

Using Waivers in High School Athletics: The *Wagenblast* Decision

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One of the most frequent questions asked by coaches today concerns waivers and their use in an athletic program. A waiver is a form of an exculpatory agreement (Nygaard and Boone, 1989). The definition of waiver is the voluntary giving up of a right. An exculpatory agreement relieves a trustee (in our case, a coach or school district) of all responsibility for things that go wrong or for losses if the trustee (coach or school district) acts in good faith. Therefore, a person who expressly agrees to accept a risk of harm arising from another's conduct enters into an exculpatory agreement, which may be enforceable against that individual. It is implied that the person agreeing to accept a risk of harm arising from another's conduct must understand and comprehend the nature of the risk. This is why warning of dangers inherent in a sport must be part of a coach's plan. Coaches must remember that a person cannot accept a risk that he or she does not know.

Exculpatory agreements usually take the form of a contract (i.e. a written waiver agreement), but they can also be noncontractual. For instance, you might have signs in your parking lots used for games stating that stadium parking is at an owner's risk. The agreement is reached when the patron parks in the lot.

A waiver (exculpatory agreement) may be broad in scope, relieving the coach and school district of all responsibility for the safety of the participants; or it may be narrow, covering only a specific risk such as injuries. However, it should be clear and unambiguous. Some courts have said that the word negligence should be specified while other courts have held that if the terminology is clear in what is meant, whether or not the term negligence is used, it is valid.

A valid waiver requires that a person be of majority age; therefore, waivers signed by minors are not valid. Minors may always rescind or disaffirm any waiver they sign. Parents cannot sign for their minor children. If a parent signs for a minor child, the child can affirm or void the waiver whenever he or she reach majority age. The parental relationship does not change this. School districts that believe that securing permission from parents for their child relieves them of the possibility of a lawsuit are basing their security in a false belief.

Parents can sign waivers that can be enforced as to their claim to action, for pecuniary (money) loss, such as medical claims. Parental forms are encouraged because they also represent a public relations effort with parents.

Disparity in bargaining power is the reason commonly given for invalidating liability waivers contained in parental consent forms. When schools require that parents sign a waiver of liability as a precondition for their child's participation, the court can rule, and has in numerous cases, that the parent is at a disadvantaged position. It is a form of coercion. The parent may refuse to sign the waiver, but that would deprive the child of participation. There are not any other reasonable options under these circumstances, and courts tend to view these waivers as against public policy. Waivers that contravene public policy are not enforceable.

It is also against the practice of courts to allow a waiver of liability when intentional or reckless conduct is involved. If a waiver against intentional or reckless conduct were allowed to be accepted, it might foster and encourage such behavior. Intentional and reckless conduct would include conduct that is careless, inattentive, and shows willful disregard for the safety of others.

In *Wagenblast v. Odessa School District* (1988), the Washington Supreme Court was confronted with the issue of whether waivers could be required, signed by students and parents, as a condition to participation in certain school-related, extra-curricular activities. Odessa School District required students to sign a standardized form which released the school district from liability resulting from any ordinary negligence that may arise in connection with the school district's interscholastic activities programs. The Seattle School District had a release that was similar but particularly applied to the school district's wrestling program.

In *Wagenblast*, students and parents from the school district brought court action to void the releases and forbid the particular school district from requiring such releases as a condition to participating in extra-curricular activities. The superior court for Lincoln County ruled in favor of the students and parents, declaring the releases void and permanently forbidding the school district from requiring the students and their parents to sign the releases. The King County superior court reached the opposite verdict with regard to the *Vulliet* case in Seattle (Harnetiaux, 1990). Waivers in the Seattle case were declared valid.

Both cases ended up before the Washington Supreme Court where they were consolidated for review. In an unanimous decision, the Supreme Court held that exculpatory releases from any future school district negligence are invalid because they violate public policy.

The beneficial effect of the *Wagenblast* decision is that it shifts focus away from attempts to provide excuses for wrongful conduct, and toward seeking ways to make programs safer for participants. Harnetiaux (1990) states that this is a fundamental purpose of tort law and the rule of civil liability — to provide an incentive for persons or entities to conform their conduct with reasonable standards. He also says, "The *Wagenblast* decision does not elevate whatsoever the standard of care required for school districts or in any way lower the burden of proof placed upon persons seeking to establish school district liability. *Wagenblast* merely removes from the picture the possibility of a form of contractual immunity" (p. 93).

Why then use a waiver? There are several reasons why using a waiver can be of great value to a coach and school district. They include:

1. It is one documentary piece of evidence that the coach and school district are trying to meet the criteria for assumption of risk.
2. It is a record that responsibilities of participants have been presented and understood by participants, and therefore it could be useful for proof of a participant's contributory negligence and/or comparative negligence.
3. It is a good public relations device to inform participants and parents as to the nature of the activity, expected responsibilities of participants, warnings of inherent dangers, and possible types of injuries which may occur.

I would encourage coaches and school districts to continue to use waivers. It certainly provides evidence that they are trying to make their programs safer.

References

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