Washington and Lee Law Review

Volume 22 | Issue 2 Article 8

Fall 9-1-1965

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Recommended Citation

Exculpatory Clauses In Tug Assistance Contracts, 22 Wash. & Lee L. Rev. 237 (1965).
Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol22/iss2/8

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A different result was reached in *United States ex rel. Sheffield v. Waller*,[42] where defense counsel realized any remedial motions were foredoomed to failure. Counsel learned that the judge would not tolerate a motion for continuance, and failure to make such motion was held not to be a waiver of defendant's right to allege prejudicial pretrial publicity for the first time on appeal.

It is submitted that the *voir dire examination* of prospective jurors is the only effective way of determining bias within the jury. In the *Van Duyne* case, a more extensive oral examination was permitted after one juror had been selected in order to discover any possible prejudice within the panel. If this procedure were followed by all courts faced with the problem of prejudicial pre-trial publicity, a greater number of impartial juries would be secured at the original trial. This would eliminate the problem of reversing lower court decisions, due to a biased jury, and then obtaining an impartial jury for the first time on remand to determine fairly the guilt or innocence of the accused. This expanded *voir dire* would permit an impartial jury to be drawn at the first instance.

BAXTER L. DAVIS

EXCULPATORY CLAUSES IN TUG ASSISTANCE CONTRACTS

A general principle of maritime law is that a tug is not a common carrier[1] and hence not subject to strict liability for injury to its tow.[2]

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challenges has also been held to be a waiver of his right to object to prejudicial pretrial publicity on appeal. The appellate court may deem this important, for jurors who could have been challenged were accepted by the defendant. United States v. Milanovich, 303 F.2d 626 (4th Cir. 1962); United States v. Shaffer, 291 F.2d 689 (7th Cir. 1961); United States v. Moran, 236 F.2d 361 (2d Cir. 1956); and Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953).

[42] 126 F. Supp. 537 (W.D. La. 1954).

[1] Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932); Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928); The Margaret, 94 U.S. 494 (1876); Walter G. Hougland, Inc. v. Muscovalley, 184 F.2d 530 (6th Cir. 1950); Ten Eyck v. Director Gen. of R.Rs., 267 Fed. 974 (2d Cir. 1920); The Atlantic City, 241 Fed. 62 (4th Cir. 1917); The Edmund L. Levy, 128 Fed. 683 (2d Cir. 1904); American Bridge Div., U.S. Steel Corp. v. Roen S.S. Co., 216 F. Supp. 353 (E.D. Wis. 1963); Glen So. Shipping Corp. v. Norfolk Towing Corp., 135 F. Supp. 146 (E.D. Va. 1955); The St. Francis, 72 F. Supp. 50 (D. Md. 1947); Mengel Co. v. Inland Waterways Corp., 34 F. Supp. 685 (E.D. La. 1940); The Primrose, 3 F. Supp. 267 (E.D.N.Y. 1933); The Sea Lion, 12 F.2d 124 (N.D. Cal. 1926); The Pacific Maru, 8 F.2d 166 (S.D. Ga. 1925); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); The James Jackson, 9 Fed. 614 (S.D. Ohio 1881); Ulrich v. The Sunbeam, 24 Fed. Cas. 515 (No. 14,329) (D.N.J. 1878); The Princeton, 19 Fed. Cas. 1342 (No. 11,433a)

A contract purporting to release a tug company from liability for its negligent performance of an assistance contract is not, therefore, invalid as a matter of law.[3]

In the recent case of *Transpacific Carriers Corp. v. The Tug Ellen F. McAllister*,[4] which sustained the validity of an exculpatory pilotage clause, the libelant's vessel was damaged due to the negligence of the pilot, supplied by the tug company, in miscalculating the strength of the current. The District Court[5] granted the shipowner recovery in rem and in personam against the tug company; but the Second Circuit reversed, dismissing the libel, and said: "Having accepted towing services under an agreement providing for certain limitations of liability, libelant is not entitled to have this court rewrite the contract and impose liabilities not bargained for."[6]

The pilotage clause in question[7] provides that the tug captain who goes on board the towed vessel becomes the servant of the assisted vessel in regard to the orders he gives and the handling of the vessel and that the tug is not liable for damages resulting therefrom.

