

## EXCLUSION CLAUSES AND WAIVERS

### **Introduction**

Sports and recreational activities are a way of life to many. Society has witnessed a dramatic increase in the number of adults and children engaged in recreational, athletic, and fitness endeavors and in particular more extreme sports which have a higher incidence of injury. The unfortunate by-product of this involvement is an increase in the number of negligence actions brought by injured participants against recreational facilities, organizations, occupiers, volunteers, employees, and referees. In the past, defendants in sports injury lawsuits relied heavily on the doctrine of *volenti non fit injuria* (“*volenti*”), or voluntary assumption of risk. The *volenti* doctrine provides that no wrong can be done to a person who consents to being injured. When argued successfully, *volenti* provides a complete bar to the claim on the grounds that a defendant is not liable for injuries resulting from risks voluntarily assumed by the plaintiff.

A series of decisions from the Supreme Court of Canada<sup>1</sup> has confined the *volenti* defence to a very narrow application. Before a plaintiff can be held to be *volens*, the defence must prove that there was a bargain between the plaintiff and defendant whereby the plaintiff surrendered any right to sue. The onus is also on the defence to show that the plaintiff freely and voluntarily assumed the risk with full knowledge as to the nature and extent of the risk, and that the plaintiff expressly or impliedly agreed to absolve the defendant from all liability arising from the activity.

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<sup>1</sup> The leading authority continues to be the 1963 decision of *Lehnert v. Stein* [1963] S.C.R. 38.

(i) **The Rise of Waivers and Releases to Limit Liability**

Due to the rise of claims based in negligence, breach of contract and *Occupiers' Liability Act*, and the demise of *volenti* as a possible defence, organizations have turned to waivers and releases as a means of limiting their liability. Although the terms “waiver” and “release of liability” are frequently used interchangeably, they are two different legal concepts. A release of liability forms a legal contract between two parties whereby one party (“the releasor”) agrees to release the other (“releasee”) from liability in certain circumstances. A waiver is the voluntary relinquishment of a legal right, and may take the form of an oral agreement between two parties, or conditions printed on the back of a ticket. Frequently, waivers and releases come in the form a written contract signed by the releasor. The principles of contract law apply with respect to the interpretation and application of waivers and releases. Courts often rely on the doctrine of *contra proferentum*, whereby any ambiguity in the contract is construed against the party relying on the waiver or the release.

(ii) **The Use of Waivers for Sports or Recreational Activities**

Waivers are particularly helpful in the area of sports or recreational activities where an inherent risk of injury exists. The jurisprudence surrounding waivers and releases began to take shape in the 1980s as a result of several ski cases in British Columbia. The principles established in the ski cases are now being applied to a variety of other settings involving claims of negligence. This paper outlines some of the most

frequent arguments advanced in release and waiver cases (“waiver cases”) and provides an overview of the elements that should be included in a well drafted waiver agreement.

**(iii) The Allegation of Fundamental Breach**

In cases involving signed waiver agreements, plaintiffs frequently allege that the defendant’s negligence constituted a “fundamental breach” of the contract. The principle underlying fundamental breach is that an exclusion clause will not apply if the person benefiting from the clause creates a situation that is radically different from that contemplated by the agreement as a whole.

Although “fundamental breach” is rooted in commercial law, the case of *Delaney v. Cascade River Holidays Ltd.*<sup>2</sup> introduced the concept into sport and recreational cases. In *Delaney*, the deceased drowned during a white water rafting excursion operated by the defendant corporation. The court found that the defendant was negligent in failing to provide adequate floatation devices for the river system. Despite the finding of negligence, the defendant was shielded from liability because the deceased had signed a standard form release before embarking on the trip. The agreement clearly and unambiguously released the defendant for any liability for negligence. The plaintiff argued that there was a fundamental breach of an implied covenant to safely transport the deceased and that the release was therefore null and void.

The court pointed out that the determination of fundamental breach depends entirely on the construction of the contract. In this case, the court held that the exclusionary provisions in the signed release excluded liability for fundamental breach.

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<sup>2</sup> [1981] B.C.J. No. 2209, 34 B.C.L.R. 62 (B.C.S.C.)

Most importantly, the court stated that there is no substantive rule of law whereby a fundamental breach of contract automatically nullifies an exclusion clause:<sup>3</sup>

There is, accordingly, no substantive rule whereby a fundamental breach automatically nullifies an exclusion clause. Rather, the court must consider fundamental breach by the defendant in the context of the contract as a whole in order to derive the true construction to be placed on the exclusion clause...Therefore, the issue becomes whether, in the context of the agreement as a whole, the clause can be construed as excluding liability for fundamental breach. Here the corporate defendant agreed to transport Delaney and the others on a white water rafting expedition. There were obvious dangers...The corporate defendant wanted protection and therefore it was not unreasonable to obtain a signed release excluding “negligence on the part of the company, its agents or servants”. The words are clear and unambiguous and the agreement when read as a whole must be taken to exclude liability for fundamental breach.

Since *Delaney*, arguments as to fundamental breach are not typically well-received by the courts in these type of cases. Accordingly, plaintiffs tend to allege that there has been a breach of industry standards, which goes to the core of the contract.

In the leading case of *Dyck v. Manitoba Snowmobile Association Inc.*,<sup>4</sup> the Supreme Court of Canada held that the defendant snowmobile association was not liable for damages after a competitor was seriously injured in a snowmobile race. The court considered that the plaintiff had signed two separate waivers prior to competing in the snowmobile race, and that inherent dangers were generally expected by competitors. Because the defendant’s negligence was not outside the realm of what could be expected, there was no fundamental breach of the contract.

The accident occurred when the plaintiff struck the defendant official who had moved onto the track to signal the end of the snowmobile race. After striking the official,

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<sup>3</sup> *Ibid*, at para. 20.

