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Avoidance of P.I. Releases for Mutual Mistake: Recent Cases

*Franklin Stafford Wearn, II**

RELEASED OR NOT?: that is an apt question for insurers, their counsel and agents. Not limiting themselves to instances of fraud, misrepresentation and overreaching, many courts are setting aside releases on the ground of mutual mistake.

Equity has always permitted an avoidance of a release for mutual mistake of a past or present material fact; as when there is an unknown claim which exists at the time of the releasing.¹ However, this has presented the courts with a dilemma. The sanctity of the release, which expressed a final adjustment of the parties' rights, if not binding, would not be compromised but would lead to court-congesting litigation. On the other hand, when there is clear liability in the releasee, i.e., insurer, but for the release, it is manifestly harsh to force the releasor to carry the burden of a mistake made by both him and the releasee, when it could be said that there would have been no release without the mistake.

Early cases pertaining to the setting aside of releases for a mistake as to the nature and extent of injury turned on the wording of the release, and on whether the releasor intended to waive claims pertaining to unknown injuries.² Two stumbling blocks in these cases were the separation of the legal and equitable sides of the courts, and the fact that the all-important physician's statement was seen as an opinion and therefore insufficient to constitute the mistake unless he were acting as the releasee's agent.³ Recently, courts have been more liberal in applying the doctrine and extending relief in appropriate situations.⁴ As a good summary can be found of cases prior to 1960,⁵ this note concentrates on recent cases.

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¹ *Lyall v. Edwards*, 6 H. & N. 337, 158 Eng. Rep. 139 (Ex. 1861) (conversion of goods unknown by releasor at time of release); *Roberts v. Eastern Counties R. Co.*, 1 Fost. & F. 460 (1859) (claim by passenger for injury to head and spine unknown at time of releasing for value of hat lost); *Lumley v. Wabash R. Co.*, 76 Fed. 66 (6th Cir. 1896) (releasee's physician stated no shoulder injury, settlement for fractured arm, fractured shoulder subsequently discovered); *Dominicis v. United States Cas. Co.*, 132 App. Div. 553, 116 N. Y. Supp. 975 (1909) (release for benefit under loss of working time provision in insurance contract, claim for benefit due to loss of arm unknown due to statement of releasee's physician). See 23 Colum. L. Rev. 302 (1923).

² 48 A. L. R. 1462 (1927), supplemented by 117 A. L. R. 1022 (1938).

³ *Ibid.*

⁴ *Carlisle, Avoidance of Personal Injury Release for Mutual Mistake of Fact*, 7 Clev.-Mar. L. Rev. 98 (1958); *Malina, Unilateral Mistake of Fact in Personal Injury Release Cases*, 10 Clev.-Mar. L. Rev. 70 (1961).

⁵ 71 A. L. R. 2d 82 (1960).

The purpose, then, is to determine the factors which currently persuade courts to set aside releases under the doctrine of mutual mistake. Therefore, cases involving fraud, misrepresentation, overreaching, or unilateral mistake are outside the scope of this article, except as they shed light on the doctrine's application. We shall consider first those cases where there is thought to be no personal injury at the time of releasing, and then those where some personal injury is known, but where it could be said that there exists a material unknown injury. Let it be noted that, as will be shown, if the releasor knowingly intended to release unknown injuries, and the court is convinced of this, the application of the doctrine of mutual mistake becomes irrelevant.

No Personal Injury Apparent

In this first area, there is thought to be no personal injury at the time of the releasing by both parties.⁶ Even though the releasor may have suffered some injury, it is thought by him to be so minor as to cause him to disclaim personal injury.⁷ A good indication of this is the allocation of the consideration for the release. This position approaches the situation of a releasor who knows he has some injury.

⁶ *McGuirk v. Ross*, 53 Del. (3 Storey) 141, 166 A. 2d 429 (1960) (directed verdict for releasor where release for cost of replacing spectacles, herniated disks found later, injury-to-release time not given but implied to be quite short); *Denton v. Utley*, 350 Mich. 332, 86 N. W. 2d 537 (1957) (judgment in favor of releasor affirmed where consideration was \$50.00 property damage and injury discovered later, no bargaining regarding personal injury); *Seaboard Ice Co. v. Lee*, 199 Va. 243, 99 S. E. 2d 721 (1957) (releasee not granted specific performance of release where release made within one month for what releasor thought covered loss of wages and cost of medical examination, subsequent atrophy of arm and nerve damage found); *Reede v. Treat*, 62 Ill. App. 2d 120, 210 N. E. 2d 833 (1965) (directed verdict for releasor for ruptured disk, release for \$125.00 before hurrying adjustor had received physician's report); *Ormsby v. Ginolfi*, 107 So. 2d 272 (Fla. Dist. App. 1958) (summary judgment for releasee reversed where release made within eight days for \$90.08 property damages); *Kerr v. May*, 24 Pa. D. & C. 2d 97, 108 P. L. J. 452 (C. P. 1960) (motion for judgment on the pleadings by releasee refused where release within three weeks for \$79.75 property damage, pain in back and neck developed three to four weeks after releasing); *Darensbourg v. Columbia Cas. Co.*, 140 So. 2d 241 (La. App. 1962) (no avoidance although release within eight days for \$229.28 property damage as releasor appears to have concealed presence of pain, and there exists a possible issue as to the liability of the releasee).

