Exclusion of Liability for Negligence

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Contracting parties often seem reluctant to make express reference to negligence in exemption clauses. Evidently it seems too bare-faced, or possibly prejudicial to customer relations, to foreshadow negligence in the performance of the contract in so many words, and disclaim responsibility for it explicitly.1 Where there is no such express reference to negligence the question not infrequently arises whether an exemption from liability which is expressed in general terms should be construed so as to apply to damage caused in that way.

Among the rules of construction evolved by the courts for the purpose of mitigating the harsh effect of exemption clauses is the rule that exceptionally clear words are necessary if liability for negligence is to be excluded. There is a presumption that, in inserting protective provisions, a party is not intending, and would not be understood, to refer to fault-based liability. The rule has been formulated in fairly strong and specific terms in some of the earlier cases. More recent English authority modifies the strictness of the earlier formulations and emphasises that such judicial dicta are not to be treated like statutory provisions. Since the enactment of the Unfair Contract Terms Act 1977 (U.K.) which makes a strained or hostile construction unnecessary in order to do justice in most cases, the rule may be of little practical importance in English law.

It is proposed here to examine the present status and scope of the rule in English and Australian law.

Formulations of the rule

It is convenient to set out the leading formulations of the rule, while bearing in mind that, as noted above, some of the terminology is now generally regarded as unduly dogmatic.

In Rutter v. Palmer Scrutton L.J. said: 2

"In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him:"

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2. [1922] 2 K.B. 87 at 92.
In *Alderslade v. Hendon Laundry Ltd* Lord Greene M.R. said: ³

"... where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

In *Canada Steamship Lines Ltd v. The King*, Lord Morton, delivering the advice of the Privy Council said: ⁴

"‘Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarised as follows:-

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called the ‘proferens’) from the consequence of the negligence of his own servants, effect must be given to that provision . . .

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens . . .

(3) If the words used are wide enough for the above purpose, the court must then consider whether ‘the head of damage may be based on some ground other than that of negligence,’ to quote again Lord Greene in the *Alderslade* case. The ‘other ground’ must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene’s words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.’"

The rule of construction as formulated in the above-mentioned cases has been accepted as part of Australian law. ⁵

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4. [1952] A.C. 192 at 208
Rationale

The rule is often described as a corollary of the *contra proferentem* rule, namely that exemptions from liability are to be construed strictly, with any ambiguities being resolved against the party for whose benefit the provision was inserted (the *proferens*). Thus the language used must make it perfectly clear that liability for negligence is intended to be excluded since it is "inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence". It is considered that "human nature being on balance more inclined to optimism than pessimism, the parties are more likely to be thinking in terms of non-negligent rather than negligent performance of the contract." This is why, if there is any other ground of liability besides negligence to which the exemption could realistically be assumed to be intended to apply, it will be taken to apply to that ground and not to exclude liability for negligence.

The reasonableness of the result of holding that an exemption covers liability for negligence has also been given as a basis of the rule. It has been said that in "choosing between two or more equally available interpretations of the language used it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result;" and that this is "precisely the reasoning followed in Lord Morton of Henryton's formulation in *Canada Steamship Lines Ltd v. The King*". Obviously the thinking underlying this dictum is that normally excluding liability for damage caused by one's own negligence would be unfair and unreasonable. In a number of cases Lord Denning M.R. went further than his brother judges in expounding the view that *all* the rules of construction by which courts have sought to

6. *Verba chartarum fortius accipuntur contra proferentem* — literally, "the words of written documents are construed more forcibly against the party putting forward the document".
alleviate the unjust effect of exemption clauses, including the one presently under consideration, are just a cover for the application of a test of reasonableness. He thought that what the courts have surreptitiously been doing is to uphold provisions which are reasonable or operate reasonably and strike down those which are unreasonable or have an unreasonable effect.\textsuperscript{11}

\textit{Further judicial interpretation of the formulations.}

Several developments should be noted:

\textit{(1) The first guideline}\textsuperscript{12} \textit{in Canada Steamship Lines Ltd v The King.}\textsuperscript{13}

This states that language which expressly exempts a person from the consequences of his own or his servant's negligence must be effective. One question is, what amounts to an \textit{express} reference to negligence? In \textit{Gillespie Brothers & Co Ltd v. Roy Bowles Transport Ltd}\textsuperscript{14} it was held that the words "all claims or demands whatsoever" constituted an express reference to negligence. However the better view would seem to be that the word "negligence" or a synonym for it must be employed for the clause "expressly" to exclude negligence.\textsuperscript{15} An argument that an express exclusion of liability for negligence was ineffective because of a reference in the contract to all reasonable care being taken by the proferens was rejected in \textit{Spriggs v. Sotheby Parke Bernet & Co. Ltd}\textsuperscript{16}

\textit{(2) The second guideline in Canada Steamship Lines Ltd v. The King}\textsuperscript{17}

This states that, if there is no express reference to negligence, the

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\item \textsuperscript{12} This terminology was preferred to the word "test" by May L.J. in \textit{The Raphael} [1982] 2 Lloyd's Rep 42 at 48; cf. Stephenson L.J. at 51 who thought it immaterial whether Lord Morton's three formulations of the duty of the Court were called "principles", "tests", "rules", "rulings" or "guidelines", so long as it was understood that they were not provisions in a statute but aids to interpretation.
\item \textsuperscript{13} [1952] A.C. 192 at 208; see text to n.4, ante.
\item \textsuperscript{14} [1973] 1 Q.B. 400 per Buckley & Orr L.J. at 421.
\item \textsuperscript{16} (1986) 278 E.G. 969; cf \textit{Moran v. Lipscombe} [1929] V.L.R. 10 ("Every care but no responsibility").
\item \textsuperscript{17} [1952] A.C. 192 at 208; See text to n.4, ante.
\end{itemize}
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court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence — any doubt being resolved contra proferentem.18 Examples of expressions which have been held to be wide enough are: “any act or omission”,19 “at the owner’s risk”,20 “no responsibility will be accepted for any loss of, or damage to . . . goods . . . for any reason whatsoever”,21 “discharged from all liability”22, “customers’ cars are driven . . . at customer’s sole risk”23 and “all claims from third parties”.24 Those which have been held insufficient include: “at charterers’ risk”,25 “all liability for any loss or damage”,26 “cars garaged and driven at owner’s risk — Every care but no responsibility”27 and “shall not be liable”.28 In some of the cases judges have drawn a distinction between the way in which damage is caused (whether by negligence or not) and the kind of damage, saying that a clause must not only make it clear that it is intended to cover loss of the kind suffered, but that it is intended to cover that loss whatever its cause or origin. Thus it is prudent for the proferens to add to words such as ‘loss or damage’, words such as ‘howsoever arising’ or ‘due to any cause whatever’.29 However decisions on the construction of one contract are of limited prece-
dent value so far as other contracts are concerned. Judges have repeatedly warned that on matters of construction other cases provide a very uncertain guide.\(^{30}\)

