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Avoiding Releases for Mutual Mistake in Personal Injury Cases

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AVOIDING RELEASES FOR MUTUAL MISTAKE IN PERSONAL INJURY CASES

The rule of law is well settled that a general release of a claim for personal injuries may, under the proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury.[1] However, there are many variations in the application of this rule. More specifically, many courts are at odds in determining exactly what is required to avoid a general release for personal injuries on the ground of mutual mistake of fact.[2] The purpose of this Comment is to examine recent decisions in the area to determine what criteria are used to allow avoidance of a release for personal injuries for mutual mistake of fact and to suggest possible steps which may be taken to alleviate some of the confusion that now exists in these cases.

I. THE POLICY DICHOTOMY

The dilemma facing the courts when a question concerning avoiding personal injury releases arises is one of conflicting policies. On the one hand is the policy of the law to encourage out of court settlements, and the established rules of contract law dealing with the sanctity of written documents.[3] The law "cannot and does not operate in retrospect to relieve a party from his contractual obligations, deliberately and intentionally assumed, because of the subsequent development of unfortunate and unforseen results."[4] The philosophy is that in the absence of fraud, duress or other unfair conduct on the part of the releasee, the law should extend its protection to afford stability to the transaction by upholding the express terms of the release.

> To hold otherwise would create a legal situation which would make it impossible, or at least inadvisable, to settle

1. *See generally* Annot., 71 A.L.R.2d 82 (1960); Annot., 48 A.L.R. 1462 (1927).

2. This Comment is limited to a discussion of the requirements necessary to avoid a release for mutual mistake of fact. Cases involving other grounds on which a release may be avoided, such as fraud, misrepresentation, overreaching or unilateral mistake are outside the scope of this article, except as they relate to the application of the doctrine of mutual mistake.

3. *See, e.g.*, Page v. Means, 192 F. Supp. 475 (9th Cir. 1959); Nogan v. Berry, 193 A.2d 79 (Del. 1963); Swilley v. Long, 215 So. 2d 340 (Fla. Dist. App. 1968); Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (1967); Wheeler v. White Rock Bottling Co. of Ore., 229 Ore. 360, 366 P.2d 527 (1961); Bollinger v. Randall, 184 Pa. Super. 644, 135 A.2d 802 (1957).

4. Smith v. Loos, 78 N.M. 339, 343, 431 P.2d 72, 76 (1967).

> any suit. Settlements are necessarily based on facts which are then available to the parties and there is always the risk that injuries may prove to be more serious or less serious than contemplated, and there is always the disputed question of liability to be considered. If a release is to be lightly set aside for no other reason than the parties were mistaken as to the extent of the injuries, the effect of a release and the advantage of a settlement would be lost. Under these circumstances defendants would be compelled to let every suit go to trial in order to obtain an adverse judgment which would be binding and final. Many cases . . . would never be settled and plaintiffs, instead of receiving funds immediately, would be compelled to wait for their damages and undergo additional expenses in proving their cases, always with the risk that the verdict would go against them.[5]

On the other hand, if the releasor is bound by the literal terms of the release, he may be left with little or no compensation for injuries caused by another. This is especially noxious in that the releasee is usually an insurer who has been paid to assume the risk and is receiving a windfall by avoiding liability.[6] The philosophy behind treating personal injury releases as voidable recognizes the human factors involved. As was noted in *Clancy v. Pacenti*:[7]

> It is not an article of commerce that is involved, but the human mind and body, still the most complicated and mysterious of all things that are upon or inhabit the earth. Here, mistakes are easily made and the consequences are more serious than in any other of the affairs of man. A slight abrasion may mean nothing or it may lead to a malignancy. Insignificant pain may mean the beginning of a fatal coronary attack or only a slight intestinal disturbance. Yet, 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.[8]

Furthermore, it has been recognized that as between releasor and releasee there is a disparity of bargaining power. The release is usually drafted by experts and presented on a take it or leave it basis, while the releasor is generally without knowledge of legal documents, without assistance of legal counsel, and anxious to make a fast settlement so as to assure himself of at least some recovery.[9]

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5. Bollinger v. Randall, 184 Pa. Super. 644, 650, 135 A.2d 802, 806 (1957).

