THE USE OF WAIVERS TO AVOID LIABILITY:

WHAT WORKS AND WHAT DOESN'T

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Bruno De Vita
Barrister & Solicitor

Alexander Holburn Beaudin & Lang
Vancouver, British Columbia

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Robert B. Kennedy
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ALEXANDER HOLBURN BEAUDIN & LANG
Barristers & Solicitors · Trade Mark Agents

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1. INTRODUCTION

As owners and occupiers of public recreational facilities, municipalities across Canada face significant exposure to liability for injuries sustained by users of those facilities. Ever since the demise of the doctrine of voluntary assumption of risk, greater attention has been placed on waivers and releases as a means of controlling exposure to liability, particularly with respect to activities that involve inherent risk of injury. Over the past fifteen years, a body of law has developed providing guidelines as to the enforceability of waivers and releases. While the courts continue to impose stringent requirements for enforceability of waivers, the case law illustrates that a properly worded and carefully designed release of liability, effectively communicated to the public in a manner consistent with the requirements laid down by the courts, can provide a complete defence to claims based in negligence.

2. WHAT IS A WAIVER?

A waiver or release of liability is a contractual agreement between two parties whereby one party (the "releasor") agrees to release the other (the "releasee") from liability in circumstances that are clearly defined in the agreement. Waivers can take different forms. They are sometimes seen as written conditions on the back of tickets. More often, the waiver is a written contract signed by the releasor. General principles of contract law apply with respect to the interpretation and application of releases of liability. This includes the doctrine of *contra proferentum,* which provides that any ambiguity in the contract will be construed against the party proffering the release.

3. FROM *VOLENTI* TO WAIVERS

The prevalence of waivers as a means of controlling exposure to legal liability, particularly in the recreation industry, is attributable in part to the demise of the defence of *volenti non fit injuria* or voluntary assumption of risk. Historically, the doctrine applied in circumstances where a plaintiff was found to have freely and voluntarily assumed the risk inherent in an

activity. Under the doctrine, a defendant was not liable in respect of injuries from the risk voluntarily assumed by a plaintiff.

It is now well established that in order to succeed on the defence of voluntary assumption of risk, it must be proven that the Plaintiff had agreed, either expressly or impliedly, to absolve the Defendant from any liability in negligence. In other words, proof of assumption of the physical risk is not sufficient. There must be proof that the Plaintiff, knowing of the virtually certain risk of harm, had agreed to assume the **legal risk**, or that he waived his right of action against the Defendant. (*Dube v. Labar*[1]*; Crocker v. Sundance*[2]*).*

With respect to premises liability, this defence was also available under a number of Occupiers' Liability statutes in Canada, which provided that the duty of care of an occupier does not apply "in respect of risks willingly assumed by the person who enters the premises". However, the scope of this defence was similarly circumscribed by the courts to apply only where the Plaintiff had assumed the legal risk by expressly or impliedly waiving his right of action against the Defendant. (*Waldick v. Malcolm*[3]*)*

As a result of these changes in the law, more and more public and private entities, particularly those involved in the recreation industry, began to rely upon releases and waivers as a means of defending themselves in the face of mounting negligence claims. What follows is a discussion of cases where waivers have been employed successfully, as well as cases where the waiver defence has failed. A close examination of the features of those cases will lead to a better understanding of how to make a waiver program work effectively.

4. THE SUCCESSFUL WAIVER DEFENCE

The following cases are examples of where waivers or releases of liability have been employed successfully in defending negligence claims. They show how otherwise costly litigation can be concluded quickly and at minimal cost. Most of the cases involve waivers

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[1] [1986] 1 S.C.R. 649

[2] [1988] 1 S.C.R. 1186

[3] 83 D.L.R. (4th) 114 (S.C.C.)

that have been carefully designed as part of a comprehensive program involving not only sound legal drafting but appropriate training to industry employees who deal directly with the public when the waivers are signed.

(a) Karroll v. Silver Star Mountain Resorts Ltd.[4]

The Plaintiff, a ski instructor, was injured during the course of a recreational downhill race, when she accidentally collided with another competitor who was standing on the course. The Plaintiff alleged that the ski area operator and race organizers were negligent in failing to exercise proper control over the course. Prior to the event, the Plaintiff had signed a one page release and indemnity agreement acknowledging that the event involved inherent risks and releasing the ski area operator and race organizers from all liability, including liability resulting from their own negligence.

