C.A. 461/62

ZIM ISRAEL NAVIGATION CO. LTD. and Another

v.

SHOSHANA (ROSA) MAZIAR

In the Supreme Court sitting as a Court of Civil Appeal
June 26, 1963
Before Silberg J., Landau J. and Witkon J.

Contract - validity of exemption clause in ship-passenger ticket – public policy.

During a voyage between Marseilles and Haifa, the respondent fell ill, apparently from food she had eaten on board, and for three months after arriving in Israel suffered from a stomach infection. She sued the ship owners and the ship's chef for negligence. The appellants pleaded in defence *inter alia* the exemption clause relieving them from liability which appeared in the passenger ticket sold to the respondent. The District Court found for the respondent on the ground that *res ipsa loquitur* and held that the exemption clause was null and void.

Held. As between the English approach which was cautious in annulling exemption clauses outright, balancing public policy against the freedom of contract, and the American approach which struck down such clauses either because of the absence of real voluntary consent to their inclusion or because of public policy, the latter was to be followed. In so doing Israeli law would not be adopting some alien "creature" but applying in the area of law principles of Jewish ethics which prized human life and well-being highly and giving the concept of public policy a specific Jewish content. All this was warranted by local statutory provision which made contracts contrary to public order and morality unlawful. Generally, the matter raised the whole question of standard contracts and called for legislative regulation.

Per Witkon J., it was questionable whether the invalidation of exemption clauses would raise the standard of care expected from the parties concerned in any significant manner. It would be better to impose absolute

liability, regardless of fault, and leave it to carriers to cover themselves by insurance. That would also spread the cost among the travelling public at large and ensure that persons injured by some mishap were not left remedyless.

Israel cases referred to:

(1) C.A. 136/56 - *Slavko Fox v. Ilan & Etzioni Ltd*. (1957) 11 P.D. 358

(2) C.A. 99/59 - *"Shoham" Maritime Services Ltd. v. Ephrayim and Alfreda Feiner* (1960) 14 P.D. 1451.

English cases referred to:

(3) *Redhead v. Midland Rly Co*. (1869) 20 L.T. 628.

(4) *Luddit v. Ginger Cove Airways* (1947) 1 *All* E.R. 328: (1947) A.C. 233.

(5) *Peek v. Directors etc. of* N. *Staffordshire Rly. Co.* 11 E.R. 1109 (1863).

(6) *Thompson v. London, Midland and Scottish Rly. Co.* (1930) 1 K.B. 41.

(7) *Gibaud v. Great Eastern Rly. Co.* (1920) 3 K.B. 689.

(8) *Adler v. Dickinson* (1954) 3 *All E.R.* 397;(1955) 1 Q.B. 158.

(9) *Beaumont-Thomas v. Blue Star Line Ltd*. (1939) 3 *All* E.R. 127.

(10) *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd*. (1959) 3 *All* E.R. 182; (1959) A.C. 576.

(11) *J. Spurting* Ltd. *v. Bradshaw* (1936) 2 *All E.R.* 121.

(12) *Printing etc. Co. v. Sampson* (1875) 32 L.T. 354.

American cases referred to:

(13) *The Kensington* 183 *U.S.* 263 (1902).

(14) *Baltimore & Ohio Southwestern Rly. Co. v. Voigt* 176 U.S. 498 (1900).

(15) *New York C.R. Co. v. Lockwood* 21 L. ed 627.

(16) *Oceanic Steam Navigation Co. v. Corcoran 9 F (2nd)* 724 (1925).

G. *Gordon* for the appellant.

P. *Maoz* for the respondent.

SILBERG J. This is an appeal against a judgment of the Tel Aviv-Yaffo District Court ordering the appellants to pay the respondent a sum of IL 720 together with interest and costs for injuries sustained by her on a voyage from Marseilles to Haifa.

2. It seems that the parties would have reached a settlement but for the baneful fact that the ticket which the respondent bought from the first appellant, a shipping company, contains an exemption clause releasing the company and its employees from all responsibility for injury to the respondent, financial and physical, and the learned judge in an interim judgment declared this clause to be null and void as offending against public order or morality in accordance with section 64(1) of the Ottoman Civil Procedure Law. Hence the keen struggle which Zim has waged against the judgment that requires it to pay the trivial sum above-mentioned.

Let us therefore first examine this important basic question and then, if we find that the exemption clause is in fact unable to exempt, turn to the facts as found by the learned judge regarding the actual negligence of the two appellants.

