belief that the doctrine is applicable only in cases involving sealed cans and packages and not when the question involves a bottled beverage. Because it is reasonably possible for the cap to be

[1] 221 La. 919, 60 So. 2d 873 (1952).

[2] Day v. Hammond Coca-Cola Bottling Co., 53 So. 2d 447 (La. App. 1951); Nichols v. Louisiana Coca-Cola Bottling Co., Ltd., 46 So. 2d 695 (La. App. 1950); Jenkins v. Bogalusa Coca-Cola Bottling Co., Ltd., 1 So. 2d 426 (La. App. 1941).

[3] 60 So. 2d at 878.

[4] 55 So. 2d 7 (1951).

removed and replaced after the bottle leaves the possession of the manufacturer, the courts of appeal in a number of cases had held that the doctrine of *res ipsa loquitur* is the basis for the cause of action, which is the same as when the beverage bottle explodes.[5]

The majority opinion cited the case of *Dye v. American Beverage Co.*,[6] a decision of a court of appeal, in which the following rule was stated:

> Where the plaintiff shows by a preponderance of evidence that the beverage contained a foreign substance... the burden of proof shifts to the defendant to excuse itself from liability by proving to the satisfaction of the court that the foreign matter did not enter the beverage during the bottling or manufacturing process.[7]

In the case of *Mayerhefer v. Louisiana Coca-Cola Bottling Co.*[8] the supreme court declared that it was applying the doctrine of *res ipsa loquitur* and that the plaintiff had satisfied all of the required elements by establishing that the bottle was in the same physical condition when sold to plaintiff as when delivered by defendant's agent. However, in that case the court in effect was applying the doctrine of implied warranty, and it quoted from the *Dye* case to the effect that the question of tampering with the container was a defensive matter. The *Le Blanc* case should settle the conflict that has existed in Louisiana on the question of implied warranty as to bottled beverages.

The majority opinion is supported by the weight of authority in those states which apply the doctrine of implied warranty in cases involving foreign substance in food drink.[9] However, the dissenting opinion may possibly be the better view when the question concerns bottled beverages.[10] The cap on a bottle does not

[5] Cases cited *supra* note 2.
[6] 194 So. 438 (La. App. 1940).
[7] *Id.* at 440.
[8] 219 La. 320, 52 So. 2d 866 (1951).
[9] See Notes, 111 A.L.R. 1251 (1937), 142 A.L.R. 1479 (1943).
[10] See Note, 171 A.L.R. 1209 (1947).

seal the container in a permanent manner as does a sealed can. With the cap being very susceptible to being removed and replaced without detection, a better view would be to apply the doctrine of *res ipsa loquitur* and require the plaintiff to prove the absence of mishandling by middlemen.

GROSS NEGLIGENCE—SPEEDING AS SOLE BASIS

Texas. In *Burt v. Lochausen*[11] an insurance agent, while carrying an applicant home, lost control of his car. The applicant was killed, and action was brought against the insurance company and against the agent. From the fact situation the courts agreed, as a matter of law, that the applicant was a "guest" within the automobile guest statute,[12] and they agreed there was no liability on the part of the insurance company. The jury found for the plaintiff on the issue of gross negligence, but the trial court sustained a motion for judgment non obstante veredicto. The court of civil appeals sustained the judgment for defendant, but the supreme court reversed and rendered judgment for plaintiff on the grounds there was sufficient evidence to support the jury's findings.

The dissenting opinion of Justice Garwood pointed out the inconsistency in the court's decision on the question of gross negligence as a matter of law. In *Rogers v. Blake*[13] the defendant at night-time drove through a stop sign at an intersection without stopping, with knowledge of the location of the sign and at a speed greater than circumstances would warrant because of automobiles approaching the intersection at right angles to him, which automobiles he saw or should have seen. The court held as a matter of law there was no gross negligence. In the *Lochausen* case the defendant was driving approximately twenty miles an hour in excess of the speed limit along a four-lane highway, and he had just passed a van truck going in the same direction when he

[11] .....Tex....., 249 S. W. 2d 194 (1952).
[12] TEX. REV. CIV. STAT. (Vernon, 1948) art. 6701b.
[13] .....Tex....., 240 S. W. 2d 1001 (1951).

entered a left-hand curve. The right wheels ran onto the shoulder, and the car ran into a guard rail, after which it swung to the left crossing the highway.

