

Financial implications

Based on the average cost of a resort course being \$65, the average cost of an openwater course being \$375, the average daily rate on a live-aboard diving vessel being \$180 and the average day boat rate being \$120, it can reasonably be estimated that the average cost per dive is \$80.. This indicates that the total value of the Diving Industry to Queensland in direct expenditure is of the order of \$103,240,000.

Summary

From the data presented by operators it appears that

- 1 1,290,500 dives are undertaken in Queensland waters each year.
- 2 943,000 dives are conducted by trained divers.
- 3 150,000 open water training dives are conducted.
- 4 68,000 speciality and ongoing training dives are conducted.
- 5 129,500 resort courses are conducted
- 6 that approximately 60% of all diving that occurs on the Great Barrier Reef takes place in the area from offshore Innisfail to Lizard Island.

Acknowledgements

This study was commissioned by The Great Barrier Reef Marine Park Authority, assisted by DIVE Queensland Inc., Division Of Workplace Health & Safety, Queensland Travel and Tourism Commission and the Association of Marine Park Tourism Operators. It was completed in May 1995.

Key Words

Diver numbers, environment, recreational diving, training.

David Windsor is Secretary of Dive Queensland, a dive tourism body. His address is PO Box 19, The Grange, Queensland 4051, Australia. Phone 07-3856-0717. Fax 07-3856-0686,

WAIVERS EFFECTIVE OR NOT?

Michael Gatehouse and Tom Wodak

It is increasingly common for Australian and overseas dive charter operators to require divers to sign a document (frequently called a *waiver*, *release*, or *indemnity*, or some combination containing one or more of those words), which purports to deprive the diver of any rights they may otherwise have to sue the charter operator even if the charter operator's negligence has been the cause of the injury or loss.

In Australia as a general rule, where the charter operator is a sole trader or partnership, a diver can release the charter operator from all liability, including any right to sue for negligence, by signing a properly drafted waiver.

The situation will probably be different if the waiver is subject to the laws of Western Australia as that State has enacted statutory provisions supplanting the common law position which exists in the rest of Australia.

The position overseas is not straightforward and the efficacy of waivers signed in or subject to the laws of non-Australian jurisdictions would usually involve the consideration of complex questions of international law.

An effective waiver is one expressed in language which is clear and unambiguous, and specifically covers claims brought in negligence. If there is any ambiguity or defect in the drafting of a waiver, the courts generally construe the documents strictly and against the party seeking to rely on it (in this instance the charter operator), in order to restrict its operation.

Provided the waiver is written with clarity, Australian courts will generally interpret and give effect to the document according to its ordinary meaning. Courts usually approach this interpretive function by construing the document as a whole, giving due weight to the context in which the clause containing the waiver appears.

Whilst Australian courts have yet to determine specifically the effectiveness of a waiver in respect of diving litigation, some guidance as to the likely approach can be gleaned from recent decisions. Both cases involved sporting and risk inherent adventure activities. The conclusion reached demonstrates that Australian courts may well be prepared to hold that an injured diver had waived the right to sue a charter operator by signing a properly drawn waiver.

In the first of these cases the Defendants owned and operated a gymnasium. The Plaintiff, who was keen to take up competitive body building, purchased a

gymnasium membership. He signed an agreement incorporating a waiver in the following terms:

"I acknowledge that during all such times whilst on the premises both my property and my person shall be at my own risk and I will not hold (the gymnasium) or its instructors liable for any personal injury or loss of property whether caused by negligence of (the gymnasium), its servants or its agents."

The Plaintiff had previously sustained a back injury and knew from experience the condition would recur if he performed squats. The gymnasium designed and supervised a body building program for the Plaintiff which included squats. The Plaintiff complained he was unable to perform squats as a consequence of a pro-existing back injury. He was informed he would have to do them but that they could be done in a way which would not affect his back condition. Placing his trust in the expertise of the gymnasium, the Plaintiff performed squats. He suffered back symptoms and so informed his instructor who promised to look into the problem, but otherwise took no action. The instructor did not advise the Plaintiff to cease performing the squats. The Plaintiff continued with his program, including squats, and eventually sustained a serious back injury requiring surgical intervention.

The Plaintiff sued the gymnasium in negligence. The court found the gymnasium had been negligent but dismissed the Plaintiff's claim by upholding the validity of the waiver which he had signed on the grounds it constituted a bar to his right to sue for that negligence. The Plaintiff appealed but the Court of Appeal found no fault in the decision of the trial Court and the appeal failed.

The second decision resulted from a claim brought following a parachute training accident. During a training jump the pilot employed by the parachuting school negligently flew his plane too close to the Plaintiff who was forced to take evasive action as a consequence of which she was seriously injured. The court found the pilot and the parachuting school were both entitled to rely on the waiver which the Plaintiff had signed in which she agreed to relieve both Defendants of *"...all liability however arising ... from parachuting."*

An attempt by the Plaintiff to have the waiver declared by the Court to be unconscionable, harsh or oppressive (and thus unenforceable), failed.

The Court was satisfied that the waiver was expressed with clarity, was not ambiguous and had been signed by the Plaintiff in full knowledge that parachuting was a highly dangerous sport. Indeed, given the inherent risks involved, the Court considered it was reasonable for any person providing parachuting training to require its students to sign such a waiver.