6. *See, e.g.*, Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963); Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957).

7. 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957).

8. *Id.* at 176, 145 N.E.2d at 805.

9. *See, e.g.*, Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal.

These considerations have long been recognized as warranting special treatment for releases in personal injury cases.[10]

II. The Determinations of Fact

There is relatively little difficulty in stating the rule of law which is appropriate in cases dealing with avoiding releases for personal injuries, for it is universally accepted. The problem arises when the universally accepted rule is interpreted and applied to the fact patterns presented. Williston states the general rule to be:

> A release though in general terms will be reformed so as to cover merely the right with regard to which the parties were dealing and exclude the rights of which they were ignorant.[11]

The right to set aside a release will occur if there is a mutual mistake of past or present material fact, but not if there is a mistake in prophecy or opinion relative to an uncertain future event, such as probable developments from and permanency of a known injury.[12] In order to prove a mistake of material fact, it is critical to show that the parties intended the release to apply only to the facts as they were known at the time of settlement. In this regard, Williston says:

> [W]here a release is given by one injured in an accident and more serious injuries develop than were supposed to exist at the time of settlement, it is a question of fact whether the parties assumed as a basis of the release the known injuries, or whether the intent was to make a compromise for whatever injuries from the accident might exist whether known or not.[13]

Before a release will be set aside, the court must therefore make a two-fold determination of fact. First, it must find that the mistake went to an existing material fact, *i.e.*, that the injury was not known to exist at the time of settlement. If the subsequent injury is actually the unexpected consequence of an injury

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Rptr. 307 (1963); Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957); Wheeler v. White Rock Bottling Co. of Ore, 229 Ore. 360, 366 P.2d 527 (1961).

10. Dean Wigmore states:

> In general, the modern trend is to lay down no one or more rules of thumb, but to develop a special doctrine in each Court for that class of cases, liberally relieving the party who has signed the release.

9 J. Wigmore, Evidence § 2416 (3d ed. 1940).

11. 5 S. Williston, Contracts § 1551 (rev. ed. 1937):

> Equity will reform or rescind a release given for accidental injuries, but the more common recognition of the equitable rule allowing avoidance of a release for mutual mistake of material fact occurs where the release is set aside in an action at law brought to recover damages for the unknown injury.

See also, Restatement of Contracts § 504 (1932).

12. *See, e.g.*, Ormsby v. Ginofli, 107 So. 2d 272 (Fla. Dist. App. 1958); Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957); Birch v. Keen, 449 P.2d 700 (Okla. 1969); 76 C.J.S. *Release* § 25 (1952).

13. 5 S. Williston, Contracts § 1551 (rev. ed. 1937).

already known to exist at the time of settlement, it falls in the category of a mistake of opinion relative to an uncertain future event and will not be sufficient to warrant setting aside the release. Secondly, the court must determine that the parties intended that the release cover only known injuries. If it is apparent that the parties also intended the release to cover all future injuries, including any unforeseen injury, the release will not be set aside.

III. Unknown Injury vs. Unknown Consequences of Known Injuries

The area in which the courts have been most at variance is in the application of the mistake doctrine, for there is often a very fine distinction in determining whether an injury was unknown at the time of settlement, or whether it is merely a consequence of a known injury that was unexpected at the time of the settlement. There is relatively little difficulty when a releasor is not aware that he has suffered any injury at the time of signing the release. Here, both parties are laboring under a mistake of fact and the release will ordinarily be set aside.[14] If the releasor is unaware of his injuries because of his own negligence in failing to consult a physician, however, the release will not be set aside because the

14. Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968) (judgment for releasor affirmed where release signed within 20 days for $308.79 property damage, injury to back discovered several weeks later); Evans v. S.J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963) (judgment for releasor when release made without consideration within four weeks to enable owner-driver to recover for property damage, but subsequently discovered severe head injury); Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963) (directed verdict for release reversed where release for $490.90 to cover property damage executed within one month, compression fracture of vertabra and herniated disc discovered two months after accident); Hye v. Riggin, 208 A.2d 513 (Del. Super. 1964) (releasee's motion for summary judgment denied where release for $69.85 property damage executed within three weeks, minor pain at time of accident had ceased by the time of release); Ormsby v. Ginolfi, 107 So. 2d 272 (Fla. Dist. App. 1958) (release made in eight days for $90.08 property damages, serious injuries discovered later); Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957) (judgment for releasor where injuries discovered after release for $50.00 property damage signed); Cady v. Mitchell, 208 Pa. Super. 16, 220 A.2d 373 (1966) (judgment affirmed for husband and wife releasors where release executed nine days after accident for amount of property damage, wife was included in release as a precaution even though she was unaware of any injury at the time); Groh v. Huckel, 36 Pa. D. & C.2d 172 (C.P. Alleg. 1964) (release for $90.00 one month after accident, releasor's symptoms of herniated disc appeared two months after accident); Emery v. Mackiewicz, 30 Pa. D. & C.2d 443 (C.P. Luz. 1962) (release executed in seven weeks, herniated disc discovered later); Kerr v. May, 24 Pa. D. & C.2d 97 (C.P. Alleg. 1960) (release within three weeks for $79.75 property damage, symptoms of whiplash injury appeared four weeks after accident).

releasor was the culpable party.[15]

The problem arises when the releasor is aware that he has sustained an injury prior to signing the release but does not discover the true nature or extent of injury until after the settlement. Whether a subsequently discovered injury was unknown at the time the settlement was made, or whether it was merely a consequence of a known injury that was unknown is a question of fact. However, most of the inconsistencies noted in the cases resulted from the manner in which the courts determined this fact. Ordinarily, if the injury actually sustained is of a completely different nature from what the parties had mutually believed at the time of settlement, the release will be set aside on the ground that the settlement was based on mistaken material facts.[16] However, the court has refused to set aside the release for a bump on the head which later resulted in a hematoma,[17] a subsequent development of pseudarthrosis with respect to the mending of a broken leg,[18] the subsequent aggravation of ulcers by trauma in a colli-

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15. Mannke v. Benjamin Moore & Co., 251 F. Supp. 1017 (W.D. Pa. 1966), *aff'd*, 375 F.2d 281 (3d Cir. 1966) (release not avoidable where releasor was aware of his injury, did not consult a physician, and permitted more than a month to elapse before signing release); Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (W.D. Ark. 1962) (summary judgment for releasee where releasor knew of back injury but failed to disclose injury to insurer at the time release was executed); Nogan v. Berry, 193 A.2d 79 (Del. 1963) (releasee's motion for summary judgment granted where releasor, aware of some injury, failed to use reasonable diligence to determine its extent before signing release); Sosa v. Velvet Dairy Stores, Inc., 407 S.W.2d 615 (Kansas City Ct. App. 1966) (releasee's motion for summary judgment granted where releasor, aware of minor injury immediately after accident, failed to see a doctor before signing release and stated in the accident report that she had received no injuries).

16. Farmers Mut. Auto. Ins. Co. v. Buss, 188 F. Supp. 895 (D. Kan. 1960) (release for $300.00 for mere broken leg avoided when subsequent knowledge revealed fracture to be so serious that there was risk of amputation and loss of life, release signed seventeen days after accident while releasor still in hospital); Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962) (new trial granted releasor where releasor signed over consideration to property damage claimant within three weeks of accident thinking she had only a bruised knee, fractured kneecap and torn ligaments discovered later); Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960) (judgment for releasor affirmed where release executed on basis of known minor injury, subsequent discovery of subdural hematoma resulting in mental incompetency justified avoiding release for mutual mistake); Hall v. Strom Constr. Co., 368 Mich. 253, 118 N.W.2d 281 (1962) (use of release enjoined where release signed within one month for $425.00 in consideration for superficial back and head injuries, brain injury resulting in epilepsy discovered later); Ware v. Geismer, 8 Mich. App. 627, 155 N.W.2d 257 (1968) (judgment for releasor affirmed avoiding release signed for $600.00 where parties were aware releasor had suffered injuries to head and back but were unaware of internal injuries serious enough to subsequently cause a heart attack); Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964) (judgment for releasor where only stiff neck known at time of settlement and herniated disc discovered one year later, release within five weeks for $20.19 property damage).

17. Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (1967).

18. Hoopes v. Lamb, 102 Ariz. 335, 429 P.2d 447 (1967).

sion,[19] or an injury to the eye which resulted in blindness.[20]

An especially difficult problem arises from what is the most prolific source of cases in this area—the whiplash injury in automobile accidents. Since the symptoms often appear minor, or are not apparent at all until months after the accident, releases are frequently signed before the extent of injury is known. Here again, if there were no signs of injury before settlement, the release will be set aside on the ground of mutual mistake.[21] However, when the releasor is aware of some whiplash injury, and discovers it to be much more serious after signing a release, the courts are split on the question of mistake. The majority of cases have held that the subsequent discovery of more serious effects from the whiplash is not the discovery of an unknown injury, but merely the consequence of a known injury, which is not sufficient to set aside the release.[22] Those courts which have found the more serious effect to be a new and unknown injury have stated that pain in the injured area,[23] being badly shaken,[24] an assumed back sprain,[25] or an assumed recurrence of bursitis[26] were not equivalent to knowledge of a herniated disc.

It is in the factual determination of whether the injury is a new and unknown injury or whether it is merely the consequence of a known injury that the courts are in the most confusion. Each court, it seems, is developing its own doctrine to apply to each of these classes of cases. Unfortunately, it is the innocent injured

19. Thomas v. Hollowell, 20 Ill. App. 2d 288, 155 N.E.2d 827 (1959).
20. Bollinger v. Randall, 184 Pa. Super. 644, 135 A.2d 802 (1957).
21. Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968); Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963); Hye v. Riggin, 208 A.2d 513 (Del. Super. 1964); Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964); Cady v. Mitchell, 208 Pa. Super. 16, 220 A.2d 373 (1966); Groh v. Huckel, 36 Pa. D. & C.2d 172 (C.P. Alleg. 1964); Kerr v. May, 24 Pa. D. & C.2d 97 (C.P. Alleg. 1960).
22. Randolph v. Ottenstein, 238 F. Supp. 1011 (D.D.C. 1965); Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (W.D. Ark. 1962), *aff'd*, 315 F.2d 818 (8th Cir. 1963); Nogan v. Berry, 193 A.2d 79 (Del. 1963); Reason v. Lewis, 250 A.2d 390 (Del. Super. 1969); DeWitt v. Miami Transit Co., 95 So. 2d 898 (Fla. 1957); Swilley v. Long, 215 So. 2d 340 (Fla. Dist. App. 1968); Welsh v. Centa, 75 Ill. App. 2d 103, 221 N.E.2d 106 (1966); Sosa v. Velvet Dairy Stores, Inc., 407 S.W.2d 615 (Kansas City Ct. App. 1966); Birch v. Keen, 449 P.2d 700 (Okla. 1969); Wheeler v. White Rock Bottling Co. of Ore, 229 Ore. 360, 366 P.2d 527 (1961); Cotman v. Whitehead, 209 Va. 377, 164 S.E.2d 681 (1968).
23. Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1966); Emery v. Mackiewicz, 30 Pa. D. & C.2d 443 (C.P. Luz. 1962).
24. Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963).
25. Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957).
26. Reynolds v. Merrill, — Utah —, 460 P.2d 323 (1969).

party who frequently suffers the hardship resulting from the inherently difficult fact determinations.

IV. Intent

If it is established that the releasor is suffering from an injury that was unknown at the time of settlement, the element of intent of the parties at the time of settlement must be considered. It is generally stated that a release will be ineffectual to cover unknown claims unless the surrounding circumstances indicate that *both* parties contemplated their inclusion.[27] It is therefore necessary to examine the factors influencing a court when it resolves the question of whether, in spite of the inclusive language of the release, the parties intended the settlement to compensate only for known injuries, or whether they also intended to include injuries unknown at the time of settlement.

