

**The Establishment of Guidelines for
Injury Waivers in College Athletic Programs**

by

Keith S. Buckley

**Project submitted to the Faculty of
Virginia Polytechnic Institute and State University
in partial fulfillment of the requirements for the
degree of**

MASTER OF SCIENCE in EDUCATION

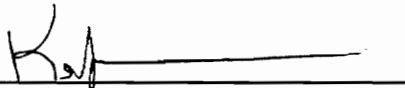
in

Health and Physical Education

APPROVED:



Elyzabeth J. Holford, Chair



Kerry J. Redican



Richard K. Stratton

LD
5655
V851
1994
B835

Introduction

In our litigious society it is becoming increasingly important for athletic departments to take every precaution regarding the prevention of law suits. One of the prominent issues involved in negligence litigation is the injury waiver. An injury waiver is a contract that alters the ordinary negligence principles of tort law. Such a document can be used by an institution to protect itself against lawsuits in foreseeable dangerous situations (Hobbs, 1982). However, there are major limitations to such a document which have been discussed in recent literature and case law. When waivers themselves are discussed in court they are carefully scrutinized as to their content and usage. These two issues are often the determining factors in deciding a negligence case involving injury waivers.

Statement of Purpose

The purpose of this project was to create guidelines of practice for college athletic directors in creating injury waivers for their departments.

It is the complexity of the different issues concerning the waiver that led Steve Horton, an Assistant Athletic Director at Virginia Tech to suggest the need for the development of standards for collegiate athletic programs in Virginia (Horton, 1993). However, it is possible for standards to be developed that can be used for any athletic

department as long as the users are aware of the applicable laws in their own states. Creation of general guidelines will provide a tool which athletic departments can use in establishing their standard of care to the athletes. The establishment of tangible guidelines may make the use of injury waivers as a defense, more plausible in court.

Review of Literature

In order to better understand the legal significance of the injury waiver, one must first understand negligence. Negligence is defined as:

a failure to exercise that degree of care which a person of ordinary prudence (a reasonable man) would exercise under the same circumstances. The term refers to conduct which falls below the standard established by law for the protection of others against unreasonable harm (Gifis, 1975, p. 136).

In order to prove negligence, the plaintiff must prove four elements: 1) that the defendant owed the plaintiff a duty of care; 2) there was a breach of that duty; 3) an injury occurred; and 4) the breach must have resulted in the injury (Hobbs, 1982). The plaintiff must prove that all four of the conditions existed in order for the court to rule in their favor.

One of these elements which is often debated is the duty of care. The owner or operator of the athletic facility has a legal duty to exercise reasonable care in operating facilities for their participants (Horton, 1993). Reasonable care is determined by the reasonable person standard. Wong (1988) defines how a reasonable person should react as "a person of ordinary sense using ordinary care and skill would react under similar circumstances" (p.307).

The issue of injury waivers have been the focal point of several cases, especially concerning their content. For example in Paterek v. 6600 Limited (1990), the court held that a waiver must be fairly and knowingly made. If it is found to be unfairly made because of the condition of the signer or the nature of the document, then it is found to be invalid. In Garrison v. Combined Fitness Centre, Ltd. (1990) the court stated that for a waiver to be valid and enforceable, it must contain clear, and unequivocal language. This implies that the waiver should not be filled with legalese that a nonlawyer might not understand.

The other specific requirements that must be included in the injury waiver are, that the appropriate rules and expected skills be discussed; the risks of the activity should be explained; both parties involved must be named with their signatures, and the document is to be dated (Boone & Ewert, 1987).

Another restraint that the courts place on waivers is that it cannot violate public policy (Wong, 1988). If the injury waiver is found to violate public policy then it is invalid. The courts judge whether or not waivers are against public policy by considering the impact on the public's interest. If the waiver is found to be against public policy it means that it would have a negative impact on society (Clarkson, Miller, Jentz, & Cross, 1989). For example, a court could find that an injury waiver is against public policy because it would have a negative impact if the public were able to enter a contract that relieves the another party from negligence.

