Kentucky Law Survey: Remedies

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Remedies

By Kenneth B. Germain*

I. MISTAKE AS A DEFENSE TO PERSONAL INJURY RELEASES

A. Introduction

In *Trevathan v. Tesseneer*, the plaintiff, Melissa Trevathan, was knocked unconscious in an automobile accident while riding as a passenger in a car owned by one defendant and driven by the other defendant. She was hospitalized for several days and then returned to her home where her doctor further examined her for internal injuries and inspected an abrasion on her elbow. According to the complaint, the plaintiff also informed her doctor of a lump on the side of her head.

Two weeks after the accident an insurance adjuster interviewed the plaintiff and took her statement regarding the accident and her injuries and expenses. About two months after the accident, Trevathan, a 21-year-old college senior acting "with full knowledge of her parents," believing that she had recuperated from all of the injuries caused by the accident, signed a standard form release in return for the insurance company's payment of $344.16. By the terms of the release, she released the defendants and their insurer from "all injuries, known or unknown . . . which have resulted or may in the future develop . . ." from the accident.

Two months after signing the release, and thus about four months after the accident, the plaintiff suffered a blackout; medical examinations indicated that she had a type of epilepsy caused by a traumatic head injury. The condition appeared to be serious and permanent, causing "considerable physical impairment and financial expense."

Subsequently, the plaintiff sued the defendants, both of

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1 519 S.W.2d 614 (Ky. 1975).
2 The opinion does not indicate the exact date of the accident.
3 519 S.W.2d at 614.
4 *Id.* at 614.
5 *Id.*
whom pleaded the release in defense. The plaintiff challenged the validity of the release, arguing that it should be set aside because of "mistake." The circuit court, however, upheld the validity of the release and granted the defendants summary judgment. The Court of Appeals affirmed the circuit court's judgment in an opinion written by Special Commissioner Armand Angelucci, who stated the issue very clearly:

The sole issue for the court's consideration here is the effect of the release signed by the appellant. Since the record is devoid of any indication of fraud, overreaching, or physical impairment at the time of execution, the simple question becomes whether the release is final and binding according to its terms or whether it may be invalidated on the ground of mutual mistake as to the nature and extent of [plaintiff's] injuries.8

In enforcing the release the Court relied primarily on a prior Kentucky case, Clark v. Brewer.7 In Clark, the plaintiff, who had only a tenth-grade education, had incorrectly "assumed" that the release he had signed by endorsing a settlement check for $104.88 covered only property damages and not personal injuries.8 However, the release stated very clearly that it covered all "known and unknown . . . [injuries to] person and property."9 When he later discovered serious personal injuries resulting from the accident, his lawsuit was undercut by the release. The Court of Appeals, affirming the circuit court's decision against the plaintiff, stated:

When an instrument is clearly within the understanding of the parties, one who for a valuable consideration signs without reading and without inducement either to sign or not to read, cannot shelter under a claim of mistake. He is not truly mistaken in the content. He has simply made no effort to ascertain it.10

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6 Id.
7 329 S.W.2d 384 (Ky. 1959).
8 The plaintiff's property damage totaled $104.88.
9 329 S.W.2d at 385 (emphasis added).
10 Id. at 386, citing Kentucky Rd. Oiling Co. v. Sharp, 78 S.W.2d 38, 42 (Ky. 1934), to the effect that even illiterates will be bound by what they sign, since they should know enough to have someone read it to them.
The *Trevathan* Court quoted the first sentence of this passage\(^{11}\) and made a passing reference to *Gibson v. Dupin*,\(^{12}\) an earlier case that had approved the teaching of *Clark*. In *Gibson* the Court upheld a “release”\(^{13}\) obtained in order to satisfy the Financial Responsibility Law,\(^{14}\) even though the release was apparently given gratuitously and the plaintiff mistakenly failed to realize that he might have a cause of action against the minor driver’s father, who owned the vehicle involved.

The *Trevathan* Court also relied on *Johns v. Kubaugh*,\(^{15}\) in which the plaintiff had received $32.60 in consideration for signing a release that included the bold-faced caveat: “THIS IS A FULL RELEASE—READ CAREFULLY.” Although the automobile accident had been a very minor one, apparently causing only some “low back pain,” it allegedly led to two hospital stays for severe back problems and possible heart damage. The plaintiff claimed that the insurance adjuster had orally represented that the release did not cover personal injuries. Nevertheless, both the trial court and the Court of Appeals held for the defendant.\(^{16}\)

The *Trevathan* opinion is rounded out by a brief reference to the policies behind the Court’s strict enforcement of releases. The Court pointed to the “many years”\(^{17}\) of adherence to the *Clark* rule and concluded that the “rule favors orderly settlement of disputes and avoids multiplicity of suits and the chaos which would result if the releases were not treated seriously by the courts.”\(^{18}\) A small bone of sympathy was thrown to the plaintiff at the end of the opinion.\(^{19}\)

\(^{11}\) 519 S.W.2d at 615.
\(^{12}\) 377 S.W.2d 585 (Ky. 1964).
\(^{13}\) “Though expressed in terms of a mere acknowledgement, the disclaimer at the foot of the release form must be presumed to have a purpose more significant than its possible use in evidence as an admission against interest.” *Id.* at 586.
\(^{15}\) 450 S.W.2d 259 (Ky. 1970).
\(^{16}\) The Court said:

In [the] face of the clear language of the release considered with the fact that [plaintiff] did not then regard herself as having any claim for personal injury, it is difficult to perceive how she could rely on a purported statement of an adjuster flatly contradicting the plainly stated terms of the release.

