



# Waivers at Work

The enforceability of waivers depends on a variety of factors determined by the courts, including principles of contractual interpretation, the circumstances in which waivers are read (or not read) and the age of the people signing them.



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During the holidays, the fictional character of Ethan participates in Huxley's Ski Camp at Crystal Mountain. Prior to starting his lessons, he is told to sign a form entitled "Release of Liability, Waiver of Claims, Assumption of Risk & Indemnity Agreement." The form mentions Crystal Mountain, but Huxley's Ski Camp does not appear anywhere. The form also states: "This waiver includes our liability in negligence." Eager to begin his first lesson, Ethan signs the form without reading it and proceeds to the chair lift. On a steep run, Ethan loses his balance, falls and sustains severe injuries. Can he successfully sue Huxley's Ski Camp?

## ANATOMY OF A WAIVER

The form Ethan signed is a waiver. This is standard fare in any commercial or recreational sporting activity. Waivers are used as a mechanism to shield organizations from liability. The enforceability of a waiver depends on the factors discussed below.

Although the waiver did not explicitly mention Huxley's Ski Camp, courts generally accept that this type of waiver can protect the agents, employees, representatives and members of Crystal Mountain against any liability, where the waiver includes these terms.

For example, in one British Columbia case<sup>1</sup>, a plaintiff sustained personal injuries in an all-terrain-vehicle (ATV) accident during a guided tour operated by the defendant resort. The plaintiff sued the resort, alleging the waiver was unenforceable because the tour company was not named. The court found the waiver clearly stated that the waiver extended to agents of the resort. The resort contracted on behalf of the tour company, the tour company authorized the resort to obtain waivers on its behalf, and the tour company provided a service to the plaintiff in exchange for his signature on the waiver. Therefore, the court enforced the waiver to defeat the plaintiff's claim.

As a general rule, the unnamed entity must demonstrate four criteria to obtain the benefit of the waiver: 1) the waiver makes it clear the unnamed entity is intended to be protected by the terms that limit liability; 2) if the unnamed entity is acting as an agent, the waiver must provide that agents are included in the waiver; 3) the unnamed entity authorized the creator of the waiver to obtain signed waivers on its behalf, and; 4) the unnamed entity provided something in exchange for the signature on the waiver.

A lack of specific and explicit reference to the type of accident or injury sustained is not fatal to the enforceability of the waiver. This principle is demonstrated in a recent British Columbia case<sup>2</sup> involving a snowmobile race. In this case, the plaintiff sustained an injury during a pre-race practice run, when he drove over a large piece of metal. His snowmobile was propelled into the air, resulting in serious injuries to the plaintiff.

The plaintiff argued the waiver only covered the race; not pre-race activities. The plaintiff relied on the ambiguity in the phrase "...arising out of or related to the event(s)." The term "event" was not defined, and the plaintiff argued it could only mean the race itself. The court disagreed. The court gave effect to the term in its ordinary and natural meaning, finding that it was clear the waiver extended to a practice for the race as well as the race itself.

### CONTRACTUAL INTERPRETATION

In considering waivers, courts rely on general principles applied in contractual interpretation. A waiver will be considered in its entirety, without strained interpretation, and the terms of the waiver will be given their ordinary and natural meaning. Technical errors in grammar or sentence structure will not void the terms of the waiver. Unresolved ambiguities are, however, construed against the entity seeking to rely on the waiver.

Failing to read the waiver prior to signing does not automatically void the waiver, except in certain circumstances. For example, in a case involving an injury during a martial arts course<sup>3</sup>, the

plaintiff had failed to read the waiver. The court found the plaintiff had not intended to be bound by the particular terms of the waiver. The waiver constituted a very small portion of the entire contract; it appeared in extremely small print, with no emphasis to direct the reader to its importance; and no provision drew the student's attention to the fact that by signing the waiver, he or she



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was waiving his or her legal rights. As a result, the defendant martial arts studio had a duty to bring the terms of the waiver to the attention of the plaintiff, which it failed to do, and the court refused to enforce the waiver.

Generally, it is immaterial that the waiver is not read, except in three situations: 1) if the person signing the waiver believes it to be something completely different than what it is; 2) if there has been misrepresentation of the purpose or nature of the waiver, or; 3) if the defendant knows the person signing does not intend to be bound by the waiver, thus creating a duty on the entity seeking to rely on the waiver to bring the terms of the waiver to the attention of the person signing the waiver.

Special circumstances arise when parents or guardians sign waivers on behalf of their children. In a British Columbia case<sup>4</sup>, the infant plaintiff suffered injury when he was violently thrown to the ground during a sparring match at a Hapkido school owned and operated by the defendant martial arts centre. The defendant sought to rely on a waiver signed by the child's mother. The court determined the waiver was unenforceable because of the British Columbia Infants Act<sup>5</sup>. This legislation states a parent or guardian cannot enter into any binding agreement, other than the specific excepted contracts stated in the Act, unless the contract is approved by the Public Trustee. This case demonstrates that in British Columbia, parents or guardians cannot bind their children to an agreement waiving the children's right to bring an action for damages in tort.

### ETHAN'S CASE

So, can Ethan successfully sue Huxley's Ski Camp? It is unlikely. Huxley's will most likely be able to demonstrate that the waiver extends liability protection to them as an agent of Crystal Mountain. Further, Ethan's accident would be captured by the term "negligence." Ethan's failure to read the waiver will not assist him because the heading of the waiver is clear that the purpose of the waiver was to limit liability.

The answer would most likely be the same if Ethan's accident occurred in another jurisdiction in Canada. Other provinces, notably Alberta and Ontario, rely on British Columbia cases for guidance. A significant difference is that courts in Alberta and Ontario will also consider if additional reasons exist for why the waiver should be voided, including unconscionability or fundamental breach.

Too bad, Ethan. ☹

1 *Goodspeed et al v. Tyax Mountain Lake Resort Ltd. et al*, 2005 BCSC 1577.

2 *Dixon v. British Columbia Snowmobile Federation*, 2003 BCCA 174.

3 *Parker v. Ingalls*, 2006 BCSC 942.

4 *Wong v. Lok's Martial Arts Centre Inc.*, 2009 BCSC 1385.

5 *R.S.B.C. 1996, c. 223*.