1946

Medico-Legal Aspects of Compromise Settlements

Joe C. Stephens Jr.

MEDICO-LEGAL ASPECTS OF COMPROMISE SETTLEMENTS

*By Joe C. Stephens, Jr.**

THE PRINCIPLES controlling the upsetting of compromise settlements in personal injury cases because of an innocent non-negligent error in a physician's diagnosis are shrouded by exceedingly chaotic judicial rationalizations. The many factual distinctions and legal theories which may be seized by the judge harassed by the pitiful pleas of the injured plaintiff and the importunities of the indignant defendant can hardly be weighed in advance by the attorney drafting the release or the doctor phrasing his diagnosis. The claim agent, the lawyer and the physician who deal with personal injury cases must know the state of the local law in order to follow an effective procedure in settling controversies with finality, and the public is interested in having rules, as to the avoidance of releases, which will work substantial justice in the maximum number of individual cases and will promote the important social interests at stake.

Scant contact with the law is sufficient to cause the observer to realize that where medicine or other scientific fields with their constant search for progress and questioning attitude toward the past impinge on the law with its ancestor worship the results are likely to be anamolous if not disastrous. The courts, permeated with the doctrine of *stare decisis,* may apply to a new or changing situation rules gathered from related fields which are closely analogous legally but in complete contrast factually—judges are likely to be interested in the symmetry of legal principles while scientists are concerned primarily with facts.

In the decisions dealing with the rescission of releases for erroneous statements of a doctor these conflicts are apparent. The seven league strides of medicine in the last century have not been matched by the interstitial advances of the law. A little over a hundred years ago the opinion of the layman as to the nature, extent and probable course of his injury was approximately as reliable as a similar opinion of his physician, whereas today, though medicine may still be a combination of art and science, even the well-educated layman is at a disadvantage as compared with the

*A.B.; LL.B.; member of the bar, Dallas, Texas; former editor of the Harvard Law Review; part time instructor in the College of Law, Southern Methodist University.

poorest of doctors. Doubtless the law has taken cognizance of some of the implications of this change, but the cases still abound with theories that were formulated in the infancy of medicine and science and cannot be justified in the present state of scientific knowledge. The lawyer persists in demanding that the rules of ordinary contracts be applied to releases executed in reliance on a doctor's diagnosis and decries the logic of that court which decides a case on the premise, frequently inarticulated, that a release of a personal injury claim is something different from the sale of a horse and that a doctor's opinion is more reliable than a horse trader's evaluation.

The typical case before the court is the plaintiff with, let us say, a spinal injury, permanent in nature, who after being injured by the defendant[1] has made a settlement for $150.00, releasing the defendant from "all damages, liabilities, etc., accrued or to accrue, arising out of injuries sustained in an accident occurring on July 19, 1943" etc.[2] The settlement is made after the plaintiff is informed by a doctor paid by the defendant that (a) the plaintiff has sustained only minor bruises or (b) "you'll be all right—ready to work in ten days or two weeks." This case has its mutations—the doctor may be more or less closely connected with the defendant or he may be plaintiff's own family physician. The statement involved may be pure diagnosis; it may be diagnosis and prognosis; it may be pure prognosis, and if prognosis alone it may be a cautiously qualified opinion or a blunt assertion of a flat date for recovery. The consideration received is normally much less than the damages sustained although it may vary from a nominal sum to a substantial amount involving four figures.[3] The

[1]In most of the cases the defendant is an insurance company or a large employer. Whether this indicates that plaintiffs only select eminently solvent defendants or that most defendants are either insured or of a size to self-insure by adequate costing procedures is not capable of ascertainment. Probably both factors exercise a selective influence.

[2]See Notes (1927) 48 A. L. R. 1462, 1524; (1938) 117 A. L. R. 1022, 1043. Almost every release is as broad as the attorney can make it, and every new wrinkle mentioned by the decisions will immediately be incorporated in next year's form books.

[3]Any thorough study of this subject would make at least two statistical comparisons. One of these would be a ratio of recovery as against a ratio of non-recovery—the ratio would be the amount of the verdict divided by the amount of the consideration for the release. The ratio of recovery would be expected to be much higher than that of non-recovery. The other study would compare the time interval between the accident and release in recovery and non-recovery. It is probable that the average time elapsed in the former would be much less than in the latter. For such a statistical analysis in the field of mistake in building contracts, see Lubell, Mistake in Construction Contracts (1932) 16 Minn. L. Rev. 137.

judge or the jury with their preconceptions must then decide whether or not the settlement will be sustained. In laying down rules of law for the guidance of the jury the judge has many tools at his command; he has the doctrines of misrepresentation and mistake, which blend together; the whole question can be disposed of on principles of agency; the matter may be determined by the distinction between facts and opinion, each with its many exceptions; the materiality of the statement may determine the result; the case may hinge on the fact that the injured party did not rely on the erroneous opinion because of independent advice or because the court believes that the plaintiff has no "right" to rely on the defendant's doctor. With these many tools to choose from a judge can write a presentable opinion on either side of ninety-five percent of the cases, and with due respect it seems that many courts do select those tools best fitted to carve out a result consonant with the court's notions of equity and justice on the specific set of facts presented to it.[4] If predictability is the chief merit in law, it is then obtainable only so long as different judges hold the same notions of fairness.

Reconciling the decisions in the several American judisdictions is a virtual impossibility, and it is nearly as difficult to find rational continuity even in the decisions of the courts of one jurisdiction. By way of apology to the judges for the foregoing statement, the reason for such diversity of decision becomes readily apparent to any person who attempts to formulate rules as to what the law should be even in that ideal jurisdiction, the realm of the law review articles.

In a modest effort to indicate a possible reorientation of the decisions dealing with the rescission of compromise settlements[5] the writer must follow certain definite steps. It is relevant to review briefly the history of the law of deceit and misrepresentation. And it is desirable to discuss the differences between an action of deceit and the equitable remedy of rescission as well as to note some factual differences between rescission of a contract

[4]Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision (1929) 14 Corn. L. Q. 274. The fair judge need only acquire the right hunch, but the good judge must get the right hunch and write a good supporting opinion. The dangerous judge is the humorless one who believes there is only one foreordained answer.

[5]Any hope of guiding such a reorientation is pure vanity. Courts will not note an obscure article, and, if they do, claim agents will continue their practices because they can make a dozen uncontested settlements tainted with the same error for which a court avoids one settlement. The odds are obvious.

of sale and avoidance of a release in personal injury matters. Some writers have even contended that it is desirable to review the decisions of the courts in the field being discussed—solely for the sake of conventionality this article makes some such attempt. Finally, since the law is a living thing and is supposedly designed to settle actual controversies and to minimize potential controversies in our complex civilization, it is thought worthwhile to mention a few of the factors that might influence the decisions of a court which does not consider itself irretrievably bound by its precedents. It is then for the courts to evaluate the truly relevant factors and select those that are worthy of legal consideration.

I

History of the Law of Deceit

While this paper is devoted solely to an analysis of suits for rescission of releases in personal injury cases, it is necessary to understand the history of actions at law for deceit in which an affirmative liability is sought to be imposed upon the defendant for his misrepresentations, since the courts often fail to distinguish cases imposing such affirmative liability from cases of rescission which impose no liability but only leave the parties where they were prior to the transaction. Actions at law for deceit include cases enforcing liability against misrepresentors who are not bound to the plaintiff by any contractual obligations, while by definition rescission of a release or contract is a remedy available only between parties who have undertaken contractual relationships. The distinction between these remedies and the difference of treatment which is demanded by such distinctions will be discussed later—however, it will be seen that the tendency of the law is toward wider relief in both instances.

In the latter part of the 19th century the Court of Appeals crystallized the English law of deceit by the decision in the leading case of *Derry v. Peek*.[6] This case has been extremely influential in the United States although a number of states have refused to follow it and many others have paid lip service to it while actually disregarding it through various fictions. The court in *Derry v. Peek* required as a basis for an action of deceit that there be either conscious misrepresentation of a material existing fact or wanton and willful disregard of the truth of the representation. The facts of that case seem to have presented at least wanton dis-

[6] (1899) 14 App. Cas. 337.

regard of the truth, yet the Court of Appeals held the misrepresentor not liable.

Criticism of this decision was almost immediate. The difficulty of proving an actual intent to tell an untruth is practically insuperable. Since the average defendant is loath to admit on the stand that he was a consummate liar at the time of the questionable transaction, to prove fraud the evidence adduced must by extrinsic facts show not only the untruth but that the defendant must have been aware of such untruth. It is true that *Derry v. Peek* was probably in line wtih the morality of contemporary America, then in the heyday of free enterprise and Black Fridays. Only three years before that decision the first ineffectual Interstate Commerce Act was forced on a reluctant Congress by the agrarian protestants of the West. In view of the unwillingness of the courts at this time to hamper industry in its "legitimate" pursuits, it is amazing that there was no greater unanimity among American jurisdictions in adopting the rule. The answer to its rejection in many states may have been the growing Populist revolt.

A line of distinguished commentators has discussed liability for the use of language, negligent, fraudulent or innocent. Jeremiah Smith, the initial professorial critic, approached the matter gingerly.[7] He advocated liability for negligent misrepresentation in certain cases but limited this liability by a number of strict requirements.[8] Furthermore, his article is permeated with the apologetic theme that the novelty of such an action should be no bar to its adoption. Even as Professor Smith was writing the tide of public opinion was changing; the muckrakers were in vogue, and Ida Tarbell and Lincoln Steffens ruled the roost on McClure's Magazine. Legal thought was shifting from the acceptance of *caveat emptor* and protection of the seller of the gold brick to *caveat vendor* and a wide extension of the law of warranty. The strict rule in actions of deceit could hardly be maintained inviolate in the face of the changing morality and a new attitude toward business dealings which was to bring forth the Pure Food and Drug Act and the Federal Trade Commission.

[7]Smith, Liability for Negligent Language (1900) 14 Harv. L. Rev. 184; see also Note (1900) 14 Harv. L. Rev. 66.

[8]*Id.* at 195. The requisites would be (1) defendant volunteered a statement to plaintiff, (2) the statement was untrue, (3) defendant, though believing the statement, had no reasonable ground for such belief, (4) defendant intended that plaintiff should act on the statement, (5) the subject of the statement was such that substantial pecuniary loss could be expected if untrue, (6) plaintiff reasonably relied on the statement, and (7) to his damage.

These cross currents of thought affected both the courts and the commentators and the next major criticism, an article by Professor Williston,[9] was no longer apologetic for an action on negligent misrepresentation but assumed that in theory it should be completely acceptable as a basis for liability. He argued further that under certain circumstances non-negligent innocent misrepresentations should create liability in an action on the case, which would practically absorb the law of deceit since any calculating litigant would be foolish to attempt to prove conscious misrepresentation when a suit proving innocent error would be just as effectual.[10] His thesis is that, since the courts do impose liability for innocent misrepresentations in many situations (such as warranties and in instances where the facts justify an estoppel or where the misrepresentor occupies a position of intimate knowledge), then the requirement of conscious mistatement in deceit or even negligent misrepresentation is entirely illogical, destroying the vaunted symmetry of the law. If his theory of liability for innocent misrepresentation were accepted, Williston would limit it to misrepresentations made in a business transaction or where the misrepresentor expects to gain from the actions induced by his statements. Obviously any thoughtful analyst would hesitate to predicate liability on every misrepresentation in view of the possibility of unexpected damage arising from mere casual conversation.

Professor Bohlen contributed to the thought in this field in an article entitled "Misrepresentation as Deceit, Negligence or Warranty"[11] dividing the cases which have rejected *Derry v. Peek* into those based on negligent misrepresentation and those on innocent misrepresentation. While it seems that Bohlen prefers negligent misrepresentation as a creator of liability because of the familiarity of the courts with the technique of negligence actions, his main thesis is that the courts should distinguish the action of deceit from an action on the case for negligence. He wishes to eliminate the fictions through which judges, though enunciating strict rules of deceit, yet manage to hold individuals for innocent or negligent misrepresentation so that they will use special defenses which should be applicable to the latter situations. His conclusion

[9]Williston, Liability for Honest Misrepresentation (1911) 24 Harv. L. Rev. 415. Professor Williston has repeated these ideas in his treatise, acknowledging the existence of later articles without being affected by them. 5 Williston, Contracts (Rev. Ed. 1937) § 1486—1534, in particular § 1510.

