



LEGAL BRIEFS

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THE POWER OF WORDS

Key words: Exculpatory release, informed consent.

One of the remarkable things about the Anglo-American system of law is the contract. A contract is a private system of rules and procedures that governs the relationship between the parties. Not only do the parties have an opportunity to agree but also their agreement will be enforced by the government. The parties can provide what each of them is to do, and they can allocate burdens and risks between themselves. As events arise, the terms of the contract will govern and if one of the parties fails or refuses to carry out what the parties agreed to, the other party may go to a court and have the agreement enforced. It is a very simple but powerful concept and lies at the very foundation of our economic system. But the price paid for government enforcement is the ability of the government to selectively enforce what the parties agreed to. The government will not enforce contracts that are inherently unfair, especially when there is unequal bargaining power. In view of this selective enforcement, it is surprising to see the confidence that some people place in contracts, especially those trying to use the contract to take an unfair advantage.

Many healthcare practitioners have been concerned with the “malpractice crisis.” Insurance companies advise us that not only are more lawsuits filed against healthcare practitioners but also

that the average award keeps increasing. This results in an increase in malpractice insurance premiums. If contracts are powerful tools, why not use the power of a contract to solve the healthcare malpractice crisis? We could simply require, as a condition to receiving healthcare, that patients would agree not to sue their healthcare practitioners. Someone not familiar with the American legal system might claim that if healthcare practitioners would require these agreements before providing healthcare services, there would be no malpractice lawsuits, and the healthcare malpractice insurance crisis would disappear. In fact, various individual practitioners have tried such an approach. There are several cases where a healthcare practitioner has required, as a condition to performing healthcare service, that the patient must agree that the practitioner performing the service will not have any legal responsibility. The only problem with such a scheme is that it does not work.

This type of contract is known as an “exculpatory agreement,” and while the courts do not like them, they are, in general, enforceable. “If a release is clear, the general rule in Washington [state] is that exculpatory clauses are enforceable unless: (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous” (*Vodopest v MacGregor*, 128 Wash.2d 840, at p. 848). Courts are willing to enforce these

agreements if they seem fair, but courts do not want to enforce agreements under circumstances where no one could rationally agree to them or where one of the parties did not understand what he or she was signing or where one of the parties was so desperate that he or she had no choice but to sign what was demanded by another party.

Beehner v Cragun Corporation

In *Beehner v Cragun Corporation* (636 N.W. 2d 821 (Minnesota, 2001)), a woman was injured while riding a horse she had rented from a stable operator. The woman brought suit against the stable. However, the stable had required that she enter an agreement that provided:

I do further agree that except in the event of THIS STABLE's gross negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action against THIS STABLE and ITS ASSOCIATES for any economic and non-economic losses due to bodily injury, death, property damage sustained by me and/or my minor child and/or legal ward in relation to the premises and operations of THIS STABLE to include riding, handling or otherwise being near horses owned by or in the care, custody and control of THIS STABLE, whether on or off the premises of THIS STABLE. (636 NW 2d at 825)

The court held that the release was unambiguous, that there was no disparity of bargaining power between the parties, and that the types of services being offered were neither a public nor an essential service. Consequently, the court upheld the restriction on liability found in the contract and the suit was dismissed.

While horseback riding is pleasant, it is not a necessity. If Ms Beehner did not like the terms of the contract, she could have gone for a walk or a bike ride or driven to another stable. On the other hand, healthcare services are essential. Healthcare practitioners have an unfair advantage when bargaining with patients or future patients because no one wants to give up healthcare because of a disagreement over the form of a contract. There are a number of cases in which healthcare practitioners have tried to limit their liability for negligence only to find that the courts refuse to enforce their attempts to limit their liability.

Olson v Molzen

In *Olson v Molzen* (558 S.W. 2d 429, Tenn., 1977), a physician would only perform a procedure if the woman executed a release that read:

I am aware of the minor risks and hazards, and realize that this type of surgical operation is no different than any other kind of surgical operation and has attending complications that may be beyond the control of the surgeon. I, therefore, release Dr. Molzen and his staff from responsibility associated with any complications that may come up, or be apparent, in the next twelve (12) months.

