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Torts--Negligence--Exculpatory Clause

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mentioned as the "rule of the *Finn* case" was wisely limited only to those situations where the judge was the initial decision-maker.

It is not hard to perceive the awkward and confusing position of an accused who is first allowed, and then denied, bail because of a change in judges. The integrity of the judicial system might also be somewhat impaired when judges of equal rank and each "vested with sound discretion" are allowed to reverse each other after hearing essentially the same facts as to probable guilt.

It is not to be denied that an accused who acts in such a manner as to be a menace to society or who is deemed unlikely to appear for trial should have his bail revoked and further bail denied. This, however, was not the case in *Marcum* for there was no indication that the appellant acted in any way other than that prescribed by law while awaiting trial.

In conclusion it should be said that the Court in *Marcum* took another wise step in securing the freedom of the citizens of the Commonwealth from arbitrary intrusions. Section 16 of the Kentucky Constitution assures the right to bail. Section 2 likewise declares that absolute and arbitrary power over the liberty of free men exists nowhere in a republic, not even the largest majority. The Court has affirmed and applied each of these provisions and has clarified and secured the position of the individual under them.

Mark Stephen Pitt

TORTS—NEGLIGENCE—EXCULPATORY CLAUSE.—As a result of her diabetic condition, plaintiff's leg was amputated in 1965. Three years later upon applying to defendant Rehabilitation Center for instruction in the use of an artificial limb, plaintiff was accepted as a "candidate" for rehabilitation. However, as a condition of her acceptance, she, like all other patients of the Rehabilitation Center, was forced to sign an exculpatory agreement¹ which released the hospital from liability for its own negligence.² After this formality was satisfied, actual therapy was begun, and during the third treatment her stump was severely

¹ "Exculpatory—clearing or tending to clear from alleged fault or guilt; excusing." BLACK'S LAW DICTIONARY 675 (4th ed. 1951). There are three types of exculpatory clauses. The exemption clause which is found in the present case provides that the exculpated party is not liable for any clause whatsoever. Second, there is a release whereby the releasing party waives all claims. Third, the releasing party covenants not to sue for any claim. Smith, *Contractual Controls of Damages in Commercial Transactions*, 12 HASTINGS L.J. 122 (1960).

² The agreement provided:

I further agree that, I will assume all risks which have been explained to me in detail that result from diagnosis and treatment. I will not assert any claim against the Center, its employees, or its volunteers that results from unintentional acts or conduct on their part.

fractured by one of the employees of the Center. The injured leg was later examined by her doctor who diagnosed that the fracture precluded any possibility of future use of an artificial limb. Suit was then brought against the Rehabilitation Center for negligence. The Jefferson Circuit Court directed a verdict for the defendant based on the exculpatory agreement and the plaintiff appealed.³ *Held*: Reversed. An exculpatory agreement will not be upheld where either public interest requires the performance of duties or the parties do not stand on an equal footing. *Meiman v. Rehabilitation Center, Incorporated*, 444 S.W.2d 81 (Ky. 1969).

In deciding past cases involving exculpatory clauses,⁴ the Kentucky Court of Appeals has in each case used the public interest test.⁵ Thus, the Court has found liability where a party owing a public duty has attempted to avoid negligence liability through an exculpatory contract.⁶ Conversely, the Court has held that a party may contract against his responsibility if he neither owes a public duty nor affects the public interest by his actions.⁷ Hence, a municipality⁸ has not been allowed to avoid liability while a landlord⁹ has been permitted to exculpate himself freely.

Like Kentucky, all other states except New Hampshire¹⁰ have used public interest as the determining factor in finding liability. Typically, public service corporations which supply gas,¹¹ electricity,¹² tele-

³ The defendant relied upon the exculpatory clause when making the motion for directed verdict in the trial court; but in its brief filed on appeal, it placed no reliance on the clause. Rather, the Center contented itself with asserting that there was no proof that it did not meet the standard of care.

⁴ See *Cincinnati N. O. & T. P. Ry. v. Haneford*, 305 Ky. 854, 205 S.W.2d 346 (1947); *Gorman Coal Co. v. Louisville & N. R.R.*, 213 Ky. 551, 281 S.W. 487 (1926).

⁵ The public interest test provides that if any party is involved in an activity in which the whole public has a direct and positive interest, it shall not be permitted to contract away its liability. Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089 (1930).

⁶ *French v. Gardners' & Farmers' Market Co.*, 275 Ky. 660, 122 S.W.2d 487 (1938).

⁷ *Greenwich Ins. Co. v. Louisville & N. R.R.*, 112 Ky. 598, 66 S.W. 411 (1902).