[10]This ignores possible differences in measure of damages and a few unusual situations where deceit would still be the only available remedy.

[11](1929) 42 Harv. L. Rev. 733.

is that the courts should recognize an action for negligent use of language or, if they choose to impose liability for innocent non-negligent misrepresentation through some analogy to warranty, then the law of warranty should be expanded to include cases where privity of contract is lacking. He is open-minded as to the rules to be applied but demands that the courts re-examine the bases of liability.

Bohlen's discussion was followed immediately by two interesting articles in the *Illinois Law Review*.[12] Professor Carpenter seems to think that legal consistency *per se* is no virtue, thus taking issue with Professor Williston. He believes that there is room in the law for an action of deceit for conscious misrepresentation, for an action for negligent misrepresentation in certain instances and for other doctrines such as defamation, estoppel *in pais,* and warranty. Professor Weisiger agrees with Professor Carpenter in feeling that each situation is entitled to its special rule; but he would realign the doctrines, imposing liability for conscious dishonesty, liability for negligent misrepresentation, or absolute liability for innocent misrepresentation depending upon the relative social weight to be attached to each interest involved. Abstractly, of course, this theory is ideal and is no doubt the over-all aim of the law but as a solution of particular cases it leaves the average judge or litigant somewhat at sea.

Dean Leon Green analyzes these questions in an interesting article[13] which became a chapter of his book "Judge and Jury." He dissects the cases of deceit and examines the resulting portions microscopically. His conclusion is that there are so many formulas and sub-formulas that the trial court has a wide range of choice. His theory is summed up in his own words:

"But the point to be stressed here is that whatever sort of judgment is desired the formulas which have been evolved and their coteries of attendant phrases provide the most flexible accommodation without in the least impairing their own integrity or that of the judicial process."[14]

A careful analysis of the cases in this and other fields certainly indicates that many courts do determine the result first and then

[12]Carpenter, Responsibility for Intentional, Negligent and Innocent Misrepresentation (1930) 24 Ill. L. Rev. 749; Weisiger, Bases of Liability for Misrepresentation (1930) 24 Ill. L. Rev. 866.

[13]Green, Deceit (1930) 16 Va. L. Rev. 749.

[14]*Id.* at 770. The quotation continues: "A science of law could ask little better by way of intellectual machinery for handling these varied and difficult cases." This may be true as to a "science of law" but how many judges have time to be legal scientists?

work out a theory to support the holding. It has been mentioned that in ninety-five percent of the cases where a release is attacked due to an erroneous statement by a doctor an excellent opinion can be written for either side of the case without disturbing the findings of fact. Whether such decision by visceral reaction or hunch can be indulged without impairment of judicial integrity is, indeed, another matter. It may be urged that this flexibility has the effect of permitting the courts to weigh the social interests involved as advocated by Professor Weisiger, but such a weighing process is likely to be inaccurate unless it is consciously adverted to, which is rarely the case, since a majority of judges probably believe that they are applying immutable heaven-sent rules, although their personal predilections are the actual deciding factors in the judicial process.[15]

A recent article[16] by Harper and McNeely in the *Minnesota Law Review* contains an excellent summary of the preceding articles and classifies the factual situations encountered in misrepresentation cases into four categories depending upon the degree of reliance which is justified in the particular case.[17] These categories are, of course, generalizations and, if they are accepted and the courts are willing to shift particular statements from one category to another when the *mores* and social needs change and when the reliability of a certain type of representation varies, then such a theory is entirely acceptable, but, considering the proclivities of the courts for stratification of decision based on *stare decisis,* we may be permitted to have some doubt as to the workability of the theory, even though it is an excellent tool for the analysis of decisions.

[15]Subsequent to Green's article there was an interesting interchange of blasts between Dean Green and Professor Bohlen. Bohlen, Should Negligent Misrepresentations Be Treated As Negligence or Fraud (1932) 18 Va. L. Rev. 703; Green, Innocent Misrepresentation (1932) 19 Va. L. Rev. 242. Probably the chief point of issue between Green and Bohlen related to the advisability of achieving legal results through fictions. However, the neutral bystander may wonder how anyone could found liability on innocent misrepresentation when two such learned gentlemen could each argue so vehemently that the other "innocently" misrepresented his carefully worded article.

[16]Harper and McNeely, A Synthesis of the Law of Misrepresentation (1938) 22 Minn. L. Rev. 939.

[17]*Id.* at 943-945. The four categories are (a) no reliance justified as in the case of puffing, (b) only reliance justified is on the honesty and sincerity of the other party, (c) where honesty plus reasonable care and competence may be expected and (d) where absolute assumption that the facts are true is justified.

II

Deceit Versus Rescission; Contracts of Sale Versus Releases

The foregoing articles are concerned chiefly with the imposition of liability at law for the use of negligent language and proceed on the theory that rescission in equity is a horse of another color, assuming that rescission will uniformly be granted for innocent non-negligent misrepresentation.[18] Analysis of rescission of releases for misrepresentation will indicate that many courts do not observe this difference, applying deceit formulas to cases of rescission. Nevertheless, despite the abolition of the forms of action and the blending of law and equity the distinction between a suit for rescission and an action of deceit has a firm factual basis. Assume that B is negligently injured in the employ of A Co. B is examined by M, A Co's. medical man, who innocently and carefully tells B that he has sprained some muscles in his back and will be well in a week. B in reliance on this settles with A Co. for $100.00 and executes a general release. As a matter of fact, one of B's vertebrae is smashed and he will be permanently incapacitated. If on one theory or another we avoid or rescind the release and permit B to bring an action against A Co., we have simply returned the parties to their original position and are reimposing on A Co. a liability which the law has felt should be imposed as a matter of policy. If, however, we permit B to recover against M for his non-negligent innocent assertion we are imposing an entirely new liability. Such a liability may shock our sense of fairness. But if M has knowingly or carelessly misinformed B, our sense of fairness may not be shocked by this "punishment" of a "bad" or "careless" man. Certainly whatever liability is imposed on A Co. has been expected from the day of the injury and when we can restore it to the status quo, there is no justification in permitting it to retain the fruits of M's misrepresentation, however innocent, whereas any liability on M is new and unexpected.[19] Thus there is ample logic back of a rule permitting rescission for innocent misrepresentation while

[18]5 Williston, Contracts (Rev. Ed. 1937) § 1500. Green, Fraud, Undue Influence and Mental Incompetency (1943) 43 Col. L. Rev. 176, 178.

[19]The illustration, positing an affirmative liability against the doctor, is controversial. If an affirmative action against A Co. were permitted the net result would probably be the same as rescission since privity of contract existed. Where the liability is contractual the chief difference would be the measure of damages and possible defenses. Williston, *supra* note 8, at 440 attaches very little importance to the measure of damages used in an action for misrepresentation.

requiring fraud or negligence for an affirmative action of deceit, even though many courts do not recognize the validity of the distinction.

The primary interest of the commentators has been the liability for deceit in sales or other business transactions. Such situations are clearly distinguishable factually from the settlement and release of personal injury claims. It may be said that the injured party is selling his claim to the tortfeasor, and no doubt in some instances he is doing just that and the parties are dealing at arm's length, each sparring warily, looking for an opening. But one may contend that there is a distinction without being called a sentimentalist. The law does profess to be more concerned with invasions of personal than property rights. More often than not the injured party is floored by the calamity, doctor's bills are mounting, his pay check is shrinking, and the bills come in on the first of the month without fail (provided credit is still obtainable). There is vital pressure to obtain cash for immediate needs. As a contrast the tortfeasor ordinarily can afford to wait since his income remains unimpaired and he knows that the time required for adjudication favors the defendant. Disastrous economic compulsion squeezes the injured party, and this compulsion is a legitimate factor for judicial consideration; it is clear that, however much the courts may profess to abhor principles based solely on ability to pay, it is nevertheless the prime mover behind many rules of law. Such compelling needs often lead to a hasty release without any taint of "undue influence" in the legal sense of the word. When to compulsion is added the assurance of a qualified physician that the injured party will be well within a short period, the obvious answer is settlement. If settlements of personal injury suits do not differ from the sale of a horse, there is justification for applying the same rules to each situation, but if the pattern is consistently different (despite those few instances which deviate from the normal), then there is adequate justification for different treatment in each type of case. Although the courts do not usually flatly state that the ordinary principles of contract law are inapplicable to releases of personal injury claims, a substantial number of jurisdictions do apply special rules to such releases and in so doing recognize these distinctions.[20]

[20]Bakamus v. Albert, (1939) 1 Wash. (2d) 241, 95 P. (2d) 767. At 770 the court said, "It has often been held that a demand of which a party was ignorant at the time of the execution of the release, was not embraced within its term. This is particularly true in cases of a physical injury existing at the

Furthermore, rescission in sales cases is a more drastic remedy than rescission of a release in personal injury claims because the "reliance interest" is greater. Due to the rapid changes of price and general business conditions even rescission of most business contracts is likely to have consequences extending beyond the particular sale and affecting the collateral business life of the parties whereas rescission of a personal injury release is unlikely to have any effect except the reimposition of an original liability, whose consequences could not have been avoided except for the release.

III

Definition of Mistake and Misrepresentation

Before examining the cases dealing with the problems of misrepresentation and mistake as possible grounds for the avoidance of a personal injury release it is well to define our terms. The following definition of innocent misrepresentation seems as satisfactory as any:

"If the mistake of one party is induced by the other with neither knowledge of the error nor willful indifference in regard to it there is misrepresentation but not fraud. And there is simply mistake if the erroneous belief was not induced by the other party."[21]

From this quotation it is implicit that fraud is a misrepresentation where the representor is either conscious of the error or is willfully indifferent to its truth or falsity.[22] This definition does not state what misrepresentations or mistakes will have legal effect, and several elements must be added to the misinformation to make it actionable. For instance, it is usually said that for relief to be granted for mistake it must be material and in reference to a matter of fact, not to mention that some courts refuse to give any relief for innocent misrepresentation.

---

time of the giving of the release, but then unknown to the parties, especially if such an injury be of so serious a character as to indicate that if it had been known, the release would not have been executed." The court in a realty matter then applied a substantially different rule from that enunciated as applying to personal injury cases.

[21] 5 Williston, Contracts (Rev. Ed. 1937) § 1487. Restatement, Contracts (1932) § 470 reads as follows:

(1) "Misrepresentation in the Restatement of this Subject means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accord with the facts."

And § 500:

"In the Restatement of this Subject, mistake means a state of mind that is not in accord with the facts."

Accord, Restatement, Restitution (1937) § 6 and § 8, Comment b.

[22] Cf. Restatement, Contracts (1932) § 471 and Restatement, Restitution (1937) § 8.

One of the principal elements of confusion concerning the rules governing the avoidance of releases arises directly out of these definitions. If D's doctor, M, erroneously diagnoses P's injury, then in a jurisdiction accepting the rule that innocent misrepresentation will vitiate a release, P need only prove the error, his reliance on the representation and connect M with D. In a jurisdiction rejecting relief for innocent misrepresentation, however, the same misrepresentation may be viewed as a mistake since it induces a state of mind not in accord with the facts. If M gives P and D erroneous information, omitting therefrom an unsuspected injury, P and D are laboring under a mutual mistake no matter whose doctor M is. Whether or not that mistake is grounds for relief depends on the rules governing that subject. For mistake there seems to be no logical requirement that M be D's doctor—he may be an independent doctor or even P's family physician; in any event P and D both are mistaken as to a fact material to the settlement. Therefore, even in a jurisdiction granting relief for innocent misrepresentation it may be prudent for P to seek relief for mistake if he cannot connect M with D (such connection is by definition an integral element of misrepresentation) provided that the remaining elements of actionable mistake are present.

Because of this overlapping of mistake and misrepresentation the decisions frequently do not characterize the error as either mistake or misrepresentation.[23] Such treatment doubtless makes for loose thinking, but it may lead to substantial justice in many instances. This confusion is so prevalent and the decisions are so chaotic that the only practical analysis of the cases is by a breakdown into fact situations.

