

MARCH 1998 NRPA LAW REVIEW

WHITEWATER RAFTING WAIVERS ILLUSTRATE EXPRESSED ASSUMPTION OF RISK

Assumption of risk is a voluntary encounter with a known danger. Establishing a participant's actual knowledge of a particular risk is the key component in the assumption of risk defense. Defendant must establish that the injured plaintiff subjectively appreciated and accepted a particular risk of injury associated with defendant's negligence in providing a given recreational activity.

Liability releases and waiver agreements involve expressed assumption of risk. In such exculpatory agreements (the term used for liability releases and waivers), the scope and nature of the risks to be assumed by the participant are spelled out, i.e., "expressed," within the specific terms and language of the written document. In exchange for the opportunity to participate in a recreational activity, the participant agrees within the terms of the contract to release or waive any personal injury claim arising from the future negligent conduct of the recreation service provider.

The *Goldstein* and *Saenz* cases described herein present a tale of two waivers involving whitewater rafting. In the *Goldstein* case, the enforceability of the waiver was suspect due to its lack of specificity regarding the scope and nature of the risks to be assumed "on the trip." In contrast, the waiver agreement in *Saenz* operated within a context which clearly communicated to the participants the general scope of the risks associated with whitewater rafting. Specifically, the waiver was integrated into a larger educational process in which the service provider communicated the nature of particular risks to the whitewater participants. In so doing, the waiver in *Saenz* could be used as evidence to establish the assumption of risk defense.

In *Goldstein*, the waiver made no mention of any whitewater rafting activity on the trip. As a result, the participant did not expressly assume the risk of fatal injuries in the whitewater activity. Moreover, there was no evidence that defendant attempted to educate participants regarding the peculiar risks of injury associated with a particularly dangerous river.

In contrast, the defendant in *Saenz* described in vivid detail the risks associated with the aptly named "Murderer's Bar" rapid. Following defendant's explanation of the risks involved with running this rapid, the participant was asked two times whether he wanted to run the rapid. The participant responded in the affirmative both times to the effect: "Let's get it over with," or "Let's do it." Given these facts, the court found sufficient evidence that the participant expressly assumed the risks that ultimately caused his death.

ADVISED & APPRECIATED SPECIFIC RISKS?

In the case of *Goldstein v. D.D.B. Needham Worldwide, INC.* 740 F.Supp. 461 (S.D. Ohio 1990), plaintiff's husband drowned after he was thrown from a raft into the Chilko River in Canada.

MARCH 1998 NRPA LAW REVIEW

The incident occurred during a “outdoor adventure” business outing sponsored by defendant Needham. The facts of the case were as follows:

On Saturday, August 1, 1987, Goldstein, the ten other participants and the guide boarded the raft. Their destination was the Chilko Lodge, downstream from their campsite. As they were traveling down the Chilko River, upon entering what is called the "White Mile" stretch of the river, a large and very powerful wave broke onto and into the starboard fore section of the raft pushing it to the left side of the river channel causing the raft to hit a boulder in the river. When the wave broke over the raft, it was essential that the passengers immediately engage in "high siding" in the raft to avoid disaster. No one effectively executed the "high siding" maneuver. Eleven of the twelve passengers, including the guide, fell into the water. Five of those eleven died.

In response to plaintiff's allegations of negligence, Needham asserted that a signed release document relieved defendant of any liability. In pertinent part, this release provided as follows:

In consideration of travel arrangements made for me by Ron Thompson Guiding, and other good and valuable consideration, receipt of which is hereby acknowledged, I hereby release and discharge Ron Thompson Guiding, DDB Needham Worldwide, Inc., and Al Wolfe or other of their respective officers, directors, agents, employees, and other representatives from and against any liabilities, damages, losses, costs or expenses, including reasonable attorney fees, arising out of personal injury or property or other damage arising out of my participation in the trip to Chilko Lake and the Chilko River on July 29, 1987, whether arising before, during or after such trip. I represent and warrant that neither I nor my heirs, successors or assigns shall make any claim against any of the persons named herein. I will provide my own insurance coverage at my own expense.

In determining the enforceability of this particular waiver, the court considered “whether Goldstein was knowledgeable and appreciated the risks associated with whitewater rafting on the Chilko River.” Based upon the following facts, the court questioned “whether any discussion occurred by the participants in order for them to appreciate the risks involved in the trip either before they signed the ‘release’ or prior to their rafting trip, and whether ‘high siding’ was explained.”

The eleven participants met at the airport in Vancouver, British Columbia before taking chartered planes to Chilko Lodge on Wednesday, July 29, 1987. While in the Hudson Terminal of the Vancouver Airport, Wolfe requested [an employee of Needham participating in the trip] Stuart Sharpe, who had never rafted on the Chilko River prior to this trip, to circulate a written instrument to each participant

MARCH 1998 NRPA LAW REVIEW

for his signature. The participants had no prior opportunity to review the instrument. Wolfe was not present when it was circulated and signed by the participants. The guide for the trip, Thompson, was not present at the airport when the written instruments were presented, reviewed and signed by the participants. Goldstein had never met Thompson before he signed the instrument.

