Land & Water Law Review

Volume 23 | Issue 2 Article 15

1988

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Recommended Citation

Nauss, Susan C. (1988) "Contract Law - Should the Word Negligence Be Included in an Exculpatory Clause in Order to Relieve a Peson from Liability for His Own Negligence - Schutkowski v. Carey," *Land & Water Law Review*: Vol. 23 : Iss. 2 , pp. 577 - 589.
Available at: https://scholarship.law.uwyo.edu/land_water/vol23/iss2/15

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CONTRACT LAW—Should the Word "Negligence" be Included in an Exculpatory Clause in Order to Relieve a Person From Liability for his own Negligence? *Schutkowski v. Carey*, 725 P.2d 1057 (Wyo. 1986).

Barbara Schutkowski, a sky diving student, signed a release and indemnity agreement discharging her instructors from any and all liability for injury.[1] During her first jump, Schutkowski had a difficult landing. She suffered back, arm and leg injuries.[2] She filed an action against her instructors, Dwain Carey and Robert D. Rodekohr.[3] Schutkowski alleged that the instructors were negligent in failing to warn her of the risks involved in parachuting and failing to adequately instruct and direct her during the sky diving procedures.[4]

The instructors filed a motion for summary judgment, claiming that the release and indemnity agreement barred Schutkowski's action.[5] Schutkowski admitted that she signed the release;[6] however, she argued that the release did not excuse the instructors from liability caused by their negligence.[7] The trial court granted the motion for summary judgment. It held that there had been consideration for the release, and that the release was not void as contrary to public policy.[8]

On appeal, Schutkowski argued that she and her instructors "did not clearly and unambiguously intend to excuse [defendants] from liability for negligence."[9] The Wyoming Supreme Court held that the contracting language was not ambiguous, and affirmed the order granting summary judgment.[10]

Schutkowski deals with the enforceability of an exculpatory clause regarding a hazardous recreational activity. The decisions's significance, however, is that the Wyoming Supreme Court has adopted a definite four-

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1. Brief for Appellees at 3, Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986)(85-101) [hereinafter Brief for Appellees]. The agreement provided in pertinent part as follows:

> I . . . release and discharge the said Cheyenne Parachute Club . . . from any and all other claims and demands, actions, and causes of action . . . resulting from, personal injuries, conscious suffering, death, or property damages sustained by me, arising out of aircraft flights, parachute jumps, or any other means of lift, ascent, or descent from an aircraft of any nature, or arising out of the ownership, operation, use, maintenance or control of any vehicle . . . and meaning and intending to include herein all such personal injuries . . . resulting from or in any way connected with or arising out of instructions, training, and ground or air operations incidental thereto . . . .

Id. at 6-7.

2. Schutkowski v. Carey, 725 P.2d 1057, 1058 (Wyo. 1986).
3. *Id.* Steven D. Johnson was also named as a defendant; however, plaintiff's case was dismissed against his estate. *Id.* n.1.
4. *Id.* at 1058.
5. *Id.*
6. Brief for Appellees, *supra* note 1, at 3.
7. *Schutkowski*, 725 P.2d at 1058.
8. Brief for Appellees, *supra* note 1, at 3.
9. Brief for Appellant at 11, Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986)(85-101) [hereinafter Brief for Appellant].
10. *Schutkowski*, 725 P.2d at 1062.

part test from *Jones v. Dressel*[11] to determine the validity of exculpatory clauses. This casenote will examine whether the Wyoming Supreme Court properly interpreted the exculpatory clause to excuse the instructors from liability due to their negligence. Specifically, this casenote will discuss whether the court properly decided that the contracting parties expressed their intent in clear and unambiguous language.

BACKGROUND

Exculpatory clauses include waivers, releases and indemnity agreements. These agreements are synonymous to the extent that they limit a person's liability.[12]

Courts are divided as to whether one may contract away his liability for negligence.[13]

> The general rule is that private contracts exculpating one from the consequences of his own acts are looked upon with disfavor by the courts and will be enforced only when there is no vast disparity in the bargaining power between the parties and the intention to do so is expressed in clear and unequivocal language.[14]

The Wyoming Supreme Court follows this general rule, and has noted that courts look unfavorably upon contracts exculpating one from the consequences of his own acts.[15] Likewise, the Wyoming Constitution and several statutes disfavor limiting one's liability for negligence.[16] In determining the validity of exculpatory clauses, the Wyoming Supreme Court looks at the intention and understanding of the parties. "Intention is determined from the words of the contract, if the language is clear and unam-

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11. Four factors must be met:
(1) The existence of a duty to the public;
(2) The nature of the service performed;
(3) Whether the contract was fairly entered into; and
(4) Whether the intention of the parties is expressed in clear and unambiguous language.

Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981).

12. An "exculpatory clause" is a means to excuse or tend to clear oneself from alleged fault or guilt. BLACK'S LAW DICTIONARY 508 (5th ed. 1979). While a "release" is the "relinquishment, concession, or giving up of a right, claim, or privilege," *Id.* at 1159, a "waiver" is an intentional or voluntary relinquishment of a known right. *Id.* at 1417. "Indemnification" applies to a loss that has already occurred. It is the giving of compensation to make a person whole from a loss already incurred. *Id.* at 692.

13. PROSSER & KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984).

14. Kansas City Power & Light Co. v. United Tel. Co. of Kan., 458 F.2d 177, 179 (10th Cir. 1972).

15. Cities Service Co. v. Northern Prod. Co., 705 P.2d 321, 327 (Wyo. 1985)(third-party action against an oil field service employer based upon an indemnity contract).

16. The Wyoming Constitution prohibits employers from entering into contracts with its employees to release or discharge the employer's liability for personal injuries, even if it is due to the employer's negligence. WYO. CONST. art. 19 § 7. *See also* WYO. STAT. § 27-1-105 (1977, Rev. 1987)(further substantiates this constitutional provision). Likewise, railroads may not enter into contracts restricting their liability. WYO. STAT. § 37-9-504 (1977). In agreements relating to wells for oil, gas or water, or mines for any mineral, it is against public policy to indemnify against loss or liability resulting from one's own negligence. WYO. STAT. § 30-1-131 (1977, Rev. 1983).

biguous, and ... [considering] the writing as a whole, taking into account the relationships between the various parts."[17] An exculpatory provision may be enforced if it is not contrary to public policy.[18] These authorities illustrate the general principles which Wyoming followed in determining the validity of exculpatory clauses. However, the Wyoming Supreme Court had established no concrete guidance regarding such validity.

Thus, the *Schutkowski* court relied on *Jones v. Dressel*,[19] which is a leading case concerning an exculpatory clause that relates to recreational activities. The Colorado Supreme Court described four factors to consider in determining the validity of an exculpatory agreement:

(1) The existence of a duty to the public;

(2) The nature of the service performed;

(3) Whether the contract was fairly entered into; and

(4) Whether the intention of the parties is expressed in clear and unambiguous language.[20]

The *Jones* court concerned itself primarily with the first factor.[21] In determining whether a duty to the public existed, the court relied on *Tunkl v. Regents of Univ. of California*,[22] in which the California Supreme Court provided guidelines concerning various types of transactions involving an exculpatory clause. A contract need not meet all of the following characteristics to affect the public interest. A sufficient number of the characteristics is all that is required.[23] These characteristics are summarized as follows: the business is suitable for public regulation, the service is of great importance to the public and held out as available to anyone. Additional elements include whether the nature of the service is essential, whether the party invoking exculpation has a bargaining advantage over the public and may use a standardized adhesion contract of exculpation, and whether the purchaser is under the seller's control and subject to the seller's potential carelessness.[24] In holding that the contract did not concern a public duty, the *Jones* court noted that a contract to teach sky diving did not provide an essential service, and was not a contract of

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17. Kost v. First Nat'l Bank, 684 P.2d 819, 823 (Wyo. 1984).

18. Brittain v. Booth, 601 P.2d 532, 535 (Wyo. 1979).

19. 623 P.2d 370 (Colo. 1981). The plaintiff was being flown to the parachute jump site when the airplane crashed. As a result of the crash, the plaintiff suffered injuries. *Id.* at 373. He had signed a contract which released defendants in part for their negligence. The contract stated: "The [plaintiff] exempts and releases ... [defendants] from any and all liability, claims, demands or actions or causes of action ... whether such loss, damage, or injury results from the negligence of [defendants] or from some other cause." *Id.* at 372.