Unless it is felt that releases of personal injury claims are a special field, justifying treatment different from that applied to mercantile contracts, many of the cases simply cannot be explained. In almost every case cited in this article the release involved was general in form, specifying that P released D from all liability arising from injuries sustained in a certain accident including "all damages, liabilities, etc., of whatsoever nature, whether now accrued or to accrue." Such a release is obviously intended by D and his attorney to cover all injuries arising out of the accident, whether such injuries are known or unknown.[24] If D's doctor

[23]Note (1927) 48 A. L. R. 1462, 1464.

[24]It is probable that in most cases the settlement itself was based solely on a discussion of known injuries and the estimated time of recovery. The release, however, includes all injuries, and, if there is no fraud in the execu-

actually makes a consciously erroneous statement intended to induce settlement, it is submitted that all courts would give relief bottomed on fraud. However, litigants can rarely prove such fraud, but, even so, there is no difficulty in obtaining relief from those courts which agree with the commentators in granting rescission for innocent misrepresentation. But what can a court do whose precedents deny relief for innocent misrepresentation,[25] and what can any court do when the doctor is either independent of both parties or is responsible only to P?

The crux of the difficulty is the general release. If the doctor is independent or the court does not permit rescission for innocent misrepresentation, how can a mistake as to the extent of the injuries be grounds for relief in the face of a clause specifically covering all injuries, known and unknown? If a release is simply an ordinary contract, and the claimant is selling his claim (and one court has definitely said that is the situation)[26] wherein lies the mistake? Of course, the parties by definition did not know of the "unknown" injury, but they have contracted to settle for such unknown injuries, and on the principles of contract law it was a risk adverted to and paid for, and there could be no relief.

---

tion, the parol evidence rule prevents the court from considering the original settlement—at least no case has been found *consciously* evading that rule. No doubt most claimants who are unrepresented by counsel do not realize the full import of the general release and still think they are settling only for existing injuries and the probable effects thereof. On the other hand it is also certain that most releases (or their attorneys) understand fully the import of the general release and realize that they are "buying complete peace." Therefore, if mistake exists it is unilateral, being solely on the part of the claimant. And it is a set rule of law that relief will be denied for unilateral mistake. See Notes (1926) 26 Col. L. Rev. 989; (1927) 27 Col. L. Rev. 60; Lubell, Mistake in Construction Contracts (1932) 16 Minn. L. Rev. 137. This rule of law is of course not foreordained and relief would logically be given under the now-discarded theory of contracts based on "meeting of the minds." 5 Williston, Contracts (Rev. Ed. 1937) § 1535; McClintock, Mistake and the Contractual Interests (1944) 28 Minn. L. Rev. 460.

[25]While a party cannot contract against his own fraud, it is theoretically possible to contract against liability for innocent misrepresentation. 5 Williston, Contracts (Rev. Ed. 1937) § 1511. Yet such clauses are rarely included in releases, though provisions that the releasor relied on no representation of any person are frequently encountered and about as frequently vitiated by the courts on some theory of mistake or are simply ignored. See Texas & P. Ry. Co. v. Presley, (Comm. App. 1941) 137 Tex. 232, 152 S. W. (2d) 1105.

[26]In dealing with rescission of a personal injury settlement the court in Kane v. Chester Traction Co., 186 Pa. 145, 40 Atl. 320 (1898) said: "If plaintiff had been a merchant selling goods, and the defendant a purchaser depreciating their value in the dicker, we could not say that the latter had exceeded the license allowed him by the standard of commercial honesty, and there is no reason to hold the present parties to any stricter rule." It is thought that the date of this case is significant. Accord Vondera v. Chapman, (1944) 352 Mo. 1034, 180 S. W. (2d) 704. *But see* Backamus v. Albert, (1939) 1 Wash. (2d) 241, 95 P. (2d) 767, *supra* note 20.

Two recent cases have pointed up this problem neatly. The Supreme Judicial Court of Massachusetts[27] refused relief where P, having sustained a fracture of the femur and bruises of the leg due to D's negligence, was after treatment advised by her doctor that she had fully recovered. The doctor also informed D of this and a settlement was made. Two months later osteomyelitis developed in the injured leg. The court refused relief for this mistake, denying it unless there was fraud or concealment. The court was not of the opinion that this error as to the extent of the injury or of the fact of recovery was a mistake in view of the general release. On basic contract principles the logic of this case is hard to refute. The Supreme Court of Minnesota was faced by a similar situation but granted relief in the face of a powerful dissent.[28] The facts in *Larson v. Sventek* indicate that the doctor's report omitted any mention of an existing brain injury. P and D evidently settled on the basis of this report of an independent physician, P executing a general release. The majority followed the Minnesota decisions which give relief for mistake or misrepresentation as to existing unknown injuries holding that it was for the jury to decide whether the parties intended to compromise unknown injuries no matter how broad the language. Judge Stone, dissenting, criticizes the holding as deviating from the usual contract rule, though recognizing the precedents within Minnesota, saying, "Neither is it denied that there are many cases, some of which are cited by the majority, which in result lend support to the decision. It is respectfully submitted that there is no occasion to analyze them until someone at least makes an effort, by resort to the reason of the problem, to show that the usual principles and controls of contract law are for some reason, so far unexplained, inapplicable." "Quite inadvertently, this decision applies to releases from liability for personal injuries a rule we do not apply in similar cases from other torts or breach of contract. There is being created an exception which in reason has no basis. The error results from failure to appreciate that a release is a contract, in the making of which the parties exercise unlimited contractual competence."[29] Stone thus aligns himself with the Massachusetts court despite contrary Minnesota precedent. Doubtless his logic is irrefutable if "the parties exercise unlimited contractual competence" and if a release is to be judged by the rules of ordinary contracts. And yet on some theory or

[27]Tewksbury v. Fellsway Laundry, Inc., (Mass. 1946) 65 N. E. (2d) 918.
[28]Larson v. Sventek, (1941) 211 Minn. 385, 1 N. W. (2d) 608.
[29](1941) 211 Minn. 385, 1 N W. (2d) 608, 611.

another the majority of jurisdictions do grant relief, even for mistake, despite the fact that some of these courts must be aware of the deviation from ordinary contract principles, and it is submitted that the facts of the situation support those courts granting relief. However, a number of courts find themselves torn between the two logics, that of the symmetry of legal principles and that of the inescapable factual differences.

Even though the courts frequently disregard a general release, still it is effective enough that practically all releases are general in character, and, unless otherwise mentioned in this paper, it will be assumed that the release is as broad in covering all injuries, claims and liabilities arising out of the accident as legal ingenuity can make it. If the release presents even the shadow of a doubt as to its breadth, the courts will construe it as covering only known injuries; thus where the release is general in terms but specifies particular injuries the court, using the rule of thumb that the specific governs the general, will interpret the release as valid but as intended to cover only the specified injuries.[30] In such a case the suit is based on the original negligence but recovery may be had only for damages resulting from the unspecified or unknown injuries. Occasionally the entire issue is sidestepped by requiring the plaintiff to return the consideration received for the settlement as a condition precedent to bringing suit[31] although most courts consider this re-

[30]Texas & Pacific Railway Co. v. Dashiell, (1905) 198 U. S. 521, 25 Sup. Ct. 737, 49 L. Ed. 1150; Union Pac. Ry. Co. v. Artist, (C. C. A. 8, 1894) 60 Fed. 365, 23 L. R. A. 581; Lumley v. Wabash R. Co., (C. C. A. 6, 1896) 76 Fed. 66; Gold Hunter Mining & Smelting Co. v. Bowden, (C. C. A. 9, 1918) 252 Fed. 388; Beddingfield v. New Orleans & N. E. R. Co., (1915) 110 Miss. 311, 70 So. 402; see Hoffman v. Eastern Wisconsin Ry. & Light Co., (1908) 134 Wis. 603, 115 N. W. 383; *contra* Quebe v. Gulf, C. & S. F. Ry. Co., (1904) 98 Tex. 6, 81 S. W. 20. The theory of these cases is more unexceptionable than the usual rescission of a general release, but it is hard to see that the mistake is any different in such cases—specifying the injury only makes proof that there were unknown injuries simpler. It may be noted that these cases were early ones—attorneys learn quickly. Sometimes it is impossible to learn enough, as witness the plaintive cry of counsel in Nygard v. Minneapolis St. Ry. Co., (1920) 147 Minn. 109, 179 N. W. 642, 643, "Appellant's counsel expressed a desire to have the court advise how a release may be framed that will not be open to attack on the ground of mutual mistake, if the one in question is not. If fraud or mutual mistake has induced the making of an unconscionable contract, courts ought to be more concerned about granting relief, than desirous of clinching future wrongs by making such contracts incontestable."

[31]Hubbard's Adm'x. v. Louisville & N. R. Co., (1937) 267 Ky. 435, 102 S. W. (2d) 343; Smallwood v. Ky. & West Va. Power Co., (1944) 297 Ky. 202, 179 S. W. (2d) 877; Och v. Missouri, K. & T. Ry. Co., (1895) 130 Mo. 27, 31 S. W. 962; Stewart v. Steinoff, (Mo. App. 1938) 119 S. W. (2d) 76; Gilbert v. Rothschild, (1939) 280 N. Y. 66, 19 N. E. (2d) 785, 134 A. L. R. 1; Casualty Reciprocal Exchange v. Bryan, (Tex. Civ. App. 1937) 101 S. W. (2d) 895.

quirement so onerous that they evade it by various expedients such as deduction of the consideration from the amount of the judgment[32] —practically speaking it is often impossible for the claimant to restore the consideration which has long since been spent on medical and living expenses. Of course, any rule requiring tender prior to rescission has the effect of placing an additional economic hurdle in the claimant's path.

IV

Rules Involved

It is clear that all jurisdictions will grant rescission of a release of a personal injury claim where the defendant's doctor consciously misrepresented the extent of plaintiff's injuries and plaintiff relied on that misrepresentation in making the settlement.[33] This statement is an application of the usual principles governing the rescission of simple contracts. The rarity with which such true fraud can be proved probably explains the paucity of decision in some states. Probably most states in which no decisions have been found can be placed in this category along with those specifically adhering to the rule. Some states which originally accepted fraud as the only ground of relief have switched to more liberal rules.[34] Any jurisdiction which will rescind for innocent misrepresentation (and probably all mistake jurisdictions) would *a fortiori* grant relief in these circumstances. No theorist could quarrel with relief for fraud, but almost all would object to limiting relief so narrowly. Where this rule obtains it makes little difference if the statement was of fact or opinion since if the fraud exists it is actionable even though opinion.[35]

[32]Peterson v. A. Guthrie & Co., (W. D. Wash. 1933) 3 F. Supp. 136; Texas Employers Ins. Assn. v. Kennedy, (Comm. App. 1940) 135 Tex. 483, 143 S. W. (2d) 583. Tender was not required in about one-third of the cases cited in this article. See also Haigh v. White Way Laundry Co., (1914) 164 Iowa 143, 145 N. W. 473; Note (1941) 134 A. L. R. 6.

[33]Haigh v. White Way Laundry Co., (1914) 164 Iowa 143, 145 N. W. 473; Missouri Pac. Ry. Co. v. Goodholm, (1900) 61 Kan. 758, 60 Pac. 1066; Loveless v. Cunard Mining Co., (Mo. App. 1918) 201 S. W. 375; Carlson v. Northern Pac. Ry. Co., (1928) 82 Mont. 559, 268 Pac. 549; Hardy v. Manchester St. Ry., (1913) 77 N. H. 21, 86 Atl. 257; Pass v. McClaren Rubber Co., (1929) 198 N. C. 123, 150 S. E. 709 (expressly denying relief unless there was fraud); Ward v. Heath, (1943) 222 N. C. 470, 24 S. E. (2d) 5; St. Louis & S. F. R. Co. v. Reed, (1913) 37 Okla. 350, 132 Pac. 355; Beatrice Creamery Co. v. Goldman, (1935) 175 Okla. 300, 52 P. (2d) 1033; Chicago, R. I. & P. Ry. Co. v. Johnson, (1918) 71 Okla. 118, 175 Pac. 494.

[34]The only state, cases from which are mentioned in note 33, *supra,* not having at least one more liberal case is North Carolina.

[35]Lumley v. Wabash R. Co., (C. C. A. 6, 1896) 76 Fed. 66; Yeager v. St. Joseph Lead Co., (1929) 223 Mo. App. 245, 12 S. W. (2d) 520; Oestreich v. Chicago, St. P., M. & O. Ry. Co., (1918) 140 Minn. 280, 167 N. W. 1032.