⁷ *Sloan v. Standard Oil Co.*, 177 Ohio St. 149, 203 N. E. 2d 237 (1964) (release within five weeks for \$20.19 property damage, only stiff neck known, cervical disk rupture found twelve months later, judgment for releasor); *Dansby v. Buck*, 92 Ariz. 1, 373 P. 2d 1 (1962) (new trial granted releasor on appeal where releasor signed over consideration to property damage claimant, release made within three weeks, fractured kneecap and torn ligaments found later); *Goodman v. Missouri Pac. R. R.*, 312 S. W. 2d 42 (Mo. 1958) (releasee's motion for a directed verdict denied and judgment given for releasor under FELA as release for \$15.00 believed by releasor to cover lost wages; injured vertebra, knee bursa and varicose veins discovered later); *Rill v. Darling*, 21 App. Div. 2d 955, 251 N. Y. S. 2d 396 (1964) (releasee's motion for summary judgment denied where release made four days after accident and consideration was \$25.00 for a "strawberry" on the knee); *Morris v. Millers Mut. Fire Ins. Co. of Tex.*, 343 S. W. 2d 269 (Tex. Civ. App. 1961) (no avoidance despite release in seven weeks for property damage only where claim filed through and release presented by releasor's own insurance agent).

Thus, although some pain may have existed after the event, causing the ultimate injury, the pain had ceased at the time of releasing,⁸ or was considered by the releasor to have been so minor as to have resulted in his answering "none" to the question about claiming any personal injury in accident reports or insurance claim forms.⁹ Unless there is a physician's report supporting the releasor's belief, however, the releasor might have a heavy burden of persuading the court that his belief is not negligent.

It should be noted that in such cases either there was no discussion or bargaining for damages for personal injury,¹⁰ or there was no consideration paid for personal injury in the settlement,¹¹ or both elements were present.¹² In addition, as hallmarks of these cases, a short period of time between the occurrence of the injury-causing event and the releasing,¹³ and ultimate great expenses compared to the consideration for the release,¹⁴ are usually present. The latter is also significant as indicating the materiality of the mistake.¹⁵

The courts have stated the test for setting aside a release for a mutual mistake in words that differ, but have similar meanings. Usually it is said that there must be a mutual mistake of a past or present material fact, as opposed to an opinion.¹⁶ A mistake as to the nature and extent

⁸ *Hye v. Riffin*, 208 A. 2d 513 (Del. Super. 1964) (releasee's motion for summary judgment denied where release made within three weeks for \$69.85 property damage); *Emery v. Mackiewicz*, 30 Pa. D. & C. 2d 443 (C. P. 1962) (releasee's motion for judgment on the pleadings denied where release made within seven weeks, herniation of cervical disks and other serious injuries discovered later).

⁹ *Evans v. S. J. Groves & Sons Co.*, 315 F. 2d 335 (2d Cir. 1963) (judgment for releasor for subsequently developing mental illness, release made within four weeks for \$1.00 to enable owner-driver to recover his property damage); *Casey v. Proctor*, 59 Cal. 2d 97, 378 P. 2d 579, 28 Cal. Rptr. 307 (1963) (directed verdict for releasee reversed where release made within twenty-three days for \$490.90 property damage, ruptured disk found almost two months after releasing); but see, *Nogan v. Berry*, 193 A. 2d 79 (Del. 1963) (summary judgment for releasee affirmed where releasor concealed knowledge of pain existing at the time of releasing).

¹⁰ *Reede v. Treat*, *supra* n. 6.

¹¹ *Evans v. S. J. Groves & Sons Co.*, *supra* n. 9; *Sloan v. Standard Oil Co.*, *supra* n. 7; *Casey v. Proctor*, *supra* n. 9; *Dansby v. Buck*, *supra* n. 7; *Goodman v. Missouri Pac. R. R.*, *supra* n. 7; *Denton v. Utley*, *supra* n. 6; *Hye v. Riffin*, *supra* n. 8; *Rill v. Darling*, *supra* n. 7; *Kerr v. May*, *supra* n. 6. But see *Hutcheson v. Frito-Lay, Inc.*, 315 F. 2d 818 (8th Cir. 1963) (summary judgment for releasee affirmed, 2-1, on basis that the releasor failed to divulge presence of pain after denying personal injury on insurance form, consideration was \$152.98 property damage as determined by middle of three estimates).

