

Waivers. Managing your risk

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Waivers

- Purpose of Waivers
- Scope of Waivers
- Practical Steps for Successful Application
- FAQs re Waivers



Waivers - Purpose

- Contractual Release of a claim for damages (injuries)
- Providing awareness to parties of the types of risk the activity entails



Damage Awards - Trends

- **Ever increasing cost of future care claims**
- **Awards in the \$5 - \$10 million range**
- **Now the largest component of a serious bodily injury awards**



Scope of Waivers

- Contractual release of damages caused by?
- Your Negligence?
- Participant's Negligence?
- Intentional Acts?



Scope of Waivers

- The language of the exclusion must refer to the circumstances of the accident. It must include a list of the types of accidents that could occur.



Scope of Waivers

- The waiver must exclude liability for risks or injuries caused by negligence.
- If both parties' negligence, must be specific.



Scope of Waivers

... and NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING IN ECO ACTIVITIES. I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREIN.



Scope of Waivers

- The language of the waiver must specifically identify the names of the parties seeking protection.



Scope of Waivers

- The waiver must identify that the document eliminates a right to sue by anyone who signs it.



[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!



Application of Waivers

- Court considers:
 1. Length of Waiver
 2. Font
 3. Bold Lettering
 4. Highlighted sections
 5. Opportunities to initial specific terms



Application of Waivers

[21] Participants are required to first sign the Release immediately adjacent to that warning. They then must fill in their name, address and weight. At the bottom, they must sign the Release under the wording "I have read the Release Agreement above, and I agree to be bound by its terms." The Release must also be witnessed.



Application of Waivers

- The plaintiff needs to read the waiver and appreciate they have waived the right to sue
- What reasonable steps you took to bring the terms to the other party's attention



Questions

- What if the person later says,
- *“I did not actually read the waiver, and would not have signed it if I knew I was giving up my right to sue.”?*



Questions

Tyax Mountain Lake Resort - BC Case

- **Not sufficient for plaintiff to say waiver not read**
- **One of the reasons the court enforced this waiver was because it was simple and easy to read**



Questions

- *Is a waiver binding on a person under the age of 19?*



Questions

- Children (up to 19) cannot waive their rights to sue.
- *Is there any point in having a minor sign a waiver if it is not binding?*



Questions

- After age 13 a child/teenager can be held contributorily negligent for their own conduct, regardless of the conduct of others.



Questions

- What if the plaintiff says,
- *“I was rushed through the registration process and did not have a chance to really read the document before signing.”*



Questions

- An occupier must take reasonable steps to bring modifications of liability (i.e. a waiver) to the attention of the other contracting party.



Questions

- *Greeven v. Blackcomb Skiing Enterprises Ltd.*,
- waiver void – insufficient evidence to show that the resort took reasonable steps to bring the terms to the attention of the Plaintiff



Practical Steps

- Website – online Waiver – must read online, print, sign, and then submit.
- Policy in place for consistent application of procedure to allow for opportunity to review waiver.



Practical Steps

- Online Waiver & Procedure for time to review
- Eliminates *arguments of duress, coercion or unfair advantage* , resulting from economic or psychological need.



Practical Steps

- *McQuary v. Big White Ski Resort Ltd.*
- The waiver was displayed in bright colours on both the face of the lift tickets and the numerous signs.



Questions

- *What if the injuries arise from an activity not described to the participant? Should the plaintiff be bound by a waiver that did not contemplate that type of incident?*



Questions

Section 3 of the *BPCPA* provides that any waiver or release of a person's rights, benefits or protections under the *BPCPA* is void except to the extent that the the *BPCPA* expressly permits the waiver or release.



Questions

[45] The Plaintiffs acknowledge that the *BPCPA* has never been applied in a recreational sports context. Assuming that the *BPCPA* does apply, the evidence in this case does not support the submission that Cougar committed either deceptive or unconscionable acts. There is no evidence that the representation on the website concerning the safety of the system is anything but true. The answer relates to the structure of the system, not its operation. The fact that there have been some accidents does not lead to a contrary conclusion.



Questions

- *What other defences are available to prevent a waiver from applying?*



Questions

- Often a Plaintiff will argue that the waiver is not enforceable because of the doctrine of fundamental breach or unconscionability. *Will that be upheld?*



Questions

- A release of liability agreement is reasonable in light of the inherent risks in the activities involved and that plaintiffs know that a precondition of engaging in such risky activity is that they will bear the risk of the defendants' negligence.





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