ticularly that of the guilty party,[66] this allows the court to consider a party's devotion or efforts to maintain a workable marriage relationship in ordering alimony. It appears, then, that a court, in addition to "punishing" the "guilty" party, may also "reward" extraordinary diligence to preserve the marriage.

Present Living Standards, Ability to Pay and Relative Needs. The parties' "standard of living" to which they have been accustomed prior to the divorce had not been explicitly employed as a factor by the Iowa Supreme Court prior to *Schantz.* However, such may be considered a part of the needs and abilities of the parties. As previously mentioned, the several criteria set forth in *Schantz* are merely various aspects of the general underlying rule that the amount awarded be based upon the wife's necessities and the husband's financial abilities.[67] That these two general considerations must be balanced has been a long-followed procedure in Iowa and elsewhere.[68]

Any Other Relevant Factors. An "open door" clause, this allows a court much flexibility in tailoring its considerations of the factors to the facts and circumstances of each case. The supreme court has emphasized that precedents are of little value in determining factual issues and that each case must be determined according to its own particular facts.[69] This final element of the general formula set forth in *Schantz* allows the court to fit the considerations to each case and to consider other factors not enumerated herein to be utilized in making alimony awards and property divisions.

The Iowa Supreme Court, by specifically listing the criteria to be considered in awarding alimony and property settlements, accomplished several tasks. It clarified and emphasized the law as to what factors should and will be taken into consideration, utilizing a relatively simple "check-list" that should be of greater benefit to the Bench and Bar than the previously used practice of lumping factors together into a few lengthy sentences. It has also reiterated in a striking fashion the controlling concepts of divorce awards of alimony and property in Iowa. Indeed, it may be more than coincidence that the court utilized *Schantz* to emphasize the criteria prevailing in Iowa at a time when the legislature is giving consideration to reforming Iowa divorce laws, including discarding the "fault" concept. The court, in taking such pains to reaffirm and reassert the several elements, appears to be saying that such changes as the elimination of the guilty party's conduct from consideration must come from the legislative branch of the government. It is, then, clarifying the law not only for the Iowa lawyers but also for the legislators of the state.

DENNIS G. LINDER

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66 *See* text accompanying notes 54-57 *supra.*

67 *See* text accompanying note 27 *supra.*

68 2 W. NELSON, DIVORCE & ANNULMENT, §§ 14.39, 14.41 (2d ed. 1961); 24 AM. JUR. 2d *Divorce & Separation* § 631 (1966); 27A C.J.S. *Divorce* §§ 233(3), 233(6) (1969); note 27 *supra.*

69 Cole v. Cole, 259 Iowa 58, 61, 143 N.W.2d 350, 352 (1966).

Release—The Release of an Original Tort-Feasor Is Not a Bar to Malpractice Action Against Treating Physician.—*Smith v. Conn* (Iowa 1968).

Plaintiff broke her leg as a result of a fall on church property. Defendant, an osteopathic physician, was employed to treat her injuries. An action was brought for malpractice alleging that the defendant performed his duties negligently. Defendant, as part of his answer, alleged plaintiff had settled her claim with the church and executed a complete release of all liability in connection therewith. Defendant urged that the settlement and release of the church barred an action against a subsequent treating physician. This contention was sustained and plaintiff appealed to the Supreme Court of Iowa. *Held,* reversed and remanded, all justices concurring. A release by an injured party of the original tort-feasor does not of itself preclude an action by the injured person against a physician or surgeon for negligent treatment of the injury. *Smith v. Conn,* — *Iowa* —, 163 N.W.2d 407 (1968).

