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Torts -- Damages -- Liability of Automobile Owner When Decedent's Spouse Covenants Not to Sue Negligent Driver -- Plath v. Justus

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Torts—Damages—Liability of Automobile Owner When Decedent's Spouse Covenants Not to Sue Negligent Driver—*Plath v. Justus.*[1]—Plaintiff's wife was killed when she was struck by an automobile owned by the defendant and driven by one Moses. The plaintiff and the allegedly negligent driver entered into a settlement agreement whereby Plath agreed not to institute any legal action against Moses. The plaintiff did, however, incorporate into the settlement agreement with the driver a clause which reserved "any and all rights"[2] against any other person who might be liable for his wife's death. Thereafter, the plaintiff commenced an action pursuant to New York's wrongful death statute[3] against Justus, the owner of the car, seeking damages for the death of his wife. This claim against Justus was based upon Section 388 of the New York Vehicle and Traffic Law,[4] which imposes liability upon the owner of a motor vehicle for the negligence of any person operating the vehicle with the express or implied permission of the owner. The defendant moved to dismiss the complaint, contending that the plaintiff's settlement with the driver, the active tortfeasor, also released him from any liability since he was not a joint tortfeasor, his liability being solely vicarious and secondary.[5]

The Supreme Court of Rensselaer County, New York denied the defendant's motion to dismiss the action and concluded that the agreement between the parties was not a release, but rather a covenant not to sue which did not relieve the owner of liability.[6] The Supreme Court of New York, Appellate Division, affirmed this decision,[7] and the defendant appealed to the New York Court of Appeals. The Court of Appeals, in a unanimous decision, held that the lower courts did not err in failing to dismiss the plaintiff's complaint.[8]

In *Plath*, the New York Court of Appeals was confronted with the issue of whether an instrument, termed a covenant not to sue by the parties and executed between the plaintiff and the active tortfeasor, which expressly reserved all rights against any other person who might

[1] 28 N.Y.2d 16 (1971).

[2] Id.

[3] N.Y. Estates, Powers and Trusts Law § 5-4.1 (McKinney 1967).

[4] N.Y. Vehicle and Traffic Law § 388 (McKinney 1970) provides:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to a person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder.

[5] See Sarine v. American Lumbermen's Mut. Casualty Co., 258 App. Div. 653, 17 N.Y.S.2d 754 (Sup. Ct. 1940).

[6] 28 N.Y.2d at 23.

[7] Plath v. Justus, 33 App. Div. 2d 833, 306 N.Y.S.2d 80 (Sup. Ct. 1969).

[8] 28 N.Y.2d 16 (1971).

be liable for the alleged injury, should be regarded as a general release of all parties or merely as a covenant having no effect upon the statutory vicarious liability of the automobile owner. While the release and the covenant not to sue are similar in that they both have the effect of relieving a potential defendant of liability, nevertheless, the two instruments produce different consequences in terms of their total effect upon the plaintiff's possible causes of action. It is settled that a release extinguishes a cause of action.[9] On the other hand, a covenant not to sue is not so broad; it does not effect the viability of the cause of action nor does it pardon all joint tortfeasors.[10] Rather, it acts as a defense to any rights the plaintiff might assert against specific covenantees to the instrument.[11] While the parties may label their agreement either a covenant not to sue or a release, many courts are in agreement that the exact nature of the instrument in issue is to be determined by referring to the circumstances and intent surrounding the execution of the agreement.[12] In view of this judicial approach it is important to determine the legal relationship between the potential defendants. If those who may be liable for the plaintiff's injuries are joint tortfeasors, the judicial tendency is to treat an agreement by the plaintiff not to pursue one tortfeasor as a covenant not to sue.[13] Therefore, an instrument executed between the plaintiff and one joint tortfeasor in which the plaintiff either expressly or impliedly reserves his rights against another joint tortfeasor, will be regarded as a covenant not to sue, and the plaintiff will be deemed to have intended to retain his cause of action against the non-covenantee defendant.[14] On the other hand, where an agreement between the plaintiff and the released party is such that the court believes that it was intended as full satisfaction of all claims, the instrument will be treated as a full release of all joint tortfeasors, despite any express reservation of rights.[15] This judicial attitude is obviously based upon the policy that a plaintiff may obtain only one full recovery for his injuries.