3. Upon deciphering the faulty Hebrew of the exemption clause, we gather that the company and its employees is not to be responsible for any evil that may befall a passenger, be it death, physical injury or financial loss, even if caused by an act of one of the ship's crew and all the more so if "only" the result of negligence. The company declares in the clause that it does not give "any condition of liability or guarantee" regarding "the religious purity, grade, condition, quality or quantity of any food, beverage or medicine" which the passenger might take. That is to say, not only may the food be bad but even any medicine administered to a passenger to counteract the bad food may also be bad. The clear meaning of the entire clause is that a passenger, affected in his body or property by the adventures of a voyage in one of the company's ships, can have no recourse to any law or court.

The question is whether effect should be given to such a draconian clause.

4. The legal validity of exemption clauses in contracts of carriage has been discussed in the English decisions at length. The result has been that the strictness with which the matter

was originally treated has given place to a more lenient approach. The responsibility of a general (as against a private) carrier and in particular a general carrier of goods (as against a carrier of passengers) was at one time very severe indeed; it covered all injurious events apart from those due to force majeure or enemy action: *Readhead v. Midland Rly. Co.* (3); *Luddit v. Ginger Coote Airways* (4). The larger companies therefore began to seek for some "medicament" against the ills of statute and case law, and with the assistance of the wise counsel of erudite lawyers introduced into their contracts of carriage and bills of lading exemption clauses, usually in illegible small print. By such puny-lettered clauses a company would take itself out of the statute and free itself as it desired from the legal responsibility which might threaten it from careless or negligent treatment of the object of the contract. The prospective customer stood helpless and impotent in the face of these clauses. Normally he was not even aware of their presence or had not read them at all and even if he had, did not understand them since few can plumb the mysteries of legal terminology. And should it wondrously happen that the clause was plain and he had read and understood it, there was no option but to accept it since the only alternative was to forgo the journey or the consignment of the goods.

5. The attitude of the English courts towards exemption clauses was at first suspicious and cautious. Exactly a hundred years ago in the famous decision of the Court of the Exchequer in *Peek v. North Staffordshire Rly. Co.* (5) Blackburn J. said that although according to the cases decided between 1832 and 1854 a carrier could make a contract exempting him from all responsibility for damage even if caused by the gross negligence or fraud of his servants, the (Canal Traffic) Act of 1854 changed the situation. The purpose of this Act was to prevent companies "from evading altogether the salutory policy of the common law." ... For this reason he denied validity to an exemption clause which in his opinion was not "just and reasonable". The House of Lords - for various reasons which we need not enter into here - in a majority judgment set aside the decision of the Court of Exchequer but each of the judges supported the view that the conditions of an exemption clause must be just and reasonable, otherwise no benefit can be derived from it.

6. Even some 75 years later echoes are still heard in the courts of the doctrine which continues to disregard justness or reasonableness. Thus for instance in *Thompson v. London, Midland and Scottish Rly. Co.* (6) Lord Lawrence expressed the view that if an

exemption clause in a railway ticket is unreasonable, the passenger would not be bound by it. Sankey J. agreed with this view and announced that if the document referred to "imposed such unreasonable conditions that nobody could contemplate that they exist", the passenger would not be deemed bound by them (at pp. 390, 391).

Sankey J.'s observation gives some little opening to the necessity for reasonableness. An unreasonable condition is a "hidden" undisclosed condition and the exemption it accords does not bind the passenger.

A similar notion, but still not very clear, was developed in *Gibaud v. Great Eastern Rly. Co.* (7) in which Bray J. said:

> "Every contract is voidable by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I should say that the assent of the party receiving the ticket was obtained by fraud, and he would not be bound."

But a few lines below he went on to add:

> "In my opinion, once it is found that a party has expressly or by his conduct assented to the condition, he is bound by these conditions ... and it is no answer to say that they are unreasonable, unless he can prove that his assent has been obtained by fraud."

This is essentially inconsistent. On the one hand, every unreasonable condition is *ipso facto* a condition obtained by deceit and fraud. On the other hand, the defence of unreasonableness cannot be raised unless deceit and fraud is proved. I wonder whether these two propositions can exist side by side.

7. But these ideas which combine unreasonableness and "hiddenness" had their effect and ultimately destroyed the whole doctrine of reasonableness. This doctrine presented in such an attractive form by Blackburn J. in the first *Peek* decision - that the use of unreasonable

exemption clauses frustrates and defeats "the salutory policy of the common law" - became increasingly blurred until it vanished without trace. It was so closely swathed that it ceased to breathe. For if the emphasis is upon the cognitive knowledge of the person purchasing a ticket, then formal reference on the face of the ticket, in red ink, to what is contained in one or another of the "small print" conditions is sufficient to evidence the actual or constructive knowledge of the purchaser so as to render the exemption clause valid, whatever its reasonableness or justness.

