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# Torts—Constructive Release of Co-Tortfeasors Fails

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An amended statute, explicit in terms and leaving no room for doubt on any point, would prevent further injustice.[31]

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CONSTRUCTIVE RELEASE OF CO-TORTFEASORS FALLS

Following the granting of a general release in an auto negligence claim, the plaintiff sustained aggravation of her injuries through maltreatment. In an action to recover against the alleged malpractitioner, the bar of a general release granted a fellow tortfeasor was raised. Upon appeal the Court of Appeals *held*, where a general release is granted to one who has not acted *jointly*, in concert, with his co-tortfeasors, the release will not by operation of law discharge the liabilities of such co-tortfeasors. Instead, availability of the release in their defense presents questions of fact concerning the adequacy of the compensation had by the grantor or the intention of the grantor to surrender all claims for less than full compensation. Both issues are to be borne by the plaintiff. *Derby v. Prewitt*, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962) (three judges dissenting).

English common law courts fashioned the rule of constructive release based upon the concept of joint tort liability. Concerted action served the common law courts as a link by which the individual joint tortfeasor could be held vicariously liable for the entire damage produced by such conduct.[1] This liability was neither predicated upon causation in fact,[2] nor upon foreseeability of the damage that flowed from the act.[3] The gist of the concept was the mutual agency by which the act of one became the act of all.[4] Since any one joint tortfeasor was liable for the total damage by imputation of the fault of all, his release was the release of all.[5] Of course this conclusion assumes that full compensation has been had for the release. At common law there was some excuse for such an assumption. Releases were then sealed instruments, recitals in which were conclusive.[6] Confusion over the meaning of a joint tortfeasor, the terms as used in various contexts, led to the extension of the rule of release by operation of law to mere co-tortfeasors.[7] The corresponding rule in the law of judgments did not share this development. Unsatisfied judgments against one co-tortfeasor did not bar recovery against other co-tortfeasors.[8] Harsh rules permit of harsh exceptions, so that the courts in order to mitigate the rigorous result began by construction to view releases containing a reservation of claims

31. 16 St. John's L. Rev. 108 (1941).

1. Duck v. Mayeu, [1892] 2 Q.B. 511; Prosser, Torts 234 (2d ed. 1955).
2. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413 (1932).
3. Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950).
4. Prosser, Torts 225, 234 (2d ed. 1955).
5. Southern Pacific Co. v. Raish, 205 F.2d 389 (9th Cir. 1953); Lucio v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956).
6. Williston, Contracts 3140 (1920).
7. Prosser, Torts 233, 242-43 (2d ed. 1955).
8. *Id.* at 241, 243.

against others as covenants not to sue.[9] The law would give effect to the intention of the grantor without belaboring the contradiction in terms, a general-reserved release. What had first been assumed by the courts, then effected through exceptions, finally became the rule, itself. Satisfaction and intention were to guide the efficacy of a release among co-tortfeasors. Today there is a quickening trend to abolish the rule of constructive release even in its application to joint tortfeasors.[10]

Thirty years ago the Court of Appeals decided *Milks v. McIver*,[11] a case seemingly four-square with the present one. There, Judge Lehman speaking for the court held that a general release granted to a negligent motorist was a bar to recovery against a malpractitioner for aggravation. The court so held in the face of argument pressing the distinction between joint and co-tortfeasors. Recently, the Court of Appeals in interpreting a statutory prohibition in the Workmen's Compensation Law against unauthorized settlement of third party actions allowed recoveries against both the initial and subsequent wrongdoers, despite the fact that both recoveries were for the identical and all-inclusive fatal injury.[12] However, the decision is too rooted in the peculiarities of compensation law, especially the compromise between liability and compensation, to be of great precedential value.

In the present case the majority, in trading the rule of constructive release for the more fundamental standards of satisfaction and intention, strongly attacked, both in argument and authority, automatic bar even as applied to releases among joint tortfeasors. The obvious prediction is that this vestige of constructive release simply awaits a proper case to be interred. A fortiori, the majority found the application of automatic bar in the case of co-tortfeasors objectionable, since it is easily demonstrated that the liabilities of co-tortfeasors are, at least in extent, distinct. The malpractitioner did not cause the auto accident. What point the dissenting opinion had, concerned the majority's evasion of the *Milks* precedent and the difficulties of application presented by the newly adopted broad standards. *Milks* should have been expressly overruled. Attempted distinction of the case by fact differentiation and by imputation of a second decisional ground seems unworthy of an otherwise well reasoned and convincing majority opinion. Judge Lehman in the *Milks* decision did not order a trial of the question of whether or not a complete satisfaction had been obtained by the plaintiff. Yet, the majority now says that they, themselves,

9. Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

10. Eagle Lion Films, Inc. v. Loew's, Inc., 219 F.2d 196 (2d Cir. 1955); Daniel v. Turner, 320 S.W.2d 135 (Ky. 1959); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958); Riley v. Industrial Finance Service Co., 157 Tex. 306, 302 S.W.2d 652 (1957); Jukes v. North American Van Lines, Inc., 181 Kan. 12, 309 P.2d 692 (1957); Weldon v. Lehmann, 226 Miss. 600, 84 So. 2d 796 (1956); Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954).

