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In Bennett v. Shinoda Floral, Inc., 1 the Washington Supreme Court departed from a national trend toward flexibility in permitting avoidance of personal injury releases. 2 The plaintiffs in Bennett had signed releases of all claims, known and unknown. The plaintiffs were unaware of the extent or consequences of their injuries, but they had signed knowing that the injuries were not yet healed. 3 The court held that the releases were binding because the plaintiffs had assumed the risk of any unforeseen consequences. 4

The Bennett opinion followed two lines of analysis. First, the court held that the validity of a release is an issue of fact only if the injured person was unaware of any injury at the time of release. 5 Second, the court held that under contract law a mistake about the extent or consequences of an injury was not grounds for avoiding an unambiguous release. 6 The decision left open the question of whether a release binds a person who knows of an injury but is unaware of a separate, collateral injury.

Personal injury releases warrant an exception to the general rule that an unambiguously worded contract is binding 7 because the releases deal with compensation for personal harm rather than pure economic losses. Washington courts, in assessing the validity of releases, could incorporate the competing public policy interests of finality of settlements and compensation for the injured into a two-part test. Under this test, the trier of fact would first determine whether a latent injury 8 was reasonably related to some injury known at the time

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3. Bennett, 108 Wash. 2d at 388, 739 P.2d at 649.
4. Id. at 395–97, 739 P.2d at 653–54.
5. Id. at 392–96, 739 P.2d at 651–53.
6. Id. at 396–97, 739 P.2d at 653–54.
8. "Latent injuries" indicates injuries, complications, or symptoms that were not known at the time that a personal injury release was executed.
of release. If so, the release would be binding. If not, the trier of fact
would determine whether the release was fairly and knowingly made.
The test would be consistent with the dictates of fair and efficient risk
allocation and the results of prior Washington Supreme Court
decisions.

I. BACKGROUND

A. Conflicting Analyses of Personal Injury Releases

State laws conflict about whether personal injury releases may be
avoided by a plaintiff who develops injuries that were not evident
when the release was executed. Most courts adopt one of two basic
approaches. Under the first approach courts apply traditional objec-
tive contract analysis to personal injury releases. These courts will not
void a release unless reason can be shown under contract doctrine.9
Courts following the second approach either modify or disregard con-
tract analysis. The latter courts reason that because personal injury
claims are qualitatively different from commercial contract remedies,
the court should look outside the terms of the release to determine
whether the release was fairly and knowingly made.10

I. Contract Analysis of Personal Injury Releases

The traditional, objective contract analysis looks only at the terms
of a release to determine whether the injured person bargained to
assume the risk of latent injury.11 The need for finality of settlements
undergirds this approach.12 A court applying objective contract anal-
ysis will uphold a release as a matter of law unless it was executed
pursuant to a mutual mistake of material fact13 or obtained through
fraud, misrepresentation, or overreaching.14


case, see Bernstein, 430 A.2d 602.

12. See generally Dobbs, Conclusiveness of Personal Injury Settlements: Basic Problems, 41
N.C.L. REV. 665, 666–67 (1963); Annotation, Modern Status of Rules as to Avoidance of Release
of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries, 13

1987); Dobbs, supra note 12, at 702–30.

14. See generally Dobbs, supra note 12, at 702–30. The following discussion assumes that
neither party to a release has engaged in fraud, misrepresentation, or overreaching. In this Note
the term "fraud" includes all deceptive behavior.
Personal Injury Releases

In jurisdictions that apply orthodox contract analysis, personal injury plaintiffs can rarely show that a release was executed pursuant to a mutual mistake of material fact. Courts in these jurisdictions, pursuant to an objective contract analysis, have reasoned that, one, the mistake was unilateral rather than mutual because all information about the plaintiff’s condition was provided by the plaintiff, and the defendant therefore did not make an independent mistake; two, the plaintiff assumed the risk of mistake because the release expressly acknowledged the possibility of latent injury; or three, the mistake was made in reliance on a prognosis of recovery, and therefore is a mistake of opinion, not of fact.

2. Modified Contract Analysis

Jurisdictions that modify or override traditional objective contract analysis recognize that the injured party’s subjective intent in releasing claims for latent injury may be an issue of fact. First, the court determines whether the injured person’s intent is an issue of fact. If it is, the trier of fact must determine whether the release was “fairly and knowingly made.” Courts use several analytical strategies to bypass the express language of releases. Some interpret the contract

15. But see, e.g., Gleason v. Guzman, 623 P.2d 378, 385–87 (Colo. 1981) (summary judgment for the defendant on the ground of no mutual mistake was error where there was some evidence that the releasor was unaware of the risk of epilepsy after a head injury).


17. E.g., Bennett v. Shinoda Floral, Inc., 108 Wash. 2d 386, 388, 739 P.2d 648, 649 (1987); Hoggatt v. Jorgensen, 43 Wash. App. 782, 719 P.2d 602 (1986); see also A. CORBIN, supra note 16, § 598; RESTATEMENT (SECOND) OF CONTRACTS §§ 152, 154 (1979). Personal injury releases typically release all future claims. The language employed in the releases in Bennett is typical: “It is understood and agreed that this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected.” Bennett, 108 Wash. 2d at 388, 739 P.2d at 649.


