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Conclusiveness of Personal Injury Settlements: Basic Problems

Dan B. Dobbs

CONCLUSIVENESS OF PERSONAL INJURY SETTLEMENTS: BASIC PROBLEMS

DAN B. DOBBS*

I. FUNCTIONS OF SETTLEMENT

The Problem

This article is addressed primarily to students who are unfamiliar with methods and difficulties of settling personal injury litigation. It does not attempt to discuss all settlement problems, but only those relating to the finality or conclusiveness of the settlement. Without ramifications the problem is this: When should courts set aside a voluntary settlement of a personal injury claim and permit the plaintiff to seek a greater recovery? Or, put conversely, when should courts permit a defendant to "buy his peace" by a voluntary settlement so as to escape full liability for the actual injury inflicted?

In concrete form, the problem is presented by these facts or some variation: Don Doop negligently drops a brick on Patty Poop's toe, causing a painful bruise. The next day Don's adjuster sees Patty and offers her fifty dollars for her trouble. She accepts and signs a release[1]—a document which has the standing of a contract[2] and which says that Patty gives up or releases any claim she may have against Don. Later she discovers that the injury is more serious than she thought at the time of the settlement. It may be that she has suffered a broken toe, or it may be that the bruise does not heal, gangrene sets in, and amputation is necessary.[3] Patty feels that Don Doop or his insurance company should pay the additional damage. But if she tries to collect any further damages, Don (through his

* Assistant Professor of Law, University of North Carolina.

[1] Typically a release provides that the claimant gives up all his claims against the defendant, including claims for unknown injuries. The cases cited in note 19 *infra* include some typical release provisions.

[2] Technically a release might be regarded as non-contractual. It is not a promise on the part of either party, but rather is evidence that the cause of action previously held by the plaintiff is surrendered. See Havinghurst, *Problems Concerning Settlement Agreements*, 53 NW. U.L. REV. 283 (1958). But courts usually speak of releases as contracts, and so they are, for most practical purposes. There is no need in this article to distinguish releases and covenants not to sue.

[3] These are the facts in Mack v. Albee Press, Inc., 263 App. Div. 275, 32 N.Y.S.2d 321 (1942), *aff'd without opinion*, 288 N.Y. 623, 42 N.E.2d 617 (1942).

insurance company) will produce the release as a shield; and normally it will function admirably in that capacity.

Yet there are some circumstances that will justify avoidance of the release—for example, circumstances that permit Patty to ignore the release and sue for her injury just as if it had never been given. Courts will often give relief of this sort to Patty if fraud has been practiced upon her,[4] if she was subjected to undue pressure,[5] if she had no capacity to execute a legal document,[6] or if there was a mutual mistake of a certain sort.[7] When relief is given, the whole question of how much damages, if any, the defendant should pay is re-opened. It is determined either by a trial or by a second settlement.

The Desirability of Settlement

Obviously, the parties to a dispute are not required to settle their differences out of court. Thus if Don wanted to be certain that Patty could not later assert her claim again, he could ignore the settlement opportunities and proceed to a full scale trial—a point to be discussed later. But settlement out of court is desirable. If courts had to accept all the disputes that are now being settled, a case arising today might not be decided until long after the parties are dead. There is simply no room in the courts. Partly for this reason, private settlements today account for the termination of virtually all personal injury cases. But voluntary settlement would be desirable even if the court dockets were not overcrowded. It is faster, and because trials cost money, it is cheaper both for the parties and the public. Settlement also means that less unproductive time is used in preparing and trying the issues in dispute. The parties, the witnesses, and the jurors are free to do more useful work. Settlement causes less emotional drain than a trial does. A trial is a good way of attaining justice, but it is a very poor way of life; and the sooner disputants can get on with the ordinary business of living, the better. Settlement usually permits this.

The Purpose of Finality

A settlement is of little use unless it is final. Without finality, neither the plaintiff nor the defendant will be able to project his

[4] Discussed in text accompanying notes 45-77 *infra.*
[5] Discussed in text accompanying notes 102-19 *infra.*
[6] Discussed in text accompanying note 109 *infra.*
[7] Discussed in Part IV *infra.*

future plans with any degree of accuracy. There are also other very practical reasons that argue for finality of settlement. Foremost of these, perhaps, is the strong suspicion that a plaintiff who assessed his own injury and accepted money for it assessed it correctly the first time. When he later comes into court with second thoughts, we may be permitted to suspect that his first thoughts were either more honest or more realistic. A similar reason for upholding settlements is that a second effort to litigate or argue the matter may not increase the chances that justice will be done. Witnesses' memories are clouded; or they have moved; or investigation that might have been made was not made because of an early settlement. Settlements should be as final as a civilized system of law can make them. Disputes should not be reopened unless the price of finality is too high.

The Dilemma

Unfortunately there are cases in which the price of finality in settlements is too high. Where the defendant has been guilty of certain kinds of fraud in procuring the release, all agree that the settlement cannot stand, and that the plaintiff must be permitted to pursue his claim against the defendant without regard to the release. Whether the price is also too high where the plaintiff merely makes a bad mistake as to the seriousness of his injuries is not so clear.

What *is* clear is that the law is faced with a dilemma. There are two legitimate interests involved—the defendant's rightful desire to buy his peace and to rely on the settlement; and the plaintiff's rightful expectation that the wrongdoer should pay just compensation for the injuries he has inflicted. The dilemma runs even deeper. A voluntary settlement, like other contractual arrangements, should be respected. If the plaintiff releases "all" claims, an individualistic principle of the law which is compendiously expressed as one favoring "freedom of contract" might demand, absent fraud, that the plaintiff be held to his agreement. But an equally individualistic principle says that the wrongdoer—not society, or the victim, or the victim's family, but the wrongdoer—should pay.[8] Almost all our tort law of personal injury is based upon this principle. This we have chosen in conscious preference to a social scheme for compensa-

[8] See the discussion of Judge Frank in Hume v. Moore-McCormack Lines, Inc., 121 F.2d 336 (2d Cir.), *cert. denied,* 314 U.S. 684 (1941), discussing these principles in terms of "status" and contract.

tion—in preference, for example, to insurance schemes or social welfare payments[9] to those injured by the tort of others. Where only mistake and not fraud is involved, there is no reconciling these two individualistic principles, the one that holds a plaintiff to his contract and the other that holds a defendant to his tort. It is not surprising, then, that on some issues concerning the finality of settlement, the cases lie in a bed of confusion. But the cases should not be discussed until the different forms of settlement have been examined.

II. Mechanics of Settlement

There are several distinct ways of terminating personal injury disputes, and awareness of these methods is of course necessary to their practical use. A comparison of these methods is important here, however, because a settlement by one means may be more "final" than a settlement by other methods.

Trial and Judgment

Although only a small percentage of personal injury claims are actually tried, the consequences of trial and final judgment are significant; they give a good guide to what *might* be done in cases of voluntary settlement.

Suppose Patty Poop refuses the adjuster's offer to settle. She obtains a lawyer and eventually her case is called for trial. A jury awards her 100 dollars. The judge then enters a judgment which says, in effect, that the defendant owes Patty 100 dollars. The defendant pays it. Suppose Patty then discovers that her injury was worse than anticipated or that she had a different injury, unknown to her at the time of trial. Can she then file another suit against the defendant or re-open the old one?

The answer is usually no. The reason is res judicata—the thing

[9] When losses are high it is likely that the injured plaintiff will receive benefits from other sources, such as insurance. See Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. Pa. L. Rev. 913, 919 (1962). Some of these collateral benefits would be paid to the injured plaintiff whether or not the tortfeasor paid his share. There are no exact figures, however, as to the extent of public assistance going to plaintiffs who are unable to collect full reimbusement from the tortfeasor. Non-economic losses ought to be evaluated here, too. For example, if the husband is injured and does not recover, the wife may be required to work and there may be a concomitant detriment to home life. See Morris & Paul, *supra* at 918.

has been adjudicated.[10] However, there are two exceptions. At common law the trial court has absolute control over its own judgments within the term at which they are rendered.[11] Thus the judgment is not final until the term is at an end. If the term of court is six months long and a judgment is rendered on the first day of the term, a plaintiff who later discovers a more serious injury might within six months apply to the trial judge to vacate the judgment. On the other hand, if the judgment is entered on the last day of the term, it becomes final the next day. A second exception to the rule which binds Patty to her unfortunately small judgment is that equity will relieve her from some kinds of mistake. But the mistakes of this sort are limited. They are sometimes called *extrinsic* mistakes—mistakes extrinsic to the merits and of the kind that prevent the plaintiff from getting a trial at all or a generally fair trial.[12] For example, plaintiff mistakenly believes the trial is scheduled in June, but actually it is scheduled and held in May. If the mistake is a reasonable one the plaintiff may be relieved. But mistakes as to the merits of the case are different, and these mistakes are not subject to relief in equity. Thus Patty's belief that she had a small injury is a mistake, but it is one about the merits and relief is not justified.

Statutes have been enacted in most jurisdictions to provide relief by vacation of the judgment in the trial court which rendered it. The grounds given usually include mistake or discovery of "new

[10] The doctrine of res judicata, when used to hold a winning plaintiff to his judgment, is called merger. It is said that his original cause of action is merged into the judgment and his only rights are those given in the judgment itself. See RESTATEMENT, JUDGMENTS § 47 (1942).

[11] MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 385 (1952); Fraser, *Reopening of Judgments by the Plaintiff*, 42 IOWA L. REV. 221 (1957). This rule often holds good within term time even though statutes regulate procedure for setting aside a judgment after the term. Thus under N.C. GEN. STAT. § 1-220 (1953), a judgment may be set aside for certain statutory grounds within one year; but within the term, the trial judge may set aside or modify for any reason within its discretion. See Burrell v. Dickson Transfer Co., 244 N.C. 662, 94 S.E.2d 829 (1956); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E.2d 407 (1947).

[12] RESTATEMENT, JUDGMENTS §§ 118b, 126(2)(e) (1942); FREEMAN, JUDGMENTS § 1246 (5th ed. 1925). A similar, but not so retrictive distinction is made about releases. The mistake must be "basic," not "collateral." See Havinghurst, *The Effect Upon Settlements of Mutual Mistake as to Injuries*, 12 DEF. L.J. 1, 3 (1963). But the restriction to a basic mistake in releases is not so great as the restriction to an "extrinsic" mistake in judgments.

evidence" of a limited sort.[13] Sometimes these statutes set up a special time limitation—one year, for example—in which the party seeking relief may apply. These statutes do not say what kind of mistake is contemplated. But it is often clear that they are designed to codify the equity action for relief mentioned above. It seems probable, therefore, that the mistake mentioned in these statutes is the so-called "extrinsic" mistake. If so, these statutes are of no help to Patty, for her mistake is "intrinsic" to the merits—a part of what was in issue. These statutes also make provision for relief when new evidence is discovered. But there is no reason to think that the "new evidence" for which new trial can be granted is of the kind Patty now has. It was not in existence at all when she tried her case. Lawyers seem to agree for they have generally not tried to vacate plaintiff's judgments for the kind of mistake Patty made.[14]

Thus, discovery of injury unknown at the time of the trial is probably seldom or never grounds for relief. The judgment is final except so far as the trial judge has absolute control over it during the term time. This may occasionally be important, but in the vast number of cases the plaintiff will not learn that his injuries were more serious than he first thought until too late. The seemingly harsh result is perhaps reasonable enough because plaintiffs are very much aware of the need to prove all future medical problems and doctors are permitted to estimate the likelihood of future pain and suffering, future expense, and future consequences. Thus if Patty's case is tried she will ordinarily have a physician who can testify not only as to injuries she presently has but also as to what consequences—such as gangrene—are likely. A trial therefore usually forces two things that are important here: (1) physical examination by a physician who knows he may have to testify; and (2) every effort to foresee future consequences. For this reason it is not unfair to say that Patty is stuck with her mistake.

Suppose, however, that the defendant Doop had been guilty of

[13] *E.g.*, FED. R. CIV. P. 60(b); N.Y. R. CIV. PRAC. 5015(a); N.C. GEN. STAT. § 1-220 (1953). Some apparently provide relief only for defendants. *E.g.*, CAL. CIV. CODE § 473. See Fraser, *Reopening of Judgments by the Plaintiff*, 42 IOWA L. REV. 221 (1957).

[14] But, for similar cases where lawyers have tried for plaintiff-relief from their own favorable judgments, see Machera v. Syrmopoulos, 319 Mass. 485, 66 N.E.2d 351 (1946); Cain v. Quannah Light & Power Co., 131 Okla. 25, 267 Pac. 641 (1928). No relief was granted in either case, although both involved consent judgments.

fraud in his conduct of the law suit, as for example, by introducing perjured testimony. When Patty discovers this, can she bring a new suit or re-open the old one? Again the answer is no.[15] Even provable fraud does not justify setting aside the original judgment in most instances, unless it is "extrinsic"—that is, the kind that prevents a real trial. Perjured testimony is certainly unfair. But it goes to the merits of the case, and cross-examination plus a jury's judgment of credibility are the best weapons we have against it. Even though in Patty's case we might be able to prove beyond doubt that Doop was guilty of fraud, to permit judgments to fall on this ground is to permit harassment of innocent defendants who would be subjected to constant relitigation. Thus even fraud in presenting a case on its merits is not ground for relieving Patty.[16]

These rules do not apply to some administrative hearings.[17] Under workmen's compensation statutes, the dispute is often subject to re-opening.[18] There are several reasons for the different treatment of these claims. One is based on policy, the protection of the injured worker and his family. Another is that these hearings normally are not so expensive and fully prepared as trials of personal injury claims in courts, and the administrative handling of claims means that a defendant is not quite so troubled by re-opening the matter as he would be if a second jury trial were required.

Settlement by Release

The most common method of settlement is by release or covenant not to sue. Although a covenant not to sue has important consequences in some jurisdictions when joint or concurrent tort-feasors are involved, it is, so far as finality is concerned, on the same footing as a release. A release usually provides that the injured party (hereafter called the "plaintiff" for convenience) "releases" all his claims

[15] See RESTATEMENT, JUDGMENTS §§ 118-26 (1942). If a statute mentions fraud as a ground, it presumably means the so-called "extrinsic" fraud which was a ground for equitable relief, and not simply any fraud at all. Some, however, explicitly extend relief to cases involving any kind of fraud. See FED. R. CIV. P. 60(b).

[16] Neither can a plaintiff so situated bring an independent action in tort to recover for the fraud or perjury. To permit this would be to permit a collateral or indirect attack on the judgment. See, *e.g.*, Ragsdale v. Watson, 201 F. Supp. 495 (W.D. Ark. 1962); Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

[17] See *Developments in the Law, Res Judicata,* 65 HARV. L. REV. 818, 865-74 (1952).

[18] *E.g.*, N.C. GEN. STAT. § 97-47 (1958).

against the defendant arising from the particular transaction. Releases are usually written by defendant's lawyers or insurance companies and favor the defendant very strongly. Today they usually provide that the claimant releases not only claims for known injuries, but also claims for unknown injuries and claims for unexpected consequences.[19] For example, Patty's broken toe was an unknown injury and the gangrene was a "consequence" of a known injury and both would be released—if the language of the release is effective. Sometimes these provisions are ignored by courts and claimants are permitted to set aside their releases. This will be discussed in more detail later.[20]

If the release is valid and the claimant decides he should have more money, in most jurisdictions he will bring an ordinary lawsuit and allege the original negligence of the defendant. The defendant will then plead the release as a defense. At this point the court or jury must decide whether the release is effective or valid.[21] If it is, the plaintiff must lose, for it is a good defense. If it is not valid, the plaintiff must then prove the defendant's original negligence and damages. In most instances a plaintiff will never bring such a suit; he knows what the release said and he thinks, rightly in most cases, that it is a bar. In a few jurisdictions the claimant who has signed a release will not bring suit directly on his personal injury claim but may first bring suit in equity to set aside the release.[22] If he

[19] Examples of release provisions may be found in many cases. See, *e.g.*, Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (W.D. Ark. 1962); Casey v. Proctor, 22 Cal. Rptr. 531 (Cal. App. 1962), *rev'd*, 28 Cal. Rptr. 307, 378 P.2d 579 (1963); Tattershall v. Yellow Cab Co., 225 Mo. App. 611, 37 S.W.2d 659 (1931); Mendenhall v. Vandeventer, 61 N.M. 277, 299 P.2d 457 (1956); Phillips v. Alston, 257 N.C. 255, 125 S.E.2d 580 (1962).

[20] See Part IV *infra*.

[21] Procedure varies. Sometimes a jury passes solely on the validity of the release. If it is not valid, a second jury then hears the claim on the merits. In other cases both the question of release validity and the merits of the case are submitted at the same time to a jury. See Bowie v. Sowell, 209 F.2d 49 (4th Cir. 1953); Casey v. Proctor, 22 Cal. Rptr. 531 (Cal. App. 1962), *rev'd*, 28 Cal. Rptr. 307, 378 P.2d 579 (1963); Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960); Mendenhall v. Vandeventer, 61 N.M. 277, 299 P.2d 457 (1956); Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962). Of course, the facts as to validity may be so clear—at least in the mind of the judge—that there is no jury question at all, so that summary judgment or nonsuit may be proper. Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (W.D. Ark. 1962) (summary judgment); Nogan v. Berry, 188 A.2d 116 (Del. Super. 1963) (summary judgment); Ward v. Heath, 222 N.C. 470, 24 S.E.2d 5 (1953) (nonsuit).

[22] See Ruggles v. Selby, *supra* note 21; Wheeler v. White Rock Bottling Co., 299 Ore. 360, 366 P.2d 527 (1961).

succeeds on that, he may then bring a separate suit based upon the defendant's negligence and his own injuries.

Parents' Indemnifying Releases

In many jurisdictions defendants have coped with the problem of settling with minors by inventing a document called a "Parents' Indemnifying Release." Since a release is treated like a contract, and since a minor is not bound by his contract, an ordinary release would not bar a minor's claim. He could sign it but later on repudiate it. This does not attain the defendant's objective.

The parents' indemnifying release is designed to avoid this problem. This release is for the minor's injuries, but it is signed by the parent of the injured minor. The parent gives up or releases any claims he may have personally, and he also promises that if the minor should ever bring suit, that he, the parent, will re-pay the defendant for any recovery the minor makes.[23] If the claim is small defendants often feel adequately protected by this device, since the minor would not normally bring suit during minority except by his parents, and they will not do so because if the minor recovers they may subject themselves to liability under the indemnifying release.

There are clear advantages to the indemnifying release. Parents will seldom make a settlement unless sufficient money is paid, and this is an economical method of settlement often desirable where the claim is small and does not justify a lawsuit. But it is also clear that such releases pressure parents *not* to act in the best interests of the minor. If it is later determined that the minor's injuries were worse than suspected the parents may refuse to sue for fear of liability under the indemnity release. Courts that have reached the problem have said that such an idemnity provision is a backdoor way of holding a minor to his release, and have ruled that such releases violate public policy and are invalid.[24] In still other states the releases are not used because of local belief that they are ineffective or because of

[23] The procedure is described in Panel, *Settlement Procedures,* 11 ARK. L. REV. 54, 56 (1956); Note, U. KAN. CITY L. REV. 237 (1962). Typical provisions are quoted in Loesch v. Vassiliades, 17 N.J.S. 306, 86 A.2d 14 (1952), and Ohio Cas. Ins. Co. v. Mallison, 223 Ore. 403, 354 P.2d 800 (1960).

[24] Loesch v. Vassiliades, *supra* note 23; Ohio Cas. Ins. Co. v. Mallison, *supra* note 23; Valdimer v. Mount Vernon Hebrew Camps, Inc., 9 N.Y.2d 21, 172 N.E.2d 283 (1961). Notes, 30 U. KAN. CITY L. REV. 237 (1962); 12 SYRACUSE L. REV. 415 (1961); 7 UTAH L. REV. 274 (1960).

statutes which seem to contemplate a different procedure for settlement with minors.[25]

There is certainly much wisdom in holding that a parent's indemnifying release is against public policy. But it is not an unarguable proposition. Who more than parents should be able to approve a settlement with a minor? What the rule against indemnifying releases requires is that a formal—and often *purely* formal—suit be instituted so that a judge may decide whether the proposed settlement is advisable. Absent unusual ignorance on the part of parents, or fraud or duress, there seems to be no reason why the parents are not equipped in most instances to make this decision. The requirement of a court procedure for every settlement with minors is expensive and it might be argued that the expense is too high for the relatively limited protection given in court approved settlements. Nevertheless, this argument has been weighed and considered inadequate to balance the need for full protection of minors that courts have long given.[26] Perhaps the conclusion is correct because lawyers themselves have never been disposed to regard an indemnity release as much protection and have relied more on its psychological value as a deterrent to further claims than its legal value.[27] But, for this very reason, it is possible that on small claims that do not justify more expensive settlement procedures, lawyers will continue to use such agreements in spite of decisions voiding them. If such practice is in fact continued, it is difficult to see how decisions avoiding such agreements will effectuate public policy except in the few instances where parents rebel.[28] Unless the claimants themselves are aware of their rights to proceed without fear of indemnity claims, needs of many minors may go unredressed in spite of the liberal portective policy of these recent decisions. On the other hand such agreements are "chancier" than they were before such decisions and careful attorneys may well hesitate to use them.

[25] Thus, if a statute contemplates judicial approval of settlements with minors, it may be inferred that settlement in any other manner is void. *Cf.* Valdimer v. Mount Vernon Hebrew Camps, Inc., *supra* note 24.

[26] Ohio Cas. Ins. Co. v. Mallison, 223 Ore. 403, 354 P.2d 800 (1960).

[27] Panel, *supra* note 23, at 56.

