

The Lowdown on Liability Waivers for Charities and NFPs

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OVERVIEW



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- Enforceability of Liability Waivers
- Best Practices for Liability Waiver Enforceability
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A. INTRODUCTION

- Liability waivers may be used by charities and NFPs in providing products and services to the public or when recruiting members or volunteers, particularly in high risk situations
- Liability waivers, though, are often the subject of civil litigation, as their purpose is to require a person to give up their legal rights to sue for injury, property damage or death
- Drafting and processing of liability waivers must be done very carefully to maximize the chances of legal enforceability

B. WHAT IS A LIABILITY WAIVER?

- Written contract between the signee and the organization providing services, activities, programs
- Common risk management tool
- If well drafted, can provide full legal defence to civil claims
- Sometimes necessary to acquire liability insurance
- *Volenti non fit injuria* – “to a willing person, injury cannot be done”
- It is in essence an onerous type of contract which asks signatories to waive basic legal rights, including the right to sue
- Consider the following examples dealing with the enforceability of liability waivers from caselaw

C. ENFORCEABILITY OF LIABILITY WAIVERS

1. Primary Cases where Liability Waiver Enforced

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

- Reported on in [Charity & NFP Law Bulletin No. 178](#)

- Case provides guidance on key elements of well-drafted liability waiver

FACTS:

- Mr. Isildar had died while partaking in a recreational scuba program
- The court found that the liability release (waiver) and assumption of risk agreement that he had signed were properly drafted, and enforceable
- As a result, the lawsuit by surviving relatives was dismissed

- *Isildar* established a three-step legal test for the validity of liability waivers (para 634):

1. Is the waiver valid in the sense that the plaintiff knew what they were signing?

- Did the presenting party take reasonable steps to ensure the nature of the document was known by the signatory

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

3. Are there any factors making enforcement of the waiver unconscionable?

- The court found that Mr. Isildar was aware of the risks of partaking in a scuba diving program and knowingly waived his legal rights
- The defendants explained this sufficiently and presented the opportunity for participants to ask questions about the waiver
- The language of the waiver was broad enough to release the defendant from exposure to claims in both contract and tort, specifically contemplated the harm that befell Mr. Isildar, and sheltered them against claims from his heirs

- The court also ruled that the waiver was not “unconscionable”
- The court followed earlier case law, stating that liability waivers for competent adults do not diverge from community standards of commercial morality to render them unconscionable or contrary to public policy
 - See later comments about liability waivers and minors

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Levitta v. Crew and True North Hockey Canada
2015 ONSC 5316

- Discussed in [Charity & NFP Law Bulletin No. 375](#)

- Mr. Levitta, a hockey player in an adult recreational league, was injured during a game by an opposing player

FACTS:

- Both the opposing player, who was blamed for Mr. Levitta's injuries, and the league were sued

- The court dismissed argument that the waiver was unenforceable

- The waiver clearly addressed the inherent risks of playing ice hockey and the type of injury which Mr. Levitta suffered (a broken leg)

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Other Cases where Liability Waiver Enforced

- *Loychuck v Cougar Mountain Adventures Ltd.*, [2011] B.C.J. No. 254 ([Charity & NFP Law Bulletin No. 251](#)) – Zipline injury waiver found to be enforceable
- *Quilichini v Wilson's Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd.*, 2017 SKQB 10 ([Charity & NFP Law Bulletin No. 404](#)) – Go-kart injury waiver found to be enforceable
- *Arif v Li*, 2016 ONSC 4579 ([Charity & NFP Law Bulletin No. 391](#)) – Rock climbing injury waiver found to be enforceable

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2. Case where Liability Waiver Not Enforced

Peters v Soares, 2019 BCSC 189

- Discussed in [Charity & NFP Law Bulletin No. 444](#)
- The liability waiver was contained in a club membership agreement for the defendant martial arts academy
- The waiver did not make mention of risk of injury during competitions
- The plaintiff was injured during a competition and alleged negligence on the part of the academy
- The court stated that the waiver did not extend to competitions as it only mentioned a risk of injury during classes
- “releases only cover matters specifically in the contemplation of the parties at the time the release was given”

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D. BEST PRACTICES FOR LIABILITY WAIVER ENFORCEABILITY

- Liability waivers may reduce risks of lawsuits and liability, if best practices are followed, including:
 1. Use clear and precise language and include relatives of participant as parties excluded from making claims if damage is suffered by the participant
 2. Make waivers available in advance of registration

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3. Use reasonable steps to bring the waiver to the attention of the signatory, including:

- a) Posting a copy to the organization's website
- b) Make the signing of the waiver mandatory for registration and do not accept payment until the waiver is signed
- c) Ensure the signatory has time to read the waiver
- d) Make it available in other languages
- e) Highlight most significant elements of document
- f) If online, ensure the signatory clicks "I agree" using appropriate programs

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- 4. Ensure a comprehensive description of event, risks, and waiving of legal claims
- 5. Include indemnity clause for harm done to other participants, and costs incurred by the organization
- 6. Include liability waiver for medical treatment
- 7. Include a media release waiver
- 8. Include waiver of liability for organization AND its employees, volunteers, officers, directors and members
- 9. Ensure waivers are properly organized and stored for later reference

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E. LIABILITY WAIVERS AND MINORS



- Parents often sign liability waivers on behalf of their minor children
- However, longstanding Ontario case law brings the validity of these waivers into question
- Liability waivers are likely unenforceable when signed on behalf of minors
- Parental indemnities are also likely unenforceable
- Some insurers still require organizations they insure to use them for dissuading claims and for claim settlement negotiation purposes

F. LIABILITY INSURANCE



- A waiver is not a replacement for liability insurance
- Events with any risk of injury or property damage require liability insurance to provide organization with legal liability protection
- This can prevent the organization and its members, employees, volunteers, officers and directors from being liable for monetary damages and legal costs
- Serious personal injury claims can be in the millions of dollars
- Speak to your insurance broker to secure the level and type of liability insurance that is appropriate for your organization

G. KEY TAKEAWAYS



If an organization uses liability waivers, make sure they are customized to its specific programs, activities and events



Once the liability waiver is properly drafted, make sure that those responsible for obtaining the waiver, from participants follow protocols to secure informed consent



Liability waivers are not a substitute for following good safety practices and event management, which are also important factors in overall risk management



If you are unsure if your event, program or activity is covered by liability insurance, ask your broker or insurer to give you a response in writing



Finally, if unsure about the wording of your liability waiver, seek legal counsel

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