The Defendant proceeded by way of summary trial application with respect to the enforceability of the release of liability agreement, thereby avoiding the delay, expense and time commitment of a full trial on all issues. The Defendant asked the Court to assume, for the purposes of the summary trial application only, that the allegations of negligence could be established. The Defendant argued that the release of liability was sufficiently broad in scope to encompass all allegations of negligence in the action.

The Plaintiff countered by way of Affidavit in which she stated that at the time of signing, she had not read the release, was unaware of its contents, and did not know that the release purported to extend to acts of negligence on the part of the Defendant.

The primary issue in the case came down to whether, in the circumstances, the Defendant ski area operator had taken reasonable steps to draw the terms of the release of liability to the attention of the Plaintiff. The Court noted that the release was written in clear terms, and prefaced by a heading which clearly stated the legal nature of the document. The Court also noted that the Plaintiff had sufficient opportunity to familiarize herself with the document before signing. The Court concluded that there was no evidence to establish that the Defendant ski area operator had failed to take reasonable steps to draw the terms of the

[4] (1988), 47 C.C.L.T. 269 (B.C.S.C.)

release to the attention of the Plaintiff. The Court held that the Plaintiff was bound by the terms of the release and dismissed the action on that basis.

(b) Erickson v. Whistler Mountain Ski Corporation Enterprises Ltd.[5]

The Plaintiff in this case was a 21 year old expert skier. He was skiing a Black Diamond run at Whistler Mountain, practicing for an upcoming free-style competition, when he claimed he accidentally became airborne off a cat-track which the ski area had cut into the side of the run in order to permit access to the lift line for maintenance purposes. The cat-track had been fenced for several days after it was initially cut, however as it became skied out and receded into the general topography of the run, the fence was removed. The accident involving the Plaintiff occurred shortly following the removal of the fence.

Videotape footage of the Plaintiff leaping from cornices and skiing extreme runs shortly prior to the accident, was produced in evidence. The cat-track of which the Plaintiff complained, could be clearly seen on the video from the top of the run. In other words, to the extent that what remained of the cat-track might constitute an obstacle to an expert skier, it could clearly be seen and easily avoided, especially given the near-perfect visibility conditions on the day in question.

Rather than proceeding to a full trial of the action on its merits, the Defendant elected to deal initially with the defence of contractual exclusion of liability based on the release signed by the Plaintiff when he purchased his seasons pass at the beginning of the season. As is typical in release of liability cases, the Plaintiff denied having read the release, and indicated that had he been aware of its contents, he would have refused to sign. The Defendant argued that in law, it is not necessary to establish that the Plaintiff had actual knowledge of the contents of the release, so long as the Defendant can satisfy the Court that it took reasonable steps to draw the terms of the release to the attention of the skier. In *Erickson* the Court was satisfied that the Plaintiff either knew, should have been aware, or had a reasonable opportunity to make himself aware, of the terms of the release of liability which he had signed. The action was dismissed against Whistler Mountain solely on the basis of the release of liability.

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[5] (January 18, 1990), Vancouver Registry F882911, (B.C.S.C.)

(c) Knowles v. Whistler Mountain Ski Corporation[6]

The Plaintiff, a novice skiing on rental equipment, fell and was injured. The bindings on the rental skis failed to release. The Plaintiff attributed her injury to the failure of the bindings to release, and attributed the non-release of the bindings to defective design, manufacture, installation, maintenance or adjustment of the equipment. An independent post-accident investigation of the equipment indicated that the equipment functioned well within the manufacturer's recommended parameters. The Plaintiff however introduced expert evidence from a mechanical engineer challenging the manufacturer's binding adjustment parameters, which had been relied upon by the ski area operator in its equipment rental program. Rather than allowing the matter to proceed to a full trial, the Defendant elected to proceed by way of summary trial application on a release of liability signed by the Plaintiff at the time of renting the equipment. The Plaintiff challenged the release defence on the basis that the release was unconscionable and contrary to public policy. The Court held that:

> The circumstances in which [the Plaintiff] signed the Release Agreement are far-removed from the hurried execution of a document containing a release that only the most attentive could read such as rent-a-car and other standard form contracts. There is no evidence of duress, coercion or unfair advantage, resulting from economic or psychological need or the inability to understand the nature of the contract. This is the evidence generally adduced when the validity of a consumer contract is challenged.

