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has probably undermined the policy reasons for remaining with *Schwartz* in the future.

Whether the decision will be applied to other malpractice is not clear. Certainly the equities are no less demanding when the plaintiff is injured by an injection,[33] by a surveyor's careless measurements,[34] or by an attorney's failure to act before a statute of limitations barred his client's claim.[35] Significantly, these various types of malpractice have been covered by the New York statute of limitations for malpractice.[36] A lower court decision after *Flanagan* suggests that the discovery principle may not be applied to other professional malpractice. In May, 1969, a trial court in *Marine Midland Trust Co. v. Penberthy*[37] applied the "continuous treatment theory"[38] to a legal malpractice situation. Thus, the traditional rule for the running of the statute still exists in one type of relationship but not another even though the same equitable issues arise. Until a similar malpractice case comes before the Court of Appeals again, New York will have to be content with a very limited discovery rule. In light of the twenty years of Law Revision Commission recommendations and decisions in other jurisdictions, the Court of Appeals should certainly uphold the majority rationale and, upon reconsideration of the issues, expand the scope of the rule to include all undiscovered malpractice.

JEROME D. SCHAD

NEGLIGENCE-PERSONAL INJURY—GENERAL RELEASE SUBJECT TO RESCISSION WHERE PARTIES ARE MISTAKEN ABOUT THE EXTENT AND EXISTENCE OF PLAINTIFF'S INJURIES

Infant plaintiff, injured in an automobile accident, was examined by three doctors and then assured that the only injury that resulted was to her lower spine. Since the date of injury she had complained of pain radiating down the back of her posterior left thigh and a "clicking" sound in the region of her left hip. Her counsel settled her claim for $1,000 and prepared general releases relinquishing "all claims for personal injuries, medical expenses, loss of wages (claims for expenses and loss of service) as a result of an automobile accident on February 26, 1963." Six months later she was again examined by a doctor who stated that the accident had caused an additional injury, an avascular

33. Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

34. Seger v. Cornwell, 44 Misc.2d 994, 255 N.Y.S.2d 744 (Sup. Ct. 1964). The court viewed Schwartz v. Heyden Newport Chemical Corp. as controlling.

35. Siegel v. Kranis, 52 Misc.2d 78, 274 N.Y.S.2d 968 (Sup. Ct. 1966). The court applied the traditional rule and held that "New York takes the view that fraudulent concealment does not toll the statute of limitations." *Id.* at 80, 274 N.Y.S.2d at 970.

36. *See supra* note 1 for statutory history.

37. 301 N.Y.S.2d 221 (Sup. Ct. 1969).

38. *See supra* note 14.

necrosis of the femoral head of the left hip. The doctor believed that such a condition could be brought about by a blow to the knee area which by forcing the femoral head into its socket damaged the blood supply. His diagnosis explained the click as the result of the gradual flattening of the femoral head, a phenomenon which would not develop until about six months after the initial impact. Therefore, he concluded that the plaintiff must have been mistaken when she said that she noticed the "click" so soon after the injury. The plaintiff and her father brought an action for personal injuries and sought to have the releases set aside on the grounds of mutual mistake. They asserted that the parties neither intended the releases to cover the unknown injury nor to cover the known injury. The defendants moved to dismiss the complaint and sought summary judgment on the ground that the releases were executed to cover all claims resulting from the accident. They further contended that the record demonstrated that infant plaintiff, her father, her attorney and her two doctors were all cognizant of the existence of an injury to her left hip at the time of the court approval of the compromise. The trial court denied the motions and the defendants appealed. The Appellate Division, Third Department, reversed the trial court's ruling on the motion for summary judgment and held for the defendants.[1] The Court of Appeals reversed and *held*, the motion for summary judgment failed to demonstrate as a matter of law both that the plaintiff's injury was known at the time of settlement and that the parties intended to release both the known and unknown injuries. *Mangini v. McClurg*, 24 N.Y.2d 556 (1969).

