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Torts--Independent Tort-Feasors--Entire Liability

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injunctive relief at the instance of the state against the violation of a self-executing constitutional provision or statute.[12] It is therefore suggested that Article 15, Section 6 is self-executing to the extent that it may be enforced by the courts through the use of the injunction when invoked by prosecuting officers.[13]

EUGENE SELKER

TORTS — INDEPENDENT TORT-FEASORS — ENTIRE LIABILITY

The plaintiff alleged that A and B corporations negligently permitted their respective pipe lines to break, allowing salt water and oil to escape and drain into the plaintiff's lake. The defendants' pleas in abatement asserting a misjoinder of parties and causes of action were sustained by the lower court on the ground that the petition did not allege a concert of action or unity of design between the defendants and therefore did not state a case of joint and several liability. *Held:* Judgment reversed, overruling a previous Texas case, one justice dissenting. The court reasoned that whenever the tortious acts of two or more wrong-doers unite to produce an invisible injury all the wrongdoers will be held jointly and severally liable.[1]

It is generally held that defendants do not cause a single indivisible injury where they independently contribute pollution to the total pollution of the plaintiff's stream[2] or air,[3] unlawfully contribute flood waters to the total flooding of his land,[4] or independently contribute noise to a noise nuisance.[5] It is usually held that such separate tort-feasors may not be joined in the same action.[6] The primary reason advanced for these results is that damages in these cases are capable of at least a rough apportionment.[7] This view has been attacked by most text-writers.[8] Their criticism is based on the premise that many times the injury is, "as a practical matter and realistically considered, but a single indivisible injury, incapable of apportionment."[9]

That injustice may be caused by the view taken in the majority of cases is well illustrated by the Texas decisions prior to the principal case. Zealous

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[12] *In re* Debs, 158 U.S. 564, 39 L. Ed. 1092 (1892) (injunction against interference with interstate commerce); State v. McMahon, 128 Kan. 772, 280 Pac. 906 (1929) (injunction against usury in violation of statute).

[13] *See* State *ex rel* Hunter v. Fox Beatrice Theatre Corp., 133 Neb. 392, 275 N.W 605 (1937); State *ex rel.* Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N.W 705 (1929) In the *Fox Theatre* case the court said: "Lottery laws are directed against an evil and it is the duty of courts to give effect to the remedies invoked by prosecuting officers." And *see* State v. Fox Great Falls Theatre Corp. 114 Mont. 52, 91, 132, P.2d 689, 708 (1942), in which a dissenting judge stated that the injunction is a proper remedy to enforce a self-executing constitutional provision prohibiting lotteries.

to prevent unfairness to a defendant, the courts often left the plaintiff remediless because he could not discharge with sufficient certainty the burden of proving the portion of the injury attributable to each defendant.[10] It has been suggested in answer to this difficulty that the rule of divisibility be retained, but that the burden of proving the respective shares of damages be shifted from the plaintiff to the defendant.[11]

The suggested modification of the majority rule should be contrasted with other types of judicial solutions which grew up in a crazy quilt pattern alongside the cases affirming the traditional view. One court attempted to make a distinction between tort-feasors who created a private nuisance and those who created a public nuisance, the latter being held entirely liable for damages caused by their concurrent negligence in a situation in which only separate liability would have been imposed in a private nuisance situation.[12] Finding concert where in fact there was none, at least in the

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[1] Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731 (Texas 1952), *overruling* Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Texas Commission of Appeals 1930).

[2] City of Mansfield v. Bristor, 76 Ohio St. 270, 81 N.E. 631 (1907).

[3] Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S.W 93 (1903). RESTATEMENT, TORTS § 881 (1939).

[4] Wm. Tackaberry Co. v. Sioux City Service Co., 154 Iowa 358, 132 N.W 945 (1911).

[5] Sherman Gas & Elec. Co. v. Belden, 103 Tex. 59, 123 S.W 119 (1909).

[6] Farley v. Crystal Coal & Coke Co., 85 W Va. 595, 102 S.E. 265 (1920).

[7] "the amount discharged into the stream by each [defendant] and the degree of polluting properties in each, furnish an approximate guide to a reasonable division of the damages." City of Columbus v. Rohr, 20 Ohio C. Dec. 155, 10 Ohio C.C.(N.S.) 320 (1907).

[8] 1 COOLEY ON TORTS 276-287 (4th ed. 1932). Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939); Wigmore, *Joint Tort-Feasors and Severance of Damages; Making an Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1922); Comment, 19 CALIF. L. REV. 630 (1931). Prosser is alone among the writers. He feels that the disadvantages have been exaggerated. See PROSSER, TORTS 335 (1941).

[9] Jackson, *supra* note 16, at 402. There is a line of cases dating from the year 1802 that approve this view, but they constitute a definite minority. Hill v. Smith, 32 Cal. 166 (1867); McDaniel v. City of Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913); Greer v. Pelican Natural Gas Co., 163 So. 431 (La. App. 1935); Tidal Oil Co. v. Pease, 153 Okl. 137, 5 P.2d 389 (1931); Wright v. Cooper, 1 Tyler 425 (Vt. 1802). *Cf.* Jessup & Moore Paper Co. v. Zeitler, 180 Md. 395, 399, 24 A.2d 788, 791 (1942).

[10] Algorde Oil Co. v. Hokanson, 179 S.W.2d 350 (Tex. Civ. App. 1944); Paluxy Asphalt Co. v. Helton, 144 S.W.2d 453 (Tex. Civ. App. 1940); Tucker Oil Co. v. Mathews, 119 S.W.2d 606 (Tex. Civ. App. 1938).

[11] Wigmore, *supra* note 16, at 459. Professor Wigmore suggests that the rule of joint and several liability was designed to relieve a plaintiff of the intolerable burden of proving what share each of two or more wrongdoers contributed to plaintiff's injuries.