In addition to these guidelines there are also several secondary issues that involve the issuance and implementation of the document. First the forms must be voluntarily signed. This means that there cannot be some form of leverage on the participant such as the power of assigning grades or the threat of unemployment. This type of condition would imply a non-voluntary agreement. Second, there must be other options of participation open to the participant. Third, the waiver must include the proper information. There should be a description of the program, specifics of time, place, necessary rules to follow, and expected hazards. Fourth, minors cannot waive their right to sue, and many recent court decisions indicate that parents cannot waive the rights of

their children (Boone & Ewert, 1987). This stipulation may come into play if the athlete is under the age of 18. According to Boone and Ewert (1987), there should also be:

A warning to read the form carefully, a listing of prerequisites, a participant statement that she or he is of sufficient age and intelligence to sign the contract, a statement that the form is considered a contract and the inclusion of a comprehensive waiver clause which precludes future lawsuits against the agency arising from that activity or program (p. 29).

Whether or not these different points are or should be in the waiver is often the center of discussion in litigations concerning negligence.

Methods

The author analyzed the current literature and case law pertinent to the subject of injury waivers. From this literature and case law review the author developed recommendations for what should be contained within an injury waiver. The case law review will be in the following format:

Citation:

Topics covered:

Facts of the case:

Issues discussed:

Decision:

Rational of the Court:

The culmination of these two processes will be the creation of a manual of guidelines for injury waivers in Division I-A athletic departments. The manual of guidelines will be based on the following outline:

I. Introduction

A. Definition and explanation of negligence

B. Definition and explanation of waivers

II. Limitations of Waivers

A. Minors

B. Public Policy

C. Environment in which waiver is signed

III. Guidelines for Injury Waivers

A. Content of the waiver

B. Secondary issues in waivers

**Guidelines for
Injury Waivers in
College Athletic Programs**

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Introduction..... | 10 |
| Strategies for Negligence Defense..... | 12 |
| Limitations of Injury Waivers..... | 13 |
| Guidelines for Injury Waivers..... | 15 |
| Secondary Issues in Injury Waivers..... | 19 |
| Checklist for Injury Waivers..... | 21 |
| References..... | 22 |
| Appendices..... | 24 |

Introduction

In our litigious society it is becoming increasingly important for athletic departments to take every precaution regarding the prevention of law suits. One of the prominent issues involved in negligence litigation, is the injury waiver. An injury waiver is a contract that alters the ordinary negligence principles of tort law. Such a document can be used by an institution to protect itself against lawsuits in foreseeable dangerous situations (Hobbs, 1982). However, there are major limitations to such a document which have been discussed in recent literature and case law. When waivers themselves are discussed in court they are carefully scrutinized as to their content and usage. These two issues are often the determining factors in deciding a negligence case involving injury waivers.

In order to better understand the legal significance of the injury waiver, one must first understand negligence. Negligence is defined as:

a failure to exercise that degree of care which a person of ordinary prudence (a reasonable man) would exercise under the same circumstances. The term refers to conduct which falls below the standard established by law for the protection of others against unreasonable harm (Gifis, 1975, p. 136).

In order to prove negligence, the plaintiff must prove four elements: 1) that the defendant owed the plaintiff a duty of care; 2) there was a breach of that duty; 3) an injury occurred; and 4) the breach must have resulted in that injury (Hobbs, 1982). The plaintiff must prove that all four of the conditions existed in order for the court to rule in their favor.

One of these elements which is often debated is the duty of care. The owner or operator of the athletic facility has a legal duty to exercise reasonable care in operating facilities for their participants (Horton, 1993). These duties primarily include, providing proper and adequate instruction and supervision, to provide and maintain safe facilities, provide safe equipment, and to provide proper medical attention (Bjorklun, 1989). Given these duties of care, if the school or a school representative negligently breaches one of them, they will be held liable for damages for injuries proximately caused by the breach (Bjorklun, 1989). The amount of care that the athletic director must use is determined using the reasonable person standard. Wong (1988) defines how a reasonable person should react as "a person of ordinary sense using ordinary care and skill would react under similar circumstances" (p.307).

Strategies for Negligence Defense

In order to lessen the risk of a law suit and, or to strengthen the defense in a law suit many athletic departments require individuals to sign either a release, assumption of risk form, or a waiver. All three of these forms serve the purpose of defending against law suits for negligence, however, they do it in three slightly different ways. A release is defined by Gifis (1975) as, "...the act or writing by which some claim, right or interest is given up to the person against whom the claim, right or interest could have been enforced" (p.174). In other words, technically a release must come after an action has already taken place. An assumption of risk form is a document that aids in proving that the participant understands the dangers involved in the specific activity, that they know the rules and skills of the activity, and are aware of the possible consequences of participating in the activity (Holford & Gresh, 1993). An injury waiver is basically an agreement before participation that the participant will not sue. The waiver states that an individual knows and accepts the risks involved in the activity, and relieves the athletic director, school, coach, and other persons that could be named as defendants, of the possibility of legal action (Horton, 1993). Therefore, a waiver is basically an assumption of risk form with a clause included concerning the waiving of the right to sue.