The majority of courts faced with the issue have held that a general release of a negligent tort-feasor bars a subsequent malpractice action against the treating physician.[1] There is, however, a growing minority of jurisdictions holding that a release by an injured party of the original tort-feasor does not of itself bar an action against a physician or surgeon for negligent treatment.[2]

The majority rule seems to be based on two grounds. As a matter of law the original tort is considered to be the proximate cause of any injuries resulting from the malpractice which occurred while treating the original injury.[3] Consequently, it is the almost universal rule that the original wrongdoer is liable for the aggravation of the original injury resulting from the negligent treatment of a physician or surgeon.[4] The ensuing liability of the original tort-feasor for the aggravated injury leads to the conclusion that the injury resulting from the joint action is a single injury and constitutes basis for but a single cause of action.[5] An additional ground for the majority rule is that there should be only one satisfaction for the same injury and failure to bar an action for malpractice after release of the original tort-feasor might enable the injured person to recover twice for the same injury.[6] This theory is furthered by the conclusion that a settlement with one of the joint tort-feasors represents a full satisfaction of the entire claim[7] and by case holdings that a re-

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1 Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Keown v. Young, 129 Kan. 563, 283 P. 511 (1930); Thompson v. Fox, 326 Pa. 209, 192 A. 107 (1937). *See also,* Annot., 40 A.L.R.2d 1075 (1955).

2 Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Coullaird v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966); *See also,* Annot., 40 A.L.R.2d 1075 (1955).

3 Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963).

4 Phillips v. Werndorff, 215 Iowa 521, 243 N.W. 525 (1932).

5 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

6 Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963); Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

7 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

lease to one of two tort-feasors is a complete surrender of any claim against the other[8] without regard to the sufficiency of the actual compensation.[9]

Although agreeing there can be but one satisfaction for one injury, the minority courts reject the belief that there is but one cause of action. Therefore, these courts have not allowed the release of the original tort-feasor to bar an action against the malpracticing physician. Some of the minority courts have held that the physician's negligence gives rise to a separate or distinct cause of action against an independent wrongdoer[10] and that the majority rule is based on the mistaken theory that, as in the early cases of joint trespass, there is but a single cause of action.[11] Others have stated that since the tort-feasors did not combine to produce the wrong, they only share a common element of liability[12] or that the action was concerned not with a joint tort but with successive independent torts.[13] This reasoning refutes the theory that there is but a single cause of action.

In accepting the proposition that there can be but one recovery for any one injury,[14] the minority courts argue that the action against the physician should not be barred by the release of the original wrongdoer unless there has been a *full* recovery in fact of *all* damages.[15] One such court stated: "The modern tendency . . . is to treat the older rule as an illegitimate offspring of the rule that release of one joint tort-feasor releases all, which rule is itself condemned by some of our ablest scholars on the theory that the courts have confused *release* of a party with *satisfaction* of a cause of action."[16] (Emphasis added.) A satisfaction is an acceptance of *full* compensation for the injury, but a release is only a surrender of a cause of action, which might be gratuitous or given for inadequate consideration.[17] However, those courts supporting the majority rule generally feel that a release is "conclusive evidence" of full satisfaction.[18] Others, supporting the minority view, have taken the position that a presumption that a settlement is full compensation shall not apply where the person's claims embrace injuries caused by independent

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8 Price v. Baker, 143 Colo. 264, 352 P.2d 90 (1959); Holmes v. Kammerman, 10 Ill. App. 2d 450, 135 N.E.2d 162 (1956); Lucio v. Curran, 157 N.Y.S.2d 948, 139 N.E.2d 133 (1956).

9 Hawber v. Raley, 92 Cal. App. 701, 268 P. 943 (1928); Greene v. Waters, 260 Wis. 40, 49 N.W.2d 919 (1951).

10 Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Dickow v. Cookinham, 123 Cal. App. 81, 266 P.2d 63 (1954).

11 Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963).

12 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

13 Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).

14 Annot., 40 A.L.R.2d 1075, 1077 (1955).

15 *Id.*

16 Cannon v. Pearson, 383 S.W.2d 565, 567 (Texas 1964). The court cited the following authorities: Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 422 (1936); W. PROSSER, TORTS 268-73 (3d ed. 1964); 1 F. HARPER & F. JAMES, TORTS 709-14 (1956); Wigmore, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563 (1923).