The Court concluded that the Release Agreement exonerated the Defendant from any liability based on negligence relating to the rental of the ski equipment. The Plaintiff's action was dismissed with costs awarded to the Defendant.

(d) Blomberg v. Blackcomb Skiing Enterprises Ltd.[7]

Mr. Blomberg was a very experienced skier. He was injured while skiing down the left hand edge of a gentle trail when he accidentally lost his balance, skied off the edge of the trail

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[6] (January 14, 1991), Vancouver Registry No. C900215 (B.C.S.C.)

[7] (1992), 64 B.C.L.R. (2d) 51 (B.C.S.C.)

and collided with a large wooden snow fence. The snow fence was located approximately four feet from the edge of the trail, and was painted bright blue to highlight its presence. Visibility on the day of the accident was excellent and the snow fence could be seen from several hundred yards up the trail. The Plaintiff admitted that he was well aware of the presence and location of the snow fence, having skied the run on previous occasions. The Plaintiff alleged that the snow fence should have been padded or relocated, in order to prevent injury to skiers who might lose control and ski off the run. The Defendant ski area operator took the position that skiers have an obligation to ski under control at all times in order to avoid known or anticipated obstacles in their path.

When applying for a season's pass at the commencement of the ski season, the Plaintiff had signed a release of liability in favour of the Defendant. The Plaintiff maintained however, that although he had signed several releases in the past, he had on no occasion taken the time to read the release and was unaware that the release was a legal document. He claimed not to be bound by its contents. There was evidence from the ski area operator to the effect that the Plaintiff was advised at the time of signing that the document was a waiver and that he should read it carefully. The Plaintiff disputed this evidence. This conflict in the evidence was required to be resolved by a trial judge hearing oral testimony, thus preventing the matter from proceeding by way of summary trial application on affidavit evidence. The issue of the enforceability of the release was however severed from the other issues in the case and tried separately. The Court concluded that the Plaintiff was aware of the nature of the document he signed, that the document fully excluded any liability to the Defendant in respect of the alleged acts of negligence, and dismissed the action with costs awarded to the Defendant. In arriving at this conclusion, the Court relied heavily on the evidence of the Defendant's employees as to their standard practice when obtaining a skier's signature on a release of liability.

(e) Ocsko v. Cypress Bowl Recreations Ltd.[8]

The Plaintiff was an expert skier and a part-time volunteer ski patroller with the Defendant ski area operator. He was injured while skiing an intermediate run on his day off. The Plaintiff alleged that while skiing along a cornice at the edge of a run, he unexpectedly

[8] (September 14, 1992), Vancouver Registry No. CA014675 (B.C.C.A.)

encountered a rock or boulder in his path causing him to become airborne and resulting in serious injuries in the ensuing fall. The Plaintiff alleged that the rock or boulder should have been marked, a job normally assigned to the area operator's ski patrol staff. The presence of the alleged rock or boulder was never confirmed. A detailed investigation was not conducted following the accident, as the Plaintiff made no mention of the alleged rock or boulder until several months later.

Once again, the Plaintiff had signed a release of liability in favour of the ski area operator when obtaining a season's pass at the beginning of the ski season. As in the *Blomberg* case, the Plaintiff maintained that he had not read the release, was unaware of its contents, and understood that he was only signing an application form, without any legal consequences. Following a summary trial application brought by the Defendant, the action was dismissed solely on the basis of the release of liability, with costs awarded to the Defendant. On appeal, the British Columbia Court of Appeal rejected the Plaintiff's assertion that he was unaware as to what he was signing. Due to the lack of evidence on behalf of the Defendant as to its standard practice in administering the release program, the actual format of the release document was critical in establishing that the Defendant had met its obligation to take reasonable steps to draw the terms of the release to the attention of the skier.

