Settlement with One Joint Tortfeasor Bars Recovery against Others of the Settling Tortfeasor's Proportionate Share of Damages

John W. Bickle

mental condition is in controversy and that good cause exists for each examination. Effectively, then, the Court struck a balance between protection of the parties involved and allowance of medical examinations.

The adoption of the position taken by the court of appeals[38] would have ignored this delicate balance by allowing physical and mental examinations merely by the inclusion within the pleadings of statements calculated to have that effect. Further, under this view, court-ordered medical examinations could easily have become a matter of routine, resulting in harassment and costly delay at the expense of the hapless litigant.

Fortunately the Court found the balance and struck it.

A. W. Tarkington, Jr.

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I. INTRODUCTION

The terms "joint torts" and "joint tortfeasors" have been the subject of much confusion.[1] Numerous attempts have been made to define the terms and a multitude of tests have been proposed in an effort to determine when the principles embodied in these terms are applicable.[2] It is the friction created by the unavoidable clash of two of these principles, *viz.*, the doctrine of contribution between joint tortfeasors and the rule that a plaintiff may settle with one or more joint tortfeasors without surrendering his cause of action against the others, which gives cause for concern.

A. *Contribution Between Joint Tortfeasors*

The common law doctrine of contribution between joint tort-

[38] That is, that the mere allegation within the pleadings that his poor vision was a contributing factor to the collision was enough to satisfy the requirements of rule 35(a) for ordering medical examinations. Schlagenhauf v. Holder, 321 F.2d 43 (7th Cir. 1963).

[1] See, *e.g.*, Jackson, *Joint Torts and Several Liability*, 17 TEXAS L. REV. 399 (1939), and Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

[2] A few of the tests proposed have been: the existence of a like, or common duty; the opportunity to use the same evidence against each defendant; and the identity of a cause of action against each defendant. See generally, 1 COOLEY, TORTS 276-78 (4th ed. 1932).

feasors[3] has developed along very unusual lines.[4] Since 1799, it has been an established common law principle that no *right* of contribution exists between joint tortfeasors.[5] This rule, although apparently originally intended to apply only to intentional wrongdoers, has been applied also to negligent tortfeasors. In fact, a majority of American jurisdictions in which contribution rights are not yet controlled by statute apply the doctrine regardless of the presence or absence of intent on the part of the persons causing the injury.[6] The underlying theory supporting these holdings is that a man should not be allowed to make his own misconduct the basis for a cause of action in his favor. A growing number of these jurisdictions, however, have done away with the common law prohibition as it applies to negligent tortfeasors and have in effect established a common law right as between these joint tortfeasors.[7] The destruction

[3] The doctrine of contribution has as its sole function the allocation or equalization, among the parties who are at fault, of the burden resulting from tortious conduct.

[4] See Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

[5] Merryweather v. Nixon, 1 Camp. 345, 101 Eng. Rep. 1337 (K.B. 1799). In this case, plaintiff had been forced to pay under a joint judgment rendered against the defendant and himself. From the meager record available, it appears that the two were intentional tortfeasors acting in concert.

[6] Almost one-half of the states will adhere to the common law rule and do not allow contribution between tortfeasors. The states which continue to follow the common law rule are: Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Montana, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, South Carolina, Utah, Vermont, Washington and Wyoming. Of these states, fifteen apply the doctrine equally as to negligent or intentional tortfeasors. *Alabama:* Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933). *Arizona:* Schade Transfer & Storage Co. v. Alabama Freight Lines, 75 Ariz. 201, 254 P.2d 800 (1953) (dictum). *Colorado:* Colorado & S. Ry. Co. v. Western Light & Power Co., 73 Colo. 107, 214 P. 30 (1913). *Connecticut:* Rose v. Heisler, 118 Conn. 632, 174 A. 66 (1934). *Florida:* Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353 (1940). *Illinois:* John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923) (dictum). *Indiana:* Jackson v. Record, 211 Ind. 141, 5 N.E.2d 897 (1937). *Nebraska:* Andromidas v. Theisen Bros., 94 F.Supp. 150 (D.C. Neb. 1950) (dictum). *New Hampshire:* Graveline v. D. F. Sullivan Auto Co., 81 N.H. 279, 124 A. 552 (1924). *Ohio:* Royal Indem. Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (1930), *overruling* Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663 (1853). *Oklahoma:* Cain v. Quannah Light & Ice Co., 131 Okla. 25, 267 P. 641 (1928). *Oregon:* Smith v. Burns, 71 Ore. 133, 135 P. 200 (1914). *Utah:* Hardman v. Matthews, 1 Utah 2d 110, 262 P.2d 748 (1953). *Vermont:* Spalding v. Oakes' Admr., 42 Vt. 343 (1869). *Washington:* City of Puyallup v. Vergowe, 95 Wash. 320, 163 P. 779 (1917).

