

St. John's Law Review

Volume 54
Number 3 *Volume 54, Spring 1980, Number 3*

Article 15

July 2012

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Caroline F. Marks

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Recommended Citation

Marks, Caroline F. (1980) "Release Agreement Held No Bar to Negligence Action Under Rule of Strict Construction," *St. John's Law Review*. Vol. 54 : No. 3 , Article 15.

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interest in protecting its treasury as well as society's interest in discouraging wanton and reckless conduct by governmental employees.³⁴⁴

Rose Frances DiMartino

Release agreement held no bar to negligence action under rule of strict construction

It has long been the rule in New York that exculpatory agreements³⁴⁵ intended to insulate one of the contracting parties from liability for his own ordinary negligence are enforceable,³⁴⁶ absent statutory prohibition³⁴⁷ or overriding public policy.³⁴⁸ Because they

undesirable to permit liability shifting through insurance despite possible adverse consequences to the municipal fisc. Where liability is vicarious, a municipality should be held responsible for failing to carefully select and train its employees, rather than shifting the burden to taxpayers. See McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 577-78 (1978). Where punitive damages are levied directly against a municipality, society's interest in punishing and deterring antisocial conduct should take precedence over a threat to a city's financial stability. While the innocent citizenry ultimately will provide the funds from which the award is paid under these approaches, the dual aims of punishment and deterrence nevertheless are effected because of the citizens' power to remove those officials whose policies gave rise to the award.

³⁴⁴ See note 340 *supra*.

³⁴⁵ The term "exculpatory agreement" has been used indiscriminately by the courts to encompass both releases and covenants not to sue. *Colton v. New York Hosp.*, 98 Misc. 2d 957, 414 N.Y.S.2d 866 (Sup. Ct. N.Y. County 1979). Technically, however, a "release" is the present abandonment of an existing right or claim, while a "covenant not to sue" is a prospective promise to forego a right of action that may accrue in the future. *Id.* at 963, 414 N.Y.S.2d at 871-72. Since a prospective disclaimer, other than one between joint tortfeasors, operates as a complete and permanent bar to a cause of action, it has the same legal effect as a release. *Id.* at 965, 414 N.Y.S.2d at 873. For purposes of this Survey, the technical differences between these terms will be regarded as immaterial.

³⁴⁶ *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963); *Phibbs v. Ray's Chevrolet Corp.*, 45 App. Div. 2d 897, 357 N.Y.S.2d 211 (3d Dep't 1974); *e.g.*, *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961); *Church v. Seneca County Agricultural Soc'y*, 41 App. Div. 2d 787, 341 N.Y.S.2d 45 (3d Dep't), *aff'd*, 34 N.Y.2d 571, 310 N.E.2d 541, 354 N.Y.S.2d 945 (1973); *Solodar v. Watkins Glen Grand Prix Corp.*, 36 App. Div. 2d 552, 317 N.Y.S.2d 228 (3d Dep't 1971). See generally RESTATEMENT OF CONTRACTS § 574 (1932); W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971); 15 S. WILLISTON, CONTRACTS § 1750 (3d ed. 1972).

³⁴⁷ Agreements purporting to exempt parties engaged in certain businesses serving the public from liability for their own negligence have been rendered "void as against public policy and wholly unenforceable" by statutory directive. See GOL § 5-321 (landlords); *id.* § 5-322 (caterers); *id.* § 5-323 (building service and maintenance contractors); *id.* § 5-325 (garages and parking facilities); *id.* § 5-326 (places of public amusement and recreation).

³⁴⁸ Releases purporting to exculpate parties from liability for injuries caused by gross negligence or intentional wrongs, however, are absolutely void as against public policy. See,

are viewed with disfavor by the courts,³⁴⁹ however, contractual disclaimers of liability traditionally have not been given effect unless the intent to exculpate a party from the consequences of his own fault is expressed in clear and unequivocal language.³⁵⁰ This rule of strict construction, however, has been applied less rigorously to indemnification contracts.³⁵¹ It is not the express language of the agreement that controls but the "unmistakable intent of the parties" to encompass the indemnitee's own negligence, an intent which may be adduced from the circumstances surrounding the en-

