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Contracts—Contract Intended To Release Liability For Negligence Invalidated—Language Not Sufficiently Explicit

James B. Denman

the accountant, was personally retained by the taxpayer and not by the attorney. The attorney and accountant merely took a share of the recovery independent of the other's fee. It is incidental that the fee of each is the same percentage. But, this retainer agreement, since the money came from a lump sum, may have been a technical departure from Canon 34. The policy reflected in this case is not to deny recovery on the express contract for a technical departure from Canon 34 in light of the evident beneficial results to the taxpayer as long as the accountant does not render legal services. In light of this decision, there is no indication whether the Court will or will not uphold an agreement between a layman who renders non-legal services and an attorney to split the attorney's fee, as where the attorney personally retains an accountant whose salary is computed according to the attorney's fee.

Anthony S. Kowalski

CONTRACT INTENDED TO RELEASE LIABILITY FOR NEGLIGENCE INVALIDATED—LANGUAGE NOT SUFFICIENTLY EXPLICIT

The defendant is a manufacturer of motion picture film. A number of reels of its film were sold to the plaintiff in standard packages on which were printed certain conditions of sale stating, in part, that the film price did not include processing, and that, except for replacement of the film, defendant would not assume lability of any kind in any subsequent handling of the film.[1] The plaintiff, in fulfillment of a contract with another party, traveled to Alaska, exposed the film and returned it to defendant for processing. While in defendant's possession, a substantial part of the film was damaged beyond usefulness. The case was submitted to the Appellate Division on an agreed statement of facts.[2] The Court *held*, first, that an inference of negligence was warranted and, second, that the conditions of sale could not be construed so as to relieve defendants of liability for negligence. In an appeal based on the latter point, the Court of Appeals affirmed, holding that, since contracts purporting to absolve the offeror from liability for negligence are not favored by the courts, and must therefore meet strict standards of interpretation, the language of the present contract was not sufficiently clear to relieve the defendants of liability. *Willard Van Dyke Prods. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963).

The agreement involved here purported to release the offeror of *future* liability for *ordinary* negligence. Although the rule applicable to such agreements may generally be said to support their validity,[3] considerations of policy

1. The relevant language is as follows: "This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company. Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind. Since dyes used with color films, like other dyes, may, in time, change, this film will not be replaced for, or otherwise warranted against, any change in color." Instant case at 303, 189 N.E.2d at 694, 239 N.Y.S.2d at 339.

2. N.Y. Sess. Laws 1920, ch. 925, § 546.

3. See Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962

and strict rules of construction have narrowly restricted the usefulness of these contracts.[4] An exculpatory agreement, executed prior to injury, will not relieve the offeror from liability for negligence characterized either as gross, or wanton, wilful and reckless.[5] It is frequently stated that such agreements are invalid where the releasor stands in an inferior bargaining position, or where the interest of the public is involved.[6] Thus, an employer may not in this manner be relieved of liability to his employees,[7] and where the duty involved is that owed by a public utility to its subscribers, such contracts are similarly invalidated, the utility being denied exculpation in most such instances due to its monopolistic bargaining advantages.[8] Earlier New York decisions upheld contracts relieving a common carrier from liability for negligence to its patrons,[9] but later holdings have tended to restrict this rule to cases where the carrier has furnished its services either without compensation,[10] or at a reduced rate.[11]

(1961) (personal injury, release of total liability); Graves v. Davis, 235 N.Y. 315, 139 N.E. 280 (1923) (maritime towing service, agreement limiting liability); Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245 (1932) (landlord-tenant release upheld). *But see* N.Y. Real Prop. Law § 234 (invalidating such agreements).

4. It may be more correct to phrase the rule as Williston does, *i.e.*, such agreements ". . . may be valid." 6 Williston, Contracts § 1751 B (rev. ed. 1938).

5. Restatement, Contracts § 574, comment *a* (1932); Krivitsky & Cohen, Inc. v. Western Union Tel. Co. Inc., 129 Misc. 431, 221 N.Y. Supp. 525 (Munic. Ct. N.Y. 1927) *modified on other grounds*, 227 N.Y. Supp. 836 (1st Dep't 1928).

6. Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 296, 177 N.E.2d 925, 926, 220 N.Y.S.2d 962, 964 (1961); 6 Williston, Contracts § 1751 C (rev. ed. 1938); Restatement, Contracts § 575 (1932).

7. Johnston v. Fargo, 98 App. Div. 436, 90 N.Y. Supp. 725 (4th Dep't 1904), *aff'd*, 184 N.Y. 379, 77 N.E. 388 (1906); Kelly v. Central Railroad, 178 App. Div. 685, 165 N.Y. Supp. 862 (2d Dep't 1917); Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 102 N.Y.S.2d 65 (3d Dep't 1951).

