

Exclusion Clause

Exclusion clauses are conditions that limit a party's liability, either contractually or in torts.

Ex. use at own risk

→ need to be read in ordinary meaning and link construction to breach (Darlington)

1. Exclusion clause is a term so you have to figure out if it is incorporated

→ If it is not incorporated it is not binding

Three main types

1. Clauses which seek to exclude rights of one party, which they would otherwise possess under the contract
2. Clauses which restrict the rights of one party without affecting the other
3. Clauses which qualifies the rights under the contract by subjecting them to specified procedures

p

Darlington Futures v Delco

Facts: Darlington Futures was a broker dealing with commodity futures for Delco. Delco instructed Darlington to only engage in day trading, which has small amount of risk. Darlington didn't do that and suffered heavy losses. Delco sued Darlington for damages, and Darlington sought to rely on an exclusion clause that limited any liability not covered by this broad exclusions clause to \$100

Judgement: Where the meaning is clear courts will give the contract its simple and ordinary meaning

2. If the exclusion clause is (or may be) incorporated, it must be construed. Such a clause is construed contra proferentem where ambiguous (also consider 4 corners)

Contra → When constructing the ambiguous meaning of this type of clause, the ordinary meaning is constructed AGAINST the party seeking to rely on the clause ... the rule is limited to cases of ambiguity by Darlington

Four corners

Courts are willing to construe an exclusion clause as excluding liability for acts that were not authorized by or outside of the main contract

Council of Sydney v West

→ West parked in parking station. His car was gone when he came back to collect it and sued for damages.

Terms: council does not respect responsibility for damages however it may arise or be caused. This ticket must be presented for time stamping and payment before delivery of vehicle

→ The attendant had been tricked by a thief who asked for a duplicate ticket!!

→ Council had dealt with plaintiffs property in a way that was outside the four corners of the contract

→ It didn't exempt the city from liability that was outside of the contract

→ Council had not done what it was contracted to do in the way it was contracted to do it

Deviation rule

This rule is usually applied to the carriage of goods

→ An exclusion clause that would otherwise protect a carrier will not apply once the carrier deviates from the course that the parties agreed upon

Special Rules Concerning Negligence

Negligence arises from a breach due to a failure to take reasonable care

3 rules (Canada SS)

1. If the clause contains language which expressly excludes the person in favor of the provision, it must be granted
2. If no express reference to negligence, are the words wide enough in their ordinary meaning to cover negligence? If no then must rule against person who it would protect
3. If words used are wide enough to cover negligence, court must consider whether the head of damage may be based on ground other than negligence. (if grounds for liability other than negligence, does not cover neg)

Canada SS v King

Exclusion CLAUSES SEEKING TO EXCLUDE LIABILITY FOR NEGLIGENCE MUST BE PARTICULARLY BROAD AND CLEAR

Davis v Pearce Parking

Davis parked car at Pearce Station, received a printed document containing a delivery ticket and a parking check. Printed on the parking check was an exclusion clause stating that the parking station will not be responsible for loss or damage. His WHOLE CAR was stolen due to negligence. The contract was one of bailment, and therefore parking station owed a duty to exercise reasonable care in and about custody of goods placed in its hands... clear words are required to exclude liability for negligence.

3. After you construed the clause you must offer view as to whether clause operates to shield the proferens from liability (this step blurs with step 2)

Privity

1. Consider the facts and see if it really is a privity problem. Is the party you are advising a party to the contract?

A person who is not a party to a contract cannot enforce it or incur any obligations under it

Collus v Baggot → contract was expressed husband and company, company made NO promise to wife. Wifes signature did not make her a party

2. Can privity be circumvented? (Trust, agency, special exception)

TRUST

Trustee holds property on trust for another person (right under contract is form of property)

Trident General Insurance v McNiece Bros

Facts: McNiece was the principal contractor for work being done at a plant owned by Blue Circle. Under Blue Circle's insurance contract with Trident, Trident agreed to indemnify the assured against liability of injury to non-employees. This was defined in contract. Crane driver working under McNiece sued for personal injuries and McNiece claimed indemnity from Trident under terms of insurance contract made with Blue Circle

Judgement: insurance contracts are an exception to the privity rule

AGENCY

Privity rule will NOT apply if a person promised a benefit under a contract can show that one of the parties entered into the contract as their agent. AN agent is a person who has power to enter into contracts on behalf of other person

→ to prove you must show that principal expressly or impliedly consented to the agent acting on their behalf

Scruttons v Midland – Agency for stevedore

1. Contract makes it clear that a benefit is to be conferred on a beneficiary
2. Contract makes it clear that promise is acting as agent for beneficiary
3. They had authorization to do that
4. Beneficiary provided consideration for the promise

3. If it can be circumvented explain the result of doing so

Trust= one might circumvent privity by arguing that the contracting party holds the relevant contractual right on trust for third party

Agency= if there is agency than privity is not a concern at all

4. What are the remedies?

If K is intending to benefit 3rd party and privity says party cannot enforce then the party can seek nominal damage or estoppel

Termination by performance

1. Is it a case where one party is seeking to demonstrate an entitlement to the other party's performance?

Discharge is the term used to describe the contractual obligations terminating by one of six ways.

Sometimes a question will arise as to whether a party has done what is necessary to earn the contract price (did they do what was necessary to oblige the other party to perform)