IS THERE A WAY TO GET AROUND A RECREATIONAL SPORT WAIVER?

By Fran Zinger, Rosalia Nastasi and Bottom Line Research

Introduction

A waiver is usually required to participate in recreational activities that are considered risky such as skiing, rock climbing, and horse-back riding. A waiver is usually a written document that the recreational operator requires the participant to sign before engaging in the activity. Waivers often require the participant to waive their right to sue the recreational operator for any injury that may occur during the activity, even if the injury is due to the operator's negligence. It appears from the cases and commentary that many participants sign these documents without reading or understanding their contents and the rights they are giving up.

Plaintiffs that have been injured have tried numerous arguments to challenge a waiver's validity. The arguments include arguing that waivers are unconscionable or contrary to public policy, or raising contractual arguments such as there was no consideration or that a fundamental breach occurred. Many of these arguments have held little traction. There are however other arguments that have met with some success, such as finding that the participant's attention was not brought to the terms of the document and the participant therefore did not consent; or limiting the scope of the waiver so that unexpected negligence is not covered, or that risks created by the provider are not covered.

The law relating to waivers is fairly strict and can result in apparent unfairness to an injured plaintiff who has not read or understood the waiver. Some courts are willing to apply the law faithfully while others are more willing to rely on an exception to relieve the unfairness. Notably reforms to the law in this area have been encouraged by some academics and Law Reform Commissions.[1]

[1] See "*The Battle of Contractual Waivers of Liability for Personal Injury in Sporting and Recreational Activities: An Annotation to Loychuk v. Cougar Mountain Adventures Ltd*.", by Philip H. Osborne, (2011) 81 CCLT-ART 100; and

Circumstances of Signing

To begin, we will look at the line of cases which consider whether a waiver is negated by the circumstances surrounding its signing. The leading case in this area is ***Karroll v. Silver Star Mountain Resorts Ltd.*** (1988), 33 B.C.L.R. (2d) 160, 1988 CarswellBC 439. McLachlin J (as she then was) considered the case of a skier who was injured in a downhill ski race. She broke her leg in a collision with another skier during the race. The plaintiff alleged that the defendant was negligent in failing to ensure that the downhill race course was clear of other skiers before permitting her to descend.

Prior to the race, the plaintiff had signed a one-page document releasing the ski hill from liability for any injuries sustained in the race. The document had "Release and Indemnity, Please Read Carefully" in bold at the top of the document. It then went on to provide a release and indemnity to the ski hill for any injury that arose out of the event, even if the injury was occasioned by an act or failure of the ski hill. There was also an acknowledgment of the risks involved in the racing event and assumption of those risks, at para. 4:

> **Release And Indemnity**
>
> **Please Read Carefully**
>
> RE: Over - the - Hill Downhill
>
> TO: Silver Star Mountain Resorts Ltd. ("Resorts") and its directors, officers, employees, representatives, officials and agents (collectively called the "Agents")
>
> I have read the guidelines, rules and regulations issued for the Event, which I understand, and I agree to be bound by them. In consideration of your acceptance of my entry to this Event by Resorts or my being permitted to take part in the Event and/or any activity associated therewith, I agree to: RELEASE, SAVE HARMLESS; and INDEMNIFY Resorts and/or its Agents from

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"*Waivers of Liability for Sporting and Recreational Activities*", Manitoba Law Reform Commission, Report #120, January 2009.

> and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to my person or property, wheresoever and howsoever caused, arising out of, or in connection with, my taking part in the Event and notwithstanding that the same may have been contributed to or occasioned by any act or failure to act (including, without limitation, negligence) of Resorts and/or any one or more of its Agents. I further agree and acknowledge that:
>
> 1) the rules governing the Event are solely for the purpose of regulating this Event and it remains the sole responsibility of me to act and govern myself in such a manner as to be responsible for my own safety;
>
> 2) I am aware of the risks inherent in participating in the event; and,
>
> 3) I assume the risks and waive notice of all conditions, dangers or otherwise, in or about the Event.
>
> I agree that this Release shall bind my heirs, executors, administrators and assigns. I have read this Release and understand it.

The plaintiff argued she should not be bound by the waiver as she was not given adequate notice of its content, nor sufficient opportunity to read and understand it. The circumstances around the signing were that the plaintiff was given her racing bib and told to go to another table to sign the paperwork. At the other table, the plaintiff signed and dated the release. She explained to her friend that the release had to be signed if you wanted to race, and that the release precluded a person from suing the ski hill if the person fell and hurt themselves of their own accord. The plaintiff could not recall if she read the bold heading at the top of the form, but admitted she did not read the body of the document. Her evidence was that she could have read it in one or two minutes, but did not recall if she was given an opportunity to take the time to read it.

The defendant argued that while the plaintiff may not have read the release, she knew the document affected her legal rights and that was sufficient to make it binding upon her.