This is what Lord Denning said in his new and novel judgment in *Adler v. Dickson* (8). There a ship passenger was seriously injured by falling off the gangway from a height of 16 feet upon reembarking in Trieste. She sued the ship's master and boatswain and not the shipowners themselves, fearing the effect of an exemption clause in her ticket. One of the defences was that if the shipowners' employees were made personally liable to pay damages, the very purpose of the exemption clause would be defeated.

> "I pause to say that, if a way round has been found, it would not shock me in the least. I am much more shocked by the extreme width of the exemption clause which exempts the company from all liability whatsoever to the passengers. It exempts the company from liability for any acts, default or negligence of their servants in any circumstances whatsoever, which includes, I suppose, their wilful misconduct. And this exemption is imposed on the passenger by a ticket which is said to constitute a contract but which she has no real opportunity of accepting or rejecting. It is a standard printed form on which the company insist and from which they would not depart, I suppose, in favour of any individual passenger. The effect of it is that, if the passenger is to travel at all, she must travel at her own risk. She is not even given the option of travelling at the company's risk on paying a higher fare. She pays the highest fare, first class, and yet has no remedy against the company for negligence. Nearly one hundred years ago Blackburn J., in a memorable judgment, said that a condition exempting a carrier wholly from liability for the neglect and default of their servants was unreasonable... . I think so too."

These incisive observations of a foremost judge such as Lord Denning would lead us to expect that like Blackburn J. he would also pronounce the exemption clause null and void. A contractual condition, shocking in its wickedness, is not worthy of solemn statutory warrant, for can we truly desire that the curse of "in the place of justice, wickedness exists" (Eccl. 3:16) should befall us? But Lord Denning thought otherwise since he regarded himself bound by the recent English case law in the matter. And so he continued

> "Nevertheless, no matter how unreasonable it is , the law permits a carrier by special contract to impose such a condition: see *Luddit v. Ginger Coote Airways Ltd*. (4): except in those cases where Parliament has intervened to prevent it. Parliament has not so intervened in the case of carriers by *sea* (emphasis added). The steamship company are, therefore, entitled to the protection of these clauses, as indeed this court held in *Beaumont-Thomas v. Blue Star Line Ltd*. (9)."

It should be noted that in *Luddit* the journey was not by sea but by air, but sea and air are the same thing, neither being land. But the very distinction between land travel on the one side and air and sea travel on the other is not very logical. Can we draw any conclusions from the fact that in Blackburn J's time no one dreamed of jet airplanes such as the Boeing 707? It is true that section 7 of the 1854 Act, on which Blackburn J. relied, deals with land carriers, but the idea which that judge culled from it against unreasonable exemption clauses for "... marring the salutory development (that is, the progress) of the common law" is a general moral idea. And if that is so, it applies in equal measure to all forms of carriage, since what difference is there between them? I would almost say that those who follow the Blackburn doctrine are prepared to apply it also to contracts which are not contracts of carriage at all, witness the example of unreasonableness given by Sankey J. in *Thompson* (6) (at 44).

8. The English judges have apparently felt uncomfortable with a punctilious use of extreme exemption clauses; they shocked Lord Denning and he therefore tried to sweeten the pill by another "helpmate" by a personal touch and extending appreciably the well-known

qualification of fundamental breach: *Sze Hai Tong Bank Ltd. v. Rambler Cycle* Co. *Ltd.* (10).

In that case a bicycle manufacturer sent its products by steamship to Singapore for sale to its regular customers there. The bill of lading was made out to the order of the seller and indicated the name and address of the prospective buyer. The bill of lading stated that the responsibility of the carrier would cease absolutely after the goods were discharged from the ship. The goods were discharged but the carrier's agents released them not to the seller or to its order under the bill of lading but to the buyer without receiving the price on an indemnity given to the carriers by the buyers' bank. In an action between the bank and the manufacturer arising out of the indemnity the question arose whether the carrier was liable to the manufacturer for the loss in view of the exemption clause in the bill of lading. Lord Denning answered this question in the affirmative. saying

> "If the exemption clause, on its true construction, absolved the shipping company from an act such as that, it seems that, by parity of reasoning, they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case. they would both have said: 'Of course not'. There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it; and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for. But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, 'unto order or his or their assigns', against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must, therefore,

be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract."

The great and broadening novelty of this judgment is the construction of "implied conditions" which reduce the excessive scope of the exemption clause (cf. *Spurling v. Bradshaw* (11) at pp. 124-25).