19. See, e.g., Gleason, 623 P.2d 378 (requiring a subjective interpretation of the intent and knowledge of the parties to a personal injury release).


22. E.g., Ranta, 421 P.2d 747; Denton, 86 N.W.2d 537; Mangini v. McClurg, 24 N.Y.2d 556, 249 N.E.2d 386, 301 N.Y.S.2d 508 (1969). In these cases, the courts tend to focus on the
doctrine to find mutual mistake; some override contract doctrine under a broad principle of equity; and others rely directly on the public policy interest in compensating injured persons.

B. Washington Developments

The Washington courts initially employed an objective contract analysis of personal injury releases. Generally, absent fraud, a plaintiff could avoid a release only by presenting "clear and convincing" evidence that both parties were mistaken as to a material fact. In *Finch v. Carlton* the Washington Supreme Court strayed from prior decisions by holding that a release of all claims for personal injury could be avoided without applying objective contract doctrine. In *Finch* the plaintiff had been in an automobile accident, sustaining no apparent injury. He executed a personal injury release as part of a settlement for property damage. Several months later he was hospitalized for internal injuries that were a result of the accident. When he sued to recover for the newly discovered injuries, the insurer raised the release as a defense.

The supreme court reversed the trial court's summary judgment for the defendant. The court based its decision on a balancing of public policy interests. It reasoned that while finality of settlements ordinarily requires that releases be upheld, the balance favors compensation plaintiff's knowledge of injury in determining whether there is an issue of fact. The trier of fact may consider both fairness and the plaintiff's knowledge of injury. See, e.g., infra note 32.

23. E.g., Gleason, 623 P.2d 378 (broadly construing mutual mistake).

24. E.g., Denton, 86 N.W.2d 537.

25. E.g., Ranta, 421 P.2d 747; Finch, 84 Wash. 2d 140, 524 P.2d 898.

26. See Pepper v. Evanson, 70 Wash. 2d 309, 422 P.2d 817 (1967) (release binding as a matter of law where the plaintiff showed willingness to settle despite uncertainty regarding injuries), overruled on other grounds, Simonson v. Fendell, 101 Wash. 2d 88, 675 P.2d 1218 (1984); Beaver v. Estate of Harris, 67 Wash. 2d 621, 409 P.2d 143 (1965) (release binding where the plaintiff's testimony is ambiguous, the insurer's sole source of medical information is the plaintiff, and the plaintiff's conduct indicates knowledge that the release is final); Schwieger v. Harry W. Robbins & Co., 48 Wash. 2d 22, 290 P.2d 984 (1955) (where terms of a release are clear, they cannot be limited due to subsequent developments).

27. Pepper, 70 Wash. 2d at 313, 422 P.2d at 820; Beaver, 67 Wash. 2d at 626, 409 P.2d at 146; Spratt v. Northern Pac. Ry. Co., 90 Wash. 592, 593-94, 156 P. 563 (1916). None of these cases actually voided a release. The "clear and convincing evidence" standard has been used more as a bar to avoidance than as a decision-making rule.


29. Id. at 141-42, 524 P.2d at 898-99.

30. Id. at 142, 524 P.2d at 899.
of injured persons if a release was not “fairly and knowingly made.” The trier of fact must determine the validity of the release.

The court acknowledged the prior use of objective contract analysis, but made no attempt to reconcile its holding with that line of cases. Finch left two issues open. First, should objective contract analysis also be discarded in cases where the plaintiff signed a release knowing of some injury? Second, if objective contract analysis is discarded, should the trier of fact decide whether the release was “fairly and knowingly” made in every latent injury case?

II. BENNETT v. SHINODA FLORAL, INC.

In Bennett v. Shinoda Floral, Inc., the Washington Supreme Court addressed the questions left open in Finch. The court consolidated two actions for personal injuries sustained in automotive accidents. The plaintiffs in both cases had sustained back injuries, but were told by their physicians that they would recover and would be able to return to work. The plaintiffs, without benefit of counsel, settled with the defendants’ insurers and signed releases. The plaintiffs later discovered that their injuries were far more severe than originally diagnosed.

The plaintiffs sued to recover for the latent injuries, and both defendants raised the releases as an affirmative defense. The courts of

31. Id. at 145-46, 524 P.2d at 901.
32. The trier of fact must consider the following factors in deciding whether a release was fairly and knowingly made:

(1) the peculiar dignity and protection to which the law cloaks the human person, as contrasted with articles of commerce; (2) the inequality of the bargaining positions and relative intelligence of the contracting parties; (3) the amount of consideration received; (4) the likelihood of inadequate knowledge concerning future consequences of present injury to the human body and brain; and (5) the haste, or lack thereof, with which release was obtained.

Id., 84 Wash. 2d at 146, 524 P.2d at 901.