[28] For this reason it has been suggested that the defendant who has paid on an infant's claim and has taken an indemnity release should not receive credit for what he has paid if the infant later sues. Note, 12 SYRACUSE L. REV. 415 (1961). It is supposed that such a rule would discourage the use of indemnity releases. Since the amounts are small and the psychological deterrent to suit by the minor is great, it seems doubtful whether this measure would materially assist in enforcing the policy against such agreements.

Court Approval of Minors' Settlements

Where a parents' indemnifying release can not be used, and where the defendant wants the greater certainty of a court-approved settlement, he may do one of two things. He may arrange for a "friendly suit" with the plantiff, in which defendant will consent to a judgment in the amount previously agreed upon; or he may arrange to have a guardian appointed for the minor and for court approval of a guardian's release. The friendly suit or consent judgment procedure goes something like this: The defendant negotiates with the parents of the minor-claimant until a settlement is reached. When an amount is agreed upon the defendant hires an attorney for himself and another one to represent the claimant. Defendant attorney prepares a complaint, which he furnishes the plaintiff's attorney, and it is filed. Defendant immediately files an answer, and the parties then, as previously agreed upon, waive a jury trial and meet more or less informally with the judge. They inform him of the agreed settlement and he satisfies himself that the settlement is a fair one, considering the probable proof of negligence, contributory negligence, and severity of injury. This usually involves the taking of some testimony, however informally it may be presented. When the judge is so satisfied, he will enter a judgment finding for the plaintiff in the amount agreed upon by the parties. Sometimes judgments of this sort show on their face that they are "consent judgments." Sometimes they are written to disguise this fact. In any event the defendant's liability is now determined judicially and when the judgment is paid he can normally feel that his liability is finally determined and not any more subject to further dispute than a trial-based determination. Thus where the minor's release would not protect the defendant from further litigation, the consent judgment ordinarily will.

This is a relatively expensive mode of procedure. The defendant must have an attorney to file the answer, and an attorney must be obtained for the plaintiff (if he does not already have one) to file the complaint. All these costs are borne by the defendant and of course increase the cost of settlement. This form of settlement does have some advantages over a release. The record indicates a lawsuit which teminates with a judgment, and a court's judgment attains a great deal of finality indeed. In general it may be said that this sort of judgment is more likely to end the matter completely than a

release; it is not apt to be set aside for mistake or fraud so easily as a release might.

But there are holes in this procedure, too. One of the reasons why a full scale trial and final judgment is accorded great finality is that it offers the special protections to the parties of the adversary system. A pro forma settlement with court approval minimizes that protection. The plaintiff's attorney in the consent judgment is usually selected and paid by the defendant. There is nothing either illegal or unethical about this. The attorney so retained must represent the plaintiff fully even though the defendant pays his fee. Occasionally such attorneys have insisted on settlements higher than the original agreement called for. This shows that plaintiffs in such a situation can be protected by attorneys who are paid by defendant. But certainly an attorney retained *by* the defendant but *for* the plaintiff has little inclination to stir the brew of controversy and courts may doubt that the minor-plaintiff has been so fully protected as he would have been in a full adversary trial with his own attorney. Thus, although such settlements take the form of judgments, they do not acquire so much strength against attack as a trial-based judgment, and they are sometimes set aside upon a showing that the minor was not fully represented, or that the judge did not make adequate inquiry into his injuries or into the merits of the case.[29] They could also be set aside for fraud, but mere mistake offers a poor ground for setting aside such a judgment. Since there is enough formal protection to indicate to the parties that a serious matter is being considered, chances of a casual mistake are comparatively small.[30]

[29] Missouri Pac. Ry. v. Lasca, 79 Kan. 311, 99 Pac. 616 (1909); Rector v. Laurel River Logging Co., 179 N.C. 59, 101 S.E. 502 (1919); Annots., 20 A.L.R. 1249 (1922), 15 A.L.R. 667 (1921). See also Smith v. Price, 253 N.C. 285, 116 S.E.2d 733 (1960), where the insurance company for one minor used a consent judgment against that minor to settle with another minor. When the first minor wanted to bring an action of his own he was permitted to set aside the consent judgment against him because of the "conflict of interest among the defendants, all [of whom] were represented by the same attorney."

[30] Thus some courts have said that even a consent judgment or friendly suit involving minors will not be set aside absent fraud. Hudson v. Thies, 35 Ill. App. 189, 182 N.E.2d 760 (1962). See also Handley v. Mortland, 54 Wash. 2d 489, 342 P.2d 612 (1959) (4 Judges dissenting). Other courts content themselves with the observation that while failure of the trial court to supervise the settlement properly, as by failure to ascertain the injury, is ground for relief, mere mistake as to the seriousness of the injury of the claimant is not. Reeves v. Runyan, 172 Ohio St. 177, 15 Ohio Op. 2d 327, 174 N.E.2d 244 (1961), *affirming* 15 Ohio Op. 2d 431, 168 N.E.2d 587 (1961) (involving a petition for authorization to settle and not a friendly suit).

The problem of settling with infants may be approached in another way. A petition may be filed with the appropriate court for approval of a settlement.[31] This would normally require that a guardian be appointed for the minor and that the guardian execute the release. Such a release would be binding, at least if the approval was more than formal. However, where the approval of the judge is perfunctory, and his study of the situation is inadequate, again the minor has a right to set aside the release and sue for his injuries.[32]

In some states this procedure is simplified. Thus in North Caroline an *ex parte* proceeding may be brought for approval of a minor's settlement[33] and when it is approved by the judge, the settlement so approved becomes final when the defendant pays the money into the office of the clerk.[34] Although it would seem that the judge must make appropriate inquiries into the minor's injuries here as well as in the case of a consent judgment or friendly suit, this procedure seems less cumbersome than a full guardianship proceeding.

Adult's Settlement by Consent Judgment, Dismissal or Nonsuit

Settlement with a minor involves special hazards for obvious reasons. Settlement with an adult may be accomplished by some of the same methods and such settlements typically involve less danger that the settlement will later be overturned. An adult-plaintiff may sue for his injuries and later agree with defendant upon a settlement. When this occurs, three basic patterns of settlement can be distinguished.

One. A consent judgment may be entered, much as in the case of minors. Here, however, the plaintiff usually has his own counsel and judicial supervision of the settlement is not necessary. The parties may simply appear before the judge in chambers, advise him that the case is settled, and ask him to sign a judgment, the form of which they have agreed upon.[35] The judgment will often recite that the amount awarded has been paid and that the judgment is

[31] See, *e.g.*, Hudson v. Thies, *supra* note 30; Reeves v. Runyan, *supra* note 30.

[32] Reeves v. Runyan, 172 Ohio St. 177, 15 Ohio Op. 2d 327, 174 N.E.2d 244 (1961), *affirming* 15 Ohio Op. 2d 431, 168 N.E.2d 587 (1961). See Annot., 8 A.L.R.2d 460 (1949).

[33] N.C. GEN. STAT. §§ 1-400 to -402 (1953).

[34] Gillikin v. Gillikin, 252 N.C. 1, 110 S.E.2d 474 (1960).

[35] Statutes may simplify procedures even further. Thus N.C. GEN. STAT. § 1-209 (1953), provides for entry of such judgments by the Clerk of the Superior Court.

"satisfied" or discharged. The appearance of such a judgment on the records may be like that of a judgment rendered after a full trial. Sometimes the judgment recites that the parties submitted the controversy to the judge sitting as a finder of fact and recites his "findings" that defendant was negligent and plaintiff injured and so on. In other judgments of this sort there is a recital that it is entered by consent of the parties.

Whatever the form, a judgment entered by consent of the parties has both a judicial and contractual aspect. How should it be treated —as a contract, like a release, or as a judgment like any other judgment? Should we say, for example, that fraud is ground for relief from this judgment, but only if it is extrinsic fraud, the type required to upset a normal judgment? Or should we permit *any* kind of fraud, of the sort for which a release may be set aside, as a ground for setting aside the consent judgment? The same question applies to mistake. Should we set aside a consent judgment for mistake only if a normal judgment would be set aside—or may it be set aside if a release would be set aside under the same circumstances?

The answers to these questions are undecided. Courts frequently talk of setting aside a consent judgment for fraud or mistake, but they do not say what kind of fraud or mistake they mean.[36] Sometimes courts speak of a "mutual mistake," and that may suggest they are thinking in contractual terms.[37] If so, a consent judgment would be treated like a release. At other times they seem to assume that

[36] *E.g.*, Moody v. Wike, 170 N.C. 541, 87 S.E. 350 (1915) (apparently assuming any fraud to be sufficient); Weaver v. Hampton, 201 N.C. 798, 161 S.E. 480 (1931). In Ire S. Bushey & Sons v. W. S. Hedger Transp. Corp., 167 F.2d 9 (2d Cir. 1948), the court seemed to assume that the kind of fraud or mistake required to vacate a consent judgment was like that required to vacate any other judgment. The court cited the Restatement of Judgments §§ 117-26. In King v. King, 225 N.C. 639, 35 S.E.2d 893 (1945), the court held that a mistake of the legal effect of a consent judgment did not justify relief. In Middlesex Concrete Prods. & Excavating Corp., v. Borough, 35 N.J. Super. 226, 113 A.2d 821 (N.J. App. 1955), the defendant had agreed to pay plaintiff-contractor periodically for construction work done on the basis of estimates of the value of the work. Estimates were made as agreed, but the defendant apparently disagreed and refused payment. Plaintiff then brought suit and after further study, defendant agreed to a consent judgment which was entered and paid. Thereafter defendant seems to have decided it was mistaken in the amounts of the estimates. It sought to set aside the judgment. The court held that the trial court did not abuse its discretion in refusing to set aside the judgment.

[37] *E.g.*, Leggett v. Smith-Douglass Co., 257 N.C. 646, 127 S.E.2d 222 (1962); Deaver v. Jones, 114 N.C. 650 (1894); Kerchner v. McEachern, 93 N.C. 447 (1885); Baran v. Baran, 166 Pa. Super. 532, 72 A.2d 623 (1950).

statutes providing for relief from judgments apply, and if so it would seem that they are thinking of consent judgments as judgments so that the rules requiring extrinsic fraud or mistake would apply.[38] But the fact is that the courts have not really decided this question at all, and reasoning of this sort is not really helpful in predicting what they would do if presented with the issue.

Perhaps it is more useful to notice two things about consent judgments affecting adults. The first is that there may be a greater tendency in the case of consent judgments to award relief than in the case of judgments entered after trial. This is only an estimate, but it is borne out in part by the second point, which is this: a consent judgment usually means the same kind of careful preparation that is given to a trial and the parties are normally represented by counsel. Thus, much of the protection of a trial goes into most consent judgments involving adults. Sometimes this is not so, and some cases have taken note of the fact and relieved parties from consent judgments which did not seem to involve the kind of extrinsic fraud or mistake necessary to get relief from a trial-based judgment.[39] No final answer can be given, but in most respects it would seem that a consent judgment should have the same finality as a trial-based decision. We can probably expect the exceptions to be few and far between.

In one respect consent judgments attain greater finality than

[38] This seems to be the assumption of Justice Hoke in Cox v. Boyden, 167 N.C. 320, 83 S.E. 246 (1914), referring to the predecessor of N.C. GEN. STAT. § 1-220 (1953). Federal courts have held that FED. R. CIV. P. 60(b) applies to consent judgments. Washington v. Sterling, 90 A.2d 836 (D.C. App. 1952), *aff'd*, 91 A.2d 844 (D.C. App. 1952); Fleming v. Heubsch Laundry, 159 F.2d 581 (7th Cir. 1951). But under Rule 60(b) extrinsic fraud or mistake is not required. In Lowery v. Callahan, 210 S.C. 300, 42 S.E.2d 457 (1947), the court talked about the consent judgment first as if it had the standing of a release and then as if it had the standing of a judgment.

[39] In Fleming v. Heubsch Laundry, *supra* note 38, the OPA advised defendant that its practices violated regulations. Defendant was represented by counsel, but on the strength of these representations nevertheless consented to an adverse judgment. Later, with new counsel, he discovered that regulations made his activities lawful and sought to set aside the judgment. He was permitted to do so, partly because "we are dealing with a citizen and his government" and partly because of the difficulty of finding OPA regulations. In Seaboard Air Line R.R. v. Gill, 227 F.2d 64 (4th Cir. 1955), an ignorant administrator was appointed for the estates of his son and others killed in an auto-train collision. An attorney was procured for him for the purpose of instituting the administration, but the attorney did not represent the administrator in the settlement negotiations. The administrator executed releases and these were set aside on a finding of fraud and duress. See also Acker v. Martin, 136 W. Va. 503, 68 S.E.2d 721 (1952).

ordinary judgments based on trial. In some jurisdictions no appeals can be had from consent judgments, and they may not be set aside during term time in the judge's discretion as ordinary judgments can.[40] The theory for such rules is that a consent judgment is really a contract—for this purpose—and must be set aside, if at all, only on the grounds which permit a contract to be set aside. The rule that denies the judge power to set aside a consent judgment in his discretion during term time seems wrong, for it penalizes settlement—a plaintiff would clearly be better off to insist on a trial.

Two. In some jurisdictions much the same sort of thing is accomplished by the plaintiff's submitting to a nonsuit by agreement,[41] and this can also become final,[42] but it perhaps does not have the standing in practice that a fully considered judgment has. Where a nonsuit is used it is often customary to take releases from the plaintiff as well, since if there is question as to the court's jurisdiction the nonsuit might not be effective.

Three. In other jurisdictions there is a dismissal "with prejudice," meaning dismissal with prejudice to any further claim or suit. The mechanics vary slightly. In some jurisdictions the plaintiff simply endorses on the complaint, or docket, or both, words to the effect that he has dismissed with prejudice, and signs it. In other courts the practice is to petition the court for an order dismissing the case or to file a stipulation for dismissal signed by all parties.[43]

In the first two forms, the settlement is a formal adjudication and in the case of dismissal with prejudice it has substantially the same effect. In such cases, where adults are involved, the settlement is normally final and a mistake will not vitiate it even though the same mistake might vitiate a release.[44]

The form used in completing a settlement makes a difference in the finality that settlement achieves. A judgment entered after a full trial is apt to be conclusive even though the plaintiff can prove fraud, with rare exceptions where extrinsic fraud is involved. Settlement by consent judgment or voluntary dismissals are *formally* like full

[40] See, *e.g.*, Cason v. Shute, 211 N.C. 195, 189 S.E. 494 (1937); Deaver v. Jones, 114 N.C. 649, 19 S.E. 637 (1894).

[41] See, *e.g.*, N.C. GEN. STAT. § 1-209 (1953).

[42] Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

[43] See FED. R. CIV. P. 41(a).

[44] Pulley v. Chicago, R.I. & P. Ry., 122 Kan. 269, 251 Pac. 1100 (1927); *cf.* Mensing v. Sturgeon, 210 Iowa 918, 97 N.W.2d 145 (1959) (plaintiff, previously a defendant, had settled—he is now barred from suing).

adjudications; but since they also look very much like contracts, and since the full protections of adversary procedure are not always involved in consent judgments, courts may be willing to set aside such judgments on the showing of simple fraud or mistake without requiring the extrinsic fraud or mistake necessary to set aside a trial-based judgment. Releases are only contractual and do not involve any adjudication. Neither do they afford the plaintiff the protection of adversary procedures and judicial supervision. They are, therefore, much more vulnerable to attack if the plantiff has mistaken his injuries or his rights, or if the defendant's conduct in obtaining the release is unfair.

But it is important to notice that under some circumstances, judgments may be set aside with relative ease. During term time a judgment can be set aside within the trial judge's discretion—even though the plaintiff's mistake or the defendant's conduct would not be enough to set aside a release. On the other hand, in many jurisdictions there is a time limit beyond which a judgment may *not* be set aside, even if fraud or mistake is proved, and even if it is the kind of fraud or mistake necessary to avoid a judgment. Both of these rules have been found useful in dealing with judgments. Both are suggestive as to what might be done about the problem of setting aside releases. In general, however, time limits involved in setting aside judgments are not the primary considerations in setting aside releases. Generally releases are set aside for fraud, duress, incapacity, or mistake—grounds which will now be examined in that order.

III. Avoidance of Settlement for Fraud and Misconduct

A. Fraud

Most defendants—the term here is used to include their insurance companies and adjusters—are entirely fair in settling claims. Sometimes they are tempted to lie their way into a favorable settlement, however, and this is particularly easy with the injured. Typical lies inducing claimants to sign releases are that the claimant has no legal claim,[45] that the claimant is not seriously injured,[46] that the release is only a receipt for the first payment,[47] or that defendant will employ

[45] See text accompanying notes 50-57 *infra,* and cases cited in note 51 *infra.*

[46] See text accompanying notes 58-71 *infra.*

[47] See note 54 *infra* and accompanying text.

claimant for life.[48] To a businessman, some of these things are obviously false; to the injured they are often entirely credible statements. Unless such statements are so unlikely that no one could believe them, a release signed because of them ought to be set aside. No defendant should be permitted to avoid full payment for his original wrong on the ground that he has compounded that wrong by fraud. Perhaps this rule should not apply where the settlement has been consummated by a consent judgment, for the reasons mentioned earlier.[49] But where, as is ordinary, the settlement is consummated by release, there should be no serious problem in rescinding it.

Misrepresentations of Law

It is often said that a misrepresentation of law—as distinguished from a misrepresentation of fact—is not actionable. There seems to be no good reason for this rule and it is therefore difficult to tell just when, or how, it will be applied. Two contradictory reasons are given for it.[50] One is that everyone is presumed to know the law; therefore when an adjuster tells claimant that he has no legal rights, claimant should know better. The other reason is that *no one* knows the law; therefore when an adjuster tells claimant that he has no legal rights, claimant should realize that the adjuster does not know what he is talking about. The absurdity of the rule has led to its general condemnation and a few courts have rejected it altogether. Others generally find a way to avoid the rule, and this is not usually difficult because it is riddled with exceptions.

The primary exception involved in release cases is this: if the fraud-feasor is in position to know the law, or seems to be, then the claimant may reasonably rely on what he says. Adjusters and lawyers are usually better educated or more experienced with claims. Therefore, it is appropriate for a claimant to believe what he is told—or at least a jury could so find. If so, he should not be bound by his release.

A number of cases are in accord with this rule.[51] Perhaps a

[48] See note 55 *infra.*

[49] See Part II *supra.*

[50] The history of the rule, its contradictory reasons, and its general application are discussed in Keeton, *Fraud: Misrepresentations of Law,* 15 TEX. L. REV. 409 (1937).

[51] See Camerlin v. New York Cent. R.R., 109 F.2d 698 (1st Cir. 1952), where defendant implied that the plaintiff, who was covered by the Federal Employers' Liability Act, could only recover under state workmen's com-

larger number grant relief without even discussing representations of law at all.[52] In still others no one even thinks of applying the hoary "representations of law" rule and recovery is permitted. These are cases where the statement involved has a certain amount of factual content and is more than a mere legal conclusion. For example, a representation sometimes made is that the claimant has to sign the release to get some insurance, implying that the release does not bar recovery of damages later. Although this sort of statement involves some legal conclusions, it is not usually called a misrepresentation of law.[53] Similarly, if an adjuster says that the release is only a receipt[54] or that it says plaintiff will have lifetime employment,[55] there is no difficulty, for these are purely statements of fact.

In spite of the general view that a claimant may reasonably rely on misstatements of law made to him by a person in position to know

pensation. In Sainsbury v. Pennsylvania Greyhound Lines, Inc., 183 F.2d 548 (4th Cir. 1950), a service man, injured by the defendant, was told he could recover only a limited amount since the government paid for his medical attention. The cases are collected in Annot., 21 A.L.R.2d 266 (1952).

[52] Frazier v. Sims Motor Transp. Lines, Inc., 196 F.2d 914 (7th Cir. 1952) (adjuster told plaintiff he could recover only $600 in court); Elledge v. Cornelius, 86 F. Supp. 766 (D. Okla. 1947) (lawyer told plaintiff he could settle and still claim workmen's compensation). In Styron v. Atlantic & N.C. Ry., 161 N.C. 78, 76 S.E. 692 (1912), plaintiff was told that she had no claim against the town. The court affirmed a judgment for the plaintiff in spite of her release without mentioning any possibility that this was a misrepresentation of law. *Cf.* cases cited in note 51 *supra.*

[53] See, *e.g.*, McCall v. Toxaway Tanning Co., 152 N.C. 648, 68 S.E. 136 (1910). *Cf.* Dorsett v. Clement-Ross Mfg. Co., 131 N.C. 254, 42 S.E. 612 (1902) (plaintiff asked to sign release so that doctors could be paid).

[54] In Camerlin v. New York Cent. R.R., 199 F.2d 698 (1st Cir. 1952), relief was granted even though the plaintiff had copied the words "I have read and understand this release" on the face of the document. In Ricketts v. Pennsylvania R.R., 153 F.2d 757 (2d Cir. 1946), plaintiff's own attorney allegedly told him the release was a receipt for back wages only. In cases such as these, plaintiff must show some good reason why he did not read the release, or, if he did read it, that he did not understand it. Of course, the fraud of the defendant may have induced him not to read the release, and if so, recovery is permitted. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Dorsett v. Clement-Ross Mfg. Co., *supra* note 53. Presumably if plaintiff was represented by counsel, a representation of law to the attorney would not be effective. *Cf.* McGill v. Bison Fast Freight, Inc., 254 N.C. 469, 96 S.E.2d 438 (1957).

