

## MARCH 1996 LAW REVIEW

### LIABILITY WAIVERS & RELEASES OVERVIEW CAN YOU SAY "EXCULPATORY AGREEMENT"?

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In a valid and enforceable sports waiver or release agreement, the participant waives or releases any future negligence claim he or she may have against the provider of a sport or recreational services in exchange for an opportunity to participate. Waivers and releases are also referred to as "exculpatory agreements" because the sports participant "exculpates," or forgives in advance, the provider for future negligent conduct. The release or waiver of liability is, therefore, limited to negligent conduct. Accordingly, the participant does not waive or release any claims based upon the willful or wanton misconduct of the provider.

Unlike negligence, which is unreasonable conduct likely to result in injury, willful or wanton misconduct (sometimes referred to as "gross" negligence) goes well beyond mere carelessness. Willful or wanton misconduct demonstrates an utter disregard for the physical well being of the participant. While willful or wanton misconduct does not require an intent to injure, such conduct is so outrageous that injury is almost a certainty. A valid and enforceable waiver or release, therefore, lowers the applicable standard of liability from ordinary negligence to gross negligence or willful/wanton misconduct. The following description of reported case law illustrates a few of the factors courts are likely to consider in determining the validity and enforceability of a particular liability waiver agreement.

#### NOTICE OF TYPE OF NEGLIGENCE ASSUMED?

In the case of *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill.App. 3d 581, 559 N.E.2d 187 (1990), plaintiff alleged that the negligent design of a weightlifting bench caused the weights to fall on him. A waiver of liability clause in defendant's membership agreement released defendant from negligence liability for injuries "arising out of facilities and equipment." According to the court, a valid and enforceable exculpatory clause must contain clear, explicit, unequivocal language waiving defendant's liability for negligence. Specifically, the court found plaintiff must be put on notice of the range of dangers assumed, including reference to the types of activities, circumstances, or situations encompassed which plaintiff agrees to relieve defendant of his duty of reasonable care.

Applying this principle to the facts of the case, the court found that "the exculpatory clause could not be more clear or explicit." The waiver provided that any injury from the use of weights, equipment, and the selection of the type of equipment to be used was the "entire responsibility" of the member. As a result, the court found that plaintiff's injury fell "within the scope of possible dangers ordinarily accompanying weightlifting." Further, the court found this type of injury was "normally contemplated by the parties at the time of contract." The court, therefore, held that plaintiff's injury clearly fell within the parameters of the exculpatory clause.

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On the other hand, that this exculpatory clause would not always relieve defendant of potential liability stemming from the provision of defective equipment. Specifically, the court found that defendant would not be insulated from liability where the dangers constituted willful or wanton misconduct. For example, if plaintiff could show that the quality or integrity of defendant's equipment was extremely inferior, then the court found supplying such equipment to the public would be deemed willful and wanton negligence, outside the scope of a valid and enforceable waiver.

### CAN PARENT SIGN WAIVER FOR CHILD?

In the case of *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992), plaintiff, age 12, was injured while participating in defendant's ski school. The trial court granted summary judgment to defendant dismissing plaintiff's negligence claims based upon an "exculpatory" (i.e., waiver/release) clause contained in the application to the ski school. The application was signed by plaintiff's mother and it relieved the ski school from any liability for its own negligence.

On appeal, the issue was whether plaintiff's parent had the legal authority to release, not only her own claims, but also the potential future negligence claim of their minor son when she signed defendant's application form. According to the state supreme court, a parent generally does not have the legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence (here defendant's ski school). Applying this principle to the facts of the case, the court held that this particular release violated public policy and was, therefore, unenforceable to the extent that it purports to release the defendant ski school from any liability for their son's own negligence claims. On the other hand, the court acknowledged that a clear and conspicuous exculpatory clause could bar the parent's own negligence claim for damages arising out of their child's injury (e.g., medical expenses paid by parent on behalf of the child.)

In contrast, the court in the case of *Hohe v. San Diego School District*, 274 Cal.Rptr. 647 (1990) held a waiver signed by a minor and her parent was valid. In this particular instance, the 15 year old plaintiff and her parent signed a liability waiver prior to her participation as a volunteer in a PTA fundraising magic show. As noted by the court, the law generally allows children to disaffirm contracts they sign with adults, including waiver contracts, to protect minors from their own "improvidence." On the other hand, the court found this particular type of waiver was designed to insulate the PTA and its volunteers from negligence liability.

According to the court, significant public benefit would be derived from allowing children to give up their right to sue for negligence and, thus allow children to participate in volunteer sponsored recreational activities. In the opinion of the court, such waivers would avoid the costs of litigation for alleged negligence by volunteers and thousands of children would benefit from volunteer sponsored sports and recreational activities. Since "every learning experience involves risk," the court found that it was not necessarily against public policy to shift the burden of the risk from community volunteers to the participating children and their parents.

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### I DIDN'T READ THE "SIGN UP SHEET!"

In case of *Dombrowski v. City of Omer*, 199 Mich.App. 705, 502 N.W.2d 707 (1993), plaintiff was injured in a rope climbing event conducted during the defendant city's annual "Sucker Festival." The trial court granted summary judgment to the city based upon plaintiff's signing a release of liability prior to crossing the river on a rope. The waiver of liability form which plaintiff was required to sign had "Rifle River Sucker Festival" printed at the top and read, in pertinent part, as follows: "In consideration of the possible injurys (sic) which occur in this event, I hereby release all participating groups and persons officially connected with this event from any and all liability for any injury or damages whatsoever arising from any participation in this event." The language of the form was double spaced in capital letters and was in standard pica 12 point script font. Several signatures appeared at the bottom of the form; plaintiff's signature was at the bottom of the list. Times of various participants for the rope event were also noted on the list.

