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Torts-Joint Tort-Feasors--Release of One Not Release of All

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TORTS—JOINT TORT-FEASORS—RELEASE OF ONE NOT RELEASE OF ALL—Plaintiff, a woman who had been struck by a taxicab, underwent treatment by defendant-physician. After eight months under defendant's care, she accepted his assurances that she would fully recover, and executed a general release in favor of the taxi driver. Plaintiff subsequently discovered, however, that the defendant had been negligent in his treatment of her both before and after the execution of the release. In a malpractice action before the Supreme Court of New York judgment was entered in favor of the plaintiff, and defendant appealed. The Appellate Division dismissed the original complaint, holding that the general release discharging the original wrongdoer also discharged the physician. On appeal, *held*, reversed and judgment reinstated, three judges dissenting. The release of one tort-feasor does not discharge another tort-feasor unless it is so intended or the consideration given constitutes full satisfaction. *Derby v. Prewitt*, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1963).

At common law the term joint "tort-feasors" was deemed to include not only those multiple tort-feasors who act in concert but also those who act independently but concurrently and those who act independently but successively.[1] The traditional rule has been that a release of any such joint tort-feasor releases all,[2] and despite the fact that writers have frequently criticized the application of this rule to the two kinds of independent joint tort-feasors,[3] it has nevertheless been upheld in most states.[4] This rule governing the release of the joint tort-feasor was evolved

1 See PROSSER, TORTS § 46 (2d ed. 1955).

2 *E.g.*, Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956) (successive tort-feasors); Trieschman v. Eaton, 224 Md. 111, 117, 166 A.2d 892, 895 (1961) (successive tort-feasors); Shortt v. Hudson Supply & Equip. Co., 191 Va. 306, 60 S.E.2d 900 (1950) (concurrent tort-feasors); Abb v. Northern Pac. Ry., 28 Wash. 428, 68 Pac. 954 (1902) (concurrent tort-feasors).

3 COOLEY, TORTS § 80 (1930); 4 CORBIN, CONTRACTS §§ 933-35 (1951); 1 HARPER & JAMES, TORTS 711-12 (1956); PROSSER, *op. cit. supra* note 1, § 46, at 244-45; Prosser, *Joint Torts and Several Liabilities*, 25 CALIF. L. REV. 413 (1937); Wigmore, *Release to One Joint Tort-Feasor*, 17 ILL. L. REV. 563 (1923).

4 Shapiro v. Embassy Dairy, Inc., 112 F. Supp. 696 (D.N.C. 1953); see PROSSER, *op. cit. supra* note 1, § 46.

to solve the problem raised by the commission of concerted wrongs where the effects of the separate acts could not be distinguished.[5] In justification for extending the doctrine to independent tort-feasors, it was said that the original wrongdoer was responsible for the proximate, foreseeable consequences of his negligent acts, including the aggravation of such injuries by a negligent physician.[6] The courts reasoned that the wrongs of independent tort-feasors coalesced into one cause of action,[7] and therefore the release of all claims and causes of action as to the original wrongdoer necessarily discharged any other wrongdoers.[8] It was thought that to hold otherwise would allow the injured party to recover twice for a single cause of action.[9]

Notwithstanding these purported justifications, the inelastic common-law rule seems unjust where there is an intention to release only one tort-feasor, as in the principal case, or where the release does not provide the injured party with adequate compensation. Under the traditional rule a release is presumptively full satisfaction,[10] and the actual compensable needs of the plaintiff are consequently disregarded. A presumption of full satisfaction seems warranted only if there is a single indivisible injury, and when the acts are independent the injuries are not necessarily indivisible. It would probably be more reasonable in such circumstances to presume that the release of one wrongdoer merely represents the best obtainable compromise, rather than to deem it full compensation as a matter of law. Furthermore, the fear of double satisfaction is unrealistic, since any compensation received from one tort-feasor, by release or otherwise, is deducted from the actual damages recovered from the other tort-feasor.[11]

5 See generally Jackson, *Joint Torts and Several Liabilities*, 17 TEXAS L. REV. 399 (1939); Prosser, *Joint Torts and Several Liabilities*, *supra* note 3.