<sup>4</sup> [1985] 4 W.W.R. 319, [1985] 1 S.C.R. 589, 1985 CarswellMan 180.

the plaintiff collided with the outside wall of the track and was seriously injured. Prior to the race, the Plaintiff signed an entry form releasing the defendant association, along with its organizers and agents, from liability howsoever caused in connection with the race. The waiver specifically contemplated negligence. In addition to the waiver signed on the day of the race, the plaintiff had signed a competition membership application which purported to release the association from liability. The plaintiff was also a member of the Manitoba Snowmobile Association whose rules expressly released the association from all liability for injuries suffered by entrants in races sanctioned by it.

The Court of Appeal found that the accident had occurred entirely from the negligence of the official. Despite this finding, the court held that the waiver constituted a complete defence. The Supreme Court of Canada concurred with the reasoning of the Court of Appeal, and held that in the context in which it was signed, the waiver clause in the entry form exonerated the association from liability. The court also rejected the argument that the official's actions constituted negligence of a kind that was radically different from anything reasonable men could have contemplated. The court was of the view that the accident was precisely the type contemplated by the exclusion clause and that although the actions of the official were negligent they were not uncommon in snowmobile races.<sup>5</sup> As such, there was no fundamental breach on the part of the defendants. The court also held that there were inherent dangers associated with snowmobile racing, of which the plaintiff should have been aware.

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<sup>5</sup> *Ibid*, at para 8.

The British Columbia Supreme Court decision in *LaFontaine v. Prince George Auto Racing Association*<sup>6</sup> provides a clear example of a plaintiff attempting to rely on a breach of industry standards to escape a waiver agreement. In *LaFontaine*, the plaintiff's husband was struck and killed by a race car while he worked in the pit crew of the track. At the time of the race, the deceased was a member of the Prince George Auto Racing Association ("the PGARA"). Prior to the race, he executed two separate liability waivers, one at the renewal of his annual membership with the PGARA, and the other in order to participate in the race.

On the day of the accident, the race was held on a track owned by the PGARA, but was conducted and supervised by the Interior Open Wheel Association ("the IOWA"). The conduct of a race at this facility was subject to certain safety procedures which were established both by custom and practice in the sport of automobile racing and detailed in the rules and regulations of PGARA and IOWA. It was a term of the contract between the deceased and the defendants that the established safety procedures would be observed. The accident occurred when a race participant stalled his motor vehicle in the middle of the track, contrary to the rules and regulations of the sport. The flagman and the main flagman took no steps to halt the race despite the stalled vehicle and the presence of the pit crew members on the track. The deceased was fatally struck by another driver in the course of a practice run.

At trial, the plaintiff argued that the failure of the flagman to stop the race when pit crew members were on the track amounted to a "fundamental breach" of the rules of PGARA and that this breach negated the effect of the release. The court rejected this

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<sup>6</sup> [1994] B.C.J. No.176.

argument on the grounds that the rules themselves did not constitute a contract with the deceased. Furthermore, the court concluded that the rules were a guide to the conduct of the sport and not a guarantee against injury or death. In upholding the validity of the liability waivers, the court held that the terms of the waivers were not manifestly unfair, and that the deceased had signed such waivers on previous occasions.

**(iv) When the Plaintiff Fails to Read or Understand the Release or Waiver**

It is understandable that sports participants get caught up in the excitement and fail to read the waiver agreement they are asked to sign. But, imagine the frustration of the organizer who drafts a carefully worded release and obtains a signature, only to later learn that the participant claims not to have read or claims to have not understood the document. Unfortunately, this is an argument commonly faced by recreational organizations who find themselves faced with a lawsuit.

Under the general principles of contract law, a party who signs a document in the absence of fraud or misrepresentation is bound by its terms. As the author noted in *The Law of Contracts*, “one who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words used in their reasonable meaning.”<sup>7</sup> This principle has been expanded to include the proposition that signature to a document may bind the signer even if the document is unread and the signer ignorant of its contents.<sup>8</sup>

This legal principle has been relied upon by parties seeking to uphold a waiver’s terms, particularly when it is alleged that the signer did not read the document. This

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<sup>7</sup> Waddams, S.M. (2005) *The Law of Contracts*, Canadian Law Book Inc.: Toronto, at pg. 221.

<sup>8</sup> *Ibid.*

principle finds its origins in *L'Estrange v. Graucob Ltd.*<sup>9</sup> where the court held that where a party signs a document which he knows affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document. The court in *L'Estrange* concluded that “where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents.”<sup>10</sup> The Supreme Court of Canada in *Marvco Color Research Ltd. v. Harris*<sup>11</sup> arrived at the same conclusion and added that an individual cannot rely on his or her failure to read the agreement to argue that the terms of the agreement are not legally binding. Justice Estey explained as follows:<sup>12</sup>

The defendants, in executing the security without the simple precaution of ascertaining its nature in fact and law, have nonetheless taken an intended and deliberate step in signing the document and have caused it to be legally binding upon themselves. ... this negligence, even though it may have sprung from good intentions, precludes the defendants in this circumstance from disowning the documents, that is to say, from pleading that their minds did not follow their respective hands when signing the document and hence that no document in law was executed by them.

There were initially two exceptions to this doctrine, first, where the document is signed by the party in circumstances which make it not her own act, and secondly, when the agreement has been induced by fraud or breach. A third exception was later added, namely, where the party seeking to enforce the document knew or ought to have known of the other's mistake as to its terms. In circumstances involving recreation injuries and waivers, the courts have also established a second line of authority which states that a

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<sup>9</sup> *L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.) 403, at pp 406-407

<sup>10</sup> *L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.) 403, at pp 406-407.

<sup>11</sup> [1982] 141 D.L.R. (3d) 577.

<sup>12</sup> *Ibid*, at para. 586.

party seeking to rely on an exclusion of liability must show that a reasonable attempt has been made to bring the terms of the release to the signor's attention.

These principles of contract law were cited with approval by McLachlin C.J.B.C. (as she then was) in *Karroll v. Silver Star Mountain Resorts Ltd.*<sup>13</sup> In *Karroll*, the plaintiff broke her leg when she collided with another skier while participating in a downhill ski race. Prior to the race, the plaintiff signed a document releasing the defendant and its agents from liability for any injuries sustained in the race. The defendant brought an application pursuant to Rule 18A of the British Columbia Rules of Practice for an order that the plaintiff was precluded by the terms of the release from recovering damages from the ski resort. The plaintiff opposed the motion on the basis that she was not given adequate notice of the contents of the waiver, and was not given an opportunity to read it.

