

Liability Waivers Are Sometimes Just a Bluff

Whereas the Terms Fail to Establish an Enforceable Legal Agreement or Legal Release of Rights

Understanding that Warnings May Be a Waiver of Rights Only In Very Certain Circumstances



Everyday, we see numerous signs providing warnings such as "Not Responsible", "Use at Own Risk", and various other indications that rights are lost if we participate in certain activities. It seems that most purchase agreements, service contracts, application forms, and the like, contain some type of liability waiver to which we must agree if we want what someone else is selling.

Unfortunately, many laypersons believe that liability waivers are absolute and legally binding; yet in most circumstances, a forced liability waiver will be unenforceable. Furthermore, a liability waiver, when genuinely agreed to, remains very limited and applicable only to those risks willingly assumed. Accordingly, a liability waiver should be inapplicable to risks that were beyond the reasonable contemplation of the (supposedly waiving) party when originally agreeing to the liability waiver. Simply put, a liability waiver is very limited in scope, if valid at all, and will be applied cautiously by the courts.

The Supreme Court of Canada has said in the case of *Saskatchewan River Bungalows v. Maritime Life*, [\[1994\] 2 S.C.R. 490](#) at 499 to 500:

Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [\[1991\] 2 S.C.R. 61](#) (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are that full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated; however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiver had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

When Is Acceptance of Risk?

Another legal consideration involves whether a risk is truly an accepted risk rather than simply a known risk. Further, legal considerations involve whether the knowledge or awareness of a risk relates to a risk inherent in an activity, a risk inherent in nature, or a risk created by human intervention.

Generally, even where a person received repeated warning of a risk and continued to voluntarily engage in an inherently dangerous activity, only the very inherent risk will likely be deemed waived. Corollary risks, especially those risks arising from the direct negligence of others, remains without being subject to the waiver.

The law in this regard can be somewhat complex as various doctrines as well as statute laws may be applicable and therefore intertwined. A decision involving various factors was well stated in *Van Staveren v. Coachlite Roller Gardens Inc.*, [2012 ONSC 5941](#) at 58 to 59 as:



[58] The evidence of the defendant is that there were signs posted in the premises which stated “Skate at your own risk”. Neither the plaintiff nor his wife had any recollection of seeing these signs. However, both acknowledged that falling is an inherent risk of roller skating. I accept this as a basic principle. Like many other activities in life, roller skating does have inherent risk. People who engage in these activities understand and accept those risks. However, I do not believe that this extends to an acceptance of risks caused by the negligence of the defendant in creating a hazardous condition on the skating floor.

[59] As noted by the Supreme Court of Canada in the *Waldick* decision, supra, the application of the volenti defence as set out in Section 4(1) of the *Occupier's Liability Act* will not shield a defendant from liability unless there is clear evidence that the plaintiff was consenting to accept the legal risk and waive any legal rights that might arise from the negligence of the defendant. There was no evidence during this trial to support such a conclusion. I therefore conclude that the plaintiff did not accept the risk of a hazardous condition being created by the defendant on the skating floor, and Section 4(1) does not afford a defence to the defendant in this action.

Statutory Obligation (duty of care)

Furthermore, there may be a strict duty of care imposed by statutes, such as is found within the *Occupier's Liability Act*, [R.S.O. 1990, c. O.2](#), wherein those with ownership or control of premises or the activities occurring upon premises, are subject to a reverse onus or near reverse onus, of having to demonstrate that an incident arose without the negligence of the party with ownership or control. As was decided by the court in the *Van Staveren* case above, the voluntary participation by Van Staveren in an inherently risky activity of which Van Staveren was warned was insufficient to waive liability against Coachlite when Coachlite negligently failed to maintain the premises. Specifically, the *Occupier's Liability Act* states:

Common law duty of care superseded



2 Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.

Occupier's duty

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

Risks willingly assumed

4 (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

Volenti Non Fit Injuria

The legal doctrine known in Latin as *volenti non fit injuria* (referred to simply as *volenti*) is a defence in negligence law and is therefore technically unrelated to contract law waiver of liability; however, the use of *volenti* as a defence to allegations of negligence liability often appears alongside the contractual 'waiver of liability' defence. The *volenti* defence is used when suggesting that the injured party voluntarily assumed the risk of injury where the risk of injury is inherent in the activity. As such, *volenti* as a general doctrine would generally apply to the risks inherent in a variety of activities such as the activity of roller skating outlined in the *Van Staveren* case above. Of course, as in *Van Staveren* above, where an additional 'unassumed' risk becomes involved, such as a wet floor due to an improperly maintained roof, successful use of the *volenti* defence may be difficult.

The bottom line is simply that if you have suffered injury or harm and someone tries to suggest that you waived your legal rights, you should obtain legal advice as a full and complete waiver of liability rarely occurs! Get a qualified legal opinion before giving up and simply accepting that your legal rights are lost.