Releases have been defined as contracts "whereby the injured party accepts monetary consideration and agrees in return to forego all claims arising out of his injury."[2] Therefore, if one views the problem by this simple notion one is led to the conclusion that the courts are bound to make determinations about personal injury releases solely in accordance with the law of contracts.[3] However, equitable principles have modified the traditional view that once a party freely enters into a contract there is no recourse but to give the agreement full effect. These considerations are especially relevant in the personal injury field. The tendency on the part of the courts toward flexibility in order to reach a just result under the circumstances of each controversy is not surprising, for it is common in this area to find unbalanced bargaining among the parties.[4] In the typical setting the individual releasor bargains away his cause of action with a releasee, usually an insurance carrier, who commands more legal expertise and superior economic strength. The insurance carrier has the ability to continue negotiations for long periods of time; a plaintiff from the outset, by

1. Mangini v. McClurg, 27 A.D.2d 194, 277 N.Y.S.2d 991 (3d Dep't 1967).
2. Note, *Avoidance of Tort Release*, 13 W. Res. L. Rev. 768 (1962).
3. Garcia v. California Truck Co., 183 Cal. App. 767, 192 P. 708 (1920); Moses v. Carver, 164 Misc. 204, 298 N.Y.S. 378 (Sup. Ct. 1937); Picklesimer v. Baltimore & Ohio Ry., 151 Ohio St. 1, 84 N.E.2d 214 (1949).
4. Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957); Dutch v. Giaquinto, 15 A.D.2d 20, 222 N.Y.S.2d 101 (3d Dep't 1961).

economic necessity, is under pressure to bargain. Moreover, he is usually represented by an attorney who is also under considerable pressure to end the dispute quickly and preferably without the burden of a trial. Therefore, releases are an accepted method to attain "general peace" by ending the controversy, and to reduce the huge number of personal injury claims that are clogging court dockets.[5] They are based on the assumption, embodied in our legal system, that most individuals are capable of managing their own affairs and generally should be able to freely enter into binding legal agreements. Once the parties have done this they should not escape their contractual duties through the use of hindsight.[6] It is for this reason that the burden of setting aside a general release is cast upon the plaintiff.[7] Consequently, for the same reason releases have generally been set aside only on limited grounds of fraud, misrepresentation and mistake.[8] Nevertheless, as mentioned above, the need to preserve the stability of contracts must be weighed against equitable considerations which are especially relevant in the personal injury field. This countervailing policy to entertain equitable considerations in particular cases is further strengthened by the general experience that the average amounts of settlements are far below the average of jury verdicts.[9] Hence, the majority of courts, including those of New York, look beyond the actual wording of personal injury releases and seek the intent of the parties which may absolve them from the literal terms of the release.[10] In searching for this intent the courts look to collateral matters such as the nature of the injury, the intelligence and bargaining positions of the parties, the amount of consideration, the presence of counsel, the ability to detect injury, and the haste in settlement.[11]

In the instant case the plaintiffs primarily urged mutual mistake in their effort to set aside the general release. This method of attacking releases questions an essential element of the contract, namely assent, that is, the common understanding concerning the subject of the bargain.[12] The body of law that

5. Knapp Engraving Co. v. John Post Constr. Corp., 107 N.Y.S.2d 328 (Sup. Ct. 1951), *aff'd* 280 A.D. 763, 113 N.Y.S.2d 647 (1st Dep't 1952), *appeal denied*, 280 A.D. 864, 114 N.Y.S.2d 256 (1st Dep't 1952).

6. Oakley v. Duerbeck Co., 366 S.W.2d 430, 433 (Mo. 1963). The court stated: "What is today only a conjecture, an opinion, or a guess, might by tomorrow, through the exercise of hindsight, be regarded then as an absolute fact."

7. Brusseau v. Potter's Estate, 217 Mich. 165, 185 N.W. 836 (1921); Moses v. Carver, 164 Misc. 204, 298 N.Y.S. 378 (Sup. Ct. 1937); Davison v. Tamas, 30 Misc. 156, 63 N.Y.S. 828 (Sup. Ct. 1899).

8. Amend v. Hurley, 293 N.Y. 587, 59 N.E.2d 416 (1944); Porter v. Commercial Casualty Ins. Co., 292 N.Y. 176, 54 N.E.2d (1944).

9. Havighurst, *Problems Concerning Settlement Agreements*, 53 Nw. U.L. Rev. 283 (1958). At 299-300, note 56, Havighurst lists numerous cases showing large discrepancies between settlement and jury verdict awards.

10. Clancy v. Pacenti, 16 Ill. App. 2d 171, 145 N.E.2d 802 (1957).

11. Schoenfield v. Baker, 267 Minn. 122, 114 N.W.2d 560 (1962); Aron v. Gillman, 309 N.Y. 157, 128 N.E.2d 284 (1955); Atterbury v. Bank of Washington Heights of City of New York, 241 N.Y. 231, 149 N.E. 841 (1925). Restatement of Contracts § 230 (1932).

