

May 1971

## Torts - Proximate Cause. Haft v. Lone Palm Hotel, \_\_Cal. 3d \_\_, 478 P.2d 465, 91 Cal. Rptr. 465 (1970)

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### Repository Citation

J. W. Montgomery III, *Torts - Proximate Cause. Haft v. Lone Palm Hotel, \_\_Cal. 3d \_\_, 478 P.2d 465, 91 Cal. Rptr. 465 (1970)*, 12 Wm. & Mary L. Rev. 928 (1971),  
<https://scholarship.law.wm.edu/wmlr/vol12/iss4/15>

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from undue harassment would be to deny reality.<sup>16</sup> *Garner* avoided the problem by refusing to categorize the relationship.<sup>17</sup>

Apparently, the court has taken cognizance of the detached relationship between today's large corporations and their multitude of shareholders by refusing to adopt, without limitation, the trustee theory followed by *Pattie Lea* in its application of the joint client exception. In its place, *Garner* has provided a more flexible set of indicators to be used, on a case by case basis, in determining whether or not a group of stockholders is in sufficient privity to the corporation to justifiably preclude the corporation from asserting the privilege against them. Among the factors,<sup>18</sup> which the court will consider in determining the presence of the privilege are: the nature of the claim, the characteristics of the claimants, and the availability of other means of securing the information.<sup>19</sup>

MICHAEL D. HORLICK

Torts—PROXIMATE CAUSE. *Haft v. Lone Palm Hotel*,—Cal. 3d—, 478 P.2d 465, 91 Cal. Rptr. 465 (1970).

In an action to recover from a motel owner for the unwitnessed drownings of a father and son in the motel pool, plaintiffs alleged that defendant's failure to comply with the statutory requirement that a

16. Cf. *In re Prudence Bonds Corp.*, 76 F. Supp. 643 (E.D. N.Y. 1948). Part of the managerial task is to seek counsel when desirable, and obviously, management prefers that it confer with counsel without the risk of having the communication revealed at the instance of one or more dissatisfied shareholders.

17. The court discussed the various theories concerning the corporation-stockholder relationship but declined to adopt any of them.

18. The court's test emphasized the following factors:

[T]he bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

430 F.2d at 1104.

19. The only definite conclusion this court reached as to the lower court's holding was that this case involved a federal question with ancillary state aspects. It was not a diversity case. Consequently the law of the forum state, Alabama, was not binding. *Id.* at 1098.

lifeguard be present or that a sign warning of the absence of a lifeguard be posted constituted negligence per se and was the proximate cause of the drownings as a matter of law. Accordingly, plaintiffs contended that these issues should not have been submitted for determination by the jury.<sup>1</sup>

On appeal, the Supreme Court of California held that failure to satisfy the statutory safety requirements constituted negligence as a matter of law, and that, in proving defendant's violation, plaintiffs sustained their initial burden of proof on the issue of proximate cause. The burden of showing that their violation was not a proximate cause of the deaths was thereby shifted to the defendant.<sup>2</sup>

In ruling that the failure to satisfy statutory safety requirements constituted negligence as a matter of law, the supreme court adopted a position recognized by earlier California decisions,<sup>3</sup> and the majority of states which have passed on the question.<sup>4</sup> However, the court's declaration that the evidence establishing the violation of such a statute would satisfy plaintiff's initial burden of proving proximate cause and shift the burden to the defendant is a new departure.

The California Court of Appeals was faced with a similar fact situation in *Lucas v. Hesperia Golf & Country Club*<sup>5</sup> wherein plaintiff's son had drowned in an unattended swimming pool. There, the jury had returned a judgment for plaintiff. On appeal, defendant contested the finding of proximate cause absent direct evidence that violation of the statute was the cause of death. In rejecting this contention, the court ruled that the "breach of a statutory duty may be sufficient to

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1. *Haft v. Lone Palm Hotel*, — Cal. 3d —, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). The trial court denied an instruction to the jury that violation of the statute constituted negligence as a matter of law, or that the violation was the proximate cause as a matter of law. This ruling was upheld on appeal. 83 Cal. Rptr. 312 (1969).

2. 478 P.2d at 469. It should be remembered that the drownings were unwitnessed and therefore there was no direct evidence on the issue of cause.

3. *Lucas v. Hesperia Golf & Country Club*, 255 Cal. App. 2d 241, 63 Cal. Rptr. 189 (1967); *Linsey v. DeVaux*, 50 Cal. App. 2d 445, 123 P.2d 144 (1942). See also RESTATEMENT (SECOND) OF TORTS § 286 (1965).

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 202 (3d ed. 1964). Once the plaintiff has shown himself to be within the class of persons which the statute was designed to protect, the majority of courts hold that an unexcused violation is conclusive on the issue of negligence, and that the jury must be so instructed.

A minority of jurisdictions hold that such a violation is only evidence of negligence which the jury may accept or reject. See, e.g., *Guinan v. Famous Players-Lasky Corp.*, 267 Mass. 501, 167 N.E. 235 (1929).