Without criticising Lord Denning for containing the jungle of wild exemption clauses, it seems to me, however, that it is at least possible to apply the idea to those clauses also which exempt a carrier for bodily injuries, since is it not possible to "infiltrate" here as well some implied condition to the effect that a carrier assumes the obligation to carry the passenger to his desired destination in hale and hearty condition? The loss of a limb at sea defeats the main purpose of a passenger ticket no less than the delivery to another of goods after discharge defeats the main object of the bill of lading.

9. The approach of the American courts co this question is different. American case law is far more audacious. It does not maintain the plaintive conservative view marked by the lip service of moral indignation on the one hand and resignation co the existing situation on the ocher. The prevailing view in American case law has for a very long time been that a clause exempting a carrier from all liability for his own acts and those of his agents and servants is null and void, either because it lacks in truth the element of willing agreement or because it is contrary to public policy.

Appellants' counsel submitted that the laurel for this liberal doctrine rests on the American legislature and not the courts, but it is not so. In the United States things took the opposite course, the case law preceded legislation and section 1 of the Harter Act of 1893 which makes it unlawful for a carrier to insert in a bill of lading any clause exempting him from liability for damage arising out of negligence, fault or omission (and if inserted, makes it null and void) merely put the statutory seal on a very widespread principle already existing.

Moreover, legislation not only did not give birth to the case law but also did not affect or narrow it (except as expressly provided therein), witness the fact that wherever one

cannot rely on the Harter Act because it does not regulate the matter - for instance, in connection with personal injuries co passengers - the courts have applied the much broader pre-Harter rule.

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary... .
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> True it is that by the act of ... 1893 ... known as the Harter Act ... the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But while this statute changed the general rule in cases which the Act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed" *(The Kensington* (13) at pp. 268-69).

10. Why did American Common law "rebel" against its begetter, English Common law, and what ideological basis was there for this change of position? There were two reasons: first, the exceeding concern of American judges for human life and personal safety; second, the profound abhorrence of the social phenomenon of the grinding down of the small man by the large corporations. These are not vague fancies or empty phrases. The ideas they emody are clearly formulated in a Supreme Court judgment at the outset of the present century: *Baltimore & Ohio S.W. Co. v. Voigt* (14).

This case concerned a passenger injured in a railway accident. The victim was an express messenger who frequently travelled between Cincinnati and St. Louis as an official

of the express company, accompanying express parcels, under special contract between the company and the railway. One of the terms of his employment was that he would waive - and indeed did waive - every claim against the railway for injury sustained by him whilst accompanying parcels. The question was whether he should be regarded as a "passenger" in respect of the general rule that treats as a nullity any condition exempting a carrier from liability for injury caused to passengers. In the course of the hearing, the Court explained the scope and reasons of the general rule.

Because of the inherent importance of the ideas voiced in this judgment, it is proper to cite from it in *extenso.* Justice Shiras brings to light the differences between the English and American judiciary over exemption clauses of carriers. He mentions, on one side, a number of American judgments (of inferior courts) which propound the nullity of such clauses on account of public policy; and then he cites, on the other side, the dictum of Sir George Jessel, that rejects the public policy of avoiding the clauses in favour of "the paramount public policy" of freedom of contract (*Printing ... Co. v. Sampson (12)* at p.465). Justice Shiras proceeds to ask what principles the American judges chose in dealing with the cases before them.

> "They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of New York *C.R. Co. v. Lockwood* (15):
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> > 'In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties - an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to

passengers the highest degree of carefulness and diligence is expressly exacted.'

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the *Lockwood Case* as a forcible statement of the situation:

'The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents: often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business... .

If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public act, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it.... These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality.' "

This is indeed a powerfully expressed description - uncommon in any legal literature - of the small man's dependency, standing, as he does, powerless before the mighty machine of profit which crushes him into the dust. Justice Shiras, adopting these ideas, thus formulates accordingly the policy of American case law:

> "1. That exemption claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding.
> 2. That all attempts of carriers, by general notices or special contracts, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid" (at pp. 505-507).

In another judgment, the Circuit Court of Appeals in New York *(Oceanic Steam Navigation* Co. *v. Corcoran* (16) at 732) cites with approval Shearman and Redfield on *Negligence* (6th ed.) vol. 2, para. 505c:

> "In the federal courts, and in Connecticut, Indiana, Wisconsin, Iowa, Missouri, Texas, Utah, Virginia, Michigan, Vermont and other states it is held that such a contract (exempting from liability) as to any degree of negligence is void, at least against a passenger giving any compensation for his journey, because it tends to cheapen human life, and to remove the most efficient guarantee which the Common law has given to society against destruction of its members by negligence... . The state has an interest of the highest degree in the preservation of its citizens' lives, and experience demonstrates that there is no practical safeguard against the destruction of those lives by negligence, except in private actions by the persons injured, or their representatives. The protection thus afforded to the individual is therefore of such value to the state that it should not allow it to be waived."

