

# WAIVERS AND RELEASES

Presented by:

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# Waivers and Releases

- Among the many services provided by municipalities, recreational activities can be some of the most important and most risky.
- Examples of recreational services offered by municipalities: swimming pools, recreation centres, sports fields, sports teams, children's camps, exercise classes, fairs, rides, golf courses.
- Many of these activities are inherently dangerous or risky.

Continued

# Waivers and Releases

- A properly executed Release and Waiver can protect a Municipality from liability, including negligence, that could potentially flow from the activity being offered.
- Voluntary assumption of risk.

# *Van Hooydonk v. Jonker (2009)* (Alberta)

- Not a municipality, but takes us through the legal analysis.
- 2 hour trail ride at B&B.
- Plaintiff signed a waiver.
- Within 15 minutes, Plaintiff fell off horse.
- Plaintiff was injured.

# *Van Hooydonk v. Jonker (2009)* (Alberta)

- Plaintiff claimed the Defendants breached the duty of care owed to her by giving her an improper horse and inadequate instruction.

# Negligence

In order to establish a claim in negligence, the Plaintiff must establish:

- that a duty of care was owed to her by the Defendant;
- that the Defendant failed to meet that duty; and
- that the breach was the cause of the Plaintiff's injuries.

# Duty of Care

- duty of care to take reasonable precautions to prevent injury.
- not an insurer of the safety of customers.
- certain element of risk must be accepted.
- proper equipment, competent instructors.

# Van Hooydonk

- Defendants clearly owed a duty of care to take reasonable precautions to prevent injury to the Plaintiff by providing a proper horse, proper equipment and competent guide.
- Defendants did take those reasonable precautions.
- Fall was an unforeseeable consequence.
- Plaintiff failed to establish negligence.

# Causation

- Plaintiff must show that “but for” the negligence of the Defendant the injury would not have occurred.

# Waivers and Releases

- Even if there is negligence found on the part of the Defendant, a properly executed waiver may protect the Defendants from any liability, including negligence, that could potentially flow from the activity being offered.

# Waivers and Releases

- Read the waiver and understood its contents prior to signing.
- Waiver was witnessed.
- Terms of the release were wide enough to cover the alleged conduct of the Defendant that led to the injury.

# Negligence

- Negligence was specifically mentioned.
- Sufficient to cover the alleged conduct of the Defendant.

# Negligence

- “Where a defendant seeks to avoid liability on the basis that a plaintiff voluntarily assumed risk of the defendant’s negligence, the defendant must establish that the plaintiff knowingly assumed that risk and waived any legal right of action arising from that risk.”

# Van Hooydonk

- Even if there has been negligence on the part of the Defendants, the waiver signed by the Plaintiff protected the Defendants from liability.

# Enforceability

Ideally:

- Participant will have read the waiver and understood its contents prior to signing.
- Waiver will be witnessed.
- Waiver is clear.

Continued

# Enforceability

- Certain portions specifically brought to the attention of the participant.
- Terms of the release were wide enough to cover the alleged conduct of the Defendant that led to the injury – negligence must be specifically mentioned.

# Negligence

Simple use of word “negligence” may not be enough.

- What would the general or reasonable person in these circumstances understand the word negligence to mean?
- Reasonable person may not know what is meant by the word negligence.

# Negligence

- Layperson might think negligence means making mistakes.
- Actually means failing to take careful measures available and understood to be necessary for safety in the circumstances.

# Negligence

- In order for a court to find the term (in a release) sufficient to cover any negligent behaviour, it must be satisfied that the individual signing it, if he read it, could reasonably be expected to understand its meaning.
- Though understanding need not come from waiver alone.
- May also come from individual's knowledge of the activity.

# Drafting

Release will always be strictly construed against the party who drafted it:

- *contra proferentem*.
- Avoid grammatical errors, confusing language.
- Release should be read in its plain and ordinary meaning.
- Unintelligible will mean unenforceable.

