Case Western Reserve Law Review

Volume 13 | Issue 4 Article 10

1962

Avoidance of Tort Releases

Jonathan S. Dworkin

Avoidance of Tort Releases

A release is a contract whereby the injured party accepts monetary consideration and agrees in return to forego all claims arising out of his injury. Ostensibly the agreement is binding, and although, as will be seen, there are instances where it may be set aside, courts are reluctant to permit an express agreement to be easily undermined.[1] Generally, it is not error for a court to strike a petition[2] or sustain a demurrer[3] when it has determined that a release exists, for it may be treated as an absolute bar to a cause of action. The presumption of the validity of a release lies with the defendant, and such presumption can only be overcome by *clear and convincing* proof of defect.[4] It is only when the plaintiff has sustained this burden that courts will permit the merits of the case to be determined by a jury.[5]

The problem in a given case is that legal and ethical considerations appear in opposition to one another. On one hand, there is the deep-rooted legal doctrine that a person is bound by his contracts and that to permit repudiations would discourage settlements and increase litigation.[6] On the other hand, is the fact that an insurance adjuster is frequently an experienced attorney, motivated by the desire to settle a claim as quickly and inexpensively as possible. A relatively innocent plaintiff is often overwhelmed by the skilled negotiator. The experiences of a well-known trial attorney attest to a practice of promoting inequities:

> I have read adjuster's handbooks proffering practices making Fagan's curriculum, in comparison, seem as noble as the ten commandments. Some adjusters, not so instructed but being motivated by a desire to 'please the home office,' or because it is an 'accepted custom of their trade,' I have heard brag of their method of 'ether settlements.' . . .[7]

A subtle and disarming technique indulged in by adjusters has been to give legal counsel. The claimant may be the recipient of unsolicited but generously given advice: "You really don't have a case; the company is only giving you this money in order to avoid problems of litigation and to maintain good public relations." Relying upon this, the trusting layman signs away all rights, claims, and causes of action. If the releasor

1. *E.g.*, O'Donnel v. Langdon, 170 Ohio St. 528, 166 N.E.2d 756 (1960); Snyder v. Castle, 16 Ohio App. 333 (1922); Jones v. Pickle, 7 Ohio App. 33 (1916).

2. Felder v. Paugh, 84 Ohio App. 271, 81 N.E.2d 639 (1948).

3. O'Donnel v. Langdon, 170 Ohio St. 528, 166 N.E.2d 756 (1960).

4. See Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941); Jones v. Pickle, 7 Ohio App. 33 (1916); Edwards Mfg. Co. v. Perry, 4 Ohio App. 390 (1915).

5. See Chicago, Rock Island & Pac. Ry. v. Lewis, 109 Ill. 120 (1894); O'Grady v. City of Newark, 6 Ohio App. 388 (1917).

6. O'Donnel v. Langdon, 170 Ohio St. 528, 166 N.E.2d 756 (1960). *Contra,* Ricketts v. Pennsylvania R.R., 153 F.2d 757, 767 (2d Cir. 1946) (concurring opinion).

7. 1 BELLI, MODERN TRIALS 347 (1954).

ever realizes his mistake, he is precluded from further action by the precept that a unilateral mistake of law will not warrant the rescission of a contract.[8]

The Federal Bar Association has recognized this problem and has admonished adjusters that to advise a claimant as to law constitutes a breach of professional ethics.[9] Various courts have permitted rescission of releases, as opposed to other contracts, when a misrepresentation of law has occurred.[10] Even bare unilateral mistake of law will occasionally warrant the setting aside of a release where there is a showing that otherwise gross injustice will result.[11]

As with all contracts, the construction of a release is controlled by the intent of the parties, as manifested by the written word.[12] Where there is no ambiguity on the face of the document, a court will not create a new agreement.[13] The phrase, "intent of the parties," is flexible and elusive of precise definition. A modern trend in interpreting this intent has been to scrutinize the contract to see if it meets standards of fairness and justice.[14] Under this view, questions such as whether the execution was concluded with unseemly haste are evaluated.[15]

In a recent case[16] the defendant tortfeasor suggested that to set aside a release merely because it embodied some injustice would discourage settlements and engender disregard for contractual obligations. The court countered:

> That is a glib prediction based upon no evidence and intended to frighten the court. Sometimes judges have been persuaded by such prophecies which later events have shown to have been unfounded.[17]

Despite an indication that occasionally lower courts are sympathetic to

---

8. See 5 WILLISTON, CONTRACTS §§ 1581-82 (1937).

9. See statement of Conference Committee on Adjusters in 3 MARTINDALE-HUBBEL, LAW DIRECTORY 144A & 145A (1962):

"4(a) The companies or their representatives will not advise the claimant as to his legal rights."