8. Emery v. Rochester Telephone Corp., 156 Misc. 562, 282 N.Y. Supp. 280 (Sup. Ct. 1935), *aff'd*, 246 App. Div. 787, 268 N.Y. Supp. 439 (4th Dep't 1935), *rev'd on other grounds*, 271 N.Y. 306, 3 N.E.2d 434 (1936) (invalidating exculpatory agreement where damage arose from failure to provide service at time of emergency). *But see* Hamilton Employment Serv. v. New York Tel. Co., 253 N.Y. 468, 171 N.E. 710 (1930) (contract limiting liability for directory errors upheld).

9. Nicholas v. New York Central and Hudson River R.R. Co., 89 N.Y. 370 (1882) (property damage); Maynard v. Syracuse, B. & N.Y.R.R. Co., 71 N.Y. 180 (1877) (property damage). *But see* Cole v. Goodwin & Story, 19 Wend. 251 (N.Y. Sup. Ct. of Judicature 1838) *and* Hollister v. Nowlen, 19 Wend. 234 (N.Y. Sup. Ct. of Judicature 1838). The early 19th century New York courts feared that, without liability, the small carrier would defraud its patrons. The late 19th century courts, however, were faced with different considerations, *i.e.*, the inequality of bargaining power as created by monopolistic or oligopolistic carriers. Consequently, in 1838 such agreements were invalid, but in the Spencerian days of 1882 they were upheld. The federal courts, though, have consistently invalidated these agreements where the defendant is a common carrier. See Bank of Kentucky v. Adams Ex. Co., 93 U.S. 174 (1876); The Saratoga, 20 Fed. 869 (S.D.N.Y. 1884).

10. Montalbano v. New York Central R.R. Co., 267 App. Div. 617, 47 N.Y.S.2d 877 (4th Dep't 1944); Kroehling v. City of New York, 270 App. Div. 909, 61 N.Y.S.2d 474 (2d Dep't 1946). In each case, plaintiff was defendant's employee, thus it was a jury question as to whether the pass was issued as a mere gratuity, or as part of the employment contract.

11. See N.Y. Pers. Prop. Law § 189 (a carrier may not contract in such a manner as to impair his obligation of reasonable care). *But see* Anderson v. Erie R.R. Co., 223 N.Y. 277, 119 N.E. 557 (1918); National Blouse Corp. v. Felson, 274 App. Div. 164, 79 N.Y.S.2d 765 (1st Dep't 1948), *aff'd*, 299 N.Y. 612, 86 N.E.2d 177 (1949); Chenango Textile Corp. v. Willock, 247 App. Div. 638, 288 N.Y. Supp. 270 (1st Dep't 1936); Kaydro Fashions, Inc. v. S. & H. Express, Inc., 236 N.Y.S.2d 670 (N.Y. City Civ. Ct. 1962) (holding that liability for negligence may be limited where a lower rate is charged).

Although the controlling principle of invalidation is said to be based upon the relationship of the parties, cases of invalidation based on inequality of bargaining power involving defendants other than public utilities, carriers, or employers are not to be found. It is thus uncertain whether the courts are in fact referring to a broad principle, or whether there is a tendency to pigeon-hole cases according to the categories noted above.[12]

The courts look with disfavor upon agreements purporting to release persons from liability for negligence, and consequently such contracts are interpreted most strictly against the wrongdoer.[13] The language must be clear and unequivocal,[14] and the construction sought to be placed upon it by the defendant must have been obvious to the releasor upon a casual reading of the agreement.[15] The above discussion paraphrases the standard of interpretation as expressed in a number of New York cases.[16] Applying this test, the Court of Appeals, in a wrongful death action, recently held that an agreement purporting to release the defendant ". . . of any and all responsibility or liability of any nature whatsoever for . . . personal injury . . . ," was per se ineffectual.[17] From this case, and others similar, it may safely be inferred that the de facto test is somewhat more rigid than the above phrases would suggest. Boilerplate language may fall ostensibly within this standard (as the above quoted language does), yet the recent decisions consistently invalidate agreements of that nature.[18] Where, on the other hand, the agreement specifically disclaims liability for negligence, and refers as well to the specific injury for which compensation is sought, the release may be upheld.[19]

The Court in deciding the instant case, without referring to the relation-

12. The instant case is illustrative: Although the Federal Trade Commission has concerned itself on more than one occasion with the monopolistic behavior of this defendant, the issue of inequality of bargaining power was not discussed either at the Appellate Division or at the Court of Appeals. It is submitted that in addition to an oligopolistic seller, the service or commodity sold must be one of the conventional necessities. See Fed. Trade Comm'n v. Eastman Co., 274 U.S. 619 (1927); Eastman Kodak Co. v. Federal Trade Commission, 158 F.2d 592 (2d Cir. 1946).

