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**A BILL TO PREVENT THE AVOIDANCE OF CIVIL
LIABILITY IN CASES OF DEATH OR PERSONAL
INJURY CAUSED BY NEGLIGENCE**

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QUEENSLAND

LAW REFORM COMMISSION

CONFIDENTIAL

WORKING PAPER ON A BILL TO PREVENT THE
AVOIDANCE OF CIVIL LIABILITY IN CASES
OF DEATH OR PERSONAL INJURY CAUSED BY
NEGLIGENCE (Q.L.R.C.W.P. 26).

PREFACE

The Law Reform Commission has been functioning since the 1st March, 1969 and is constituted by the Law Reform Commission Act 1968 - 1984.

MEMBERS:-

The Honourable Mr. Justice B.H. McPherson, Chairman

The Honourable Mr. Justice G.N. Williams

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LAW REFORM COMMISSION

WORKING PAPER ON A BILL TO PREVENT THE
AVOIDANCE OF CIVIL LIABILITY IN CASES
OF DEATH OR PERSONAL INJURY CAUSED BY
NEGLIGENCE.

The Third Programme of the Law Reform Commission of Queensland as approved by the Governor-in-Council requires the Commission "to examine the law relating to exclusion, exemption, and unreasonable clauses and conditions in contracts" (item no. 11).

The Commission has prepared a Bill to prevent the avoidance of civil liability in cases of death or personal injury caused by negligence.

The working paper is being circulated to persons and bodies known to be interested in these matters, from whom comment and criticism are invited. It is circulated on a confidential basis, and recipients are reminded that any recommendations for reform must have the approval of the Governor-in-Council before being laid before Parliament. No inferences should be drawn as to any Government policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, Brisbane North Quay 4000 so as to be received no later than 13th September, 1984.

B.H. McPherson (Sgd.)

The Hon. Mr. Justice B.H.
McPherson,
Chairman.

AVOIDANCE OF CIVIL LIABILITY IN CASES
OF DEATH OR PERSONAL INJURY CAUSED
BY NEGLIGENCE.

1. General Introduction.

A person may generally exclude his civil liability for most torts either by contract or otherwise: see B. Coote, Exemption Clauses, pp. 33 (1964). The courts will not, of course, permit a wrongdoer to exonerate himself from the consequences of his acts of fraud: Pearson v. Dublin Corporation [1907] A.C. 351.

The courts have adopted certain presumptive rules of construction in regard to exemption clauses contained in contracts. An exemption clause will generally not have operation for an independent act unconnected with the contract, but such a presumption may be rebutted if the clause is wide enough. The courts also adopt a presumption, which may be rebutted by clear language, that an exemption clause will not apply to negligence: see B. Coote, *ibid.* p. 34. However, the House of Lords recently affirmed in Geo. Mitchell Ltd. v. Finney Lock [1983] 2 A.C. 803 that the courts must give effect to the natural language of an exemption or limitation clause. In that particular case their Lordships considered a condition that limited the liability of a vendor of goods to a replacement of the goods or a refund of the price. Lord Bridge remarked that it was only possible by a process of "strained construction" (at p. 814) to confine the condition to breaches of contract arising without negligence. In that case it was, however, held that it would not be "fair or reasonable" within the meaning of S. 55(4) of the Sale of Goods Act 1979 to allow reliance on the condition.

White v. John Warwick [1953] 1 W.L.R. 1285 concerned the hire-purchase of a cycle under an agreement which provided that "nothing in this agreement shall render the owners liable for any personal injuries..." It was held that the exemption clause excluded liability for breach of an implied warranty of fitness, but not liability for negligence. Coote points out generally if liability for negligence is excluded the promisee has no right of action for negligence either in contract or in tort: Exemption Clauses, p. 35.

The doctrine of fundamental breach was formulated to alleviate the consequences of exemption clauses. It has been held that a fundamental breach disqualifies a wrongdoer from any reliance on an exemption clause: see B. Coote, Exemption Clauses, p. 109; Alexander v. Railway Executive [1951] 2 K.B. 882. However, the House of Lords in Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827 held that the doctrine of fundamental breach by virtue of which the termination of a contract brought it and, with it, any exclusion clause to an end was not good law. Lord Wilberforce discussed the effect of the Unfair Contract Terms Act 1977. His Lordship remarked:

"After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions" (p. 843).