And finally, I completely release Dr. Molzen and his staff from any present or future legal responsibility associated with performing an abortion on myself. (558 S.W. 2d 429)

Although the physician appeared to perform the abortion, the patient continued to experience nausea and a general sense of malaise. About 3 months later, she consulted another doctor who advised her that she was still pregnant. It was too late, however, to perform an abortion.

When she sued the physician, the physician claimed that she could not bring suit against him because she had signed a release. The physician presented a number of cases like the *Beehner* case in

which the court had upheld the ability of a party to contract away any liability for personal negligence. However, the court felt that this was not a satisfactory result in a case involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state. There are some relationships “that once entered upon, they involve a status requiring of one party greater responsibility than that required of the ordinary person, and, therefore, a provision avoiding liability is peculiarly obnoxious.” (*Williston on Contracts* quoted in *Olson v Molzen* (558 SW 2D at p. 430). The court ruled that a professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insisted that the physician must be unanswerable for his or her own negligence. “We do not approve the procurement of a license to commit negligence in professional practice.”

Tatham v Hoke

In *Tatham v Hoke* (469 F. Supp 914, (North Carolina, 1979)), the plaintiff sued a physician for negligence in performing a procedure. The physician answered the plaintiff’s complaint by moving to dismiss the complaint because it asked for more than \$15,000. In order to obtain the procedure, the patient had to agree to binding arbitration and to a provision limiting any liability to \$15,000. The patient argued that the release was invalid. The court found that the rule in North Carolina is that, in general, contracting parties may agree to limitations of liability for ordinary negligence. However, exculpatory agreements are not enforceable when they relate to transactions involving a substantial public interest or when they are colored

by inequality of bargaining power.

The court found that there were no North Carolina cases on the subject, but that there were cases in other jurisdictions holding that an exculpatory agreement was unenforceable where: (1) the party relying on the exculpatory clause is significantly regulated by public authority, (2) the party holds itself out to the public as willing to perform the sort of services subject to such regulation, (3) the party purports to be capable of performing the services in conformity with the standard of care established in the community, (4) the party provides the services in an atmosphere suggestive of unequal bargaining power, and (5) the party subjects the patient to precisely the sort of risk that is the subject of the exculpatory agreement. The court looked at the depositions taken in the case. The plaintiff testified that she did not even remember reading the back of the form when she signed it and did not know what its contents were. The doctor testified that he requires all prospective patients to sign the form and would not provide services unless they did so. The court held that the testimony was not sufficient to establish a clear and significant inequality of bargaining power in the usual sense. However, because the defendant was a professional seeking exculpation, a much lesser degree of proof of inequality of bargaining power was required and in the court’s opinion had been met. Therefore, the court held that the exculpatory provision was invalid.

When a party presents another party with a contract that has to be signed just as it is, with no negotiation or chance to bargain over its terms, it is called a “contract or adhesion.” The law of contracts permits one party to bargain with another and to use the authority of the state to enforce what both had

agreed to. Courts do not like being forced to impose harsh terms where one party is taking advantage of another. Consequently, contracts of adhesion are disfavored by the courts.

Belshaw v Feinstein

In *Belshaw v Feinstein* (258 Cal. App. 2d 711, 65 Cal.Rpte. 788, 1968), the defendants were specialists in stereotaxic surgery, a specialty with very few specialists in the state of California. The plaintiff had been diagnosed with Parkinson disease and the defendants advised him that he was a good candidate for stereotaxic surgery. During the operation the surgeons cut too deeply when cutting the skull and the ensuing bleeding caused permanent brain injury. Several issues were raised by the case, including the appropriateness of a jury instruction on *res ipsa loquitur*. The plaintiff had executed 2 written agreements relieving the defendants from liability due to any and all untoward risks or complications resulting from the stereotaxic surgical procedures. The court summarized California law on the subject of exculpatory releases.

...[A]n exemption from liability is invalid if the transaction exhibits some or all of the following characteristics: (1) it concerns a business of the type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) in exercising a superior bargaining power the party confronts the public with a standard adhesion contract of exculpation, and makes no provision whereby additional reasonable fees may be paid to obtain protection against negligence; (6) as a result of the trans-

action, the person or property of the member of the public is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or his agents. When all or most of these circumstances exist, the [California] Supreme Court held, the public policy of the state is violated. (258 Cal. App. 2d at 725)

Based on these factors, and on a prior California case involving a hospital and physicians, the court had no difficulty ruling that the release was invalid and did not protect the defendants.