One problem for the *proferens* is the danger that if he over-stresses the width of the relevant phrase in order to pass test (2), he might make it more difficult to argue that the provision does not founder on test (3). It has been said that "many a party putting forward such a clause to protect him might find it has got him out of the frying pan of the Privy Council's second principle into the fire of its third".\(^{31}\)

(3) The third guideline in *Canada Steamship Lines Ltd v. The King*.\(^{32}\)

Lord Morton said that even if the words used are *prima facie* wide enough to cover negligence, nevertheless it is necessary to ask if there is another ground of liability to which they might apply. If so, and if the other ground is not "so fanciful or remote" that the *proferens* cannot be supposed to have desired protection against it, its existence is "fatal" to the *proferens*. The provision will be taken to be intended to apply to the other ground of liability and not to negligence. Thus, if the defendant is a common carrier who owes a strict duty as well as a duty of care, the exemption may be construed as only applying to the strict duty.\(^{33}\) Or if a supplier of goods is strictly liable for their condition the exemption may not protect him from liability for a defect which is due to negligence.\(^{34}\) And where a lessor had certain strict duties imposed by law an exclusion of liability for damage to the lessee's goods did not apply to damage caused by negligence.\(^{35}\) Another example is where a party is liable both for negligence and breach of statutory duty; an exemption expressed in general terms may only cover the latter.\(^{36}\)


32. [1952] A.C. 192 at 208; see text to n.4, ante.


The relevance of the existence of another head of liability is, of course, "to show that sufficient meaning or content can be given to an ambiguous clause without expanding it to cover liability for negligence." 37 But the principle, in its literal terms, is clearly capable of distorting what would otherwise be the plain meaning of words, thereby yielding a strained construction. Recently the strictness of the rule appears to have been relaxed. In The Raphael 38 the English Court of Appeal was dealing with a claim for damage resulting from negligent stowage by the defendant of a derrick on the plaintiff's ship. The defendant relied on a clause in the contract which excluded liability for "any damage loss injury costs or expenses" arising from "any act or omission". The plaintiff sought to argue that the exclusion could have been intended to refer to damage resulting from delay; or from nonperformance (as opposed to negligent performance) of the contract; or to contractual (as opposed to tortious) liability in negligence; or to liability for the torts of nuisance, conversion or detinue. With the exception of liability for contractual negligence which would have to be excluded if the clause covered tortious negligence, all these alternative grounds were rejected, either as falling outside the scope of the clause or as being too esoteric to have been within the contemplation of the parties. Thus the defendant's liability was held to have been successfully excluded.

The Court emphasised that full force must be given to the caveat that the "other ground" must not be "so fanciful or remote" that it is unlikely that the parties would have had it in contemplation and inserted a protective provision in respect of it. 39 It was said not to be the duty of the court to "seek out, or think up, remote and far-fetched possibilities in order to defeat the intention, which would otherwise be derived from the plain meaning of the clause, to protect the party relying on it from liability for negligence". 40 Indeed, it was queried whether the expression "fanciful or remote" carries the correct shade of meaning. It was suggested by May L.J. 41 that it is not necessarily the case that so long as there is another ground which is not totally unreal or speculative, the principle will apply and liability for negligence will remain. In applying the principle, other grounds of liability should be discarded if, on a reasonable assessment of all the circumstances, it is unlikely that the parties would have addressed their minds to them at the time of formation of the contract. It is not only those which are totally implausible and fantastic which should be left out of account.

The Raphael is in line with the notably more relaxed and permissive attitude towards exemptions from liability generally, which is manifested in recent English cases. Lately English Courts have emphasised that protective provisions are not necessarily to be

39. Ibid. per Donaldson L.J. at 45.
41. Ibid at 48-9.
viewed with hostility, especially in commercial contracts which have been freely negotiated between parties who are in an equal bargaining position. They are of course to be construed strictly, with ambiguities resolved against the proferens, but it is said to be improper to read in ambiguities by a process of strained construction. This view was articulated in particular in the two House of Lords cases which, because both involved an alleged breach of a contract to provide security patrol services by a company of that name, have become known as Securicor 1 and 2. It was said that, in deciding whether the exemptions from liability were intended to apply, it was necessary to note that the potential losses which may result from breach of such a contract are great in proportion to the sums which can reasonably be charged for security services, and to take account of the fact that property insurance is more economical than liability insurance. These factors led to the conclusion that it was by no means implausible that the parties might have agreed to insert stringent exemption clauses which threw the risk of loss or damage on the property owner rather than the service provider. Such an arrangement would be by no means unreasonable.