[55] Hayes v. Atlanta & Charlotte Air Lines Ry., 143 N.C. 125, 55 S.E. 437 (1906) (release read to plaintiff, an illiterate, as containing clause for employment). But unless the plaintiff has an excuse for not reading the release, or if the defendant is not fraudulent, plaintiff's belief in a promise of lifetime employment does not entitle him to relief. Aderholt v. Seaboard Air Lines Ry., 152 N.C. 411, 67 S.E. 978 (1910); White v. Richmond & D.R.R., 110 N.C. 456, 15 S.E. 197 (1892).

something about law, there are a few striking cases to the contrary. One is *Massey v. North Carolina Pub. Serv. Co.*[56] The plaintiff was apparently a Negro tenant farmer. The adjuster told him that his claim was legally worthless and that if he "put it in law you won't get anything; you will have enemies of white and colored." Plaintiff accepted the offer of a small settlement, remarking that he could not afford to have white enemies. The court upheld the validity of the release saying the representation "might well be considered as a representation of law and not of fact," and that ordinarily "such representations do not create a cause of action."[57]

On the whole, however, it seems probable that few claimants today will be barred from relief if they genuinely relied on a misstatement of law.

Opinion

Plaintiffs more often have trouble with the dogma that statements of opinion are not actionable.[58] Like the rule against relief for misrepresentations of law, this dogma generally has been debunked. It is a headless monster, full of no purpose and going nowhere—but it often manages to blunder into innocent victims of fraud.

Tort victims are frequently told by adjusters or doctors that they are not seriously injured or, what amounts to the same thing, that they will be back at work in a few weeks. On the basis of such representations, they sign releases. When it turns out that their injuries are permanent and that the doctor or adjuster knew it all along, they rightly wish to rescind the release and sue for the damages to which they are entitled. Many courts today will grant such relief.

A good many decisions which assert that statements of opinion are not actionable appear to mean a good deal less. In many cases there was no fraud at all—that is, the doctor really believed that the plaintiff would be well in a few weeks and had no intent to deceive him. In such cases it is relevant that the statement is in the form of an opinion, but only because it may indicate that there was no

[56] 196 N.C. 299, 145 S.E. 561 (1928).

[57] *Id.* at 301, 145 S.E. at 562. *But cf.* Hopskins v. Fidelity Ins. Co., 240 S.C. 230, 125 S.E.2d 468 (1962).

[58] See generally Keeton, *Fraud: Misrepresentations of Opinion,* 21 MINN. L. REV. 643 (1937).

intentional deception.[59] Such cases are no authority for the purported rule that misstatements of opinion are not actionable; they are only authority for the rule that intent to deceive may be necessary in some jurisdictions.[60]

Thus if a doctor intentionally misstates his opinion, and plaintiff can prove it, there should be no difficulty in rescinding the release, providing only that the defendant is chargeable with the doctor's lie.[61] In such cases reliance by the injured claimant is usually reasonable, because the doctor is an expert and a layman may justifiably rely on the opinions of experts,[62] just as courts may accept their testimony. In appropriate circumstances, even an adjuster's statement as to the claimant's health may justify reliance and rescission.[63]

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[59] Fraud usually requires an intent to deceive or an intentional misstatement, but even an innocent misstatement may justify relief by way of rescission. In release cases the innocent misstatement is often called "constructive fraud" or "mutual mistake." See text accompanying notes 134-39 *infra.*

[60] Thus in Texas Midland R.R. v. Wilson, 263 S.W. 1109 (Tex. Civ. App. 1924), the court quoted 23 R.C.L. 392: "Representations by the releasee's physician as to future results of the injuries . . . if made in good faith, are mere expressions of opinion. . . ." If they are made "in good faith," there is no fraud at all. That seems to be the meaning of many cases cited as supporting the rule against relief in this area. However, some of the same courts permit relief for innocent or good faith representations which turn out to be false if they are not "mere expressions of opinion." See, *e.g.,* Atchison, T. & S.F. Ry. v. Peterson, 34 Ariz. 292, 271 Pac. 406 (1928).

[61] Typically the doctor must have been hired by the defendant. Prince v. Kansas City So. Ry., 229 S.W.2d 568 (Mo. 1950); Fort Worth & R.G. Ry. v. Pickens, 153 S.W.2d 252 (Tex. Civ. App. 1941), *rev'd on other grounds,* 139 Tex. 181, 162 S.W.2d 691 (1942). Sometimes this causes considerable difficulty. See Chicago, R.I. & G. Ry. v. Taylor, 203 S.W. 90 (Tex. Civ. App. 1918). In Rickets v. Pennsylvania R.R., 153 F.2d 757 (2d Cir 1946), the plaintiff's own attorney had induced him to execute a release by fraud; plaintiff was permitted to avoid the release with one judge dissenting. The other two judges differed as to the grounds. Judge Frank favored relief on a mistake theory; Judge Hand favored relief because of the fraud of plaintiff's attorney.

[62] See generally Keeton, *supra* note 58, at 647-50. Unlike the sales-of-goods situation, opinions in release cases can seldom be regarded as puffing or dealer's talk which might be accepted in our society and therefore "innocent." Occasionally, however, decisions do point out that a claimant is in a bargaining situation and must expect a certain amount of "sales talk" from defendant or his adjuster. And an adjuster's statement that the *doctor's* opinions were reliable might be regarded as mere puffing. See Prince v. Kansas City So. Ry., 229 S.W.2d 568 (Mo. 1950).

[63] See Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934), where the individual defendant, a layman, told the plaintiff she would be up in a short time; Simmons v. Kalin, 10 Wash. 2d 409, 116 P.2d 840 (1941), where the adjuster concealed the doctor's knowledge of a broken bone. *But see*

Many courts distinguish two kinds of statements made in these circumstances. The first is a statement of opinion as to the claimant's present physical condition, *e.g.*, "you are well," "you have only one broken bone," or the like. All courts seem willing to treat such statements as statements of fact, and, if made fraudulently, they justify relief.[64] The second kind of statement is sometimes labeled a "prediction" or mere "prognosis." The doctor says "you will be well in a week," or "you will have only 10% disability," or "you will regain your sight." Many courts say that such a statement is not one of fact and hence not actionable.[65]

The distinction is unfortunate. It makes some cases turn on the form of words used. Any lawyer knows testimony as to exact words used is often unreliable. More than that, the form of words is seldom important in determining their meaning. An assertion by a doctor that plaintiff will be on his feet in a week certainly asserts a great deal about the plantiff's present condition. If the assertion is false, and if the plaintiff reasonably relied on it, there is no good reason why the defendant should profit from this form of fraud. In the much-quoted *Scheer* case[66] Judge Learned Hand said:

> To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood.[67]

A few other courts have recognized and acted upon this idea.[68] Still others grant relief where defendant's doctor makes such a prognosis,

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Prince v. Kansas City So. Ry., *supra* note 62, where the adjuster's fraud consisted in boasting of the value of the doctor's opinion and this was held insufficient to justify relief; Ward v. Heath, 222 N.C. 470, 24 S.E.2d 5 (1943), where relief was denied on a number of grounds, among them that the adjuster, not a doctor, made the false statements about plaintiff's condition.

[64] See, *e.g.*, Prince v. Kansas City So. Ry., 229 S.W.2d 568 (Mo. 1950); Tattershall v. Yellow Cab. Co., 225 Mo. App. 611, 37 S.W.2d 659 (1931); McMahan v. Carolina Spruce Co., 180 N.C. 636, 105 S.E. 439 (1920). See generally Annot., 71 A.L.R.2d 82, 135 (1960).

[65] See, *e.g.*, Conklin v. Missouri Pac. R.R., 331 Mo. 734, 55 S.W.2d 306 (1934); Texas Midland R.R. v. Wilson, 263 S.W. 1109 (Tex. Civ. App. 1924).

[66] Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

[67] *Id.* at 945.

[68] See Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952); Graham v. Atchison, T. & S.F. Ry., 176 F.2d 819 (9th Cir. 1949); Allison v. Chicago Great W. Ry., 240 Minn. 547, 62 N.W.2d 374 (1954).

simply calling it a statement of fact.[69] The real question in all these cases is whether the claimant in fact relied on the opinion, whether it is called an opinion or fact. In some cases the opinion is patently false; it contradicts all known human experience. If so, the plaintiff probably did not rely on any such statement and we can further doubt whether the statement was even made at all. In those circumstances, relief is appropriately denied to the plaintiff.[70] But normally claimants do rely on doctor's opinions, and they equally rely on the doctor to disclose full information.[71] When they do so rely—and this is usually a jury question—the defendant should not escape his primary liability for the original injury simply because he knows enough to speak in the form of opinion.

The Tort Action for Deceit

Usually the relief awarded to the plantiff for fraud in obtaining a release is in the form of rescission. The release is set aside formally in a separate action, or in the action for personal injuries is held not to bar the recovery if obtained by fraud. However, the defendant's fraud in obtaining the release may be the sort that would justify an action at law, not for the personal injury, but for deceit. This tort action for damages for fraud is of the sort used by plaintiffs who have

[69] Ozan Graysonia Lumber Co. v. Ward, 188 Ark. 557, 66 S.W.2d 1074 (1934). See also Ciletti v. Union Pac. R.R., *supra* note 68.

[70] Thus where plaintiff's own doctor is available, or his own knowledge of his condition belies the statement, it is often said that his reliance is not reasonable or, more accurately, that there was no reliance at all. See Conklin v. Missouri Pac. R.R., 331 Mo. 734, 55 S.W.2d 306 (1932); Ward v. Heath, 222 N.C. 470, 24 S.E.2d 5 (1943). *But see* Associated Employers Lloyds v. Aiken, 201 S.W.2d 856 (Tex. Civ. App. 1947), where a workmen's compensation claimant was given relief from a release which she executed in reliance on doctor's statement that her eye was all right, though she knew subjectively that it was not. On the other hand, the claimant may know the doctor's statement is false in a subjective sense and still believe the doctor if the claimant is uneducated and without experience. Thus in Prince v. Kansas City So. Ry., 229 S.W.2d 568 (Mo. 1950), the doctor told claimant that certain chest symptoms were only the natural result of a hernia operation. But claimant had the symptoms before the operation and could hardly have believed such a statement. On the question of reliance the court said: "Respondent was a man of little education who had had no prior experience with surgical operations. He was hardly on an equal footing in his relationship with Dr. Miller, and it is to be expected that he would repose confidence in his doctor who possessed special learning and skill." *Id.* at 572.

[71] Hence relief in cases where medical information is concealed from claimant, who signs the release in ignorance. Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952) (relief on this and other grounds); Simmons v. Kalin, 10 Wash. 2d 409, 116 P.2d 840 (1941).

been induced to buy phoney shares of stock, or homes infested with hidden termites and the like. Usually those transactions may be rescinded, but the plaintiff may affirm the transaction, give up his remedy of rescission, and sue for damages. There seems to be no theoretical reason why this alternative remedy should not be available against a defendant who fraudulently obtains a release, and some courts have permitted it.[72]

An action of this kind will present complexities not encountered in an action to rescind the release or an action for personal injuries in which the plaintiff attempts to avoid the release because of the fraud. Nevertheless, it may have some advantage to plaintiffs. Thus the plaintiff who cannot restore the consideration received for the release, in some jurisdictions, will be barred from relief by rescission,[73] but may nevertheless be entitled to maintain the tort action for deceit. It is also possible that the measure of damages in deceit will be more favorable than in the personal injury action, and it is this point that raises difficulties.

Suppose a plaintiff settles his claim against the defendant for fifty dollars because the defendant fraudulently tells plaintiff that an x-ray shows no broken bones, when in fact plaintiff has several broken vertebrae. Now if there had been no fraud, or if the plaintiff had not believed the misrepresentation, several different things might have happened. One is that the plaintiff might have settled, but for a greater amount of money. Another is that the plaintiff might have to go to trial, in which case he might have won or lost. Suppose he would have lost, because the defendant was not negligent or the plaintiff was guilty of contributory negligence. Suppose further, that absent fraud, the defendant would nevertheless have paid 1000 dollars in settlement to avoid the expense of litigation. Under either of the two rules for deceit damages,[74] the problem is what amount the plaintiff should recover in an action for deceit. Should it be 950 dollars, representing what the defendant would have paid in

[72] See Immel, *The Requirement of Restoration in the Avoidance of Releases of Tort Claims*, 31 NOTRE DAME LAW. 629, 673 (1956).

[73] This requirement is discussed in text accompanying notes 195-204 *infra*.

[74] One rule gives plaintiff the loss of his bargain, *i.e.*, the value he would have obtained if the representation had been true. The other gives him his "out of pocket" loss, *i.e.*, the difference between what he parted with and what he got. MCCORMICK, DAMAGES § 121 (1935); PROSSER, TORTS § 91 (2d ed. 1955). Neither of these seems easy to apply in a release-rescission case, but the loss of bargain rule is especially difficult. See Immel, *supra* note 72.

settlement had there been no fraud? Or should it be nothing—the amount the plaintiff would have recovered on a trial of the merits? If it is the former, it will pay the plaintiff to sue in tort for the deceit, for if he sought rescission he would still get nothing because he has no rights on the merits.

If the measure of damages is what the plaintiff could and would have settled for absent fraud, he may recover in the deceit action even though he would lose in a trial on the merits. His proof need only be that he could have settled for a greater sum absent fraud. Hence, he has a real loss, though he was undeserving on the merits. But to prove the loss he will almost surely have to prove some facts about his case, facts that would show what the settlement probably would have been. The more he shows of this kind of fact, the closer he gets to putting the merits of the case before the jury, with the danger that the merits will become seriously confused with the cause of action for deceit.

If the measure of damages is what the plaintiff *could* have recovered at a *trial,* then the deceit action is substantially the same in result as an action for rescission or a trial on the merits in which the release is not permitted as a defense. The result of this approach is that the jury must be instructed on *two* theories—first, the rules for deceit, and second, the rules that establish the plaintiff's rights on the merits. This would also entail considerable confusion and would be quite unnecessary since a direct action for the personal injury could do the same thing.

Whichever approach is taken, the deceit action will introduce confusion that is quite unnecessary, except as a devious means of avoiding the requirement of tender. There are other plaintiff-advantages, but few of them seem worthy of protection at the expense of such confusion. One has been mentioned—the fact that plaintiff may be able to recover damages for the deceit even though he had no rights on the merits. This is proper enough in itself, since plaintiff has actually lost money he would have received had there been no fraud. But it does not seem sufficiently worthy of protection if his claim was only a nuisance-value claim. Perhaps plaintiffs could gain much in an action for deceit by suing, not the individual defendant, but his insurance company which fraudulently procured the release. Any plaintiff is glad to have an insurance company as a named defendant. But in most states there is no direct action against

the liability insurance company on the merits and the deceit action is only a means to avoid this policy. There seems no good reason to permit it.

The courts are divided on whether or not the plaintiff may be permitted to sue for deceit or whether he must seek relief more directly by an action for personal injuries in which the release will be in issue. Some courts have denied plaintiffs the right to sue in deceit for reasons like those mentioned above,[75] while others have assigned technical reasons which do not always seem to apply.[76] Whatever reason is given, these courts avoid much unnecessary confusion by insisting that the plaintiff's relief should be a direct action for personal injuries where the fraudulently obtained release will not be a bar.

There may, nevertheless, be a few occasions when a deceit action could be justified. The plaintiff who has no rights on the merits, but is defrauded and prevented from a substantial settlement, may contend with much justification that relief ought to be given, though he could not have won at a trial. Perhaps if the fraud is egregious and the loss to the plaintiff is great enough, such an argument ought to prevail. But on the whole the confusion and difficulty of trying such a claim, and the probability of its ultimate failure, is a good indication that the deceit action should not be allowed. Where the plaintiff can obtain service of process by use of a deceit action and not by suit on the original claim, other considerations may prevail. Suppose *A* and *B* are involved in an automobile collision in California. Suppose *A,* who is injured, resides in North Carolina where, due to *B's* fraud, he executes a release. If he sues on his original cause of action the suit must be in California or where *B* can be found. But, assuming a valid statute permits it, he might sue for the tort of deceit in North Carolina and obtain valid service of process there, at least against *B's* insurance company because it does business in North Carolina and committed the fraud there. In such a situation, the action of deceit against the insurance company might be permitted with much justification. Another justification that

[75] Shallenberger v. Motorists Mut. Ins. Co., 167 Ohio St. 494, 150 N.E.2d 295 (1958).

[76] Hopkins v. Fidelity Ins. Co., 240 S.C. 230, 125 S.E.2d 468 (1962). Apparently the deceit action has been ruled out as a practical matter in North Carolina by Davis v. Hargett, 244 N.C. 157, 92 S.E.2d 782 (1956), but the decision may apply only to deceit actions against third persons who were not responsible for the original tort.

might be urged with some force is that the action for fraud against the insurance company would not directly involve the original defendant. Such a course may be fairer, since it is usually the insurance company, not the original defendant, that committed the fraud, if any was in fact committed. This may be especially important where the original claim on the merits exceeds the policy limits, for to re-open the litigation on the merits subjects the original defendant to potential personal liability for the fraud of the insurance company, while in an action for deceit aimed solely at the insurance company which committed the fraud, it, and only it, would be liable. The chances of such special difficulties seem, however, remote. Perhaps when special considerations of the sort mentioned here are involved the action for deceit should lie. Otherwise, the judicial process will be better served by requiring the victim of fraud to sue directly for his personal injury and to avoid the release if it was procured by fraud.

Proof of Fraud

The central problem for the plaintiff who seeks to prove fraud is one of fact, not one of law. He must convince a jury and he must convince a reviewing court that his evidence was sufficient for that purpose. Sometimes he must prove fraud, not merely by a preponderance of the evidence, but by "clear, cogent and convincing evidence."[77] Any evidence that shores up the plaintiff's own testimony on the fraud point may be valuable. For example, proof that the consideration paid for the release was inadequate tends to corroborate the charge of fraud. Similarly, if the plaintiff was ill at the time the settlement was made, he was probably more susceptible to unfair dealing and this also will corroborate his contention that the defendant misrepresented the facts. This kind of proof, standing alone, does not prove anything, however, and it would seem relevant primarily for the purpose of bolstering plaintiff's other proof. However, factors of this sort should never be overlooked in preparing proof of fraud. At the same time it is apparent that plantiffs are often given relief even when other proof of fraud is missing or doubtful merely because there is proof of some serious misconduct on the part of the defendant. Cases that give relief when factors like these are present often pretend to do so on the ground that they prove fraud. But the

[77] This requirement is discussed in text accompanying notes 205-09 *infra*.

real basis seems to be that misconduct short of fraud is sufficient to justify relief. Accordingly, these cases are considered here as separate grounds for avoiding the release.

B. Other Misconduct Short of Fraud

Inadequate Consideration

All decisions seem to recognize that mere inadequate consideration paid for a release is no ground for avoiding the release.[78] "[T]he amount paid by the defendant is of no consequence if the demand for damages was wholly unliquidated."[79] The same is true where the claim is partly liquidated, as where the defendant pays for the exact damage to the claimant's automobile. If, in such a case, the claimant later discovers a personal injury, the release for property damage is also a bar to his personal injury claim, though obviously no consideration was paid beyond the amount of car damage.[80]

In a number of cases inadequacy of consideration, even when coupled with misconduct by a defendant, has not been enough. Several decisions seem to have accepted without qualm the practice of some railroads to lay off injured workers and to rehire them only when they have executed a release. When such releases are attacked they have been upheld in spite of this obvious pressure coupled with inadequate compensation—such as a promise to employ for one further day.[81]

From a contractual point of view such cases seem in accord with

[78] See, *e.g.*, Trokey v. United States Cartridge Co., 222 S.W.2d 496 (Mo. App. 1949); Watkins v. Grier, 224 N.C. 339, 30 S.E.2d 223 (1944). See generally Annot., 48 A.L.R. 1462, 1515 (1927).

[79] Ross v. Koenig, 129 Conn. 403, 28 A.2d 875, 877 (1942).

[80] Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (D. Ark. 1962); Darensbourg v. Columbia Cas. Co., 140 So. 2d 241 (La. App. 1962). In Casey v. Proctor, 22 Cal. Rptr. 531 (Cal. App. 1962), *rev'd on other grounds*, 28 Cal. Rptr. 307, 378 P.2d 579 (1963), the court rejected the argument that since payments equalled the value of the car, there was no consideration for injury. *But see* Warren v. Crockett, 364 S.W.2d 352, 354 (Tenn. 1963), where the court said: "So, virtually the whole consideration that passed to him was for his property damage; and no consideration actually passed to her for release of her personal injuries." The actual holding in *Warren* seems to be based on mutual mistake, but it is not clear whether the quoted language indicates an alternative holding.

[81] This was the situation in St. Louis-S.F. Ry. v. Ferguson, 325 P.2d 735 (Okla. 1958), and Lusk v. White, 58 Okla. 773, 161 Pac. 541 (1916). *Cf.* Maynard v. Durham & So. Ry., 251 N.C. 783, 112 S.E.2d 249 (1960), *rev'd*, 365 U.S. 160 (1961) (reversed because jury should decide whether the consideration was "back pay"). In *Maynard*, unlike the other cases cited, there was a cash consideration in addition to re-employment.

the general rules in other types of cases. But inadequate consideration may be important, not on the contract issue, but on the issue of fraud,[82] mistake,[83] or undue influence,[84] and the decisions generally so recognize.[85]

For example, if a plaintiff contends that defendant misrepresented to him his legal rights, the fact that defendant paid fifty dollars on a claim clearly worth 1,000 dollars is strong evidence supporting the plaintiff's contention, though by no means is it conclusive. Thus where the plaintiff, an ignorant woman, was told by defendant that she had no legal claim and accepted six dollars in settlement, her claim of fraud was upheld and she was permitted to recover 325 dollars in spite of her release.[86] It is important in such cases to notice that the plaintiff should have recovered in any event if the jury believed the testimony, for there is generally enough evidence to establish a misrepresentation. The importance of inadequacy of consideration in cases of this sort is, therefore, limited. It may help convince the jury, along with other facts. It may likewise convince the court that there is, in a close case, sufficient evidence for the jury, so that a nonsuit can be avoided. Beyond that most courts have never gone in these cases; inadequacy of consideration is one factor but no more.