Justice McLachlin noted that in a commercial setting, there is no need for the party presenting the document to bring its onerous terms or exclusions of liability to the attention of the signing party, nor must the signing party be advised to read the document.<sup>14</sup> Justice McLachlin then considered the plaintiff's argument that there may be exceptional circumstances when greater efforts must be made to bring the terms of the release to the releasor's attention. The court summarized the law as follows:<sup>15</sup>

It emerges from these authorities that there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in

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<sup>13</sup> [1988] B.C.J. No. 2266, 33 B.C.L.R. (2d) 160.

<sup>14</sup> *Ibid*, at para 19.

<sup>15</sup> *Ibid*, at para 23-24.

question, that such an obligation arises...Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing.

Justice McLachlin concluded that once a party signed a release, it was irrelevant whether the party read or understood the document prior to signing it. The three exceptions to this general rule were as follows: *non est factum*, where the agreement had been induced by fraud or misrepresentation and where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms.

In *Karroll*, the waiver of liability effectively barred any claim for damages as against the defendant ski resort. Justice McLachlin held that there was no misrepresentation and that the Plaintiff signed the release knowing that it was a legal document affecting her rights. The release was also consistent with the purpose of the contract, which was to permit the plaintiff to compete in the ski race. Finally, the signing of such releases was a common feature of ski races, and the plaintiff had signed similar releases on previous occasions. In this particular fact situation, the court found that it was not incumbent on the defendant to take reasonable steps to bring the contents of the release to the plaintiff's attention, or ensure that she read it fully.

The *Karroll* case remains the most cited authority for the proposition that a waiver may be upheld despite allegations that a party did not read the release prior to

signing the document. In *Blomberg v. Blackcomb Skiing Enterprises Ltd.*,<sup>16</sup> the British Columbia Supreme Court held that a waiver signed by the plaintiff at the time of his season ticket purchase was sufficient to fully exonerate the defendant ski resort from liability. In this case, the plaintiff collided with another skier at the defendant ski resort, and as a result, the plaintiff crashed into the buttress of a snow fence sustaining serious injuries. At the time of the injury, the plaintiff held a season's pass with the resort, and had signed a waiver prior to obtaining the pass. In support of his claim, the plaintiff argued that he did not understand that he was signing a document of this nature, and that no one on behalf of the defendant informed him of the terms of the release. The plaintiff further alleged that he required eyeglasses for reading, and did not have his glasses with him that day.

The Court dismissed the plaintiff's claim and held that the waiver was a complete defence to the action. The Court noted that the waiver was broad in scope, short in length, the printing was clear and legible, and negligence was expressly mentioned in bold letters. The court also accepted that one of the defendant's employees had asked the plaintiff to "sign the waiver" when he was purchasing the season's pass. The Court placed much weight on the fact that the plaintiff was an educated and experienced businessman, an experienced skier, and had signed similar waivers on numerous occasions.

The Court in *Blomberg* also found that there was no evidence to suggest to the defendant at the time of signing that the plaintiff did not know that he was signing a liability waiver. The defendant therefore took all reasonable steps to bring the contents of

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<sup>16</sup> [1992], 64 B.C.L.R. (2d) 51.

the waiver to the plaintiff's attention.<sup>17</sup> The Court also refused to accept the plaintiff's argument that he was unaware of the contents of the document, as he had not been given an opportunity to read it. The Court made the following observations with respect to this argument:

I think that this plaintiff was well aware that the document he signed was a waiver of his legal rights to sue, which he knew whether or not he actually read the document. With respect, his stand that he did not read it because he had no eyeglasses or that he did not want to hold up others in line or did not understand the waiver is purely self-serving in my view. According to the witnesses above who assisted him in the applications for passes, he made no mention of being unable to see the print or that he did not understand the document, and both witnesses said that others took time to read it so there would be no problem, in my view, of holding people up if he took time to carefully read the document. In my view, the plaintiff was well aware what the waiver was and chose not to examine it or was careless or unconcerned about the nature of the document.<sup>18</sup>

The Court concluded that the plaintiff did not fall into one of the three exceptions set out in *L'Estrange* or *Karroll*. The principle of *non est factum* did not apply in this case and there was no misrepresentation or fraud. There was no evidence that the plaintiff was mistaken as to the contents of the waiver.

In the more recent case of *Goodspeed v. Tyax Mountain Lake Resort Ltd.*,<sup>19</sup> the British Columbia Supreme Court again upheld the validity of a waiver that had not been read by the plaintiff. In the *Goodspeed* case, the plaintiff was severely injured when he participated in an ATV tour operated by the defendant resort. Prior to the tour, the participants were asked to sign a "form" so that the number of persons wishing to use an ATV could be confirmed. The "forms" were actually the liability waivers, and were

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> [2005] BCSC 1577, [2006] B.C.W.L.D. 579.

stacked in the end corner of a table. Approximately 18 to 24 participants lined up to sign the form. The group members were rushed into signing the waiver so that the tour could get started, and no representative of the defendant explained that the form was in fact a waiver. Like most of the participants, the plaintiff did not read the document, but did notice the title and understood the document to mean that his rights to sue were affected.

The Court granted summary judgment and held that the waiver agreement was enforceable, providing a complete defence to the action. The Court restated that where a party has signed a waiver form, it is immaterial that he or she did not read it, except in the three circumstances set out in the *Karroll* case: (1) where there has been *non est factum*, (2) where there has been misrepresentation, and (3) where the defendant knows that the plaintiff does not intend to be bound by the form, and therefore there is a duty to bring its terms to the plaintiff's attention.<sup>20</sup> The Court found as a fact that the plaintiff did not read the waiver, but that he knew what it was and what it was intended to do. The Court also considered that the waiver was easy to read, that the plaintiff had signed waivers in the past, and that he at least knew that the document was intended to discourage him from suing. The Court further held that the defendant took reasonable and sufficient steps to bring the terms of the waiver agreement to the attention of the plaintiff. The plaintiff could not therefore successfully argue that he did not understand the document because he did not read it.<sup>21</sup> Based on all of the factors, the court held that the defendant had no duty to bring the waivers terms to the plaintiff's attention.<sup>22</sup>

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<sup>20</sup> *Ibid* at para 94.