The theme which runs through all these judgments like a scarlet thread is the vital social need of protecting human life and well-being.

11. We have surveyed the English and American case law on the problem before us and seen the basic differences in their moral approach. The question is which path should Israeli judges pursue: are we to follow English case law which in its rigidity holds that the contract must prevail or are we to adopt - at least as regards injury to a person's life or health - the more liberal rule of American case law?

It seems to me that we must take up the American rule because in doing so we are not choosing an alien creature but drawing legal conclusions from fundamentals very deeply rooted in Jewish consciousness.

Should we then be asked how we can legitimize forming our own outlook on a rule which has its source in Turkish legislation, the answer is that whilst the rule that a contract can be set aside for being contrary to public policy is derived from section 64(1) of the Ottoman Civil Procedure Law, what that public policy is must be gathered from our own ethical and cultural conceptions since no other source exists for that.

12. Judaism has always extolled and glorified the high value of human life. The Jewish religion is not a philosophical system of opinions and beliefs but a way of life and a way for living "which if a man do, he shall live by them" *(Len.* 18:5), "live by them and not die by them" (Yoma 85b). The verses are innumerable which stress the causal nexus between the Torah and life: "keep my commandments and live" *(Prov.* 4:4): "he is just, he shall surely live" *(Ezek.* 18:9): "who is the man that desireth life..." *(Ps.* 34:13) and so on.

Clearly Judaism has not regarded life as the supreme value. There are ends which go beyond it and ideals which exceed it, for the sake of which we should - indeed are commanded - to sacrifice life. Myriads of Jews have given their lives in sanctification of the Holy Name in all places and at all times. But in the ordered framework of social life, according to the priorities of the Jewish religion, life is the most sanctified of possessions ousting any other sacred value, including without a doubt the sanctity of contracts. "There is nothing that comes before the saving of life except only idolatry, incest and bloodshed"

(Ketubot 19a); "For (the Sabbath) is holy unto you - it is committed into your hands, not you into its hands" *(Yoma* 85b).

There is nothing in Jewish ethics which is more abominated than the taking of life. King David was punished for that reason: "But God said unto me, 'Thou shalt not build a house for My name, because thou art a man of war and hast shed blood' " (1 *Chron*. 28:3). "A Sanhedrin that effects an execution once in seven years is branded a destructive tribunal" *(Makot* 7a). And also in the prophetic visions of Isaiah and Micah of eternal and universal peace, "nation shall not lift up sword against nation, neither shall they learn war any more" *(Isa*. 2:4: *Micah* 4:3) are filled with deep revulsion and aversion to the shedding of blood.

It is not easy to mint from these lofty concepts the coinage of actual law but when the decisive question in arriving at some legal conclusion is a question of philosophical outlook - what is "good" and what is "bad", what promotes the public weal and what impairs it - we may and indeed must draw precisely upon our ancient sources for these alone truly reflect the basic outlook of the entire Jewish people.

The voice that calls from the depths of these sources tells us not to commerce in human life, not to act lightly in safeguarding it, for life is of the highest value, not ours to play with. The sanctity of contracts, or the sanctity of the principle of freedom of contract, has its proper place in the order of things but of far greater sanctity is that of life. No weapon that is formed against it shall prosper, and every tongue that shall arise against it in judgment you shall condemn, to paraphrase *Isaiah* 54:17.

13. The conclusion to be drawn from all the foregoing with regard to the case before us is that an exemption clause in the ticket which the respondent bought from the appellant company is null and void, as being contrary to public policy in the sense of section 64(1) of the Ottoman Civil Procedure Law. It is superfluous to emphasise that injury to life and injury to health are the same within the contemplation of the concepts that have their part in this context.

I have not overlooked that rule in Jewish law, "if one said, 'put out my eye, cut off my arm, break my leg' ... on the understanding that the other would be exempt, the latter is nevertheless liable" *(Baba Kama* 92a], but I have not applied it in this judgment because having regard to the reason assigned to it by Maimonides *(Hilkhot Hovel uMazik,* V, 11) and the *Shulhan Arukh Hoshen Mishpat* (421:12) I have grave doubts whether it reflects the idea of prejudice to public policy within the meaning of section 64(1) as above.

