

WAIVER & RELEASE

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Risk Management Considerations for Waivers of Liability

In *Loychuk v. Cougar Mountain Adventures Ltd. (2011)*, 81 C.C.C.L.T. (3d) 89, 2011 CarswellBC 275 BCSC, the plaintiffs suffered injuries as a result of a collision while riding the defendant's zip line. The collision occurred when one plaintiff was negligently cleared to go from the top of the line when the other plaintiff remained suspended on the line near the bottom. The defendant company applied successfully to have the claim dismissed on the grounds that each plaintiff had signed a waiver of liability.

In *McQuary v. Big White Ski Resort Ltd. (1993)*, 1993 CarswellBC 1831 BCSC, the defendant ski resort submitted that the action against them should be dismissed as they excluded their liability by means of an 'exclusion of liability' agreement. The exact circumstances of the accident were in dispute, but the result was that the plaintiff left the ski trail and ended up in a concrete drainage culvert with a fractured pelvis. The plaintiff sued the ski resort for his injuries. The resort relied on the conditions under which the plaintiff purchased the ski lift ticket. The exclusion of liability was noted on all of the tickets. The wording was in capital letters and was printed in red and blue. In addition to the wording on the ticket, the resort also placed large, brightly painted signs with the exclusion of liability around the ski resort. The judge considered past case law and concluded

that if the plaintiff knew that there was writing on the ticket and knew or believed that the writing contained conditions, then he is bound by those conditions. The ski resort took all reasonable steps to bring the exclusion of liability to the plaintiff's attention. The plaintiff's action was dismissed.

In *Pelechtyk v. Snow Valley Ski Club (2005)* CarswellAlta 974, 2005 ABQB 532, 14 C.P.C. (6th) 319, [2005] A.W.L.D. 2974, the plaintiff was injured using a handle tow to go up the hill. While standing in position waiting for the next handle, the plaintiff was hit behind the knee by a handle which, instead of hanging straight down from the rope, was improperly in the horizontal position. The plaintiff suffered a ligament tear and brought an action alleging that the ski club was negligent in its maintenance, operation and supervision of the handle tow. The defendant applied for a dismissal on the ground that the plaintiff purchased a lift ticket which contained a waiver of liability clause in the event of personal injury. The court looked at whether Snow Valley took reasonable steps to bring the waiver to the plaintiff's attention. Although the ski club had bright coloured lettering on their tickets and posted signs, it was found that the number of signs and the location of the signs was not sufficient to prove that the club took reasonable steps to bring the waiver to the attention of the skier. The application for summary dismissal was denied.

Islander v. Kanata Diving Supply 2008 CaswellOnt 3580, 168 A.C.W.S. (3d) 444, is a decision of the Ontario Superior Court. In this case a man died while doing a deep dive for a scuba certification program. During the dive the plaintiff and his dive buddy encountered conditions where visibility was zero. The deceased became separated from his dive buddy, panicked, and was eventually found with no signs of life and pronounced dead. Although the judge made all of the factual and legal findings necessary to find liability on the part of the defendant (the diving instructor failed to follow safe diving practices as set out in the advanced open water manual; the instructor paired the deceased with another inexperienced diver) the action was dismissed because of the release that had been signed by the deceased. The release was found to be valid as the deceased had known what he was signing. He signed the waiver in the presence of an instructor who had reviewed the wording of the release with him. The release was found to be easy to read and contained no 'fine print'. In this case, the defendant avoided what could have been a substantial judgment because they invested in drafting an appropriately worded release of liability, and ensuring that the document was signed and its effect adequately explained to participants.

These cases illustrate the continuing battle of contractual waivers, especially waivers used in sporting and recreational activities. Organizations draft waivers and plaintiffs seek to negate them. Each case is decided on its particular facts, the rules set out in the contractual waiver and the defendant's wrongdoing.

When an entity tries to limit or extinguish its liability to potential claimants, a court will undertake an analysis in order to decide whether or not the release is enforceable. Some things to consider when drafting a waiver include the following:

1. Although a waiver may be printed on the back of a ticket, the enforceability of such forms can be questionable. A signed contract is the preferred approach to obtaining a release of liability.
2. The purpose of a waiver is to have a participant agree that they are assuming both the legal and the physical risks.
3. The wording of the waiver must be clear and not ambiguous. The participant must understand that they are signing something that affects their legal rights.

4. Waivers should be highlighted or in bold.
5. The waiver must specifically refer to the foreseeable risks, dangers and hazards in respect to which the participant is waiving their rights.
6. The waiver must specifically state that the participant is waiving his/her legal right to sue, including in respect of the operator's own negligence, negligent misrepresentation, breach of statutory duty (including the Occupiers Liability Act) and breach of contract.
7. The waiver should refer to all potential claims in respect of which the legal right to sue is being waived, such as physical property damage and physical injury of any nature whatsoever.
8. The waiver should list all of the parties the operator wishes to protect from potential actions. This should include all parties which might be found to owe a duty of care.
9. The waiver should specifically describe the event or activity to which it applies. The definition of the activity or event should be broad enough to encompass all potential activities.
10. The waiver should include a spot for the participant to write their name, address and telephone number. If the waiver is a part of a larger agreement, have a spot for the participant to initial beside the waiver clause.
11. If the waiver is more than a page in length, the participant should initial each page.
12. The waiver should always be signed.
13. Minors need their guardian to sign the waiver.
14. The signature should be witnessed by an employee.
15. Always advise the participant to read the waiver in its entirety and give the participant sufficient time to do so.
16. Ensure that employees responsible for obtaining a waiver are trained in the procedures relating to them. Make sure training includes what questions to ask the participant and the importance of making sure that the participant understands what they are signing.
17. Ensure that the employee handing out the waivers and obtaining signatures is not a minor.
18. The waiver should be drafted, or at least reviewed, by legal counsel to ensure that all required elements are present and that the release is properly tailored to the particular event or activity.

Liability waivers do not allow you to escape your liability for negligent operations, although the use of them can be very helpful. The inclusion of such liability waivers in participation forms may serve to communicate the exclusion to participants and may be helpful in the long term mitigation of claims. The use of waivers may also dissuade people from initiating claims against an organization. They are an excellent risk management practice. However, you cannot always rely on a waiver, so always keep your statutory duty of care in mind.

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