The court reasoned that the pilot's negligent act was within the pilotage clause with respect to the handling of the vessel and stated that such a pilotage clause is valid absent a showing that the contracting parties possessed unequal bargaining power.

Tug assistance may involve a contract for towage[8] or a contract

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(S.D.N.Y. 1851); San Francisco Bridge Co. v. Charles Nelson Co., 10 Cal. App. 2d 685, 52 P.2d 978 (Dist. Ct. App. 1936).

[2]The Margaret, 94 U.S. 494 (1876); Walter C. Hougland, Inc. v. Muscovalley, 184 F.2d 530 (6th Cir. 1950); Glen So. Shipping Corp. v. Norfolk Towing Corp., 135 F. Supp. 146 (E.D. Va. 1955); Mengel Co. v. Inland Waterways Corp., 34 F. Supp. 685 (E.D. La. 1940); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); San Francisco Bridge Co. v. Charles Nelson Co., 10 Cal. App. 2d 685, 52 P.2d 978 (Dist. Ct. App. 1936).

[3]In the absence of strict liability or regulatory statutes, only by legal adjudication can such a power be restricted.

[4]336 F.2d 371 (2d Cir. 1964).

[5]209 F. Supp. 870 (S.D.N.Y. 1962).

[6]336 F.2d at 376.

[7]"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any damage resulting therefrom." 336 F.2d at 373.

[8]"Towage service is the employment of one vessel to expedite the voyage of another." Sacramento Nav. Co. v. Salz, 273 U.S. 326, 328 (1927).

for tug assistance in the docking and undocking of vessels.[9] Contracts for carriage are not involved.[10]

Three types of exculpatory clauses have been used in tug assistance contracts: (1) clauses which stipulate that the assisted vessel undertakes the entire transaction at its own risk;[11] (2) clauses which stipulate that all of the tug's employees are servants of the assisted vessel;[12] and (3) clauses which make only the pilot a servant of the assisted vessel.[13] The first two types are efforts to contract against all liability.

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[9]This involves merely the parking or dispatching of a vessel from its loading and unloading pier resting place.

[10]This would involve transportation of goods or persons. Mississippi Valley Barge Line Co. v. T. L. James & Co., 244 F.2d 263 (5th Cir. 1957). Liability in carriage contracts is determined by statutes. The Harter Act, 46 U.S.C.A. § 192; Interstate Commerce Act, 49 U.S.C.A. §§ 901, 902.

[11]E.g., "all towing is done at the sole risk of such vessel."

Cases involving this type of clause are: Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928); British Columbia Mills Tug & Barge Co. v. Mylroie, 259 U.S. 1 (1922); The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1870); Ten Eyck v. Director Gen. of R.Rs., 267 Fed. 974 (2d Cir. 1920); The Oceanica, 170 Fed. 893 (2d Cir. 1909); Mengel Co. v. Inland Waterways Corp., 34 F. Supp. 685 (E.D. La. 1940); The John J. Feeney, 3 F. Supp. 270 (E.D.N.Y. 1933); The Primrose, 3 F. Supp. 267 (E.D.N.Y. 1933); The Vim, 40 F.2d 638 (D.R.I. 1930); The Sea Lion, 12 F.2d 124 (N.D. Cal. 1926); The Pacific Maru, 8 F.2d 166 (S.D. Ga. 1925); The Jonty Jenks, 54 Fed 1021 (N.D.N.Y. 1893); The American Eagle, 54 Fed. 1010 (N.D. Ohio 1893); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); The James Jackson, 9 Fed. 614 (S.D. Ohio 1881); Deems v. Albany & Canal Line, 7 Fed. Cas. 348 (No. 3,736) (C.C.S.D.N.Y. 1878); San Francisco Bridge Co. v. Charles Nelson Co., 10 Cal App. 2d 685, 52 P.2d 978 (Dist. Ct. App. 1936).

[12]E.g., "and that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power."

Cases involving this type of clause are: Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); The St. Francis, 72 F. Supp. 50 (D. Md. 1947); The Mercer, 14 F.2d 488 (E.D.N.Y. 1926); Graves v. Davis, 235 N.Y. 315, 139 N.E. 280 (1923).

