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Ambiguity as a Factor in the Validity of Exculpatory Agreements

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An exculpatory agreement or waiver of liability is a contract in which the participant or user of the service agrees to relinquish the right to pursue legal action against the service provider in the event the provider is the cause of an injury occurring to the participant. For such an agreement to be valid, it must meet all of the requirements for a valid contract. One of these requirements is that the language must be clear, unambiguous, conspicuous, and the hazard must be within the contemplation of the parties. The purpose of this article is to examine, in detail, the various aspects of this requirement as it relates to the validity of sport-related exculpatory agreements. This analysis of the elements of ambiguity comes from an examination of case law involving sport–related exculpatory agreement cases.

Courts agree that the language which would release a party from liability for its own negligence "must be clear, explicit, and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor ... of the effect of signing the agreement" (*Ferrell v. Southern Nevada Off Road Enthusiasts, Ltd.*, 1983, p. 318).

Courts recognize the challenge of clarity facing the writer of exculpatory agreements. *Link*, in referring to a 193–word sentence, notes that long, convoluted sentences do not meet the requirement of clarity (*Link v. National Association for Stock Car Auto Racing, Inc.*, 1984). *Dombrowski* stated that the exculpatory agreement must put a layman on notice as to any rights being waived and indicated that it could not be so "laden with legalese" as to be incomprehensible to anyone but a lawyer (*Dombrowski v. City of Omer*, 1993).

In the same vein, a California court stated that if an exculpatory agreement is

> . . . short and to the point, a release will be challenged as failing to mention the particular risk which caused a plaintiff's injury. . . . If the drafter strives to be comprehensive, the release is attacked as unduly lengthy, but if he fits it on a single page, the type size will be criticized as inadequate. . . . To be effective a release need not achieve perfection. . . . It suffices that a release be clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence (*National and International Brotherhood of Street Racers v. Superior Court*, 1989, p.937–938).

Four major areas of contention were identified that relate to the clear, explicit, and unambiguous nature of an exculpatory agreement. Each of these areas will be examined.

USE OF THE WORD "NEGLIGENCE"

The general rule among the states is that while the word "negligence" is not required, the intent to extinguish liability must be clear and unambiguous. Colorado's Supreme Court in 1989 ruled that the "specific terms 'negligence'... are not invariably required for an exculpatory agreement to shield a party from claims based on negligence" (*Heil Valley Ranch v. Simkin*, 1989, p.785). The Wyoming Supreme Court concurs with this view, stating that the primary concern in interpreting a contract is to determine the intent of the parties (*Schutkowski v. Carey*, 1986).

The Supreme Court of Vermont said that it is not necessary to "indulge in a plethora of synonyms and redundancies" to clearly express intent (*Douglas v. Skiing Standards, Inc.*, 1983, p.98). The court further stated that failure to include the word "negligence" as being within the scope of intent does not preclude other language from having that effect. The U. S. Court of Appeals, Fourth Circuit, noted that the language used, ". . . release . . . from any and all liability actions . . . of every kind and nature whatsoever which I now have or which may arise out of or in connection with my trip . . .", was obviously sufficient to waive a negligence action (*Krazek v. Mountain River Tours, Inc.*, 1989, p. 165–6). The court further stated that "magic words" were not required to cover negligence. Similar language was found to be sufficient to protect against negligence by courts in Illinois, Idaho, Ohio, and Washington (*Calarco v. YMCA of Greater Metropolitan Chicago*, 1986; *Lee v. Sun Valley Co.*, 1983; *Cain v. Cleveland Parachute Training Center*, 1983; *Blide v. Ranier Mountaineering, Inc.*, 1982)

In a further elaboration on why "negligence" need not be specified, the Superior Court of Pennsylvania noted that "to say that negligent conduct is not included in 'any liability' is patently incorrect" (*Zimmer v. Mitchell and Ness*, 1978, p.440). In viewing a similar exculpatory agreement, the Court of Appeals of Ohio pointed out that a ". . . release has no purpose unless it insures against negligence because, even in the absence of a release, the plaintiff assumed all risk incident to the sport in which he was engaged" (*Hine v. Dayton Speedway Corp.* 1969, p. 652).

