

# Exploring the Exculpatories

(A tour of the islands of forgiveness in a sea of negligence claims)

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## Disclaimer:

I am not licensed to guide tours or to practice law outside Texas. The following is general information only. Consult local professionals familiar with your operation and the laws which apply to it.

# What is an “exculpatory”?

“Exculpate”: v. to free from blame or accusation; to exonerate. (Black’s Law Dictionary).

“Exculpatory clause (or agreement)”: a provision or a collection of provisions relieving a party of liability for a negligent act.

# Why visit the exculpatories?

Exculpation eliminates or reduces the legal duty of care owed to a client – to act as a reasonable organization would, in protecting the client from unreasonable risks harm.

“Duty” is the sine qua non of a negligence claim.

# Negligence revisited

The elements of a successful claim of negligence are:

- A legal duty of care owed
- A breach of that duty
- A loss, caused by the breach.

If no duty is owed, there is no negligence.

# Forms of exculpation:

Legal principles, or concepts, from common law; inherency, assumption, release, etc

State and federal statutes and regulations; immunity, shrinking of duty, etc

Agreements, the content of which is exculpatory: visitor, participant, camper agreements, etc.

# Exculpatory principles:

- 1) The inherency of the loss causing risk
  - a) No duty to protect from, or liability for
  - b) The “yeah, I can see that” test.
  - c) Not age or awareness dependent
  - d) Precipitating event, or outcome?
  - e) Examples: horse, raft, hike, climb, etc.

# Exculpatory principles (cont'd):

## 2) The assumption of the risk:

Expressed – an awareness, no duty, full defense.

Primary (PAR) – risk is inherent (no duty), applies to sports and rec (simple negligence?), societal interest in vigorous participation..

Implied (secondary) – informed participation including, in the face of a known duty to protect, a comparative fault defense usually



## Exculpatory principles (cont'd):

3) A pre-injury release of a claim.

Issues: negligence, parent for minor, conspicuous, scope, etc.

Where allowed/ not allowed. The “Oregon(and Vermont) problem”.

## Exculpatory principles (cont'd):

- 4) Public policy - a compelling public interest favors forgiveness.

### Factors:

Participants' expectations (control, etc)

Vigorous participation/safety balance

Avoidance of litigation

Laws of other jurisdictions

# Exculpatory statutes/regulations:

- 1) Statutory immunities - persons and institutions, state and federal.
  
- 2) Recreation Use Statutes
  
- 3) Recreation Liability Acts
  - General
  - Special – ski, equine, other

# The exculpatory agreement:

An exculpatory agreement provides a reliable memorial and can strengthen the principle(s).

The components of such an agreement include: title, parties, activities, risks, inherency, assumption, release.

Other helpful components – warnings, disclaimers.

# Shoals in the exculpatories

- 1) Defenses to the enforcement of contracts  
generally:
  - a) competency of the parties
  - b) no coercion or fraud.
  - c) consideration
  - d) clarity, shared understanding

## More shoals:

- 2) Defenses to exculpatory clauses and agreements:
  - a) the risk is not inherent, or it is enlarged
  - b) no awareness (“same general nature?”)
  - c) public policy enhancement of the duty or denial of the release (unconscionable, essential service, ultra-hazardous (?))

# Q and A, Blue Sky - Thanks