¹² *McGuirk v. Ross*, *supra* n. 6; *Moak v. American Auto Ins. Co.*, 242 La. 160, 134 So. 2d 911 (1961) (judgment for releasor reversed, consideration was \$242.00 for uncollected property damage on subrogation agreement, court found no intent to release personal injuries); *Ormsby v. Ginolfi*, *supra* n. 6.

¹³ *Evans v. S. J. Groves & Sons Co.*, *supra* n. 9; *Sloan v. Standard Oil Co.*, *supra* n. 7; *Dansby v. Buck*, *supra* n. 7; *Hye v. Riffin*, *supra* n. 8; *Rill v. Darling*, *supra* n. 7; *Ormsby v. Ginolfi*, *supra* n. 6; *Kerr v. May*, *supra* n. 6.

¹⁴ *Evans v. S. J. Groves & Sons Co.*, *supra* n. 9; *Casey v. Proctor*, *supra* n. 9; *Seaboard Ice Co. v. Lee*, *supra* n. 6.

¹⁵ *Dansby v. Buck*, *supra* n. 7; *Goodman v. Missouri Pac. R. R.*, *supra* n. 7.

¹⁶ *Goodman v. Missouri Pac. R. R.*, *supra* n. 7; *Ormsby v. Ginolfi*, *supra* n. 6.

of the injury is such a fact.¹⁷ As examples, it is stated that a pain in the injured region,¹⁸ or being badly shaken,¹⁹ is not equal to knowledge of an injured vertebra or ruptured disk.

On the other hand, courts have avoided formulating a strict test by saying that each case must be decided on its own particular circumstances,²⁰ or as justice dictates,²¹ or have criticized the application of the doctrine of mutual mistake by observing that the releasee is indifferent to the presence of a personal injury;²² or that these situations are *sui generis*,²³ as knowledge, with certainty, as to the condition of the human body is improbable. However, the same factors and elements appear to influence these courts.

The last issue in this area is whether, despite the amount of consideration, the releasor intended to forego any future claim as to an unknown injury. If so, the intention must be fairly and knowingly made.²⁴ In such situations the fact that liability or contributory negligence was seriously contested, and therefore material to the settlement, precludes a finding that the small consideration was due to mistake.²⁵ In this situation the settlement and release form a true compromise.

Releasor Aware of Some Injury

When the releasor is aware of the existence of some injury prior to, or at the time of, releasing, the focus shifts to the question of whether the subsequently-found greater injury is a consequence of the little-known injury or is separate (and therefore an unknown injury). If the situation involved a consequential injury, then the release is not avoided, but the release will be set aside if the court finds an unknown injury.²⁶

¹⁷ Sloan v. Standard Oil Co., *supra* n. 7; Dansby v. Buck, *supra* n. 7; McGuirk v. Ross, *supra* n. 6; Seaboard Ice Co. v. Lee, *supra* n. 6.

¹⁸ Evans v. S. J. Groves & Sons Co., *supra* n. 9; Dansby v. Buck, *supra* n. 7; Goodman v. Missouri Pac. R. R., *supra* n. 7; Emery v. Mackiewicz, *supra* n. 8.

¹⁹ Casey v. Proctor, *supra* n. 9; Ormsby v. Ginolfi, *supra* n. 6.

²⁰ Seaboard Ice Co. v. Lee, *supra* n. 6; but see, Clark v. Brewer, 329 S. W. 2d 384 (Ky. 1959) (summary judgment for releasee affirmed as unilateral mistake induced by releasor despite consideration being only \$104.88 property damage, release made within one month).

²¹ Denton v. Utley, *supra* n. 6; Reede v. Treat, *supra* n. 6.

²² Casey v. Proctor, *supra* n. 9.

²³ Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N. E. 2d 802 (1957) (avoidance of release and judgment for releasor affirmed despite \$60 consideration for personal injuries as ruptured disk condition unknown at time of releasing).

²⁴ Rill v. Darling, *supra* n. 7.

²⁵ Darenbourg v. Columbia Cas. Co., *supra* n. 6.

²⁶ *Separate injury*: Farmers Mut. Auto. Ins. Co. v. Buss, 188 F. Supp. 895 (D. Kan. 1960) (releasee's motion for new trial denied where release for mere broken leg compared with risk of amputation and of loss of life, knowledge withheld from releasor, release within seventeen days while releasor still in hospital); Barnard v. Cedar Rapids City Cab Co., 133 N. W. 2d 884 (Iowa 1965) (judgment for releasor affirmed where release for bump on head compared with serious whiplash, release

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However, looking at the facts behind recent cases, there is a significant variance between courts as to the application of the mistake doctrine. The factors of amount of consideration,²⁷ of compromise as to liability,²⁸

