

## **DISCLAIMERS AND WAIVERS OF LIABILITY : A SUMMARY**

### **1. Relevant Law**

The two areas of law most commonly encountered and to which these doctrines may be material are the law of contract and the law of negligence.

#### **1.1. Contract**

The law of contract is that applicable where one individual or organisation (the supplier) provides goods or services to another (the customer) usually, but not necessarily, for monetary reward. Although there are variations from one jurisdiction to another, the principle strands of contract law are substantially similar in different jurisdictions.

#### **1.2. Negligence**

In the United Kingdom the law of negligence is based on the idea that an individual or organisation owes a duty of care to another (the victim) and has a liability to compensate the victim if the victim suffers loss or injury in consequence of a breach of that duty of care. In many western European jurisdictions the law is codified but adopts substantially similar principles as do many other jurisdictions.

### **2. Terminology explained.**

In many jurisdictions these doctrines have no application, but in some others they have greater or lesser importance.

#### **2.1. Disclaimer.**

This word embodies the principle that the supplier can refuse to accept liability or can limit liability either at all or in specified circumstances. It usually arises in a contractual relationship and requires a degree of acceptance by the customer (because the customer agrees to enter into contract on terms which include the disclaimer).

#### **2.2. Waiver.**

A waiver is normally a written document signed by the customer (for evidential purposes) by which the customer agrees to forgo or waive any claim against the supplier arising from a contract for the supply of goods or services. It can apply in negligence as well as contract law and could be used in return

for a permission to enter onto private land. In the USA the term “Release” is normally used instead of “Waiver”.

### **3. Legality**

3.1. Disclaimers in their purest sense have limited application in all jurisdictions of which we have knowledge if they attempt to exclude all liability for everything. They cannot be used to exclude liability for personal injury or death arising from an act of negligence. They are commonly relied on to exclude liability for loss or damage arising from the mis-use (or abuse) of a product or services. For example, the incorrect application of climbing equipment or financial advice. It is for this reason that many products are sold pre-packaged or with guidance or instruction notes attached. It is common practice for many contracts to exclude liability for consequential loss (for breach of contract) or to limit the amount of compensation that can be recovered.

#### **3.2. Waiver.**

In jurisdictions where the concept of waiver has legal force it is standard practice for a supplier to require a customer to sign a waiver form and not uncommon to find this in countries where the doctrine is not applicable. In the United Kingdom waivers have no effect whatsoever and they are of limited effect elsewhere in Europe where gross negligence can never be excluded and minors have special protection. An European Union directive rules that professionals cannot rely on a waiver of liability for personal injury or death. In contrast, in Canada and most states in the USA waivers are effective except where there is personal injury or death of a minor or where gross negligence is involved.

### **4. Doctrine of Informed Consent**

This legal doctrine is applicable in most European jurisdictions, most states of the USA and in Canada. It is distinguished from the doctrines of disclaimer and waiver in that it does not apply to exclude or limit liability where a supplier has been negligent or there is a material breach of contract. However it is helpful to a supplier and in particular an owner/occupier of land or premises to evidence the fact that a customer/victim was aware that he/she was participating in a risk activity and

voluntarily accepted those risks. The requirement that the participant was aware of and understood the risk is a refinement to the basic principle of voluntary acceptance of risk (“volenti non fit injuria”). It is commonly used by climbing wall operators when a user is requested to indicate whether or not he/she is experienced or if he/she requires instruction.

## **5. Criminal Law**

The doctrines of disclaimer and waiver have no application whatsoever to criminal law. Liability for criminal acts can never be excluded.

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Martin Wragg