Limitations of Injury Waivers

Although the injury waiver is a strong defense in law suits relating to negligence, there are certain limitations to such a document of which the athletic director must be aware. One of these limitations concerns minors. Even though most of the athletes that participate in college athletics are over the age of 18 years old, there are still a few freshmen that are minors. Waivers are often difficult to enforce with minors. The difficulty arises because a minor can disavow a contract at any time during their minority or a reasonable time after reaching the age of majority (Bjorklun, 1989). The exception to this is if the contract is for necessities. Since athletic participation is hardly a necessity, a minor could disavow an injury waiver at any time. Also, the parent's or guardian's signature on the form could not constitute a waiver of the minor's rights (Bjorklun, 1989). However, since adults can contract to waive their rights, they may waive their own right to sue for damages to their child because of another's negligence (Bjorklun, 1989).

One of the most prominent issues that is questioned when injury waivers are used as a defense is whether or not it is against public policy. If the waiver is found to violate public policy it is invalid (Wong, 1988). The definition of public policy differs with state statutes. For example, in Georgia, a contract cannot be determined to be contrary to

public policy unless the General Assembly declares it so or if it is contrary to good morals and contrary to law (Williams v. Cox Enterprises, 1981). Most courts judge whether or not waivers are against public policy by considering its impact on the public's interest. If the waiver is found to be against public policy it means that it would have a negative impact on society (Clarkson, Miller, Jentz, & Cross, 1989). The California Supreme Court developed a test to determine whether or not waivers are against public policy. The test consists of six criteria of which the waiver must meet some or all to be determined against public policy and therefore invalid (Wagenblast v. Odessa School District, 1988). These criteria are: 1) the type of business is that which is thought to be suitable for public regulation; 2) it is a public server requesting the waiver; 3) the party requesting the waiver is willing to offer the service to any member of the public that wants it; 4) there is an unfair bargaining advantage for the party seeking the waiver; 5) if using a superior bargaining position fails to provide the public protection against negligence; 6) as a result of the waiver, the party is now placed under the control of the other party and subject to its carelessness (Wagenblast v. Odessa School District, 1988). Horton (1993) sums up public policy by stating that it could be considered, "...a thought or a feeling. It is what we as people feel is 'fair' and 'right' at this time and place in

history. [sic] It can, and has, changed over time." (p.5, 1993)

Guidelines for Injury Waivers

The following are guidelines within which the athletic director can develop their own injury waiver for their department. The guidelines will consist of two components, the actual contents of the waiver, and the secondary issues surrounding the waiver.

The first concern when developing a waiver is that it is written in clear and unequivocal language. As the court stated in Garrison v. Combined Centre, Ltd, "...an exculpatory clause, to be valid and enforceable, should contain clear, express, and unequivocal language..." (p.5, 1990). The language must also be detailed and specific as to the conditions of the waiver (Wong, 1988). One case in which the language of the waiver was such that it failed as a defense was Hertzog v. Harrison Island Shores Inc. (1964). In this case the plaintiff as a member of the club sued for damages for a fall he took off a gangplank at the club. Despite the fact that the plaintiff had signed a waiver, the court ruled in his favor. Their reasoning for this is that the provision in the membership contract stating that as a member you waive any claim for loss to personality or for personal injury, was neither clear nor explicit enough to absolve the club's responsibility (Hertzog v. Harrison Island Shores Inc. 1964).