6 Sams v. Curfman, 111 Colo. 124, 128, 137 P.2d 1017, 1018 (1943); Wells v. Gould, 131 Me. 192, 194, 160 Atl. 30 (1932); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 422, 92 N.W.2d 96, 99 (1958); Martin v. Cunningham, 93 Wash. 517, 518, 161 Pac. 355, 356 (1916). See also RESTATEMENT, TORTS §§ 457, 879 (1934).

7 Wells v. Gould, *supra* note 6, at 194, 160 Atl. at 30; Milks v. McIver, 264 N.Y. 267, 269, 190 N.E. 487, 488 (1934).

8 Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Martin v. Cunningham, 93 Wash. 517, 161 Pac. 355 (1916). *Contra*, Dickow v. Cookinham, 123 Cal. App. 2d 81, 89, 266 P.2d 63, 69 (1954).

9 Morris v. Diers, 134 Colo. 39, 42, 298 P.2d 957, 959 (1956); Sams v. Curfman, 111 Colo. 124, 128, 137 P.2d 1017, 1018 (1943); Edmondson v. Hancock, 40 Ga. App. 587, 591, 151 S.E. 114, 116 (1929); McBride v. Scott, 132 Mich. 176, 182, 93 N.W. 243, 245 (1903).

10 See O'Shea v. New York C. & St. L.R.R., 105 Fed. 559, 561 (7th Cir. 1901); Hawber v. Raley, 92 Cal. App. 701, 705, 268 Pac. 943, 944 (1928); PROSSER, *op. cit. supra* note 1, § 46 at 243. Authorities have used blanket statements, such as that a "release is considered a satisfaction in law, and equivalent to a satisfaction in fact" (Brown v. Marsh, 7 Vt. 320, 327 (1835)), or that a release is "presumptively in full satisfaction" (Burke v. Burnham, 97 N.H. 203, 210, 84 A.2d 918, 924 (1952)).

11 Morris v. Diers, 134 Colo. 39, 42, 298 P.2d 957, 959 (1956); Trieschman v. Eaton, 224 Md. 111, 119-20, 166 A.2d 892, 896-97 (1961); see PROSSER, *op. cit. supra* note 1, § 46 at 244.

For many years a growing minority of courts[12] has refused to apply the common-law rule to independent tort-feasors. These courts have taken at least four different approaches. Some inquire initially whether the wrongdoers acted in concert; if the acts were independent, two distinct causes of action are found to exist, the release of one having no effect upon the other.[13] Others give effect to express reservations of right to sue contained in the release.[14] Another group of courts circumvents the common-law rule by interpreting a release as a covenant not to sue; the cause of action is not extinguished and the plaintiff may pursue other tort-feasors until he is fully compensated.[15] The most frequently used alternative to the traditional release doctrine is the theory, applied in the principal case, that the release of one wrongdoer does not discharge a subsequent wrongdoer unless the parties to the release so intended or the injured party has in fact received full compensation.[16] A frequent objection to this approach is that the admission of evidence of intent or actual damage violates the parol evidence rule.[17] This criticism, however, is unwarranted,

12 In addition to judicial innovation, there has been significant legislative activity in this area. The original UNIFORM CONTRIBUTIONS AMONG JOINT TORT-FEASORS ACT (1939), as well as the 1955 Revision, states that a release of one joint tort-feasor does not discharge any other tort-feasor unless the instrument so provides. Ten states have adopted, unmodified, the act or its revision: ARK. REV. STAT. ANN. §§ 34-1001 to -1009 (1962); DEL. CODE ANN. tit. 10, §§ 6301-08 (1953); HAWAII REV. LAWS §§ 246-10 to -16 (1955); MD. ANN. CODE art. 50, §§ 16-24 (1957); MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (Supp. 1962); N.M. STAT. ANN. §§ 24-1-11 to -1-18 (1953); N.D. CENT. CODE §§ 32-38-01 to -38-04 (Supp. 1957); PA. STAT. ANN. tit. 12, §§ 2080-89 (1951); R.I. GEN. LAWS ANN. §§ 10-6-1 to -6-11 (1956 & Supp. 1963); S.D. CODE §§ 33.04A01-.04A10 (1960). The MODEL JOINT OBLIGATIONS ACT (1925) permits express reservations of right to sue and treats a release containing such a reservation as a covenant not to sue. Furthermore, the act provides that a judgment against one obligor does not discharge a co-obligor who was not a party to the action. Four states have adopted the act: NEV. REV. STAT. §§ 101-010 to -090 (1961); N.Y. DEBT & CRED. LAW § 231-04 (1945); UTAH CODE ANN. §§ 15-4-1 to -4-7 (1953); WIS. STAT. §§ 113.01-.10 (1957). Other state laws affecting the common law of release are: ALA. CODE tit. 7, § 381 (1958) (intent of parties to be controlling); LA. CIV. CODE ANN. art. 2203 (1952) (common-law rule not to apply if release expressly reserves right to sue others); MICH. STAT. ANN. § 27A.2925 (1962) (abolishing the release rule); MO. ANN. STAT. § 537.060 (1953) (abolishing the release rule); MONT. REV. CODES ANN. § 13.702 (1955) (intent of the parties to be controlling); W. VA. CODE ANN. § 5481 (1961) (abolishing the release rule).