# Unconscionable

A waiver can be set aside as being unconscionable:

- However, it is perfectly reasonable for those who provide risky activities to demand that those who participate bear the risk of any negligence.
- Release of liability agreement have been held reasonable in a number of cases where dangerous activities have been involved, such as skiing, scuba diving and snowmobile racing.

# Unconscionable

Where there are inherent risks to an activity and the participants know that a precondition of engaging in such a risky activity is that they will bear the risk of the defendant's negligence, a release of liability agreement is reasonable (not unconscionable).

- v. releasing a surgeon for negligent medical treatment.

# Pre-Emptive Release

- A release or waiver signed in advance of events that ultimately give rise to a claim for damages.
- Other ways a party may seek to prevent or limit claims – exculpatory language included in the terms of a written contract signed by the parties, signs or notices, printed on tickets.

# Pre-Emptive Release

Reasonable steps must be taken to bring the waiver and its contents to the attention of the plaintiff.

- Plaintiff made aware the documents is a waiver of the legal right to sue.
- Reasonable attempt to bring to participant's attention required.

# Pre-Emptive Release

- Language, format and procedure can all contribute to this.
- Different than usual commercial contract where if you sign it you are assumed to have read (and understood) it.

# Tickets and Signs

- Issue as to Plaintiff's knowledge of particular language.
- If evidence shows Plaintiff read and understood words of sign or ticket, not issue as to Defendant's efforts to draw the Plaintiff's attention to the words.

# Tickets and Signs

- If can't show Plaintiff read and understood the exempting language, then the issue becomes whether the Defendant took reasonable steps to see the Plaintiff was aware of the language.

# Tickets and Signs

“Golfers are responsible for all eventualities of their play”.

Continued



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# Tickets and Signs

Lift Ticket example.

# Consideration

Permission to continue with the activity is considered the consideration for a pre-emptive release.

# Unusual Risk

- May be an issue whether a pre-emptive release will apply to unusual risks that were not in the contemplation of the party who signed the document.
- Even by participating in an event, accepting the ticket and signing the release, the Plaintiff may be found not to have accepted an “unusual risk”.
  - Snowmobile case.

# Other Waiver/Negligence Cases

- *Delaney Estate v. Cascade River Holidays* (1983) BC.
- *Dixon v. British Columbia Snowmobile Federation* (2003) BC.
- *Dixon v. City of Edmonton* (1924) SCC.
- *Hussain v. City of Edmonton* (2004) Alta.

# Waivers and Releases

Factors a court will consider when Defendant seeks to rely on a pre-emptive release:

- Wording and format of the document.
- Description of the releasees.
- Words used to set the scope of the release.

# Waivers and Releases

- Whether the scope explicitly encompasses negligence.
- Whether the Plaintiff was taking part in an inherently risky activity and fully appreciated the extent of the associated risk.

# Waivers and Releases

- Whether the Plaintiff's injuries or damages resulted from an unexpected risk that was not assumed by the Plaintiff.
- Whether the Plaintiff signed the document freely.
- Whether the Plaintiff read and understood the effect of the document or otherwise should have understood its effect.
- The amount of time available to the Plaintiff to read and understand the document prior to signing.

# Waivers and Releases

- The extent to which the Plaintiff had previously been involved in similar activities and has previously signed similar documents.
- The Plaintiff's English language skills.
- The Plaintiff's level of sophistication and familiarity with contracts.

# Waivers and Releases

- Whether the nature and effect of the document was misrepresented in some way to the Plaintiff.
- Whether the circumstances were such that a reasonable person would have known that the plaintiff was not consenting to the terms of the document.

# Waiver and Release

- PLEASE READ THIS CAREFULLY. BY SIGNING THIS LEGAL DOCUMENT, YOU GIVE UP CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE.
- Name, address and birth date of participant.

# Waiver and Release

- In consideration of being permitted to participate in the Activity, I **ACKNOWLEDGE** and **AGREE** to the following:
  - I **ACKNOWLEDGE** there are inherent risks in participating in the Activity.

