

Understanding Liability Waivers

Eric Eilerman & Dr. Peter Titlebaum

To understand liability waivers, it is first important to have an understanding of some of the legal terms. One important term is "negligence." There are two basic types of negligence—gross negligence and ordinary negligence.

Gross negligence primarily occurs when there is a failure to correct a problem after it has been reported. For instance, an injury that results from a failure to repair a piece of broken fitness equipment after the malfunction had been reported would qualify as gross negligence. The facility or organization will be held liable in the event of gross negligence, regardless of whether a liability waiver has been signed or not.

According to Doyce Cotten, a sports risk consultant, ordinary negligence is "the failure to act as a reasonably prudent professional would act under the circumstances." These circumstances can include broken equipment, safety hazards or accidental bad advice from a professional. For a facility or event, a liability waiver is designed to provide financial protection from this type of negligence. For example, a liability waiver could prevent a facility from being sued if a person breaks their leg because a treadmill suddenly stopped working.

While waiver law is pretty straightforward when applied to adults, there is quite a bit of leeway in the law when it is applied to minors. Liability waivers are typically viewed as a contract. Minors, however, are unable to legally sign a contract and are therefore not bound by the waiver. This leaves a facility liable for all negligent acts regarding minors and leaves them open to a lawsuit either by the parents of the child or from the child himself after he reaches the age of 18.

Many facilities now protect themselves by having a parent or guardian co-sign the waiver along with the minor. The facility believes that the parent is signing away the rights of the minor and "promising" the facility that neither the parent nor the minor will file any legal action against the facility. This concept, however, is not usually enforced by the courts.

An interesting case occurred in 1996 in Michigan when a 10-year-old girl was injured when another child jumped into a swimming pool on top of her. The mother agreed not to sue in exchange for a \$3,275 settlement with the YMCA where the injury occurred. However, when the girl turned 18, she filed a lawsuit against the YMCA. The court ruled that the parent "had no authority, merely by virtue of being a parent, to waive, release or compromise claims by or against the parent's child." In other words, the mother did not have the legal authority to sign away the child's rights, and the YMCA was still liable for the negligent act.



~ continued ~



Understanding Liability Waivers

..... Key Legal Terms

Liability: when a facility is held responsible for its actions.

Gross negligence: when there is a complete disregard for the safety of customers.

Ordinary negligence: can occur when an injury results from unreported broken equipment, safety hazards or accidental bad advice.

Liability waiver: designed to protect a facility from a lawsuit in the event of ordinary negligence.

Agreement to participate: another form used by facilities, it does not provide a facility with liability protection, but does often outline the typical rules and expected behaviors, as well as outlining potential risks.

Another example took place in 2002 when the Colorado Supreme Court ruled that a ski resort was liable for negligence in the case of a 17-year-old boy. The boy crashed into a tree while skiing in 1995 and was blinded. Although the boy's mother had signed a liability waiver, the court stated that there are "significant protections" in Colorado that prevent a parent or guardian from signing away the rights of a minor and their ability to sue for negligence.

However, it should be noted that at least six states (California, Florida, Massachusetts, North Dakota, Ohio and Wisconsin) have upheld a waiver that was signed by at least one parent or guardian. Therefore, while liability laws vary from state to state, many clients are encouraged to pursue lawsuits against the negligent facility or event since the vast majority of states will hold them liable, with or without the signature of a parent or guardian.

Facility directors should be aware of this, and should also encourage parents to read and understand liability waivers before signing them. If they simply sign their name on the form without reading, they are limiting the chance of collecting a settlement in court if something does go wrong.

Train your staff members on liability waivers, too. After the parent reads the waiver, if there is something that they don't understand, they should be able to ask someone affiliated with the organization about it. This person should be able to explain what each section of the waiver means and how it applies to their particular facility.

If they are unable to explain the waiver, it may be because the waiver is too vague and therefore might not be a valid contract. There have been multiple court cases where a facility or event was held liable because the liability waiver was too confusing or not easily distinguishable from other legal information.



~ continued ~



Understanding Liability Waivers

~ continued ~

5 Important Tips Regarding Liability Waivers & Children

A liability waiver signed only by a minor is not a valid contract.

Most courts have ruled that a parent cannot sign away their child's right to sue for negligence.

Only six states have upheld a waiver signed by a minor and a parent.

Encourage parents to read and understand what the waiver says before they sign it.

Provide a staff member who can explain key points.

Agreement to participate forms and permission slips do not grant liability protection to a facility.

For example, in a 1998 Arizona case, a 10-year-old girl was injured when attempting to move a horse at a local stable. Although her father had signed a liability waiver, the court ruled that the waiver was not clear and was not specific enough to protect the facility.

Finally, know that parents are not obligated to sign the waiver. If they refuse to sign, you then have the option of limiting the child's ability to participate in an activity.

Not all "waivers" are the same. There are several different types of forms besides or in addition to a liability waiver. One frequently used form is the "agreement to participate" form. Essentially, this form will warn the participant of the inherent risks of an activity and inform the person of the expected behavior. This form by itself will not prevent a facility from being liable, but when used in conjunction with a liability waiver, it can strengthen a facility's case in the event of a lawsuit.

Another form used particularly with minors is the permission slip. This slip typically serves as an informational document and does not provide any liability protection. In order for a school or facility to have liability protection, they would need to include a liability waiver along with the permission slip.

When it comes to liability waivers, it is extremely important to encourage parents to do more than just sign the form. By being informed of what the waiver says, they will know what options they have in the unfortunate event that a negligent act causes injury. And, by encouraging parents to know what the liability waiver means, you are demonstrating that you care about safety at your facility.

Facility owners would be well advised to consult with a lawyer well-versed in this area to ensure their liability waivers are as effective as possible.

Eric Eilerman is student at the Villanova University. His past experiences include interning with the Dayton Dragons professional baseball team and University of Dayton Sports Information Department.

Dr. Peter Titlebaum is associate professor of Sport Management at the University of Dayton in Dayton, Ohio. He has over 20 years' experience in management in the profit, nonprofit, private and public sectors.