Another concern of the athletic director which ties in closely with the document being written clearly and explicitly is that the document be fairly and knowingly made. For example, in Paterek v. 6600 Limited (1990), the court held that a waiver must be fairly and knowingly made. If it is found to be unfairly made because of the condition of the signer or the nature of the document, then it is found to be invalid. There is a distinction to be made between the terms fairly and knowingly in relation to the content of the waiver. Fairly refers to the condition of the signer. The condition would encompass issues concerning their age, mental capacity, and sobriety. The term knowingly made refers to how the waiver is presented to the participant. A couple of these issues would be small print, or the question of if it was clearly an injury waiver that the participant was signing. For this reason, the waiver should be a separate document from the others that the athlete must sign. In other words, make the document a distinctly separate entity. This issue was addressed in Paterek v. 6600 Limited (1990). The plaintiff claimed that because the waiver was included in the team roster that he signed, that it was misrepresentation. The court ruled that at most it was an innocent misrepresentation and dismissed the claim. However, this case does point out the fact that courts are aware of how the waiver is presented to the participant. Therefore, the athletic director should

insure that the waiver a separate document, and that the participant is fully aware of what he or she is signing.

Another element which relates to the concern that the participant fully understands the waiver and what it means, is a statement at the end of the waiver that the participant has read and understands the document. This issue was also discussed in Paterek v. 6600 Limited, when the plaintiff claimed that the waiver was invalid because he did not read it before signing it. The court held that "One who signs [sic] contract cannot seek to invalidate it on [sic] basis that he or she did not read it or thought that its terms were different, absent a showing of fraud or mutual mistake" (p.9, 1990). Although the court supported the defendant on this case it is best to remove all doubt as to whether or not the document was read and understood by addition of the clause at the end of the document.

Because the assumption of risk doctrine is a critical component of the injury waiver, it is imperative that the waiver provide a reasonably comprehensive list of the possible consequences resulting from participating in the sport. This is to insure that the participant is fully aware of the risks that he or she will assume. However, every possible occurrence that could result in injury need not be mentioned. Riffer explains that "In adopting the broad language employed in the agreement, it seems reasonable to conclude that the

parties contemplated the similarly broad range of accidents which could occur" (Riffer, p. 520, 1985). Along with the risks involved, the waiver should also include a description of the physical as well as the mental skills needed (Ewert, 1989).

As a consequence to the fact that the waiver should include the aforementioned risks and requirements of the sport, it is necessary that the waiver be sport specific. If the waiver is not sport specific, at least categorized as a contact sport versus a non-contact sport (Horton, 1993).

The waiver must also have an exculpatory clause expressly stating that the signer is contracting to give up the right to sue the athletic department or anyone else related to the activity for injury resulting from their negligence. The waiver should accomplish this by including words such as indemnify, hold harmless, or reimburse, according to the law of the particular state (Hobbs, 1982).

Since the injury waiver is a contract between two parties, there must be adequate consideration. Consideration can come in many forms, such as money, or opportunity to participate, to name a couple. Absence of such consideration would nullify a contract.

Secondary Issues in Injury Waivers

In addition to the actual contents of the waiver there are several secondary issues that must be addressed. First is that the waiver must be voluntarily signed. This means that there cannot be some form of leverage on the participant such as the power of assigning grades or the threat of unemployment. This type of condition would imply a non-voluntary type of agreement (Boone & Ewert, 1987). This issue could be raised concerning scholarship athletes, if signing the waiver is a criteria for receiving scholarship. If this is the case, the athletic department has two alternatives. One is that the department use the assumption of risk form as an alternative to the waiver. By utilizing the assumption of risk form the participants are only agreeing that they are aware of the risks involved in the activity and accept them. This is a lesser consideration and may be a more palatable defense to the court than having the participant contract away their right to sue because of the possibility of losing their scholarship. Another alternative is that the athletic department have the athletes sign the waiver after they receive their scholarships therefore not making it a condition of receiving financial aid.

In order to aid participants in understanding the document, a member of the department should review it with the athlete on a one to one basis or at least team by team (Horton, 1993). Waivers should also be signed and reviewed on

a yearly basis. As Horton stated, "waivers serve as reminders to all parties of the dangers and consequences involved in the particular sport. A yearly review and restatement should be the minimum reminder" (pp 15-16, 1993).

Athletic departments should also consider whether their institution is public or private. Private institutions generally have more success in utilizing waivers than public institutions (Ewert, 1989). This is another instance where that athletic department may choose to utilize an assumption of risk form rather than an injury waiver. If the institution is a private institution, they generally have more flexibility when entering into contracts. Therefore it would be more acceptable for them to utilize an injury waiver. However, a public institution has more responsibility to adhere to the constitutional rights of its students. Consequently, an assumption of risk form would be more appropriate.

The following is an outline of the previously discussed elements which are contained in and surround the injury waiver. Athletic directors may choose to use this as a checklist with which to check their own waiver.