<sup>21</sup> *Ibid* at para 96.

<sup>22</sup> *Ibid*

In determining whether a plaintiff understood the terms of a liability waiver, the courts will consider the context in which the waiver was signed, and his or her prior experience with such contracts. In *Ochoa v. Canadian Mountain Holidays Inc.*,<sup>23</sup> the British Columbia Supreme Court held that a signed release absolved a tour guide of all liability after a client was killed in an avalanche. The defendant company, Canadian Mountain Holidays Inc., offered heli-skiing tours on the mountains of British Columbia. Prior to participating in the tour, clients were required to sign liability waivers in favour of the company. The plaintiff signed the liability waiver on December 10, 1990, for the trip that was to take place the following March. The signing occurred at the plaintiff's home, and the defendants did not verbally communicate the terms of the waiver. On March 12, 1991, the plaintiff participated in the ski tour and was tragically killed by an avalanche.

The plaintiff's estate brought an action against the defendant ski company for negligence. To assess the claim, the court was required to determine the applicability of the waiver signed by the plaintiff months before his death. The Court found that the plaintiff was not fluent in the English language and that he could not have read the terms of the waiver (which were only in English). The Court assumed that the waiver was not translated for the plaintiff prior to his signing of the document.

Despite these findings, the Court upheld the validity of the waiver and rejected the suggestion that *non est factum* applied in this case. The plaintiff could not escape the terms of the contract on the grounds that he did not understand what he was signing. In arriving at this conclusion, the Court took into account that the plaintiff was an

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<sup>23</sup> [1996] B.C.J. No. 2026 (B.C.S.C.)

accomplished businessman who had traveled throughout North America, and that translation services were readily available to him. The Court also considered that this had been the plaintiff's third ski tour with the defendant company, and that he had signed similar liability waivers on prior occasions. The Court concluded as follows:

“in the circumstances, the only reasonable conclusion to be drawn from Mr. Ochoa's witnessed signature is that the actual contents of the waiver were immaterial to him. He was prepared to be bound by the contract.”<sup>24</sup>

In conclusion, the courts have clearly upheld the principle that once a party signs a liability waiver, it is irrelevant whether the party read or understood the document prior to signing it. This legal principle is one of basic contract law, and has now been affirmed in a number of leading cases, certainly in British Columbia. The courts recognize the following three exceptions to this general rule: *non est factum*; an agreement induced by fraud or misrepresentation; and mistake as to the terms of the release. As was evident in the *Ochoa* case, however, the courts appear reluctant to apply these exceptions when the effect would render a signed waiver void. The crucial question that remains unanswered is whether Ontario courts will follow the path blazed by the British Columbia courts.

(v) **When the Defendant is Not Named in the Waiver Agreement**

In most cases, a plaintiff will sue a number of parties that were involved in the recreational event which led to the injury. At times, a defendant in the lawsuit may not be expressly named in the waiver agreement. This situation can be difficult for a defendant who wishes to rely on the waiver, as basic contract principles of law provide that only the parties to the agreement may rely on it to its benefits. Despite this rule, courts have

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<sup>24</sup> *Ibid*, at para. 133.

recognized that in certain circumstances, a defendant who is not expressly named in the waiver may rely on the waiver to deny liability.

In the *Karroll* case,<sup>25</sup> the defendant mountain resort was expressly named in the waiver, but the defendant ski club was not. The Court acknowledged that benefits under a contract are generally only enforceable by parties who are privy to it. However, Justice McLachlin held that an unnamed party can rely on the waiver agreement if it establishes the following four propositions:

1. that the agreement makes it clear that the [unnamed party] intended to be protected by the provisions which limit liability;
2. that the agreement makes it clear that the [named party] was contracting not only on its own behalf but on behalf of the [unnamed party];
3. that the [named party] had authority from the [unnamed party] to enter into the agreement on its behalf; and
4. that the [unnamed party] gave consideration for the agreement.<sup>26</sup>

These four propositions were established in *Karroll*, as the release clearly stated that the liability provisions extended to the resort's representatives and agents. Courts now approach the propositions expressed in *Karroll* in light of the purpose and intent of the waiver agreement. In doing so, the waiver as a whole is examined to determine whether there was a clear intention to include the unnamed party. If there is any doubt, the principle of *contra proferentum* applies and the unnamed party will not be permitted to rely on the waiver.

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<sup>25</sup> opt. cit.13.

<sup>26</sup> *Supra*, note 11.

In the *Goodspeed* case,<sup>27</sup> the British Columbia Supreme Court allowed the defendants' application for summary judgment, despite the fact that they were not named in the waiver agreement. The waiver only named the ATV rental operator but referred to "all of its related companies, officers, directors, and employees." The Court relied on the propositions set out in *Karroll* and concluded that although the defendants were not expressly named, there was no doubt as to whom the waiver was intended to cover. The broadly worded clause releasing all officers and directors was sufficient evidence to include the defendants in the release provisions. The Court also held that a plaintiff who did not read the waiver could not rely on a drafting defect to later escape the release provisions:

The function of the Waiver Agreement is found in its title: Release and Waiver of Liability. In this regard, it is very straightforward, plain speaking and not unduly onerous. The Respondent knew full well what it was, having read at least the title. Having not read the balance of the Waiver Agreement (although by the Respondent's own admission, the Applicants had no basis for knowing that), the Respondent cannot now state that a perceived defect in a portion of the content can overcome its fundamental effect.<sup>28</sup>

In *Goodspeed*, the court focused primarily on the intentions of both contracting parties and the subjective knowledge of the plaintiff at the time the waiver was signed. There was clear willingness on the part of the court to include the defendants under a broad category and little regard was given to the fact that they were not expressly named in the waiver agreement.

