

Good Risk Management Can Include Taking Responsibility



Amos Comeau and Karen Orr
Carfra Lawton LLP
September 24, 2026

TOPICS TO BE ADDRESSED

1. What is a waiver, release and indemnity as opposed to an informed consent?
2. What do all of the clauses in a typical waiver, release and indemnity agreement mean?
3. Is the waiver/release/indemnity worth the paper it is written on?
4. Why advocate for an informed consent model?



CARFRA LAWTON
LLP • LAWYERS

GENESIS FOR THIS PRESENTATION



Playground Negligence Cases

Thompson v. Corp. of the District of Saanich, 2015 BCSC 1750

- Grounders played on playground structure
- Impossible to eliminate all risk. Some risk is part of an active childhood.

Deo v. Vancouver School District No. 39, 2018 BCSC 133

- Adopted *Thompson* in context of tree climbing
- No obligation to remove “reachable” branches
- Sound rules and protocols in place
- Distinguishable from “inherently dangerous” cases involving corroded lamppost and tree which allowed access to the school roof



PURPOSE OF A WAIVER/RELEASE/INDEMNITY

- A waiver/release/indemnity is designed to prevent a person from suing.
- Or, in the case of infant participants, protect the person offering the activity from a claim by shifting the legal responsibility to the infant's parent, guardian or supervisor by way of an indemnity.
- Even if there was negligence!





FIRST THESIS FOR DISCUSSION

- It is not ethical to require adult users of facilities or participants in activities for a fee (including risky activities) to waive their right to sue for injuries resulting from such activities.





LOYCHUK V. COUGAR MOUNTAIN (BCCA 2012)

- “The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.”



OCCUPIERS LIABILITY ACT DUTIES CAN BE WAIVED

- Section 4 of the *OLA* codifies the common law whereby an occupier can “restrict or exclude” the occupier’s duty of care as long as the occupier takes “reasonable steps” to bring that restriction or exclusion to the attention of the person.
- The *OLA* requirement is directly analogous the common law as to enforceability.





CARFRA LAWTON
LLP • LAWYERS

PUBLIC ENTITIES TAKING MORE RISKS





CARFRA LAWTON
LLP • LAWYERS

...AND MORE



CAMPBELL V. COUNTY OF BRUCE (2016)

“Mountain biking, like many sports, involves an inherent risk of injury. There can be little doubt that SC knew and acknowledged a risk of injury from this activity.

However, I am satisfied after reviewing the evidence that the technical features in the trails area and more particularly, Free Fall, constituted a hazard or unexpected danger. “

...

“I conclude that unlike the obvious and clear risk of diving head first into shallow water, the risks posed by Free Fall and a lack of adequate signage was a hidden danger and a hazard to SC. Such danger was neither obvious nor apparent to SC.”





KWONG V. CITY OF SURREY (2014)

- Long term pool user and annual member of Surrey Sport and Leisure Complex sustained a cut to her hand on a plastic lane line with a broken piece.
- The City included a waiver of liability on the receipt issued for the Claimant's annual pass and presented evidence that the Claimant received notice of the waiver numerous times.





KWONG V. CITY OF SURREY

- The Court agreed that though Ms. Kwong testified to not knowing there was a waiver, that she would have continued to use the facility had she known.
- However, the Court did not address the waiver because it found that the City was not negligent.



MEANING OF THE TERMS WAIVER/RELEASE

- A waiver or release gives up a right, such as releasing a person or entity from liability for harm or damage that may occur from performing under a contract, or participating in an activity.
- Example:
Extreme Air Park Inc. (EAP) Participant Agreement





CARFRA LAWTON
LLP • LAWYERS

EAP WAIVER



USE OF WAIVERS

- Document references from handouts:
- EAP Waiver Review





ADULTS CAN WAIVE THEIR RIGHT TO SUE

- There is ample case law enforcing waiver agreements signed by adults.
- These waivers may stop a person from suing and the courts (particularly BC Courts) are willing to dismiss the claims at the summary trial stage with evidence in support of the waiver.





CARFRA LAWTON
LLP • LAWYERS

COUGAR MOUNTAIN ZIP LINE





LOYCHUK V. COUGAR MOUNTAIN (2011 BCSC)

- Plaintiff fitness instructor injured when zip line guides sent participant (recent law school graduate) down zip line before the plaintiff was safely out of the way. Negligence admitted.
- Case dismissed on summary trial and trial judgment upheld on appeal. SCC dismissed application for leave to appeal.