12. Moser v. York Cloak & Suit Co., 112 Misc. 480, 183 N.Y.S. 27 (Sup. Ct. App. Term 1920); Singer v. Karron, 162 Misc. 809, 294 N.Y.S. 566 (N.Y.C. Mun. Ct. 1937).

has been developed to solve this issue is complex, divergent and confusing. It is difficult to rationalize the explanations given in different jurisdictions for allowing or disallowing rescission of general releases on the ground of mutual mistake. Early decisions held that a mistake as to the existence or extent of personal injuries was merely a mistake of opinion and not of fact and therefore a general release was considered a complete defense to future action.[13] A dwindling minority of courts still adhere to this early view that the mistake does not relate to a present or past fact essential to the contract but merely expresses, in the light of present facts, an opinion respecting future conditions. Therefore, under this analysis the parties are not mistaken about what they bargained, but only about the future effect that the contract will have. These courts distinguish between fact and prophecy. They hold that the lack of knowledge concerning the extent of a known injury or the existence of an unknown injury is merely a mistake in prophecy, not a factual mistake about the meaning of the contract. However, under this view it developed that if there is a mutual mistake in diagnosis, as opposed to prognosis, a ground for setting aside a release exists.[14] This development toward more liberal rescission continues and is manifested in the growing number of jurisdictions which allow rescission where there is mistake about the presence of an unknown injury or about the extent of a known injury.[15] These courts reason that the parties, not comprehending the serious condition of the injured party, could not have included it within the reach of their contract.[16] The distinctions between opinion and fact, and diagnosis and prognosis are abandoned. If the parties bargain without full knowledge of the injured party's condition, they are mistaken as to an essential element of the contract, namely adequate compensation for injuries suffered. New York is in line with the majority of jurisdictions which allows liberal rescission where an injury present but undiscovered at the time of settlement is later uncovered.[17] Thus, the development in New York has stopped short of unlimited rescission. The New York courts reason that an unknown injury is an essential prerequisite to setting aside a general release on the grounds of mutual mistake; since the injury is unknown it could not have been contemplated by the parties as part of the bargain encompassed in the release.[18] This approach developed from an early case which held that a releasor

13. Tewksbury v. Fellsway Laundry, 319 Mass. 386, 65 N.E.2d 918 (1946); Nelson v. Chicago & N.W.R. Co., 111 Minn. 193, 126 N.W. 902 (1910); Kane v. Chester Traction Co., 186 Pa. 145, 40 A. 320 (1898).

14. Great Northern Ry. v. Fowler, 136 F. 118 (9th Cir. 1905); Poti v. New England Road Machinery Co., 83 N.H. 232, 140 A. 587 (1928).

15. Union Pacific Ry. v. Zimmer, 87 Cal. App. 2d 524, 197 P.2d 363 (1948); Sullivan v. Elgin, J. & E.R. Co., 331 Ill. App. 613, 73 N.E.2d 632 (1947); Hanson v. Northern States Power Co., 198 Minn. 24, 268 N.W. 642 (1936).

16. Graham v. Atchison, T. & S. Ry. Co., 176 F.2d 819 (9th Cir. 1949); Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941).

17. Scheer v. Long Island Ry. Co., 282 A.D. 724, 122 N.Y.S.2d 217 (2d Dep't 1953); Dominicis v. United States Casualty Co., 132 A.D. 553, 116 N.Y.S. 975 (3d Dep't 1909).

18. Landau v. Hertz Drivurself Stations, Inc., 237 A.D. 141, 260 N.Y.S. 561 (1st Dep't 1932).

may set aside a release if a specific cause of action in his favor, which existed at the time of execution of the release, was included in it, contrary to the intention of the parties.[19] In granting rescission under this view the New York courts draw a waivering line between mistake as to the existence of an unknown injury and mistake as to the extent of a known injury. In the first instance the courts will grant relief whereas in the second they will not. The rationale for this view is that a releasor is in essence taking the risk that the nature and extent of known injuries will be more serious than was expected when he enters into the release. This risk is thought to be within the sphere of contemplation in a bargain whereas this is not necessarily true of an unknown injury.[20] New York and jurisdictions following this approach do not deny that a defendant may utilize a release as a method of attaining "general peace." However, in drawing this basic distinction these courts permit the plaintiff to show by extrinsic evidence that the release was intended to cover solely the known injury. Therefore, if the courts strictly adhere to viewing a case through the "known-unknown" dichotomy, equitable decisions are made to depend on the characterization of the plaintiff's injury.

