Contractual Exculpation from Tort Liability in California--The True Rule Steps Forward

Daniel I. Reith
CONTRACTUAL EXCULPATION FROM TORT LIABILITY IN CALIFORNIA—THE "TRUE RULE" STEPS FORWARD

As a condition to his admission as a patient, Hugo Tunkl signed (without reading) a contract purporting to exculpate the hospital from liability for negligence. Later he brought a malpractice suit against the hospital. Faced with this situation, the court might have taken one of several positions, all used at various times, on the effect of the exculpation clause: (1) hold Tunkl strictly to the terms of the contract which he executed "freely and voluntarily without reading";¹ (2) search for ways to relieve him from the harsh contract under the particular facts, as by finding no contract² or construing the clause so as not to provide exculpation for the particular wrong or injury;³ or (3) invalidate the exculpatory clause directly on the basis of a public policy protecting the party in the weaker bargaining position.⁴ The California Supreme Court in 1963 selected the last approach in Tunkl v. Regents of Univ. of Calif.,⁵ and two district court of appeal decisions since then have invalidated exculpation clauses on the same ground.⁶ By basing their decisions on relative bargaining power, the California courts have adopted what many writers had claimed to be the "true rule"⁷ governing exculpation clauses.⁸ As a consequence of their formulation of the rule in general terms, the courts have imposed upon themselves the delicate and difficult task of defining new restrictions to the freedom of contract.⁹

² In this instance, the jury found that Tunkl was not in such pain that he was unable to comprehend what he was doing. Tunkl v. Regents of Univ. of Calif., 60 A.C. 38, 41 n.1, 383 P.2d 441, 442 n.1, 32 Cal. Rptr. 33, 34 n.1 (1963).
⁶ Vandermark v. Ford Motor Co., 221 A.C.A. 685, 34 Cal. Rptr. 723 (1963); E. B. Ackerman Importing Co. v. City of Los Angeles, 219 A.C.A. 565, 33 Cal. Rptr. 245 (1963). The California Supreme Court has granted hearings in both cases, and as this Comment went to press the Supreme Court handed down its decision in Vandermark v. Ford Motor Co., A.C. 896, 37 Cal. Rptr. 896 (1964), holding that both an automobile manufacturer and dealer would be held to a strict liability in tort for any personal injury caused by a defect, and that there could be no contractual exculpation from the imposition of strict liability. Thus the supreme court apparently added a new basis for refusing to apply an exculpation provision. The district court of appeal decision retains its usefulness, however, as an indication of the judicial application of the Tunkl bargaining power rule.
⁷ By "true rule" is meant "the actual doing of the courts," looking to the results of the cases "without paying attention to language long corrupted by lifeless dogma" in those areas in which it has been so corrupted. Euckenwein, Conflict of Laws 308, 353 (1962). See Llewellyn, On Reading and Using the Newer Jurisprudence, 40 Colum. L. Rev. 581, 589 (1940).
⁸ E.g., Prosser, Torts 306 (2d ed. 1955); James, Assumption of Risk, 61 Yale L.J. 141, 162-66 (1952); Comment, Contractual Exemption from Liability for Negligence, 44 Calif. L. Rev. 120 (1956); Note, Significance of Comparative Bargaining Power in the Law of Exculpation, 37 Colum. L. Rev. 248 (1937).
⁹ Those who have favored special standards for adhesion contracts have not discounted the difficulty in fixing those standards or determining what is an adhesion contract. Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629, 636 (1943); Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 732 (1931).
At the beginning of this century the courts insisted upon the right of free and equal men to bargain freely, notwithstanding an incipient legislative recognition of the fact that equality was often fictitious in the emerging industrial society. That early judicial hostility to legislative regulation of contractual relationships has long since subsided, but where legislation itself has not established the limits of contractual freedom, the courts have been reluctant to disavow free bargaining. Rather than recognize different standards for different situations, they have sought to preserve "the pious myth that the law of contracts is of one cloth" by "construing" the particular contract language in question not to have intended the result it did intend. But this indirect method of neutralizing superior bargaining power continues to admit the power of a dominant party to contract as he wishes, and thus encourages contract draftsmen to redraft objectionable clauses in an effort to overcome unfavorable decisions. This produces needless uncertainty. Thus, Llewellyn urged that the courts direct their inquiry to the "true issue":