e.g., *New York Cent. R.R. v. Mohney*, 252 U.S. 152, 157 (1920); *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 297, 177 N.E.2d 925, 926, 220 N.Y.S.2d 962, 965 (1961); *Krivitsky & Cohen, Inc. v. Western Union Tel. Co.*, 129 Misc. 431, 435, 221 N.Y.S. 525, 529 (N.Y.C. Mun. Ct. N.Y. County 1927), *modified*, 227 N.Y.S. 836 (1st Dep't 1928). *See generally* 6A A. CORBIN, *CONTRACTS* § 1472 (1962); *RESTATEMENT OF CONTRACTS* §§ 574, 575 (1932); S. WILLISTON, *supra* note 346, § 1750A.

There is also a judicially recognized public policy against enforcing exculpatory clauses where a special relationship exists between the parties. *See, e.g.*, *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 247, 194 N.E. 692, 693 (1935) (common carrier and passenger); *Johnston v. Fargo*, 184 N.Y. 379, 382, 77 N.E. 388, 389 (1906) (employer and employee); *Emery v. Rochester Tel. Corp.*, 156 Misc. 562, 563, 282 N.Y.S. 280, 281 (Sup. Ct. Monroe County), *aff'd mem.*, 246 App. Div. 787, 286 N.Y.S. 439 (4th Dep't 1935) (public utility and customer).

³⁴⁹ *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 304, 189 N.E.2d 693, 694, 239 N.Y.S.2d 337, 339 (1963); *Phibbs v. Ray's Chevrolet Corp.*, 45 App. Div. 2d 897, 897-98, 357 N.Y.S.2d 211, 213 (3d Dep't 1974); *Boll v. Sharp & Dohme, Inc.*, 281 App. Div. 568, 570, 121 N.Y.S.2d 20, 22 (1st Dep't 1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954); *Howard v. Handler Bros. & Winell, Inc.*, 279 App. Div. 72, 75-76, 107 N.Y.S.2d 749, 752 (1st Dep't 1951), *aff'd*, 303 N.Y. 990, 106 N.E.2d 67 (1952); *Johnston v. Fargo*, 98 App. Div. 436, 442, 90 N.Y.S. 725, 730 (4th Dep't 1904), *aff'd*, 184 N.Y. 379, 77 N.E. 388 (1906). In determining the validity of contractual disclaimers of liability, a conflict emerges between the principle of freedom of contract and a judicial reluctance to allow a party to absolve himself from responsibility for consequences attributable to his negligent conduct. Exculpatory agreements are disfavored because they are at variance with the modern " 'concepts of justice and fair dealing,' " which require that an injured party should not be deprived of his remedy for injuries resulting from another's wrongdoing. *Lee v. Consolidated Edison Co.*, 95 Misc. 2d 120, 131, 407 N.Y.S.2d 777, 785 (N.Y.C. Civ. Ct. N.Y. County 1978) (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957)). Moreover, it has been postulated that releases of liability may actually tend to foster carelessness, since a party freed from legal responsibility for his misconduct may cease to exercise that standard of care normally required of him. *Kirshenbaum v. General Outdoor Advertising Co.*, 258 N.Y. 489, 494, 180 N.E. 245, 246 (1932). *See generally* 6A A. CORBIN, *CONTRACTS* § 1472 (1962); 4 S. WILLISTON, *CONTRACTS* §§ 602A, 626 (3d ed. 1961).

³⁵⁰ *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963); *Kaufman v. American Youth Hostels, Inc.*, 5 N.Y.2d 1016, 1018, 158 N.E.2d 128, 129, 185 N.Y.S.2d 268, 268 (1959) (mem.).

³⁵¹ *See Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971); *Liff v. Consolidated Edison Co.*, 23 N.Y.2d 854, 245 N.E.2d 800, 298 N.Y.S.2d 66 (1969) (mem.); *Kurek v. Port Chester Hous. Auth.*, 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966).

ture agreement.³⁵² Recently, in *Gross v. Sweet*,³⁵³ the Court of Appeals refused to extend this less exacting rule of construction to a personal injury release, holding that an exculpatory agreement drafted in general terms was insufficient to bar a personal injury claim grounded specifically in negligence.³⁵⁴