While the requirement of "clear and unambiguous intent" does not require the use of the word "negligence" in most states, courts in three states have taken a somewhat stricter stance. The position of Florida courts on requiring the use of the word "negligence" in an exculpatory agreement is among the strictest. In *Lovas v. Dolphin Research Center, Inc.*, (1991), the court ruled that since there was no specific reference in the exculpatory agreements to negligence, they provided no defense to the negligence claim in the case. Another court agreed, saying that an exculpatory clause ". . . must clearly state that it releases the party from liability for its own negligence" (*Van Tuyn v. Zurich American Ins. Co.*, 1984, p.320 citing *L. Luria & Son, Inc. v. Alarmtec International Corp.*, 384 So.2d 947 [Fla.4th DCA 1980]). The exculpatory agreement states "I hereby voluntarily assume any and all risk, including injury to my person and property which may be caused as a result of

my riding or attempting to ride this Bucking Brama Bull . . ." *(Van Tuyn v. Zurich,* 1984, p.320). The court ruled that the defendants did not demonstrate that the plaintiff agreed to assume the risk of the defendants' negligence in operating the ride. The Florida Supreme Court held that ". . . the use of the general terms 'indemnify . . . against any and all claims' does not disclose an intention to indemnify for consequences arising solely from the negligence of the indemnitee" (*Jones v. Walt Disney World Co.,* 1976, p.528 citing *University Plaza Shopping Center, Inc. v. Stewart,* 272 So.2d, p.511). The court noted that "...an expression of intent to exculpate one from his own negligence would require the same specificity in the contract as in the indemnification situation..." *(Jones v. Walt Disney World Co.,* 1976, p.528).

Cases in Texas are governed by the express negligence doctrine which provides that, ". . . in order to require one party to release or indemnify another party against the consequences of that party's own negligence, the intent of the parties to do so must be expressed in specific terms within the four corners of the contract" (*Rickey v. Houston Health Club, Inc., D/B/A President & First Lady Health & Racquetball Club,* 1993, citing *Page Petroleum,* 36 Tex.Sup.Ct.J. p.739). The court further indicated that an exculpatory agreement must expressly list negligence as a claim being relinquished by the signer.

In New York, the court "grudgingly accepts" the contracting away of liability for negligently caused actions, but only when the intention is clear and unequivocal (*Gross v. Sweet,* 1979). The court stated that although the plaintiff signed an exculpatory agreement waiving any and all claims for personal injuries, he was not barred from suing for personal injuries he incurred as a result of the defendant's negligence. "The release nowhere expressed any intention to exempt the defendant from liability for injury or property damages which might result from his failure to use due care . . . . The agreement could most reasonably be taken merely to emphasize the fact that the defendant was not to bear any responsibility for injuries that ordinarily and inevitably would occur, without any fault of the defendant, to those who participate . . . ." *(Gross v. Sweet,* 1979, p.306). It should be noted that the court did not expressly require the use of the word "negligence," but said words of a similar import must appear, e.g., "fault" or "neglect."

■ FORMAT OF THE DOCUMENT

The general rule among the states seems to be that format is an important element in determining the validity of an exculpatory agreement. Three important factors in the format are the title, the size of print used, and the conspicuousness of the exculpatory language. While the validity of an exculpatory agreement does not depend solely on components of format, in general, exculpatory agreements with appropriate formats are more likely to be upheld than those with poor formats.

Title. A descriptive title has been shown to have effect. In *Toth* the document was titled "Release and Waiver of Liability and Indemnity Agreement" *(Toth v. Toledo Speedway,* 1989). It was the opinion of the court that "even if appellants had not read beyond this headline, they would, nevertheless, have been notified of the document's purpose" *(Toth v. Toledo Speedway,* 1989, p.358). The court in *Griggy*

v. Edwards Motors, Inc., (1992), with an identical title, concurred in this opinion. A similar opinion was rendered by an Illinois court in referring to a document captioned "Waiver and Release" in bold face type *(Rudolph v. Santa Fe Park Enterprises, Inc.*, 1984). The court stated "the conspicuousness of this heading militates against . . . not knowing what he was signing" *(Rudolph v. Santa Fe Park Enterprises, Inc,* 1984, p.625). A Michigan court ruled similarly, noting the exculpatory agreement had "sufficient clarity, particularly in view of the fact that it is captioned 'WAIVER OF LIABILITY' . . . ." *(Dombrowski v. City of Omer,* 1993, p.710). However, a descriptive title alone will not ensure an exculpatory agreement's validity. For example, a Washington court ruled that a provision titled "Liability Statement" was inconspicuous enough to warrant a jury decision on whether the plaintiff had unwittingly signed the exculpatory agreement *(McCorkle v. Hall,* 1989). In this case, the provision was at the end of a document entitled "Application for Membership" just prior to the signature.