Any practicing attorney realizes that it is almost as difficult to prove that a doctor has been negligent as to prove actual fraud. Nevertheless a few cases have been found where negligent misrepresentations have been the basis of relief.[36] These cases may be only one aspect of the fraud rule since actionable fraud is frequently defined as a misrepresentation whose untruth the misrepresentor knew or *should have known.* To call the latter fraud in the lay sense is obviously fictional, and it seems preferable to characterize it as negligence. However, in reading most of the decisions granting relief in such cases one feels that actual fraud existed but was impossible of proof under the circumstances; for that reason denominating such cases as fraud may not be as fictional as supposed.

The leading state granting relief in cases of innocent misrepresentation by defendant's doctor but denying it for mistake where there is a general release is Texas.[37] This position seems to be that accepted as the correct rule by the commentators[38] although the

[36]St. Louis & S. F. Ry. Co. v. Richards, (1909) 23 Okla. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; Ballenger v. Southern Ry. Co., (1916) 106 S. C. 200, 90 S. E. 1019. Minnesota grants relief for innocent misrepresentation of fact but denies relief where the statement of the doctor is only a prediction; yet Minnesota granted rescission under such circumstances where the prediction was negligently made. Kjerkerud v. Minneapolis, St. P. & S. S. M. Ry. Co., (1921) 148 Minn. 325, 181 N. W. 843. South Carolina is the only one of these jurisdictions in which no case going beyond negligent misrepresentation has been found.

[37]Missouri, K. & T. Ry. Co. v. Maples, (Dallas Civ. App. 1913) 162 S. W. 426; Missouri, K. & T. Ry. Co. v. Haven, (Texarkana Civ. App. 1917) 200 S. W. 1152; Reasoner v. Gulf, C. & S. F. Ry. Co., (1918) 109 Tex. 204, 203 S. W. 592; St. Louis Southwestern Ry. Co. v. Thomas, (Texarkana Civ. App. 1922) 244 S. W. 839; El Paso Electric Co. v. Cowan, (El Paso Civ. App. 1924) 257 S. W. 941, aff'd (Comm. App. 1925) 271 S. W. 79; Texas & P. Ry. Co. v. Presley, (Comm. App. 1941) 137 Tex. 232, 152 S. W. (2d) 1105. *Contra* Houston & T. C. R. Co. v. McCarty, (1901) 94 Tex. 298, 60 S. W. 429; Jones v. Gulf, C. & S. F. Ry. Co., (1903) 32 Tex. Civ. App. 198, 73 S. W. 1082; Quebe v. Gulf, C. & S. F. Ry. Co., (1904) 98 Tex. 6, 81 S. W. 20; El Paso & Southwestern Co. v. Kramer, (El Paso Civ. App. 1911) 141 S. W. 122. The foregoing cases cited as *contra* lay down a fraud test—note that they are all early cases and the Texas rule appears to have changed. The only recent case denying relief for innocent misrepresentation is Panhandle & Santa Fe Ry. Co. v. O'Neal, (Eastland Civ. App. 1938) 119 S. W. (2d) 1077. Texas is supposed not to require scienter even in an action for deceit. Miller, Innocent Misrepresentation as the Basis of an Action for Deceit (1928) 6 Tex. L. Rev. 151. Texas denies relief for mutual mistake in the face of a general release. Inter-Ocean Casualty Co. v. Johnston, (Comm. App. 1934) 123 Tex. 592, 72 S. W. (2d) 583; Commercial Casualty Ins. Co. v. Hilton, (Comm. App. 1935) 126 Tex. 497, 87 S. W. (2d) 1081.

[38]5 Williston, Contracts (Rev. Ed 1937) § 1500, 1551. Williston admits the possibility of mistake in respect to unknown injuries despite a general release, though he thinks that usually on interpretation of the instrument it should cover all injuries. To the writer of this article it seems difficult to imagine such a mistake (other than unilateral) with a general release. The

hardship on the plaintiff is of similar magnitude whether the error is called mistake or misrepresentation. Assume that P has released his claim for $100, relying on D's doctor's statement that he has only a wrist injury whereas he also has a fractured pelvic bone—is there any merit in distinguishing that case from a similar report by a doctor independent of both plaintiff and defendant. Actually P may rely more implicitly on such independent advice than he does on D's doctor. The chief factual justification for distinguishing the two situations rests on a possible inference of fraud if the doctor is D's agent or employee. If relief for innocent misrepresentation by defendant (or his doctor) is granted because of the hardship in requiring plaintiff to prove fraud or negligence, then a distinction between the two is justified. The cynical observer can hardly be censured for feeling that where the defendant's doctor makes a misstatement, though the proof shows innocence, there may be something more involved than meets the eye—this very feeling may be one justification of the wide extension of the law of warranty in modern days. And analogies with the law of warranty are certainly persuasive that innocent misrepresentation should be ground for rescission of a settlement for personal injuries. In addition to Texas which specifically denies relief for mistake it is possible that some courts which grant relief under the name mistake are actually doing so on the ground of innocent misrepresentation—this would seem to be the solution of those cases which grant relief for mistake *so long as the doctor is the defendant's* but refuse to do so where the doctor is independent or hired by the plaintiff.[39] In order to prove actionable misrepresentation it is necessary that in some way the doctor be connected with the defendant—in theory there should be relief only where the doctor is an employee or agent of the defendant,[40] but the cases seem to

construction of the release is perfectly clear though relief might still be granted as a matter of policy despite the obvious language. Furthermore, mistake as an equitable doctrine may not be capable of exact definition. Moffett, Hodgkins & Clarke Co. v. Rochester, (C. C. A. 2, 1898) 91 Fed. 28 at 35, "The word 'mistake' is of so broad a character, and includes so many varied circumstances, that rules which undertake to define what a court of equity can do or cannot do in regard to correction of a mistake, either *unilateral* or mutual, seem to me to confuse rather than to enlighten."

[39]Sitchon v. American Export Lines, (C. C A. 2, 1940) 113 F. (2d) 830, *cert. den.* (1940) 311 U. S. 705; Toland v. Uvalde Const. Co., (1939) 198 Ark. 172, 127 S. W. (2d) 814; Douda v. Chicago, R. I. & P. Ry. Co., (1909) 141 Iowa 82, 119 N. W. 272.

[40]Restatement, Contracts (1932) § 477. If a third person has made the material misrepresentation, the transaction may be avoided until the other person has given value or materially changed his position—from that the question arises whether ridiculously low compensation should be considered as true "value" in such instances.

extend the connection to any doctor whose bill is paid by the defendant or go further and accept some broad equitable principle evidently refusing to allow the defendant to accept the fruits of the misrepresentation at the same time he denies responsibility for it.[41] This equitable principle can easily be extended to the point where the court under the name of misrepresentation is actually giving relief for mutual mistake.[42]

Although any attempt to categorize the decisions is probably futile, the next observable line of decisions are those denying relief for innocent misrepresentation but granting it for mistake.[43] The cases abound with statements like "if Doctor Jones (defendant's physician) made these statements fraudulently, then the release can be upset for misrepresentation, while if the statements were innocently made, there has been a mutual mistake justifying rescission."[44] Doubtless if such jurisdictions refuse relief where the physician is independent, then in fact relief is really being granted simply for innocent misrepresentation under another name, probably due to the court's feeling that its precedents forbid relief for misrepresentation unless there was actual fraud. However, some

[41]The Texas Commission of Appeals seems to tend toward a more liberal rule. Cowan v. El Paso Electric Ry. Co., (Comm. App. 1925) 271 S. W. 79; Graves v. Hartford Accident & Indemnity Co., (Comm. App. 1942) 138 Tex. 589, 161 S. W. (2d) 464. The earlier cases and the lower courts are thoroughly confused. Gulf, C. & S. F. Ry. Co. v. Huyett, (1906) 99 Tex. 630, 92 S. W. 454; Missouri, K. & T. Ry. Co. v. Haven, (Texarkana Civ. App. 1917) 200 S. W. 1152; Great American Indemnity Co. v. Blakey, (San Antonio Civ. App. 1937) 107 S. W. (2d) 1002; Gibson v. Employers Liability Assurance Corporation, (Texarkana Civ. App. 1939) 131 S. W. (2d) 327; Lipscomb v. Houston Electric Co., (Galveston Civ. App. 1941) 149 S. W. (2d) 1042, (dictum that the doctor must have been authorized to settle the claim).

[42]Pattison v. Seattle, R. & S. Ry. Co., (1909) 55 Wash. 625, 104 Pac. 825.

[43]Great Northern Ry. Co. v. Fowler, (C. C. A. 9, 1905) 136 Fed. 118; Steele v. Erie R. Co., (W. D. N. Y. 1930) 54 F. (2d) 688, aff'd (C. C. A. 2, 1931) 54 F. (2d) 690; Reddington v. Blue & Raferty, (1914) 168 Iowa 34, 149 N. W. 933; Landau v. Hertz Drivurself Stations, (1st Dept. 1932) 237 App. Div. 141, 260 N. Y. S. 561; (See as tending toward a more strict rule in New York, Barry v. Lewis, (4th Dept. 1940) 259 App. Div. 496, 20 N. Y. S. (2d) 88; Yehle v. New York Cent. R. Co., (4th Dept. 1943) 267 App. Div. 301, 46 N. Y. S. (2d) 5); K. C. Motor Co. v. Miller, (1939) 185 Okla. 84, 90 P. (2d) 433 (no doctor); Borzor v. Alan Wood Steel Co., (Pa. Super. Ct. 1938) 130 Pa. St. 182, 196 Atl. 532; Metropolitan Life Ins. Co. v. Humphrey, (1934) 167 Tenn. 421, 70 S. W. (2d) 361; Schmidtke v. Great Atlantic & Pacific Tea Co., (1940) 236 Wis. 283, 294 N. W. 828; see Note (1942) 17 Wis. L. Rev. 401.

[44]Lion Oil Refining Co. v. Albritton, (C. C. A. 8, 1927) 21 F. (2d) 280; Matthews v. Atchison, T. & S. F. Ry. Co., (1942) 54 Cal. App. (2d) 549, 129 P. (2d) 435; Wolf v. Cudahy Packing Co., (1919) 105 Kan. 317, 182 Pac. 395; Mancini v. Pennsylvania Rubber Co., (1942) 147 Pa. Super. 359, 24 A. (2d) 151.

courts maintain their logical consistency to the extent of granting relief if the doctor is independent or plaintiff's physician.[45]

Some jurisdictions, notably Minnesota,[46] recognize both innocent misrepresentation and mistake as grounds for rescission of a release of personal injury claims.[47] The distinction between the two can then be logically drawn on the relation between the doctor making the statements and the defendant. This rule is certainly the most comprehensive possible and is designed to effectuate substantial justice in the greatest number of cases, but it has not gone without criticism even by members of its own court as the dissent in *Larson v. Sventek* indicates. However, that criticism is principally aimed at relief for mistake where the doctor is independent and the release is general in terms, and probably Stone, J., would not object to relief for innocent misrepresentation by defendant's doctor, if the same rule obtains in ordinary contract cases.[48] This comprehensive position permits the courts to give relief for mistake where proof of the doctor's agency is lacking, but it encounters the logical difficulty of upsetting a general release covering all injuries simply because there was a mistake as to the extent of the injuries.

In addition to the foregoing rules there are some miscellaneous doctrines based on the consideration received by the injured claimant. Naturally the fact that a desperately injured party re-

[45]Robert Hind, Ltd. v. Silva, (C. C. A. 9, 1935) 75 F. (2d) 74; Southwest Pump & Machinery Co. v. Jones, (C. C. A. 8, 1937) 87 F. (2d) 879; Tulsa City Lines v. Mains, (C. C. A. 10, 1939) 107 F. (2d) 377; McCarthy v. Eddings, (1942) 109 Colo. 526, 127 P. (2d) 883; Jordan v. Brady Transfer & Storage Co., (1939) 226 Iowa 137, 284 N. W. 73; Dominicis v. U. S. Casualty Co., (3d Dept. 1909) 132 App. Div. 553, 116 N. Y. S. 975; Le Francois v. Hobart College, (Sup. Ct. Ontario 1941) 31 N. Y. S. (2d) 200, aff'd, (1941) 287 N. Y. 638, 39 N. E. (2d) 271.

