Chicago-Kent Law Review

Volume 42 | Issue 1 Article 8

April 1965

# Contracts - Exculpatory Clause - Contractual Exemption from Liability for Negligence Held Absolute Defense

B. Sidler

tions wherein the injured party was actually aware that some injury had been sustained before the end of the statutory period. On that basis they are to be distinguished from the *Mosby* case.

Therefore, *Mosby v. Michael Reese Hospital* was a case of first impression at the appellate level in the Illinois Courts. As such, it is bound to serve as precedent for later hearings of similar cases in the state, and it is likely that under the existing statutory law of Illinois the result will be the same in subsequent cases. However, *Mosby* did not make any changes in the existing case law of the state; it merely extended that rule which already prevailed.

It is important to note, however, that the court was not pleased with the opinion it felt constrained to hand down in the principal case. Justice Dempsey, speaking for the court, expressed the opinion that a more equitable result could have been obtained by commencing the statute of limitations at such time as the plaintiff became aware of the malpractice. That the court felt this to be beyond the scope of its power, however, was expressed by Justice Dempsey's final comment that, "Relief must come from the legislature and not from the courts."[31]

In *Mosby*, while the resulting decision was harsh on the plaintiff, it was the only decision at which the court could arrive. The "end of treatment" rule could not have been employed as Mrs. Mosby had not remained within the care of the hospital long enough to bring her action within the statutory time period under the provisions of that rule. And, for the court to allow the suit on the ground that the plaintiff was merely ignorant of her cause of action would have been to flout the statute, as interpreted by this writer, by not setting it in motion when the cause of action accrued. Therefore, the court was compelled to apply the rule which starts the statute of limitations immediately upon the infliction of the injury. In this instance that was immediately upon the completion of the operation.

Until there is a legislative reform, the courts shall continue to be obliged to issue judgments which are inequitable in cases where the plaintiff, though not defrauded by the plaintiff, remained ignorant through no fault of his own, that a cause of action existed for him.

E. Wm. Bedrava

CONTRACTS—EXCULPATORY CLAUSE—CONTRACTUAL EXEMPTION FROM LIABILITY FOR NEGLIGENCE HELD ABSOLUTE DEFENSE—The case of *Owen v. Vic Tanny's Enterprises*, 48 Ill. App. 2d 344, 199 N.E.2d 280 (1st Dist. 1964), provides an opportunity to reexamine the question of the validity of contractual clauses which purport to exempt one of the contracting parties from the legal consequences of his own negligence.

[31] Mosby v. Michael Reese Hospital, 49 Ill. App. 2d 336, 342, 199 N.E.2d 633, 636 (1st Dist. 1964).

The *Owen* case is almost identical to that of *Ciofalo v. Vic Tanny Gyms*,[1] a New York case, decided in 1961. In both cases, the plaintiff was a member of the defendant's gymnasium, and sought to recover for personal injuries resulting from a fall on the slippery floor near the defendant's swimming pool. In each case, as a condition of membership, the plaintiff had signed a membership contract which contained an exculpatory clause reading in part as follows:

> Member, in attending said gymnasium and using the facilities and equipment therein, does so at his own risk. Tanny shall not be liable for any damages arising from personal injuries sustained by Member in, on or about the premises of any of said gymnasiums. Member assumes full responsibility for any injuries or damages . . . and he does hereby fully and forever discharge Tanny . . . from any and all claims . . . resulting from or arising out of Member's use or intended use of the said gymnasium. . . .[2]

The Illinois Appellate Court, First District, held in *Owen*, as did the New York Court of Appeals in *Ciofalo*, that the exculpatory clause included in the membership contract was valid and effectively prevented the plaintiff's recovery. In so holding, the court pointed out that exculpatory clauses are to be construed strictly and, in cases of ambiguity or lack of clarity, are to be construed against the party seeking to exculpate itself—which is almost invariably also the party responsible for drafting the agreement.[3] However, the court found that the language used in the Vic Tanny membership agreement was clear, explicit, and unequivocal.[4]

Since the court found no problem in the construction or interpretation of the exculpatory clause, it was forced to decide the question of its validity. In so doing, it relied primarily on two earlier Illinois decisions in which the validity of exculpatory clauses in leases had been upheld.