"5(c) The companies or their representatives will not advise a claimant to refrain from seeking legal advice, or against the retention of counsel to protect his interest."

"5(f) The companies recognize that the Canons of Ethics of the American Bar Association apply to all branches of the legal profession, and that specialists in particular branches are not to be considered as exempt from the application of those Canons."

10. Sainsbury v. Pennsylvania Greyhound Lines, 183 F.2d 548 (4th Cir. 1960). See 1 BELLI, MODERN TRIALS 346-47 (1954).

11. Reggio v. Warren, 207 Mass. 525, 93 N.E. 805 (1911).

12. Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919).

13. *Ibid.*

14. Scott v. Bodnar, 52 N.J. Super. 439, 145 A.2d 643 (Super. Ct. 1958); Greenfield v. Aetna Cas. & Sur. Co., 75 Ohio App. 122, 61 N.E.2d 226 (1944).

15. Chicago, Rock Island & Pac. Ry. v. Lewis, 109 Ill. 120 (1894).

16. Ricketts v. Pennsylvania R.R., 153 F.2d 757 (2d Cir. 1946).

17. *Id.* at 769 (concurring opinion).

this approach,[18] the Ohio Supreme Court has refrained from approving this modern trend, and although the court will not hold sacrosanct a contract which is shockingly cruel,[19] neither will it permit a release to be attacked merely because it appears unfair or unjust.[20] Thus, there is a presumption that the release has settled the claim. The plaintiff's position is difficult, but relief is not invariably precluded. The existence of certain facts may permit the releasor to avoid his agreement of settlement and to prosecute his original tort claim.

FRAUD AND MUTUAL MISTAKE

Fraud

In attempting to overcome a release and to continue in an action for damages on grounds that such release was fraudulent, one must be particularly aware of the distinction between fraud in the inducement and fraud in the execution. Fraud in the execution has been defined as that which goes directly to the instrument.[21] In other words, where a person without negligence on his part is fraudulently led to believe that he is signing something other than a release, a receipt, for example, the fraud goes directly to the instrument. Fraud in the inducement exists where the claimant knows that the document is a release, but is misled into signing it by representations which are ancillary to the instrument.[22] Intentionally false statements as to the extent of the person's injuries or of his prognosis may constitute fraud in the inducement.[23]

The importance of recognizing the different species of fraud was brought into clear focus in *Dice v. Akron, Canton, & Youngstown Railroad.*[24] An action for damages was brought by an injured employee under the Federal Employer's Liability Act.[25] The employee had previously signed a release, but claimed that the release had been obtained by fraud. The Ohio Supreme Court held that if there had been any fraud it was in the inducement. The fraudulently induced instrument was voidable, that is, it was valid and binding until judicially rescinded. Rescission of the release was denied for the reason that the plaintiff omitted to state in his petition that he had tendered to the defendant the consideration received

18. Greenfield v. Aetna Cas. & Sur. Co., 75 Ohio App. 122, 61 N.E.2d 226 (1944).

19. Pittsburgh, Chicago & St. Louis R.R. v. Kinney, 95 Ohio St. 64, 115 N.E. 505 (1916).

20. O'Donnel v. Langdon, 170 Ohio St. 528, 166 N.E.2d 756 (1960). Note the dissent by Zimmerman, J., *id.* at 531, 166 N.E.2d at 758.

21. Perry v. M. O'Neil & Co., 78 Ohio St. 200, 85 N.E. 41 (1908).

22. Picklesimer v. Baltimore & O.R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949).

23. *Ibid.*

24. 155 Ohio St. 185, 98 N.E.2d 301 (1951), *rev'd*, 342 U.S. 359 (1952).

25. 35 Stat. 65 (1908), as amended 45 U.S.C. § 51 (1958).

under the release.[26] Failure to allege either actual return of the consideration or tender thereof is fatal to the plaintiff's claim and the release stands.[27]

When the fraud goes to the instrument itself, the release is wholly void. The plaintiff need not acknowledge it in his petition and may successfully meet its effects by reply. There is no necessity of tender.[28]

Certain operative difficulties are apparent in the distinction between fraud in the inducement and fraud in the execution. Most obvious is the fact that one cannot always be certain that a particular fraudulent situation falls within one of the definitions to the exclusion of the other. Moreover, the supreme court has not been notably helpful in adequately articulating this line of demarcation.[29]