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for \$100.00 within one month); *Hall v. Strom Constr. Co.*, 368 Mich. 253, 118 N. W. 2d 281 (1962) (decree enjoining use of release as defense affirmed where release for back sprain and head injuries compared with brain damage resulting in epilepsy, releasor treated by releasee-employer's physician, release within twenty-seven days for \$175.00 medical expenses); *Cleghorn v. Terminal R. R. Ass'n of St. Louis*, 289 S. W. 2d 13 (Mo. 1956) (judgment for releasor affirmed where release for cuts and bruises of knee and finger compared with required surgical removal of knee cartilage, diagnosis by releasee-employer's physician, settlement within one month, FELA release avoided despite presence of issue of releasee's liability); *Turner v. Mutual Benefit Health & Acc. Ass'n*, 5 Misc. 2d 524, 160 N. Y. S. 2d 883 (Sup. Ct. 1957) (summary judgment motion by releasee denied, question of whether injury covered as such under policy when release given in exchange for sickness benefit paid).

Consequential: *Durham v. Gulf Interstate Eng'g Co.*, 74 N. M. 277, 393 P. 2d 15 (1964) (Workman's Compensation Statute, unexpected consequences of head injury held, but court found more than mutual mistake to be required for avoidance and affirmed judgment for releasee); *Caudill v. Chatham Mfg. Co.*, 258 N. C. 99, 128 S. E. 2d 128 (1962) (judgment for releasor reversed and condition held to be unforeseen consequence where release for spinal abscess compared with injury requiring spinal fusion); *Corbett v. Bonney*, 202 Va. 933, 121 S. E. 2d 476 (1961) (judgment for releasor reversed where mistake as to extent of treatment of back pain, release given day after accident); *Kennedy v. Bateman*, 217 Ga. 458, 123 S. E. 2d 656 (1961) (judgment for releasor reversed and condition found to entail only more severe consequences after physician gave favorable prognosis, five to two decision with dissent asserting the right to rely on the physician's representation); *DeWitt v. Miami Transit Co.*, 95 So. 2d 898 (Fla. 1957) (summary judgment for releasee affirmed where release for strains and minor tearing compared with herniated disk, held to be mistake as to consequences based on physician's diagnosis seen as error of judgment, release for \$90.00 within six days); *Mendenhall v. Vandeventer*, 61 N. M. 277, 299 P. 2d 457 (1956) (directed verdict for releasee affirmed where situation is found to be mistake as to what might happen in the course of cure, releasor held to have released releasee from such possibility); *Stiff v. Newman*, 134 So. 2d 260 (Fla. Dist. App. 1961) (dismissal of suit to vacate release affirmed where minor whiplash provided basis for settlement, release for \$1044.15 [\$450 for personal injury] within six days, court held unilateral mistake as to future consequences); *Joell v. Boro Rug and Carpet Co.*, 31 Misc. 2d 1035, 221 N. Y. S. 2d 999 (Sup. Ct. 1961) (releasee's motion for summary judgment granted where back pain failed to go away, release three months after accident, hence miscalculation of consequences); *Bellomo v. Lincoln Savings Bank of Brooklyn*, 23 Misc. 2d 632, 201 N. Y. S. 2d 24 (Sup. Ct. 1960) (releasor's complaint dismissed where release for skull fracture compared with resulting mental retardation, victim aged two and one-half, issue of causation present, courts hold merely more serious although criticizing the haste with which the release was obtained).

²⁷ *Barnard v. Cedar Rapids City Cab Co.*, *supra* n. 26; *Rankin v. New York, N. H. & H. R. R.*, 338 Mass. 178, 154 N. E. 2d 613 (1958) (release for \$2400.00 including lost wages and \$1420.60 medical expenses before ruptured disk discovered, releasee-employer's physician failed to disclose extent of injury to releasor, directed verdict for releasee reversed on FELA); *Ruggles v. Selby*, 25 Ill. App. 2d 1, 165 N. E. 2d 733 (1960) (judgment for releasor who became mentally incompetent after release for \$900.00, negligent insurance investigation).

²⁸ *Reynard v. Bradshaw*, 196 Kan. 97, 409 P. 2d 1011 (1966) (judgment affirmed and releasor held bound by release made within one month for \$2500.00 when releasor had had benefit of opinions of three medical experts of her own choosing); *Pearson v. Weaver*, 252 Miss. 724, 173 So. 2d 666 (1965) (dismissal of suit affirmed, release for \$30.00 within three weeks to buy peace); *Schoenfeld v. Buker*, 262 Minn. 122, 114 N. W. 2d 560 (1962) (action to set aside previous stipulation of settlement denied as releasee had settled to keep claims within the limits of his policy, his injury was not known at time, he was believed liable for accident, court held unilateral mis-

