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In this Issue…

Waivers and Managing your Risk

By Steve Wallace

It has been 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. Despite this decision 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 29 Canadian court decisions that considered the applicability of a waiver, the courts rejected the waiver 18 times; that equates to only a 37% 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. nine (9) out of sixteen (16) 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 year there have been two 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 article 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 the two recent court decisions and some practical considerations for underwriters.

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 courts all decided the term "negligence" was mandatory.

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. *"The simple use of the word 'negligence' in a waiver is not enough."*

Waivers then evolved again, incorporating these changes and adding even more protective language. This new evolution of waivers is particularly used by large corporate insureds involved in skiing, zip lining and eco-tourism.

These waivers now 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) encompassed on one 8" x 11" sheet of paper.

This form of waiver has been accepted on more than one occasion by the courts as a valid waiver, barring a tort claim. Unfortunately, this form of waiver is still not universally used by insureds.

Acceptable Presentation of Waivers

With the courts 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. *It is incumbent on the party presenting the document to take reasonable steps to bring an exclusion clause to the attention of the signator.*

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. These practices include: (a) providing the participant with notification that the document they are being asked to sign is a waiver; (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.

Recent Decisions

In *Niedermeyer v. Ziptrek Ecotours Inc.* a Plaintiff was returning from a zip line to the Whistler village when the bus she was travelling in went off the road, overturned, and fell down a hill. The Plaintiff suffered significant injuries. The Plaintiff argued that the waiver did not intend to exclude liability for the defendants' negligence in the operation of a motor vehicle which had nothing to do with the zip line activities. This is yet another example of Plaintiffs arguing the wording of a waiver had an *insufficient description of the risks.*

The B.C. court disagreed. "*Although the plaintiff may not have been aware of the need for a bus trip to the zip line site, travel to and from the tour area was clearly identified as one of the adventure activities included in the Release. The Release was incorporated onto a single page and was highlighted with warnings that it was an important document. It did not operate against the plaintiff's reasonable expectations because it clearly stated the activity included travel to and from the Ziptrek site*".

This waiver was almost identical in nature to the waiver that was upheld the year prior in another zip line case, *Loychuk v. Cougar Mountain Adventures Ltd.* Both of these waivers demonstrate examples of the new evolution of waivers that the courts will find acceptable.

In *Arndt v. The Ruskin Slo Pitch Association* 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. "*The "waiver" information is hidden within the roster requirements. She was not provided with any explanation, nor was she given an opportunity to read the document which was simply passed around at the first practice, attached to a clipboard. She knew she had to sign the roster to be allowed to play. Thus the act of signing the document was not the act of signing a waiver*".

The *Arndt* decision highlights what is required for proper waiver wording and reminds us of some unacceptable practices in presenting a waiver to the participants.

Recent Challenges

Last year, in both BC and Ontario, Plaintiffs unsuccessfully attempted to 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. The courts have dismissed this argument. "*It is not unconscionable for the operator of a recreational sports facility to require persons to sign releases as preconditions to the use of that facility*".

Practical Considerations

In speaking with numerous brokers and underwriters who provide coverage for sports related risks, it was 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 *Niedermeyer v. Ziptrek Ecotours Inc*. or *Loychuk v. Cougar Mountain Adventures Ltd*. decisions;

(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.

Social Media and the Emergence of Cyber Liability

By Colleen O'Neill

Recent technological advancements have given rise to the age of "social media." This has also given rise to a number of new issues in the insurance world. From utilizing evidence obtained from social media sites about a Plaintiff and other witnesses, to issues arising out of bloggers posting information live from the courtroom, to spoliation of jurors and mistrials due to internet access, social media has not wasted any time in becoming a sizeable issue that insurers and defence Counsel must deal now with. Further, with the increasing reliance on computers, cloud servers, and other electronically stored data in an attempt to go "paperless," we are also witnessing the emergence of an entirely new area in the insurance industry - cyber liability.