[7] *California:* Augustus v. Bean, 56 Cal.2d 270, 363 P.2d 873 (1961). *Iowa:* Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956). *Maine:* Hobbs v. Hurley, 117 Me. 449, 104 A. 815 (1918). *Minnesota:* Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887). *Tennessee:* Davis v. Broad St. Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950). (Tennessee courts have limited the right of contribution to the *passively* negligent tortfeasor as against the *actively* negligent tortfeasor.) *Wisconsin:* Ellis v. Chicago & N.W. Ry. Co., 167 Wis. 392, 167 N.W. 1048 (1918). *District of Columbia:* George's Radio Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942).

of the "no contribution" rule has been justified primarily on the grounds that the rule has not been a deterrent to tortious conduct and has served to stifle attempts to compromise and settle controversies prior to litigation.[8]

The common law rule has been abolished in several states by the passage of legislation which provides for contribution between joint tortfeasors.[9] Texas was among the pioneers in this area of tort law, imposing a *duty* to make contribution through passage of the Contribution Between Tortfeasors Act of 1917.[10] The purpose of the Texas statute is to allocate the burden equally between all solvent tortfeasors[11] by providing that a tortfeasor can recover from his solvent joint tortfeasors that amount which he is required to pay in excess of his pro rata share of the judgment.[12]

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[8] McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942).

[9] The remaining states have dealt with the problem through legislation. *Arkansas:* ARK. STAT. ANN., § 34-1001 (1947). *Delaware:* DEL. CODE ANN. tit. 10, §§ 6301-08 (1953). *Georgia:* GA. CODE ANN. § 105-2012 (1956). *Hawaii:* HAWAII REV. LAWS, §§ 246-10 to -16 (1955). *Kentucky:* KY. REV. STAT. ANN. § 412.030 (1955). *Louisiana:* LA. CODE CIV. PROC. ANN. arts. 1111-16 (1961). *Massachusetts:* MASS. GEN. LAWS ANN. ch. 231, §§ 1-4 (Supp. 1962). *Maryland:* MD. ANN. CODE art. 50, §§ 16-24 (1957). *Michigan:* MICH. STAT. ANN. § 27A.2925 (1962). *Mississippi:* MISS. CODE ANN. §§ 335.5 (1960). *Missouri:* MO. REV. STAT. § 537.060 (1959). *New Jersey:* N.J. REV. STAT. § 2A:53A-2 (1951). *New Mexcio:* N.M. STAT. ANN. §§ 24-1-11 to -18 (1953). *New York:* N.Y. CIV. PRAC. § 211-a (1962). *North Carolina:* N.C. GEN. STAT. § 1-240 (1959). *North Dakota:* N.D. CENT. CODE §§ 32-38-01 to -04 (1960). *Pennsylvania:* PA. STAT. ANN. tit. 12, §§ 2082-89 (1961). *Rhode Island:* R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1956). *South Dakota:* S. D. CODE §§ 33.04A01-.04A10 (Supp. 1960). *Texas:* TEX. REV. CIV. STAT. ANN. art. 2212 (1948). *Virginia:* VA. CODE ANN. § 8-627 (1961). *West Virginia:* W. VA. CODE ANN. § 5482[13] (Supp. 1962).

