

Court Upholds Waiver

Isildar v. Kanata Dive Supply is a decision of the Ontario Superior Court, released on June 9. The lengthy decision is an important one for any business or other entity trying to limit its liability by means of contract. In this fatal accident claim, although the trial judge made all of the factual and legal findings necessary to support the imposition of liability on the defendants, the action was dismissed because of the wording of a release that had been signed by the deceased.

While this decision happened to involve a business as a defendant, it is equally applicable to municipalities and hospitals, as well as any other type of enterprise. In each case, if the entity tries to limit or extinguish its liability to potential claimants, a court will undertake the same sort of analysis that was done in the *Isildar* case, in order to decide whether or not the released is enforceable.

In this case, the defendants avoided what would otherwise have been a very substantial judgment because they invested a modest amount in (a) drafting an appropriately- worded release and (b) ensuring that the document was signed and its effect adequately explained to potential claimants. Thus, the decision is a cautionary tale that will instruct all sorts of institutions in the law of releases.

The trial judge was Madam Justice Giovanna Toscano Roccamo. The action arose out of an incident in which the deceased, a novice diver, drowned in the St. Lawrence River while receiving instruction as part of a scuba certification program. The suit was brought by the wife and child of the deceased, against the individual instructor who was leading the dive when the accident occurred and against the organization that had offered the certification course.

Much of Justice Toscano Roccamo's lengthy reasons consist of a detailed review of the evidence. Ultimately, she found that both defendants had fallen below the applicable standard of care and that their actions "were a necessary and proximate cause temporally and substantially connected to the tragic outcome".

However, the action was dismissed on the strength of a release or waiver that had been signed by the deceased prior to diving. Her Honour approached the analysis as one having three stages:

1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signator?
2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
3. Whether the waiver should not be enforced because it is unconscionable?

Her Honour concluded that in this case, all of these questions should be answered in the defendants' favour.

The actual text of the release does not appear in the reasons, but the document provided in part, that the deceased agreed to waive his legal rights and

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to exempt the released parties from “all liability or responsibility whatsoever for personal injury, property damage or wrongful death however caused, including, but not limited to, the negligence of the released parties, whether passive or active.”

The evidence satisfied Toscano Roccamo J., that one of the instructors had reviewed the wording of the release in the presence of the deceased at the initiation meeting at which he had signed the document.

The evidence also indicated that the deceased had signed three other releases in the past, which apparently had had similar wording. Her Honour said of this release, that it was “contained on one page, easy to read and there was no fine print”.

She rejected the argument, made by counsel for the plaintiff, that this was a case of fundamental breach of contract, such that the release should not be enforced. She also concluded that the document was not unconscionable, nor did it diverge from community standards of fairness and morality.

On this basis, the action was dismissed. We have heard that both an appeal and cross-appeal are being considered.

One other interesting aspect of Justice Toscano Roccamo’s decision is that she applied the Court of Appeal’s decision in *Snushall v. Fulsang* to the issue of contributory negligence. In *Snushall*, the Court of Appeal held that it would be

unreasonable to apportion to a plaintiff who has been injured in a motor vehicle accident contributory negligence of more than twenty-five percent for failing to wear a seatbelt. Justice Toscano Roccamo said that that reasoning should not be limited to seatbelt cases:

I have heard no argument of any force to persuade me that the reasoning in Snushall, supra, should not be applied to other circumstances where a defendant creates an unreasonable risk of harm causally connected to the injury that results and in which a plaintiff may have averted injury or damage.

Her Honour assessed 15% contributory negligence against the deceased. She likened this case to *Snushall* in this way:

The responsibility of a plaintiff who fails to wear a seatbelt, as in Snushall, supra, and Mr. Isildar’s failure to remain with his dive buddy are similar, in that no matter what the degree of the defendants’ responsibility for causing the accident, he might have averted injury by following safety precautions.

As mentioned above, this might not be the last word on the subject of this release, as it appears that the Court of Appeal will be asked to review the case.