[13]E.g., "When a captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Cases involving this type of clause are: United States v. Nielson, 349 U.S. 129 (1955); Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932); Gray v. Johansson, 287 F.2d 852 (5th Cir. 1961); Publicker Industries, Inc. v. Tugboat Neptune Co., 171 F.2d 48 (3d Cir. 1948); The Margaret A. Moran, 57 F.2d 143 (2d Cir. 1932); Calzavaro v. Planet S.S. Corp., 31 F.2d 885 (4th Cir. 1929); Farrell Lines, Inc. v. The S/S Birkenstein, 207 F. Supp. 500 (S.D.N.Y. 1962); Victory Carriers, Inc. v. The Sea Scout, 164 F. Supp. 701 (N.D. Cal. 1958); Pennsylvania R.R. v. The S.S. Beatrice, 161 F. Supp. 136 (S.D.N.Y. 1958); People v. The S.S. Jules Fribourg, 140 F. Supp. 333 (N.D. Cal. 1956); National Distillers Prods. Corp. v. Boston Tow Boat Co., 134 F. Supp. 194 (D. Mass. 1955); The St. Francis, 72 F. Supp. 50 (D. Md. 1947); The Niels R. Finsen, 52 F.2d 795 (S.D.N.Y. 1931).

The third only attempts to contract against liability for damages resulting from the pilot's negligent performance of the service.

Tugs have traditionally tried to avoid liability for their negligent performance of tug assistance contracts. The practice usually employed has been to contract specifically against their negligence by stating in the assistance contract that the assisted vessel proceeded at at her own risk, or by saying that the tug's employees became servants of the assisted vessel. As early as the middle and late Nineteenth Century, doubt was cast upon the validity of such contract clauses,[14] and a series of conflicts between the federal circuits resulted.[15] When ordinary care was not exercised, these clauses were generally considered to be ineffective to release the tug company from its, or its employees', negligence.[16] Such declarations of invalidity, however, were based solely upon the construction of the contracts as not intending to relieve the tugs from liability for their own negligence, but only from liability for damages occurring when neither party was at fault.[17] This

[14] The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1870); The American Eagle, 54 Fed. 1010 (N.D. Ohio 1893); The Jonty Jenks, 54 Fed. 1021 (N.D.N.Y. 1893); The Rescue, 24 Fed. 190 (W.D. Pa. 1885); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); The James Jackson, 9 Fed. 614 (S.D. Ohio 1881); Williams v. The Vim, 29 Fed. Cas. 1413 (No. 17,744a) (S.D.N.Y. 1879); Deems v. Albany & Canal Line, 7 Fed. Cas. 384 (No. 3,736) (C.C.S.D.N.Y. 1878); Ulrich v. The Sunbeam, 24 Fed. Cas. 515 (No. 14,329) (D.N.J. 1878); The Alfred & Edwin, 1 Fed. Cas. 399 (No. 190) (E.D.N.Y. 1874); The Princeton, 19 Fed Cas. 1342 (No. 11,433a) (S.D.N.Y. 1851).

[15] Compare Calzavaro v. Planet S.S. Corp., 31 F.2d 885 (4th Cir. 1929), where an exculpatory clause was held not to exempt tug owners from liability, with The Oceanica, 170 Fed. 893 (2d Cir. 1909), where an exculpatory clause was held to exempt the tug owners.

[16] British Columbia Mills Tug & Barge Co. v. Mylroie, 259 U.S. 1 (1922); The Vim, 40 F.2d 638 (D.R.I. 1930); The American Eagle, 54 Fed. 1010 (N.D. Ohio 1893); The Jonty Jenks, 54 Fed. 1021 (N.D.N.Y. 1893); The Rescue, 24 Fed. 190 (W.D. Pa. 1885); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); The James Jackson, 9 Fed. 614 (S.D. Ohio 1881); Deems v. Albany & Canal Line, 7 Fed. Cas. 348 (No. 3,736) (C.C.S.D.N.Y. 1878); Ulrich v. The Sunbeam, 24 Fed. Cas. 515 (No. 14,329) (D.N.J. 1878).

Contra, Ten Eyck v. Director Gen. of R.Rs. 267 Fed. 974 (2d Cir. 1920); The Mercer, 14 F.2d 488 (E.D.N.Y. 1926); Graves v. Davis, 235 N.Y. 315, 139 N.E. 280 (1923).

