Buffalo Law Review

Volume 12 | Number 1 Article 57

10-1-1962

Torts—Gymnasium's Contractual Disclaimer of Liability for Negligence Given Effect

John O. Delamater

was passed by the Senate but was not acted upon in the Assembly Codes Committee. The Law Revision Commission argued that the New York rule should be changed for two basic reasons. First, the New York rule is too difficult to administer because the rule requires the courts to discriminate between those payments which will reduce damages and those which will be disregarded (such as insurance cases), and secondly, the New York rule fails to recognize and implement the deterrent function of tort damages by allowing some defendants to escape some of the unpleasant consequences of the wrongdoing by virtue of the accidental fact that the plaintiff has received gratuitous services.[16] The Law Revision Commission, therefore, strongly recommended that New York change its law to conform to the great weight of authority in the United States.

In supporting the New York rule, the Court argued that since the New York Legislature did not deem it wise to pass the proposed legislation in 1957, the Court would not now overrule the Legislature's decision and change one of the basic laws of the state. The Court seems to have forgotten, however, that this is a court-made policy which may be overruled by the Court at any time. But, merely because New York is one of only two states in the country which deny recovery for the value of gratuitous services, it does not necessarily follow that this policy is wrong. In the field of negligence, a principle of payment for gratuitous service is contrary to reason, logic, and the best interests of society. The law of damages has long been held to be twofold, *i.e.*, either compensatory or punitive. Any recovery in negligence should be based upon compensation for damages proximately caused by such negligence. The plaintiff has the burden of proving all losses. If the Court adopted the theory that gratuitous services are losses, the Court would be requiring the plaintiff to prove that which he might have lost but did not, and would be allowing the plaintiff to be paid for what could have been a loss but was not.

M. A. K.

GYMNASIUM'S CONTRACTUAL DISCLAIMER OF LIABILITY FOR NEGLIGENCE GIVEN EFFECT

Defendant corporation franchises a coast-to-coast system of gymnasiums providing exercise facilities and instruction. The right to use the facilities and to receive instruction during business hours is provided in a single page membership contract which contains a clause exempting Vic Tanney Gyms from liability for negligence. Plaintiffs, husband and wife, brought a negligence action for personal injury and sequential damages suffered as the result of a

by reason of the fact that the injured person has received payments of wages, salary, medical or other expenses, or other monies or aid, whether gratuitous or otherwise, from any person, unless the payment or aid was made or rendered by or on behalf of a person who was or may be liable to the injured person for causing such injuries or who was or may be liable to the injured person for the act or omission of the person who caused them.

16. N.Y. Leg. Doc. No. 65(G) (1957).

fall by the wife while using facilities pursuant to a signed membership contract. The fall was alleged to have been caused by excessive slipperiness about the edge of defendant's swimming pool. From an affirmance of the Appellate Division, one justice dissenting,[1] granting defendant's motion for summary judgment dismissing the complaint, *held*, affirmed. Because the Court found that the agreement clearly expressed the intention of the parties to hold the defendant blameless for consequences of his own negligence, in the absence of a legal relation of public concern, the provision must be construed according to its terms and hence is a complete defense for a charge of ordinary negligence. The importance of this decision is manifest in view of the widespread growth that has occurred in privately owned physical fitness establishments during the last decade. The majority of their patrons are neither athletic by nature nor experienced in the proper and safe use of ordinary gymnasium equipment. *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961).

The general rule is that one who signs a writing which should be understood to be an agreement is bound by its terms.[2] However, certain clauses in particular factual settings are against public policy and will be unenforceable and invalid.[3] This raises the problem of determining at what point freedom to contract should be interfered with in the interest of the state's policy of protecting those of whom unconscionable advantage might be taken. Courts are circumspect of contracts that break down common law liability. Such contracts will not be favored and will be strictly construed against the relying party.[4] But when the language is clear and explicit, such clauses are usually enforceable.[5]

Whether or not a clear and explicit exculpatory clause relieving a party from liability for his own negligence will be given effect depends on the legal relationship. Where the contract is essentially one of adhesion, co-determination of the terms is lost, and freedom to contract means only deciding to accept or reject the proposed contract in its entirety.[6] In contracts of adhesion the role of public policy protects individuals from disadvantageous conditions that they can neither effectively bargain against nor avoid without losing the benefit of essential services or relationships.[7]

1. Ciofalo v. Vic Tanney Gyms, Inc., 13 A.D.2d 702, 214 N.Y.S.2d 99 (2d Dep't 1961).

2. Restatement, Contracts § 70 (1932); e.g., Richardson v. Prudential Ins. Co. of America, 29 Misc. 2d 202, 217 N.Y.S.2d 300 (Sup. Ct. 1961); Bel-Rose Fashions, Inc. v. Braunheim, 25 Misc. 2d 1037, 207 N.Y.S.2d 567 (Sup. Ct. 1957).

