



Waivers, Releases, Exculpatory Contracts, and Assumption of Risk Documents

Torts
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Now why did I make this (fairly long) slide show?

- Assumption-of-risk/waiver/
release/exculpatory-contract documents are
ubiquitous in our society!
- They are part of torts in the real world!
- They are mysterious! (Once you've learned a
little tort law, they tend to be more
confounding, not less!

Imagine this conversation at
the indoor rock-climbing place ...

“Why do I have to sign this?”

*“Because if you hurt yourself, we don’t want to get
sued.”*

“Oh, okay.”

Imagine this conversation at
the indoor rock-climbing place ...
after you’ve taken Torts ...

“Why do I have to sign this?”

*“Because if you hurt yourself, we don’t want to get
sued.”*

**“Oh, okay. No — wait a minute! I can’t sue you for
hurting myself. But I would be able to sue you if
you failed to undertake the care that a reasonable
indoor rock-climbing place would. Were you
planning to fail to use reasonable care?”**

*“Look, it’s lawyers and stuff. You wanna rock climb
or not?”*

Our questions today:

- What are those things they make you sign at the trampoline/ indoor-skydiving/rock-climbing/ etc. place?
- What legal effect do they have (if any) and why?
- What practical effect do they have?

Some initial observations:

- This slideshow concerns defenses – *waiver*, *release*, and *exculpatory contract* - not explicitly covered in the casebook, but this material should be considered alongside *assumption of risk*, which is covered in the casebook.
- Whether "waiver," "release," or "exculpatory contract," we are talking about the idea that the defendant should be off the hook (i.e., have an affirmative defense), based on the fact of the plaintiff's agreement or intent not to pursue a claim.
- Various jurisdictions might draw distinctions among waiver, release, and exculpatory contract, or they might consider them to be overlapping or different labels for the same thing.
- Courts may also mash any or all of these things together with assumption of risk.
- The fact is, the law gets pretty messy here. Reading the cases tends to reveal doctrine that is unclear and confused.

Quick review: affirmative defense of assumption of risk

- **What are the elements of assumption of risk?**
 - **Knowledge/appreciation:** The plaintiff must actually know about and appreciate the risk, including severity/nature. This is (at least theoretically) subjective.
 - **Voluntariness:** The plaintiff must encounter the risk in a truly voluntary way, having had a genuine choice not to do so. Having to forgo a legal right isn't truly voluntary (*Marshall v. Ranne*).
- **What is a huge limitation on the enforceability of express assumption of risk agreements?**
 - **Public policy** (*Tunkl v. U.C. Regents*)
 - **Name examples of places where public policy almost certainly will prevent enforcement:**
 - Hotels, grocery stores, hospitals, doctors, etc., on the basis of public policy (people's need for access).
 - **Name two examples on the fence:**
 - Skiing (AOR void in Vermont); fitness center (AOR upheld in Maryland).

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 this sees assumption of risk as a distinct theory from waiver / release / exculpatory contract.

But waiver, release, and exculpatory contract can be thought of as separate theories themselves.

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Note: This statement ("waiver/release is a contract") is not true. Waiver and release are things that can be subjects of a contract, just as land, money, and promise of future labor can be subjects of a contract. But a promise of future labor, by itself, is not a contract. Same goes for waiver and release.

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The point of showing you this is to show you how this stuff gets mushed up and shuffled around in the real world.

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- Waiver / release / exculpatory contract come from outside of tort law.
 - Waiver can be considered a doctrine of equity.

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Let's stop and talk
about equity for a
second ...

A bit about equity ...

- In pre-1776 England*, there were two separate court systems, "courts of law" and "courts of equity."
- Courts of law worked on precedent, had juries, and awarded damages as well as some limited non-damages remedies.
- Courts of equity worked on broad principles of fairness, didn't have juries, and 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.

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**What does this mean for us?
Most saliently, it means that if something is "equitable," it won't be decided by a jury. Also, there can be leeway to explicitly argue fairness.**

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 - A release ...

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What is the difference between a "waiver" and a "release"?