[17] Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928); British Columbia Mills Tug & Barge Co. v. Mylroie, 259 U.S. 1 (1922); Calzavaro v. Planet S.S. Corp., 31 F.2d 885 (4th Cir. 1929); The Vim, 40 F.2d 638 (D.R.I. 1930); The Sea Lion, 12 F.2d 124 (N.D. Cal. 1926); The American Eagle, 54 Fed. 1010 (N.D. Ohio 1893); The Jonty Jenks, 54 Fed. 1021 (N.D.N.Y. 1893); The Rescue, 24 Fed. 190 (W.D. Pa. 1885); The M. J. Cummings, 18 Fed. 178 (N.D.N.Y. 1883); The James Jackson, 9 Fed. 614 (S.D. Ohio 1881); Deems v. Albany & Canal Line, 7. Fed. Cas. 348 (No. 3,736) (C.C.S.D.N.Y. 1878); Ulrich v. The Sunbeam, 24 Fed. Cas. 515 (No. 14,329) (D.N.J. 1878).

Recent cases which have used similar reasoning are: Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); Walter G. Hougland, Inc. v. Muscovalley, 184

left unsettled the validity of contracts construed as intending to release the tug company from liability for negligence.[18]

In 1932, in *Sun Oil Co. v. Dalzell Towing Co.*,[19] the validity of a contract of the third type, construed as intending to release the tug company from liability for its own negligence, was considered by the Supreme Court of the United States for the first time. A unanimous court held that a contract making the tugboat captain, when acting as pilot, the servant of the assisted vessel was effective to insulate the tug from liability for its captain's negligence. The court reasoned that towage did not involve a bailment and that pilot-supplying and assistance was less than towage, and thus less than a common carrier relationship existed. The Court further reasoned that the piloted vessel was under no compulsion to accept the terms of the pilotage clause and that there was no evidence to show that the parties to the contract were not on equal footing. Justice Butler further pointed out that it is an established principle of law that when one places his employees at the disposal and under the control of another, he becomes the employee of the latter.[20]

Although *Sun Oil* involved only a pilotage clause and not an attempt to avoid total liability, many cases construed it as upholding *all* exculpatory clauses. Further conflict resulted.[21]

In 1955, in *Bisso v. Inland Waterways Corp.*,[22] the Supreme Court of the United States seemed to dispose of the conflict by declaring that a tug may not "validly contract against *all* liability for its own negligent towage."[23] Thus, a distinction was drawn between pilotage clauses and clauses attempting total release from liability.

F.2d 530 (6th Cir. 1950); American Bridge Div., U.S. Steel Corp. v. Roen S.S. Co., 216 F. Supp. 353 (E.D. Wis. 1963); Glen So. Shipping Corp. v. Norfolk Towing Corp., 135 F. Supp. 146 (E.D. Va. 1955); Compania de Navegacion Cristobal, S.A. v. The Lisa R, 116 F. Supp. 560 (E.D. La. 1953). See 44 Ill. B.J. 229 (1955).

[18]It is clear that if a court merely decides that two contracting parties did not intend to agree to a certain obligation, it does not invalidate such an obligation if it were agreed to.

[19]287 U.S. 291 (1932).

[20]This type of reasoning disregards the contracted for exculpatory clause and merely states that as concerns the factual situation, an agency relation did exist.

[21]The St. Francis, 72 F. Supp. 50 (D. Md. 1947); The Harris No. 2, 45 F. Supp. 282 (E.D.N.Y. 1942); Mengel Co. v. Inland Waterways Corp., 34 F. Supp. 685 (E.D. La. 1940); The Melvin & Mary, 23 F. Supp. 398 (E.D.N.Y. 1938); The John J. Feeney, 3 F. Supp. 270 (E.D.N.Y. 1933); The Primrose, 3 F. Supp. 267 (E.D.N.Y. 1933); see Justice Frankfurter's dissenting opinion in the Bisso case, 349 U.S. at 98, 117. Contra, Petterson Lighterage & Towing Corp. v. The J. Raymond Russell, 87 F. Supp. 467 (S.D.N.Y. 1949).

[22]349 U.S. 85 (1955).

[23]349 U.S. at 85. (Emphasis added.)

Justice Black, in the majority opinion, gave three reasons why a tug should not be allowed to contract against all liability for negligence: (1) negligence should be discouraged by making the negligent party responsible for damages; (2) people who are in need of services should be protected from people who drive hard bargains; and (3) visitors to American ports should not be subject to "monopolistic compulsions."[24] Justice Black distinguished *Bisso* from *Sun Oil* by stating that in *Sun Oil* the court was faced with a contract that relieved the tug only from negligence on the part of the *pilot,* who was to be deemed the servant of the assisted vessel.

