Release Agreement Held No Bar to Negligence Action Under Rule of Strict Construction

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interest in protecting its treasury as well as society's interest in discouraging wanton and reckless conduct by governmental employees.\textsuperscript{344}

\textit{Rose Frances DiMartino}

\textit{Release agreement held no bar to negligence action under rule of strict construction}

It has long been the rule in New York that exculpatory agreements\textsuperscript{345} intended to insulate one of the contracting parties from liability for his own ordinary negligence are enforceable,\textsuperscript{346} absent statutory prohibition\textsuperscript{347} or overriding public policy.\textsuperscript{348} Because they undesirable to permit liability shifting through insurance despite possible adverse consequences to the municipal fisc. Where liability is vicarious, a municipality should be held responsible for failing to carefully select and train its employees, rather than shifting the burden to taxpayers. See McKillip, Punitive Damages in Illinois: Review and Reappraisal, 27 De Paul L. Rev. 571, 577-78 (1978). Where punitive damages are levied directly against a municipality, society's interest in punishing and deterring antisocial conduct should take precedence over a threat to a city's financial stability. While the innocent citizenry ultimately will provide the funds from which the award is paid under these approaches, the dual aims of punishment and deterrence nevertheless are effected because of the citizens' power to remove those officials whose policies gave rise to the award.

\textsuperscript{344} See note 340 supra.

The term "exculpatory agreement" has been used indiscriminately by the courts to encompass both releases and covenants not to sue. Colton v. New York Hosp., 98 Misc. 2d 957, 414 N.Y.S.2d 866 (Sup. Ct. N.Y. County 1979). Technically, however, a "release" is the present abandonment of an existing right or claim, while a "covenant not to sue" is a prospective promise to forego a right of action that may accrue in the future. \textit{Id.} at 963, 414 N.Y.S.2d at 871-72. Since a prospective disclaimer, other than one between joint tortfeasors, operates as a complete and permanent bar to a cause of action, it has the same legal effect as a release. \textit{Id.} at 965, 414 N.Y.S.2d at 873. For purposes of this Survey, the technical differences between these terms will be regarded as immaterial.


Agreements purporting to exempt parties engaged in certain businesses serving the public from liability for their own negligence have been rendered "void as against public policy and wholly unenforceable" by statutory directive. See GOL § 5-321 (landlords); \textit{id.} § 5-322 (caterers); \textit{id.} § 5-323 (building service and maintenance contractors); \textit{id.} § 5-325 (garages and parking facilities); \textit{id.} § 5-326 (places of public amusement and recreation).

\textsuperscript{346} Releases purporting to exculpate parties from liability for injuries caused by gross negligence or intentional wrongs, however, are absolutely void as against public policy. See,
are viewed with disfavor by the courts, however, contractual disclaimers of liability traditionally have not been given effect unless the intent to exculpate a party from the consequences of his own fault is expressed in clear and unequivocal language. This rule of strict construction, however, has been applied less rigorously to indemnification contracts. It is not the express language of the agreement that controls but the "unmistakable intent of the parties" to encompass the indemnitee's own negligence, an intent which may be adduced from the circumstances surrounding the en-


There is also a judicially recognized public policy against enforcing exculpatory clauses where a special relationship exists between the parties. See, e.g., Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 247, 194 N.E. 692, 693 (1935) (common carrier and passenger); Johnston v. Fargo, 184 N.Y. 379, 382, 77 N.E. 388, 389 (1906) (employer and employee); Emery v. Rochester Tel. Corp., 156 Misc. 562, 563, 282 N.Y.S. 280, 281 (Sup. Ct. Monroe County), aff'd mem., 227 N.Y.S. 836 (1st Dep't 1928). See generally 6A A. CORBIN, CONTRACTS § 1472 (1962); RESTATEMENT OF CONTRACTS §§ 574, 575 (1932); S. WILLISTON, supra note 346, § 1750A.

Moreover, it has been postulated that releases of liability may actually tend to foster carelessness, since a party freed from legal responsibility for his misconduct may cease to exercise that standard of care normally required of him. Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 494, 180 N.E. 245, 246 (1932). See generally 6A A. CORBIN, CONTRACTS § 1472 (1962); 4 S. WILLISTON, CONTRACTS §§ 602A, 626 (3d ed. 1961).


tire agreement. Recently, in *Gross v. Sweet*, the Court of Appeals refused to extend this less exacting rule of construction to a personal injury release, holding that an exculpatory agreement drafted in general terms was insufficient to bar a personal injury claim grounded specifically in negligence.