Suppose, however, there is no other evidence of fraud—just grossly inadequate consideration. Could a finding of fraud be sustained under such circumstances? A few courts in release cases have intimated that fraud would be found.[87] North Carolina seems to have fully accepted and applied such a view, and in a number of cases has permitted a finding of fraud even where no misrepresentation at all is shown. These cases deserve some further treatment.

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[82] See Ross v. Koenig, 129 Conn. 403, 28 A.2d 875 (1942).

[83] See Hume v. Moore-McCormack Lines, Inc., 121 F.2d 336 (2d Cir.), *cert. denied,* 314 U.S. 684 (1941).

[84] See King v. Atlantic Coast Line R.R., 157 N.C. 44, 63-64, 72 S.E. 801, 808-09 (1911).

[85] See Annot., 48 A.L.R. 1462, 1515 (1927).

[86] Styron v. Atlantic & N.C. Ry., 161 N.C. 78, 76 S.E. 692 (1912); *accord,* Kansas City, M. & B.R.R. v. Chiles, 86 Miss. 361, 38 So. 498 (1905).

[87] Ross v. Koenig, 129 Conn. 403, 28 A.2d 875 (1942), citing an earlier Connecticut case, Benedict v. Dickens' Heirs, 119 Conn. 541, 177 Atl. 715 (1935), which did not involve releases. Other courts sometimes imply that if the consideration is so small as to "shock the conscience," something vague might be done about it; but such statements are often followed by strong language implying just the opposite. See Aponaug Mfg. Co. v. Collins, 207 Miss. 460, 42 So. 2d 431 (1949).

The first suggestion of such a rule in North Carolina came in 1902 in *Dorsett v. Clement-Ross Mfg. Co.*[88] There plaintiff's arm was mangled in machinery belonging to the defendant-employer. Amputation was required. Six weeks later the doctor and adjuster told the plaintiff, who was illiterate, that he should sign the paper they showed him so that the doctors could get their money and that if he did, they would give him fifteen dollars for his time. The "paper" was a release. Plaintiff later brought this action for his injuries and obtained a jury verdict. The court affirmed, saying fraud was established since the adjuster and doctor clearly misled plaintiff as to the effect of the paper he signed. There were other factors of misconduct as well. The court then added:

> It is true that inadequacy of consideration alone is not sufficient to set aside a written instrument 'unless the consideration is so inadequate as to shock the moral senses and cause reasonable persons to say he got it for nothing'. But it is proper evidence to be considered upon an issue of fraud and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud. . . .[89]

The court added that there was, in the case before it, "no real consideration" to support the release. The court cited no authority for the implied proposition that shockingly inadequate consideration might be enough to set aside the release.[90] Further, it seems quite clear that the plaintiff had sufficient evidence to justify the recovery he received and the allusion to inadequate consideration was unnecessary.

Some nine years later the court, in what seems to be a dictum, affirmed the implication of *Dorsett,* saying that the consideration paid for a release "must not be so small as to cause one of ordinary discretion and judgment to say he paid nothing."[91] The court cited two

[88] 131 N.C. 254, 42 S.E. 612 (1902).

[89] *Id.* at 260, 42 S.E. at 614.

[90] The court cited McLeod v. Bullard, 84 N.C. 515 (1881). That case was not a release case, but one in which a deed was obtained by fraud. The court in that case said, "a want of consideration and a gross inadequacy of price are each some evidence of fraud and may, *in connection with other circumstances* . . . furnish ground . . . for setting aside a contract . . . ." *Id.* at 527. (Emphasis added.)

[91] King v. Atlantic Coast Line R.R., 157 N.C. 44, 53, 72 S.E. 801, 804 (1911).

cases,[92] both of which involved, not the question of what consideration was needed to sustain a contract, but the question of whether a conveyance was made in fraud of creditors.

At this point the doctrine would seem to have very little support indeed, for the cases enunciating it have not applied it and they are not grounded in authority. But in the same year the North Carolina court did apply the doctrine in a case where there was no claim of a misrepresentation at all.[93] The evidence there showed (1) that plaintiff was illiterate and blind and hard of hearing; (2) that his wife and brother were excluded from the room when the release was signed; (3) that "he thought" he was signing a receipt; and (4) that the consideration was 372 dollars, "whereas the jury found that $4,850 was reasonable and just compensation." The court held the evidence was sufficient to take the case to the jury on the issue of fraud. The impressive feature of this decision is that the plaintiff did not assert, so far as the court indicates, that defendant misrepresented anything. It is not clear whether the decision would have been the same absent the inadequate consideration point.

The decision was followed by one which, on somewhat less convincing facts, reversed, for error in the instructions, a judgment for a plaintiff who had settled for seven dollars.[94] The court pointed out that grossly inadequate consideration would never constitute fraud as a *matter of law.*

In two other cases recoveries were predicated on grossly inadequate consideration as evidence of fraud where, in addition, there was evidence that plaintiff was in financial distress at the time of the settlement.[95] In neither case does there seem to be any evidence of

[92] Fullenwider v. Roberts, 20 N.C. 420 (1839); Worthy v. Caddell, 76 N.C. 82 (1877).

[93] Brazille v. Carolina Barytes Co., 157 N.C. 454, 73 S.E. 215 (1911). Fraud was alleged and the court in reciting the facts said there was evidence of a misrepresentation. But none is alluded to in the opinion, and the court in summarizing the evidence in favor of the plaintiff does not indicate any testimony of the plaintiff to the effect that an actual misrepresentation was made.

[94] Knight v. Vincennes Bridge Co., 172 N.C. 393, 90 S.E. 412 (1916). See McMahan v. Carolina Spruce Co., 180 N.C. 636, 105 S.E. 439 (1920), where the defendant's doctor misrepresented the injury. There seems to have been no proof of fraud, *i.e.,* intentional misrepresentation. But settlement was for $165 as compared to an ultimate verdict of $6500. The judgment for the plaintiff was upheld.

[95] Preddy v. Britt, 212 N.C. 719, 194 S.E. 494 (1938); Butler v. Armour Fertilizer Works, 195 N.C. 409, 142 S.E. 483 (1928) (settlements for $220 and $578 as against jury verdicts for $1,000 and $5,000).

fraud other than the relatively small settlement. In both, however, there is one other factor—the plaintiff's financial distress. This factor suggests that defendant may have taken undue advantage of the plaintiff in settling for such a small sum. But as for *fraud,* there seems to be no evidence.

A somewhat similar case[96] was decided by the federal court under North Carolina law and reached the same result where, in addition to gross inadequacy of the settlement the court emphasized that the plaintiff was illiterate and had no counsel. In some respects this is perhaps the most liberal case. There was a conflict in the evidence as to whether releases were explained to the plaintiff, and perhaps that alone, as to a known illiterate, was enough to indicate fraud. Beyond this, however, there was little more than gross inadequacy. Even the inadequacy is doubtful. The case involved the deaths of three persons for whom the plaintiff was appointed administrator at the request of the defendant railroad in order to make a settlement. He was paid 950 dollars in settlement of all three deaths. A small sum, but when the release was avoided the jury returned verdicts for only a total of 4,000 dollars.

The conclusion seems to be this: North Carolina has recognized a broad rule which permits the jury to consider gross inadequacy of consideration as evidence of fraud. It has *said* that this alone may be sufficient without other evidence.[97] But in all cases where recovery was granted on this ground, there were actually other factors involved whether the court recognized them explicitly or not. At the same time the "other factors" need not necessarily be proof of fraud—perhaps the suggestion of plaintiff's difficult bargaining position is enough.[98] In short, in any appropriate case, grossly inadequate consideration without any appreciable other proof of fraud, will take the case to the jury.

What constitutes "grossly inadequate consideration" remains something of a mystery. It does seem clear that the North Carolina Court has granted recovery on this basis in cases where it is quite difficult to say that the defendant "paid nothing"—the standard first used. When the defendant pays 220 dollars and the verdict of the

[96] Seaboard Air Line R.R. v. Gill, 227 F.2d 64 (4th Cir. 1955).

[97] *E.g.,* Butler v. Armour Fertilizer Works, 195 N.C. 409, 142 S.E. 483 (1928). This is the clear implication in the other cases cited in connection with this issue.

[98] See cases cited note 95 *supra.*

jury is 1,000 dollars[99] he has obviously paid more than "a mere nothing" and the payment is hardly even shocking. Indeed, if 1,000 dollars would have been a fair settlement, it is at least doubtful that recovery should be permitted on such facts, absent additional misconduct by defendant.

Two further things ought to be said about the inadequate consideration cases. One is that, although inadequate consideration may aid in proving fraud, the real principle in most of the cases is not that fraud is proved but that misconduct short of fraud is in evidence and that the tort-feasor should not be able to minimize liability by such misconduct. Thus it is considered unconscionable to allow a tortfeasor to take undue advantage of a necessitous claimant to force an extremely small settlement. However, to label these cases as fraud decisions is to obscure the operative principle.

The other thing to be noticed about such cases is that they have the great advantage to the plaintiff of forcing attention on the practicalities of the matter and especially upon the money difference between what the tortfeasor paid and what he owed. In some cases this may amount merely to a showing of a mistake by the claimant as to the seriousness of his injury. If the mistake is serious enough, he may receive relief under the fraud theory by showing inadequate compensation—which is merely another way of showing a mistake so serious as to justify the aid of the courts.

At the same time the claimant who settles for a grossly inadequate compensation must meet at least some of the ordinary fraud rules. He must still read the release unless prevented from doing so by fraud,[100] and he must show reasonable reliance on the misrepresentation made by defendant if defendant actually made one.[101]

Duress and Misconduct—Capacity

The common law recognized that a contract made under threat of physical harm or imprisonment was no contract at all, and the same,

[99] Preddy v. Britt, 212 N.C. 719, 194 S.E. 494 (1938).

[100] Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Watkins v. Grier, 224 N.C. 339, 30 S.E.2d 223 (1944).

[101] Davis v. Davis, 256 N.C. 468, 124 S.E.2d 130 (1962). In the cases where no actual misrepresentation is charged, and the plaintiff is relying on gross inadequacy of consideration alone or in connection with some other misconduct short of fraud, this has not been a problem. See Brazille v. Carolina Barytes Co., 157 N.C. 454, 73 S.E. 215 (1911). Thus the anomaly that if, in addition to proof of inadequate consideration, plaintiff proves actual fraud, he has a more difficult case to make out, for he must also prove reasonable reliance on the misrepresentation.

of course, would apply to a release. Today a contract or release may be vitiated if it is made under somewhat lesser pressures. Threats of economic pressure, if they go beyond what is normally considered fair bargaining, are enough to avoid the contract.[102] If the defendant tells the claimant, "Sign or I'll fire your father and see that he gets no more employment," a release so executed is void, and this is so even though a substantial consideration is paid.[103] The threat need not be economic. In a West Virginia case[104] the defendant's adjuster took advantage of the fact that an undertaker was holding the body of plaintiff's child until payment was made. The adjuster's settlement negotiated under such circumstances was held to be duress which avoided the release.

There are, of course, cases where the duress seems as clear and as intolerable but which uphold the release. A release executed because the railroad would not continue claimant's employment until the release was executed seems in this category.[105] Perhaps the answer in these cases is that the argument was not made that the railroad's threat to fire claimant, unless he signed the release, was duress. In one of these cases[106] the court alludes to the plaintiff's claim of duress; but reference to the brief for the plaintiff indicates that the point was not argued.[107] Likewise the threat to a tenant farmer that unless he settled he would "have enemies of white and colored" was held in one case[108] not to vitiate the release, but again the duress point apparently was not argued, and the court decided on the issue of fraud. It is possible that cases of this sort would be decided differently if plaintiff's counsel argued the duress point, for it certainly seems that the threats presented were wholly unjustified and there

[102] On the whole subject of duress, see Dalzell, *Duress by Economic Pressure,* 20 N.C.L. REV. 237, 341 (1942); and on compromise, see *id.* at 374-77.

[103] Perkins Oil Co. v. Fitzgerald, 56 Ark. 516, 121 S.W.2d 877 (1938). The settlement thus induced was in the amount of $5000, a sum representing the amount of defendant's liability insurance. The court found duress and affirmed a judgment for $45,000.

[104] Carroll v. Fetty, 121 W. Va. 215, 2 S.E.2d 521 (1939).

[105] See cases cited note 81 *supra.*

[106] Maynard v. Durham & So. Ry., 251 N.C. 783, 112 S.E.2d 249 (1960), *rev'd on other grounds,* 365 U.S. 160 (1961).

[107] Brief for plaintiff-appellant, pp. 18-33, an impressive review of fraud cases in FELA actions, alludes to a claim of fraud and "undue influence," but does not appear to argue duress or undue influence.

[108] Massey v. North Carolina Pub. Serv. Co., 196 N.C. 299, 145 S.E. 561 (1928).

can be no policy which encourages tort-feasors to escape liability by this kind of pressure.

A number of cases deal with more subtle forms of misconduct by the defendant, and recoveries are frequent in these cases, though there is neither a verbal misrepresentation nor a verbal threat. In a number of cases the result is made to turn on the plaintiff's mental "incapacity" at the time he executed the release. Of course, the plaintiff who executes a release while under the influence of drugs or in shock should not be bound.[109] More often than not, however, the "capacity" cases do not involve any mental incapacity either in a layman's or lawyer's sense. What they do involve is misconduct by the defendant who takes undue advantage of a claimant who is in poor position to bargain because of his condition.

Thus it may make no difference whether the claimant has "mental capacity" to know what he is doing or not if the defendant procures a release by taking undue advantage of the claimant's ignorance,[110] his poverty and immediate need for money,[111] or his shock.[112] In cases like these the defendant takes advantage of the claimant's severe position and pays an unconscionably small amount. Of course, if the defendant merely gets a good bargain, he had not been guilty of any misconduct unless it can be said that he would not have done so well with a normal claimant who is not so handicapped. At the same time, any doubts in such a situation should be resolved against the defendant, for by hypothesis he is a tort-feasor initially responsible for the claimant's condition, and he ought not to escape his full share of liability by any further misconduct, however slight.

There is no good way of stating a general rule for such cases except to say that if, considering all the factors, the defendant may have taken unconscionable advantage of the claimant's condition, the

[109] It has been held that unless the claimant's incapacity is known to the defendant, the release is still good. See West v. Seaboard Air Line Ry., 154 N.C. 24, 69 S.E. 676 (1910) *affirming* 151 N.C. 231, 65 S.E. 979 (1909). It seems doubtful whether such a rule will be followed. See Ipock v. Atlantic & N.C.R.R., 158 N.C. 445, 74 S.E. 352 (1912); Mangum v. Brown, 200 N.C. 296, 156 S.E. 535 (1931).

[110] See, *e.g.*, Seaboard Air Line R.R. v. Gill, 277 F.2d 64 (4th Cir. 1955).

[111] See Butler v. Armour Fertilizer Works, 195 N.C. 409, 142 S.E. 483 (1928), where the court said that even absent fraud or duress, a defendant may not take undue advantage of a person "in peculiar necessity and distress."

[112] See Airline Motor Coaches v. Parks, 190 S.W.2d 142 (Tex. Civ. App. 1945), *aff'd without discussion of the point herein,* 193 S.W.2d 967 (Tex. 1946).

release ought to be set aside if the claimant chooses. A number of evidentiary facts are often important. If the plaintiff is in the hospital when he executes a release, this alone is strong evidence that undue advantage was taken, even though plaintiff admits he knew what he was doing and was not under influence of drugs.[113] Similarly, if the claimant is in pain and suffering anxiety,[114] or is deprived of friends or relatives,[115] or lacks counsel,[116] the tendency is to avoid the release and permit recovery. Some cases have also recognized that an injured claimant may have special confidence in his doctor, so that if the defendant induces the doctor to advise settlement, even though no fraud is committed or threats made, the release should be set aside.[117]

Some cases turn on the enormity of the defendant's conduct in violating normal rules of social behavior. If an adjuster negotiates a settlement with a widow while she is in the undertaker's establishment to view the body of her husband, the release so obtained is void.[118] Courts may talk in terms of the plaintiff's capacity or

[113] Butler v. Armour Fertilizer Works, 193 N.C. 632, 137 S.E. 813 (1927), *subsequent appeal,* 195 N.C. 409, 142 S.E. 483 (1928) (plaintiff admitted knowing what he was doing); Puckett v. Dyer, 203 N.C. 684, 167 S.E. 43 (1932) (analogy to "fiduciary relations").

[114] Bean v. Western N.C.R.R., 107 N.C. 731, 12 S.E. 600 (1890); Airline Motor Coaches v. Parks, 190 S.W.2d 142 (Tex. Civ. App. 1945), *aff'd without discussion on this point,* 193 S.W.2d 967 (Tex. 1946) (good faith settlement with widow while at mortuary arranging husband's funeral).

[115] Brazille v. Carolina Barytes Co., 157 N.C. 454, 73 S.E. 215 (1911); Bean v. Western N.C.R.R., *supra* note 114; Dorsett v. Clement-Ross Mfg Co., 131 N.C. 254, 42 S.E. 612 (1902) (adjuster badgered claimant to avoid his consultation with wife); Kansas City, M & B.R.R. v. Chiles, 86 Miss. 361, 38 So. 498 (1905).

[116] Seaboard Air Line R.R. v. Gill, 227 F.2d 64 (4th Cir. 1955); Bean v. Western N.C.R.R., 107 N.C. 731, 12 S.E. 600 (1890). And conversely, if he does have counsel, this fact tends to negate a right to recover. See Watkins v. Grier, 224 N.C. 339, 30 S.E.2d 223 (1944).

[117] *Cf.* Dorsett v. Clement-Ross Mfg. Co., 131 N.C. 254, 42 S.E. 612 (1902), where the court treated the case as one of fraud, which was certainly justified, but the underlying considerations seem to be that the defendant took undue advantage in part by using the doctor in whom claimant had faith. A similar case recognizing the special faith a claimant may put in the doctor who treats him is Prince v. Kansas City So. Ry., 229 S.W.2d 568 (Mo. 1950). This case is likewise based on "fraud," but again the principal may well be the broader one that the defendant simply may not take an unconscionable advantage of the injured. *But see* Gulf, C. & S.F. Ry. v. Huyett, 99 Tex. 630, 92 S.W. 454 (1906), in which a doctor advised settlement and also said the plaintiff would soon be well. The decision, however, turned on the question of whether the doctor's acts were binding upon the defendant.

[118] Airline Motor Coaches v. Parks, 190 S.W.2d 142 (Tex. Civ. App.

emotional state; but it would seem that a widow who settles with one hand on the casket and the other on the cash is a reasonably cool customer, and the real reason for granting relief is the obnoxious behavior of the defendant.

If the claimant is, at the time of the settlement, in perfectly sound physical and mental condition, he may still accept an unconscionably small amount in settlement because of immediate financial need. In normal bargaining situations, perhaps, such an element properly may be ignored or minimized. But in all release cases it is important to remember that the defendant is, or may be, a tortfeasor; and it would be intolerable to allow him to minimize his legal obligation because he has wronged a poor man, or because he has wronged an ordinary man so badly that he is in immediate financial distress. Therefore, the defendant is not permitted to take advantage of the claimant's poverty or extreme need and to settle at an unconscionably low sum because the claimant must have money immediately.[119]

Cases involving defendant's misconduct tend to run together and are most often labeled fraud cases. In all misconduct cases, the problem is largely one of proof, but no matter how labeled, unconscionable conduct by the defendant which induces a release is enough to vitiate the settlement and permit the plaintiff to recover. The tendency of lawyers and courts is to treat "fraud and duress" as a single claim or argument, but it seems apparent that the cases fall broadly into at least three general categories—fraud, meaning a misrepresentation or concealment, by silence, by words, or by conduct; duress, a threat by silence, words, or conduct; and other forms of misconduct that can only be described as "unconscionable." Sometimes it may be helpful to identify these categories separately, for the duress argument in some of the cases might succeed when the fraud argument fails. Perhaps in most cases fraud, duress, and undue advantage should all be pleaded and argued separately; certainly, the pleader cannot afford to ignore the fraud contention, since many cases involving undue advantage or duress are decided under the label of fraud.

In any event, the ball should not be lost sight of in the tangle of

1945), *aff'd without discussion of this point,* 145 Tex. 44, 193 S.W.2d 967 (1946).

[119] Preddy v. Britt, 212 N.C. 719, 194 S.E. 494 (1938); Puckett v. Dyer, 203 N.C. 684, 167 S.E. 43 (1932); Butler v. Armour Fertilizer Works, 195 N.C. 409, 142 S.E. 483 (1928).

labels. Any misconduct chargeable to the defendant and which induces the execution of the release should be sufficient to avoid it, since the tortfeasor should never be permitted to minimize his own liability for his own wrong by his own further wrong—whether his further wrong amounts to actionable fraud or not. This does not mean that the plaintiff has carte blanche; he still must prove the misconduct and he must also prove that the misconduct induced the release. But once those things are proved, that should always be sufficient to avoid the release.

IV. Mutual Mistake

The Technical Arguments

It is easy enough to conclude that the tortfeasor should not escape liability because of misconduct, no matter how slight, in procuring the release. But if he procures a release honestly and without misconduct, should the release be avoided if it later turns out that the claimant's injuries were much worse than expected? There are some very strong technical arguments against relief here. It may be useful to raise them in a concrete case.

Take the case of Patty Poop, whose toe is bruised when Don Doop negligently drops a brick on it. Patty sees a doctor who treats the toe and advises Patty to "keep a close watch on it, something might develop." A few days later, before the toe is healed, Don's adjuster offers Patty a settlement for fifty dollars which will cover her doctor bill, her loss of time, and inconvenience. She accepts and executes a release. A month later the toe still has not healed and gangrene sets in. Amputation becomes necessary and Patty loses her leg. When she brings suit Don's attorney pleads as a defense the release which she has given. Patty argues that it was given under a mutual mistake and therefore is not binding. Since we generally recognize mutual mistake as a ground for avoiding other contracts, this may seem reasonable enough.