Justice Douglas, in his concurring opinion,[25] felt that *Bisso* was further distinguishable from *Sun Oil* by the fact that in *Sun Oil,* the tow was under its own motive power, while in *Bisso,* the tow had no motive power, no steering, and the movements were completely under the control of the tug. Thus, Justice Douglas felt that in *Sun Oil* the pilot was in fact the servant of the tow, as supported by the contract, and that the tug assistance contract effectively relieved the tug of liability.

The reasoning employed by the majority in *Bisso* is criticized for its logic[26] and in its failure to abide by the reasoning in *Sun Oil,* to which there had been unanimous assent.[27]

Bisso, however, does represent the present law and stands for the proposition that a tug owner cannot contract against *all* liability for the negligent performance of an assistance contract either by an explicit clause to that effect or by the fiction that all employees become servants of the assisted vessel.[28] A clause making a pilot the servant of

[24]349 U.S. at 91.

[25]349 U.S. at 95.

[26]69 Harv. L. Rev. 173 (1955); 30 Tul. L. Rev. 133 (1955); 17 U. Pitt. L. Rev. 93 (1955); 42 Va. L. Rev. 77 (1956); see Justice Frankfurter's dissent in Bisso, 349 U.S. at 98. See also 5 De Paul L. Rev. 132 (1955); 24 Geo. Wash. L. Rev. 338 (1955).

[27]Supra note 19. Bisso was a 5 to 3 decision in which Justice Black delivered the opinion of the Court, Chief Justice Warren, Justices Clark and Minton concurred. Justice Douglas wrote a separate concurring opinion. There was a vigorous dissent by Justice Frankfurter, who was joined in dissent by Justices Reed and Burton. Justice Harlan took no part in the decision. In Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963), Justice Harlan, in a concurring opinion to a per curiam decision, said: "While I would prefer to see Bisso reconsidered, believing, with deference, that it was wrongly decided, I nevertheless join in the opinion of the court." 372 U.S. at 698.

It is interesting to note that Justices Frankfurter, Reed, and Burton, all of the original dissenters to Bisso, are now retired from the Supreme Court of the United States, and of the majority, only one, Justice Minton, is retired.

[28]349 U.S. at 93. The Bisso doctrine is subject to two exceptions. In Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959), it was held that when a towboat owner's power is effectively controlled or reviewable by a "per-

the assisted vessel, as in *Sun Oil*, is entirely valid and absolves the tug owner from liability for the negligent acts of the pilot.[29] The precise extent to which a tug owner can contract against *some* of his liability for negligence, beyond mere pilotage, remains undetermined.[30]

The considerations which may determine the extent to which exculpatory clauses may be validly used in the future are whether: (1) the assisted vessel is under its own motive power, (2) the assistance involves ultrahazardous conditions, (3) the pilot is in fact the servant of the assisted vessel, (4) the ship owner must accept a contract with an exculpatory clause, (5) the tug owner has a geographical tug monoply, (6) the towing practices are reviewable by a regulatory commission, and (7) the burden of showing the nature of the tug industry in respect to compulsion and monopoly is on the tug owner.

(1) If the assisted vessel is under its own motive power, the courts have assumed that this is evidence that control, or at least the power to control, remains in the assisted vessel and that the pilot is in fact the servant of the assisted vessel. Thus, in the presence of an applicable exculpatory clause, the tug is relieved from liability for damage resulting therefrom.[31] If the vessel is not under its own motive power, the courts have assumed that this is evidence that control is with the tug and that a master-servant relationship between the assisted vessel and the pilot does not exist.[32]

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vasive regulatory scheme," in this case the I.C.C., exculpatory clauses were not void as a matter of law, but subject to such administrative review for determination. It is interesting to note that Chief Justice Warren and Justices Black and Douglas dissented from the majority opinion, which was written by Justice Harlan.

The second exception to this doctrine is found in Chile S.S. Co. v. The Justice McAllister, 168 F. Supp. 700 (S.D.N.Y. 1958), where it was decided that an exculpatory clause was valid when the tower had undertaken to tow a scow in an ice-clogged river. This case indicates that the tower and tow are placed on an equal footing where the former undertakes extreme risk, and constituting sufficient consideration for a complete exculpatory clause.