13 Parkell v. Fitzporter, 301 Mo. 217, 228, 256 S.W. 239, 241 (1923) (original wrongdoer and negligent physician were same person); Staehlin v. Hochdoerfer, 235 S.W. 1060, 1062 (Mo. 1921); Black v. Martin, 88 Mont. 256, 265-66, 292 Pac. 577, 579-80 (1930); see Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944).

14 Adams Express Co. v. Beckwith, 100 Ohio St. 348, 356-57, 126 N.E. 300, 302 (1919); Black v. Martin, 88 Mont. 256, 267, 292 Pac. 577, 580 (1930); see Connelly v. United States Steel Co., 161 Ohio St. 448, 452, 119 N.E.2d 843, 846 (1954). *Contra*, McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903).

15 Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P.2d 783 (1945); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Holland v. Southern Pub. Util. Co., 208 N.C. 289, 180 S.E. 592 (1935).

16 *E.g.*, Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Staehlin v. Hochdoerfer, 235 S.W. 1060 (Mo. 1921); Hansen v. Collett, 380 P.2d 301 (Nev. 1963); Wheat v. Carter, 79 N.H. 150, 106 Atl. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).

17 Principal case at 561 (dissenting opinion); 36 TEXAS L. REV. 55, 61 (1957); see Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958).

for it is well settled that a stranger to a release has no standing to raise the parol evidence rule.[18] Since the second tort-feasor is neither a party to, nor a third-party beneficiary of, the release, he is consequently a stranger to it and has no standing to raise the parol evidence rule.[19] Without reference to the fact that the second tort-feasor lacks standing, some courts have purported to avoid the parol evidence rule by relying on the exception for mutual mistake.[20] Despite the fact that in most cases the release clearly shows that the parties intended to discharge the releasee from liability for both known and unknown injuries,[21] these courts assume there is a mutual mistake simply because unknown injuries later develop.[22] The reliance of these courts on the mutual mistake exception seems ill-placed;[23] all that is clear is that these courts do refuse to apply the common-law rule, their justification for doing so remaining obscure.

It cannot be seriously denied that the results of the common-law doctrine are usually unjust when applied to independent tort-feasors. An injured party seeking to avoid litigation might be deterred from entering into a settlement with one tort-feasor because releasing one would bar his claim against the other. Moreover, to hold that the release of one tort-feasor always releases all other tort-feasors, regardless of the compensation actually received, ignores the basic purpose of tort recovery—to make the injured party whole.

18 *E.g.*, Dickow v. Cookinham, 123 Cal. App. 2d 81, 88, 266 P.2d 63, 69 (1954); Couillard v. Charles T. Miller Hosp., Inc., *supra* note 17, at 424-28, 92 N.W.2d at 101; Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 402, 131 N.W. 612, 615 (1911); Safety Cab Co. v. Fair, 181 Okla. 264, 266, 74 P.2d 607, 609 (1937). *Contra*, Muse v. DeVito, 243 Mass. 384, 137 N.E. 730 (1923). See also 4 CORBIN, *op. cit. supra*, note 14, § 934; 4 WILLISTON, CONTRACTS § 647 (rev. ed. 1936). Also, parol evidence is admissible to show that a release absolute in form was actually intended as a covenant not to sue. See 4 CORBIN, *op. cit. supra* note 3, § 934.