McLachlin J was confronted with two conflicting lines of authority in the law relating to the validity of such agreements when they have not been read by the signor. One line of authority

held that in contract law, where a party signs a document that he knows affects his legal rights, he is bound by the document despite his failure to read or understand it, so long as there is no fraud or misrepresentation, at para: 15:

> The parties referred to two distinct lines of authority. The first, relied on by Silver Star, supports the principle of general contract law that **where a party signs a document which he knows affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document: L'Estrange v. F. Graucob Ltd., [1934] 2 K.B. 394 at 403 (C.A.)**, applied to a release in Delaney v. Cascade River Holidays Ltd. (1983), 44 B.C.L.R. 24, 24 C.C.L.T. 6, affirming 34 B.C.L.R. 62, 16 B.L.R. 114, 19 C.C.L.T. 78 (C.A.). [Emphasis added]

The second line of authority held that in order to rely on an exclusion of liability, the party asserting the exclusion must show that the he made a reasonable attempt to bring the signing party's attention to the terms of the document. The reasonableness of the attempt will depend on the context of the situation, including the nature of the contract and the practicalities such as the time afforded for reading and whether the exclusion is in fine print, at para. 16:

> **The second line of authority is cited in aid of the plaintiff's assertion that the party seeking to rely on an exclusion of liability which the signing party has not read must show that he has made a reasonable attempt to bring the signing party's attention to the terms contained on the form if he wishes to rely on the release**: Union SS. Ltd. v. Barnes, [1956] S.C.R. 842, 5 D.L.R. (2d) 535 at 546 [B.C.]. **What constitutes a reasonable attempt to bring the exclusion of liability to the attention of the other party depends on various factors, such as the nature of the contract and the practical possibility of apprising oneself of the exclusion of liability in view of such considerations as time and the fineness of the print in which the exclusion is couched**: see, for example, Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400 (C.A.). [Emphasis added]

McLachlin J reconciled these two conflicting positions by adding a qualification to the applicability of the requirement to use reasonable steps to bring the terms to the signing party's attention. She stated that this rule is not a general principle of contract law, but one that only applies in special circumstances. She held that in fact, it is a third exception to the general rule that a party is bound by signing a document. The general rule in ***L'Estrange*** was

that a party was bound by a signed agreement, regardless of whether they had read it, unless 1) there were circumstances which made it not her act (non est factum), or 2) where the agreement has been induced by fraud or misrepresentation. To this, McLachlin J added the third exception.

The third exception to the general rule is that if a party seeking to enforce a document knows or had reason to know that the signing party was mistaken as to the terms, the terms should not be enforced. The signing party cannot be taken to have consented to the terms in that case. Allowing someone to sign a document when it appears they are mistaken as to its contents is similar to active misrepresentation, at para. 20:

> **To these exceptions a third has been added. Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced**: Waddams, The Law of Contract, quoted with approval in Tilden Rent-A-Car v. Clendenning, supra, per Dubin J.A. at p. 605. This new exception is entirely in the spirit of the two recognized in 1934 in L'Estrange v. F. Graucob Ltd. **Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term, with the result that the signature which purportedly binds him to it is not his consensual act.** Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation. [Emphasis added]

Therefore, the general rule of law is that a person providing a document for signing <u>does not</u> have to take reasonable steps to bring onerous terms to the attention of the signing party to ensure they are read and understood. It is only where a reasonable person knows the signing party is not consenting to the terms in question that such an obligation arises, at para. 24.

Importantly, McLachlin J went on to describe a number of factors that are relevant in determining whether reasonable steps must be taken to advise of an exclusion clause or waiver. One of these factors is the length and format of the document and the time available for reading and understanding the terms. Other factors include the nature of the contract and whether an exclusion clause would be in the signing party's normal expectations, at para. 25:

> Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. **The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing.** This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case. [Emphasis added]

In ***Karroll***, the plaintiff signed the document knowing that it was a legal document affecting her rights. She was therefore bound by the release unless she could bring herself within one of the three exceptions to the rule. It was not a case of non est factum, nor was there active misrepresentation. It was therefore up to the plaintiff to establish "(1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention", at para. 26.

The circumstances of the plaintiff's signing were not suspect in this case. The release was consistent with the purpose of the contract, which was to allow the plaintiff to engage in a hazardous activity which she wished to undertake. The exclusion was consistent with allowing her to be in the race while limiting the liability of the ski hill that made it possible. As well, the release was short and easy to read, and had the heading in capital letters of "RELEASE AND INDEMNITY — PLEASE READ CAREFULLY", which proclaimed its purpose. There was no fine print, nor was the release buried in the fine print of a long document. McLachlin J held that the "most casual glance would reveal to a reasonable person that this was a legal document calculated to release those staging the race from liability", at para. 28. The nature of the document did not suggest that a person signing it would not be in agreement with its terms.

Another factor was that signing such releases was a common feature of ski races and the plaintiff had signed them before. It was not an unusual term, and in fact was standard in this type of contract.

Considering these factors, McLachlin J held that a reasonable person in the ski hill's position would not conclude the plaintiff did not agree to the terms of the release. Therefore, the ski hill did not have to take reasonable steps to bring the contents of the release to her attention.

She went on to find that even if reasonable steps were required in this case, the ski hill had met that obligation by using the heading at the top of the document and a capitalized warning to read it carefully. This was sufficient to bring a reasonable person's attention to the need to read the document. The plaintiff also could not establish on the facts that she was not given sufficient time to read the document, at para. 31.

The rule in ***Karroll*** is now the standard test applied in cases concerning the enforceability of a release. The B.C. Court of Appeal has applied it in a number of cases over the years and the cases show that the law prevails that a person signing a waiver is bound by it even when they do not read it. The following cases are instructive of the approach taken by courts in their strict application of the test.