finding and marking out type-situations in which limits of permissible bargaining . . . [should be] laid down; or finding and marking out types of parties who . . . [should] be limited in their bargain-play with each other—and then spotting what the needed limitations are.

The history of California's attitude toward contractual exculpation reflects the full cycle of judicial thought on the freedom of contract. After a beginning of hostility to the idea that public policy might be concerned with an exculpation provision in a private contract, the courts turned occasionally to employing vaguely stated public policy or tortured constructions of the exculpatory clauses to render them inapplicable under the facts of the case. Only with the arrival of Tunkl have the courts confronted the "true rule."

This Comment will discuss the problems raised by the transition in California's law of contractual exculpation to the Tunkl rule. Part I will examine the content of the new rule. Part II will canvass California's more traditional pre-Tunkl views, which have largely been embodied in statutes which still remain in effect. Finally, Part III will explore the interplay of the old and new to determine the present state of the law, with a look into the future in the light of the limitations inherent in the relative bargaining power rule. In the process some of the difficulties and rewards in formulating special rules for adhesion contracts in a given area of law may become apparent.


11 Kessler, supra note 9, at 634.

12 Llewellyn, supra note 9, at 732.

13 Id. at 732-33.

14 Id. at 732 n.62.


I

THE TUNKL RULE

The Tunkl case established that in certain adhesion contracts an exculpatory clause adversely "affects the public interest" and will not be given effect. The statement of the rule and the consequence of its application, namely nullification of the offensive clause, could not be simpler. The problem is to identify those adhesion contracts in which one party will be defeated in his attempt to exact exculpation. In a society that compels the individual to enter into numerous contracts, leaving varying degrees of freedom to select the terms of the agreements and the persons with whom they will be made, the courts must deal with many variables if they are to develop meaningful standards to guide them in their task. The Tunkl court recognized the problem and suggested an outline of those transactions in which attempts at exculpation will prove ineffective:

[The transaction] exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

This rather elaborate breakdown seems to focus inquiry on three elements of the transaction, the type of business seeking exculpation, the source and nature of its superiority in bargaining power, and the form and content of the contract. It was doubtless intended to provide the lower courts with guidelines for identifying invalid clauses and to encourage careful, discriminating analysis in each case. Thus even flaws or ambiguities in the statement stand an excellent chance of affecting the law. This part of the Comment will therefore take a critical look at the elements of the Tunkl formula. It is submitted that the examination will show that several of the tests are of little value as indicators of invalid clauses and, more important, some of the criteria mentioned may prove to be misleading.

A. Type of Business Involved

Regulation of an industry was historically a reliable indicator of whether exculpation would be permitted. The high degree of public interest in the business that was considered constitutionally required to sustain regulation also usually resulted in the law's insistence on liability for any failure to serve the public properly. Such businesses included carriers, utilities, and others who were

---

18 60 A.C. at 40, 383 P.2d at 442, 32 Cal. Rptr. at 33–34.
19 To date all cases have involved the use of the exculpatory clause as a defense. When the clause is invalidated, it is simply excised from the otherwise effective contract. It is unlikely that a court would permit the weaker bargainer to avoid the entire contract because of the presence of such a clause. Cf. Uniform Commercial Code § 2–302(1) (not adopted by California).
21 60 A.C. at 44–47, 383 P.2d at 445–46, 32 Cal. Rptr. at 37–38 (footnotes omitted).
22 The Tunkl formula has already served as the basis for two decisions, see note 6 supra.
often granted monopolistic power coupled with a duty to serve the public. It is not at all surprising that they were the first to be denied exculpation.

