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LEGAL RELEASES IN RECREATIONAL SCUBA DIVING

Bill Turbeville

Introduction

There are two opposing views of legal releases in scuba diving. They can be considered as a necessary shifting of risk or unconscionable shafting of the diving public. Those that require the diver to sign away all rights arising from the dive instructor's or operator's negligence produce the most emotion.

The Madison Decision

On July 29, 1986, Ken Sulejmanagic signed up for a scuba diving course at his local YMCA in Southern

California. During the initial enrolment procedure, Ken, who was nineteen years old at the time, was asked to sign a document entitled "NAUI Waiver, Release And Indemnity Agreement". The document Ken signed provided in relevant part as follows:

For and in consideration of permitting (1).....to enrol in and participate in diving activities and class instruction of skin and/or scuba diving given by (2).....the Undersigned waives and relinquishes any and all actions or causes of action for personal injury, property damage or wrongful death occurring to him/herself arising as a result of engaging or receiving instructions in said activity or any activities incidental thereto wherever or however the same may occur and for whatever periods that activities or instructions may continue, and the Undersigned does for him/herself, his/her heirs, executors, administrators and assigns hereby release, waive, discharge and relinquish any action or causes of action, aforesaid, which may hereafter arise for him/herself and for his/her estate and agrees that under no circumstances will he/she or his/her heirs, executors, administrators and assigns prosecute, present any claim for personal injury, property damage or wrongful death against.....or any of its officers, agents, servants or employees for any of said causes of action, whether the same shall arise by the negligence of any of said persons, or otherwise. IT IS THE INTENTION OF (1).....BY THIS INSTRUMENT, TO EXEMPT AND RELEASE (2).....FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH CAUSED BY NEGLIGENCE.

Ken proceeded through his scuba diving course, apparently without mishap, and completed all requirements except for one open water dive which he had missed. On November 15, 1986, Ken went on a make-up dive with his instructor and a recently certified diver in the ocean off southern California. During the course of the dive, Ken ran low on air. Rather than terminating the dive at that point, Ken's instructor elected to accompany him to the surface and instruct him to swim to the dive buoy that had been anchored at the site prior to the commencement of the dive.

The instructor then returned to the bottom to continue his dive with the other diver, which lasted about another ten minutes. When the instructor and his buddy surfaced, Ken was no where to be seen. They were approached by another diver who asked if "they had been the ones yelling for help," which immediately led the instructor to believe that he had a significant problem on his hands. A search was made and Ken's body was located on the bottom. All resuscitative efforts failed and it was determined that Ken died from asphyxiation secondary to salt water drowning. Ken's parents promptly brought suit for the wrongful death of their son against the YMCA and Ken's instructor. Both defendants filed a motion for summary judgment basically stating that whether their actions

were proper or not, they could not be legally held liable for Ken's death because of the release he had signed as a condition to his enrolment in the course. The trial court denied the motion and the defendants appealed to the intermediate California appellate court.

Due to the nature of a motion for summary judgment, which essentially requires the court to give the party not moving for summary judgment every possible benefit of the doubt, the court took it as established that Ken's instructor was negligent for failing to follow the buddy system and that this negligence directly led to Ken's death. In a decision which was soundly based upon prior precedent, but which nevertheless opened a new era for recreational diving releases in the United States, the court held that "as long as the release constitutes a clear and unequivocal waiver with specific reference to defendants' negligence, it will be sufficient." 250 Cal. Rptr. at 304. Thus a nineteen year old diver on a certification dive, whose instructor was clearly negligent, could not pursue a wrongful death law suit brought on his behalf solely because he signed a brief piece of paper as part of his enrolment package. It is the purpose of this article to briefly analyse how that happened and whether such a decision is defensible in today's day and age.

Release issues

So how could the Madison court find for the negligent defendants? How could it, in light of the clear negligence of an instructor who disobeyed the foremost rule of scuba instruction of never abandoning a student, allow that instructor to walk away scot free leaving his parents and families with their anguish and nothing more? The answer is simple: because he signed a valid, binding contract.

Lest this be too glib of an answer, it must be realised that to come to this point, one has to consider nearly nine-hundred years of Anglo-American jurisprudence. The concept of a contract as it evolved over the centuries has come to mean one fundamental thing: if persons of sound mind with roughly equivalent bargaining positions decide to agree to something which is neither illegal nor contrary to the greater public interest, courts will strive to hold each party to that contract to their side of the bargain. And while, curiously enough, England has overridden this common law principle by an act of Parliament which forbids the enforcement of recreational releases of negligence, with only few exceptions the courts of the United States will uphold an unambiguous release. Freedom to contract has always been a fundamental principle of transactional law in English speaking countries. It has long been expressed that courts are loath to interfere in private transactions not affecting the public welfare, and it is upon this simple yet fundamental principle that recreational releases operate.