In ***Mayer v. Big White Ski Resort Ltd.*** (1998), 112 B.C.A.C. 288, 1998 CarswellBC 2005, a skier signed a release when he went to obtain his season's pass at the opening of ski season. He was given a single sheet of paper and told to sign it. He asked what it was and was simply told he had to sign the document to get his pass. The skier signed the document without reading it. He was told to put his name and address on a spot where he had neglected to, which was just below heavy blank ink stating "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 skier did so, but still did not read the document. Later in the ski season, the skier suffered a badly broken ankle when he collided

with a snowmobile operated by an employee of the ski hill and attempted to sue for negligence or breach of an occupier's duty.

In this case, the requirement to take reasonable steps to bring the release to the skier's attention was set out in the *Occupiers Liability Act* of BC, which stated the following, at para. 7:

> 4(1) Subject to subsections (2), (3) and (4), where an occupier is permitted by law to extend, restrict, modify or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

Therefore, the skier did not have to establish that a reasonable person would know he was not consenting to the terms in question before requiring reasonable steps to be taken. The *Act* requires reasonable steps to be taken to have the exclusion clause brought to his attention, at para. 7:

> The respondent's obligation to take reasonable steps to bring the release to the appellant's attention is set out in the Occupiers Liability Act, R.S.B.C. c.303, as follows …

The trial judge had found that reasonable steps were taken, as the ski hill application form for the season pass stated a Release would have to be completed and the ski hill had set up a table to ensure the Release was signed before a pass was received. As well, the design and wording of the Release emphasized the purpose of the release and that it was an important legal document. On appeal, the skier argued that the trial judge failed to take into account the casual manner in which the release was handled, as the evidence was that the Releases were tossed unwitnessed into an overflowing container. This, it was argued, could reasonably lead someone to think the document was of no consequence. However, it was noted that the clerk receiving the letter took the document seriously enough to observe the skier had not included his name and address and asked for that information. The Court noted the skier "made no effort to read any part of it, despite opportunities to do so and large bold print which should have alerted the most casual reader", at para. 11.

The trial judge had relied on ***Karroll*** properly to analyse and dispose of the matter. The ski hill had taken reasonable steps to bring the release to the skier's attention, at para. 12.

Other cases have held that due to the *Occupiers' Liability Act* there is an obligation to take reasonable steps to bring an exclusion of liability to a person's attention: ***Newsham v. Canwest Trade Shows Inc.***, 2012 BCSC 289, 2012 CarswellBC 700, at paras. 83-84. The obligation exists in Alberta's *Occupiers' Liability Act* and has been noted in the case law as well: see s. 8, *Occupiers' Liability Act*, R.S.A. 2000, c. O-4, and ***Khan v. Calgary Exhibition & Stampede Ltd.***, 1999 ABQB 742, 1999 CarswellAlta 913, at para. 24.

Another case with a strict application of the test, ***Loychuk v. Cougar Mountain Adventures Ltd.***, 2011 BCSC 193, 81 B.L.R. (4th) 320, *affirmed*, 2012 BCCA 122, 347 D.L.R. (4th) 591, *leave to appeal to Supreme Court refused* [2012] S.C.C.A. No. 225, involved participants in a zip-line activity. Two participants were seriously injured when due to the guide's negligence, one participant was sent down the line when another participant had not yet finished her decent, and they collided. The participants had signed waivers and releases that included the negligence of the tourism provider. They understood that they would not be able to zip-line unless they signed the release. One of the participants believed the release would prevent her from suing if an incident occurred such as her tripping and breaking her leg. She did not realize the release covered the negligence of the zip-line provider, no matter how severe. The other participant was a recent law school graduate. When she signed the release she made a flippant comment that releases "may or may not be binding". In her evidence she stated she knew she was waiving certain rights, but was not aware she was waiving all rights including the provider's own negligence.

The Release in the case was a one page document that advised in bold capitalized letters that it was a release of liability and that by signing the person would waive certain legal rights, including the right to sue following an accident. The document also had a paragraph about the

assumption of risks and specifically mentioned the negligence of participants or guides and the zip line company.

The injured participants argued that the release was unenforceable because they were not apprised of the terms, along with other creative arguments relating to consideration, deceptive advertising, consumer protection legislation and unconscionability.

The Court referred to ***Karroll*** in its decision and noted this was not a case of non est factum or active misrepresentation, which left the third exception. The Release was reviewed for the factors mentioned in ***Karroll***. The Court found the Release was consistent with the purpose of the contract, which allowed the plaintiffs to embark on a hazardous activity. As well, even upon a simple review of the document it was clear the Release was a legal document that impacted their rights to sue following an accident. The plaintiffs had not asked any questions about the terms of the Release, nor had they indicated they were not prepared to sign it. As a result, the Court concluded there was nothing to suggest the plaintiffs did not intend to agree to what they signed, and the zip-line operator had no obligation to take reasonable steps to bring the plaintiff's attention to the terms, at paras. 30-31:

> **The Release was consistent with the purpose of the contract, which was to permit the Plaintiffs to engage in a hazardous activity upon which they, of their own volition, had decided to embark. The most casual review of the document would have revealed to the Plaintiffs that the Release was a legal document impacting on their legal rights to sue or claim compensation following an accident. They asked no questions concerning the terms of the Release. They never indicated to Cougar that they were not prepared to sign the Release.**
>
> **There is nothing in the circumstances that would lead Cougar to conclude that the Plaintiffs did not intend to agree to what they signed.** In these circumstances, Cougar was under no obligation to take reasonable steps to bring the terms of the Release to the Plaintiffs' attention. [Emphasis added]

The Court went on to additionally find that even if reasonable steps had been required in the circumstances, the zip-line operator had met that requirement by the bold wording in the

heading and the notice to read the Release carefully. The plaintiffs were also given sufficient time to read the Release and acknowledged that they knew from what they read that the Release limited their legal rights to sue in some circumstances, at para. 32.