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and of haste in securing the release after the injury-causing event²⁹ are important. Thus, a bump on the head is distinguished from permanent damage to the occipital nerves due to a whiplash;³⁰ a sprained ankle from a broken one with complications;³¹ a minor whiplash from a ruptured or herniated disk or vertebra;³² cuts and bruises on the knee from a torn ligament;³³ hemorrhage, heart murmur and rib fractures from an aortic aneurysm;³⁴ mere broken leg from risk of amputation or loss of life;³⁵ back sprain and head bump from brain damage;³⁶ bump on head and injured eye from blindness;³⁷ and cuts and bruises on head and body are distinguished from a subdural hematoma of the brain.³⁸ On the con-

(Continued from preceding page)

take as to consequence); *Bollinger v. Randall*, 184 Pa. Super. 644, 135 A. 2d 802 (1957) (denial of petition to reopen judgment affirmed where blindness undiscovered, release for \$600.00 for skull fracture approved by court previously as releasor was minor, probable contributory negligence by releasor); *Bellomo v. Lincoln Savings Bank of Brooklyn*, *supra* n. 26. *But see Cleghorn v. Terminal R. R. Ass'n of St. Louis*, *supra* n. 26, and *Turner v. Mutual Benefit Health & Acc. Ass'n*, *supra* n. 26.

²⁹ *Farmers Mut. Auto. Ins. Co. v. Buss*, *supra* n. 26; *Barnard v. Cedar Rapids City Cab Co.*, *supra* n. 26; *Hall v. Strom Constr. Co.*, *supra* n. 26; *Cleghorn v. Terminal R. R. Ass'n of St. Louis*, *supra* n. 26; *Groh v. Huckel*, 36 Pa. D. & C. 2d 172 (C. P. 1964) (rescission granted where release made within six weeks for \$90.00 and lumbar disk herniation discovered later); *Albarelo v. Meier*, 5 Misc. 2d 193, 159 N. Y. S. 2d 761 (N. Y. City Ct. 1957) (releasee's motion to dismiss denied, release held not binding when signed immediately after accident in hospital emergency room, where consideration of \$100.00 was represented by releasee's agent as a gift, as court found releasor's failure to read the instrument excusable and the circumstances to amount to fraud). *But see Corbett v. Bonney*, *supra* n. 26; *DeWitt v. Miami Transit Co.*, *supra* n. 26; *Stiff v. Newman*, *supra* n. 26; *Bellomo v. Lincoln Savings Bank of Brooklyn*, *supra* n. 26.

³⁰ *Barnard v. Cedar Rapids City Cab Co.*, *supra* n. 26.

³¹ *Central of Ga. Ry. v. Ramsey*, 275 Ala. 7, 151 So. 2d 725 (1963) (judgment for releasor affirmed despite three releases after first sprain, then broken ankle, then fracture with complications found, as court found releasee-employer's physician's representation to have caused mistakes).

³² *Clancy v. Pacenti*, *supra* n. 23; *Groh v. Huckel*, *supra* n. 29; *Rankin v. New York, N. H. & H. R.R.*, *supra* n. 27. *But see Sloan v. Standard Oil Co.*, *supra* n. 7; *Goodman v. Missouri Pac. R.R.*, *supra* n. 7; *Reede v. Treat*, *supra* n. 6; *Emery v. Mackiewicz*, *supra* n. 8. *But see Viskovich v. Walsh-Fuller-Slaterry*, 16 App. Div. 2d 67, 225 N. Y. S. 2d 100 (1962), *aff'd*, 13 N. Y. 2d 1100, 246 N. Y. S. 2d 632, 196 N. E. 2d 267 (1963) (release given in eight months to subcontractor held valid as to general contractor and complaint dismissed, as more than mutual mistake held to be required); *Wheeler v. White Rock Bottling Co. of Ore.*, 229 Ore. 360, 366 P. 2d 527 (1961) (judgment for releasor reversed where release given in three months for \$500.00 as court finds person who shifts the burden of risk for prompt payment bound).

³³ *Dansby v. Buck*, *supra* n. 7.

³⁴ *Doud v. Minneapolis St. Ry.*, 259 Minn. 341, 107 N. W. 2d 521 (1961) (stipulation of settlement previously approved by court now set aside after death of minor releasor, release for \$3745.50 [\$2299.87 = out of pocket] within five months after accident).

³⁵ *Farmers Mut. Auto. Ins. Co. v. Buss*, *supra* n. 26.

³⁶ *Hall v. Strom Constr. Co.*, *supra* n. 26. *See Evans v. S. J. Groves & Sons Co.*, *supra* n. 9; *Rill v. Darling*, *supra* n. 7.

³⁷ *Knipe v. Hettrick*, 28 Misc. 2d 363, 214 N. Y. S. 2d 824 (Sup. Ct. 1959) (motion for summary judgment for the releasor denied where blindness in one of minor releasor's eyes developed after court previously approved settlement for \$1250.00 seven weeks after accident, but rescission action and tender required as condition precedent for instituting the action).