13. See Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961) (expressing the applicable New York standard). *But see* 6 Williston, Contracts § 1751 B (rev. ed. 1938) ("[I]f possible, [such] bargains are construed not to confer this immunity.") The latter would appear to express more precisely the position taken by the New York courts.

14. Bernstein v. Seacliff Beach Club, Inc., 35 Misc.2d 153, 228 N.Y.S.2d 567 (Nassau County Ct. 1962); Kaufman v. American Youth Hostels, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959), *modifying*, 6 A.D.2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958); Walters v. Rao Electrical Equipment Co., 289 N.Y. 57, 43 N.E.2d 810 (1942).

15. Rappaport v. Phil Gottlieb-Sattler, Inc., 280 App. Div. 424, 426, 114 N.Y.S.2d 221, 223 (1st Dep't 1952), *aff'd*, 305 N.Y. 594, 111 N.E.2d 647 (1953); Boll v. Sharpe and Dohme, 281 App. Div. 568, 121 N.Y.S.2d 20 (1st. Dep't 1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954); Howard v. Handler Bros. and Winnell, 279 App. Div. 72, 107 N.Y.S.2d 749, (1st. Dep't 1951), *aff'd*, 303 N.Y. 990, 106 N.E.2d 67 (1952).

16. *Ibid.*; See cases cited note 14 *supra*.

17. Kaufman v. American Youth Hostels, *supra* note 14.

18. Bernstein v. Seacliff Beach Club, Inc., 35 Misc.2d 153, 228 N.Y.S.2d 567 (Nassau County Ct. 1962); Boll v. Sharpe and Dohme, 281 App. Div. 568, 121 N.Y.S.2d 20 (1st Dep't 1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954).

19. Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961).

ship of the parties, was unanimous in finding the language of the agreement insufficiently explicit to relieve the defendant of liability for negligence. The Court implied that both the duty violated and the injury sustained were contemplated by the terms of the agreement, but that greater explicitness or specificity would be required for the agreement to be effective. Although the release was held invalid on the basis of its language alone, it was further noted that, since the release was accepted at the time the film was purchased, the plaintiff could reasonably have believed the agreement did not relate to its return for processing.

In all cases involving exculpatory agreements of the type discussed here, the essential argument revolves around notions of freedom of contract on the one hand, and on the other, the reprehensible quality of contracts which relieve a tortfeasor from liability for his wrongful acts.[20] Ideally, each case should turn upon the extent to which its own peculiar facts load one or the other of the above conflicting considerations.[21] In New York, however, it would appear that an overly cautious respect for stare decisis has resulted in a loss of the flexibility which this formula seems to offer. Invalidation on the basis of the parties' relationship would now seem to be restricted to fixed categories,[22] and although the courts have been able to carry out their policy of invalidation through strict construction of contractual language, this approach at the same time informs the alert draftsman of the sort of language required for a valid exculpatory clause. It is safe to assume that properly worded releases will thus appear more frequently and that they will be at least as acceptable to the layman as boilerplate would be. One could further conclude that the rule of strict construction of contractual language is both unrealistic (since the lay releasor cannot be selective on this basis) and impractical (since it will cease to be effective wherever it is understood). Ultimately then, if the courts wish to continue restricting the usage of these agreements, they must resort to a different rationale. The legislature apparently has undertaken a piecemeal approach toward outlawing these agreements,[23] but this resolves only a small part of the judicial problem. It is submitted that the courts could restrict validation of these releases to a limited area, for example, in purely "take-it-or-leave-it" situations where the defendant has had no opportunity to protect himself from the consequences of his negligence.[24] Admittedly this would be a bold departure from precedent, but it may be more responsive to the underlying reasons for judicial disfavor of these contracts.

James B. Denman

20. See Bisso v. Inland Waterways Corp., 349 U.S. 85 (1954) (presenting a lengthy discussion of these ideas, the majority holding according to public policy, the minority holding that freedom of contract should prevail).

21. See generally *Ibid.*

22. See text accompanying note 12 *supra.*

23. See N.Y. Uniform Commercial Code § 2-719 ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. . . ."); N.Y. Real Prop. Law § 234; N.Y. Pers. Prop. Law § 189.

24. Laufer, *Torts and Workmen's Compensation, 1962 Survey of New York Law*, 14 Syracuse L. Rev. 309, 319 (1963).