Don's attorney, however, can make a strong argument against rescission of the release on the grounds of mutual mistake. This argument may take one of two forms. *One.* Patty made no mistake at all. A mistake is a state of mind that is not in accord with the facts.[120] Patty did not have a state of mind that differed from the facts. It is true that she was ignorant of the future, as all mortals

[120] Restatement, Restitution § 6 (1937).

are, but unless she had a positive belief that no further complications would come about, there was no mistake. She obviously had no such belief, for her own doctor warned her to keep an eye on the bruise. Furthermore, the release itself provides that she released claims of further complications and unknown injury, so she must have recognized the risk of further loss. *Two.* Patty willingly assumed the risk of future adverse developments.[121] We know this because of the release language which refers to the possibility of future developments. She was "consciously ignorant" of what would happen in the future, and that means she assumed the risk, or that there was no mistake.[122] That, indeed, is the character of all compromise settlements.

The defendant's arguments are technically sound and they are persuasive. Patty still has some ammunition left, however, and the argument might proceed something like this:

Plaintiff: All that may be so, but the truth is, I never really thought about the matter at all, I just assumed I would have no further trouble. In legal terms I believe you call this "no meeting of the minds," and if there is no meeting of the minds, there is no contract.

Defendant: Of course, if you never thought about it at all, there is no mistake at all, since you had no "state of mind" on the subject.[123] As for meeting of the minds, it is true courts sometimes use such language, but it is well settled that the mental reservations or peculiarities are not controlling over the written language of the contract, and the written language of the release makes it clear that you are taking the risk of any future medical developments.

Plaintiff: Perhaps all that is true, but even if I did "assume the risk" of future developments, I did not assume such a *large* risk. I was willing to take the risk that the toe would be uncomfortable for a period of time, and perhaps even that it would have to be amputated; but I certainly never intended to take the risk that I would lose my leg.[124]

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[121] *Id.* at § 11(1).

[122] *Id.* at § 6, comment *c.* Professor Havinghurst has recently set out these arguments quite clearly. See Havinghurst, *Effect Upon Settlement of Mutual Mistake as to Injuries,* 12 DEF. L.J. 1, 3-5 (1963).

[123] *Cf.* RESTATEMENT, RESTITUTION § 6, comment *c* (1937).

[124] It seems clear that even where some risks are assumed, as in a compromise agreement, not every conceivable risk is assumed, at least absent written language dealing expressly with the point. Thus "even a specific

Defendant: A clever argument, and if we were looking at your subjective intention it might work. But here again the release is right on point and it refers to the fact that you release *all* claims for future developments, not just small ones. Besides, even if you did not intend to assume the risk of a *serious* medical problem, even if you did make a mistake as to how *much* medical problem you might have, *I* made no such mistake. *I* intended all along that you assume *all* the risk, as the release clearly shows. Therefore, even if we look at your subjective intention, the most you can find is a unilateral mistake, and that, as is well known, is not sufficient for relief.[125]

On these arguments, the defendant seems to have a stronger position on the basis of the law of mistake as applied to other kinds of contracts. It can be clearly seen from the arguments made that the defendant's main approach centers on holding the plaintiff to the written language of the release which releases claims for future developments as well as existing problems. If the court is willing to look *subjectively* at the parties' intentions,[126] it may well give plaintiff relief, for, though plaintiff assumed the risk of future developments, she may not have assumed the risk of grave developments such as the loss of a leg. On the other hand, if the parties specifically considered the possibility that plaintiff might lose her leg, then it is clear that the plaintiff subjectively as well as objectively—in her mind as well as on paper—assumed the risk, and the release should be upheld and recovery denied.[127]

Releases today always say, in effect, that claimant assumes the

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statement by the parties that the transaction is final does not make it such, and it is not final if there is a basic mistake as to matters not believed by the parties to be doubtful." RESTATEMENT, RESTITUTION, § 11, Comment *b* and Illustrations (1937). On this basis, if there is no doubt in the minds of the parties that claimant will (a) have future medical trouble, but (b) nothing serious, it is arguable at least that plaintiff's position is correct, unless affected by the written language of the release.

[125] This point was made by the defendant and accepted by the court in Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 381 (1953). This writer believes the court there was in error. See text accompanying note 176 *infra.*

[126] *I.e.,* if neither party thought loss of a leg or other similar injury was in the realm of reasonably likely possibilities, they did not contract with reference to such development, and that development is not within the realm of the compromise agreement or within the realm of the assumed risk. See note 124 *supra.*

[127] On similar facts the court denied recovery in Mack v. Albee Press, Inc., 263 App. Div. 275, 32 N.Y.S.2d 321 (1942), *aff'd without opinion,* 288 N.Y. 623, 42 N.E.2d 617 (1942). It appears that the plaintiff there had diabetes and was more or less specifically aware of the danger when he accepted settlement.

risk of unknown and unforeseeable injuries. If relief is given to the plaintiff, then, it will ordinarily be because we are willing to look at the subjective state of mind of the parties at the time the release was signed, or because as a matter of policy we are willing to give relief in spite of even an intentionally assumed risk, at least if the risk is vague and not known and understood. Many courts are willing to do just that, because behind the technical arguments, on which defendant may have the better case, lie the two policy considerations mentioned before—on the one hand, the policy of encouraging and protecting settlements; on the other, the policy of making the tortfeasor pay for his wrong. Because results in the cases depend upon these policy considerations, each case must be judged very largely on its own facts. The net result is that general rules are difficult to apply with precision.

General Rules[128]

1. *Minority View Denying Relief.* Some courts deny relief altogether when only mistake is involved. This view emphasizes two points. The first is the policy favoring compromise, which these courts feel is controls over the policy of holding the tortfeasor to his full liability when a serious mistake is made.[129] The second point is that the release itself is the objective manifestation of the parties' intentions and that release makes it abundantly clear that he claimant is to assume all risks of any descripiton—unforeseeable consequences of known injuries, unknown injuries, or anything else that may come along. This view has the merit, at least, of avoiding the difficult problems which the majority of courts must face—namely, how to give relief and still make most releases useful.

2. *Relief for unknown injury.* The majority of courts will grant relief where the claimant is mistaken in believing that he has no injury, or that the injury is healed when it has not in fact done so, or where the injury is greater than thought. These courts are

[128] The cases are collected in Annots., 71 A.L.R.2d 82 (1960); 117 A.L.R. 1022 (1938); 48 A.L.R. 1462 (1927).

[129] "[T]here are attractive policy reasons for adopting a rule that would permit perfectly honorable releases to be repudiated in the event of aggravation of an injury or the discovery of undiagnosed injuries. There are less compassionate but equally sound policy reasons for requiring persons of legal age and capacity to contract to stand by their covenants, including bargains containing an element of change . . . ." Wheeler v. White Rock Bottling Co., 229 Ore. 360, 367, 366 P.2d 527, 530 (1961). The dissent said: "[E]quity will relieve a person . . . when that person in good faith gets his foot in a trap." *Id.* at 371, 366 P.2d at 532.

willing to ignore or minimize the language of the release.[130] They look at the subjective intent of the parties as gleaned from various circumstances of the transaction, and not to the written manifestation of intent contained in the release. Perhaps this approach is "objective" in the sense that courts do not try to read minds, but rather look at various "objective" factors, such as the amount of payment, the intelligence of the claimant, and other matters.[131] But in any event they are not looking at the objective manifestation of intent normally controlling—the written agreement.[132] These courts weigh quite heavily in the balance the policy that the innocent victim of a tort should be paid, and paid by the tortfeasor, and for such courts, it is more important than the counterveiling policy of protecting the finality of settlements. Under this view, it is still possible for the claimant to assume the risk, and if he does so intentionally and subjectively, he is barred by his release. This point is discussed at greater length later.

3. Relief for Innocent Misrepresentation. A third view is like the second in that it grants relief in spite of the written language of the release. This view says that mutual mistake is not enough, however; relief is not granted unless the defendant or someone acting for him makes a misrepresentation of fact to the claimant which induces the release. This is not a requirement of fraud; it is quite enough if the representation is an honest one and chargeable to the defendant.[133] Of course, courts which recognize mutual mistake *a fortiori* recognize it when the mistake is induced by defendant's own statement; it is still a mutual mistake, and the difference is primarily that the defendant has been responsible for it, though not at fault. Sometimes a mistake so induced is called "constructive fraud"[134] or "legal fraud,[135] labels which are probably a bit confusing and unnecessary.

[130] *E.g.*, Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962); Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957). To be distinguished are cases which reach the same result by purporting to construe the release and saying that general language releasing "all" claims does not control if specific injuries are enumerated. See, *e.g.*, Texas & Pac. Ry. v. Dashiell, 198 U.S. 521 (1905).

[131] Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957).

[132] A subjective approach in this sense is not unusual in mistake cases generally, or so it seems to this writer.

[133] *Compare* Houston & T.C.R.R. v. McCarty, 94 Tex. 298, 60 S.W. 429 (1901), *with* Associated Employers Lloyds v. Aiken, 201 S.W.2d 856 (Tex. Civ. App. 1947). See Note, 20 TEX. L. REV. 382 (1942).

[134] Atchison, T. & S.F. Ry. v. Peterson, 34 Ariz. 292, 271 Pac. 406 (1928).

[135] Ozan Graysonia Lumber Co. v. Ward, 188 Ark. 557, 66 S.W.2d 1074 (1934).

They do serve to emphasize, however, that a case based on an honest misrepresentation is in some respects different from an ordinary mutual mistake case. The plaintiff is certainly in a better position to recover where his mistake is induced by the defendant, no matter how honest the defendant is. At least that seems to represent the normal emotional reaction. But there are other differences of a practical order. One difference is that if the plaintiff's claim is based upon a misrepresentation by the defendant's agent—his doctor, for example—the plaintiff will have to bring the misstatement home to the defendant by proving the principal-agent relationship and all the other requisites of agency.[136] This is not always easy, and plaintiffs may lose because of their failure to make such proof. Contrast with this theory of "constructive fraud" the simple mutual mistake theory: under a theory of mutual mistake no such proof as to the source of the mistake would be required. But under a mutual mistake theory the plaintiff may be obliged to prove that the mistake was indeed mutual—*i.e.*, that the defendant shared it, and this may itself present a problem. A representation by the defendant, even an innocent one, may strengthen the plaintiff's position by making it clear that the mistake was in fact shared by the defendant. If plaintiff thinks, "I have no broken bones," he may make a mistake. But if defendant thinks, "I don't know whether he has broken bones or not and I'm glad to settle for $100," it is quite doubtful whether the defendant is mistaken. Any mistake may be unilateral. However, if the defendant represents to the plaintiff that he has no broken bones, it is then clear that either both plaintiff and defendant are mistaken in their basis for settlement or the defendant is guilty of fraud. Thus a misrepresentation by a defendant, however innocent it may be, furnishes a stronger case for the plaintiff.[137]

There may be other practical consequences if the mistake was induced by defendant's innocent misrepresentation. The Arizona Court once said[138] that a mistake induced by defendant's innocent but false statements was the same thing as a mutual mistake; but then it proceeded to say that the plaintiff did not have to restore con-

[136] Gulf, C. & S. Ry. v. Huyett, 99 Tex. 630, 92 S.W. 454 (1906).

[137] See Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 331 (1953), in which the mistake was unilateral since defendant intended to settle for future complications, but if defendant had represented that there would be no complications, the mistake would be mutual.

[138] See Atchison, T. & S.F. Ry. v. Peterson, 34 Ariz. 292, 271 Pac. 406 (1928).

sideration he received for the release since the defendant was guilty of "constructive fraud."

The Problem of Assumed Risk

Under the majority view, relief is granted for a mistake and the plaintiff who gave a release is permitted to ignore it and sue for his personal injury. Still, he may have assumed the risk of unknown injury when he signed the release; and if he has, the release is effective to bar any further claim. The assumption of the risk may be shown by the plaintiff's words or conduct, though not by the release itself. Given these rules the question of avoiding a release could be solved simply by looking at the plaintiff's conduct and words and determining whether he had in fact assumed the risk.[139] But some complex and unnecessary rules that recognize two separate situations have been developed.

1. Unknown Injury. If the claimant suffered an injury of which he had no knowledge and settles without knowledge of such injury, he is usually settling only for known injuries. He and the defendant both believe that there are no other injuries and they are not contracting with reference to any other injuries. Under such circumstances and absent any other indication that plaintiff is to assume the risk of unknown injuries, the claimant can usually avoid the release under the majority rule. Actually, the majority is more liberal than that, and in many cases the plaintiff has recovered even though he knows his injuries are not fully healed and that they may be worse than he thinks. Thus a claimant whose doctor told her she was healed but who was still having eye pains was allowed to recover when blindness developed,[140] and a number of claimants who settled while still in pain were allowed to recover when it was later discovered that the injury was more serious than thought.[141] In all

[139] See note 124 *supra*. According to the Restatement, if the facts are "doubtful" plaintiff assumes the risk. At least this is the implication. A somewhat more liberal standard seems to be applied in release cases, since plaintiffs in several cases have gained relief even though they must have known when the release was executed that the future course of their recovery was "doubtful." See text preceding note 170 *infra*.

[140] Associated Employers Lloyds v. Aiken, 201 S.W.2d 856 (Tex. Civ. App. 1947).

[141] Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960) (as to the wife, not the husband); Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957); Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941). The plaintiff was apparently still in pain when he executed the release in Ozan Graysonia Lumber Co. v. Ward, 188 Ark. 557, 66 S.W.2d 1074 (1934),

of these cases a good argument could be made that the claimant assumed the risk, even on the subjective standard applied by the majority. Sometimes the argument is accepted in such circumstances, particularly if the amount paid in compensation is more than nominal,[142] or there is a question of liability which indicates that the plaintiff is acting, not with reference to his injury or lack of it, but with reference to the probable lack of liability.[143] In these cases the release is held good and bars the plaintiff. Likewise, if the plaintiff knows specifically of the possibility that the injury is worse than thought, he may still intentionally take his chances in order to get an immediate settlement.[144] In short, whether the plaintiff assumes the risk becomes a question of fact in each case, though many courts decide the question almost as though it were one of law.

2. Unforeseeable Consequences of a Known Injury. Most courts say that in addition to the situation above discussed, there is a separate and distinct situation. Our gangrene case is an example. Patty knows she has a bruise and she knows it is not well when she settles. Arguably, that alone is enough to indicate that she has assumed the risk of further difficulty, but in the situation first discussed it is generally held otherwise. If, therefore, when Patty settles for her bruised toe, it has already become infected with gangrene, the settlement is no bar to further recovery, for she has not assumed the risk of an unknown and serious injury—unless other facts indicate a specific intention to do so. But suppose that Patty has a bruised toe, and at the time of the settlement no infection has set in.

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and Reed v. Harvey, 253 Iowa —, 110 N.W.2d 442 (1961). See also Doyle v. Teasdale, 253 Wis. 328, 57 N.W.2d 381 (1953) (remanded to determine whether the mistake was "mutual"). *But cf.* Nogan v. Berry, 188 A.2d 116 (Del. Super. 1963) in which summary judgment was rendered for the defendant because at the time of the release the plaintiff was in pain plus the fact that she told the defendant she was not hurt. On the same facts as *Nogan,* but with a contrary result, is Casey v. Proctor, 28 Cal. Rptr. 307, 378 P.2d 579 (1963).

[142] See, *e.g.,* Viskovich v. Walsh-Fuller-Slattery, 16 App. Div. 67, 225 N.Y.S.2d 100 (1962).

[143] See, *e.g.,* Schoenfelt v. Buker, 262 Minn. 122, 114 N.W.2d 560 (1962). And, of course, there may be other reasons for settlement which indicate that the settlement is not caused at all by any mistake, but by some private desire of the plaintiff. See, *e.g.,* Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962), where the plaintiff was in a hurry to settle and pressuring his attorney to complete the matter. Whether plaintiff's unexplained private desire to settle should alone be treated as negativing a mistake seems at least arguable, however.

[144] See Mack v. Albee Press, Inc., 263 App. Div. 275, 32 N.Y.S.2d 321 (1942), *aff'd without opinion,* 288 N.Y. 623, 42 N.E.2d 617 (1942).

All Patty has at the moment is a bruise—and of that she is fully aware. Suppose that the infection does not occur until *after* the settlement is consummated. In this situation, most courts say she has assumed the risk as a matter of law.[145] They put this conclusion in several different ways: They say that any mistake that will relieve Patty must be a mistake of fact. A mistake about what *will* happen in the future is not a mistake of fact but only a mistake of prediction. Hence, Patty cannot recover if the gangrene set in after the settlement, but she can if it was present and unknown at the time of the settlement. Another way of saying much the same thing is to say that one assumes the risk—as a matter of law—of "unforeseeable consequences of a known injury." Presumably this is so because everyone must be taken to know that all sorts of medical problems can develop from a known injury. At any rate the distinction is made between a mistake as to the nature or extent of an injury (diagnosis), and a mistake as to the future consequences of a known injury (prognosis).

There are so many things wrong with this distinction that it is easy to criticize, but it should be said that it very often results in a just solution in this difficult area. Nevertheless, it is not consistent with what the courts do in other cases. Plaintiffs often recover even though at the time they settle they know their injuries have not healed—a situation strongly suggesting an intentional assumption of the risk and one involving just as much mistake in "prediction" as the situation discussed here. Once the court is willing to look at the intent of the parties as indicated by all circumstances instead of the objective manifestation of intent embodied in the release, there is no reason to set up a mechanical rule that distinguishes mistakes about injuries from mistakes about consequences of injuries. If we are looking at Patty's intent, it is just as clear that she did not intend to assume the risk in one case as in the other. In both cases of course she intended to assume *some* risk, but in neither did she intend to assume the risk that her injuries were so bad that she would lose a leg. It makes no difference in ascertaining Patty's intention whether the infection came before or after the time of settlement: in neither case did she intend to assume the risk.

Another difficulty with this distinction between injury and its consequences is that, as some courts have pointed out, there is no

[145] See Note, 26 MICH. L. REV. 828 (1928), criticizing such decisions on the ground that the matter is essentially a question of fact.

good way in many cases of separating the two. Suppose plaintiff sustains a bruised back and settles for thirty dollars. A few weeks later she finds she has kidney trouble as a result of the blow to her back. Assuming that the kidney trouble did not develop until after settlement, should it be regarded as a separate injury from the back bruise and therefore as one for which relief should be granted? Or should it be regarded as an "unforeseeable consequence of a known injury," and therefore as a matter that does not justify relief? Or should we simply assume that the injury to the kidney *did* exist at the time of settlement? The Oklahoma court chose the last course.[146] If a knee is injured should torn ligaments be regarded as consequences of the known injury to the knee, or as unknown injuries? The Arizona court thought there was an unknown injury.[147]

It seems obvious that any mistake about future possibilities of an injury is a mistake pro tanto about the injury itself. If the present injury, the bruise, will become infected and cause loss of a leg, the claimant seriously misunderstands the present injury itself if he fails to recognize the possibility of infection and loss of a leg. What a thing *is* is determined partly by what it *does*.[148] Some courts seem to have rejected the distinction between injury and its consequence (or "fact and prediction") as merely involving a "verbal technique."[149] Of course a rejection of the distinction does not imply a rejection of the assumed risk argument; it merely means that whether plaintiff assumed the risk or not is a question of fact to be determined by looking at all the relevant circumstances.

In practice the rule that denies relief when the mistake is about "consequences of a known injury" is much mitigated. For example, in *Ruggles v. Selby*[150] the plaintiff, after settlement, developed a

[146] K. C. Motor Co. v. Miller, 185 Okla. 84, 90 P.2d 433 (1939).

[147] Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962).

[148] See Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

[149] Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957). The Court said: "It is said . . . that we must distinguish between mistake of a material past or present fact, and the mistake of prophecy or opinion concerning the future. The existence of the former, it is said, will justify rescission (or cancellation, or avoidance, or vacating) but not of the latter. Yet we may well ask, as a practical matter (as distinguished from a verbal technique) is it possible to completely divorce diagnosis from prognosis? Is there not an interrelation, even not an interdependence? Is not a doctor's opinion as to prospects of recovery a representation as to an existing factual situation upon which all parties should be entitled to rely?" *Id.* at 339, 86 N.W.2d at 540. *Cf.* Graham v. Atchison, T. & S.F. Ry., 176 F.2d 819 (9th Cir. 1949).

[150] 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960).

speech defect. A brain operation revealed a subdural hematoma from which he never recovered. He was relieved from his release, even though the court recognized the rule about "consequences of known injuries." The court regarded the mistake as one about the "nature and extent" of the injury and not about its consequences. The reason seems to be that the court thought of the hematoma as being in the process of "development" at the time of settlement. In other words it was an "existing" condition in some sense, and therefore came under the rule about unknown injuries. The technique is basically to assume without proof that the injury did in fact exist at the time of settlement so as to come within the more liberal rule. Much the same technique was used in an earlier Illinois case.[151] There the plaintiff had suffered what appeared to be minor scratches and bruises, but she was still suffering pain and having difficulty in walking when the settlement was made. She accepted a settlement which paid her thirty-three dollars for loss of time in addition to her car damage and doctor bill. Later, the plaintiff discovered that her pain was due to blood clots in her leg and that her injury was more serious than anticipated. The defendant argued that there was no mutual mistake because plaintiff's mistake was one about future developments; there was no showing, he said, that the blood clots existed at the time of the settlement. If they did not exist at the time of the settlement, they were future developments or consequences of a known injury and there was no mistake. The court rejected the argument on the ground that "It cannot be doubted the infection was present when the settlement was made, as shown by the swelling and pain. . . ." Thus the court gave the plaintiff an assist on the proof.