Issues in the Courtroom

Social media has now entered the courtroom and several legal issues have come along with it. In *Lester v. Allied Concrete Company*, a U.S. decision out of Virginia, the court dealt with the issue of spoliation related to Facebook evidence. In this case the Plaintiff's lawyer instructed his client to delete photos off Facebook that were the subject of a pending discovery request, and failed to disclose both the photos and his email exchange to the court. This ultimately required a further hearing to deal with sanctions against both the client and his lawyer for the spoliation that occurred regarding the Facebook photos.

Perhaps one of the biggest issues surrounding social media in the courtroom is the potential risk it poses to the jury system. The potential for juror's opinions to be influenced or tainted by accessing information or communicating with others through social media during trial or the deliberation process is concerning.

For example, there have been mistrials related to jurors being Facebook friends with family members of a victim, a clear breach in the concept of an impartial jury. Additionally, the U.S. Appeal courts have heard appeals based on a juror's Facebook activity. In *United States v. Ganias*, the court heard an appeal based on evidence that a juror had posted comments during a lunch break and on the trial outcome.

Comments such as "*I may get 2 hang someone*" and "*Guinness for lunch break*" should obviously be avoided during the conduct of a trial, whether or not these comments give rise to an actual finding of bias. The issue of mistrials due to social media related misconduct has also been seen in Canada. For example, a murder trial in New Brunswick was halted when the family of the accused brought to the attention of the court that a member of the jury had posted comments on a Facebook page dedicated to the conviction of the accused.

The issue of jury misconduct due to social media has prompted one Judge to provide the following instruction: "*I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case.... You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube*."

The U.S. has also responded through the Judicial Conference Committee on Court Administration and Case Management (CACM), rewriting their "Model Jury Instructions" in August of 2012. The CACM added instructions in the area dealing with usage of electronic devices and social media. Jurors are now instructed to inform the presiding Judge if they become aware that a juror on the panel has violated the rules on the use of electronic devices and/or social media to do research or communicate regarding the case. The CACM also added a paragraph explaining the reasoning behind the rule against the use of electronic devices and social media. As some refer to it, "*trial by Google*" is a greater concern with the continual growth and widespread usage of social media. The potential impact on litigation and defence costs is far-reaching as there is no doubt that we will be seeing mistrials and appeals in the near future in many jurisdictions as a result of social media reaching the jury box or the deliberation room.

The Emergence of Cyber Liability

Technological advances have also changed the way we store and access documents. Documents stored electronically can be accessed through computers, tablets and smart phones. Companies store financial documents, customer lists, receipts, transaction records, and intellectual property in electronic storage. Further, confidential emails are exchanged daily between professionals both internally and externally. Typical business insurance coverage policies do not cover electronic data, and additional coverage is needed to protect against risk factors such as computer theft, computer hacking/security breaches, viruses, extortion, as well as errors on the part of employees of an organization. Cyber liability insurance as well as breach response plans are becoming of paramount importance and the lack thereof can lead to massive legal actions and business expenses.

For example, recently in Canada the Human Resources and Skills Development Canada lost a device containing the data on 583,000 Canada Student Loan borrowers from the years 2000 to 2006. Among the information contained on the missing files are the names, social insurance numbers, birth date and contact information of the borrowers. As a result, Human Resources and Skills Development Canada had to quickly respond to the security breach by providing answers through a hotline to those people wanting to know if their information was amongst the missing files. Each affected person will have correspondence sent to them informing them of the breach. Many of the borrowers intend to join a class action

suit against the federal government as a result of having their information compromised. The financial impact of such a security breach is far reaching, including business losses, crisis management and response, repairing the computer systems and litigation. As the usage of electronically stored information and internet communication increases, so does the need to protect against the inherit risks that this system creates.

Cyber liability is clearly a rapidly developing area in the insurance world. It is necessary to understand the intricacies of the area in order to establish cost efficient policies and responses. Insurers and lawyers must work collaboratively to stay informed on issues that will continue to grow and evolve as this area develops.

For this reason, Dolden Wallace Folick will publish a series of articles on cyber liability, including topics covering the statutory and common law basis for liability, the prime targets for cyber liability, cyber related claims against law firms and lawyers, and cyber liability policy structure and coverage exclusions.

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