It might be thought that this change in attitude on the part of the English courts was a reaction to the Unfair Contract Terms Act 1977 which deals with the unpalatable effects of exemptions from liability, by wholly invalidating them in some circumstances, and in other contexts subjecting them to a test of reasonableness. Reference was made in Securicor 1 to the fact that the need for sophisticated refinements and judicial distortion of the English language in order to do justice in the face of an unfair exemption clause has been banished by the Act. On the other hand one commentator considers that the more permissive approach probably predated the Act. Be that as it may, there is no equivalent legislation in Australia which deals specifically and comprehensively with exemptions from liability, as does the Unfair Contract Terms Act 1977 (U.K.). Nevertheless the more lenient attitude of the English courts seems to have met with approval in Australia. Thus, in the latest pronouncement from the High Court in Darlington Futures Ltd v. Delco Australia Pty Ltd we find an apparent approval of the dicta in the recent House of Lords cases and an endorsement of


the ‘natural and ordinary meaning’ approach to the construction of
the words of an exclusion from liability.\(^{46}\)

This does not necessarily represent a “revolution”\(^{47}\) or even a
change in direction in Australian law, since Australian judges never
went as far as the English courts in their attack on unfair exclusion
clauses. The rise and fall of the doctrine of fundamental breach,
for example, virtually by-passed Australia. In fact the High Court
in \textit{Darlington} appeared to think that the present attitude of the
House of Lords to the construction of exemption clauses does not
differ materially from that which was taken by the High Court
itself in cases dating back to the nineteen sixties. Having referred to
four previous High Court decisions\(^{48}\) the Court said:\(^{49}\)

“These decisions clearly establish that the interpretation of an exclusion
clause is to be determined by construing the clause according to its
natural and ordinary meaning, read in the light of the contract as a
whole, thereby giving due weight to the context in which the clause
appears including the nature and object of the contract, and, where
appropriate, construing the clause contra proferentem in case of ambig­
unity. Notwithstanding the comments of Lord Fraser in \textit{Ailsa Craig}, the
same principle applies to the construction of limitation clauses.”

The High Court in \textit{Darlington} was not concerned to express an
opinion about the scope of the particular rule of construction with
which this article is dealing, since the breach of contract in question
was deliberate not negligent. However, the court’s exposition of the
proper approach to the construction of exclusion clauses implies
that the third guideline in \textit{Canada Steamship} must yield if its
application would defeat the parties’ apparent intention or conflict
with the natural and ordinary meaning of the words used.

(4) \textit{Where negligence is the only liability.}

It is no longer the case, in English law at any rate, that, in the words
of Lord Greene M.R. in \textit{Alderslade v. Hendon Laundry Ltd},\(^{50}\)

\begin{itemize}
\item \textit{Ibid.} at 507–10; see also \textit{Life Savers (Australasia) Ltd v. Frigmobile Pty Ltd}
\footnote{1983} 1 N.S.W.L.R. 431 per Hutley J.A. at 434–5 and Mahoney J.A. at 439;
\textit{Bright v. Sampson & Duncan Enterprises Pty Ltd} \footnote{1985} 1 N.S.W.L.R. 346
\footnote{per Mahoney J.A. at 365–6; \textit{Celhene Pty Ltd v. W.K. J. Hauliers Pty Ltd}} \footnote{1981} 1 N.S.W.L.R. 606 at 618–20.
\item Lord Denning M.R. in \textit{George Mitchell (Chesterhall) Ltd v. Finney Lock
Seeds Ltd} \footnote{1983} 1 Q.B. 284 at 296, 299 described the \textit{Securicor} cases as
having “revolutionised” the approach to exemption clauses.
\item \textit{Sydney Corporation v. West} \footnote{1965} 114 C.L.R. 481; \textit{Thomas National
Transport (Melbourne) Pty. Ltd v. May & Baker (Australia) Pty. Ltd} \footnote{1966}
115 C.L.R. 353; \textit{H. & E. Van Der Sterren v. Cibernetics (Holdings) Pty. Ltd}
\footnote{1970} 44 A. L.J.R. 157; \textit{Port Jackson Stevedoring Pty Ltd v. Salmond &
Spraggon (Aust.) Pty Ltd} \footnote{1978} 139 C.L.R. 231.
\item \textit{Ibid.} at 507–10; see text to n.3, ante. This kind of reasoning was
employed in \textit{Gibaud v. Great Eastern Railway Co.} \footnote{1921} 2 K.B. 426; \textit{Rutter
v. Palmer} \footnote{1922} 2 K.B. 87; \textit{Smith v. Eric S. Bush} \footnote{1987} 3 W.L.R. 889;
\textit{Crouch v. Jeeves} \footnote{1938} \textit{Pty Ltd} \footnote{1946} 46 S.R. (N.S.W.) 242; \textit{Sydney City
Council v. West} \footnote{1965} 114 C.L.R. 481 per Kitto & Menzies JJ. (diss.) at
493–4, 499–500; \textit{Thomas National Transport (Melbourne) Pty Ltd v. May &
Baker (Australia) Pty Ltd} \footnote{1966} 115 C.L.R. 353 per Windeyer J. (diss.) at
\end{itemize}
"where the head of damage in respect of which limitation of liability is sought to be imposed . . . is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter" (emphasis added). The word "must" in this passage is too strong. It has since been held that it is possible, even in circumstances where a duty to exercise care is the only relevant duty and therefore negligence is the only ground of liability, to give meaning and content to an exemption clause, but yet hold that liability for negligence is not excluded. Thus it has been held that a bailee's duty to exercise care with respect to the custody of the goods is not necessarily excluded by an exemption which is expressed in general terms, despite the fact that bailees owe no higher duty than one of care.51 A reasonable interpretation which may be placed on the provision by the bailor, in an appropriate case, is that it is not an exemption from liability at all, but just a warning or statement of the general law. The bailee is simply informing the bailor that, contrary to what he might otherwise assume, the law does not impose strict liability on bailees for purely accidental loss of or damage to the goods.52 The purpose of such a warning may be assumed by the bailor to be to inform him that he should insure against such loss.