The absence of a descriptive title does not necessarily invalidate an exculpatory agreement. In *Zimmer v. Mitchell and Ness* (1978), the title was "Rental Agreement and Receipt," however, the agreement was upheld because the court felt the document should be considered as a whole. A Washington court, without discussion of the title *per se*, ruled that a plaintiff did not unwittingly sign an exculpatory agreement titled "Entry Blank" since the exculpatory language was conspicuous *(Garretson v. United States*, 1972). In contrast, a case involving a document entitled "Receipt" was remanded to determine if the exculpatory agreement was obtained knowingly (*Moore v. Edmonds*, 1942). In a Tennessee case, plaintiff signed a document referred to as a "sign–in" sheet. In the absence of evidence that plaintiff was aware of the exculpatory clause when signing, the exculpatory agreement was not upheld (*Hobby v. Ramblin Breeze Ranch*, 1984).

Size of Type. Three California cases address the issue of type size. The court in *Celli v. Sports Car Club of America, Inc.* (1972) did not rule on the issue, but questioned whether public policy would permit the enforcement of provisions printed in small type (less than six point). The court in *Link v. National Association for Stock Car Racing* (1984, p.514) commented that "the five–and–one–half–point print is so small that one would conclude that defendants never intended it to be read. Moreover, the lengthy fine print seems more calculated to conceal and not to warn the unwary." They noted that the Civil Code generally restricts type size in contracts to 8– to 10–point type and suggest that "as a matter of public policy, the typeface size of the crucial language in a release should be no smaller" *(Link v. National Association for Stock Car Racing,* 1984, p.514). A later appellate court ruling failed to interpret *Link* as requiring eight–point type, pointing out the context *(Bennett v. United States Cycling Federation*, 1987). The *Bennett* court noted that, in *Link*, "the statement was buried in the midst of a highly prolix sentence, which was itself surrounded by paragraphs of fine print . . . . Print size is an important factor, but not necessarily the only one, to be considered in assessing the adequacy of a document as a release" *(Bennett v. United States Cycling Federation,* 1987, p.1489)

Conspicuousness. Courts have addressed aspects of the conspicuousness of the exculpatory language. The *Link* court stated that the "important operative

language should be placed in a position which compels notice and must be distinguished from other sections of the document" *(Link v. National Association for Stock Car Racing,* 1984, p.515). Part of the reasoning confirming that an exculpatory agreement was clear and legible in another California court was that the language

> ... was not buried in a lengthy document or hidden among other verbiage. The type is clear and legible and in light of the fact it has no other language to compete with, its size is appropriate (*Okura v. U.S. Cycling Federation*, 1986, p. 432).

The disclaimer in *Baker v. City of Seattle* (1971, p. 407) was "included in the middle of the agreement and was not conspicuous." The court stated that "to allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable." In another Washington case, the court stated that the exculpatory agreement was "so conspicuous that reasonable men could not reach different conclusions on the question of...unwittingly signed..." *(Hewitt v. Miller,* 1974, p. 247). The Washington court remanded a later case for trial to determine whether a Liability Statement within an Application for Membership was sufficiently conspicuous to notify the signer of its purpose *(McCorkle v. Hall*, 1989).

Some courts seem to give weight to wording which asserts that the signer has read the document, especially when the wording is near the signature line *(Adams v. Roark*, 1985; *Barnes v. Birmingham International Raceway, Inc.*, 1989; *Broderson v. Rainier Nat. Park Co.* 1936; *LaFrenz v. Lake Cty. Fair Bd.*, 1977). An Illinois court ruled that the notice "CAUTION: READ BEFORE SIGNING" preceding the signature coupled with a caption "RELEASE" were sufficiently conspicuous to overcome a claim of fraudulent inducement *(Bien v. Fox Meadow Farms, Ltd.,* 1991). The issue of conspicuousness of an exculpatory agreement at the top of a sign–up sheet was at issue in cases in Washington and Indiana *(Conradt v. Four Star Promotions, Inc.*, 1986; *LaFrenz v. Lake Cty. Fair Bd.*, 1977). The courts found the documents to be sufficiently conspicuous especially in light of the fact that "I have read this release" or "THIS IS A RELEASE" was printed above each signature line.