Today, however, when virtually every business is subject to regulation at some level of government, suitability for public regulation is not a meaningful touchstone for determining whether a business may effectively provide for exculpation in its contracts. To be sure, the nature of the regulation imposed on a business may still afford a clue as to whether exculpation will be permitted. Regulations creating a duty to serve the public or imposing safety or professional standards for a business indicate public concern, extending beyond the specific regulations, for maintaining a standard of service which exculpation would tend to undermine. Here exculpation may be denied. But regulation not reflecting concern with standards of care, such as the 1963 California legislation dealing with fraudulent practices by appliance repairmen rather than any dangers of their incompetence, does not of itself seem to bear upon the permissibility of exculpation in that business. Generalization along these lines is not yet possible, however, as the landlord-tenant cases indicate. The landlord is typically subject to numerous building code safety regulations, yet he has generally been permitted to invoke an exculpatory clause in the lease unless the negligence happens to involve violation of one of the specific safety statutes. Whatever importance safety regulation has should become apparent by the amount of stress placed upon it in the inevitable challenge to exculpation clauses in leases. At present its unimportance is evidenced by the fact that it has not been mentioned in the cases since Tunkl, although some regulation of the types of businesses involved could have been found.

In addition to suitability for regulation, Tunkl accepts willingness to serve the public rather than a duty to do so as a characteristic indicating that a given business' exculpation attempts will be defeated. In discarding the older view that a duty to serve was necessary, the court expands the areas in which exculpation clauses are likely to be struck down, since willingness to serve the public, or at least some segment of it, is common to all businesses and professions. The relevance of this test will therefore probably be limited to supporting exculpation claimed for non-recurring transactions. Certainly the presence of an exculpation clause in such a contract indicates that the parties have bargained for it. The distinction between a transaction in the regular course of business and a non-recurring transaction has not been directly articulated by the courts, but it may well underlie some of the judicial aversion to exculpation clauses in standardized, form contracts.

23 See Hall, Concept of Public Business (1940).
24 Railroad Co. v. Lockwood, 84 U.S. 357, 379-80 (1873); Restatement, Contracts § 575(1) (b) (1932). See McClain, Contractual Limitation of Liability for Negligence, 28 Harv. L. Rev. 550 (1915).
27 See notes 56-58 infra, and accompanying text.
28 See notes 105-06 infra.
30 60 A.C. at 45-46 n.12, 383 P.2d at 445 n.12, 32 Cal. Rptr. at 37-38 n.12.
32 See text accompanying notes 44-47 infra.
B. Source of Bargaining Power

Bargaining power may stem from a variety of sources. In its crudest form, it is the power of the party with a monopoly of a commodity or service that is a necessity and for which there is no immediate substitute. On the other hand, the power may simply be the result of a "monopoly" in judgment, brains, and foresight, as where one party prepares the contract form which the other signs without considering the possible consequences. This may frequently be the case with exculpatory clauses, for the purchaser is primarily interested in the product or service offered and probably does not calculate the possibilities of injury from any defects. Most situations undoubtedly involve a combination of a real or imagined need for the product and a minimal appreciation of the risks or the significance of the exculpatory clause.

Tunkl speaks only in terms of bargaining power growing out of necessity. Certainly the recent California exculpation cases, involving hospital care, the purchase of an automobile, and a businessman's use of the only available storage facilities, have contained strong elements of need by the weaker bargainer. In order to invalidate clauses the concept of necessity has been stretched in other states to encompass a boy's need to go to summer camp and a downtown worker's need to use a parking lot.

