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LIABILITY OF JOINT TORTFEASORS IN COLORADO

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Joint liability for injuries caused by tortious act is imposed in several distinguishable situations which can be, for convenience, divided into three basic categories. The first and most obvious is the situation wherein two or more persons cooperate and act in concert in the actual doing of the tortious act. Here the liability is joint because the act is joint. The second general category includes cases where two or more persons, acting independently, commit separate tortious acts and an injury is inflicted upon a third person as a result of the combined acts. Here joint liability is imposed because each wrongdoer has contributed to the injury. The fact that the actors were not equally culpable or that their independent acts contributed in varying degree to the total injury is not considered by the courts. They are each liable for the total damage ensuing as each contributed to the injury, and as between wrongdoer and injured party, the wrongdoer is at fault. The third category, although not strictly involving joint tortfeasors, still results in joint liability to the person injured. This is what is commonly designated vicarious liability, or the liability of both master and servant for the tortious act of the servant. In this case the joint liability is imposed as a matter of justice to insure compensation to the injured party. We mention this last category only to point out a further method by which joint tort liability is imposed. Rules as to contribution, indemnity, release, and satisfaction applicable to vicarious joint liability would not apply to cases intended to be here covered. We therefore only mention this form of joint tort liability in passing.

Colorado has recognized all three of these categories and has imposed joint and several liability in each of them. In the case of *Reyher v. Mayne*,¹ the defendants trespassed upon land to hunt. Coming upon the plaintiff's live decoys the defendants shot same, and in the process, wounded the plaintiff. There, even though it was contended by the one defendant that the shot injuring the plaintiff was fired by the other defendant, the court said, "It is the fact of participation, not the degree, or the extent, or the particulars, that makes every participant in such a tort liable. It is a thing integral and indivisible. Each defendant here is properly answerable for the sum of the damage inflicted by both wrongdoers." In *Larimer and Weld Irrigation Company v. Walker*,² two irrigation companies acting pursuant to an agreement for the sharing of water, transferred, by the separate act of each, an ex-

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¹ 90 Colo. 586, 10 P. 2d 1109 (1932).

² 65 Colo. 320, 176 P. 282 (1918).

cessive amount of water into a public stream which resulted in the flooding of plaintiff's land. Even though the respective amounts of water diverted by the two defendants were greatly unequal the court held both defendants to be jointly liable for the full amount of the damage on the grounds that each had violated a duty owed to the plaintiff. The act of each, though done separately, combined to become one act, the joint act of both.

In *Alden v. Watson*,³ the court held that the concurring negligence of two automobile drivers resulting in the injury of the plaintiff, even though such acts were independent and the exact proximate cause of the accident was not determined, made defendants jointly liable for the total harm caused thereby.

LIAILITY IS JOINT AND SEVERAL

Although there is not an abundance of Colorado cases involving joint tortfeasors, nor is there any statutory law regarding this matter, it would seem from the limited cases that the Colorado Supreme Court follows the common law rule that the liability of joint tortfeasors, acting either in concert or independently, is joint and several.

The early case of *Carper v. Risdon*⁴ refused to repudiate liability of tortfeasors even after dismissal as against some. This was an action for an alleged conversion of mining machinery by a former lessee against both the land owner and a subsequent lessee. The court, in dismissing the action against the innocent lessee, stated as follows:

The point is made that after the court had ordered the dismissal as to Lindemann (lessee), it could not lawfully render judgment against Carper, because the complaint charged a joint conversion. For a joint trespass, the liability is joint and several. This action might have been brought in the first instance against Carper alone; there might at any time before judgment, have been a dismissal by the plaintiff as to Lindemann, leaving the action to proceed against the other defendant; and, on principle, we confess ourselves unable to see why the court might not do what could have been done by the plaintiff, or why it is not competent to either court or jury, in an action for a trespass, to find one defendant guilty and another not guilty.

Shortly after this decision, in an action against several defendants for the loss of a trunk and its contents,⁵ the jury returned a verdict against one defendant and acquitted two others, the court held that a plaintiff is entitled to a judgment against those de-

³ 106 Colo. 103, 102 P. 2d 479 (1940).

⁴ 19 Colo. App. 530. 76 P. 744 (1904).

⁵ *Denver Omnibus and Cab Co v. Gast*, 54 Colo. 17, 129 P. 233 (1912).

fendants found guilty even though some of the defendants are acquitted.