Another issue related to conspicuousness is whether an exculpatory agreement appearing on the back of a document is valid if the document is signed only on the front. The court in *Putzer* ruled that while the language of the exculpatory agreement would protect, it was for a jury to decide if the agreement was called to the plaintiff's attention when the instrument was executed *(Putzer v. Vic Tanney–Flatbush, Inc.*, 1964). In a similar case, the document was signed on the front, the exculpatory agreement was on the back, and there was no reference to the exculpatory agreement on the front page *(Kubisen v. Chicago Health Clubs*, 1979). The court ruled that the location of the exculpatory agreement was relevant only if the plaintiff was unaware of the exculpatory language. In this case, the exculpatory agreement was upheld because the plaintiff had made no such assertion. The same reasoning was used in upholding the exculpatory agreement in *Mechanic v. Princeton Ski Shop, Inc.* (1992). In this case, the plaintiff had initialed the front of the receipt which stated "I have read the agreement on the back of this form . . . ." *(Mechanic v. Princeton Ski Shop, Inc.,* 1992, p.2).

SIGNED WITHOUT UNDERSTANDING

The general rule is that a person is under a duty to inform himself of what he is signing *(Garretson v. United States,* 1972). A Wisconsin court states that a contracting party is bound by the law to know and understand the terms of the document he signs *(Kellar v. Lloyd,* 1993). Exceptions are made in some states in the event of such circumstances as fraud, mutual mistake, duress, disability, and prevention from reading the exculpatory agreement.

Did not read. Probably the most common argument offered for failure to understand a document or unwittingly signing it is that the party did not read the document. In general, courts are not tolerant of this excuse.

> The court is cognizant of the almost daily challenges the average person faces in regard to determining when it is prudent to affix his signature to a document. Nevertheless, the only method by which to evaluate the pertinent characteristics of a document is by reading it (*Toth v. Toledo Speedway,* 1989, p. 358).

In the same vein, this court quotes the ruling of the Supreme Court of Ohio:

> A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed *(Toth v. Toledo Speedway,* 1989, citing *McAdams v. McAdams,* 80 Ohio St., p. 240–241).

The court concludes that if a person is allowed to escape the obligations of a contract by saying he did not read it or did not know what it contained, a contract would not be worth the paper on which it was written. They ruled that an exculpatory agreement is not unenforceable "merely because appellants... neglected to read it. ... In the absence of an allegation of fraud or mistake, appellants alone are responsible for omitting to read what they signed" *(Toth v. Toledo Speedway,* 1989, p.359).

A Tennessee court agrees, stating that a person is under a duty to learn the contents of a contract before he signs it *(Thoni v. Duck River Speedway, Inc.*, 1984). Unless there is fraud, even if he fails to read it, he is presumed to know the contents and cannot deny his obligation. A contract cannot be avoided by pleading that the signer did not know the terms and did not read the document.

Mutual Mistake. In an interesting attempt to avoid the effect of a exculpatory agreement, *Dombrowski* claimed mutual mistake (*Dombrowski v. City of Omer,* 1993). While Dombrowski readily admits not having read the exculpatory agreement, he asserts that this failure was a mistake on his part and that the mistake was mutual since the defendant was aware of his failure to read. The court did not accept this argument.

No opportunity to read. In some cases, plaintiffs have contended that conditions at the time of signing made it impossible for them to know what they were signing. Such factors as insufficient lighting and time pressure are used in attempts to challenge an exculpatory agreement, but such claims are generally ineffective. In *Griggy v. Edwards Motors, Inc.* (1992), the court ruled that the validity of the agreement was not affected by the claim that the plaintiffs had only a few seconds to sign and were unaware of the terms. Similar opinions are stated or implied by the courts in upholding exculpatory agreements in Florida, Missouri, Illinois, Pennsyl-

vania, and Tennessee *(DeBoer v. Florida Offroaders Driver's Association, Inc.,* 1993; *Haines v. St. Charles Speedway, Inc.,* 1989; *Rudolph v. Santa Fe Park Enterprises, Inc.,* 1984; *Seaton v. East Windsor Speedway, Inc.,* 1990; *Thoni v. Duck River Speedway, Inc.,* 1984). In contrast, a Washington court suggested that a signed contract would be invalid if there was not ". . . ample opportunity to examine the contract . . . ." *(McCorkle v. Hall,* 1989). Similarly, the court in *Nickloy* ruled in favor of the defendant stating that the plaintiff had ample opportunity to read on previous occasions *(Nickloy v. Bryan Motor Speedway,* 1992).