(f) Schuster v. Blackcomb Skiing Enterprises Limited Partnership[9]

The Plaintiff was a business woman from Montreal, and an intermediate skier. She was participating in a three-day instructional program sponsored jointly by Blackcomb and Whistler. Part of the program consisted of practice runs down a recreational race course. The Plaintiff successfully descended the course, but unfortunately, lost her balance after crossing the finish line, fell, and sustained a compression fracture of a vertebrae. The Plaintiff alleged that her fall was caused when she skied over a nylon mesh fence, forming part of the corral area below the finish line which had blown over from the wind. The ski instructor maintained that the Plaintiff skied over the mesh fence without difficulty, and only appeared to lose her balance on the steeper slope below the course.

[9] [1995] 3 W.W.R. 443 (B.C.S.C.)

The Plaintiff had signed a comprehensive release of liability at the beginning of the three-day course. On a summary trial application by the Defendant ski area to dismiss the case based on the release, the primary issue to emerge was the notice given by the ski area to the skier as to the terms of the exclusion of liability. Although the Plaintiff admitted she was aware that the document she signed was a release of liability, she denied any knowledge or understanding of the scope of the release, or its impact on her ability to pursue a claim in negligence against the ski area.

The Court was impressed by the fact that the Plaintiff had signed an identical document when taking the same course the previous year. The Court noted that the Plaintiff was afforded a reasonable opportunity to examine the release of liability before signing it and held that in the circumstances, the Plaintiff was precluded from taking the position that the Defendant ski area failed to do what was necessary to draw her attention to the contractual terms of the waiver limiting its liability. The action was dismissed with costs.

(g) McQuary v. Big White Ski Resort Limited[10]

The *McQuary* decision differs from the preceding cases, in that the defence of contractual exclusion of liability relied upon by the defendant was based not on a signed waiver, but rather on the exclusion language set forth on the lift ticket sold to the Plaintiff. The Plaintiff was seriously injured while night skiing at Big White, a popular ski area near Kelowna. Eye witness evidence established that the Plaintiff was descending an intermediate slope at high speed, when he suddenly swerved to the right and off the edge of the run. The Plaintiff skied through a bamboo and nylon rope fence which had been erected adjacent to the edge of the run. Unbeknownst to the Plaintiff, the fence warned of a ten foot deep, open concrete culvert, used to gather water for the ski area's snowmaking operations. The Plaintiff skied into the culvert, sustaining a fractured pelvis.

Visibility at the time of the accident was excellent. Photographs taken some distance up the run immediately following the accident, showed that a portion of the rope fence which had not been knocked down by the Plaintiff was clearly visible under the night lighting. Toxicology tests conducted at the hospital later that evening suggested that the Plaintiff was seriously intoxicated at the time of the incident.

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[10] (October 4, 1993), Victoria Registry No. 90-1214, (B.C.S.C.)

The Plaintiff had been skiing on a multi-day lift pass which he had purchased a few days before the accident. Although the Plaintiff was not required to sign any form of written waiver, the lift pass did contain comprehensive exclusion of liability language, not dissimilar to the exclusion language in the release cases previously considered.

Although the Plaintiff denied having read either the wording on the lift ticket, or the signage posted adjacent to the wickets which replicated the exclusion language on the ticket, the Plaintiff did acknowledge a general awareness that ski area lift tickets in the province of British Columbia routinely contain language relating to "assumption of risk".

On summary trial application to dismiss the action based on the lift ticket exclusion language, the Defendant relied upon a 19th century decision of the English Court of Appeal: *Parker* v. *South Eastern Rail Co.*, one of the classic "ticket cases". This case is authority for the legal proposition that where a ticket holder knows there is writing on the ticket, and believes the writing contains conditions relating to his legal liability, he is bound by those conditions, regardless of whether the ticket holder actually took the time to read the ticket.

In applying the principle to the *McQuary* case, the Court held that the Plaintiff's failure to read the conditions on the ticket was irrelevant. The Court noted that the Plaintiff appeared to have had an opportunity to read the ticket, but failed to take the time to do so. The Court held that by means of the format of the exclusion language on the ticket itself, and the posting of clearly worded signage adjacent to the ticket wickets, replicating the exclusion language, the Defendant ski area complied with the provisions of the British Columbia *Occupiers' Liability Act*, requiring that the occupier take "reasonable steps" to draw the terms of an exclusion to the attention of the skier. The action was therefore dismissed.