These cases show the difficulty that a plaintiff faces when they challenge the validity of a waiver or release. However, there are a number of cases where the circumstances of signing were not ideal, and a waiver was not enforced.

In ***Arndt v. Ruskin Slo Pitch Assn.***, 2011 BCSC 1530, 343 D.L.R. (4th) 356, the female plaintiff was injured when she stepped in a hole on a softball field during a baseball game. She brought an action against her slow pitch association who raised a waiver she had signed as its defence.

The Court looked at the circumstances surrounding the signing of the waiver. At the beginning of the season, the slow pitch association had provided its team captains with releases to provide to their players. The forms had to be signed before a team could play in the league. The plaintiff was provided with what she thought was a team roster to sign in order to play with her local team. She remembered receiving the form while they were warming up for the first time in the 2009 season (she had played for many years). The form was on a clipboard and was passed around to sign. There was no discussion about the form or how to fill it out, and no explanation that the roster also contained a waiver. She did not ask any questions and said she was not given an opportunity to read it. She signed it and passed it along. She believed that all she had signed was a team roster.

The Court noted the document was a one page sheet with various pieces of information, but that it was entitled "SLO-PITCH NATIONAL SOFTBALL INC. - *RELEASE OF LIABILITY, ASSUMPTION OF RISK AGREEMENT AND TEAM MEMBERSHIP/ROSTER APPLICATION FOR YEAR 20___",* with the italicized portions in red. The heading was followed with various boxes and lines to be filled out with general information about the time. Around the middle of the page, in red font, was wording stating that the back of the page had to be read and understood before signing. Then

there was a place with lines for 20 names with spaces for information on name, sex, date of birth, address, phone number and signature. There was then a portion for the signature in faint small red type.

The back of the page contained the Release agreement. At the top of the document was the following in black type: “PLEASE READ COMPLETELY AND UNDERSTAND FULLY BEFORE SIGNING RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT”, followed by a voluntary disclosure consent paragraph, and then the words “**WAIVER OF RESPONSIBILITY, RELEASE OF LIABILITY AND ASSUMPTION OF RISK” followed by a paragraph containing the waiver that included negligence.

The parties agreed that the applicable law was the test set out in ***Karroll***, and the Court reviewed a number of wavier cases. The Court found on the facts that the plaintiff thought she was signing a team roster and did not know it was a waiver of liability. However that was only one factor. Another factor was that the defendant slow pitch association was not obtaining the signatures itself, but asking its team managers and coaches to present the document. As a result, the Court found the association had no method to ensure the document was being presented in a way that would facilitate the understanding of its terms. Nor was there any evidence from the coach about the circumstances under which the document was signed, at para. 39:

> In the circumstances here, the method in place for obtaining signatures is such that the defendants themselves do not tender the document for signature. On its face, the document has a dual purpose. **The defendants have no particular method to ensure that the document is presented in such a way as to facilitate understanding of its terms, other than the general instructions given by Mr. Gosselin to the team managers and coaches, and there is no evidence that the defendants have any system in place to check to see that the coaches or managers have told the players about the document. Nor is there any evidence from the coach or manager about the circumstances under which the document was signed by the plaintiff and the players, or what, if anything, was said at the time. [Emphasis added]**

Based on this, the Court found there was no evidence the coach or manager did anything other than attach the document to a clipboard and have the players sign it as a roster. As a result, a reasonable person in the defendant's position would not conclude the plaintiff was agreeing to sign a release of liability, at para. 40:

> **Since the presentation and signing of the document takes place in circumstances outside the defendants' knowledge and control, there is no follow-up, and there is no evidence the coach or manager did anything other than attach the document to a clipboard and have the players sign it as a roster, I am not persuaded that a reasonable person in the defendants' position would conclude that the plaintiff was agreeing to sign a release of liability**. [Emphasis added]

The Court then considered whether reasonable steps had been taken to ensure the plaintiff understood the nature of the document. The Court noted the following factors were relevant in this consideration, at para. 42:

- is the effect of the exclusion clause contrary to normal expectations?
- what is the format?
- how long is the document?
- how much time was made available to read it?

It found the concept of a waiver was not contrary to normal expectations, but that it would not normally be a part of a team roster. In terms of the document itself, the Court was of the view that it looked more like a roster than a waiver, despite the red type advising the person to read and understand the waiver before signing. As well, the words "I agree to waiver" were very faint. The Court noted there was no evidence that direction or information had been given by the coach regarding the waiver, at para. 44:

> 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" on 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. [Emphasis added]

The Court suggested that the slow pitch association should have had individual release forms prepared and signed by each player. Again the Court criticized the association for having "no means of determining if the plaintiff understood the document because they did not present it to her, leaving its nature to be explained by coaches or managers who did not do so", at para. 45. The form of the document and the circumstances of presentation were not such that a reasonable observer would understand the document's nature, and the defendant had not used reasonable steps to bring the nature of the document to the plaintiff's attention. The waiver was therefore unenforceable.

In ***Moodie v. Perfect Images Inc.***, 1993 CarswellBC 1700, [1993] B.C.J. No. 502 (BCSC), the plaintiff attended at a toning and tanning centre in Kelowna to engage in a passive exercise system. Before attending, she had a discussion with an employee about the exercise program and was handed a form titled "TERMS AND CONDITIONS OF THE AGREEMENT", which contained a waiver. During the conversation, the plaintiff explained she wanted information on the machines before she started because she had a back fusion and had rods, screws and wires in her body and was cautious. She was assured that the machines would be fine for her.