In *Shallenberger v. Motorists Mutual Insurance Company*[30] the plaintiff attempted to forego questioning the validity of his release and instead brought an action in fraud directly against the tortfeasor's insurance company.[31] The plaintiff had been injured in an automobile accident while driving a borrowed car. The insurance company's agent told the plaintiff that she would have to sign a paper to enable the owner of the borrowed vehicle to recover his property damages. She was assured that such was a mere formality and would not affect her rights. In reliance upon these representations and without reading the contract, the plaintiff signed an absolute release. Thereafter, she brought an action for damages against the insurance company, claiming that the company's deceitful conduct had negated her right to recover from the insured. The Ohio

26. See Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N.E. 74 (1903). *Accord,* Picklesimer v. Baltimore & O.R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949); Kercher v. Brown, 72 N.E.2d 588 (Ohio Ct. App. 1947); Conrad v. Keller Brick Co., 12 Ohio C.C.R. (n.s.) 126 (Cir. Ct. 1907); *aff'd,* 79 Ohio St. 461, 87 N.E. 1134 (1909); Bragg v. Ohio Elec. Ry., 23 Ohio N.P. (n.s.) 140 (C.P. 1920); Crawley v. Indiana, Columbus & E. Traction Co., 15 Ohio N.P. (n.s.) 157 (C.P. 1912).

27. Stark v. Testo, 106 Ohio App. 386, 148 N.E.2d 109 (1958). See Hancock v. Blackwell, 139 Mo. 440, 41 S.W. 205 (1897).

It is noteworthy that the *Dice* case was overruled by the United States Supreme Court. The ruling of that tribunal, however, concerned only cases brought by virtue of the Federal Employers Liability Act. The *Dice* case still states the applicable Ohio law and was expressly approved in McCluskey v. Budnick, 165 Ohio St. 533, 138 N.E.2d 386 (1956).

28. Soeder Sons Milk Co. v. Salacienski, 32 OHIO L. REP. 161 (Ct. App. 1930); Jones v. Pickle, 7 Ohio App. 33 (1916).

29. See Robinson v. Easton, 14 Ohio C.C.R. (n.s.) 87 (Cir. Ct. 1911), which sets forth the early supreme court cases which have settled this point in Ohio.

30. 167 Ohio St. 494, 150 N.E.2d 295 (1958).

31. Three reasons may be assessed as having possibly contributed to this procedure:

(1) The facts present a middle ground between fraud in the inducement and fraud in the execution. It is possible that the attorney did not know which course to follow.

(2) If the release had been treated as fraud in the inducement, it is probable that the plaintiff's negligence in failing to read the release before signing it would have prevented rescission. *E.g.,* Dice v. Akron, C. & Y.R.R., 155 Ohio St. 185, 98 N.E.2d 301 (1951), *rev'd on other grounds,* 342 U.S. 359 (1952).

(3) A successful action for fraud may have warranted punitive damages.

court proved unreceptive to this theory and held that the complaint lacked that element of damages essential to a cause of action in deceit. If the release had been fraudulently induced, plaintiff's only recourse was to have it set aside and to continue in an action based upon the original tort. If the release had been fraudulently executed, it was void *ab initio* and never existed at law. In such event, there was no damage to the plaintiff as there was no release.[32]

The *Shallenberger* case affirms with undeviating rigidity the classic distinction between frauds. This has not been the situation in other jurisdictions. In *Ricketts v. Pennsylvania Railroad Company*[33] Judge Franks of the Second Circuit indicated that the theories of void and voidable releases may do a greater disservice than service and that they should generally be ignored.[34] In an early Mississippi case the court logically concluded that where a person did not know of his right to repudiate a voidable release, bringing the action which the release was supposed to bar was equivalent to repudiation.[35]

The preceding commentary is not intended to convey the impression that a distinct suit for equitable rescission of a release is a prerequisite to a second suit for damages. On the contrary, the two issues may be merged into a single petition. Furthermore, the court has discretion to submit all the issues, including the question of whether the release was void or voidable, to the jury.[36]

In *Martin v. Sentker*[37] the plaintiff was injured while a passenger on defendant's roller coaster. Defendant set up a release as a bar to the action, to which the plaintiff replied that the release was fraudulently executed and void. The relevant facts were in dispute and the entire matter was submitted to the jury. A general verdict was rendered for the plaintiff. There was no specific finding as to whether the release was wholly void or not. This issue was especially pertinent, as the plaintiff had not tendered the return of payment received by virtue of the contract. The court of appeals held that implicit in the general verdict was a finding that the plaintiff had not released his claim. The alleged release was void, and tender was not a condition precedent to the right of

32. Some jurisdictions permit this type of action. See Pattison v. Highway Ins. Underwriters, 278 S.W.2d 207 (Tex. Ct. App. 1955), approved, 292 S.W.2d 694 (Tex. Ct. App. 1956).

33. 153 F.2d 757 (2d Cir. 1946).

34. *Id.* at 770.

