JUNE 1982 LAW REVIEW

COURTS FROWN ON LIABILITY RELEASE AGREEMENTS

James C. Kozlowski, J.D.

During a recent workshop I conducted on legal liability at the University of Georgia Center for Continuing Education, several participants asked about the legal effect of personal injury release forms in recreation activities. Ordinarily, these documents are thought to insulate the recreation agency and its employees from any liability for personal injuries sustained by the participant in a given program or activity. As indicated by the following review of general legal principles and recent court decisions, release forms do not necessarily provide a strong legal defense to a personal injury claim. This is particularly true in the case of public recreation and park services where such agreements are likely to be considered against public policy, and consequently void.

Waivers and releases of liability are commonly referred to in the law as 'exculpatory agreements, meaning a contract which absolves an individual from alleged fault for negligence. A negligence cause of action arises when a prospective defendant fails to conform to a standard of care to which he owes a duty, and such failure causes injury to a foreseeable plaintiff. The applicable standard of care refers to the appropriate conduct of a reasonable man under the circumstances. The reasonable recreation supervisor would, therefore, be expected to take those steps necessary to guard against foreseeable risks of injury to participants in a specific activity or program.

An exculpatory agreement effectively relieves an individual of his legal duty to exercise ordinary care and caution. Such agreements, however, do not preclude liability for gross negligence as indicated by willful, wanton, or malicious misconduct.

Because exculpatory agreements exempt a person from liability for future negligent acts, they are not favored by the law. As perceived by the courts, these agreements tend to induce a lack of care on the part of the party insulated from liability. As a result, releases are very strictly construed. Any doubt regarding the intent of the agreement is resolved against the party who is protected by the release. (57 Am.Jur. 2d Negligence §21, 31).

Exculpatory agreements cannot exempt an individual from liability for negligence in the performance of a duty imposed by law, especially an obligation imposed for the benefit of the public. An exculpatory agreement is, therefore, unenforceable if one of the parties is charged with a public service duty, and the purpose of the contract is to avoid liability for negligent performance of this public responsibility.

In almost every instance, public parks and recreation agencies are discharging a public duty in conducting their activities and programs. Depending upon the law in a particular jurisdiction, such public agencies may have an absolute defense to negligence actions based upon sovereign immunity. However, exculpatory agreements in which the participant or his parents assume responsibility for any injuries sustained in a particular recreational activity will not provide a valid defense for the public agency or its employees.

Since public park and recreation agencies discharge a public duty, any attempt to relieve their legal duty to exercise reasonable care and caution through an exculpatory agreement is void as against public policy. This point of law is so well settled that very few cases involving exculpatory agreements issued by public recreation and parks agencies ever reach an appeals court. It would be safe to assume that any such agreements would most likely be declared void at the trial court level. As a result, the following reported appellate court decisions involves private, not public entities as defendants.

RECENT COURT DECISIONS

In the Maine case of *Doyle v. Bowdoin College*, 403 A2d 1207 (1979), plaintiff's son was hit in the eye while playing floor hockey at defendant's two week summer hockey clinic. A plastic hockey blade flew off the end of another's child's stick shattering Brian Doyle's glasses. The jury awarded the plaintiff $50,000 in damages for his son's injuries (a damaged left retina resulting in partial blindness).

At trial, the judge had ruled that a document signed by Brian's father did not constitute a release for defendant's own negligence in supervising the clinic. Brian's father had signed a document which read in part: "I understand that neither Bowdoin College nor anyone associated with the Hockey Clinic will assume any responsibility for accidents and medical or dental expenses incurred as a result of participation in this program.

The Maine Supreme Court in this case agreed with the trial judge that the signed document quoted above did not constitute a release of liability for injuries Brian might suffer as a result of participating in the clinic. Since the document contained "no express reference to defendant's liability for their own negligence," the court said, "such language merely indicates an unwillingness to shoulder any additional obligation which the college would not otherwise bear." As a result, the agreement did not insulate the defendant against liability for injuries which could be traced to Bowdoin's failure to adhere to a reasonable standard of care under the circumstances, i.e. proper supervision.

Citing the fact that courts have traditionally disfavored contractual exclusions of negligence liability, the Maine court recited a familiar rule of law regarding the specificity required for a valid release:

> Contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law… [S]uch contracts must spell out the intention of the parties with the greatest of particularity . and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it (S)uch contracts must be construed with every intendment against the party seeking immunity from liability.

In the case of *Goyings v. Jack and Ruth Eckerd Foundation*, 403 So.2d 1144(1981), the plaintiff enrolled her minor daughter at E-Nini-Hassee Girls Camp, a recreational facility operated by the defendant for children with emotional problems. Plaintiff had signed a contract containing an exculpatory clause which read in part: "It is further agreed that reasonable precautions will be taken by Camp to assure the safety of said boy/girl but that Camp is not to be held liable in the event of injury, illness or death of said boy/girl and the undersigned does fully release Camp and all persons concerned therewith for any such liability."

While on a two week canoe trip supervised by the camp, the defendant failed to administer the daughter's medication, contrary to a verbal agreement with the plaintiff. The daughter had been under continuing psychiatric care and was required to take the prescribed medication to keep her mentally stable. As a result of defendant's failure to administer the prescribed medication during the canoe trip, the daughter suffered mental and physical injuries requiring hospitalization.

According to the appeals court, the exculpatory clause in the contract did not necessarily bar plaintiff from recovering damages for defendant's negligence. Absent "an explicit provision to that effect," an exculpatory clause would not insulate the defendant against liability for his own negligence. In addition, defendant's assurances to plaintiff of "reasonable precautions" effectively negated any intention by the plaintiff to knowingly assume the risk of defendant's ordinary negligence. According to the court, the "duty to undertake reasonable care expressed in the first part of the provision would be rendered meaningless if the exculpatory clause absolved the defendants from liability."