*Id.* at 262, *quoted in Trevathan*, 519 S.W.2d at 615.
\(^{17}\) 519 S.W.2d at 615. This is somewhat of an overstatement, since *Clark* was decided in 1959, only 16 years before *Trevathan*.
\(^{18}\) 519 S.W.2d at 616.
\(^{19}\) See the statement quoted from *Amlung v. First Nat'l Bank*, 411 S.W.2d 465,
B. Kentucky "Mistake" Law

Although Trevathan is consistent with the prior Kentucky cases discussed above, it is probably not mandated by those decisions. For example, it could be cogently argued that the two cases heavily relied upon by the Court of Appeals involved a type of mistake different from the mistake in Trevathan. In Clark\(^2\) and Johns\(^2\) the plaintiffs misunderstood the legal effect of signing their releases, whereas in Trevathan the plaintiff failed to accurately appreciate the nature of her injury. Indeed, the Trevathan opinion noted this distinction, but dismissed its importance by saying that "there appears to be little difference in the treatment of releases."\(^2\) However, a valid distinction can be made: In the earlier cases the mistakes could easily be viewed as self-imposed, for in each case the plaintiff was to some extent negligent in failing to carefully read the proffered document before he signed it; in contrast, the plaintiff in Trevathan appears to be faultless, having acted in reasonable reliance upon the professional advice of her physician.\(^2\)

Because the granting or denial of relief from mistake is often treated as a matter of broad "equitable" discretion, it would not be at all peculiar to draw a distinction along these lines.\(^2\)

Another notable aspect of Kentucky "mistake" law relevant to Trevathan is the arguable inconsistency between the 1954 case of Phoenix Indemnity Co. v. Steiden Stores, Inc.\(^2\)

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\(^2\) Clark v. Brewer, 329 S.W.2d 384 (Ky. 1959), discussed in text accompanying notes 7-10 supra.

\(^2\) Johns v. Kubaugh, 450 S.W.2d 259 (Ky. 1970), discussed in text accompanying notes 15-16 supra.

\(^2\) 519 S.W.2d at 615. It should also be noted that in Gibson v. Dupin, 377 S.W.2d 585 (Ky. 1964), discussed in text accompanying notes 12-14 supra, the mistake could most appropriately be described as a "mistake of law," a type of mistake that courts are generally unwilling to recognize as an invalidating cause. See D. Dobbs, LAW OF REMEDIES § 11.8 (1973) [hereinafter cited as Dobbs ON REMEDIES].


\(^2\) See id. at 724: "Behind the facade of mutual mistake the courts are going about the work of adjusting, the best they can, the 'equities' of the unfortunate situation. Mutual mistake, at least in the technical sense, has little or nothing to do with their decisions."

\(^2\) 267 S.W.2d 733 (Ky. 1954).
and the personal injury release cases. In *Phoenix Indemnity* a property insurance policy differentiated between "inside jobs" and other thefts, providing a lower maximum coverage for the former type of loss. A theft occurred, resulting in a loss of nearly twice the "inside job" policy limit of $2,500. After investigating and finding no evidence that the theft had been committed by any of the insured's employees, the insurance company paid the full loss. Over one and one-half years later, however, one of the insured's employees confessed his guilt, and the insurance company sued for a refund of its "overpayment." The Court of Appeals reversed a trial court judgment for the insured, holding that the insurance company could recover its excess payment made pursuant to a mistake of fact. In so holding, the Court expressly rejected cases treating this situation as an unremediable "assumption of risk," explaining that such cases made "a judicial determination that the insurer and the recipient of the payment have entered into a compromise, where no real compromise has been made." The policy basis for this decision was the encouragement of prompt settlements by insurance companies, but the Court emphasized that the insurance company's payment of the full amount of the claimed loss indicated that no compromise (i.e., "assumption of risk") was intended.

Quite aside from the merits *vel non* of the *Phoenix Indemnity* case, the decision poses an interesting contrast with *Trevathan*. Apparently, if an insurance company makes a mistake and pays too much it may recover the excess, but if a tort victim makes a mistake and receives too little he or she may not recover the deficiency. Perhaps this analysis is overly

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25 Id. at 735 (emphasis added).
67 Id.
27 For apt criticism see Dobbs on Remedies § 11.7, at 758-59, where it is contended that insurance companies *should* be viewed as "assuming the risk" of mistake, since their policies always obligate them to pay claims within a specified period of time, indicating that they must expect sometimes to have to pay without wholly satisfactory evidence. Moreover, Dobbs further opines that after the policy's investigation period has passed and the insured has been paid there are strong reasons to consider the case closed, so as not to impair the security of the insured, who probably relies in a variety of ways upon the finality of the settlement. Indeed, this analysis would seem especially appropriate in a case like *Phoenix Indemnity*, where the time lapse between payment and discovery of the mistake was over one and one-half years.
simplistic. Arguably, the mistake in *Phoenix Indemnity* was a palpable mistake in *performance* of a contract and should rightly lead to restitution of the "unjust enrichment," whereas the mistake in *Trevathan* was merely a mistake as to the *formation* of a contract and should be remediless—or was it? What would the outcome be if the insurance company paid *too little* in a *Phoenix Indemnity*-type situation? Would the Court of Appeals order an additional payment? How would the Court handle a *Trevathan*-type case in which the insurance company paid *too much*? Would the Court refuse to grant relief? It is interesting that the Kentucky Court seems to have more sympathy for mistaken insurance companies than mistaken tort victims, when most jurisdictions see it the other way.