20. *Id.* at 376.

21. The *Jones* court analyzed a duty to the public based on factors discussed in Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 383 P.2d 441, 444-46, 32 Cal. Rptr. 33, 37-38 (1963).

22. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

23. *Jones*, 623 P.2d at 377.

24. *Tunkl*, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38. *Tunkl* appears to be the leading authority in determining whether a duty to the public exists. *See also* Jones v. Dressel, 623 P.2d 370 (Colo. 1981); 57 AM. JUR. 2D *Negligence* § 28 (1971).

adhesion. Additionally, the court stated that the party invoking exculpation (the instructors) did not provide an essential service.[25]

On the other hand, exculpatory clauses have been invalidated for being against public policy in situations between a customer and a public utility, a passenger and a common carrier, and an employer/employee relationship where an employer imposed a condition of employment.[26] In each of these situations, one party may have little discretion in entering into the contractual relationship.

The second factor of the *Jones* test is the nature of the service performed. Some of the same elements of the public duty factor apply to the second factor. One must determine if the service provided is necessary.[27] As previously noted, sky diving is not an essential service.[28]

The third factor of the *Jones* test is whether the parties entered into the contract fairly. Because the parties agreed that the contract was fairly entered into, the *Jones* court did not discuss this issue.[29] However, the Minnesota Supreme Court, in *Schlobohm v. Spa Petite, Inc.*,[30] looked at this factor. The court, citing extensively to *Jones*, held that there was no disparity of bargaining power. The plaintiff had voluntarily applied for membership in a health spa and had accepted the terms of the membership agreement. Furthermore, even if a party could show there was a scarcity of similar facilities in the area, "that fact alone would not create such a disparity of bargaining power."[31]

The fourth factor of the *Jones* test is whether the parties expressed their intent in clear and unambiguous language. This is the crucial issue which most concerned the *Schutkowski* court. The *Jones* court held that since the exculpatory clause included the specific word "negligence," the parties clearly expressed their intent.[32]

Courts differ over whether an exculpatory clause must specifically state the term "negligence." To limit one's liability for negligence, courts have held that the exculpatory language must be "absolutely clear,"[33]

25. *Jones*, 623 P.2d at 377.

26. PROSSER & KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984) (citing Collins v. Virginia Power & Elec. Co., 204 N.C. 320, 168 S.E. 500 (1933)(public utility); First Nat'l Bank v. Banker's Dispatch Corp., 221 Kan. 528, 562 P.2d 32 (1977)(common carrier); Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388 (1906)(imposed employment condition)).

27. Casenote, *Exculpatory Clauses and Public Policy: A Judicial Dilemma, Jones v. Dressel*, 53 U. COLO. L. REV. 793, 801 (1982).

28. *Jones*, 623 P.2d at 377; Malecha v. St. Croix Valley Skydiving Club, 392 N.W.2d 727, 731 (Minn. App. 1986).

29. *Jones*, 623 P.2d at 378.

30. 326 N.W.2d 920 (Minn. 1982)(negligence action by member of health spa against the spa in which the membership contract contained an exculpatory clause).

31. *Id.* at 925. The *Schlobohm* court did not explain its rationale of why a scarcity of similar facilities would not itself create a disparity of bargaining power.

32. *Jones*, 623 P.2d at 378.

33. Willard Van Dyke Prod., Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 189 N.E.2d 693, 694, 239 N.Y.S.2d 337, 339 (1963). The court held that the following waiver of liability did not express in clear and unequivocal terms that defendant's liability for his own negligence would be limited: "This film will be replaced if defective in manufacture, labeling, or

must be expressed in "unequivocal terms,"[34] and must be "clear and explicit."[35] The exculpatory language must be both unambiguous and understandable.[36] Wyoming has followed these general principles.

