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WAIVERS OF LIABILITY FOR CHARITY AND NOT-FOR-PROFIT EVENTS: AN UPDATE OF THE LAW

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A. INTRODUCTION

The use of written contractual waivers[1] of liability has been a long standing practice among many charities and not-for-profit organizations. However, recent cases from trial courts in Ontario and British Columbia have highlighted the need for careful drafting of waivers to increase the likelihood that they will be declared enforceable by a court. This *Charity Law Bulletin* will explain these recent court decisions and summarize the lessons to be learned in preparing effective waivers as part of the risk management plan for charities and not-for-profits.

B. RECENT CASE LAW: ENFORCEABILITY OF LIABILITY WAIVERS

1. *Isildar v. Kanata Diving Supply,* [2008] O.J. No. 2406 (OSCJ)

   This action was brought by the widow and son of Mr. Isildar, a 28 year old man who died while completing a deep dive in the St. Lawrence River as part of an Advanced Open Water recreational scuba certification program offered by the defendant, Kanata Diving Supply, and led by the Defendant, Sarah Dow, a certified Open Water scuba instructor. Justice Roccamo of the Ontario Superior Court of Justice upheld a Liability Release and Assumption of Risk Agreement signed by the deceased that relieved the defendants of any liability. After a lengthy trial, the claims of the deceased's widow and son were barred and the action was dismissed.

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[1] This Bulletin uses the word "waiver" to include all documents including releases, indemnities and covenants not to sue designed to allocate the responsibility for wrongdoing causing personal injury or death to another person.

The court described a three stage analysis that was followed to determine whether a signed waiver of liability is valid:

(a) Is the waiver valid in the sense that the plaintiff knew what he/she was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signatory?

(b) What is the scope of the waiver and is it worded broadly enough to cover the conduct of the defendant?

(c) Whether the waiver should not be enforced because it is unconscionable?[2]

In *Isildar*, the court found that Mr. Isildar knew what he was signing and expressly agreed to waive his legal rights. The language of the waiver called attention to the nature of the document and its intended purpose. In addition, the document was concise, easy to read and had no fine print. Further, the court found that reasonable steps were taken by the defendants to bring the waiver to the attention of the students in the diving class. One of the instructors read the form aloud verbatim and then offered the students the opportunity to ask questions.

With respect to the second element of the analysis, the court found that the language of the waiver was broad enough to cover the conduct of the defendants under the law of contract and tort. The court pointed to the following release language, which appears in all capitals text at the bottom of the waiver document, which excluded: "…ALL LIABILITY OR RESPONSIBILITY WHATSOEVER FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH HOWEVER CAUSED, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE."

The court also pointed out that the waiver specifically contemplated the types of harm that resulted in Mr. Isildar's death. The waiver enumerated, without limiting, some of the risks which are associated with scuba diving, including heart attack, panic, hyperventilation and drowning. In addition, the court noted that the waiver document contained specific language referring to the student's estate, heirs and

[2] *Isildar v. Kanata Diving Supply*, [2008] O.J. No. 2406 (OSCJ) at para. 634.

beneficiaries, sheltering the defendants from any claims by Mr. Isildar or his family arising from participation in the diving course.

With respect to the third element of the analysis, the court looked at relevant case law and summed up the governing principle that an otherwise valid waiver and release of liability provision will be enforceable unless:

(a) the provision removes from the contract the very thing contracted for in a manner that makes it "unfair or unreasonable" to give effect to the contract; or

(b) the provision sufficiently diverges from community standards of commercial morality rendering it unconscionable.[3]

The court found that there was nothing to suggest that the waiver should not be enforced. There was no fundamental breach of contract and the waiver was not divergent from community standards of fairness and morality.

2. *Gallant v. Fanshawe College of Applied Arts and Technology*, [2009] O.J. No. 3977 (OSCJ)

The plaintiff, Deanna Gallant, was injured during a motorcycle riding course offered by the defendant Fanshawe College and taught by the defendant instructors. The matter was tried by a jury who found the defendants 80% at fault for the plaintiff's injuries and the plaintiff 20%. The plaintiff signed a waiver in favour of the defendants immediately prior to commencing the course. The judge dismissed the defendants' motion to have the waiver found valid and awarded judgment for the plaintiff for 80% of the agreed upon damages. The court found that the waiver lacked the required clarity to make it understandable. The waiver was missing key terms such as "for any," "negligence," "liability" and "howsoever caused." Since any ambiguity must be resolved against the drafter, the waiver was deemed ineffective and unenforceable.

