

YOUR LIFE IN THE HAND OF GOD IF YOU SIGN THAT LIABILITY RELEASE

Robert Ewald

David Reuther was going diving in the Cayman Islands. On the way to the dive site, the charter boat he was on encountered a huge wave and he was injured. A federal court in Indianapolis applied British law and allowed him to pursue his claim for negligence, because the release he signed did not waive his rights arising from careless operation, although it did cover diving-related activities. Had Mr. Reuther's injury occurred while he was actually diving, he would have had no claim, no matter how grievous the fault.

Don Hewitt was taking an advanced open water scuba course when he disappeared in Puget Sound. No trace of him or his diving equipment was ever found. His heirs attempted to bring suit against the instructors, claiming fault on their part. A Washington appellate court found that Hewitt had signed a release in which he gave up all rights against the instructors, no matter how careless they were; therefore, no suit could be maintained.

Susan Mitchell drowned after becoming entangled in underwater guide lines set up by her instructor while participating in an advanced scuba course. A Wisconsin appellate court held that the release she signed, supplied by PADI, absolutely prevented her or her estate from bringing any claim for negligence against her instructor.

These cases demonstrate that releases divers sign are probably enforceable according to their terms, at least as to claims of fault resulting from carelessness or negligence. Many of these releases, which divers sign without reading carefully, provide for waiver of virtually all rights which a diver may have for injuries or even death resulting solely from the fault or misconduct of the dive operator.

I have reviewed copies of releases used by several live-aboard dive operators, some of which call for complete and total release of all rights. Several releases are unconscionable, demonstrating a callous disregard for the rights of divers who sign them. Some operators wait until after the diver has paid all fees and is aboard the boat before demanding execution of such a release. This is totally unfair for it leaves the divers without a choice.

The release used by one large live-aboard operator provides that the diver waives absolutely all claims that may arise against the operator, no matter how serious the fault. Even though death may result, the live-aboard will completely deny any responsibility. Furthermore, they even deny all liability if their boats are unseaworthy. For example, if they do not properly maintain safely equipment

and the boat explodes or burns, maiming or even killing the passengers, the live-aboard is relieved of any liability. Likewise, if they fill a tank with bad air, which you don't discover until 140 feet down on the Blue Hole dive, they will pay nothing even though you could prove the bad air that caused your injury was solely their fault.

Another leading live-aboard operation is no different. Their release provides for a complete waiver of all claims. Although the release does not specifically deny liability for an unseaworthy boat, it does something just as bad. It provides that equipment is rented "as is". It specifically places the burden on the diver to inspect the equipment and denies any responsibility whatsoever for any defect. Unless you are trained to detect hidden defects in a regulator, don't rent one from them for they refuse to stand behind the quality of what they supply. You might expect this from a used car dealer, but not from a well respected live-aboard operator. If your rented regulator fails solely because of sloppy maintenance and you die, they can hide behind the release and say "tough luck to your wife and kids, I rented the regulator as is and it's your responsibility to find the hidden defect."

How about another top live-aboard? They also demand a release in which the diver agrees to waive all claims. If the operator hires an incompetent captain who runs the boat aground and a diver is killed or injured, the live-aboard will deny all liability because you signed their release. "We're sorry our captain got drunk, but don't expect us to pay for the damages. We're no Exxon and this wasn't the Valdez".

It gets worse. According to the release form, if someone else sues the live-aboard, it may recover its costs from everyone who signed such a release. It is true! The divers all agree to reimburse the live-aboard for "any and all claims...by whomever or wherever made or presented." While it is doubtful that such a clause could be enforced, it suggests that many dive operators have no respect for divers' legal rights and will seek to take advantage of their customers to the maximum extent possible in order to minimize the costs of their own mistakes. The live-aboard operator will allow exclusion of this last clause if the diver complains. The live-aboard operator also advises they are in the process of changing their form.

Is there anyone out there who attempts to be fair? Yes! The operators of the *Little Cayman Diver*, in a short straightforward and understandable document ask the diver to agree to take responsibility for his or her own safety and not hold the operator liable for accidents occurring in the normal course of diving. This does not release the operator from liability for its own fault. Congratulations to this dive operation for being reasonable. While the release does limit liability for property damage, its language is clear and understandable.

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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