WAIVER OF LIABILITY CLAUSES FOR PERSONAL INJURIES IN RAILROAD FREE PASSES

Lunsford v. Cleveland Union Terminals Co.
170 Ohio St. 349, 165 N.E.2d 3 (1960)

Plaintiff brought an action against the Cleveland Union Terminals Company for injuries received as she was thrown from an escalator which was carrying her from track level to the main concourse of the depot, charging the defendant with negligent operation of the escalator. The defendant interposed as a defense a waiver of liability clause that appeared in a free pass issued by the New York Central Railroad System to the plaintiff and under which she travelled, alleging that the coverage of this exculpatory provision should extend to the benefit of the defendant. The terminal company provided the only station facilities for the New York Central Railroad in Cleveland.[1] The Ohio Supreme Court affirmed judgment for the defendant, holding that the waiver of liability clause was a complete defense to the Terminal Company's alleged negligence.[2]

The problem presented in this case is the validity of the waiver of liability provision contained in the free pass and whether or not such waiver should be interpreted to include within its benefits the terminal facility used by the railroad. The traditional rule is that one party may not contract away liability for his negligence prior to the occurrence of the negligent act.[3] A modification of this rule was evidenced in a 1904 United States Supreme Court decision by which a passenger was denied recovery on the basis of an exculpatory clause contained in a free pass.[4] Further qualification

[1] Upon reaching West 28th Street in the City of Cleveland, the New York Central train transporting the plaintiff entered upon the right-of-way of the Cleveland Union Terminals Company, travelling the remaining distance to the station on these tracks. Lunsford v. Cleveland Union Terminals Co., 170 Ohio St. 349, 165 N.E.2d 3 (1960).

[2] Lunsford v. Cleveland Union Terminals Co., *supra* note 1. The free pass read in part: "In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person . . . ."

[3] 12 Am. Jur. "Contracts" § 183 (1938), "Undoubtedly, agreements exempting persons from liability for its own negligence induce want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting. It has therefor been declared to be a good doctrine that no person may contract against his own negligence. . . ." Such was deemed strictly applicable with regard to railroads and other common carriers which engage in daily intercourse with society and which are charged with a high degree of public responsibility. See also, Cleveland, P. & A. R.R. v. Curran, 19 Ohio St. 1 (1869); 8 Ohio Jur. 2d "Carriers" § 223 (1954), and 11 Ohio Jur. 2d "Contracts" § 101 (1955).

[4] Northern Pac. Ry. v. Adams, 192 U.S. 440 (1904). "If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his own fare and compelled the company to receive and carry him. . . . It was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

of the orthodox view arose as a result of judicial interpretation of the Hepburn Act.[5] A series of decisions have held that a waiver of liability clause contained within a free pass is a valid defense to an action for negligence by one injured during a portion of the trip covered by such pass.[6]

Under the "waiver-immunity" doctrine of the Supreme Court of the United States, the problem as to the scope of the coverage of such passes still remains as the fulcrum of decision in the instant case. This can be a delicate decision.[7] Inasmuch as numerous fact determinations must be made prior to the adjudication of any individual case, it must suffice to display in the analysis below the primary considerations for resolution of these disputes.

In the instant case, the pass under which the plaintiff travelled was headed "New York Central System" and read in part as follows: ". . . voluntarily assumes all risk of accidents and expressly agrees that the company shall not be liable under any circumstances. . . ." Two cases, decided prior to the instant case, stand as the leading sources of analysis in this field. In *Wilder v. Pennsylvania R.R.*,[8] a liberal interpretation of the provisions of the free pass involved resulted in the plaintiff being precluded from recovery for injuries received, since she had expressly "assumed all risk of accident" under the pass. The decision emphasized that the pass was headed "Pennsylvania System" and held that the terminal was to be considered a part of the system due to its *close identity with the operation of the railroad in that locality*. Thus, in the absence of restrictive words in the pass to show an intent to delimit liability, this court extended the protective coverage of the pass to include a connecting carrier.

The gratuitous pass was given a more strict construction in *Parker v. Bissonette*[9] where the court looked directly to the wording of the pass. The

[5] 34 Stat. 584 (1906), 49 U.S.C. § 1(7) (1958) which states in part: "No common carrier subject to the provisions of this part shall . . . directly or indirectly, issue or give any interstate free tickets, free passes, or free transportation for passage, except to its employees . . . and the families of any of the foregoing." The plaintiff in the instant case was the wife of an employee of a railroad.

[6] Kansas City So. Ry. v. Van Zant, 260 U.S. 459 (1923); Charleston and Western Carolina Ry. v. Thompson, 234 U.S. 576 (1914); Spanable v. New York Cent. R.R., 80 Ohio App. 50, 69 N.E.2d 441 (1946). It is to be noted that the decisions of the federal courts are controlling upon the state courts as to clauses in a free pass which exempt the interstate carrier from liability for ordinary negligence. It is acknowledged, moreover, that an interstate carrier could not protect itself from liability even under a waiver of liability provision for wilful or wanton negligence. Donnelly v. Southern Pac. Co., 18 Cal. App. 2d 863, 118 P.2d 465 (Sup. Ct. 1941).