A. *Consideration*

The first factor to be considered is the amount of consideration compared with the risk of unknown injury. Although inadequacy of consideration is not ordinarily, of itself, a sufficient basis for cancellation of an executed release, along with other circumstances it is an important indication of the parties' intent.[28] Where the consideration for the release is limited to the amount of property damage sustained in an accident, there is an indication that the parties did not intend the settlement to compensate for personal injuries that may also have been sustained;[29] likewise when a release is executed for no consideration.[30] However, when the consideration includes an amount greater than the property damage, and especially when that amount is also greater than the amount of medical expenses to the date of settlement, the courts will consider this as an indication that the parties meant the release to include all compensation for bodily injuries, known and unknown.[31]

B. *Discussion of Personal Injuries*

If pre-settlement negotiations do not include a discussion of personal injuries and the amount, if any, of compensation attribut-

27. *See, e.g.*, Cady v. Mitchell, 208 Pa. Super. 16, 220 A.2d 373 (1966).

28. *See, e.g.*, Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962).

29. *See, e.g.*, Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968) (settlement of $308.79 property damage set aside when disc injury subsequently discovered); Hye v. Riggin, 208 A.2d 513 (Del. Super. 1964) (settlement of $69.85 property damage set aside when more serious injuries from whiplash discovered); Ware v. Geismer, 8 Mich. App. 627, 155 N.W.2d 257 (1968) (settlement of $600.00 avoided when internal injury serious enough to cause heart attack found).

30. Evans v. S.J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963); Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962).

31. Swilley v. Long, 215 So. 2d 340 (Fla. Dist. App. 1968); Welsh v. Centa, 75 Ill. App. 2d 103, 221 N.E.2d 106 (1966); Van Avery v. Seiter, 13 Mich. App. 88, 163 N.W.2d 643 (1968); Birch v. Keen, 449 P.2d 700 (Okla. 1969). *But see* Reynolds v. Merrill, — Utah —, 460 P.2d 323 (1969).

able thereto as consideration for the release, there is a strong indication that the parties did not contemplate the release to cover anything more than the property damage.[32] Conversely, when preliminary negotiations include a discussion of personal injuries, and the amount of settlement includes some compensation for medical bills or pain and suffering, the courts will conclude that the parties fully intended the settlement to be full compensation for injuries received.[33] However, if the reason that there was no discussion of personal injuries before settlement was that the releasor did not mention them even though he was aware that he had sustained some injury, the courts will not avoid the release. In these cases, the releasor was prevented from receiving compensation for his injuries because he either negligently failed to see a doctor before signing the release,[34] or simply passed them off as too minor to merit mention where, with reasonable diligence, the extent of injury could have been ascertained.[35]

C. *Bargaining and Negotiating*

Another factor in determining intent is the presence or absence of bargaining and negotiating leading to the settlement. If the settlement and release are presented on a take it or leave it basis, the courts will recognize the inferior bargaining position of the releasor and hold that it was not the intent of *both* parties to be bound by the release if further injuries were to arise.[36] If the facts show that the parties did, in fact, negotiate a settlement and come to a true compromise agreement, the release will not be set aside merely because subsequent events show the settlement to

32. Evans v. S.J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963); Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962); Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963); Hye v. Riggin, 208 A.2d 513 (Del. Super. 1964); Ware v. Geismer, 8 Mich. App. 627, 155 N.W.2d 257 (1968); Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964); Cady v. Mitchell, 208 Pa. Super. 16, 220 A.2d 373 (1966).

33. Randolph v. Ottenstein, 238 F. Supp. 1011 (D.D.C. 1965); Hoopes v. Lamb, 102 Ariz. 335, 429 P.2d 447 (1967); Reason v. Lewis, 250 A.2d 390 (Del. Super. 1969); Swilley v. Long, 215 So. 2d 340 (Fla. Dist. App. 1968); Welsh v. Centa, 75 Ill. App. 2d 103, 221 N.E.2d 106 (1966); Van Avery v. Seiter, 13 Mich. App. 88, 163 N.W.2d 643 (1968); Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (1967); Birch v. Keen, 449 P.2d 700 (Okla. 1969); Wheeler v. White Rock Bottling Co. of Ore., 229 Ore. 360, 366 P.2d 527 (1961); Bollinger v. Randall, 184 Pa. Super. 644, 135 A.2d 802 (1957).