Since Finch was decided the Washington legislature has enacted a measure stating in part that “[a] determination that the amount paid for a release . . . was unreasonable shall not affect the validity of the agreement . . . .” Wash. Rev. Code § 4.22.060(3) (1987) (effective July 26, 1981). The statute arguably requires the trier of fact to base avoidance of a release on circumstances other than the inadequacy of the settlement amount, such as gross bargaining inequities or the plaintiff’s unawareness of injury.

33. See Finch, 84 Wash. 2d at 143-46, 524 P.2d at 899-901.
37. Id. at 389-91, 739 P.2d at 650-51.
38. Id. at 389-91, 739 P.2d at 649-51.
appeal reached conflicting conclusions in the two cases. In *Bennett v. Shinoda Floral, Inc.*,\(^{39}\) the court held that *Finch* required the trier of fact to determine whether the release was "fairly and knowingly" made.\(^{40}\) In *Hoggatt v. Jorgensen*\(^ {41}\) the court upheld the release without mentioning *Finch*, asserting that under contract law the plaintiff had assumed the risk of mistake by signing the release.\(^ {42}\) The Washington Supreme Court characterized the issue in both cases as whether injury "victims are bound, as a matter of law, by releases executed when they knew they had been injured, but did not know the extent or consequences of the injuries."\(^ {43}\)

**A. Public Policy Balancing**

The first question was whether the court's rule in *Finch* extended to the present facts. The court held that it did not.\(^ {44}\) The court used a public policy analysis to determine that the "fairly and knowingly" test could not be used if the releasor knew of some injury at the time of release. It observed that the two competing policies governing contested releases are the needs for compensation of accident victims and for finality of settlements of disputed claims.\(^ {45}\) The court expressed concern that avoidance of releases executed with knowledge of injuries would impair the finality of settlements.\(^ {46}\) The incentive to settle claims would be reduced, and both parties and courts would suffer a

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40. The plaintiff's physician stated that his "injury would heal within a reasonable time period so that he could go back to work." *Id.* at 505, 717 P.2d at 1380. The defendant's insurer promised to pay wage loss and medical expenses until he could return to work. The insurer later received a report that Bennett's prognosis was still undetermined, and four months after the accident terminated payments and offered a final settlement of $5,000. *Id.* Bennett, believing the settlement would meet his needs until he returned to work, signed a general release. *Id.* at 506, 717 P.2d at 1381. More than a year after settlement, Bennett was found to have a herniated intervertebral disc and a degenerative disc disease that had been precipitated by the accident. He was permanently disabled. *Id.* at 506–07, 717 P.2d at 1381–82.
42. The plaintiff, Hoggatt, was diagnosed initially as having compression fractures of two vertebrae. Two months later he negotiated with the defendant's insurer for a settlement of $26,500. Hoggatt consulted other physicians both before and after the settlement. Two years after the accident, a neuroradiologist "diagnosed a probable mild spinal cord injury . . . with an associated mild paraparesis." *Id.* at 784, 719 P.2d at 603. Hoggatt was subsequently found to be disabled for the purposes of receiving Social Security Disability benefits. *Bennett v. Shinoda Floral, Inc.*, 108 Wash. 2d 386, 391, 739 P.2d 648, 651 (1987).
43. *Bennett*, 108 Wash. 2d at 388, 739 P.2d at 649.
44. *Id.* at 394, 739 P.2d at 652.
45. *Id.* at 394–95, 739 P.2d at 652–53.
46. *Id.* at 395, 739 P.2d at 653.
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flood of litigation. Where the plaintiff executes a release with no knowledge of any injury, the policy balance tips in favor of compensation; but where the plaintiff knows of some injury, the policy tips back toward finality.

B. Contract Analysis

The court followed an objective contract analysis to determine whether the release was voidable due to mutual mistake. The contract analysis was nearly identical to that used by the court of appeals in Hoggatt. The court would not void a release on the basis of mutual mistake if the party seeking avoidance bore the risk of mistake; it reasoned that a party assumes the risk by executing the release despite a "conscious uncertainty" regarding the facts. Because the releasors knew of some uncertainty regarding their injuries when they signed the releases, they assumed the risk of latent injury.

III. ANALYSIS

The court's application of objective contract analysis in Bennett undermines the compensatory purpose of personal injury settlements. Personal injury victims do not have the freedom to contract that justifies strict adherence to the terms of commercial contracts. Furthermore, the court's application of contract doctrine is analytically inconsistent with Finch v. Carlton. Washington contract law never in practice allows relief in latent injury cases, despite recitations that relief is available for mutual mistake. Yet in Finch the court permitted relief despite the existence of an unambiguous release.

The court's balancing of policies was not a true balancing test that assigned values to the policies and weighed them on a common scale. It was instead an arbitrary classification of persons who, in the court's opinion, had assumed the risk of latent injury. The resulting rule takes the factual issues underlying assumption of risk from where they belong—with the trier of fact. A true balance between the competing policies would address the weight of the interests in each case; this could be done adequately by structuring the burdens of proof at trial.