[46]The following cases are misrepresentation cases: Jacobson v. Chicago, M. & St. P. Ry. Co., (1916) 132 Minn. 181, 156 N. W. 251, L. R. A. 1916D 144; Vineseck v. Great Northern Ry. Co., (1917) 136 Minn. 96, 161 N. W. 494; Althoff v. Torrison, (1918) 140 Minn. 8, 167 N. W. 119; Bingham v. Chicago, M. & St. P. Ry. Co., (1921) 148 Minn. 316, 181 N. W. 845. The following cases are mistake cases: Mix v. Downing, (1929) 176 Minn. 156, 222 N. W. 913, (1930) 179 Minn. 351, 229 N. W. 319; Serr v. Biwabik Concrete Aggregate Co., (1938) 202 Minn. 165, 278 N. W. 355, 117 A. L. R. 1009. No relief will be granted for unilateral mistake. Hanson v. Northern States Power Co., (1936) 198 Minn. 24, 268 N. W. 642.

[47]Atchison, T. & S. F. Ry. Co. v. Peterson, (1928) 34 Ariz. 292, 271 Pac. 406; Tatman v. Philadelphia, B. & W. R. Co., (1913) 10 Del. Ch. 105, 85 Atl. 716; Bailey v. London Guarantee & Accident Co., (1918) 72 Ind. App. 84, 121 N. E. 128; Crane Co. v. Newman, (1941) 111 Ind. App. 273, 37 N. E. (2d) 732; Clark v. Northern Pac. Ry. Co., (1917) 36 N. D. 503, 162 N. W. 406, L. R. A. 1917E. 399.

[48]Stone's objections might extend to innocent misrepresentation if (a) it has not generally been a ground for rescission of other types of contracts or (b) if the release expressly provided against innocent misrepresentation as a basis for avoidance.

ceived a paltry sum for executing a release would have some effect on any court, but, unless the consideration is legally inadequate, the small amount is not alone grounds for rescission.[49] Two cases give some indication that a greatly disproportionate consideration alone may be grounds for rescission,[50] but they are probably freaks which would not be followed in their own jurisdictions except in special circumstances. There are many decisions to the effect that a very small consideration is some evidence of fraud,[51] and it may also indicate that the extent of the injuries was actually unknown.[52] Furthermore there are cases where no one factor would justify a release but the totality of factors plus the pitifully tiny consideration leads the courts to grant relief for what might be termed "imposition in general" for want of some better phrase.[53] On the other hand where the consideration is large and seems adequately compensatory a court is likely to search for a rule that will deny relief.[54] The Kansas court seems to have seized on the frequent references to the inadequacy of the consideration to announce as its rule that mutual mistake as to the extent of the injuries plus grossly inadequate consideration justifies relief.[55] As a matter of fact this inadequacy exists in such a large proportion of the cases that Kansas by adding this requirement as to consideration has probably not actually changed the usual rule, or it may be that the court is only commenting on the small consideration as evidence that the extent of the injuries was actually unknown. It is

[49]Morris v. Seaboard Air Line Ry., (1919) 23 Ga. App. 554, 99 S. E. 133; Carlson v. Northern Pac. Ry. Co., (1928) 82 Mont. 559, 268 Pac. 549; Pass v. McClaren Rubber Co., (1929) 198 N. C. 123, 150 S. E. 709; Quebe v. Gulf, C. & S. F. Ry. Co., (1904) 98 Tex. 6, 81 S. W. 20; St. Louis Southwestern Ry. Co. v. Thomas, (Tex. Civ. App. 1922) 244 S. W. 839.

[50]Russell v. Dayton Coal & Iron Co., (1902) 109 Tenn. 43, 70 S. W. 1; *Cf.* Ross v. Koenig, (1942) 129 Conn. 403, 28 A. (2d) 875.

[51]E. I. Dupont de Nemours & Co. v. Kelly, (C. C. A. 4, 1918) 252 Fed. 523; Atkinson Paving Co. v. Edwards, (1936) 192 Ark. 961, 96 S. W. (2d) 954; Parrott v. Atchison, T. & S. W. Ry. Co., (1922) 111 Kan. 375, 207 Pac. 777; Collins v. Hughes & Riddle, (1938) 134 Neb. 380, 278 N. W. 888; McMahan v. Carolina Spruce Co., (1920) 180 N. C. 636, 105 S. E. 439.

[52]Montgomery Ward & Co. v. Callahan, (C. C. A. 10, 1942) 127 F. (2d) 32; Parrott v. Atchison, T. & S. F. Ry. Co., (1922) 111 Kan. 375, 207 Pac. 777; Mattson v. Eureka Cedar Lumber & Shingle Co., (1914) 79 Wash. 266, 140 Pac. 377.

[53]Bedser v. Horton Motor Lines, (C. C. A. 4, 1941) 122 F. (2d) 406; Owens v. Norwood-White Coal Co., (1919) 188 Iowa 1092, 174 N. W. 851. Many of the other cases cited present several hardship factors, and it is difficult to tell how many of these factors could be removed and still obtain rescission.

[54]Tewksbury v. Fellsway Laundry, Inc., (Mass. 1946) 65 N. E. (2d) 918; LaRosa v. Union Pac. R. Co., (1942) 142 Neb. 290, 5 N. W. (2d) 891.

[55]Bidnick v. Armour & Co., (1923) 113 Kan. 277, 214 Pac. 808; Koshka v. Missouri Pac. R. Co., (1923) 114 Kan. 126, 217 Pac. 293.

probable that under other circumstances the Kansas court might rephrase its rule.[56]

V

NATURE OF THE INJURIES

Once the major principles have been developed the courts then have various subsidiary decisions to make. It is unanimously stated that relief will be granted under the appropriate formula where there are existing (at the time of the release) unknown injuries, but will be refused where there is error as to consequences of a known injury.[57] So the release will be upset if the doctor tells the plaintiff that his injuries consist only of a cut wrist whereas he has also an injured shoulder which eventuates in loss of an arm, but not if the doctor states that the wrist has been cut and later an infection sets in due to which a gangrenous condition develops and the plaintiff loses an arm. In the case of the unexpected development of a known injury the obvious solution is that at the time of the release there was no mistake or misrepresentation — the doctor's statement was true unless he went further and fixed a date of recovery. On the other hand there are innumerable borderline decisions really relating primarily to the question of seriousness.[58]

[56]Smith v. Kansas City, (1918) 102 Kans. 518, 171 Pac. 9; Wolf v. Cudahy Packing Co., (1919) 105 Kan. 317, 182 Pac. 395; Parrott v. Atchison, T. & S. F. Ry. Co., (1922) 111 Kan. 375, 207 Pac. 777; Crawn v. Fowler Packing Co., (1922) 111 Kan. 573, 207 Pac. 793; Rider v. Kansas City Terminal Ry. Co., (1923) 112 Kan. 765, 212 Pac. 678. All the foregoing cases presented problems as to the amount of compensation, but did not enunciate the rule as mutual mistake plus inadequate consideration.

[57]Great Northern Ry. Co. v. Reid, (C. C. A. 9, 1917) 245 Fed. 86; Hume v. Moore-McCormack Lines, (C. C. A. 2, 1941) 121 F. (2d) 336; Ladd v. Chicago, R. I. & P. Ry. Co., (1916) 97 Kan. 543, 155 Pac. 943; Althoff v. Torrison, (1918) 140 Minn. 8, 167 N. W. 119; Richardson v. Chicago, M. & St. P. Ry. Co., (1924) 157 Minn. 474, 196 N. W. 643; Dolgner v. Dayton Co., (1931) 182 Minn. 588, 235 N. W. 275; Yocum v. Chicago, R. I. & P. Ry. Co., (1933) 189 Minn. 397, 249 N. W. 672; Serr. v. Biwabik Concrete Aggregate Co., (1938) 202 Minn. 165, 278 N. W. 355; Landu v. Hertz Drivurself Stations, (1st Dept. 1932) 237 App. Div. 141, 260 N. Y. S. 561; Mack v. Albee Press, Inc., (1st Dept. 1942) 263 App. Div. 275, 32 N. Y. S. (2d) 231; Petersen v. Kemper, (S. D. 1945) 18 N. W. (2d) 294.

[58]Great Northern Ry. Co. v. Fowler, (C. C. A. 9, 1905) 136 Fed. 118, *cert. den.* (1905) 197 U. S. 624 (mistake as to "nature of wounds," relief); Robert Hind, Ltd. v. Silva, (C. C. A. 9, 1935) 75 F. (2d) 74 (injury thought ended but recurred, relief); Tatman v. Philadelphia B. & W. R. Co., (1913) 10 Del. Ch. 105, 85 Atl. 716 (1913) (known eye injury, depth of penetration unknown, relief); Weathers v. Kansas City Bridge Co., (1917) 99 Kan. 632, 162 Pac. 957 ("extent" of injuries unknown, relief); Mix v. Downing, (1929) 176 Minn. 156, 222 N. W. 913, (1930) 179 Minn 351, 229 N. W. 319 (thought a bruise, actually broken bone, relief); Blair v. Chicago & A. Ry. Co., (1886) 89 Mo. 383, 1 S. W. 350; Roti v. New England Road Machinery Co., (1928) 83 N. W. 232, 140 Atl. 587 (bruise actually deep muscular injury, relief); Spangler v. Kartzmark, (1936) 121 N. J. Eq. 64, 187 Atl. 770 (bruise actually

It may be postulated that if a panel of physicians were given the basic rule it would reach results varying substantially from those reached by law courts, but it is also probable that a group of physicians assembled in 1916 might disagree with a similar group assembled in 1946. These doubtful cases put great power into the hands of the court, and it is likely that in such cases a judge who believes relief is justified on the facts will decide that the injury was an existing unknown injury whereas if he is of the opposite opinion a contrary decision will be reached. In any one case it is difficult to quarrel with the result obtained, although it would be impossible to reconcile all of the decisions.

VI

Fact and Opinion

The fine line between opinion and fact is so largely a matter of individual taste[59] that the courts have great latitude in influencing the result of litigation by simply designating a certain statement as fact or opinion. This is possible because the courts have unanimously stated that for relief for misrepresentation or mistake the erroneous assertion must relate to an existing fact and not opinion.[60] In the solution of concrete problems it is of little help for the commentator to explain that, philosophically speaking, it may be impossible to denominate anything as fact since each phenomenon must be viewed subjectively, for the courts are dealing with concrete cases under

deep muscular injury, no relief); Harvey v. Georgia, (Sup. Ct. Tompkins, 1933) 148 Misc. 633, 266 N. Y. S. 168 (epilepsy from known laceration of scalp, relief); Ruby v. Hutchison, (1944) 154 Pa. Super. 456, 36 A. (2d) 244 (dislocated sacroiliac later found separated, relief); Schmidtke v. Great Atlantic & Pacific Tea Co., (1940) 236 Wis. 283, 294 N. W. 828 (bruise known but deep injury to blood vessels unknown, relief).

[59]For a recent discussion of opinion in reference to misrepresentation see Keeton, Fraud: Misrepresentations of Opinion, (1937) 21 Minnesota Law Review 643; also Cook, "Facts" and "Statements of Fact," (1937) 4 U. of Chi. L. Rev. 233.

[60]Restatement, Contracts (1932) § 474

"A manifestation that the person making has no reason to expect to be understood as more than an expression of his opinion, though made also with the intent or expectation stated in § 471, is not fraud or a material misrepresentation, unless made by

(a) one who has or purports to have expert knowledge of the matter, or

(b) one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion."

The view taken by the Restatement is probably a declaration of the existing law, but the cases often ignore various aspects of the rule without analysis.

an existing rule with long historical antecedents, and they must decide what "fact" is from the precedents at hand.[61]

A frequently quoted early English case in analyzing whether there could be a misrepresentation of intent said "The state of a man's mind is as much a fact as the state of his digestion."[62] A doctor may be skeptical of both parts of that proposition. Actually even the simplest diagnosis is an opinion, and it is well known that such a diagnosis may be erroneous despite the greatest competence on the part of the physician and the widest use of clinical tests. Rarely, however, does a court call true diagnosis opinion.[63] And if any court did label diagnosis opinion is should add that the opinion of an expert or a person with special knowledge is as actionable as a statement of fact.