Prior to enrolling in a parachute jumping course conducted by the defendant, plaintiff in *Gross* executed a "Responsibility Release" in which he agreed to waive "any and all claims . . . for any personal injuries . . . that [he] may sustain or which may arise out of [his] learning, practicing or actually jumping from an aircraft."³⁵⁵ After one hour of on-the-ground instruction,³⁵⁶ the plain-

³⁵² The rule of *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N.Y. 36, 2 N.E.2d 35 (1936), which had previously controlled the standard of construction to be applied to all exoneration provisions, has been liberalized in the context of indemnity agreements. In *Thompson-Starrett*, the Court of Appeals found that a broadly drafted indemnity contract exempting a general contractor from "any and all liability" was ineffective to impose a duty of indemnification on its subcontractor for injuries caused by the indemnitee's own negligence. *Id.* at 41, 2 N.E.2d at 37. The *Thompson-Starrett* test was eroded, however, by a series of decisions in which the Court determined that exoneration clauses in commercial leases were enforceable if the nature of the agreement evidenced an "unmistakable intent" to encompass the indemnitee's negligence, although the language of the agreement was somewhat equivocal. See *Liff v. Consolidated Edison Co.*, 23 N.Y.2d 854, 855, 245 N.E.2d 800, 800, 298 N.Y.S.2d 66, 66 (1969) (mem.); *Kurek v. Port Chester Hous. Auth.*, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 27, 276 N.Y.S.2d 612, 615 (1966). Finally, in *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971), the Court enunciated a "plain meaning" test for interpreting indemnity provisions, *id.* at 210, 269 N.E.2d at 801, 321 N.Y.S.2d at 84, and concluded that *Thompson-Starrett* "is no longer a viable statement of the law." *Id.* at 211-12, 269 N.E.2d at 802, 321 N.Y.S.2d at 85-86. See generally *The Quarterly Survey*, 46 St. JOHN'S L. REV. 355, 367 (1971).

While the *Levine* decision was narrowly construed by the lower courts, see *The Quarterly Survey*, 46 St. JOHN'S L. REV. 561, 566-68 (1972); see, e.g., *Redding v. Gulf Oil Corp.*, 67 Misc. 2d 464, 324 N.Y.S.2d 490 (Sup. Ct. Nassau County 1971), *aff'd*, 38 App. Div. 2d 850 (2d Dep't 1972), the Court of Appeals subsequently clarified the scope of the *Levine* holding by finding that a party's own negligence is encompassed by an indemnification agreement whenever the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 297 N.E.2d 80, 83, 344 N.Y.S.2d 336, 339 (1973). Clearly, therefore, the validity of indemnification provisions no longer turns on "semantic stereotypes with which an agreement may be phrased," but will be construed so as to give effect to the parties' intentions. *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 159, 366 N.E.2d 263, 266, 397 N.Y.S.2d 602, 606 (1977).

³⁵³ 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979), *aff'g* 64 App. Div.2d 774, 407 N.Y.S.2d 254 (3d Dep't 1978).

³⁵⁴ *Id.* at 104-05, 108, 400 N.E.2d at 307, 310, 424 N.Y.S.2d at 366, 369.

³⁵⁵ *Id.* at 109, 400 N.E.2d at 310, 424 N.Y.S.2d at 369.

³⁵⁶ *Id.* at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 366. The plaintiff was given the defendant's routine introductory lesson, which included oral instruction and several jumps off a two and a half foot table. *Id.*

tiff, under the defendant's supervision, made his first practice jump from an altitude of 2,800 feet and suffered a broken leg upon landing.³⁵⁷ In the plaintiff's subsequent personal injury action,³⁵⁸ the Supreme Court, Ulster County, finding that the release barred the plaintiff's suit, granted the defendant's motion for summary judgment and dismissed the complaint.³⁵⁹ A divided appellate division reversed, however, on the ground that the terms of the disclaimer were not sufficiently explicit to preclude a cause of action based on the defendant's negligence in instructing and equipping the plaintiff.³⁶⁰

On appeal, a closely divided Court of Appeals affirmed the appellate division.³⁶¹ Judge Fuchsberg, writing for the majority,³⁶² noted the antipathy with which such exemptions from liability have traditionally been treated by the courts.³⁶³ Although the defendant's business was deemed to be outside the purview of New York's anti-exculpation statutes,³⁶⁴ the Court reaffirmed the general rule that an exculpatory clause will not be enforced absent an

³⁵⁷ *Gross v. Sweet*, 64 App. Div. 2d 774, 774, 407 N.Y.S.2d 254, 255 (3d Dep't 1978), *aff'd*, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979).