Wyoming Johnson, Inc. v. Stag Indus., Inc.,[37] involved an indemnity provision whereby a subcontractor agreed "to be bound to the Contractor by the same terms, as the Contractor's contract with the Owner."[38] The Wyoming Supreme Court held that this broad language was not a clear and unequivocal agreement to indemnify the general contractor for its own negligence.[39] The thrust of *Wyoming Johnson* is that the court will impose liability unless the indemnity provision is stated in clear and express terms. The language must express the purpose of indemnifying against one's own negligence "beyond any peradventure of doubt."[40]

Another Wyoming case, *Chicago and North Western Railway Co. v. Rissler*,[41] involved an indemnity agreement that stated in part:

> [T]he Licensee forever indemnifies the Railway Company against any such loss or damage to its property and agrees to indemnify and save it harmless from any and all claims, demands, lawsuits or liability for any such loss, damage, injury and death, costs and expenses, even though the operation of the Railway Company's railroad may have caused or contributed thereto.[42]

The court held that although the provision did not include the word "negligence," the agreement covered "any and all damages which the Railway Company may sustain even though it may have caused or contributed to the accident causing the damages."[43] The court further noted that the word "negligence" was not necessary to use in a provision regarding one's own negligence. "[I]t is sufficient if the parties by 'apt language' include

packaging, or if damaged or lost by us .... Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind." *Id.* at 694, 239 N.Y.S.2d at 339.

34. *Id.* at 695, 239 N.Y.S.2d at 340.

35. Boll v. Sharp & Dohme, Inc., 281 A.D. 568, 121 N.Y.S.2d 20, 22 (N.Y. App. Div. 1953), *appeal dismissed*, 306 N.Y. 669, 116 N.E.2d 498 (1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954). The court held that the following waiver did not relieve defendants of liability for their own negligence: "I agree that [defendants] ... shall [not] be in any way responsible for any consequences to me resulting from the giving of such blood." *Id.*, 121 N.Y.S.2d at 22-23.

36. Gross v. Sweet, 49 N.Y.2d 102, 107, 400 N.E.2d 306, 309-10, 424 N.Y.S.2d 365, 368 (1979).

37. 662 P.2d 96 (Wyo. 1983).

38. *Id.* at 98.

39. *Id.* at 99.

40. *Id.*

41. 184 F. Supp. 98 (D. Wyo. 1960).

42. *Id.* at 100. The indemnity provision was part of an agreement whereby the Railway Company granted a temporary crossing license to a construction company. The court noted that the Railway Company did not enter into the agreement as part of its public duty; it was acting as a private landowner. *Id.* at 101. Therefore, the agreement was not void as being against public policy for a public carrier to contract away its liability. *Id.*

43. *Id.* at 102.

such negligence."[44] Likewise, other courts have held that the word "negligence" need not be stated; however, "words conveying a similar import must appear."[45]

Cain v. Cleveland Parachute Training Center,[46] is one such case that did not require "negligence" to be specifically stated in a waiver and release agreement. The *Schutkowski* court cited extensively to *Cain*. That case dealt with a waiver and release agreement concerning conduct, whether directly or indirectly related to activities of a parachute jump student. The agreement extended to injuries sustained while involved in training or parachuting with the Cleveland Sport Parachuting Center.[47] The Court of Appeals of Ohio held that the exculpatory language applied to a negligence action and stated: "A participant in a recreational activity is free to contract with the proprietor of such activity so as to relieve the proprietor of responsibility for damages or injuries to the participant caused by the negligence of the proprietor, except when caused by wilful or wanton misconduct."[48]

The foregoing cases provided the foundation upon which the Wyoming Supreme Court decided *Schutkowski*. In fact, the Wyoming Supreme Court referred to most of the cases previously discussed. Many of the earlier cases referred to some of the factors that make up the test in *Jones v. Dressel*. *Jones* has gone farther than the previous cases by developing a definite test to use in determining the validity of an exculpatory clause.

THE PRINCIPAL CASE

Because *Schutkowski* was a case of first impression in Wyoming, the Wyoming Supreme Court looked to other jurisdictions for guidance. The court adopted the Colorado four-part test from *Jones v. Dressel*, in determining whether the exculpatory clause was valid. The appellant's appeal focused on the fourth factor concerning the "unambiguous language."[49]

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44. *Id.*(citing Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co., 129 F. Supp. 335 (D. Iowa 1955)).

45. *Gross*, 49 N.Y.2d at 108, 400 N.E.2d at 309-10, 424 N.Y.S.2d at 368. In *Gross*, the New York Court of Appeals considered an exculpatory provision in a contract to teach parachute jumping. The provision stated:

> I . . . waive any and all claims . . . against [defendants] . . . for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport.