[10] TEX. REV. CIV. STAT. ANN. art. 2212 (1948).

> "Contribution between tortfeasors.
>
> Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons codefendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency. Acts 1917, p. 360."

[11] Callihan Interests, Inc. v. Duffield, 385 S.W.2d 586 (Tex. Civ. App. 1964) *error ref.*, in particular the statement on page 587 where Chief Justice Grissom says "our courts have held that the purpose of the statute was to place the burden equally upon joint tortfeasors; that it was enacted to prevent inequities between joint tortfeasors; that a defendant tort-feasor may bring in other wrong-doers not sued by the plaintiff; that a joint judgment against tort-feasors is not required as a prerequisite to recovery of contribution by one against another and that the "dominant purpose" of article 2212 is to "create the right of contribution."

[12] The statute has remained unchanged since its original passage. See Hodges, *Contribution*

B. *Release Or Covenant Not To Sue*

The common law rule regarding the giving of a release or covenant not to sue one of several joint tortfeasors appears to have developed along the same harsh lines as the common law doctrine of contribution. The original rule was that the release of one joint tortfeasor released all, even if there was an express reservation of a cause of action against the tortfeasors who were not parties to the release.[13] In other words, the liability of the tortfeasors was joint, and not several. The rule apparently was based on the theory that the injured party had only one claim. By accepting satisfaction for his injury from one joint tortfeasor the injured party in effect discharged his entire claim so that he no longer had any cause of action against the remaining tortfeasors. The harshness of such a rule is apparent on its face and dissatisfaction with it has resulted in legislation[14] and court-made devices[15] designed to avoid its effect. The most important device adopted by the courts is embodied in the rule that a covenant not to sue as opposed to a release of one of several tortfeasors does not operate to release the others.[16] The theory behind this rule is that a covenant not to sue is not a present abandonment or relinquishment of a right or claim but is merely an agreement not to enforce an existing cause of action.[17] However, the effect of either a release or covenant not to sue upon the released party is precisely the same.

II. Effect of Covenant not to Sue upon Parties to Suit

The legal effect of a covenant not to sue differs according to the approach taken by each jurisdiction. The alternative approaches are either to (1) deprive the settlement of its necessary finality, (2) deprive the non-settling tortfeasor of his right to contribution, or (3) deny the injured party his full satisfaction by placing upon him a burden which would otherwise be the responsibility of one or all

and Indemnity Among Tortfeasors, 26 Texas L. Rev. 150 (1947) for a perceptive analysis of the statute, its application and effect.

[13] See generally, 45 Am. Jur. 701, *Release* § 37 (1943); and 76 C.J.S. 678, *Release* § 49 (1952).

[14] In particular see, *Uniform Joint Obligations Act of 1925*, §§ 4-5, 9B Uniform Laws Annotated 229, 230-34 (1957); and *Uniform Contribution Among Tortfeasors Act of 1939*, §§ 4-5, 9 Uniform Laws Annotated 233, 242-46 (1957).

[15] The two primary escape devices, other than the covenant not to sue, have been created by excepting from the general rule a release of one who is not, in fact, liable for the tort, and a tort committed by independent or concurring, as distinguished from joint, tortfeasors.

[16] Gillette Motor Transport Co. v. Whitfield, 186 S.W.2d 90 (Tex. Civ. App. 1945) *error ref. w.m.*

[17] Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945).

of the defendants. The basic conflict requires a policy decision to determine the best method available for encouraging parties to settle their differencs without litigation.

A. *Deprive The Settlement Of Its Necessary Finality*

The settlement may be deprived of its finality by allowing the injured party to obtain a judgment for his total damages less the consideration received in settlement, and then allowing the joint tortfeasor who pays more than his pro rata share to have a cause of action for contribution against the settling tortfeasor. This is the solution found in states which adopted the Uniform Contribution Among Tortfeasors Act of 1939,[18] before its amendment in 1955. It provided in section 4 that "release by the injured person of one joint tortfeasor . . . reduces the claim against the other tortfeasors in the amount of the consideration paid for the release. . . ." Furthermore, section 5 of the act provided that "[a] release . . . does not relieve him [the joint tortfeasor] from liability to make contribution to another joint tortfeasor. . . ." The legal principle upon which this result is based is that an injured plaintiff is entitled to full and complete satisfaction for his injuries from any or all of the joint tortfeasors whose liability to the plaintiff is joint and several. Also, allowing an action for contribution recognizes the duty and the right of joint tortfeasors to equalize their obligation.

