

Waivers 101: Can you “Waive” Goodbye to Liability?

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Topics to Cover

- Essential wording and content
- Presentation and execution
- “Typical” legal challenges
- Recent case law – positive trends
- Risk Management recommendations
- Facility Use Agreements

Waivers – Are they effective?

- Effective risk management tool
- Courts increasingly willing to enforce waivers
- Complete defence

Waivers – Form and Content

The waiver must:

- 1) Identify the parties protected
- 2) Include a detailed description of the risks associated with the activity

Waivers – Form and Content

- 3) Say “negligence”
- 4) Highlight that by signing you are waiving your right to sue

Waivers – Form and Content

5) Ideal if on one piece of paper

6) Must be witnessed

Waivers – Form and Content

[20] The Release is a one-page document. At the top of the Release is a box in large print which reads as follows:

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND ASSUMPTION OF RISK
AGREEMENT

(hereinafter referred to as the "Release Agreement")

BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS,
INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN
ACCIDENT

PLEASE READ CAREFULLY!

Waivers - Presentation and Execution

- 1) Identify the document as a waiver
- 2) Allow time to review and consider the waiver
- 3) Present the waiver before activity is paid for

Waivers - Presentation and Execution

- 4) Optional participation
- 5) Do not include waiver with other documents (i.e. Team roster)
- 6) Clearly identify risks (i.e. river rafting = drowning);

Waivers - Typical Legal Challenges

- “I did not actually read the waiver, and would not have signed it if I knew I was giving up my right to sue.”
- *Tyax* - Insufficient for plaintiff to say they did not read the waiver

Waiver – Typical Legal Challenges

- Broad exclusion sufficient to capture “all” risks?
- *Nelson v. BC* (2020)

Waivers - Typical Legal Challenges

- Is a waiver binding on a minor?
 - ON, AB, MB, PE, SK and QC is 18
 - BC, NL, NB, NT, NS, YT and NU is 19
- Minors cannot waive their rights to sue

Waivers - Typical Legal Challenges

- Is there any benefit in having a minor sign a waiver if it is not binding?
- Yes. Regardless of age, the waiver highlights risks associated with activity
- Supports contributory negligence argument

Waiver – Typical Legal Challenges

- *Apps v. Grouse Mountain* (2020) BCCA
- Snowboarding accident
- “ticket” case – no signature
- Insufficient notice of waiver

Recent Case Law – Positive Trends

Ochoa v. Canadian Mountain Holidays (1997)

- Language of release a factor?
- Translation required?

Recent Case Law – Positive Trends

Loychuk (2012) BCCA

- Employee negligence was admitted - defendant sought to enforce full release
- Admitted it was a legal document effecting legal rights
- Waiver effective

Recent Case Law – Positive Trends

Niedermeyer (2014) BCCA

- Not effective until participating in the activity intended to be covered
- Not effective during transport to and from activity in a insured vehicle
- For example: the bus trip from Whistler Village to zip line park

Recent Case Law – Positive Trends

Urbanson (2016) AQB

- Sophistication of the plaintiff reduced the threshold required to bring the release to the attention of the participant
- Plaintiff was an experienced paralegal

Recent Case Law – Positive Trends

Jensen v. Fit City Health Centre (2015) Ont.

- Fitness centre membership waiver
- Broad enough to include claims under *Occupiers' Liability Act*

Recent Case Law – Positive Trends

Quilchini v. Wilson's Greenhouse (2017) SQB

- Plaintiff injured during a go-kart race when he crashed into a concrete barrier
- Electronic waiver enforced
- Claim dismissed

Do Waivers Offend Consumer Protection Legislation?

Can a Plaintiff argue that a waiver is ineffective because of the *Consumer Protection Act*?

Does a waiver offend the legislation?

Do Waivers Offend Consumer Protection Legislation?

Schnarr v. Blue Mountain Resorts, [2018] ONCA
Woodhouse v. Snow Valley, [2018] ONCA

- Both Blue Mountain and Snow Valley are ski operators
- Plaintiffs in each case were injured and had signed waivers

Court: CPA does not render waiver ineffective

Recent Case Law – Positive Trends

- Not unfair
- Not unconscionable
- No power imbalance
- Does not offend consumer protection
- Note of caution on Grouse Mountain case

Risk Management Recommendations

- 1) Review proposed waiver at the application stage
- 2) Update the waiver wording to comply with new law

Risk Management Recommendations

- 3) Ensure that a detailed list of risks is included in your insured's waiver
- 4) Obtain and review presentation protocol

Risk Management Recommendations

- 5) Encourage insureds to post their waiver on their website for public viewing
- 6) Introduce a “waiver warranty”, requiring insureds produce and present the waiver and presentation protocol

Risk Management Recommendations

- Digital waiver software is the “gold standard”
- Ensures all signed waivers are digitally retained and stored (even CCTV)
- Helps to elevate arguments that the signing party had an opportunity to read the waiver

Facility Use Agreements

- Agreement whereby user agrees to terms and conditions for use of a facility
- Must identify: parties, event, activity, date, time, location, main contact, attendees
- Confirm that an inspection of the facility has taken place and is acceptable

Facility Use Agreements

- Indemnity provision in favor of the facility owner
- Waiver of all claims against the owner
- Insurance provision that requires that owner be listed as an additional insured.

Scope of Indemnity

When indemnity agreements become the subject of litigation, it is often the scope of the indemnity that is at issue.

A question commonly asked is whether the agreement extends to liability arising from the negligence of the indemnified party themselves.

Griffiths v. New Westminster (City), 2001 BCSC

Player injured during recreational hockey game at a City-owned ice rink.

City sought indemnity under facility use agreement that had been signed by a player when booking the ice time.

Griffiths v. New Westminster (City), 2001 BCSC

Wording of the indemnification stated that it was operative in relation to:

“any and all claims, demands, actions, suits, and costs arising out of any act or omission of the Licensee or any servant, agent or employee of the Licensee or arising of or resulting form the use of the said Facility by the Licensee”

Griffiths v. New Westminster (City), 2001 BCSC

Court: indemnity not enforceable.

Indemnity extended to acts or omission of that player only, not his organization or the other players.

Indemnity clause too onerous to be enforceable under any other interpretation.

Griffiths v. New Westminster (City), 2001 BCSC

Court:

“There is a heavy burden on a party claiming indemnity to establish that the words of the clause actually impose the obligation alleged by the drafter of the indemnity”

Indemnity Clauses

Solution?

Ensure that the indemnity clause has unambiguous wording.

Neely v. MacDonald
(2014) 37 DLR (4th) (Ont. C.A.)

Player injured by a runaway golf cart down a steep hill during golf tournament. He sued the tournament and the course owner.

Course owner sought indemnification from tournament host under indemnity clause: “*Claims of any nature that may arise from or through the use of a golf cart.*”

Neely v. MacDonald
(2014) 37 DLR (4th) (Ont. C.A.)

Steep hill had been the subject of prior complaints.

Court: to shift the risks of owner's own negligence onto the tournament's host, the contract between them had to say so in the clearest of terms.

Wording too ambiguous to provide the golf course owner with indemnity for own negligence.

Shameless Plug...



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