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Admiralty - Exculpatory Clause in Towage Contract Held Invalid as Against Public Policy

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CASE NOTES

ADMIRALTY–EXCULPATORY CLAUSE IN TOWAGE CONTRACT HELD INVALID AS AGAINST PUBLIC POLICY

The *Cairo*, a steam towboat, pulled the oil barge *Bisso* up the Mississippi River. The barge was without any officers, crew, steering apparatus, or power of its own. The *Cairo* furnished the motive power and controlled the barge's movements. While so engaged, the barge struck a bridge pier and sank. The respondent disclaimed liability for any negligence because the contract of towage called for the tow to be at the "sole risk" of the barge owners, providing also that masters, crews, and employees of the *Cairo* should "in the performance of said service, become and be the servants" of the petitioner's barge *Bisso*. The district court found that the respondents were negligent in the management of the tow, but that these clauses relieved them from liability.[1] The Court of Appeals affirmed.[2] The Supreme Court reversed, holding that the exculpatory clause in the towage contract could not relieve the liability of the respondent for his negligence. *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955).

There is no express constitutional or statutory provision relating to exculpatory clauses in maritime contracts. The Court drew upon its constitutional powers in matters maritime to decide the case.[3] Prior decisions and public policy considerations are the basis for the holding.

The first question decided was that a towboat owner could not, by contract, relieve himself of liability for his negligence in towing another vessel which was without crew or power. The Court based this holding on public policy held to have been enunciated in earlier decisions, concerning tugs and tows. *The Steamer Syracuse* was cited as having set forth this rule.[4] That Court, in a very brief statement, held that the law had not imposed on the tug owner the liability of a common carrier, but that a tug owner would have to exercise "reasonable care, caution, and maritime skill." If such is not exercised the tower must be liable for the results. "It is unnecessary to consider the evidence relating to the alleged contract of towage . . . [because even if] the canal boat was being towed at her own risk, nevertheless, the steamer is liable"[5] if the tower's negligence caused the loss.

[1] 114 F. Supp. 713 (E.D. La., 1953).

[2] 211 F. 2d 401 (C.A. 5th, 1954).

[3] U.S. Const. Art. 3, § 2.

[4] 79 U.S. 167 (1870).

[5] Ibid., at 171.

This represents in substance the Court's only comments on the question. The opinion is concerned mainly with whether the *Syracuse* was navigated with reasonable skill and care. The defense attempted to show that reasonable care had been exercised. The Court itself does not suggest that it is setting forth public policy barring agreements by which a private carrier may relieve itself from liability. Two years later in *New York Central R. Co. v. Lockwood*,[6] the same Court decided that such agreements were not valid for common carriers. Eighteen years later a similar rule for common carriers by water was adopted.[7] Mr. Justice Frankfurter in his dissent in the instant case points out:

> Surely this Court [*The Syracuse*] did not impliedly, in a moment of absent mindedness, declare such a rule in the case of a private carrier and two years later require 25 pages to justify it in the case of common carriers.[8]

The majority of the Court in the instant case declared that *The Syracuse* was decided in an era which was hostile to release from negligence clauses. It is not evident, however, why the Supreme Court would go to the length of writing an involved opinion justifying its decision as to common carriers, protecting the passenger public at large when it required barely one hundred and fifty words to establish such a policy as to private carriers two years before. Further, the hostility toward such clauses occurred generally where there was great inequality of bargaining power; i.e., the average train passenger as to the railroad company. In the case of tug versus tow such inequality has not been shown. Regardless, most courts accepted the doctrine, and later cited *The Syracuse* as having established it.

Prior to *The Syracuse* two New York courts held that tug owners were not common carriers and that, therefore, they might perhaps limit their liability by special agreement.[9] *Alexander v. Greene* was appealed and reversed.[10] The tug was held liable for its negligence, apparently as a negligent common carrier. The case of *Wells & Tucker v. The Steam Navigation Co.*[11] on appeal somewhat later, held that tug owners were not common carriers, but that a tug could not by a contractual clause providing that towing be done "at the risk of the master and owner thereof" escape liability for their negligence. The court stated that such a provision would certainly have to be put more clearly, and that the parties evidently

[6] 84 U.S. 357 (1873).

[7] Liverpool and Great Western Steam Co. v. Phenix Insurance Co., 129 U.S. 397 (1889).

[8] Bisso v. Inland Waterways Corp., 349 U.S. 85, 103 (1955).