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- These terms are sometimes used interchangeably.
- People tend to say "waiver" in a before-the-fact context.
 - E.g., a suspect "waives" their right to counsel.
- People tend to say "release" in an after-the-fact context.
 - In a settlement, the plaintiff gets money in exchange for a "release" of claims.
- So why, in a trampoline-park-type context, is it "waiver and release"?
 - Maybe it's "belt-and-suspenders" drafting. (And once legal language gets grooved-in, drafters/lawyers are often averse to removing or changing it.)

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 - Waiver can be considered a doctrine of equity.
 - The phrase "exculpatory contract" signals that validity and effect depends on contract law.
 - A release can be thought of as a thing being exchanged via a contract.
 - E.g.: In exchange for money (or something else of value), I release the legal claim I had or might have against you.
 - But a waiver can also be thought of as something exchanged via a contract, since waiver and release often are used as synonyms.

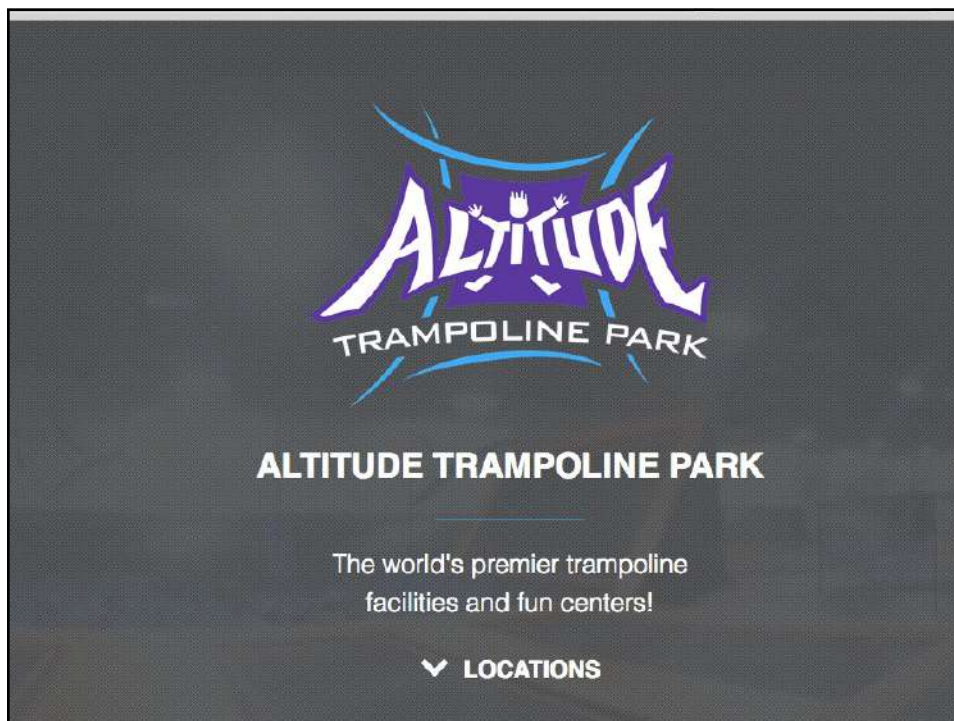
Ramifications for validity in a given case:

