

# Waivers of Liability, Explained<sup>1</sup>

A waiver/release agreement has two primary protective purposes:

1. Contractual exculpation, which uses contract law principles (waivers and releases are contracts) to excuse a sports organization for its simple negligence; and
2. Providing 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.

## Excusing Negligence

A waiver/release is an exculpatory contract that attempts to excuse or relieve a party, for injuries to a participant that arise out of the known and unknown risks in an activity. This includes the inherent risks that arise from the sports organization's ordinary negligence. Waiver/release documents are interpreted by the courts using contract law principles.

A waiver/release will only be upheld if all of the following conditions are satisfied:

1. The injury arises from risks stated in the waiver/release contract (here we will often see language of "known and unknown risks" and discussions of the inherent risks of an activity), or from the sports organization's simple negligence.
2. The waiver/release is properly drafted or worded according to the law in the state of the sports organization.
3. It does not violate any state laws or public policy.

If all of these conditions are met, the use of a waiver/release may result in the lawsuit being dismissed on summary judgment. Summary judgment concludes litigation early in the process.

## Excusing Negligence Under Contract Law

### When the Injured Party is an Adult

The laws regarding adult waiver/releases vary from state to state. As far as adult injuries are concerned, waiver/releases can be very effective and may result in lawsuit dismissals in most states as long as the three above-listed conditions are satisfied.

### When the Injured Party is a Minor

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<sup>1</sup> Source: *Sadler Sports and Recreation Insurance*; <http://www.sadlersports.com/riskmanagement/sports-insurance-waiverrelease.php>

Laws regarding minor waiver/releases also vary from state to state. However minors are not legally competent, which means they aren't seen as capable of entering into a binding contract such as a waiver/release. Therefore, the only way for a minor to be bound for purposes of contractually excusing negligence would be through a parent's signature on the waiver/release. Even then, most states will not allow a parent to contractually waive their minor children's right to sue for a sports-related injury.

This is a developing area of the law that is undergoing constant change. The same three conditions that apply for upholding adult waiver/releases also apply to parental waiver/releases. In addition, the language in the waiver/release will be scrutinized under the same degree of strictness as indicated under adult waiver/releases on a state-by-state basis.

A parental waiver/release may be upheld in a minority of states.

## Assumption of Risk (AOR) as a Defense to Negligence

The second protective purpose of a waiver/release is to trigger the assumption of risk (AOR) defense under tort law. In other words, it's to provide evidence that the sports organization gave adequate warnings of the risks so that an argument can be made that the participant assumed those risks. In order to trigger the AOR defense to a negligence lawsuit, a waiver/release should contain the proper assumption of risk language. However, one can also demonstrate assumption of risk by having evidence (usually in the form of other witnesses) of other types of warnings such as signs, brochures, verbal instructions and safety briefings.

The waiver and release should specifically mention the types of risk that are assumed (known and unknown) and the worst-case injury scenarios (permanent disability and death). It is also important to note that courts will often only apply the AOR defense to inherent risks of the activity. Inherent risks are those that the organization will simply not be able to control, regardless of their best efforts (ex: in baseball, being hit by a pitched ball).

With minors and the AOR defense, the minor must be capable of understanding the risks and must sign the assumption of risk portion of the waiver/release. Just like with adults, you can demonstrate assumption of risk by both the language in the waiver/release and by the verbal instructions or safety briefings given. Many courts have ruled that a 7-year-old child may be capable of understanding the inherent risks involved in an activity if adequately explained. It is also helpful if the parent signs a statement that they have explained the risks to the child.

A successful AOR defense may or may not result in a lawsuit being dismissed on summary judgment. If not, AOR defense can come into play much later in the legal proceedings when evidence is being introduced before a trier of fact.