[9] Wells & Tucker v. the Steam Navigation Co., 2 Comst. (N.Y.) 204 (1849); Alexander v. Greene, 3 Hill (N.Y.) 9 (1842).

[10] 7 Hill (N.Y.) 533 (1844). [11] 8 N.Y. 375 (1853).

had in mind those disasters which might occur without the tug's negligence. This is slightly contradictory because if tugs are not common carriers they are liable only for their own negligence and wilful misconduct. Thus, the contractual clause would be meaningless. The court, however, did not state that a release from negligence clause could not, even if properly drawn, be given that effect. This court cited the second *Alexander* case with approval.

In 1850 in *The Vanderslice v. The Superior*,[12] a federal district court held that a tug owner could not avoid liability for his own negligence though the tow was to be at the risk of the tow owner. In this case the weather was such as to make the voyage hazardous. The tug captain set out after it was agreed that the tow was to be at its own risk. The tug through poor seamanship and negligence injured the tow and sought to avoid liability on the strength of this agreement. The court in a dictum thought it advisable that tugs be considered common carriers, and held the tug liable for its negligence in spite of the agreement. *The Princeton*,[13] in 1851, held that owners of towing vessels were not liable as common carriers citing the first *Wells* case, and indicating that a tug owner might be able to limit his liability by contract. On appeal in 1853, the court stated that "an agreement to be towed 'at the risk of the master and owners' of the tow, does not exempt the tug from proper and reasonable care and skill in her navigation."[14] The court held that the evidence did not show that the *Princeton* was definitely negligent, and therefore, did not go further with the question, nor was reference made to other cases. It was, then, in this climate of judicial opinion that *The Syracuse* was decided, coming forth with its rule, representing a crystallization of the rules and trends shown by these earlier cases. None of these earlier cases including *The Syracuse*, purported to be stating public policy. In fact, some thought of tugs as common carriers and liable therefore, unless the very highest degree of care was exercised. The rest seemed simply to consider it wrong for a tug to escape liability for its negligence with no real basis given in law for this result. In any event, *The Syracuse* opinion of 1870 cited none of the prior decisions in similar circumstances.

After *The Syracuse*, the Supreme Court in *The Margaret*[15] held that although a tug is not a common carrier, it is bound to exercise reasonable skill and care in towing. There was no question of an exculpatory clause here. In 1878 the court in *Ulrich v. The Sunbeam*[16] held that it is settled that a tug owner is not a common carrier, but that it is against public

[12] 28 Fed. Cas. 970, No. 16,843 (E.D. Pa., 1850).

[13] 19 Fed. Cas. 1342, No. 11,433a (S.D. N.Y., 1851).

[14] 19 Fed. Cas. 1344, 1345, No. 11,434 (C.C. N.Y., 1853).

[15] 94 U.S. 494 (1876).

[16] 24 Fed. Cas. 515, No. 14,329 (D.C. N.J., 1878).

policy to allow a tug owner to escape liability for his negligence by the expedient of a towage contract provision. This court did not cite *The Syracuse* at all. In *The Jonty Jenks*[17] the court cited *The Princeton*[18] and *Langley v. The Syracuse*[19] and stated that it is not necesary to consider whether or not the towage was to be at the sole risk of the tow because such agreements are not valid as exempting the tug from the duty to use reasonable care.

Then in the Second Circuit in 1909, *The Syracuse* was repudiated in *The Oceanica.*[20] A tug, the court stated, is liable only for the results of its negligence, so that contract clauses to assume all risks or at the sole risk as in *The Syracuse* would be meaningless unless they were understood to include negligence. The court, apparently did not mean to suggest that a tug owner would not be liable for intentional wrongs, but this was not mentioned in the opinion. However, the court decided to give the contract effect and allow the tow company to avoid liability for its negligence. This court hoped that the question would be set at rest by the Supreme Court, but certiorari was denied.[21] The court in *The Oceanica* felt that it was not against public policy to allow a tug to escape liability through an exculpatory clause. The court did not go against any *express* opinions to the contrary except for the lower court holding in *The Sunbeam.*[22] Courts in the Second Circuit have followed *The Oceanica* since.[23]

In *Compañia de Navegacion Interior, S.A. v. Firemen's Fund Ins. Co. (The Wash Gray)*[24] the Supreme Court of the United States again considered the question. In this case, a tug owner insured his small tug with defendant insurance company; the tug was lost at sea while being towed. The insurance company denied liability on the policy for the reason that the plaintiff had entered into a contract with the tug relieving the tug from liability for its negligence. The insurance company claimed that this contract was valid, and that therefore the insured had bargained away the insurance company's subrogation rights, thus releasing them by provision in the insurance agreement of any obligation to pay on the policy.