In the decision of *Lafontaine v. Prince George Auto Racing Association*<sup>29</sup> the British Columbia Supreme Court similarly held that a party not expressly named in the

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<sup>27</sup> opt. cit. 19

<sup>28</sup> *Supra*, note 19 at para.67.

<sup>29</sup> *Supra*, note 6

waiver agreement would be protected by its terms. In *LaFontaine*, the deceased had executed two separate liability waivers: one at the renewal of his annual membership with the Prince George Auto Racing Association (the “PGARA”), and the other in order to participate in the particular race. The release signed on the day of the race did not specifically name the PGARA and the deceased was mistakenly asked to sign a waiver intended for drivers as opposed to pit crew members.

Despite these two serious defects, namely, the wrong form and the failure to specifically name the PGARA, the Court determined that the PGARA would be protected by the waiver agreement. The Court concluded that there was no ambiguity as to whom the waiver was intended to cover, given the deceased’s level of experience and his knowledge of the organization. The Court also took into account all the factors surrounding the signing of the waiver. Of even greater interest is the fact that the court modified the duty of reasonable notice, and the principles of privity of contract, based on the plaintiff’s experience and familiarity with the activity:

In approaching these submissions it is important that one not lose sight of the facts surrounding Mr. Wong’s execution of the document. He was not a tourist driving past a sign inviting them to try a white water rafting trip, or a first time skier on a particular hill being invited to participate in a race, he was an experienced participant in a sport which is by its nature inherently dangerous... Given his state of knowledge of the organizations involved and his membership in P.G.A.R.A. it is impossible to conclude that he was in any doubt as to who “the promoters, participants, racing associations, sanctioning organizations, or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, [or] rescue personnel...” were meant to be covered by the release on any race day or, in particular, on the date of his death... The argument attacking both privity of contract and lack of consideration is, in my respectful view, misconceived. The concept of privity is that generally only those who are direct parties to a contract may claim a remedy under it. A sport which, by its nature, carries with it significant risks of injury of death draws participants

who are, in general terms, knowledgeable and cognizant of those risks... The consideration flowing between the various participants is the mutual release and waiver of claims against all others. The requirement that the agreement be signed before any person is allowed to enter the restricted areas or participate in the events meets the requirement of both privity and consideration.<sup>30</sup>

The courts, in the appropriate circumstances, will rely on the doctrine of *contra proferentum* to support of a finding that a party not expressly named in a waiver agreement cannot rely on its terms. For example, the British Columbia Supreme Court in *Quick v. Jericho Tennis Club*,<sup>31</sup> the plaintiff was injured while participating in a tennis tournament at the defendant tennis club. Prior to the tournament, the plaintiff signed a brochure which contained a broadly worded waiver clause on the back page. The Jericho Tennis Club was not expressly named in the Waiver agreement. The Court refused to make an Order pursuant to Rule 18A that the plaintiff's action be dismissed pursuant to the signed waiver provision. The Court applied the principle of *contra proferentum*, and concluded as follows:

Where a party to a personal injury litigation of this kind relies upon a Waiver of Claims clause, it must be clear as to the parties as well as to the waiver. In my view, at the time of signing the entry form which must be taken to include, in my view, an acknowledgement of reading the waiver of claims clause, it would not be clear to the entrant (the plaintiff) that he was waiving any claims against this particular defendant, it not being specifically named.<sup>32</sup>

It would appear that there were other factors in the *Quick* case that contributed to the court's decision to exercise *contra proferentum* rule in this instance. For example, the plaintiff obtained the brochure from a friend, and not the defendant. There was also evidence that the exclusionary clauses were in a smaller point font, and not readily

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<sup>30</sup> *Supra*, note 6, at para. 47.

<sup>31</sup> (1998), 40 B.L.R. (2d) 315

<sup>32</sup> *Ibid*, at para. 22.

viewable. Regardless, *Quick* serves as a refreshing reminder that evidence concerning the intentions of the parties must be available when relying on a waiver where the defendant is not expressly named.

(vi) **Where Negligence is Not Specifically Excluded**

A common issue arising in waiver cases is whether the type of negligence alleged against the defendant falls within the ambit of the agreement. Two types of scenarios typically arise which jeopardize the validity of the waiver: first, there is a reference to negligence, but the agreement does not specify the type of negligence that is excluded. Secondly, where the waiver excludes liability but does not specifically mention negligence. While these scenarios do create challenges, courts are willing to overlook this deficiency provided that the remainder of the defence evidence is compelling.

The British Columbia Supreme Court decision in *Clark v. Action Driving School Ltd.*<sup>33</sup> is a good illustration of the court's willingness to uphold a waiver agreement that is silent with respect to negligence. In this case, the plaintiff was injured at the defendant's driving school while taking a motorcycle lesson. Prior to the lesson, the plaintiff signed a waiver agreement which included the following exclusionary clause:

I hereby release the Action Driving School Ltd., and its officers, instructors, and any agency which is sponsoring Action Driving School Ltd., from all responsibility of property damage, bodily injury, liability, cost, and expenses and claims of every nature and kind howsoever arising from or in consequence of such students participation in any of the training courses conducted by the school...<sup>34</sup>

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<sup>33</sup> [1996] B.C.J. No. 953 (British Columbia Supreme Court)

<sup>34</sup> *Ibid*, at para.2.

The Court considered all factors surrounding the execution of the waiver, including the fact that the Defendant was a 53 year old professional who clearly understood the nature of the document being signed. The defendant was under no pressure when the waiver was signed, and the fact that the transaction was witnessed should have impressed upon him significance of the document. In the circumstances, the Court gave effect to the waiver agreement despite the fact that it did not exclude negligence. The Court held that the words “howsoever arising” were sufficient to cover claims based in negligence.