It appears that the issue and finding by the jury of gross negligence was predicated primarily on the factor of speeding. Although the road was winding, there were no signs warning of the curve to indicate it was unsafe to traverse the curve at a greater than standard speed. Therefore, neither the excess speed along the four-lane highway nor the act of the defendant in passing the van would be sufficient to raise a presumption of conscious indifference to the consequences.[14] In order for a motorist's conduct to result in a "conscious indifference to consequences" he must know that the guest will probably be affected by the motorist's act or omission, and the motorist must be conscious of the fact that he is indifferent at the time and upon the occasion in question.[15] Mere violation of a speed standard, or mere failure to have a car under control, even at a curve, should not of itself be recklessness.[16]

It is not likely that the results reached by the supreme court would be supported by the weight of authority of the states having automobile guest statutes, although many jurisdictions would agree.[17] From the fact situation it appears to be a case of error of judgment or momentary thoughtlessness and not one of heedless or reckless disregard of the rights of others. The phrase "heedlessness or reckless disregard of the rights of others" conveys the same meaning as the term "gross negligence".[18] Gross negligence is great or excessive negligence, or negligence in a very high degree. It is an extreme departure from the ordinary standard of care.[19]

---

[14] Mayer v. Johnson, 148 S.W. 2d 454 (Tex. Civ. App. 1941) *er. dism. judgm. cor.*

[15] *Ibid.*

[16] McQuillen v. Meyer, 213 Iowa 1366, 241 N.W. 442 (1932).

[17] See Notes, 74 A.L.R. 1198 (1931), 86 A.L.R. 1145 (1933), 96 A.L.R. 1479 (1935).

[18] Burt v. Lochausen, ...Tex....., 249 S.W. 2d 194, 198 (1952).

[19] PROSSER, TORTS (1941) 260.

In the *Blake* case the court held there must be something of a continued or persistent course of action in order to render the driver of an automobile guilty of "heedless or reckless disregard of the rights of others" or "gross negligence". In this case there was no evidence of any continued course of action on the part of the defendant, only the single factor of speeding just prior to the accident. For the court to be consistent with its holding in the *Blake* case it should have held as a matter of law there was no gross negligence.

Joint Liability For Independent Wrongdoers

Texas. A recent decision of the Texas Supreme Court resulted in a change of the law as to the liability of wrongdoers when their independent acts produce a single injury. In *Landers v. East Texas Salt Water Disposal Co.*[20] the plaintiff sought a joint and several judgment of damages, and injunctive relief, against two defendants whose independent acts allegedly caused a single injury to his property. The two defendants, one engaged in pumping salt water and the other engaged in pumping both oil and salt water, allowed salt water and other waste to escape when pipe lines of the respective companies broke on approximately the same date. By different means and routes this waste found its way into a lake in which the plaintiff stocked fish, killing them. The trial judge ordered a severance after sustaining pleas in abatement of both defendants based upon misjoinder of parties and causes of action, but the suit seeking injunctive relief was permitted to remain on the original docket. The cause of action for damages was dismissed by the court when the plaintiff declined to replead and proceed against each defendant severally.

The court of civil appeals upheld the decision of the trial court, and the defendants claimed, on appeal, that in refusing to replead the plaintiff lost his right to complain of the order of dismissal. But the supreme court pointed out that when the trial court

[20] ___Tex___, 248 S. W. 2d 731 (1952).

ordered a severance of the cause of action, the plaintiff's case, asserting a joint and several cause of action, was terminated just as effectively as if it had been dismissed. The court then said the plaintiff had a right to pursue to trial the case made by his pleadings, without repleading, and the important question arose whether or not he had alleged facts in his pleadings which, if established by evidence, would make the defendants jointly and severally liable. The petition did not indicate there was any concert of action or unity of design between the defendants. The rule of law prior to this case, as set out in *Sun Oil Co. v. Robicheaux*,[21] required one of these elements before joint liability could be imposed against tortfeasors. In that case the commission of appeals stated the rule:

> An action at law for damages for torts cannot be maintained against several defendants jointly, when each acted independently of the others and there was no concert or unity of design between them.... And the fact that it may be difficult to define the damages caused by the wrongful act of each person who independently contributed to the final result does not affect the rule.[22]

The supreme court pointed out that it had not adopted the opinion of the commission of appeals in the *Robicheaux* case, although the rule, as stated, had been followed by a long line of decisions by the lower appellate courts, and was specifically cited and followed by the court of civil appeals in deciding the instant case. The court recognized the fact that the rule in the *Robicheaux* case is supported by respectable authority,[23] and that with the exception of Oklahoma and Kansas[24] the courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers who, acting independently, produce a single injury by interfering with the use

[21] 23 S. W. 2d 713 (Tex. Comm. App. 1930).