A more accurate expression of this aspect of the rule therefore, is that of Scrutton L.J. in Rutter v. Palmer who said 53 that "if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him" (emphasis added). It seems that where a Court is left uncertain about whether a provision is an exemption from liability or a mere warning, the matter should be resolved against the defaulting party.54

The Australian position may not be so clear. In Sydney City Council v. West 55 and Thomas National Transport (Melbourne) Pty Ltd v. May and Baker (Australia) Pty Ltd 56 members of the High Court expressed themselves in terms similar to those of Lord


52. This kind of construction is criticised by E.M. Barendt (1972) 35 Mod L. Rev 644 at 646-7 on the ground that it is unlikely that the proferens intended such a clause to be a mere warning.

53. [1922] 2 K.B. 87 at 92; see text to n.2, ante. In The Raphael [1982] 2 Lloyd's Rep 42 at 49 May L.J. favoured the expression "should usually". It may be noted however that the relevant provision in Alderslade v. Hendon Laundry Ltd was a limitation clause which presumably would not be open to the interpretation that it was a warning rather than an exemption provision.


55. (1965) 114 C.L.R. 481 at 493-4 (Kitto J.), 499-500 (Menzies J.).

Greene M.R. in *Alderslade v. Hendon Laundry Ltd.* A protective provision, it was said, must necessarily be intended to cover negligence if negligence is the only form of liability. Otherwise the clause would lack subject matter. However in the earlier case, *Moran v. Lipscombe* a more flexible approach was taken. The Victorian Full Court was dealing with a provision in a contract to repair a car, saying: "Cars garaged and driven at owner's risk — Every care but no responsibility". The Court held that liability for negligence in the course of test driving the car was not excluded. The provision was susceptible of the interpretation that it was not intended to cut down common law liability, but rather constituted a reminder or warning that the vehicle was at the owner’s risk so far as loss or damage which could not be avoided by reasonable care was concerned. It is probable that Australian law is in line with English law in this regard, and that the High Court judges in the passages in the cases mentioned above were expressing themselves in unduly emphatic language.  

(5) Limitation Clauses

The House of Lords has now held that the *Canada Steamship* rules do not apply in their full rigour to clauses which merely limit, as opposed to totally excluding, liability. The leading cases are *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co. Ltd* and *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd.* In the former Lord Wilberforce said:

"Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he received, and possibly also the opportunity of the other party to insure.

57. [1945] 1 K.B. 189 at 192.
59. This is the view of N.E. Palmer, *Bailment* (1979) at p. 926.
Lord Fraser said: 63

"There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity — see particularly the Privy Council case of Canada Steamship Lines Ltd v. R. at p. 208, where Lord Morton of Henryton, delivering the advice of the Board, summarised the principles in terms which have recently been applied by this House in Smith v. U.M.B. Chrysler (Scotland) Ltd. In my opinion these principles are not applicable in their full rigour when considering the effect of clauses merely limiting liability. Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in Cl.4(i) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. It is enough in the present case that the clause must be clear and unambiguous."

Though these dicta were subsequently endorsed in the later House of Lords case of George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd, 64 they did not find favour with the High Court of Australia in Darlington Futures Ltd v. Delco Australia Pty Ltd. 65 It was said there that the same principles of construction apply to clauses of exclusion and limitation alike. In the passage in Darlington Futures where the High Court expressed this view, they specifically disapproved the dicta of Lord Fraser in Ailsa Craig. Lord Fraser in that case said that the Canada Steamship principles were not applicable "in their full rigour" to clauses which merely limit liability. In view of the acceptance in earlier cases 66 of the Canada Steamship rules as part of Australian law, the High Court’s rejection of different principles of construction for limitation and exclusion clauses must mean that those rules continue to apply "in their full rigour" to clauses of limitation.

63. Ibid at 105–6, 970. Oliver L.J. in George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd [1983] 1 Q.B. 284 offered another rationale saying (at 304) that “a clause totally excluding liability tends to be construed more restrictively than a clause merely limiting damages payable for breach, for a total exclusion of liability, if widely construed, might lead to the conclusion that there was no primary obligation at all and thus no contract”; discussed by N.E. Palmer, “Negligence and Exclusion Clauses Again” (1983) Lloyd’s Mar & Com. Law 557 at 570–2.


66. See n.5, ante.
The following criticisms of the rule may be made:

a) Excessive rigidity

First, as noted above, it may still be the law in Australia that where negligence is the only ground of liability, then the clause must apply to negligence because otherwise it would lack subject matter. If so, then the English experience has demonstrated that such a rule is unnecessarily inflexible and can cause hardship, especially for consumers.

Secondly, in the situation where there is another ground of liability to which the words of a clause could refer, the position may be unsatisfactory. So long as the other ground is not "so fanciful or remote that the proferens cannot be supposed to have desired protection against it" does its existence automatically rule out exclusion of liability for negligence? Are the parties deemed conclusively to have intended the exemption to apply to the other ground; with "fatal" consequences for the argument that liability for negligence is excluded? If this is so, the rule does seem excessively rigid and mechanical. It may be quite plausible that the parties should have intended the exemption to cover negligence as well as the other form of liability. It would be preferable to regard the third principle as a presumption about the parties' probable intention rather than a rule to be applied automatically. This may well be the law, since in many of the cases, including The Raphael, courts have emphasised that the dicta of Lord Morton in Canada Steamship Lines Ltd. v. The King were mere guidelines or aids to construction and are not to be treated like the words of a statute. In the end, it is said, the scope of the protection given by an exemption clause turns on the parties' intention.