Checklist for Injury Waivers

Content Issues:

- Written in clear and unequivocal language.
- Written in specific language concerning the conditions of the agreement.

- Written so as to be fairly and knowingly made.
- Written as a separate and distinct document.
- Written with a statement of reading and comprehension of the document.
- Written with a reasonably comprehensive list of risks and skills involved in the activity.
- Written to be sport specific.
- Written with an exculpatory clause.
- Written with adequate consideration between parties included.

Secondary Issues:

- The waiver must be voluntarily signed.
- The waiver must be reviewed with individual athletes or by teams.
- The waiver must be reissued every year.
- The waiver must be written with consideration given to a public vs. private institution's position with waivers, versus assumption of risk forms.

These guidelines have been the result of a review of the current literature and case law. One issue that has been made clear through this review is that no assumption of risk or injury waiver will always prevent an injured party from filing a suit. However, these guidelines should aid the athletic director in the prevention and, or, the defense of a law suit for negligence.

References

- Boone, T., & Ewert, A. (1987). Risk management: Defusing the dragon. Journal of Experimental Education, 10 28-35.
- Bjorklun, E. (1989). Assumption of risk and its effect on school liability for athletic injuries. West's Education Law Reporter, 55 349-360.
- Clarkson, K., Miller, L., Jentz, G., & Cross, F. (1989). West's Business Law (4th ed). St. Paul, MN: West's.
- Ewert, A. (1989). Risk management in the outdoor HPER setting. JOPERD, 60, 88-92.
- Garrison v. Combined Fitness Centre, Ltd. 559 N.E. 2d 187 (Illinois, 1990).
- Gifis, Steven H. (1975). Law Dictionary. New York: Barron's.
- Heitt v. Lake Barcroft Community Association, Inc et al., 418 S.E. 2d 894 (Virginia, 1992).
- Hobbs, W. C. (1982). Understanding Academic Law. Washington: Jossey-Bass Inc.
- Holford, E., & Gresh D. (1993). Participant's perceptions of assumption of risk forms in a recreational sport setting. NIRSA Journal, 18, 26-30.
- Paterek v. 6600 Limited, 465 N.W. 2d 342 (Michigan, 1990).
- Riffer, J. K. (1985). Sports and recreational injuries. Colorado Springs, CO.: McGraw-Hill.
- Saenz v. Whitewater Voyages, Inc., 276 Cal. Rptr. 672 (California, 1990).

Scroggs v Coast Community College District, 41 Ed. Law
Rep. 1204 (California, 1987).

Williams v. Cox Enterprises, Inc et al., 283 S.E. 2d 1
(Georgia, 1981).

Appendix A

Citation: Hiett v. Lake Barcroft Community Association, Inc et al., 418 S.E. 2d 894 (Virginia, 1992).

Topics Covered: Injury release forms, public policy

Facts: The Lake Barcroft Community Association, Inc (LABARCA) sponsored a triathlon called the Lake Barcroft Teflon Man Triathlon. The rules stated that teams of up to three people were eligible to participate, with each person performing one or more of the segments (swimming, biking, or running). Each applicant had to complete an entry form, and pay the entry fee. The plaintiff, David Hiatt was asked by a coworker to participate in the swimming portion of the event. Consequently, Hiatt filled out the necessary paperwork in order to participate. On the day of the race Hiatt stood about 20 feet from the water and when the race began he proceeded to jump into the water which was approximately thigh high. As he entered the water he apparently struck his head on an object beneath the surface which rendered him a quadriplegic. Hiatt consequently filed a suit against both LABARCA and the lake owners claiming that the defendant's failed to, a) insure that the lake was reasonably safe, b) properly supervise the swimming segment, c) to advise the participants of the risk of injury, and d) to train them concerning avoiding such injuries. The defendants successfully had the suit dismissed on the grounds that Hiatt

had signed a release before participating. The Virginia Supreme Court overturned the Circuit Court's decision and remanded it to trial court.

Issues: Is it against public policy for an individual to waive their right to sue to recover for the negligence of the other party?

Answer: Yes

Reasoning of the Court: The Supreme Court's ruling primarily addressed the subject of public policy. Hiett argued that the Circuit Court was wrong in ruling that the waiver provision of the entry form was not against public policy. He further argued that since the decision of the Virginia Supreme Court in Johnson v. Richmond and Danville Railroad Company (1890), that the law had been settled concerning injury waivers. In Johnson (1890), the Supreme Court found that injury waivers were invalid because they violated public policy. The Court stated,

"to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct...can never be lawfully done when an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void" (p. 978).