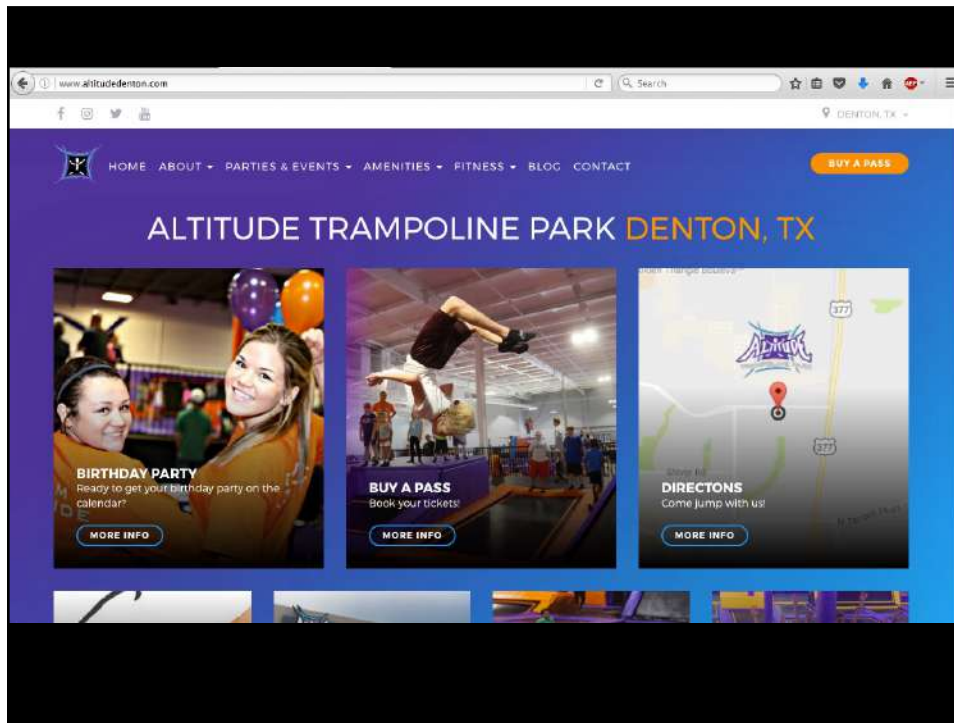
- The validity of assumption of risk depends on the tort doctrine.
 - And it doesn't need contractual validity (for instance, no consideration is needed!).
- The validity of an equitable defense of waiver depends on fairness.
 - And it doesn't need contractual validity (for instance, no consideration 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!

All the contract law you need to know (at least for torts 😊) ...

- To be legally binding (i.o.w., to be the basis of a suit for breach of contract), a putative contract must have:
 - Offer and acceptance
 - Meaning one party offers to enter into a contract with another party, and the other party accepts.
 - Consideration
 - Meaning each party gets something of value out of the contract that they didn't have before (services to be rendered in the future, money to be paid in the future, etc.).
 - A key point in Contracts is that purely donative promises generally are not enforceable via contract law. (I promise to mow your lawn next Tuesday, and in return you promise me nothing and give me nothing. If I don't mow your lawn, you can't sue me for breach of contract.)

- But in real cases, courts are often unclear about whether they 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" ...





VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC – ALTITUDE TRAMPOLINE PARK
 PARTICIPANT AGREEMENT
 WAIVER, RELEASE AND ASSUMPTION OF RISK

PARTICIPATION IN TRAMPOLINE COURT ACTIVITIES ENTAILS KNOWN AND UNANTICIPATED RISKS THAT COULD RESULT IN PHYSICAL AND/OR EMOTIONAL INJURY, PARALYSIS, DEATH OR DAMAGE TO YOUR SELF AND/OR TO OTHERS. RISKS MAY INCLUDE, BUT ARE NOT LIMITED TO, SLIPPING AND FALLING, COLLISIONS WITH FIXED OBJECTS AND/OR OTHER PEOPLE WHICH MAY RESULT IN SPRAINS, FRACTURES, BREAKS, SCRAPES, BRUISES, DISLOCATIONS AND INJURIES TO HEAD, BACK AND NECK.

In consideration of the services provided by VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC, a Texas limited liability company, who is the owner and operator of ALTITUDE TRAMPOLINE PARK (the "Park") and my desire to spectate and/or participate in the activities and services provided by VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC at the Park (*Vertical Trampoline Park Enterprises, LLC and its individual members, managers, directors, officers, agents, employees, volunteers, representatives, servants, predecessors, successors, assigns, affiliated entities, heirs, personal representatives and all other persons, firms, or entities claiming by or through them are hereinafter known as "Vertical"*);

I, _____ (*print name*), on behalf of myself, my spouse, my child(ren), minor child for whom I am appointed guardian, my parent(s), my heirs, assigns, personal representative and estate hereby:

(a) agree to use the Park and its facilities in a safe and responsible manner;