Jaffe v Palotta Teamworks

In *Jaffe v Palotta Teamworks* (276 F.Supp.2d 103, District of Columbia, 2003), a woman was participating in a fund-raising, bicycle ride. The ride began in Raleigh, NC, and ended on the Mall in Washington, DC. The plaintiff approached a medical station complaining of dizziness and nausea. Volunteers staffing the station administered intravenous fluids but her condition did not improve and, in fact, became worse. The complaint alleged that she suffered a full cardiopulmonary arrest that caused her death. As a condition to enroll in the event, the plaintiff had been required to sign a release of liability including a medical waiver that provided, "I agree to assume all risks and to release and hold harmless...Palotta Teamworks,...Or any other Ride Medical Team member... who, through negligence, carelessness or any other cause, might otherwise be liable to me" (276 F. Supp. at 105). The federal district court, applying District of Columbia law (where the contract was entered into) dismissed the complaint because "In general, exculpatory contract provisions are valid and enforceable in the District of Columbia." The court noted that in other jurisdictions, courts have not recognized releases in cases involving pre-injury medical liability waivers when the circumstances

show less unfairness and more superiority of bargaining power. However, this was not a case against a hospital but against the organizers of a fund-raising, bicycle ride. There was no argument that the plaintiff was misled or did not understand what she was signing or had no choice. The release was a condition to participation in a recreational activity. There was no inequality of bargaining position because the plaintiff could very easily have refused to ride in the event. It just so happened that the problem was medical.

Lucier v Williams

In *Lucier v Williams* (366 N.J.Super. 485, 841 A.2d 907, 2004), a woman brought suit against a home inspector for fraud, breach of warranty, breach of contract, and negligence. She alleged that the inspector should have discovered that the roof of the house she was buying was defective because it lacked flashing. The court noted that exculpation clauses are particularly disfavored in contracts involving professional services and that in this case there was no negotiation at all. It was a true contract of adhesion. If the plaintiff wanted to engage the services of the home inspector, the plaintiff had to sign the contract with the exculpatory provision. The contract limited recoveries to the sum of \$500. The court looked at the parties' bargaining positions and noted that the home inspector had been in the business for 20 years, while the plaintiff was a first-time home buyer. The contract of adhesion and the unequal bargaining power of the parties led the court to conclude that the limitation on liability was unenforceable.

Eelbode v Chec Medical Centers

In *Eelbode v Chec Medical Centers*

(97 Wash.App. 462, 984 P.2d 436, 1999), a job applicant brought a medical malpractice case against a clinic that had been retained by a potential future employer to evaluate the applicant's physical condition. The applicant claimed that the clinic improperly administered a back torso strength test and had injured his back. As a condition for taking the test the applicant was forced to sign a document that said:

To the fullest extent permitted by law, I hereby release Chec...from all liability arising from any injury to me resulting from my participation in the exam including, but not limited to, any injury resulting from any failure to provide information concerning my physical or mental condition or to refrain from participating in an activity as required by this acknowledgment and agreement. (97 Wash. App. at p. 465)

The court found that the release was clearly stated, but nonetheless held it was against public policy. The applicant could not take the test unless the release was signed, which made the release a contract of adhesion, not subject to negotiation. There was a difference in the parties' bargaining power. The applicant needed the examination to obtain employment. This was not like *Jaffe v Pallotta Teamworks*, the District of Columbia case involving a bike ride, where the release was required to participate in a recreational activity. Here, the release was required to obtain a physical examination that was necessary to apply for a job. The court felt this gave the medical center an unfair bargaining position.