⁸ *Hazard Municipal Housing Comm'n v. Hinch*, 411 S.W.2d 686 (Ky. 1967).

⁹ *Cobb v. Gulf Refining Co.*, 284 Ky. 523, 145 S.W.2d 96 (1941). Federal Courts in Kentucky have applied this rule more liberally. In *Franklin Fire Ins. Co. v. Chesapeake & O. Ry.*, 140 F.2d 898 (6th Cir. 1945), the court held that a common carrier may contract against its ordinary negligence when not acting in its capacity as a common carrier.

¹⁰ New Hampshire does not use the public interest test but it applies the restrictions more stringently. It simply does not allow avoidance of liability by contract at all. See *Nashua Gummed & Coated Paper Co. v. Noyes Buick Co.*, 93 N.H. 348, 41 A.2d 920 (1945); *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941); *Wessman v. Boston & M. R.R.*, 84 N.H. 265, 152 A. 476 (1930).

¹¹ *Fairfax Gas & Supply Co. v. Hadary*, 151 F.2d 939 (4th Cir. 1945).

¹² *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 P. 39 (1903).

phones,¹³ and telegraphic services¹⁴ have not been permitted to limit their liability. In addition, irrigation companies¹⁵ and housing authorities¹⁶ have also been held to a public duty, while banks¹⁷ have been allowed to avoid liability because of their lack of public duty. From these examples, one might correctly infer that for a number of years most public service corporations have been restricted in their use of exculpatory clauses; however, hospitals, which are also public service corporations, were permitted to make use of the clauses freely until 1963 when the California Supreme Court abolished their use by hospitals in that state in *Tunkl v. The Regents of the University of California*.¹⁸

Six years later the influence of the California decision reached Kentucky when in the instant case, the Kentucky Court of Appeals cited *Tunkl* and used its twin concepts of public interest and equal footing to strike down the exculpatory clause. Unfortunately, the Kentucky Court did not analyze the facts and concepts together in its written opinion; rather the Court merely stated¹⁹ the rule and held that it applied.²⁰ Although the Court's opinion lacked a discussion of the rule, it is a logical deduction that the Court probably applied the *Tunkl* approach²¹ of setting forth an outline of six required characteristics before an exculpatory clause could be disallowed.

The first of these characteristics is that the business concerned must be of a type generally thought suitable for public regulation.²² Second,

¹³ *F. A. Straus & Co. v. Canadian P. R.R.*, 254 N.Y. 407, 173 N.E. 564 (1930).

¹⁴ *Fowler v. Western U. Tel. Co.*, 80 Me. 381, 15 A. 29 (1888).

¹⁵ *Evergreen Farm v. Attalia Land Co.*, 91 Wash. 192, 157 P. 487 (1916).

¹⁶ *Housing Authority v. Morris*, 244 Ala. 557, 14 So.2d 527 (1943).

¹⁷ *Annot.*, 175 A.L.R. 8, 78 (1947). This view is supported by the fact that banks and their customers generally deal on an equal footing. *Contra*, *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 P. 947 (1926).

¹⁸ 60 Cal.2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963).

¹⁹ The Court said:

The annotation points out that the decisions recognize that in some instances such an agreement may be valid, but that in no event can such an exculpatory agreement be upheld where either: "(1) the interest of the public requires the performance of such duties, or (2) because the parties do not stand upon a footing of equality, the weaker party is compelled to submit to the stipulation." *Meiman v. Rehabilitation Center, Inc.* (Ky. Court of Appeals, May 30, 1969 at 6).

²⁰ "In our view, the case at bar is one in which it is clearly against public policy for the Center to seek refuge in the exculpatory agreement." *Id.*

²¹ The California Court had said that:

No definition of the concept of public interest can be contained within the four corners of a formula. The concept, always the subject of great debate, has ranged over the whole course of the common law; rather than attempt to prescribe its nature, we can only designate the situations in which it has been applied. 60 Cal. 2d 92, 32 Cal. Rptr. 33, 36, 383 P.2d 441, 444 (1963).

²² See 11 S. CAL. L. REV. 296 (1938).

the party seeking exculpation must be engaged in performing a service of great importance to the public.²³ Third, the party must hold himself out as willing to perform the service for any member of the public who seeks it, or at least for any member coming within certain established standards.²⁴ Fourth, the exculpating party must possess a decisive advantage in bargaining strength.²⁵ The exculpating party also must face the public with a standardized adhesion contract²⁶ and make no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.²⁷ A final requirement is that as a result of the transaction the releasing party has placed himself under the control of the exculpating party and is subject to his carelessness.²⁸

In the present case, one can easily see how the Kentucky Court could have mechanically found all of the above characteristics. First, because of the nature of the treatment and the ailing conditions of incoming patients, it is justifiable that a medical center should be regulated in order to benefit its patients and the public.²⁹ For the same reasons, it is apparent that the operation of a center is of great importance to the public.³⁰ Next, although the Center did not hold itself out to the general public, it did satisfy the third characteristic by holding itself out to members of the public who could meet the standards of examination.³¹ In order to satisfy the fourth requirement, one could assume that a person who is in need of medical services is at a decisive bargaining disadvantage.³² Fifth, the contract was obviously an adhesion contract which was standardized for all the incoming

²³ See *New York C. Ry. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873); *Arterburn, The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927).

