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Mark Broadley v. Mashpee Neck Marina, Inc. United States Court of Appeals for the 1st Circuit 471 F.3d 272 (Decided December 22, 2006)

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in the harbor sank or that the waves generated by the storm were so severe that they would have contributed to the loss regardless of the incomplete engine work.

The Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for Progressive. It also held that Hart presented no genuine issue of material fact because he failed to present evidence to refute Progressive's prima facie showing of negligence that Hart's inadequate maintenance was the dominant cause of the FOOT LOOSE's sinking.

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COURT OF APPEALS REJECTS DISTRICT COURT'S ENFORCEMENT OF OVERBROAD EXCULPATORY CLAUSE

The United States Court of Appeals for the 1st Circuit reversed the district court's decision to narrow and enforce defendant's overbroad exculpatory clause. The court considered the clause's boiler-plate nature, over-breadth, lack of clarity, and attorney fee structure in deciding that enforcement would be against public policy.

Mark Bradley v. Mashpee Neck Marina, Inc.
United States Court of Appeals for the 1st Circuit
471 F.3d 272
(Decided December 22, 2006)

Plaintiff-Appellant, Mark Bradley ("Bradley"), brought a negligence action in the United States District Court for the District of Massachusetts against Mashpee Neck Marina ("Marina"), for injuries sustained as a result of improper dock maintenance. Bradley, who rented a seasonal mooring at the marina, fractured his ankle when his foot became trapped between a fixed dock and the attached floating dock where his vessel was moored. Bradley alleged that the Marina was responsible for the accident because the Marina could have prevented exposing dock gaps by affixing a flexible material to the topside of the docks or ensuring the docks themselves were more tightly secured. The Marina contended that Bradley's negligence claim was barred by the exculpatory clause contained in the rental agreement. Bradley contended that admiralty law prohibits use of exculpatory clauses which completely immunize against ordinary negligence or bar claims for gross negligence or intentional wrongdoing. *S.C. State Ports Auth., v. Silver Anchor, S.A.*, 23 F.3d 842, 846 n. 3 (4th Cir.1994). The exculpatory clause read:

The OWNER [Bradley] warrants and [covenants] that...the OWNER...will [not] make any claims, demands, causes of action of any kind and nature, or obtain or enforce any judgments, executions or levies thereon...against MARINA, its officers, directors, agents, servants, or its employees, arising out of any damage, loss, personal injury or death suffered by [him]...The OWNER...agree[s] and covenant[s] that [he] will defend,

indemnify and save MARINA harmless from any and all of such claims, demands, causes of action, judgments and executions, and the MARINA shall be entitled to responsible attorneys fees in the event of breach of the OWNER's covenant hereunder.

The district court decided to narrow the overbroad exculpatory clause and apply it to the extent it covered claims for ordinary negligence. Since Broadley asserted no claim for gross negligence or reckless negligence, the district court granted summary judgment for the Marina. On appeal, Broadley reasserted that controlling admiralty law prohibits clauses which fully immunize against ordinary negligence; for support, Broadley cites the Supreme Court's decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), and the 1st circuits decision in *La Esperanza de P.R., Inc v. Perez Y Cia de P.R., Inc.*, 124 F.3d 10 (1st Cir.1997).

Bisso, which was decided in the context of towing contracts and specifically concerned with the threat of "monopolistic compulsion," has been unevenly applied between circuits. Two circuits plainly accept *Bisso* and would allow a release for negligence. One circuit limits *Bisso* to situations of unequal bargaining power. *La Esperanza*, a 1st circuit decision, upheld an exculpatory clause focused on ordinary negligence. The court reasoned that application was proper so long as the terms were "expressed clearly in contracts entered into freely by parties of equal bargaining power." *Id.* at 19. As a result, the Court of Appeals surmised that absent a showing of unequal bargaining power, a narrowly tailored exculpatory clause which bars claims for ordinary negligence should be upheld.

The cases cited by Broadley were only of marginal support, for he never alleged unequal bargaining power. Nonetheless, the Court of Appeals continued its inquiry. The Court of Appeals questioned the appropriateness of the district court's decision to reform and then enforce the overbroad exculpatory clause. The Restatement 2nd of Contracts § 184 provides for situations where a contract is overbroad. "A court *may* treat only part of a term as unenforceable...if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing." However, a comment to the rule further advises that, "the fact that the [overbroad] term is contained in a standard form supplied by the dominant party argues against aiding him in this request." *Id.* § 184 cmt. b.

The Court of Appeals relies on the Restatement 2nd as an analytical starting point and continued to consider the remaining public policy concerns. If enforced, the Court of Appeals reasoned that the over-breadth of the clause would discourage legitimate claims for reckless, gross, and intentional negligence that would otherwise have been brought. Additionally, since the clause lacked clear and express reference to negligence suits, it provided inadequate warning to the contracting party. Lastly, the portion of the clause transferring Marina's attorney fees to the party bringing suit was an unwarranted deterrent. Without the guidance of controlling case law, the Court of Appeals decided that it would not be proper to uphold the overbroad exculpatory clause under these conditions. The Court of Appeals further extended all of the previously mentioned criteria to reject application of the contract's severability clause. The case was reversed and remanded for further proceedings, with each side bearing costs.

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