

*Summers v. Tice* ♦ 33 CAL.2D 80 (1948)

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EDITOR'S NOTE: "A Second Look" is a series of articles that will provide new perspectives on noteworthy decisions by the California Supreme Court.

THE CALIFORNIA SUPREME COURT'S decision in *Summers v. Tice* represents a staple of the first-year law-school curriculum. *Summers*, which many of you may remember as "that who-done-it tort case with the three hunters," makes excellent classroom fodder because the facts are so simple, the dilemma they create so readily grasped, and the Court's solution so elegant. But as in so many cases, the facts in *Summers* were hotly disputed. This article takes a second look at *Summers*, and considers how the case might have turned out differently.

The *Summers* Court recited the material facts in one paragraph, as follows:

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7½ size shot. Prior to going hunting, plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.<sup>1</sup>

These facts reveal the plaintiff's problem: Summers did not know who, as between his two companions (Simonson

and Tice), had fired the blast that deposited shot in his eye and lip. Assuming Summers had to prove every element of his case by a preponderance of the evidence, how could he show which of the defendants caused his injury, if the proof was in complete equipoise as to the two of them?

This was not a problem that the plaintiff in *Summers* anticipated. His complaint envisioned that the court would identify either Tice or Simonson as the culpable party, and enter judgment against one of them. It alleged "[t]hat plaintiff is in doubt as to the person from whom he is entitled to redress and therefore has joined both defendants in this action with the intent that the question as to which of the defendants is liable, and to what extent, may be determined by this Court."<sup>2</sup>

But instead of pinning responsibility on Tice or Simonson, the trial judge found them both jointly liable. Two weeks after a two-day bench trial in October 1946, the judge pro tempore who presided over the case ordered "that the plaintiff have judgment against the defendants, and each of them, in the sum of Ten Thousand (\$10,000) Dollars."<sup>3</sup> This order did not include a factual or legal basis for the decision. Instead, it directed Summers' counsel to prepare findings of fact and conclusions of law. As drafted by this attorney and later signed by the judge, these findings included the somewhat coy determination that "as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip."<sup>4</sup>

Tice and Simonson both appealed the judgment, arguing (as put in Tice's opening brief before the Court of Appeal) that "the judgment must be reversed because of the failure of the court to make a specific finding . . . as to which of the defendants is liable in this action, in that the evidence conclusively shows that plaintiff's eye was not destroyed by shots from each of the guns of the defendants, but only by one shot which could have been fired only by one of the defendants."<sup>5</sup>

The defendants managed to secure a reversal from the Court of Appeal, but Summers petitioned for review and fared better before the California Supreme Court. In unanimously affirming the judgment entered by the trial court, *Summers* advanced a resonant policy rationale for holding both defendants liable for their negligence:

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

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only, a requirement that the burden of the 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. . . . Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. . . . [I]n the instant case plaintiff is not able to establish which of defendants caused his injury.<sup>6</sup>

Torts professors love *Summers* because it engages students of all inclinations. More cautious pupils can draw a narrow rule from the decision, learning that circumstances analogous to those involved in *Summers* (i.e., negligent defendants with better access to proof, a blameless plaintiff unable to establish causation on his or her own, all potentially culpable defendants before the court) may allow for a shift in the burden of proof on causation in a negligence case. More adventurous students, meanwhile, can glean from the case the broader, if more qualified, principle that doctrine should serve to promote justice, not stand in its way, and to the extent that the law does not fulfill this purpose, it should be reformed.

In addition to these takeaways, *Summers* offers a subtler lesson regarding the contingencies that lurk behind any appellate holding. The three hunters all recounted the events of November 20, 1945 differently in their trial testimony. Some of these differences were crucial. Among them, the three actors disagreed about the timing of the relevant shots. Tice testified that he fired his gun just once, three to five minutes before Simonson fired the first of his two shots. Tice added that it was only after Simonson's second shot that Summers yelled out that he had been shot. Simonson confirmed that he fired twice to Tice's once, testifying that Tice's shot and his first shot came in fairly close sequence, with his second shot being somewhat delayed. Summers, however, testified that his companions fired two shots "almost together, simultaneously." Simultaneous firing, of course, made it more likely that either Simonson or Tice could have fired the shot that put out Summers' eye.

Another important point of disagreement involved the type of shot Simonson and Tice used. The *Summers* decision repeats the trial court's finding that both defendants used size 7½ shot, and provides no indication that the size of the shot was disputed. It was. Tice testified at trial that he loaded his gun with size 6 shot, which is of detectibly different size from the size 7½ shot Simonson used. Summers' trial testimony imbued this discrepancy with added significance. Summers testified that although he had been given the shot removed from his eye, he had since lost it. If Tice testified truthfully about the sizes of the shot that he and Simonson used, then Summers,

and not the defendants, had access to the best evidence regarding the identity of his shooter, in the form of the shot he had since misplaced — a fact that would undercut a key pillar of the Supreme Court's decision.

All in all, the parties' testimony, along with the other evidence adduced at trial, could have supported a judgment against Simonson only. It is unclear why the trial judge, without explanation in his order, found both defendants liable. Perhaps he believed that Tice lacked credibility as a witness. Perhaps he believed that Tice's blast was a cause of Summers' harm even if it hit nothing, as it may have emboldened Simonson to fire — a theory later posited by the Supreme Court in its decision. Perhaps other considerations, such as the defendants' ability to pay damages, factored into the equation.

In any event, the findings of fact that Summers' attorney extrapolated from the judge's terse order made certain to resolve every material factual dispute in his client's favor. These findings flatly rejected Tice's testimony regarding the type of shot he used, determining instead that both defendants were using size 7½ shot at the time of the accident. Given this finding, Summers' loss of the shot became immaterial. The findings also rejected Tice's testimony that he last fired his gun three to five minutes before Simonson first fired his. Instead, both defendants were found to have shot in Summers' direction, and "within a very short space of time after said shooting" Summers called out that he had been shot.<sup>7</sup> After the road bump in the Court of Appeal, these findings paved the way for the Supreme Court's innovative twist on conventional causation principles.

For all of its prominence in casebooks, in practice *Summers* now serves more as an archetype than a touchstone. Few cases involve the seemingly perfect balance of proof that makes *Summers* so memorable. A Westlaw search performed in connection with this article yielded twice as many citations to *Summers* in secondary sources as have appeared in judicial opinions. But even though *Summers* dictates the outcome in relatively few cases, the logic behind its holding is today well accepted; *Summers* now represents a base camp on the way to more challenging and remote destinations in the law. ☆

#### ENDNOTES

1. *Summers v. Tice*, 33 Cal.2d 80, 82-83 (1948).
2. Complaint for Damages and Personal Injuries, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Jan. 25, 1946), at p. 2.
3. Order, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Oct. 24, 1946), at p. 1.
4. Findings of Fact and Conclusions of Law, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Nov. 27, 1946), at p. 4.
5. Appellant Harold W. Tice's Opening Brief on Appeal, *Summers v. Tice*, Court of Appeal Case No. 16002 (July 18, 1947), at p. 4.
6. *Summers v. Tice*, *supra*, 33 Cal.2d at p. 86.
7. Findings of Fact and Conclusions of Law, *supra*, at p. 3.