MORGAN V. SUN PEAKS (2013)

- Plaintiff fell getting on the ski lift and alleged that the ski resort employee was negligent in walking towards her to help her up rather than hitting the emergency stop button. The next chair hit her causing injury.
- Plaintiff's case dismissed with costs based on broad Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement.





PUBLIC POLICY APPLIED TO WAIVERS

- Our courts will not enforce an otherwise valid exclusion clause because of the existence of an overriding public policy.
- *Neidermeyer v. Charlton* (BCCA 2014): Zipline tour waiver not valid as to MVA claim.
- *Fleming v. Massey* (ONCA 2016): Go-kart race waiver not valid as to claim by race director employed by raceway park.



WHAT IF THERE IS A DEATH?

- Depending on the legislation, a waiver may not bar a claim by the heirs of the deceased.
- Prince Edward Island case law states that the heirs have an independent cause of action and the waiver is immaterial due to the specific wording of its *Fatal Accidents Act*.
- BC's *Family Compensation Act* is worded differently and waivers should apply.





IS THERE A WEAKNESS IN THE ARMOR?



- *Apps v. Grouse Mountain Resorts Ltd.*, 2020 BCCA 78
 - Snowboarder from Australia is grievously injured at the Grouse Mountain terrain park.
 - Grouse Mountain relies on an exclusion of liability notice printed on a sign above the ticket booth and on the back of his ticket together with warnings posted at the Terrain Park.



APPS V. GROUSE MOUNTAIN

- Case dismissed at Supreme Court level. Overturned on appeal:

[29]...whether it seeks to exclude its duty of care by express term of the contract or express notice, the occupier must take reasonable steps to bring the exclusion to the attention of the person using the occupier's premises.

- Not good enough here but signed waiver law is distinguishable.

The Battles Continue – *Ortega v. Burley*, 2023 BCSC 806

- Ortega family from Florida went on a guided snowmobiling tour in Golden. Tour was arranged through the Fairmont Hotel.
- One of the adults drove her snowmobile into a tree bank. A minor was riding with her. Both died.
- The plaintiff family members sued for nervous shock and per the *Family Compensation Act*.
- The facts appear to be that the family was taken by bus from their hotel to the snowmobile location where they were asked to sign waivers releasing the tour operators, the hotel, its employees and the Province from liability arising from the activities. They signed them.
- The waivers were not included as a defence in the response to civil claim filed but the documents were disclosed.
- On an application to amend the pleadings to add the waiver defence, PC objected on the basis that there was no genuine issue of fact to determine principally because the waivers should not be enforced based on the lack of explanation provided and the fact that there was a cancellation policy whereby had the Ortega's refused, their payment would be forfeit.
- The court allowed the application determining the issue of validity will be left for the trial judge to determine.
- What is the issue raised by this fact scenario?



OPINIONS RE THESIS #1

- BC and other Canadian courts will enforce waivers signed by adults with respect to recreational activities even when guides were negligent.
- *OLA* permits occupiers to limit their premises liability in much the same way.
- Public policy can override but this is limited.
- How might a school's ethical obligations differ from a private entity?



SECOND THESIS FOR DISCUSSION

- It is not ethical to require a parent or guardian of children to save harmless and indemnify a school or local government for injuries suffered by a child who uses the facility or who participates in its program.





INFANT CLAIMS CANNOT BE WAIVED

- *Wong v. Lok's Martial Arts Centre Inc.* (BCSC 2009): Parent signed membership agreement for 12 year old son to take part in Hapkido. Son injured when thrown to the ground. Defendant argued parent signed release and assumption of risk agreement.
- Defendant applied to dismiss the action by way of summary trial.



WONG V. LOK'S MARTIAL ARTS

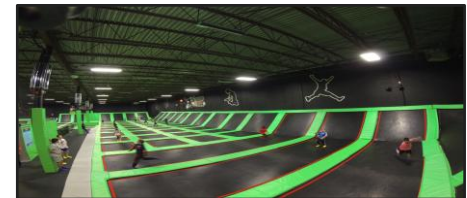
“The *[Infants] Act* does not permit a parent or guardian to bind an infant to an agreement waiving the infant’s right to bring an action in damages in tort.”





INDEMNITY CLAUSE AS SUBSTITUTE FOR WAIVER

- Practical reality remains that recreational activity operators need insurance.
- Many recreational activity operations are geared towards children (like EAP).
- Insurance companies require waivers as a precondition for coverage.
- Indemnity ‘work around’—See EAP Handout.