In an action in trespass for conversion of mining ore,⁶ where the plaintiff chose to sue only one of the converters and not the original trespasser, the court held that acts of conversion that are *ex delicto* are joint and several and that the plaintiff was not required to join all tortfeasors in a single action. The court quoted approvingly both *Carper v. Risdon* and *Denver Omnibus and Cab Company v. Gast*, supra, as authority for this proposition. Still further emphasis on this point was made in an action for malicious prosecution,⁷ where the court, in dismissing an action against one defendant, said: "In an action for damages for malicious prosecution, the liability of joint tortfeasors is joint and several, and the judgment may be against one, more, or all of them."

A partner's liability for the tortious acts of another partner, even prior to the adoption of the Uniform Partnership Act by Colorado in 1931, was joint and several. Even when partners are sued jointly for the death of a mining employee, and one partner dies before judgment, the action is not abated, and the case can proceed to judgment against the surviving partner.⁸ In *Bonfils v. Hayes*⁹ the defendants contended they were operating as a corporation even though the charter had not been renewed. When this contention was overruled, they maintained they were not a partnership and could not be held personally liable for the negligent tort of the defendant's agent. The court in ignoring this defense, stated:

If they were actively co-operating in a business enterprise and, in connection therewith, committed the tort in question, they are liable whatever the title of their combination, partners, co-adventurers, joint tort-feasors or what.

The Uniform Partnership Act¹⁰ makes the partnership jointly and severally liable:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

The act further provides¹¹ that a partnership is bound to make good any breach of trust:

⁶ *American Smelting and Refining Co. v. Hicks*, 65 Colo. 146, 172 P. 1055 (1918).

⁷ *Bernstein v. Simon*, 77 Colo. 193, 235 P. 375 (1925).

⁸ *Rice v. Van Why*, 49 Colo. 7, 111 P. 599 (1910).

⁹ 70 Colo. 340, 201 P. 677 (1921).

¹⁰ C. S. A., Ch. 123, Sec. 13 (1935).

¹¹ C. S. A., Ch. 123, Sec. 14 (1935).

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Liability of railroad companies using common tracks, for injuries caused by reason of faulty maintenance of such tracks was recognized early in Colorado history in the case of *Denver and Rio Grande Railroad Company v. Sullivan*.¹² Plaintiff was injured as a result of a derailment of defendant lessee's car. In holding both roads jointly and severally liable, the court made the following statement:

Where one company owns a line of railroad and another company is permitted to use a part of the line, the same duty devolves upon each to see that the road over which it runs is safe and in good repair. Both companies are liable for injury resulting from the negligent condition of the track. The liability is joint against both companies, or single against either.

This rule of law has been followed whenever an analogous situation has arisen. Where an explosion resulting in death occurred in a freight yard due to the negligence of the lessee of the railroad tracks, both the owner of the tracks and the lessee were joined in one action and held liable.¹³

Negligence ordinarily imposes joint liability where there is a common neglect of a common duty owed either to individual third persons or to the general public. The failure of both an adjoining lot owner and the city to cover a sidewalk excavation is an obligation common to both and makes it possible for them to be sued jointly or severally.¹⁴ Employment of two physicians for diagnosis and treatment which is performed negligently makes them liable as joint tortfeasors.¹⁵

At common law permissive joinder of defendants was limited to cases of concerted action on the theory that the plaintiff had only one cause of action and could recover only one judgment. Colorado has consistently refused to follow this doctrine both before and after the adoption of the liberal joinder provisions of the Colo-

¹² 21 Colo. 302, 41 P. 501 (1895).

¹³ Willson v. Colorado & Southern Railway Co. et al., 57 Colo. 303, 142 P. 174 (1914).

¹⁴ Elliott et al. v. Field, 21 Colo. 378, 41 P. 504 (1895); Goede v. City of Colorado Springs et al. 200 F. 99 (1912); Belcaro Realty Investment Company et al. v. Norton, 103 Colo. 485, 87 P. (2d) 1114 (1939).

¹⁵ Bolles v. Kinton et al., 83 Colo. 147, 263 P. 26 (1928).

rado Rules of Civil Procedure. This, of course, does not preclude the plaintiff from suing joint tortfeasors severally.

