ELISABETH PEDEN, NSW

Liability for recreational services: A contract law analysis

During 2002 and 2003 many jurisdictions enacted legislation to reduce the volume of personal injury litigation and inflating insurance premiums.[1] Some jurisdictions, including New South Wales and the Commonwealth, have dealt with the issue of waiver of contractual duties of care for recreational activities.[2] This article considers the effect of these pieces of legislation and the common law that deals with incorporation and construction of exclusion clauses.

Dr Elisabeth Peden is a Senior Lecturer in the Faculty of Law at the University of Sydney **PHONE** (02) 9351 0233
EMAIL elisabeth@law.usyd.edu.au

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FACT SCENARIO

The effect of the changes to the legislation can be seen in a fact scenario. Presume two people, Anna and Stuart, park in a carpark. Anna is going to a business meeting, Stuart to the theatre. Upon entry to the carpark they are both issued with a ticket from a machine, which refers to conditions contained on signs, both at the entry and inside the carpark. One condition provides: 'The carpark owners regret they cannot accept liability for any harm howsoever caused.' Anna and Stuart take the tickets and leave their cars in the carpark. They take the lift to get to ground level. The lift has not been maintained, due to the carpark owners' negligence. The lift crashes two flights and Anna and Stuart are injured. Can Anna and Stuart sue the carpark for the injuries they have suffered? Until this year, both might have argued the exclusion clause was not operative because:

- The exclusion clause was not incorporated into their contract.
- The exclusion clause was rendered void under the *Contracts Review Act* 1980 (NSW) ('CRA').
- The exclusion clause was void due to section 68 of the *Trade Practices Act* 1974 (Cth) ('TPA').

All these arguments should be considered in light of the new law.

INCORPORATION OF THE EXCLUSION CLAUSE

The first of these arguments is still available to Anna and Stuart. There would probably be no issue as to there being a contract. Everyone would understand that a pay carpark allows people to park their cars in return for payment. However, what about the other contact terms? In particular, are the exclusion clauses included on the signs incorporated?

Exclusion clauses can be incorporated into contracts in several ways:

- By signature on a written contract.
- By reasonable notice.
- By reference.
- By a course of dealing.

In the fact scenario, it is most likely the clause is incorporated by notice. Incorporation in this way usually entails a sign setting out the exclusion of liability. The argument about incorporation in this context revolves around whether the notice is 'reasonable' in the circumstances.

Lord Denning famously said that if a clause is particularly onerous in that it excludes all liability, the party seeking to rely on it should ensure that it was in red ink with a red hand pointing to it, directing the other party's attention to the clause.[3]

Complications can arise where one party is given a document referring to the contract terms, including exclusion clauses. Cases that deal with whether such exclusion clauses are part of the contract are usually dubbed the 'ticket' cases.

Classic examples involve parking station tickets. Parking station operators want to exclude liability for damage or injury to customers, their cars or belongings. Sometimes the contract terms for parking in the station will be displayed on a large sign at the entrance. The customer's 'ticket' will often state that 'conditions apply'. It is taken for granted that these conditions have been accepted, provided the notice is 'reasonable' when the customer leaves their car in the parking station.

Incorporation by signature has been the subject of some recent cases. Following the case of *L'Estrange v Graucob*[4], a signature has the immediate effect of incorporating a clause, even if the party has not read the contract or ▶

the particular clause.

Recent cases highlight that just because a signed document exists, it cannot be assumed that everything within the document is automatically part of the contract.[5] First, it must be determined whether the document is contractual in effect.[6]

Admittedly, a signature on a document is usually a good indication that the party agreed to what it contains.

Sometimes signed documents do not have contractual effect. For example, a receipt might be signed, but the signature will not incorporate new terms into an existing contract.

Once the clause is part of the contract, the next questions are: What does the clause mean? Does it exclude liability for the event in question? Courts use techniques of contractual construction to resolve these issues. The primary aim of construction is to determine the parties' intentions. The court asks: 'What would a reasonable person, in the position of the party to whom the words were addressed, regard as the other party's intention?'

This process of construction is assisted by some 'secondary' rules, which really amount to particular applications or adaptations of the general approach to construction. Traditionally, courts were quite hostile to exclusion clauses and took a rather aggressive approach to their construction, making it very difficult to convince the court that the clause was incorporated or that it should be construed to exclude liability in the particular circumstance.

However, courts now take a more balanced approach, largely because of legislative developments protecting parties in weaker bargaining positions, such as consumers under the TPA, CRA and *Sale of Goods Act* 1923 (NSW).

If the new legislation operates to restrict consumer rights, it might be that courts again approach the rules of incorporation in a strict way. When proposing changes to the TPA, the Ipp Committee report on the Review of the Law of Negligence claimed that changes to the law 'will not significantly reduce consumer protection, since ordinary rules of contract law are stringent'. This seems to reveal a view that rules of incorporation and construction will again be strained and manipulated to benefit consumers.

In commercial contracts, exclusion clauses are treated the same way as any other term of the contract. Thus, the High Court introduced the 'natural meaning' approach in *Darlington Futures Ltd v Delco Australia Pty Ltd*[7]:

'[T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.'

Other construction principles that assist the courts[8] include the four corners rule,[9] deviation cases, and the *Canada SS*[10] rules concerning negligence.