14. There remains the second and last question of whether the appellants were guilty of negligence in the injury sustained by the respondent. My answer is that they were. The respondent embarked on the "Theodor Herzl" for the journey from France to Israel in good health. The following day after eating the food served to her, she felt unwell, began to vomit and to have diarrhoea. Upon arriving in this country she went down with a stomach infection that lasted some three months. Such physical hurt was caused apparently by the tainted food she had received on board, and the learned judge rightly applied the rule of *res ipsa loquitur*. Hence, since the appellants did not succeed to rebut the presumption, the company is vicariously liable and the ship's chef (the second appellant) directly liable. The negligence of these two appellants lies in serving tainted food which the respondent ate whilst on board the ship.

In my opinion therefore the appeal should be dismissed.

LANDAU J. I agree.

In *Fox v. Ilan & Etzioni* (1), dealing with restraint of trade, I drew attention to section 64(1) of the Ottoman Civil Procedure Law and mentioned article 6 of the French Civil Code, from which the provision prohibiting contracts that are contrary to public order and morality is drawn. This statutory provision of ours, as well as article 46 of the Palestine Order in Council, 1922, relieves us from the necessity of turning to English case law regarding public policy. When I went on there to express the opinion that it might be more correct to interpret section 64(1) in accordance with French jurisprudence, I did not mean to say that we should adopt the substance of French law in the matter but that we should define the general boundaries of the concept of public order and fill it with content of our own.

French legal scholars construe the term "public order" in article 6 of the Civil Code in broad general terms, in the spirit of the basic concepts on which the entire legal system is based. This approach is fundamentally different from the conservative approach which treats the categories of public policy as being closed, so that creative power has been taken from the courts and there is nothing to add to what earlier courts up to a century ago laid down in the matter. According to the broad French approach, the source of these concepts lies not only in the realm of positive law but also in basic ideas of justice and morality and in the ever-varying needs of the social and economic system: see D. Lloyd, *Public Policy*, pp. 117 ff. That does not mean that the courts may intervene as they please in contractual relations according to the private view of the judge of what is good and useful in contemplation of these principles but must faithfully interpret them in the light of the opinion common to the enlightened public of which he is a part.

My honourable friend, Silberg J., uncovered the deep roots of the Jewish view about the sanctity of life and all that stems from that. Such a view is not exclusively ours but is common to all other civilized peoples. This is what Josserand, *Cour de Droit Civil Positif Francais* (1930) vol. I, para. 475, has to say about contractual conditions which exempt from liability for injury caused by negligence:

> "In my opinion the test must be sought in the nature of the injury; a distinction must be made between injury to persons and injury to property.
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> For injury to persons, it is essential to repair the wrong: physical personality is above private contracts, just as are a person's good name and repute. We cannot confer on another the right to kill us, to injure us or to defame us without punishment."

So also Ripert, *Droit Maritime* (4th ed.) vol. 2, para. 2004, p. 891, cited by the learned judge:

> "It is in fact possible to lay down that public order prohibits also involuntary injury to a person's physical well-being. What is involved is no longer a matter of financial relations between two people. Monetary compensation is but the lesser of two evils and cannot make up for the damage sustained. Hence the prohibition of the cause of such damage needs to be absolute, not to be evaded by any voluntary act."

For the relevant French literature and case law. see also the interesting note by I. Englard in (1961) *HaPraklit* 219.

I see no need to decide whether moral repugnance to endangering life and health is sufficient to invalidate any condition which a person may voluntarily take upon himself that offends against these values. When, however, a condition of this kind appears in a standard contract, as in the present case, where in fact the passenger has no choice, it must be set aside for being contrary to public order. The reasons for that are convincingly explained by the American judges cited by Silberg J. There is no occasion, in my view, for distinguishing in this matter between serious and minor injury to physical well-being, since every attempt to do so will involve prescribing finely drawn tests, the bounds of which do not lend themselves to clear definition. Nor do I see sufficient reason to distinguish between ordinary and gross negligence, as suggested in the alternative by appellants' counsel.

Nothing in section 55(c)(1) of the Civil Wrongs Ordinance, 1944, is inconsistent with what I have said. That section, which deals with contributory negligence, was taken from section 1(1) of the English Act of 1945 but only preserves the general rule regarding conditions which negative liability in torts; it is not, however, intended to deny the possibility of negating such liability always and in all circumstances by contractual condition.

The conclusion we have reached sits well with the decision of this Court in *Shoham v. Feiner* (2) which concerned a condition similar to the present one in a claim for repair to damage to property.