Sometimes courts introduce some related complications by distinguishing among these kinds of mistakes: as to the existence of an injury; as to the nature and extent of the injury; as to the seriousness of the injury. Some seem to require a mistake as to the very existence of "the injury"; others seem willing to give relief for a mistake as to the seriousness of the injury.[152] But these unneeded distinctions do not often seem to be determinative in the courts' thinking of the problem of relief or no relief, and perhaps they do not cause as much trouble as they might.

[151] Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941).

[152] See Havinghurst, *Effect Upon Settlements of Mutual Mistake as to Injuries,* 12 DEF. L.J. 1, 6 (1963).

In all of these cases the better analysis would be simply the assumed risk analysis. The question could be simply, "Did the claimant assume the risk?" This question applies to both the risk of unforeseen consequences of a known injury and the risk of unknown injury. Since all courts do not really follow the distinction between diagnosis and prognosis, further lip service merely adds to the confusion.

Factors in Recovery

However the assumed risk problem is dealt with, whether in terms of an unknown injury or in terms of unforeseeable consequences, all courts seem to agree that a number of factors are involved in making the determination whether claimant assumed the risk. If an "objective standard"—the written release—were used, then of course, we could determine the "intent of the parties" by simply examining that document. But since courts in fact are using a subjective approach in which the claimant's personal intent or lack of it is important, some means must be used to prevent relief in every case. Since a claimant could always testify about his subjective intent, this would create a jury case, unless we insist on some more or less objective factors in the evidence (other than the release itself). These are numerous and no final list can be made, but some of the important factors should be discussed.

1. Amount of Settlement. If the defendant paid a substantial sum in settlement, there are reasons to hesitate in giving relief.[153] One is that a substantial settlement indicates a fairly high probability that plaintiff assumed the risk. It indicates serious injuries and probably considerable investigation by the plaintiff. We should hesitate to cancel releases for which substantial sums were paid.

2. Proportion of Settlement to Actual Injury.[154] A related consideration is the proportion of the settlement sum to the actual money value of the injury as ultimately understood. This is important for

[153] See Viskovich v. Walsh-Fuller-Slattery, 16 App. Div. 67, 225 N.Y.S.2d 100 (1962) (more than a "nominal amount" was paid, thus no relief given).

[154] This factor is sometimes ignored and relief is given in spite of a relatively small differential between settlement and actual injury. See Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952). It is, on the other hand, apparently a factor in many cases which make no mention of it as such. See, *e.g.*, Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960) (settlement turned out to be "grossly unjust"). The California court recently said that the amount of consideration paid should be considered in proportion to the amount of *risk* of unknown injuries, and so considered was a factor in determining whether plaintiff assumed the risk of such injury. Casey v. Proctor, 28 Cal. Rptr. 307, 378 P.2d 579 (1963).

much the same reason indicated above. Perhaps this consideration is even more important. If the plaintiff injures his back and settles for 3500 dollars, a fairly substantial sum, it still may turn out later that he is paralyzed and will never work again. If he is paralyzed there is no trouble in seeing that his mistake was a serious one. But if his disability must be rated in terms of percentages, or in terms of pain and suffering or in some other less concrete way, then we cannot always be certain that his mistake was really very serious. If, in such a case, however, a jury brings in a verdict of 50,000 dollars and this is capable of being sustained, then we have a fairly concrete basis for deciding that the mistake was serious enough to justify destroying a compromise. Another way of saying the same thing, is to say that in settling for 3500 dollars the claimant probably never intended to assume such a vast risk.

If the difference between settlement and ultimate actual money "value" of the injury is small, courts are not justified in spending time on the case, in view of the desirability of compromise. Professor Havinghurst has pointed out[155] that the man who settles for 600 dollars and then recovers 1200 dollars when the release is set aside actually profits nothing—the additional sum he received probably went to his attorneys. When the injury is either not serious at all or not grossly worse than the parties anticipated, there is no good reason for setting aside the release.

3. Counsel.[156] If the plaintiff has counsel he is ordinarily well advised of possibilities. Any experienced counsel is sedulous in presenting claims for any *possible* injury. He will milk the defendant's adjuster for every dime he can get on the basis of future loss of earnings, future disability, future pain and suffering, and so on. Thus it may be that where the plaintiff has counsel the amount he received in settlement is partly in payment for future developments. This cannot be safely treated as very weighty a consideration in all cases, however. Defendant's insuror is not buying a pig in a poke; he is

[155] Havinghurst, *Problems Concerning Settlement Agreements,* 53 Nw. U. L. Rev. 283, 312 (1958).

[156] By inference, this is important in a number of cases involving both misconduct and mistake. It is sometimes explicitly recognized as in Viskovich v. Walsh-Fuller-Slattery, 16 App. Div. 67, 225 N.Y.S.2d 100 (1962). For similar reasons it is important to know whether the settlement was *negotiated* or merely casual. Thus in Casey v. Proctor, 28 Cal. Rptr. 307, 378 P.2d 579 (1963), defendant's insuror settled by mail. In granting relief, the court emphasized, among other factors, that there was no negotiation and bargaining.

paying, if at all, for known injury plus fairly predictable or doubtful future possibilities. If the future possibility is fairly predictable or in doubt, then the claimant is assuming the risk. But he is not assuming the risk as to really unanticipated future developments, regardless of the presence of counsel or how much the insuror pays. Still, the presence of counsel tends to assure the courts that plaintiff was well advised, and probably tends to expand the limits within which releases will be approved.

4. Claimant's Intelligence.[157] The claimant's intelligence and experience are also important. If plaintiff is quite intelligent and experienced he may appreciate a risk which an ordinary man would not appreciate. If he does appreciate the risk, he may knowingly assume it. The doctor who gets a bruised toe surely may be expected more than a layman to appreciate the risk of gangrene.

5. Whether Liability Was in Issue. If, at the time of the settlement, there was an issue of liability between the parties, the plaintiff may be willing to accept what later appears to be a very small settlement. This may be because the plaintiff fears that he will not do well before a jury. If this is so, several reasons might be given for refusing later to set aside the release. It might be said that this evidence shows the plaintiff intended to assume the risk; or that he made no mistake at all, since he may have recognized the possibility of future difficulties and still decided to settle to avoid the liability problem; or, that the mistake is not basic[158] and hence not sufficient for avoidance of the settlement; or it might be said that the mistake was not "material," in the sense that it did not *cause* him to act. Whatever the terminology, it must always be recognized that in spite of a liability issue at the time of settlement, it is still possible that a claimant may have made a mistake for which relief should be granted. It is still possible that he would not have settled except for a complete misestimate of his injury or its future course. Therefore, the fact that liability was in issue, is, like the other matters discussed in this section, only one factor to be considered.

It perhaps should be said that there may be related questions which involve much the same points. It may be that liability was not in issue but that, for reasons of his own, an adequately informed and represented plaintiff still wishes to press for immediate settlement.

[157] Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957); Viskovich v. Walsh-Fuller-Slattery, *supra* note 156.

[158] *Cf.* RESTATEMENT, RESTITUTIONS § 9 (1937).

Again in such a circumstance, it may be that he acts to settle, not so much because of a mistake as to his injury, but for some other reasons of his own. If this can be established, then it may be said that the plaintiff either made no mistake or that he assumed the risk. It may be dangerous to say that a mistake about injury did not cause the settlement, however. A mistake about the injury still may have played a substantial part in the plaintiff's desire for immediate settlement, even though he had other motives of his own. Perhaps the best way of treating this problem is that of the Restatement[159]—by asking whether the mistake is "basic" or not. If the plaintiff was primarily motivated to settle by other reasons and was not concerned with his injury, then the mistake would not be basic.

When the plaintiff settles largely because of an issue of liability, that is, because he fears that he may lose his case if it is tried to a jury or court, there is an especially sound reason for refusing him relief. A settlement made under such circumstances is very likely as just a settlement as can be made between the parties. The chance that a court or jury could do any better justice is very slim indeed. If plaintiff is represented by counsel (and perhaps this reasoning does not apply unless he is) the chances are good that counsel on both sides had very accurate estimates of the jury possibilities of the case. Any later attempt to upset the settlement may often raise serious doubts about the good faith of the plaintiff, though certainly not always. Thus, more because of this reason than because of any technical argument concerning assumed risk or the like, courts should be most hesitant to upset settlements made where liability was in issue and the plaintiff was represented by competent counsel. They should not be rigid—but they should be as hesitant as the policy indicates in the facts of the case.

This is an issue that ought to appear in the cases more often. Defendants may perhaps be guilty of relying too heavily upon obvious but unworkable approaches to this problem such as use of language in the release which asserts (invariably) that liability is in issue. But as has already been seen, the release language is only a minor factor in any event.[160] There should be concrete evidence for

[159] *Ibid.*

[160] It may be much more important in the trial court. One lawyer explained that his personally drawn releases were printed in large letters, "FINAL SETTLEMENT." He did not use the term "release," he said, because he wanted something large enough for a jury to see and understand, so that confusion with "receipt," often engendered by the word "release," could be

the defendant that there was a *genuine* dispute over liability and that such a doubtful liability issue was largely a motivating factor in the plaintiff's decision to settle. Such proof is not easy, of course; but so far as it can be obtained or inferred from facts available, it ought to be in the record on appeal and it ought to be argued.

One way of proving that liability was in issue is to prove that the plaintiff accepted *less* than his actual expenses, or that he accepted a lump sum not based on actual expenses.[161] Unfortunately this mode of proving that liability was in issue does not always work and it may be subject to conflicting inferences. For example, in one case the defendant paid less than the actual expenses of the plaintiff, which would presumably indicate that there was a serious issue of liability; but the court thought this meant that the plaintiff could not have intended to assume the risks, since he received less than his actual expenses.[162]

Any other way of proving that liability was in issue should be used, such as proof of negotiations between the parties or their counsel. Proof that the plaintiff in the present suit actually paid others in the same collision is usually good proof that he was actuated by a desire to avoid liability and that, even had he known of his injury, he would have settled anyway.[163] This conclusion is not inevitable, but it is likely in most cases.

If liability was *not* a question, this fact should work in the plaintiff's favor. Thus, if the plaintiff claims a given amount and is paid the full amount claimed, there is an inference that the parties intended full compensation for the plaintiff's injuries, whatever they were, so that it is appropriate for the plaintiff to make additional claims when he discovers additional injuries.[164] Some courts have apparently not adopted this reasoning and have flatly rejected the notion that full settlement of a property damage claim, at least when

avoided. But in appellate courts, the language itself is not normally interpreted to mean what it says; the plaintiff does not assume the risks in spite of language to that effect.

[161] *Cf.* Reed v. Harvey, 253 Iowa —, 110 N.W.2d 442 (1961) (discussing and explaining earlier Iowa cases); Thomas v. Hollowell, 20 Ill. App. 2d 288, 155 N.E.2d 827 (1959) (no evidence of such, but court says it may be in parties' minds anyway).

[162] Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960); *but cf.* Thomas v. Hollowell, *supra* note 161.

[163] Schoenfeld v. Buker, 262 Minn. 122, 114 N.W.2d 560 (1962); *cf.* Mensing v. Sturgeon, 210 Iowa 918, 97 N.W.2d 145 (1959).

[164] Casey v. Proctor, 28 Cal. Rptr. 307, 378 P.2d 579 (1963); Reed v. Harvey, 253 Iowa —, 110 N.W.2d 442 (1961).

not coupled with a personal injury claim, is any proof whatever that full payment for injuries was intended.[165] These cases are distinguishable, however, and very likely right, because a defendant often pays a full property damage claim of several hundred dollars simply because investigation and negotiation is too expensive to justify any other course. Hence a full payment of a property damage claim, or even a small personal injury claim, does not necessarily indicate an intent to pay for all of the plaintiff's injuries. Unless substantial amounts of money are involved, the defendant should not suffer this adverse inference any more than the plaintiff should suffer an adverse inference when he has accepted less than his full claim where the amounts involved are relatively small.

6. Time of Settlement.[166] If the settlement takes place long after the injury or after the apparent healing period, it will seem very likely that the plaintiff had adequate opportunity to know his own injury. Since disputes must end someday, we must leave some risk upon the claimant. Thus courts are perhaps less likely to permit avoidance of a release if the settlement was made after full opportunity for the plaintiff to know his own injury. The reason, perhaps, is not so much an impatience with the claimant's ignorance as it is a belief that he was *not* mistaken. All of the questions concerning assumed risk and the parties' intent are vague indeed when it comes to proof. A plaintiff who settles a year after his last complaint, we suspect, very well knew his own condition when he settled and further claims are probably not just ones.

7. Time of Bringing Suit. There are a number of defenses that may be interposed if the plaintiff has delayed in bringing suit after the settlement and they are discussed later.[167] But delay is perhaps a factor influencing decisions, apart from the legal doctrines involved in such topics as laches, ratification, or limitation of actions. There is always the possibility that the defendant has been prejudiced. There is small chance that he is able to show it, but any lawyer knows of the likelihood. If the release was procured through mis-

[165] Hutcheson v. Frito-Lay, 204 F. Supp. 576 (D. Ark. 1962); Casey v. Proctor, *supra* note 164; Darensbourg v. Columbia Cas. Co., 140 So. 2d 241 (La. App. 1962); *but cf.* Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957).

[166] Viskovich v. Walsh-Fuller-Slattery, 16 App. Div. 67, 225 N.Y.S.2d (1962). *Cf.* MD. CODE ANN. art. 79, § 11 (1957), releases signed within five days of injury are voidable within sixty days at the plaintiff's option.

[167] See text accompanying notes 194-98 *infra.*

take, not fraud, this chance should be weighed carefully. What is perhaps more important, however, is this: it is very likely indeed that there was no mutual mistake when the settlement was made, for most settlements are made knowledgeably. And this likelihood increases with time, for most mistakes are discovered in a fairly short period. The chances are, therefore, good that there was no mistake at all if the new suit was not brought until long after the settlement. When this is considered in conjunction with the likelihood of defendant's prejudice at delay, it seems apparent that there is not a very good probability that a court deciding the matter much later will have a chance of getting a more just result than that achieved by the parties themselves.

On the other hand, if the plaintiff discovers his condition very soon after the settlement, courts should be more willing to permit avoidance of the release, even if other factors in the case are not very favorable to the plaintiff. This is so because the chance of real prejudice to the defendant is very slight indeed. This approach can be pointed up in a very convincing fashion if we consider what happens under a formal *judgment* (rather than a release). As we have seen, a judgment may be set aside at common law in the judge's discretion (with no provable reason at all) within the term time.[168] In addition, statutes often permit setting aside a judgment for serious mistakes and set some more or less arbitrary limit, such as one year.[169] If the claimant brings his suit within either of the times applicable for setting aside judgments, perhaps that alone ought to be enough to justify avoidance of the release. Surely a release should not have any greater finality than a judgment rendered by a court of record.

8. Form of Settlement.[170] As already mentioned, a judgment is ordinarily treated as a stronger document than a contract. But a consent judgment is treated, for some purposes, like a contract only, though is is given res judicata (and not merely contractual) effect. It is probable that a settlement consummated by a judgment in some form, is "stronger" or more final than a release. Such judgments are seldom attacked on mistake grounds. One reason why judgments

[168] See notes 11 & 40 *supra.*

[169] *E.g.,* N.C. GEN. STAT. § 1-220 (1953); *cf.* N.Y. R. CIV. PRAC. 5015(a)(1). *Compare,* MD. CODE ANN. art. 79, § 11 (1957), where the plaintiff is permitted to avoid a hasty release within sixty days.

[170] See text Part II *supra,* discussing various forms which a settlement may take.

should be less susceptible to attack on grounds of mistake is that they represent action by a court in some degree. In the case of judgments, the mistake may well have to be "extrinsic," a matter not required for attacking releases for mistake. The real reasons, however, seem to be different. One is that counsel is usually present and claimant has had the benefit of his efforts and advice. Formal procedure eliminates haste and too-early settlements. Elements of undue advantage are virtually gone from settlements made by judgment. All in all the chances are very good that the parties considered all angles of the case and decided for quite adequate reasons, that a settlement ought to be made.

9. Language of the Release. As already indicated, the language of the release itself is not given controlling weight. If it were, plaintiff's would never recover, for releases usually provide that they cover all unknown injuries, future complications and almost everything else. Indeed, release language today is so broad that a release intended to cover one of two torts committed by a defendant may be held to cover them both, though they are committed at widely different times.[171] Many courts do say, however, that the language of the release is given *some* effect as evidence or as one factor in deciding whether to give relief. Professor Havinghurst has commended this view as leaving some measure of "freedom of contract" to the parties.[172] It is sometimes difficult to ascribe much meaning to a rule which would give unequivocal language of the release "some" effect. It does not seem unduly rigid to suggest that either it means what it says or that it means nothing at all. It is also difficult to see much freedom of contract left when the parties are permitted to write a clear provision into the contract only to find that it may be treated as merely "one factor" and not as conclusive in the decision. Even very liberal courts, on the other hand, have been able to conceive situations in which the language of the release might be given full effect.[173] Presumably if the release specified in detail that it

[171] *Cf.* Merrimon v. Postal-Telegraph-Cable Co., 207 N.C. 101, 176 S.E. 246 (1934). *But see* Jeffreys v. Southern Ry., 127 N.C. 377, 37 S.E. 515 (1900).

[172] Havinghurst, *supra* note 152, at 12.

[173] Thus in Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957), the court said that the plaintiff, in signing the release, might say: "I may have serious injuries I know nothing about. As to them I will take my chances." *Id.* at 344, 86 N.W.2d at 542. The court also said, however, that such a statement would be given effect only if that was in fact the claimant's intention. *Id.* at 345, 86 N.W.2d at 543.

covered certain injuries that were suspected, that would be enough. But here the defendant would have a dilemma. If he provided in the release that plaintiff was releasing any claims for unknown back injuries, then plaintiff might turn up with an unknown brain injury—and the inference from the specification in the release of "back injuries" would undoubtedly be that unknown brain injuries were not covered. Careful release drafting may indeed assist defendants. But even if the court recognizes that release language may be treated as one factor in the decision, that is seldom much comfort for defendants, for it seems apparent from the cases that if it is a factor, it is a minor one.

At various times and in various ways courts consider all these factors and perhaps others not readily reducible to words in determining whether the plaintiff shall be relieved from his settlement. These factors do not always relate directly to mutual mistake or assumed risk, but they are all important in granting or denying relief. A reading of the cases leaves one with the feeling that in all too many of them adequate proof for both the plaintiff and defendant has not been made on these issues. Other doubts creep in: if these factors really are important, how can they possibly be assessed by a jury, by people who have no means for judging the policy questions involved? And an ever greater doubt: can the cases really be explained by "mutual mistake" as this article and most of the cases have tried to do? Or isn't it, as some of these factors seem to suggest, a matter of balancing the need for finality of settlements against the need for justice?

The Rationale of Relief

The basic theory for relief in such cases as we have discussed in this part is that there was a mutual mistake and that the plaintiff did not intentionally assume the risk of such a mistake. This rationale may explain many cases, but it does not seem adequate in those cases where the risk is clearly assumed, a unilateral mistake is involved, or where the court bases its decision on policy factors.

1. Difficulties With Mutual Mistake. In many cases it seems clear that the plaintiff has assumed the risk of mistake. Even when a rather subjective approach to this question is used, a claimant who knows he is still in pain and is still malfunctioning, surely assumes the risk that he is not well and that he may never get well. A woman sustains an eye injury. Her doctor tells her she is well and she settles.

But even at the moment her doctor assures her that she is well, she admittedly knows better, for she is still having difficulty with her vision. She *must* be aware that her doctor is wrong. Yet the court said she had not assumed the risk.[174] There are, of course, a number of cases essentially contrary in spirit. But there are also other cases which have permitted plaintiffs to avoid releases given while they are still in pain and obviously not well.[175] They surely have made no mistake. They surely have compromised their claim to future developments. And yet relief may be granted. Mutual mistake cannot explain such results.

Doctrine has it that there is no relief for a purely unilateral mistake. In some cases this doctrine is given effect. For example, the plaintiff may not intend to include unknown injury in his settlement, but the defendant most certainly does; he knows perfectly well that future trouble will develop in some cases and that is why he wishes to settle—for future injuries as well as ones now known. Thus the defendant does not mistakenly assume that the only injuries are the ones now known. He assumes, on the contrary, that there is some likelihood that plaintiff will have some further trouble not now known. He makes no mistake, though the plaintiff may. Such a situation was presented in *Doyle v. Teasdale.*[176] There plaintiff, who had been examined by his own doctor and who had been treated for back pain, executed a release of all claims, including future difficulties. He later discovered an injury to his coccyx in the low back, a good deal lower than the source of his previous pain. He brought suit and the trial court set aside the release. On appeal the defendant argued that the release should not be set aside because the mistake was not mutual. He argued that he settled for a "sprained back" which included a sprained back all the way down to

[174] Associated Employers Lloyds v. Aiken, 201 S.W.2d 856 (Tex. Civ. App. 1947).

[175] See cases cited note 141 *supra,* and Prince v. Kansas City So. Ry. 229 S.W.2d 568 (Mo. 1950), where a plaintiff relied on a doctor's statement that his symptoms resulted from a hernia operation, though he knew he had the symptoms prior to the operation. Relief was granted. See note 70 *supra.* See also Warren v. Crockett, 364 S.W.2d 352 (Tenn. 1963) (plaintiff knew there might be further trouble).

[176] 263 Wis. 328, 57 N.W.2d 381 (1953). See also, Havinghurst, *supra* note 152, at 10. Professor Havinghurst concludes that such an argument—that the defendant was not mistaken—is not a good tactical line for the defense. If he is right, as this writer thinks, then it can hardly be said as a practical matter that "mutual" mistake is required as a prerequisite to relief in release cases.

the coccyx. Whatever the *plaintiff* may have meant in settling for a sprained back, he, the *defendant,* meant to include the whole back, including the coccyx. The plaintiff may have assumed he would have no further trouble; but the defendant made no such error. The court on appeal agreed with the defendant. A coccyx was a part of the back, it reasoned, and if it had been sprained, it was covered by the release. Any mistake on the part of the plaintiff was unilateral.