In the situation where the released party and the defendant are not joint tortfeasors, but rather where the defendant's liability is only vicarious, for instance in the master-servant situation, the law is unsettled as to the effect of an instrument executed by the plaintiff releasing the active tortfeasor but reserving his rights against the vicariously liable defendant. Many jurisdictions have adopted the rule that an agreement not to pursue the active wrongdoer will automatically release a secondary tortfeasor regardless of any reservation

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[9] See, e.g., Note, 10 B.C. Ind. & Com. L. Rev. 1030, 1031 (1969).

[10] Id.; see also, Note, 28 Ohio State L.J. 537, 540 (1967).

[11] See note 10 supra.

[12] See Annot., 73 A.L.R.2d 403, 425 (1960) and cases cited therein.

[13] 76 C.J.S. Release § 50(a)(2) (1952).

[14] See Martin v. Burney, 160 Fla. 183, 34 So. 2d 36 (1948); Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 31, 142 N.E.2d 717, 731 (1957).

[15] See Breen v. Peck, 28 N.J. 351, 359, 146 A.2d 665, 669 (1958).

of rights by the plaintiff.[16] The decisions in these jurisdictions are founded upon the belief that it would be inequitable to permit the plaintiff to institute an action against a party whose liability is dependent upon the negligence of a previously exonerated tortfeasor. Other jurisdictions, however, have not adopted this rule, but consider the intent of the parties controlling even when the defendant's liability is vicarious.[17] Therefore, in these latter states, an instrument containing an express reservation of rights will be construed as a covenant not to sue, and will not terminate the derivative liability of the remaining tortfeasor. This was the approach of the New York Court of Appeals in construing the instrument between the plaintiff and the allegedly negligent driver in *Plath*. It is submitted that the court, in rejecting the harsh automatic release rule and adopting those decisions which focus upon intent as the critical factor determinative of the instrument's effect, has taken the more reasoned and equitable approach.

Prior to 1924, a New York automobile owner was not liable for the negligence of an operator of his motor vehicle unless a master-servant relationship could be established.[18] This rule was based upon the judicial policy that an injured person should pursue his remedy against the party whose negligence actually caused his injuries.[19] However, in 1924, the New York Legislature enacted what is now Section 388 of the Vehicle and Traffic Law.[20] The purpose of this statute was to provide a person injured by a negligently operated motor vehicle some recourse to a financially responsible party.[21] The legislature accomplished this result by statutorily imputing to an automobile owner the negligence of one operating his automobile with his permission. In view of the fact that New York has a system of compulsory automobile insurance[22] presumably rendering all automobile owners financially responsible, it was believed that by making all automobile owners liable for the negligence of their operators, injured plaintiffs would be assured of an adequate tort remedy. The liability imposed by section 388 is purely vicarious and thus not based upon any fault of the owner. Clearly, the legislature's sole purpose in enacting the statute was to protect injured plaintiffs against financially irresponsible defendants.

In *Plath*, a case of first impression in New York, the court was

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[16] See, e.g., Simpson v. Townsley, 283 F.2d 743, 746, 748 (10th Cir. 1960); Bacon v. United States, 321 F.2d 880, 824 (8th Cir. 1963); Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966).

[17] See, e.g., Ellis v. Jewett Rhodes Motor Co., 29 Cal. App. 2d 395, 84 P.2d 791 (1938); Wilson v. City of New York, 131 N.Y.S.2d 47 (1954).

[18] See Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917).

[19] Id.

[20] N.Y. Vehicle and Traffic Law § 388 (McKinney 1970).

[21] See Continental Auto Lease Corp. v. Campbell, 19 N.Y.2d 350, 280 N.Y.S.2d 123, 227 N.E.2d 28 (1967).

[22] N.Y. Vehicle and Traffic Law § 310 et seq. (McKinney 1970).