In *Simpson v. Nahanni River Adventures Limited*,<sup>35</sup> the plaintiff’s husband died while hiking during a wilderness trip supervised by the defendant tour company. Prior to the trip, the husband signed a waiver releasing the tour company and its employees from any liability for death suffered as a result of his participation in the trip, "for any cause whatsoever". The husband died after an unexpected flash flood swept him away while he was hiking in a dry creek bed. The wife subsequently sued the defendant company for negligence, and the company brought an application pursuant to Rule 18A for an order dismissing the plaintiff’s claim.

The defendant’s application was granted. For the purpose of the application, the Court accepted that the company had been negligent in allowing the husband to walk in a dry creek bed while knowing that a flash flood may occur at any moment. Despite falling below the standard of care required of a tour guide company, the Court concluded that the waiver was a total defence to the plaintiff’s claim. While the waiver did not specifically release the company from injuries caused by negligence or from flash floods, the Court

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<sup>35</sup> [1997] Y.J. No.74 (Y.T.S.C.)

held that the wording in the waiver of "hazards in and on lakes and rivers" and "violent and unpredictable weather" essentially covered the incident in question.<sup>36</sup>

The Court cited the *Dyck* case and concluded that given the nature of the activity undertaken, it was reasonable for the defendant to rely on the wording of the waiver. The risk of a flash flood was not so remote as to be taken outside of the scope of the waiver. In deciding to uphold the waiver, the Court also considered that the husband was highly educated, that he had read the waiver, and that the company had made representatives available to answer questions and concerns.

As can be seen from this discussion, the courts have clearly demonstrated a willingness to uphold a waiver agreement, even when negligence is not specifically excluded. In relying on these precedents, however, the resort must ensure that the plaintiff understands the general release provision and that adequate notice of the release is provided. In *Ochoa*,<sup>37</sup> the British Columbia Supreme Court warned that the word “negligence” itself is not necessarily sufficient to uphold a waiver agreement. The legal meaning of “negligence” is not easily understood by lay persons. As such, without contributing factors such as an educated plaintiff and reasonable notice of the exclusion clause, the word “negligence” in a waiver agreement may not bind a plaintiff. The Court commented as follows:

Any waiver seeking to cover negligent conduct must surely contain something more than the word negligence. That something more would include, at the least, a context for the word negligence describing the kind of conduct amounting to negligence which is intended to be covered. In order for a court to find the term sufficient to cover any negligent behaviour, it must be satisfied that the individual signing it, if he read it, could reasonably be expected

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<sup>36</sup> *Ibid*, at para. 12.

<sup>37</sup> *opt. cit.*

to understand its meaning. I hasten to add that the authorities on this subject do not require that that understanding be objectively found on the waiver alone. It may be gleaned from the circumstances of the individual's knowledge of the activity at issue coupled with the document under consideration.<sup>38</sup>

**(vii) Tickets as Waiver Agreements**

In certain industries, it is not practical to obtain signed waiver agreements from participants who engage in potentially dangerous recreational or athletic endeavors. When lawsuits arise in these circumstances, defence counsel must rely on exclusion clauses printed on tickets, and other warnings located throughout the premises. Although the nature of the contract is different in ticket cases, the courts are willing to uphold such exclusionary clauses provided that reasonable steps have been taken to alert the plaintiff to the waiver terms.

The leading Canadian case in this area is the decision of the Supreme Court of Canada in *Union Steamships Ltd. v. Barnes*.<sup>39</sup> In the *Union Steamships* case, the plaintiff fell down an open hatch in the dark and sustained injuries on a ship due to the defendant's negligence. The issue on appeal was whether the waiver terms located on the back of the ticket were binding on the plaintiff. The front of the ticket contained a notice, outlined in red, that the trip was subject to conditions printed on the back. The plaintiff knew that there was some writing on the ticket but did not read it. The issue before the Court was whether the defendant took sufficient measures to notify the plaintiff of the exclusionary clauses. The Supreme Court of Canada held that the defendant took

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<sup>38</sup> *Supra*, note 23, at para.136.

<sup>39</sup> [1956] S.C.R. 842 (S.C.C.)

reasonable steps to bring the terms of the release to the plaintiff's attention, and could therefore rely on the release to deny liability. Justice Locke reasoned as follows:

In my opinion, the issue in the present matter is determined by the finding of fact that the endorsement on the face of the ticket printed in red ink and referring to the conditions endorsed on this reverse side constituted a reasonable attempt to bring to the passenger's attention the terms of the contract and I consider that his acceptance of the ticket without protest and embarking upon the voyage precludes him from reprobating its terms, relying upon the fact that he did not read it.<sup>40</sup>

This early case continues to shape the jurisprudence relating to unsigned ticket waivers. The test laid down in the *Union Steamships* case still applies today, namely, that waivers on tickets will be upheld if reasonable steps are taken to bring the exclusionary clause to the plaintiff's attention.

In 1993, two landmark decisions were released by the British Columbia Supreme Court which reinforced this law. The first case was *McQuary v. Big White Ski Resort Ltd.*,<sup>41</sup> a judgment still cited in current ticket cases. In *McQuary*, the plaintiff sustained a fractured pelvis when he skied off the edge of a ski run and into a ten foot deep concrete culvert. The plaintiff had been skiing at the defendant resort, and was using a multi-day lift pass which he had purchased a few days before the accident. Although the plaintiff did not sign a written waiver agreement, the lift pass did contain comprehensive exclusion of liability language. The plaintiff denied having read the clauses on the ticket, and did not recall seeing signs adjacent to the ticket window which replicated the exclusion clauses on the ticket. The plaintiff did acknowledge a general awareness that ski lift tickets routinely contain language relating to "assumption of risk".

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<sup>40</sup> *Ibid*, at pg. 574.

<sup>41</sup> [1993] B.C.J. No.1956 (B.C.S.C.)

