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## **HOCKEY INJURY LAWSUIT DISMISSED**

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*By Barry Kwasniewski\**

### **A. INTRODUCTION**

A decision, released on September 1, 2015, of the Ontario Superior Court of Justice in *Levita v. Crew and True North Hockey Canada* (“Levita”)<sup>1</sup> highlights the importance of liability waivers as an effective liability shield. This is particularly true when charities and not-for-profits are engaged in activities, or even fundraising programs, that may involve the risk of harm or injury to participants or others. In *Levita*, an adult hockey player who was injured during the course of a hockey game sued both the opposing player, Alan Crew (“Mr. Crew”), who was alleged to have intentionally or negligently caused the injury, and the hockey league, for alleged negligence for allowing the opposing player to participate in league play.

For the reasons to be discussed, the lawsuit was dismissed against both defendants. While the dismissal of the claim as against Mr. Crew led the court to conclude that the claim as against the League could not succeed, the court nonetheless had instructive comments on the issue of the enforceability of liability waivers.

For charities and not-for-profits, an important part of risk management in relations to programs, events and activities is the consistent use of liability waivers. A well-drafted waiver may provide a complete defence to injury or property damage claims.

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<sup>1</sup> *Levita v Alan Crew et al.*, 2015 ONSC 5316, online:< <http://canlii.ca/t/gkxqm>>.

This *Charity and NFP Bulletin* discusses the issue of the enforceability of waivers by reference to the court's decision in *Levita*. While that case did not involve charities or not-for-profits, the principles of the case apply equally to both types of organizations.

## **B. FACTS**

### 1. True North Hockey Canada

True North Hockey Canada (“TNHC”) is a recreational adult hockey league that began in 1990 with only 16 teams of 15 players each. It has since grown to over 754 teams and over 10,000 players. TNHC holds itself out as a non-contact recreational hockey league and charges \$500 to each player to participate in the league.

At the beginning of each season, the TNHC requires the players to sign a waiver. The waiver informs the players that playing hockey has inherent risks. The risks outlined in the waiver include the risk of collision with other participants, the risk of collision with other objects such as hockey sticks, pucks, boards, nets or ice. Additionally, the waiver states that injuries could arise from being struck by “sticks and pucks, and injuries from collisions could include injuries to the eyes, face, teeth, head and other parts of the body, bruises, sprains, cuts, scrapes, breaks, dislocations and spinal cord injuries” which may cause paralysis. Importantly, the waiver released the TNHC and its officials from liability for loss or injury that the player may suffer while participating in league games.

### 2. The Players Involved in the Dispute

Mr. Levita, a 36-year-old lawyer at the time of the injury, joined the league in 2000. He joined the TNHC to improve his hockey skills and for the social aspects of the game. He also joined the TNHC because it was a non-contact league, and he thought that he was unlikely to get injured. He started with his team in Division E, the lowest skill level in the league and over the years eventually ascended with his team to the Division A, the highest skill level in the League. This was the Division in which the injury was suffered.

Mr. Crew, a 32-year-old business manager at the time of the incident, joined the TNHC in 2003. Mr. Crew had played hockey since about 5 or 6 years of age. He testified at trial that his skill level

was above average, and that he was faster than most other players in the league. Mr. Crew played the position of forward on his team.

### 3. The Incident

On the night of November 20, 2006, Mr. Levita and Mr. Crew were playing on opposing teams. While the facts of the incident were in dispute, the outcome was that Mr. Crew made contact with Mr. Levita, resulting in Mr. Levita falling feet first into the boards fracturing his tibia and fibula. Mr. Levita required surgery and subsequent physio therapy, massage therapy, as well as chiropractic therapy. In addition, he was unable to work for three months and required personal care assistance during that period. The resulting effects of the incident have resulted in limited ability to participate in recreational sports, lasting scars, potential for future surgery and difficulty in walking on uneven surfaces.

With respect to the liability of Mr. Crew, the court held that there was insufficient evidence to attach liability on either the basis of an intentional act to cause injury or negligence. The court observed that the “physical contact between the players which took place in this game occurred in the course of play and fell within the the accepted inherent risks.”<sup>2</sup>

## C. INHERENT RISK AND WAIVER

While dismissing the action against Mr. Crew, the court went on to review the allegations of negligence against TNHC, and the TNHC waiver defence. Firstly, on the issue of negligence, the court found that there was insufficient evidence to show that Mr. Crew’s hockey history in the league was such that he should have been expelled. There was also evidence that the TNHC had in place clear rules and a penalty system for infractions that went beyond what was recommended by the Canadian Hockey Association for recreational leagues. Therefore, the court held that no liability would be imposed against the TNHC on the basis of negligence.

With respect to the waiver, Mr. Levita made a number of arguments against the validity of the waiver. The first issue he raised was that no representative of the TNHC explained the terms of the waiver to the players.<sup>3</sup> The court, however, held that had he not been explained the terms of the waiver, or given

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<sup>2</sup> *Ibid* at para 98.

<sup>3</sup> *Ibid* at para 15.

sufficient time to understand that waiver, that steps were still open to him to satisfy himself that he understood the content of the documents before signing.<sup>4</sup> Mr. Levita was also found to have understood the legal significance of signing a waiver document. As a result, the court held that the effect of the waiver could not be voided in hindsight.<sup>5</sup>

Further, the court held that the waiver was clear and unambiguous in addressing the risks inherent in recreational hockey, and included the kind of injury in its disclosure that was unfortunately suffered by Mr. Levita.<sup>6</sup> Relying on the trial and appeal decisions in *Kempf v Nguyen*,<sup>7</sup> the court further noted that even if TNHC been found negligent, the waiver still constituted a complete defence to the claims made by Mr. Levita.<sup>8</sup>

#### **D. CONCLUSION**

This case is instructive to charities and not-for-profits that engage in activities that present risks of bodily injury or property damage, in that a well-drafted waiver can be an effective shield against such liability risks. Waivers are relatively complex legal documents and need to be carefully drafted before being used to increase the likelihood of surviving a legal challenge. If a charity or not-for-profit has any concerns about the drafting or the use of waivers, they should seek legal advice. Finally, it should be noted that the TNHC's failure to explain the waiver to the players did not affect its enforceability in this instance. However, as a general practice, charities and not-for-profits should take the step of explaining the waiver to the individuals required to sign them, to make sure the legal significance is clearly understood.

It is important to note however, that the *Levita* decision involved the signing of a waiver by a competent adult. When charities and not-for-profits are engaging in inherently risky activities with minors, they need to be cognizant of the particular status of minors in relation to waivers of liability. While it is still prudent to have a parent or guardian sign a waiver in Ontario on behalf of their minor child/ward, in some provinces (such as British Columbia), there is legislation that has been interpreted by the courts such that neither a parent nor a guardian can waive a child's right to bring an action for personal injury.

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<sup>4</sup> *Ibid* at para 105.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* at para 104.

<sup>7</sup> *Kempf v. Nguyen*, 2015 ONCA 114, online:< <http://canlii.ca/t/ggbv0>>.

<sup>8</sup> *Supra* note 1 at para 102.

Even in jurisdictions without specific legislation prohibiting such waivers, the enforceability of waivers as against minors is problematic. Therefore, while waivers should be part of a risk management strategy, organizations need to have appropriate safety policies and training to avoid injuries, in addition to adequate insurance coverage, particularly with regard to minors.



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