17 Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 423 (1936).

18 J. E. Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 286 P. 95 (1930); Greene v. Waters, 260 Wis. 40, 49 N.W.2d 919 (1951).

successive tort-feasors.[19] It has also been stated that the majority approach goes beyond any reasonable necessity to honor the principle of law that a litigant should not recover twice for the same injury.[20] "The fear of double recovery is meaningless, since the amount paid under the release must be credited to the second tortfeasor in any case. . . ."[21] Another authority suggests that a release to one wrongdoer should operate to release the remaining wrongdoer only if the parties to the release so intended *and* if the injured party has in fact received full compensation for his injury.[22] Courts supporting the minority rule agree and hold that whether there was such intention and a full recovery is a jury question.[23]

Courts adopting the minority rule differ as to the proper placing of the burden of going forward with the evidence of the intent of the parties to the release. Some hold that a settlement of all claims against the initial tortfeasor raises a presumption of satisfaction of a claim for malpractice and places the burden on the plaintiff to go forward with evidence that it was not so intended.[24] Others hold that the burden is on the doctor to go forward with evidence that the parties to the release intended to satisfy the plaintiff's claim for malpractice.[25]

The minority rule that a release of the original wrongdoer does not of itself release the malpracticing physician appears supported by the better reasoned cases and a growing number of jurisdictions have adopted it.[26] The majority rule is still widely accepted, however, and continues to receive support.[27]

The Iowa Supreme Court's decision in the 1932 case of *Phillips v. Werndorff*[28] placed Iowa with the majority of jurisdictions by holding that a release of the original wrongdoer was a bar to an action against a physician for malpractice in treating the original injuries. In so holding the Iowa Supreme

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19 Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944), cited with approval in Dickow v. Cookinham, 123 Cal. App. 81, 266 P.2d 63 (1954).

20 Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958).

21 W. PROSSER, TORTS 270 (3d ed. 1964).

22 1 F. HARPER & F. JAMES, TORTS 713 (1956).

23 Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958); Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

24 Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962); Cannon v. Pearson, 383 S.W.2d 565 (Texas 1964).

25 Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958) (seems to also say that the doctor has the burden of showing that the plaintiff *did not* receive full compensation from the original wrongdoer).

26 DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966). In 1961 the North Carolina General Assembly enacted N.C. GEN. STAT. § 1-540.1 (Supp. 1967):

> The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise.

27 Kapusta v. DePuy Mfg. Co., 234 N.E.2d 487 (Ind. 1968) (a release of the original tort-feasor barred action against manufacture of plate affixed to fractured leg).

28 215 Iowa 521, 243 N.W. 525 (1932).

Court observed that the original wrongdoer was liable for the aggravation of the injury by a treating physician[29] and that there could be but one satisfaction for the injury received.[30] The court then held that the release "was clearly designed to release the original wrongdoers from all and every claim. . . . This necessarily included the aggravation . . ." of the injury by the defendant.[31] In a later case,[32] the court held that the act of the original wrongdoer was the proximate cause of the injury and that it "naturally followed, therefore, that, where the injured party proceeds against the wrongdoer by an action for damages, and thereby recovers his damages, he is deemed to have received full satisfaction for the injury suffered and for all of its aggravations, if any, by unskillfull treatment."[33] The court has also said that the reason for the holding in *Phillips v. Werndorff*[34] was that there "can be but one settlement for one tort or wrong, and that the case showed there was a release from all damages arising from or growing out of the accident. . . ."[35] In another decision, the court stated that "full compensation" did not mean complete or adequate compensation and that the "consideration so demanded and received [for the release] was, in a legal sense, full payment, and he [releasor] cannot recover another or further payment from any other person for the same wrong."[36] The court again held that there could be but one satisfaction for one claim.[37] The Iowa Supreme Court thus placed itself with the majority of jurisdictions by accepting the rationale that there is but one cause of action and that a release is to be considered as full satisfaction for the injury as aggravated.