The Court dismissed the plaintiff's claim on a summary trial application, and upheld the waiver provisions on the back of the lift ticket. The Court considered the drafting, design, the colour of the tickets and the signage at the resort and concluded that reasonable steps had been taken to alert the plaintiff to the exclusionary language. Indeed, the lift ticket contained the words "Exclusion of Liability" in bold, capital letters printed in red and blue. A red border surrounded the front of the ticket and the exclusionary clauses. The defendant had placed a number of coloured signs throughout its property which highlighted in bold, capital letters the same exclusion clauses found on the ticket. In addition to the defendant's efforts, the Court placed great weight on the plaintiff's admission that the lift ticket likely contained liability provisions. There was also undisputed evidence that the plaintiff had a reasonable opportunity to read the waiver clauses, and was not rushed by the ski resort. When all of these factors were considered, the Court concluded that the defendant succeeded in bringing the waiver provisions to the plaintiff's attention. The plaintiff's failure to read the provisions was merely a product of his own carelessness.

The second case, *Dawe v. Cypress Bowl Recreations Ltd.*,<sup>42</sup> is substantially similar in its factual pattern and the Court's findings as the *McQuary* case. In *Dawe*, the defendants moved pursuant to Rule 18A for an order dismissing the Plaintiff's action on the grounds that the ticket waiver provided a total defence. The plaintiff was injured at the defendant resort after he fell over an unmarked precipice in the marshalling area. At the time of the accident, the plaintiff was an intermediate skier who had approximately twenty years of experience. The day pass purchased by the plaintiff contained waiver

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<sup>42</sup> [1993] B.C.J. No. 2892 (B.C.S.C.)

language which was marked in capital letters and red ink at the top and bottom of the ticket. The plaintiff admitted at his Examination for Discovery that he was aware that limitation clauses were on the ticket and on signage throughout the property. The Court determined that the defendant took reasonable steps to bring the exclusionary language to the plaintiff's attention and that a person could not be forced to read provisions that were put before him. In these circumstances, the court granted the relief sought.

The *McQuary* and *Dawe* decisions indicate that as long as reasonable steps are taken to alert a customer to the waiver provisions, occupiers may rely on tickets containing language designated to exclude liability even in the absence of a signed agreement. The determination of whether reasonable steps were taken requires a finding of fact in each case. However, the courts appear less willing to dismiss a claim based on a ticket waiver than a signed waiver, particularly where a plaintiff has no general knowledge of exclusionary provisions. In *Greeven v. Blackcomb Skiing Enterprises Ltd.*,<sup>43</sup> the language of the ticket and signs were substantially similar to that in *McQuary* and *Dawe*, with the exclusionary clauses printed in capital letters. The ski ticket in *Greeven*, however, contained no colouring and the print was quite small, though legible. The plaintiff was also unfamiliar with the Canadian ski industry and it was her first time at the resort. The Court concluded that evidence established that the plaintiff did not have even a basic understanding of limitation provisions. The Court also found that the evidence of the placement of the signs was too vague to support a conclusion that the plaintiff must have seen them. Based on these findings of fact, the defendant's motion to dismiss the claim was denied.

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<sup>43</sup> [1994] B.C.J. No. 2056 (B.C.S.C.)

The case law since *Greeven* has produced varied results based on measures taken to alert visitors to the exclusion language and the adequacy of the waiver provisions on the ticket and surrounding signage.<sup>44</sup> In the recent case of *Pelechytik v. Snow Valley Ski Club*<sup>45</sup> the Alberta Court of Queen's Bench refused to grant summary dismissal to the defendant based on the ticket waiver. The plaintiff in *Pelechytik* was injured by an improperly positioned handle tow while skiing at the defendant's resort. The plaintiff brought an action alleging that the ski club was negligent in its maintenance, supervision and operation of the handle tow. The defendant moved for summary dismissal on the ground that the ticket Waiver provided a complete defence. The Court acknowledged that as long as reasonable steps are taken to alert a visitor to the waiver clauses, an occupier can rely on such clauses.<sup>46</sup> The Court then modified this broad statement by considering the subjective knowledge of the plaintiff and the measures taken by the defendant to display the liability provisions. The Court placed great weight on the fact that the plaintiff had not admitted actual knowledge, even in a general way, of the limitation of liability provisions. The Court also considered that the signage at the ticket counter was difficult to see and was not facing the customer. The evidence of additional signage on the property was also unclear. The Court concluded that it was not plain and obvious that the defendant took reasonable steps to draw the waiver language to the plaintiff's attention.

To some, the *Pelechytik* and the *Greeven* decisions may suggest that the subjective knowledge of the plaintiff is a factor to consider in determining whether the defendant took reasonable steps to alert individuals to the exclusionary clauses. This

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<sup>44</sup> For example, in *Brown v. Blue Mountain Resort Ltd.* 2002 CanLII 7591 (ON S.C.), the court refused to grant summary judgment in favour of the defendants as the court found that there was a real and genuine issue to be tried in this case.

<sup>45</sup> 2005 CarswellAlta 974, 2005 ABQB 532, 14 C.P.C. (6<sup>th</sup>) 319.

<sup>46</sup> *Ibid*, at para.15.

misconception was clarified in the decision of Justice A. Campbell in *Argiros v. Whistler and Blackcomb Mountain*,<sup>47</sup> where the Court explicitly stated that the “reasonable steps” determination is objective.

In *Argiros*, the plaintiff was injured at a British Columbia ski resort. Prior to attending on the hill, the plaintiff purchased multiple tickets and vouchers, all containing the terms of the waiver. In several areas on the premises, there were brilliant yellow signs with warnings marked in red reading: “PLEASE READ... EXCLUSION OF LIABILITY ON TICKET”. Underneath this warning, the signs themselves also contained the exclusionary clauses. The evidence showed that 10 signs were prominently displayed at the purchase point and elsewhere, with the liability provisions set at eye level. The Court described the signs as garish.<sup>48</sup>

This is not a case like *Judith Greeven v. Blackcomb Skiing Enterprises* where the evidence was vague as to the location of the signs and the warning at the top of the ticket was different. In this case the evidence was clear that the plaintiff must have seen them and the red printing above the ticket and the voucher says “THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS.” In this case the signs are numerous, prominent, and garish. The colours, lay-out and form of the signs and the ticket and voucher warnings do everything possible to bring them to the attention of the customers. The contract provisions are reasonably legible. They are as clear in their wordings as such provisions usually are. The defendants took all reasonable steps to bring the contractual terms to the attention of the customer. On the facts of this case, they must have come to the Plaintiff’s attention.