5. 255 Cal. App. 2d 241, 63 Cal. Rptr. 189 (1967).

give rise to an inference from which the jury may find that the injury was the proximate result of the violation".<sup>6</sup>

The problem presented in *Haft* differs from that in *Lucas*, however, in that the jury returned a verdict for defendant in the former, while a plaintiff verdict was rendered in the latter.<sup>7</sup> The jury in *Haft* appeared to have rejected the inference that defendant's failure to supply a lifeguard was the proximate cause of the drownings, despite the absence of defense evidence to the contrary. The court was therefore faced with a situation in which defendants were allowed "to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created."<sup>8</sup> In view of defendant's lack of rebuttal evidence on the issue of proximate cause, the court announced that plaintiffs' initial showing of the statutory violation was sufficient to shift to defendants the burden of proving otherwise.

In justifying this ruling, the *Haft* court found two earlier California decisions dealing with analogous situations to be persuasive.<sup>9</sup> In *Summers v. Tice*,<sup>10</sup> two hunters simultaneously fired their guns and one pellet of shot struck a third member of the party. Instead of dismissing the action against both for lack of conclusive proof against either, the court shifted the burden of proving lack of causation to the two defendants.<sup>11</sup> Thus, the innocent plaintiff was allowed to recover where the negligence of the defendants was clear and only the issue of causation was in doubt.<sup>12</sup>

The holding in *Summers* was predicated in part upon the celebrated decision in *Ybarra v. Spangard*.<sup>13</sup> While that case dealt primarily with a *res ipsa loquitur* situation, the practical difficulties were similar.<sup>14</sup> There the plaintiff sustained an injury while anesthetized on an operating table. The burden of demonstrating which among the many doctors and nurses who had participated in the operation had caused

6. 63 Cal. Rptr. at 196. See also *Lindsey v. DeVaux*, 50 Cal. App. 2d 445, 123 P.2d 144 (1942), where under similar circumstances a like contention was rejected.

7. 63 Cal. Rptr. at 196.

8. 478 P.2d at 475.

9. *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944).

10. 33 Cal. 2d 80, 199 P.2d 1 (1948).

11. 199 P.2d at 4.

12. Dean Prosser considers this decision quite satisfactory. W. PROSSER, *supra* note 4, at 247.

13. 25 Cal. 2d 486, 154 P.2d 687 (1944).

14. *Haft v. Lone Palm Hotel*, — Cal. 3d —, 478 P.2d 465, 475, 91 Cal. Rptr. 745, — (1970).

the injury proved to be impossible. In view of the unfairness of this burden, the court came to the plaintiff's aid and held that under the *res ipsa loquitur* doctrine, plaintiff could maintain his claim against everyone who had any connection with the operation, and the burden was on the individuals to show their non-involvement.<sup>15</sup>

While the issue of proximate cause was not at the heart of these two decisions, the analogy is unavoidable. Where negligence was clear and only the issue of individual causation was in doubt, the courts shifted the burden of proof to the defendants, requiring them to show an absence of responsibility. It must be remembered, however, that these two cases are precedent only on the issue of apportionment of liability, not on the issue of proximate cause.

In *Haft*, the jury's return of a defense verdict forced the court to re-evaluate the weight to be given proof of a violation of a safety statute. As noted, the prevailing position, as per *Lucas*, was that the jury was permitted to draw an *inference* of proximate cause from proof of a statutory violation. But the defense verdict in *Haft*, an apparent rejection of such an inference, was returned in the absence of any defense proof to support it. Rather than allow the verdict to stand the *Haft* court, upon the rationale of *Ybarra* and *Summers*, declared that the burden of proof must be shifted to the defendant. This decision was reached on the ground that since the defendant was negligent as a matter of law in failing to provide a lifeguard, and since the absence of a lifeguard had operated to deny plaintiffs their only possible witness to the drownings, the defendant must bear the burden of proof which his neglect had made so difficult. As a practical matter, it would appear to be equally as difficult to prove absence of proximate cause as to prove its existence.<sup>16</sup>

The impact of this decision upon California case law is that it replaces what was merely an allowable inference under *Lucas* with a compelled finding of proximate cause in the absence of defense evidence to the contrary.<sup>17</sup> As the *Haft* court noted, this result is con-

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15. The *Summers* court noted that the effect of the *Ybarra* decision "is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of this injury." 33 Cal. 3d at 86-87, 199 P.2d at 4.

16. It should be noted that although defendants may be unable to show the absence of proximate cause when the burden has been shifted to them, the defenses of contributory negligence or assumption of risk are still available. *Gonzales v. Derrington*, 56 Cal. 2d 130, 363 P.2d 1, 14 Cal. Rptr. 1 (1961).

17. It is interesting that this is precisely the result which the intermediate appellate

sistent with the emerging tort law policy of assigning liability to the party who is in the best position to distribute the loss.<sup>18</sup>

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court declined to reach, saying, "[B]ut plaintiffs want us to go much further and to hold that the inference is not only permissible, but compelled." 83 Cal. Rptr. at 316.

18. 478 P.2d at 477.