In *Smith*,[38] the court overruled *Phillips v. Werndorff* insofar as it "implies a complete release to an original tort-feasor conclusively releases the treating physician from liability for subsequent negligence. . . ."[39] In so holding the court said that the general principle that there could be but one satisfaction for an injury received does not necessitate the broad majority rule.[40] The court then cited extensively from a New York case[41] for the proposition that the plaintiff has two causes of action, one against the original wrongdoer for his negligent acts and the other against the doctor for his alleged malpractice[42] and that the release of one is not full satisfaction unless it is full recovery and is so regarded.[43] The court, continuing to cite the New York case, said that

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29 *Id.* at 522, 243 N.W. at 526.
30 *Id.* at 523, 243 N.W. at 526.
31 *Id.* at 524, 243 N.W. at 527.
32 Paine v. Wyatt, 217 Iowa 1147, 251 N.W. 78 (1934).
33 *Id.* at 1149, 251 N.W. at 79.
34 215 Iowa 521, 243 N.W. 525 (1932).
35 Johnson v. Selindh, 221 Iowa 378, 382, 265 N.W. 622, 624 (1936).
36 Dungy v. Benda, 251 Iowa 627, 635, 102 N.W.2d 170, 175 (1960).
37 *Id.* at 633, 102 N.W.2d at 174.
38 Smith v. Conn, 163 N.W.2d 407 (Iowa 1968).
39 *Id.* at 411.
40 *Id.* at 409.
41 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).
42 Smith v. Conn, 163 N.W.2d 407, 410 (Iowa 1968).
43 *Id.* at 411.

the plaintiff had the burden of proving that the release was not intended to be and was not in fact a full satisfaction of the aggravated injury.[44]

The *Smith* decision thus places Iowa with those jurisdictions holding that a release by an injured party of the one responsible for the original injury does not of itself preclude an action by the injured person against a physician for negligent treatment of the injury. This appears to be the more practical approach, as the consideration given in exchange for the release of the original tort-feasor often does not fully compensate the injured party.

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Wrongful Death—A STILLBORN FETUS MAY NOT BE INCLUDED WITHIN THE MEANING OF A STATUTE PERMITTING RECOVERY FOR THE WRONGFUL DEATH OF A MINOR CHILD.—*Stokes v. Liberty Mutual Insurance Company* (Fla. 1968).

The parents of a stillborn fetus[1] claimed damages for its wrongful death pursuant to a clause in a policy issued by an insurer. The insurer brought an action to determine if a stillborn fetus, prenatally injured, is a minor child within the meaning of the statute for the wrongful death of a minor child. The parties stipulated that the viability[2] of the fetus was immaterial. The district court of appeal[3] affirmed the judgment for the insurer, and the Florida Supreme Court granted certiorari. *Held,* affirmed, one justice dissenting. A stillborn fetus is not within the meaning of a statute permitting recovery for the wrongful death of a minor child. *Stokes v. Liberty Mutual Insurance Company,* 213 So. 2d 695 (Fla. 1968).

Although there was virtually no right of recovery for wrongful death at common-law,[4] every state has now enacted some type of statute providing a cause of action where death results from a wrongful act.[5] Most of these statutes provide for a cause of action by the decedent's personal representative

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44 *Id.*

1 A fetus is the "product of pregnancy (*i.e.*, the infant growing in the uterus) from the end of the second month to the time it is born." SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE 299 (1968).

2 Viability is the "ability to survive outside the uterus, depending on the state of development or age." *Id.* at 870.

3 Stokes v. Liberty Mut. Ins. Co., 202 So. 2d 794 (Fla. 1967).

4 Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

5 W. PROSSER, TORTS 924 (3d ed. 1964).