Disability. The Virginia Supreme Court included illiteracy and the denial of the opportunity to read in its list of factors which must be absent for a contract to be valid *(Hiett v. Lake Barcroft Community Association, Inc.,* 1992). However, in *Randas v. YMCA of Metropolitan Los Angeles* (1993) the plaintiff, who could not read English, signed a exculpatory agreement which included a statement, "I HAVE READ THIS RELEASE." The court noted that the general rule is one who signs cannot escape liability on the ground he has not read a document. If he cannot read, it is his responsibility to have it read or explained to him. In *Haines v. St. Charles Speedway, Inc.* (1989, p. 575) the judge commented, "If Norman Haines is functionally illiterate, it is his duty to procure someone to read or explain the release to him before signing it."

Fraud. Another situation where a party may sign a document without understanding it is when there is fraud. Fraud occurs if a party is induced to sign a exculpatory agreement while believing it to be a document of another type or if the party knows he is signing a exculpatory agreement, but is induced to do so by false representations of the other party *(Rudolph v. Santa Fe Park Enterprises, Inc.,* 1984). Similarly, fraud may also exist in cases in which material facts are withheld from a signer *(Palmquist v. Mercer,* 1954).

If the court finds that there is no issue of fact regarding fraud, the exculpatory agreement is upheld. In an Illinois case, the plaintiff claimed she thought the document she signed was primarily a record of each lesson *(Campbell v. Country Club Stables,* 1990). The court ruled that since she alleged no action or statement by defendant's employees which was the basis of her belief or induced her to sign without appreciating the nature of the agreement, there was no issue of material fact. In a similar case the court said that the plaintiff, although alleging that she thought she was signing an insurance document, had not raised a question of fact that she was fradulently induced to sign the exculpatory agreement *(Bien v. Fox Meadow Farms, Ltd.,* 1991).

Nickloy, in an Ohio case, alleged fraud by inducement asserting that the exculpatory agreement was presented as a sign–in sheet for insurance purposes and that it was not presented in a way that it could be read *(Nickloy v. Bryan Motor Speedway,* 1992). The exculpatory agreement was not upheld on other issues. In an Illinois case, Rudolph claimed that the lighting was poor, he was rushed, he did not read or understand the documents, he did not intend to exculpate Santa Fe for injuries, he did not have a fair opportunity to read the documents, and that they were not explained to him. The court said that none of these alleged any conduct that Santa Fe fradulently induced him to sign the exculpatory agreement *(Rudolph v.*

Santa Fe Park Enterprises, Inc., 1984). Barnes alleged misrepresentation in the exculpatory agreement by the raceway *(Barnes v. Birmingham International Raceway, Inc.*, 1989). The court said he could not have relied on it to his detriment since he failed to read it and the fraud claim failed.

When an issue of fact is shown, the exculpatory agreement does not protect. In *Kropf v. City of Monroe* (1983), the plaintiff alleged that the exculpatory agreement was presented as a team roster. In contrast, the team manager testified that players were made aware they were signing an exculpatory agreement. In an Illinois case, the plaintiff signed a sheet titled "SIGN–IN" which contained an exculpatory clause *(Erickson v. Wagon Wheel Enterprises, Inc.*, 1968). The versions of what was said at this time given by the plaintiff and defendant's employee differ. In each of these cases, the court ruled that the question of whether there was fraud was a jury question.

Fraud may occur when the exculpatory language is hidden from the signer by the paper being folded, covered, or simply missing. In *Sexton v. Southwestern Auto Racing Ass'n* (1979) the plaintiff claimed that the exculpatory language was covered by another paper when he signed on a signature line. In a similar situation in Pennsylvania the plaintiff testified that the paper was folded to hide the exculpatory agreement when he signed *(Talbert v. Lincoln Speedway,* 1984). In *Johnson v. Robert Dunlap and Racing, Inc.* (1981), the plaintiff and two witnesses testified that only lines for the signature were on the document. In a similar case, the plaintiff and her niece testified that a section entitled "WAIVER OF LIABILITY" did not appear on the sheet when they signed it *(Hobby v. Ramblin Breeze Ranch,* 1984). In each of these cases, the exculpatory agreement was not upheld.

