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WAIVERS: MANAGING YOUR RISK

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A. INTRODUCTION

It has been more than 25 years since the Supreme Court of Canada recognized that a contractual waiver clause can serve as a full defence to a claim in tort.[1] Despite this, waivers are often challenged by the participants of a variety of different sporting and outdoor activities, particularly when their injuries are significant. As a result, there have been numerous waiver decisions from Canadian courts.

It is not surprising however that many insurers and insureds are cynical of the validity of a waiver. In a review of 30 Canadian court decisions that considered the applicability of a waiver, the courts rejected the waiver 18 times; that equates to only a 40% success rate.

The Canadian decisions arise primarily from Ontario and British Columbia. In Ontario there were only two (2) out of eight (8) waivers that were upheld. In B.C. ten (10) out of seventeen (17) waivers were upheld. While these figures may appear discouraging, it is important to note that with each decision there is an evolution toward finding:

(a) the right type of waiver; and

(b) the right procedure for presenting a waiver that will ultimately be deemed acceptable by the courts.

Insurers and insureds can draw upon these decisions to improve the strength of their waiver defence.

In the past few years there have been further waiver decisions that serve as a reminder for claims examiners and underwriters that waivers will still be challenged and what insureds can do to increase the likelihood of the waiver successfully applying. The balance of this paper will identify the typical reasons waivers have been set aside, including the type of unacceptable wording, what constitutes an improper procedure for presenting a waiver, the type of arguments raised to challenge the waiver, the results of recent court decisions and some practical considerations for underwriters.

[1] *Dyck v. Manitoba Snowmobile Association,* [1985] 1 S.C.R. 589; *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186

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B. ACCEPTABLE FORM & WAIVER WORDING

The first series of Canadian waiver cases focused on the appropriate wording of the waiver. Specifically, whether or not the term, "negligence" had to be included. The term "negligence" was often mandatory.[2]
After insureds began altering their waivers to include "negligence", the next wave of court decisions focused on the idea that, in some cases, the waivers were not adequately identifying the negligence of the insureds (as opposed to just the participant), or failing to include a more detailed description of the risk. For example, injury arising from the condition of a water slide was not covered under a release excluding liability from injury arising on a water slide and a hold harmless agreement was found to waive injuries sustained in an aircraft while preparing to parachute but not during parachute training outside of the aircraft at the defendant's office.[3]

Waivers evolved again, adding even more protective language and incorporating the changes described below. This new evolution of waivers is particularly used by large corporate insureds involved in skiing, zip lining and eco-tourism. Waivers now typically include the following:

(a) a description of all the parties intended to be included in the waiver;

(b) a detailed description of the types of risks the participant will or may face during the scope of their involvement in the activity (including negligence by all parties named);

(c) a specific warning that the participant was giving up their right to sue, denoted with a separate place for the participant to initial;

(d) bold lettering and highlighted areas; and

(e) they are typically encompassed on one 8" x 11" sheet of paper.

This form of waiver, or a waiver encompassing most of these waiver characteristics, has been accepted on more than one occasion by the courts as a valid waiver, barring a tort claim.[4] Unfortunately, this form of waiver is still not universally used by insureds.

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[2] *Canada Steamship Lines Ltd. v. The King,* [1952] A.C. 192 at para. 10, on appeal from the Supreme Court of Canada, [1950] 4 D.L.R. 703; *Collins v. Richmond Rodeo Riding Ltd.,* [1966] B.C.J. No. 97 at para. 20; *Saari v. Sunshine Riding Academy Ltd.* (1967), 65 D.L.R. (2d) 92 at para. 24; *Lyster v. Fortress Mountain Resorts Ltd.* (1978), 6 Alta. L.R. (2d) 358 at paras. 41 – 42.

[3] *McGivney v. Rustico Summer Haven (1977) Ltd.* (1986), 64 Nfld. & P.E.I.R. 358; *Smith v. Horizon Aero Sports Ltd.* (1981), 12 A.C.W.S. (2d) 192

[4] *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 74 B.C.L.R. (2d) 159; *LaFontaine (Guardian ad litem of) v. Prince George Auto Racing Association* (1994), 45 A.C.W.S. (3d) 419; *Goodspeed et al v. Tyax Mountain Lake*

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C. ACCEPTABLE PRESENTATION OF WAIVERS

With the courts largely recognizing a certain form of waiver as appropriate, one would think the biggest hurdle was over. *If everyone just used the latest waiver, wouldn't all cases be dismissed?* Unfortunately, the next challenge is satisfying the court that the waiver was *presented* to the participant in an acceptable manner. Was the participant provided ample opportunity to review and consider the waiver? If not, this is a sufficient basis to set aside the waiver.