In terms of the document, the plaintiff stated that she was given the form to fill out for her name and medical information and history and then she would be taken to the machines. In fine print on the page there was a paragraph stating the company would not be liable for any personal injuries and a release from any claims, with the critical parts being underlined. The plaintiff admitted that she signed the document but did not read it. She stated that the way in

which the document was given to her was not as a document to read, but as one for her to fill out. She noted her medical situation on the form and signed it. She did not understand that she was being given a legal document.

The plaintiff was injured during her session and attempted to recover damages for her injuries.

The Court referred to pertinent case law, including ***Karroll*** and the quote from that case that only in circumstances where a reasonable person would know that the person signing was not consenting to the terms in question does an obligation arise to take reasonable steps to point out the onerous terms or ensure the terms are read and understood, at para. 14.

In this case, the wording preceding the waiver was not sufficient to warn the plaintiff of the release. As well, the plaintiff's mention of her medical problems and questioning should have alerted the employee that she needed to point out and potentially explain the significance of the waiver, at para. 15:

> **Here, the defendants' fine print is not preceded by words which might reasonably serve to warn - such as "Standard Liability Release" (Delaney), or "Release and Indemnity Please Read Carefully" (Karroll). That aside, the plaintiff's insertion of the nature of her medical problems at the top of the document, together with her emphasis in questioning Marlene Shore about the appropriateness of using the defendants' toning tables should have alerted Ms. Shore to the need to point out and, if necessary, explain the significance of the waiver provisions. [Emphasis added]**

As a result, the defendant's application for summary dismissal based on the waiver was refused.

In ***Poluk v. Edmonton (City)*** (1996), 191 A.R. 301, 1996 CarswellAlta 962 (ABQB), the plaintiff was playing in a twilight golf tournament at a golf course. The tournament was sponsored by a radio station, and the plaintiff attended at the radio station ahead of time and signed a release form.

On the night of the tournament, the plaintiff was in a pre-tournament meeting and then returned to his car in a hurry to get his golf clubs. It was dark already. The plaintiff ran down the path into the parking lot and ran into a black iron post at the spot where the pathway and parking lot meet. There was no lighting in the area and the plaintiff somersaulted, injuring his knees and fracturing his elbow. He sued the golf course owner for negligence. The golf course raised the release form in its defence.

The Court looked at the circumstances surrounding the signing of the release form. The plaintiff attended at the radio station and was given the form by the radio promotion manager. The manager appeared to be in a hurry and asked him to fill out the entry form and to sign the back of the entry form in case he was hit by a golf ball. The promotion manager stated that if the plaintiff was hit by a golf ball the radio station would not be liable. The plaintiff did not read the form but simply signed it and gave it to the promotion manager.

The Court found that the release could not be relied upon by the golf course. The golf course itself (which was owned by the City of Edmonton), did not itself seek a release from the participants, even though it was named in the release as a promoter, at para. 21. Secondly, the release was not properly presented to the plaintiff. He was incorrectly told the release meant the radio station would not be liable if he were hit by a golf ball. The release was presented in a hasty and informal way. The combination of the improper representation and presentation meant the release was not enforceable, at para. 22:

> **Second, the release was not properly represented to the plaintiff. The promotion manager, according to the plaintiff's evidence, which I accept and which is not contradicted, advised the plaintiff that signing the release form meant K-97 would not be liable if he, the plaintiff was hit by a golf ball. It is true the plaintiff did not read what he signed, but given the hasty informal way the release was presented to the plaintiff and the improper representation of the release, I am satisfied that the defendant cannot rely on the release to obviate liability for the plaintiff's injuries. [Emphasis added]**

In coming to this decision, the Court referred to ***Karroll*** and found this case fit into the second category of exceptions to the rule that a person is bound by what they sign. The explanation given by the radio promotions manager misled the plaintiff to the extent that the plaintiff should not be bound by the release, and amounted to misrepresentation, at para. 23:

> In Karroll v. Silver Star Mountain Resorts Ltd. (1988), 33 B.C.L.R. (2d) 160 the Supreme Court sets out three exceptions to the general rule that a person is bound by what he or she signs. The second exception deals with misrepresentation. **While the improper representation in this case was not committed for fraudulent purposes, it nevertheless in the circumstances, mislead the plaintiff to the extent that I find that the plaintiff is not bound by Exhibit 1, Tab 3, the release. [Emphasis added]**

Scope of the Waiver

It appears that in most cases of this type, as a generalization, if negligence is mentioned in the waiver it will shield the provider from any claim in negligence. In most cases, specific types of negligence do not have to be mentioned; however there are a few cases that require some context to be given for the negligence, such as naming the types of risks involved. An example of the latter is the case of ***Ochoa v. Canadian Mountain Holidays Inc.***, 1996 CarswellBC 2034, [1996] B.C.J. No. 2026 (BCSC). The plaintiff went heli-skiing and was caught in a large avalanche where he died with several other people. There was evidence that the accident occurred because of a mistake in the assessment of the stability of a slope, however other evidence showed that significant precautions had been taken, and that the guide was trained and had applied industry standards. The Court considered whether the actions of the guide were negligent and also whether the waiver that had been signed was enforceable.