C. The Rule in Other Jurisdictions

[Outside of Kentucky] there appears to be a definite trend toward granting relief liberally where it appears that the injured party will otherwise be left to suffer injuries, or the results of injuries, unsuspected at the time of the execution of the release, [particularly where] the financial burden . . . will far exceed the compensation given in the release.

*Clancy v. Pacenti,* an Illinois Appellate Court case, is repre-

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22 Indeed this was the basis given in *Phoenix Indemnity,* 267 S.W.2d at 734, where the Court relied upon Supreme Council of Catholic Knights of America v. Fenwick, 183 S.W. 906, 910 (Ky. 1916):

It is the settled rule in this state, adopted at an early date and followed by a long line of decisions, that whenever, by a clear or palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it may and ought to be recovered.

*Accord,* McDonald's Corp. v. Moore, 237 F. Supp. 874 (W.D.S.C. 1965); *see* DOBBS ON REMEDIES § 11.7, at 755-56.

23 Cf. Dobbs, *Basic Problems* 712: "Sometimes courts introduce some related complications by distinguishing among . . . kinds of mistakes . . . . But these unneeded distinctions do not often seem to be determinative in the courts' thinking of the problem of relief or no relief . . . ."


25 Andrews, *The Personal Injury Release,* 1965 *Ins. L.J.* 212; *cf.* Note, 16 CLEV.-MAR. L. REV. 340, 350 (1969); DOBBS ON REMEDIES § 11.10, at 777 n.23: "It is fairly common to allow relief where the settlement sum equals or approximately equals a property damage claim and little or nothing is allowed for personal injury."

sentative of the "pro-relief" cases. The plaintiff in Clancy was injured in an automobile accident, suffering a "sprained" back according to the plaintiff's physician. Two and a half months later the plaintiff signed a typical release in return for a payment of $150, $100 of which was allocated to property damage. Eight months later he underwent surgery for herniated discs, whereupon he sued for recovery of full damages, notwithstanding the release. The court held the release voidable and allowed a judgment for plaintiff in an amount exceeding $22,000, viewing the release payment of $150 as a mere "nominal" sum not indicative of a bona fide compromise of the personal injury claim. It pointed out that there had been a mutual mistake as to a serious unknown injury, because both parties had understood the plaintiff's injury to be "of little or no consequence" and were wrong "both as to [the] nature and extent" of the injury. It emphasized that this was not a case in which the parties had settled on the "assumption that the consequences [of a known injury] would not be as severe as those which followed." The court then strongly urged that personal injury release cases be treated differently from commercial mistake cases:

[Person]al injuries cases . . . are sui generis. . . . [N]o rationale has been formulated for special treatment of such cases. It appears to rest on the peculiar character of personal injuries. In such cases it is not an article of commerce that is involved, but the human mind and body, still the most complicated and mysterious of all things that are upon or inhabit the earth. Here, mistakes are easily made and the consequences are more serious than in any other of the affairs of man. A slight abrasion may mean nothing or it may lead to a malignancy. Insignificant pain may mean the beginning of a fatal coronary attack or only a slight intestinal disturbance. Yet, a man cannot and does not live in dread of these possibilities. He accepts assurances that all will be well, even though ultimate consequences cannot be appraised as in matters involving property or services.
The opinion was ended with a statement acknowledging the "sharp economic inequality of the bargaining parties which generally exists in this class of cases."\textsuperscript{38}

A few other pro-relief cases are worth mentioning. In \textit{Dansby v. Buck},\textsuperscript{39} a release obtained in return for a payment of $138 (attributable to the plaintiff's property damages only) was avoided in accordance with "sound logic" and the "great weight of authority."\textsuperscript{40} More significantly, however, the court stated that its task was to ascertain the \textit{actual} intention of the parties vis-a-vis assuming the risk of truly unknown injuries. In this vein the court said that a release would be rescinded, "if it is clearly established that [it] was entered into under a mutual mistake as to a substantial injury, \textit{existing but unknown at the time and not taken into consideration}."\textsuperscript{41} It even added that "[i]t matters not that the releasor read and understood the release."\textsuperscript{42}

An interesting contrast appears in \textit{Harvey v. Robey},\textsuperscript{43} where a true compromise settlement, achieved after many meetings between the parties and calling for payment of $524 for medical expenses plus $1,000 to cover possible future medical expenses, was upheld even though the plaintiff's "head injuries" ultimately led to blindness in one eye and deafness in one ear. The court explained that the plaintiff's ultimate injuries were merely "the unknown and unexpected consequences


\textsuperscript{39} 373 P.2d 1 (Ariz. 1962).

