

Businesses should beware of waiver of liability forms that are limited to activities for a specific date (*Mitchell v. Mason*)

Contracts | Exclusion Clauses | Litigation | Litigation & Dispute Resolution | Waiver of Liability

27 May 2024

In the recreational industry, it is common for businesses to require participants to waive liability for any potential injuries incurred while participating in their respective activities. In general, to validly limit a business owner's liability for an injury suffered by a participant, the waiver of liability must, among other things, be completed prior to participating in the activity, be clearly worded and understandable, and be brought to the attention of the participant. The waiver of liability can be a manual form, an electronic form, or be printed on the back of a ticket.

In circumstances where a participant will be entering into a series of activities, the waiver of liability should expressly indicate that it will apply to all of the activities for the length of time that the participant will be involved in the activities. Otherwise, a defendant may have difficulties proving that the circumstances surrounding the entering of the waiver contemplated that it would apply to the entire series of activities.

In *Mitchell v. Mason*, 2024 BCCA 142, the failure of the business owner to ensure that his waiver of liability applied to all of the plaintiff's rock climbing activities was fatal to the waiver's enforceability. Although the plaintiff had signed a waiver before participating in rock climbing activities, the defendant business owner was denied an application for judgment to dismiss the plaintiff's action based on the waiver because the court found that the waiver of liability only applied to the plaintiff's first climb, which occurred on 18 June 2021. The plaintiff had been injured on his third climb, which occurred on 15 July 2021. The application judge found that plaintiff did not sign any waiver in connection with the 15 July 2021 climb.

The British Columbia Court of Appeal upheld the application judge's decision on the grounds that the application judge made no extricable errors of law in the interpretation of the waiver of liability.

In the summer of 2021, the plaintiff had been referred to the defendant for his wilderness adventure services. After the parties made contact and discussed in general the plaintiff's desires to explore rock climbing activities in June, July and August, the defendant agreed to be the plaintiff's guide and asked for the plaintiff to complete an online waiver.

Under the waiver, the plaintiff agreed to waive any claims against the defendant and his company for any cause, including negligence, breach of contract or breach of statutory duty, and all liability for property damage or personal injury, in connection with wilderness activities in which he participated. The online waiver form noted the date as "17 June 2021."

More importantly, the online waiver contained a "Trip Date" field which the plaintiff was required to complete. In that field, the plaintiff entered "18 June 2021", as this was the only climb he had confirmed with the defendant at the time the waiver of liability was completed.

Although, the plaintiff engaged the defendant on subsequent climbs, the application judge made a series of findings that limited the application of the waiver of liability signed by the plaintiff to the 18 June 2021 climb.

The application judge found, among other things, that:

- at no time did the defendant ask the plaintiff to sign any additional waiver of liability form or tell the plaintiff that waiver signed by him would apply to expeditions beyond the initial climb of 18 June 2021;
- it was undisputed that the only communication between the plaintiff and the defendant about the waiver specifically was reflected in an email the defendant sent to the plaintiff on 17 June 2021. Neither party ever said that they verbally discussed the waiver, either on 17 June 2021, when the defendant sent to the plaintiff the online waiver and he signed it, or at any time thereafter;
- the waiver of liability expressly applied to the climb on 18 June 2021;
- the parties had confirmed no other climbs at the time that the waiver of liability was signed; and
- there were no written communications between the parties about a “summer climbing program”.

On the appeal, the defendant argued that the application judge had failed to properly interpret the waiver by denying that it applied to the July 15th climb. Despite the findings made by the application judge, the defendant contended that the parties had discussed a “summer climbing program” and that the plaintiff would be required to sign a waiver before the first climb, which applied to all of the climbs.

Among other arguments, the defendant submitted that the application judge had failed to give proper consideration to the surrounding circumstances and had failed to read and construe the waiver as a whole.

The appellate court rejected all of the defendant’s submissions.

With respect to the surrounding circumstances, the intentions of the parties supported the application judge’s conclusion that the date of 18 June 2021 entered into the “Trip Date” field of the waiver was not understood to mean anything other than the climb scheduled for 18 June 2021.

As a matter of contract law, the defendant’s subjective belief or intention that the waiver applied to all of the plaintiff’s rock climbs was irrelevant to the enforceability of the waiver. The only thing that mattered was the parties’ mutual intention based on the objective evidence. That evidence demonstrated that the 18 June 2021 guided climb was the only one the parties had scheduled and that there was no obligation on the plaintiff to hire the defendant’s service for any other climbs. Based on the facts, the purpose of the 18 June 2021 climb was to permit the defendant to assess the plaintiff’s climbing abilities and his fitness, and the plaintiff to assess the defendant’s performance as a guide.

With respect to the application judge’s findings in regard to interpretation of the waiver, the appellate court found that the case fell within paragraph 55 of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, wherein the Supreme Court of Canada explained that the goal of contractual interpretation (i.e., to ascertain the objective intention of the parties) was inherently fact specific, and that the close relationship between the selection and application of principles of contractual interpretation and construction ultimately given to a contract meant that the circumstances in which a question of law could be extricated from the interpretation process would be rare.

The defendant was unable to identify any specific palpable error or error in principle made by the application judge in interpreting the waiver. The finding that the waiver of liability only applied to the 18 June 2021 was open to the application judge and was consistent with the evidence.

There was also no merit to the defendant’s argument that the plaintiff must have expected that the waiver he signed on 17 June 2021 applied to the 15 July 2021 climb because, from past experience, he understood that rock climbing participants are “not allowed” to engage in such activities without first signing a waiver. The appellate court stated that there was no law against mountaineering without agreeing to waive liability. A waiver was not required to lawfully engage in a rock climbing expedition.

The key takeaway for businesses which use waiver of liability forms to protect themselves against claims for injuries suffered by a client is that they must ensure that if a series of services is offered over a period of time, the form must clearly capture the length of time over which those services will be provided. The waiver of liability should not contain a fixed date. If a client is only allowed to enter a fixed date or where no date for participation in an activity is specified, then there must be clear evidence which establishes the date or dates of a client’s activities.

Although there are strong public policy rationales for upholding waivers of liability in the recreational industry, a poorly drafted waiver of liability or a waiver that creates doubt about the date of its application can result in the business losing the protection from being sued by an injured client. A waiver of liability is an important contract and therefore businesses which use these kinds of forms should not hesitate in having them reviewed by a lawyer. A PDF version is available for download [here](#).



(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com