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Torts--Joint and Concurrent Tortfeasors Defined--Effect of Release in Kentucky

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TORTS—JOINT AND CONCURRENT TORTFEASORS DEFINED—EFFECT OF RELEASE IN KENTUCKY

In the recent Kentucky case of *Miller's Adm'x.* v. *Picard*,[1] the Court of Appeals, like many other courts, has created a trap for the unwary in the use of the term *joint tortfeasor* and has seemingly departed from certain established rules in this state. Briefly, the facts were these: *M* employed *S*, the owner and operator of a taxicab, to transport her, and during the course of the journey, the sheriff, who held a warrant for the arrest of *S*, sought to stop his cab. *S* attempted to run the sheriff down. Then the latter fired into the cab and killed *M*. *M*'s administratrix filed suit against *S*, asking damages in the sum of $10,000. A settlement for $350 was reached, however, by which the administratrix gave a full and complete release to *S*. Then the sheriff was sued. The lower court dismissed the petition. On appeal, the Court of Appeals affirmed the decision and held that where independent wrongful acts of two or more persons concur in contributing to and producing a single injury, such persons are joint tortfeasors and that a settlement with and a full release of one joint tortfeasor bars any action against the other.

Were the defendants in the *Miller case* joint tortfeasors or were they wrongdoers whose independent and concurrent acts combined to produce a single result? The English rule is that such persons are not joint tortfeasors.[2] Although joinder of concurrent wrongdoers has been commonly allowed under the codes of procedure in the United States,[3] the term *joint tortfeasors* should not be applied to them, as Mr. Prosser says, through "careless usage."[4] And again he writes: "No reason can be found for refusing to allow joinder without making the parties 'joint' for any other purpose than the convenient trial of the case."[5]

Among the sources on which the principal case relied to support the view that where independent wrongful acts of two or more persons concur in contributing to and producing a single injury, such persons must be regarded as joint tortfeasors, was a section from *American Jurisprudence*.[6] There, however, both rules are stated; and there is shown to be a clear conflict in the cases. The Kentucky

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[1] 301 Ky. 157, 191 S. W. 2d 202 (1945).

[2] The Koursk, (1924) P. 140.

[3] KENTUCKY CIVIL CODE (Carroll, 1938) Sec. 83. For the application of this section, see Miller v. Weck, 186 Ky. 552, 217 S. W. 904 (1920); Pickerill v. City of Louisville, 125 Ky. 213, 100 S. W. 873 (1907).

[4] PROSSER, TORTS (1941) 1103.

[5] *Id.* at 1104.

[6] 52 AMERICAN JURISPRUDENCE (1944) 451-452. In accord with the view that such persons are not joint tortfeasors, see Bonte v. Postel, 109 Ky. 64, 58 S. W. 536 (1900). A very clear explanation is

Court also cited *Louisville Gas & Electric Co.* v. *Beaucond*[7] to support its holding that the sheriff and the taxi driver were joint tortfeasors. (Actually the defendants in the *Beaucond case* were independent and concurrent tortfeasors.) But in so doing it inadvertently overruled the earlier case on another point, namely, that a release of one joint tortfeasor does not release the others. It would seem to be the correct interpretation of the law that only joint liability is intended. It is not meant that the defendants should be joint tortfeasors in the real sense of the term but only that they are joined for the purpose of the suit.

The second problem is that of the release of one wrongdoer only by the injured plaintiff. The cases in Kentucky prior to *Miller's Adm'x.* v. *Picard* are in substantial accord to the effect that a release of,[8] or a judgment against,[9] one joint tortfeasor does not bar a suit against remaining tortfeasors unless full satisfaction has been received in the first instance. Many of those decisions contain the same statement as in the *Miller case* which results in treating concurrent but independent wrongdoers as joint tortfeasors. If the Kentucky courts have allowed one tortfeasor acting in concert with another to be released without prejudice to later settlements with the others, it should be true, *a fortiori,* that one who is a concurrent tortfeasor may be released without barring a later recovery against the other, or others.

Whether the tort is joint or concurrent, the test to be used should be not, was there a release of one,[10] but has full satisfaction

given in the case of Dickson v. Yates, 194 Iowa 910, 188 N. W. 948, 951 (1922), where it is said:

> "The joint liability of wrongdoers in tort is a joint and several liability, but exists only where the wrong itself is joint. A mere similarity of design or conduct on the part of the independent actors is not sufficient to constitute such actors joint tortfeasors. . . . If the tort of two or more parties is several when committed, it does not become joint by reason of the union of the consequences of the several torts in producing any injury."