In *Crocker v. Sundance Northwest Resorts Ltd,*[5] the Court did not bar the plaintiff's tort claim on the basis of an executed entry form which included a waiver because the waiver provision in the entry form was not drawn to the plaintiff's attention, he had not read it, did not know of its existence and believed he was simply signing an entry form, not a waiver, when he executed it. In *Greeven v. Blackcomb Skiing Enterprises Ltd.*[6] the Court refused to uphold a waiver of liability printed on a ski ticket and on signs because the plaintiff was a stranger to the country, unfamiliar with the mountain where she was injured, had no degree of knowledge of the ticket's limitation of liability and a reasonable person would have concluded the ticket only contained advertising and the definition of the period for which it was issued. More recently, the Court refused to uphold an executed waiver as a bar to a tort claim when the defendant did not bring the waiver or the risks engaged in shoot-fighting to the plaintiff and the plaintiff had not reviewed the *hidden* waiver enclosed in a "Student Enrollment Agreement" before executing it.[7]

The cases illustrate that it is incumbent on the party presenting the document to take reasonable steps to bring an exclusion clause or waiver to the attention of the signatory. Again, with the passage of time and observance of the Canadian court decisions, insurers and insureds can learn what will or will not be considered acceptable practices. The practices that appear to be accepted by the Court to uphold an executed waiver include:

(a) providing the participant with notification that the document they are being asked to sign is a waiver;

Resort Ltd. et al, 2005 BCSC 1577; *Loychuk vs. Cougar Mountain Adventures Ltd.,* 2011 BCSC 193 aff'd 2012 BCCA 122; *Morgan v. Sun Peaks Resort Corporation,* 2013 BCSC 1668.

[5] *Supra* at note 1

[6] (1994), 22 C.C.L..T. (2d) 265

[7] *Parker v. Ingalls (c.o.b. Pure Self Defence Studios),* 2006 BCSC 942

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(b) providing ample time for the participant to review and consider the waiver;

(c) not providing the waiver to the participant *after* they have paid for the activity;

(d) not creating coercion or duress to the participant;

(e) not including the waiver in with a series of other documents that would confuse the participant; and

(f) not advertising the activity as something different from what they participate in.

D. CHALLENGES TO WAIVERS

Where a plaintiff has sustained injury and they executed a waiver which is said to bar their tort claim, or some unsigned form of waiver is said to bar the plaintiff's tort claim, the plaintiff will often attempt to challenge the waiver. Typical challenges to waivers include:

(a) arguing the waiver is invalid;

(b) a *non est factum* argument;

(c) misrepresentation; and

(d) unconscionability.

These grounds for challenging waivers are discussed in greater detail below.

i. The validity of the waiver

Plaintiffs may challenge whether the requisite offer, acceptance or consideration have been exchanged to validate the waiver. This can arise whether the waiver is in an unsigned or signed document. If a party intends to rely on an unsigned waiver, the party intending to rely on it needs to provide reasonable notice of it to the other party before it can be said to form a contract. An objective test is applied to determine if reasonable notice has been provided. It must be proven that a reasonable person knew the waiver was a term of the contract. This can be particularly burdensome to prove if

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the waiver a party intends to rely on is an unsigned form such as a posted sign, billboard or ticket.[8]

Traditionally, signing a written contract bound a party to its terms (unless *non est factum* or a misrepresentation was proven).[9] However, in *Karroll v. Silver Star Mountain Resorts Ltd.*,[10] McLachlin J., held that a party was not bound by a signed waiver if they could establish:

(1) a reasonable person did not intend to agree to the waiver; and

(2) the party intending on relying on the waiver failed to take reasonable steps to bring the contents of it to the participant's attention.