Had the Defendants in either case been incorporated (that is traded as companies) or the contract subject to Western Australian law, the consumer protection provisions of the Commonwealth *Trade Practices Act* or the Western Australian *Fair Trading Act*, the waivers would almost certainly have been rendered ineffective.

The *Trade Practices Act* applies throughout Australia, and to dealings between corporations (companies) and consumers. It has no application where the entity providing the goods or services trades as a sole trader or partnership. The Western Australian *Fair Trading Act* applies where Western Australian Courts exercise jurisdiction, that is within the State or where the laws of Western Australia apply, for example where an agreement is subject to the laws of that State.

Both Acts imply into any contract for the provision of domestic services (which would include recreational scuba diving), warranties that the services contracted for would be supplied with *due care and skill*. Any clause which purports to limit or exclude the operation of either Act is void and of no effect.

Apart from such statutory provisions, courts have traditionally declined to enforce waivers which are not expressed clearly and without ambiguity, or which fail to specifically refer to liability arising in negligence. Any comments or representations made by charter operators or their employees or agents prior to the signing of a waiver such as "Don't worry, it is just a formality and doesn't mean anything" may prevent the operator from relying upon it.

As a general rule, a waiver cannot operate as such unless it has been incorporated into a contract between the signatory and the party seeking to enforce it. Frequently a contract between a diver and an overseas charter operator will be concluded through a travel agent prior to the diver's departure from Australia. If, prior to concluding the contract, the diver had not signed the waiver, or agreed to sign a waiver in a particular form of which the diver was then aware, it is unlikely to be enforceable in Australian courts.

The circumstances in which a diver is asked to sign a waiver may well bear upon the disposition of a court to uphold the validity of it. Evidence of duress being exerted on the diver may lead a court to conclude the diver and the charter operator were not dealing with each other at arm's length when the waiver was signed. In one recent case in the USA a court refused to allow a charter operator to rely on a waiver which an injured diver had been asked to sign only when the dive vessel was well out to sea and the diver about to enter the water.

It is clearly preferable to resolve any questions concerning waivers prior to arrival at a diving destination. To this end it is strongly recommended that, before booking an interstate or overseas diving trip, any diver who has a concern about signing a waiver should request the charter operator or resort owner to forward copies of the proposed waiver documentation which they will require the diver to sign before diving. Once such material has arrived, the prospective diver can peruse it, and decide whether he or she is willing to sign the waiver (and if necessary obtain appropriate legal advice). If the diver is not prepared to sign the waiver, there is still the opportunity to investigate other diving alternatives, with other resort owners or charter operators whose terms of business are regarded as acceptable.

It must be acknowledged that reliance on waivers is becoming more and more normal practice. Indeed a charter operator or resort owner who does not seek to rely on some form of waiver may, by that fact alone, give rise to some concern as to the nature of the operation being conducted. With the passage of time and an increasing understanding of the likely attitude of courts to the use of waivers, there is likely to be some standardisation in the drafting of these documents. Of course, every case is determined by courts on the facts peculiar to a particular case, but already there is a degree of confidence with which one can say how a court is likely to look at a dispute which relates to the construction of a waiver.

Finally, those who organise diving related conferences should undertake enquiries into the proposed usage of waivers and ensure that any promotional material discloses in as much detail as possible the contents of any waivers which delegates may be asked to sign if they intend diving during the conferences.

Key Words

Legal, recreational diving.

Michael Gatehouse is a diving instructor and partner of the legal firm Herbert Geer & Rundle (GPO Box 524J, Melbourne, Victoria 3001, Australia. Phone 03-9641-8764. Fax 03-9670-4475.), who specialises in diving related litigation.

Tom Wodak is a diving instructor and Judge of the County Court of Victoria.

ROYAL ADELAIDE HOSPITAL HYPERBARIC MEDICINE UNIT

Basic Course in Diving Medicine

Content Concentrates on the assessment of fitness of candidates for diving. HSE-approved course
 Dates Monday 28/10/96 to Friday 1/11/96
 Cost \$A 500.00

Advanced Course in Diving and Hyperbaric Medicine

Content Discusses the diving-related, and other emergency indications for hyperbaric therapy.
 Dates Monday 4/11/96 to Friday 8/11/96
 Cost \$A 500.00

\$A 800.00 for both courses

For further information or to enrol contact
 Professor John Williamson, Director, HMU,
 Royal Adelaide Hospital, North Terrace
 South Australia, 5000.
 Telephone Australia (08) 224 5116
 Overseas 61 8 224 5116
 Fax Australia (08) 232 4207
 Overseas 61 8 232 4207

ROYAL ADELAIDE HOSPITAL HYPERBARIC MEDICINE UNIT

Diving Medical Technicians Course

Unit 1 St John Ambulance Occupational First Aid Course. Cost approximately \$A 500
 Unit 2 Diving Medicine Lectures. Cost \$A 500
 Unit 3 Casualty Paramedical Training. Cost \$A 300

Dates
 October/November 1996
 Unit 1 14/10/96 to 18/10/96
 Unit 2 21/10/96 to 25/10/96
 Unit 3 14/10/96 to 1/11/96

Diver Medical Technician Refresher Courses

Dates
 21/10/96-25/10/96
 Cost \$A 350

For further information or to enrol contact
 Professor John Williamson, Director, HMU,
 Royal Adelaide Hospital, North Terrace
 South Australia, 5000.
 Telephone Australia (08) 224 5116
 Overseas 61 8 224 5116
 Fax Australia (08) 232 4207
 Overseas 61 8 232 4207