²⁴ See *Burdick, The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 616, 743 (1911).

²⁵ See *Note, The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248 (1937); 20 CORN. L.Q. 352 (1935); 19 S. CAL. L. REV. 441 (1946). This principle of equal bargaining is today considered a separate test.

²⁶ See *Simmons v. Columbus Venetian Stevens Bldg.*, 20 Ill. App. 2d 1, 155 N.E.2d 372 (1958).

²⁷ See 6A A. CORBIN, *CONTRACTS* § 1472 (1962). This provision does apply to the instant case but is more important in a commercial setting.

²⁸ See *Franklin v. Southern Pacific Co.*, 203 Cal. 680, 265 P. 936 (1928).

²⁹ See 11 S. CAL. L. REV., *supra* note 22. See also 175 A.L.R., *supra* note 17, at 38.

³⁰ See 75 U. PA. L. REV., *supra* note 23.

³¹ See 11 COLUM. L. REV., *supra* note 24. See also 28 BROOKLYN L. REV. 357 (1962).

³² See citations and discussion, *supra* note 25. See also *Note, Contractual Limitations of Negligence Liability*, 8 U. FLA. L. REV. 109 (1955); *Note, Exculpatory Clauses in Leases of Realty in Pennsylvania*, 15 U. PITT. L. REV. 493 (1954).

patients at the Center.³³ It is highly unlikely that this particular contract was drawn especially for the plaintiff. Finally, since the patient was flat on her back and being held in place by two employees at the time of the injury, it is certain that she was completely under the control of the Center when the therapy was being administered and was subject to its negligence.³⁴

After applying this outline of characteristics to the instant case, it is not difficult to see how the Kentucky Court could reach its decision by using the public interest test. Since liability has recently been extended to both hospitals and surgeons,³⁵ in spite of exculpatory agreements, it follows that a private health center should be next. In light of this, the Court could have decided this case correctly on the public interest test alone; however, it went further and based its decision on the concept of equal bargaining but that test does not seem to support this decision.

The equal bargaining or equal footing test provides that if the parties dealt with one another on an equal basis, then the exculpatory clause is valid.³⁶ At one time this factor was considered part of the public interest test,³⁷ however, today it has evolved into a separate test because the public interest test was so ambiguous that a new test was needed to supplement it.³⁸ Its proponents felt that it protected public policy, like the public interest test, and furthermore protected freedom of contract and security of transactions.³⁹ In applying the test, several factors need to be considered. The first of these factors is that there must be mutual assent and complete knowledge of the exculpatory clause.⁴⁰ The second factor is the relative degree of equality in bargaining strength.⁴¹ Therefore, the more even the bargaining strength the better the chances of the clauses being allowed. Third, the importance of the subject matter of the contract to the releasing party is relevant.⁴² Finally, the freedom of choice that the releasing party had in dealing with the exculpating party is im-

³³ See 20 Ill.2d 1, 155 N.E.2d 372 (1958). See also *Irish & Swartz Store v. First Nat. Bank of Eugene*, 220 Ore. 362, 349 P.2d 814 (1960).

³⁴ See *Franklin v. Southern Pacific Co.*, 203 Cal. 680, 265 P. 936 (1928).

³⁵ *Belshaw v. Feinstein*, 258 Cal. App. 2d—, 65 Cal. Rptr. 788 (1968).

³⁶ See citations and discussion, *supra* note 26.

³⁷ *Id.*

³⁸ 175 A.L.R., *supra* note 18, at 15. See also 6 S. WILLISTON, CONTRACTS § 1751 (rev. ed. 1936).

³⁹ 175 A.L.R., *supra* note 18, at 15.

⁴⁰ *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 58 N.E.2d 658 (1944); RESTATEMENT, CONTRACTS § 70 (1932).

⁴¹ 175 A.L.R., *supra* note 18, at 16.

⁴² *Id.* at 17.

portant.⁴³ Thus, contracts with monopolies would probably be disallowed more often than contracts with competitive contractors.

