CASE NOTE

TORTS—Effect of release of one of two tortfesors upon liability of the other, where the parties to the release did not intend any effect.

In an action for wrongful death resulting from a collision between defendant's automobile and railroad's engine, defendant pleaded as a bar to his liability a release given to the railroad by plaintiff, administrator of decedent's estate, for a consideration of $1,000. The trial court ruled that the release was not a defense to plaintiff's action, and defendant appealed. *Held,* reversed. The intent not to release defendant was not determinative of the question. If plaintiff intended to and did release the railroad, plaintiff's claim was satisfied and could not be asserted against the driver of the automobile. So long as there has been a settlement with and release of a third party for a claim for injuries sustained, and these same injuries are the basis of the present claim, there can be no further recovery. *Dungy v. Benda,* 251 Iowa 627, 102 N.W.2d 170 (1960).

The general rule at common law is that the release of one joint tortfeasor releases all responsible for the same harm,[1] but the terms joint tort and joint tortfeasors have been subject to various meanings. In early English common law, the term joint tortfeasor was applicable *only* where persons had acted in concert in the commission of a tortious act. When common purpose or design was found each person who acted in, planned, assisted, or encouraged the commission of an act was responsible for the entire damage done, and all *could* be joined in the same action at law. Until changed by statute, the English rule was that a plaintiff could obtain only one judgment on a joint tort. Since the act of one was the act of all there was only one cause of action. A judgment against one alone, even though unsatisfied, barred any later action against the remaining wrongdoers.[2]

A second meaning of the term joint tortfeasor is the result of statutes beginning with the Field Code of Civil Procedure passed in New York in 1848. This act, and others similar to it which were passed in several states, contained provisions *permitting* joinder as defendants of any person claiming an interest adverse to the plaintiff in any controversy or necessary to the final determination of that controversy.[3] Initially many American courts tended to diminish the intended effect of these statutes and preserved the rule making concerted action the test for permissive joinder. In time, however, courts gave these laws full effect, and allowed joinder in a number of situations where the acts of two or more persons concurred to produce a single, indivisible injury although the wrongdoers had not acted in concert.[4] These wrongdoers are properly called concurrent tortfeasors, but by careless

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1 RESTATEMENT, TORTS § 885 (1939); PROSSER, TORTS 240 (2d ed. 1955); and cases collected in 45 AM. JUR. *Release* § 35 (1943); 76 C.J.S. *Release* § 50(a) (1952).

2 COOLEY, TORTS 177 (1930); HARPER, TORTS 676 (1933); PROSSER, TORTS 234 (2d ed. 1955).

3 CLARK, CODE PLEADING §§ 60-61 (2d ed. 1947); PROSSER, TORTS 237 (2d ed. 1955).

4 Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276 (1896); Doyle v. St. Paul Union Depot Co., 134 Minn. 461, 159 N.W. 1081 (1916); Robertson v. Chicago, B. & Q. Ry., 108 Neb. 569, 188 N.W. 190 (1922); Rowe v. Richards, 32 S.D. 66, 142 N.W. 664 (1913).

usage or extension of the earlier rule they have been commonly called joint tortfeasors.

The most important distinction between the joinder by statute and true joint tortfeasors acting in concert is that in the former case there is more than one cause of action which *may* be joined, for for procedural convenience, into one law suit. While joinder is permitted it is not compelled. The injured party may, if he elects, sue any one of the parties separately or may join them all in the same action.[5] When judgments are entered against more than one, a partial satisfaction of one of the judgments does not prevent enforcement of those remaining, but must be credited pro-tanto against them.[6]

A rule intended to prevent double recovery for one's injuries, often cited in the area of release, is the equitable rule that an injured party is entitled to but one satisfaction for his injuries. A satisfaction is the receipt of some compensation *accepted* as full compensation for the claim. A release is a *surrender* of a cause of action which can be accompanied by full compensation of the claim or anything less than full compensation. When a release was executed by one of several *true* joint tortfeasors at common law, the result was the release of the remaining tortfeasors because plaintiff had but one cause of action which he had surrendered whether the compensation was full satisfaction or not. When the wrongdoers are concurrent tortfeasors not acting in concert, it need not follow that the release of one releases all unless the injured party has received full satisfaction for his injuries which would terminate his remaining cause or causes of action by the application of the equitable rule.