Appellants' counsel submitted that to impose liability in tort upon the first appellant as a ship company would lay too heavy a burden upon it since it is not covered against such risks by its general insurance policies. But that is insufficient to justify exempting the appellant from all liability for physical damage caused by it or its employees' negligence. It would be better for the appellant to cover itself against risks such as these and to add the cost of the insurance to the price of the ticket, than to place upon the passenger the concern to insure himself, or leave him without compensation for any physical damage he may sustain.

After writing these lines I read the instructive judgment of my honourable friend, Witkon J., and I wish to express my agreement with his balanced analysis of the various factors affecting the problem before us.

WITKON J. It is with much hesitation that I have also come to the conclusion that no validity attaches to the condition exempting the appellant from all liability for the physical injury which its employees have wrongly occasioned the respondent.

I have no intention of placing in doubt our powers to set such a condition aside. I find strong foundation both in section 64(1) of the Ottoman Civil Procedure Law and in article 46 of the Palestine Order in Council, 1922, for the rule that an Israeli court may certainly invalidate a contractual term which in its opinion conflicts with the public good. Even without such statutory provisions I would not contend that the court must give effect and recognition to every harmful and unfair term to which the parties have agreed. For instance, a condition which exempts from liability for killing or wilful wounding, it is unnecessary to say, no court will recognize. And it is also clear beyond all doubt that in adopting this principle - whether from England or from France or as axiomatic of our very judicial functions - we are not dependent upon English or French scholars in deciding what in our contemplation is valid and what invalid from the viewpoint of the public welfare. A condition which is valid in England - will not for that reason alone presumptively be valid with us. As my honourable friend, Landau J., said, we must give our own content to the framework of public order.

When, however, we come to weigh the considerations for or against invalidating any given condition, we immediately become aware that we are faced with a problem that is a cause of concern the world over. The American courts - so my honourable friend, Silberg J., demonstrated in his comprehensive survey - have annulled such a condition and we learn from Landau J. that French legal scholars have trod the same path. In England as well people are in fact unhappy about conditions in standard contracts which exempt a carrier in a monopoly position from all liability for the physical injuries of his passengers. The sharp complaints voiced by Lord Denning in *Adler v. Dickson* (8) bear witness to that, and this case is also the source of the rule that the condition will not hold in the event of a breach going to the foundations of a contract. Thus we see that this flinching revulsion is universal, as are also the considerations which demand invalidation of the condition. The starting point of those who would set it aside is undoubtedly their concern for the security of the person who is in need of a public service, that neither his life nor his health should be at the whim of the carrier. Further, such a person also merits protection of the law against exploitation of his weakness, since the two parties are not in the same bargaining position.

The first of these considerations - the sanctity of life - is not disputed and I would say that it is so well-known that it does not call for evidence. Everywhere, irrespective of religion or nationality, human life is regarded as a treasured possession to be guarded at all costs. It is a universal heritage, certainly among the Jewish people, as was shown by Silberg J. in his judgment. The trouble is, however, that this supreme consideration is not the only one which we must bear in mind. Were it possible to be guided solely by the concept which was so warmly expressed by Silberg J., we would arrive at some far-reaching conclusions which he himself does not support. We would have to annul every condition which limits a person's liability to compensate another for negligent physical injury irrespective of the circumstances in which the condition was stipulated, of the party making it and the mutual relationship of the parties concerned. The private carrier - as distinct from the public carrier - indeed everyone who agrees to render a service during which he may err and cause bodily harm to the other, would be prevented from agreeing with the latter to limit his liability. Such a result would certainly not meet with approval. Hence to arrive at a balanced outcome we must weigh all the considerations that pertain to the matter. As in most problems of law and of life in general, it is not the choice between

the good and the bad which makes decision difficult. The difficulty lies in the choice between different considerations all of which are good and worthy of attention but inconsistent among themselves and in respect of which we must determine an order of priority. In the present case I have not found the task a simple one.

Doubts over whether it is indeed desirable to annul the given condition stem in the first place from the leading rule that a person has full contractual freedom to ensure rights for himself and to waive rights, all as he pleases. In our own times, this rule may have lost some of its preeminence but in my opinion, subject to certain limitations, this freedom is still a treasured possession and a necessary institution in the life of society. Moreover, if interference with freedom of contract is effected not by way of legislation but judicially, confidence in the law will be shaken. For the rule is that stipulation is permitted in civil law and denial thereof is adverse to the sanctity of contracts.