[7] 188 Ky. 725, 224 S. W. 179 (1920).

[8] Standard Sanitary Mfg. Co. v. Brian's Adm'r., 224 Ky. 419, 6 S. W. 2d 491 (1928); Louisville Gas & Electric Co. v. Beaucond, 188 Ky. 725, 224 S. W. 179 (1920); City of Louisville v. Nicholls, 158 Ky. 516, 165 S. W. 660 (1914); City of Covington v. Westbay, 156 Ky. 839, 162 S. W. 91 (1914); Louisville & Evansville Mail Co. v. Barnes' Adm'r., 117 Ky. 860, 79 S. W. 261 (1904).

[9] Brown's Adm'r. v. Little, 160 Ky. 765, 170 S. W. 168 (1914); United Society of Shakers v. Underwood, 74 Ky. (11 Bush) 265 (1875); Sharp v. Gray, 44 Ky. (5 B. Mon.) 4 (1844); Elliot v. Porter, 35 Ky. (5 Dana) 299 (1837).

[10] A release may be made upon a consideration, which may be very small. It may also reserve the right to seek compensation from the remaining party, as in Louisville Times Co. v. Lancaster, 142 Ky. 122, 133 S. W. 1155 (1911). Somewhat like a release is a covenant not to sue, which has been held not to release other wrongdoers in the cases of Matheson v. Kane, 211 Mass. 91, 97 N. W. 638 (1912); and Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N. W. 337 (1928).

been received for the entire injury?[11] The Court held, however, that a release of one concurrent tortfeasor for $350 released all by barring the subsequent suit against the sheriff. Prior Kentucky cases have adopted the better view by saying that unless full satisfaction is intended by the party giving the release, he may later sue those not released. For example, in the case of *City of Covington* v. *Westbay*,[12] the plaintiff received $750 from the street railway company and later got a judgment of $500 against the city. The Court, in holding that the release of the railway company did not bar the recovery against the city, said:

> "Whatever may be the rule in other States, it is well settled in this jurisdiction, in view of the foregoing statute, that the acceptance by the injured party of a certain sum from one of two joint [really concurrent] tortfeasors in part satisfaction of his cause of action does not release the other."[13]

Again the Kentucky Court of Appeals said, in *Louisville & Evansville Mail Co.* v. *Barnes' Adm'r.*,[14] (quoting an opinion of the United States Supreme Court),[15] that satisfaction should be "in full for the injury done to him, from whatever source it may have come." The facts in the *Miller case* lead us to conclude that the release for $350 certainly was not intended by the releasor nor by the releasee as full satisfaction for the entire injury.

There is no problem of double recovery or unjust enrichment in cases in which the parties intend only a partial satisfaction, for in later actions the earlier recovery is credited *pro tanto* against the amount of the judgment or settlement.[16] Thus that objection is removed, and the plaintiff is allowed to receive what he is justly entitled to get, that is, full compensation for his entire injury. Only in those cases where the first settlement represents full or substanial satisfaction should later actions be barred. For instance, in the case of *Thomas' Adm'r.* v. *Maysville Street Railway & Transfer Co.*,[17] the plaintiff recovered two judgments, one for $5,500, and one for $5,000. He was required to elect which judgment would be satisfied.

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[11] Exactly the same problem arose in Moreland's Adm'r. v. Stone, 292 Ky. 521, 166 S. W. 2d 998 (1942), the full account of which appears in a note, Evans, *Proximate Cause, Settlement, Last Clear Chance, Standard of Care in Emergencies* (1943) 31 KY. L. J. 346. See also Note, *Torts—Joint Wrongdoers—Release of One as Bar to an Action Against Another* (1921) 34 HARV. L. REV. 442.

[12] 156 Ky. 839, 162 S. W. 91 (1914).

[13] *Id.* at 842, 162 S. W. at 93. The statute referred to is now KY. R. S. 454.040, discussed later in this note.

[14] 117 Ky. 860, 874-875, 79 S. W. 261, 264 (1904).

