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## *Exculpatory Clauses in Leases*

Margaret Mazza\*

**E**XCULPATORY CLAUSES in leases are used in order to free the lessor from liability for his future acts of negligence. For the purpose of this article we will assume that there was a legal duty resting upon the party asserting the clause as a defense. The validity of such a provision then requires a choice between two conflicting policies: (1) a person should be liable for the negligent breach of his duty; (2) a person should have the right to contract freely. The common law developed the rights and duties of the parties in certain relations and determined that damages be awarded for the negligent breach of those duties. The basic relations so determined are those of the common-carrier and passenger, bailor and bailee, employer and employee, innkeeper and guest, and landlord and tenant.<sup>1</sup>

Common law tort liability applies to these situations, except as modified by the element of contract. What happens to the common law liability when two parties agree that certain rights are to be relinquished and duties escaped by the contracting parties?

### History of Exculpatory Clauses in Leases

Every State, by case law or legislation, has regulated the rights and duties of landlord and tenant. As the renting of property became more prevalent, especially due to urban development, legislation for its control became necessary. During the 19th century, many States enacted statutes imposing the duty of premises repair upon the lessor.<sup>2</sup> The California code is typical and provides as follows:

The lessor of a building for the occupation of human beings must, in the absence of an agreement to the con-

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<sup>1</sup> *Simmons v. Columbus Venetian Stevens Buildings*, 20 Ill. App. 2d 1, 155 N. E. 2d 372 (1959); and see n. 42 below.

<sup>2</sup> Mont. Rev. Codes, § 42-201 *et seq.* (1947), enacted in 1895; N. D. Rev. Code, § 47-1612 *et seq.* (1943), enacted in 1887; Okla. Stat. Ann., § 41-31 *et seq.* (1937), enacted in 1910; S. D. Code of 1937. § 38.0409 *et seq.* enacted in 1919.

trary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable.<sup>3</sup>

“In the absence of an agreement to the contrary” certainly left room for the use and enforceability of exculpatory clauses. Justice Cardozo, pin-pointing the problem, stated in *Altz v. Lieberman*<sup>4</sup> that:

The legislature must have known that unless repairs were made by the landlord, they would not be made by anyone.

Thus, because of the imposition of duties, lessors sought exculpatory clauses as a means of avoiding them. The use of these clauses became widespread and their variety now is limited only by the ingenuity of the legal draftsmen. As legislation followed legislation and decision followed decision, the States disagreed as to the validity of exculpatory clauses.

Illinois upholds these clauses and infers in its decisions that the only way of nullifying the clause is to prove disparity of bargaining power. In a case which dealt with the rental of business property, the Illinois court concluded that there is nothing contrary to public policy in the use of exculpatory clauses in leases; these agreements are purely private affairs, and if there is no evidence of disparity of bargaining power between the parties, the clause is sufficient to waive the tenant's claims against the landlord for the alleged negligence.<sup>5</sup> In *Simmons v. Columbus Venetian Stevens Buildings*<sup>6</sup> the Illinois court attacked the reasoning on which its common law is based, but still following it, found for the landlord. This same State has also upheld the validity of such clauses for apartment rentals.<sup>7</sup>

States upholding exculpatory clauses in leases consider freedom to contract as an almost absolute right and therefore, disparity of bargaining power is difficult to prove. For example, a lease with an exculpatory clause was signed by a seventy-four-year old man. If the man had not renewed the lease, he would have been required to move a long established business, a hard-

<sup>3</sup> Civil Code of Calif., § 1942 (1872).

<sup>4</sup> 233 N. Y. 16, 134 N. E. 703, 704 (1922).

<sup>5</sup> *Jackson v. First National Bank*, 415 Ill. 453, 144 N. E. 2d 721 (1953) (injury occurred on a common stairway).

<sup>6</sup> *Supra* n. 1.

