



Limiting Liability through Waivers and Releases

Requirements,
Enforceability and Practical
Considerations



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The use of waivers and releases is a powerful tool to limit liability exposure

Today's goals:

1. Understand the legal requirements of waivers;
2. The enforceability of waivers; and
3. Practical considerations to keep in mind when preparing waivers/releases.

A waiver is a contractual exclusion of liability whereby one party (the signor of the waiver) agrees to release another party from liability with regards to certain activities and circumstances.

A waiver will be enforceable where the evidence demonstrates the two following requirements:

- 1. That the party waiving had both a full knowledge of his/her/its rights; and**
- 2. That there was an unequivocal and conscious intention by the signor to abandon these rights.**

The language of waivers and releases should expressly inform the signor of his/her/its acknowledgement that it is waiving a particular set of rights related to a certain activity the signor agrees to participate in

- Ski instructor (Plaintiff) injured during downhill ski race, sued Ski Resort (Defendants)
- Plaintiff signed a release, but claimed she did not read it
- **Issue:** Did the Defendants take reasonable steps to inform the Plaintiff of the terms of the release?
- Court found in favour of the Defendants and upheld the release based on the following:
 - The release was written in clear terms;
 - There was a heading that clearly stated the legal nature of the document; and
 - The Plaintiff had sufficient opportunity to familiarize herself with the document before signing.

Karroll v Silver Star Mountain Resorts Ltd, [1988] BCJ No 2266, [1989] CLD 118 (BCSC).

- Plaintiff injured during 'tube race' on ski hill
- Plaintiff signed waiver under the influence of alcohol
- Evidence demonstrated that, due to the Plaintiff's intoxication, he did not understand the force and effect of the waiver and consequently did not voluntarily assume the legal risk of injury during the tube race
- Release not enforced, judgment for the Plaintiff

Crocker v Sundance Northwest Resorts Ltd, [1988] 1 SCR 1186, 64 OR (2d) 64 (SCC)

- To be protected by a signed waiver, consider:
 - ✓ Were reasonable steps taken to draw the signor's attention to the release?
 - ✓ Were the terms of the release communicated to the signor?
 - ✓ Does the signor have the requisite mental capacity to understand the terms of the release?

- Waivers can be found to be unconscionable where there is an unequal bargaining power between the parties and the stronger party takes advantage of its position to force the weaker party to execute the agreement
- A waiver will be enforceable where the stronger party does not take advantage of its position of power in relation to the party releasing his/rights under the waiver

Tercon Contractors Ltd v British Columbia (Transportation and Highways), [2010] 1 SCR 69, 2010 SCC 4

- Plaintiff rented ski equipment and was injured when the equipment failed to release upon her fall
- Plaintiff argued the waiver was too broad and unconscionable
- Court upheld the terms of the release as there was no duress, coercion or unfair advantage between the parties when the waiver was executed

Knowles v Whistler Mountain Ski Corporation, [1991] BCJ No 61, 24 ACWS (3d) 938 (BCSC)

- When a release is properly worded and the signor is sufficiently made aware of its terms and effect (or given the reasonable opportunity to do so, the release will be upheld.

- The Court will consider the following:
 - The circumstances of execution;
 - The format of the document, such as print size and headings; and
 - The ease of comprehension by a lay person of the release language.

Occupiers' Liability Act, RSA 2000, c O-4:

Risks willingly accepted

7 An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor.

Variation of duty of care

8(1) The liability of an occupier under this Act in respect of a visitor may be extended, restricted, modified or excluded by express agreement or express notice but no restriction, modification or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor.

- Accident during zip-line tour, waiver upheld as the BC Court of Appeal did not find the waiver contrary to public policy
- Waivers of liability are unlikely to be invalidated on public policy grounds unless the defendant either knowingly or recklessly puts the public in danger by providing a deficient product or service and there is an element of serious and purposeful misconduct

Loychuk v Cougar Mountain Adventures Ltd, 2012 BCCA 122

- The participant accepts **some** risk that is **inherent** in the **activity**
- But this **does not negate the duty of care**
- The nature and character of the dangerous activity **alters** the applicable standard of care owed to participants
- Examples: horseback riding, in-line skating, skiing, parasailing, etc.

- Plaintiff was injured while trying to learn how to roller skate on the Defendant's premises.
- The Court acknowledged the risks inherent in roller skating but also found that the Defendant was required to not expose participants to **unreasonable risk**
- Based on the circumstances of the Plaintiff, the Court did not find the Defendant exposed the Plaintiff to unreasonable risk and the waiver was upheld

Rozenhart v Skier's Sport Shop (Edmonton) Ltd, 2002 ABQB 509

- Minors cannot enter into contracts which restrict/restrain their rights!

Court confirmation of minor's contracts

3(1) The Court may, on application, if in the Court's opinion it is in a minor's best interest to do so, confirm any contract

- (a) the minor has entered into or proposes to enter into, or
- (b) the minor's guardian has entered into or proposes to enter into on behalf of the minor.

Minors' Property Act, SA 2004, c M-18.1

- Minor's mother signed release at martial arts studio where the minor was learning martial arts. Minor was injured and mother sued the studio on behalf of her injured son
- BC Supreme Court interpreted the *Infants Act*, RSBC 1996, c 223, which does not permit a parent/guardian to sign a release on behalf of the minor that precludes the ability to bring a tort claim
- Waiver was found to be not enforceable

Wong (Litigation Guardian of) v Lok's Martial Arts Centre Inc, 2009 BCSC 1385

1. Give advance notice that a release will be signed at the event
2. Ensure the release is clearly worded and unequivocal
3. Define the risks the release is intended to cover and protect against negligence and breach of contract claims
4. Give the signor time to consider the application of the release to his/her legal rights
5. Keep the release concise and to the point
6. Consider the use of an identified representative at the event whose primary duty is to be familiar with the release and explain it to the attendees

7. Also consider using this representative as a witness to all releases
8. Ensure the release is completely filled out and there are no blank spaces – make sure the document is signed and dated!
9. Make the representative available to answer any and all questions signor's may have regarding the release and its impact on the signor's legal rights
10. Do not downplay the seriousness of the release
11. Give plenty of time for signor's to read the release



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QUESTIONS?

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