Therefore, the Court determined that injury waivers, like the one signed by Hiett were prohibited by public policy and void in the state of Virginia.

Appendix B

Citation: Garrison v. Combined Fitness Centre, Ltd., 559 N.E. 2d 187. (Illinois, 1990).

Topics: Language, relationship of the parties involved.

Facts: In 1983 Garrison became a member of the Centre and began a regular schedule of workouts. Garrison's normal workout consisted of 2 to 2 1/2 hours of weight training, three to four days a week. During one of these workouts Garrison was preparing to perform a 295 pound bench press. As he was preparing he called out to a friend to spot him. As he did so the weighted bar rolled off the grooved rest at the top of the bench and fell onto his neck. He suffered a crushed trachea, and continues to suffer permanent and disfiguring injuries. Garrison filed a complaint alleging that his injuries were proximately caused by the improper design of the bench press provided to him by the Centre. The Centre moved for summary judgement, contending that an exculpatory clause contained within the membership agreement signed by Garrison, relieved the Centre of all liability for injury arising out of the use of its facilities and equipment. The summary judgement was granted.

Issue: Is it against public policy for one party to contract against suing for another party's negligence caused by defective equipment provided for the party's use?

Answer: No

Reasoning of the Court: According to Illinois state law, a party may contract to avoid liability for his own negligence and, unless there is fraud, or wilful and wanton negligence, the contract will be valid. The other conditions which nullifies the contract are: a) if there is a great disparity in the bargaining power of the two parties; b) if the exculpatory clause is against public policy; or b) there is something in the social relationship between the two parties that would necessitate voiding the clause.

The reasoning of the Court is that they should not interfere with the right of two parties to contract with each other if they freely and knowingly enter into the agreement. However, the Court stipulates that for an exculpatory clause to valid and enforceable, it must contain clear, explicit language. It should also refer to the types of activities, circumstances, or situations that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care. Because of the content of the waiver or exculpatory clause, the plaintiff will be put on notice of the range of risks involved and therefore enabling him to minimize the risks by exercising a greater degree of caution.

In reference to the current case the Court found that the injury falls within the scope of ordinary dangers associated with the activity and therefore, reasonably contemplated by the plaintiff. Also, the membership agreement was not

fraudulently obtained nor was there a special relationship or unequal bargaining position between the parties. Additionally, the clause could not have been made more clear or explicit. Garrison was also found to be an experienced weight lifter and therefore was well aware of the risks involved and therefore accepted them. Consequently, because of a lack of evidence that any of the previously mentioned conditions existed to void the exculpatory clause, the summary judgement of the Circuit Court was affirmed.

Appendix C

Citation: Paterek v. 6600 Limited, 465 N.W. 2d. 342 (Michigan, 1990).

Topics: Failure to read contract.

Facts: The plaintiff, Daniel Paterek injured his knee while running to catch a fly ball during a softball game at the defendant's recreational field. He sued claiming that the field was improperly maintained. The circuit court granted summary disposition to the defendant based upon the fact that the plaintiff had signed an official team roster and contract which purported to release the defendant from liability for injuries occurring on his fields. Paterek appealed the decision.

Issue: Is failure to read the contract grounds for rescission?

Answer: No

Reasoning of the Court: The Court stated that, "one who signs a contract cannot seek to invalidate it on the basis that he or she did not read it or thought that its terms were different, absent a showing of fraud or mutual mistake" (p.18). Therefore the court affirmed the decision of the lower court.

Appendix D

Citation: Williams v. Cox Enterprises, Inc et al., 283 S.E. 2d 367 (Georgia, 1981).

Topics: Public policy, bargaining position, assumption of risk doctrine

Facts: Williams entered the 1977 Peachtree Road Race which was a 10,000 meter event in Atlanta Georgia, on July 4th. During the race he collapsed and was hospitalized for heat stroke, heat prostration, renal failure, and several other disorders. As a result of the disorders, he allegedly suffered brain damage and consequently permanent impairment of some motor functions. The complaint accused the defendant of negligence in failing to publish adequate warnings of possible serious injuries from running the race in conditions of extreme heat and humidity, failing to provide adequate liquids and medical facilities along the course and failure to determine whether all entrants were physically capable of running the race. The trial court granted summary judgement for the defendant based on the plaintiff's signing of the written waiver of liability prior to the race and the doctrine of assumption of risk.