When considering whether to uphold a signed waiver, the Court has given consideration to:

(1) the location of the signature on the document;

(2) whether the plaintiff has initialed or signed the document on more than one occasion;

(3) the plaintiff's education;

(4) the plaintiff's experience participating in the activity;

(5) whether the waiver is a separate document from other documents; and

(6) the wording of the waiver.

Plaintiffs may argue there was no consideration for the waiver.[11] This may be argued if the plaintiff paid for the activity prior to signing the waiver. They argue that a fee was already paid prior to execution of the waiver. As such, they say the only consideration is past consideration and the waiver is invalid. *(In an effort to avoid this, the insured should have the participant execute the waiver at the same time payment is made for the activity.)*

[8] *Greeven, supra* at note 6; *Pelechytik v. Snow Valley Ski Club,* 2005 ABQB 532
[9] *L'Estrange v. Graucob,* [1934] 2 K.B. 394
[10] (1988), 33 B.C.L.R. (2d) 160
[11] *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24

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ii. Non Est Factum

The plaintiff argues *Non Est Factum* when they say they made a fundamental mistake about the nature of the contract they entered. *(For a very brief but helpful analysis of this argument see Gordon v. Krieg.*[12]*)* However, in order for this argument to be successful, the mistake cannot arise as a result of their negligence. A fundamental mistake may arise because a plaintiff has failed to review the waiver or contract or has not asked sufficient questions of the party offering it. These are typical defences to the *Non Est Factum* argument.

iii. Misrepresentations

A plaintiff may argue that the nature, purpose or scope of the waiver was misrepresented to them. This may negate the effect of a waiver clause in a contract. Alternatively, the waiver may be interpreted according to the misrepresentation.
Typical arguments against misrepresentation include:

(1) no verbal misrepresentation occurred; and

(4) the waiver included a no misrepresentation clause.

iv. Unconscionability

Plaintiffs will argue the doctrine of "unconscionability" by arguing there was an inequality in their position arising out of endurance or weakness, which left them in the power of the defendants when executing the waiver. They will argue the waiver is invalid because of unconscionability.

In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),*[13] the court considered unconscionability and at paras. 121 – 122, Binnie J. stated:

> "*The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.*
>
> *The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend*

[12] 2013 BCSC 842
[13] 2010 SCC 4

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on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" ([Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426], at p. 462). This second issue has to do with contract formation, not breach."

The Court has used varying language to express the test for unconscionability. In *McNeill v. Vandenberg,*[14] Garson J.A. described the test at paragraph 15 as:

> "*In order to set aside a bargain for unconscionability, a party must establish:*
>
> *(a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and*
>
> *(b) proof of substantial unfairness in the bargain.*
>
> *This test was articulated in Harry v. Kreutziger (1978), 9 B.C.L.R. 166 (B.C.C.A) at 173 and reiterated in Klassen v. Klassen, 2001 BCCA 445."*

In *Roy v. 1216393 Ontario Inc.,*[15] Tysoe J.A. quoted from the judgment of Madam Justice McLachlin in *Principal Investments Ltd. v. Thiele Estate (1987),* 12 B.C.L.R. (2d) 258 at 263:

> "*Two elements must be established before a contract can be set aside on the grounds of unconscionability. There first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain created by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: Morrison v. Coast Fin. Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A); Harry v. Kreutziger (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231.*

The Courts have been reluctant to find circumstances surrounding the execution of a release to be unconscionable. In *Delaney v. Cascade River Holidays Ltd.*[16] the Plaintiff executed a release in favour of a white white water rafting company before he was killed on a white water rafting excursion. The BC Court of Appeal upheld the trial

[14] 2010 BCCA 583
[15] 2011 BCCA 500
[16] *Supra* at note 11

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judge's decision that there was no basis to rescind the release as a consumer transaction that involved a deceptive or unconscionable act or practice under what was formerly section 22(1)(b) of the *Trade Practice Act,* R.S.B.C. 1979, c. 406. In *Knowles v. Whistler Ski Corp.,*[17] the plaintiff sued the defendant alleging that an employee who adjusted her bindings had been negligent. The plaintiff had executed a release against the defendant but argued it was invalid because it had been entered into without any opportunity for negotiations between the two parties that were in unequal bargaining positions and this rendered it unconscionable. Huddart, J. rejected this submission, dismissed the argument and stated:

> *"The circumstances in which Mrs. Knowles signed the Release Agreement are far-removed from the hurried execution of a document containing a release that only the most attentive could reach 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. This is not a case where the party seeking to rely on the waiver of liability clause was seeking to avoid all the burdens of the contract. The ski shop provided the ski equipment at a cost of $36.00.*
>
> *Nothing that was said or done could have led anyone to believe the waiver would not apply. Mrs. Knowles understood fully what she was signing and why. One of the risks she assumed when she skied that day was the technician at the ski shop might have been negligent in setting the binding adjustment or otherwise. The Release Agreement not only says that, it also sets out specifically the risks inherent in the ski-boot binding system. If Mrs. Knowles did not want to waive any claim in negligence she could have done what her counsel suggest others in her situation will do. She could have refused to ski."*

In *Ochoa v. Canadian Mountain Holidays Inc.,*[18] the wife of her deceased husband sued the heli-skiing company and two of its guides. Her husband had executed a release prior to heli-skiing. In dismissing her argument that the release was unconscionable, Koeningsberg J. stated at paragraph 139:

> *"…It is true that the promotional materials emphasized that the guiding would be careful, meet a high standard of professionalism and minimize risks inherent in the sport of heli-skiing. However, it did not purport to be a guarantee of no mistakes or lapses in judgment in the exercise of skill and judgment. Reading all of the literature and seeing how the operation was carried out, in fact, Mr. Ochoa as a*

[17] [1991] B.C.J. No. 61
[18] [1996] B.C.J. No. 2026

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> *reasonable person would likely have understood the waiver to address the possibility that human error, even in the form of the exercise of judgment falling below the standard of care in the industry, might occur. If such a thing occurred as an isolated incident, in my view, it would arguably be negligence but would not remove from the contract the very thing being contracted for."*

In addition, the Court has stated that there is no power imbalance created merely by virtue of a person wishing to engage in an inherently risky recreational activity that is controlled or operated by another.[19] Additionally, it is not unfair for the operator of such a recreational activity to require a release or waiver as a condition of participating.[20] The Court's decisions indicate it will be difficult to establish a waiver is invalid because of unconscionability.

E. RECENT DECISIONS AND ISSUES RELATED TO WAIVERS

i. Recent court decision illustrative of proper waiver wording and presentation

In *Morgan v. Sun Peaks Resort Corporation,*[21] the plaintiff was injured while she was loading onto a chair lift at the defendant's ski resort. She alleged the defendant's employee negligently failed to stop a ski lift prior to the ski lift running her over. The defendant asserted that the standard form waiver applying to the Plaintiff's ski pass released it from all liability and was a bar to her claim. The plaintiff had signed and initialed her standard form waiver, was given an opportunity to read it prior to signing it and allowed her children to initial and sign their standard form waivers, when she bought their ski passes. The standard form waiver commenced:

> "**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!"***

The Court concluded the defendant took reasonable steps to bring the release to the attention of the plaintiff and concluded the plaintiff was bound by the terms of the release. The Plaintiff's claim was dismissed.

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[19] *Supra* at note 4
[20] *Ibid; Dyck supra* at note 1
[21] 2013 BCSC 1668

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ii. Recent court decision illustrative of improper waiver wording and presentation

The decision of *Arndt v. The Ruskin Slo Pitch Association*[22] reminds us of some unacceptable practices in presenting a waiver to participants. In *Arndt,* the Plaintiff was injured when she stepped in a hole on a softball field while running to catch a fly ball. The Plaintiff argued she was not bound by the waiver because she thought she was signing a softball team roster. The B.C. court agreed. In refusing to enforce the waiver against the plaintiff, at paragraphs 44 and 45, Humphries J. stated:

