

Can we make ourselves bullet-proof?

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Disclaimer: Neither the author, nor the AJO-DO, nor the AAO would ever advise a reader to “go bare” or practice without malpractice insurance. Although some practitioners in the health care industry have done this, it is a very dangerous course to embark upon. On occasion, mishaps do happen and that is the primary reason that doctors carry, and the AAO offers its members, malpractice insurance. However, this column has been dedicated for almost 25 years to providing the reader with a broad spectrum of risk management and legislative insights and an exposure to what is happening around the country. It is in that spirit alone that this column was penned in the manner in which it was.

The clause read:

[Dr Straightensem Goode] will not carry any medical malpractice insurance. Being of sound mind and sound body, I hereby acknowledge this fact and agree not to sue [Dr Goode or the professional corporation of 2th Str8nrs, PA] for any reason. My reason for doing this is that I realize that [Dr Goode] and his staff will do the very best to take care of me according to community medical standards.

The question facing the court in *Brooks v Paul*, (Fl. Ct. App., 4th Dist. June 17, 2017) was a simple one: Are exculpatory agreements, like the one above, enforceable or not? In other words, can a doctor absolve himself from liability for negligence by merely announcing up front that he does not carry malpractice insurance, and that if you want to be treated by him, you have to agree not to sue him if something goes wrong? If you don't want to agree, that's fine; go get treated by somebody else.

The trial court had no problem and dismissed the suit, finding the clause-agreement-release to be unambiguous and therefore enforceable. The plaintiff appealed. The Appellate Court said not so fast and reversed the trial court's ruling. Citing existing law, the court noted that

An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. ... Exculpatory clauses

are disfavored in the law because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss. ... Further, such clauses “will be strictly construed against the party claiming to be relieved of liability. ... Such clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away. (Cits Omit)

In other words, the person signing away his rights has to clearly understand the rights that are being signed away. The court then gave an example of 2 exculpatory clauses. The first was found to be unambiguous and therefore enforceable; the second was deemed to be unenforceable owing to its ambiguity:

1. I/we hereby release Give Kids the World, Inc. and all of its agent officers, directors, servants, and employees from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants. The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind.

I/we further agree to hold harmless and to release Give Kids the World, Inc. from and against any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us. (Cit Omit)

2. It is further agreed that reasonable precautions will be taken by Camp to assure the safety and good health of said boy/girl but that Camp is not to be held liable in the event of injury, illness or death of said boy/girl, and the undersigned does fully release Camp, and all persons concerned therewith, for any such liability. (Cit Omit)

The court found the second clause to be unenforceable because Camp, by its own language, agreed to undertake reasonable care to protect the child. This duty

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becomes meaningless if the remainder of the clause absolves them of all liability. It is the inconsistency of the statements in the clause that gives rise to the ambiguity contained therein. The court noted that every contract must be read as a whole and if contradictions are contained within the 4 corners of the document, it can not then be said that it is unambiguous and hence enforceable. The court noted that because the law “does not look with favor on exculpatory clauses, we must require the draftsmen of all contracts which contain them to use clear and unequivocal language totally without a hint of deceptive come-on, or inconsistent clauses.”

Coming back to the present case, the court noted that the clause was “rife with ambiguity and uncertainty.” Here is the court’s reasoning in its entirety:

The exculpatory provision appears in smaller font below a statutory notice regarding the doctor’s decision not to carry malpractice insurance. The provision is not thorough or detailed. It does not expressly release any particular type of claims and it comprises three sentences which, read together, are contradictory. The first sentence reiterates the fact that the doctor and his practice do not carry malpractice insurance. The second sentence acknowledges that [the patient] understands this and agrees not to sue for “any reason.” The third sentence provides [the patient’s] reason for agreeing not to sue—because she believes the doctor and his staff will do their “very best to take care of me according to community medical standards.”

The first two sentences, read in isolation, are broad and arguably encompass a negligence claim. However, as in [*Cits Omit*] there is additional language in the release that creates ambiguity about exactly what type of claims are being released. The third sentence, which qualifies the first two sentences, creates an ambiguity. Indeed, if the defendants intended to be released from their own negligence, it begs [*sic*] the question as to why the third sentence is included in the release. Unlike the release in Sanislo, the language in the release here could lead “a person of ordinary intelligence [to] believe that the release could most reasonably be taken merely as driving home the fact that the defendant was not to bear any responsibility for injuries that ordinarily and inevitably would occur, without any fault of the defendant.”

The court remanded the case back to the lower court for further proceedings.

COMMENTARY

I have no issue with trying to minimize exposure to potential liability; I’ve been writing about it for almost

25 years. But, like anything else, the devil is in the details. If you don’t want to carry malpractice insurance, that’s your choice. Maybe a little crazy, but hey, it’s a free country. Today’s atmosphere is litigious, to say the least. But not carrying malpractice insurance comes with a cost; and this cost is valued in far more than dollars. There is the publicity, there is the angst, there is the uncertainty, there is the mental and physical unrest, there is the loss of time and productivity, there is the professional and community reputation, and, lest we forget, there is the ego. Yes, getting sued is a royal pain in the gluteus maximus. The only one of the concerns voiced above that you can protect against is the dollar cost via malpractice insurance.

But, like I have said so many times in this column, this is America and you are free to make choices; some good, some bad, some smart, some dumb. So, let’s say you decide to go bare (no insurance). You have to say this loud and clear to your patients: I’ve got no money, honey, no insurance, nada. You also have to tell them in no uncertain terms, and as “in your face” as you can say it: I will do my very best to serve you and provide the best care I know how, but *accidents happen and mistakes do occasionally occur*. You have to tell your patients that you must be assured that they understand this and are willing to forego their right to sue you if anything goes wrong or if they are unhappy with you or the results of your ministrations. They have to understand that if they want to be treated by you, they are releasing you (your partners, your staff, your corporation, your alter ego, everybody) from liability for absolutely anything and everything, including negligent treatment, that can happen as a result of accepting care in your office. Tell them that they should speak with an attorney about signing this and if they still have any reservations at all about signing they are free to go and get treated by the guy down the block.

Now, before y’all go running out to have this exculpatory clause printed, you’d best check with your local attorney: Some states do not allow such agreements because they deem them to be against public policy. This may be America, but it is not the Wild Wild West where anything and everything goes. The simpler way may just be to keep up with the literature, provide your patients with the best care you can render, always place them and their needs first, try to be a nice guy, and pay the stupid malpractice premium.

No? Still like the exculpatory clause? If that’s the case, then give up your auto insurance, your homeowners insurance, your life and disability insurance, because after all nothing bad will ever happen to you. But if, or better yet, when it does, as Billy Joel sang in his song “Big Shot”: “Don’t come bitchin’ to me.”