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# Torts--Effect of a Release of an Original Tort Feasor Upon the Malpractice of Attending Physician

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whenever there is a previous history of bargaining. However, when there is no history of bargaining, these factors will be regarded more realistically and severance will be more likely.

There is no question that the Board has the discretion to determine the appropriate bargaining unit in a severance case. The only limitation is that their decision cannot be based on the fact that a previous determination in favor of a broader unit had been made.[16] Courts will not overrule the Board's determination unless it is arbitrary or unreasonable.[17] It is when the Board follows the tendency of any administrative body which is overloaded with work to lay down general rules and guidelines that it is in danger of being reversed by the courts. These general rules do not always give reasonable results when applied to the facts of a particular case. The Board has stated that it will proceed on a case-by-case basis in deciding what is the appropriate bargaining unit. However, if the Board's actions in these three cases and subsequent ones are any indication, it is in danger of returning to a doctrine not unlike that of *American Can.* The Board is in danger of establishing a rule that severance will not be granted where there is a history of bargaining in the production and maintainance unit.

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## Torts—Effect of a Release of an Original Tort Feasor Upon the Malpractice of Attending Physician

*P* suffered severe injuries as a result of an automobile accident. *D* a specialist in plastic surgery, was engaged by *P* for treatment of his facial injuries. *P* commenced an action against the original tortfeasor which was settled by the entry of a consent judgment.[1] Subsequently *P* discovered that the series of reconstructive opera-

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[16] Labor Management Relations Act § 9(b)(2), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(2) (1965).

[17] NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959); Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958).

[1] The court considered the consent judgement the same as a release. This comment will likewise treat it as a release without discussion and consider only the problems connected with releases as a bar to an action against negligent physican.

tions by *D*, both before and after the original settlement, was negligently performed and commenced a malpractice action against *D*. The jury returned a verdict for *P*. *Held*, affirmed. A strong sense of justice requires following the modern trend in judicial decisions whereby a release by an injured party of the one responsible for the original injury does not of itself preclude an action by the injured person against a physician for the negligent treatment of the injury. The parties must intend the release to be full compensation for *P's* total injuries; thus, if the malpractice is discovered after the release, the parties could not possibly have intended this to be in full compensation thereof. *DeNike v. Mowery*, 418 P.2d 1010 (Wash. 1966).

It is almost a universal rule that if an injured person uses ordinary care in selecting a physician, then the law regards an injury resulting from mistakes of the physician or his want of skill, as a part of the immediate and direct damages which naturally flow from the original injury.[2] The law regards the negligence of the one who caused the original injury as the proximate cause of the damages flowing from the negligence of the physician, and holds him liable therefor.[3] Consequently courts have held that a release of the original tortfeasor must release the physician because if the one liable for the whole claim is released, then the entire claim is extinguished.[4] The underlying theory is that there should be only one satisfaction for the same injury.[5] It is presumed that the negligence of the physician could have been and was included in the action against the original tortfeasor and was therefore included in the settlement and release of the original tortfeasor.[6] The presumption is irrebuttable.[7]

In the case where the physician's negligence is subsequent to that of the original tortfeasor, they are properly labeled sucessive

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[2] Mier v. Yoho, 114 W. Va. 248, 171 S.E. 535 (1933).

[3] *Ibid.*

[4] *E.g.*, Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Keown v. Young, 129 Kan. 563, 283 Pac. 511 (1930); Smith v. Mann, 184 Minn. 485, 239 N.W. 233 (1931); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

[5] Edmonson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929); Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W. 233 (1931); Milks v McIver, *supra* note 4; Thompson v. Fox, 326 Pa. 209, 129 Atl. 107 (1937).

[6] Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943).

[7] *Ibid.*

tortfeasors[8] and not joint tortfeasors.[9] However, the majority of courts holding that a release of the tortfeasor is a bar to an action against the negligent physician treat the independent wrongdoers as joint tortfeasors or apply, by analogy, the common law principal that the release of one joint tortfeasor releases all joint tortfeasors.[10]

The view that a release is a bar has been severly criticized by text writers who advocate that "a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it."[11] However, it still remains the majority view.[12] In one recent decision the issue was posed in an Oklahoma court in a case of first impression.[13] The court set forth the majority and minority rules, cited all the jurisdictions adopting the majority rule, and apparently feeling the majority view was overwhelming, concluded that they would follow the majority rule without evaluating the relative merits of either rule. Conversely, a Nevada court in a case of first impression did evaluate the merits of each view and sided with the minority, stating that the minority cases were better reasoned.[14] Several jurisdictions have overruled precedent and adopted the minority view.[15]

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

[9] Mier v. Yoho, 114 W. Va. 248, 171 S.E. 535 (1933). This was of special significance in this case because if the physican and the original tortfeasor had been considered joint tortfeasors then the release would not have been a bar to the action under W. Va. Code ch. 55, art. 7, § 12 (Michie 1966) which provides that a release of a joint tortfeasor is not a bar to an action against the other joint tortfeasor. See Hardin v. New York Cent. R.R., 145 W. Va. 676, 116 S.E.2d 697 (1960).