47. Id.
48. Id.
49. Id. at 396–97, 739 P.2d at 653–54.
51. Bennett, 108 Wash. 2d at 396–97, 739 P.2d at 653–54.
52. Id. at 397, 739 P.2d at 654.
53. Id.
A. **Objective Contract Analysis Is Inappropriate for Personal Injury Releases**

1. **Objective Contract Doctrine Is Based on Normative Assumptions Inappropriate in Personal Injury Cases**

   The Washington Supreme Court's application of contract doctrine in *Bennett* disregards the need to make personal injury victims whole through compensation. Contract law strives to facilitate transactions by ensuring some security for the parties to the transaction.\(^{54}\) It is directed primarily at encouraging economically efficient transactions;\(^{55}\) a contract may not be avoided simply because one party struck a bad bargain.\(^{56}\) In contrast, personal injury settlements resolve underlying tort claims; tort law is concerned with compensation for the injured,\(^{57}\) not with promotion of economically efficient transactions.\(^{58}\) If private compensation is not forthcoming, the burden is shifted away from the parties and onto society at large.\(^{59}\) The contractual aspects of personal injury releases are therefore unsupported by the economic justifications underlying contract doctrine.

   a. **Personal Injury Releases Are Not Entered into Freely by Both Parties**

   The free market assumptions of contract law are valid only with respect to the defendant's insurer. Contract doctrine generally assumes that parties enter a contract freely for their own benefit.\(^{60}\) The assumptions are arguably valid with respect to the insurer in a personal injury claim. The insurer profits because settlement provides closure, while premiums gathered from other policyholders offset the payment.\(^{61}\) The insurer acts freely in drafting the release and agreeing

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\(^{54}\) See *Restatement (Second) of Contracts* § 344 comment a (1979).

\(^{55}\) See *Restatement (Second) of Contracts* ch. 16 introductory note and reporter's note (1979).


\(^{57}\) Tort law arguably has an important deterrent function in addition to compensation. However, this does not appear to enhance the appropriateness of applying contract doctrine to personal injury releases.


\(^{59}\) Id.

\(^{60}\) Absolute freedom of contract increasingly has been circumscribed by regulation where one party has no real bargaining power. J. Calamari, *supra* note 13, at 6. Nevertheless, "[m]ost of contract law is premised upon a model consisting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining." *Id.; see also Restatement (Second) of Contracts* ch. 16 introductory note and reporter's note (1979) (explaining economic efficiency theory of contract remedies).

to settle; if a settlement is unacceptable, the insurer can wait for a more favorable moment or litigate the claim.

From the injured person's viewpoint, a settlement is a fundamentally different transaction. There is no profit, though the injured person may seek as much money as possible; the aim is to compensate, not to enrich the victim. Furthermore, the victim lacks free choice in two respects. First, the need for compensation is not assumed voluntarily, in contrast to parties who seek business contract opportunities. Second, the victim may have no free choice in settlement due to immediate financial pressures. Medical and other expenses, loss of income, and the inevitable delay in litigation may combine to make even an unfavorable settlement appear attractive. Under these circumstances, early compensation is less a boon to the plaintiff than a bargaining lever for the defendant.

b. **Personal Injury Victims Cannot Opt out of Bad Bargains by Breaching**

Personal injury releases also depart from the free market model because the injured party cannot efficiently breach the agreement. Either party, acting in its own self-interest, can breach a commercial contract if the cost of performance exceeds the liability for damages. The breaching party in effect exchanges a loss on performance for less severe loss in damages. However, this option is available to personal injury releasors only if a court voids the release. The releasor cannot unilaterally decide to breach the agreement. The efficient breach

62. See id. at 778.

63. The plaintiff's vulnerability and the insurer's tactics in Bennett illustrate a forced settlement. Bennett had little chance of finding employment after his injury. See Bennett v. Shinoda Floral, Inc., 43 Wash. App. 504, 505, 717 P.2d 1379, 1380 (1986), rev'd, 108 Wash. 2d 386, 739 P.2d 648 (1987). He was under financial pressure to settle because he had almost no cash resources and the defendant's insurer had just cut off wage loss payments. Id. at 505-06, 717 P.2d at 1381. Bennett's unfamiliarity with legal matters put him at a further disadvantage in negotiation. Id. at 505, 717 P.2d at 1380.

64. An award of expectation damages puts the non-breaching party in the same position as if the contract had been performed. This remedy gives "an incentive to break the contract if, but only if, [the breaching party] gains enough from the breach that he can compensate the injured party for his losses and still retain some of the benefits from the breach." Restatement (Second) of Contracts ch. 16 introductory note and reporter's note (1979).

65. Id.

66. See Ferson, The Nature of Legal Transactions and Juristic Acts: Analysis of Common Factors and Variations, 31 Cornell L. Q. 105 (1945). Dean Ferson argues that "exchanges," which would include releases, are distinguishable from contracts. Contracts create obligations through executory promises, whereas exchanges create no obligation because they are consummated at the moment of the exchange. Id. at 110-16. A releasor therefore cannot breach a release, because it is a completed transaction; there is no promise to be broken.
that justifies a strict adherence to commercial contracts is not available to personal injury victims. Personal injury releases therefore lack the economic underpinnings that generally support contract analysis.

c. Personal Injury Releases Are Unique Because They Resolve Claims for Human Injury

Many authorities have recognized that personal injury releases are a unique species of agreement. The Washington Supreme Court recognized the fundamental difference between commercial contracts and personal injury releases in *Finch*. However, in *Bennett* the court abandoned that recognition by turning again to contract analysis. The remoteness of contract analysis from the needs of injured persons is accentuated by the *Bennett* court’s reliance on a municipal finance case, Public Utility District No. 1 v. Washington Public Power Supply System (“*WPPSS*”) to support its contract analysis.