[22] *Id.* at 715.

[23] See collection of cases in Notes, 9 A.L.R. 939 (1920), 35 A.L.R. 409 (1925), 91 A.L.R. 759 (1934).

[24] McDaniel v. City of Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913); Kanola Corporation v. Palmer, 167 Okla. 430, 30 P. 2d 189 (1934).

and enjoyment of a landowner's air and water.[25] However, the court said that the general rule, strictly followed, made it impossible for a plaintiff, under circumstances existing in the present case, to secure relief in the nature of damages, and it stated that it was specifically overruling the *Robicheaux* case. The new rule was stated as follows:

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.[26]

In declaring the new rule, the supreme court was attempting to correct the grave injustices which had resulted from the application of the rule set out in the *Robicheaux* case. In prior cases the plaintiff was defeated because of his inability to establish the extent of the injury caused by each defendant, and although theoretically divisible, as a practical matter there was but a single indivisible injury. A typical example of an unjust result under the old rule is found in *Tucker Oil Co. v. Matthews*.[27] The facts in that case were similar to those in the present one, but the plaintiff sought damages from only one defendant. The jury found damages to the plaintiff in the amount of $1,000, and it found that seventy-five per cent of the loss was the proximate result of defendant's negligent acts. In accordance with such finding, the court rendered judgment for plaintiff for $750, but on appeal plaintiff was defeated, the court saying:

> . . . [T]here was no possible basis in the testimony for a determination of how much of the pollution of the water was caused by acts or omissions of the defendant. . . . And, therefore, the judgment rendered against the defendant was necessarily based on mere surmise or suspicion and conjecture, which was no more than a mere scin-

[25] 4 RESTATEMENT, TORTS (1939) § 881; 1 COOLEY, TORTS (4th ed. 1932) 283-287; Note, 35 A.L.R. 412 (1925).
[26] 248 S. W. 2d at 734.
[27] 119 S. W. 2d 606 (Tex. Civ. App. 1938).

> tilla of evidence, which was incompetent to support a recovery.... And since it is manifest from the record that it will be impossible for plaintiff, on another trial, to determine how much of plaintiff's damages resulted from the alleged negligence of the defendant, separate and apart from that caused by the pollution of the water from other sources with which defendant had no connection, the judgment of trial court will be reversed and judgment will be here rendered....[28]

The same fate has befallen the plaintiff in other cases under similar circumstances.[29]

The general rule is that acts of independent tortfeasors, each of which causes some damage, may not be combined to create a joint liability for damages. The noted authority on the law of torts, Prosser, supports the rule, and says that the test for entire liability, when two or more tortfeasors are involved in an injury to the plaintiff, should be the absence of any logical basis for apportionment of the damages.[30] When such basis does exist (as where defendants' acts are separated in time) and it is possible for the court to say that separate portions of the loss can be attributed to each individual defendant, then neither of the defendants should be liable for the damages caused by the other. He emphasizes that difficulty of proof should not impose liability upon either, and this problem can be met to some extent by giving the jury a comparatively free hand. He believes that difficulty of proof has been overstated, and he remarks that it has been said that general evidence as to the portion each defandant has contributed to the result will be sufficient to support separate verdicts.[31] As a last resort it may be presumed that each of the defendants is equally responsible, and it should be possible to divide the damages equally among them.[32] But from the many

[28] *Id.* at 608.

[29] Panhandle & S.F. Ry. Co. v. Wiggins, 161 S. W. 2d 501 (Tex. Civ. App. 1942) *er. ref. w. m.*; Paluxy Asphalt Co. v. Helton, 144 S.W. 2d 453 (Tex. Civ. App. 1940) *er. dism. judg. cor.*; Powell Salt Water Co. v. Bigham, 69 S. W. 2d 788 (Tex. Civ. App. 1934).

[30] Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 439 (1937).

[31] *Ibid.*

[32] *Ibid.*

decisions by the lower appellate courts in Texas in which the plaintiff has been met with an instructed verdict, it does not appear that such relaxed rules of evidence have found their way into the courts of this state.