[29]Exculpatory pilotage clauses have been deemed invalid in respect to uncontemplated third persons injured due to the pilot's negligence. Boston Metals Co. v. the Winding Gulf, 349 U.S. 122 (1955); Pennsylvania R.R. v. The S.S. Beatrice, 161 F. Supp. 136 (S.D.N.Y. 1958).

Exculpatory pilotage clauses have also been held invalid when the injury is to the tug itself. United States v. Nielson, 349 U.S. 129 (1955). This case reasons that injury to the tug was not contemplated in the agreement.

[30]The future in this area is unclear due to a lack of consideration of these instances. It is conceivable that in towage and docking and undocking contracts that the tug companies may be able to avoid substantially all liability for their negligence by means of a valid pilotage clause placing all employees under the direct supervision of the pilot.

[31]Supra note 19.

[32]Supra note 22; American S.S. Co. v. The Great Lakes Towing Co., 333 F.2d 426 (7th Cir. 1964). Contra, The Mercer, 14 F.2d 488 (E.D.N.Y. 1926); Graves v. Davis, 235 N.Y. 315, 139 N.E. 280 (1923).

(2) If the assistance contracted for involves ultrahazardous conditions, the courts have tended to infer that the risk of peril to the tug may be sufficient consideration for an exculpatory clause.[33]

(3) If the pilot would, by ordinary agency principles, be the servant of the assisted vessel, then an exculpatory clause so stating will be upheld.[34]

(4) If the ship owner is under compulsion to accept a contract with exculpatory clauses, this lack of equal bargaining power places the ship owner at an undue disadvantage and the courts view this as a reason for a declaration of invalidity.[35] Lack of compulsion has led to the contrary result.[36]

(5) If it appears that the tug owner possesses a monopoly, this is evidence that there is not equal bargaining power.[37]

(6) If the towing agreement is reviewable by a regulatory commission, the court will not enforce an otherwise void clause, but leave it to the regulatory body to control.[38]

(7) Where there is not an affirmative showing that a monopoly exists or that there is an absence of equal bargaining power, the courts are not clear as to who has the burden of proof. It appears that if the clause in question attempts to avoid total liability, the burden of proof is on the tug owner to show an absence of these factors,[39] while if the clause in question is a pilotage clause, the burden is on the assisted vessel to show that the factors do exist.[40]

The principal case, *Transpacific Carriers Corp. v. The Tug Ellen*

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[33]Chile S.S. Co. v. The Justice McAllister, 168 F. Supp. 700 (S.D.N.Y. 1958); The Alfred & Edwin, 1 Fed. Cas. 399 (No. 190) (E.D.N.Y. 1874).

[34]Supra note 19.

[35]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); American S.S. Co. v. The Great Lakes Towing Co., 333 F.2d 426 (7th Cir. 1964); Pittsburgh Consol. Coal Co. v. Harrison Constr. Co., 223 F.2d 260 (3d Cir. 1955).

[36]Supra note 4.

[37]Supra note 22.

[38]Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959).

[39]Supra note 22.

[40]The only case to deal directly with this problem, National Distillers Prods. Corp. v. Boston Tow Boat Co., 134 F. Supp. 194 (D. Mass. 1955), said that the burden of establishing a contract provision is against public policy is on him who asserts that it is against public policy. This case was decided after Bisso and the court directly referred to it. It appears, however, that such a decision, as a matter of logic, is contrary to the rule in Bisso since there the party making the assertion was awarded a favorable judgment when his adversary failed to negate the assertion and no affirmative evidence of any kind was introduced.

F. McAllister, [41] introduces two additional factors. The court mentioned that "elimination of the pilotage clause would call for an increase on insurance rates...."[42] The possible effect of this seemingly minor consideration could prove to be very important. If the pilotage clause were eliminated and insurance rates were increased, the tug companies, due to economic necessity, would have to increase their service rates. Thus, the ultimate burden of a declaration of invalidity would be felt by the assisted vessels, the exact parties the courts have been struggling to protect from "monopolistic compulsions."[43]

The second factor was introduced by the court's statement: "Had the ship owner wished protection against the type of damage suffered it might well have secured it at an appropriate rate."[44] Declarations of the invalidity of exculpatory clauses have been predicated upon the absence of equal bargaining power.[45] To circumvent this reason for invalidity, tug companies may offer an option with a rate differential concerning release-from-negligence clauses, a higher rate being charged for a contract without an exculpatory clause. Thus, the ultimate loss would again fall upon ship owners as a class.