The court’s analogy between the *WPPSS* contracts and personal injury settlements is incompatible with the concern for injury victims espoused in *Finch*. *WPPSS* involved loans from special municipal districts to WPPSS to finance the “mothballing” of incomplete nuclear power plants. The risk of loss in *WPPSS* was substantial, but the agreement was entered freely, and the potential loss was solely economic. In contrast, the plaintiffs in *Finch* and *Bennett* did not choose to be in a position requiring compensation, and their loss due to mistake was a failure to be compensated for severe personal loss. The court in *Bennett* did not recognize these distinctions.


68. The court in *Finch* stated that jurisdictions applying strict contract principles to personal injury releases “appear not to differentiate between standards applicable to commercial transactions and those peculiar to personal injuries.” *Finch*, 84 Wash. 2d at 143–44, 524 P.2d at 900.


71. The parties had mistakenly believed that the Public Utility Districts had legal authority to obligate themselves to WPPSS under an earlier agreement. WPPSS asserted that the loan agreements were void due to a mutual mistake as to a basic assumption of the contract. The court held that the authority to enter the earlier agreement was not an assumption basic to the loan. The court also stated that WPPSS had assumed the risk of any mistake by proceeding despite a conscious uncertainty regarding the facts. The uncertainty stemmed from a prior legal challenge to the existence of WPPSS. *WPPSS*, 104 Wash. 2d at 362–63, 705 P.2d at 1203–04.

Although some jurisdictions have interpreted contract doctrine to allow avoidance of personal injury releases, the decisions of Washington courts employing objective contract analysis make avoidance impossible.\(^7\) The plaintiff’s opportunity to show mutual mistake is illusory because the courts treat mutual mistake as an issue of law, nullifying any factual showings.\(^7\) A more tempered contract analysis would follow the traditional doctrine, but recognize that the mutual mistake doctrine is an application of law to fact. The plaintiffs could then show that they did not actually bargain for or intend to assume the risk of latent injury. The law would accordingly be more responsive to the special plight of personal injury victims.

a. **Unilateral Mistake**

Washington courts uphold releases if medical information about the plaintiff is provided to the insurer solely by the plaintiff or the plaintiff’s physician.\(^7\) The courts assert that the only mistake about the plaintiff’s condition was made by the plaintiff. The insurer did not make an independent mistake. Therefore the mistake was unilateral, and a release cannot be avoided on the basis of unilateral mistake.\(^7\)

The “unilateral mistake” line of reasoning distorts the nature of the parties’ mistake. The source of erroneous information is not important in distinguishing a unilateral from a mutual mistake. The crucial issue instead is whether both parties acted on an erroneous assumption regarding a vital existing fact.\(^7\) Courts may void a contract for mutual mistake because the transaction turns out to be quite different from the exchange the parties had contemplated.\(^7\) The “mutuality” is therefore in the parties’ states of mind, not in their acts.

\(^7\) The court in *Finch* was able to permit avoidance only by disregarding contract analysis altogether. See *Finch* v. Carlton, 84 Wash. 2d 140, 524 P.2d 898 (1974).


\(^7\) J. CALAMARI, supra note 13, § 9-26, at 379.

\(^7\) Id.
Assuming that the plaintiff’s medical information has been fully disclosed to the defendant, the parties to a personal injury settlement have equal knowledge and are under the same misapprehension regarding the facts. If the injured person assumed the risk of mistake, then the release is binding; but the injured person should have an opportunity to show the trier of fact that he or she did not assume the risk. Under Bennett and prior Washington law that opportunity has been denied.

b. Assumption of Risk

The court in Bennett stated that a person who executes a release knowing of unhealed injuries assumes the risk of any mistake regarding the extent of the injuries, citing the Restatement (Second) of Contracts and Corbin on Contracts. The court neglected the principle, established in Finch and implied by both the Restatement and Professor Corbin, that a releasor’s assumption of risk is an issue of fact. The court in Bennett quoted Professor Corbin’s statement that to prevail, the plaintiff must show that a latent injury “was outside of his contemplation when he executed the release.” The court concluded from this statement that the plaintiffs alone bore the risk of mistake because uncertainty regarding their condition must always exist.


80. Id. at 396-97, 739 P.2d at 653-54 (citing Restatement (Second) of Contracts §§ 152, 154 (1979) and 3 A. Corbin, supra note 16, § 598). Section 152(1) of the Restatement provides:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Section 154 provides:

A party bears the risk of a mistake when . . . (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient. . . .