Even assuming that the courts will interpret necessity liberally, there remains the problem of the exculpatory clause in cases in which the product or service is clearly a luxury. Greenman v. Yuba Power Prod., Inc., a 1963 personal injury action based on alleged defects in the manufacture of a hobby power tool, hints that the exculpatory clause will not be honored, although none was present in the case. In holding that product liability for personal injuries is a strict liability in tort rather than a contractual warranty, the court speaks of "the refusal to permit the manufacturer to define the scope of its own responsibility for defective products." Yet courts in such luxury product cases may be reluctant openly to rescue the purchaser from a predicament resulting from his own apathy regarding the terms of his contract, and may fall back to strained interpretations of the particular clause to avoid applying it in the case.

---

38 It may be recalled that Hugo Tunkl did not even read the exculpation contract he signed.
35 Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
36 It may be unrealistic to put all of the blame on the individual. Even if he objected to the clause, the apathy of purchasers generally may make the seller unresponsive to individual complaints. In dealing with cases of exculpation regarding non-essential goods or services, the courts might draw the line between the valid and invalid clause by determining whether the purchaser could have obtained the goods or services without the exculpation condition by bargaining or shopping around. See Henning v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (automobile warranty); O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 441–50, 155 N.E.2d 545, 547–52 (1959) (dissent) (residential lease).
37 See cases cited note 17 supra.
C. Form and Content of the Contract

Mass selling, a necessary complement to mass production, is greatly facilitated by the use of standardized, form contracts. The matters actually bargained for by the parties are reduced to a minimum, with the bulk of the terms left to the drafting of one party's lawyer, who can be expected to give his client the best possible position in the event that something goes wrong in the transaction. The exculpation provision is typically one of these unbargained-for parts of the contract package. As the Tunkl court put it in referring to the clause in a hospital admission form, "The admission room of a hospital contains no bargaining table ...." Of course, the standardized contract is not objectionable in itself, but its use in a transaction is strong evidence that a power disparity exists. The presence of a standardized, form contract has traditionally prompted the courts to construe any real or imagined ambiguities against the drafter, and it should prove to be a workable, easily ascertained indicator that bargaining disparity caused the inclusion of any exculpation clause in a contract.

Even while using a form contract, the party with superior bargaining power can generally exculpate himself if he is willing to temper his demands by offering to assume his normal liability for a higher price. The California statutes discussed in Part II of this Comment strongly support this proposition and indicate some of the anomalies in such a system. Particularly, those who are least able to bear the financial burdens of a loss are the ones who are least able to afford to pay a higher price for goods or services in order to preserve a potential tort claim. Thus the device works least effectively where the disparity in bargaining power is greatest. Furthermore, the variable price device may not be usable outside the areas in which it has been traditionally employed. For example, in Tunkl the plaintiff was a charity patient who paid nothing for his hospital care. While the railroad free pass cases would lead to upholding the exculpatory clause under such circumstances, the court was unwilling to sanction this roundabout restoration of charitable immunity to defeat the claims of those least able to bear the resulting loss.

II

PRE-Tunkl (STATUTORY) LAW

In addition to the new Tunkl bargaining power rules on contractual exculpation from tort liability, California has for many years had a few statutes denying effect to exculpation clauses and a greater number permitting elimination or limitation of liability in certain businesses and situations. This haphazard collec-

44 Llewellyn, supra note 9, at 731.
45 This unilateral legal planning has been critically referred to as an attempt "to buy the Law in advance." RODELL, Woe Unto You, LAWYERS! 158 (1957). In rebuttal, the subject matter of this Comment shows that "the Law" cannot always be bought.
46 60 A.C. at 48, 383 P.2d at 447, 32 Cal. Rptr. at 39.
48 E.g., Donnelly v. Southern Pac. Co., 18 Cal.2d 863, 115 P.2d 465 (1941). RESTATEMENT, CONTRACTS § 575(1)(b) (1932), draws the general conclusion that, absent consideration, the exculpatory provision will be upheld.
49 60 A.C. at 49-50, 383 P.2d at 448, 32 Cal. Rptr. at 40.
tion of statutes generally follows the traditional views on exculpation, and, in many respects, clashes with the Tunkl reasoning.