34. Mannke v. Benjamin Moore & Co., 251 F. Supp. 1017 (W.D. Pa. 1966), *aff'd*, 375 F.2d 281 (3d Cir. 1966); Sosa v. Velvet Dairy Stores, Inc., 407 S.W.2d 615 (Kansas City Ct. App. 1966).

35. Hutcheson v. Frito-Lay, Inc., 204 F. Supp. 576 (W.D. Ark. 1962), *aff'd*, 315 F.2d 818 (8th Cir. 1963); Nogan v. Berry, 193 A.2d 79 (1963).

36. Evans v. S.J. Groves & Sons Co., 315 F.2d 335 F.2d 335 (2d Cir. 1963); Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964).

be improvident.[37]

D. *Disputed Liability*

When, at the time of settlement, there was a legitimate question between the parties as to the releasee's liability and the amount of damages, the courts will be more easily persuaded to uphold the settlement as a compromise in situations which might otherwise justify the conclusion that there was a mutual mistake.[38] When there is no question as to liability, the courts will more closely scrutinize the terms of the release for indications of overreaching on the part of the releasee.[39]

E. *Haste In Securing Release*

Where it appears that the release was secured so soon after the occurrence of the accident that the parties did not have adequate time to assess the extent of the injuries, this will be a factor tending to support the contention that there was a mistake,[40] especially when it appears that the haste was the result of pressure exerted by the releasee. However, where the injured party is not pressured into signing a release, has adequate time to assess his injuries and defers settlement until he can make an investigation as to their nature and extent, the indication is that the parties intended the settlement and release to be inclusive and final.[41] A similar conclusion will be reached when it is the releasor who puts pressure on the releasee to come to a quick settlement.[42]

None of the above factors are conclusive, of themselves, to warrant sustaining or avoiding a release. However, taken with all other surrounding circumstances, they should be considered when determining whether or not both parties intended the release to cover all claims, both known and unknown, or whether, irrespective of the inclusive terms of the release, the parties intended only a limited release of claims.

V. Present Legislation

Unfortunately, many releases of personal injury claims are made in a setting of haste, grief, or dazed acquiescence. The re-

37. Reason v. Lewis, 250 A.2d 390 (Del. Super. 1969); Welsh v. Centa, 75 Ill. App. 2d 103, 221 N.E.2d 106 (1966); Van Avery v. Seiter, 13 Mich. App. 88, 163 N.W.2d 643 (1968).

38. Thomas v. Hollowell, 20 Ill. App. 2d 288, 155 N.E.2d 827 (1959); Van Avery v. Seiter, 13 Mich. App. 88, 163 N.W.2d 643 (1968); Sosa v. Velvet Dairy Stores, Inc., 407 S.W.2d 615 (Kansas City Ct. App. 1966); Bollinger v. Randall, 184 Pa. Super. 644, 135 A.2d 802 (1957).

39. Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960).

40. Hall v. Strom Constr. Co., 368 Mich. 253, 118 N.W.2d 281 (1962); Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957); Cady v. Mitchell, 208 Pa. Super. 16, 220 A.2d 373 (1966); Groh v. Huckel, 36 Pa. D. & C.2d 172 (C.P. Alleg. 1964).

41. Welsh v. Centa, 75 Ill. App. 2d 103, 221 N.E.2d 106 (1966); Van Avery v. Seiter, 13 Mich. App. 88, 163 N.W.2d 643 (1968).

42. Randolph v. Ottenstein, 238 F. Supp. 1011 (D.D.C. 1965).

leasor is normally in an inferior bargaining position, unfamiliar with the terms and ramifications of legal documents and without assistance of legal counsel. Too often, the temptation to obtain a quick financial settlement, and thereby avoid the necessity of awaiting the outcome of extended litigation, will cause the injured party to release his rights to a personal injury claim for an amount substantially below their worth. In recognition of the setting in which many of these transactions occur, several states have enacted legislation to give some, although still limited, protection to the injured party.