81. Bennett, 108 Wash. 2d at 397, 739 P.2d at 654 (quoting 3 A. Corbin, supra note 16, § 598). The full quote states:

[T]he claimant must show that an injury existed that was outside of his contemplation when he executed the release. In settling any such claim, the claimant knows that there is some degree of uncertainty. In so far as he is aware of uncertainty respecting his future harm and loss he is consciously exchanging this uncertainty for the liquidated amount received in settlement. To this extent the release is not voidable for mistake.

(Emphasis added.)

82. Bennett, 108 Wash. 2d at 397, 739 P.2d at 654.
The court misread Professor Corbin's text. Professor Corbin notes that the plaintiff in every settlement knows there is some uncertainty. However, he also recognizes that the plaintiff is not necessarily aware of the full extent of the uncertainty, and should be bound by the release only to the extent of his or her awareness. The Bennett court, in contrast, read the passage to mean that a plaintiff who signs a release bargains for the risk of all latent injury, if there is any uncertainty at all regarding the plaintiff's condition. The court's interpretation of Professor Corbin's treatise disregards the possibility that a latent injury may have been entirely beyond the plaintiff's contemplation at the time of release. The Bennett court denied the injured party any opportunity to show that the particular injury was in fact outside of his or her contemplation. In determining that any injured person who signs a release assumes the entire risk of latent injury, the court inappropriately interposes a rule of law where there may be a genuine issue of fact.

c. Fact-Opinion Distinction

The Washington Court of Appeals in Lambert v. State Farm Mutual Automobile Insurance Co. held that an erroneous medical prognosis of recovery cannot justify avoidance of a release, because it is a mistake of opinion about future events rather than a mistake of fact. However, a physician's opinion is traceable to factual observations, and if the observations do not correspond to the patient's true condition they could rightly be considered mistakes of fact. Some jurisdictions have recognized a physician's opinion as a statement of fact because of the patient's reliance on the statement. Furthermore, the Washington Supreme Court has recognized mistaken legal opinions as a legitimate basis for mutual mistake outside of the personal injury setting. The court would act consistently if it also recognized mistaken medical prognoses as grounds for mutual mistake; but as in

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83. See supra note 81.
84. Id.
85. Bennett, 108 Wash. 2d at 397, 739 P.2d at 654.
86. See id. at 388, 739 P.2d at 649.
88. Id. at 140-41, 467 P.2d at 218.
the unilateral mistake and assumption of risk cases, the court has upheld releases as a matter of law.

3. Failure To Permit Avoidance Conflicts with the Court's Reasoning in Finch

The Washington Supreme Court's decision in Finch recognized that compelling equity and public policy arguments demand avoidance of releases in at least some cases. The court's rationale was inconsistent with its prior use of objective contract analysis. The court resolved the inconsistency by simply disregarding contract doctrine. The court in Bennett reverted to the strict contract approach, but gave no reason why its decision did not overrule Finch. Instead it simply asserted that the public policy balance required Finch to be limited to its facts.

The distinction made in Bennett is one of fact, not law. If the court rejects contract doctrine in Finch, then it should reject application of contract doctrine to all personal injury releases, unless it can distinguish a class of cases for which contract analysis is uniquely appropriate. Variations of fact may justifiably determine different outcomes, but they do not provide an analytically sound basis for suspending contract analysis. The Bennett court's differentiation between injured persons who sign releases knowing of injury and those who do so unknowingly failed to distinguish such a class.

B. The Public Policy Balancing Employed in Bennett Is Unsuitable for Resolving Issues of Fact

In both Finch and Bennett the court relied on a balance of competing policy interests to decide whether to give the issue of voidability to the trier of fact, yet in neither case did the court articulate an optimum balance between the public policies. In Finch, the court asserted that the better policy approach was to favor compensation over finality mistake. Chemical Bank, 102 Wash. 2d at 898–99, 691 P.2d at 538–39. All parties had been mistaken regarding the legal authority of the municipalities to enter the agreement. Id.

The parties in Chemical Bank did not rely on existing fact; they instead relied on opinions regarding an unresolved question of law. The opinions are analogous to a medical prognosis because a legal opinion implicitly or explicitly anticipates the outcome of future litigation, just as medical opinions anticipate the outcome of medical treatment.

92. See id. at 144–46, 524 P.2d at 900–01.
93. See id.
95. Id. at 394–96, 739 P.2d at 652–53; Finch, 84 Wash. 2d at 145–46, 524 P.2d at 900–01.
of releases. In Bennett, the court simply turned the assertion around. While the Bennett court correctly recognized the fairness of allowing avoidance in Finch by reiterating the exception to objective contract analysis, it did not balance the policy concerns. Instead, the court set an arbitrary limit to the interest in finality: where the injured person knows of no injury, fairness requires that the finality interest be terminated.

I. The Public Policy Balancing in Bennett Creates an Excessively Rigid Legal Rule

The court in Bennett undermined the potential benefits of a balancing test by engaging in “definitional balancing.” Definitional balancing creates a general rule that makes further balancing in future decisions unnecessary. The Bennett court created such a rule by stating that the “fairly and knowingly” test cannot be applied to a release if the releasor knew of some injury at the time of execution. Definitional balancing provides some certainty for future cases, but it may fail to accurately map the facts of subsequent cases.