squarely confronted with the issue of determining the effect of an agreement not to sue upon the vicarious liability of an automobile owner under Section 388 of the Vehicle and Traffic Law. The court, unanimously construing the instrument as a covenant not to sue, held that it could not be asserted as a defense to an automobile owner's liability. In reaching its decision, the court favored the rule of construction which treats an agreement as a covenant not to sue when there is an express reservation of rights against a vicariously liable party. In attempting to ascertain the true intent of the parties, the court emphasized two factors as important. First, the parties incorporated an express reservation of rights clause in their agreement.[23] The court found that this clause clearly established that the plaintiff did not intend to exonerate all wrongdoers, but only the negligent driver. The opinion pointed to the policy, adopted by the lower courts of New York, that instruments reserving rights against a passive tortfeasor constitute covenants not to sue rather than general releases, and indicate an *express* intent by the plaintiff to maintain his action against that person. In this regard, the court was influenced by *Boucher v. Thomsen*,[24] an important decision on this issue by the Supreme Court of Michigan. In *Boucher*, the plaintiff's husband was struck and killed by an automobile owned by the defendant and operated by one Franck with the permission of the owner. The plaintiff and driver settled the case and executed an agreement which stated that the plaintiff reserved his right to proceed against any other person who might be liable for her husband's death. Thomsen, the owner, claimed that this agreement released him from all liability. The Michigan court, concluding that Thomsen was not released, relied primarily upon the language of the settlement agreement which, in the court's opinion, clearly evidenced an intent not to release the owner of the automobile.[25]

As a second important factor bearing upon the issue of intent, the *Plath* court indicated that the covenant with the driver was only for a portion of the entire claim.[26] From this fact, the court implied an intention by the plaintiff to preserve his cause of action against the owner for the remainder of his damages. Other courts have followed this approach by concluding that exoneration from all liability is dependent upon whether the sum paid to the plaintiff amounted to a full satisfaction for his injuries.[27] Utilizing this approach, the amount paid in settlement could well be conclusive as to the parties' intent. In *Plath*, the driver gave the plaintiff only a partial payment for his injuries as consideration for the covenant not to sue. Examining the

[23] 28 N.Y.2d at 22.

[24] 328 Mich. 312, 43 N.W.2d 866 (1950).

[25] 328 Mich. at 321-22, 43 N.W.2d at 870.

[26] 28 N.Y.2d at 22-3.

[27] Clapper v. Original Tractor Cab Co., 270 F.2d 616, 620 (7th Cir. 1959); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Gronguist v. Olson, 242 Minn. 119, 127, 64 N.W.2d 159, 165 (1954).

problem in this fashion, it was easy for the court to conclude that the plaintiff intended to gain the remaining compensation for her injuries by means of an action against the automobile owner.

In its most basic terms, the *Plath* decision conflicts with the rule applied by a large number of other jurisdictions.[28] These latter decisions adhere to the strict rule that any agreement in which a plaintiff releases an active tortfeasor is also to be construed as releasing one secondarily liable, notwithstanding the existence of any reservation of rights clause. The reasoning upon which this harsh automatic release rule is based is twofold: first, such a rule avoids the problem of circuity of action; and second, since the liability of the secondary wrongdoer is completely derivative, a release of the negligent party automatically prohibits any imputation of negligence to the secondary wrongdoer.[29] Applying these reasons to the *Plath* situation, the substantial weaknesses of the automatic release rule become apparent.

Jurisdictions favoring the automatic release rule were fearful that by construing an instrument executed in settlement as a covenant not to sue, they would only be creating a roundabout cause of action for indemnity by the vicariously liable party. The injured party would recover initially from the inactive wrongdoer; then, the latter would bring an action against the active tortfeasor for indemnification. This approach would necessitate two lawsuits instead of one. However, the fear of multiple litigation does not exist in *Plath* because of the existence of New York's automobile liability insurance law which requires that every owner of a motor vehicle be insured.[30] Under this compulsory system of insurance, the standard automobile insurance policy issued in New York is read as containing a provision insuring the owner against liability arising from the negligence of one operating the vehicle with the owner's permission.[31] Because of this coverage, while New York courts have recognized that an automobile owner has a right of indemnification against a negligent operator,[32] they have nevertheless held that the owner can be indemnified only when he is exposed to liability beyond the limits of his insurance policy.[33] In every other instance, no indemnification will be allowed in favor of a vicariously liable car owner since both the owner and driver are covered by the same insurance policy.[34] The reasoning behind this rule is clear. If indemnification were allowed, the insurance company would pay the judgment against its insured, subrogate to his rights, and then attempt to collect from the driver, who is insured under the same policy and for whom the insurance company is bound to pay.

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[28] See note 16 supra.

[29] See Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966).

[30] N.Y. Vehicle and Traffic Law § 310 et seq. (McKinney 1970).

[31] N.Y. Insurance Law § 167(2) (McKinney 1966).