A case like *Doyle v. Teasdale* hews to the doctrinal line that the mistake must be mutual. But it is unusual in this respect. What was said in *Doyle* could have been said in almost any case, namely that the defendant made no mistake. Defendant, through experienced adjusters or lawyers, knows very well that there will likely be further complaints. He does not often assume that plaintiff's only medical problem is the one he knows about at the moment. If the plaintiff believes he will have no further trouble, his mistake is unilateral in this sense. Yet in case after case where this was surely true, relief is granted. That is clearly not consistent with a mutual mistake analysis, for at least in the sense involved in *Doyle v. Teasdale,* the mistake is only unilateral.[176a]

Sometimes courts granting relief attack the unilateral mistake problem in another way. They say that either there was a mutual mistake or there was fraud by the defendant. If the plaintiff believed he knew his total injury and the defendant knew better, the mistake is unilateral, perhaps, but there is fraud on defendant's part in not advising plaintiff. If the defendant did not know better, the mistake is mutual.[177] But this reasoning cannot be applied to a case like *Doyle.* The defendant has concealed nothing, has misrepresented nothing. Indeed the release itself indicates that the defendant is

[176a] Since this text was written the Supreme Court of California recognized the point here in slightly different language: "Although most of the decisions are couched in terms of 'mutual mistake,' this rationale does not satisfactorily explain the case holdings. Invariably, the release has been drafted by the releasee in terms sufficiently broad to include a discharge of liability for unknown injuries. While the releasee is ignorant of the existence of injuries, he is also indifferent to their existence. He seeks a discharge of liability in any event, and it cannot be said that he would not have entered into the release had he actually known of them." Casey v. Proctor, 28 Cal. Rptr. 307, 315, 378 P.2d 579, 587 (1963).

[177] This is a favorite attack on the problem, especially where the defendant's doctor has made an innocent representation. See, *e.g.,* Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952). Applied to such a situation the analysis which pins the defendant on either fraud or mutual mistake makes sense. See, using this approach also, Malina, *Unilateral Mistake of Fact in Personal Injury Releases,* 10 CLEV.-MAR. L. REV. 70 (1961).

concerned about possible future medical difficulty, since it usually specifically provides that such developments are settled by the release.[178] So in a case like *Doyle* the defendant is not committing fraud and has not made a mistake. There are many other cases in which reasoning like that in *Doyle* might be applied, and yet relief is granted for "mutual" mistake. It would seem that the court in *Doyle* took the requirement of mutual mistake too literally.

There is a third reason why the mutual mistake analysis is sometimes unsatisfying. It is that the courts are often considering or appear to be considering policy issues unrelated to mutual mistake. And mutual mistake is not a good doctrinal theory which aids courts in getting at the real policy issues. For example, there is always the possibility that the voluntary settlement of the parties is the best and fairest adjustment that can be made. A mutual mistake analysis does not offer a tool for considering this possibility at all. Other issues—for example the question of whether liability was in issue at the time of settlement—may relate to mutual mistake. But the contrary inferences to be drawn from such issues on the mutual mistake point leave it doubtful how much bearing such issue will have—on *that* point.

Behind the facade of mutual mistake the courts are going about the work of adjusting, the best they can, the "equities" of the unfortunate situation. Mutual mistake, at least in the technical sense, has little to do with their decisions. To be sure, there must be a mistake in some sense—plaintiff's injuries were worse than he thought. But it is not necessarily a mistake in the legal sense that the plaintiff's state of mind was at odds with the facts, for the plaintiff may well have known the possibility of future medical complications, or assumed the risk, and still get relief. Further, many cases grant relief where an analysis similar to the *Doyle* case could have been used to show that the mistake was only unilateral. Finally, mutual mistake, is not a good vehicle for reaching the real issues—and issues which courts actually consider. If mutual mistake is not a good analysis, is there any better?

2. Alternatives to Mutual Mistake. Some courts seem to be working toward a new and different rationale for relief. What that rationale will be, if it is ever achieved, is far from clear, but it looks as if it might discard mutual mistake and assumed risk altogether and

[178] Hence, also, there is a manifestation of assent required for a contract which, in other contexts, would normally bind the plaintiff.

seek new ways for drawing the line between relief and no relief. *Ruggles v. Selby*[179] is a case which may indicate such an effort. Its basic facts are rather similar to most release cases and the court granted relief. It made its obeisance to the mutual mistake approach, but it also said:

> The trend in most states . . . is to apply to releases a doctrine of liberality with respect to the attempts of injured parties to set aside release or settlement agreements which subsequently prove to be grossly unfair and unjust. . . . The trend . . . in those situations where the facts, when finally known, present an unconscionable result, is due in large measure to the fact that these are matters for the chancellor in equity who is vested with that degree of discretion and flexibility necessary to the doing of justice under the circumstances of each individual case.[180]

It could hardly be more certain that the court was not concerned with mutual mistake. It is rather concerned with the total undesirability of the end result, which it labels "unconscionable." It is worth noticing that the "unconscionable result" does not imply unconscionable conduct of the defendant; what this court is saying is that the *result* alone, if extreme, is sufficient to justify rescission. And this is true in a release case though a mere unconscionable result alone would not justify the chancellor in rescinding an ordinary contract.

In an earlier case[181] from the same jurisdiction the court expressed a similar dissatisfaction with a pure mutual mistake approach. "[N]o rationale has been formulated for the special treatment of such cases," the court said. But the court thought that the main thing involved was that the human body was more than "an article of commerce." And, as to assumed risk, the court said that men may be aware that a scratch may lead to a malignancy, but "a man cannot and does not live in dread of these possibilities. He accepts assurances that all will be well, even though ultimate consequences cannot be appraised as in matters involving property or services."

The Michigan Court put it more simply: "We exist solely to do

[179] 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960).
[180] *Id.* at —, 165 N.E.2d at 739.
[181] Clancey v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957).

justice and it shall be done."[182] The opinion of the Michigan Court is an impressive one, but of course it is not true that courts exist *solely* to do justice—they also have obligations to society at large to fashion workable rules for the ongoing of the world's business. It may be a bit too simple to say that it is simply a matter of justice in each case. But in any event these cases express, guardedly perhaps, a dissatisfaction with the mutual mistake approach.

The language of the cases just quoted seems to indicate what might be considered an "equitable" or "humanitarian" approach. There is another, though similar approach, which has already been mentioned. That approach might be called, if it must be called anything, a policy approach. It differs, perhaps, from the "humanitarian" approach just described in that its primary focus is not upon the plaintiff's injuries, but rather upon the whole multitude of problems involved. This, in some respects, is what courts are generally doing, but their task is sometimes complicated because they must write, and perhaps think, in terms of mutual mistake.

The fundamental policies involved are those mentioned before: (1) We should like to see settlements made as final as possible, not only for social convenience, but also because they represent what is apt to be a fair disposition of the matter in many cases; (2) The tortfeasor, not the victim, or society, should pay for the damage caused. Neither of these policies is related to mutual mistake and that is why it is difficult to deal with these cases in terms of mutual mistake.

Another way to look at these policies—and a way which incidentally should lay to rest the ghost of "freedom of contract"—is suggested by Judge Frank.[183] In tort law contract is not very important because the relationship between plaintiff and defendant, or victim and wrongdoer, is not based on contract but on "status"—a relationship recognized and imposed by law, much against the will of the defendant in most cases. There is no reason, except one of convenience, to permit that status to be terminated or altered significantly by contract. The reason of convenience speaks loudly, because we do generally want disputes settled; but it need not speak with authoritative finality. The law that created the status between victim and tortfeasor need not wither away merely because, for convenience, the parties have tried to make a contract. There are, of

[182] Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957).

[183] Hume v. Moore-McCormack Lines, Inc., 121 F.2d 336 (2d Cir.), *cert. denied,* 314 U.S. 684 (1941).

course, many such status relationships which we do not permit to be influenced by contract. Husband and wife relationships cannot be terminated by contract, nor can parent-child relationships. There is no reason to fear the fall of society if the same is said about the relationship between tortfeasor and victim. The fact that the parties have made a contract, then, is relatively unimportant. What is important is that disputes should be settled and settled finally—but not necessarily so if that settlement relieves a wrongdoer from an obligation which the law has imposed upon him.

This approach is not predicated upon personal wrongdoing. It applies equally to defendants whose only liability is respondeat superior or is imposed without fault, as for blasting or ultrahazardous activities. The point is not that the defendant is a bad man, but that the law has for its own reasons seen fit to create for him a status from which he ought not to escape except under conditions permitted by the law in the light of all relevant considerations. Perhaps it is sometimes unjust to hold defendants liable; if so, the substantive rule ought to be changed, but as long as the law *does* impose liability, we need not be concerned if the defendant does not escape it as readily as he likes—except, again, where the convenience of finality outweighs the convenience in making the tortfeasor pay. What has been said here, therefore, applies not only to negligent or intentional wrongdoers but also to any person upon whom the law imposes a tort liability.

With these policies in mind, a somewhat more organized attack can be made on the problem presented by the injured victim who has settled too soon. The first step in such an attack should be to review the factors discussed above—the time of bringing suit, the amount of money paid, and so on. An assessment of these factors should make some reasonable weighing of the policies involved possible. Review of all those factors is not necessary here, but two may be singled out as of extreme importance.

The first is the question of money. How much was the claimant paid and what proportion is it of his "real" injury? Is the difference gross and "unconscionable?" Is it so great that it substantially violates the principle of liability for fault, the principle that the tortfeasor should pay? In most cases this is the really important thing.[184] Perhaps this much is indicated by the North Carolina

[184] *Cf.* Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962), concluding that economic loss of $800 or

authorities which say that "fraud" is shown if the settlement sum was unconscionably small. We cannot, of course, hope for much predictability on this factor. How much is "great" or how little is "small" no one can say. But we *can* say that an obviously insubstantial difference between settlement sum and ultimate recovery ought not to justify relief. As Professor Havinghurst has pointed out,[185] it is bootless to permit a plaintiff who settled for 6,500 dollars to reopen litigation when his injuries are only 10,000 dollars[186] since he will profit little or not at all from the additional recovery due to further expenses of litigation.

Upon the question of money differential between settlement and actual injuries, courts have apparently been much impressed. One way the difference is known to the court is through a jury verdict. If the trial court permits the plaintiff's claim to go to the jury and an award is made, the appellate court has a concrete measuring rod. For example, the plaintiff was paid 500 dollars in settlement and the jury, on avoidance of the release, brought in a verdict for 5,000 dollars. It is fairly obvious that the mistake was serious enough to justify relief. When the question of relief or no relief is a close one, therefore, it seems desirable that a finding be made on the damages point if that is possible. Even if a jury is not used and the question is brought up in an equitable action for rescission rather than in a trial on the merits of the claim, a trial judge should have the benefit of some limited testimony bearing on damages, so that he can estimate the probable extent of plaintiff's true injury and thus furnish a measuring rod with which the appellate court can determine the extent of the injury.

The second factor for emphasis is that the defendant may not have been a tortfeasor at all. The policy justifying relief is largely the policy that the tortfeasor should pay. But if the defendant is *not* a tortfeasor at all, that is another matter again. Yet, when full injury is known, he will likely seem to be a tortfeasor in the jury's eyes even if at the time of the settlement no one would have thought so.

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more was the crucial figure of shock for most families. Losses of less than this amount, those writers felt, could be absorbed without really serious disruption of the family.

[185] Havinghurst, *supra* note 155.

[186] Ciletti v. Union Pac. R.R., 196 F.2d 50 (2d Cir. 1952). Possibly the $10,000 recovery was in excess of the $6,500 paid on the release, however. If the decision is based on *fraud,* relief ought to be given without regard to the amounts involved.

More important, delay in reaching the courtroom because of a settlement may have prejudiced the defendant seriously on this issue. But for lost evidence the defendant might have shown that he was free from fault. The time element thus becomes of great importance. If the plaintiff presents his claim a long time after settlement, even though he is within the statute of limitations, this factor alone should have great weight in upholding the settlement. This is so, as already mentioned, not only because of prejudice to the defendant, but because as time goes on and proof is lost, and witnesses forget, there is an ever greater possibility that the original settlement was a better adjustment than the court can now, at this late date, make.

Whatever analysis is used on these "mistake" cases, all the factors must be considered and assessed. And there is no easy nor predictable way to the results any more than there is on any other "fact" question.[187] In a good many cases it can be found that the policy of finality must bow to the policy that makes the tortfeasor pay, and that decision must be made anew in each case.

Other Mistakes

The discussion of the mistake problem has thus far involved mistakes by the plaintiff as to his injury. He can, however, make other kinds of mistakes,[188] and substantially the same principles should apply. For example, the plaintiff may believe he is signing a receipt rather than a release.[189] A mistake of this sort is apt to be serious but it does not necessarily justify relief. If it is non-negligent it may prevent the formation of a contract at all—that is, there may be no "meeting of the minds," or to speak "objectively," no mutual manifestation of assent. In such a case, ordinary contract doctrines may control. But it is also possible that a contract was formed in the objective sense, that is, that defendant reasonably believed from plaintiff's actions that plaintiff had agreed to sign a release. In that event, plaintiff may be denied recovery on the simple

[187] Whether judge or jury should decide mistake cases is discussed in Part VI *infra*.

[188] The classification used in Keefe, *Validity of Releases Executed Under Mistake of Fact*, 14 FORD. L. REV. 135 (1945), is generally used: mistakes as to the nature of the instrument, mistakes as to the content of the instrument, and mistakes of fact leading to the execution of the instrument, as for example, mistakes concerning the plaintiff's injury.

[189] *E.g.*, Miller v. Judice, 149 So. 2d 715 (La. App. 1963).

ground that the mistake was unilateral, not mutual.[190] On the other hand, if the defendant knew of plaintiff's mistake and said nothing, he is guilty of fraud or at least misconduct sufficient to justify avoidance of release. Behind these doctrines is again the same desire to make settlements final. They need not be as final as judgments, but they do need to be as final as civilized justice may permit. If the plaintiff is negligent, the settlement might well be permitted to stand, as it usually is where plaintiff failed to read the release. This is so, not because he is guilty of a wrong, but because he and only he is responsible for the situation and he should not be permitted to increase the chaos of re-opened settlements if he could reasonably have prevented such a situation. This means we are not concerned with the plaintiff's "negligence" as it is ordinarily defined, for that embodies an objective standard of conduct. What we ought to be concerned with is whether *this* plaintiff could reasonably be expected to have avoided the misunderstanding. A second reason why a "negligent" plaintiff should not be permitted to avoid his release due to his own misunderstanding is that he probably *did* understand it. If, after reading it and asserting at the time of settlement that he understood it, he later asserts he did not understand it, we are inclined to believe he told the truth the first time. Of course, evidence in a particular case may show otherwise, but standing alone, his recent admission to stupidity does not warrant much faith.

If the plaintiff is, for some reason, justified in his mistake—if it is a reasonable one for him to have made, given his intelligence and experience—then the factors discussed above ought to be considered. Was the mistake serious enough to warrant re-opening the dispute? Did the plaintiff delay? And so on. There may be more certainty in cases where the mistake is one about the nature of the paper signed, because such mistakes are often "negligent." But though it may be a relief to find such relative certainty, the task of judging in each case the value of finality as against the value of justice cannot be fairly avoided.

V. Basic Defenses

The finality of settlements is much enhanced by several defenses that may prevent relief to the plaintiff. As in the case of "mutual mistake," there are doctrines governing some of these defenses that

[190] See on the whole subject, the concurring opinion of Judge Frank in Ricketts v. Pennsylvania R.R., 153 F.2d 757 (2d Cir. 1946).

may not always relate directly to the real questions involved—the need for finality and the need for justice between the parties.

Delay in Seeking Relief

1. Statutes of Limitation. Suppose a plaintiff is injured in 1950 and has three years under the applicable statute in which to bring his claim. In 1952 he settles with the defendant, both parties being mistaken as to the seriousness of the plaintiff's injury. In 1954, after the statute has run, plaintiff discovers that his injury is worse than he originally believed. May he be relieved of his mistake and prosecute his original claim? If the release was procured by the defendant's fraud, the statute might be tolled[191] and plaintiff permitted to recover. But there may not be a good reason for such a result when mere mistake is involved, and perhaps the answer is simply that the statute of limitations has run and plaintiff is barred.

Whatever the answer is, it must be the same regardless of the procedure plaintiff uses for attacking the release and seeking recovery. If he brings suit at law on the claim for his personal injury, the defendant will normally plead the release as a defense; if the statute has run, the defendant will also plead the statute of limitation. The plaintiff can not circumvent such an answer by suing in equity to rescind. It is true that equity courts often do not feel bound by the statute of limitations, and the defense of laches would not be good absent delay in prosecuting a known right. Even so, equity could not solve the whole problem, for even if the plaintiff were not barred from equitable relief by the statute of limitations, he would still be barred when, after rescission of the release, he sought to recover on the original personal injury claim—a claim at law that is barred by the applicable statute even if equity rescinds the release. Thus whether the plaintiff proceeds at law or in equity, the answer must ultimately be the same.

What the answer is, however, is not entirely clear. Sometimes there is talk of tolling the statute of limitation for mistake as well as for fraud, but there seems no pressing reason for such a result; and it is clear that the plaintiff who mistakenly assumes he is not injured

[191] This will not always be so. Presumably, unless the fraud amounts to a concealment of a cause of action, the statute of limitations will not be tolled. In such a situation, the plaintiff might well turn to the tort action of deceit. Certain statutes of limitation are construed to prevent any tolling. See Wichita Falls & S.R.R. v. Durham, 132 Tex. 143, 120 S.W.2d 803 (1938).

and does not settle at all, is barred at the end of the statutory period. Because he would be barred at the end of the limitation period if he made *no* settlement, it is tempting to argue that the plaintiff who *does* make a settlement under a mistake as to his injury should be in no better position. The arguments seems to be a sound one.[192] It might be argued, however, that when the plaintiff settled under a mistake he was lulled to sleep; that if he had not settled at all, he might well have brought his action within the limitation period and might have made no mistake about his injuries. This argument should be given weight—but only if it has substantial proof to back it up. If the plaintiff proves that he was lulled to sleep, that he would probably have brought his action within the limitation period but for the mistake, and that he would at that time have recognized the true extent of his injury, he might well be permitted relief. But unless he makes such proof, the mistaken plaintiff ought to be barred by the statute along with the plaintiff who has not settled at all.

There are in some states special statutes of limitation applicable to a "cause of action" for mistake.[193] It seems clear that these have no application to a compromise settlement situation. Even if the plaintiff might get relief from the release because he seeks it within the time specified in the "mistake" statute of limitation, he would still be faced with the statute of limitation applicable to his *original* cause of action. It is possible to argue that if the plaintiff brings his action for relief under the mistake statute of limitation, that should carry with it relief from the limitation on his original cause of action. Another way to say the same thing is to argue that when the legislature permits relief from a mistake within three years after discovery of the mistake, it means to give *full* relief. The plaintiff should be restored to his original position, the argument runs, and that includes his original position vis-à-vis the statute of limitations on the personal injury claim. Perhaps such an argument might be successful in an extreme case, but it would permit a great lapse of time between original injury and ultimate disposition of the claim. Such a great lapse of time would indicate a high probability of prejudice to the defendant and a small probability that the plaintiff's claim is

[192] This seems to be the court's approach in Johnson v. Chicago, M. & S.P. Ry., 224 Fed. 196 (D. Wash. 1915).

[193] *E.g.*, ARIZ. REV. STAT. § 12-543 (1956); CAL. CODE CIV. PROC. § 338; IDAHO CODE § 5-218(1); N.C. GEN. STAT. § 1-52 (1953).

really justified. It seems likely, therefore, that when the original statute of limitations has run, the mistaken plaintiff will be barred.

2. Laches and Delay. Even if the statute of limitations has not run, the plaintiff's delay in seeking relief from his release may bar him. If his suit is in equity, the doctrinal tool used by the defendant will ordinarily be laches—the plaintiff's delay in enforcing a known right and resulting prejudice to the defendant.[194] The same result should obtain if the plaintiff sues directly on his claim for personal injury at law and the defendant pleads the release as a bar.[195] Laches will not generally be found unless there is actual prejudice to the defendant, the plaintiff has discovered his mistake, and thereafter delayed unreasonably.[196] Apart from the equitable doctrine of laches, however, there is good reason to bar relief for delay that might not constitute laches. Thus unreasonable delay in avoiding a transaction after the plaintiff knows the true facts may be enough to bar relief apart from laches even if no prejudice to the defendant is shown—provided it is "likely" that there was such prejudice.[197] Under either the doctrine of laches or the doctrine of "delay," there is some fault on the part of the plaintiff—he must have delayed unreasonably.

3. Innocent delay, with prejudice to defendant. Suppose the plaintiff settles and later, within the statute of limitation, discovers his injuries are far more serious than he thought at the time of settlement. Suppose further that as soon as he discovers his mistake, he brings an action, so that he cannot be charged with unreasonable delay. Even under these circumstances the defendant may be prejudiced. Witnesses may have died or may have forgotten important details. Prejudice may result in many other less obvious

[194] See generally McCLINTOCK, EQUITY 71 (2d ed. 1948); Friedman, *Delay as a Bar to Rescission*, 26 CORNELL L.Q. 426 (1941).

[195] See Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953), recognizing laches in a legal action where plaintiff brought suit on the original tort and defendant pleaded the release. Friedman, *supra* note 194, deals separately with the defense of laches and that of delay, as does the Restatement of Restitution. See RESTATEMENT, RESTITUTION § 64 (delay), § 68 (ratification), and § 148 (laches) (1937).