But the results are quite different where prognosis, and not diagnosis, is involved. Actually competent physicians know that ventures into prognosis are highly uncertain. The human body is something more than a combination of basic elements, and for purposes of diagnosis and prognosis medical science still reveals its artistic aspects. For this reason physicians usually qualify their opinions adequately, if only for the sake of their reputations. Presumably a properly qualified opinion even without a statement as to diagnosis should not be misrepresentation not because it is opinion but because it is not erroneous in fact.[64] If a doctor says "you should in the normal course of events be well in three months, but some of these injuries heal more slowly and some are permanent" then there is no error if the patient falls within the excepted categories provided that the diagnosis was correct in the first place; that is, if the injury was such that the diagnosis should have been that ninety-nine percent of these cases are permanently incapacitated, then there has been error in the original diagnosis and that error should be denominated as one of fact if any diagnosis is fact.[65]

[61]Restatement, Contracts (1932) § 474, Comment a, mentioning the converse of the text, that every "statement of opinion is a statement of fact, namely that the person making the statement holds that opinion." Comment c says that the distinction to be drawn is between "knowledge" and "opinion."

[62]Edgington v. Fitzmaurice. (1885) 29 Ch. Div. 459.

[63]*But see* Wingfield v. Wabash R. Co., (1914) 257 Mo. 347, 166 S. W. 1037; Culvern v. Kurn, (Mo. 1946) 193 S. W. (2d) 602; Eccles v. Union Pac. Ry. Co., (1891) 7 Utah 335, 26 Pac. 924.

[64]*Cf.* Colorado Springs & I. Ry. Co. v. Huntling, (1919) 66 Colo. 515, 181 Pac. 129; Atchison, T. & S. F. Ry. Co. v. Bennett, (1901) 63 Kan. 781, 66 Pac. 1018; Harp v. Red Star Milling Co., (1926) 121 Kan. 451, 247 Pac. 856.

[65]The court in Pattison v. Seattle, R. & S. Ry. Co., (1909) 55 Wash. 625, 104 Pac. 825, says that where a doctor makes an unqualified assertion as to time of recovery, it will be sufficient, if erroneous, to upset a release.

Whether it is actionable by reason of reliance or materiality is another matter.

To the average patient an involved polysyllabic diagnosis is not half so informative as a statement of the time of probable recovery. It is easy to comprehend and evaluate a statement predicting recovery in two months—probably the average man doesn't think that the time stated is an infallible prediction, but he does rely on recovery within some calculable deviation from the date predicted.[66] Furthermore, the most important element in estimating the damages sustained by a personal injury claimant is the duration of the injury. The other factor that influences his decision is the knowledge that he will eventually recover. Certainly the most reliable evidence the layman can obtain about his injuries is the statement of his doctor, whether it be straight diagnosis or unadulterated prognosis.

Probably in view of the fact that a doctor is an expert and that both diagnosis and prognosis are opinion, the rationale of the decisions defining prognosis as opinion or non-actionable is not that it is simply opinion, but that it is a prediction as to future events. After all it is well recognized that while statements of opinion by laymen are not usually a proper basis for an action for misrepresentation, an opinion by an expert is frequently actionable.[67] There is no reason why this special exception recognizing an expert's opinion as actionable should not be carried over into the field of prediction.[68] The commentators are agreed that the reason for the opinion rule is that such expert opinion is entitled to inspire reliance; it is the type of statement that governs all our actions in respect to specialized fields.[69] In the realm of medicine a prediction as to duration of injury by a physician is entitled to reliance (and reasonable people govern their affairs accordingly) and should be actionable at least in cases where rescission is the desired remedy.

Doubtless a great deal depends on the length of time specified by the doctor as well as the conditions attached to the length of time. If a physician lightly says: "You'll be up and around in a

[66]"To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood." Scheer v. Rockne Motors Corporation, (C. C. A. 2, 1934) 68 F. (2d) 942, 945.

[67]Restatement, Contracts (1932) § 474, *supra* Note 60.

[68]5 Williston, Contracts (Rev. Ed. 1937) § 1496.

[69]Prosser on Torts (1941) 754-767 in specifying the reason for the expert exception to the opinion rule states that the parties are not on an equal footing and therefore the individualistic basis for the common law rule has been destroyed.

week" the patient has every reason to rely on that statement. On the other hand, if "two years" is substituted for "a week" the added time may be said to render reliance must less justifiable. The reliability may be said to vary inversely to the time specified. And yet if any weight is given to the existence of economic compulsion, the measure of economic pressure probably varies directly with the length of the period specified. The patient who is told he will recover in a week can "sweat it out," while the man facing two years' disability badly needs the money to be obtained from a settlement. Of course, the patient whose injuries turn out to be permanent or of much greater duration than predicted is likely to be inadequately compensated in either event.

Every prediction as to time of recovery should be based on a diagnosis of present condition or as it is sometimes phrased the opinion (prediction) implies a certain state of facts—actually this is true of every prediction no matter how long the duration of time. If the underlying facts are not as implied, then relief should be granted on ordinary principles of misrepresentation or mistake of fact. The only difficulty with such a solution is that the particular underlying facts may not be readily apparent and there is little way to prove them. Therefore, if there is great discrepancy between the predicted duration and the actual duration there is argument for relief on the ground that the implied facts must have differed greatly from the actual facts provided it is shown that the condition of the claimant was such that normally a greater duration should have been expected. This rule would require of doctors a high degree of care in giving opinions but one of the objects of decisions in this field is to secure for the plaintiff reasonable protection and so great care is desirable. The scrupulous defendant can protect himself by demanding that his settlements be made only upon the diagnosis of a competent physician and that any prognosis be in the conditional form considered standard by better physicians and surgeons; further the defendant can protect himself against fraudulent plaintiffs by having his doctor render a written opinion which is signed by the plaintiff.[70] The suggested rule would certainly give relief for predictions as to duration of injury which are made in such unqualified form and with such inadequate diagnosis that want of due care seems apparent and actual fraud may be suspected.

The courts have rarely attempted to explain the rationale of

[70]For specific suggestions as to protective measures which may be undertaken by the defendant see Note (1942) 17 Wis. L. Rev. 401. The best device is to train claim agents and adjusters in proper procedures.

the decisions, but have usually simply labelled the offending statement as fact or opinion and passed on to clearer fields. Normally little attention is paid to the reason back of denying relief for statements of opinion or prediction, which is whether reliance on such statements is reasonable; and most cases do not discuss the relation of the expert to opinion or prediction and whether reliance on such opinion or prediction is justified because made by an expert.[71] In general, predictions that recovery will occur in a short period of time are held to be "fact" on the basis that the prediction implies an existing factual condition—holding them to be "fact," of course, only means that the court considers them actionable.[72] Relief as to prophecies of a longer period for recovery are generally denied although they, too, imply certain existing facts.[73] There are, of course, many cases holding such predictions, even as to short convalescence, not actionable,[74] but in either event it may be

[71]Bailey v. London Guarantee & Accident Co., (1918) 72 Ind. App. 84, 121 N. E. 128; Missouri, K. & T. Ry. Co. v. Haven, (Tex. Civ. App. 1917) 200 S. W. 1152; Duncan v. Texas Employers' Ins. Assn., (Tex. Civ. App. 1937) 105 S. W. (2d) 403; Viallet v. Consolidated Ry. & Power Co., (1906) 30 Utah 260, 84 Pac. 496; Brown v. Ocean Accident & Guarantee Corporation, (1913) 153 Wis. 196, 140 N. W. 1112.

[72]Shook v. Illinois Cent. R. Co., (C. C. A. 5, 1902) 115 Fed. 57; Great Northern Ry. Co. v. Fowler, (C. C. A. 9, 1905) 136 Fed. 118, *cert. den.* (1905) 197 U. S. 624 (two weeks); Gold Hunter Mining & Smelting Co. v. Bowden, (C. C. A. 9, 1918) 252 Fed. 388 (three weeks); Steele v. Erie R. Co., (W. D. N. Y. 1930) 54 F. (2d) 688, aff'd. (C. C. A. 2, 1931) 54 F. (2d) 690 (two weeks); Tulsa City Lines v. Mains, (C. C. A. 10, 1939) 107 F. (2d) 377 (Injuries slight, six weeks); Atchison, T. & S. F. Ry. Co. v. Peterson, (1928) 34 Ariz. 292, 271 Pac. 406 (thirty days); Indiana Steel & Wire Co. v. Studes, (1918) 187 Ind. 469, 119 N. E. 2 (six to eight weeks); Jacobson v. Chicago, M. & St. P. Ry. Co., (1916) 132 Minn. 181, 156 N. W. 251, L. R. A. 1916D 144 (three to four weeks); Smith v. Great Northern Ry. Co., (1918) 139 Minn. 343, 166 N. W. 350 (two weeks); Dominicis v. U. S. Casualty Co., (3d Dept. 1909) 132 App. Div. 553, 116 N. Y. S. 975 (going to be all right); Ft. Worth & R. G. Ry. Co. v. Pickens, (Tex. Civ. App. 1941) 153 S. W. (2d) 252, rev'd on other grounds (Comm. App. 1942) 162 S. W. (2d) 691 (two to three weeks); Viallet v. Consolidated Ry. & Power Co., (1906) 30 Utah 260, 84 Pac. 496; Pierce v. Seattle Electric Co., (1914) 78 Wash. 167, 138 Pac. 666.

[73]Relief denied. Fitzpatrick v. Chicago, M. & St. P. Ry. Co., (1913) 121 Minn. 370, 141 N. W. 485 (six months); Conklin v. Missouri Pac. R. Co., (1932) 331 Mo. 734, 55 S. W. (2d) 306 (four months); Pass v. McLaren Rubber Co., (1929) 198 N. C. 123, 150 S. W. 709 (eight to ten weeks). Relief granted. Reasoner v. Gulf, C. & S. F. Ry. Co., (1918) 109 Tex. 204, 203 S. W. 592 (two months); Duncan v. Texas Employers' Ins. Assn., (Tex. Civ. App. 1937) 105 S. W. (2d) 403 (sixty days); Brown v. Ocean Accident & Guarantee Corporation, (1913) 153 Wis. 196, 140 N. W. 1112 (five months).

[74]Alabama & V. Ry. Co. v. Turnbull, (1894) 71 Miss. 1029, 16 So. 346 (two or three weeks); Homuth v. Metropolitan St. Ry. Co., (1895) 129 Mo. 629, 31 S. W. 903 (two weeks); Macklin v. Fogel Const. Co., (1930) 326 Mo. 38, 31 S. W. (2d) 14; LaRosa v. Union Pac. Ry. Co., (1942) 142 Neb. 290, 5 N. W. (2d) 891 (going to be all right, note large compensation); Chicago, R. I. & P. Ry. Co. v. Perkins, (1925) 115 Okla. 233, 242 Pac. 535; Texas Employers Ins. Assn. v. Watkins, (Tex. Civ. App. 1936) 90 S. W. (2d) 622 (two to four weeks).

felt that the courts choose a label proper to support their holdings which are based on their instinctive reaction to the entire factual situation.

The only significant departure from this pattern is the rule adopted by the courts of Arkansas which hold that where defendant's doctor states that an injury is of limited duration whereas it turns out to be permanent the release will be rescinded.[75] The predicted period justifying relief in one instance was nine or ten months, long enough that most courts would be unwilling to grant rescission. While the rule enunciated may be unusual it is difficult to criticize the result. The claimants undoubtedly relied on the doctor's prediction in making the settlement, and the compensation received was generally inadequate with respect to the injuries.[76] It hardly offends our sense of justice to see a defendant, who was originally liable and would have been required to bear the burden except for the release, forced to pay full damages where the release was obtained through the claimant's erroneous belief that his convalescence would be of limited duration. Probably a properly conditioned opinion by the doctors could have saved these releases, but such a conditional opinion might well have entailed larger compensation at the time of the release itself. The Arkansas rule also has the effect of discarding the distinction between existing unknown injuries and the development or seriousness of a known injury.