Id. at 109, 400 N.E.2d at 310, 424 N.Y.S.2d at 369. The court held that the language was not sufficiently clear to relieve defendants of liability for failing to exercise due care. *Id.* at 109, 400 N.E.2d at 311, 424 N.Y.S.2d at 369.

46. 9 Ohio App. 3d 27, 457 N.E.2d 1185 (1983).

47. *Id.* 457 N.E.2d at 1186. Pertinent portions of the Waiver, Release, and Hold Harmless Agreement are as follows: "[I]ndemnify, save and hold harmless . . . from any and all losses, claims, actions or proceedings of every kind and character . . . arising directly or indirectly from any activity by me as a parachute jump student, member or participant." *Id.*

48. *Id.* at 1187.

49. Brief for Appellant, *supra* note 9, at 11. The Wyoming Supreme Court also referred to a similar test adopted in Pennsylvania. The standards in Pennsylvania are:

> (1) contracts providing for immunity from liability for negligence must be construed strictly . . .; (2) such contracts must spell out the intention of the par-

However, the Wyoming Supreme Court briefly discussed the other three factors to examine the full impact of the public policy considerations.[50] The court held that sky diving instruction was not a public necessity.[51] Schutkowski did not have to sign the agreement. The instructors were not placed in an advantageous bargaining position because the agreement did not involve an essential service.[52]

The main issue addressed by the Wyoming Supreme Court involved the fourth prong of the *Jones* test. That is, whether the parties expressed their intent in clear and unambiguous language. More specifically, was the word "negligence" necessary to show the parties' intent? The Wyoming Supreme Court discussed cases falling on both sides of the issue, then followed the line of cases that do not require "negligence" in an exculpatory clause. The court held it was better to look at the parties' intent rather than "negligence" terminology. "When interpreting a contract our primary concern is to determine the intent of the parties."[53] Thus, the court looked to all of the contract language as well as surrounding circumstances, relationship of parties, and nature and purpose of the contract, to determine the parties' intent. By examining the meaning of the contract as a whole, the court noted specific and repeated exemptions for the instructors' responsibility.[54]

The Wyoming Supreme Court placed emphasis on the dissenting opinion of *Gross v. Sweet*,[55] a New York case concerned about a release in a contract to teach parachute jumping. In the *Gross* dissent, Justice Jones reasoned that parachuting is a hazardous activity. The dissent noted that where the student is under the guidance of an instructor, the only conceivable claims for personal injuries or property damage would be based on the instructor's negligence. Thus, if an exculpatory agreement could not limit liability for negligence, the release would be meaningless.[56]

In *Schutkowski*, Justice Rose joined Chief Justice Thomas' dissenting opinion. They agreed with the majority opinion to the extent that the decision may be appropriate as it pertained to sky diving or parachut-

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> ties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it; (3) such contracts must be construed with every intendment against the party who seeks the immunity from liability; (4) the burden to establish immunity from liability is upon the party who asserts such immunity.

Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n, 423 Pa. 288, 224 A.2d 620, 623 (1966)(citations omitted).

50. *Schutkowski*, 725 P.2d at 1060.

51. *Id.* In *Tunkl*, 60 Cal. 2d 92, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33, 37-38 (1963), the court described certain elements of an agreement that affect the public interest. The service to be provided is suitable for public regulation [as with a utility or mass transit system], is of a practical necessity and of great importance to the public, and because of the economic position the party seeking exculpation has an advantageous bargaining power. *Id.*

52. *Schutkowski*, 725 P.2d at 1060.

53. *Id.* at 1061.

54. *Id.*

55. 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979).