Yet recreational releases do face one elemental problem: courts across the country uniformly disfavour any type of contract which agrees to limit liability for wrong doing. The sort of viscerally negative reaction that most of us have to such an agreement (hence the commonly quoted but legally incorrect statement that "you cannot sign away your rights") is expressed by the law in the strict adherence to all the legal niceties of a proper contract when a liability release is to be enforced. While courts may struggle with the concept of a liability release, the greater interest, in least in the United States, has been to allow parties to contract as they see fit. As stated by one Oregon court:

Although agreements to limit liability are not favoured, neither are they automatically void. An agreement limiting liability is governed by principles of contract law and will be enforced in the absence of some consideration of public policy derived from the nature the subject of the agreement or a determination that the contract was adhesiory.

K-Lines v Roberts Motor Co., 273 Or. 242, 248-254, 541 P.2d 1378 (1975).

Or, as an earlier court from the same state declared, "there is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please unless to permit them to do so would contravene the public interest." Irish and Swartz Stores v First National Bank, 220 Or. 362, 375, 349 P.2d 814 (1960).

So what about the "public interest" in Ken Sulejmanagic's death? Is there not a public interest in preventing dive instructors from avoiding the consequences of their own negligence? Perhaps there is. But that is not the type of public interest the courts in the United States are focusing on. Nor is it the type of interest which is sufficient to overcome what the courts perceive to be the even greater public interest in freedom of contract.

The types of "public interest" which courts view as sufficient to overcome the tenet of freedom of contract were well outlined in a 1963 opinion of the California Supreme Court.

- 1 It concerns a business of a type generally thought suitable for public regulation.
- 2 The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
- 3 The party holds himself out as willing to perform his service for any member of the public who seeks it, or at least for any member coming within certain established standards.
- 4 As a result of the essential nature of the service in the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage of bargaining strength against any member of the

public who seeks its services.

- 5 In exercising a superior bargaining power, the party confronts the public with a standardised adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

Tunkl v Regents of the University of California, 60 Cal. 2d 92, 101, 32 Cal. Rptr. 33, 383 P.2d 442 (1963).

Applying these criteria to a recreational dive operation, or for that matter, any recreational activity at all, the courts of the United States have generally found that the concept of freedom of contract overrides whatever public interest may be involved in such a contract. At least in this county, recreational scuba diving is not considered to be the type of business “generally thought suitable for public regulation.” Indeed, the Occupational Safety and Health Administration specifically exempted both scientific and recreational scuba diving from its regulatory ambit when it decided to govern the commercial diving industry back in the late 1970s. This also holds true for such recreational activities as sky diving, (Hulsey v Elsinore Parachute Center, 168 Cal. at App.3d 333, 214 Cal. Rptr. 194 (1985)), mountain climbing (Blide v Rainier Mountaineering, Inc.), 30 Wash. App. 571, 636 P.2d 492 (1982)), snow skiing (Milligan v Big Valley Corp. 754 P.2d 1063 (Wyo. 1988)), and auto racing (Theis v J & J Racing Promotions, 571 So.2d 92 (Fla. 2d DCA 1990)).

Recreational scuba diving has never been found to be “a matter of practical necessity for some members of the public”, and is thus unlike travel on common carriers such as airlines, trains, or other forms of public transport. In fact, Federal law in the United States forbids such common carriers from requiring passengers to sign an exculpatory contract for this very reason. So too for the other established criteria for an essential public interest; the recreational diving industry is simply not seen as important enough to overcome the centuries old policy of allowing adults of sound mind to agree to do essentially, or at least legally, what they will. The Madison court discussed these very criteria when analysing the claim of Ken’s parents:

Here, Ken certainly had the option of not taking the class. There is no practical necessity that he do so. In view of the dangerous nature of this particular activity defendants could reasonably require the execution of the release as a condition of enrolment. Ken entered into a private and voluntary transaction in which, in exchange for enrolment in a class which he desired to take, he freely agreed to waive any claim against the defendants for a negligent act by them. This case involves no more a question of public interest than does motocross racing or motorcycle dirt bike riding. 250 Cal. Rptr. at 305 (citations omitted).

Perhaps the key statement here refers to the “dangerous nature” of scuba diving. Because of that, according to the court, the dive instructor and YMCA

could “reasonably require the execution of the release as a condition of enrolment.” And that is the essential point on which all these releases are based. Diving is a sport that has certain inherent risks. Among these risks are that your instructor might be negligent. As a result of this negligence, you might embolise, drown, become paralysed due to decompression sickness, be run over by a boat or any other of a myriad maladies associated with scuba diving.

While some are obvious (drowning) and others are not quite so apparent (decompression illness), the fact is the general public understands that any activity that is suppose to take place in a hostile environment (30 m below the ocean for scuba diving or 3,000 m in the air for skydiving) can be relatively dangerous. And while the Divers Alert Network has indicated that the morbidity rate for scuba diving is on par with that for bowling, the mortality rate is obviously far higher as is the rate of serious non-fatal accidents. Combined with the hyperlitigious nature of present American society, the simple economic fact is that without widely available and enforceable recreational releases, recreational scuba diving as it is presently known would simply cease to function in this country, not necessarily because so many more lawsuits would be filed, or that any more law suits would be successful for the plaintiffs, but because it would be simply impossible to obtain liability insurance for those activities. It is the cost of insurance which drives this whole issue. Indeed, it is a condition precedent to every presently available insurance policy for professional liability in the recreational diving field that a valid release and waiver be obtained prior to allowing a student to enrol.