\textsuperscript{40} \textit{Id.} at 4. \textit{Accord}, Reed v. Harvey, 110 N.W.2d 442 (Iowa 1961); Denton v. Utley, 86 N.W.2d 537 (Mich. 1957).


The rule permitting a general release to be set aside for mutual mistake of fact as to the nature and extent of the injury has been liberally applied. It has not been expanded in this state to include situations in which the parties have been mistaken about future developments of the injury. The mistake must relate to a past or present fact, material to the contract and not to an opinion regarding future conditions as a result of present facts . . . . A mistake as to the future consequences of a known injury is not a mistake of fact.

\textsuperscript{42} 373 P.2d at 4.

\textsuperscript{43} 176 S.E.2d 673 (Va. 1970).
of a known injury," thereby following a well-established line of authority refusing to grant relief under such circumstances. Much more significantly, however, the court emphasized the actual existence and effect of a compromise:

Mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk are not such mistakes of fact as to entitle either party to relief . . . [quoting a previous case]: The parties knew that the plaintiff would require future medical treatment . . . . They bargained with respect to future bills in the release . . . [quoting from another previous case].

In addition to Harvey's enforcement of a true compromise, it reaffirmed an earlier decision allowing rescission of a release that was not the product of a true compromise. Of course there is another side to the coin. Some courts still take a very hard line against rescission of personal injury releases, on the basis of policies favoring stability and security in contractual undertakings. One law review commentator has stated the argument in this way:

Avoidance of a release on the ground of mutual mistake of fact seems, in some ways, to make a mockery of contractual release of any-and-all-known-and-unknown injuries. The intent shown by the signing of such an instrument could not be more plain; yet the courts persist in avoiding such releases because some injury was unknown at the time of contracting.

Moreover, it can be argued that allowing releases to be set aside will "open the floodgates."

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44 Id. at 676.
45 See Dobbs on Remedies § 11.10, at 776.
46 176 S.E.2d at 675.
47 Id. at 676, referring to Seaboard Ice Co. v. Lee, 99 S.E.2d 721 (Va. 1957).
50 "A general release duly executed and fairly obtained is a complete bar to further recovery for injuries sustained, otherwise, the floodgates would open. . . ." Reinhardt v. Wilbur, 105 A.2d 415, 416 (N.J. Super. 1954).
D. Conclusion

As indicated above, there are conflicting policies at work in personal injury release situations. On the one hand, defendants rightfully desire to purchase "peace"—to be certain that the controversy has been terminated. On the other hand, plaintiffs legitimately expect to be fairly compensated for injuries they have suffered because of the defendants' torts. In *Trevathan*, the Kentucky Court of Appeals seemed to be unnecessarily hardnosed in its consideration of the plaintiff's plea. It seemed to be too willing to apply an impersonal commercial analysis to a situation where such an approach is inappropriate, for it is clear that the trend in tort law is in favor of compensation by the tortfeasor, not by society and its agencies (through welfare, for example). Perhaps all this can be summarized by a quotation from Professor Dobbs' excellent article:

In tort law contract is not very important because the relationship between plaintiff and defendant, or victim and wrongdoer, is not based on contract but on "status"—a relationship recognized and imposed by law, much against the will of the defendant in most cases. There is no reason, except one of convenience, to permit that status to be terminated or altered significantly by contract. *The reason of convenience speaks loudly, because we do generally want disputes settled; but it need not speak with authoritative finality.*

*Trevathan* does not present the most compelling facts in favor of relief, because the plaintiff was neither stupid nor ignorant, and the release was not obtained immediately after the accident, before her injuries would normally come to light. Nevertheless, the case deserved a more thorough and humane treatment than that afforded it by the Court of Appeals. A sensible approach is the one set forth by Professor Dobbs, who lists nine "Factors in Recovery" to be considered by the courts: (1) Amount of settlement; (2) proportion of settlement to actual injury; (3) counsel [i.e., was plaintiff represented?];

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51 *See Dobbs on Remedies* at 777-78.
52 Cf. *Dobbs on Remedies* at 778.
53 Dobbs, *Basic Problems* at 726.
54 *Id.* at 713-21.
(4) claimant's intelligence; (5) whether liability was in issue; (6) time of settlement; (7) time of bringing suit; (8) form of settlement; (9) language of the release. Of course another reasonable approach to the problem would be for the General Assembly to legislate on the matter, as has been done elsewhere, either by creating a "cooling off" period or by more broadly allowing relief from mistake.

II. THE EFFECT OF RELEASING ONE OF A NUMBER OF "JOINT" TORT-FEASORS

A. Introduction

In Sanderson v. Hughes, the plaintiffs, victims of an automobile accident, executed a release which expressly discharged two tort-feasors from "all claims, demands, actions and causes of action growing out of bodily injuries and property damages resulting from a motor vehicle accident." Although the release included a statement that it was "in full and complete settlement of a liability claimed," it included neither an express reservation of rights against unnamed parties nor "the broad language found in many such instruments which expressly releases the named tort-feasors, together with any and all other persons, from liability." When the plaintiffs later filed suit against a third tort-feasor for injuries resulting from the accident referred to in the release, the defendant successfully moved for summary judgment on the ground that the

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In any and all cases in which any person sustains personal injuries as a result of a tort . . . any release of the claim . . . for damages resulting from such tort, signed by such injured person within 5 days of the infliction of such injuries . . . shall be voidable within 60 days at the option of such injured party.