The most limited legislative protection is by statutes which apply only where a release has been signed by a patient while he is confined in a hospital or sanitarium.[43] These statutes make the release void[44] or voidable[45] if it was signed within either ten[46] or fifteen[47] days after the injury occurred. However, even this protection may be waived if the releasor indicates his willingness, in writing, to sign the release five days prior to doing so.[48] Since these statutes apply only in the limited situation where the release is executed while the releasor is actually confined in the hospital, and then only during the first weeks following the injury, it is

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43. Typical of this approach is the Maine statute:

> [N]o settlement or general release or statement in writing signed by any person confined in a hospital or sanitarium as a patient with reference to any personal injuries for which said person is confined in said hospital or sanitarium shall be admissible in evidence, used or referred to in any manner at the trial of any action to recover damages for personal injuries or consequential damages, so called, resulting therefrom, which statement, settlement or general release was obtained within 10 days after the injuries were sustained and such release shall be null and void.

ME. REV. STAT. ANN. tit. 17, § 3964 (1964); R.I. GEN. LAWS ANN. § 9-19-12 (1956). New York's version is a criminal statute, making it unlawful to enter a hospital for the purpose of obtaining a release within fifteen days after the injury was sustained. N.Y. JUDICIARY LAW § 480 (McKinney 1948). Any release obtained in violation of this section, however, is only presumptively invalid. Fleming v. Ponziani, 29 App. Div. 2d 881, 288 N.Y.S. 2d (1968), *aff'd*, 24 N.Y.2d 105, 247 N.E.2d 114, 299 N.Y.S.2d 134 (1969).

44. ME. REV. STAT. ANN. tit. 17, § 3964 (1964); R.I. GEN. LAWS ANN. § 9-19-12 (1956).

45. N.Y. JUDICIARY LAW § 480 (McKinney 1948).

46. ME. REV. STAT. ANN. tit. 17, § 3964 (1964).

47. N.Y. JUDICIARY LAW § 480 (McKinney 1948); R.I. GEN. LAWS ANN. § 9-19-12 (1956).

48. Rhode Island's statute states that any release obtained in contravention of its protective language will be null and void

> . . . unless at least five (5) days prior to the obtaining or procuring of such general release or statement such injured party had signified in writing his willingness that such general release or statement be given.

R.I. GEN. LAWS ANN. § 9-19-12 (1956); N.Y. JUDICIAL LAW § 480 (McKinney 1948).

readily apparent that they are of such narrow scope as to be of little value in the majority of cases.

The second general category of statutes are those which make any release signed by an injured party within a stipulated length of time after the injury voidable at the releasor's option.[49] Two of these statutes also contain a time limit within which the releasor must exercise his option to void the release.[50] This type of statute is more satisfactory in that its application is not limited to releases which have been signed in the hopsital.

The third category of legislation is that which, in effect, codifies the rule of equity that a court may set aside a release on the ground of mutual mistake where the mistake has materially affected the amount of the settlement.[51] These statutes do not extend the right to avoid a release beyond what judicial decision has done in other jurisdictions.[52] As in the jurisdictions which have not enacted such legislation, the essence of the doctrine is that the wording of the release is not conclusive. There still remains a question of fact as to whether the parties intended to discharge all liability at the time of settlement.[53] However, if it is determined that the parties to the settlement did, in fact, intend that the release discharge all claims, known and unknown, then the release will be valid notwithstanding the language of the statute. This type of statute can hardly be said to give any added measure of protection to the releasor since it merely accomplishes legislatively what other jurisdictions have accomplished by judicial decision.

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49. Connecticut's statute is typical:

> No person, firm or corporation whose interest is adverse to that of a person receiving personal injuries as the result of a tortious act shall negotiate any contract, written or oral, or any settlement to release such person, firm or corporation from liability within fifteen days from the date of the tortious act. Any contract, settlement or release obtained in violation of this section shall be voidable at the option of the releasor upon restoration of the consideration.

CONN. GEN. STAT. ANN. § 52-572a (1958); IDAHO CODE ANN. § 29-113 (1967); MD. ANN. CODE art. 79, § 11 (1957); R.I. GEN. LAWS ANN. § 9-19-12.1 (Supp. 1967).

50. IDAHO CODE ANN. § 29-113 (1967) (release executed within fifteen days after the injury is voidable within one year after the release); MD. ANN. CODE art. 79, § 11 (1957) (release signed within five days after the injury is voidable within sixty days).