In terms of the waiver, the evidence was that the plaintiff had received the waiver four months before the trip and had signed such waivers in the past. An excerpt of the waiver follows, it waives claims against the heli-ski provider and guides for any cause, including negligence, at para. 134:

> I waive any and all claims I may now and in the future have against, and release from all liability and agree not to sue, CMH and its officers, employees, helicopter skiing guides, agents and representatives (collectively "its staff") or the Province for any personal injury, death, property damage or loss sustained by me as a result of my participation in any helicopter skiing trip with CMH due to any cause whatsoever, including, without limitation, negligence on the part of CMH, its staff or the Province.
>
> I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in skiing, certain additional dangers and risks, some of which include:
>
> 1. AVALANCHES - which can frequently occur in the mountain terrain used for helicopter skiing and may be caused by natural forces including steepness of slopes, snow depth, instability of the snowpack or changing weather conditions, or by skiers, the helicopter or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur;
>
> . . .
>
> 5. CMH, ITS STAFF AND OTHER SKIERS - the conduct, including negligence, of CMH, of its staff including its helicopter skiing guides and of all other skiers.

The plaintiff's estate argued that the waiver did not cover the negligence alleged.

In interpreting the waiver and its scope, the Court analyzed what a general or reasonable person in these circumstances would understand negligence to be. The Court acknowledged that the average person may not understand the word negligence, or to understand it as making mistakes, rather than as failing to take careful measures available. The Court acknowledged that only one of the eight persons who signed the waiver in this case understood what it meant, at para. 135.

Therefore, in order for a waiver to cover negligent conduct, it must contain more than the word negligence, and provide some indication of the type of conduct that would be covered. This is necessary for a court to be able to find the person signing the waiver could reasonably be

expected to understand its meaning. As well, the understanding may also be gleaned from the circumstances of the activity in question, at para. 136:

> **Any waiver seeking to cover negligent conduct must surely contain something more than the word negligence. That something more would include, at the least, a context for the word negligence describing the kind of conduct amounting to negligence which is intended to be covered. In order for a court to find the term sufficient to cover any negligent behaviour, it must be satisfied that the individual signing it, if he read it, could reasonably be expected to understand its meaning. I hasten to add that the authorities on this subject do not require that that understanding be objectively found on the waiver alone. It may be gleaned from the circumstances of the individual's knowledge of the activity at issue coupled with the document under consideration… [Emphasis added]**

In this case, the Court found the test was met. The waiver, "in format and substance, if read carefully" could reasonably be understood to include a waiver of liability for negligence of the heli-ski operator and its staff, including in assessing an avalanche hazard. The risk of avalanche was specifically contemplated in the waiver, and therefore the negligence alleged was covered by the waiver, at para. 136:

> On that basis, I find that the waiver in this case, signed by Mr. Ochoa, meets that test. **First, the waiver format and substance, if read carefully, can reasonably be understood to include a waiver of liability for negligence or a want of due care of CMH and its staff in its conduct, particularly in relation to assessing avalanche hazard. Such a risk is dealt with specifically and generally as a risk contemplated by the waiver.** …**The very type of conduct alleged to be negligent in this action is specifically contemplated by the words of the waiver. I have no hesitation in finding that the negligence alleged in this action is covered by the waiver. [Emphasis added]**

Ochoa actually goes further than most cases in requiring the type of negligence to be specified. In most cases, the mention of negligence, on its own, is enough to shelter a provider from a claim in negligence. An example from Alberta, is ***Van Hooydonk v. Jonker***, 2009 ABQB 8, 466 A.R. 197. The plaintiff went to the defendant's bed and breakfast for a weekend women's retreat. As an add-on to the retreat, she took a two-hour trail ride. She signed a waiver before the trail ride, and had informed the defendant she had fallen off a horse as a teenager. During

the ride, the horse made a quick move to one side, and the plaintiff dug her stirrup into the horse's side. The horse moved further to the side and the plaintiff leaned forward, falling into a ditch by a road and suffering injury. The plaintiff argued that she was not provided with a gentle horse, that she was given inadequate instruction and that reasonable precautions were not taken. She also argued that the terms of the release were not wide enough to cover the conduct in this case.

Justice Acton considered the allegations in negligence and breach of contract, and whether the waiver/release should be enforced. The waiver had been read and understood by the plaintiff prior to the trail ride in this case. The waiver was short and released the trail ride providers from any claims incurred while horse-back riding, including by reason of negligence. It also required an acknowledgement that participating could result in physical injury, at para. 33:

> Release and Waiver
>
> I, Theresa Van Hooydonk, for myself, my heirs, executors, administrators and assignees release Denis Jonker and Michelle Wright, their respective servants, agents or employees from any claims, demands, damages, actions or causes of actions arising out of or in consequence of any loss, injury or damage to any person or property incurred while horse-back riding. Notwithstanding, if the loss, injury, or damage may have arisen by reason of the negligence of Dennis Jonker and Michelle Wright, their servants, agents or employees.
>
> Without limiting the generality of the foregoing, I further release any recourses which I may now or hereafter have resulting from any decision of Dennis Jonker and Michelle Wright.
>
> I further state that I am in proper physical condition to participate in horse-back riding and am aware that such participation could, in some circumstances, result in physical injury.