³⁵⁸ The plaintiff's complaint was grounded in negligence, gross negligence, and breach of warranty based on the defendant's instruction and outfitting of the plaintiff, his failure to comply with Federal Aviation Administration regulations, and his failure to warn of the risks inherent in parachute jumping. 49 N.Y.2d at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 367.

³⁵⁹ 64 App. Div. 2d at 774, 407 N.Y.S.2d at 254.

³⁶⁰ *Id.* at 775, 407 N.Y.S.2d at 256. The appellate division scrutinized the release in the context of the student and teacher relationship and concluded that it did not sufficiently evidence "a clear understanding between the parties" that the defendant's negligent conduct would be encompassed by the agreement. 64 App. Div. 2d at 775, 407 N.Y.S.2d at 255-56.

³⁶¹ 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370.

³⁶² Chief Judge Cooke and Judges Wachtler and Gabrielli joined Judge Fuchsberg in the majority opinion. Judges Jasen and Meyer joined Judge Jones in his dissent.

³⁶³ 49 N.Y.2d at 106, 400 N.E.2d at 308, 424 N.Y.S.2d at 367.

³⁶⁴ *Id.* at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368; *see* note 347 *supra*. Although the *Gross* Court characterized the parachute training school owned and operated by the defendant as a "facility" and parachute jumping as a "sport," 49 N.Y.2d at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 366, it declined to hold that it was within the scope of GOL § 5-326, governing agreements entered into by the "owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities. . . ." *Id.* at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368. A contrary conclusion was reached by the fourth department in *Wurtzer v. Seneca Sport Parachute Club*, 66 App. Div. 2d 1002, 411 N.Y.S.2d 763 (4th Dep't 1978), where the defendant, in its pleadings, admitted the plaintiff's allegation that it operated a "parachute jumping and recreation center," as described in its certificate of incorporation. *Id.* at 1002-03, 411 N.Y.S.2d at 764-65.

unequivocal written expression of the parties' intention.³⁶⁵ While disavowing the notion that an effective disclaimer must explicitly refer to negligence,³⁶⁶ the majority concluded that the broad language of the release executed by Gross was inadequate to evidence an intention to absolve the defendant from the consequences of his own fault.³⁶⁷ Moreover, Judge Fuchsberg found that the less rigid rule of construction applied to indemnification agreements was inapposite, characterizing it as an exception to the general rule tailored to the "economic realities" of arm's length dealings between businessmen.³⁶⁸

In a vigorous dissent, Judge Jones urged that the more liberal construction standard should be applied to releases as well as to indemnification agreements.³⁶⁹ Thus, a general release, like a general indemnification contract, should be given effect if the intent of the parties, though expressed in broad terms, can be garnered from the nature of the agreement.³⁷⁰ Viewed under that standard, the dissent concluded, the release executed by Gross was sufficient to exonerate the defendant from liability for his ordinary negligence.³⁷¹ Furthermore, Judge Jones argued that by excluding negli-

³⁶⁵ 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370.

³⁶⁶ *Id.* at 108, 400 N.E.2d at 309-10, 424 N.Y.S.2d at 368.

³⁶⁷ *Id.* at 109-10, 400 N.E.2d at 310-11, 424 N.Y.S.2d at 369-70. The Court concluded that, at most, the release at issue encompassed only injuries resulting from the risks inherent in parachute jumping and not those resulting from the defendant's want of due care. *Id.* Judge Fuchsberg noted that the plaintiff's allegations of gross negligence would not be barred by the release under any circumstances because such agreements are void. *Id.* at 106, 400 N.E.2d at 308-09, 424 N.Y.S.2d at 367.

In dictum, the majority dismissed the contention that the relationship between the parties rendered the release agreement unenforceable as against public policy, stating that the relationship of student and teacher did not fit within those special relationships in which exculpatory provisions had previously been held invalid. *Id.* at 106-07, 400 N.E.2d at 309, 424 N.Y.S.2d at 367-68. See note 348 *supra*. The Court declined, however, to consider whether the defendant's alleged violation of Federal Aviation Administration regulations would be encompassed by the release. 49 N.Y.2d at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368.