MEANING OF THE TERM INDEMNITY

- The concept of **indemnity** is based on a contractual agreement made between two parties, in which one party agrees to pay for potential losses or damages caused by the other party.



Common Example

- An insurance policy is a contract of indemnity.



EAP INDEMNITY CLAUSE APPLIED

- If enforced, indemnity clause would require the parent/guardian to take over the defence of EAP and pay the claim.
- This would not trigger the parent's/guardian's insurance or it would be excluded.
- Impact would be significant deterrent to claim.

LAW REFORM COMMISSION

- *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (October 1994).
- Cited in *Wong v. Lok's Martial Arts*
- Law Reform Commission defunded by Harper Government.
- Provincial law reform commissions remain.



PUBLIC POLICY APPLIED TO INDEMNITIES

- There is no case law enforcing an indemnity signed by a parent/guardian.
- Arguably, such an agreement is intended to have the same effect as an unenforceable waiver and could be invalid based on *Wong*.
- Such an agreement could be void as a matter of public policy.
- Arguably, it is simply unethical.





INFORMED CONSENT

- Parent/guardian can consent to medical treatment for an infant.
- Informed consent is generally an agreement to do something or to allow something to happen only after all the relevant facts are disclosed.





THE PURPOSE OF AN INFORMED CONSENT

- Inform the participant and their parent/guardian of the risks of an activity.
- Define what risks are inherent and should be assumed by the participant and parent/guardian not to have resulted from negligence.
- Prevent the activity organizer from failing to account for risks by way of a waiver/release.

INFORMED CONSENT

- Requires organization to consider and identify risks.
- Provides notice to parent of risks to consider prior to enrolling child in program.
- Documents that both parties have identified and considered the risks.
- Does not offend the conscience.



INFORMED CONSENT / PERMISSION FORM

THIS FORM MUST BE READ AND SIGNED BY EVERY MINOR WISHING TO PARTICIPATE IN VOLUNTEER WORK FOR THE DISTRICT AND A PARENT OR LEGAL GUARDIAN OF THAT MINOR.

A MINOR IS A PERSON UNDER 19 YEARS OF AGE. ELEMENTS OF RISK

I am aware that volunteer work for the District of Saanich may involve certain elements of risk. Injuries may occur while working, including; allergic reactions, cuts, abrasions, sprains, fractures, spinal injury and even death. The risk of sustaining injury results from the nature of the activity itself, natural and manmade terrain, wildlife, plants, climatic conditions, the actions of third parties and the worker's own physical condition and actions. Injury can occur without any fault on the part of either the worker, the District of Saanich, its employees, consultants or other volunteers. By choosing to take part in this activity, you are accepting the risk that you/your child may be injured. The chance of injury can be reduced by carefully following instructions and safe work practices at all times while engaged in the activity.

Event Location and Date: _____

PARTICIPANT'S ACKNOWLEDGEMENT I HAVE READ THE ABOVE AND THE VOLUNTEER SAFETY POLICY. I AGREE TO FOLLOW INSTRUCTIONS CAREFULLY AND EXERCISE SAFE WORK PRACTICES AT ALL TIMES.

Name of participant (please print):

Signature of participant:

Date:

PARENT/GUARDIAN'S ACKNOWLEDGEMENT AND PERMISSION I HAVE READ THE ABOVE AND HAVE BEEN PROVIDED OR OBTAINED SUFFICIENT INFORMATION TO MAKE AN INFORMED DECISION ABOUT MY CHILD'S VOLUNTEER WORK. I ACKNOWLEDGE THAT THE DISTRICT OF SAANICH PROVIDES LIMITED ACCIDENTAL DEATH, DISABILITY, DISMEMBERMENT OR MEDICAL EXPENSE INSURANCE FOR REGISTERED VOLUNTEERS AND THAT BY ALLOWING MY CHILD TO WORK AS A VOLUNTEER, I AM ASSUMING THE ASSOCIATED RISKS AND UNINSURED EXPENSES.

I GIVE MY CHILD PERMISSION TO WORK AS A VOLUNTEER. Name of Parent/Guardian (please print): Signature of Parent/Guardian: Date:



THESIS 2 REVISITED

- What should the community standard be with respect to persons offering programs or activities geared towards children?
- Should that community standard differ as to schools and local governments?





Thank You for Joining!

Legal Professional Development Lunch & Learn

Feedback Survey



Scan to share your feedback

Next Session | October 6th



Scan to register for the next session