For that reason, even if we were to say that every exemption clause of the kind in question is likely to render life and health a matter of free-for-all - and I do not join in this extreme view - there is in my opinion still no room to annul, because only of "the sanctity of life", every such condition contractually agreed upon by two individuals in the same position and of the same mind. To annul it, another factor is required, and indeed we are told that a contract between equal parties is unlike one between a powerful public or quasi-public body and a private person - "the small man" - who is in need of some essential commodity or service and is compelled to yield. Here occurs the well-known problem of standard contracts which will in the future occupy the attention also of our legislature. But here also I have reservations and I would not hasten to condemn all standard contracts. They appear to me called for by the realities of life, the outcome of the trend to standardisation that prevails in all areas of the economy. At all events, the courts do not generally incline to assume power to set aside such contracts when it is proved to their satisfaction that the conditions and *fiats* were brought to the notice of the customer. If need exists to control these contracts, the view is that it is a matter for the legislature (see per Cohn J. in *Shoham v. Feiner* (2) at p. 1454). Only thus can a supplier submit the reasonableness of his conditions to review, before contracting with his customers; and the proposer of the bill now before the Knesset in the matter has done well to choose this course. Here I wish to sum up by saying that if it is possible at all to regard the case before

us as one in which the court may annul a condition agreed upon by the parties, that can only be because of the conjunction of two factors: firstly the contents of the condition are undersirable ethically and socially, and secondly it was stipulated in a contract in which the party at the disadvantage was not free to contest it. In this manner we have restricted the conclusion we have reached in the present case to standard contracts.

Even the combination of these considerations still does not meet all my doubts. We must ask ourselves what is the reason for, what is the significance of, setting aside the exemption clause. Do we thus in truth enhance the degree of care taken by the appellant and all its employees and agents? I am not at all sure of that. The presumption is that a person will not treat another's life lightly. I would think that a person is careful or careless with another (and even with himself) according to his nature, his temperament and his ethical and intellectual standards, but the knowledge that he has to pay - or not to pay - damages for his negligent acts (in contrast to anticipating criminal conviction) has almost no effect in reinforcing - or weakening - his standard of care. If that is so in the case of the direct liability of a person, it is all the more so in the case of his servants and agents. It is common today to treat with doubt every principle of fault as a basis of liability in damages for injury arising out of the use of automobiles. Better, it is said, to proceed on the principle of absolute liability and the reason is that it is not to be presumed that the tortfeasor or victim will be less careful if he knows that in any case the victim will receive compensation, whether the injury was caused by the negligence of the one or of the other or without the negligence of either of them. Just as the expectation of having to pay damages even without fault by the tortfeasor does not render him more indifferent to another's life and health, it may also be assumed that the expectation of being exempted in the event of negligence will not increase his indifference. It is not therefore to be said that annulling the exemption will self-evidently encourage carefulness where before there was scorn, but the result - here as where absolute liability is imposed on car owners
- will be to spread the risk over the whole population by way of insurance.

That in effect is the problem before us. What is displeasing in a case such as the present is that a person injured through negligence is without financial remedy, for remedy is denied him in consequence of the contractual condition which he accepted without having any choice in the matter. If we say that we cannot tolerate such a situation and that

the exemption is not to be given effect, it is as if we said that the carrier must insure himself against this risk, and doubtlessly he will effect such insurance at the expense of the passenger by increasing the cost of the service. Theoretically, such compulsory insurance could also be imposed directly on the passenger, but clearly compulsory insurance effected by the carrier is more practical and reasonable. Nevertheless, is it in fact desirable and just to spread the risk of the individual among all passengers? That also will increase prices of commodities and services. One or other passenger may say to us, perhaps justly, that he wants no favours and is prepared to take the risk without paying any supplement to his fare. I can imagine many services, both in the transport area and in other areas, where it would be justified for the supplier to exempt himself from liability for negligent injury to customers and reasonable on the part of the customer to exempt him from this liability and take the risk without any insurance cover. Perhaps our case is such a case.

My learned friends think that in point of public policy it would be better to compel the carrier to bear liability and ensure that the injured passenger receives her compensation. I am ready to join in this conclusion - even if not without hesitation - out of the consideration that what is involved is an essential mass service generally carried out without mishap. The straits of the injured individual, left without remedy, may be hard and in the result offend against the feeling of justice. On the other hand to spread the risk among all passengers cannot involve very large expenditure and the price for the service need not go up appreciably. If the "decree" we issue against carriers and passengers generally is that they shall not abandon the injured individual to his plight, they can bear up under it. Accordingly on balance of the considerations it seems to me also that the law should incline in favour of the respondent. In the result I also agree to dismiss the appeal.

Appeal dismissed

Judgment given on June 26, 1963.