Even if the waiver were not ambiguous, the court found that the wording of the waiver was not sufficiently broad or clear to encompass the negligence of the defendants found by the jury. The court stated that the clearest language is required if the defendants wish to absolve themselves of liability for their own negligence. The waiver at issue did not describe the risks and dangers of the activity or

[3] *Ibid*. at para. 655.

mention negligence. The court stated that if a defendant intends to rely on a waiver, it must make sure that each student understood the legal effect of the waiver. It must be made clear to the students that they are foregoing all rights to make any claim howsoever arising.[4] The court found that the signing of the waiver was a relatively perfunctory exercise with little explanation by the defendant. The waiver was not explained by the instructor and students were not questioned as to their understanding. In addition, the waiver was not presented and signed until well after registration and payment for the course, no refunds were offered if students refused to sign, and students were not advised that they would have to sign a waiver when they registered and paid. Therefore, there was no evidence to suggest that the students knew they were assuming the negligence of the instructor. Even if the waiver had been found to be otherwise valid, the court concluded that it should not be enforced. The plaintiff signed the waiver predicated on the promise that the course would be conducted in a safe environment by competent instructors. Therefore, it would be unfair and unreasonable in all the circumstances to give effect to the waiver and thereby exonerate the defendants from responsibility to live up to their promises.[5]

3. *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*, [2009] B.C.J. No. 1992 (BCSC)

The infant plaintiff Wong, who was injured during a sparring match at the defendant's Hapkido school, brought a claim for negligence alleging that the defendant, Lok's Martial Arts Centre Inc., failed to take preventative measures to ensure injuries did not occur in the course of sparring matches. Defendants Lok's Martial Arts Centre Inc. and Michael Lok made an application for summary dismissal on the basis that the plaintiff's mother had signed a release absolving the defendants of all liability. The British Columbia Supreme Court dismissed the defendants' application because B.C.'s *Infants Act* does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action for damages in tort. However, the court did state that the wording of the release was broad enough to require the plaintiff's claim be dismissed were the release effective to bind the infant plaintiff.

The court considered the defendant's arguments that the court should not limit the full range of parental authority. But ultimately the defendants' motion for summary judgment was dismissed

[4] *Gallant v. Fanshawe College of Applied Arts and Technology*, [2009] O.J. No. 3977 (OSCJ) at para. 41.
[5] *Ibid*., at para. 49.

because, under the *Infants Act*, a parent cannot effectively execute a pre-tort release on behalf of a minor. Therefore, the waiver signed by the plaintiff's mother could not bar the plaintiff's claim against the defendants. The court concluded, by reading the *Infants Act* as a whole, that the legislature intended the Act to establish the sole means of creating contractual obligations that bind minors.[6]

C. BINDING AND ENFORCEABLE LIABILITY WAIVERS: LESSONS LEARNED FROM THE COURTS

Liability Waivers will be closely scrutinized by courts. Organizations that rely on waivers to defend personal injury claims need to be aware of the following principles and practices to increase the likelihood that the waiver be found to be binding and enforceable:

1. Draw the signatory's attention to nature of the document and its intended purpose.

The first step in the analysis outlined in *Isildar* is to determine whether the plaintiff knew what he/she was signing. Similarly, in *Gallant* the court stresses that the effect of the document must be clear to the signatory. The waiver used by the defendants in *Isildar* used language that made it clear the student was giving up their legal rights by signing. For instance, in *Isildar* the waiver stated "*I understand and agree that I am not only giving up my right to sue the Released Parties but also any rights my heirs, assigns or beneficiaries may have to sue the Released Parties resulting from my death*." In *Isildar*, the plaintiffs conceded that there was no doubt the Liability Release called attention to the nature of the documents and its intended purpose. In contrast, the waiver at issue in *Gallant* was found to be ambiguous because it was missing key words like "negligence" or "liability". An effective waiver should make it clear to the signatory that the document affects his or her legal rights. Further, the party seeking to rely on the waiver should be able to show that reasonable steps were taken to bring the waiver to the attention of the signatory. These reasonable steps might include:

- Reading the waiver aloud to the signatories;
- Questioning the signatories as to their understanding;
- Allowing time for the signatories to ask questions about the waiver; and
- Using bold or capitalized fonts

In *Gallant*, no such reasonable steps were taken and the waiver was found to be unenforceable. Some lessons can be drawn from *Gallant* – Participants in a program should be advised in advance that they

[6] *Ibid*. at para. 60.

will have to sign a waiver; participants should be given sufficient time to read and consider the implications of the document; and participants should be offered some explanation of the waiver.