[10] Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944).

[11] PROSSER, TORTS § 46, (3d ed. 1964). See also Havighurst, *The Effect of a Settlement with One Co-Obligor Upon the Obligation of the Others*, 45 CORNELL L.Q. 1, 23 (1959), Wigmore, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563 (1923).

[12] Annot., 40 A.L.R.2d 1075 (1955).

[13] Farrah v. Wolfe, 357 P.2d 1005 (Okl. 1960).

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

[15] *E.g.*, Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963), *overruling* Vatalaro v. Thomas, 262 Mass. 383, 160 N.E. 269 (1928); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958), *overruling* Smith v. Mann, 184 Minn. 485, 239 N.W. 233 (1931); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958), *overruling* Adam v. DeYoe, 11 N.J. Misc. 319, 166 Atl. 485 (1933), *overruling Milks* v. *McIver*, 264 N.Y. 267, 190 N.E. 487 (1934); Derby v. Prewitt, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1963); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955), *overruling* Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1927) and Hooyman v. Reeve, 168 Wis. 420, 170 N.W. 282 (1919).

The minority view takes the position that a release against the original wrongdoer is not a bar to an action unless there has been full compensation for all injuries including the malpractice.[16] In *Wheat v. Carter*[17] the physician burned the plaintiff with x-ray. Thereafter, the plaintiff settled with and released the original tortfeasor.[18] The court stated that since the reason for the position that such a release bars recovery is that it is inequitable to permit one who has been fully compensated for his loss to recover compensation a second time, the true question was whether the injured person had already been compensated for the loss he sustained as a result of the use of the x-ray and not whether the one responsible for the original injury might have been liable for the loss.[19] The release is not in and of itself a bar to a malpractice suit unless the plaintiff had already been compensated for that loss, in which case it was the fact of the compensation in itself which constituted the bar and not the release.[20]

The court in the *DeNike* case was faced with the prior precedent of *Martin v. Cunningham*[21] which had clearly put the state in the majority position. In the *Martin* case the plaintiff was fully aware of the malpractice when he signed a release with the original tortfeasor. In the *DeNike* case the malpractice was not known until after the release of the original wrongdoer. Thus, the court distinguished the *Martin* case and stated that there was no question that the intention was not to release the surgeon as neither party was aware of the malpractice at the time of the release. The court adopted the rule that a release by an injured party of the one responsible for the original injury does not of itself preclude an action against a physician or surgeon for negligent treatment of the injury.

Although the court maintained that it did not overrule the *Martin* case, this is a questionable conclusion. While admittedly the two cases are distinguishable, the court has changed the rule to depend on the intent of the parties when the release is executed. This is

[16] Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Wheat v. Carter, 79 N.H. 150, 106 Atl. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).
[17] 79 N.H. 150, 106 Atl. 602 (1919).
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] 93 Wash. 517, 161 P. 355 (1916).

in fact the minority rule. It was easier for the court to adopt the minority view in this case since the malpractice was discovered after the release and the court could easily find that the plaintiff did not intend to release the physician. However, under the rule adopted in the instant case, a plaintiff who signs a release while aware of the malpractice could still show that he did not intend to release the physician for his negligence even though he was fully aware of it at the time of the release as in the *Martin* case. It appears that the court was somewhat reluctant to announce the overruling of a prior precedent, but its net effect was to do so.[22]

The court in the principal case cites the New York decision of *Derby v. Prewitt*[23] for the leading authority of the modern trend. The fact pattern in the New York decision is almost identical to the principal case. The malpractice was discovered after the release, and the court concluded that the parties did not intend to release the physician since the wrong was discovered after the release was executed. The New York court had the decision of *Milks v. McIver*,[24] a leading case for the majority view, as precedent. The court, as in the principal case, distinguished *Milks* on the ground that the plaintiff was fully aware of the malpractice at the time of the release. While in *Milks* the plaintiff may have been aware of the malpractice, he strongly contended that he did not intend to release the physician, but the court held the release was a bar.