A third respect in which the rule can be criticised for excessive rigidity relates to the statement in the third guideline in Canada Steamship that the other ground must not be so "fanciful or remote" that the proferens cannot be supposed to have desired protection against it. A preferable approach may be that of May L.J. in The Raphael. As noted above, he took a view more generous to the proferens by suggesting that the alternative grounds which should be left out of account are not solely those which can be

68. Ibid; Lord Greene M.R. in Alderslade v. Hendon Laundry Ltd [1945] 1 K.B. 189 at 192 expressed himself similarly, saying that where there is another ground of liability than negligence, the clause "must" be confined in its application to loss occurring through the other cause.
described as totally far fetched and fantastic, but simply those to which it is unlikely that the parties would have addressed their minds.

b) Artificiality of distinguishing the three guidelines in Canada Steamship

It is doubtful whether there is any value in distinguishing tests (1) and (2). The question whether (1) is only satisfied if the word ‘negligence’ or a synonym is used, or whether wider words will suffice seems a rather sterile debate. Furthermore the usefulness of distinguishing (2) and (3) may be queried. In many cases courts have scrupulously applied themselves to the question in (2) before proceeding to (3).\(^{73}\) But in determining the scope of the protection given by an exemption, is it not artificial to look at the words of the clause in the abstract, as required by the second guideline, without reference to the various types of duty resting on the proferens for breach of which protection might have been sought? The very reason why a “doubt” about the coverage of a clause, which has to be “resolved against the proferens”, may arise, is likely to be because the possible breaches of duty which the parties had in mind would have included breaches other than negligence.\(^{74}\)

c) Ambiguity in the second guideline in Canada Steamship.

It might be thought that there is an internal inconsistency in the second guideline in so far as it calls first for a consideration of the “ordinary meaning” of the language used, but then requires a strict construction contra proferentem. It has been suggested\(^ {75}\) that there would be few provisions which would fail the test if the sole inquiry was whether, in their ordinary meaning, the words were wide enough to cover negligence. But in fact the courts seem to have bypassed this aspect of the test and to have adopted a strict construction contra proferentem approach.

d) No justification for distinguishing limitation clauses.

The view expressed in the English cases that the rules in Canada Steamship do not apply to clauses of limitation as opposed to clauses of total exclusion has generated considerable criticism.\(^ {76}\)

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\(^{74}\) Yeldham J. in Celthene Pty Ltd. v. W.K.J. Hauliers Pty Ltd [1981] 1 N.S.W.L.R. 606 at 616 appears to be merging (2) and (3) when he says that the words of the clause “would appear to be sufficiently wide to exclude liability for negligence as otherwise, in the case of a contract such as the present, they would lack any content.”


First, it is pointed out that a limitation clause may be so restrictive as to be virtually indistinguishable in its effect from a clause of total exclusion, for example where the *proferens* limits a large potential liability to a derisory sum.\(^7\) Secondly, it seems anomalous that a clause of total exclusion is subject to especially rigorous standards even though the potential liability at its maximum may not be great, whereas a limitation clause is always to be tested by more relaxed standards no matter how draconian its effect may be in terms of the disparity between a very extensive actual loss and a very small limitation.\(^8\)

Thirdly, there is the puzzling question of just what are the “specially exacting standards” which Lord Fraser said apply “in their full rigour” to clauses of exclusion or indemnity but not to those which merely limit liability.\(^9\) Both Lords Wilberforce and Fraser in *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co Ltd*\(^8\) accepted that limitation clauses must be clearly and unambiguously expressed and will be construed *contra proferentem*. If the *Canada Steamship* rules are really only a common sense corollary of the *contra proferentem* rule it is not easy to see why and in what way they are to be applied “less rigorously” to clauses of limitation. Lord Wilberforce said in respect of limitation clauses that “one must not strive to create ambiguities by strained construction”.\(^8\) Surely the inference cannot be that, with regard to exclusion clauses, it is proper to strive to create ambiguities. Fourthly, there is the question whether, as Kerr L.J. apparently thought in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd*,\(^8\) there are any exceptions to the rule that limitation clauses are subject to less exacting standards. He considered that the *Canada Steamship* rules did apply to the limitation clause before him, distinguishing the clause in *Ailsa Craig* which he said was “worded in unusually strong terms.” Lastly there is the question whether other types of protective provision are also to receive the more lenient treatment, for example time-bar clauses or limited indemnity clauses.

Doubtless it was these kinds of consideration which underlay the High Court of Australia’s rejection, in *Darlington Futures Ltd v. Delco Australia Pty Ltd*\(^8\) of different standards of construction for clauses of limitation and of total exclusion.

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79. *Ibid* at 558–9; Allan & Hiscock, *op. cit.* n. 76, ante, p. 254.
80. [1983] 1 All E.R. 101, 1 W.L.R. 964; see text to notes 62, 63, ante.
83. (1986) 161 C.L.R. 500.
The scope and operation of the rule

i) Construction of the contract as a whole

In applying the rule presently under consideration, another rule of construction must be borne in mind. This is the rule sometimes expressed in the Latin terms *ex antecedentibus et consequentibus fit optima interpretatio*, meaning that words must be construed in the context of the whole of the term in which they appear and of the whole document. 84 Thus in *Canada Steamship Lines Ltd v. The King* 85 where the lease of a shed provided that the lessee should have no claim against the lessor for damage to goods in the shed, it was said that this clause should be read in the light of another provision whereby the lessor undertook to keep the shed in repair. When so construed the exclusion afforded no protection against liability for negligence in the course of effecting certain repairs to the shed. Similarly in *The Raphael* 86 it was accepted that it was legitimate to argue that an exclusion clause which did not expressly cover negligence should be read in the light of other terms in the contract which were more comprehensively worded and clearly designed to protect against liability for negligence (though it was held that failure to use the same comprehensive language in the clause in question did not give rise to the inference that the draftsman had not intended negligence to be covered). However a caveat to the rule should be noted. In *The Oceanic Amity* 87 an argument similar to that in *The Raphael* was rejected for the reason that it was well known that the more comprehensively worded clause in the charterparty was not drawn by the same draftsman but lifted from elsewhere. And in *The Emmanuel* C Bingham J. said: 88

"It would undoubtedly be wrong to approach this charterparty form on the assumption that it represents the work of a single all-seeing creator. It is notorious that such forms contain clauses drawn from different sources, and inserted at different times, sometimes to meet special problems . . . Counsel for the owners is accordingly right to warn against close textual analysis of cl.16"

(ii) Status and relationship of the parties

In a number of cases it has been considered relevant to the interpretation of exclusion clauses to take account of whether the con-