2. Use language broad enough to encompass all possible claims

The language used in the waiver at issue in *Isildar,* as reproduced at page 2 of this bulletin, was found to be sufficiently broad.

However, it is not enough for the drafter of a waiver to simply include a sweeping broad statement. It must be clear from the wording of the whole waiver that the signatory intended to waive any right of action that he or she might have.

3. Ensure the risks to be assumed by the signatory are clear

Persons signing waivers prior to participating in an activity probably do not contemplate that they are assuming the risk of injury potentially arising from the negligence of the activity's organizer. Therefore, the language used in a waiver must be very clear if a party wishes to absolve themselves of liability for their own negligence. A fully effective waiver should specifically refer to damage or injury caused by the organizer's own negligence.

In *Gallant*, the court found that the evidence was to the effect that students were assuming only their own risks. Similarly, in *Mile v. Club Med Inc.*, [1988] O.J. No. 426 (mentioned in *Isildar*), the court found that the liability release that made no reference to damage or injury caused by Club Med's own negligence applied only to the normal risks involved in sports and did not cover the negligent conduct of Club Med. In contrast, the successful waiver in *Isildar* contains the language "*INCLUDING BUT NOT LIMITED TO THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE*."In addition, the successful waiver in *Isildar* specifically outlined the potential risks of scuba diving.

> "*I understand that diving with compressed air involves certain inherent risks; including but not limited to decompression sickness, embolism or other hyperbaric/air expansion injury that require treatment in a decompression chamber."*

> *"I also understand that skin diving and scuba diving are physically strenuous activities and that I will be exerting myself during this program, and that if I am injured as a result of heart attack, panic, hyperventilation, drowning or any other cause, that I expressly assume the risk of said injuries…"*

Similarly in the waiver at issue in *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026, the risks and dangers of heli-skiing were enumerated in detail, including avalanches and the conduct of the defendant, its staff and other skiers. In *Gallant*, the court distinguished the waiver at issue from the *Ochoa* waiver because there was no such description or any mention of negligence in the waiver at issue in *Gallant*.[7]

4. Enforceability of an otherwise valid waiver

In *Isildar*, the court set out the principle that an otherwise valid waiver and release of liability provision will be enforceable unless:

(a) the provision removes from the contract the very thing contracted for in a manner that makes it "unfair or unreasonable" to give effect to the contract, or

(b) the provision sufficiently diverges from community standards of commercial morality rendering it unconscionable.

In Gallant, the basis of the agreement between the plaintiff and the defendants was that the defendants promised to provide a safe course in a safe environment taught by competent instructors. The jury found as fact that these promises were not kept. The court found that it would be unfair and unreasonable in all the circumstances to give effect to the waiver. The waiver fell within one of the two exceptions to the general presumption of enforceability outlined in *Isildar* – it removed from the contract the very thing being contracted for.

A waiver may not be enforceable if the waiver purports to absolve the party seeking to rely upon it from the responsibility to live up to their core contractual obligations.

Wong raises the difficult issue of the enforceability of waivers signed by parents or guardians on behalf of minors. According to *Wong*, in British Columbia, a parent or guardian cannot bind an infant to an

[7] *Gallant* at para. 35.

agreement waiving the infant's right to bring an action for personal injury damages. Therefore, in British Columbia, any waiver signed by a parent on behalf of their child is likely unenforceable. There is no similar legislation in Ontario, which remains governed by the common law rules relating to the capacity to contract of a minor. However, this issue remains unresolved in other Canadian jurisdictions, as there is a lack of judicial pronouncements that deal directly with the enforceability to waivers signed on behalf of minors.

D. CONCLUSION

Liability waivers can form a component of the overall risk management strategy of your organization. However, the drafting of waivers is a relatively complex legal exercise, which needs to be custom fit to your organization's needs. In addition to a properly drafted waiver, it is important that your organization be aware of the practical steps that need to be taken to ensure that the event participant understands what he/she is signing. If your organization is sued and will rely on a signed waiver in its defence, both the wording of the waiver and the practices of the organization will be carefully reviewed.

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