Accord, N.D. Cent. Code §§ 9-08-08, 9-08-09 (1975).

56 See Tenn. Code Ann. § 23-3002 (Supp. 1974): "Where a compromise settlement of a claim for damages resulting from personal injuries has been brought about by . . . mistake, such settlements may be rescinded . . ."

57 526 S.W.2d 308 (Ky. 1975).

58 Id., quoting the Court's paraphrasing of the terms of the release. The actual language of the release is not contained in the opinion.

The two parties expressly named in the release apparently were another driver involved in the collision and the owner of the vehicle he was driving.

59 Id. (emphasis by the Court).

60 Id. (emphasis by the Court).
release of one "joint" or "concurrent" tort-feasor automatically releases all such tort-feasors. On appeal, the Court of Appeals affirmed.

In the Court's opinion, written by Commissioner Vance, all but one of the Justices expressed their continued faith in the rule applied in the 1961 case of Kingins v. Hurt: "[A] release of one joint or concurring tort-feasor serves to release them all unless on its face it can be fairly interpreted as reserving the claimant's rights against other tort-feasors." Thus, the Court viewed the release as fatal to the plaintiffs' cause of action, even though it did not expressly discharge unnamed tort-feasors, and notwithstanding its phraseology referring to "a claim as opposed to all claims." This result was reached by refusing to recognize the various implications of the phrase just quoted, thereby allowing the majority to conclude that "there is nothing contained in the instrument which can rea-

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41 The term "joint tort-feasor" really should be reserved for situations involving concerted action or conspiracy between or among more than one tort-feasor, whereas the term "concurrent tort-feasor" is aptly applied to situations involving two or more tort-feasors whose wholly independent acts concurrently caused an indivisible injury. Because true concurrent tort-feasors are often "joined" as defendants in modern lawsuits, the term "joint tort-feasors" has been used generally by courts, albeit somewhat incorrectly, in reference to both types of tort-feasors. See generally W. Prosser, Law of Torts §§ 46-47 (4th ed. 1971) [hereinafter cited as Prosser]. Years earlier, Prosser had commented:

"Joint tort-feasor" is one of those unhappy phrases of indeterminate meaning, whose repetition has done so much to befog the law. Nobody knows what exactly is a joint tort . . . . An examination of the multitude of cases leads to the conclusion that "joint tort-feasor" means radically different things to different courts, and often to the same court, that much of the existing confusion is due to the entire failure to distinguish the different senses in which the term is used; and that separate problems of joinder of parties in the same action, as a matter of procedure, and the substantive liability of two or more defendants for the same result, require separate consideration and have very little in common.

Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413 (1937). Prosser concluded:

When . . . concurrent wrongdoers who have caused the same loss become "joint tort-feasors," the result is chaos . . . . It is deplorable that common law notions of unity of a cause of action have survived to such an extent.

Id. at 423-24.

42 Chief Justice Reed filed a dissenting opinion, which is discussed in the text accompanying notes 67-69 infra.

43 344 S.W.2d 811 (Ky. 1961).

44 526 S.W.2d at 308.

45 Id. at 309 (emphasis by the Court).
sonably be interpreted to preserve a right of action against other tort-feasors.\textsuperscript{66}

Chief Justice Reed filed a lone dissent, saying that he would "prospectively\textsuperscript{67} change the \textit{[Kingins]} rule" because its results were "questionable" and because post-\textit{Kingins} cases "have thrown the result more out of harmony in that area of tort law."\textsuperscript{68} The Chief Justice's opinion also effectively dispels some old "bugaboos" and rejects the basic joint tort-feasor-release rule as "harsh in the light of current realities.\textsuperscript{70}

B. The Origin of the Joint Tort-Feasor-Release Rule and Its Many Modifications

Dean Prosser has pointed out that the joint tort-feasor-release rule originated in the English law notion that only one judgment could be obtained for a joint tort: "Since the act of each tortfeasor was the act of all, it was considered that there was only one cause of action, which was . . . merged in the judgment, and judgment against one alone, even though unsatisfied, barred any later action against another."\textsuperscript{70} This, of course, should never have been viewed as affecting "concurrent" as opposed to "joint" tort-feasors, but, unfortunately, it was so viewed by American courts which confused it with "a quite distinct [and basically 'equitable'] principle, that the

\textsuperscript{66} Id.

\textsuperscript{67} The suggestion that the rule should be changed "prospectively," \textit{i.e.,} for purposes of future cases only, is somewhat inconsistent with calling the opinion a "dissenting opinion." Moreover, these would be odd circumstances in which to apply a "prospective" approach, as was pointed out by the Court about 10 years ago:

\begin{quote}
We are not persuaded that claimants have been lulled into execution of full releases by virtue of reliance upon decisions of this court that the releases did not mean what they said. On the contrary, it seems plain that no person cognizant of the law would deliberately execute a full release with a view to later asserting that the release did not mean what it said.
\end{quote}

\textit{Dep't of Highways v. Cardwell}, 409 S.W.2d 304, 306 (Ky. 1966).