³⁶⁸ 49 N.Y.2d at 108, 400 N.E.2d at 310, 424 N.Y.S.2d at 369.

³⁶⁹ *Id.* at 112, 400 N.E.2d at 312, 424 N.Y.S.2d at 371 (Jones, J., dissenting). Judge Jones reasoned that since the *Thompson-Starrett* standard had initially been applied to both indemnification agreements and releases, the new, less stringent rule of the indemnity cases, see note 352 and accompanying text *supra*, should apply in all contexts. *Id.* at 111-12, 400 N.E.2d at 311-12, 424 N.Y.S.2d at 370-71 (Jones, J., dissenting). Moreover, Judge Jones opined that the rationale underlying the Court's liberal interpretation of the language of indemnification agreements was likewise applicable to release agreements. *Id.* at 112, 400 N.E.2d at 312-13, 424 N.Y.S.2d at 371 (Jones, J., dissenting).

³⁷⁰ *Id.* (Jones, J., dissenting); see note 352 *supra*.

³⁷¹ *Id.* at 113, 400 N.E.2d at 313, 424 N.Y.S.2d at 372 (Jones, J., dissenting). Judge

gence from the scope of the disclaimer, the majority had rendered the exculpation clause meaningless since injuries incurred, absent the defendant's failure to exercise due care, would not give rise to an actionable claim in any event.³⁷²

The Court of Appeals' decision in *Gross* culminates a virtually unbroken line of lower court authority which continued to apply a rule of strict construction to release agreements even after the liberalization of the standard applied to indemnity contracts.³⁷³ In sanctioning this approach, it is submitted that the *Gross* majority correctly determined that the indemnity cases were not intended to effect a comprehensive change in New York's law on exculpatory agreements.³⁷⁴ Because enforcement of a release extinguishes an aggrieved party's right of action, while an indemnification agreement merely reallocates the liability for his injury,³⁷⁵ it seems justifiable that the release should be subject to a more exacting scrutiny. Moreover, since indemnification contracts normally arise in a commercial context,³⁷⁶ the parties thereto are more frequently ad-

Jones, however, agreed that the plaintiff's cause of action for gross negligence would not be barred by the release agreement. *Id.* at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370 (Jones, J., dissenting).

³⁷² *Id.* at 112-13, 400 N.E.2d at 313, 424 N.Y.S.2d at 372 (Jones, J., dissenting).

³⁷³ See, e.g., *Johnson v. Thruway Speedways, Inc.*, 63 App. Div. 2d 204, 206, 407 N.Y.S.2d 81, 83 (3d Dep't 1978); *Caravello v. Pine Hollow Stud Farm, Inc.*, 61 App. Div. 2d 974, 974, 402 N.Y.S.2d 451, 452 (2d Dep't 1978); *Bradley Realty Corp. v. New York*, 54 App. Div. 2d 1104, 1105, 389 N.Y.S.2d 198, 199 (4th Dep't 1976); *Phibbs v. Ray's Chevrolet Corp.*, 45 App. Div. 2d 897, 897, 357 N.Y.S.2d 211, 213 (3d Dep't 1974); *Colton v. New York Hosp.*, 98 Misc. 2d 957, 967-68, 414 N.Y.S.2d 866, 875 (Sup. Ct. N.Y. County 1979); *Philip Wick Co. v. Lee Dyeing Co.*, 71 Misc. 2d 82, 83-84, 335 N.Y.S.2d 619, 622 (Sup. Ct. Fulton County 1972), *aff'd*, 41 App. Div. 2d 905, 343 N.Y.S.2d 595 (3d Dep't 1973).

³⁷⁴ The Court of Appeals had previously distinguished between exculpatory agreements and indemnification agreements, holding that the statutory proscription against exculpatory agreements between landlords and tenants did not extend to indemnity agreements between the same parties. *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 161, 366 N.E.2d 263, 267, 397 N.Y.S.2d 602, 607 (1977); see *Gottschalk v. Consolidated R.R. Corp.*, 469 F. Supp. 254, 257 (S.D.N.Y. 1979).