Under such circumstances, plaintiff argued that Needham had failed to establish the voluntary assumption of risk defense, i.e, Goldstein knew and accepted the risks associated with whitewater rafting in the Chilko River.

As noted by the court, "the defense of voluntary assumption of risk is based upon the moral supposition that no wrong is done to one who consents":

The burden is on the defendant, in each case, to prove that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by plaintiff, occasioned by the defendant's negligence. In every case the question is whether the plaintiff gave an express or implied consent to accept or assume the risk without compensation. In other words, did the plaintiff really consent to absolve the defendant from his common law duty of care, saying or implying, in effect, "I am prepared to take the risk of your negligence and if I am injured you will not be legally responsible for my damages." The question is not simply whether the plaintiff knew of the risk, but whether the circumstances were such as necessarily to lead to the conclusion that the whole risk was intentionally incurred by the plaintiff.

Applying these principles to the facts of the case, the court found the risks of rafting on the Chilko River were not fully disclosed to Goldstein prior to his undertaking those risks.

While the validity of exculpatory agreements is certainly recognized, this written instrument does not indicate any specific risks which will be encountered by a participant on this trip. There is absolutely no mention of whitewater rafting as an activity to be undertaken on this trip, any of the potential risks and dangers involved in whitewater rafting, or mention of any other activities to be undertaken on this trip...

Moreover, the time and place in which this written instrument was executed does in no way contemplate that Goldstein was advised of or appreciated the risks involved in what he would be subjected to on the Chilko River... Finally, this particular river, the Chilko River, involved much greater and more appreciable risks than any river previously encountered by Goldstein.

As a result, the court held that the nebulous language in this particular waiver did not establish an

MARCH 1998 NRPA LAW REVIEW

expressed assumption of risk for the fatal injuries incurred by Goldstein.

WARN, EXPLAIN, TEACH, REVIEW

In contrast to *Goldstein*, the facts in *Saenz v. Whitewater Voyages, INC.*, 226 Cal.App.3d 758, 276 Cal.Rptr. 672 (1990) clearly established that the participants were repeatedly advised of the unique risks associated with this particular whitewater activity. In so doing, defendant provided participants with a reasonable opportunity to either accept or avoid an encounter with a particularly dangerous series of whitewater rapids. As illustrated by the following facts, defendant communicated and reinforced risk information provided to participants regarding the dangers of whitewater rafting:

Trip leader David Butterfield gave a safety talk, covering such topics as what to do when thrown in the river, how to swim in that situation, how to get out from underneath the raft and the dangers of whitewater rafting. He warned: "Whitewater rafting is not a Disneyland ride and you can get hurt and even die."

The guides assisted the participants in adjusting their life jackets for a snug fit; decedent was fitted with an adult large/extra large type IV personal flotation device. He wore the device throughout the trip and was wearing it when he drowned. Participants were also told that helmets must be worn on all class IV rapids.

On the first day, decedent crewed on the raft guided by Butterfield. The crew encountered two class III rapids as well as Tunnel Chute Rapid, a class IV rapid considered by William McGinnis, founder of Whitewater, to be "by far the most difficult and dangerous rapid of the three day trip."

Whitewater's brochure gives each river a rating using the "I to VI International Scale of River Difficulty." The three day trip down the Middle Fork of the American River is rated II-IV. Class II rapids are labeled "Medium" and described as "Rapids of moderate difficulty with passages clear." Class III rapids are labeled "Difficult" with the description: "Waves numerous, high, irregular; rocks; eddies; rapids with passages clear though narrow; requiring expertise in maneuvering." Finally, class IV rapids are "Very Difficult": "Long rapids; waves powerful, irregular; dangerous rocks, boiling eddies; powerful and precise maneuvering required."

All passengers were given an opportunity to scout the rapid in advance, as well as the option of walking around the trail instead of running the rapid. Butterfield advised them not to "pay any attention to any peer pressure and to make this choice on their own." Butterfield also explained how they must enter the eddy so

MARCH 1998 NRPA LAW REVIEW

as not to become trapped, and related that last year a woman sustained injuries when she fell out and was crushed against the wall of Tunnel Chute.

Thomas also reviewed the possibility of falling out, and explained how to swim when that happens... Prior to starting out on the third morning, guide Thomas taught decedent and others how to swim a rapid, practicing on small ripple rapids near camp. Before they began rafting, Thomas reviewed that Murderer's Bar, the last class IV rapid, was optional and no one had to run it.

Murderer's Bar rapid was the last rapid.. After scouting the rapid Thomas spent about five minutes with decedent "directly" explaining the configuration of Murderer's Bar, how they would approach it, and what crew maneuvers were necessary. Thomas explained to decedent the dangers of the rapid, including the large rock they must avoid striking, as well as the eddy on the right of the rapid. Finally, Thomas explained the possibility of falling out and swimming and if this occurred, decedent should relax, take a breath and keep his feet up, pointed down river. Thomas asked decedent twice if he wanted to run the rapid; decedent replied affirmatively both times. Forney [another participant] said decedent's words were "Let's get it over with." Thomas described his response as "Let's do it."