The New York Court of Appeals in the instant case was faced with the dilemma of rendering a just decision in a case which defied easy characterization of the plaintiff's injuries. Could the injury be fitted into the "unknown injury" category? More specifically, was knowledge of symptoms erroneously attributed to the known injury the equivalent of the distinct injury so as to preclude a mutual mistake of fact? The court concluded that there must be actual knowledge of the injury to include it within a release; mere knowledge of an injury to a single area of the body does not put a party on notice of another injury of a different type and gravity in the same area.[21] Hence, on this first issue there is present a question of fact since a jury could find that at the time of settlement the parties believed that the plaintiff's hip and left femur were uninjured.[22] This view further refines the "unknown injury" classification by requiring that plaintiff must actually know that the symptoms she experienced were from the distinct injury to make it a "known injury." The second issue confronting the court was whether the release was given in consideration for ending the defendant's liability or merely as compensation for the known injuries at the time of settlement. The court cited *Farrington v. Harlem Savings Bank*, which states the New York equitable rule that a release "fairly" and "knowingly" made to cover both known and unknown injuries will be given

19. Kirchner v. New Home Sewing Machine Co., 135 N.Y. 182, 31 N.E. 1104 (1892).

20. Miles v. New York Central Ry. Co., 195 A.D. 748, 178 N.Y.S. 637 (Sup. Ct. Sp. Term. 1919); Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 381 (1953).

21. Lockrow v. Church of the Holy Family, 5 A.D. 959, 171 N.Y.S.2d 622, (4th Dep't 1958) *aff'd* 5 N.Y.2d 1024, 185 N.Y.S.2d 549 (1959).

22. Barry v. Lewis, 259 A.D. 496, 20 N.Y.S.2d 88 (4th Dep't 1940); Brown v. Manshul Realty Corp., 271 A.D. 222, 63 N.Y.S.2d 1 (1st Dep't 1946); Rill v. Darling, 21 A.D.2d 955, 251 N.Y.S.2d 396 (3d Dep't 1964).

full effect as an agreement for "general peace."[23] Applying the test of "fairness" and "knowledge" to the present case the court denied summary judgment. In essence the court's holding insures that the plaintiff, in this type of case, will have access to the jury on the issue of the parties' intent.

The court's approach to the problem of inequitable release agreements in the personal injury field seems deficient. If a plaintiff is mistaken as to the extent of injuries a release is a bar.[24] However, the plaintiff may be just as mistaken about what he bargained for as in the "unknown injury" situation. More importantly, the result may be just as inequitable where there is only a mistake about the extent of injury. In the present case the court was directly confronted with the possibility of an unjust decision based merely upon classification of the plaintiff's injuries. Therefore, it is suggested that the court's "known-unknown" dichotomy is not conducive to just decisions in the personal injury field. The court must have been aware of the possibility that a contrary decision would have left the minor plaintiff without adequate compensation for her injuries. Fortunately, an equitable decision was reached but at the price of an intensive struggle by the court to refine an inappropriate classification scheme of types of injuries. There is no imperative need to adhere to it. Personal injury settlements are based upon an assumption of the existence of a state of facts, namely the condition of the plaintiff. If the parties' views of these essential facts are incorrect, then they are mistaken as to what they have bargained about. Under this simplified contract approach general releases should be rescinded whenever an injured party experiences further complications which are discovered after settlement that if not compensated for, would result in a grossly inequitable situation. This would enable the courts to deal directly and openly with this problem and to abandon a classification scheme which may lead to inequitable decisions.

VICTOR OLIVERI

SELECTIVE SERVICE LAW—IN PROVIDING FOR CONSCIENTIOUS OBJECTOR EXEMPTION, FREE EXERCISE OF RELIGION CLAUSE OF FIRST AMENDMENT PRECLUDES DISCRIMINATION IN FAVOR OF THOSE WITH FORMAL RELIGIOUS BELIEFS

On April 17, 1968, John Sisson, Jr., in obedience to an order from his local Board, reported to the Boston, Massachusetts induction center for induction into the armed forces. After being warned of the consequences by the officer-in-charge, Sisson deliberately refused to be inducted. Since his objections were based upon convictions of general morality and conscience, Sisson did not claim in any formal sense to be a religious conscientious objector. Additionally, Sisson

23. 280 N.Y. 1 (1939).
24. Moyer v. Scholz, 22 A.D. 50, 253 N.Y.S.2d 483 (3d Dep't 1964).