³⁸ *Ruggles v. Selby*, *supra* n. 27.

trary, it has been found that no separate injury existed when there was an undetected abscess which existed at the time that a spinal fusion was performed, the latter forming the basis of the settlement.³⁹

A similar case has held that it is for the jury to determine whether an unknown condition existed when the attending physician had mentioned, in passing, the possibility of a latent arteriosclerotic condition being activated by the same cause as that which formed the basis for a release.⁴⁰ Here the consideration consisted solely of the costs of the medical examinations performed only, and the parties appeared not to have bargained on the basis of such a possible injury. As is noted, there is authority adverse to setting aside releases for mistakes, but upon noting the bases of the decision, either express or implied from the facts, many of these cases actually support the general doctrine of setting aside releases for a mutual mistake of a material fact.

Thus, one court has decided for the releasee on the basis that causation of the subsequently-discovered injury was not proven, although the opinion implied on the one side that the mental retardation may only be consequential, and expressed on the other, the court's strong sympathy with the minor injured's position where the settlement was hastily made.⁴¹ It should be noted that this particular jurisdiction requires more than a mere mistake to set aside a release,⁴² but the scope of what constitutes the fraud, misrepresentation or overreaching necessary is broadly defined.⁴³ Also, cases with minors present an inherent problem in the fact that a court has approved a settlement.⁴⁴

³⁹ Caudill v. Chatham Mfg. Co., *supra* n. 26.

⁴⁰ Bryan v. Noble, 5 Wis. 2d 48, 92 N. W. 2d 226 (1958) (denial of releasee's motion for summary judgment affirmed where release given thirty-three days after accident for the reimbursement of the cost of a medical examination). Mannke v. Benjamin Moore & Co., 251 F. Supp. 1017 (W. D. Pa. 1966) (motion for new trial granted after jury found release not binding where release given thirty-eight days after accident for property damage plus \$25.00 and injury claimed is injured back).

⁴¹ Bellomo v. Lincoln Savings Bank of Brooklyn, *supra* n. 26.

⁴² Viskovich v. Walsh-Fuller-Slaterry, *supra* n. 32; Flandorfer v. Wilford, 25 App. Div. 2d 751, 269 N. Y. S. 2d 159 (1966) (releasee's motion for dismissal granted where action based only on mutual mistake); Moyer v. Scholz, 22 App. Div. 2d 50, 253 N. Y. S. 2d 483 (1964) (judgment for releasee affirmed, no avoidance allowed although release given within three months for \$21.00 more than out-of-pocket expenses, injury was not minor neck pain but a spur on a vertebra); Knipe v. Hettrick, *supra* n. 37.

⁴³ Castenada v. Ruderman, 48 Misc. 2d 321, 264 N. Y. S. 2d 744 (Sup. Ct. 1965) (judgment for releasor, overreaching as custodian was unemployed penurious aunt, unseemly haste present and consideration is \$750.00 for skull fracture); Parker v. United Tank Truck Rental, Inc., 21 Misc. 2d 246, 190 N. Y. S. 2d 250 (Sup. Ct. 1959) (releasee's motion to dismiss denied, overreaching where adjuster represented that nurse said releasor was all right, releasor is uneducated, and release given nine days after accident causing releasor wife to miscarry, for \$200.00); Albarello v. Meier, *supra* n. 29.

⁴⁴ Doud v. Minneapolis St. Ry., *supra* n. 34; Bollinger v. Randall, *supra* n. 28; Perry v. Kingston City Transp. Corp., 19 App. Div. 2d 202, 241 N. Y. S. 2d 579 (1963) (releasor's motion for summary judgment granted and injury found too consequential where scars ulcerated after settlement for \$1000.00 had been approved in court); Bellomo v. Lincoln Savings Bank of Brooklyn, *supra* n. 26; Knipe v. Hettrick, *supra* n. 37.

Other cases have turned on the fact that liability was contested,⁴⁵ that it was the releasor's own physician who induced the mistake,⁴⁶ or that such a great time intervened prior to the releasing, that the releasor should have discovered the injury.⁴⁷ Further, it is sometimes clear that the court feels that the releasor is not acting in good faith in requesting a setting aside of the release, evidenced by his demeanor at the hearing.⁴⁸ Finally, there are cases in which it appears that both parties negotiated on the basis that further medical treatment was necessary and so provided in the settlement,⁴⁹ or the releasor testifies to his knowledge of the finality of the release (even though as subsequent injury became known there were new releases for additional consideration).⁵⁰

In several of the above decisions, the court will hold that the mistake is unilateral and not subject to rescission,⁵¹ but there is authority for the proposition that it makes no difference as to this distinction.⁵² Other holdings have been to the effect that if the party upholding the release was not mistaken, then he must have been acting fraudulently.⁵³

Finally, there are cases in which the mutual mistake doctrine is not applied to set aside a release because the releasor, an attorney, initiated and hastened the settlement,⁵⁴ or because the releasor, thought to have

⁴⁵ Cases cited n. 28, *supra*.