SPECIFY DEFENDANT'S NEGLIGENCE

In the New York case of *Gross v. Sweet*, 400 NE 2d 306, (1979) the plaintiff signed a "responsibility release" form as a prerequisite to enrolling in the defendant's Stormville Parachute Center Training School. The release form read in part, "I hereby waive any and all claims that I may have against Nathaniel Sweet . . . for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft." After one-and-a-half hours of land training, which included several jumps off a two-and-a-halffoot table, the plaintiff was equipped with a parachute and flown to an altitude of 2,800 feet for his first practice jump. Upon impact, plaintiff suffered serious personal injuries and later sued the defendant for negligence.

In determining whether the signed release form relieved the defendant of any liability for negligence, the court said, "the law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and [therefore] . . . such agreements are subject to close judicial scrutiny." The court further stated, "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts."

Since the release did not specifically release the defendant from liability for his failure to use due

care in his training methods or furnishing safe equipment, the court refused to read such intent into the agreement. Instead, the court narrowly interpreted the scope of the release to include only those obvious and unavoidable hazards associated with the sport of skydiving:

> Assuming that this language alerted the plaintiff to the dangers inherent in parachute jumping and that he entered into the sport with apprehension of the risks, it does not follow that he was aware of, much less intended to accept, any *enhanced exposure* to injury occasioned by the carelessness of the very person on which he depended for his safety.

The case of *Jones v. Dressel,* 623 P2d 370 (1981) also involved skydiving. In this instance, however, the plaintiff's contract contained a release clause which specifically absolved the defendant, Free Flight Sport Aviation, Inc., from liability for its own negligence. Plaintiff agreed to exempt and release "the Corporation . . . from any and all liability . . . whether such . . . injury *results from the negligence of the Corporation."* The agreement allowed the plaintiff to use defendant's recreational skydiving facility which included airplane service to ferry skydivers to the jump site. Plaintiff was injured when defendant's airplane crashed during the skydiving operation.

In applying the "close scrutiny" standard of judicial review to defendant's exculpatory agreement, the Colorado Supreme Court listed four factors which must be considered to determine the validity of a release:

> (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into: (4) whether the intention of the parties is expressed in clear and unambiguous language.

Since the defendant was not performing a public duty or service, the court looked to the nature and language of the agreement. Unlike the plaintiff in *Gross,* this plaintiff was an experienced skydiver and, therefore, not necessarily at the mercy of the defendant regarding the quality of instruction and the safety of the equipment. More importantly, however, he specifically assumed the risk of defendant's ordinary negligence as part of the contract to use defendant's facility. The plaintiff did not allege willful or wanton negligence. The court, therefore, found that the exculpatory agreement did in fact insulate the defendant from liability for ordinary negligence which allegedly caused plaintiff's injuries.

The United States Tenth Circuit Court of Appeals in the case of *Rosen v. LTV Recreational Development, Inc.,* 569 F2d 1117 (1978) reviewed the validity of a signed stipulation in a ski resort season pass contract which read as follows:

> I understand that skiing is a hazardous sport and that hazardous obstructions, some marked and some unmarked, exist on any ski area. I accept the existence of such dangers and that injuries may result from the numerous falls and collisions

> which are common in the sport of skiing, including the chance of injury from the negligence and carelessness on the part of fellow skiers.

The plaintiff suffered multiple leg fractures when he collided with another skier and was catapulted into a metal pole located in an open area on defendant's ski slope. The plaintiff alleged that defendant had been negligent in maintaining a steel pole set in concrete at that particular location. A jury awarded the plaintiff $200,000 in damages. Defendant appealed this decision arguing plaintiff's contract had released the corporation from liability for hazardous conditions on the slopes.

In its decision, the court cited that "onesidedness" of exculpatory agreements as a reason for closely scrutinizing the language of such contracts. As a result, the court found that an acknowledgement that skiing was a hazardous sport and that hazardous obstructions existed in any ski area was not tantamount to plaintiff's accepting the consequences of defendant's negligence. "Acknowledgement of the existence of such hazard, and even acceptance of such dangers, falls short of saying that the ski area may be negligent toward the signer free of liability." While the agreement did specifically release the defendant from injuries resulting from the negligence and carelessness of fellow skiers, it failed to include unequivocal language which would exonerate the ski area from its own negligence. As a result, the court found "the agreement is ambiguous and . . . does not expressly provide for the waiver which is asserted."

CONCLUSION

In four out of five of the cases discussed above, the court refused to absolve the defendant of potential liability for ordinary negligence based upon a signed release form. This gives some indication as to the very limited legal effect of release forms. Any disparity in bargaining power or ambiguity in language is always resolved in favor of the injured plaintiff. As a result, the defendant usually fails to realize the business objective in drafting such documents, i.e. limiting potential liability for negligence.

Drafting a valid release form which will absolve oneself of liability for negligence is obviously a very difficult task. A more effective alternative, may be to limit liability without ever resorting to release forms. This can be accomplished through comprehensive insurance coverage for participants as well as the providers of recreational facilities and services. In other words, it may, be more prudent to shift the risk of liability for negligence to an insurance company, rather than seek the illusory protection of an exculpatory clause or agreement.

This is not to say that exculpatory agreements are totally ineffective. To the unwary party who believes what he reads, a signed exculpatory agreement may dissuade him from further pursuing a personal injury claim. However, if the potential plaintiff receives the advice of counsel before the applicable statute of limitations runs out, he will likely pursue his personal injury claim despite the existence of a signed release form. In the final analysis, the practical effectiveness of liability release forms may ironically depend on the ignorance of individuals who sign such

documents without knowing the limited legal significance of exculpatory agreements.