This solution seems to offset any disadvantages which might accrue to a non-settling tortfeasor on account of a settlement to which he was not a party and to which he did not consent. Indeed, the covenant not to sue could operate to the benefit of the remaining joint tortfeasors because it would assure them of a credit against any subsequent judgment. Nevertheless, this alternative discourages compromise and settlement in that a defendant continues to be subject to a suit for contribution. Moreover, the use of a covenant not to sue could tempt plaintiffs to make collusive settlements, the situation which has motivated the enactment of most contribution statutes.

B. *Deprive The Other Tortfeasor Of His Right To Contribution*

The second solution is to deprive the non-settling tortfeasor of his right to contribution by *requiring* him to pay the entire judgment subject only to a credit in the amount of the consideration paid for the covenant not to sue. This alternative is the present solution pro-

[18] 9 UNIFORM LAWS ANNOTATED 233 (1957). See also PROSSER, TORTS, § 46 at 272 (3d ed. 1964); RESTATEMENT, TORTS § 885 (1939); and 1 HARPER & JAMES, TORTS § 10.2 at 714 (1956).

vided by the Uniform Contribution Among Tortfeasors Act of 1939, as amended in 1955.[19] Sections 4 and 5 of the original act have been replaced by a new section 4 which provides that a release "(a) . . . reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, (b) . . . discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."[20] Under this solution, the remaining tortfeasor would be deprived of his right to equalize his payment with that of the settling tortfeasor. The result could be justified as a penalty against the non-settling tortfeasor for his failure to compromise and for causing the additional expense and delay involved in litigation. Undoubtedly, this would encourage settlements and discourage litigation.

The primary objection to summarily depriving the non-settling tortfeasor of his contribution right is that he should not be adversely affected by a settlement to which he was not a party. Moreover, as with the first, this alternative does not deter the injured party from making a collusive settlement. The solution of denial of contribution however, unlike the others, is precluded in Texas because it directly conflicts with our statute providing for contribution among joint tortfeasors.[21]

C. *Deny The Injured Party His Full Compensation*

The third solution is to deny the plaintiff full compensation for his injuries by reducing the amount of the verdict rendered against all tortfeasors by the settling tortfeasor's proportionate share of the damages. This solution places the burden, which otherwise would fall upon one or more of the defendants, upon the injured party. More importantly, it serves to decrease the injured party's total recovery as the direct result of the injured party accepting less than a pro rata share of recoverable damages from the compromising tortfeasor. Under this alternative, compromise agreements become final and the settling tortfeasor is protected from future suits for contribution. At the same time, the injured party is not tempted to enter into a collusive settlement as he might be under the other alternatives be-

[19] *Uniform Contribution Among Tortfeasors Act of 1939*, as amended in 1955, 9 UNIFORM LAWS ANNOTATED 111, 118-19 (Supp. 1963).

[20] Only Massachusetts and North Dakota have adopted the 1955 revision. See *Massachusetts:* MASS. GEN. LAWS ANN., ch. 214 §§ 1-4 (1962). *North Dakota:* N. D. CENT. CODE §§ 32-38-01 to -04 (1957).

[21] See note 10 *supra.*

cause any settlement agreed upon will cause a pro rata reduction in the amount of his recovery.