However, by an apparent confusion between satisfaction and release, all but a strong minority of jurisdictions[7] continue to hold that the release of one of two or more concurrent tortfeasors is a release of all.[8] This is held to be so even though there was no common design or concert of action between the wrongdoers.[9] Many decisions, including the principal case, consider only that the same injury is involved and that to allow the injured party to recover against the remaining wrongdoers would permit

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[5] Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N.E. 956 (1892).

[6] Boyles v. Knight, 123 Ala. 289, 26 So. 939 (1899); Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154 (1863); Meixell v. Kirkpatrick, 29 Kan. 679 (1883); Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1923).

[7] See cases collected in note 20, *infra*.

[8] Tompkins Motor Lines v. Georgia Broilers, 260 F.2d 830 (5th Cir. 1958); Dura Electric Lamp Co v. Westinghouse Elec. Corp., 249 F.2d 5 (3rd Cir. 1957); Petroleum Carrier Corp. v. Carter, 233 F.2d 402 (5th Cir. 1956); Southern Pac. R.R. v. Raisch, 205 F.2d 389 (9th Cir. 1953); Shapiro v. Embassy Dairy Co., 112 F. Supp. 696 (D. N.C. 1953); Price v. Baker, 143 Colo. 264, 352 P.2d 90 (1951); Hadden v. Moran, 104 Cal. App. 2d 777, 232 P.2d 594 (1951); King v. Powell, 220 N.C. 511, 17 S.E.2d 659 (1941); Murray v. Helfrich, 146 Ore. 602, 30 P.2d 1053 (1934); Stires v. Sherwood, 75 Ore. 108, 145 Pac. 645 (1915); Wright v. Fischer, 24 Tenn. App. 650, 148 S.W.2d 49 (1940); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 Pac. 586 (1924).

[9] Southern Pac. R.R. v. Raisch, 205 F.2d 389 (9th Cir. 1953); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); Ducey v. Patterson, 37 Colo. 216, 86 Pac. 109 (1906); Manthei v. Heimerdinger, 332 Ill. App. 335, 351, 75 N.E.2d 132, 139 (1947) ("Whether or not they were joint tortfeasors or not we do not deem it necessary to answer; in the view we take of the case it was enough if they were both liable for the same injury."); Murray v. Helfrich, 146 Ore. 602, 30 P.2d 1053 (1934).

a double recovery.[10] The one satisfaction to which an injured party is entitled[11] is as a result often a technical form of satisfaction rather than a true satisfaction based on the plaintiff's injuries. The mere fact of the existence of a release given for some consideration is held to imply full satisfaction of the releasor's claim. Any assertions by the releasor as to his true intent or the inadequacy of the consideration are in vain, and the suit cannot be maintained again the remaining wrongdoers. This has been held though the releasor reserved an express right to maintain an action against those wrongdoers not a party to the release,[12] though one of the wrongdoers was liable at common law and the other by statutory enactment,[13] or though the compensation received was only half of the actual ascertained damages.[14]

The artificial nature of the majority rule becomes apparent when the words of release are changed to those of a covenant not to sue. These same majority jurisdictions hold that when a covenant not to sue is given by the injured party, persons not a party to the instrument are not discharged.[15] Because of the fact that a covenant not to sue can be supported by such consideration as to amount to a satisfaction, the covenantor's claim *can* be entirely satisfied and thereby discharged even though the form used was not technically that of release.[16] But with the *presumption of satisfaction* removed, an interesting change takes place. In determining whether the covenantor has any further standing, courts will now consider such factors as the amount of consideration received, the wording of the instrument, and the circumstances surrounding the settlement.[17] In so doing, because of a few changes in words used in the instrument these courts are considering the exact factors that they refused to consider in dealing with a release.

When a release has been given, but the releasor reserved the right to proceed against remaining wrongdoers, some jurisdictions which adhere to the majority rule as to the effect of a release will, however, give effect to these reservations and allow the suit against those defendants not a

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10 Shapiro v. Embassy Dairy Co., 112 F. Supp. 696 (E.D. N.C. 1953); Lamoreaux v. San Diego & Ariz. Eastern Ry., 48 Cal. 2d 617, 311 P.2d 1 (1957); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).

11 Lamoreux v. San Diego & Ariz. Eastern Ry., and Morris v. Diers, *supra*, note 10; Davidow v. Seyfarth, 58 So. 2d 865 (Fla. 1952); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938).

12 Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); Bland v. Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933).

13 Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947) (common law negligence, and Dram Shop Act).

14 Lucie v. Curran, 157 N.Y.S.2d 948, 2 N.Y.2d 157, 139 N.E.2d 133 (1956) (but see dissent which contends that the disparity in value shows a contrary intent not to release all who were liable).