RELEASE OF JOINT TORTFEASORS

A release is a surrender of a cause of action and does not necessarily indicate that satisfaction of the claim through full compensation for the injury has been received. Since at common law releases were under seal, a release to one of two tortfeasors that had acted in concert necessarily released the other, as there was only one cause of action to be surrendered. American courts have divided on this point. Colorado follows the common law rule in holding that a release of a right of action against one tortfeasor releases the other.¹⁶ This is true even though the release itself indicated an intention not to release all of the joint tortfeasors.¹⁷ It would seem from the decisions of the Colorado Supreme Court that joint tortfeasors are liable both jointly and severally and a release of one is a release of all.

LIABILITY AS BETWEEN JOINT TORTFEASORS

Historically contribution between joint tortfeasors has been denied. Thus where a judgment has been recovered against two wrongdoers jointly and only one actually satisfies the judgment, he is left with no remedy against his fellow judgment debtor. That one of two equally culpable parties should bear the entire loss caused by the joint wrongful act while the other wrongdoer goes free, so to speak, seems unjust and inequitable. The reason for the rule seems to be that public policy will not allow the wrongdoer who has responded in damages to ground an action upon his own iniquity. In some jurisdictions there has been a distinction drawn between the cases in which malice was involved and those involving only negligence, allowing contribution in the latter case but denying it in the former. Several states have by statute allowed recovery by one tortfeasor over against his fellow wrongdoer in limited cases. Some seven states and Hawaii have adopted the Uniform Contribution Among Tortfeasors Act which completely abrogates the common law rule denying contribution between joint tortfeasors.

The authors were unable to find any case in Colorado directly bearing upon the point of contribution between tortfeasors, nor was any statutory enactment in Colorado found on the subject. There is dictum in the case of *Otis Elevator Company v. Maryland Casualty Company*¹⁸ to the effect that where the joint tortfeasors acted in concert contribution will be denied. As this is merely dictum, and as no Colorado case has arisen where contribution was actually denied, the question is to a great extent an open one in this state. Just where the Colorado Supreme Court will draw

¹⁶ *Bowman v. Davis*, 13 Colo. 297, 22 P. 507 (1889); *Denver & Rio Grande R. Co. v. Sullivan*, *supra*.

¹⁷ *Ducey v. Patterson*, 37 Colo. 216, 86 P. 109 (1906).

¹⁸ 95 Colo. 99, 33 P. 2d 974 (1934).

the line is only subject to conjecture. The rather liberal rule adopted in the cases of indemnity of one tortfeasor by his fellow wrongdoer, to be discussed later, may indicate that contribution in Colorado might be allowed except in the cases of actual malice or concerted action.

Indemnity of one joint tortfeasor from his joint wrongdoer has been allowed in Colorado. In *Colorado & Southern Railway Company v. Western Light & Power Company*,¹⁹ the court recognized the general rule that there can be no contribution or indemnity between joint tortfeasors but held that the case fell within a well recognized exception to the rule where "the plaintiff's negligence was antecedent, negative and passive, merely producing the occasion or condition, and did not contribute to the accident, and that the defendant's negligence, of a different character, if not willful, was subsequent, active and positive, and the sole cause of the collision." The wrongdoer whose negligence was the actual cause of the injury, as between the two wrongdoers, is primarily liable and must indemnify his fellow wrongdoer for damages paid as a result of the injury done by such negligence.

In the case of *Otis Elevator Company v. Maryland Casualty Company*,²⁰ where the elevator company's negligence consisted of improper installation of the elevator cables and the Oil Exchange Building Company's negligence consisted merely of failure to inspect such cables, indemnity was allowed not only to the extent of monies paid in damages but also for expenses of defending suits against injured third parties. The court said, "Oil Exchange Building had the right to recover from Otis Company for its negligence as the *primary* cause of the accident." (Italics ours.)

In the case of *Parrish v. De Remer*,²¹ the Colorado Supreme Court clearly stated a summarization of the above discussed two cases. Speaking of the decision in *Colorado & Southern Railway Company v. Maryland Casualty Company*, which was followed by the *Otis Elevator Company* case, the court said:

In this decision the general principles announced are: 1. That while there is a general rule which precludes one wrongdoer from receiving indemnity from another wrongdoer, there is an exception thereto which permits a party who is in fault as to the person injured, but who is without fault as to the party whose actual negligence is the cause of the injury, to recover indemnity. 2. Where an action is brought and both defendants are found guilty, one who pays the judgment may have a cause of action against the other for indemnity because the question as to the negligence of which the defendant was the primary, sole and proximate cause of the injury was

¹⁹ 73 Colo. 107, 214 P. 30 (1923).