35. Alabama & Va. Ry. v. Jones, 73 Miss. 110, 19 So. 105 (1895).

36. Dice v. Akron, C. & Y.R.R., 155 Ohio St. 185, 98 N.E.2d 301 (1951), *rev'd on other grounds*, 342 U.S. 359 (1952); Flynn v. Sharon Steel Corp., 142 Ohio St. 145, 50 N.E.2d 319 (1943). *But see* Ulrich v. McDonough, 89 Ohio App. 178, 101 N.E.2d 163 (1950), where the court stated that fraud became a question of fact for the jury and held the lower court was not justified in directing a verdict for the defendant.

37. 12 Ohio App. 46 (1918).

recovery. This case stands for the proposition that where there is conflicting evidence as to the nature of the fraud, a general verdict in favor of the plaintiff will be conclusive that the release was fraudulently executed and therefore void.[38]

Mistake

A second means of attacking the validity of a release is to allege that at the time of execution both parties were mistaken as to the facts essential to the contract.[39] A mistake of fact will not permit the rescinding of a release unless the mistake is actually mutual; and it must comprehend a material aspect of the contract. The Restatement of Contracts provides:

> A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable; nor do such mistakes of both parties if the respective mistakes relate to different matters; but if the mistakes relate to the same matter, the power of avoidance is not precluded because the mistakes of the parties as to that fact are not the same.[40]

Insurance companies have noted the necessity for mutuality and have included in most release forms an express provision denying liability for subsequently discovered injuries.[41] An injured party who sells his tort claim too soon or for too little does so at his own risk.[42] He will find a court inhospitable to a claim that he suddenly discovered additional injuries.[43] His protestation of ignorance at the time of contracting will be unavailing, for the written agreement is decisive. If there was any mistake, it was unilateral and the company foresaw and provided for this possibility.[44] The deafness of the court to such plaintiff's arguments is not unqualified. To allow a release of trifling harm to cover crippling impairment would be intolerable. The claimant may be afforded the opportunity to convince the court that, notwithstanding the literality of the contract, there was a mutual reliance upon the assumption that no further injuries existed.[45] In view of the presumption that a written agreement expresses the will of the parties, the task of persuasion is

38. See Chicago, Rock Island & Pac. Ry. v. Lewis, 109 Ill. 120 (1884).

39. See 1 BELLI, MODERN TRIALS 348 (1954).

40. RESTATEMENT, CONTRACTS § 503 (1932).

41. See Chicago & Nw. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949).

42. Corbett v. Bonney, 202 Va. 933, 121 S.E.2d 476 (1961); Diltz v. Sherrick, 108 Ohio App. 188, 161 N.E.2d 93 (1958).

43. DeWitt v. Miami Transit Co., 95 So. 2d 898 (Fla. 1957); Mandenhall v. Vandeventer, 61 N.M. 277, 299 P.2d 457 (1956); Stumpf v. Stumpf, 28 Ohio L. Abs. 479 (Ct. App. 1938).

44. See Stiff v. Newman, 134 So. 2d 260 (Fla. Ct. App.); *aff'd mem.*, 135 So. 2d 17 (Fla. 1961).

45. Stumpf v. Stumpf, 28 Ohio L. Abs. 479 (Ct. App. 1938).

laborious. The claimant is, however, fortified by a rule of construction that no matter how broad the release, it releases only what is definitely referred to — that the specific rules the general.[46]

Erroneous medical prognosis preceding a release has been prominent in many successful avoidances where mutual mistake was an issue.[47] In an Indiana case[48] the plaintiff entered defendant's hardware store to purchase plumbing supplies. He was invited by a clerk to step into an elevator and ride to the second floor. The area was unlighted and neither the clerk nor the plaintiff was aware that the elevator was elsewhere until the plaintiff stepped into the vacant shaft. A doctor, who was consulted, examined only the plaintiff's ribs, hips, and knee, concluding that the injuries were superficial. Plaintiff and defendant's insurance company entered into a contract, whereby the plaintiff released any and all claims arising out of the injury for a sum of $140. Later it was shown that the fall had caused a permanent and crippling back injury. The court set aside the release, saying that neither party had contemplated the extent of the injuries, but each had relied upon the medical assurances that the injuries were not serious. The plaintiff was entitled to avoid the contract, as it had been executed in an environment of mutual mistake.[49] Such holdings are limited by the facts of the case and the attitude of the jurisdiction. Even where the doctor is wrong, the right to rescind may be somewhat tenuous. In *Kostick v. Swain*[50] a release for $215 was entered into after doctors employed by both parties had examined the claimant. The examinations failed to reveal a severe back injury which rendered the plaintiff unable to work for a period of one year. Despite the medical representations, the California court refused to permit the release to be ignored. The plaintiff was held to have known what he was signing and to have assumed the risk of subsequently discovered injuries.