In *Merten* the exculpatory agreement falsely stated that the company had no liability insurance (*Merten v. Nathan*, 1982). The court ruled that a contract is voidable if it contains a statement of fact which is untrue. In *Carnival Cruise Lines, Inc. v. Goodin* (1988), plaintiff signed a document which stated that "certain cabins and public restrooms would not accomodate a wheelchair" (*Carnival Cruise Lines, Inc. v. Goodin*, 1988, p.100). The court found this implicitly fradulent since no cabins or restrooms on the ship were wheelchair accessible. In *Palmquist* the defendant concealed from the plaintiff the fact that, in spite of his request for a gentle horse, the assigned horse was headstrong, high– spirited, and difficult to control. The court said there was ample evidence to sustain a finding of fraud *(Palmquist v. Mercer,* 1954).

WITHIN THE CONTEMPLATION

The general rule is that for an agreement to be effective, it must ". . . appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm" (*Restatement Second of Torts*, §496B, com.*d*, p.566). The document should reference ". . . 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" *(Garrison v. Combined Fitness Centre,* 1990, p.190). It is well established that "exculpatory agreements that are broad and general in terms will bar only those claims that are within the contemplation of the

parties when the contract was executed" *(Arnold v.Shawano County Agric. Society*, 1982).

Cases involving "not within the contemplation" claims fall into four categories. The first category contains cases where the specificity of the language used was the issue. Cases from this category can be divided into two general types: those where the circumstances seem to clearly fall within the range of activities to which the exculpatory agreement applies and those where the risk may not be one normally associated with the activity.

In each of the following cases, the exculpatory agreement clearly applied and the court upheld the exculpatory agreement. In two cases a person injured while riding a horse claimed that they had not contemplated a fall from the horse as being a risk covered by the exculpatory agreement *(Bien v. Fox Meadow Farms, Ltd.*, 1991*; Guido v. Koopman*, 1991). In skydiving cases, two plaintiffs contended that malfunctioning parachutes did not fall within the scope of the agreement and a third claimed that a plane crash was not included *(Malecha v. St. Croix Valley Sky Diving Club*, 1986*; Falkner v. Hinkley Parachute Center*, 1989; *Jones v. Dressel*, 1978). In each of these cases the exculpatory agreements included language encompassing the negligence of the defendant and all phases of the activity. In three cases involving auto racing, plaintiffs were injured while standing near the track serving as a flagger, when crossing a pit access road, and when losing control after hitting a rut on the track *(Griggy v. Edwards Motors, Inc.*, 1992*; Kellar v. Lloyd*, 1993*; French v. Special Services, Inc.*, 1958). Each of these was ruled to be a common risk associated with auto racing. In fact, in *Griggy*, the judge said ". . . it is exactly this type of injury to which the agreement speaks" *Griggy v. Edwards Motors, Inc.*, 1992, p.5). Korsmo suffered an injury while waterskiing, Neumann was injured lifting weights in a spa, and Trainor was injured while participating in a motorcross race *(Korsmo v. Waverly Ski Club*, 1988; *Neumann v. Gloria Marshall Figure Salon*, 1986; *Trainor v. Azlatan Cycle Club*, 1988). Broad language prevented recovery in each of these because the injuries resulted from risks common to the activity.

In the following cases, the plaintiff challenged whether the cause of the injury was a risk normally associated with the activity. In *Schlessman v. Henson* (1980), a banked portion of the race track caved in during a race. In *National and International Brotherhood of Street Racers v. Superior Court* (1989), a driver's injuries were aggravated when he was being removed from his car. In *Huber v. Hovey* (1993) a detached wheel struck a spectator. In these cases, the courts upheld exculpatory agreements which included language such as "any and all claims . . . arising out of . . . ordinary negligence . . . ." The *Schlessman* court commented:

> The parties may not have contemplated the precise occurrence which resulted in plaintiff's accident, but this does not render the exculpatory clause inoperable. 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 occur in auto racing *(Schlessman v. Henson*, 1980, p. 1254).