<sup>7</sup> *O'Callaghan v. Walker & Beckwith Realty Co.*, 15 Ill. App. 2d 349, 146 N. E. 2d 198 (1957), *aff'd* 15 Ill. 2d 436, 155 N. E. 2d 545 (1959).

ship at his advanced age. These circumstances were pleaded as grounds for disparity of bargaining power, but the court did not consider this to be sufficient to render the clause unenforceable.<sup>8</sup> It has also been ruled that an acute housing shortage does not establish unequal bargaining power; but there is a split of authority on this question.<sup>9</sup>

An escape solution to the problem used by many courts is to construe the clause strictly. In the well-known case of *Worthington v. Parker*,<sup>10</sup> the clause provided that the landlord was not liable for damage due to leakage in the roof or piping. The court, in strictly construing the clause, ruled that the landlord was not liable for damage resulting from ordinary wear and tear, but that he was liable for misrepair. The rule of strict interpretation of exculpatory clauses is followed in Ohio.<sup>11</sup> In further limiting the provision, the Ohio rule is that the landlord must correct conditions which constitute a menace to the public, and cannot escape liability to persons not on the premises at the time of harm.<sup>12</sup>

An example of the application of the public nuisance theory to exculpatory clauses is found in *Godfrey v. West Carolina Power Co.*<sup>13</sup> The defendant had caused a flooded area to develop, which attracted disease-carrying mosquitoes. The flooding of the area did not constitute grounds for action by the lessee because of a limiting clause, but the court ruled that the facts resulted in the creation of a public nuisance and therefore awarded damages to the plaintiff.

Other theories are used by the courts to limit the application of exculpatory clauses. New York courts have interpreted a clause relieving a landlord from liability for loss sustained by a tenant as intended by the parties to limit liability for the negli-

<sup>8</sup> *Simmons v. Columbus Venetian Stevens Buildings*, *supra* n. 1.

<sup>9</sup> *O'Callaghan v. Walker & Beckwith Realty Co.*, *supra* n. 7, which held that acute housing shortage did not prove disparity of bargaining power. But in *Kay v. Cain*, 154 F. 2d 305 (D. C. Cir. 1946) it was held that an acute housing shortage proved disparity of bargaining power and therefore the exculpatory clause was unenforceable.

<sup>10</sup> 11 Daly 545 (N. Y., C. P. 1885).

<sup>11</sup> *Mansfield Mut. Ins. Co. v. Cleve. C., C. & St. L. R. R. Co.*, 74 Ohio St. 30, 77 N. E. 269 (1906); *George H. Kingledy Lumber Co. v. Erie R. R. Co.*, 102 Ohio St. 236, 131 N. E. 723 (1921).

<sup>12</sup> *Friedl v. Lackman*, 136 Ohio St. 110, 16 Ohio Ops. 40, 23 N. E. 2d 950 (1939) (injury occurred on sidewalk and was caused by a window glass which fell due to a worn sash cord).

<sup>13</sup> 190 N. C. 24, 128 S. E. 485 (1925).

gence which allowed the defect to arise, but not for the failure to repair after the condition arose and the landlord was notified.<sup>14</sup> In another case, the clause was interpreted to make the landlord liable for his affirmative negligence in not repairing a known defect, but exempting him from liability where the cause of the damage was wear and tear, an inherent defect, or the action of the elements even when by active vigilance he might have prevented the damage.<sup>15</sup> In a similar fact situation as in the above two cases, but where no notice was given the landlord and the negligence was the mere existence of—not the failure to correct—the defect, the court ruled that the landlord was not liable.<sup>16</sup> The difficulty here is in deciding what was the intention of the parties or what constitutes affirmative negligence. Clauses explicitly providing that the landlord shall not be liable for leakage damage, no matter how negligent the landlord, are enforceable.<sup>17</sup>

Another possible escape is lack of consideration for the limiting clause. Lower rent or additional services to the tenant at no charge, exchanged for his consent to the clause in the lease, have been viewed as consideration for the clause, making the contract enforceable.<sup>18</sup>

Generally limiting provisions in contracts between carrier and passenger are void and unenforceable. Courts, in finding for the plaintiff, have put landlord-tenant contracts in the classification of carrier contracts. By way of example, a passenger in an elevator has been considered a passenger in the elevator and not a tenant of the landlord.<sup>19</sup>

The element of fraud also can affect the validity of an exculpatory clause. An action was brought for damage due to mois-

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<sup>14</sup> *Garrity v. Propper*, 209 App. Div. 508, 205 N. Y. S. 192 (1924); *Nyamco Associates v. Cherniaeff*, 152 Misc. 306, 273 N. Y. S. 327 (1934). New York law is now governed by statute which is discussed below.

<sup>15</sup> *Kessler v. The Ansonia*, 253 N. Y. 453, 171 N. E. 704, *affg.*, 277 App. Div. 290, 237 N. Y. S. 537 (1930).

For the same result in Alabama, see *Wheeler, Lacey & Brown, Inc. v. Baker*, — Ala. —, 112 So. 2d 461 (1950).