The preceding discussion indicates that although insurance releases may be set aside, the tendency of courts has been to regard them as binding contracts, unassailable except by clear and convincing evidence of fraud or mutual mistake. An attorney who seeks to prosecute his client's tort claim, notwithstanding a prior release, must be prepared for a vigorous struggle. Judicial latitude varies with the jurisdiction. The recent

46. Havighurst, *Problems Concerning Settlement Agreements,* 53 Nw. U.L. Rev. 283, 286-87 (1958).

47. *E.g.,* Chicago Nw. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Farmers' Mut. Auto. Ins. Co. v. Buss, 188 F. Supp. 895 (D. Kan. 1960); 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); Kopp v. Diamond K Markets, Inc., 141 N.Y.S.2d 542 (Sup. Ct. 1955); K. C. Motor Co. v. Miller, 185 Okla. 84, 90 P.2d 433 (1939); Seaboard Ice Co. v. Lee, 199 Va. 243, 99 S.E.2d 721 (1957).

48. Crane Co. v. Newman, 111 Ind. App. 273, 37 N.E.2d 732 (1941).

49. *Accord,* see cases cited in note 47 *supra.*

50. 116 Cal. App. 2d 187, 253 P.2d 531 (1953).

case of *O'Donnel v. Langdon*[51] expresses the position of the Ohio Supreme Court. Plaintiff, while riding a motorcycle, was struck by defendant's automobile. The insurance company quickly induced the plaintiff to sign a release for $56.90 (the cost of repairing the motorcycle). Although plaintiff only intended to settle his property damage, the release purported to be absolute. The Ohio Supreme Court said that the sole issue was whether the plaintiff intended to execute a contract of settlement. As this was admitted, there was no cause of action. The court expressed its apparent belief in the immutability of contracts as follows:

> To condone this plaintiff's conduct would seem to reduce the value of a legitimate release to the vanishing point by encouraging individuals to sign the document with the feeling that it can be nullified at will and without regard to the failure of a signer to exercise any care in his own behalf.[52]

Thus, there exists no touchstone by which an attorney may predict his success in suing in spite of previous settlement. One should not be unmindful, however, of certain factors which have been the foundation for avoiding releases in Ohio and other jurisdictions.

State of Mind of Claimant

A most profitable area of consideration for the plaintiff's attorney is the mental and physical health of his client at the time the release was signed. It is not uncommon to uncover facts that will indicate to a jury that the plaintiff was incapacitated to the extent of being unable to intend to contract.[53] In an Arkansas case a ninety-year-old man entered into a release while under the influence of codeine tablets which had been prescribed to ease his pain. Medical testimony that even a small amount of codeine would affect the mental processes of a man of that age was sufficient to enable the jury to find that the plaintiff lacked capacity to enter into a valid contract.[54] In a California case an $800 release was set aside and a verdict of $3,500 rendered upon a showing that at the time of contracting the plaintiff was in a dazed, semi-conscious condition.[55] Similarly, in a Massachusetts case the fact that the plaintiff was somewhat shaken by the accident was sufficient for avoidance.[56] An early Ohio decision held that where the claimant was confined to her bed suffering

51. 170 Ohio St. 528, 166 N.E.2d 756 (1960).

52. *Id.* at 530, 166 N.E.2d at 758. Compare Lusted v. Chicago & Nw. Ry., 71 Wis. 391 (1888).

53. The Ohio rule is that issues of capacity and intent are for the jury. Brown v. Kiechler Mfg. Co., 98 Ohio St. 440, 121 N.E. 901 (1918); Mutual Life Ins. Co. v. Svonavec, 32 Ohio App. 195, 166 N.E. 905 (1929).

54. Gillenwater v. Johnson, 226 Ark. 400, 290 S.W.2d 1 (1956).

55. Backus v. Sessions, 17 Cal. 2d 380, 110 P.2d 51 (1941).

56. Bliss v. New York C. & H.R.R., 160 Mass. 447, 36 N.E. 65 (1894).

mental and bodily pains and under the influence of opiates at the time of entering into a settlement agreement, such agreement was void and not a bar to an action for damages.[57]

Agreements which are executed immediately following the accident are viewed suspiciously as indicating that the injured party was still significantly under the influence of trauma and unable to formulate a valid intent.[58] Such a situation was determinative where an adjuster ignored a "no visitors" sign, entered plaintiff's hospital room, and secured a settlement in less than one hour.[59]