While the question has not been broached in most jurisdictions,[22] the alternative of reduced damages has found support in the jurisdictions which have encountered it.[23] In fact, both New Jersey[24] and the District of Columbia[25] have applied the proportionate share reduction of damages rule in joint tort situations, primarily for the reasons indicated. In the leading New Jersey case,[26] Mr. Justice Brennan (then Judge Brennan of the Supreme Court of New Jersey) reasoned that "if the injured party is required to credit only the amount received in settlement . . . he may be tempted to make collusive settlements . . . . Also the settlement then lacks finality because the settler cannot count on his adjustment with the injured person as ending the matter but must apprehend a suit at the hands of his co-tortfeasors. This would have a stifling effect upon efforts at compromise and settlement, contrary to the policy of our law . . . ."[27] Similar reasoning is found in the leading District of Columbia decision[28] and in an earlier Texas case.[29]

Obviously these three alternatives can not be used in conjunction; one must be used to the exclusion of the others. A determination of which alternative is to be applied necessitates balancing the interests involved. The apparent merit of each alternative has led the Supreme Court of Texas to reevaluate these policy considerations.

III. PALESTINE CONTRACTORS, INC. v. PERKINS[30]

Mrs. Perkins was a passenger in an automobile involved in a three-way collision with a truck owned by Palestine Contractors, Inc. and another automobile. Herman Conoway, the driver of the other automobile, turned into an intersection in violation of a flashing red signal. The streets were wet. The driver of the corporation's truck was traveling at an excessive rate of speed and failed to stop the vehicle. He lost control, crossed over onto the other side of the

[22] See notes 6-9 *supra.*

[23] See cases cited notes 24-25 *infra.*

[24] Pilosky v. Dougherty, 179 F. Supp. 148 (E.D. Pa. 1959) (applying New Jersey law); Smootz v. Ienni, 37 N.J. Super. 529, 117 A.2d 675 (1955); Oliver v. Russo, 29 N.J. 418, 149 A.2d 213 (1959); and Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).

[25] Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962); Otis v. Thomas, 262 F.2d 232 (D.C. Cir. 1958); and McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

[26] Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).

[27] *Id.* at 78, 110 A.2d at 36.

[28] Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962).

[29] Gattegno v. The Parisian, 53 S.W.2d 1005 (Tex. Comm. App. 1932).

[30] 386 S.W.2d 764 (Tex. 1964).

road, hit Mrs. Perkins' automobile and then crossed back hitting Conoway's automobile.

Sometime after the accident Mrs. Perkins gave Conoway, who was insolvent, a covenant not to sue, reciting a consideration of $10.00 which was never paid. In the covenant, Mrs. Perkins expressly reserved her cause of action against the corporation.[31] Mrs. Perkins then brought suit against Palestine Contractors, Inc., who in turn filed a third party action against Conoway. Palestine alleged that the covenant not to sue given to Conoway operated as a release of her claim against him so that only one-half of the damages could be recovered from Palestine. Its position was based on the theory that Mrs. Perkins agreed not to sue Conoway, directly or *indirectly*, and that by asserting full damages against Palestine she was indirectly suing Conoway in contravention of their agreement because Palestine would have a right of contribution from Conoway for one-half of the damages if held liable for the full amount. Therefore, Palestine argued, Mrs. Perkins should only recover one-half of her damages from Palestine Contractors because in effect she had sold her right to one-half of her claim by giving Conoway a covenant not to sue.

The trial court rendered judgment for Mrs. Perkins against both parties and allowed Palestine Contractors, Inc. a judgment against Conoway for contribution. The court of civil appeals affirmed the judgment but reformed it to the extent that Palestine Contractors, Inc. could have no right to contribution unless it paid more than its pro rata share of the damages.[32] The Supreme Court of Texas reversed and held that the covenant not to sue Conoway reduced Mrs. Perkins' recovery by Conoway's proportionate share of the total damages and therefore no contribution would be necessary.[33]

In arriving at its decision, the court relied especially on three cases: *Gattegno v. The Parisian*,[34] *Judson v. Peoples Bank & Trust Co.*,[35] and *Martello v. Hawley*.[36] In the *Gattegno* case, the injured party released one of two alleged joint tortfeasors in exchange for the privilege of breaking a lease. The Texas Commission of Appeals held that this was in effect a release of one-half of the injured party's right to damages, stating: "Therefore, if it be found that Gattegno and Muir are both active tortfeasors as between each other,

