

COMMERCIAL WAIVER SIGNED BY PARENT

James C. Kozlowski, J.D., Ph.D.

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Should a waiver form signed by a parent on behalf of a child releasing any liability for negligence in a recreational activity be void as against public policy? This is a recurrent issue being addressed by state courts. The answer to this question may depend on the jurisdiction and the public policy involved.

(See “Waiver for Disabled Teen Drowning” January 2007 Law Review in *Parks & Recreation* - waiver in public recreation program not void as against public policy.)

Traditionally, parents do not have the right to sign away the rights of their children for future negligence claims arising out of recreational injuries. Rather, pursuant to the doctrine of *parens patriae*, the courts have a duty to protect the best interests of the child and, as a matter of public policy, not enforce a pre-injury release or waiver of liability signed by a parent. A modern trend, however, has emerged in several opinions which redefines the public policy to be protected by the courts.

In several instances, state courts have recognized a public policy in favor of encouraging and supporting volunteerism in sports and recreational activities. In so doing, the courts acknowledge that liability concerns may have a chilling effect and act as a disincentive to volunteerism. As a result, upholding the validity of liability waivers signed by parents on behalf of their children would support a public policy which favors volunteerism by insulating individual volunteers against liability for ordinary negligence.

(See “State High Court Upholds Waiver Signed By Parent On Child’s Behalf” October 1998 Law Review in *Parks & Recreation* - parents have authority to bind their minor children to exculpatory agreements [i.e., liability release or waiver] in favor of volunteers and sponsors of nonprofit sport activities.)

This public policy in favor of volunteerism is also reflected in a number of volunteer immunity statutes enacted in many jurisdictions which effectively achieve the same legal effect of a valid and enforceable waiver by precluding negligence liability for individual volunteers. Similarly, many jurisdictions have governmental immunity statutes applicable to public parks and recreation which also achieve the legal objective of a valid and enforceable waiver, i.e., no liability for ordinary negligence, only gross negligence.

In contrast to the doctrine of *parens patriae*, several courts have also found that public policy should support parental authority and the freedom to make decisions on behalf of their minor children, including the right to waive their child’s claim for future acts of negligence in exchange for the child’s opportunity to participate in recreational activities.

COMMERCIAL RECREATION

In the case of *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 901 A.2d 381 (N.J. 2006), the issue before the Supreme Court of New Jersey was “whether a parent can bind a minor child to either a pre-injury waiver of liability or an agreement to arbitrate.” In reaching its conclusion, the state supreme court cited the doctrine of *parens patriae*. In so doing, the court found public policy considerations did not support enforcement of a “parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility.”

In January 2003, twelve-year old Andrew Hojnowski was injured while skateboarding at a skate park facility operated by defendant Vans, Inc. (Vans). Andrew suffered a fractured femur when an aggressive skateboarder forced him off a skateboard ramp. Hojnowski alleged that Vans "negligently failed to supervise the activities at the skate park; negligently failed to control activities of aggressive skateboarders; negligently failed to warn his parents that the activities of aggressive skateboarders would not be monitored, and negligently failed to provide a safe place to skateboard."

In response, Vans filed for commercial arbitration with the American Arbitration Association based upon a release that Andrew's mother had executed during a previous visit to the skateboard facility. The release contained a clause agreeing to submit any claims against Vans to arbitration, as well as a provision limiting Vans' liability.

The trial court found that Hojnowski was bound by the arbitration provision and dismissed the lawsuit. The appeals court upheld the arbitration provision, but found “a pre-injury release of liability executed by a parent on behalf of a minor child violates public policy and is therefore unenforceable.” According to the court, the *parens patriae* duty of the judiciary “to protect the best interests of the child” prohibited enforcement of the liability release under the circumstances of this case.

[T]he judiciary must stand as guardians of the State's children... [W]ere the court to decide otherwise, it would be relieving an alleged wrongdoer from its traditional legal responsibility to provide compensation for injuries caused by its negligence and shifting the economic burden to families, public welfare agencies and private charities without any concomitant benefit to either an injured child or his parents.

As a result, the appeals court voided the release. In so doing, the appeals court reiterated the traditional principle that “a parent lacks the authority to sign a pre-tort agreement limiting the liability of a tortfeasor to exclude negligent conduct.” Defendant Vans appealed to the state supreme court to determine “the validity of the pre-injury release of liability.”

PUBLIC POLICY

The specific issue before the state supreme court was, therefore, “whether New Jersey's public policy permits a parent to release a minor child's potential tort claims arising out of the minor's use of a commercial recreational facility.” On appeal, Hojnowski argued that “a parent may not waive a minor child's right to sue for negligence.” The state supreme court acknowledged that “the vast majority of states have held that a parent's attempt to waive a child's prospective cause

of action is void as a matter of public policy.” Moreover, the court noted that “public policy disfavors pre-injury waivers of liability because they encourage tortious conduct by absolving a commercial enterprise of its ordinary duty to exercise due care.”