51. California's statute is typical:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

CAL. CIVIL CODE § 1542 (Deering 1960); MONT. REV. CODES ANN. § 58-510 (1947); N.D. CENT. CODE § 9-13-02 (1959); S.D. CODE § 47.0241 (1939); TENN. CODE ANN. § 23-3002 (Supp. 1969) (allowing rescission of settlement without return of consideration where settlement brought about by fraud or mistake).

52. Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963).

53. *Id.*

VI. Suggested Legislation

In view of the unconformity of the decisions among the various courts in this area of law, and in view of the potential financial burdens an innocent party may unwittingly be forced to assume by executing an improvident release, it is submitted that a legislative solution is needed to adequately protect the releasor and add stability to the law. The enactment must be of such character as to allow the parties to contract as they choose while giving the releasor additional remedies, within limits, for avoiding the release if the settlement is greatly disproportionate to the damages suffered.

It is suggested that the solution lies in legislation patterned after the Idaho and Maryland statutes.[54] The statute should include provisions allowing a release signed during a stipulated period to be voided at the option of the releasor, with the right to exercise that option of limited duration. It is submitted that a statue would meet the requirements of the needed legislation if it provides that: (1) any release signed by any person within sixty days after he incurs a personal injury, which may adversely affect his right to be compensated for such injury, shall be voidable at the option of the releasor; and (2) that such option to void the release must be exercised within six months from the date that the injury is incurred.

The great majority of settlements involving danger to the releasor have been made within the sixty day period following the accident. Thus, a readily accessible means to avoid an improvident release executed within that time would be provided. On the other hand, any settlement made more than sixty days after the injury is sustained will presumably be based on more reliable information as to the nature and extent of the injury. Thus, during the period when the releasor is most likely to make an unwise settlement due to the unknown or unsuspected consequences of his injury, he will be adequately protected. However, in the interests of encouraging out of court settlements, this protection should not be open-ended. Therefore, the releasor would have the limited period of six months in which to avoid the improvident release, after which the settlement would become binding and final, unless set aside by a court under the circumstances discussed in previous sections of this Comment.

The advantage of such a statute would obviously be that an injured party could more readily avoid a release when it appears

54. Idaho Code Ann. § 29-113 (1967); Md. Ann. Code art. 79, § 11 (1957).

that he has a greater claim for damages than originally expected. This would take the great majority of cases dealing with avoiding releases for personal injuries off the overcrowded court dockets. However, the primary purpose of such legislation is not to allow the releasor to avoid the release, but to prevent an unfair release from ever arising. The statute, in effect, would help to equalize the bargaining positions of the parties. The releasee, rather than trying to rush the settlement so as to obtain a release before any greater injury is discovered would be forced to recognize that an inadequate early settlement could be easily voided. Both parties would gain by waiting before entering into a settlement—the releasor by having a greater opportunity to determine the nature and extent of his injuries, and the releasee by assuring himself that the settlement ultimately agreed upon will not be set aside because it was entered into before the parties knew what injuries had been sustained. Yet the waiting period is not so long that it would discourage settlements, nor is it so long that the injured party loses the advantage of receiving funds relatively soon after the accident. The true effect of the statute would be to make both parties wait until they could make a more informed determination of the nature and extent of injuries suffered by the releasor.

VII. Conclusion

It appears that a significant number of general releases executed in personal injury cases have been avoided by the courts on the ground of mutual mistake. Many other releases have been attacked in court but upheld because the releasor failed to sufficiently prove a mutual mistake of material fact, or the intent of the parties to limit the settlement only to the injuries as they were known at the time of the release. The latter cases work a tremendous hardship on the injured party even though at times he may be somewhat blameworthy. In recognition of the inferior bargaining position of the releasor, and in order to more adequately protect the injured party who may be strongly tempted to prematurely release his claim for personal injury damages, a legislative solution is needed. Such a statute would also be beneficial in that it would minimize the number of cases of this type which would ever get to court. It would therefore be of advantage to both parties to a personal injury settlement, and to the judiciary, if the legislature would enact the needed legislation.

Hugh J. Hutchison