[196] Laches was found without any showing of prejudice to the defendant where the statute of limitations had run in Johnson v. Chicago, M. & S.P. Ry., 224 Fed. 196 (D. Wash. 1915).

[197] RESTATEMENT, RESTITUTION § 64 (1937). Compare the section on laches, § 148, which requires a proceeding in equity and speaks of actual hardship to the defendant, not merely the likelihood of such hardship. See, discussing the difference, Friedman, *supra* note 194.

and less tangible ways woefully familiar to any defense lawyer. Is this kind of prejudice—for which the plaintiff is not responsible—enough to bar relief? The normal doctrines of laches and delay do not apply. The cases do not suggest much help for the defendant here. Perhaps the reason is that when the plaintiff settles, *both* parties necessarily run the risk of mistake and the risk that, if there *is* a mistake, testimony may have evaporated without anyone's fault. This is a risk to the plaintiff as well as to the defendant. If the plaintiff's testimony is lost, as it sometimes will be, he is not for that reason alone permitted to rescind where rescission would otherwise be denied. The defendant should be in no better position on that issue than the plaintiff; he should not be permitted to avoid a rescission that would otherwise be granted merely because testimony has been lost. Each party must run his own risks of prejudicial change in the circumstances.

This reasoning, however, does not necessarily apply where the defendant has lost testimony relating to his status as a tortfeasor. The basic reason for permitting avoidance of the release in many cases is that the *tortfeasor* should not escape the liability the law has imposed upon him. But this assumes he was in fact a tortfeasor, legally liable in the first instance. Of course this is not always so. Many defendants choose to settle and take a release from the plaintiff, not because they are guilty, but because a settlement is more expedient and cheaper than trial. The defendant who settles quickly may very well avoid making the investigation he would otherwise have made. He may lose testimony that will show he is not, in fact, a tortfeasor at all. If this is so it would be unfair to make the innocent defendant run the risk of losing evidence as to the liability. It would serve no policy of the law to do so. Lost evidence on the damages is one thing; but lost testimony as to the defendant's liability in the first instance is something else altogether. If, therefore, the defendant can offer reasonably convincing evidence to show that he is prejudiced by innocent delay on the issue of liability, no relief should be granted the plaintiff. Of course, the defendant can never prove his original defense, for if he could, there would be no prejudice. It should be enough that he shows a reasonable likelihood that he has been seriously prejudiced on the liability issue. The policy favoring finality of settlements should weigh enough in the balance to protect the defendant in this situation.[198]

[198] In Allison v. Chicago Great W. Ry., 240 Minn. 547, 62 N.W.2d 374

4. Affirmance and Ratification. Apart from statutes of limitation or prejudicial delay, the plaintiff may also delay in such a way as to indicate that he intends to be bound by the release—to affirm it.[199] This may be done by any words or conduct that indicate such a choice. If a plaintiff accepts or retains benefits of the settlement after knowledge of his mistake or of the fraud, this will be sufficient to indicate an affirmance of the transaction—provided a normal person would have repudiated the transaction earlier.[200] It is, therefore, important that the plaintiff act as quickly as possible when he finds, or suspects, a serious mistake or fraud. On the other hand, it must always be remembered that mistakes of a medical nature may dawn slowly. Since rescission would not be allowed for a trivial mistake, the plaintiff is entitled to sufficient time to realize not only that he mistook his injury, but also that he made a *serious* mistake.[201]

The doctrines of affirmance, laches, and delay are often good tools for achieving justice between the parties. But they do not always permit sufficient flexibility to effectuate the policy of finality in settlements. In all release cases involving mistake it should be

(1954), one of the doctors who had treated plaintiff and on whose testimony defendant relied had died. Defendant urged that its position was therefore prejudicially changed and relief should be denied. The court did not discuss specifically the effect of the death of the doctor; the plaintiff was granted relief. In Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953), two of the doctors on whom defendant relied in settling had died. The court held it was error to submit an issue of laches since there had been no unreasonable delay by the plaintiff after discovering his mistake.

[199] See RESTATEMENT, RESTITUTION § 68 (1937); Friedman, *supra* note 194.

[200] RESTATEMENT, RESTITUTION § 68, comment *b* (1937). See Presnell v. Liner, 218 N.C. 152, 10 S.E.2d 639 (1940) (plaintiff spent a part of the settlement money after learning of the alleged fraud of defendant). But the plaintiff must be aware of the mistake before he can be charged with an affirmance. K. C. Motor Co. v. Miller, 185 Okla. 84, 90 P.2d 433 (1939). In Miller v. Judice, 149 So. 2d 715 (La. App. 1963), plaintiff thought the release was only a receipt for payments to date and this was reasonable. However, plaintiff thereafter endorsed checks which contained an unequivocal release. This was held not to bar plaintiff's claim of mistake as to the original release even though the checks contained a clear statement that they were in full payment and for final settlement, since, thereafter, defendant sent further checks for further claims. Presumably, if the issue had been raised immediately after plaintiff's signature on the check and before the other checks were sent, "ratification" or affirmance would have been found. And presumably the transaction is now un-ratified. *Cf.* the case of the good man who, having scratched out his eyes in the bramble bush, went back to scratch them in again. Nevertheless, the case seems correct because it comports with the actual agreement of the parties, as evidenced by subsequent payments from the defendant.

[201] See Union Pac. R.R. v. Zimmer, 197 P.2d 363 (Cal. App. 1948).

remembered that delay is one factor (though no more than that) in deciding whether the plaintiff should be given relief. It should be a factor even if none of the technical doctrines mentioned can be invoked. This is so not merely because the defendant may be prejudiced. It is so because if the alleged mistake is not brought to light soon after settlement, the chances of a court's doing justice are slight. It is so because if the mistake is not litigated soon after settlement it is reasonably likely that no mistake was made, or that it is not serious enough to warrant disruption of the final settlement. Thus courts should not feel unduly limited by the doctrines of delay and affirmance. In any case the decision should be made for relief only after the factor of delay is considered as one factor among others.

Tender

It is sometimes stated as a general rule that as a prerequisite to rescission the plaintiff must tender to the defendant whatever he received in the transaction—that is, he must put the defendant back in the position that existed prior to the transaction by returning the money or other consideration received.[202] There are so many exceptions to this principle,[203] that its generality may be doubted. All of the exceptions cannot be reviewed here, but it should be sufficient to indicate the main lines of thought involved in the requirement of tender.

One, and perhaps the main, reason for the requirement is to prevent the plaintiff's unjust enrichment. He should not keep what he received in settlement and also be allowed a full recovery. If he sued at law on his original tort action, the theory was that he had already rescinded by restoring the consideration to the defendant. This needed no court intervention and the rescission was complete. Hence, he could sue in "law" on the original tort. But if he had not restored the consideration or offered to do so, then there had been no "rescission at law" and the release was still valid to bar his claim. This is partly based on pure theory of rescission at law, that the parties rescind without court intervention, and partly based on the assumption that, if the plaintiff were permitted to proceed, he would be unjustly enriched because the law court could not deduct the

[202] See RESTATEMENT, RESTITUTION § 65 (1937); Immel, *The Requirement of Restoration in the Avoidance of Releases of Tort Claims*, 31 NOTRE DAME LAW. 629 (1956). A number of cases are collected in Annot., 134 A.L.R. 6 (1941).

[203] *Ibid.*

settlement money from the ultimate judgment or render a conditional judgment. But today procedure is not so rigid, and courts frequently do permit a plaintiff to recover and then deduct from the verdict the amount paid in settlement. Hence, today, even at law, plaintiff is not unjustly enriched, and the older views which made a rigid separation of law and equity for this purpose seem quite anachronistic and unneeded.[204] If the suit was in equity the theory was different. The theory was, not that the plaintiff had already rescinded, but rather that he was asking the equity court to cancel the release for him. Until the release was cancelled or rescinded, there was no need to restore any consideration and the equity court could require restoration as a condition of relief. This would avoid unjust enrichment, so that generally in equity, where the action was solely to rescind the release, no tender was required.[205]

If the basis of the rule requiring tender is to prevent unjust enrichment then there is no reason to require tender today, since unjust enrichment of the plaintiff may be prevented in equity by a conditional decree or in law by deducting the settlement money from the plaintiff's verdict if he gets one.[206] For this reason, presumably, the Restatement of Restitution excepts the plaintiff from the tender requirement if the consideration "consists of money which can be credited if restitution is granted."[207] In most jurisdictions such a credit should be possible[208] and since most releases do involve money payments, this exception, if followed, should operate in the majority of cases to relieve the plaintiff of any tender as a prerequisite to his action for relief, whether it is in law or equity. Courts have relieved plaintiffs of the tender requirement in a good many situations, as where the plaintiff has spent the money, or finds restoration impossible, or where tender would have been refused by the defendant in any event, or where there was fraud in the execution, or in some cases where there was any kind of fraud at all.[209] Plaintiff therefore

[204] *Cf. In re* Meiselman, 105 F.2d 995 (2d Cir. 1939).

[205] See Immel, *supra* note 202.

[206] Arguably this might be different where consideration for the release is not money but something not capable of valuation.

[207] RESTATEMENT, RESTITUTION § 65(f) (1937).

[208] Seaboard Air Line R.R. v. Gill, 227 F.2d 64 (4th Cir. 1958) (refusing to deduct consideration on the ground that jury had already done so); Preddy v. Britt, 212 N.C. 719, 194 S.E. 494 (1938) (deducting release consideration from jury's verdict).

[209] See authorities cited note 202 *supra*. A succinct and useful statement of many exceptions is found in Note, 11 U. FLA. L. REV. 362, 369-70 (1958).

has an effective collection of shields to fend off any claim that he must fail for lack of tender; and of course he should use them all, since tender is still a theoretical requirement in most jurisdictions when the action is "at law" and failure of tender may cost the plaintiff his relief.[210]

But all this assumes that prevention of unjust enrichment is the only reason for the tender requirement. Sometimes it is suggested that there are other reasons. For example, it is said that the tender requirement may operate to discourage plaintiffs from attacking releases too readily, and that the requirement should be maintained on that ground,[211] even though the original theory behind it has no application. This argument assumes that plaintiffs will recoil at the first obstacle thrown in their paths—a proposition that hardly seems demonstrable in view of the successful plaintiff attacks on other rules that have not suited them. Thus there may be some doubt whether the tender requirement really discourages plaintiffs from seeking relief, especially since they have a good chance of coming within some exception. Furthermore, it would be grossly unfair to prevent relief which a plaintiff deserves otherwise, merely because he innocently spent the money paid for the release and cannot return it.

However, though a tender requirement may not discourage plaintiffs, they may be encouraged by the fact that, if no tender is required, they can risk nothing to gain much. This is perhaps what is really objectionable and this is the thing that may encourage undue attacks on the finality of settlements. But the tender requirement is a poor way to meet this objection. For one thing, a plaintiff knows very well that his tender will almost always be rejected. When it is, he may safely proceed with his attack on the settlement without further risk. If he loses, he still has his settlement; if he wins, he may obtain additional compensation without any risk. Some other way needs to be found to meet this problem, for the tender requirement does not do so. A practical way to meet it would be to permit either a

Some statutes also relieve plaintiff of the tender requirement, *e.g.*, N.Y. R. CIV. PRAC. § 3004. See the discussion in Patterson, *Improvements in the Law of Restitution*, 40 CORNELL L.Q. 667 (1955). The possibility, in fraud cases, of affirming the release and suing for deceit is discussed in the text accompanying note 72 *supra*. If this is permitted, no tender is necessary.

[210] See Havinghurst, *Problems Concerning Settlement Agreements*, 53 NW. U.L. REV. 283, 311 (1958).

[211] See Havinghurst, *supra* note 210, at 312; Immel, *supra* note 202, at 632.

civil fine or all actual costs of defendant (not merely "court costs") to be levied against a losing plaintiff, who brings action for relief on clearly inadequate grounds. This should discourage the plaintiff who wishes to try his luck without any real basis for his action. But it would not penalize the plaintiff who has an honest claim nor prevent relief if he cannot make a tender.

Quantum of Proof

It is frequently said that a release will not be set aside for fraud or mistake unless the person attacking the release can prove the invalidity by clear, cogent, and convincing evidence or some similar quantum of proof.[212] It is doubtful whether such a rule means much, if anything, to juries,[213] since they have very little with which to compare the evidence, and probably are unable to distinguish the difference—if there is one—between preponderance of the evidence and clear and convincing proof. But if the standards mean nothing to juries, judges believe that they can discern a difference between evidence that preponderates and that which is clear and convincing, and plaintiffs sometimes lose cases because courts make such distinctions.[214]

Other jurisdictions use the ordinary preponderance standard for proof, eschewing the special "clear and convincing" requirement altogether.[215] An interesting variation is the requirement of clear and convincing proof where the action is to *reform* a release, but the requirement of preponderance of the evidence when the action is to set the instrument aside.[216]

So far as juries are concerned, any extra proof requirement in these cases probably makes no difference. Yet it does seem desirable to call attention to the policies favoring finality of settlement in some way, and the requirement of clear and convincing evidence probably

[212] Reinhardt v. Wilbur, 30 N.J. Super. 502, 105 A.2d 415 (App. Div. 1954) (mistake); Campbell v. Campbell, — W.Va. —, 124 S.E.2d 345 (1962) (fraud).

[213] See Note, 1959 WIS. L. REV. 525. Testing mock juries, the authors found that jurors were unable to distinguish the standards and in any event did not apply them.

[214] See cases cited note 212 *supra.*

[215] The federal courts, following a hint in Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952), seem to agree that the quantum of proof required is merely a preponderance of the evidence. See, *e.g.*, Allison v. Chicago Great W. Ry., 240 Minn. 547, 62 N.W.2d 374 (1954).

[216] Maynard v. Durham & So. Ry., 251 N.C. 783, 112 S.E.2d 249 (1960), *rev'd on other grounds,* 365 U.S. 160 (1961).

does suggest to judges, though not juries, that an attack on a final settlement is not something to be accepted lightly. That does not mean that any formal standard of proof is the way to emphasize the policy problem, however. Judges can, like the rest of us, slip all too easily off into a mechanical repetition of the proof standard without necessarily considering the policies involved at all. Perhaps, then, the additional burden placed on plaintiffs in some jurisdictions does not really serve a good purpose, except to permit judges, under the guise of measuring the standard of proof, to decide the matter for themselves—that is, to avoid the effect of jury verdicts. Perhaps this device to avoid jury decision is desirable, since juries are not really qualified to judge the policy factors involved; but at best it can only assist the judge, and when a jury is charged as to a special standard of proof, confusion ensues without profit. It may be better to find another and more straightforward way to eliminate juries from consideration of policy questions involved in release cases and to eliminate the special proof standards altogether.

VI. Some Suggestions and Conclusions

Juries

Various factors are used in deciding whether relief should be granted for "mistake." The mere fact of mistake itself is not decisive. Who looks at all the factors that should be considered? Who examines the policies of finality and justice? Is it judge or jury? In most jurisdictions the plaintiff simply files his law suit as if a release had never been given. Defendant pleads the release in defense. The case then proceeds to trial, usually a jury trial. The jury decides (a) the liability issue, *i.e.,* whether defendant was at fault, and (b) the release-validity issue, *i.e.,* whether the mistake, fraud, or duress was the kind that will permit relief. Under this procedure it is obvious that the jury is permitted to decide a complex matter of policy—should the needs of justice outweigh the needs of finality? It is equally obvious that they cannot be instructed feasibly on all the factors to be considered, and that they are not equipped by training, experience, expert testimony, or judicial instruction to make such policy decisions. Juries often, of course, do make policy decisions. When a jury decides that defendant's conduct was negligent, it is really evaluating his conduct and deciding whether it is of the kind the community permits or should permit.

For such decisions jurors are exceptionally well equipped. But for the decision on whether the whole system of settlement should afford finality in a particular case, jurors are usually quite unqualified. Only a judge should make such decisions. This, of course, is what frequently happens—judges take cases away from juries on the ground that "as a matter of law" the mistake involved is not sufficient to justify relief. But that is not the same thing in all cases as the judge deciding for himself. This is especially obvious on the appellate level. Judges in appellate courts do not hear and see witnesses. And they can only decide that the case is not one for the jury to decide. Trial judges need to have a bigger hand in such decisions. They should decide whether relief is to be granted on the basis of all the factors that are relevant to the conflicting policies involved.

Unfortunately, the jury systems of most states cannot easily be changed in this respect. However, in many states it *is* possible to have separate trials of the two basic parts of the case—of the release-validity issue and of the liability issue. The first trial may be by a judge sitting without a jury and may deal solely with the release question—whether it is valid. If it is not valid, then the second trial may be held in which the release need not be mentioned and a jury will decide the issue of whether the defendant was at fault. Separate trials have disadvantages in many cases. For example, there may be a duplication of proof, for plaintiff will have to show, in the trial on the release-validity, that he was seriously injured; if he does not, there will be little or no justification for avoiding the release. He will then have to show proof of injury again to the jury. But though there is some duplication, it is probably counterbalanced by cases where a single trial on the release issue will terminate in favor of the defendant, thus avoiding the necessity for the expense of a jury and a full scale trial on the liability issue.

No one can say in advance that all release cases ought to have the issues severed in this manner, and in some jurisdictions it would not be possible to do so because of a jury trial requirement even on "equitable" issues. But, where severance is possible, the trial judge should recognize that the jury is not really an appropriate judge of the policies involved in release cases. In the light of that consideration, severance would seem appropriate in most cases.

Civil Fines

A civil fine, or imposition upon the plaintiff of a charge equal to all or part of defendant's actual costs in defending an unwarranted claim for relief would be an appropriate substitute for the outmoded and unworkable requirement that plaintiff restore, or offer to restore, the consideration obtained under the release. A statute imposing such potential liability upon a plaintiff would do more to discourage unreasonable demands than anything else. It might be expected to do much to preserve or increase the finality of settlement, while at the same time permitting relief where it is appropriate. Under such a statute a plaintiff who obtained 500 dollars under a release and proved only 1,000 dollars in damages should be denied relief, and also, in the discretion of the trial judge, be required to pay defendant's expenses in defending the suit. Of course, such a statute, if passed, ought not to be invoked against a plaintiff who has any reason to hope for relief. If he merely mis-estimates his chances of winning, he need not be penalized. The point of the statute would be to force him to make a careful estimate and to eliminate the something-for-nothing situation that is now possible. It would be hoped that such a statute would never be applied, for if it worked it would eliminate unreasonable claims rather than merely punish those who have already made them. In order to assure that the plaintiff himself is aware of the risks he takes when he seeks to re-open a released claim, such a statute should require the defendant, if he wishes to take advantage of the statute, to serve notice of the potential claim upon the plantiff personally.

The trial judge in most states can undoubtedly be relied upon to apply such a rule wisely and without oppression against a plaintiff who has already suffered a serious loss. If so, the rules for tender and restoration with their attendant complications and exceptions could be avoided and a workable way to discourage unfair attacks on releases substituted.

Time Limitations

A release is one form of settling a legal dispute. A judgment is another form of doing the same. A judgment is one of the most final and certain documents known to the law, yet it may be set aside, at least for "extrinsic" mistakes. Many statutes permitting this relief from unfair judgments recognize that the most important element involved is time. Once an appropriate mistake is found, relief is left

largely to the discretion of the trial judge—provided only that relief is sought within a given period of time after the judgment was entered. Time is likewise an important factor in deciding whether a release is to be set aside. Perhaps, however, it should be more important. It would seem appropriate by statutory rule to require the plaintiff to bring his action within one year (or some other specified period) after execution of the release. This would work hardship on very few plaintiffs, for most mistakes can be discovered within a year. The plaintiff ought to be barred absolutely (on mistake grounds) after the one year period, because of the danger that testimony will be lost and that unprovable prejudice to the defendant will arise. This should be so even though the original statute of limitations on the merits has not yet run. But the other side of the coin is that, if plaintiff brings his action within the one year period after the execution of the release, the decision on the issue whether he can avoid the release or not should be largely within the discretion of the trial judge. Of course, the plaintiff ought to prove the mistake and that it was serious, and the trial judge ought to consider all the factors discussed above. But, as in the case of relief from judgments, the question should be primarily addressed to the trial judge's discretion. If such a statute were adopted, a good many complex and unnecessary rules could be eliminated. But at the same time, much certainty would be introduced by requiring the plaintiff to bring his action within one year of the release, when mistake is asserted as grounds for rescission of the release.

Conclusion

The focus of attention in cases where the plaintiff attacks a release for mistake or fraud is often in the wrong place. In the fraud cases the only question is: did the defendant or his agent commit any unconscionable act? If so, we need not inquire whether the act amounts to actionable fraud or even the kind that would merit equitable relief. He should not be permitted to minimize the tort liability imposed on him by law by any but the most scrupulous conduct. Concern over "misrepresentations of law" or over "opinion" is out of place. It is enough if the plaintiff executed the release in reliance on some unfair statement or concealment or because of some unfair conduct. In the mistake cases the focus of attention has sometimes gone even further afield from the real problems. Vision is often concentrated on sterile rules that are not based upon the needs involved, the need

for finality and the need to hold the tortfeasor to his tort. Nothing could be less important in answering these problems than the spurious issue whether the plaintiff made a mistake in prognosis or diagnosis, in fact or prediction, or whether he offered to restore the consideration received. Even the fundamental theory of relief, the old contract term, "mutual mistake," is itself out of place, and in fact has little to do with relief granted in release cases. In the end the law can be simplified and improved by eliminating these catch phrases and beginning each case with an inquiry into the policies of finality and fairness. Beyond that, a study of the factors indicated above as applied to the particular case should be of some assistance. The application of sense, experience, and good will may avoid many of the pitfalls. There can be in these cases little certainty or predictability—probably no more than as to what amounts to negligence or contributory negligence. But there can be some rational basis for decision, and that would be progress. And perhaps statutory changes along the lines of those suggested above would provide additional certainty as well.