



Waivers: Protect Your Business With A Waiver

The Supreme Court of Canada confirms that waivers are an effective risk management tool to limit exposure to liability for participants in sports and recreation activities.

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Court Rules Waivers Are An Effective Risk Management Tool

Issues to consider when drafting waivers

By Suzanne Yar Khan, a business writer based in Toronto

Sports and recreation facilities in Canada are breathing a sigh of relief now that they have the ability to rely on waivers to protect their businesses.

The news comes after the Supreme Court of Canada recently dismissed a leave to appeal application in two Ontario cases: *Schnarr v. Blue Mountain Resorts* and *Woodhouse v. Snow Valley Resorts*.

Plaintiffs Schnarr and Woodhouse sought damages from the resorts after being injured while skiing. Both signed waivers, but said the waivers were unconscionable because they offended the *Consumer Protection Act* (CPA) legislation to ensure that products or activities are reasonably safe, explains Morgan Martin, lawyer, Dolden Wallace Folick LLP.

“They’re effectively saying that if you are accepting payment from someone to participate in an activity, you must make sure the activity is safe,” says Martin. “And that’s the opposite of what a waiver does. The waiver says you’re accepting all risks of participation in an activity.”

Upon appeal, the Ontario Court of Appeal found that the waivers did not offend the CPA legislation, and no one was forced to participate; it’s a choice they both made.

So these cases “close the door on the argument that waivers and effectively worded releases of liability are inoperable in Ontario,” says Martin. “They solidify the long-held belief that waivers are an effective risk management tool to limit exposure to liability for participants in sports and recreation activities.”

Ashley Chinner, Senior Vice President & Director of Golf at Signature Risk Partners Inc. agrees. “The ruling helps protect businesses. The inherent risks associated with any recreational facility are exactly that—risks. If you’re at a golf course and trip on a bunker or get hit by a golf ball, those are things that are inherent to the game.”

But while waivers have become better risk management tools for businesses, it’s still up to the facility to ensure proper wording and presentation of the forms. Here are some tips.

Wording and presenting waivers

Often, owners and operators overlook simple things, like ensuring that the customer has actually read the waiver and understands it.

“They have to be well-informed,” says Paul Lo Presti, lawyer and mediator at Lo Presti Mediation and Dispute Resolutions. “For example, you have to ensure they’re not intoxicated—there’s nothing or no one influencing their decision and what they’re reading.”

He adds that when drafting a waiver, retaining legal counsel is important. “Have them do some research and construct a waiver that’s concise and free of any ambiguities.”

Martin offers tips to consider when drafting a waiver based on the prevailing jurisprudence.

- It needs to include the word “negligence.”
- It needs to fully and obviously state that anybody signing it is waiving a legal right to sue. “I would use bold letters and colourful wording to really bring that home to anyone that is reading the document,” he says. “People shouldn’t have to search for the meaning.”
- It needs to list the various dangers for the various activities, so you shouldn’t have a one-size-fits-all waiver. For example, if you’re going white-water rafting, the waiver should state that drowning is a risk. If you’re going rock climbing, it should list there’s a risk of falling.
- It needs to limit liability by clearly indicating the contracting parties.

Further, Martin says when presenting the waiver, don’t bury it between other documents. For instance, for a gym membership, the customer might have to fill out a 10-page document on health history, and review the terms and conditions of membership. So do not place the waiver somewhere in the middle of the document.

“Courts have said that it is ideal if the waiver is on one piece of paper, presented separately, rather than listed among other pages of a document,” he says.

Also, provide the waiver before the activity is paid for so the customer has time to review and consider it. Martin uses the example that if someone wants to go white-water rafting out of town, signs up and pays for the activity online, books a hotel, then goes to the white-water rafting facility to participate and is presented with a waiver, they might just sign it because they’ve already invested so much.

“You also want to highlight that participation is entirely optional,” says Martin. “If you don’t want to sign it, tell the person ‘you can wait here and we can take you back to the resort after,’ for instance.”

And offer the waiver in different languages, since Canada is a multi-cultural melting pot. Martin recalls one case where a Mexican businessman participated in heli-skiing, and the family later tried to sue the resort when he died. “They said the waiver was unenforceable because the gentleman couldn’t read English.” Luckily for the facility in that case, it turned out he could read English, so the case was thrown out.

Finally, as the world becomes more digital, electronic waivers are key.

“You can update them, and embed safety videos into them to ensure every participant has watched it before it flips to the next screen, where they have to click the box saying they did watch the video,” says Martin. “It takes the presentation to the next level, and human error element out of the equation because you know how it’s being presented every single time. You can even have a screen that lists the waiver in different languages.”

Further, electronic waivers can be stored forever in the cloud. So owners will have an easier time searching for a waiver if they ever get sued.

“If you can imagine a ski resort in Ontario over March break, there’s a lot of high school students working there,” says Martin. “They might be getting 1,500 people a day signing waivers, and that student has to stack and file those away.”

“The limitation period is two years. So for personal injury actions, an injured party has two years before they have to commence action. Two years is a long time to store papers. If you can’t produce the waiver, it is very difficult to prove that one was completed. E-waivers are perfect because you can email a copy to the participant and upload a copy into the cloud without taking up any space.”

More risk management tips

Waivers are key when it comes to limiting liability and protecting a facility from personal injury claims. But there are other measures that owners can take.

“Have an eye to those parts of the facility that can pose dangers,” says Lo Presti. “For instance, pathways or certain areas where there might be regular or extensive traffic by either people or public vehicles. Give consideration to what parts of the facility can pose a hazard to people.”

Chinner adds walk through the facility like it’s your first time there.

“Start in the parking lot and come in the way your guests come in,” he says. “Go down to the locker rooms, in the showers, for instance. When walking outside, you’re looking for branches hanging off trees, loose stones, and paths that are worn out to the point that if there was rain, it might be slippery. Put up signs that warn people of sharp corners, steep declines and steep hills.”

Overall, the insurance industry can’t continue to pay hundreds of thousands of dollars for slip-and-fall claims, notes Chinner. And this is why solid risk management and using waivers are important.

Chinner says, “The massive increase in personal injury suits is forcing insurers to specifically ask: ‘Do you have a waiver program in place?’ If you do, great. If not, chances are there is going to be some exclusionary language, or the pricing will be expensive, or both.”

Disclaimer: *The views of the author and her sources of information are not to be taken or construed in any way as legal advice. It’s strongly recommended that you contact your own legal counsel.*

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