In *Derby* the court stated that the rule that a settlement with one of the tortfeasors represents a full satisfaction of the entire claim and that any further recovery would involve double recovery for the same injury does not make sense.[25] Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease.[26] The court thus changed from an irrebuttable pre-

[22] The same argument used in the principal case was attempted in Manifort v. Giannestras, 49 Ohio Ops. 440, 67 Ohio L. Abs. 380, 111 N.E.2d 629 (1951) where the facts in the prior Ohio decision of Tanner v. Espey, 128 Ohio St. 82, 190 N.E. 229 (1934) were similiar to the *Martin* case, i.e., the malpractice occurred before the release. The plaintiff argued that the rule would not apply where the malpractice occurred subsequent to the settlement. The court held that it is clear that the application of the majority rule is not limited to such a situation. The test is whether the injuries caused by the negligence of the surgeon are merely an aggravation of the original injury and are the proximate result of the negligence of the original tortfeasor.

[23] 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1963).

[24] 264 N.Y. 267, 190 N.E. 482 (1934).

[25] Derby v. Prewitt, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1963).

[26] *Ibid.*

sumption to a rebuttable presumption.[27] It maintained that it did not overrule the *Milks* decision, but in supporting its decision the court cited cases which applied the minority view.[28] In commenting on this decision, writers have stated that *Milks* is overruled.[29] This view is supported by a recent decision in New York subsequent to *Derby* where the plaintiff was aware of the malpractice at the time of the release (the situation as in *Milks*) and the court followed the minority view stating that the fact to be determined with respect to the settlement of the action is whether such settlement actually constituted satisfaction of the damages caused only by the wrong of the original tortfeasor or whether the settlement was intended to be in full satisfaction of all the damage caused by the original and the subsequent tortfeasor.[30] The courts have stated that the plaintiff has the burden of proving that the settlement did not reflect full satisfaction of the original and the aggravated injuries.[31]

The decision in *Derby* was 4-3 with a strong dissent critical of the overruling of an established precedent without warning to the bench and bar. The dissent suggested that the solution would be to change the law by legislation if the change was desired. This is a sensible solution which has been adopted in North Carolina.[32]

The position which the West Virginia Supreme Court would take on this question is not clear. In *Mier v. Yoho*[33] the plaintiff was aware of the malpractice when he released the original tortfeasor. The court citing both *Milks v. McIver*[34] and *Martin v. Cunningham*[35] held that where the aggravated conditions due to mal-

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[27] 31 FORDHAM L. REV. 836, 838 (1962).

[28] Among cases cited were Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Wheat v. Carter, 79 N.H. 150, 106 Alt. 602 (1919) Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).

[29] 27 ALBANY L. REV. 231 (1963); 31 FORDHAM L. REV. 836 (1962).

[30] Risk v. County of Nassau, 262 N.Y.S.2d 56 (App. Div. 1965).

[31] *Ibid.* This is the view taken by most courts following the minority view. *But see* Daily v. Somberg, 28 N.J. 372 146 A.2d 176 (1958) where the court placed the burden on the claiming the release is a bar.

[32] N.C. Gen. Stat. § 1-540.1

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

[33] 114 W. Va. 248, 171 S.E. 535 (1933).

[34] 264 N.Y. 267, 190 N.E. 487 (1934).

[35] 93 Wash. 517, 161 P. 355 (1916).

treatment by the physician appear to have been known to the parties at the time of the release and the settlement was clearly made with a view to covering all these elements of damage, the release is a bar. The court stated it is a well settled doctrine of the law that complete satisfaction for an injury received from one person in consideration of his release operates to discharge all who are liable therefor, whether they be joint or several wrongdoers. The court then added, in dicta, that it appeared that the alleged malpractice of the defendants was an element then being considered, but even if it was not then considered, the general rule is the same. The court, in dicta, indicated that West Virginia is in the majority and has been cited by other jurisdictions as being in the majority.

In the following year a similiar case came before the court,[36] but the distinguishing factor was that the malpractice was subsequent to the release. The physician relied on the *Mier* case and pleaded the release to the original tortfeasor as a bar, but the court struck down this defense stating that a person does not anticipate that those called upon to treat his injury will so negligently perform their service as to aggravate the condition. This case seems to place West Virginia in the minority position.

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**Workmen's Compensation—Dual Capacity Doctrine**

Claimant, president and sole stockholder of a corporation, was seriously injured in an automobile accident while returning from a business appointment in the interest of the corporation, in the capacity of a traveling salesman. An Industrial Commissioner's award of workmen's compensation to him was affirmed by the circuit court and the employer appeals. *Held*, affirmed. Where the executive officer and sole stockholder of a sales corporation was performing at the time of his injury in the capacity of a traveling salesman, he was an employee within the meaning of the Workmen's Compensation Act and was allowed recovery for such injuries. *B. W. Sales Co. v. Industrial Comm'n*, 35 Ill. 2d 418, 220 N.E.2d 405 (1966).

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[36] Conley v. Hill, 115 W. Va. 175, 174 S.E. 883 (1934).