(h) Dixon v. Kamloops Exhibition Assn.[11]

This action arose out of an accident that occurred at a snowmobile trade show. The Plaintiff entered a "grass drag" snowmobile race sponsored by the British Columbia Snowmobile Federation and hosted by the Kamloops Exhibition association. The Plaintiff signed a waiver which contained express references to negligence and liability for negligence. The Court accepted that the waiver had been brought to the Plaintiff's attention and that the

[11] [2003] B.C.J. No. 605 (B.C.C.A.) rev'g [2002] B.C.J. No. 766 (B.C.S.C.)

Plaintiff understood the legal effect of signing the waiver. While practicing prior to the race the Plaintiff was injured when his snowmobile was upended by a "T" shaped piece of iron left in long grass in the practice arena.

The waiver form referred to "Events" throughout but did not specify whether "Events" included practice runs in addition to the actual race event. At trial, the Court refused to enforce the waiver finding that there was "no clear evidence as to which event, i.e. the practice event or the racing event, were to be events for which the Plaintiff's recovery for damages would be excluded". However, the Court of Appeal found that the language "arising out of or related to the event(s)" extended to cover both the practice for the race and the race itself. The Court of Appeal also rejected the Plaintiff's argument that the waiver was invalid because it did not refer to the specific race or event at the top of the form. The Court found that a reasonable person would have known that the waiver was related to the race that was to take place on that same day. Thus, the Court of Appeal dismissed the Plaintiff's claim on the basis of the valid waiver.

While the defendant was ultimately successful on appeal, the trial decision points to the need to ensure specificity in describing the nature of the activity to which the waiver applies.

(i) Sibley v. British Columbia Custom Car Assn. (c.o.b. Mission Raceway Park and/or Mission Race Ways)[12]

The Plaintiff was a competitive motorcycle racer and was injured before a race in the pre-race staging area when a snowmobile collided with his motorcycle. The Plaintiff had signed a broadly worded release agreement which released the Defendant from all claims, including those resulting from the Defendant's negligence. He argued however that the agreement incorporated the rulebook of the association, that these terms constituted a collateral warranty to the release and that the terms were breached by the Defendant. The Plaintiff also argued that there was a fundamental breach of contract and alleged that the Defendant had wrongly permitted the snowmobile to operate in the pre-race area at the same time that motorcycles were present, had failed to properly inspect the snowmobile, and had wrongly permitted the driver of the snowmobile to operate it with a modified throttle.

[12] [2005] B.C.J. No. 745 (B.C.S.C.)

The Court rejected the Plaintiff's argument that the rulebook constituted a collateral warranty and found that the rules were not expressly or by inference incorporated into the release. There were no representations made to the Plaintiff that the rules were incorporated into the release and it was not the clear intention of the parties to have the rules incorporated into the release. The Court further found that even if the rules did form part of the release agreement and if there had been a fundamental breach of the contract the issue is whether the release itself was wide enough to exclude liability for fundamental breach. The Court determined that the rulebook and the release were consistent and that the release would operate to exempt the Defendants from liability to the Plaintiff.

5. THE UNSUCCESSFUL WAIVER DEFENCE

It can be particularly instructive to examine cases where waivers have not been enforced. In some cases, the decision turns on the lack of particularity in the wording of the release or its failure to adequately describe the risk that is being assumed. In other cases, the waivers are not enforced because of the failure of the releasees to bring the waiver to the attention of the releasors properly, either in their dealings or by not using words on the release form which might reasonably serve to warn.

(a) Kettunen v. Sicamous Fireman's Club[13]

The Plaintiff was injured while observing a "mud bog race" in which her husband was a participant. She was struck by the vehicle of a participant as she sat in the campsite adjacent to the pit area. Prior to entering the site, the Plaintiff had signed a waiver believing that this entitled her to access to the camp site and to receive a bracelet which would allow her to enter the restricted areas of the race. There were findings of fact made by the trial judge that the event volunteer responsible for having the waivers executed did not explain to the Plaintiff what it was she was signing, nor did she ask whether she had read and understood the form. The Court chose not to enforce the waiver. In so doing, it distinguished the *Karroll v. Silver Star Mountain Resorts Ltd.* decision on the following grounds:

[13] [1999] B.C.J. No. 1930 (B.C.S.C.), appl. for leave dismissed, [1999] B.C.J. No. 2764 (B.C.C.A.)