15 Southern Pac. R.R. v. Raisch, 205 F.2d 389 (9th Cir. 1953); Petroleum Carrier Corp. v. Carter, 233 F.2d 402 (5th Cir. 1956); Bedwell v. De Bolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Liouzis v. Corliss, 94 N.H. 377, 54 A.2d 365 (1947); Murray v. Helfrich, 146 Ore. 602, 30 P.2d 1053 (1934); Wright v. Fischer, 24 Tenn. App. 650, 148 S.W.2d 49 (1940).

16 Bedwell v. De Bolt, supra, note 15; Short v. Hudson Supply & Equip Co., 191 Va. 306, 60 S.E.2d 900 (1950).

17 Petroleum Carrier Corp. v. Carter, 233 F.2d 402 (5th Cir. 1956); Horner v. Cookeville, 36 Tenn. App. 535, 259 S.W.2d 561 (1952).

party to the release.[18] Other jurisdictions, accepting the harsh common-law rule across the board, would state that such a reservation is repugnant to the very nature of the release and would thus ignore the releasor's expression of intent not to release all.[19]

A strong minority of jurisdictions do not adhere to the early common-law rule as to the effect of a release, but allow the intention of the parties to the agreement to determine whether release of one releases all.[20] Again, the underlying rule involved in the decisions is that the injured party is entitled to but one satisfaction of his claim,[21] but these jurisdictions look for *actual* satisfaction where the majority jurisdictions appear to raise *presumptions of satisfaction* by the mere fact of settlement.[22] One case representing the minority view stated:

> [W]hen the true intentions of the parties can be gathered from the four corners of the instrument, whether release or covenant not to sue, resort will not be had to artificial reasoning and mere technicalities that hamper and interfere with the duty and capacity of the court to adjudicate disputes and administer justice between the parties.[23]

To determine the true intent of the parties these courts consider the instrument as a whole,[24] the amount of consideration received as compared with the actual injuries sustained,[25] the relationship of the parties to the instrument,[26] express reservation of rights,[27] and, in some cases, whether there is a *specific* statement of what is dealt with in the instrument.[28] With such an approach, the releasor is allowed to settle a portion of his claim with one of the wrongdoers and at the same time preserve rights as against the others.[29] Concern over the so-called double recovery is diminished in these jurisdictions by reducing the amount of a later recovery, pro-tanto, by the amount of the consideration received for the release,[30] similarly to

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[18] Liouzis v. Corliss, 94 N.H. 377, 54 A.2d 365 (1947); Lucio v. Curran, 157 N.Y.S.2d 948, 2 N.Y.2d 157, 139 N.E.2d 133 (1956); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 Pac. 586 (1924).

[19] See cases in note 12, *supra*.

[20] Eagle Lion Films v. Loew's, Inc., 219 F.2d 196 (2d Cir. 1955); St. Paul Mercury Indem. Co. v. United States, 201 F.2d 57 (10th Cir. 1952); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Milwaukee Ins. Co. v. Gas Service Co., 185 Kan. 604, 347 P.2d 394 (1959); Jukes v. North Am. Van Lines, 181 Kan. 12, 309 P.2d 692 (1957); Daniel v. Turner, 320 S.W.2d 135 (Ky. 1959); Grondquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Weldon v. Lehman, 226 Miss. 600, 84 So. 2d 796 (1956); Burke v. Burnham, 97 N.H. 203, 84 A.2d 918 (1951); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

[21] Jukes v. North Am. Van Lines, Daniel v. Turner, and Grondquist v. Olson, *supra*, note 20; Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930); Fitzgerald v. Union Stockyards Co., 88 Neb. 393, 131 N.W. 612 (1911).

[22] McKenna v. Austin, 134 F.2d 659, 664 (D.C. Cir. 1943) ("Facts and intentions rather than presumptions from the mere fact of settlement should control.").

[23] Grondquist v. Olson, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954).

[24] Eagle Lion Films v. Loew's, Inc., 219 F.2d 196 (2d Cir. 1955); St. Paul Mercury Indem. Co. v. United States, 201 F.2d 57 (10th Cir 1952); Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Grondquist v. Olson, *supra*, note 23.

[25] McKenna v. Austin, 77 App. D.C. 228, 134 F.2d 659 (D.C. Cir. 1943).

[26] Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

[27] McKenna v. Austin, 77 App. D.C. 228, 134 F.2d 659 (D.C. Cir. 1943); Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930); Colby v. Walker, 86 N.H. 568, 171 Atl. 774 (1934).