56. *Id.* at 113, 400 N.E.2d at 313, 424 N.Y.S.2d at 372.

ing.[57] The dissent focused its discussion on contracting parties' intent to a release of liability. It relied, in part, on the Wyoming Supreme Court's interpretation of Wyoming Statute section 1-1-113(a).[58] That statute deals with liability between joint tort-feasors and was construed in *Bjork v. Chrysler Corp.*[59] The Wyoming Supreme Court held that the release document must specifically identify or otherwise name the released tort-feasor in order to show the intent of the parties.[60] The *Schutkowski* dissent, apparently by way of analogy, determined that the legal term "negligence" should be specifically stated in an agreement to clearly show exculpatory intent.[61]

The dissent feared that the *Schutkowski* rationale could extend too easily to entities such as day care centers, youth activity organizations, health clubs, public or private schools, landlords, and an indefinite number of activities. The dissenting justices focused their attention entirely on the intent factor of the *Jones* test, and would require that the word "negligence" be included in any exculpatory clause limiting liability for one's negligence.[62]

ANALYSIS

In order to apply the *Jones* test properly and limit the activities to which exculpatory clauses may apply, it is critical to examine all four factors. However, the *Schutkowski* court focused primarily on the intent factor, as will this analysis. That factor concerns whether the parties' intent to limit the instructors' liability for ordinary negligence was expressed in clear and unambiguous language.

Interpreting Unambiguous Language Such as "Negligence"

The *Schutkowski* dissent would require the term "negligence" to be specifically stated in exculpatory clauses.[63] "Negligence" is defined as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances."[64] The definition may seem plain and distinct, but its application may not be easy. "Negligence" includes several required elements: duty of care, breach of that duty, injury and causation.[65] In the legal sense, negligence is a "relative as well as a broad term

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57. *Schutkowski*, 725 P.2d at 1062 (Thomas, J., dissenting).

58. The statute states:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death: . . . (ii) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

WYO. STAT. § 1-1-113(a) (1977) *repealed by* 1986 WYO. SESS. LAWS ch. 24, §§ 2, 4.

59. 702 P.2d 146 (Wyo. 1985).

60. *Id.* at 162-63.

61. *Schutkowski*, 725 P.2d at 1063 (Thomas, J., dissenting).

62. *Id.*

63. *Id.*

64. BLACK'S LAW DICTIONARY 930 (5th ed. 1979).

65. 57 AM. JUR. 2D *Negligence* § 1 (1971).

in that it may embrace various standards and degrees of care."[66] Thus, it is difficult to formulate a comprehensive definition of actionable negligence.

A lay person may consider "negligence" as legal jargon. The fact that lawyers have difficulty construing the meaning of "negligence" lends more credence to a lay person's inability to understand the meaning and impact of the term "negligence."[67] For example, in *Truman v. Thomas*,[68] the Supreme Court of California noted that lay persons may be unfamiliar with technical meanings of "relevant" and "material."[69] Similarly, the Court of Appeal of Louisiana noted that the words "defects" and "ruts" may not mean the same thing to a lay person and an expert witness.[70] These cases illustrate the difficulty in defining technical terms. Likewise, the legal term "negligence" may be ambiguous to a lay person.

Strict "negligence" terminology may create further confusion. A lay person may think he has no claim at all, even though he could have a claim for an intentional tort. In any event, specifically stating "negligence" in an exculpatory clause does not mean that a lay person will necessarily understand its full implications.

Rather, the entire exculpatory clause should be examined in the context of the particular circumstances to which it applies. The exculpatory language must be clear and unambiguous. Ordinary terms may serve this clarifying purpose. However, problems may still arise. A lengthy exculpatory clause, even though composed of ordinary terms, may be confusing. A sentence may be so long that a reader cannot fully understand its meaning.

Such was the case in *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.*[71] There, the California Court of Appeal noted that when only one person drafts an exculpatory clause, the exculpatory language must clearly and explicitly express the parties' intent.[72] The *Ferrell* exculpatory language appeared in a "convoluted 147 word sentence."[73] While the *Schutkowski* exculpatory clause involved over 300 words, it is distinguishable from *Ferrell*. The exculpatory clause in *Ferrell* was written in laymen's terms.[74] However, the court held that the ordinary lay person could not

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66. *Id.*
67. Harmon v. Town of Afton, 745 P.2d 889, 891 (Wyo. 1987)(tort case in which more than one conclusion could be drawn from the evidence); Centric Corp. v. Drake Bldg. Corp., 726 P.2d 1047 (Wyo. 1986)(negligence case in which alternative theories were argued).
68. 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980).
69. *Id.* at 294-95 n.5, 611 P.2d at 907 n.5, 165 Cal. Rptr. at 313-14 n.5.
70. Farlow v. Roddy, 478 So. 2d 953, 962 (La. App. 1985), *aff'd*, 493 So. 2d 592 (1986).
71. 147 Cal. App. 3d 309, 195 Cal. Rptr. 90 (Cal. Dist. Ct. App. 1983).
72. *Id.* at 94.
73. *Id.* at 96.
74. The release stated, in pertinent part:

> In consideration of the acceptance of this entry or of my being permitted to take part in this event, I, for myself, my heirs, executors, administrators, successors and assignes [sic] agree to save harmless and keep indemnified SNORE, Ltd., it's [sic] individual members and their respective agents, officers, officials, servants and representatives, the owner, curators, lessors, agencies,

comprehend the intent and effect of the document to release his claims for his personal injuries, because of the lack of release and waiver terminology.[75] On the other hand, the *Schutkowski* exculpatory clause repeatedly referred to "release" and "indemnify" and was entitled "Release and Indemnity Agreement."

The *Schutkowski* court focused on the contract language as a whole rather than the specific term "negligence," to determine the parties' exculpatory intent.[76] Exculpatory intent to relieve one from liability for his own negligence can be perceived without stating the word "negligence."[77] Several cases involving contracts to teach sky diving illustrate this principle.

In *Poskozim v. Monnacep,*[78] the Appellate Court of Illinois held that the following release and discharge was not ambiguous:

> [I]n any way resulting from, personal injuries . . . sustained by me, arising out of . . . *parachute jumps* . . . or arising out of the ownership, operation, use, maintenance or control of any vehicle . . . and . . . resulting from or in any way connected with or arising out of instructions, training, and ground or air operations incidental thereto. (emphasis added).[79]

The *Poskozim* exculpatory clause is similar to that confronted by the *Schutkowski* court.[80]

Even less explicit, but still held to be unambiguous, was the waiver and release in *Cain v. Cleveland Parachute Training Center.*[81] That agreement absolved defendants from liability due to "any and all losses, claims, actions or proceedings of every kind and character . . . arising directly or indirectly from any activity by me as a parachute jump student."[82] The exculpatory provisions of *Poskozim* and *Cain* illustrate the ease with which an ordinary lay person can understand such clauses.

Although the exculpatory clause in *Schutkowski* is quite lengthy, the language is simple, clear and unambiguous. A lay person should know that he released the instructors of all liability for personal injuries. The lan-

> (including, but not limited to Federal, State, County and City), or managers of any lands upon which this event takes place from and against all actions, claims, costs and expenses and demands in respect of death, injury, loss of or damage to my person or property, howsoever caused, arising out of or in connection with my entry or my participation in this event, and not withstanding that the same may have been contributed, to, occasioned by, or directly caused by the negligence of the said bodies, their agents, officials, servants or representatives.

Id. at 91.

75. *Id.* at 96.
76. *Schutkowski,* 725 P.2d at 1061.
77. *Id.*
78. 131 Ill. App. 3d 446, 475 N.E.2d 1042 (1985).
79. *Id.* at 1043.
80. Brief for Appellees, *supra* note 1, at 3.
81. 9 Ohio App. 3d 27, 457 N.E.2d 1185 (1983).
82. *Id.* at 1186.

guage referred to personal injuries and property damages resulting from "instructions, training, and ground or air operations incidental thereto."[83] The clause specifically referred to aircraft flights, parachute jumps, and other means of lift, ascent or descent from an aircraft. The exculpatory language seems to be all-encompassing concerning sky diving instruction and training. Furthermore, Ms. Schutkowski read and signed the exculpatory clause.[84] There is no evidence that she questioned its terms. Given the simplicity of the terms and the clarity of the clause, the logical inference is that she understood what she signed.