3. E.g., Montalbano v. New York Cent. R.R., 267 App. Div. 617, 47 N.Y.S.2d 877 (4th Dep't 1944).

4. Boll v. Sharp & Dohme, 281 App. Div. 568, 121 N.Y.S.2d 30 (1st Dep't 1953), aff'd 307 N.Y. 646, 120 N.E.2d 836 (1954); Howard v. Handler Bros. & Winell, 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); Isler v. National Park Bank, 239 N.Y. 462, 147 N.E. 66 (1925).

5. Kaufman v. American Youth Hostels, 6 A.D.2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958), modified mem., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

6. Insurance contracts are an excellent example. Most states have effected legislation to protect policy holders from harsh contract terms. See, e.g., N.Y. Ins. Law § 143.

7. See note 6, supra. See generally, Lenhoff, Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law, 36 Tul. L.

The argument made in the instant case that the disclaimer clause should be invalidated because the parties were of unequal bargaining power was rejected.[8] Alone, unequal bargaining power has never been sufficient ground to invalidate a provision relieving a party from liability for his own negligence.[9] Plaintiffs' argument that the release was contrary to public policy also was rejected.[10] In general, the areas that have warranted public policy exceptions involve parties with a public duty and responsibility or a special legal relationship.[11] The court pointed out that plaintiff desired to join a private organization having no obligation to accept her as a member. Furthermore, the language of the exculpatory clause was found to indicate clearly that the defendant should not be liable for injuries resulting from his own negligence.[12] Although the trial court opinion mentioned that neither plaintiff questioned by affidavit the agreement nor alleged that the signer was unaware of the exculpatory provision,[13] it seems doubtful that this contract could be profitably compared with those in the so-called baggage ticket cases.[14] The dissenting justice of the Appellate Division objected that this gymnasium was essentially open to the public for a fee and, therefore, should be held to a standard of duty similar to that of innkeepers.

Rev. 481 (1962); Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072 (1953); Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943). Some examples of areas where judicial applications of public policy have been made appear in note 11, infra.

8. For a full development see Plaintiffs-Appellants' Brief at 6-9.

9. Kilthau v. International Mercantile Marine, 245 N.Y. 361, 157 N.E. 267 (1927); Burke v. Union Pac. Ry., 226 N.Y. 534, 124 N.E. 119 (1919).

10. For a full development see Plaintiffs-Appellants' Brief at 2-6.

11. Conklin v. Canada-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935), public carrier; Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388 (1906), employer-employee; Wells v. New York Cent. R.R., 24 N.Y. 181 (1862), public carrier; Western Union Tel. v. Cochran, 277 App. Div. 625, 102 N.Y.S.2d 65 (3d Dep't 1951), employer-employee; Kelly v. Central R.R., 178 App. Div. 685, 165 N.Y. Supp. 862 (2d Dep't 1917), employer-employee; see Restatement, Contracts §§ 574, 575 (1932).

12. Paragraph 3 of Membership Contract contained in Record on Appeal at 18:

> Tanny shall not be liable for any damages arising from personal injuries sustained by member in, on or about the premises of any of the said gymnasiums. Member, in attending said gymnasiums and using the facilities and equipment therein, does so at his (her) own risk. Member assumes full responsibility for any injuries or damages which may occur to member in, on or about the premises of said gymnasiums and he (she) does hereby full and forever release and discharge Tanny and all associated gymnasiums, their owners, employees and agents from any and all claims [sic] demands, damages, rights of action, or causes of action, present or future, whether the same be known or unknown, anticipated or unanticipated, resulting from or arising out of the member's use or intended use of the same gymnasiums or the facilities and equipment thereof, including but without limitation, any claims for personal injuries resulting from or arising out of the negligence of Tanny, the associated gymnasiums, or their owners, agents and employees or the negligence of any other persons present on said premises including other persons using the said premises as members.

13. N.Y.L.J., September 23, 1960, p. 13, col. 3M-4M (Sup. Ct.).

14. See, e.g., Jones v. Great No. Ry., 68 Mont. 231, 217 Pac. 673, 37 A.L.R. 754 (1923). As in typical baggage ticket cases the plaintiff here did not sign anything and did not read the printed matter, assuming that the paper was merely a receipt and means of future identification.

The defendant's business does not seem to fall within any of the traditional categories where contractual disclaimers of liability have been invalidated on public policy grounds. For such a disclaimer the court was unwilling to invoke public policy in an area outside of those previously reserved for its application.[15] It seems that the legislature is cognizant of public policy in this area and will provide the courts with statutory authority for invoking the doctrine in other than traditional circumstances meriting exercise of the state's paternal role.[16] Furthermore, when the Uniform Commercial Code goes into effect in New York,[17] the courts will be endowed with another statutory basis for refusing the enforcement of contracts or clauses on public policy grounds. Section 2-302 of the Code provides that a court may refuse to enforce the whole or any part of a commercial contract that is unconscionable. The highest court of New Jersey, a state in which the Code has been adopted but is not yet effective,[18] referred to section 2-302 in a decision that declared void on public policy grounds a disclaimer of warranty clause in a form contract.[19] Although public policy justifiably may be used "to prevent freedom of contract from becoming a one-sided privilege,"[20] it seems wise for the Court to reserve judicial enlargement of public policy exceptions for extraordinary circumstances vital to general public welfare. Without this self-imposed restraint, precedent might be set unwittingly in areas that fail to produce dangers other than those to which the public is exposed ordinarily. In the instant case plaintiff's fall was occasioned by a slippery surface not unlike the tile floors and bathtubs encountered regularly in most homes. Future cases may be distinguished from this one if the injuries result from a failure to supervise specialized apparatus.