Duress

On occasion, insurance adjusters have been known to use duress in obtaining a release. A classic example occurred when an agent told an ignorant laborer that he was in trouble with the police and could only be protected by signing his name to a settlement. The Nebraska Supreme Court held that this was of sufficient magnitude to warrant submitting the issue of fraud to the jury.[60]

Misunderstanding of Substance of Release

Courts have not favorably acknowledged the bare assertion that the plaintiff did not understand what he signed where there has been no further showing of mental or emotional disability. As a rule, a person cannot be heard to say that he was misled when he could have attained the truth by further investigation.[61] In *Fay v. Buckeye Pipe Line Company*[62] the claimant did not have his glasses, and the release was read to him by the adjuster. The contract was read fully and in good faith. The plaintiff misinterpreted what he had heard and signed in reliance upon his misinterpretation. The agreement was held binding. The plaintiff was required to understand what was read to him and its import. Cases to the contrary usually contain an added factor of intentional misrepresentation on the part of the insurance agent.[63]

57. Perry v. M. O'Neil & Co., 78 Ohio St. 200, 85 N.E. 41 (1908).

58. McGregor v. Mills, 280 S.W.2d 161 (Ky. Ct. App. 1955); Red Top Cab Co. v. Whitfield, 26 Ohio App. 373, 159 N.E. 848 (1927).

59. Leonard v. Hare, 325 S.W.2d 197 (Tex. Ct. App. 1959), *aff'd*, 336 S.W.2d 619 (Tex. 1960). See Klettke v. Checker Taxi Co., 26 Ill. App. 2d 341, 168 N.E.2d 453 (1960).

60. Bryant v. Greene, 164 Neb. 15, 81 N.W.2d 580 (1957). See also Service Fire Ins. Co. v. Reed, 220 Miss. 794, 72 So. 2d 197 (1954).

61. McFall v. Conner, 162 N.E.2d 876 (Ohio Ct. App. 1959). In Atchison, Topeka & Santa Fe Railroad Company v. Vanordstrand, 67 Kan. 386, 73 Pac. 113 (1903), the court stated that being in a hurry is not an excuse for not having read the release before signing.

62. 30 Ohio App. 316, 164 N.E. 782 (1928).

63. See Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 Pac. 719 (1929); Schubert v. St. Louis Pub. Serv. Co., 358 Mo. 303, 214 S.W.2d 420 (1948); Whitehead v. Montgomery Ward & Co., 194 Ore. 106, 239 P.2d 226 (1951).

Experience and Intelligence

Significant differences in intelligence and experience between an adjuster and a claimant should be weighed in determining the effect of a misrepresentation. A disparity in backgrounds was germain to a decision where a lawyer-adjuster, who had settled claims for over one hundred companies, negotiated a release with an illiterate claimant. The claimant expressed the belief that his injuries were worth $10,000. The insurance agent acknowledged this statement derisively and told him that he could not hope to recover more than $600 if he went to court. This was held to be substantial evidence of fraud.[64] The court was more impressed with the argument that the plaintiff had been wrongfully misled than with the binding effect of sterile legal formalities. The court stated:

> When we consider the vast difference in the intelligence, education, background, training and experience of these two men . . . and then consider all of the testimony and other evidence concerning the settlement they negotiated, we find it difficult to escape the conclusion that the skilled adjuster resorted to statements which he knew were false in order to induce the illiterate laborer, for a grossly inadequate consideration, to release his claim.[65]

The court affirmed the rescission of the $500 release and a subsequent verdict of $18,000.[66]

In addition to the requirement that an adjuster must exercise meticulous care not to mislead one who is intellectually less competent than himself is the affirmative duty to explain fully the nature and effect of a proposed settlement. The obligation is increased when the releasor is illiterate.[67] In *Scott v. Bodnar*[68] the plaintiff was an illiterate woman of low mental capacity. She was struck by defendant's truck and a release was negotiated. The plaintiff neither knew what she was doing nor did she consult an attorney. Although the adjuster, who had not explained the agreement, pleaded ignorance of any misunderstanding, the court concluded that the mental deficiencies of the claimant should have been so apparent as to constitute a warning to the adjuster to make certain of absolute comprehension. Otherwise, the parties could not be said to have dealt on that basis of equality which fairness and justice demand.

A 1903 decision of an Ohio circuit court[69] concerned an injury to

64. Frazier v. Sims Motor Trans. Lines, Inc., 196 F.2d 914 (7th Cir. 1952).

65. *Id.* at 917.

66. See Seaboard Air Line R.R. v. Gill, 227 F.2d 64 (4th Cir. 1955); Jordan v. Guerra, 23 Cal. 2d 469, 144 P.2d 349 (1943); Parker v. United Tank Truck Rental, Inc., 190 N.Y.S.2d 250 (Sup. Ct. 1959).