In declaring the new rule, the supreme court pointed out that Texas courts have long imposed joint and several liability in negligence cases where there was neither concert of action nor unity of design.[33] In such cases the negligent acts of the defendants were operating simultaneously, but in the *Landers* case the plaintiff did not allege that the salt water escaping from the two pipe lines reached the lake at the same time. However, the court still believed that the burden of proof is just as onerous where the defendants' acts were not operating simultaneously, and that there is no sound reason to permit joint liability in one class of cases and to deny it in the other.

The decision of the supreme court will alleviate the injustice to *plaintiffs* in damage suits against independent tortfeasors who do not act simultaneously. The important question arises: Where will this new rule lead in fixing final liability against *defendants?* A defendant is allowed contribution from his co-defendants, by statutory provision, proportioned according to the number of wrongdoers when the joint tortfeasors are *in pari delicto.*[34] In determining whether parties are *in pari delicto,* the law does not seem to take note of the quantity of negligence of different joint tortfeasors, but it has recognized a distinction in the quality of their negligence.[35] Aside from the statute, indemnity is allowed among the tortfeasors when one defendant breaches a duty to his co-defendant[36] or when one is an active wrongdoer and the other is only a passive wrongdoer.[37] In situations like that in the *Landers* case one would hardly ever find circumstances where

[33] Texas Power & Light Co. v. Stone, 84 S. W. 2d 738 (Tex. Civ. App. 1935) *er. ref.*
[34] TEX. REV. CIV. STAT. (Vernon, 1948) art. 2212.
[35] Wheeler v. Glazer, 137 Tex. 341, 345, 153 S. W. 2d 449, 451 (1941).
[36] *Ibid.*
[37] City of San Antonio v. Smith, 94 Tex. 266, 271, 59 S. W. 1109, 1111 (1900).

indemnity would be allowed, and therefore the only relief as between the tortfeasors would be contribution. In the event one party were pumping waste from only one oil well and a second party were pumping waste from one hundred oil wells, and the combined waste found its way to the plaintiff's property, under the application of the statute on contribution the first defendant could not expect to recover more than one-half of the entire liability from his co-defendant. His liability would be considerably out of proportion to the risk which he created, and there would be an injustice to allow the second tortfeasor, whose fault was patently greater than the first, to shift the burden imposed on him by the injured person.

A solution to the problem that would result in the least injustice has been suggested in the Uniform Contribution Among Tortfeasors Act.[38] The desirable rule is:

> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares. . . .[39]

In applying the rule the court would determine from the evidence if an apportionment of fault should be made. In the event an apportionment were necessary, the court would instruct the jury to fix the relative degrees of fault.

Is it possible that the Texas courts will reach this fair result without the aid of a statute such as that just quoted? In order to apply such a rule it would be necessary to avoid the application of the Texas contribution statute. The statute applies only in cases when no such right exists under the statute or at common law.[40] At common law, as a general rule, joint tortfeasors had no right

[38] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS AND PROCEEDINGS (1939) 243.

[39] *Id.* at 244.

[40] See Note, 5 Southw. L. J. 356 (1951).

of *contribution* among themselves.[41] However, it has been held that indemnity is properly allowed where the joint tortfeasors are not *in pari delicto*, as where there was no concerted action, or where the injury has resulted from a violation of the duty which one owes the other.[42] The defendants in the *Landers* case were not *in pari delicto* to the exent that they were not equally at fault, nor was there any concert of action. Where there is no concerted action, the general rule does not apply, as the parties in such case are not *in pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them.[43] Texas courts have held the principal delinquent responsible to the co-delinquent when under the facts the parties were not equally culpable.[44] The Texas Supreme Court has used the doctrine *in pari delicto* quite broadly in allowing indemnity as distinguished from contribution.[45] It is submitted that the courts should allow a tortfeasor in a fact situation like that in the *Landers* case to take his case out of the statutory provision for contribution and secure an apportionment in relation to the degrees of fault.

Clarence J. Eden.

---

[41] 18 C. J. S., *Contribution*, § 11, p. 14.

[42] *Id.*, § 11, p. 16.

[43] Vandiver v. Pollak, 97 Ala. 467, 12 So. 473 (1893); Skala v. Lehon, 343 Ill. 602, 175 N. E. 832 (1931); 1 COOLEY, TORTS (3d ed. 1906) 259.

[44] 10 TEX. JUR., *Contribution*, pp. 554, 555.

[45] Humble Oil & Ref. Co. v. Martin, 148 Tex. 175, 222 S. W. 2d 995 (1949); see Note, 4 Southw. L. J. 349 (1950).