VII

Reliance

The relation of the doctor to the parties is obviously significant in any jurisdiction giving relief only for misrepresentation, for, by definition, to be misrepresentation the error must have been

[75]St. Louis, I. M. & S. Ry. Co. v. Hambright, (1913) 87 Ark. 614, 113 S. W. 803 (four months, rule not mentioned); St. Louis I. M. & S. Ry. Co. v. Morgan, (1914) 115 Ark. 529, 171 S. W. 1187 (rule enunciated); Griffin v. St. Louis, I. M. & S. Ry. Co., (1915) 121 Ark. 433, 181 S. W. 278 (few days); Kiech Mfg. Co. v. James, (1924) 164 Ark. 137, 261 S. W. 24 (four to five months); Sun Oil Co. v. Hedge, (1927) 173 Ark. 729, 293 S. W. 9; Standard Oil Co. v. Gill, (1927) 174 Ark. 1180, 297 S. W. 1020; Missouri Pac. R. Co. v. Elvins, (1928) 176 Ark. 737, 4 S. W. (2d) 528 (thirty days); Kansas City Southern Ry. Co. v. Sanford, (1930) 182 Ark. 484, 31 S. W. (2d) 963; Phoenix Utility Co. v. Smith, (1932) 185 Ark. 553, 48 S. W. (2d) 238 (three months); Missouri Pac. R. Co. v. Treece, (1933) 188 Ark. 68, 64 S. W. (2d) 561 (nine to ten months); Ozan Graysonia Lumber Co. v. Ward, (1934) 188 Ark. 557, 66 S. W. (2d) 1074 (will get well).

[76]The compensation received loomed large in the later cases. Missouri Pac. Transp. Co. v. Robinson, (1935) 191 Ark. 428, 86 S. W. (2d) 913; Atkinson Paving Co. v. Edwards, (1936) 192 Ark. 961, 96 S. W. (2d) 954.

induced by the defendant. The cases of rescission have become more liberal in attributing the misrepresentation to the defendant, evidently accepting some theory that the defendant can't take the fruits of the misstatement while denying his responsibility therefor[77]—actually complete acceptance of this doctrine in its widest application would lead a court to give relief for mistake under the name of misrepresentation, but no court seems to have gone this far.

A doctor may occupy a number of different positions; he may (1) act as claim agent for the defendant, (2) be employed in defendant's company hospital, (3) be the regular doctor of an insurance company or large employer, (4) be the regular doctor to treat the few injuries of defendant's employees, (5) be paid by the defendant for treatment of the plaintiff's injuries alone, (6) be defendant's doctor as in the first five situations and also the plaintiff's family physician, (7) be independent of both parties or (8) the plaintiff's doctor. In the first five cases the tendency is to hold the defendant liable for his misstatements if the other ingredients for relief are present.[78] And in the last three instances there are cases where the release is rescinded on the ground of mutual mistake if both parties are informed of the doctor's report.[79] Of course,

[77]Montgomery Ward & Co. v. Callahan, (C. C. A. 10, 1942) 127 F. (2d) 32 (opinion through third person).

[78](1) Gulf, C. S. F. Ry. Co. v. Huyett, (1906) 99 Tex. 630, 92 S. W. 454 (no relief as doctor not an agent for settlement); Lipscomb v. Houston Electric Co., (Tex. Civ. App. 1941) 149 S. W. (2d) 1042 (same); (2) Missouri, K. & T. Ry. Co. of Texas v. Haven, (Tex. Civ. App. 1917) 200 S. W. 1152; (3) Fitzpatrick v. Chicago, M. & St. P. Ry. Co., (1913) 121 Minn. 370, 141 N. W. 485; Ft. Worth & R. G. Ry. Co. v. Pickens, (Tex. Civ. App. 1941) 153 S. W. (2d) 252, rev'd on other grounds, (Comm. App. 1942) 162 S. W. (2d) 691; (4) Sun Oil Co. v. Hedge, (1927) 173 Ark. 729, 293 S. W. 9; (5) Indiana Steel & Wire Co. v. Studes, (1918) 187 Ind. 469, 119 N. E. 2; Crane Co. v. Newman, (1941) 111 Ind. App. 273, 37 N. E. (2d) 732; Pattison v. Seattle, R. & S. Ry. Co., (1909) 55 Wash. 625, 104 Pac. 825. Some few cases require that the doctor have knowledge of a prospective settlement in order to make his statements the basis of rescission. Jacobson v. Chicago, M. & St. P. Ry. Co., (1916) 132 Minn. 181, 156 N. W. 251, L. R. A. 1916D 144; Cowan v. El Paso Electric Ry. Co., (Tex. Comm. App. 1925) 271 S. W. 79; Great American Indemnity Co. v. Blakey, (Tex. Civ. App. 1937) 107 S. W. (2d) 1002.

[79](6) Tatman v. Philadelphia, V. & W. R. Co., (1913) 10 Del. Ch. 105, 85 Atl. 716; Parrott v. Atchison, T. & S. F. Ry. Co., (1922) 111 Kan. 375, 207 Pac. 777; Ruby v. Hutchison, (1944) 154 Pa. Super, 456, 36 A. (2d) 244; (7) McCarthy v. Eddings, (1942) 109 Colo. 526, 127 P. (2d) 883; (8) Scheer v. Rockne Motors Corporation, (C. C. A. 2, 1934) 68 F. (2d) 942; Robert Hind, Ltd. v. Silva, (C. C. A. 9, 1935) 75 F. (2d) 74; Jordan v. Brady Transfer & Storage Co., (1939) 226 Iowa 137, 284 N. W. 73; Serr v. Biwabik Concrete Aggregate Co., (1938) 202 Minn. 165, 278 N. W. 355, 117 A. L. R. 1009; Poti v. New England Road Machinery Co., (1928) 83 N. H. 232, 140 Atl. 587.

if the plaintiff alone knows of the report and the defendant is uninformed of it, the mistake is unilateral and no cases have been found granting relief in such circumstances. In all of these cases the plaintiff is justified in relying on the statement in the absence of unusual circumstances.

Equal or greater reliance is justified where the claimant has been examined by both defendant's doctor and plaintiff's doctor and their opinions coincide.[80] Logically the agreement of the two doctors constitutes the greatest assurance of exactness and justifies the fullest reliance, but jurisdictions permitting relief only for misrepresentation would be expected to deny rescission under such circumstances on the ground that primary reliance is on plaintiff's own doctor. If plaintiff's doctor makes a diagnosis of more serious injuries than defendant's doctor, then in most instances there is no reliance in fact.[81] Certainly in a minimum number of such cases the plaintiff may rely on the defendant's doctor despite advice of his own physician due to the greater reputation of the former or some other unusual situation,[82] but the number of such cases must be so small that a court is justified in denying reliance as a matter of law. The decisions indicate greater reluctance to set aside a release where the plaintiff has the advice of his own physician and of his own attorney no matter what theory of relief the court may take.[83] The logic of these cases is clear, for where the plaintiff has his own competent advisors the area within which the defendant may practice imposition has been narrowly circumscribed —after all the courts must be satisfied with substantial, not perfect, justice.

---

[80]Cases granting relief are: Southwest Pump & Machinery Co. v. Jones, (C. C. A. 8, 1937) 87 F. (2d) 879; Tulsa City Lines v. Mains, (C. C. A. 10, 1939) 107 F. (2d) 377; Crane Co. v. Newman, (1941) 111 Ind. App. 273, 37 N. E. (2d) 732; Mix v. Downing, (1929) 176 Minn. 156, 222 N. W. 913, (1930) 179 Minn. 351, 229 N. W. 319; Le Francois v. Hobart College, (Sup. Ct. Ontario 1941) 31 N. Y. S. (2d) 200, aff'd (1941) 287 N. Y. 638, 39 N. E. (2d) 271.

[81]Toland v. Uvalde Const. Co., (1939) 198 Ark. 172, 127 S. W. (2d) 814; Douda v. Chicago, R. I. & P. Ry. Co., (1909) 141 Iowa 82, 119 N. W. 272; Fornaro v. Minneapolis Street Ry. Co., (1931) 182 Minn. 262, 234 N. W. 300; Yocum v. Chicago, R. I. & P. Ry. Co., (1933) 189 Minn. 397, 249 N. W. 672; Great American Indemnity Co. v. Blakey, (Tex. Civ. App. 1937) 107 S. W. (2d) 1002; Texas & New Orleans R. Co. v. Hawkins, (Tex. Civ. App. 1938) 112 S. W. (2d) 1107; Texas Employers Ins. Assn. v. Arnold, (Tex. Civ. App. 1938) 114 S. W. (2d) 636; Eccles v. Union Pac. Ry. Co., (1891) 7 Utah 335, 26 Pac. 924.

[82]Graves v. Hartford Accident & Indemnity Co., (Comm. App. 1942) 138 Tex. 589, 161 S. W. (2d) 464 (chiropractor); Pierce v. Seattle Electric Co., (1914) 78 Wash. 167, 138 Pac. 666.

[83]Sitchon v. American Export Lines, (C. C. A. 2, 1940) 113 F. (2d) 830, *cert. den.* (1940) 311 U. S. 705. See cases under in footnote 81 *supra.*

VIII

Conclusion

Some attempt has been made to collect and classify a few of the decisions setting aside settlements in personal injury cases. Analysis of the opinions reveals no unanimity of result or reasoning. Yet on the whole it is clear that most jurisdictions depart from the rules governing ordinary contracts in order to grant relief in cases of hardship with respect to releases executed in reliance on the erroneous statements of a physician. Certainly symmetry of the law cannot be demanded at the expense of justice and socially desirable results—for just such reasons the courts have built up a special field of insurance law in defiance of the general principles of contracts, basing the deviation on the unequal bargaining power of the parties. Within the field of personal injury releases itself special rules have been devised to deal with special situations. For example, it is almost universally held that the party who is seeking to avoid a settlement has the burden of proving the misrepresentation or mistake by a heavy preponderance of the evidence, but where a shipowner pleads a release as a bar to a seaman's claim for damages for personal injury, the cases hold that it is incumbent on the shipowner to prove that the release was obtained under fair and equitable conditions.[84] The law is flexible enough to carve out special rules to fit exceptional fields. Logically, Judge Stone's objections are valid, as he says, only so long as there is no indication that releases of personal injury claims present factual differences distinguishing them from other releases, thus creating an exceptional field.

Whether such distinguishing characteristics exist obviously depends largely on the subjective approach. No one can quarrel with Judge Stone's view on the matter, and he has respectable authority with him. What are the social policies involved? There is the interest of society as a whole in the security of transactions, which

[84]Garrett v. Moore-McCormack, Inc., (1942) 317 U. S. 239, 63 Sup. Ct. 246, 87 L. Ed. 239; Bonici v. Standard Oil Co., (C. C. A. 2, 1939) 103 F. (2d) 437; Sitchon v. American Export Lines, (C. C. A. 2, 1940) 113 F. (2d) 830, *cert. den.* (1940) 311 U. S. 705; Hume v. Moore-McCormack Lines, (C. C. A. 2, 1941) 121 F. (2d) 336; Stuart v. Alcoa S. S. Co., (C. C. A. 2, 1944) 143 F. (2d) 178; Spillers v. South Atlantic S. S. Co., (D. C. Del. 1942) 45 F. Supp. 2; King v. Waterman S. S. Corp., (S. D. N. Y. 1945) 61 F. Supp. 969; Premeaux v. Socony-Vacuum Oil Co., (Tex. 1946) 192 S. W. (2d) 138; *Contra:* Wilson v. McCormick S. S. Co., (1940) 38 Cal. App. (2d) 726, 102 P. (2d) 412. For an apparent exception with respect to an Indian plaintiff, see Midland Valley R. Co. v. Clark, (1920) 78 Okla. 121, 189 Pac. 184.

would lead us to uphold releases. From this comes the oft-repeated maxim that the law favors compromise settlements. But that is no more than a mixim and the law actually favors only "fair" compromise settlements. When one person is injured negligently by another the law has long seen fit to make the negligent person liable for damages. Yet in the long run society must foot the bill, for during the period of incapacity the injured individual is more or less unproductive. The defendant manages to shift his burden to the public at large through insurance or, if he is a self-insurer, he may do so through an adjustment of the cost basis of his wares.[85] If the burden is allocated to the plaintiff it is shifted to society in modern times through unemployment compensation, relief and private charities to the extent that such agencies compensate adequately, but to the extent that such compensation is inadequate plaintiff bears directly a portion of the burden (though society may bear a certain part of the cost in such devious ways as the decreased productivity, etc., of plaintiff's children by virtue of inadequate education or physical debility). If the defendant manages to limit his burden through a release the public at large must pay the bill directly through taxation or charity. It may be thought that by virtue of the defendant's ability to shift the risk in less objectionable form he should suffer the reimposition of liability in every instance of mutual mistake or misrepresentation. Yet such a result hardly accords with our notions of fairness or the desire of the business world for some security of transactions.