\textsuperscript{68} 526 S.W.2d at 309.

\textsuperscript{69} Id. Chief Justice Reed also relied upon \textit{Orr v. Coleman}, 455 S.W.2d 59 (Ky. 1970), "as explicated in" \textit{Cox v. Cooper}, 510 S.W.2d 530 (Ky. 1974). Reliance upon \textit{Orr} seems odd because in its only arguably relevant part it merely held that: "Knowledge by the jury that one of the claimed tort-feasors has paid off certainly could serve no legitimate purpose." \textit{Orr v. Coleman}, \textit{supra} at 61. Likewise, the \textit{Cox} case, while containing a clarification of one point in \textit{Orr}, does not state anything relevant to the joint tort-feasor-release issue. \textit{See Cox v. Cooper}, \textit{supra} at 536 n.3.

\textsuperscript{70} \textit{Prosser} \S 48, at 299.
plaintiff was entitled to but one compensation for his loss, and that satisfaction of his claim, even by a stranger to the action, would prevent its further enforcement." 71 Today, the "one cause of action" rule has fallen into disrepute, whereas the "one satisfaction" rule is still in good standing. 72 Nevertheless, application of the "one cause of action" rule to releases of one concurrent tort-feasor, albeit an incorrect application ab initio, has continued, causing confusion and inequity. 73

Legal scholars have been united in their condemnation of the joint tort-feasor-release rule. For example, consider Dean Prosser's view:

[The rule] has been justly condemned because it compels the plaintiff either to forego any opportunity of obtaining what he can get from one defendant without suit, or to give up his entire claim against the other without full compensation. Historically, and logically, it has no justification . . . . The fear of double recovery is meaningless, since the amount paid under the release must be credited to the second tort-feasor in any case; and the argument that the plaintiff should not be permitted to make piece-meal collections from different defendants is quite pointless when he is allowed to do precisely that after judgment. 74

Wigmore, while still a student, made no bones about his disdain for the rule and his hope for its early demise:

Our obnoxious old friend, that constant companion of personal injury cases, viz., the rule that a release to one of several joint tort-feasors is a discharge of all, is receiving numerous hard knocks lately. He is already aged and infirm, being quite anachronistic; and it looks as though he would soon have to retire from active meddling in the affairs of men . . . . . . . . We shall not be sorry to end acquaintance with this old party, for he is merely a surviving relic of the Cokian period of metaphysics. He arrived at maturity, after a period of infantile uncertainty, in Coke's time . . . . Crossing to this

71 Id.
72 Id. at 299-301.
73 Id. at 301-02.
74 Id. at 302. The second part of this quotation was directly relied upon by Chief Justice Reed in his dissenting opinion in Sanderson, 526 S.W.2d at 309. Cf. 1 F. HARPER & F. JAMES, LAW OF TORTS § 10.1, at 711-12 (1956).
country at a fairly early date, his right to settlement was vigorously disputed; but he finally established himself pretty generally in the good graces of our supreme courts.\textsuperscript{75}

Although many courts have recognized the unreasonableness of the rule, most have chosen the less severe step of modifying rather than repudiating it. As a result, numerous methods of finessing the rule have been developed, most notably: the express reservation of rights, the covenant not to sue and the repayable loan evidenced by a "loan receipt." Thus, it has often been held that if the release itself contains an express reservation of rights against unnamed parties, the normal, automatic release of such parties is avoided.\textsuperscript{76} Indeed, some jurisdictions have even allowed the "reservation" to be shown by extrinsic evidence,\textsuperscript{77} on the theory that the parol evidence rule is not applicable in favor of one not a party to the release.\textsuperscript{78}

Covenants not to sue, that is, promises that the tort victim would not bring an action against the promisee-tort-feasor, have been viewed as simply not coming within the joint tort-feasor-release rule because they are not in the form of releases,\textsuperscript{79} notwithstanding that they function in exactly the same way as releases.\textsuperscript{80} Repayable loans evidenced by so-called "loan receipts" likewise are not held to be releases for purposes of the joint tort-feasor-release rule,\textsuperscript{81} again despite the fact they func-

\begin{itemize}
\item \textsuperscript{75} 17 ILL. L. REV. 563 (1923).
\item \textsuperscript{76} See, e.g., Kingsins v. Hurt, 344 S.W.2d 811 (Ky. 1961); Middleton v. Rheem Mfg. Co., 34 So. 2d 271 (La. App. 1948); Black v. Martin, 292 P. 577 (Mont. 1930).
\item \textsuperscript{77} See, e.g., Louisville & Evansville Mail Co. v. Barnes' Adm'r, 79 S.W. 261, 262 (Ky. 1904); Fitzgerald v. Union Stock Yards Co., 131 N.W. 612 (Neb. 1911).
\item \textsuperscript{78} See, e.g., Davis v. Moses, 215 N.W. 225 (Minn. 1927); Fitzgerald v. Union Stock Yards Co., 131 N.W. 612, 615 (Neb. 1911).
\item \textsuperscript{79} See, e.g., McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 146 A.2d 665, 674 (N.J. 1958) (concurring opinion).
\item \textsuperscript{80} Dean Prosser refers to this as a "technical evasion, which is the most obvious of subterfuges for circumventing an inconvenient common law rule." PROSSER § 49, at 303. Cf. McKenna v. Austin, 134 F.2d 659, 662 (D.C. Cir. 1943); Pedersen v. Bring, 117 N.W.2d 509, 511-12 (Iowa 1962); Gronquist v. Olson, 64 N.W.2d 159, 164 (Minn. 1954).
\item \textsuperscript{81} See Biven v. Charlie's Hobby Shop, 500 S.W.2d 597, 598 (Ky. 1973), where the "loan receipt" read as follows:
\end{itemize}