67. Miller v. Spokane Int'l Ry., 82 Wash. 170. 143 Pac. 981 (1914); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 Atl. 442 (Sup. Ct. 1901).

68. 52 N.J. Super. 439, 145 A.2d 643 (Super. Ct. 1958).

69. Lake Shore & M. So. R.R. v. Ehlert, 1 Ohio C.C.R. (n.s.) 418 (Cir. Ct. 1903).

an employee whose mastery of the English language was barely sufficient to permit normal communication. A release was read to him and executed for the consideration of one dollar. Clearly, he had no understanding of the significance of the document, for at the conclusion of the formalities he asked the attorneys what the dollar was for; ". . . they said for him to take it out and spend it."[70] The court rescinded the settlement and said:

> The parties with whom such dealings are had should be negotiated with, and the facts explained fully and perfectly — that they are buying him off . . . .[71]

The requirement that an insurance adjuster must disclose the full nature of the agreement rests upon the uncertain basis of judicial determination as to who is and who is not mentally competent. The Ohio case of *McCuskey v. Budnick*[72] emphasizes the resultant inconsistency. The plaintiff was unable to avoid his contract of settlement because the court concluded that he was a person of ordinary mind, sufficiently intelligent to comprehend the release. A glance at some of the plaintiff's testimony warrants the implication that he was at least extremely naive.

> A. * * * He said, 'Sign right here.' I didn't pay no attention to nothing.
> Q. But you don't know whether it [the release] was covered up or not?
> A. When I signed this, as far as me seeing 'release' and all that, as far as me reading this, the man didn't ask me to read nothing. And he said, 'Sign this, and you will get your car.' And I signed it and that was all there was to it.[73]

CONSIDERATION

Grossly inadequate consideration in a contract of release will never, when standing alone, warrant an avoidance. It will, however, be considered as evidence tending to establish fraud or mutual mistake.[74] The extent to which the question of sufficiency of payment will be determinative is individual to each jurisdiction. In a California decision the inadequate amount for which a permanent disability was settled was held to suggest that the tortfeasor did not intend to be completely absolved from liability. The release was avoided for mutual mistake.[75]

The issue in an early Wisconsin case was whether in signing the settlement it was intended that the cause of action as to personal injuries was released along with property damages. It was stated that the $50 consideration did not fully pay for the plaintiff's loss of property. There-

70. *Id.* at 422.
71. *Ibid.*
72. 165 Ohio St. 533, 138 N.E.2d 386 (1956).
73. *Id.* at 535, 138 N.E.2d at 387.
74. Wilson v. Southwest Cas. Ins. Co., 288 Ark. 59, 305 S.W.2d 677 (1957).
75. Union Pac. R.R. v. Zimmer, 87 Cal. App. 2d 524, 197 P.2d 363 (1948).

fore, it certainly did not comprehend settlement of substantial personal injury.[76]

Two Ohio cases illustrate a contrary theory. In *Toledo & Ohio Central Railroad Company v. Coleman*[77] the plaintiff had received a severe eye injury and was told by his employer to sign a release in consideration of one dollar. He was assured that this was a mere formality and would not preclude any substantive right of action. Even if both the plaintiff and defendant had actually believed that the document was no more than a formality, the court would not permit it to be avoided. The fact that one dollar was ridiculously small was held meaningless. Equivalent reasoning negated the plaintiff's right of action in *O'Donnel v. Langdon.*[78]

Character of Instrument

Release of Joint Tortfeasor

This area has been responsible for much disappointment to claimants. The invariable statement of law is that a release of one joint or concurrent tortfeasor releases the others.[79] Difficulty in determining whether a party is jointly liable has engendered confusion. In *Garbe v. Halloran*[80] the plaintiff's automobile was hit by X and turned sideways. Six seconds later Y collided with the helpless vehicle. Settlement as to the property damage was made with X for $350. The second collision had occasioned personal injury, and the plaintiff brought an action against Y for $5,000. Recovery was denied on grounds that the release of X extended to Y. Justice Zimmerman dissented, saying that the time interval separating the two collisions prompted the conclusion that the issue of concurrent negligence, as opposed to separate torts, should have been submitted to a jury.[81]

The doctrine that a contract of settlement extends to all joint or concurrent tortfeasors has been of especial benefit to the medical profession. Suppose A is injured by B and releases his claim. Thereafter A is further impaired by the negligence of a physician treating the original injury. The malpractice (unless it constitutes gross negligence) is

76. Lusted v. Chicago & Nw. Ry., 71 Wis. 391 (1888).

77. 12 Ohio C.C.R. (n.s.) 497 (Cir. Ct. 1908), *aff'd mem.*, 81 Ohio St. 522, 91 N.E. 1127 (1909).