In the first of these cases, *Jackson v. First National Bank*,[5] the Illinois Supreme Court held that contracts by which one seeks to avoid the legal consequences of his negligent behavior are generally enforceable in Illinois, unless (1) it would be against the settled public policy of the State to enforce them, or (2) there is something in the social relationship of the parties militating against upholding the agreement.

These criteria are neither so definite nor so independent as they may at first appear. Very frequently, the social relationship of the parties determines the nature of the public policy with respect to them. However, an

1 10 N.Y.2d 294, 177 N.E.2d 925 (1961). In both cases, the locale of the accident, the nature of the injury, the language of the membership agreement and the identity of the defendant were the same.

2 Owen v. Vic Tanny's Enterprises, 48 Ill. App. 2d 344, 345, 199 N.E.2d 280, 281 (1st Dist. 1964).

3 *Ibid.* The court cited Moss v. Hunding, 27 Ill. App. 2d 189, 169 N.E.2d 396 (1st Dist. 1960).

4 48 Ill. App. 2d at 347, 199 N.E.2d at 281.

5 415 Ill. 453, 114 N.E.2d 721 (1953).

examination of cases suggests that the criterion of "settled public policy" is the more conservative, and the criterion of "social relationship" is the more liberal. In other words, if a court can be shown by sufficient clear precedent that exculpatory clauses have been invalidated in situations similar to the one in question, or, alternatively, if a legislative enactment has declared them to be contrary to the public policy of the State, as in Illinois with respect to leases,[6] the court may well hold the clause to be invalid as contrary to settled public policy.

In the case of *O'Callaghan v. Waller & Beckwith Realty*,[7] the second case relied upon by the court in deciding *Owen*, the Illinois Supreme Court reviewed a variety of situations in which the settled public policy of the State had been used to invalidate exculpatory clauses. These included contracts between common carriers and shippers,[8] regulated public utilities and their customers,[9] and employers and employees.[10] These categories correspond to those which the Restatement of Contracts includes as agreements in which exculpatory clauses are illegal,[11] although the Restatement also includes a provision that "a bargain by a common carrier or other person charged with a duty of public service limiting . . . damages . . . is lawful."[12]

The reasons given for the invalidation of exculpatory provisions on public policy grounds are varied. They include, among others, the concept that certain relationships create duties between the parties above and beyond the duties expressed in the contract between them, or, as expressed by an Illinois appellate court, "One cannot exempt himself by contract from negligence in cases of public duty imposed by law."[13] The California Civil Code expresses the same idea in these words:

> Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.[14]

The concept of public duty imposed by law has been applied to com-

6 Ill. Rev. Stat. ch. 80, § 15a (1963). "Every covenant, agreement or understanding in . . . connection with . . . any lease of real property . . . exempting the lessor from liability for damages for injuries . . . caused by or resulting from the negligence of the lessor . . . shall be deemed to be void as against public policy and wholly unenforceable."

7 15 Ill. 2d 436, 155 N.E.2d 545 (1958).

8 Crane v. Railway Express, 369 Ill. 110, 15 N.E.2d 866 (1938); Chicago and N.W. Ry. v. Calumet Stock Farm, 194 Ill. 9, 61 N.E. 1095 (1901); Chicago and N.W. Ry. v. Chapman, 133 Ill. 96, 24 N.E. 417 (1890).

9 Tyler, Ulman & Co. v. Western Union Tele., 60 Ill. 421 (1871).

10 Campbell v. Chicago, R.I. & P. Ry., 243 Ill. 620, 90 N.E. 1106 (1910).

11 Restatement, Contracts § 575 (1932).

12 *Ibid.*

13 Cerny Pickas & Co. v. C. R. Jahn Co., 347 Ill. App. 379, 106 N.E.2d 828 (1st Dist. 1952).

14 Cal. Civ. Code § 3513.

mon carriers,[15] professional bailees,[16] public utilities,[17] innkeepers,[18] and banks.[19] A fairly certain yardstick in years past was whether or not a business was sufficiently important to the public welfare to qualify for regulation. If so, it would be denied the right of exculpation, or it would be permitted that right only under certain fairly well defined circumstances, usually including regulations permitting merely limitation of liability.