(b) agree to abide by the Park rules and instructions and the directions of Park employees and representatives, whereby I acknowledge that (i) those rules, instructions and directions are intended to promote the safety of both myself and others; (ii) my failure or refusal to abide by those rules, instructions and directions can lead to the immediate revocation of my right to use the Park and its facilities, without any right to refund of any payments made; and (iii) in the event of sickness, accident or injury, I authorize the Park employees and representatives to obtain, on my behalf, emergency medical treatment and to secure such medical treatment at my expense;

(c) agree to fully and forever waive, release and discharge Vertical from any and all claims, actions, causes of action,

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I, _____ (print name), on behalf of myself, my spouse, my child(ren), minor child for whom I am appointed guardian, my parent(s), my heirs, assigns, personal representative and estate hereby:

- (a) _____
- (b) I acknowledge that I understand the rules, instructions and directions of the Park and its facilities, and I agree to abide by those rules, instructions and directions. I agree to use the Park and its facilities at my expense; _____
- (c) _____

For exemplar documents, I'm not going to read everything out loud ... I'm focusing on things with the orange arrows ...

I acknowledge that (i) those rules, instructions and directions are intended to promote the safety of both myself and others; (ii) my failure or refusal to abide by those rules, instructions and directions can lead to the immediate revocation of my right to use the Park and its facilities, without any right to refund of any payments made; and (iii) in the event of sickness, accident or injury, I authorize the Park employees and representatives to obtain, on my behalf, emergency medical treatment and to secure such medical treatment at my expense;

- (c) _____ agree to fully and forever waive, release and discharge Vertical from any and all claims, actions, causes of action, demands, judgments, damages (including compensatory, general, special, consequential, exemplary and punitive), liability or obligations of any nature or kind, whether known at the time I leave the Park or which may arise or become known later, which accrue on account of, or in any way arise out of or in connection with: (a) my activities within the Park; (b) the activities within the Park by others; (c) the operation of the Park by Vertical; (d) my use of any and all of the Park facilities; and (e) my use of any and all equipment within the Park, whether owned by me, Vertical or a third party;
- (d) _____ agree to indemnify and hold Vertical harmless from and against any and all losses, liabilities, claims, obligations, costs, damages, and/or expenses whatsoever, including, but not limited to, any and all attorneys' fees, costs, damages and/or judgments directly or indirectly arising out of, or relating to my acts or omissions while participating in any activities at the Park;
- (e) _____ agree to accept and assume all of the risks which accompany the Park's activities and represent that my participation in the activities is purely voluntary and I elect to participate in the activities notwithstanding the risks;
- (f) _____ fully understand that participating in the activities within the Park involves physical exertion; and accordingly represent that I (i) am in sufficient good health to participate in activities within the Park; (ii) I do not have any pre-existing physical or medical condition, including without limitation pregnancy, orthopedic problems, including back problems; heart problems; and/or breathing problems, that might be impacted or worsened by my use of the Park; and (iii) will not use the Park and its facilities while under the use of any drugs, alcohol or medications that may impair my physical abilities or judgment; and,
- (g) _____ certify that I have adequate insurance to cover any injury or damage I may cause or suffer while participating in the activities within the Park, or if not, I agree to bear the costs of such injury or damage to myself and others.

I agree that any legal proceeding shall be filed solely in the state of Texas and I further agree that the substantive law of Texas shall apply in that action without regard to the conflict of law rules of that state. I agree that if any portion of this agreement is found to be void or unenforceable, the remaining portions shall remain in full force and effect.

By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have waived my right to maintain a lawsuit against Vertical on the basis of any claim from

Where we're at ...

- You should understand the conceptual distinctions among:
 - assumption of risk as an affirmative defense and a doctrine of tort law
 - a valid release as something exchanged in a binding contract
 - a waiver upheld as an equitable matter
- But because the law gets so doctrinally confused in this area, it's important to understand this from a practical/general perspective ...