Declarations of the invalidity of exculpatory clauses are intended to place the burden on the negligent party when the contracting parties possess unequal bargaining powers. The courts seem to operate under the assumptions that corporate monopolies necessarily result in unequal bargaining power and that tug owners are better able to assume damage losses than ship owners, neither assumption seeming to lead to its conclusion.[46] The courts, making the above assumptions, have then concluded that a declaration of invalidity frees the assisted vessel from hardship, when in fact it is, at best, in the same position it was prior to such declarations.[47] It further appears that the courts are inconsistent in declaring that exculpatory clauses against all liability

[41]Supra note 4.

[42]336 F.2d at 373.

[43]Supra note 24.

[44]336 F.2d at 375

[45]Supra note 22.

[46]A monopoly may exist, and the parties may still be on equal footing as concerns equal bargaining power if options are given to the ship owners. It is not at all clear that tug owners are in a superior financial position.

[47]Under these practices, if damage results due to the tug owner's negligence, and the assisted vessel elects to accept a contract with an exculpatory clause, it will suffer the loss. If the assisted vessel selects a contract without an exculpatory clause, it does not have to bear the loss caused by the tug for the individual damage claim, but the higher rate serves to compensate the tug owner for the additional burden undertaken. In either case, assisted vessels as a class assume the loss, regardless of their individual desires or needs.

in tug assistance contracts are invalid, while upholding exculpatory clauses avoiding liability only for the negligent acts of pilots. In both situations, where the negligence lies and who has the superior bargaining power are the same. It is submitted that the courts have drawn a factual distinction unsupported by logic.

Furthermore, increase in insurance rates due to declarations of invalidity, and contract options with rate differentials concerning exculpatory clauses, may not only place the parties in a position of equal bargaining power, but place the ultimate economic loss on the same parties that bore the loss prior to such declarations, with the additional disadvantage to the ship owner that the assisted vessels pay for the tug's insurance costs even though the assisted vessel may already be adequately covered by insurance or self-insured. This payment would be forced upon the assisted vessel regardless of its wishes or its needs. It is submitted that the *Bisso* doctrine should be revisited, since such a declaration of invalidity may lead to undesirable results.[48]

HENRY ANGLL

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[48]The following information is based upon a letter and materials submitted by Mr. Gerard M. McAllister, Executive Vice President of McAllister Brothers, Inc., New York, N.Y.

Tug service rates vary, depending upon the day of the week, the size of the assisted vessel, and the duration of the assistance time, generally from $150.00 to $400.00 for a base period of one and one-half hours. In excess of the base period, and subject to the same above contingencies, the excess hourly rate varies generally from $50.00 to $80.00. The assisted vessels sometimes range in value from $5,000,000 to $10,000,000.

Severe damage done to an assisted vessel and chargeable to the tug company could easily bankrupt the tug company. Exculpatory clauses were created in order to protect the tug companies from such economic disaster. The United States Government had full knowledge of the existence of such clauses and consented to their use. It appears, therefore, that exculpatory clauses, rather than being products of "monopolistic compulsions," are a means of protecting a necessary industry from total destruction.

Assisted vessels, insured or self-insured, are better able to assume such loss than are tug companies. If the tug companies are required to insure against this loss due to declarations of invalidity, then the assisted vessels will have to pay a higher rate for tug services in order to cushion the tug company for its insurance expenses. In such a case, the assisted vessel will suffer the ultimate economic loss and pay twice for the same insurance coverage.

Competition in the tug industry is intense and healthy, and monopolies only exist in those ports which are so small that the amount of tug assistance needed can only support one tug company, such as Portland, Me., Savannah, Ga., Jacksonville and Port Everglades, Fla.

The use of exculpatory clauses in the United States is less severe and less protective of the tug industry than that found in many foreign ports. Following are the towing conditions found in a Canadian tug contract:

1. The Tug Company will not be responsible for any delay in supplying tug service arising from any cause whatsoever or for any loss, damages or injuries which