Received from the Aetna Casualty and Surety Company, for and on behalf of Charles S. Davis, Dorothy B. Davis, Jeffrey Davis and Danny D. Davis, the sum of $20,000.00, as a loan, and in full consideration for all claims which the undersigned may have against Charles S. Davis, Dorothy B. Davis, Jef-
tion as releases.\textsuperscript{82}

In addition to the various judicial techniques for circum-
venting the joint tort-feasor-release rule, several states have
ameliorated the problem legislatively.\textsuperscript{83} Even more impor-
tantly, modern courts are showing a decided tendency to reject
the older rule outright in favor of a more rational approach that
asks whether the releasing tort victim \textit{really} was compensated
for his loss and intended to surrender his right to sue unnamed
joint tort-feasors:

Two factors should be controlling in determining the effect of
an agreement purporting to operate as a release:

(1) Whether the injured party has received full satisfaction;
and

(2) Whether the parties \textit{intended} that the release be in full
satisfaction of the injured party's claim, thus releasing all
. . . [other] tort-feasors from liability . . . . (Both are ques-
frey Davis and Danny Davis . . . . This loan, without interest, is repayable
only in the event and to the extent of any net recovery the undersigned may
make from any person, persons, corporation, corporations or other parties
causing or liable for the accident aforesaid and as security for such repay-
ment the undersigned hereby pledges to The Aetna Casualty and Surety
Company all her claim or claims against said person, persons, corporations,
or other parties to the extent necessary to repay such loan.

\textsuperscript{82} See id. at 599:

It seems quite obvious to us that this is not a situation where the com-
pany is making a so-called loan to an insured to pay damages for which the
company might ultimately become liable, but rather is a direct payment
from the insurer to the injured party. There is no possible way to consider
this instrument as representing a loan but rather the intention of the parties
clearly indicates that it is a release acknowledging the payment of a consider-
ation for which the Davises were released from all liability. We, therefore,
hold that the loan receipt constitutes nothing other than a release and it was
valid for such purpose.

\textsuperscript{83} Prosser § 49, at 303. One of these statutes provides as follows:

When a release or a covenant not to sue or not to enforce a judgment is given
to one of two or more persons liable or claimed to be liable in tort for the
same injury, or the same wrongful death, it does not discharge any of the
other tort-feasors from liability for the injury or wrongful death unless its
terms expressly so provide, but it reduces the claim of the releasor against
the other tort-feasors to the extent of any amount stipulated by the release
or the covenant, or in the amount of the consideration paid for it . . . which-
ever is the greatest.

N.Y. Gen. Oblig. Law § 15-108(a) (McKinney Supp. 1975); accord, Uniform Contribution Among Tortfeasors Act § 4(a) (1955), which has been adopted in 16 states according to 12 Uniform Laws Annotated (1975).
tions of fact and normally to be determined by the jury.) The actual form or title of the release is immaterial and parol evidence should be permitted to determine the intent of the parties.\textsuperscript{84}

C. The State of the Law in Kentucky

The pre-1966 Kentucky law relating to the joint tort-feasor-release rule is nicely summarized in Justice Stewart's dissenting opinion in \textit{Department of Highways v. Cardwell.}\textsuperscript{85} Justice Stewart traced the issue to a 1904 case which held: "The law ought not to be that a release of one tort-feasor, by his making a partial satisfaction for the wrong done, should operate as a release of the other wrongdoers."\textsuperscript{86} He pointed out that this early case had produced the following effects:

(1) The establishment of the rule that the release of one joint tort-feasor is not automatically the release of all; and
(2) the admissibility of parol evidence to show (a) the intention of the parties and (b) the amount of satisfaction of the claim.\textsuperscript{87}

Some years later, another case reaffirmed these principles despite release language unequivocally stating that the settlement amount was accepted "\textit{in full for damage received.}"\textsuperscript{88} Justice Stewart continued by noting a later case in which a reservation of rights provision was held to preclude the normal application of the joint tort-feasor-release rule.\textsuperscript{89} This approach was reaffirmed in 1945,\textsuperscript{90} 1949\textsuperscript{91} and again in 1959.\textsuperscript{92}

