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TORTS-RELEASE OF JOINT TORTFEASOR

TORTS — RELEASE OF JOINT TORTFEASOR — Plaintiff, vendee, sued defendant, vendor, upon an alleged fraudulent warranty that the cows, which were the subject matter of the sale, had been immunized against hemorrhagic septicaemia, or "shipping fever." While in transit, through the negligence of the railroad, the cows were injured. Their resistance to the disease was consequently lowered and they became infected, whereby plaintiff was damaged by consequent sterility, unmarketable milk, and abortions. Plaintiff accepted $1,500 from the railroad as "settlement in full for any liability you may be under." This settlement was pleaded as a bar to the action against the vendor. *Held*, that plaintiff's damages were indivisibly traceable to the acts of both the defendant and of the railroad; that though "independent" tortfeasors, their acts had "concurred" to bring about plaintiff's damage; and that, being jointly and severally liable, a release of one is a bar to an action against the other. *Coldwell v. Lang*, (Vermont 1933) 166 Atl. 10.

The rule seems well established that the release of one concurrently negligent person operates to discharge other such persons.[1] Whether such tortfeasors be deemed *joint* or *independent* appears to be of no substantive consequence inasmuch as it is manifestly absurd to demand concerted action between persons the gist of whose default is negligence.[2] What makes them fellows is rather the concurrence of their negligence to the plaintiff's damage.[3] The court in the instant case considered the fact that defendant's act was intentional.[4] But because it found an elaborate causal interconnection between the acts of both, it decided that this fact was not important. Cases presenting a comparable fact situation are rather rare. In *Brimer v. Scheibel*,[5] plaintiff sued for assault and battery and false imprisonment committed upon him by strikers. Defendants pleaded that plaintiff had already accepted a settlement from the company for their negligence in permitting him to be thus assaulted. On appeal, it was held that such settlement was no bar to an action brought against the present de-

[1] Muse v. DeVito, 243 Mass. 384, 137 N. E. 730 (1923); Hoban v. Ryder, 257 Mich. 188, 241 N. W. 241 (1932); McCoy v. L. & N. R. R., 146 Ala. 333, 40 So. 106 (1905); Myers v. Kennedy, 306 Mo. 268, 267 S. W. 810 (1924); Coleman v. Gulf Refining Co., 172 Ark. 428, 289 S. W. 2 (1926).

[2] Muse v. DeVito, 243 Mass. 384, 137 N. E. 730 (1923); Nordhaus v. Vandalia R. R., 242 Ill. 166, 89 N. E. 974 (1909); 1 COOLEY ON TORTS, 4th ed., sec. 86 (1932).

[3] In Feinstone v. Allison Hospital, (106 Fla. 302) 143 So. 251 (1932), a negligent hospital and a negligent driver who sent the plaintiff there were deemed concurrently negligent for the purpose of a release given the driver. An energetic criticism of the decision is found in 18 CORN. L. Q. 257 (1933).

[4] In Vermont the statement must be either knowingly false, or made as of one's knowledge with no knowledge in fact. McAllister v. Benjamin, 96 Vt. 475, 121 Atl. 263 (1923); Bond v. Clark, 35 Vt. 577 (1863).

[5] 154 Tenn. 253, 290 S. W. 5 (1926).

fendants. In *Young v. Anderson*,[6] in an action brought against a bailee for injury to the horse lent, defendant counterclaimed for injuries received from breach of warranty that the horse was gentle. Plaintiff offered to show that defendant had released a railroad, an alleged joint tortfeasor. It was held that the release could not bar the counterclaim because plaintiff and the railroad were not joint tortfeasors "in any sense of the word." [7] It appears in the instant case that the plaintiff was damaged considerably in excess of the amount of the settlement. It is submitted that since the reason for the release-rule is that there can be only one satisfaction for an injury,[8] if it appears that notwithstanding the settlement and concurrence between the acts of defendant and of the railroad the plaintiff has not been made whole, the qualitative difference in these acts should be seized upon to justify an exception to this rule, the settlement being admissible to reduce damages *pro tanto*. Whether such exception be predicated on the notion that an intentional wrongdoer should respond in punitive damages[9] to ease the stress on concurrence and indivisibility of the damage, or be based on the principle elsewhere applied [10] that different sorts of wrongful conduct do not concur to erase liability, seems immaterial if from the application of an artificial principle patent injustice results. Further, it would seem possible to bring the release here within the category of a covenant not to sue, as defined by the court.[11] The recital of the release "for any liability you may be under" ought to be a sufficient expression of reservation, especially as the railroad was probably unaware that another was liable for the damage. To say that a party injured in an unascertained amount accepts a sum from a joint tortfeasor under pain of having that deemed payment in "full satisfaction" seems very harsh. It is submitted, therefore, that a different conclusion might have been reached without violating the symmetry of the law, and more consonant with substantive justice between the parties.

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[6] 33 Idaho 522, 196 Pac. 193 (1921).

[7] In Slade v. Sherrod, 175 N. C. 346, 95 S. E. 557 (1918), it was held that a release given *W* for an assault made upon the plaintiff when the latter attempted to take the license number of the car in which *W* was a passenger was no bar to an action brought against *S* for negligence in the operation of that car, whereby plaintiff was injured, and which act preceded the altercation with *W*.

[8] Moffit v. Endtz, 232 Mich. 2, 204 N. W. 764 (1925).

[9] In Brimer v. Scheibel, 154 Tenn. 253 at 258, 290 S. W. 5 at 6 (1926), the court said: "The defendants are charged with an unlawful assault and imprisonment, and with liability not only to compensate for the injury, but to respond in punitive damages."

[10] Plaintiff's negligence does not concur with defendant's intentional wrong of assault, Steinmetz v. Kelley, 72 Ind. 442, 37 Am. Rep. 170 (1880). Plaintiff's negligence does not concur with defendant's wanton, wilful negligence: Lacey v. Louisville & N. R. R., (C. C. A. 5th, 1907) 152 Fed. 134; Birmingham Ry., Light & Power Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906). Contributory negligence may be looked upon in effect as a release.

[11] "It is the rule of this court that, where an injured person accepts partial payment from a joint tort-feasor, and releases the latter, but expressly reserves the right to proceed against the other tort-feasors, it will not operate as a discharge of the others, unless it appears that the payment made was in full satisfaction." Coldwell v. Lang, (Vermont 1933) 166 Atl. 10 at 13.