- The Plaintiff did not know the document she was signing was a release and that if injured she would be precluded from suing;
- No effort was made to bring the intended effect of the document to the Plaintiff's attention;
- The release was not short or easy to read, it consisted of fine print and a reasonable person would not be able to tell on a casual glance that it was intended to preclude him/her from suing anyone associated with the race for injuries suffered as a result of the race.

This case points to the importance of drawing to the attention of the releasor the nature of the document being signed. It also underlines the significance attached to the design and format of the waiver document and the emphasis that should be placed on clarity in the physical presentation of the waiver (eg. boldly printed headings stating in no uncertain terms the legal nature and importance of the document). Specific recommendations regarding the format of the waiver document are discussed later in this paper.

(b) Moodie v. Perfect Images Inc.[14]

In this case, the Plaintiff claimed damages for injuries allegedly sustained during participation in a muscle toning program. The Plaintiff had informed the defendant during a pre-treatment interview of her continued back problems and the presence of surgical fixation devices in her back from a back fusion. She had signed a waiver form which was titled "Terms and Conditions of Agreement". The Defendant sought a dismissal based on the waiver.

The trial judge found that in the circumstances of this case, there was an obligation on the part of the Defendant to point out and, if necessary, explain the significance of the waiver provisions. Specifically, he referred to the fact that the "fine print" of the waiver was not preceded by words which might reasonably serve to warn – such as "Standard Liability Release" or "Release and Indemnity, Please Read Carefully". As a result, the court refused to enforce the waiver.

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[14] [1993] B.C.J. No. 502 (B.C.S.C.)

(c) Quick v. Jericho Tennis Club[15]

The Plaintiff was injured when he ran into a chain link fence and hit his knee on a projecting bolt during a competitive tennis tournament. The Plaintiff was an experienced competitive tennis player and upon entering the tournament had completed an entry form that was part of a one-page double sided brochure. The brochure indicated that Jericho Tennis Club was hosting the event and contained a "Waiver of Claims" paragraph that waived all claims against several named tennis organizations and tournament organizers. Jericho was not specifically named in the waiver paragraph, but was a member of one of the named associations. In addition, the waiver did not specifically refer to the negligent conduct of the releasee. Jericho applied to dismiss the Plaintiff's action on the basis of the waiver clause.

The Court found that because Jericho was not specifically named in the waiver paragraph the Plaintiff could not have reasonably known that he was waiving any claims against it. The Court found it must be clear to the Plaintiff both as to what the waiver is and who the parties are. The Court dismissed Jericho's application and allowed the action to proceed.

This case points to the need to ensure that the wording of the waiver or release is specific as to who is to be released and that the release wording is broad enough to encompass all claims, including those arising from the negligence of the releasee.

(d) Greeven v. Blackcomb Skiing Enterprises Ltd.[16]

The Plaintiff was injured while skiing on Blackcomb Mountain. Blackcomb issued her a ticket which on its face indicated that there was an exclusion of liability on the reverse side. The reverse side set out the entire exclusion of liability policy and was printed in clear small type. In addition, exclusion of liability notices were posted at the ticket wickets on bright yellow and red paper. The Plaintiff was a tourist who had never skied in Canada before and she claimed not to have read the ticket. The Court accepted that she had no actual notice of the exclusion clause. The defendant argued that it took all reasonable steps to draw the exclusion clause to the Plaintiff's attention.

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[15] [1998] B.C.J. No. 1149 (B.C.S.C.)

[16] [1994] B.C.J. No. 2056 (B.C.S.C.)

The Court distinguished *McQuary v. Big White Ski Resort Ltd* (supra at 8) on the basis of the position of the Plaintiff. In *McQuary*, the Plaintiff had known in a general way that the ticket included a limitation of liability clause. However, in this case because the Plaintiff was not from Canada and had never skied in Canada, she did not have a similar degree of knowledge. The Court found that the evidence relating to the number and location of the posted red and yellow notices was not sufficient to demonstrate that the defendant met the reasonableness standard. In addition, the Court found that there was nothing about the ticket itself that would "necessarily draw to the attention of a reasonably alert person without prior knowledge that they contain writing other than the advertising and definition of the period for which they are issued." Thus, the Court dismissed the Defendant's application to have the exclusionary terms enforced against the Plaintiff.