Justice Acton considered whether the release covered the conduct in question. She noted that the test was set out by the Alberta Court of Appeal and requires the defendant to show that a plaintiff knowingly assumed the risk and waived any legal right of action arising from that risk, at para. 37:

> Having found that the Plaintiff is bound by the release or waiver, I must now consider whether the terms of the release are wide enough to cover the alleged conduct of the Defendants that led to the injury. The Alberta Court of Appeal considered this issue in Murray v. Bitango (1996), 184 A.R. 68 (Alta. C.A.), and held, at para. 24:
>
> > **Where a defendant seeks to avoid liability on the basis that a plaintiff voluntarily assumed the risk of the defendant's negligence, the defendant must establish that the plaintiff knowingly assumed that risk and waived any legal right of action arising from that risk.**
>
> **[Emphasis added]**

She also noted that the law generally only requires the word "negligence" to appear in a release or waiver in order for negligent conduct to be covered, at para. 38:

> …**The inclusion of the word "negligence" in a release or waiver is generally all that is required to ensure that the release of waiver covers the Defendant's negligence**, see Fred D. Cass, The Law of Releases in Canada (Canada: Canada Law Book, 2006) at 164. … [Emphasis added]

Justice Acton noted the ***Ochoa*** case, but found the requirement that specific negligent acts be mentioned is "exceptional" and is not reflective of the case law. She concluded that a release does not need to mention specific acts of negligence in order to be valid, at para. 40:

> **The finding in Ochoa that the word negligence, on its own, is not enough to cover acts of negligence by the Defendants is exceptional. This finding has, to my knowledge, only been considered in two cases: Goodspeed v. Tyax Mountain Lake Resort Ltd., 2005 BCSC 1577 (B.C. S.C.) and Simpson v. Nahanni River Adventures Ltd., [1997] Y.J. No. 74 (Y.T. S.C.). I do not think that a release needs to mention specific acts of negligence in order to be valid.** Nor do I find that the Plaintiff was under a false impression as to what negligence meant in these circumstances. [Emphasis added]

In this case, although the waiver was written somewhat awkwardly, Justice Acton found that the first paragraph specifically mentioned negligence and that this was sufficient to cover the alleged conduct in the action, at para. 44:

> Finally, the Plaintiff takes issue with the term "recourses" in the third sentence: "Without limiting the generality of the foregoing, I further release any recourses which I may now or hereafter have resulting from any decision of Dennis Jonker and Michelle Wright." I agree that the words in this sentence are awkward and that the Defendants cannot rely on this sentence to shield them from liability**. I cannot, however, strike down the entire release on one erroneous sentence. The first paragraph will stand. That paragraph specifically mentions negligence and is sufficient to cover the alleged conduct of the Defendants in this action. [Emphasis added]**

There are cases that hold that unexpected negligence is not covered, or that risks created by the provider are not covered. One example from Alberta is ***Champion v. Ski Marmot Basin***, 2005 ABQB 535, 379 A.R. 173. The plaintiff was injured when he fell off a T-bar lift at a ski hill. He argued that the lift track was dangerously icy and had not been groomed or roughened, causing the fall. The ski hill sought summary dismissal on the basis of the waiver of liability printed on the ski lift ticket, and because the same waiver was printed on bright signs in the ticket area and hill. The waiver required skiers to assume all risks from any cause whatsoever, including skiing, the use of ski lifts, collisions with objects or persons, and also mentioned negligence, at para. 5:

> NOTICE TO USERS OF THESE FACILITIES EXCLUSION OF LIABILITY - ASSUMPTION OF RISK - JURISDICTION THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS PLEASE READ CAREFULLY!
>
> As a condition of use of the ski area facilities, the Ticket Holder assumes all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to the risks, dangers and hazards of skiing, snowboarding and other recreational activities; the use of ski lifts; collision with natural or man-made objects or with skiers, snowboarders or other persons; travel within or beyond the ski area boundaries; or negligence, breach of contract, or breach of statutory duty of care on the part of Ski Marmot Basin and its employees, agents, representatives and sponsors (hereinafter collectively referred to as "the ski area operator"). The Ticket Holder agrees that the ski area operator shall not be liable for any such personal injury, death or property loss and releases the ski area operator and waives all claims with respect thereto.

The Master considered the waiver and whether the alleged negligence was encompassed by its terms.

The plaintiff argued that he could not have accepted the risk of injury from the unusually icy and poorly maintained conditions of the track, because he could not have foreseen that risk; and that he had not encountered similar dangers on his previous visits. The Court referred to an Ontario case, ***Brown v. Blue Mountain***, where a similar argument based on a similar waiver had been accepted, and found that there was therefore a genuine issue for trial, at paras. 20-21:

> **In the case of Brown v. Blue Mountain Resort Ltd., [2002] O.J. No. 3650 (Ont. S.C.J.) [Brown], an Ontario court considered the scope of a ski resort's waiver. That waiver was, in all essential respects, identical to the one in the case at bar. The plaintiff was injured when she skied into a patch of slushy snow, allegedly a result of the resort's negligence in maintaining and operating its snow-making machine. She argued that this hazard was not one which would normally occur at a ski facility, and that negligence of this type was not contemplated by the terms of the release**. The Court accepted that this argument raised a genuine issue for trial.
>
> **Champion's arguments are very similar. He claims that the ski area operators were negligent in maintaining and grooming the lift track, and that the hazard created by this negligence was not one normally encountered. Following Brown, supra, this is a genuine issue for trial**. The ski area operators' motion for summary judgment on the waiver of liability issue is denied. [Emphasis added]