A. Invalidation of Contractual Exculpation

California's only statute on contractual exculpation applicable to all types of contracts is Civil Code section 1668, which provides:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

Only two exculpatory clauses have been invalidated on the basis of the literal language of the section. The sole fraud case, involving allegations that the plaintiff's signing of the exculpation contract was fraudulently induced where a stable attendant gave plaintiff a wild horse knowing of the plaintiff's inexperience, did not cite the section. No case has involved willfully-inflicted injuries. In view of the number of statutory standards of care, it is most surprising that only two cases have invalidated the clauses because the negligence causing the damage happened to be a violation of law. The statute has been justly criticized for the incongruous results possible because it fails to cover gross negligence. The gross negligence case has yet to appear, however, and there is no reason to believe that a court will feel constrained by a lack of statutory authority to deal with the problem, particularly since the common law or traditional view denies exculpation for aggravated forms of negligence. Yet even in cases involving ordinary negligence, the section has caused different results to flow from similar facts. Thus, where a landlord's negligence causes water damage to his tenant's personal property, the exculpatory clause in the lease will ordinarily protect the landlord, but not if the harm stems from a violation of the municipal building code. This distinction based on the source of the standard of care is hard to justify.

See Restatement, Contracts §§ 574–75 (1932); 6A Corbin, Contracts § 1472 (1962); Williston, Contracts § 1751 (1938); McClain, supra note 24.


See cases cited note 60 infra.

The Restatement of Contracts, which permits exculpation for ordinary negligence in all but employment contracts and contracts with public service companies, would not allow exemption for negligence "falling greatly below the standard established by law," which presumably means gross negligence. Restatement, Contracts §§ 574–75 (1932).


The section would seem to bar contractual exculpation only for fraud, willfully-inflicted injuries, and the willful or negligent violation of a statute. Yet in Tunkl, a case involving mere negligence not violative of a statute, the court refers to the section as invalidating any exculpatory provision "affecting the public interest." This expanded reading of the statute discredits the cases that refused to look beyond the statutory language to invalidate exculpatory clauses, but for purposes of analysis it is sounder to read the section literally in order to highlight the differences between the old and new law.

In addition to section 1668, California statutes specifically prevent contractual exculpation by warehousemen for any negligence and by common carriers for "gross negligence, fraud, or willful wrong." In both instances, however, the state supreme court has permitted the use of declared value clauses to limit liability. Thus the sections have been emasculated for all practical purposes.

Adoption of the Uniform Commercial Code adds two new sections denying validity to attempted exculpation. Section 4103 prevents a bank from disclaiming or limiting its liability for lack of good faith or failure to exercise ordinary care in connection with bank deposits and collections. Although the statute is new,
California courts had previously reached the same result by concluding that public policy requires that a bank be “held accountable for the ordinary and regular performance of its duties.”

More important is section 2719(3), which authorizes the courts to invalidate a clause excluding or limiting consequential damages in sales contracts. It provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The key term “unconscionable” is not defined in the Code. In fact, the Uniform Code’s more general section allowing the courts to refuse to enforce any unconscionable sales contract or clause was not enacted in California partly because of uneasiness over the term’s unknown scope. Apparently section 2719(3) is aimed at preventing over-reaching in the same adhesion contract situations dealt with in Tunkl. This view is reinforced by the holding in Vandermark v. Ford Motor Co. that Tunkl requires invalidation of a manufacturer’s disclaimer of liability for personal injury to the purchaser. The same clause would, of course, be “prima facie unconscionable” under section 2719(3). It remains to be seen whether differences will develop between the Code’s “unconscionability” and Tunkl’s “public policy” as applied to tort exculpation clauses in sales contracts. Although the two seem to be aimed at similar problems, it is entirely possible that significant differences will develop in their application, particularly since the interpretation of the unconscionability provision is likely to be influenced by the decisions in the other jurisdictions that have or will adopt the Code. Certainly the broad term “unconscionable” potentially affords more leeway for the courts than the bargaining power formula set up by Tunkl.