⁴⁶ *Central of Ga. Ry. v. Ramsey*, *supra* n. 31; *Hall v. Strom Constr. Co.*, *supra* n. 26; *Rankin v. New York, N. H. & H. R. R.*, *supra* n. 27.

⁴⁷ *Wheeler v. White Rock Bottling Co. of Ore.*, *supra* n. 32; *Moyer v. Scholz*, *supra* n. 42; *Joell v. Boro Rug and Carpet Co.*, *supra* n. 26.

⁴⁸ *Randolph v. Ottenstein*, 238 F. Supp. 1011 (D. C. D. C. 1965) (complaint dismissed where releasor-attorney initiated and rushed settlement to close, consideration included \$150.00 for personal injury, mistake held to be unilateral and releasor-induced); *Myers v. Carter*, 215 Cal. App. 2d 238, 30 Cal. Rptr. 91 (Dist. App. 1963) (judgment for releasee affirmed where releasor claimed herniated disk discovered three years after settlement based on cut on head and fractured ribs, releasor was not hospitalized, unilateral mistake found as to mistake issue); *Collier v. Walls*, 51 Tenn. App. 467, 369 S. W. 2d 747 (1962) (decree for releasee affirmed and release not set aside where court found releasor to have been evasive in testifying, to have built up settlement towards adjuster, that personal injuries were discussed, release given for \$1096.55 within two weeks).

⁴⁹ *Corbett v. Bonney*, *supra* n. 26.

⁵⁰ *Page v. Means*, 192 F. Supp. 475 (N. D. W. Va. 1961) (judgment for releasee where naval officer settled after three independent naval physicians gave conflicting diagnosis as to presence of fractured vertebra); *DeWitt v. Miami Transit Co.*, *supra* n. 26. *But see* *Central of Ga. Ry. v. Ramsey*, *supra* n. 31.

⁵¹ *Randolph v. Ottenstein*, *supra* n. 48; *Myers v. Carter*, *supra* n. 48; *Stiff v. Newman*, *supra* n. 26; *Thomas v. Hollowell*, 20 Ill. App. 2d 288, 155 N. E. 2d 827 (1959) (judgment for releasee affirmed where general release for \$350.00 and suit is for subsequent aggravation of pre-existing ulcers); *Sosa v. Velvet Dairy Stores, Inc.*, 407 S. W. 2d 615 (Kansas City Ct. App. 1966) (Defendant-releasee's motion for summary judgment granted where literate releasor believed she was signing a release covering only property damage).

⁵² *Casey v. Proctor*, *supra* n. 9. *See*, *Central of Ga. Ry. v. Ramsey*, *supra* n. 31; *Rankin v. New York, N. H. & H. R. R.*, *supra* n. 27; *Bryan v. Noble*, *supra* n. 40; *Reede v. Treat*, *supra* n. 6.

⁵³ *Denton v. Utley*, *supra* n. 6; *Ruggles v. Selby*, *supra* n. 27; *Albarello v. Meier*, *supra* n. 29.

⁵⁴ *Randolph v. Ottenstein*, *supra* n. 48.

been the primarily liable party, stipulated a settlement dismissing the suit by the other parties and keeping his liability within the limits of his insurance policy.⁵⁵ Thus, in these cases, the court appears to be thrusting the duty to determine the extent of the injury upon the capable releasor, or refuses to aid the person whose injury appears self-inflicted. Included in this latter category, by analogy, would be those releasors who knowingly and fairly intended to waive any future claims for unknown injuries.⁵⁶

Mutuality of the Mistake

As has been undoubtedly noted by the reader, the question as to mutuality is almost inseparable from the question of the application of the doctrine. Courts have frequently stated that the mistake must be mutual, and have then proceeded to disregard this requirement.⁵⁷ On the other hand, courts will sometimes call the mistake unilateral, when the decision could have been made on a simpler basis as outlined above.⁵⁸ Finally, there are courts which expressly disregard this requirement and speak of the balancing of the interests in maintaining men secure in their contracts and in favoring out of court settlements against the inequality of bargaining position of the releasor and the experienced insurer, and the potential injustice to be found in the difficulty of knowing the state of the human organism with certainty and precision.⁵⁹

One particular question in this area which remains, although not as importantly as in past decades, is the status of a physician's statement. Previously, such was held to be opinion and to be ineffective to support rescission unless the physician was the releasee's agent, permitting the doctrine of constructive fraud to be raised.⁶⁰ Courts now appear to be more receptive towards viewing the attending physician's, or specialist's, statement as one of fact and thus forming the ground for a mutual mistake,⁶¹ as both parties have the right to rely upon it. The reasons for this appear in the expert role of the physician, and in a recognition by the courts of the difficult distinction between diagnosis and prognosis in reality.