Question: Is a waiver of liability against public policy?

Answer: No

Reasoning of the Court: The court stated that a contract can only be contrary to public policy if the General Assembly

declares it to be or unless the consideration of the contract is contrary to good morals or contrary to law.

In reference to the appellant's argument that there was disparity in the bargaining positions of the two parties. The appellant argues that because running and jogging had become such popular pastimes and because the Peachtree was "the only road race of its kind in the Atlanta area," that he and the other participants were under enormous pressure to participate under whatever terms were offered. The court considered this argument "ludicrous" and decided that the appellant signed the waiver of his own free will.

Regarding the Doctrine of Assumption of Risk, the application described the race in very specific terms and warned that heat and humidity would make it a "grueling" race. Also, the appellant admitted that he had both read the warning and was already aware of the danger. Therefore, the trial court's decision was upheld.

Appendix E

Citation: Saenz v. Whitewater Voyages, Inc., 276 Cal. Rptr. 672, (California, 1990).

Topic: Assumption of risk

Facts: Edward Sienz (decedent) was part of an organized group that participated in a three day whitewater rafting trip hosted by the defendant, Whitewater Voyages, Inc.. After the group arrived at the site, they completed a "Release and Assumption of Risk Agreement". The trip leader gave a safety talk, covering such topics as, being thrown in the river, how to swim in that situation, and the dangers of whitewater rafting. He warned that "whitewater rafting is not a Disneyland ride and you can get hurt and even die." (p. 12) All participants were fitted with type IV personal flotation device, and told that helmets must be worn on all class IV rapids.

During the trip the guides continued to caution the participants concerning the rapids, even to the extent of telling of deaths and serious injuries that occurred along parts of the river. On the last morning, the guide described the last class IV rapid and explained that it was optional and no one had to run it. The guide repeatedly asked the decedent if he wanted to run the rapid and the decedent replied affirmatively every time. The decedent fell out of the raft during the run and drowned. The defendant moved for summary

judgement based upon the theory of assumption of risk. The Court granted the summary judgement.

Issue: Does the theory of assumption of risk relieve the negligent party of liability in this case?

Answer: Yes

Reasoning of the Court: The court agreed with the defendant's position that the release which the decedent signed served to bar the wrongful death action. Their reasoning centered around whether or not a release of this nature is against public policy. In California, there is no public policy opposing "private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party..." (p.21). The Court summarized it's reasoning by stating that the release, in plain language, expressed that the signer was aware of the risks and dangers involved in any river trip, including hazards of personal injury, accident and illness. The release continues by stating that by signing the document the signer assumes those risks and will not hold the agents of the company culpable for any injury except in the case of gross negligence. The document ends with a clause stating that the signer cannot participate unless he or she signs the waiver. The Court's conclusion was that the decedent expressly assumed the risks that led to his death. The Trial

Court properly concluded that the defendants were entitled to the summary judgement.

Appendix F

Citation: Scroggs v. Coast Community College District. 41 ED. Law Rep. 1024 (California, 1987).

Topics: Release language, heir's right to sue

Facts: Frank Scroggs enrolled in a SCUBA class at Coast Community College, and as part of the enrollment process was required to sign a release. During a certification dive, Scroggs drowned. The release that was signed provided for the participant to waive any claims that he, or his representatives, executors or heirs may have against Coast Community College. His wife filed a complaint alleging that the death of her husband was the result of the defendants' negligence. The defendants answered by moving for a summary judgement holding that the release barred any recovery by the wife. The trial court agreed and the plaintiff appealed.

Issue: Was the language of the document clear in indicating that the signer was assuming all risks and that he waived the right to sue? Can a participant waive the right of their heirs to sue in the case of wrongful death?

Answer: No, No

Reasoning of the Court: The Court found that the document that was signed did not contain language that indicated that the decendant assumed all the risks involved in the activity, nor did the release waive the defendants' negligence. The Court stated that a clear and unequivocal waiver with specific

mention concerning the defendant's negligence is required when seeking to escape responsibility.

The court also asserted that any contract intending to limit or negate a cause of action which belongs to the heirs should be approached with an abundance of caution. The Court found that this document failed to bar recovery from the decendant's heir.