Prior to enrolling in a parachute jumping course conducted by the defendant, plaintiff in *Gross* executed a "Responsibility Release" in which he agreed to waive "any and all claims . . . for any personal injuries . . . that [he] may sustain or which may arise out of [his] learning, practicing or actually jumping from an aircraft." After one hour of on-the-ground instruction, the plaintiff was given the defendant's routine introductory lesson, which included oral instruction and several jumps off a two and a half foot table. *Id.*

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362 The rule of Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936), which had previously controlled the standard of construction to be applied to all exoneration provisions, has been liberalized in the context of indemnity agreements. In *Thompson-Starrett*, the Court of Appeals found that a broadly drafted indemnity contract exempting a general contractor from "any and all liability" was ineffective to impose a duty of indemnification on its subcontractor for injuries caused by the indemnitee's own negligence. *Id.* at 41, 2 N.E.2d at 37. The *Thompson-Starrett* test was eroded, however, by a series of decisions in which the Court determined that exoneration clauses in commercial leases were enforceable if the nature of the agreement evidenced an "unmistakable intent" to encompass the indemnitee's negligence, although the language of the agreement was somewhat equivocal. See *Liff v. Consolidated Edison Co.*, 23 N.Y.2d 854, 855, 246 N.E.2d 800, 800, 298 N.Y.S.2d 66, 66 (1969) (mem.); *Kurek v. Port Chester Hous. Auth.*, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 27, 276 N.Y.S.2d 612, 615 (1966). Finally, in *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971), the Court enunciated a "plain meaning" test for interpreting indemnity provisions, *id.* at 210, 269 N.E.2d at 801, 321 N.Y.S.2d at 84, and concluded that *Thompson-Starrett* "is no longer a viable statement of the law." *Id.* at 211-12, 269 N.E.2d at 802, 321 N.Y.S.2d at 85-86. See generally *The Quarterly Survey*, 46 St. John's L. Rev. 355, 367 (1971).

While the *Levine* decision was narrowly construed by the lower courts, see *The Quarterly Survey*, 46 St. John's L. Rev. 561, 566-68 (1972); see, e.g., *Redding v. Gulf Oil Corp.*, 67 Misc. 2d 464, 324 N.Y.S.2d 490 (Sup. Ct. Nassau County 1971), aff'd, 38 App. Div. 2d 850 (2d Dep't 1972), the Court of Appeals subsequently clarified the scope of the *Levine* holding by finding that a party's own negligence is encompassed by an indemnification agreement whenever the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 297 N.E.2d 80, 83, 344 N.Y.S.2d 336, 339 (1973). Clearly, therefore, the validity of indemnification provisions no longer turns on "semantic stereotypes with which an agreement may be phrased," but will be construed so as to give effect to the parties' intentions. *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 159, 366 N.E.2d 263, 266, 397 N.Y.S.2d 602, 606 (1977).


364 *Id.* at 104-05, 108, 400 N.E.2d at 307, 310, 424 N.Y.S.2d at 366, 369.

365 *Id.* at 109, 400 N.E.2d at 310, 424 N.Y.S.2d at 369.

366 *Id.* at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 366. The plaintiff was given the defendant's routine introductory lesson, which included oral instruction and several jumps off a two and a half foot table. *Id.*
tiff, under the defendant's supervision, made his first practice jump from an altitude of 2,800 feet and suffered a broken leg upon landing. In the plaintiff's subsequent personal injury action, the Supreme Court, Ulster County, finding that the release barred the plaintiff's suit, granted the defendant's motion for summary judgment and dismissed the complaint. A divided appellate division reversed, however, on the ground that the terms of the disclaimer were not sufficiently explicit to preclude a cause of action based on the defendant's negligence in instructing and equipping the plaintiff.