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87. [1983] 1 All E.R. 672 at 685.
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tract is a consumer or commercial one, whether the parties are dealing at arm's length and are of equal bargaining power, and whether the terms have been freely negotiated or alternatively imposed by one on the other. That these factors are relevant to the application of the rule presently under consideration would seem to follow from the rationale of the rule as stated by Buckley L.J. in Gillespie Brothers and Co. Ltd. v. Roy Bowles Transport Ltd. namely that "it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence". The status and relationship of the parties would be relevant to the determination of what the assumptions, expectations, understanding, intention and knowledge of the plaintiff would be likely to be. Thus the understanding and expectation of the class of person to whom the clause was addressed was material to the interpretation of the particular provision in Hollier v. Rambler Motors (A.M.C.) Ltd. The question was whether a term in a contract to repair a car, stating that the garage company was not responsible for damage caused by fire to customers' cars on the premises, was an exemption from liability or a mere warning or reminder that the company was not liable in the absence of negligence. It was held that the clause was insufficiently clearly worded to bring home to a layman such as the plaintiff that the company was seeking to exclude its liability for fire caused by its own negligence.

On the other hand the "inherent improbability" of one party's having agreed to absolve the other from liability for his own negligence is not always apparent. In Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. it was thought that the owners of


90. [1973] 1 Q.B. 400 at 419.
92. In the Emmanuel C [1983] 1 All E.R. 686 at 689, Bingham J. said that though the standard of the intelligent layman will be appropriate in many circumstances, "where a contract is made in a specialised business by two practitioners in that business . . . a somewhat different standard is indicated, approximating to that of the reasonably informed practitioner in the field in question".
fishing vessels which were lost due to the negligence of the security patrol company employed to guard them would not be surprised to find stringent exempting provisions in the contract. In view of the low charge made for the services, the large potential losses which might result from negligence on the company's part and the likelihood that property owners would be insured, protection against liability for negligence would be neither unexpected nor unreasonable. 94

In these cases the courts were primarily considering what the assumptions and expectations of the plaintiff would be. The presumed intention of the *proferens* is also obviously important. After all, the third test in *Canada Steamship Lines Ltd. v. The King* 95 mandates an inquiry into the various forms of liability which he would have had in contemplation and against which he might have sought protection. 96 But where the understanding of the class of person to which the plaintiff belongs would differ from the likely intention of the *proferens*, it seems that the courts lean towards a construction favourable to the former. 97

(iii) **Insurance**

It is clear that in construing exemption clauses courts do not close their eyes to the actual or probable insurance position of the parties in the contest before them. Indeed the comment has been made that: "The availability of insurance lies at the root of most of the decisions on this topic, and it may well be that courts are influenced by the fact that property insurance is notoriously less expensive than liability insurance." 98 The typical situation in which the insurance factor is likely to be most influential would be one where property damage has been caused by negligent performance of a service, where the charge for the service is relatively small in proportion to the possible losses which might result from negligence and where property insurance is prevalent and more economical than liability insurance. In these circumstances it would be expected that courts would lean in favour of the construction that an exemption covers liability for negligence.

Of course insurance or insurability are not always, nor even usually, expressly mentioned in the cases. However, even in some of the earlier cases open advertence to the insurance position can be

94. See also *Photo Production Ltd v. Securicor Transport Ltd.* [1980] A.C. 827 and *Davis v. Pearce Parking Station Pty. Ltd.* (1954) 91 C.L.R. 642 at 652 where it was said that the plaintiff would expect an exclusion of liability for similar reasons. Hutley J.A. in *Life Savers (Australasia) Ltd v. Frigmobile Pty. Ltd.* [1983] 1 N.S.W.L.R. 431 at 435 accepted that the assumption of or exemption from legal burdens cannot be disassociated from the costs of providing a service.
96. Stephenson L.J. in *The Raphael* [1982] 2 Lloyd's Rep. 42 at 51 said that in formulating the third principle Lord Morton was considering the supposed intention of the *proferens*.
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found. Thus in *Rutter v. Palmer*\(^9\) the question was whether a provision that customers' cars were driven "at customers' sole risk" protected the defendant against liability for negligently caused damage to the plaintiff's car which had been deposited with the defendant for sale on commission. In construing the provision as extending to cover negligence Bankes L.J. said\(^10\) that "it is well known to be the common practice for the owners of motorcars to insure themselves against all risks in connection with the car..." And in *Davis v. Pearce Parking Station Pty Ltd.*\(^1\) where the question was whether a provision in a contract to park a car at a parking station that cars were "garaged at the owner's risk" excluded liability for negligence, the Court noted that the defendant bailee was making a very small charge for taking custody of valuable goods. He was likely to intend and be expected by the bailor to intend to protect himself against a possibly very heavy liability arising from the negligence of a servant. Either party, it was said, can insure, and such a clause may reasonably be taken by the bailor to mean that, if he wishes to be protected against loss or damage at all, he must insure.\(^10\)

References to the insurance factor have become increasingly common more recently.\(^10\) It seems the view is taken that it is legitimate to consider whether the parties are or should be insured, and what type of insurance is most common and economical in the circumstances. The parties' intention with respect to the scope of an exemption is to be determined in the light of their presumed knowledge of these matters. It is clear that this recognition of the relevance of insurance to the construction of protective provisions in contracts is capable of conflicting with the rule or presumption embodied in the *Canada Steamship* guidelines.

The latter advocates a construction contra proferentem while consideration of the insurance position would often promote a construction favourable to the proferens.