This split in cases where exculpatory clauses are generally valid in contracts relating to recreational pursuits but are held to be invalid when it comes to medical care reached a logical conclusion in *Vodapest v MacGregor* (128 Wash.2d 840, 913 P.2d 779, 1996). The plaintiff answered an advertisement looking for volunteers to participate

in a project run by a nurse to test if a special technique of "altitude breathing" was effective in becoming acclimated to mountain climbing at high altitude. The nurse, Rosemary MacGregor, was to lead a group to go mountain climbing in the Himalayas. In order to join the expedition, the plaintiff was required to sign a release that stated:

I personally assume all risks in connection with all activities, and further agree to indemnify and release Rosemary MacGregor, other group leaders, and all other participants from all liability, claims and causes of action or harm which may befall me arising from my participation in this trek. (128 Wash. 2d 846)

The plaintiff was MacGregor's roommate on the trek and began to show symptoms of altitude sickness at 8,700 feet. MacGregor suggested that it was a food problem. When the symptoms continued, MacGregor suggested that the plaintiff had some type of flu but could keep climbing. Finally, the plaintiff was sent down the mountain where she was ultimately diagnosed with cerebral edema from altitude sickness. The plaintiff claims to have suffered permanent brain damage. The plaintiff sued MacGregor claiming negligence. The trial court issued a decision before trial began that because of the exculpatory release, MacGregor could only be liable for gross negligence. The jury found insufficient proof of gross negligence. The plaintiff appealed.

The Supreme Court of Washington had to decide if the release violated public policy. MacGregor, the defendant, argued that the case was about mountain climbing, a high-risk sport, and the exculpatory release should be enforceable. The plaintiff argued that the case was about the medical care she should have received and in cases involving medical care, exculpatory releases are invalid. The question

on appeal was whether the trial court had correctly ruled that the release was valid, and that the jury could not consider whether MacGregor had merely been negligent. Thus, if the release was unenforceable and there was any interpretation of the evidence that supports the plaintiff's position, the plaintiff will be entitled to a new trial. In analyzing the case, the appellate court ruled that the trip was *both* a recreational trek and a medical research project. If the release was being applied to a situation involving only the recreational aspect, if, for example, the plaintiff had fallen on a steep trail as a result of the defendant's negligence, the release may have been effective. But if the plaintiff was complaining that the defendant's negligence was in the medical area, then the release was void as against public policy.

An additional aspect of this case was that after the defendant had recruited volunteers for the trek to the Himalayas, she decided to make it a research project on the effectiveness of her method of high-altitude breathing. Because human subjects were involved, to do so, she needed the sponsorship of the University of Washington. In the course of obtaining approval the defendant submitted the form of release that she was going to use only to have it disallowed by the University of Washington. Federal regulations prohibit the use of exculpatory releases in experimental research projects. The appellate court ruled that if the negligence occurred in the scope of a medical research project, the pre-injury exculpatory releases were invalid. The appellate court sent the case back to the trial court to make the determination.

Summary

Thus, we see that in enforcing contracts, the courts are not confined

to the written word and bring their own standards of fairness. In these cases, they have created an exception to the ability of private parties to set the terms of their relationship. If the activity is crucial enough to be licensed by the state, the courts will ensure that one party does not take advantage of an unfair bargaining relationship.

We have, in past columns, examined the area of informed consent and noted that the piece of paper to be signed evidencing consent is not as important as the process that it documents. To have a valid informed consent there must be an exchange of information and the opportunity to ask and answer questions. Informed consent, unfortunately, is an area where people are tempted to ignore the process and rely on an exculpatory informed consent acknowledgment. For the same reasons that we saw in exculpatory releases, a well-drafted

informed consent provision means very little if there has not been an exchange of information or if the patient's questions have not been answered. Ignoring the process but having the patient acknowledge that the patient has had an opportunity to ask questions and has been provided with relevant information will have the same effect as an exculpatory contract. If, in fact, the patient has not had a chance to obtain information and if the patient's questions are unanswered, then there has been no informed consent and any paper agreement to the contrary will be useless. The courts will not be party to depriving patients of the most basic of rights over their own bodies in the absence of actual consent.

We have heard of instances where physicians write well-crafted provisions into the medical chart stating that the process has been explained and accepted and

that the patient has acknowledged that all risks have been explained. If the process has not been followed, this is no better than getting the patient's signature on an exculpatory release. Having the patient sign a form has the minor advantage that at least there has been some participation by the patient. What the courts will look at is whether the process took place, whether the patients' questions were answered, and whether the risks were explained. Having the patient sign and acknowledge that his or her questions were answered when they were not and that the patient has been advised of risks and alternatives when the patient has not, will not carry any weight. In the absence of the proper informed consent process, writing something in a chart that the patient has no control over will provide the same lack of protection as an exculpatory release.