On appeal, a closely divided Court of Appeals affirmed the appellate division. Judge Fuchsberg, writing for the majority, noted the antipathy with which such exemptions from liability have traditionally been treated by the courts. Although the defendant's business was deemed to be outside the purview of New York's anti-exculpation statutes, the Court reaffirmed the general rule that an exculpatory clause will not be enforced absent an

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558 The plaintiff's complaint was grounded in negligence, gross negligence, and breach of warranty based on the defendant's instruction and outfitting of the plaintiff, his failure to comply with Federal Aviation Administration regulations, and his failure to warn of the risks inherent in parachute jumping. 49 N.Y.2d at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 367.
559 64 App. Div. 2d at 774, 407 N.Y.S.2d at 254.
560 Id. at 775, 407 N.Y.S.2d at 256. The appellate division scrutinized the release in the context of the student and teacher relationship and concluded that it did not sufficiently evidence "a clear understanding between the parties" that the defendant's negligent conduct would be encompassed by the agreement. 64 App. Div. 2d at 775, 407 N.Y.S.2d at 255-56.
561 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370.
562 Chief Judge Cooke and Judges Wachtler and Gabrielli joined Judge Fuchsberg in the majority opinion. Judges Jasen and Meyer joined Judge Jones in his dissent.
563 49 N.Y.2d at 106, 400 N.E.2d at 308, 424 N.Y.S.2d at 367.
564 Id. at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368; see note 347 supra. Although the Gross Court characterized the parachute training school owned and operated by the defendant as a "facility" and parachute jumping as a "sport," 49 N.Y.2d at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 367, it declined to hold that it was within the scope of GOL § 5-326, governing agreements entered into by the "owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities. . . ." Id. at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368. A contrary conclusion was reached by the fourth department in Wurtzer v. Seneca Sport Parachute Club, 66 App. Div. 2d 1002, 411 N.Y.S.2d 763 (4th Dep't 1978), where the defendant, in its pleadings, admitted the plaintiff's allegation that it operated a "parachute jumping and recreation center," as described in its certificate of incorporation. Id. at 1002-03, 411 N.Y.S.2d at 764-65.
unequivocal written expression of the parties' intention. While disavowing the notion that an effective disclaimer must explicitly refer to negligence, the majority concluded that the broad language of the release executed by Gross was inadequate to evidence an intention to absolve the defendant from the consequences of his own fault. Moreover, Judge Fuchsberg found that the less rigid rule of construction applied to indemnification agreements was inapposite, characterizing it as an exception to the general rule tailored to the "economic realities" of arm's length dealings between businessmen.

In a vigorous dissent, Judge Jones urged that the more liberal construction standard should be applied to releases as well as to indemnification agreements. Thus, a general release, like a general indemnification contract, should be given effect if the intent of the parties, though expressed in broad terms, can be garnered from the nature of the agreement. Viewed under that standard, the dissent concluded, the release executed by Gross was sufficient to exonerate the defendant from liability for his ordinary negligence. Furthermore, Judge Jones argued that by excluding negli-

\[\text{footnotes}\]

- 286 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370.
- 287 Id. at 108, 400 N.E.2d at 309-10, 424 N.Y.S.2d at 368. 49 N.Y.2d at 110-11, 400 N.E.2d at 310-11, 424 N.Y.S.2d at 369-70. The Court concluded that, at most, the release at issue encompassed only injuries resulting from the risks inherent in parachute jumping and not those resulting from the defendant's want of due care. Id. Judge Fuchsberg noted that the plaintiff's allegations of gross negligence would not be barred by the release under any circumstances because such agreements are void. Id. at 106, 400 N.E.2d at 308-09, 424 N.Y.S.2d at 367.

In dictum, the majority dismissed the contention that the relationship between the parties rendered the release agreement unenforceable as against public policy, stating that the relationship of student and teacher did not fit within those special relationships in which exculpatory provisions had previously been held invalid. Id. at 106-07, 400 N.E.2d at 309, 424 N.Y.S.2d at 367-68. See note 348 supra. The Court declined, however, to consider whether the defendant's alleged violation of Federal Aviation Administration regulations would be encompassed by the release. 49 N.Y.2d at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368.