[32] Naso v. Lafata, 4 N.Y.2d 585, 176 N.Y.S.2d 622, 152 N.E.2d 59 (1958).

[33] Ammann v. Devinney, 62 Misc. 2d 255, 308 N.Y.S.2d 237 (Sup. Ct. 1970).

[34] For a full discussion of this issue, see McLaughlin, Civil Practice, 20 Syr. L. Rev. 449, 474 (1969).

This rule of indemnification was emphasized in *Beck v. Renahan*,[35] a tort action in which an insured automobile owner's vehicle had been negligently operated by a third party driving the vehicle with the owner's consent. The owner was insured under the standard New York automobile liability insurance policy which covered both the named insured and any person using the vehicle with his permission. In a suit by the automobile owner for indemnification, the court held that the insurance company had no action as a subrogee against the active tortfeasor for indemnification because there is no subrogation against an insured;[36] under the policy the driver qualified as an insured.[37] In its opinion, the court stated: "An insurer clearly may be subrogated to its insured's claims against a third party who tortiously causes the loss, *but no subrogation exists against the insured or co-insured whose negligence caused the loss.*"[38] If the owner's liability is completely covered by his insurance policy, impleader will not be permitted because the damage is covered by insurance, and any recovery over by the owner against the operator would be tantamount to a windfall. Therefore, in *Plath*, the fear of circuity of action is not a relevant factor to be considered in determining the effect of the settlement instrument executed between the parties.

Two other results flow from the policy of permitting no indemnification from third party operators. First, it gives substantial strength to covenants not to sue. When an injured party releases a covenantee after settling on an amount of recovery, the probable intent of those parties would be that the covenantee be dropped completely from the action. The *Plath* case gives this full protection to the covenantee by preventing indemnification. Secondly, by not permitting the insurance company to recover over against a third party, New York is protecting its compulsory insurance policy. If the insurance company were permitted to institute an action against its own insured, the underlying purpose of insurance would be frustrated.[39]

The reasoning behind automatically exonerating the vicariously liable defendant also appears weak when the rule's total effect upon an instrument is considered. When an injured party and the active tortfeasor enter into an agreement, expressly reserving rights for the plaintiff against others, the sum settled upon undoubtedly constitutes a partial satisfaction of the plaintiff's damages. If this partial settlement is to be treated as an automatic release of all potentially liable parties, the injured plaintiff will not obtain full redress for his injuries. Rather, the benefit of the agreement will be extended to legally responsible wrongdoers whom the parties to the instrument never intended to release. On the other hand, under the better approach ad-

[35] 46 Misc. 2d 252, 259 N.Y.S.2d 768 (Sup. Ct. 1965).
[36] 46 Misc. 2d at 254-55, 259 N.Y.S.2d at 771.
[37] 46 Misc. 2d at 254, 259 N.Y.S.2d at 770.
[38] 46 Misc. 2d at 254, 259 N.Y.S.2d at 770-71.
[39] See Vescera v. Dancy, 52 Misc. 2d 830, 277 N.Y.S.2d 37 (Sup. Ct. 1967).

vocated in *Plath*, the court will construe the instrument according to the intent of the parties and the circumstances surrounding the agreement. In this way, the court will consider both the amount received and the intended benefit in deciding whether vicarious liability is to be continued or released. The *Plath* interpretation is clearly the more persuasive and equitable of the two approaches.

Finally, the automatic release rule would also discourage the settlement of controversies. In a jurisdiction which interprets a covenant not to sue as a complete release, an injured plaintiff would hesitate to settle unless he were certain to receive full satisfaction for his injuries. Otherwise, he might forfeit both his cause of action and the balance of his remedy by settling with the active tortfeasor. The result would be that many of these previously privately settled claims would have to be handled by the already overburdened courts.

In conclusion, the effect of the *Plath* decision is to move away from the strict rule of law favoring complete exoneration toward a more functional analysis of the intention behind the agreement. By focusing upon the circumstances and consideration of the agreement, the court has rendered an equitable decision not possible in jurisdictions where the automatic release rule is applied. However, the *Plath* decision is a limited result in that New York's insurance laws protect the operator of the automobile from any responsibility to indemnify the owner. In other situations not involving insurance, this would not be so and the covenantee would still have to indemnify a vicariously liable owner. But this limitation does not affect the real significance of the decision which lies in its emphasis on intent; agreements should be construed as often as possible according to the wishes of the parties.

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