<sup>16</sup> *Lowry & Feffer, Inc. v. Mor-ro Realty Corp.*, 223 App. Div. 621, 229 N. Y. S. 169 (1928).

<sup>17</sup> *Kirshenbaum v. General Outdoor Adv. Co.*, 285 N. Y. 489, 180 N. E. 245 (1932).

<sup>18</sup> *Shay v. Sherwood*, 66 Pa. Supp. 463 (1917). In this case, hot and cold water were supplied, with no additional consideration given by the lessee to the landlord. The same reasoning was used in *Manius v. Housing Authority of City of Pittsburgh*, 350 Pa. 512, 39 A. 2d 614 (1944).

<sup>19</sup> *Steiskal v. Marshall Field & Co.*, 238 Ill. 92, 87 N. E. 117 (1909); *Springer v. Ford*, 88 Ill. App. 529 (1899), *affd.* 189 Ill. 430, 59 N. E. 953 (1901).

ture in a basement. The clause stated that the lessor should not be liable for damage "resulting from any source whatsoever." The court ruled that the clause was ineffective because of the fraudulent statement of the lessor in representing the basement as dry.<sup>20</sup>

Licenseses of the lessee present another problem. In one case, a truck driver was injured while picking up the lessee's laundry. The court denied recovery on the theory that the driver's rights against the landlord were derived from the lessee. Because of an exculpatory clause, the lessee would have no claim; hence, neither did the driver.<sup>21</sup> Illinois holds another view: the lessee's employees are not denied recovery because of an exculpatory clause agreed to by the lessee.<sup>22</sup>

### Public Policy Deeming Exculpatory Clauses Invalid

Some States, by court decisions or legislation, have ruled exculpatory clauses in leases invalid. One of these is New Hampshire, which ruled that one may not by contract relieve himself of the consequences of future non-performance of his common-law duty to exercise ordinary care, and that the public policy of protecting against the negligence of individuals in causing injuries was transcendent and could not be waived by contract.<sup>23</sup>

New York courts originally decided that a covenant to relieve the landlord of his obligation to repair was valid and not against public policy.<sup>24</sup> But because of the New York Multiple Dwelling Law, Section 2, courts refused to recognize the validity of contract provisions which exempted the landlord from liability for his negligence in the maintenance and repair of multiple dwellings.<sup>25</sup> Section 234 of the New York Real Property Law, as amended, strongly expresses the present rule of that State:

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused or resulting from

<sup>20</sup> *Blumenfeld v. Wagner*, 63 Misc. 69, 116 N. Y. S. 500 (1909).

<sup>21</sup> *Telless v. Gardner*, 266 Mass. 90, 164 N. E. 914 (1929).

<sup>22</sup> *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354 (1905).

<sup>23</sup> *Wessman v. Boston & Maine Railroad*, 84 N. H. 475 (1930); *Papakolos v. Shaka*, 91 N. H. 265, 18 A. 2d 377 (1941).

<sup>24</sup> *Kirshenbaum v. General Outdoor Adv. Co.*, *supra* n. 17.

<sup>25</sup> *Excellent Holding Corp. v. Richman*, 155 Misc. 257, 279 N. Y. S. 587 (1935).

the negligence of the lessor, his agents, servants, or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void and against public policy and wholly unenforceable.<sup>26</sup>

In referring to the above section of the statute, one New York court said that although an individual contract exempting the landlord from liability for his negligence may not be of any public concern, the existence of a large number of such agreements unquestionably is a matter of public concern.<sup>27</sup>

The interpretation and application of Section 234 of the New York statute involved some controversy. Immediately upon its enactment, the question arose as to its effect upon leases executed prior to its passage. In *Hanfeld v. A. Broido Inc.*,<sup>28</sup> the court ruled on prospective application, because retroactive application would give rise to doubts about the Act's constitutionality. Clauses making the lessee responsible for repairs and liable for the non-repair of the premises are still valid in New York. Such provisions have been interpreted as not attempting to exculpate the lessor from liability.<sup>29</sup> It has been further held that, where the lessor's negligence is "passive," a clause exempting him from liability to third persons coming on the property is valid because it is purely an indemnity provision and therefore not within the Act.<sup>30</sup> It would seem that a legislative enactment such as Section 234 would settle the matter, but the old common law still exerts an influence on the courts. Dissenting opinions still are written, such as in *Mutual Life Insurance Co. of N. Y. v. Winslow*,<sup>31</sup> where the reasoning of the *Kirshenbaum*<sup>32</sup> case is brought up and viewed as sound.