---


The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.


The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.


72 Twenty-eight states and the District of Columbia had enacted the Code by February 26, 1964. In the order of enactment, they are Pennsylvania, Massachusetts, Kentucky, Connecticut, New Hampshire, Rhode Island, Wyoming, Arkansas, New Mexico, Ohio, Oregon, Oklahoma, Illinois, New Jersey, Georgia, Alaska, New York, Michigan, Indiana, Tennessee, West Virginia, Montana, Maryland, California, Wisconsin, Maine, Nebraska, Missouri, and District of Columbia. It had also been introduced into the legislature in Mississippi and Virginia. Letter from National Conference of Commissioners on Uniform State Laws, Feb. 27, 1964.
B. Permitted Exculpation Clauses

Those businesses charged with a duty of public service, such as common carriers, utilities, professional bailees, and innkeepers, were traditionally unable to provide contractually for exculpation for negligence. However, a number of California statutes provide these businesses with such effective methods for excluding or limiting their liability for property damage that the traditional position has been nullified in many situations. Thus a common carrier is not liable for loss of property beyond specified minimal amounts unless a higher value is declared, for which a higher tariff will be charged. Furthermore, the declared value has been held in one early case to be the measure of damages even when the loss results from the carrier's gross negligence. The court reasoned that the declared value provision was not a contract limiting the carrier liability for gross negligence, which would have been invalid, but rather was a contract assuming responsibility to the full extent of value, as declared by the shipper. The court thus discounted the fact that a declared value provision is as much a means of fixing the shipping rate as it is a means of informing the carrier of value, and may therefore provide a poor measure of damages for willful injury or gross negligence.

A depositary for hire is made liable for negligence only to the extent of the declared value or, in the absence of a declaration, the amount he has reason to believe the deposited object to be worth. Even when the depositary knows of a high actual value, the supreme court has permitted him to limit his liability to the declared value by contract. The court, by analogy to the carrier's statutory right, concluded that the limitation was permissible, although not specifically authorized by statute. This approach seems to open the door to other uses of the declared value device as a means of limiting liability even when not granted to the particular business by statute.

Innkeepers, boarding house keepers, and the like are classified as depositaries for hire for purposes of determining their liability for loss or injury to personal property. Thus their liability is also limited to the declared or supposed value of the guest's property. In addition, one statute limits the liability to specified minimal amounts unless the innkeeper agrees in writing to assume a greater liabil-

---

73 See materials cited in note 24 supra.
74 George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 851-58, 205 P.2d 1037, 1048-52 (1949) (Carter, J., dissenting). Witkin writes, "The rule that a party charged with a duty of public service cannot exempt itself from liability . . . is largely theoretical; limitation of liability to such small amounts as to make litigation unlikely is usually permissible." I WITKIN, SUMMARY OF CALIFORNIA LAW 230 (7th ed. 1960).
75 CAL. CIV. CODE §§ 2176, 2178, 2200, 2205.
77 CAL. CIV. CODE § 2175.
78 151 Cal. at 769, 91 Pac. at 608.
81 Id. at 846-48, 205 P.2d at 1045-46.
82 But see text accompanying notes 98-99 infra.
83 CAL. CIV. CODE § 1859.
ity;85 another section exculpates him completely for loss of “articles of unusual value and small compass” if the guest fails to place them in a safe provided by the innkeeper, and even if the objects are so deposited, the innkeeper’s liability is limited to two hundred fifty dollars unless he gives a receipt acknowledging a higher value.86

Parking lot operators are also given an implied authorization to exculpate themselves by the statute which requires that their exculpatory clause on the parking stub be printed in readable type and that the provision be conspicuously posted on the premises.87 The lot operator’s right to exculpate himself from liability for negligence, however, was recognized before enactment of the section.88