J. O. D.

---

15. Exculpatory clauses for negligence have been given effect in cases found to fall outside of the traditional categories involving public interest. See, e.g., Turner Constr. Co. v. Rockwood Sprinkler Co., 249 App. Div. 508, 293 N.Y. Supp. 551 (1st Dep't), aff'd, 275 N.Y. 635, 11 N.E.2d 793 (1937), construction contractor; Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936), construction contractor; Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932), landlord and tenant—note that this result is now statutorily precluded by § 234 of the Real Property Law; Graves v. Davis, 235 N.Y. 315, 139 N.E. 280 (1923), tug boat towage; Long I.R.R. v. American Bridge Co., 175 App. Div. 170, 161 N.Y. Supp. 543 (2d Dep't 1916), aff'd, 225 N.Y. 692, 122 N.E. 886 (1919), construction contractor; Paddle v. Atlantic Basic Iron Works, 91 N.Y.S.2d 336 (Sup. Ct.), aff'd, 276 App. Div. 921, 94 N.Y.S.2d 827 (2d Dep't 1949), purchaser exempted from liability to reimburse seller for claims of seller's employees resulting from purchaser's negligence.

16. Landlord-tenant contracts for disclaimer of liability were outside of judicially exercised public policy prohibition until the enactment of section 234 of the Real Property Law. See Kirshenbaum v. General Outdoor Advertising Co., supra note 13. See also Real Property Law § 235.

17. N.Y. Sess. Laws 1962, ch. 553, scheduled for effect September 27, 1964.

18. Scheduled for effect January 1, 1963.

19. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), 74 Harv. L. Rev. 630 (1960), 109 U. Pa. L. Rev. 453 (1961).

20. Kessler, supra note 7, at 640.

ZONING

REFUSAL OF SPECIAL ZONING EXCEPTION WHERE SIMILAR EXCEPTIONS WERE GRANTED WAS NOT ARBITRARY

Petitioner applied to a town board for a special exception to install gasoline storage tanks and conduct a service station. The board refused his application stating the grounds that the proposed location was too near to a shopping center and a school and that it fronted on a heavily trafficked street. The lower court reversed the board's determination and granted the application.[1] Appellate Division reversed. On appeal, *held*, affirmed, two judges dissenting. The board's refusal was not arbitrary, illegal, or an abuse of discretion. *Lemir Realty Corp. v. Larkin*, 11 N.Y.2d 20, 181 N.E.2d 407, 226 N.Y.S.2d 374 (1962).

The discretion of a town board in granting or refusing zoning variances and exceptions is grounded in statute.[2] Review of the board's discretionary action merely tests that action against a standard of reasonableness,[3] the definition of which provides the problem. In *Larkin v. Schwab*,[4] a leading case in the area, the Court of Appeals took the position that where the board's action concerns a subject affecting the public safety, specific standards need not be formulated by the board as a guide to its action. Moreover, the mere fact that the board previously granted a variance in circumstances similar to those at hand does not make their present refusal arbitrary. Presumably, the board's refusal may have been guided by slight differences which might sway discretion and which are not readily apparent to the removed forum of a court. In short the board need not bind itself by legislating narrow or particular guides nor by making prior discretionary choices. Their action must simply comport with the broad contours of public safety. A number of lower courts in this state have for some time inclined to a more stringent definition of reasonableness. This test demands that the facts recounted by the board for its decision be arguable. The causal relation between the object of public safety and the factual matter at the base of that object must be drawn out. This test approaches the usual standard established for the review of administrative action, the substantial evidence test.

To decide whether the Board's determination is reasonable, the Court requires it to set forth, in its record of the hearing, the facts which led to its conclusions.[5] Due Process requires this, especially when the Board acts upon its personal knowledge, so that a court will be able to determine whether the

1. 195 N.Y.S.2d 232 (Sup. Ct. 1959); rev'd, 10 A.D.2d 1005, 204 N.Y.S.2d 584 (2d Dep't 1960).

2. Town of Hempstead, N.Y., Zoning Ordinance §§ X-1.0, X-1.9.

3. See Rothstein v. County Operating Corp., 6 N.Y.2d 728, 729, 185 N.Y.S.2d 813, 158 N.E.2d 507 (1959).

4. 242 N.Y. 330, 151 N.E. 637 (1926).

5. See People ex rel. Fordham Manor Ref. Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927).