CIVIL LIABILITY ACT

Assuming the carpark's exclusion clause is incorporated, the impact of the legislation must be considered. The New South Wales legislation seeks to move the risk involved in 'recreational activities' away from the recreational service provider back to the consumer. In particular, this will be achieved by allowing consumers to waive their right to sue the service provider for a breach of a duty of care.

Section 5N(1) and (2) of the *Civil Liability Act* 2002 (NSW) provide:

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

Section 5K defines 'recreational activity' as including:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at

a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

Section 5K(c) is very broad, covering activities that are not ordinarily 'recreational activities', but are carried out in a public environment. Furthermore, section 5N(4) provides that 'recreation services means services supplied to a person for the purposes of, in connection with, or incidental to the pursuit by the person of any recreational activity'.[11] This extends the exclusion of liability even further to include, for example, parking for the purposes of attending the theatre, a 'recreational activity'.

TRADE PRACTICES ACT

It seems that section 68B of the TPA was intended to complement section 5N of the Civil Liability Act. Section 68[12] was inserted in 1978 to protect consumers. It prohibits and renders void any contract term which purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, in particular, the implied term provisions.

The new section 68B provides:

(1) A term of a contract for the supply by a corporation of recreational services is not void under s68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
   a) the application of s74 to the supply of the recreational services under the contract; or
   b) the exercise of a right conferred by s74 in relation to the supply of the recreational services under the contract; or
   c) any liability of the corporation for a breach of a warranty implied in s74 in relation to the supply of the recreational services under the contract,

   so long as:
   d) the exclusion, restriction or modification is limited to liability for death or personal injury; and
   e) the contract was entered into after the commencement of this section.

'Recreational services' means services that consist of participation in:
(a) a sporting activity or a similar leisure-time pursuit; or
(b) any other activity that:
   (i) involves a significant degree of physical exertion or physical risk; and
   (ii) is undertaken for the purposes of recreation, enjoyment or leisure.

The new section 68B is not nearly as wide as the New South Wales legislation, particularly because the definition of 'recreational services' in section 68B is much more specific and requires a sport, another similar activity, or risky or physically challenging pursuit. Furthermore, section 68B only applies where the exclusion clause relates to personal injury, rather than economic loss.

In our fact scenario, the New South Wales legislation would suggest that the exclusion clause is operative for Stuart, who is going to the theatre, that is, an activity in connection with a recreational activity.

However, for Anna, who is going to work, the clause may not be valid, as it would contravene the CRA or implied warranties in the TPA. Would section 68B of the TPA apply? Probably not for Stuart. Parking for the purposes of going to the theatre would not fall within the meaning of provision of 'recreational services'. Thus, section 68 would apply and the exclusion clause would be void.

COMMENT ON THE NEW LEGISLATION

Twenty-five years ago, the courts alone were responsible for determining whether exclusion clauses were incorporated into contracts and how they ought to be construed. To assist parties with weaker bargaining power, particularly consumers, the courts developed strict incorporation and construction rules, which made it difficult for stronger parties to rely on harsh exclusion clauses. When consumer protection legislation was enacted (CRA and TPA sections), the courts could take a more realistic approach to exclusion clauses.

However, the 'insurance crisis' has led to the ill-conceived amendments to the TPA and legislation in New South Wales. The reforms seem intent on restoring the old position, at least in relation to 'recreational services'. To date, there are no cases concerning the legislation. In time, the courts will have to deal with the strange results that will appear when applying the different legislative tests of 'recreational services'. PL

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Endnotes: **1** Indeed, the Ipp Committee report of August 2002 at 5.8 thought that consistent changes needed to be made nationally. The legislation in other jurisdictions includes: *Personal Injuries Proceedings Act* 2002 (Qld); *Civil Liability Act* 2002 (Tas); *Personal Injuries (Liability and Damages) Act* 2003 (NT); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (WA). **2** s 5N *Civil Liability Act* 2002 (NSW); s 68B *Trade Practices Act* 1974 (Cth). See also s 68A *Consumer Affairs and Fair Trading Act* (NT); *Recreational Services (Limitation of Liability) Act* 2002 (SA); ss 32N and 32NA *Fair Trading Amendment Act* 2003 (Vic); s 97A *Goods Act* 1958 (Vic). **3** See *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 170. **4** [1934] 2 KB 394. **5** See for example *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2003] NSWCA 75, especially paras [51]-[67] and [96]-[112]. **6** Opinions can differ on this. See for example the different judgments in *Le Mans v Illiadis* [1998] 4 VR 661 and comment in J Carter, D Harland (2002) *Contract Law in Australia*, 4th ed, Butterworths [615]. **7** (1986) 161 CLR 500 at 510. **8** See J Carter, D Harland (2002) *Contract Law in Australia*, 4th ed, Butterworths [748]-[764]. **9** See for example *Gibaud v Great Eastern Railway Co* [1921] 2 KB 426 at 435. **10** *Canada SS Lines Ltd v The King* [1952] AC 192. **11** However, it can be noted that s 5N and s 68B TPA do not cover the provision of 'goods' for recreational services. Interesting cases may arise concerning whether injuries were caused by goods or services. **12** However, s 68A permits certain exclusions (provided they are fair and reasonable) where the services are not of a kind ordinarily acquired for personal, domestic or household use or consumption.