³⁷⁵ The effect of an exculpatory agreement is to allow a party to avoid liability to the victim of his negligent conduct, thus depriving the victim of an otherwise valid claim. On the other hand, through an indemnification agreement, the indemnitee does not seek to exempt himself from liability to the injured third party, but rather to have the indemnitor assume the risk of such liability. Since the injured party's right to recover is preserved, the determination focuses not on whether the injured party can recover, but from whom. *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 161, 366 N.E.2d 263, 267, 397 N.Y.S.2d 602, 607 (1977); *Colton v. New York Hosp.*, 98 Misc. 2d 957, 967, 414 N.Y.S.2d 866, 874 (Sup. Ct. N.Y. County 1979).

³⁷⁶ See, e.g., *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971); *Liff v. Consolidated Edison Co.*, 23 N.Y.2d 854, 245 N.E.2d 800, 298 N.Y.S.2d 66 (1969); *Kurek v. Port Chester Hous. Auth.*, 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612

vised by counsel, and the loss occasioned thereby is more likely to be absorbed by insurance.³⁷⁷ Thus, a stricter rule of construction is warranted for personal injury releases to prevent an inadvertent waiver by a private individual of an otherwise valid claim.³⁷⁸

Although *Gross* declined to prescribe a per se rule requiring personal injury releases to expressly provide for negligence,³⁷⁹ few instances can be found in which less specific language has been held to constitute an effective bar to an action grounded in the defendant's own fault.³⁸⁰ The Court of Appeals, therefore, has placed the burden squarely on the attorney-draftsman to employ precise language to ensure that an exculpatory agreement will achieve its intended objective.

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(1966).

³⁷⁷ See 49 N.Y.2d at 108, 400 N.E.2d at 310, 424 N.Y.S.2d at 369; *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 212, 269 N.E.2d 799, 802, 321 N.Y.S.2d 81, 86 (1971); *Kurek v. Port Chester Hous. Auth.*, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 27, 276 N.Y.S.2d 612, 615 (1966). Courts have considered the presence or absence of insurance as a factor evidencing the intent of the parties. See *Gottschalk v. Consolidated R.R. Corp.*, 469 F. Supp. 254, 258 (S.D.N.Y. 1979); *Galante v. Hathaway Bakeries, Inc.*, 9 Misc. 2d 19, 21, 167 N.Y.S.2d 277, 279 (Sup. Ct. Ontario County 1957), *aff'd*, 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (4th Dep't 1958).

³⁷⁸ See *Boll v. Sharp & Dohme, Inc.*, 281 App. Div. 568, 571, 121 N.Y.S.2d 20, 23 (1st Dep't 1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954); *Colton v. New York Hosp.*, 98 Misc. 2d 957, 969, 414 N.Y.S.2d 866, 875-76 (Sup. Ct. N.Y. County 1979) (release to cover only consequences of "nonnegligent, proper performance").

³⁷⁹ 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370.

³⁸⁰ While the *Gross* Court stated that the word "negligence" need not appear in a release to sustain its validity, the example cited by the Court was a waiver of liability containing references to "negligence" and "neglect or fault" of the defendant. See 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370; *Theroux v. Kedenburg Racing Ass'n*, 50 Misc. 2d 97, 99, 269 N.Y.S.2d 789, 792 (Sup. Ct. Suffolk County 1965), *aff'd mem.*, 28 App. Div. 2d 960, 282 N.Y.S.2d 930 (2d Dep't 1967). In *Jaylynn, Inc. v. Star Supermarkets, Inc.*, 75 Misc. 2d 542, 348 N.Y.S.2d 85 (Sup. Ct. Monroe County 1973), a waiver of subrogation rights was sustained, although it was phrased in general terminology. The court reasoned, however, that the subrogation agreement was tantamount to an agreement to indemnify the defendant against claims brought on behalf of plaintiff's insurance carrier, and that, therefore, a less stringent rule of construction was appropriate. *Id.* at 545, 348 N.Y.S.2d at 89. Since the injured party in *Jaylynn* had recovered his damages from the insurance he had purchased for that purpose, it is submitted that *Jaylynn* is consistent with the policy of providing a party means of redressing his injury.