This contract stated that the tower "is not responsible in any way for loss or damage to the *Wash Gray.*"[25] The Court then quoted the first para-

[17] 54 Fed. 1021 (N.D. N.Y., 1893).

[18] 19 Fed. Cas 1344, No. 11, 434 (C.C. N.Y., 1853).

[19] 14 Fed. Cas. 1115, No. 8068 (S.D. N.Y., 1867).

[20] 170 Fed. 893 (C.A. 2d, 1909).

[21] 215 U.S. 599 (1909).

[22] 24 Fed. Cas. 515, No. 14329 (D.C. N.J., 1878).

[23] Ten Eyck v. Director General of Railroads, 267 Fed. 974 (C.A. 2d, 1920); The Melvin and Mary, 23 F. Supp. 398 (E.D. N.Y., 1938); The Mercer, 14 F. 2d 488 (E.D. N.Y., 1926).

[24] 277 U.S. 66 (1928).

[25] Ibid., at 73.

graph of *The Syracuse* opinion with approval and held that the contract here would not release the tower from liability for his negligence; and that, therefore, the insurance company could not avoid liability on the insurance policy on this ground. There were other considerations not material here. The Court did not go into the matter beyond applying *The Syracuse* opinion to this clause. The dispute was not, therefore, finally set at rest as it might have been by a somewhat more definite statement or reference to *The Oceanica.*

In the Sixth Circuit, the courts have construed clauses as not reaching the negligence involved, and have avoided stating directly that a tug owner could not under any circumstances relieve himself of liability for his own negligence.[26] The Ninth Circuit has indicated in several cases that it preferred the rule of *The Syracuse* but it has not passed on a case squarely in point.[27] The instant case, then, should settle the question, and leave no room for doubt.

The second question decided by the instant case stems from the first. The court held as invalid provisions in towage contracts that tug company employees become the servants of the tow, thus relieving the tug company of liability for their negligence. Such provisions were held to be simply a method for the tug company to avoid liability for its own negligence, an attempt to circumvent the principle rule of the case. *Sun Oil Company v. Dalzell Towing Company*[28] was cited as allowing such a contractual provision as to pilots. An extension of this rule to include crews, masters, and employees was sought and refused.

In the *Sun Oil* case respondent furnished a pilot and three tugs. Petitioner's ship was to proceed under her own power with assistance from the tugs. The ship was damaged when run aground due to the pilot's negligence. There was a clause in the pilotage contract which stated that the pilot was to be servant of the petitioner while engaged in piloting the petitioner's vessel, and that, therefore, the tug owners were not liable. The Court found for the respondent on this ground. The instant case is readily distinguishable from this case in that the master, crew, and employees of the *Cairo* were to become and be, in the performance of such towage, the servants of the *Bisso,* while the *Sun Oil* case refers only to pilots. Further, in the *Sun Oil* case, the petitioner's ship was proceeding under her own power with some assistance from the tug as opposed to the situation in the instant case where the tug was engaged in towing a vessel without crew

[26] Walter G. Hougland, Inc. v. Muscovalley, 184 F. 2d 530 (C.A. 6th, 1950); Great Lakes Towing Co. v. American S.S. Co., 165 F. 2d 368 (C.A. 6th, 1948); Great Lakes Towing Co. v. Bethlehem Transportation Corp., 65 F. 2d 543 (C.A. 6th, 1933).

[27] British Columbia Mills Tug and Barge Co. v. Mylroie, 259 U.S. 1 (1922); Alaska Commercial Co. v. Williams, 128 Fed. 362 (C.A. 9th, 1904). See Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F. 2d 531 (C.A. 9th, 1941).