[28] Colby v. Walker, *supra*, note 27.

[29] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955).

[30] Grondquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Burke v. Burnham, 97 N.H. 203, 84 A.2d 918 (1951).

reductions used with covenants not to sue[31] even in those jurisdictions that adopt the harsh common-law rule as to releases.[32] The crucial question whether the releasor has received a full satisfaction of his claim is one of fact unless there is such satisfaction expressed in the instrument that it becomes satisfaction as a matter of law.[33] If the releasor gives a general release, purporting to release all claims, courts following the intention rule hold that all parties responsible for the same injury are released by the instrument.[34] Although this appears to be a reversion to the application of the strict rule, it is not. In terms of the criteria established by these courts for determining the intent of the parties, there is no other conclusion that can be drawn from such an instrument but that the amount received is actually satisfaction as to all. The minority jurisdictions, feeling that the majority approach is based on artificial distinctions or dogmatic application of a general rule, believe they have adapted the common law to conform to the needs of present litigants in a fair and just manner.[35]

The principal case indicates the Iowa Court's adherence to the strict common-law rule followed by a majority of courts.[36] Several early cases had suggested effect would be given to reservation of rights against a third party if the instrument so provided.[37] But despite such an express reservation a later case treated the release of one as a release of all.[38] Judge Graven in 1953 thought the law regarding releases with reservation of rights was in a hopeless state of confusion, but felt that the strict rule would be inapplicable in Iowa unless the releasor obtained full satisfaction.[39] The principal case refers to Judge Graven's opinion, but does not indicate what the Court's attitude would be on an express reservation of rights, as the release involved though purporting to release only the railroad did not by its terms purport to reserve any rights against anyone else.

Full acceptance of the common-law rule tends to extinguish litigation and add finality to any settlement actually attained by the parties. But it

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31 Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Grondquist v. Olson, *supra*, note 30.

32 See cases in note 15, *supra*.

33 McKenna v. Austin, 77 App. D.C. 228, 134 F.2d 659 (D.C. Cir. 1943).

34 Jukes v. North Am. Van Lines, 181 Kan. 12, 309 P.2d 692 (1957) Daniel v. Turner, 320 S.W.2d 135 (Ky. 1959); Beedle v. Carolan, 115 Mont. 587, 148 P.2d 589 (1944); Colby v. Walker, 86 N.H. 568, 171 Atl. 774 (1934).

35 Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958) (overruling several years of adherence to the strict common-law rule; the language found in this opinion is among the best found in support of the intention, or minority, rule).

36 See also Bolton v. Zeigler, 111 F. Supp. 516 (N.D. Iowa 1953); Hawkeye Security Ins. Co. v. Lowe Constr. Co., 251 Iowa 27, 99 N.W.2d 421 (1959); Bashford v. Slater, 250 Iowa 857, 96 N.W.2d 904 (1959); Pappas v. Pappas, 247 Iowa 638, 75 N.W.2d 264 (1956); Latham v. Des Moines Elec. Light Co., 232 Iowa 1038, 6 N.W.2d 853 (1942); Crum v. McCollum, 211 Iowa 319, 233 N.W. 678 (1930); Kilby v. Charles City Western Ry., 191 Iowa 926, 183 N.W. 371 (1921).

As in the majority of jurisdictions, a covenant not to sue does not discharge all parties responsible for the same harm, in Iowa, and the consideration received by the covenantor must be applied pro-tanto against any recovery obtainable from the remaining tortfeasors. Bolton v. Zeigler, *supra*, Savery v. Kist, 234 Iowa 98, 11 N.W.2d 23 (1943); Lang v. Siddall, 218 Iowa 263, 254 N.W. 783 (1934).

37 Gardner v. Baker, 25 Iowa 343 (1868); Seymour & Co. v. Butler, 8 Iowa 304 (1859).

38 Farmers Sav. Bank v. Aldrich, 153 Iowa 144, 133 N.W. 383 (1911).

39 Bolton v. Zeigler, 111 F. Supp. 516, 523-525 (N.D. Iowa 1953).

also tends to discourage rather than encourage settlement, even though compromise is generally encouraged. Each tortfeasor is induced to wait for another to settle, or the releasor will not want to settle for less than full satisfaction. The availability of the covenant not to sue can be advanced to counter the undesirable effects of the majority rule. This may mean, however, that full satisfaction for an injured party may depend on the skill of a draftsman, the party's knowledge or ignorance of the effect of a release, or even the work of sharp traders with ready cash.

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