In the background in decisions concerning common carriers and public utilities, and clearly present in decisions involving the landlord-tenant relationship, was the criterion of the degree of monopoly in the market. If the court found monopoly, the clause was invalidated. If it did not, the clause was upheld. For example, in *O'Callaghan* the court, upholding the validity of an exculpatory clause in a lease, said:

> The relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid.[20]

Since "settled public policy" solves the problem for those engaged in public callings, for regulated businesses, for enterprises which are clearly monopolies, for employer-employee situations, and in Illinois—by statute—for landlord-tenant contracts, we are left with a variety of miscellaneous situations, of which *Owen v. Vic Tanny* is one, to which Illinois courts apply the criterion of "social relationship of the parties."

Contractual agreements of the kind for which public policy has not become settled, either by statute or case law, arise under a great many varied circumstances. For example, there is the case of the inexperienced horseback rider who, after explaining her need for a gentle horse, is given a contract with an exculpatory clause—and a wild horse.[21] There is also the case of the charity patient who signed an exculpatory agreement in order to secure emergency medical treatment at a hospital operated by the University of California,[22] and there is the case of the woman who signed an agreement with such a clause in order to park her car.[23] In all three of these cases, the

15 Santa Fe P. & P. Ry. v. Grant Bros. Constr. Co., 228 U.S. 177, 33 Sup. Ct. 474 (1912).

16 Miller's Mutual Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951); Palotto v. Hanna Parking Garage Co., 68 N.E.2d 170 (Ohio App. 1946); Gulf Transit Co. v. United States, 43 Ct. Cl. 183 (1908).

17 Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39 (1903); Emery v. Rochester Tele. Corp., 156 Misc. 562, 282 N.Y. Supp. 280 (Sup. Ct. 1935), *aff'd*, 246 App. Div. 787, 286 N.Y. Supp. 439 (1935).

18 Oklahoma City Hotel Co. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941).

19 Thomas v. First Nat'l Bank of Scranton, 376 Pa. 181, 101 A.2d 910 (1954); Speroff v. First Central Trust Co., 149 Ohio St. 415, 79 N.E.2d 119 (1948).

20 O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 440, 155 N.E.2d 545, 546 (1948).

21 Palmquist v. Mercer, 263 P.2d 341 (Cal. App. 1954), *modified*, 43 Cal. 2d 92, 272 P.2d 26 (1954).

22 Tunkl v. Regents of Univ. of Calif., 23 Cal. Rptr. 328 (1962), *rev'd*, 32 Cal. Rptr. 33, 383 P.2d 441 (1963).

23 Miller's Mutual Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951).

exculpatory clause was declared void; in the first on the theory that the contract was fraudulent and in the second and third because of the relative bargaining power of the parties. In 1955, the United States Supreme Court declared void such a clause in a contract between a tugboat company and the owner of a number of barges. This decision also rested on the relative bargaining power principle.[24]

In cases involving hairdressers and their customers,[25] toboggan slides and their customers,[26] laundries and their customers,[27] and automobile rental agencies and their customers,[28] the courts in a number of states have upheld exculpatory clauses either on the theory that the plaintiff could secure the goods or services elsewhere (absence of monopoly in the market) or that he really did not need them anyway (a purely voluntary, private agreement toward which public policy is neutral).

The Court of Appeals of New York and the Appellate Court of Illinois determined in the *Vic Tanny* cases that:

> . . . [T]here is no special legal relationship and no overriding public interest which demand that this contract provision . . . be rendered ineffectual. Defendant . . . was under no obligation or legal duty to accept plaintiff as a "member" or patron. Having consented to do so, it had the right to insist upon such terms as it deemed appropriate. Plaintiff, on the other hand, was not required to assent to unacceptable terms or to give up a valuable legal right.[29]

This language suggests that the court will consider (1) whether or not the defendant has a legal duty to accept the plaintiff as a customer; (2) the converse, whether or not the plaintiff would lose a valuable legal right by declining to sign an agreement which contained an exculpatory clause.