When a business is required to adhere to a rate schedule filed with a regulatory agency that passes upon its fairness, persons dealing with that business may find themselves bound under no special duty to serve the public.89 However, where the customer could have purchased greater protection under the schedule if he knew of its existence, it seems to be a dubious policy on the part of the regulatory agency to protect a business that makes no effort to give notice of the schedule.90

Finally, rounding out the pre-“Tunkl” picture are the cases, mostly involving leases, upholding exculpation clauses when the party seeking exculpation was under no special duty to serve the public.91 The courts in these cases were satis-

85 CAL. CIV. CODE § 1859.
fied that the public had no concern with the allocation of risks between private parties. Without challenging this view, however, a greater number of courts in such cases managed to interpret the clauses so that they would not apply under the facts. The end result was to render the efficacy of an exculpation clause highly uncertain in the areas in which it was theoretically allowed, while the statutes previously discussed gave sure protection for those who were traditionally denied exculpation.

III

THE AFTERMATH OF Tunkl: PROBLEMS SOLVED AND UNSOLVED

Tunkl's recognition of disparity in bargaining power as a reason for denying validity to an exculpatory clause raises two problems. The first is that of determining how much of the pre-Tunkl law remains intact and what will be the working relationship between the old order and the new. Secondly, the bargaining power formula itself raises questions of how far it will reach to invalidate clauses heretofore left untouched. Indeed, the limitations of the bargaining power rationale invite inquiry as to whether it will support the "true rule" of the future.

A. Combining Old and New Views on Exculpation

The recent case of Hanna v. Lederman indicates that the new rule does not replace the statutory bases for invalidating exculpatory clauses, and points to the proper working relationship between the two. The case involved an exculpatory clause in the lease of space in a commercial building, which would seem to be a transaction in which bargaining power is as evenly divided as it is ever likely to be. Yet because the negligence alleged was a violation of a statute, the court refused to apply the clause on the basis of a literal reading of section 1668, without mentioning Tunkl or its reasoning. On the other hand, in the cases in which the clause has been invalidated on the basis of the Tunkl formula, the tortious acts alleged were outside section 1668's stated categories. It would therefore seem that the statutory grounds for refusing to permit exculpation continue to stand as independent, preliminary barriers for each exculpation clause. The Tunkl policy will then be invoked only to invalidate those clauses attempting to exculpate for negligence not in violation of statute, which are not blocked by a literal reading of section 1668. This use of Tunkl as a backstop for the more easily-applied statutory categories will, of course, tend to reduce the frequency with which the courts will be required to make the delicate social policy determinations involved in the bargaining power rule.

The statutory modes of limiting or eliminating liability for property damage by contract do not seem to be threatened by Tunkl, which indicates that it is permissible to limit liability if the purchaser is able to obtain full protection at a higher price. Yet by refusing to allow exculpation in a free hospital care contract, the case also indicates that providing a price differential may not always be enough when the purchaser's opportunity to obtain the added protection is illusory. It may also serve notice that the price differential device will have less

---

84 See cases cited note 17 supra.
86 Id. at 893, 36 Cal. Rptr. at 154.
87 Note 6 supra.
88 60 A.C. at 46-47, 383 P.2d at 446, 32 Cal. Rptr. at 38.
weight if there is an attempt to achieve exculpation or limitation of damages for personal injuries.  