In determining whether reasonable steps were taken by the defendant, the court considered the plaintiff’s assertion that no one had directed his attention to the back of the voucher, that he did not read the back of the voucher, and that no one explained the

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<sup>47</sup> [2002] O.J. No.3916 (Sup. Ct. Jus.)

<sup>48</sup> *Ibid*, at paras. 17-18.

conditions to him. The Court concluded that these arguments were irrelevant, as the test of “reasonable steps” is objective. The defendants had taken reasonable measures to alert the plaintiff to the exclusionary language by posting colourful signs on the premises and highlighting the relevant provisions on the ticket. The Court concluded:<sup>49</sup>

“... because the Defendants took reasonable steps to bring the contractual terms to the Plaintiff’s attention, and because their existence did not come to his attention, they bind him whether he read them or not.”

**(viii) Conclusion and Best Practices**

Canadian courts are generally inclined to uphold liability waivers, particularly when such waivers are signed by the plaintiff or reasonable steps have been taken to bring to the plaintiff’s attention the exclusionary language. Several recurring themes emerge from the case law, which should be used by counsel when advising clients as to instituting an effective release program. In instances where clients seek to rely on signed waivers:

- (a) They should be advised to take reasonable steps to advise individuals of the exclusionary clauses.
- (b) Where there are corporate defendants, waivers must include the proper corporate name. A corporate search should be conducted if there is any question as to the proper corporate name.
- (c) Waivers should also be drafted to include all possible defendants, and
- (d) Must include terms specifically excluding negligence, breach of contract and breach of the *Occupier’s Liability Act* and other breaches of statutory duty.

To ensure that the signed waiver is upheld by the court, we suggest the following:

- (a) The waiver should refer to employers, officers and agents.
- (b) Reference a number of the potential problems should be incorporated into the waiver.

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<sup>49</sup> *Ibid*, at para. 20.

- (c) Place headings immediately above exclusionary provisions. Make sure that the headings are printed in bold, capital letters. Use plain language to warn that legal rights are being waived. An example of an effective heading is as follows:

**RELEASE OF LIABILITY, WAIVER OF CLAIMS,  
ASSUMPTION OF RISK AND INDEMNITY AGREEMENT-**

**BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL  
RIGHTS, INCLUDING THE RIGHT TO SUE!**

**PLEASE READ CAREFULLY!**

- (d) Place the exclusion clauses in a box, and require that the individual initial this box separately. Wherever possible, use colours to surround the exclusionary language so that it cannot be later argued by the customer that the release language was not brought to his or her attention.
- (e) Have the signature witnessed by a member or employee of the organization seeking to rely on the waiver. A witness impresses upon the individual the importance of the agreement. Considering that this witness may one day have to testify in court, make sure that he or she is mature and responsible. Have the witness print his or her name on the waiver so that you can later, if necessary, locate the employee.
- (f) Limit the waiver agreement to one page. Do not use extraneous language or legalese. If multiple pages must be used, ensure that they are initialed on each page.
- (g) Ensure that there is a control mechanism in place to confirm that all individuals have signed the waiver prior to participating in an event.
- (h) A representative of the organization should be instructed to give a verbal warning to individuals when the waiver is being signed. An example of a warning: "This is a Waiver agreement. Please make sure that you have read the Waiver carefully. By signing the release you are giving up certain legal rights, including the right to sue. Please take your time when reading the Waiver and I am here if you have any questions. When you have read and understood the Waiver, please sign and date the bottom."
- (i) Make sure that the individual has enough time to read and understand the waiver agreement, and ask questions if necessary.
- (j) Take steps to ensure that individuals have advanced warning that signing a release of liability is a precondition to participating in the activity. If possible, include the terms of the waiver in the invitation or advertisement.

- (k) The waiver should list as many potential parties involved in the activity as possible, both specifically by name and generally by description.
- (l) The waiver should not be boilerplate, but should provide context so that the reference to negligence is not general. Context provides the court with an idea as to the type of negligence that is excluded by the agreement. The waiver should be tailored to the specific activity involved rather than “an off the shelf” waiver.
- (m) Speak to your organizer about having the parents sign for minors. When dealing with a child 16 or older, consideration should be given to having the infant and a parent sign the document.

In circumstances where there has not been a signed release, organizations may rely on exclusion clauses printed on tickets. In ticket cases, courts again consider whether “reasonable steps” have been taken to warn individuals of the waiver provisions. Most often, courts look to verbal warnings given and signs located at the point of sale along with signage posted throughout the premises warning of the exclusionary language. To ensure that ticket waivers are upheld, we suggest the following:

- (a) Ensure that the waiver clauses on the ticket are drafted in concise, simple language. Headings should be in bold, capital letters. The waiver provisions should be highlighted in a different colour. All exclusionary language must be presented in a manner that draws attention.
- (b) At the point of sale, have an employee give a verbal warning that the ticket contains exclusionary language that must be read carefully. The customer must be told that the ticket contains clauses which limit liability and the right to sue.
- (c) Ensure that signs are posted at the point of sale containing the same waiver provisions that are found on the ticket. The most effective signs contain bold headings, and have the exclusionary language in a different colour. The font should be large and legible. One court upheld the waiver language on a colour-coded sign that was “garish”- this is a standard that all organizations should aspire to.
- (d) There should be multiple signs posted throughout the premises containing the waiver provisions. In addition to the point of sale, signs should be

found at chairlifts, at the start of runs or trails, and at every other common location.

- (e) Annually take photographs of the waiver signs on the property so that later the organization can prove the presence of these signs. The photographs should be taken with a high resolution camera, no less than 7.1 mega pixel resolution and there should be close up pictures taken of the signage to show the waiver language. A map and a log documenting where the photographs were taken should be maintained. These photographs should be maintained for a number of years.

Once an organization adopts these precautions, it will be in the best possible position to defend a personal injury action whether it is framed in negligence, breach of contract or breach of statutory duty. In situations involving inherent risk, a well-drafted waiver agreement is essential to the overall risk management program of an organization.