(iv) Breaches more serious than negligence

It is worth distinguishing a different type of situation from that which we are considering here. The present rule is concerned with

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100. Ibid. at 90.
102. Ibid at 652.
the question whether an exclusion is intended to apply to fault-based liability at all. But another issue that can arise is whether, even if a clause does expressly or impliedly extend to negligence, it goes further and gives protection also against a 'higher' form of liability or 'worse' type of fault. Thus the question may be whether it applies to wilful or malicious damage,\textsuperscript{104} fundamental breach,\textsuperscript{105} 'deviation' from the terms of a bailment,\textsuperscript{106} breach of a statutory duty to take safety precautions\textsuperscript{107} or negligent breach of a strict contractual warranty.\textsuperscript{108} Whether it does so is a matter of construction and clear words are of course required. Rules of construction described variously as the 'four corners' rule, the 'deviation' principal, the 'main purpose' rule, the 'total breach' rule and the doctrine of 'fundamental breach' may be usefully invoked. But there is no rule that because a clause clearly covers negligence it should not be considered to extend to other types of fault such as wilful wrongdoing. The argument that there is such a rule was said in \textit{Photo Production Ltd v. Securicor Transport Ltd.}\textsuperscript{109} to be "a perversion of the rule that if a clause can cover something other than negligence, it will not be applied to negligence".

\textbf{(v)} Rule not to be used so as to favour the proferens

Another "perversion" of the rule would occur if it were allowed to work in favour of the proferens. The rule is said to be a corollary of the \textit{contra proferentem} rule. Thus an attempt to use it in such a way as to \textit{assist} the proferens must be an incorrect application. Take a situation where liability could arise in tort or contract, but the contractual duty is stricter, as is (or may be) the case with respect to an occupier's duty to a contractual entrant. It is specious to argue that, because the plaintiff chose to sue in contract rather than in negligence, the third guideline in \textit{Canada Steamship Lines Ltd v. The

\textbf{(vi)} Indemnity clauses

It is clear that the rules in \textit{Canada Steamship Lines Ltd v. The

\begin{itemize}
\item \textsuperscript{104} \textit{Photo Production Ltd v. Securicor Transport Ltd} [1980] A.C. 827.
\item \textsuperscript{105} \textit{Levison v. Patent Steam Carpet Cleaning Co Ltd} [1978] Q.B. 69.
\item \textsuperscript{109} [1980] A.C. 827 per Lord Wilberforce at 846.
\item \textsuperscript{110} \textit{Bright v. Sampson & Duncan Enterprises Pty Ltd} [1985] per Mahoney J.A. at 367–8.
\end{itemize}
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114. This term is used in Smith v. South Wales Switchgear Co Ltd [1978] 1 W.L.R. 165 by Viscount Dilhorne at 168 and Lord Fraser at 172.


118. Canada Steamship Lines Ltd v. The King [1952] A.C. 192 at 211 (semble); Smith v. South Wales Switchgear Co. Ltd [1978] 1 W.L.R. 165 at 168 (Viscount Dilhorne), 178 (Lord Keith). The fact that if the clause does not apply to negligence it confers no added protection to that afforded by the common law is no argument against such a construction: Smith v. South Wales Switchgear Co. Ltd [1978] 1 W.L.R. 165 at 174 (Lord Fraser), 179 (Lord Keith).
sally shared by judges. Nor is the strict construction approach invariably taken in all circumstances. In some cases the courts have shown themselves prepared to look behind the prima facie injustice of a provision in which one party agrees to discharge another's liability, at the relationship of the parties and the insurance position. Taking these matters into account the risk allocation effected by the clause may not be unreasonable and an intention for it to apply to fault-based liability may be more readily inferred.

(vii) Time-bar clauses

The question arises whether the rule of construction which we are considering has any application to time-bar clauses. The High Court of Australia in *Commissioner for Railways v. Quinn* 121 and the Privy Council in *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd* 122 seemed to think that the rule has no role to play with respect to clauses of this type. Such provisions are presumed to be intended to operate on all claims of whatever nature and normally would not admit of the interpretation that claims based upon negligence are beyond their reach.

(viii) Negligence in tort or contract

Does the reference to 'negligence' in the rule of construction with which we are dealing mean tortious negligence or contractual negligence? In some of the cases it seems that it is taken to refer to tortious negligence. Thus in *White v. John Warwick & Co Ltd.* 123 the owner of a carrier tricycle which was hired out to the plaintiff was considered to owe a strict contractual duty with respect to the condition of the machine, and also a duty of care in tort. A provision in the contract of hire that the owner was not to be liable


121. [1945] 72 C.L.R. 345 at 365 (Starke J.), 372 (Dixon J.), 385 (Williams J.).


123. [1953] 1 W.L.R. 1285; W. Howarth, "Some Common Law Limitations to the Construction of Contractual Exclusion Clauses" (1985) 36 N. Ire. L.Q. 101 at 116–7 queries why it is that, since tortious duties are fixed by law, contractual exclusion of tortious liability is permissible.
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for any personal injuries to riders of the machine was construed as applying to the former duty only.\textsuperscript{124}

However, in other cases where the rule has been applied, no liability in the tort of negligence would arise. An example is George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd\textsuperscript{125} where the complaint was that seed supplied to the plaintiff farmer by the defendant seed merchant was not the kind of seed stipulated in the contract. The resulting crop was commercially worthless to the plaintiff who sought damages for his lost profits. Oliver & Kerr L.JJ. in the Court of Appeal thought that one reason why the defendant's limitation clause would not protect him was that the defendant was negligent in supplying the wrong kind of seed.\textsuperscript{126}

Clearly negligence in this type of situation would not give rise to liability in tort. Nor does it seem sensible to describe the breach as contractual negligence or breach of a contractual duty of care. The contractual duty was a strict one to supply merchantable seed of the kind described in the contract. As a factual matter, of course, this duty was capable of being broken innocently or negligently. Thus the result of applying the rule of construction here was that the limitation clause did not apply to negligent breaches of the strict contractual duty to supply goods which were merchantable and of the description required by the contract.

In other circumstances the 'negligence' referred to in the rule clearly does include breach of a contractual duty of care. Thus when it is said that "if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him",\textsuperscript{127} the reference is obviously to breach of a contractual duty of care. In this type of situation it is often the case that there will co-exist with the contractual duty, an identical duty sounding in the tort of negligence.