In response, Vans claimed that parental liability waivers have been "treated in varied fashions by different states." According to Vans, “the more substantial and well-considered decisions favor enforcement of exculpatory agreements based on the fundamental right of parents to raise their children as they decide." Moreover, without enforceable releases, Vans argued that “many activities available to children may be forced to close due to liability concerns." The state supreme court rejected this argument.

In the opinion of the state supreme court “the public policy of New Jersey prohibits a parent of a minor child from releasing a minor child's potential tort claims arising out of the use of a commercial recreational facility.” Reiterating the decision of the appeals court, the state supreme court concluded that “[t]he relevant public policy implicated in this matter is the protection of the best interests of the child under the *parens patriae* doctrine.”

Parens patriae refers to the state in its capacity as provider of protection to those unable to care for themselves. In keeping with that policy, the Legislature and the courts historically have afforded considerable protections to claims of minor children. The most significant of those protections concerns the compromise or release of a minor's post-injury claims...

[A]fter a minor has suffered a tortious injury, a minor's parent or guardian may not dispose of a minor's existing cause of action without statutory or judicial approval... [Similarly,] at the time a parent decides to release the potential tort claims of his or her child, the parent may not fully understand the consequences of that action and may not have even read the waiver before signing.

As characterized by the state supreme court, such liability releases and waiver clauses are “routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance.” Moreover, the court found “[t]he party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage and then shifts the full burden of risk of harm to the other party.”

When a parent signs a pre-injury release of liability and the child is later injured, the parent is left to provide for the child's injuries while the negligent party suffers no liability. If a parent is unable to finance the child's injuries, the child may be left with no resources to obtain much needed care or support...

To allow a parent to release a child's possible future claims for injury caused by negligence may as a practical matter leave the minor in an unacceptably precarious position with no recourse, no parental support, and no method to support himself or care for his injury.

In the opinion of the state supreme court, these public policy concerns were “even more acute in the context of commercial premises liability.” According to the court, “commercial enterprises that attract children” should “take reasonable precautions to protect their safety.” Accordingly, if liability waivers were permitted, the court found it would “remove a significant incentive for operators of commercial enterprises” to provide a reasonably safe environment.

In New Jersey, business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation. That is because business owners are in the best position to control the risk of harm. Ownership or control of the premises, for example, enables a party to prevent the harm. It follows that in this case the risk of loss should fall on the party best suited to avert injury.

The operator of a commercial recreational enterprise can inspect the premises for unsafe conditions, train his or her employees with regard to the facility's proper operation, and regulate the types of activities permitted to occur. Such an operator also can obtain insurance and spread the costs of insurance among its customers.

Children, on the other hand, are not in a position to discover hazardous conditions or insure against risks. Moreover, the expectation that a commercial facility will be reasonably safe to do that which is within the scope of the invitation is especially important where the facility's patrons are minor children.

In light of such public policy considerations, the state supreme court held “a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility is unenforceable.” In reaching this conclusion, the state supreme court noted that “volunteer, community, and non-profit organizations involve different policy considerations than those associated with commercial enterprises.”

Indeed, by invalidating pre-injury releases of liability executed by a parent on a minor's behalf, we are not altering the landscape of common-law tort liability principles by which commercial enterprises typically must abide. Rather, we are preserving the traditional duties owed by business owners to their invitees. Further, as noted, because such facilities derive economic benefit from their operation, they are better able to assume the costs associated with proper maintenance and the prevention of injury than are the children to whom they cater.

In reaching this conclusion, the state supreme court rejected defendant's contention that “a parental release of liability on behalf of a minor child implicates a parent's fundamental right to direct the upbringing of his or her child.”

Although parents undoubtedly have a fundamental liberty interest in the care, custody, and control of their children, the question whether a parent may release a minor's future tort claims implicates wider public policy concerns and the *parens patriae* duty to protect the best interests of children.

ARBITRATION

Having determined that the pre-injury release signed by the parent was unenforceable, the state supreme court then considered “whether a parent can bind a minor child to an agreement to arbitrate future disputes arising out of a commercial recreation contract.” In contrast to pre-injury releases, the state supreme court took note of “the strong public policy favoring the settlement of disputes through arbitration” evident in both state and federal law.

Our Legislature codified its endorsement of arbitration agreements in the Arbitration Act, *N.J.S.A.* 2A:24-1 to -11, which, like its federal counterpart [Federal Arbitration Act (FAA), 9 *U.S.C.A.* §§ 1-16] provides that agreements to arbitrate shall be valid save for “such grounds as exist at law or in equity for the revocation of a contract,”

Further, the state supreme court concluded that the duty of *parens patriae* to protect the best interests of the child” was not violated by “allowing a parent to bind a minor child to arbitrate future tort claims.”

As opposed to a pre-injury release of liability, a pre-injury agreement to arbitrate does not require a minor to forego any substantive rights. Rather, such an agreement specifies only the forum in which those rights are vindicated. The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties...

A parent's consent and release to arbitration only specifies the forum for resolution of the child's claim; it does not extinguish the claim. Logically, if a parent has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum.

As a result, the state supreme court affirmed the judgment of the appeals court and “refer[red] this matter to the arbitrator for further proceedings consistent with this opinion.”