In a recent Queensland case it was held that an exclusion clause on a ticket to an entertainment park and a large sign at the entrance to the park absolved a defendant from liability for personal injury: see Bellart v. African Lion Safari Park (17 April, 1984, Dist. Crt. No. 124 of 1983). In that case there was evidence that the plaintiff was aware of, but did not read, the condition printed on the ticket.

2. Public Policy.

There is no principle of public policy which generally precludes a party seeking to exempt itself from liability in respect of personal injury. Lloyd notes that "in some jurisdictions in the United States the rigid approach of the common law has been departed from by holding clauses exempting from negligence to be void, though other jurisdictions have been content to apply a mere rule of construction to such clauses to the effect that they should be construed narrowly and contra proferentem." D. Lloyd, Public Policy, pp. 68-69 (1953).

In the United States it has been generally held that a contract exempting an employer from all liability for negligence towards his employees is void as against public policy. Public utilities will not be permitted to escape liability for negligence in the performance of their duty of public service. A carrier who transports passengers for hire may not contract away its public responsibility: see W.L. Prosser, Handbook of the Law of Torts, pp. 442-433 (4th ed., 1971).

3. Workers' Compensation.

Section 12 of the Workers' Compensation Act 1916-1982 provides that the Act applies notwithstanding any contract to the contrary made after the commencement of the Act. Therefore a worker may not contract away his entitlement to workers' compensation.

4. Liability of Owners or Drivers of Motor Vehicles.

Common Law

It is accepted that the owner or driver of a motor vehicle is, at common law, entitled to exclude liability to a passenger of the vehicle by a warning that he rides at his own risk, or by the use of an appropriately worded notice: see Buckpitt v. Oates [1968] 1 All E.R. 1145; Bennett v. Tugwell [1971] 2 Q.B. 267; Birch v. Thomas [1972] 1 W.L.R. 294. In Buckpitt v. Oates it was held that although the plaintiff's infancy would have saved him from being bound by the notice had it been part of a contract of carriage, infancy was no bar to volenti non fit injuria. In Jones v. Aircrafts Pty. Ltd. [1949] St. R. Qd. 196 it was held that a ticket signed by a passenger which excluded liability was not void either as against public policy, or contrary to the policy of the Motor Vehicles Insurance Act (cf. W.L. Gray and Son v. South Island Motor Union Mutual Insurance Association [1936] N.Z.L.R. 916).

Statute

In Queensland the Motor Vehicles Insurance Act 1936 - 1975 prohibits the contracting out of liability. Subsection (1) of Section 6 of the Act (as inserted by the Motor Vehicles Insurance Acts Amendment Act of 1967) provides:

"Contracting out of liability prohibited. A contract whereby a person contracts in advance out of any right to claim damages or any other remedy in respect of bodily injury (fatal or non-fatal) caused by, through or in connection with a motor vehicle shall to that extent be void."

Section 6 of the Act has not been considered judicially. Section 6 does not comprehensively provide for all the situations in which a passenger of a vehicle could be precluded from recovering damages. Certainly the provision renders inoperative any contract such as was considered in Jones v. Aircrafts Pty. Ltd. [1949] St. R. Qd. 196. A person may be exonerated from liability independently of any contract. There may be a case where a defence of volenti non fit injuria may preclude recovery by a passenger. In such a case a notice disclaiming liability may defeat a claim by a passenger. There may be an instance where a non-contractual understanding would similarly defeat a claim.

Since December 1, 1972 in England, Scotland and Wales users of motor vehicles are required under the Motor Vehicles (Passenger Insurance) Act 1971 to be insured in respect of liability for death or bodily injuries to passengers. Subsection (2) of Section 1 of the Act renders inoperative any agreement or understanding that excludes the liability of the user of a vehicle to a passenger. The subsection provides:

"Where after the commencement of this Act a person uses a motor vehicle in circumstances such that under Section 201 of the Road Traffic Act 1960 there is required to be in force in relation to his use of it such a policy of insurance or security as is mentioned in subsection (1) of that section, then, if any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held -

(a) to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by Section 203 of that Act to be covered by a policy of insurance; or

(b) to impose any conditions with respect to the enforcement of any such liability of the user;

and the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negating any such liability of the user.

