

Waivers

OVERVIEW OF ISSUE

Waivers (also known as releases) are often used by healthcare organizations and practitioners (i.e. the organizer or service provider) when engaged in a program requiring physical activity or a risk of physical harm. Liability waivers are written to ensure the participant (also known as the 'signatory') is made aware of the risks they may face and by signing the waiver, they do not hold the organization or practitioner liable for any injuries which they may sustain. Healthcare organizations and practitioners that use waivers should expect the waiver to be closely scrutinized by courts.

KEY POINTS

- Unlike informed consents and participant agreements, waivers are one sided documents requiring the participant to forfeit their rights to sue.
- While case law suggests signed waivers are unenforceable against minors (or adults without capacity), the use of a waiver may act as deterrent to legal action.

THINGS TO CONSIDER

What is a waiver?

- A legal contract between two parties where one party agrees/consents (i.e. the participant) to assume the inherent physical risk(s) associated with an event/activity **as well as** the legal risk of the organization's or practitioner's negligence.
- Unlike informed consents and participant agreements, waivers are one sided documents requiring the participant to forfeit their rights to sue.

Elements to include in a waiver

- A clear disclaimer explaining the intent of the waiver – e.g. "This document will affect your legal rights and liabilities. Please read carefully."
- A clear description of the event/activities subject to the waiver.
- Names of all the parties to be covered by the waiver. Err on the side of caution and include all participants as opposed to a selected few.
- The **known**, **obvious** and **foreseeable** risks, dangers, harms, injuries associated with the named event/activities, including (but not limited to) death, disability and injury.
- A hold harmless clause (i.e. participant agrees to not hold the organization or practitioner responsible for any injuries or losses) and indemnification clause (i.e. participant agrees to pay for any losses they suffer as a result of the participation in the activity).

- Expressed acknowledgment that the participant:
 - Has had an opportunity to ask questions about the waiver; that their questions have been answered to their satisfaction and that they sign it freely;
 - Agrees to assume the known, obvious and foreseeable physical risks as well as the injury/harm/loss arising from the organization's/practitioner's own negligence.

Minors and incompetent adults

- Waivers are one sided legal documents requiring the participant to forfeit their rights to sue. In most Canadian jurisdictions, minors cannot sign waivers nor can their parent/substitute decision maker sign the waiver forfeiting the minor's rights to sue. While case law suggests signed waivers are unenforceable against the minor (or adults without capacity), the use of a waiver **may act as deterrent to legal action**.

Enhancing a waiver's effectiveness

- Develop a protocol/checklist to determine when/whether a waiver should be utilized; ensure waivers are not used in place of good risk management and safe practices.

Waivers

- Implement formal strategies to help ensure the effectiveness of the waiver and the signatories' understanding of the forms intent. For example:
 - Present the waiver before registration and payment (where applicable);
 - Explain the intent of the form to the participant (reading out the waiver to signatories, confirming signatories' understanding of why they are signing);
 - Strategic use of highlighting/bolding of key phrases or acknowledgements in the waiver.
- Review draft waivers with legal counsel.

Retention and storage of signed waivers

- Ensure signed waivers are secured in a central location.
- Retain signed waivers for at least two years (which is the limitation period provided by the Limitations Act) plus another six months (as plaintiffs may take six months to serve the Statement of Claim).
- Provide a copy of the signed waiver to the participant.

Will a waiver prevent lawsuits?

- The answer is 'maybe'. In general, while waivers will not prevent a lawsuit, they may provide some protection (where appropriately drafted and used).
- Waivers may also act as a deterrent to legal action as the participant (i.e. the signatory) may believe they cannot sue.
- Participants signing the waiver must do so **knowingly** (i.e. they understand the intent of the waiver and the risks associated with the event/activity) and **voluntarily**.

- In a 2012 BC Court of Appeal ruling, the liability waiver was found to be enforceable by the trial judge and the Court of Appeal because it was clear, drew attention to the impact of the waiver in terms of liability of the organizer/service-provider, and gave the plaintiffs the opportunity to read and understand its terms.
 - It is also noteworthy that the Court considered the plaintiffs' capacity to understand the waiver. Where these conditions are not present, a liability waiver will be less likely to be legally enforceable if challenged.

The three staged legal analysis required to determine the validity of a signed waiver

1. Is the release valid in the sense that the plaintiff [i.e. the participant] knew what s/he was signing?
2. What is the scope of the release? And, is it worded broadly enough to cover the actions/conduct of the defendant [i.e. the organization or practitioner]?
3. Whether the waiver should not be enforced because it was unconscionable?

Isildar v Kanata Diving Supply,
[2008] OJ No 2406.



REFERENCES

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- Kwasniewski B. (2009). [Waivers of liability for charity and not-for-profit events: An update of the law](#). Carters Charity Law Bulletin No. 178.
- Tomlinson J, Mutcheson M, Olevson D, et al. (n.d.). [Mother may I? The effectiveness of waivers and permission forms in the cases of injured minor plaintiffs](#). Sports & Entertainment Liability for Minors: 29-35.