Underlying these factors are policy arguments both for and against allowing the exculpating party to limit his liability under the equal footing test. The opponents of the exemption feel that tort duties are superior to contract duties because society has a greater need to be protected from torts than from breaches of contract.⁴⁴ As a second argument, they say that any duty imposed by law is not valid consideration and thus the exculpatory clause must fail.⁴⁵ Lastly, they feel that big business both expects and plans for certain losses and can easily distribute them to the public.⁴⁶ The single policy argument advanced by the proponents of exemption is that exculpatory agreements prevent false claims against businessmen.⁴⁷

In the *Meiman* case, several questions should have been asked before the Court condemned the clause under the equal bargaining test. First, were there any other institutions to which the plaintiff could have gone?⁴⁸ Did she know about and understand the clause?⁴⁹ How urgent was her need to receive these services?⁵⁰ Any answer to these questions here would be speculation because the facts do not appear in the case⁵¹ and the questions were not considered by the Court. It would seem, however, that until these questions are answered, the Court of Appeals has gone too far in extending the equal footing test in Kentucky.

In conclusion, two observations seem apposite. First, since the equal footing test was developed to be used as a supplementary test in cases where the public interest test was not wholly satisfied, it is probably not essential that the equal footing test be satisfied in the

⁴³ *Id.*

⁴⁴ Comment, 44 CAL. L. REV. 120 (1956). The actor stated:

Where public safety has been involved, the courts on occasion have declared that the exemption contract was invalid because of the existence of a duty in tort over and above the contractual obligation. Tort duties are imposed by law to protect the interest of society in freedom from various kinds of harm. They are grounded basically upon social policy and not upon the will or intention of the parties. *Id.* at 127.

See also W. PROSSER, TORTS 478 (2d ed. 1955).

⁴⁵ 1 S. WILLISTON, CONTRACTS § 132 (rev. ed. 1936).

⁴⁶ "The large business concern is better able to bear such losses and can distribute the loss through prices, rates, or liability insurance." 44 CAL. L. REV., *supra* note 44, at 128-29.

⁴⁷ *Id.* at 128.

⁴⁸ See 175 A.L.R., *supra* note 18.

⁴⁹ 144 Ohio St. 275, 58 N.E.2d 658 (1944). See also *Dodge v. Nashville, C. & St. Ry.*, 142 Tenn. 20, 215 S.W. 274 (1919).

⁵⁰ See 175 A.L.R., *supra* note 18.

⁵¹ See discussion *supra* note 2. In the exculpatory clause there was language to the effect the contract had been explained to Mrs. Meiman. This is probably a "boilerplate" statement and does not shed light on the issue of mutual assent.

present case. For a number of years the public interest test was the exclusive basis for decision, and today if that test is completely satisfied there seems to be no reason that it can not be the sole basis of decision in *Meiman*. In light of this observation, it is extremely doubtful that the *Meiman* decision, although ineptly articulated in places, will ever return to haunt the Court.

Secondly, it appears that this decision, in spite of its lack of legal exactness, is perhaps farsighted. In recent legal history many areas of the law have evolved to a point where the protection of the individual is the primary concern. For example, in criminal law the rights of the defendant have been greatly magnified under the fifth and seventh amendments and in tort law the rights of the unborn are beginning to be realized. Therefore, it is not surprising that this legal development has progressed to exculpatory agreements used by the medical profession. However, this is not a case of change for change's sake. There are several sound reasons for holding medical centers, hospitals and doctors liable for their torts in spite of their exculpatory agreements. The first of these reasons is that the party who realizes his liability will probably be more careful in applying treatment than the exculpated party. Second, employers will be more careful in selecting their employees if they realize their liability under *respondeat superior*. Finally, while the cost of an injury would be a tremendous expense for the individual patient, the insurance carrier of the hospital or the hospital itself could more effectively absorb and spread the cost.

In light of these two observations one may suspect that the Kentucky Court of Appeals has heard the jury charge by a mountain judge, "Do right;" for, the Court seems to have done right even though it stuttered in doing so.

Bruce Montgomery Reynolds

FEDERAL INCOME TAXATION—SCHOLARSHIP AND FELLOWSHIP GRANTS—VALIDATION OF TREASURY REGULATION.—Westinghouse Electric Corporation offered a program of financial assistance to employees of their Bettis Atomic Power Laboratory. That program, consisting of two phases, was designed to attract new employees seeking to further their education and to give advanced training to employees of Bettis in engineering, physics, or mathematics. During the initial phase, the employee would pursue a course of study at a local university on company time. The company would pay tuition as well as other incidental expenses.

When all preliminary work for the doctoral degree had been completed, the employee could opt for the final phase, for which an