Practicalities/Generalities

- Waiver/release/assumption-of-risk/etc. documents can have practical effect by discouraging would-be plaintiffs from suing or seeking legal counsel in the first place.
- Courts often seem compelled to side with the defendant where there's a waiver/release/assumption-of-risk/etc. document out of a sense of respecting individual liberty and freedom of contract.
- Courts often seem compelled to side with the plaintiff where there's a waiver/release/assumption-of-risk/etc. document because of concerns about fairness, expectations, public policy, and/or a lack of meaningful choice.
- These sorts of defenses generally will not work in cases of gross negligence or intentional actions (i.e., beyond "ordinary negligence.")

Some key takeaways: (1/3)

Where the plaintiff has signed some kind of form 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 an equitable theory
 - or consideration and other necessities of contractual validity for a contractual theory

Some key takeaways: (2/3)

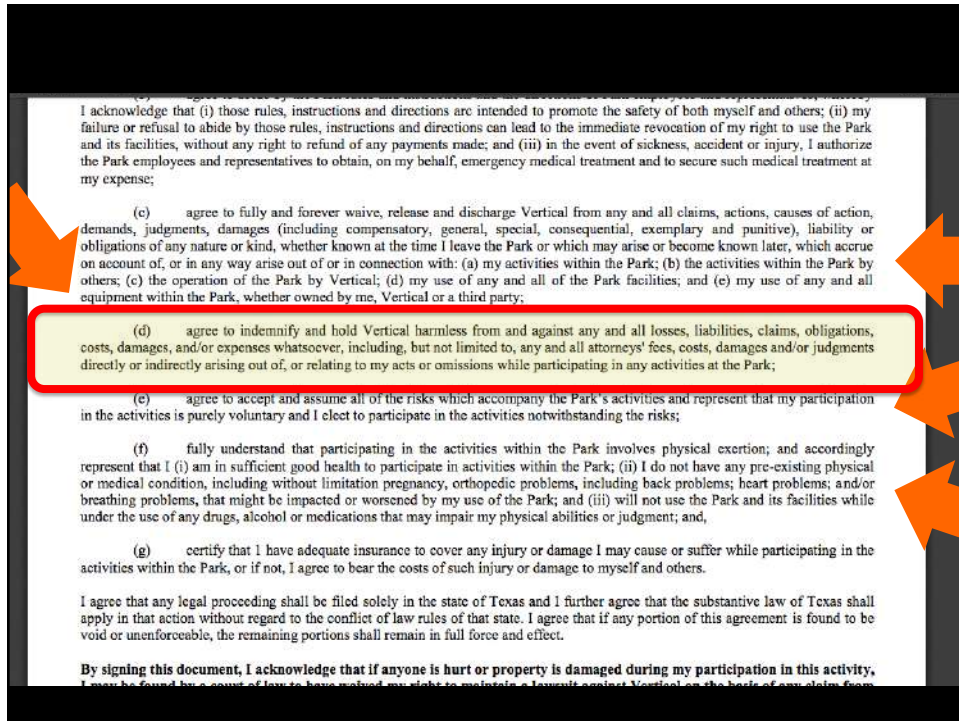
- Yet courts may gloss over the doctrinal distinctions and uphold an affirmative defense based on a broad principle of freedom of contract or the idea of an individual having made a choice that should be binding.
- No matter what, courts may reject you-signed-something defenses (regardless of type), for any of the following reasons:
 - Public policy grounds
 - Rejection is more likely where the business is viewed as a necessity.
 - Rejection is less likely where the business is viewed as leisure.
 - Rejection is more likely where bargaining power was unequal.
 - Rejection is 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 at issue being more than ordinary negligence (e.g., gross negligence, "extreme" negligence)

Some key takeaways: (3/3)

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

One more thing: Indemnification

- We didn't even talk about indemnification clauses in these sorts of documents.



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- We didn't even talk about indemnification clauses in these sorts of documents.
- We will talk about indemnification later in the course – but know that in waiver/release/assumption-of-the-risk-type documents, having the signer agree to indemnify the business is yet another way to discourage or repel negligence lawsuits.

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Now you have some answers to these questions. Those answers aren't necessarily clean, crisp, and convenient. But that's the real world.