The Bennett rule displays this mapping problem. The rule divides releasors into two classes. First, it reasonably posits that those who sign releases with no knowledge of any injury have not entertained the possibility of latent injuries, and so might not have assumed that risk. Second, the rule posits that those who sign a release knowing of some injury have assumed all risk of latent injury, because they must have considered the possibility of latent injuries. The second class is arbitrarily over-inclusive. It fails to recognize yet a third class: releasors who are aware of some risk, but who reasonably fail to contemplate the possibility of the injury that later surfaces. The latter class should, by the standards of fairness established in Finch, be allowed to show that they were reasonably unaware of the magnitude of the risk; yet under the Bennett rule they are presumed to have

96. Finch, 84 Wash. 2d at 144–45, 524 P.2d at 900.
98. Id. at 395, 739 P.2d at 653.
99. Definitional balancing is the one-time use of a balancing test to create a legal rule. In subsequent cases the courts apply the rule to the facts without weighing the interests in each case. In contrast, ad hoc balancing tests require the courts to weigh the opposing interests in each case. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 979 (1987); see also M. Nimmer, NIMMER ON FREEDOM OF SPEECH § 2.03, at 2-17 (1984).
100. Aleinikoff, supra note 99, at 979.
101. See Bennett, 108 Wash. 2d at 388, 739 P.2d at 649.
102. See Aleinikoff, supra note 99, at 979–81.
103. Bennett, 108 Wash. 2d at 395, 739 P.2d at 653.
104. Id.
assumed all risk. Thus, the balancing employed in *Bennett* is insensitive to the competing interests of compensation and finality within each case.\textsuperscript{105} The courts can adjust to new variations of fact only by abrogating the rule and striking a new balance.\textsuperscript{106}

2. *The Public Policy Balancing in Bennett Fails To Assign Values to the Competing Interests*

The *Bennett* court framed the issues in terms of public policy balancing, yet it decided the case without articulating the weights of the competing interests.\textsuperscript{107} A balancing test by definition assigns values to competing interests and weighs them against each other.\textsuperscript{108} A fundamental problem inherent in balancing tests is finding a common scale of values—a way to assess the relative value of "apples and oranges." The difficulty is not that disparate social interests cannot be weighed, but that there are no objectively established values or weights.\textsuperscript{109} The court in *Bennett* neither established a common scale nor assigned values to the policy interests. The distinction between *Finch* and *Bennett* that tipped the policy scale was the presence of a known injury.\textsuperscript{110} This is a determination of fact, not an assignment of value. The court neglected the careful weighing of interests that is essential to balancing tests.

C. *Proposed Rule for Determining the Validity of Personal Injury Releases*

In *Finch* the Washington Supreme Court correctly recognized that the need for compensation of injured persons may override the express language of a release.\textsuperscript{111} The court later recognized in *Bennett* that an evidentiary hearing on every challenged release would be a waste of personal and judicial resources.\textsuperscript{112}

\textsuperscript{105} "In a good many cases it can be found that the policy of finality must bow to the policy that makes the tortfeasor pay, and that decision must be made anew in each case." Dobbs, *supra* note 12, at 729.

\textsuperscript{106} Aleinikoff, *supra* note 99, at 978–81.

\textsuperscript{107} See generally id. at 972–76 (problems of assigning values in balancing tests).

\textsuperscript{108} Professor Aleinikoff defines a balancing opinion in constitutional analysis as "a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." Aleinikoff, *supra* note 99, at 945.

\textsuperscript{109} Professor Aleinikoff points out that the metaphorical apples and oranges can be weighed against each other; one simply gives them a price per pound and puts them on a produce scale. Aleinikoff, *supra* note 99, at 973.

\textsuperscript{110} See *supra* note 48 and accompanying text.


Personal Injury Releases

rule does more than simply screen out unwarranted claims. By taking
the issue of assumption of risk from the trier of fact, it denies compensa-
tion to some persons who did not in fact assume the risk of latent
injury.

1. Two-Part Test

A two-part test for avoidance would enable the courts to screen out
unwarranted claims at an early stage, while treating the intent of the
parties as an issue of fact. Both parts of the test would require findings
of fact, each part beginning with a rebuttable presumption that the
releasor bargains for the risk of latent injury. The first part evaluates
the releasor's intent objectively. It screens out claims where the plain-
tiff either assumed or should have assumed the risk of latent injury.
The plaintiff must show that the known injury would not signal to a
reasonable person that there was any risk of the latent injury actually
sustained. A plaintiff who fails to make an adequate showing is
deemed to have assumed the risk of latent injury, and the release is
upheld.

A plaintiff who makes an adequate showing under the first part of
the test must then show that, under the Finch standards, the release
was not fairly and knowingly made. The release is still presumed to be
binding, but the plaintiff may overcome the presumption by producing
evidence of objective manifestations of the plaintiff's intent. The
trier of fact must then determine whether the evidence shows that the
plaintiff subjectively intended to assume the risk of latent injury, and
whether the circumstances of the execution of the release were fair.

