
**THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar**

Ottawa – February 18, 2010

Waivers of Liability for Charity and Not-for-Profit Events: An Evolving Area of the Law

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A. ENFORCEABILITY OF LIABILITY
WAIVERS

- Waivers are an important component of an organization’s risk management strategy
- However, a signed waiver does not guarantee protection from liability

- In *Isildar v. Kanata Diving Supply*, [2008] O.J. No. 2406, the Ontario Superior Court of Justice described a three stage analysis to determine whether a signed waiver of liability is valid:

1. Is the waiver valid in the sense that the plaintiff knew what her/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?

2. What is the scope of the waiver and is it worded broadly enough to cover the conduct of the defendant?

3. Whether the waiver should not be enforced because it is unconscionable?

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- To increase the likelihood that your waiver will be held enforceable if challenged, the following steps should be taken:
 1. Draw the signatory's attention to the nature of the document and its intended purpose
 - An effective waiver should make it clear to the signatory that the document affects his or her legal rights
 - The waiver should be written in concise, easy to read language

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- The party seeking to rely on the waiver should take reasonable steps to bring the waiver to the attention of the signatory, including:
 - Advising participants in advance that they will have to sign a waiver
 - Providing the document to participants in advance
 - Allowing time for the signatories to read and ask questions about the waiver
 - Using bold or capitalized fonts
 - Reading the waiver aloud to the signatory
 - Questioning the signatories as to their understanding

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- 2. Use language broad enough to encompass all possible claims
 - 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 her or she might have, however caused

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- In *Isildar*, a student died during a scuba diving course conducted by the defendants
 - The defendants were shielded from liability because the signed waiver was sufficiently broad to cover the conduct of the defendants under the laws of contract and tort

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- The following language was found to be sufficiently broad in *Isildar*:
“...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 waiver also contained specific language referring to the participant’s estate, heirs and beneficiaries, sheltering the defendants from any claims by the participant’s family

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3. Ensure the risks assumed by the signatory are clear

- The waiver should be very precise, and tailored to the specific activity or event and should include an agreement in which the participant acknowledges that he or she fully understands and agrees to assume the risks of all injury and property damage that may result
- A fully effective waiver should specifically refer to damage or injury caused by the organizer's own negligence

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- In *Gallant v. Fanshawe College of Applied Arts and Technology*, [2009] O.J. No. 3977, the court stated that the clearest of language is required if the defendants wish to absolve themselves of liability for their own negligence
- The *Gallant* waiver did not mention negligence, so the defendants could not rely on it to avoid liability for the unsafe conduct of a motorcycle course
- An effective waiver should specifically outline the potential risks of the activity

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- The successful *Isildar* waiver enumerated some of the risks associated with the activity (scuba diving), including heart attack, panic, hyperventilation and drowning
- Similarly, in *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026, a skier died in an avalanche while participating in a heli-skiing excursion conducted by the defendants
 - The effective waiver listed the risks associated with heli-skiing, including avalanches and the conduct of the heli-ski operators

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4. Enforceability of an otherwise valid waiver

- An otherwise valid waiver and release of liability provision will be enforceable unless:
 - 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
 - The provision sufficiently diverges from community standards of commercial morality rendering it unconscionable

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- A waiver may not be enforceable if it purports to absolve the party seeking to rely upon it from the responsibility to live up to their core contractual obligations
- For example, in *Gallant*, the defendants promised to provide a safe motorcycle course in a safe environment taught by competent instructors
 - The jury found as fact that these promises were not kept
 - The court found it would be unfair and unreasonable in all the circumstances to give effect to the waiver

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B. WAIVERS SIGNED ON BEHALF OF MINORS

- Organizations frequently require parents/guardians to sign liability waivers on behalf of their minor children, however, the enforceability of such waivers is in doubt
- In *Wong (Litigation guardian of) v. Lok’s Martial Arts Centre Inc.*, [2009] B.C.J. No. 1992, the British Columbia Supreme Court found that B.C.’s *Infant 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

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- Therefore, in B.C., 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 of a minor to contract
- The issue remains unresolved in other Canadian jurisdictions, as there is a lack of judicial pronouncements that deal directly with the enforceability of waivers signed on behalf of minors

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C. PARENTAL INDEMNITY AGREEMENTS

- Since the enforceability of a waiver signed by a parent on behalf of a minor is doubtful, some organizations have attempted to get around this enforceability problem by requiring parents to sign an agreement indemnifying the organization in respect of legal actions of behalf of their children
- Such agreements are an attempt to indirectly achieve the same practical result as a waiver
- Although there is no case or rule directly on point, these indemnity agreements are probably unenforceable on public policy grounds

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- In *Stevens v. Howitt*, [1969] O.J. No. 1282, the Ontario High Court of Justice decided that a post-tort liability indemnity signed by the plaintiff's parents which attempted to shift the loss arising from a child's injuries from the tortfeasor to the parents was void as against public policy
- The court reasoned that such a document would effectively destroy an infant's potential cause of action, because parents would be dissuaded from bringing an action on behalf of the infant

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- *Stevens* involved an indemnity agreement signed post-tort, but both the Law Reform Commission of Manitoba and the Law Reform Commission of British Columbia have cited *Stevens* as authority that pre-tort indemnity agreements signed by parents that are designed to indirectly foreclose a child’s cause of action are against public policy
- “Post-tort” agreement refers to an indemnity signed by a parent or guardian after the accident has occurred resulting in an injury to the child
- On the other hand, a “pre-tort” indemnity is signed by the parent or guardian prior to the occurrence of an accident

- In its *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, the Law Reform Commission of British Columbia stated

“The practice of extracting agreements from parents to indemnify operators in respect of legal actions on behalf of their children also contravenes the public policy of protecting minors’ interests. They are clearly intended to discourage a parent from pursuing a child’s rights. If there is doubt about the unenforceability of such indemnities, it should be removed.”

- However, there may be some deterrent effect if parents are asked to sign waivers for minors with indemnity provisions, although a court would not likely enforce such provisions
- The existence of signed waivers with indemnities by parents or guardians of minors may practically dissuade some claims being made against an organization, especially where the injuries are of a relatively minor nature

D. EXECUTION AND STORAGE OF WAIVERS

- Organizations must ensure that each participant signs the waiver prior to participating in the activity – no exceptions
- The signature should also be dated and witnessed
- After waivers are signed, they should be kept on file where they can be easily accessed if needed
- Signed originals should be kept for each event or activity

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E. CONCLUSION

- Although waivers are not an absolute guarantee against liability, charities and NPOs should use carefully drafted and executed waivers as part of their risk management plan
- An effective waiver will support an organization’s legal defence and may create a practical deterrent to legal action
- A comprehensive waiver will also alert participants to the potential dangers of an activity, possibly preventing an injury from occurring

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