19 Although application of the common-law rule would cause a release of one tort-feasor to have a direct effect upon a second tort-feasor, this fact cannot be used to show that the second has standing to assert the parol evidence rule when the court has previously chosen to reject the common-law rule.

20 *E.g.*, Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958). "[I]f the circumstances are such that despite the wording of the release, the parties cannot be said to have contracted with reference to unknown injuries, and a material unknown injury subsequently develops, mutual mistake exists and parol evidence may be introduced to show it." Larson v. Sventek, 211 Minn. 385, 388, 1 N.W.2d 608, 610 (1941).

21 A typical release provision provides that the releasor discharges "all actions, causes of actions, claims and demands, damages and costs, accruing and to accrue to me on account of any and all known by me and unknown injury, loss and damage whatsoever, directly or indirectly sustained by me . . . ." 11 AM. JUR. *Legal Forms* § 11:1023 (1955). See also *id.* § 11:1023.1 (Cum. Supp. 1963).

22 Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96. To use the mutual mistake exception to the parol evidence rule, the language of the instrument must mean different things to the parties, and it is therefore questionable whether these courts can really find a mutual mistake where the terms of the release are clearly stated. See note 21 *supra*.

23 The parol evidence rule cannot be avoided by relying on the exception for ambiguity, because the instrument usually makes it clear that the parties intend to release as to both known and unknown injuries. See note 21 *supra*.

The principal case is clearly in line with the modern trend away from strict application of the common-law rule regarding release of joint tort-feasors.[24] *Milks v. McIver*,[25] the leading New York decision on this problem prior to the principal case, upheld the common-law rule on substantially the same facts. To avoid expressly overruling *Milks*, however, the court in the principal case distinguished *Milks* on the ground that the plaintiff there was aware of the physician's malpractice when the release was executed. Thus, according to the court in the principal case, the consideration received in exchange for the release was presumed to be in complete satisfaction for all injuries.[26] A close reading of *Milks*, however, reveals that the ground of decision was that there was but one cause of action,[27] and thus there was no inquiry into the adequacy of the consideration or the intent of the parties. The court in the principal case, however, clearly rejected the argument that there is but one cause of action;[28] furthermore, the intent of the parties and the adequacy of the compensation received were regarded as factual considerations of considerable importance.[29] In addition, the court cited with approval cases in which plaintiffs were fully aware of the subsequent malpractice before the releases were executed in favor of the original tort-feasors.[30] It appears that, despite its reluctance to overrule *Milks*, the court of appeals has adopted a mode of analysis wholly inconsistent with the rationale of the older decision. In the principal case the court of appeals did not discuss the problem of *concurrent* but independent tort-feasors, and further did not expressly reject the common-law rule as to *successive* but independent tort-feasors. Nevertheless, the tenor and approach of the principal case strongly suggest that *Milks* is no longer law in New York, and that release of one independent tort-feasor will never automatically release another.

Karen M. Swift

24 *E.g.*, Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919), *overruling* Ellis v. Bitzer, 2 Ohio 89 (1825); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958), *overruling* Smith v. Mann, 184 Minn. 485, 239 N.W. 223 (1931); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958), *overruling* Adam v. DeYoe, 11 N.J. Misc. 319, 166 Atl. 485 (Sup. Ct. 1933); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955), *overruling* Hooyman v. Reeve, 168 Wis. 420, 170 N.W. 282 (1919) and Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1927).

25 264 N.Y. 267, 190 N.E. 487 (1934). In this case plaintiff was struck by a truck and was treated for injuries by defendant-physician. After her discharge from the hospital her guardian *ad litem* executed a release of all claims against the owner and operator of the truck in consideration of $3,384. The subsequent complaint against the physician for damages was dismissed on the grounds that there was but one cause of action and the release against the original wrongdoers discharged the physician.

26 Principal case at 560.

27 Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

28 Principal case at 558-59.

29 *Id.* at 559-60.

30 *Id.* at 560, citing Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Wheat v. Carter, 79 N.H. 150, 106 Atl. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).