[15] Lovejoy v. Murray, 70 U. S. (3 Wall.) 1, 17, 18 L. Ed. 129, 134 (1865).

[16] Standard Sanitary Mfg. Co. v. Brian's Adm'r., 224 Ky. 419, 6 S. W. 2d 491 (1928); City of Louisville v. Nicholls, 158 Ky. 516, 165 S. W. 660 (1914).

[17] 136 Ky. 446, 124 S. W. 398 (1910). Also see Button v. City of Louisville, 118 S. W. 977 (Ky. 1909).

It is clear in that situation, as distinguished from the case at hand, that a subsequent action should not be brought against, or another judgment collected from, the remaining wrongdoers. (In the *Thomas case,* as in the *Miller case,* the tortfeasors were concurrent.)

The arguments advanced here concerning the distinctions between joint and concurrent tortfeasors and between a release, on the one hand, and satisfaction, on the other, receive additional support from the Kentucky statutes and the cases which have interpreted them. Section 454.040 of the *Kentucky Revised Statutes* provides: "In actions of trespass the jury may assess joint or several damages against the defendants." *Sellards* v. *Zomes* interpreted this section in terms of release by saying:

> "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong; consequently, since our statute of 1836, authorizing several judgments, a dismission or release of one or more who are sued, can not, *per se,* release the others."[18] (The defendants were actually joint tortfeasors and acted in concert.)

Section 412.030 of *Kentucky Revised Statutes,* passed in 1926, provides: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." It is held that this section changes the common law rule that no right of contribution could be enforced among joint wrongdoers *in pari delicto.*[19] Where, as in Kentucky, several liability and the right of contribution among joint and concurrent wrongdoers exist, it may be stated all the more strongly that the release of either a joint or a concurrent tortfeasor does not release others in the same class.

It is submitted that as the proper basis for its decisions the Court should, in the first place, distinguish between joint and concurrent tortfeasors; but also, secondly, should allow later suits against the remaining joint or concurrent wrongdoers unless an approximately full satisfaction from one or more of them has been received by the plaintiff. The application of sound legal principles forces the writer to reach this result. The *Miller case* creates a trap for the unwary. In the older law, the act, uninterpreted by the will behind it, was assigned its solemn consequences. When the intention of the actor came to be given prominence (about the time when no liability without fault, save in special circumstances, began to be followed by the courts), the inevitable consequences of accident were not thrown upon the actor. This doctrine that a release of one

[18] 68 Ky. (5 Bush) 90, 91 (1868). Also see Lyons v. Southeastern Greyhound Lines, 282 Ky. 106, 137 S. W. 2d 1107 (1940).

[19] Louisville Railway Co. v. Louisville Taxicab & Transfer Co., 256 Ky. 827, 77 S. W. 2d 36 (1934); Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S. W. 2d 16 (1932).

is a release of all tortfeasors, whether joint or concurrent, should follow the present trend in the case of releases of a joint promisor in the law of contracts.[20]

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[20] The obligation of joint or of concurrent tortfeasors is somewhat analogous to the obligation of co-obligors in the law of contracts. First of all, a distinction should be made between joint obligors and several obligors, just as joint and concurrent tortfeasors should be distinguished. THE RESTATEMENT OF CONTRACTS (1932) Sec. 123, states that although a release of one joint obligor discharges the other promisors from their joint duty, it does not release them from their several duties. This is true in Kentucky, where joint and several duties exist.

As in the case of joint and concurrent tortfeasors, the test to be applied is not a release itself, but is full satisfaction. On this point Mr. Williston writes: "To the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself." 2 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (Rev. Ed. 1936) Sec. 334, p. 973. If the releasor and the releasee intend only a partial satisfaction or if a valid and full consideration is not paid, then the other obligors or obligees, as the situation may be, are not released after the obligation has become past due. Lewis v. Browning, 223 Ky. 771, 4 S. W. 2d 734 (1928). A desirable rule for Kentucky to follow may be found stated in section 3 of the Uniform Joint Obligations Act, adopted in four states, which follows: "The value of any consideration received by the obligee from any co-obligor is to be credited on the obligations of all his co-obligors except those for whom he is surety for that debt." See the summary of this section in 2 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (Rev. Ed. 1936) Sec. 336 A, p. 985. The Act is in force (as of 1936) in Nevada, New York, Utah, and Wisconsin.