For the purposes of this subsection references to a person being carried in or upon a vehicle include references to a person entering or getting on to, or alighting from, the vehicle, and the reference to an antecedent agreement to one made at any time before the liability arose."

The deficiencies in S. 6 of the Motor Vehicles Insurance Act (Q) are not present in S. 1 of the Motor Vehicles (Passenger Insurance) Act (U.K.). Section 1 of the Motor Vehicles (Passenger Insurance) Act refers to "agreement and understandings", whereas Section 6 of the Motor Vehicles Insurance Act has application only to contracts. Section 1 also expressly negatives any defence of voluntary assumption of risk.

5. Railways.

There is no provision, statutory or otherwise which limits the liability of the Commissioner for Railways in respect of personal injury.

6. Occupiers Liability.

It is clear that at common law an occupier of land may restrict or exclude any liability he might otherwise be under to any licensee of his, including his liability for his own or his servants' negligence, by conditions aptly framed and made known to the licensee: see Ashdown v. Samuel Williams & Sons Ltd. [1957] 1 Q.B. 409, 427. The unsuccessful plaintiff in the Ashdown case suffered personal injuries. This principle has no operation where no agreement can be implied or imputed to a plaintiff: see Burnett v. British Waterways [1973] 1 W.L.R. 700.

The Occupiers Liability Act 1957 (Eng.) replaced the rules of the common law under which the duty of an occupier differed according as to whether a visitor was an invitee or licensee. Section 2 of the Act provides that an occupier of premises owes the same duty of care, "the common duty of care" to all lawful visitors, except in so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise may exclude himself from the duty which he would otherwise owe under the Occupiers Liability Act.

An occupier in order to claim exemption should, it is submitted, show he did all that was reasonably necessary in the circumstances to bring the terms of exemption to the notice of a visitor. In Ashdown v. Samuel Williams & Sons Ltd. [1957] 1 Q.B. 409, 430 Parker L.J. made the following remarks:

"Where, for instance, an occupier of land used as a shooting school desires to exclude liability for negligence shooting, he may well have to bring to the knowledge of the proposed licensee that the land is so used. A mere reference to negligence without a warning as to the user of the land might well be insufficient."

The Occupiers Liability Act contains a restriction on the capacity of an occupier to exclude the common duty of care. Subsection (1) of Section 3 of the Act provides:

"Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty."

Subsection (4) provides that the above principles apply whereby the terms or conditions of any tenancy (including a statutory tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier.

7. Unfair Contract Terms Act 1977.

Section 2 of the Unfair Contract Terms Act 1977 (U.K.) provides:

"2. Negligence Liability.

- (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
- (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

Subsection (1) provides that liability for death or personal injury resulting from negligence cannot be excluded or restricted by a contract term or notice. This provision has no application to a case where the law imposes liability irrespective of negligence e.g. strict liability.

Where loss or damage other than death or personal injury is concerned, the exemption or restriction of liability for negligence is subject under subsection (2) to a reasonable test. Subsection (3) precludes any defence of voluntary assumption of risk based on a provision in a contract term or notice.

The Unfair Contract Terms Act 1977 imposes a complete ban on exemption clauses in respect of death or personal injury resulting from death or personal injury. The Act differs from the recommendations of the Law Commission in its Second Report on Exemption Clauses (Law Comm. No.69). The Commission recommended, as regards liability incurred in the course of a business for death or personal injury due to negligence, that provisions excluding or restricting liability should be made void in the following circumstances:

- (a) Where a person is killed or injured in an accident arising out of and in the course of his employment and the liability is that of his employer;
- (b) Where a person is killed or injured while being carried as a passenger by land or water or in the air and the liability is that of the carrier;
- (c) Where a person is killed or injured in consequence of a defect, malfunction or mismanagement of a device for the movement of persons;
- (d) Where a person is killed or injured while making use of a car park and the liability is that of the occupier or manager of the car park.

The Law Commission also recommended that the Secretary of State should be empowered to specify classes of activity to which a complete ban on excluding liability for death or personal injury due to negligence should be excluded (see Second Report, pp. 37-39).

