

What happens if the diver complains about the language of the release? I frequently line out the offending language on releases and the operators seldom object.

Do these operators really understand what they are asking the diver to give up. Did some non-diving lawyer somewhere prepare the strongest release imaginable for the operators to pass on without thinking? Well it is time the operators became more responsible. It is time that divers started objecting. It is time the so-called consumer organisations insist that these releases be more fair and reasonable.

I have been aboard two of the boats criticised here. The actual operation of these boats does not reflect the lack of responsibility indicated in the releases. The boats were safety conscious and well run. I doubt they would supply a defective regulator or an incompetent captain, but they need to rethink their releases.

Diver/author Robert Ewald is an attorney in Louisville, Kentucky, who normally represents the defendant, not the plaintiff. As an avid diver who loves the sport he wants to share the view from the other side.

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HOW DO YOU SPELL RELEASE ?

ASSUME RESPONSIBILITY, BUT DON'T SIGN AWAY YOUR RIGHTS

Dear *Undercurrent*

The article in your October 1993 issue, "Your Life Is in the Hand of God If You Sign That Liability Release," cited a couple of examples where the courts in Washington and Wisconsin sided against plaintiffs who had signed releases. If I sign such a wavier in the state of California, am I signing away all of my legal rights even if the boat owners or the dive operation is negligent?

This all comes up now, for me, after a recent unfortunate hassle with the divemaster on a local dive boat, the *Atlantis*. For some time, I have been crossing out waiver provisions with which I couldn't agree. In this case, the divemaster saw me start crossing out lines on the *Atlantis* waiver and asked what I was doing. When I told him, he responded that I would either sign the release as it was written or get off the boat. In view of the blatant legalese relieving the boat of any and all threat of action even in the event of their negligence or unseaworthiness, I opted not to sign and was denied passage.

The following Monday, I called up the owner of the boat to discuss the matter. He pooh-poohed my concerns, saying that in the state of California "no one can sign away their rights." I asked him why did he bother then, and he had two answers. One was that it discourages frivolous lawsuits, and the other was that his insurance carrier required him to do this. He also refused to return my money for the trip since, in his opinion, I had voluntarily gotten off the boat.

Since that time, I have solicited an opinion from an attorney who specialises in personal injury liability appeals for a plaintiff firm and got some discouraging advice. He indicated that in view of the trend toward more conservative judgments in the courts and more comprehensive language in the releases, a plaintiff would have much less than a 50 per cent chance of recovering for loss or injury after having signed a liability waiver.

Cory L Gray, Long Beach, California

Since our initial article on waivers in the October 1993 issue of *Undercurrent*, Captain Preston Colby of the US. Merchant Marine sent us a copy of federal law, Title 46, Section 183(c), passed in 1992. In essence, it states that waivers that try to void or limit the responsibility of the owners (or those working for the owners) for negligence are unlawful and have no effect. However, the law is limited to vessels operating from United States ports. It is also limited in that it does not cover anything outside the duty of a common carrier. Diving most likely would fall into a category outside the duty of a common carrier.

A recent decision (Nov 1993) in the state of Washington confirms Mr Gray's suspicions that most waivers, including those that release the operator from responsibility for his own negligence, are being upheld in court. In this case, an instructor took inexperienced divers using dry suits for the first time to 30 m (100 ft) on tanks containing only 1,600 pounds of air. The divers ran out of air, and one died. Because the divers had signed a waiver before diving, the wrongful death suit was denied. Without the release, the instructor probably would have had some liability.

The author of our original article in the October 1993 issue, Robert Ewald, who is a diver and an attorney in Louisville, Kentucky, has drafted a release that he believes is fair to both the diver and the operator. We've reprinted it on the following page so that you can use it in advance to negotiate with any operator whose release seems overly inclusive.

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LIABILITY AGREEMENT

I am a certified scuba diver, trained in safe diving practices, and the purpose of my diving activity is strictly recreational. In consideration for engaging in diving activities with I certify, acknowledge, and agree to the following, each paragraph of which I have initialled:

I recognise and understand that diving involves unavoidable risks and dangers, including malfunctions of equipment, risks due to environment, animal or sea life, risks due to currents and other changing conditions, all of which can result in injuries and loss of life, and I expressly assume such risks;

I affirm that I am in good mental and physical condition for diving, but I understand that diving is a physically strenuous activity, that I will be exerting myself during this dive excursion, and I expressly assume the risk of such activity;

I will not dive under the influence of alcohol or drugs; any medication I am taking is solely my responsibility, based upon consultation with physicians who have approved its use while diving;

I understand that even if I follow all of the appropriate dive practices, there is still some risk of sustaining heart attack, decompression sickness, embolism, or other hyperbaric injuries, and I expressly assume the risk of such injuries or illnesses;

I agree to follow the recognised and established safety practices associated with scuba diving, but I realise that even though such practices are observed there is still a risk of accident or injury, and I expressly assume such risks;

I understand that diving with compressed air involves certain risks and that diving activities are often conducted under circumstances where medical attention is not immediately available, and I expressly assume the risks involved in diving under such circumstances;

I acknowledge that I alone am responsible for my own activities while engaging in scuba diving and I cannot rely upon anyone else to advise me of my own improper or unsafe procedures and practices while diving. I will exercise care in my own activities while engaging in scuba diving and I assume full responsibility and liability for injury or harm which occurs as the result of any lack of good care on my part.

Name (type or print legibly)

Signature

Date

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**DIVING SAFETY
WHOSE RESPONSIBILITY ?**

John Lippmann and Tom Wodak

For many years providers of services in the United States, whether they be doctors, dentists, or members of other professions, have been sued over dissatisfaction with a service provided. Scuba diving instructors and suppliers of diving equipment and tours have also been subjected to such damages claims. Despite some delay in following this trend, Australians have also begun to sue. Often when there is a mishap, a search for someone to blame begins.

An obvious target for blame, rightly or wrongly, is the provider of instruction, equipment, or a service. If the provider is believed to be insured, there may be a greater incentive to pursue a claim. In the hands of an industrious and aggressive lawyer, a painstaking scrutiny of the available evidence can result in at least an arguable case against the provider. The person claiming to have been injured, or the family of someone killed will often have the psychological advantage of sympathy in court proceeding.

Whilst the provider being sued may have been at fault, whether substantially or to a minor extent, what is often lost sight of is that the "victim" may have also contributed to, or even caused the mishap. However, if there is an available scapegoat, it is increasingly likely that a claim, and perhaps litigation, will follow.

The purpose of this article is not to suggest that legitimate claims should not be made. Nor is it suggested that providers of services should not do so responsibly, morally and legally. Rather, the emphasis is on the need for everyone concerned, consumer or provider, to acknowledge that each has a role in safeguarding life and limb.

Mishaps sometimes occur without anyone being at fault or negligent. On occasions, the cause of the incident is obvious and the person(s) responsible easily identifiable. In the quest to find (the truth) fault with any party involved, the conduct of every participant including the consumer should be examined.

What follows is an analysis of two diving fatalities, each of which has resulted in consideration of the facts by a legal tribunal. The first case involved a coronial inquest