Full Examination of the Jones Factors

The foregoing analysis dealt with the intent factor of the *Jones* test. While the *Schutkowski* court mainly considered this factor, it also referred to the other three factors of the *Jones* test. Regarding these factors, the court relied on *Jones v. Dressel*,[85] and *Tunkl v. Regents of Univ. of California.*[86] The *Schutkowski* court merely adopted the principles from *Jones* and *Tunkl* without any explanation. The court stated that sky diving instruction was not an essential service or of practical necessity to the public. Because the service was not essential, no decisive bargaining advantage existed. Students were not pressured into signing the agreement. Finally, the court noted that students had an opportunity to understand the contract terms.[87]

Thus the court applied the *Tunkl* factors in the context of a hazardous recreational activity such as sky diving.[88] This approach of applying the *Tunkl* factors to individual cases and situations is exactly how the *Tunkl* court intended its analysis to be used.[89]

For example, while a day care center supplies an essential nonmedical service "for sustaining the activities of daily living . . . on less than a 24-hour basis,"[90] is it really a public necessity? The Court of Chancery of Delaware noted that there was evidence in the record that a day care center is a "virtual necessity" for working mothers.[91] However, the Supreme Court of Vermont has held that child day care is not an "obligatory municipal service."[92] The different courts looked at the surrounding circumstances involved in each case to reach their decisions. Additionally, parties can pick and choose which day care center to use. This same rationale can be applied to private schools, health clubs and rental arrange-

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83. *Schutkowski*, 725 P.2d at 1059.
84. *Id.* at 1058.
85. 623 P.2d 370 (Colo. 1986).
86. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
87. *Schutkowski*, 725 P.2d at 1060.
88. *Id.* at 1062 (citing *Gross*, 49 N.Y.2d at 112, 400 N.E.2d at 313, 424 N.Y.S.2d at 371 (Jones, J. dissenting)).
89. *Tunkl*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
90. Montessori Schoolhouse v. Department of Social Services, 120 Cal. App. 3d 248, 175 Cal. Rptr. 14, 15 (Cal. Ct. App. 1981).
91. Williams v. Tsiarkezos, 272 A.2d 722, 725 (Del. Ch. 1970).
92. Brattleboro Child Dev., Inc. v. Brattleboro, 138 Vt. 402, 416 A.2d 152, 155 (1980).

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ments. The same reasoning, however, may cause an opposite result concerning public schools, especially if there is no choice in which school one may attend.

Similarly, was there equal bargaining power in executing the contract? Did the parties enter into the contract fairly? Even though one party drafts a contract, it may not be an adhesion contract.[93] The fact that the contract is on a "take-it-or-leave-it" basis alone does not make an adhesion contract.[94] One must consider whether the contract was forced upon an unwilling member of the public, whether the parties' bargaining power afforded no opportunity to negotiate, and whether the service could be obtained elsewhere.[95] Examining all of these factors will bring about different results for different entities and activities.

The *Schutkowski* dissent had a valid apprehension concerning the need for limitations. However, it did not correctly resolve its fears of extending the *Schutkowski* decision to other entities and activities. It should take reassurance from the limitations the four factors put on such extension since the factors require a case-by-case analysis.

In voicing its concern about extending the *Schutkowski* opinion to other entities and activities, the dissent did not formulate a rule applicable to any kind of situation. The dissent's analogy to day care centers, schools, etc. did not refer to any other kind of hazardous activity, whether recreational or not. However, the *Jones* four-part test does provide a specific guide which must be applied to any exculpatory clause. If the dissent had examined all of the *Jones* factors, it should have reached the same conclusion as the majority.

The *Schutkowski* outcome may appear to be an inequitable result. Ms. Schutkowski suffered injuries while making her first parachute jump. She did not recover any damages. As a beginning sky diving student, she may not have been fully aware of the risks involved in parachuting. However, Schutkowski signed a contract which expressed the parties' intent in relatively simple and clear language. When a contract is not ambiguous, the parties must adhere to, and abide by, its terms.

CONCLUSION

Based on *Schutkowski* and earlier Wyoming cases, it is clear that the Wyoming Supreme Court does not require the word "negligence" to be explicitly stated in an exculpatory clause. The *Schutkowski* court analyzed various public policy factors in relation to a private recreational service. The principal portion of the court's decision centered on the contract language itself in order to determine the parties' exculpatory intent.

However, the impetus of the decision is that Wyoming now has a definite test to use in determining the validity of *any* exculpatory clause. With the availability of the *Jones* four-part test, attorneys can advise their

93. *Jones*, 623 P.2d at 374.
94. *Id.*
95. *Id.*

clients as to the requirements of binding exculpatory clauses. Likewise, the four-part test will help to identify businesses that can and cannot limit their liability by means of an exculpatory clause. Thus, enforceable contracts can be drafted that will actually mean what they purport to say.

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