²⁰ 95 Colo. 99, 33 P. 2d 974 (1934).

²¹ 117 Colo. 256, 187 P. (2d) 597 (1947).

not adjudicated and will not be deemed to have been adjudicated until it appears that such issue was actually submitted and determined in said action for damages. 3. Even though one was guilty of some negligence resulting in damages to another, in an action for which, judgment was entered, this does not preclude, bar or estop the judgment debtor from establishing that the negligence of another was the sole, proximate and primary cause of the injury, and if this fact is established by a preponderance of the evidence, the one paying the judgment is entitled to indemnification. 4. One who has been charged with negligence as to another, and for which judgment has been entered and paid, may maintain an action against a joint tortfeasor for indemnification if he can establish by a preponderance of the evidence that the sole, proximate and primary cause of the injury and resultant judgment was the negligence of his joint tortfeasor. The judgment against two joint tortfeasors is not evidence in such an action, neither is it *res judicata*, a bar or estoppel between these joint tortfeasors.

The law governing the liability of joint tortfeasors to one another, rights of contribution or indemnity, is in a state of flux and change in all jurisdictions. Colorado is no exception. The total picture indicates a movement away from the common law rule that contribution or indemnity will not be allowed between joint tortfeasors. Some states have expressly abrogated this rule, in part, by excepting certain situations by statute. Others have accomplished the same result through judicial decision in recognizing exceptions to the general rule even though still espousing that rule.

The law on these points is not clearly defined in Colorado. The Supreme Court of this state has espoused the general rules. They have said that contribution will be denied between joint tortfeasors; they have said that indemnity of one joint tortfeasor by his fellow wrongdoer will not be allowed. Yet they have not denied contribution nor have they denied indemnity. In the case of contribution, attorneys in the area have taken the court at their word. The court said no contribution would be allowed, so no attorney has asked them to allow it. They said one of two joint tortfeasors can not obtain indemnity from his fellow wrongdoer, but when they were asked to allow such relief they found an exception to the general rule. Is it not possible, then, that when presented with a proper case they may also find exceptions to the general rule prohibiting contribution between joint tortfeasors? Granting that as a matter of public policy one cannot ground his claim on his own iniquity, could they not find that one may not advance the culpability of another to shield his own wrongful act. We do not know in what cases contribution will be allowed, or if it will be allowed. We do not know when indemnity will not be

allowed, but know only some cases in which it will be. We do not know, therefore, we may still hope, that, unlike the common law judges, our Supreme Court will approach the question with an open mind oriented to the world in which we live. We may hope that the absurd unfairness of shackling one of two merely negligent wrongdoers with the entire financial burden of damage caused thereby, simply because he is easier to collect against, will not continue to exist in Colorado. We may still hope that by approaching the problem with open eyes and minds our Supreme Court will spare us the entanglement of one more statute.

WHEN THE SPOKEN WORD BECOMES A LIBEL

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Due to the ease with which defamatory matter has been published since the advent of radio, television and other modern media, the traditional distinction between libel and slander is without basis in reason and should be abolished. The existing distinction might well be compared to the living leaves on a tree whose roots are dead. The foundation is gone, but the law founded upon that foundation lives on. Ultimately, however, the law must perish even as the leaves on the foundationless tree must fall.

Present day courts recognize the vanishing of the foundation, but refuse to depart from the historical distinction between libel and slander. The attitude of the courts is clearly expressed in a recent federal case which stated, "The distinction between libel and slander, although indefensible in principle, is too well recognized to be repudiated."¹

To graphically show the results of the present law, consider these practical examples. A letter containing defamatory matter about X is sent to X but his secretary opens the letter and reads the matter. Without proof of more X has an action against the defamer. Suppose, however, the same matter had been published in an extemporaneous television show. Then X would have no action without proof of special damages or that the slander was of the type actionable per se, since extemporaneous television broadcasts were held to be slander in the only case dealing with the point.² It is clear in which of the examples harm was most likely to result, and yet it is equally clear that in many cases redress from the grievance could only be had in the less harmful case of the letter read by a third person.

Take another example. X prepares a script in which the Z hotel is referred to as a house of ill repute. X publishes the defamation by reading the script on a radio broadcast. Y states the same defamation over the air but is not reading from a script at

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¹ Remington v. Bentley, 88 Fed. Sup. 166.

² *ibid.*