Thomas also repeated to the entire crew that they could "take out" with the vans rather than run the rapid. Decedent fell out of the raft going down Murderer's Bar and drowned.

Prior to embarking on their trip down the river, participants completed and signed a "Release and Assumption of Risk Agreement." In pertinent part, this agreement provided as follows:

I am aware that certain risks and dangers may occur on any river trip with Whitewater. These risks include, but are not limited to, hazards of and injury to person and property while traveling in rafts on the river, accident or illness in remote places without medical facilities, the forces of nature.

I hereby assume all of the above risks and, except in the case of gross negligence, will hold Whitewater harmless from any and all liability, actions, causes of action, debts, claims, and demands of every kind and nature whatsoever which I now have or which may arise out of or in connection with my trip or participation in any activities with Whitewater.

Based upon this waiver agreement and the risk information provided during the trip, the court found that "the decedent expressly assumed the risks attendant to whitewater rafting so as to relieve the rafting company of its duty of care toward him."

MARCH 1998 NRPA LAW REVIEW

Indeed, this release is not perfect. Nonetheless, in plain language it expresses that the releasor is aware of the risks and dangers that can occur on any river trip with Whitewater, including the hazards of personal injury, accident and illness. The release then goes on to express the releasor's consent to assume those risks and, "except in the case of gross negligence," to hold Whitewater and its agents harmless from any liability and claims arising out of the trip...

[K]nowledge of a particular risk, e.g., death by drowning, is not necessary where there is an express agreement to assume all risks of a particular situation, whether known or unknown to the releasor. Without question the risk of death by drowning is an risk inherent in whitewater rafting and apparent to anyone about to embark upon a three-day recreational rafting trip. The release was valid.

As a result, the appeals court concluded that "Decedent expressly assumed the risks that led to his death."

REASONABLE WARNINGS ADEQUATE

Citing *Saenz*, the federal circuit court in the case of *Sanders v. Laurel Highlands River Tours, INC.*, No. 92-1060 (C.A. 4th Cir. 1992), similarly found "the general danger of white-water rafting is a risk apparent to anyone about to embark on such a trip." Sanders was injured when he fell out of his raft while participating in one of Laurel's guided white-water tours on the upper portion of the Youghiogheny River in Western Maryland. As noted by the court, this portion of the Youghiogheny is classified, according to an industry guide, as within the most difficult of all categories of river runs, suitable for experts.

Prior to the lower Youghiogheny trip, Sanders signed a release of liability which stated in part that he "realized I could fall out of the raft or even capsize in rough water (rapids). I realize this could result in serious injury." Moreover, prior to his trip, Sanders admitted that Laurel had provided a brochure containing the following risk information:

Experience is a must everyone in your group should have rafted the Cheat [a river classified as lower in difficulty than the upper Youghiogheny] several times at various water levels. Upper Youghiogheny - advanced to expert level. The upper Youghiogheny is the ultimate challenge in white-water rafting.

In his complaint, Sanders claimed Laurel "breached a duty to warn him of the dangers of rafting." Specifically, Sanders argued that Laurel had a duty to warn him of the "extreme danger of the particular section of river they would be traversing." In response, Laurel claimed "Sanders knew of the danger and voluntarily assumed the risk." Moreover, Laurel asserted that it had "adequately warned Sanders of the dangers involved." The court agreed with Laurel. In

MARCH 1998 NRPA LAW REVIEW

the opinion of the court, Sanders had indeed assumed the risk of his injury, given his previous rafting experience and “the warnings given of the specific risk from which Sanders was injured.”

There can be no real dispute that Laurel gave Sanders adequate warnings of the hazards of white-water rafting in general and the enhanced hazards of rafting the upper Youghiogheny in particular.

Warnings need only be reasonable, they need not be the best possible warnings in the circumstances... In this case, Laurel provided several warnings of the general risks and at least one specific warning that Sanders could fall out and be injured. A more specific or adequate warning could not be required.

Furthermore, it is uncontestable that Sanders had previously been on a white-water rafting experience and had twice signed release cards that specifically warned of the dangers of falling out, capsizing and injury. Even if Sanders neither heard nor read the many warnings given him, the general danger of white-water rafting is a risk apparent to anyone about to embark on such a trip.

Under Maryland law, participants assume the obvious and apparent risks of engaging in such sports. Clearly under Maryland law, if a plaintiff, as here, voluntarily exposes himself to a known danger of which he was warned or otherwise knows of, he has assumed the risk that danger poses.

Accordingly, the court held that “Sanders assumed the risk of his injury” based upon the “obviousness of the general risks involved, the warnings given of the specific risk from which Sanders was injured, and his previous rafting experience.”

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