

THE ADVISOR

Legal Issues of General Interest to Individuals

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WAIVERS OF LIABILITY IN SPORT AND RECREATIONAL ACTIVITIES

Have you ever been asked to sign or read a waiver of liability before participating in a sport or recreational activity? Have you wondered what it meant? This Advisor highlights the importance of understanding the risks and implications of waivers before signing or agreeing to their terms.

Basis for Liability

Because of the risks inherent in many sport and recreational activities, participants are occasionally injured, and will sometimes later sue the recreational operator or sports association (the "Operator") running the activity. Claims may include damages for pain and suffering, loss of income, medical treatment and other expenses. Such actions are brought on the principle that the Operator has a legal duty to ensure that its facility and premises are reasonably safe for the intended purpose. This duty is based on two legal principles: negligence and occupiers' liability.

(a) Negligence:

The law requires an Operator to take reasonable care to prevent harm to those people who it can reasonably foresee might be harmed if it is careless. If someone is injured as a result of the Operator's lack of care, and the Operator could reasonably have foreseen the injury, then it may be held negligent and responsible to compensate that person. For example, if a white-water rafting tour Operator were to send you out in a boat without a life jacket, then it has likely breached its duty of care to you. This is so because the Operator can reasonably foresee that if the boat tips, you might drown as a result of not wearing a life-jacket. However, you have responsibility for your own actions as well; if the Operator provided the life jacket and you decided not to wear it, you might be responsible for your own injuries.

(b) Occupiers' Liability

Anyone who is in control of land, whether that person owns, leases or manages that land, owes a legal duty as "Occupier" of the land to make that land reasonably safe for people who enter onto it. This duty extends to not only the condition of the land, but also activities which take place and conduct of third parties on the land. The Occupier of the land is not required to ensure that the lands and premises are completely risk-free, only that they are reasonably safe in light of the nature of the recreational activity in question and the age and skill level of the anticipated participants.

Not all Operators are "Occupiers", as many activities take place on lands not controlled by the operator running the activity. For example, a heli-skiing operation would be conducted on a mountain that is most likely not in the control of the Operator, and therefore occupiers' liability principles would not apply to the Operator.

How do Operators limit liability?

Because of this risk of liability and costly claims, Operators often will allow people to participate in an activity only after they have signed a "waiver" of liability. A waiver is an agreement under which the participant gives up the right to sue the Operator and releases the Operator from liability. Usually these waivers aim to excuse the Operator from liability for injury to a participant, even if the Operator has acted carelessly. In some cases, the waiver even excludes deliberate acts by the Operator and its employees. If such a waiver were effective, and, for example, an employee sabotaged equipment used in the activity, the Operator might not be liable to anyone hurt as a result of those acts.

In other cases, the participant will not be required to sign a waiver. Instead, the Operator will provide with notice of the waiver on signs in the ticket booths or surrounding areas (for example, on ski-lifts), on the ticket purchased by the participant, or in brochures and information packages (as in the case of adventure tours). By participating in the activity in question, you are in most cases deemed to have accepted the terms of the waiver, and the Operator may be excluded from liability for any events or acts covered by that waiver.

What if you didn't read or understand the waiver?

Persons injured during organized sport or recreational activities will sometimes sue Operators despite having signed a waiver, claiming they had not read the waiver in question, or that they read it but did not understand the implications of the waiver, or, in the case of ticket and sign waivers, that the waiver was not brought to their attention.

Generally, courts have become more insistent that the language contained in a waiver be explicit and clear, so that participants understand the scope of the waiver and the true significance of the rights they are waiving. If a waiver is posted on signs or on the back of a ticket, the courts generally require that reasonable effort be made by the Operator to bring the waiver to the attention of the participant, either by way of large, obvious signs instructing participants to read the waiver carefully, or by having the Operator's employees personally instruct participants to read the waiver carefully. In some cases where a participant was not given ample opportunity to review a waiver before agreeing to its terms, the courts have determined that it would be unfair to permit the Operator to avoid legal liability. There are many other complex factors which are considered by the courts in determining whether a waiver should be enforced, and each case is decided on its particular facts. If you are injured in a sport or recreational activity, consult a lawyer as soon as possible to have the potential claim assessed.

Should you sign a waiver of your child's rights?

Parents or guardians are often asked to sign a waiver of their child's rights when the child is participating in sports or recreational activities. Such waivers are not generally valid, as the courts have taken the position that children should not be prejudiced by their parents' naiveté or poor judgment. However, as discussed above, each case involving waivers is decided on a case by case basis, therefore parents should not sign waivers in respect of their children assuming the waiver will not be enforceable. The parents should read and understand the waiver, ask pertinent questions of the Operator's employees, and consider whether the terms of the waiver are too broad or unreasonable.

A waiver signed by a minor releasing an Operator from liability for harm to the minor will not normally be

enforceable against the minor. In Alberta, a minor is anyone under the age of 18. If your child is injured in a sport or recreational activity, consult a lawyer as soon as possible to have the potential claim assessed by a qualified professional.

Summary of our recommendations

- read waivers carefully
- understand the consequences of the waiver
- ask questions of the Operator's employees if you do not understand
- decide whether the risk is acceptable
- if injured, seek legal advice without delay

This article is prepared by lawyers in the Personal Services Group of Field Atkinson Perraton. It is intended to provide general information on areas of law that affect individuals. This publication is based on the law at the date of publication and is not intended to provide legal advice on any specific fact situation. Please consult a lawyer before acting on the information provided.

Our experienced professionals are happy to meet with you at your convenience to discuss your individual circumstances. For further information on this topic please contact **Lisa Gaunt (260-8525)** in Calgary or **Sharon Stefanyk (423-3003 or 1-800-222-6479)** in Edmonton.

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