(e) Champion v. Ski Marmot Basin[17] and *Pelechytik v. Snow Valley Ski Club*[18]

In *Champion*, the Plaintiff was injured when he fell on the T-bar lift. He brought an action alleging that the ski area operators were negligent in maintaining the lift track. The ski operators applied to dismiss the Plaintiff's action on the ground that the waiver of liability printed on the ticket and on signs posted around the ski area constituted a complete defence to the claim. The Plaintiff denied any knowledge of the limitations on liability and also argued that the terms of the waiver did not exclude liability for this type of hazard. That is, the Plaintiff could not have accepted the risk of injury from the poorly maintained lift track because he could not have foreseen this particular risk and this hazard was not contemplated by the waiver. The Master in chambers found that this constituted a "genuine issue for trial" and denied the application to dismiss the action. However, the chambers judge also indicated that the ski operators had taken reasonable steps to bring the waiver to the attention of the Plaintiff as there were prominent signs at each cash register.

In *Pelechytik*, the Plaintiff was injured when he was struck by an improperly positioned handle attached to the ski lift equipment while waiting to use the ski lift at the Defendant's ski club. The Plaintiff also argued that the wording of the waiver clause, which included the phrase "the use of ski lifts", was insufficient to exclude liability for mechanical breakdowns

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[17] [2005] A.J. No. 875 (A.B.Q.B.)

[18] [2005] A.J. No. 878 (A.B.Q.B.)

or improperly maintained lift equipment. The Defendant brought an application to dismiss the Plaintiff's action on the basis of the waiver of liability printed on the lift ticket and brightly coloured signage posted throughout the ski area. The Master in chambers allowed the action to proceed to trial and found that it was not plain and obvious on the evidence presented that the signage was visible at the time of purchasing the ticket or that the Ski Club took reasonable steps to bring the waiver to the Plaintiff's attention. Specifically, unlike the facts in *Champion,* there was not a waiver sign visible at each sales point, and those that were visible, were to the side of the purchaser rather than facing him. Furthermore, the issue as to the scope of the waiver clause constituted an issue for trial.

Both of these cases, while not final determinations of the enforceability of the waivers in question, emphasize the need to ensure that unsigned waivers, on a ticket or signage, must be very clearly brought to the attention of the public. In *Pelechytik,* this meant ensuring that signage was visible at each sales point and was pointing in a direction that faced the purchasing public. The cases also suggest that there may be defences available on the scope of the exclusion if it is not drafted in the broadest terms to encompass all aspects of potential fault on the part of the releasee.

6. GUIDELINES FOR AN EFFECTIVE WAIVER PROGRAM

As seen above, the successful waiver defence does not depend solely upon legal drafting. The case law illustrates that the circumstances of execution, the format of the document, including the print size and headings, and the ease of comprehension by a lay person of the release language, are as critical to the success of the release defence as precise wording. Also important to any waiver program is the care taken to bring the release to the attention of the public. This involves appropriate training of employees who interact directly with users of the facility in question. The successful waiver program should also be designed in a such a manner that evidentiary proof is readily available to the defendant when there is dispute as to what may or may not have been communicated prior to the commencement of the activity.

The following guidelines may be of assistance when considering the use of waivers:

- Where possible, advance notice of the requirement to sign a release should be given to prospective participants. This can be incorporated with advertising circulars, bulletins, informational packages, posters, etc… This avoids the suggestion that the participant may have been indirectly coerced into signing a release by showing up for the event psychologically prepared to participate, only to be confronted with the release at the very last moment.

- Great attention should be paid to the design, format and content of the release. Copies of releases upheld by Courts in other cases should be closely studied. Emphasis should be placed on very clearly worded and boldly printed headings at the top of the form stating in no uncertain terms the legal nature of the document. For example, the following wording is used by a number of ski and recreational facilities in Western Canada:

  RELEASE OF LIABILITY, 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!

  This wording has been held to satisfy the onus on the part of the releasee of drawing the terms of the waiver to the attention of the person signing. Appropriate use of coloured highlighting of important portions of the release is also helpful in proving that the waiver was properly brought to the attention of the releasor.