8. Trade Practices Act 1974 (Cth.)

For constitutional reasons, the Trade Practices Act 1974 is confined, in the field of consumer protection, to dealing with the supply of goods or services by corporations as defined in the Act, or in circumstances satisfying one of the other constitutional bases selected in the Act. The Trade Practices Act is generally of no assistance to a person engaged in a transaction with a party not a corporation. Division 2 of Part V of the Act implies conditions and warranties in consumer transactions. A contract that purports to exclude any provision of, or any right conferred by, Division 2 is void: see S. 68.

The Trade Practices Act enables a term of a contract for the supply by a corporation for goods or services not ordinarily acquired for personal, domestic, or household use to limit the liability of the corporation. The liability of the corporation is essentially limited to the value of the goods or services: see S. 68A(1) para. (a) and (b). The liability of the corporation is, however, not limited where a person to whom the goods and services were supplied establishes that it is not fair and reasonable to rely on that term of the contract, see S. 68(2).

Part V of the Trade Practices Act does not, except in the use of "double jeopardy", exclude or limit the concurrent operation of any law of a State or Territory: S. 75. Any Act enacted by the Queensland Parliament can have a concurrent operation with, but cannot abrogate any provision (including any limitation provision) of, the Trade Practices Act.

9. Civil Aviation.

The Civil Aviation (Carriers' Liability) Act 1959 (Cth.) provides for the limitation of liability of a carrier in respect of the injury or death of a passenger: see S. 31(1). The Civil Aviation (Carriers' Liability) Act 1964 - 1970 (Qld.), inter alia, applies S. 31 of the Commonwealth Act in relation to a contract of carriage to which the former Act applies (intra-state carriage).

Commentary on Bill

Cl. 1 Short Title

Clause 1 contains the following short title "Law Reform (Death & Personal Injury) Act 1984".

Cl. 2 Interpretation

Clause 2 contains a definition of "negligence".

Cl. 3 Crown

Clause 3 provides that the Act binds the Crown. The Commission considers that there does not seem to be any reason of policy why the law should be otherwise. Parliament may enact special legislation to give protection to the Crown in appropriate cases.

Cl. 4 Negligence Liability

Clause 4, which is based on S. 2(1) of the Unfair Contract Terms Act 1977 (U.K.), provides that a person cannot exclude or restrict his liability for death or personal injury resulting from negligence. This clause applies to not only contracts or agreements, but also "understandings" which may have a non-contractual basis. The clause also applies to notices as it is possible to exclude or restrict liability in tort by notice rather than by contract: see Bennett v. Tugwell [1971] 2 Q.B. 267, 274. Most reported cases on the use of this technique relate to the liability of the occupier of premises towards lawful visitors, or where advice is given on a non-contractual basis by an advisor under a legal duty of care: see P.K.J. Thompson, Unfair Contract Terms Act 1977, pp. 53-54; (1978).

The Commission considers that there is no need, as in S. 2(3) of the Unfair Contract Terms Act 1977, to make provision for the defence of volenti non fit injuria. For that defence to succeed a defendant must prove, on the balance of probabilities, that a plaintiff had on an objective basis assented to bearing the risk of negligence and exempting the defendant from liability for that risk: see Bennett v. Tugwell [1971] 2 Q.B. 267, 274. It is clear from clause 4 that a defendant cannot rely on the mere existence of a contract, agreement, understanding or notice excluding or restricting liability to establish a defence.

Cl. 5 Savings.

Clause 5 provides that the Act does not derogate from the operation of the Civil Aviation (Carriers' Liability) Act 1964 - 1970 (Qld.). This clause precludes any argument that the scheme of liability provided under that Act is abrogated.

LAW REFORM (DEATH & PERSONAL INJURY) ACT 1984

An Act to prevent the avoidance of civil liability in cases of death or personal injury caused by negligence

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

1. Short title. This Act may be cited as the Law Reform (Death & Personal Injury) Act 1984.

2. Interpretation. In this Act "negligence" includes the breach -

- (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract; and
- (b) of any common law duty or duty imposed by statute to take reasonable care or exercise reasonable skill (but not any stricter duty).

3. Crown. This Act binds the Crown.

4. Negligence Liability. A person cannot by reference to any contract, agreement, understanding or notice given to persons generally or to a particular person exclude or restrict his liability for death or personal injury resulting from negligence.

5. Savings. This Act does not derogate from the operation of the Civil Aviation (Carriers' Liability) Act 1964-1970.