Recreational Waivers

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Vendors of recreational activities, such as amateur athletics and extreme sports, can face legal actions in the event of accidents, including those resulting in injury. What are the issues around waivers in the recreational industry and what steps should be taken in support of a waiver defence?

Vendors of recreational activities, such as amateur athletics and extreme sports, are often the target of litigation when unfortunate accidents occur, resulting in injury to their patrons. In many cases, because of the nature of the sport or activity, these injuries can be very serious.

The primary avenue of attack by plaintiffs in these cases in Ontario is based on the duty of care outlined in Section 3(1) of the *Occupiers' Liability Act*, which states that an "occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises."

However, the act also permits an occupier, such as a ski hill, to "restrict, modify or exclude" the duty provided that reasonable steps are taken to bring that restriction, modification or exclusion to the attention of the patron. These exceptions allow for the use and application of contractual waivers, which can provide an excellent defence that can often defeat claims entirely or, at a minimum, provide significant leverage in any settlement discussions.

While the term "waiver" is used generically, those that are properly drafted contain not only a waiver, but also terms regarding jurisdiction, indemnity and assumption of risk.

There are three types of waivers: written; ticket; and signage. Executed written waivers are the strongest contractual form and signage-based waivers are best used as evidence of reasonable efforts to bring the waiver to the attention of patrons.

GUIDANCE TO DATE

In *Dyck v. Manitoba Snowmobile Assn. Inc.*, issued in 1985, the Supreme Court of Canada was faced with a claim arising from a snowmobiling injury that occurred when the plaintiff, Ronald James Dyck, was struck while signalling the end of a race event.

The plaintiff had executed a release in favour of the defendant as part of the membership package for the snowmobiling competition. In addition, the entry form executed by the plaintiff had an indemnity provision.

The Supreme Court of Canada concurred with the ruling from Manitoba's Court of Appeal that the waiver formed a complete defence to the claims advanced by the plaintiff.

In a public policy comment, Canada's high court found the waiver did "not appear to be unreasonable" as the plaintiff knew, or should have known, that snowmobile racing was dangerous. The contracted waiver was not "unconscionable" as there was no difference in the bargaining strength of the two parties.

One of the leading cases in Ontario in the area of recreational waivers and releases is *Isildar v. Kanata Diving Supply*, issued in 2008 by the Superior Court of Justice, where Ali Isildar died during a dive while taking a course from the defendant, Kanata Diving Supply.

His widow and son brought an action for damages and alleged, *inter alia*, that Kanata Diving Supply had a contractual obligation to the deceased, "including the right to rent to him up-to-date and reliable equipment in working order and suitable for the requirements of each instructional dive, and in particular the deep dive."

The court found the company negligent for its selection of the dive instructors, in addition to a finding of vicarious liability for the negligence of the instructors. Despite those findings, the court held that the release signed by the deceased was a bar to the plaintiffs' derivative claims. In making this ruling, the court outlined a three-part test to determine the validity of a signed release:

"Based on case law as it has developed, a three-staged analysis is required to determine whether or not a signed release of liability is valid. The analysis requires a consideration of the following questions:

1. Is the release valid in the sense that the plaintiff knew what he 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 release and is it worded broadly enough to cover the conduct of the defendant?
3. Should the waiver not be enforced because it is unconscionable?

TOOLS TO COMBAT CLAIMS

The principles outlined in these cases and others — including *Goodspeed v. Tyax Mountain Lake Resorts Ltd.*, *Karroll v. Silver Star Mountain Resorts Ltd.*, *Blomberg v. Blackcomb Skiing Enterprises Ltd.* and *Mayer v. Big White Ski Resort Ltd.* — provide the recreational industry with a valuable tool to defeat personal injury claims. In fact, now that the Supreme Court of Canada has lowered the threshold for summary judgment motions (see the 2014 ruling, *Hryniak v. Mauldin*), defendants in these types of actions can move prior to trial to dispose of these lawsuits.

An excellent example of this tactic is found in the 2015 decision by Ontario's Superior Court of Justice, *Trimmeliti v. Blue Mountain Resorts Limited*, where the plaintiff skier was injured when he struck an orange mesh ribbon used by Blue Mountain Resorts to close off a trail known as Crooked Oak.

The plaintiff's primary allegation of negligence against the company was that it should not have had snow-making equipment active at that time as it obscured his vision and prevented him from seeing the ribbon.

He also put forward arguments that the trail did not have sufficient lighting and that the use of the orange mesh ribbon itself was a hazard.

At the time of the incident, the plaintiff had accessed the resort with a season's pass he had obtained at the beginning of the ski season.

To purchase the pass, he was required to execute a written waiver (see at right) with that warning heading posted at the top.

The season's pass agreement contained a detailed assumption of risks provision, an indemnity section and, most importantly, a broad waiver of claims. Despite his extensive skiing background, the plaintiff denied having any knowledge of the waiver agreement or the various waiver signs posted at Blue Mountain Resort's facilities.

In discussing the application of the waiver, the court noted that the heading could not have left anyone confused as to the "nature of the contractual terms that

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followed." Upon review of the full waiver, the court concluded that it "would have been impossible for any literate person to have signed this document — even if they did no more than scan the heading — and remain ignorant of its general purpose and intent." The waiver was not so much "fine print" as a "loud proclamation placed in a further highlighted, bold type text box."

Blue Mountain Resorts was found to have made reasonable efforts to bring the waiver to the attention of the plaintiff as a result of the form/content of the waiver itself, as well as signage and ticket waivers used at the ski hill.

Importantly, the court also held that the waiver covered the very allegations of negligence that were being advanced by the plaintiff in the litigation. There was also no basis to argue unconscionability.

The Ontario court, ultimately, granted summary judgment in favour of Blue Mountain Resorts not only on the waiver, but also as a result of an absence of negligence.

In defending the tort claims, the court stated that the company had "put its best foot forward, including filing expert reports," and that it had "clearly done [its] homework in preparing to meet [the] case." Based on the detailed factual record before it, which included photographic and video evidence, the court held that "no negligence [could] be attributed to the defendant ski resort operator on the facts of [the] case."

CHECKS AND BALANCES

From a risk management perspective, operators who want to rely on waivers should have their contracts reviewed by counsel to ensure that they contain all of the appropriate provisions. The contracts need to cover off all forms of risk and all sources of legal liability, including statute, negligence and contract.

The waivers must not be "hidden." Make the review of the waiver mandatory as part of the event/activity sign-up process. Bold headers with colourful font need to be used to draw attention to the nature of the contract and the legal rights being affected within. Initial boxes should be used on key points and the document needs to be witnessed and signed. The original written releases should be preserved so that they can be entered into evidence.

Written and ticket waivers should also be supported by appropriate signage at the event/activity. They should be strategically placed, including at entrances and lift lines. Photologs should also be created on an annual basis so that the existence and placement of the signs can be proven in court.

Finally, appropriate and immediate investigation of accidents can go a long way toward helping support a waiver argument. Statements should be obtained, witnesses identified, scene photographs taken and physical evidence preserved.

All of this evidence is crucial to supporting a waiver defence as well as providing potential defences against negligence claims.

RELEASE OF LIABILITY AGREEMENT, WAIVER OF CLAIMS, ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT
BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE
PLEASE READ CAREFULLY!

INITIAL HERE