[7] The problem arises from the language of the pass itself and the nature and means of transportation provided under the pass.

[8] Wilder v. Pennsylvania R.R., 245 N.Y. 36, 156 N.E. 88 (1927). The pass stated in part: "I hereby assume all risk of personal injuries . . . and release the company from liability therefor." The plaintiff was injured in a station owned by the Pennsylvania Tunnel and Terminal Railroad Company while waiting to board a train of the railroad which issued the free pass. Recovery was denied.

[9] Parker v. Bissonette, 203 S.C. 155, 26 S.E.2d 497 (1943). The pass read in part: "The person accepting this free ticket agrees that the Atlantic Coast Line Railroad shall

reference to waiver of liability was directed specifically to the Atlantic Coast Line Railroad, not to "the company."[10] Due to the explicitness of the pass in referring to the railroad by name, there was no evidence that the exculpatory clause was to benefit a third party, and immunity was not extended to include a party that stood apart from the railroad.[11]

The *Wilder* case demonstrates that while the language of the pass is to be considered, the nature and means of transportation involved is to be a factor contributing to the final decision. This opinion stresses that a railroad pass applies to such stations and depots as are necessary in transporting the passenger to the destination for which the pass is provided. Thus, a connecting carrier over whose tracks the passenger must travel in order to reach the terminal point established by the pass is to benefit under the waiver of liability provision, provided that the language of the pass itself is not so restrictive as to negative a broad construction.[12]

The validity and breadth of coverage to be given an exculpatory clause contained in a free pass also revolves around several policy considerations. The initial argument to be resolved is the validity of the waiver of liability clause. Traditionally, freedom to contract has not been extended as an absolute right to a public service enterprise.[13] A waiver of liability clause provided the public service enterprise with a defense to its own negligence and thereby undermined the duty that it owed to the recipients of its services. This theory was generated by the inequality of bargaining power, characteristic of transactions between a private individual and an economic giant upon whom the individual was dependent for certain services. It was feared that this dependency would force one in need of the service to accept the exculpatory clause or be deprived of the service altogether. This position is not tenable in cases involving a waiver of liability provision in a railroad free pass. The passenger is not a victim of economic coercion. He has equal bargaining strength with the railroad company and is presented with the option of accepting free travel with a deprivation of any right against the

not be liable under any circumstances, whether of negligence of agents or otherwise . . . ." The suit was against a busline operator who had a contract with the railroad to carry the latter's passengers from a station on the outskirts of the city to a downtown central area. Recovery was granted.

10 The circuit judge in the *Parker* case held that the stipulation of exemption should run to the benefit of all who participated in the transportation of the passenger. On appeal, this contention was reversed. The court then urged that the pass did not provide for the passenger to assume all risks, as in the *Wilder* case. It merely stipulated that the Atlantic Coast Line Railroad should not be liable.

11 In the instant case, the plaintiff assumed all risks of accident and agreed that the company should not be liable under a pass headed "New York Central System." It would seem judicious in the light and background of the *Wilder* and *Parker* cases to extend coverage of the exculpatory clause in the free pass so as to include the Cleveland Union Terminals Company within the meaning of the "New York Central System."

12 This factor was not expressly commented upon in the *Parker* case inasmuch as the busline was not considered to be an independent common carrier.

13 The basis for the imposed restrictions was that the public service, by societal demand, had a greater duty of responsibility.

carrier for ordinary negligence, or choosing to pay the established fare and thereby being fully protected should such negligence result in injury.

The second consideration involves the argument as to whether the exculpatory clause should be extended to the benefit of the terminal company. The more harsh view attaches a strict interpretation to a waiver of liability clause and extends coverage only to the entities specifically mentioned. It is feared that any other analysis eventually would serve to exempt the terminal company from any liability to all people. This reasoning is artificial and does not consider the activities typical of railroad operations. To overlook the functional approach to the law and the facts involved in favor of the traditional and often archaic notions of the past is to reject the concept that a railroad attempts to carry a passenger from the locale of embarkation to that of debarkation.[14] It is contemplated that, in the broad expanse of travel facilities, terminal operations will be provided. Seeing that these services are expected of the carrier and are an integral aspect of railroad travel, one is compelled to argue that such terminal facilities should be included within the scope of the waiver of liability clause. This rationale will not open the door to the exemption from liability of a terminal company to all people; it will only restrict exemption to those in this station or depot for the purpose under which the free pass, and the waiver of liability clause contained therein, was issued.

This decision by the Ohio Supreme Court is consistent with the law and with the policy considerations which underlie the law. The use of the facilities of the Cleveland Union Terminals Company was necessary to the arrival of the plaintiff at the contemplated destination, there being no other depot available to the New York Central System in the city. The terminal company was an integral part of the New York Central System operation and, by nature of the vital service that it rendered the railroad, should be included within the protection of the waiver of liability clause.

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[14] It is not sound to argue that these points are restricted to the geographical areas in which the passenger steps on and steps off of the train. The public would be loathe to travel without facilities at the place of departure and destination by which they could comfortably gain access to the central area of activity within the city.