Waiver, Release, Exculpatory Contract

Torts I

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- I'm calling this topic "**Waiver**" in the course outline, but the terms "**Release**" and "**Exculpatory Contract**" are commonly used in the cases.
- Whether "waiver," "release," or "exculpatory contract," we are talking about the idea or theory that the defendant should be off the hook (i.e., have an affirmative defense), based on the fact that the plaintiff's agreement/intent ahead of time not to pursue a claim.
- Varying jurisdictions might draw distinctions between "waiver," "release," and "exculpatory contract."
- In fact, the law here gets pretty messy, confused, and unclear in the case.
- At any rate, I'm going to treat this as one theory of affirmative defense and call it "**waiver**" here.

According to a sports insurance specialist and risk manager:

"A waiver/release agreement has two primary protective purposes: 1) "Contractual Exculpation" which uses contract law principles (waiver/release is a contract) to excuse a sports organization for its simple negligence and 2) provides "real evidence" of the sports organization's warning of inherent and other risks thereby triggering the common law Assumption Of Risk (AOR) defense under tort law."

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Notice that waiver is a distinct theory from assumption of risk.

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What area of law are we in?

- Assumption of risk is a doctrine of tort law.
- Waiver/release/exculpatory contract comes from outside of tort law.
  - Waiver can be considered a doctrine of equity.
  - The phrase "exculpatory contract" signals that this is being considered a doctrine of contract law

A bit of background on equity …

- In pre-1776 England*, there were two separate corut systems, "courts of law" and "courts of equity."
- Courts of law worked on precedent, had juries, awarded damages as well as some limited non-damages remedies.
- Courts of equity worked on broad principles of fairness, didn't have juries, awarded injunctions and non-damages-based monetary awards like restitution. Their authority derived from the king/ queen.
- Today, almost all American courts are unified – they deal in both legal and equitable claims and remedies.

**What happened after 1776 we don't care about so much, because American law separated at that point.*

Ramifications for validity in a given case:

- The validity of assumption of risk depends on the tort doctrine.
  - And it doesn't need contractual validity (for instance, no consideration is needed!).
- The validity of an equitable defense of waiver depends on fairness.
  - And it doesn't need contractual validity (for instance, no consideration is needed!).
- The validity of a defense based on an exculpatory contract depends on contractual validity.
  - That means you need offer-and-acceptance and consideration!

- But in real cases, courts are often unclear about whether the are talking about an affirmative defense of assumption of risk (tort doctrine), waiver (i.e., as a theory of equity), or some contract-based entitlement (that requires applying contract law).
- **It's super frustrating!!**
- But the real world is filled with "waivers to sign" …

Some key takeaways for you: (1/3)

Where the plaintiff has signed some kind of agreement before visiting some place or engaging in some recreational activity:

- One way it can have legal force and create a winnable affirmative defense is through assumption of the risk doctrine.
  - For this to work, the elements of assumption of the risk must be met.
- A separate way, outside of tort doctrine, is a contractual and/or equitable theory that the plaintiff agreed to give up the right to sue.
  - For this to work, you'll need fairness for a equitable theory
  - or consideration and other necessities of contractual validity for a contractual theory

Some key takeaways for you: (2/3)

- Courts may gloss over the doctrinal distinctions and uphold an affirmative defense based on a preference for upholding a broad principle of freedom of contract.
- No matter what, courts may reject you-signed-something defenses (regardless of type), for any of the following reasons:
  - Public policy grounds.
    - Rejection more likely where the business is more of a necessity.
    - Rejection less likely where the business is more of about leisure.
    - Rejection more likely where bargaining power was unequal.
    - Rejection more likely where offered on a take-it-or-leave-it basis.
  - Plaintiff's lack of understanding of the document or its effect.
  - Plaintiff's lack of appreciation of the danger involved.
  - The negligence is more than ordinary negligence (e.g., gross negligence, "extreme" negligence).

Some key takeaways for you: (3/3)

- Expect courts to be unclear and doctrine to be confused and therefore often manipulable in any given case.
- Understand that waive-release-assumption-of-risk documents can have real-world force even without legal force because they may discourage people from pursuing a claim.