Brown considered an argument that a ski resort's negligence in operating its snow-making machine was not covered by the waiver. The plaintiff found one of her skis stuck in a patch of snow adjacent to the snow making machine, and she fell and was injured. The argument was that such a hazard is not normally encountered when skiing, and was therefore not the type of negligence covered by the release. The plaintiff argued she was not accepting man-made risks by the ski hill and that they should have been pointed out to skiers. This argument had some traction with the Court, which denied the summary judgment application on the basis that this was a genuine issue for trial, at paras. 15-16:

> **It is obvious that Ms. Brown's claim against Blue Mountain is for compensation for injuries suffered by her due to hazards which were unexpected and which would not normally occur on a ski facility. Those hazards are said by her to have resulted from, or been caused by, the negligence of Blue Mountain in the care and maintenance of their snow-making equipment. Her claims are caused by the failure of Blue Mountain to adequately police those self-made hazards and to protect the paying customers from the exposure to those risks by properly policing and blocking off any area which is dangerous to the skier and caused by the negligence or inefficient operation of the equipment of Blue Mountain.**
>
> **The plaintiffs contend that this kind of negligence on the part of Blue Mountain is not contemplated nor could it be considered as part of the flavour that is printed on the tickets and posted elsewhere on the Blue Mountain property. [Emphasis added]**

A third case in a similar vein is ***Kottke v. Robert L. Sutherland Professional Corp***. (1990), 108 A.R. 212, 1990 CarswellAlta 117 (ABQB). A young girl was injured when she fell near a snow mound located at the base of a ski hill primarily used by children. The mound had been created by the ski hill and was a stockpile of artificial snow. The facility allowed children to play on the mound without supervision even though there had been injuries in recent days related to the mound. There were warning signs at the ski hill and on the ski ticket disclaiming liability for skiing injuries which stated the following, at para. 29:

> Attention
>
> Important Notice
>
> Skiing is an exhilarating, but potentially hazardous sport. Trail conditions vary constantly, and are greatly affected by weather changes and skier use. Ice, variations in terrain, moguls, forest growth, rocks and debris, as well as unpadded obstacles and hazards exist throughout this ski area. Snow grooming and snow making operations and equipment used at Rabbit Hill are constantly accessible to skiers who are not skiing in control. Falls and collisions with resulting injuries can occur at any time, even to skiers skiing in control. In short, inherent and other risks are very much a part of the sport and exist at this ski area. If you do not accept these risks and dangers freely, yourself, and recognize that they are a part of the sport and something for which this ski area is not responsible, please do not purchase a ticket to ski at this area.

In a short decision, the Court found that the warning was irrelevant, as it did not cover the situation which caused the injury, at para. 30:

> The ticket issued to Amanda (Ex. 5) bore a similar warning. **In my opinion the warning displayed on the signs and on the ticket are irrelevant so far as the accident in question is concerned. The warning does not relate to the situation which gave rise to the injury sustained by Amanda. [Emphasis added]**

Parker v. Ingalls (c.o.b. Pure Self Defence Studios), 2006 BCSC 942, [2006] B.C.J. No. 1394 found that a martial arts instructor could not rely on a waiver when the instructor injured a class participant during a demonstration. The Court held the injury was due to the negligence of the instructor in applying excessive force and that the liability waiver did not apply.

Part of the reason for the waiver not applying was that it was hidden in a larger document and not emphasized or brought to the student's attention. However, in addition, the Court found the injury did not fall under the scope of the waiver. The student did not accept risk at the hands of the instructor, who he trusted. Further, it was not reasonable for the instructor to exclude himself from his own negligence when conducting a demonstration over which he had control. Notably although the waiver in this case had the student acknowledge the risk of personal injury and assume those risks, negligence was not specifically mentioned (see paras. 40 -43). Nonetheless, this case may offer support to the argument that the scope of a waiver/release does not include unexpected risks or hazards, such as ones created by the provider themselves, at para. 72:

> In any event, I find that an injury such as that experienced by Mr. Parker does not fall within the scope of the waiver. In my opinion, Mr. Parker, by engaging in shoot-fighting lessons accepted certain risks of injury but he did not accept the risk of injury at the hands of his instructor whom he trusted not to harm him. It is reasonable for Mr. Ingalls to seek a waiver from accidents occurring in the case of a student injuring himself as a result of falling or doing a move incorrectly, or being injured by another student in the course of an exercise. However, it is not reasonable for Mr. Ingalls to seek to exclude himself from

> his own negligence where he is conducting a demonstration in which he has complete control over the safety of the student. Mr. Parker was not asked to consent to that risk and he did not do so.

Conclusion

A waiver is usually required to participate in recreational activities that are considered risky such as skiing, rock climbing, and horse-back riding. A waiver is usually a written document that the recreational operator requires the participant to sign before engaging in the activity. Waivers often require the participant to waive their right to sue the recreational operator for any injury that may occur during the activity, even if the injury is due to the operator's negligence. It appears from the cases and commentary that many participants sign these documents without reading or understanding their contents and the rights they are giving up.

Plaintiffs that have been injured in such activities have tried numerous arguments to challenge a waiver's validity. The arguments include arguing that waivers are unconscionable or contrary to public policy, or raising contractual arguments such as there was no consideration or that a fundamental breach occurred. Many of these arguments have held little traction. There are, however, other arguments that have met with some success, such as finding that the participant's attention was not brought to the terms of the document and the participant therefore did not consent; or limiting the scope of the waiver so that unexpected negligence is not covered, or that risks created by the provider are not covered.

END