It has been said however that if an exemption is wide enough to cover contractual negligence it must also cover liability for breach of a duty in tort which is co-extensive with the contractual duty.\textsuperscript{128}

This is the meaning of the often-quoted dictum of Scrutton L.J.

\textsuperscript{124} D.W. Greig & J.L.R. Davis, The Law of Contract (1987), p. 634 consider that this was only one basis of the decision; see also [1954] 17 Mod.L.Rev 155 at 157.


\textsuperscript{126} Ibid. at 306, 312-3; Oliver L.J. thought that the clause would not apply in any event, whether or not there was negligence, since there was a failure to fulfil the primary obligation of the contract. In the House of Lords it was said that as the provision was a limitation clause, not a total exclusion, the rule of construction had no application: [1983] 2 A.C. 803 at 814 (Lord Bridge).

\textsuperscript{127} Rutter v. Palmer [1922] 2 K.B. 87 per Scrutton L.J. at 92.

that “where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort”.129

(ix) Different forms of negligence

It seems to be accepted that the spirit, if not the letter, of the third guideline in Canada Steamship Lines Ltd v. The King130 is applicable even where, though negligence is the only or main ground of liability, negligence on the part of the proferens may take different forms. A clause may be taken to refer only to negligence in certain respects and not in others.131 Thus in Canada Steamship itself it was said that the protective provisions did not apply to negligence of the kind in question, namely, negligence in carrying out a contractual obligation to repair.132 In another case133 a provision was construed as excluding liability for negligence as a bailee in keeping custody of goods, but not negligence in the appointment of staff. A further illustration is a case134 in which it was held that while the exemption might exclude liability for negligence in supervising skaters at a skating rink, it did not apply to negligence with respect to the physical structure of the premises.

It will be prudent therefore for the draftsman of an exemption clause which is intended to extend to liability for negligence generally, not only to use the word “negligence”, but to follow it by some phrase such as “in any respect” or “of whatever type” or “in any circumstances whatever”. If it is intended to accept responsibility for negligence in certain matters only, but not in others, specific reference to those forms of negligence may be held inferentially to exclude liability for other types.135

(x) Non-Contractual Exempting Provisions

Not infrequently it is sought to exclude liability which would otherwise arise in tort, by means of a notice or some form of documentation which does not form part of a contract between the parties.136 Thus an occupier of premises may seek in this way to ex-

131. Hawkes Bay & East Coast Aero Club Inc. v. McLeod [1972] N.Z.L.R. 289 per Turner J. at 301; B. Coote [1972] Cambridge L.J. 53 at 55; cf Davis v. Commissioner for Main Roads (N.S.W.) (1967) 117 C.L.R. 529 at 537 where Menzies J said that there was “no sound ground for limiting the indemnity to particular breaches of the duty of care”.
clude his liability towards a licensee, or a bank may disclaim any responsibility when giving a credit reference in respect of a customer. Such exclusions may sometimes operate so as to give rise to the defence of *volenti non fit injuria*, but it seems that the circumstances where they are effective cannot always be analysed in terms of that defence. This is because actual knowledge of the exclusion, let alone the inference of an intent to waive the defendant's duty of care, are not necessary requirements. It seems that the rules of construction which apply to contractual exclusion clauses, including the rule presently under consideration, apply also to these non-contractual exempting provisions.

**(xi) Clauses other than exemption or indemnity provisions**

It seems that the rule of construction can apply to clauses other than exemption or indemnity provisions. In *Sonat Offshore SA v. Amerada Hess Development Ltd.* the question was whether a contractor which failed, because of its own negligence, to provide services for its employers was entitled to recover remuneration. The contractor was entitled to payment at a specified rate per day for the supply and operation of oil drilling equipment. The agreement provided for different rates of payment where the rig was not operational by reason of equipment breakdown. The Court of Appeal held that, in the absence of an express statement to this effect, the latter provision was not intended to apply where the breakdown was due to the contractor's own negligence or wilful default. The application of the reasoning underlying Lord Morton's third guideline in *Canada Steamship Lines Ltd. v. The King* led the Court to adopt this construction.

**Conclusion**

There is no reason to doubt that there still exists in English and Australian law a rule of construction that an exemption clause which is expressed in general terms will be presumed not to be intended to apply to liability for negligence, and that in Australia, though not in England, the rule applies to clauses of limitation and of total exclusion alike. However, the need for such a rule has been diminished, if not banished, in England, by the enactment of the Unfair Contract Terms Act 1977.

Exposition of the rule in *Canada Steamship Lines Ltd. v. The King* in the form of three propositions may have done a disser-

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143. Ibid.
vice to the law in giving the impression that the tests are to be applied mechanically and inflexibly, thereby causing some commentators\textsuperscript{144} to doubt the value of retaining such a rule. The criticism that the rule is too rigid can be met however if it is remembered that it is a rule of construction only, not a rule of law, and that it must yield if its application would defeat the intention of the parties or distort the plain meaning of the words used. The rule should be regarded only as a common sense corollary of the \textit{contra proferentem} rule and a rational deduction from the assumption that for the most part, when entering a contract, the parties are contemplating non-negligent rather than negligent performance. It remains a useful weapon which can be employed by the courts, in an appropriate case, to give relief against the unfair effects of exemptions from liability in jurisdictions where there is no legislation enabling them to strike down such provisions on the ground of unreasonableness.

So long as the rule is applied with flexibility it should not operate to defeat commercially reasonable arrangements. The courts have shown greater readiness lately to give consideration to whether, in the light of the relationship between the parties and the insurance position, an exclusion of liability for negligence might make commercial sense, and therefore accord with the parties' presumed intention. Despite this, the unpredictability of judicial reactions in many circumstances means that it remains vital that a party who wishes to exclude liability for negligence should say so in so many words in his documentation. However unpalatable he may find it a \textit{proferens} should be advised that there is no substitute for disclaiming liability for negligence expressly. Additionally, if it is intended that the exclusion is to apply to negligence in every facet of performance of the contract, words to that effect should be added.