[31] *Id.* at 765.
[32] Palestine Contractors, Inc. v. Perkins, 375 S.W.2d 751 (Tex. Civ. App. 1964) *error granted.*
[33] 386 S.W.2d 764 (Tex. 1964).
[34] 53 S.W.2d 1005 (Tex. Comm. App. 1932).
[35] 17 N.J. 67, 110 A.2d 24 (1954).
[36] 300 F.2d 721 (D.C. Cir. 1962).

the release having discharged Muir as to all liability to The Parisian, has at least discharged one-half its damages."[37] In *Palestine*, the court of civil appeals referred to the above statement as a dictum.[38] The Supreme Court of Texas, however, decided that the Commission of Appeals had intended that the statement should serve as a guide to the lower court upon a retrial of the case;[39] and, that the instruction was at least a "judicial dictum," deliberately made for the purpose of being followed, and not simply "obiter dictum." The dissent distinguished *Gattegno*[40] on the ground that, in *Gattegno*, Muir was a solvent joint tortfeasor who could have been liable for contribution.[41] Because of the solvency aspect the expressed intent of the parties was effectuated in *Gattegno*, while in *Palestine* the court gave the covenant not to sue an effect which was contrary to the expressed intent of the parties. In addition, the dissent indicated that the release in *Gattegno* was the same as an indemnity on the part of the Parisian in favor of Muir and that this construction of the instrument involved was a distinguishing feature to be considered.[42] This argument, however, appears to be unsound because when one party covenants not to sue *directly or indirectly*, an indemnity agreement would seem unnecessary and would merely clarify the result which should occur without one. The dissent also placed great importance on the fact that *Gattegno* had not been cited as authority in any case in which a plaintiff had executed such a covenant.[43] However, as the majority indicated,[44] it does not appear that a contention to reduce the plaintiff's recovery had been made in the cited cases, and without such a contention these decisions do not necessarily conflict with the majority theory.

In the *Judson* case,[45] decided under a contribution statute very similar to the Texas statute, the New Jersey Supreme Court held that a settlement with one tortfeasor proportionately reduced the plaintiff's recovery. The court based its decision primarily on the grounds that such a rule encourages complete settlements and deters collusive settlements.[46] The court there said that a collusive settle-

[37] 53 S.W.2d 1005, 1008 (Tex. Comm. App. 1932).
[38] 375 S.W.2d 751, 754 (1964).
[39] 386 S.W.2d 764, 773 (1964).
[40] *Id.* at 774.
[41] *Id.* at 776.
[42] *Ibid.*
[43] *Id.* at 777.
[44] *Id.* at 766. Note particularly the cases cited by the majority in support of this conclusion.
[45] Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).
[46] *Id.* at 78, 110 A.2d at 36.

ment would be ineffective when the plaintiff was required to reduce his recoverable damages by the settler's pro rata share as a result of the settlement.[47] In addition, the settlement is assured of its finality and an additional suit for contribution is avoided.[48] Thus, needless circuity of actions is avoided because the non-settling tortfeasor has not been required to pay more than his pro rata share of the judgment and is therefore not entitled to contribution.

In *Martello*,[49] a District of Columbia case, the injured party had settled with one of the joint tortfeasors. The court entered judgment against the non-settling tortfeasor for one-half of the damages determined by the jury and ruled that the settling tortfeasor was not liable for contribution.[50] The court said that any other decision would be unfair to the settling tortfeasor who had attempted to buy his peace, and to the non-settling tortfeasor who should not be prejudiced by an agreement to which he was not a party and to which he did not consent.[51]

Admittedly, the court in *Palestine* does not decide contra to the established common law rule that a plaintiff may sue one of several joint tortfeasors and collect his full damages from the one he sues.[52] Rather, the court expressly reiterates the correctness of this fundamental rule. Nor does the majority repudiate the accepted doctrine that had the plaintiff sued one of the joint tortfeasors without agreeing not to sue the other, the tortfeasor ultimately brought to judgment would be required to pay the total damages.[53] The *Palestine* rule allows finality of settlement combined with a minimum of injustice to the plaintiff who has the choice of whether to sue or release the defendant. The rule tends to decrease the inequities obtained in the older doctrine.

