

WAIVER & RELEASE

Personal Information		(Middle Initial)	Home Telephone
(First)	(Last)	()	()
(City)	(State)	(Zip)	Other Telephone
			()



Risk Management Considerations for Waivers of Liability Update

In May 2012, we released an article on the important role that waivers play in a well-managed risk management program. The article titled, Risk Management Considerations for Waivers of Liability, can be found online within the Risk Management Centre of Excellence. Since this article was released, there have been three recent court decisions that determined liability on the basis of waivers. This article reviews these decisions.

In *Newsham v. Canwest trade Show Inc.* 2012 *CarswellIBC 700*, 2012 *BCSC 289*, the plaintiff was an exhibitor at a trade show who signed an agreement to rent a booth that contained a waiver on the back. The plaintiff was subsequently asked if, in lieu of payment for the exhibition booth, he would perform at the show, to which he agreed. During his performance, he slipped and fell on a slippery substance that caused him to suffer a knee injury. The defendant's position was that the waiver on the back of the agreement signed by the plaintiff created a complete defence to any claims by the plaintiff against the defendant. The plaintiff claimed that either he was not aware of the waiver at all or the waiver only applied to his contract for the booth rental and not to his agreement to perform. The Judge decided that if the defendant had intended for the waiver to include both the plaintiff's performance as well as

the rental of the booth, it should have brought that to the plaintiff's attention, which it did not. The waiver was found to be unenforceable with regard to injuries suffered during the performance.

In *Niedermeyer v. Charlton* 2014 *BCCA 165*, 2014 *CarswellIBC 1136*, the appellant signed a release before participating in zip line activities at the respondent's facility. After the zip line activities were completed, the respondent provided transportation by van for the appellant during which the vehicle left the road, overturned and fell down a hill and the appellant suffered significant injuries. At trial, the Judge found that the waiver was valid and enforceable and provided a complete defence to the claim. The decision was, however, reversed on appeal on the grounds that the release was contrary to public policy due to the mandatory automobile insurance regime in British Columbia. In the Judge's view, the mandatory automobile insurance scheme is intended as a benefit for the public interest and it would be contrary to public policy to allow private parties to contract out of it. The Judge also decided that it was reasonable for the appellant to assume that her damages would be covered by the respondent's insurance due to the incident occurring while driving in the respondent's vehicle.

In *Levita v. Crew et al* 2015 CarswellOnt 13326, 2015 ONSC 5316, 257 A.C.W.S. (3d) 747, the plaintiff sustained a fractured tibia and fibula while playing recreational hockey. The plaintiff brought a claim against the hockey league and the player on the opposing team. The plaintiff signed a waiver wherein he agreed that he was aware of the risks and accepted and assumed the dangers and the possibility of personal injury. Although the Judge decided that neither the player nor the league were liable he did comment that, had the league been found liable, the waiver would have constituted a complete defence due to its clear wording and the fact that the waiver provided a detailed description of the possible risks.

These cases demonstrate that in sporting and recreational activities, a waiver can be a complete defence against tort claims if it has been meticulously and clearly drafted to ensure that the wording is broad enough to cover all aspects of the services provided and its terms are brought to the attention of the participant. However, when the waiver is not carefully considered, it can contain gaps that leave parties vulnerable to litigation and the possible payment of damages.

Waivers are legal instruments upon which Courts can rely to protect parties from liability. Accordingly, all waivers should be prepared or reviewed by a legal representative.

While Intact Public Entities Inc. does its best to provide useful general information and guidance on matters of interest to its clients, statutes, regulations and the common law continually change and evolve, vary from jurisdiction to jurisdiction, and are subject to differing interpretations and opinions. The information provided by Intact Public Entities Inc. is not intended to replace legal or other professional advice or services. The information provided by Intact Public Entities Inc. herein is provided "as is" and without any warranty, either express or implied, as to its fitness, quality, accuracy, applicability or timeliness. Before taking any action, consult an appropriate professional and satisfy yourself about the fitness, accuracy, applicability or timeliness of any information or opinions contained herein. Intact Public Entities Inc. assumes no liability whatsoever for any errors or omissions associated with the information provided herein and furthermore assumes no liability for any decision or action taken in reliance on the information contained in these materials or for any damages, losses, costs or expenses in a way connected to it. Intact Public Entities Inc. is operated by a wholly owned subsidiary of Intact Financial Corporation. Intact Design® and Risk Management Centre of Excellence® are registered trademarks of Intact Financial Corporation or its affiliates. All other trademarks are properties of their respective owners. TM & © 2021 Intact Public Entities Inc. and/or its affiliates. All Rights Reserved.