So back to the original question: Is it just? Is it just that Ken’s parents not be allowed to bring a lawsuit against an obviously negligent instructor? The answer, of course, depends upon your perspective. From the greater perspective of freedom of contract, certainly. Ken got exactly what he bargained for. He was allowed to take a diving course in return for absolving his instructor and the YMCA from any negligence they may be responsible for during the course. No doubt that from the perspective of Ken’s parents, the result was horribly unjust. Yet, it must be remembered that the only remedy allowable in American courts in such a civil case is monetary damages, and no amount of money would bring Ken back.

Perhaps the most philosophically satisfying argument against the use of releases is that they may deter dive operators from consistently using their best efforts to make the sport as safe as possible. After all, if an instructor or dive operator knows that his actions are insulated by a release as well as a million dollar policy of insurance, why should they take the extra effort and expense to make what they may already believe to be a very safe sport even safer?

The problem with this approach is twofold. First, and most importantly, there is simply no empirical evidence whatsoever to support it. While I know of no studies that have been conducted on point, the experience of our firm, which has analysed over 1,500 diving claims in the past seven years, is that if anything, dive instruction and supervision of recreational divers has consistently improved over the years. Indeed, we have documented a rather dramatic decrease in actionable claims brought over that period of time. Secondly, as every operator and recreational certification agency is all too aware, the greater the number of claims, the higher the insurance premium for the activity. Hence, because even a properly executed release does not prevent a lawsuit from being served, nor from expensive litigation from being commenced, the insurance carriers themselves would soon crack down on unsafe practices should the claims history for the activity increase due to the casual negligence of their insureds. In a less litigious society such safeguards may not be needed. But in the present American legal climate, a valid release against negligence is necessary if for no other reason than that for every case as tragic and as culpable as that of Ken Sulejmanagic, there are many more that involve no negligence on the part of the diving instructor or operator whatsoever. And if there were some mechanism to prevent lawsuits in situations where no real fault is at issue, then releases against negligence would probably not be needed. The industry could certainly afford the relatively few legitimate adverse verdicts brought against it each year if that were the only cost involved. But with the cost of defending even a perfectly innocent defendant against a claim of negligence in a complex diving situation commonly approaching \$US300,000 and more, the simple cost of defence would be enough to drive many operators out of business, once again through the dramatically increased cost of liability insurance.

Elements of a valid release

It is not as though the consuming public has no options in selecting a dive instructor or operator. The fact is that with simply a little motivation and homework, most persons can easily find out who the reputable operators are in their community or at their resort destination. While even those reputable operators will most likely use a release, no release will be enforced that is not presented in the appropriate manner. That is, the person signing the release must be given an opportunity to read, understand, and ask questions regarding the release. They must also be given a "cooling off" period. Courts in the United States have expressly declined to uphold releases given to divers on board a vessel once the vessel has left the dock. At that point, according to most courts, the prospective consumer of a diving service is no longer in a position of roughly equal bargaining power with a dive operator. They are now effectively "held hostage" until the trip is over. And even though they don't have to get into the water, by that

time they are pretty much committed to the dive and may not be held to be capable of exercising true independent judgment.

Most importantly, the release must be clear, unambiguous, and unequivocal in its release of "negligence". If that specific word is not used, most courts will not enforce the release. While some states such as Florida presume gross negligence if ever the word negligence is used, many states do not. Thus if a dive instructor or operator is guilty of particularity egregious conduct, in most jurisdictions even a valid release against negligence will be insufficient to avoid an adverse verdict. Of course, no release will be upheld anywhere in the English speaking world for an intentional act designed to cause harm to another (with the possible exception of boxing!). So intentional torts are essentially out. But absent that sort of egregious conduct, parties in the recreation activities environment may contract as they pretty much please.

Conclusion

So are releases a necessary shifting of burden or an unnecessary shafting of would-be participants in this voluntary, recreational sport? While the ultimate answer depends upon the perspective which one brings to the question, in the United States, at least, the consensus appears to be that in return for allowing the virtual explosion of personal injury and wrongful death lawsuits that have been filed in this country over the past twenty years or so, if recreational activities with an inherent degree of risks are to be pursued at all, the right of the parties involved in those activities to freely contract between themselves. While there may occasionally be a decision that offends our sense of propriety in light of our knowledge of the standard of care we would all bring to the sport, the fact appears to be that without the ability to enter into such contracts, many of us would never have had the opportunity to engage in scuba diving to begin with. And it is upon that point that I would argue that valid, binding recreational releases are a necessary "evil" if the sport of scuba diving is to continue as we know it.

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Other views about releases and the diver's responsibility appear on pages 52-58