11. 264 N.Y. 267, 190 N.E. 487 (1936); Rapp v. Myers, 291 N.Y. 709, 52 N.E.2d 596 (1943) (per curiam).

12. Meachem v. New York Central R.R. Co., 8 N.Y.2d 293, 169 N.E.2d 913, 206 N.Y.S.2d 569 (1960); Note, 11 Buffalo L. Rev. 284 (1961).

must have that question tried before final disposition of the case. Nor does the fact that the plaintiff had in the *Milks* case released the negligent motorist only after sustaining aggravation of his initial injury distinguish a general rule which applies automatically given the simple identification of co-tortfeasors. Secondly, the dissenters point to the difficulty of measuring a full satisfaction. However, tort verdicts do this work, perfectly or imperfectly, day in and day out. Accommodation of the law of contribution to the new standards does, however, remain in need of change.[13] Again as in so many of the advances made by the Court of Appeals the charge of judicial legislation has been leveled in the dissent. But as Chief Judge Desmond has observed, judicial change of judicial rules is all too proper. It is enough to say that today's change was partial, interstitial, and overdue.

Mr. Justice Rutledge has admirably summarized the deficiencies of the traditional rule:

> The rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparation are discharged, while one willing to right the wrong and no more guilty bears the whole loss. Compromise is stifled, first, by inviting all to wait for the others to settle and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all. Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tortfeasors an advantage wholly inconsistent with the nature of their liability.[14]

The metaphysical concept of constructive release is too far removed from the realities of an intelligent, bargained settlement. The bargain is restricted to all or nothing at all. Every number and kind of claim must, according to the absolute bar, be resolved. Compromise of liability in the sense of a quid pro quo is prevented. Needs of the grantor for present reparation, consideration of the defendant's solvency, the relative costs and conveniences between litigation and settlement of the various claims, all bearing on the decision to settle, have to be abandoned or else. Nor can the bargain be intelligent. The law may revisit consequences on the released tortfeasor for injuries that subsequently arise, some unforseeable altogether. Regarded as a surrender of existent claims, the release would be a more intelligent instrument. The constructive release derived much of its vitality from the imperfections, in efficiencies and fears surrounding damage apportionment.[15] Failure to solve such difficulties, as Mr. Justice Rutledge pointed out, ought to be charged against the wrongdoer, not against the wronged. At the same time these difficulties are irrelevant to the

13. N.Y. Law Revision Commission Reports 21 (1952).
14. McKenna v. Austin, 134 F.2d 659, 662 (D.C. Cir. 1943).
15. Prosser, Torts 224-25 (2d ed. 1955).

concept of fault, which is the principle at stake. With ingenuity the difficulties largely disappear. But now that the court has made it so clear that the liabilities of joint and co-tortfeasors are not necessarily identical with the other members of their respective classes, it is hoped that the law of contribution will be updated accordingly by legislative change.

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PRODUCTS LIABILITY CASES—PRIVITY NO LONGER REQUIRED

An American Airlines carrier crashed in New York killing plaintiff's intestate, a passenger. An action for wrongful death was commenced against American for negligence, and against both the manufacturer of the aircraft, Lockheed Aircraft Corporation, and the manufacturer of an allegedly defective altimeter in the said aircraft, Kollsman Instrument Corp., both for breach of implied warranty of fitness. Motions brought by both Lockheed and Kollsman to dismiss the complaint for failure to state facts sufficient to constitute causes of action pursuant to Rule 106(4) of the Rules of Civil Practice were granted. On affirmance by the Appellate Division, plaintiff appealed by permission to the Court of Appeals. *Held*, (4-3)—reversed as to the manufacturer of the aircraft, Lockheed, affirmed as to the manufacturer of the altimeter, Kollsman. The implied warranty of fitness of the manufacturer which put the assembled aircraft into the market runs in favor of all intended users of the product despite lack of privity of contract between such users and the manufacturer; no remedy lies against the manufacturer of the defective component part since there is adequate remedy against the manufacturer of the aircraft. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

In *Winterbottom v. Wright*,[1] the general rule that a manufacturer of a defective product is not liable to users not in privity of contract entered the realm of Anglo-American jurisprudence. From the outset, the privity doctrine, at best, proved to be a hard pill for courts to prescribe. An exception early arose as to articles of manufacture "inherently dangerous to life and health."[2] Judge Cardozo's landmark *MacPherson* decision[3] in 1916, citing prior New York cases which had created exceptions to the privity doctrine,[4] imposed liability in negligence, regardless of privity, upon a manufacturer in favor of the ultimate consumer. *MacPherson* dealt the death blow to the vestige of the strict *Winterbottom* influence in New York and rapidly became accepted in the vast majority

1. 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); see, *e.g.*, National Sav. Bank v. Ward, 100 U.S. 195 (1879).
2. Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852). See generally Prosser, Torts § 84 (2d ed. 1955).
3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
4. *E.g.*, Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852) (mislabeled poison bottle); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (exploding coffee urn: liability to bystanders).