[28] 287 U.S. 291 (1932).

or power of its own. This extension of the rule of the *Sun Oil* case was not allowed.[29]

> The rule against contractual exemption of a tow boat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter "employment" is purely a fiction.[30]

Then in *Boston Metals Co. v. S/S Winding Gulf*,[31] decided the same day as the instant case, the Supreme Court held that it was error to impute the negligence of the towboat company's employees to the tow, because exculpatory clauses are not valid. In that case, the owners of an obsolete destroyer brought a suit in admiralty against the owners of a steam vessel, the *Winding Gulf*, to recover for the loss of their destroyer which sank after a collision with the *Winding Gulf*. The destroyer, which was without crew or power of its own, was being towed by the tug Peter Moran. The owners of the *Winding Gulf* filed a cross libel against petitioner on the grounds that the collision was caused by the unseaworthiness of the destroyer. The district court found that the collision was due to the fact that the destroyer was inadequately lighted because the tug had not put a crew on board the destroyer to maintain such lighting.[32] In addition, the *Winding Gulf* was found to have been negligent in navigation.[33] This court imputed negligence of the tug to the petitioner on the basis of the towage contract which provided that the tug's master and crew would become the servants of the petitioner and the circuit court affirmed.[34] The Supreme Court, however, as noted previously, reversed this holding allowing petitioner to recover without division of damages.

In a third case decided with the instant case the court did not allow the tug company to gain affirmative relief on the basis of a pilotage release from negligence clause.[35] Petitioner's employee, a pilot, went aboard the *Christopher Gale*, to assist in moving the ship from a Hoboken pier to a Brooklyn pier. Two of petitioner's tugs were to assist, but the *Christopher Gale* was to move for the most part under her own power. During this operation, one of the tugs was crushed against a pier and it was for damage to this tug that petitioner sought recovery. The district court found that the collision occurred because of the negligence of the pilot

[29] See Bisso v. Inland Waterways Corp., 349 U.S. 85, 93, 94 for a discussion of the pilots' unique position in the maritime world.

[30] Ibid., at 95.

[31] 349 U.S. 122 (1955).

[32] Boston Iron and Metal Co. v. S.S. Winding Gulf, 85 F. Supp. 806 (D.C. Md., 1949); The St. Francis, 72 F. Supp. 50 (D.C. Md., 1947).

[33] In admiralty, under maritime law, contributory negligence is used mainly as a basis for division of damages. 54 A.L.R. 238, 239 (1928).

[34] Boston Metals Co. v. S.S. Winding Gulf, 209 F. 2d 410 (C.A. 4th, 1954).

[35] United States v. Nielson, 349 U.S. 129 (1955).

in not heeding the effect of wind and tide on the *Christopher Gale*.[36] Petitioner asserted that the pilot, their own employee, was the servant of the respondents and that they, by virtue of the pilotage contract, were not responsible for his negligence, and further, that they were entitled to affirmative relief in that the pilot was acting as the servant of the respondent. The district court denied recovery. The circuit court affirmed.[37] The Supreme Court held that the petitioner would not be responsible for the negligence of the pilot (giving effect to a pilotage release from liability for negligence clause) in any damage to respondent's ship, but that the tow company could not obtain affirmative relief for damage to their own ship caused by their pilot's negligence. The Supreme Court, however, hints that perhaps, with proper contractual language, such liability might attach.

The decision in the instant case sets the law at rest, stating definitely that a tug, whether acting as a common or contract carrier, cannot by contract escape libility for its negligence. The *Bisso* case combined with the *Boston Metals* case indicates that the Court will not allow this rule to be circumvented. The exception in favor of pilotage contracts is recognized in the *Bisso,* the *Boston Metals* and the *Nielson* cases, the last named case denying affirmative relief on the basis of such a contract. Thus, there would seem to be little room for question left in this area. There will be little chance for a change unless, perhaps, it could be shown authoritatively that such rules work a hardship on tug companies, that they are less able to carry the risk of loss than the shippers, that, in short, the rules are outmoded.

[36] The Dauntless No. 6, 112 F. Supp. 730 (E.D. N.Y., 1953).

[37] United States v. Nielson, 209 F. 2d 958 (C.A. 2d. 1954).

DOMESTIC RELATIONS–PUBLIC POLICY REQUIRES ENFORCEMENT OF INVALID SEPARATION AGREEMENT TO PREVENT UNJUST ENRICHMENT

Plaintiff, nearly twenty years before bringing suit, entered into a separation agreement with his wife at a time when they were living separately. Plaintiff and wife were Illinois residents. By the agreement the wife in consideration of $2,000 paid waived her rights in any property which plaintiff then owned or should later acquire. Plaintiff, by the agreement, waived his rights to property which his wife owned or should later acquire. By another clause, the wife waived her rights to support by plaintiff. A series of Illinois decisions[1] has held separation agreements invalid

[1] Lagow v. Snapp, 400 Ill. 414, 81 N.E. 2d 144 (1948); Berge v. Berge, 366 Ill. 228.