2. Results of Proposed Rule

The proposed rule gives proper weight to the competing policy
interests. It recognizes the unique need for compensation of personal
injuries by looking to the intent of the parties even though the release
may appear complete and unambiguous. It recognizes the interest in
finality by placing the burden of proof on the releasor at both stages of
the test. The rule is internally consistent, applying to all personal
injury releases without invoking or suspending bodies of doctrine
depending on the fact pattern.

113. For the full text of the standards promulgated in Finch, see supra note 32.
114. See supra note 32.
115. The rule's internal consistency is a cure for the conflict between Bennett and Finch as to
whether contract doctrine should apply to personal injury releases. See supra notes 93–94 and
accompanying text. Under the proposed rule, contract doctrine would not be determinative,
although basic contract principles would be respected in the presumptions favoring the release.
The rule may prompt insurers to take measures designed to guarantee that their releases are binding. The measures could include efforts to inform injury victims about the risks of latent injury, and to ensure that the victims actually bargain for the risks. If these measures are effective, the proposed rule may result in better-informed rather than better-compensated injury victims. This alternative result would also be laudable because, one, well-informed victims are more likely to bargain carefully, and two, courts would have better evidence of the actual intent of the parties to challenged releases.

3. Resemblance to Diagnosis-Prognosis Analysis

The new rule will have results that are similar to those reached under the diagnosis-prognosis analysis. In most cases the rule will deny relief for latent injuries that are complications of known injuries, because complications are a foreseeable risk. Complications have been characterized as mistakes in prognosis and relief thereby denied. The rule would in most cases permit avoidance if a latent injury were in a different body part than a known injury. Similarly, the diagnosis-prognosis rule would also allow avoidance, because this is a mistake of diagnosis.

Despite similar results, the new rule is not subject to the criticism leveled at the diagnosis-prognosis rule. The diagnosis-prognosis distinction has been attacked as being an ineffectual attempt to implement mutual mistake doctrine. However, the functional standard advocated here does not rely on mutual mistake doctrine, avoiding this first criticism. Critics also note that the diagnosis-prognosis rule does not allocate risk according to the actual intent of the parties. In contrast, the proposed rule attempts to mirror the intent of the parties through findings of fact.

117. Id. at 155.
118. Under the diagnosis-prognosis rule, courts permit avoidance of a personal injury release if a physician has made a mistaken diagnosis—which is a mistake of fact—but not if the physician made a mistaken prognosis, which is a mistake of opinion. See supra notes 18, 87–88 and accompanying text.
120. See Note, supra note 18, at 282–83.
121. Id.
4. Proposed Rule Would Not Impair the Public Policy Favoring Settlement

Contrary to the fears expressed in Bennett,122 insurers would have ample reason to settle out of court, even under a broader application of the Finch standards. The proposed rule still favors contract finality, with the burden of proof on the releasor to show at two stages that the release should be avoided. Objective contract analysis is not essential to preserving finality. In several Washington cases the plaintiffs' behavior showed an intent to be bound by the challenged releases, rendering the courts' mutual mistake analysis superfluous.123 The new rule applied to these cases would have reached the same result without the doctrinal contortions of mutual mistake. Furthermore, the wording of releases will tend to convince would-be challengers that the releases bar successful action.124 Thus, releases are likely to be challenged only where injuries are substantially worse than bargained for in the settlement.

IV. CONCLUSION

Bennett v. Shinoda Floral, Inc., is open to at least two interpretations. First, it may be viewed broadly, announcing a rule that almost uniformly prevents personal injury victims from avoiding releases on the grounds of latent injury. A second, narrower view would have Bennett stand for the proposition that a person with an unhealed injury who signs a release may not avoid the release due to unexpected severity or symptoms of that injury. Given the doctrinal and public policy inconsistencies in Bennett, the narrower view is preferable. Bennett should be limited to cases where the known injury and the latent injury are closely connected.

The court's use of contract analysis was inappropriate for a personal injury release, and its public policy analysis failed to articulate the relative values of the competing policies. Objective contract doctrine is based on free market assumptions that are remote from the economic and human realities of personal injury settlements. While courts could manipulate the rules of mutual mistake to permit avoidance of releases in some cases, a simpler solution would be to recognize that the pri-

123. See Beaver v. Estate of Harris, 67 Wash. 2d 621, 409 P.2d 143 (1965); Lambert, 2 Wash. App. 136, 467 P.2d 214.
124. Dobbs, supra note 12, at 672.
vate allocation of risk in a personal injury release is an issue of fact. Public policy balancing is a useful technique for focusing directly on policy interests. Responsive balancing between finality of settlements and compensating the injured requires attention to the facts of each case. In Bennett, however, the court failed to establish a common scale for weighing the opposing interests, and propounded a rule that is insensitive to the plight of some personal injury victims.

The court’s concern for finality of settlements could be incorporated into a rule that allows the trier of fact to search out the facts behind contested personal injury releases. The injured parties would have an opportunity to show that they did not in fact assume the risk of latent injury. By imposing the burden of proof on the injured person at both stages of a two-part test, courts could both promote the policy favoring the finality of settlements and allow personal injury victims a chance to receive full compensation.

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