The type of social relationship which might, in an Illinois court, invalidate an exculpatory clause is implied in another case in the following language:

> There is no rule of public policy which makes such provisions ineffective, particularly when the obligee is under no disadvantage by reason of confidential relationship, disability, inexperience or the necessities of the situation.[30]

If the people of the State of Illinois feel that agreements of this type are undesirable as a matter of policy, they will apparently find it necessary

24 Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 Sup. Ct. 629 (1955), discussed in 42 Ill. B.J. 229 (Nov. 1955).

25 Barrett v. Corrigan, 302 Mass. 33, 18 N.E.2d 369 (1938).

26 Broderick v. Ranier Nat'l Park Co., 187 Wash. 399, 60 P.2d 234 (1936).

27 Manhattan Co. v. Goldberg, 38 A.2d 172 (Mun. Ct. App. D.C. 1944).

28 Ostando v. U-Dryvit Auto Rental Co., 296 Mass. 439, 6 N.E.2d 346 (1937).

29 10 N.Y.2d 294, 177 N.E.2d 925, 926 (1961).

30 Charles Laebman Co. v. Hercules Powder Co., 79 F. Supp. 206, 207 (E.D. Pa. 1948).

to secure legislation to that end. The courts of this State are reluctant to invalidate such provisions except in those situations in which statute or precedent gives them no alternative.

MRS. B. SIDLER

TRADE REGULATION—TRADE SECRETS—EX-EMPLOYEE'S USE OF FORMER EMPLOYER'S TRADE SECRET MAY BE ENJOINED—In the case of *Schulenburg v. Signatrol, Inc.*, 50 Ill. App. 2d 402, 200 N.E.2d 615 (4th Dist. 1964), the Appellate Court of Illinois was confronted with the question of whether an ex-employee's use of a former employer's trade secret constituted unfair competition so as to necessitate the issuance of an injunction.

The plaintiff purchased plans for producing electrical flashers[1] from his previous employer in 1945 at a cost of under three thousand dollars,[2] and began manufacturing and selling these devices. The four defendants had been employees of plaintiff for many years (two of the defendants were employed nearly twenty years) during which time they learned the process for manufacturing such flashers. In 1959, one defendant, having disagreed with the plaintiff over company policies, decided to terminate his employment, form his own company and compete with the plaintiff in the business of manufacturing flashers. The remaining defendants terminated their employment with the plaintiff and joined the competing firm. The plaintiff filed suit in October, 1959, seeking to enjoin the defendants on the basis of unfair competition from using the plaintiff's alleged trade secret. The Circuit Court granted an injunction restraining defendants from the further manufacture and sale of competing flashers.

On appeal, the plaintiff alleged that its manufacturing know-how was a trade secret which had been imparted in confidence to the defendants while employees, and that the defendants had abused that confidence by using the trade secret in manufacturing a competing product to the plaintiff's financial detriment. The defendants contended that the plaintiff was not possessed of a trade secret and that the defendants used only general skills and knowledge of the plaintiff's operation acquired through employment. The Appellate Court affirmed the lower court's judgment, finding that the plaintiff's blueprinted know-how qualified as a trade secret,[3] that the defendants copied and memorized the plaintiff's trade secret, and

1 A mechanical device for automatically making and breaking electrical circuits and thereby causing lights of signs to alternately flash on and off in various patterns. Brief for Appellees, p. 2, Schulenburg v. Signatrol, Inc., 50 Ill. App. 2d 402, 200 N.E.2d 615 (4th Dist. 1964).

2 The cost of developing information is a factor to consider in determining whether or not a trade secret exists. Restatement, Torts § 757, comment b (1939).

3 Plaintiffs considered their know-how a trade secret and attempted to keep it confidential; the secret was disclosed to defendants as select employees; the secret was not divulged or abandoned by marketing the finished product; and the secret was not connected with business. Schulenburg v. Signatrol, Inc., *supra* note 1.