Some States have enacted partial legislative changes in order to control exculpatory clauses in leases of tenements or multiple

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<sup>26</sup> N. Y. Real Property Law, § 234 (amend. 1937).

<sup>27</sup> *Katz, Inc. v. East Thirtieth Street Corp.*, 172 Misc. 873, 16 N. Y. S. 2d 640 (1939).

<sup>28</sup> 167 Misc. 85, 3 N. Y. S. 2d 463 (1938).

<sup>29</sup> *Mirsky v. Saeiak Realty Co.*, 256 App. Div. 658, 11 N. Y. S. 2d 191 (1939).

<sup>30</sup> *Nixon v. Genung's Inc.*, 84 N. Y. S. 2d 892 (1948); new trial ordered on other grounds, 275 App. Div. 1049, 92 N. Y. S. 2d (1949).

<sup>31</sup> 183 Misc. 754, 52 N. Y. S. 2d 255 (1944).

<sup>32</sup> *Supra* n. 17.

dwellings. Some typical examples are Massachusetts,<sup>33</sup> New Jersey,<sup>34</sup> Pennsylvania,<sup>35</sup> and Ohio.<sup>36</sup>

### Conclusion

Exculpatory clauses in some other contractual relations have been declared void and unenforceable because of disparity of bargaining power or the social consequences of the contract. Among these are employer and employee,<sup>37</sup> common-carrier and passenger,<sup>38</sup> innkeeper and guest,<sup>39</sup> and bailor and bailee<sup>40</sup> contracts. Comparing the rule of law for the above situations with the landlord and tenant relation, Justice Bryant in *Simmons v. Columbus Venetian Stevens Buildings*<sup>41</sup> asked the following rhetorical questions:

Is it more socially desirable that people should travel freely and without danger than that they should have a safe place to live? . . . Is it any more important that a man should have a safe place to work than that he should have a safe place to live? . . . Is the guest at an inn under greater compulsion to find shelter than the tenant who comes to town to live and work and seeks shelter for himself and his family?<sup>41</sup>

It should be kept in mind that, in spite of these statements, the court, compelled by Illinois precedent, found for the landlord.

To illustrate still greater confusion, the bailee would be liable for damage to an automobile in a parking lot under certain conditions. But the landlord would not be liable for the same damage in a garage rented in connection with living quarters, if the

<sup>33</sup> Mass. (Ann. Laws), Chap. 144, §§ 80-82 (1949); provides that the duty of maintenance of fire escapes is non-delegable and that the Board of Health can declare a condition of non-repair to be a public nuisance and require its repair.

<sup>34</sup> N. J. Stats. An., Title 55, § 7-1 (1940); requires the maintenance of the roof and areas of common use.

<sup>35</sup> Pa. Stats. Ann., Title 53 PS, § 25025 (1948); states that every part of a tenement must be kept in good repair and requires the area in and about the premises be kept clean and free of dirt, filth, and garbage.

<sup>36</sup> Ohio R. C., § 3707.01 (1953) gives the Board of Health rights in the abatement of nuisances.

<sup>37</sup> 6 Williston, Contracts, § 1751 C.

<sup>38</sup> 9 Am. Jur., Carrier, § 739.

<sup>39</sup> Williston, *op. cit. supra* n. 37.

<sup>40</sup> *Ibid.*

<sup>41</sup> 20 Ill. App. 2d 1, 155 N. E. 2d 372, 384-385 (1958; rehear. den. 1959).



lease contained a limiting clause.<sup>42</sup> Another interesting situation would be injury to a custodian who rented a suite in the building which he serviced. If his lease contained a valid exculpatory clause, would the landlord be exempt from liability? Or would the custodian be considered an employee, thereby making the landlord liable?

If because of the clause the tenant receives a reduction in rent or additional services at no charge, or the tenant is the sole occupier of the premises, the validity of the clause is well grounded. On the other hand, where contracts containing a limiting clause are used in great number and as a matter of course by realty companies, or when applied to special fact situations, this question takes on confusing and unfair aspects. After examining many cases, it is apparent that consistency and judicial equanimity toward the contracting parties must be the aim of those working with and legislating for exculpatory clauses and their validity.

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<sup>42</sup> Arensberg, *Limitation by Bailees & Landlords of Liability for Negligent Acts*, 51 Dick. L. Rev. 36 (1946); Oleck, *Damages To Persons & Property*, chap. 25 (1957 rev.) as to limitation of liability in contracts of bailment and carriage.