> *"The document, looked at on its face, does not appear to be a waiver. It appears to be a roster. The attention of the person asked to sign it as a roster would inevitably be drawn to the lines in the box for the team signatures and information. While there is red type above the box requiring the person to "READ AND UNDERSTAND BACK OF PAGE BEFORE SIGNING" there was, on the evidence on this application, no direction or information given by the coach who presented the document attached to a clipboard, to be handed around and signed by the team at the first practice. The words "I agree to waiver" in the signature lines are so faint as to almost undetectable. Unlike the waivers that have been held to be enforceable in the cases referred to above, the release is not a separate sheet and the waiver and signature are not on the same page. The back of the form requires the coach to advise the people on the list that they are fully responsible for any damages "incurred by them". That was not done, nor was any step taken by the defendants to ensure it had been done.*
>
> *If the defendants wanted to ensure that they were released from liability it would be a simple matter to have individual release forms prepared and signed by each player. The defendants had no means of determining if the plaintiff understood he document because they did not present it to her, leaving its nature to be explained by coaches or managers who did not do so. The form of the document itself and the circumstances under which it was presented for signature are not such that a reasonable observer would understand its nature. I am unable to conclude that the defendants took reasonable steps to have the nature of the document as a waiver rather than a team roster brought to the plaintiff's attention."*

iii. Parent/Guardian indemnity agreements

An issue the Court will likely need to consider in the future is the enforceability of indemnity agreements executed by a parent or guardian indemnifying a party from legal action by a minor. In BC, some sporting/adventure company operators require a

[22] 2011 BCSC 1530

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parent/guardian to execute an indemnity agreement in their favor and see this as a method to circumvent a parent or guardians' inability to waive an infant's right to bring an action in damages or tort.[23] In Ontario, the Court has suggested that a parent executing an indemnity agreement on behalf of a minor is "*contrary to the procedures set up in our Courts for the protection of infants*" and should be held unenforceable.[24] In Utah, the Supreme Court has held that such an agreement is contrary to public policy.[25] The Law Reform Commission of British Columbia has suggested such agreements may be contrary to public policy.[26] How, such an agreement will be interpreted by the Court in British Columbia still requires determination.

F. PRACTICAL CONSIDERATIONS

In speaking with numerous brokers and underwriters who provide coverage for sports related risks, it is apparent there is a wide variety of practice in assessing an insured's waiver and their procedures for the presentation of their waivers. In some cases the waiver is not reviewed by underwriters or brokers prior to granting coverage. As long as the insured confirms they have a waiver, coverage is granted. In other cases a copy of the draft waiver is obtained but there is no analysis of the insured's waiver procedures. To further complicate matters, some insureds hold little faith in their own waivers or believe they are a deterrent to participants and therefore only make the minimal effort to produce them to participants to satisfy insurance requirements.

The following steps are recommended to ensure best practices are undertaken to reduce risk to insurers and to ensure the insured's waiver has a good chance of being upheld if challenged:

(a) Creating a requirement to produce a sample of the insured's standard waiver at the application stage;

(b) Comparing the sample waiver with the type of waiver used in the *Loychuk v. Cougar Mountain Adventures Ltd*. and *Morgan v. Sun Peaks Resort Corporation* decisions;

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[23] *Wong v. Lok's Martial Arts Centre Inc.,* 2009 BCSC 1385 at para. 61; In BC, the *Infants Act,* R.S.B.C. 1996, c. 223 precludes a parent or guardian from waiving an infant's legal rights. Not all provinces have similar legislation to the British Columbia *Infants Act* and they may permit a parent or guardian to waive an infant's right to legal action.

[24] *Stevens et al. v. Howitt,* [1969] 1 O.R. 761-763

[25] *Hawkins v. Peart,,* 37 P. 3d 1062 - 2001

[26] Law Reform Commission of British Columbia, *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (October 1994) at page 32

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(c) Instructing the insured to include a comprehensive description of any and all risks or possible risks that a participant is likely to encounter during their participation;

(d) Ensuring that this detailed list of risks is included in the insured's waiver;

(e) Creating a requirement that the insured provided a detailed description of the waiver protocol that is practiced before the waiver is signed by the participant

(f) Encouraging insureds to post a draft of their waiver on their website to promote early and easy access to the waiver for the participants; and

(g) Creating a "waiver warranty", requiring insureds to produce an agreed upon waiver to each participant and to follow a specific and agreed set of protocols for each participant when presenting the waiver.

There will continue to be injured participants who challenge the validity of the waiver documents they signed. Some will succeed. However, with the waiver wordings and procedures continuing to evolve from the past decisions, there is the potential for a higher success rate of accepted waivers and conversely, reduced risks for insurers.

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