\textsuperscript{85} 409 S.W.2d 304, 306-10 (Ky. 1966).
\textsuperscript{86} \textit{Id. at 307, quoting Louisville & Evansville Mail Co. v. Barnes' Adm'r}, 79 S.W. 261, 263 (Ky. 1904).
\textsuperscript{87} 409 S.W.2d at 307.
\textsuperscript{88} \textit{Id.}, \textit{quoting Lawrence v. Board of Councilmen}, 172 S.W. 953 (Ky. 1915) (emphasis added).
\textsuperscript{89} 409 S.W.2d at 308, \textit{referring to Louisville Gas & Elec. Co. v. Beaucord}, 224 S.W. 179 (Ky. 1920), about which Justice Stewart noted: "[A]lthough the release is not quoted in the opinion, it expressly reserved the plaintiff's right to prosecute an action against the defendant electric company."
\textsuperscript{90} See Miller's Adm'x v. Picard, 191 S.W.2d 202, 203 (Ky. 1945).
\textsuperscript{91} See Deatley v. Phillips, 225 S.W.2d 296 (Ky. 1949).
\textsuperscript{92} See Daniel v. Turner, 320 S.W.2d 135 (Ky. 1959).
Thus, Justice Stewart correctly summarized the pre-1961 Kentucky law as follows:

[T]he release of one joint tort-feasor does not automatically release the others, and . . . evidence extraneous to the release is admissible to show a contrary intention in avoidance of the release. In so holding this court had abandoned the common law view so frequently criticized, and had gone farther than most jurisdictions in carrying out the intention of the parties.3

However, in 1961 the Court decided Kingins v. Hurt,4 in which a deceased wife’s estate settled with a tortious railroad company, but later sued the deceased husband’s estate. The release executed by the wife’s estate’s representative referred to “all claims, demands, or causes of action of every character whatsoever,” but did not expressly refer to unnamed tort-feasors.5 Nevertheless, the Court unanimously held that because the written release made no reference to reserved rights against unnamed parties, no such rights survived its execution:

We are of the opinion . . . that so long as we are committed to the basic rule itself, that the release of one releases all, the written instrument should be construed to mean what it says, and unless on its face it can fairly be interpreted as reserving the claimant’s rights against other tort-feasors it will be treated as an unconditional release.6

Interestingly, this opinion, which relies upon “commitment” to doctrine, expressly recognized the inconsistency between its own principles and some of the cases discussed earlier.7 The Court also recognized that Dean Prosser disagreed with its new-born position.8 It did, however, find some solace in the Restatement of Torts.9

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3 409 S.W.2d at 309.
4 344 S.W.2d 811 (Ky. 1961).
5 Id. at 811-12.
6 Id. at 812 (emphasis added).
7 Id., referring to cases cited in notes 89 and 92 supra.
8 Id., referring to W. PROSSER, LAW OF TORTS § 46, at 269 (3d ed. 1964).
9 Id., citing RESTATEMENT OF TORTS § 885(1) (1939) (emphasis added):
A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others
The next decision after Kingins was the Cardwell case in 1966. There, the majority adhered to the Kingins approach, thus excluding extrinsic evidence tending to prove that a release, which by its terms included “all other persons” in addition to those named, was not really intended to discharge unnamed tort-feasors. The gist of the Court’s reasoning was that it was “committed” to Kingins’ teaching that “the plain language of the release must control.” Justice Stewart’s dissent accurately pinpointed the shortcomings of the majority’s opinion and concluded that Kingins should have been overruled.

Only one more case need be mentioned before concluding—Biven v. Charlie’s Hobby Shop, a 1973 decision. There, a “loan receipt” was employed and the Court held that although it did not express on its face any reservation of right, its language providing for the possibility that further suits might be brought against other parties implied that such rights were reserved. Of course, this was merely a logical and sensible extension of the Kingins rule.

and, if the release is embodied in a document, unless such agreement appears in the document.

Cf. Restatement (Second) of Torts § 885(1) (Tent. Draft No. 16, 1971) (emphasis added):

A valid release of one tort-feasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it shall do so.

Cf. id. at Comment d:

It is not essential that the reservation of rights against other tort-feasors be expressed in the document itself. Such a requirement might easily prove a booby-trap for the unwary, since releases are commonly signed by individuals without legal advice. The agreement as to the effect of the release may be proved by external evidence; and the objection of the parol evidence rule is met by the fact that the second tort-feasor who raises the question is not a party to the instrument.

Dep’t of Highways v. Cardwell, 409 S.W.2d 304 (Ky. 1966).

Id. at 306.

Id. at 306-10.

500 S.W.2d 597 (Ky. 1973).

Id. at 599.

The Sanderson Court correctly countered the plaintiff’s claim that Biven had announced a modification of the Kingins rule by noting that Biven involved a “loan receipt” rather than a “release” and that certain language in Biven was mere surplusage.
D. Conclusion

There are currently four approaches to the joint tort-feasor-release issue. The first is the strict common law rule whereby a release of one tort-feasor releases all tort-feasors, even if the release itself contains an express reservation clause. The second approach, the "reservation of rights" concept, is a modified version of the common law rule. According to this approach, a release of one tort-feasor releases all others, unless the release itself expressly or impliedly reserves the rights against all other joint tort-feasors. Kentucky has adopted this rule. The third view is that of the Restatement (Second) of Torts, under which a release of one tort-feasor does not release all other joint tort-feasors unless the release expressly so provides. The last view, which might most accurately be referred to as the "real intent" approach, holds that even a release which contains a clause expressly discharging "all other persons" may be interpreted, either directly or by recourse to parol evidence, as discharging only the named parties. In the opinion of this writer, these four views have been listed in ascending order of their preferability.

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