In three other cases involving exculpatory contracts which were written in broad and general terms, the agreements were not upheld. In *Arnold v. Shawano County Agric. Society* (1982) fire extinguishing chemical sprayed on a burning

vehicle allegedly caused brain damage to the driver. In *Hallman v. Dover Downs, Inc.* (1986) a rotted rail on an observation deck gave way. In *Larsen v. Vic Tanny Intern.* (1984) the plaintiff inhaled gaseaous vapors from a mixture of chemical compounds. The court in *Larsen* noted:

> "Forseeability of a specific danger is an important element of the risk . . . and serves to define the scope of an exculpatory clause . . . . Although the type of negligent acts . . . need not be forseen with absolute clarity, such acts cannot lie beyond reasonable contemplation of the parties, and no agreement to assume unknown risks is to be inferred *(Larsen v. Vic Tanny Intern.,* 1984, p.730).

The *Hallman* court noted that a defective structure is not a risk or danger inherent in auto racing. The *Arnold* court questioned whether the exculpatory contract was meant to cover negligent rescue operations and whether it applied to actions of the defendants occuring outside the "restricted area." In each of these cases, whether the danger which caused the injury ordinarily accompanies the activity was a determining factor.

Two cases in this category were found where defective equipment was the cause of the injury. In *Garrison v. Combined Fitness Centre* (1990) the injury was allegedly caused by a defective bench press. Equipment was mentioned in the exculpatory agreement and the court found the injury fell within the scope of possible dangers ordinarily accompanying the activity and upheld the agreement. In *Beardslee v. Blomberg* (1979) the exculpatory agreement did not refer specifically to equipment furnished by the defendants and it was not upheld.

The second category of cases are those where the plaintiff did not comprehend the nature of the risk. In *Dobratz v. Thomson* (1991), a water skiier signed the agreement before the stunts had been determined, so the specific risks which caused his injury could not have been contemplated. In *Tepper v. City of New Rochelle Sch. Dist.* (1988) the question of whether an inexperienced lacrosse player comprehended the true nature of the risk when he joined the team invalidated the exculpatory agreement signed by his parents.

The third category of cases hinge on the sequence of events surrounding the injury. In *Edwards v. Wilson* (1988), the plaintiffs purchased pit passes, but were injured in the parking lot, prior to entering the track. In *Hupf v. City of Appleton* (1991) a player was hit by a softball while on his way to his car following a game. The language of the exculpatory agreements specified "in attendance at race meet" and "at any activity sponsored by these groups" respectively. Neither was upheld. In contrast, the exculpatory agreement in *Moran v. Lala* (1989) which contained an admonition to "ALWAYS WEAR GOGGLES IN OR NEAR THE PLAYFIELD" protected in the case of an eye injury occuring prior to the commencement of war games. The possession of CO_2 guns on the free zone was contemplated by the rental agreement and was a risk assumed by the plaintiff.

The final category of "within the comprehension" cases consists of inappropriate obstacles to the activity. In *Bennett v. United States Cycling Federation* (1987) a bicyclist was hit by an auto which was allowed to enter a racecourse which was supposedly closed to cars. In *Simpson v. Byron Dragway, Inc.* (1991) a racer was killed by a collision with a deer on the drag strip during a race. In *Johnson v.*

Thruway Speedways, Inc. (1978) the plaintiff was injured by a maintenance vehicle driven through the infield of a racetrack. In *Dame v. Cedar Lake Speedway* (1985) the plaintiff was injured when the pole car became airborne and hit a 14–foot high power line. In each of these cases, the court found that the risk which caused the injury was not one normally associated with the activity and the exculpatory agreement was not upheld. In contrast, in *Walton v. Oz Bicycle Club of Wichita* (1991) a bicyclist was injured when he struck a parked car. The exculpatory agreement was upheld since the racer was warned that cars would be parked on the race path.

SUMMARY

The purpose of this article was to carefully examine the various aspects of ambiguity as thery relate to the validity of sport–related exculpatory agreements. It is well established that the language of exculpatory agreements must be clear, explicit, and comprehensible so that the signer is cognizant of the rights being relinquished.

Four major issues were examined. First, it was found that, while not specifically mandated in most states, use of the word "negligence" in the exculpatory language reduces the likelihood of ambiguity. Second, while not the only factor, the format (*i.e.*, title, type size, and conspicuousness) of the document sigificantly affects whether the exculpatory agreement is ambiguous in the eyes of the court. Third, since it is well– established that a person is under a duty to inform oneself of what one is signing, failure to read or understand an exculpatory agreement does not render the agreement ambiguous. Fourth, there is no ambiguity when it is clear that the intent of the exculpatory agreement was to relieve the defendant of liability for negligent acts associated with the particular activity.

References

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