Plaintiff argued that the release was unenforceable based upon the "mutual mistake" of the parties to the agreement. Specifically, plaintiff alleged that the mistake was his failure to read the liability waiver before signing it. According to the appeals court, absent a showing of fraud or mutual mistake, one who signs a contract cannot invalidate it on the basis that he or she did not read it, or thought that the terms were different. Further, the court found that failure to read a contract document provides a basis for rescision (i.e., nullification) only where the failure was not induced by carelessness alone of the signor. For example, where the signor's failure to read the contract was induced by some "stratagem, trick, or artifice" by the parties seeking to enforce the contract.

Applying these principles to the facts of the case, the appeals court found evidence that plaintiff indeed did not read the waiver before signing. Testimony indicated, however, that plaintiff was told by the defendant that "he had to sign it because it was a release form and if he got hurt, he couldn't come back on us." In light of such evidence, the appeals court found plaintiff had not been induced by the City to sign the release before reading it. Further, the court found the nature of the document itself did not hinder the reading or understanding of it. On the contrary, the court found the term "Waiver of Liability" put the layman on notice that he was waiving liability claims arising out his participation in the City's rope climbing event.

Plaintiff had also argued that the document itself misrepresented the nature of the transaction because it would lead one to believe that he or she was "only signing a list of names." Specifically, plaintiff argued that the waiver document was deficient because it had date and did not contain contract language for each individual participant with a formal signature line for each individual participant. The appeals court rejected this argument.

According to the appeals court, there was no requirement that individual liability waivers be executed by each participant in an event, rather than all participants signing the same waiver. The court said it would have found more validity in plaintiff's argument if the form was entitled "Rope Climb Sign-up Sheet" and had contained vague reference to advising participants to "read the reverse side before signing ." On the

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contrary, the court found the term "Waiver of Liability" at the top of the form spoke for itself and was not misleading, nor had there been any fraudulent misrepresentation of the nature of the document by the City.

### WAIVERS CONTRARY TO PUBLIC POLICY?

According to the state appeals court in *Dombrowski*, it was not contrary to public policy in Michigan for a party to execute a contract against liability for damages caused by ordinary negligence, i.e. a waiver or release agreement. This reflects the general view courts regarding waivers, particularly where the contracting parties are adults and the waiver involves private matters, as opposed to matters of public necessity.

The state supreme court in Virginia, however, has adopted a rather extreme minority view. In the case of *Hiatt v. Lake Barcroft Community Association*, 418 S.E.2d 894 (Va. 1992), the Virginia supreme court held that a pre-injury release provision signed by plaintiff for a triathlon was prohibited by public policy and, thus, void. In so doing, the Virginia court cited a 19th century decision to hold that such releases were prohibited "universally." According to the Virginia supreme court, to put other parties to contract at the mercy of its own misconduct can never be lawfully done "where an enlightened system of jurisprudence prevails." As noted above, the Michigan court in *Dombrowski* and most other jurisdictions allow such releases with certain limitations.

### PUBLIC INTEREST FACTORS

In the case of *Boyce v. West*, 71 Wash.App. 657, 862 P.2d 592 (1993), plaintiff's son died while participating in a scuba diving program sponsored by the defendant private university and the defendant dive shop. Plaintiff's son had signed a liability waiver which released the dive shop and its instructor from "all liability for negligence" and provided "full assumption of all risks associated with the program." The trial court granted summary judgment to defendants based upon the waiver.

On appeal, plaintiff argued that the waiver violated public policy and should not be enforced. According to the appeals court, exculpatory clauses are strictly construed, but valid in Washington, if a "public interest was not involved." As described by the appeals court, the following factors would determine whether a "public interest" was involved and make a particular waiver agreement unenforceable:

- (1) Is the endeavor of a type generally thought suitable for public regulation?
- (2) Is the party seeking exculpation performing a service of great public importance to the public which is often a matter of practical necessity for some member of the public?
- (3) Is there a decisive advantage in bargaining strength by the party seeking exculpation because of the essential nature of the service and the economic setting of the transaction?
- (4) In exercising superior bargaining strength, does the party seeking exculpation confronts the public with a standard contract of adhesion and makes no

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provision for the payment of additional fees to obtain protection against negligence? (5)  
Are members of the public seeking services placed under the control of those furnishing services and, thus, subject to the risk of carelessness on the part of the party seeking exculpation?

Applying these factors to the sport of scuba diving, the appeals court found that instruction in scuba diving does not involve a public duty. While acknowledging that scuba diving is a "popular sport," the appeals court found it did not involve a public interest. In this particular instance, the court found Boyce had the option of not taking the scuba class, and there was no practical necessity involved. On the contrary, the appeals court found that scuba diving involves "no more a question of public interest than does motorcross racing, sky diving, or motorcycle dirtbike riding."

Similarly, in *Banfield v. Louis*, 589 So.2d 441 (Fla.App. 1991), the court found that the defendant city was not engaged in an activity of great public interest, or performing a necessary service, when it promoted and sponsored the triathlon bike race in which plaintiff was injured. In this case, the specific issue was whether it was always against public policy to relieve a governmental entity of its duty not to be negligent. According to the appeals court, it would strike down a waiver contract on public policy grounds where there is a dominant public interest and the release is clearly injurious to the public good. Under such circumstances, the court would find a particular waiver would contravene an established interest of society. However, under the circumstances of this case, the appeals court found only a small percentage of the public participated in triathlon races and, thus, there was "no showing of great prejudice to a dominant public interest" if the waiver was enforced. Accordingly, the appeals court found the city should receive the benefit of the waiver which precluded negligence liability for plaintiff's injury.