But this very result, if desirable, can be reached with justice when the release has been obtained by the reliance of the plaintiff on a doctor's innocent misstatement which is attributable to the defendant. And it can be reached without violence to established legal precedents since a majority of the courts and all of the commentators agree that innocent misrepresentation is a sufficient ground for the rescission of a contract.[86] The differentiation of an action for deceit and a suit for rescission has already been attempted in this article, but there is a further reason for granting rescission of a release for innocent misrepresentation. This is the difficulty of proving either fraud or negligence on the part of the defendant or his doctor. Many times we suspect fraud or sharp dealing, but there is usually no way to prove conscious misrepresentation by a doctor except by his own testimony, and it is quite likely that he

[85]See Douglas, Vicarious Liability and Administration of Risk (1929) 38 Yale L. J. 584, 720.

[86]This is true only where the release contains no contractual limitation of liability for innocent misrepresentation. See footnote 25 *supra.*

will be unwilling to confess such conscious error. It is also well known that proof of negligence in a malpractice suit is virtually impossible. This difficulty of proof, which is at the root of such rules as *res ipsa loquitur*, is ample reason to give relief for innocent misrepresentation which is otherwise actionable.

Any argument premised on difficulty of proof is certainly not applicable to instances of upsetting a release for mutual mistake as to the extent of the injuries suffered. Of course, there can be collusion between the defendant and the plaintiff's doctor, but such situations must be so rare that our reasoning as to misrepresentation would be unsound. Where there is a general release from all damages, claims, etc., arising from injuries received in a certain accident, relief must be predicated solely on our ideas as to the public interest involved.[87] Certainly a strong case may be made for requiring the entrepreneur to assume liability in view of his ability to shift the risk more easily and fully than the injured party and in view of the economic compulsion on the latter. To do so logically the court must face the fact that releases are different from most contracts. As to the merits of the case the plaintiff has as surely and definitely been harmed by the mistake as by an innocent misrepresentation, and his unwillingness to depend on society to care for him via taxation or charity is equally as great. Most of the unworthy cases under both misrepresentation and mistake can be eliminated on theories of reliance or materiality.[88] However, if a court accepts this rule, it should do so in full cognizance of its deviation from the usual contract rules and extend such relief to other types of contracts only where the attendant circumstances justify similar holdings. If this rule as to mistake is coupled with some doctrine of disproportionately inadequate consideration, so that there is factual reason to believe that the parties actually were not contracting with significantly different unknown injuries in mind, then there is enough injustice and sufficient guarantee of trustworthiness to permit disregard of the broad language habitually incorporated in releases.[89]

[87]For a case note approving broad relief for mistake see Case (1928) 26 Mich. L. Rev. 828. The annotated case is on theory really misrepresentation. See also McClintock, Mistake and the Contractual Interests (1944) 28 Minn. L. Rev. 460.

[88]Benedum-Trees Oil Co. v. Sutton, (1939) 198 Ark. 699, 130 S. W. (2d) 720; Tucker v. Atchison, T. & S. F. Ry. Co., (1926) 120 Kan. 244, 243 Pac. 269.

[89]The opinion of Judge Frank in Hume v. Moore-McCormack Lines, (C. C. A. 2, 1941) 121 F. (2d) 336, expresses very clearly the economic disadvantages under which seamen labor in settling their injuries. His reasoning seems equally applicable to a majority of personal injury releases—basically only the historical argument is different.

Courts which believe relief is socially desirable should grant such relief, not only where there is an existing unknown injury but should go beyond that and give complete relief where the mistake is as to the seriousness of an existing injury. No doubt it would be an unwarranted extension of liability to upset a release where long after the settlement a known injury developed an infection, but such cases are very rare. The more frequent instance outside of failure to discover a completely distinct injury is an error in estimating the seriousness of a known injury—by legal legerdemain this is frequently called an existing unknown injury, but it is preferable to call a spade a spade and to admit that relief will be given where the seriousness of the injury was underestimated. Certainly the patient is no more or less abused where defendant's doctor states that there is a slight concussion when there is a definite brain injury than he is where the doctor mentions only lacerations of the face but there is also the same unobserved brain injury. If the court fears fraud on the part of the claimant there are probably more guarantees of trustworthiness in the former case than in the latter since the original examination and discovery are at least an indication of the causal connection between the injury and the accident.

The rule that a person attacking a settlement must prove the mistake or misrepresentation by clear and convincing evidence or a heavy preponderance of proof is so firmly settled in the law[90] except for seamen's releases that there is no reason to expect any change nor would any be desirable. One may doubt that instructions as to the preponderance of proof have much effect on the average jury, but to the extent that it does it should definitely be retained as an additional safeguard.

This discussion has not included the question of Statutes of Limitations or laches,[91] but the latter question might with propriety

[90]Chicago & N. W. Ry. v. Wilcox, (C. C. A. 8, 1902) 116 Fed. 913 ("clear, unequivocal and convincing"); Great Northern Ry. Co. v. Reid, (C. C. A. 9, 1917) 245 Fed. 86 ("clear and convincing"); Southwest Pump and Machinery Co. v. Jones, (C. C. A. 8, 1937) 87 F. (2d) 879 ("clear, cogent, convincing and indubitable"); Fraser v. Glass, (1941) 311 Ill. App. 336, 35 N. E. (2d) 953 ("clear and positive"); Saylor v. Clover Splint Coal Co., (1944) 297 Ky. 604, 180 S. W. (2d) 563 ("clear, unequivocal and convincing"); Blaha v. Chicago & N. W. Ry., (1930) 119 Neb. 611, 230 N. W. 453 ("clear and convincing"); McIsaac v. McMurray, (1915) 77 N. H. 466, 93 Atl. 115 ("clear and convincing"). *But see* Kansas City Southern Ry. Co. v. Sanford, (1930) 182 Ark. 484, 31 S. W. (2d) 963 (mere preponderance).

[91]Dawson, Undiscovered Fraud and Statutes of Limitation (1933) 31 Mich. L. Rev. 591; Dawson, Fraudulent Concealment and Statutes of Limitation (1933) 31 Mich. L. Rev. 875; Dawson, Mistake and Statutes of Limitation (1936) 20 Minn. L. Rev. 481.

be more freely raised in those jurisdictions following liberal rules. However, in permitting laches as a defense it must be realized that one of the distinctions between ordinary mercantile contracts and releases of personal injuries is that the passage of time is so much more significant in the market with its frequent price fluctuations and consequent changes of position than it is with releases of personal injuries; however, in any case where a release has been attended by a substantial change of position, use of the equitable doctrine of laches is desirable.

No attempt can be made to indicate set rules to follow as to expression of opinion by doctors, whether they be diagnosis or prognosis, and such set rules might be a handicap in dealing with an expanding scientific field. However, it is suggested that the courts reorient their discussions of opinion, using as a point of departure the question of reliability rather than any hard and fast rules as to "opinion." Much can be said for the Arkansas rule granting relief wherever the doctor denominates as temporary an injury which is actually permanent. At best this is only a rule of thumb, however, and is not to be confused with a sound initial analysis of the subject—only after a rule has been thoughtfully considered and accepted can it be applied without discussion. Such a rule must be flexible enough that it can be adapted to medical advance. What the court must decide concerning medical prognostication is whether this is the type of statement by which ordinary men (as well as the particular plaintiff) regulate their affairs. It is submitted that most people do rely on doctors' opinions, even prognosis; man, an optimistic creature, wishes to believe that he will recover in the shortest time specified. The date of recovery as predicted by a doctor is reliable, and it is the basic bargaining item. If the prediction is qualified in a professional manner, that is, the doctor indicates recovery in three months but calls attention to the chances of complication entailing a longer convalescence, then the court should analyze the underlying diagnosis—if the actual injuries differ radically from the diagnosed injuries, and such difference would require a more serious prognosis, then relief should be granted as for any misrepresentation or mistake of fact on the theory that the prediction implied a precedent diagnosis. On the other hand if the underlying diagnosis is correct and the prediction fits the diagnosis professionally speaking then there has been no mistake or misrepresentation even though the more serious consequences eventuate. Furthermore, it is then true that the injured

party has a clear picture of the possibilities and definitely bargains concerning the possible risks—in the face of such a prediction the court is justified in finding that the claimant actually bargained concerning those unknown consequences (and even unknown injuries) covered by most general releases.

It is possible to urge that the court upset every release where the consideration received is appreciably smaller than the damages, but probably no court is prepared to go so far in view of the fact that the parties may also be bargaining concerning the defendant's original liability and also that the claimant must in some instances advert to, and bargain concerning, unknown injuries and unusual consequences of known injuries.[92] Furthermore, such an extension of the existing mechanisms of relief would probably be an unwarranted invasion of the security of transactions.[93]

The ideas here discussed are intended only to show that a special body of rules has grown up with reference to personal injury releases. The attorney, doctor and litigant must realize this fact, recognizing that the extent to which a particular court will grant relief depends greatly on the past experience of its judges. Many a judge will recall the unscrupulous efforts of certain plaintiffs and their attorneys to avoid their freely assumed obligations—such judges may be expected to accent "unlimited contractual competence" as did Judge Stone in *Larson v. Sventek*. But many another judge will advert to similarly unscrupulous defendants and their attorneys and in particular will remember the reprehensible actions of some claim agents.[94] Such a judge may be

[92]Chicago & N. W. Ry. Co. v. Wilcox, (C. C. A. 8, 1902) 116 Fed. 913; Tulsa City Lines v. Mains, (C. C. A. 10, 1939) 107 F. (2d) 377; McIsaac v. McMurray, (1915) 77 N. H. 466, 93 Atl. 115; Marini v. Mut. Benefit Health & Accident Assn., (R. I. 1943) 33 A. (2d) 193. In most of the cases cited throughout this article the court has left to the jury the question of whether or not the release was intended as a compromise of claims for unknown injuries, but on strict theory the interpretation of the written document is for the judge.

[93]One of the criticisms of this article will center on the weight to be given to security of transactions. No doubt the reliance interest is of importance, and the frauds perpetrated by unprincipled claimants are many. Certainly if the releasor is free to upset releases for mistake or innocent misrepresentation, the releasee should have similar rights. This is not a true double-edged weapon, however, for most releasors, due to the economic compulsion stressed herein, will be judgment proof and will long ago have spent any consideration received. Furthermore, the risks of upsetting a release are too great for the releasee—his action will have to be at law for damages rather than for rescission. These many difficulties make it of slight consolation to the releasee that he has "equal" rights with the releasor.

[94]Such a judge can take consolation from the fact that some legislatures have recognized the hardships inherent in general releases. Calif. Civ. Code § 1542. "A general release does not extend to claims which the creditor does

expected to emphasize the modern limitations on freedom of contract, to call attention to the existing inequalities of bargaining power and the known economic compulsions and to stress the social interests involved from the plaintiff's viewpoint. It is only to be urged that some just and workable principles capable of easy and fair application be formulated so that litigants may anticipate equitable and ascertainable treatment.[95]

not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." It may be supposed that all states copying the California Code or the original Field Code have such provisions. See North Dakota Civil Laws, 1913, § 5834. Berry v. Struble, (1937) 20 Cal. App. (2d) 311, 66 P. (2d) 746 practically construed the California statute out of existence. *But see* Backus v. Sessions, (1941) 17 Cal. (2d) 380, 110 P. (2d) 51. Clark v. Northern Pac. Ry. Co., (1917) 36 N. D. 503, 162 N. W. 406, L. R. A. 1917 E. 399.

[95]No attempt has been made to analyze collateral medico-legal matters such as the liability of the doctor for his erroneous statement, or whether a release of the primary tort-feasor also releases the doctor for negligent treatment aggravating the original injury. The majority of jurisdictions say that it does release the negligent physician, but there is a minority espousing the contrary rule. For interesting discussions and a number of citations, see (1933) 81 U. of Pa. L. Rev. 485; (1934) 8 U. of Cinn. L. Rev. 209; (1937) 15 North Car. L. Rev. 293. The chief complications arise from the hypertechnical differences between releases and covenants not to sue and the factual question of whether the physician and the original tort-feasor can be considered as joint tort-feasors.