- A statement of the inherent risks of the activity or event in question should be included in the document, in order to give context to the contract. It is also important that the event or activity is specifically defined. Needless to say, the release language must be sufficiently broad to encompass allegations of negligence and breach of contract, such as breach of any duty of care owed under either common law or statute, including any applicable occupiers liability legislation. Several Courts

have insisted that the release make specific reference to negligence on the part of the releasee.

- In order to counter any suggestion that the releasor's interaction with the document was an off-hand, careless and quick signature on the bottom line, the release form can be designed to include a space for the releasor's name, address, phone number, age, etc. near the top of the form close to the headings. Some release forms require the releasor's initials beside the specific provision waiving liability on the part of the releasee with respect to negligence.

- Where possible, the release should be printed on one page, to avoid the standard response that the releasor looked only at the last page. Where multi-page releases are used, each page should be initialled by the releasor.

- Certain representatives of the releasee should be designated to act as witnesses to the signing of the release. Bearing in mind that the witness may some day have to give evidence in Court, the witness should be mature and responsible. The danger in allowing a friend, relative or associate of the releasor to witness the document, is the conflict the witness would be placed in if called upon to give evidence against the releasor as to the execution of the document. In fatal injury cases, the evidence of the witness may be the only evidence before the Court as to the execution of the contract.

- It is recommended that some form of control mechanism or procedure be put in place to ensure that all persons participating in the event or activity have properly executed the release.

- The release should be signed by the releasor in front of the witness. If the person has already signed the release before presenting it to the witness, the witness should either confirm the signature or ask the person to sign again.

- Before witnessing the release, the witness should observe the following points:

    (i) ensure that all parts of the release have been properly completed, including name, address, date of birth, etc., if required;

    (ii) ensure that the releasor has signed and dated the release;

(iii) ensure that the releasor has not changed or crossed out any wording on the release;

(iv) the witness should be instructed to ask every releasor a question along the following lines:

”Have you read and do you understand the release?”

(v) the releasor must respond affirmatively;

Only after these points have been confirmed should the witness sign the release. Although it is unlikely that the witness will, at a later date, remember the circumstances of the signing of individual documents, evidence as to the witness' standard procedure in administering the document may be given great weight by the Court;

- Most provinces have legislation restricting the enforceability of contracts against persons under legal age, irrespective of whether the contract has been signed by the parent or legal guardian. If the event or activity is restricted to persons of legal age or older, and if the witness is in doubt as to whether the releasor's stated age is correct, proof of age should be requested;

- If the witness suspects that the releasor may be intoxicated or otherwise impaired, the witness should refuse to sign the document, and the person's participation in the event or activity should be postponed.

- If a participant requests an explanation of the meaning of the release, witnesses should be instructed to respond along the following lines:

  “The document you are asked to sign is a release of liability. It is a legal document and by signing the release you are giving up certain legal rights, including the right to sue should you be injured during the event or activity."

- The witness and other persons associated with the release should scrupulously avoid making any extraneous comments or representations concerning the release. One of the surest methods of defeating a release defence, is to lead evidence of misrepresentation inducing the releasor to sign. A comment by a witness such as

"this is just a routine application form, just sign at the bottom" could well be fatal to the release defence. The witness should not attempt to encourage or rush a participant into signing. If the person appears to require more time to read the document than the logistics of the signing process will allow, the person should be directed to stand aside or to sign the release at a later time, after the terms of the document have been more carefully reviewed.

- Executed releases should be safeguarded for a period of not less than seven years, or longer as legal counsel may advise. As seen in the *Blomberg* case, previous releases signed by the Plaintiff may be very valuable in establishing that the Plaintiff was aware of the legal nature of the document under review.

7. CONCLUSION

For municipalities that own and operate numerous recreational facilities or are involved in the organization of programs which entail a certain level of inherent risk, a waiver program is one way to control exposure to liability. A release may also serve as a statement of the risks inherent in an event or activity, thus helping to eliminate as participants those individuals who are not prepared to assume the risk. Further, the waiver may serve to reduce a participant's expectation of recovery, which in turn may tend to reduce the incidence of frivolous or unmeritorious claims. While the waiver defence will not always be successful, the use of waivers should be given careful consideration for inclusion in your municipal risk management program.