The most important consequence of bringing bargaining power into the open is that it can help to clear away the uncertainties inherent in the former technique of dealing with exculpation cases by strained interpretations of the clauses. If a court interpreted the clause to mean what it said, the weaker bargainer might well be barred from recovery. On the other hand, indiscriminate use of tenuous rules of interpretation, such as the requirement that the clause must use the word "negligence" to exclude liability for it, might well render ineffective a clause actually bargained for by parties capable of fending for themselves. To the extent that unequal bargaining power was the stimulus for developing unrealistic rules of interpretation, open recognition of bargaining power as a ground for invalidating exculpation clauses removes the need for using the rules. Hopefully this development will remove needless doubts in cases involving proper uses of exculpatory clauses to shift burdens between parties who knowingly bargained for such a result and are able to bear or insure against the consequences. Of course, legitimate interpretation of the contract language undoubtedly should and will continue to defeat exculpation attempts. Thus, in the post-Tunkl case of Cooper v. Mart Associates, where the exculpation clause was actually ambiguous and self-contradictory, the court properly resolved the ambiguity against the party invoking the clause.

B. Limitations of the Tunkl Rule

By bringing bargaining power forward and making it the basis of opinion, the courts are exposing some of the limitations of the concept that remained largely unexplored when it was only descriptive of judicial motivation. Principally, are the unequal bargaining power situations the only ones in which courts will want to deny effect to an exculpatory clause? Bargaining power situations were the first abuses of contractual exculpation to attract attention, and most cases will continue to come under the Tunkl aegis. The concept can be expanded to some extent by broad interpretations of what is a necessity and how great the disparity in power must be. For example, exculpatory provisions in apartment leases, for years subjected to tortured interpretations, appear to be about to fall under the Tunkl rule.

---

94 Id. at 149-51, 37 Cal. Rptr. at 148-50.
95 See text accompanying notes 38-39 infra.
In the future, however, the tide of judicial antipathy toward contractual exculpation may rise higher. Consumers often unthinkingly accept exculpatory clauses even though similar goods or services are available without the liability restriction. If the courts believe that consumers should not be trusted with a choice between seeking protection and cavalierly waiving their rights, then the bargaining power rule will not provide the answer in all cases. The courts may then find it convenient to disarm the particular clause by the old method of strained interpretation.

CONCLUSION

With the open acceptance of disparity in bargaining power as a ground for invalidating exculpation clauses, the California courts have begun to reanalyze the social functions of such provisions. The detailed results of that reanalysis are not certain at the moment, but some clarification is to be expected soon. Yet even now the governing trends are readily discernible. It is not just coincidence that the exculpation clauses have proven ineffective in the five most recent cases, beginning with Tunkl. Writers have observed “trends toward an enterprise liability” that have produced “a steady erosion of fault as the ground of shifting the plaintiff’s loss to the defendant.” The same trends quite obviously run counter to the exculpation clause’s attempt to shift the loss back upon the injured party. The Tunkl rule is, however, something more than an improved technique for cutting down attempts to avoid the imposition of an enterprise liability. Henceforth the courts and parties will be able to consider exculpation provisions in the light of the “true issues.” This should produce better results, leading to enforcement of exculpation clauses where truly and fairly bargained for and invalidation where they are imposed by a party on one unable to bear the re-allocation of risks. Perhaps ultimately more important, recognition of the “true issues” may encourage efforts to develop more imaginative and workable solutions than the usual alternatives of unlimited tort liability and complete exculpation.

Daniel I. Reith


In discussing the use of the unconscionability doctrine in business settings, one commentator has written: “If the question is . . . simply the protection of small business from its own decisions, then bargaining power vis-à-vis any other business is of no consequence. The court feels that one party has been left with a choice he is unqualified to make. In a commercial setting, the doctrine of ‘unconscionability’ camouflages what is essentially a judicial determination of proper business policy.” Note, Unconscionable Business Contracts: A Doctrine Gone Awry, 70 Yale L.J. 453, 460 (1961). See also Note, Disclaimers of Warranty in Consumer Sales, 77 Harv. L. Rev. 318, 327–28 (1963).

See note 6 supra.


For one such solution in the area of hospital and medical liability that was involved in Tunkl, see Ehrenzweig, Compulsory “Hospital-Accident” Insurance: A Needed First Step Toward the Displacement of Liability for “Medical Malpractice,” 31 U. Chi. L. Rev. 279 (1964).