- 289 Id. at 112, 400 N.E.2d at 312, 424 N.Y.S.2d at 371 (Jones, J., dissenting). Judge Jones reasoned that since the Thompson-Starrett standard had initially been applied to both indemnification agreements and releases, the new, less stringent rule of the indemnity cases, see note 352 and accompanying text supra, should apply in all contexts. Id. at 111-12, 400 N.E.2d at 311-12, 424 N.Y.S.2d at 370-71 (Jones, J., dissenting). Moreover, Judge Jones opined that the rationale underlying the Court's liberal interpretation of the language of indemnification agreements was likewise applicable to release agreements. Id. at 112, 400 N.E.2d at 312-13, 424 N.Y.S.2d at 371 (Jones, J., dissenting).
- 290 Id. (Jones, J., dissenting); see note 352 supra.
- 291 Id. at 113, 400 N.E.2d at 313, 424 N.Y.S.2d at 372 (Jones, J., dissenting). Judge
gence from the scope of the disclaimer, the majority had rendered the exculpation clause meaningless since injuries incurred, absent the defendant's failure to exercise due care, would not give rise to an actionable claim in any event.\textsuperscript{372}

The Court of Appeals' decision in Gross culminates a virtually unbroken line of lower court authority which continued to apply a rule of strict construction to release agreements even after the liberalization of the standard applied to indemnity contracts.\textsuperscript{373} In sanctioning this approach, it is submitted that the Gross majority correctly determined that the indemnity cases were not intended to effect a comprehensive change in New York's law on exculpatory agreements.\textsuperscript{374} Because enforcement of a release extinguishes an aggrieved party's right of action, while an indemnification agreement merely reallocates the liability for his injury,\textsuperscript{375} it seems justifiable that the release should be subject to a more exacting scrutiny. Moreover, since indemnification contracts normally arise in a commercial context,\textsuperscript{376} the parties thereto are more frequently ad-

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\item Jones, however, agreed that the plaintiff's cause of action for gross negligence would not be barred by the release agreement. \textit{Id.} at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370 (Jones, J., dissenting).
\item Id. at 112-13, 400 N.E.2d at 313, 424 N.Y.S.2d at 372 (Jones, J., dissenting).
\item The effect of an indemnification agreement is to allow a party to avoid liability to the victim of his negligent conduct, thus depriving the victim of an otherwise valid claim. On the other hand, through an indemnification agreement, the indemnitee does not seek to exempt himself from liability to the injured third party, but rather to have the indemnitor assume the risk of such liability. Since the injured party's right to recover is preserved, the determination focuses not on whether the injured party can recover, but from whom. Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 161, 366 N.E.2d 263, 267, 397 N.Y.S.2d 602, 607 (1977); Colton v. New York Hosp., 98 Misc. 2d 957, 967, 414 N.Y.S.2d 866, 874 (Sup. Ct. N.Y. County 1979).
\end{itemize}
vised by counsel, and the loss occasioned thereby is more likely to be absorbed by insurance. Thus, a stricter rule of construction is warranted for personal injury releases to prevent an inadvertent waiver by a private individual of an otherwise valid claim.

Although Gross declined to prescribe a per se rule requiring personal injury releases to expressly provide for negligence, few instances can be found in which less specific language has been held to constitute an effective bar to an action grounded in the defendant's own fault. The Court of Appeals, therefore, has placed the burden squarely on the attorney-draftsman to employ precise language to ensure that an exculpatory agreement will achieve its intended objective.

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(1966).


379 While the Gross Court stated that the word "negligence" need not appear in a release to sustain its validity, the example cited by the Court was a waiver of liability containing references to "negligence" and "neglect or fault" of the defendant. See 49 N.Y.2d at 110, 400 N.E.2d at 311, 424 N.Y.S.2d at 370; Theroux v. Kenedburg Racing Ass'n, 50 Misc. 2d 97, 99, 269 N.Y.S.2d 789, 792 (Sup. Ct. Suffolk County 1965), aff'd mem., 28 App. Div. 2d 960, 282 N.Y.S.2d 930 (2d Dep't 1957). In Jaylynn, Inc. v. Star Supermarkets, Inc., 75 Misc. 2d 542, 348 N.Y.S.2d 85 (Sup. Ct. Monroe County 1973), a waiver of subrogation rights was sustained, although it was phrased in general terminology. The court reasoned, however, that the subrogation agreement was tantamount to an agreement to indemnify the defendant against claims brought on behalf of plaintiff's insurance carrier, and that, therefore, a less stringent rule of construction was appropriate. Id. at 545, 348 N.Y.S.2d at 89. Since the injured party in Jaylynn had recovered his damages from the insurance he had purchased for that purpose, it is submitted that Jaylynn is consistent with the policy of providing a party means of redressing his injury.