IV. Conclusion

The rationale of the *Palestine* decision leans heavily on the fact that the court must balance the interests of the parties involved, in that there are no perfect solutions to the problem. The result, although limited to a narrow context, is significant in two major

[47] *Ibid.*
[48] *Ibid.*
[49] Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962).
[50] *Id.* at 724.
[51] *Ibid.*
[52] Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).
[53] See note 10 *supra*. Of course, the tortfeasor who paid more than his pro rata share of damages could sue his joint tortfeasors for contribution either in the same or in a subsequent suit, if there had been no release or covenant.

respects. First, it is an acceptance of a solution which in effect destroys the temptation on the part of the plaintiff to make a collusive settlement. Obviously, a collusive settlement is wholly ineffective when the required result is a credit of the settling tortfeasor's pro rata share of the damages. Under the rule as adopted, if the settlement is not collusive, then the plaintiff makes a settlement upon the basis of his own appraisal of the risks incident to recovery. If an appraisal has been made, the plaintiff would hardly be deterred from making the settlement because it may later be found that he accepted less than the settling tortfeasors' proportionate share. Moreover, the amount of the judgment sought is not the plaintiff's sole consideration in his decision to settle the controversy with one of the joint tortfeasors.[54]

Second, the decision encourages attempts at complete rather than partial settlement. In any law suit, a defendant settles primarily in order to save money and to avoid the litigation.[55] If the non-settling tortfeasor has a right of contribution against the settling tortfeasor, these incentives would be destroyed. The settling tortfeasor could be sued either in the same or in a subsequent action and would therefore lose any advantages he may have bargained for and obtained in the settlement. This problem is succinctly described in the Commissioner's comments regarding the 1955 amendment to the Uniform Contribution Among Tortfeasors Act of 1939.[56] There it is stated that the effect of allowing contribution to the non-settling tortfeasor has been "to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file . . . . No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another . . . ."[57] Thus, the result in *Palestine* gives to the release or the covenant not to sue the necessary finality which should be afforded such an instrument and encourages complete settlements. As a consequence, the rule prefers the doctrine of compromise and settlement over contribution but attempts to maintain the essential integrity of each so far as is possible.

[54] Before considering any settlement, a prudent plaintiff as a minimum should examine his chances of recovery in the light of the difficulty involved in proving negligence; his need for emergency funds; the financial position of the defendant; and the amount of previous judgments determined under similar conditions.

[55] See the discussions in James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); and Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941).

[56] See note 19 *supra*.

[57] *Ibid.*

The decision is not a panacea for all similar joint tort ailments. The contribution question is left open in a situation involving more than two joint tortfeasors. What would be the result, for example, if only one of the non-settling defendants is solvent, and is required to satisfy the entire judgment less the solvent settling tortfeasor's proportionate share? Perhaps he would be allowed to obtain contribution against the settling tortfeasor but there is no indication that the rationale of the *Palestine* decision would not be extended to encompass a situation involving more than two joint tortfeasors. While it is true that the solvency-insolvency argument advanced by the dissent in *Palestine* may command greater attention in a situation involving more than two joint tortfeasors, it is doubtful that it would succeed in the face of the policy of encouraging compromise and settlement.

The trend in jurisdictions which have faced these problems is toward denying contribution and reducing the plaintiff's damages. The basis of most of these decisions is that the plaintiff is making his settlement based on a rational analysis of his chances of recovery against the particular tortfeasor involved. If such is actually the case, then there can be no argument to the effect that the decisions circumvent the intentions of the parties. If not, then the decisions could serve to deprive a plaintiff of his full satisfaction against his intentions. The difficulty with the trend is that it attempts to settle a dispute between two divergent theories, neither of which is able to provide a completely satisfactory solution. Nevertheless, the rule of reduced damages at least has the virtue of simplicity and finality.

John W. Bickle