# Waiver and Release

- MY PARTICIPATION in the Activity is purely voluntary and I elect to participate in the Activity in spite of the risks and accept all responsibility for my participation in the Activity.

# Waiver and Release

- I ASSUME AND ACCEPT ALL THE RISKS AND DANGERS associated with my participation in the Activity, including the possibility of collisions, slips, falls, accidents, illness, bodily contact, whether deliberate or accidental, personal injury, death, property damage, or other loss resulting therefrom.
- I HEREBY WAIVE ANY AND ALL CLAIMS that I have or may in the future have against ~.

# Waiver and Release

- I HEREBY RELEASE FROM ANY AND ALL LIABILITY AND AGREE NOT TO SUE ~ for any personal injury, death, property damage, health care costs, theft or other loss of any kind, that I might sustain as a result of or in any way connected to my participation in the Activity, due to any cause whatsoever NOTWITHSTANDING that the loss may have been contributed to or occasioned by the negligence of ~.

Continued

# Waiver and Release

- I am of the full age of 18 years, that I have had sufficient time to read and understand what I am agreeing to in this Waiver and Release of Indemnity before signing, that I have had the opportunity to seek independent legal advice, and I understand that the Waiver will be binding upon my heirs, next of kin, executors, administrators and successors.

# Waiver and Release

- I UNDERSTAND THAT BY SIGNING THIS AGREEMENT, I GIVE UP CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE ~ FOR ANY LOSS OR INJURY I SUFFER FROM PARTICIPATING IN THE ACTIVITY.

# Informed Consent

- Minors cannot sign waiver and release.
- Use Informed Consent instead.
- Signed and dated by parent or guardian in front of a witness.

# Informed Consent

- PLEASE READ THIS CAREFULLY. BY SIGNING THIS LEGAL DOCUMENT, YOU GIVE UP CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE.
- Name, address and birthdate of Participant.

# Informed Consent

- In consideration of my child being permitted to participate in the Activity, I ACKNOWLEDGE and AGREE to the following:
  - I am aware that there are physical risks associated with my child's participation in the Activity, which include but are not limited to ...

# Informed Consent

- I understand that the choice to participate in the Activity brings with it the assumption of those risks.
- I accept all responsibility for my child's participation in the Activity, including the possibility of personal injury, death, property damage ...

# Informed Consent

- I understand and agree I am solely responsible for my child's behaviour.
- I understand that certain activities require a minimum level of fitness and health and that each person has a different capacity for participating in these activities. I hereby warrant that my child is physically fit to participate in the Activity.

# Informed Consent

- I understand and agree that ~ is not responsible for any injury, loss or damage of any kind sustained by my child notwithstanding that the loss may have been contributed to or occasioned by the negligence of ~.
- I acknowledge that I have had sufficient time to read and understand this Informed Consent before signing it.

# Informed Consent

- I understand, appreciate and accept the risks associated with the Activity and consent to my child's participation in the Activity and all related activities.

# Informed Consent

- I UNDERSTAND THAT BY SIGNING THIS AGREEMENT, I GIVE UP CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE ~ FOR ANY LOSS OR INJURY SUFFERED BY MY CHILD FROM PARTICIPATING IN THE ACTIVITY.

# When Executing the Waiver

- Participants in any activity should be notified they will be required to sign a waiver or informed consent form well in advance of the event.
- Both waivers and informed consent forms must be signed in the presence of a witness.
- Waivers and informed consent forms cannot be signed when or where alcohol is being served.

# When Executing the Waiver

**Ideally**, witnesses to waivers and informed consent forms must:

- Verify that the participant or the parents/guardians of minors have read the form.
- Ensure the participant or the parents/guardians are of sound mind and body.

# When Executing the Waiver

- Ensure the person signing the form has not changed or crossed out any of the wording on the form.
- Ask each person signing the form: “Have you read and do you understand the waiver or informed consent form?”

# When Executing the Waiver

- Ensure the person signing the form has responded in the affirmative and say “YES”.
- Then have the person sign and date the waiver or informed consent form.

# Thank You

Questions are welcome

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