⁵⁵ Schoenfeld v. Buker, *supra* n. 28.

⁵⁶ Mannke v. Benjamin Moore & Co., *supra* n. 40; Page v. Means, *supra* n. 50; Kennedy v. Bateman, *supra* n. 26; Bryan v. Noble, *supra* n. 40.

⁵⁷ Farmers Mut. Auto. Ins. Co. v. Buss, *supra* n. 26; Hall v. Strom Constr. Co., *supra* n. 26; Rankin v. New York, N. H. & H. R. R., *supra* n. 27; Cleghorn v. Terminal R. R. Ass'n of St. Louis, *supra* n. 26; Ruggles v. Selby, *supra* n. 27.

⁵⁸ Cases cited n. 51, *supra*.

⁵⁹ Casey v. Proctor, *supra* n. 9; Wheeler v. White Rock Bottling Co. of Ore., *supra* n. 32; 71 A. L. R. 2d 82, *supra* n. 5.

⁶⁰ Caudill v. Chatham Mfg. Co., *supra* n. 26. See 117 A. L. R. 1022 (1938).

⁶¹ Central of Ga. Ry. v. Ramsey, *supra* n. 31; Denton v. Utley, *supra* n. 6. See Farmers Mut. Auto. Ins. Co. v. Buss, *supra* n. 26.

Protective Measures Indicated

As it now appears that few jurisdictions fail to adhere to some form of the rule we are concerned with (two states have expressly over-ruled prior contrary authority in recent decisions),⁶² and that even jurisdictions that have distinguished its applicability in their cases have adhered to the rule,⁶³ it is important to determine what might be done to assure the finality of a settlement.

A fruitful point of departure is the concept that the release must be fairly and knowingly made to withstand the mutual mistake attack. As a significant number of releasors are without legal counsel at the time of settlement, a large burden is shifted onto the insurer of the releasee. Therefore, unless liability is seriously contested, and although the releasor must prove the mistake clearly and convincingly, the sympathy of the courts appears to have forced the releasee, *i.e.*, insurer, to confront the dilemma of being either mistaken or fraudulent.

First, the release should not be presented until the injured has substantially or fully recovered, or there has elapsed at least a reasonable time for the condition to have become tested and known. Similarly, a duty appears in the insurer, who is deemed experienced in these matters, to have adequate testing accomplished if there is even a possibility of injury;⁶⁴ for example, x-rays and electroencephalogram if the possibility of head injury is suspected. Counsel for the releasor, if any, would be well advised to apply the same guidelines or see his client's case fall on negligence in ascertaining the injury. In this area, as the cost is slight in the light of the risk, and health insurance widespread, the key to success would appear to be through liaison with the medical profession, by both insurers and counsel, to impress the importance of securing adequate diagnosis of all proximately-resulting biochemical and physiological changes.

Secondly, when there is even the possibility of injury, again assuming the absence of a liability question, consideration for personal injury should be included in the settlement. The amount should relate both to known injury and to any possible medical care necessary in the future on the basis of this probability as determined by the procedures outlined above.

Finally, tightening of the form of the release is a possibility, although courts have generally not been bound by the printed form of the

⁶² Sloan v. Standard Oil Co., *supra* n. 7; Casey v. Proctor, *supra* n. 9.

⁶³ Page v. Means, *supra* n. 50; Pearson v. Weaver, *supra* n. 28; Kennedy v. Bateman, *supra* n. 26; Collier v. Walls, *supra* n. 48. *Accord*, Woods v. City of Hobbs, 75 N. M. 588, 408 P. 2d 508 (1965) (judgment for releasor affirmed, action filed on mutual mistake basis, court recognizes doctrine as valid in jurisdiction, but turns on fraud due to assertion by releasee-employer that releasor would continue job after releasing).

⁶⁴ Farmers Mut. Auto. Ins. Co. v. Buss, *supra* n. 26; Hall v. Strom Constr. Co., *supra* n. 26; Castenada v. Ruderman, *supra* n. 43.

release and have easily found themselves free to look behind the writing. It would pose an interesting question if a releasor attempted to set aside his release after he had reiterated in his own appropriate words, in his own handwriting, below the printing and above his signature on the form, a recital that he knowingly waived his right to a claim for an injury unknown at the time of signing for a specified part of the consideration.

Conclusion

Almost all courts are now finding it possible to set aside releases for a mutual mistake as to an unknown injury, especially when the factors of haste, of a small consideration as against the value of the injury as finally determined, and of the lack of a liability issue are present. It would seem as if the trend is toward holding the liable releasee-insurer to a duty just short of strict liability for the consequences of an injury-causing event despite present broadly-worded releases. It would therefore be in the interest of all parties to act to prevent the duplicating costs necessary when an unfair settlement is negotiated and later the case is reopened and litigated to its conclusion.