78. 170 Ohio St. 528, 166 N.E.2d 756 (1960).

79. Connelly v. United States Steel Co., 161 Ohio St. 448, 119 N.E.2d 843 (1954); Davis v. Buckeye Light & Power Co., 145 Ohio St. 172, 61 N.E.2d 90 (1945); Royal Indem. Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (1930). See Cleveland Ry. Co. v. Nickel, 120 Ohio St. 133, 165 N.E. 719 (1929).

80. 150 Ohio St. 476, 83 N.E.2d 217 (1948).

81. *Id.* at 483-84, 83 N.E.2d at 222.

deemed a continuation of the original tort, and the prior release absolves the doctor of liability.[82]

In 1825 the Supreme Court of Ohio faced for the first time the issue of a settlement executed by one of several tortfeasors. The contract embodied a specific declaration of intent not to release the others. The court determined the explicit provision to be of no bearing and held that, notwithstanding the express intent of the parties, settlement with one tortfeasor released the others.[83] This remained the law in Ohio for ninety-four years until the case was overruled in 1919 by *Adams Express Company v. Beckwith*,[84] and today express qualifications in releases will be given full effect.[85] The only exception is that damages in subsequent suits against the parties jointly liable must be confined to the excess incurred above the amount of settlement.[86]

It is to be noted that if a release is made with a party primarily liable, it is a bar to an action against the party secondarily liable, despite express provisions to the contrary.[87] This problem frequently arises where a claimant is injured on a sidewalk and settles with the abutting property owner. He cannot thereafter claim damages from the city.[88]

Covenants Not to Sue

A final consideration in regard to joint tortfeasors is whether the settlement agreement is a release or a covenant not to sue. As to a single liable party, a covenant not to sue is the same as a release. Both operate to discharge liability. In *City of Chicago v. Babcock* the court stated:

> But the rule is otherwise where there are two or more tort feasors, and the covenant is with one of them not to sue him. *In such cases the covenant does not operate as a release* of either the covenantee or the other tort feasors, but the former must resort to his suit for breach of the covenant, and *the latter can not invoke the covenant as a bar* to the action against them.[89] (Emphasis added.)

82. Knight v. Strong, 101 Ohio App. 347, 140 N.E.2d 9 (1955); Seymour v. Carrol, 43 Ohio App. 60, 182 N.E. 647 (1932).

83. Ellis v. Bitzer, 2 Ohio 89 (1825). *Accord,* Ford Motor Co. v. Barry, 30 Ohio App. 528, 165 N.E. 865 (1928) (court applying Michigan law).

84. 100 Ohio St. 348, 126 N.E. 300 (1919).

85. Bacik v. Weaver, 173 Ohio St. 214, 180 N.E.2d 820 (1962); Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied,* 352 U.S. 826 (1956) (dictum); Prok v. Cleveland, 102 N.E.2d 253 (Ohio Ct. App. 1951); Sheridan v. Werkheiser, 88 Ohio App. 474, 100 N.E.2d 301 (1950).

86. Ford Motor Co. v. Tomlinson, 299 F.2d 873 (6th Cir.), *cert. denied,* 352 U.S. 826 (1956)) (dictum); Hillyer v. City of East Cleveland, 155 Ohio St. 552, 99 N.E.2d 772 (1957); Sheridan v. Werkheiser, 88 Ohio App. 474, 100 N.E.2d 301 (1950).

87. Hillyer v. City of East Cleveland, *supra* note 86; Herron v. City of Youngstown, 136 Ohio St. 190, 24 N.E.2d 708 (1940). *But see* City of Cleveland v. Hanson, 15 Ohio App. 409 (1921), *aff'd mem.,* 105 Ohio St. 646, 138 N.E. 925 (1922).

88. See note 87 *supra.*

89. 143 Ill. 358, 366-67 (1892).

It has been stated that courts, recognizing the potential harshness of the rule of releases as to joint tortfeasors, will interpret a settlement agreement as a covenant not to sue where reasonably possible.[90]

CONCLUSION

The problem embodied in releases is that they are ostensibly no different than ordinary business contracts. Judging them in this light frequently results in the upholding of legal formalism at the expense of justice. Some jurisdictions have chosen to view a release as a distinct species of contract rendering the injured party in a more advantageous position when a sense of fairness requires it. Ohio has characteristically avoided this view. But the law in this area is still being made, and there remains the possibility that the Ohio Supreme Court will redirect itself towards the modern trend.

JONATHAN S. DWORKIN

90. Dale Hilton, Inc. v. Triangle Pub., Inc., 198 F. Supp. 638 (S.D.N.Y. 1961). See 1 BELLI, MODERN TRIALS 352 and cases cited therein.