This article was printed with the permission of Stephen Cavanagh. Mr. Cavanagh is a partner in the law firm of Cavanagh Williams. Cavanagh Williams is an Ottawa civil litigation boutique firm with a concentration in insurance law. Information about the firm and its lawyers is available on its website: www.cavanaghwilliams.com

Documentation – A Necessary Evil and A Saving Grace

No one can predict if a claim will occur. It is nearly impossible to know the timing and circumstances that may surround a claim. But what we can predict with certainty is that if a claim does occur and a legal action for recovery of damages is initiated, we will need to prepare a defence.

If a claim goes to Court, the main body of evidence in any proceeding is based upon the documents. The defendant must present documentation to prove that the standard of care was met. The plaintiff must challenge the veracity of the documents. Accurate, timely and thorough record keeping is therefore crucial to a successful defence.

Unfortunately, the record keeping is often neglected. For many people, documenting that a procedure has been completed is low on their totem pole of responsibilities. In a busy workplace, there are more pressing demands.

Usually, at the top of the totem pole is completing the procedure. So for the most part, the documentation is dropped, partially completed or left on the “to do” list. The result is incomplete records. It’s difficult, if not sometimes impossible to prove that the standard of care was met when the documentation presented is sketchy, partially completed or not presented because it does not exist.

No one likes to do the paperwork. Perhaps that is because employees don’t fully understand why they should. After all, they completed the procedure so why do they have to record what they just did? The answer may be to fully explain to employees the reasons behind the paperwork and the significance of how the documents can help “down the road”.

For one thing, documentation is evidence that the entity is committed to protecting public safety and meeting its duty of care. It provides evidence that:

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New Standards Introduced For Multi-Functional Activity Buses (MFABs)

Last January in New Brunswick, 7 students and a teacher were killed in a head-on collision while driving home in a storm from a basketball game. Although weather conditions and driver fatigue were found to have contributed to the accident, there has been much focus on the condition of the 15-person passenger van.

The safe transportation of children and youth is always of vital importance to all organizations. However, options have been limited to using private passenger vehicles, school buses or 11-plus passenger vans. Frequently, passenger vans are purchased or used by an organization, as they can be driven by nearly everyone, are able to carry more passengers or cargo than a car, and are cheaper than contracting with a bus fleet.

However, over the years, there have been numerous studies from the United States, which indicate that this type of vehicle tends to be top heavy and may be prone to rollovers. Following numerous accidents and fatalities, several U.S. states, municipalities, sports associations, church groups, and other organizations, have banned the use of these vans for the transportation of children, youth and the physically or mentally challenged.

In Canada, steps have been taken by the Canadian Standards Association (CSA) to make these vehicles safer. In August, the CSA announced the publication of a new CSA D270-08 Multi-Functional Activity Buses (MFABs) Standard.

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- 1) standardized policies or procedures existed and were followed; and
- 2) regular inspections were conducted and necessary maintenance performed.

Secondly, employees may not be able to remember exactly what they did on a particular day a year or more in the past. Over time memories fade, employees leave. Written records are always there.

Incidents are a fact of life. They are unfortunate but they do not necessarily mean that the entity is negligent or liable for the damages. Each and every incident must be assessed on its own merits. Documentation is a crucial element in the assessment. Providing completed documentation in a timely manner ensures that your defence counsel can PROVE that you met the required standard of care.

The Standard is effective as of November 1, 2008, and defines multi-functional activity buses to be a “bus for transporting:

- (a) persons with disabilities;
- (b) students to co-curricular and extra-curricular school trips, when traffic/pedestrian control devices (i.e., warning lamps and stop arm) are not required for school buses by provincial or territorial law;
- (c) persons to organizations, e.g. daycare centres, youth centres (YMCA-YWCA, Boys and Girls Clubs, etc), faith-based centres, seniors centres, and community transit organizations’

The Standard applies only to new vehicles, and is patterned after existing school bus requirements. It is broken down into several components, which address both the physical construction of the vehicle (for example brakes, tires, turning radius, emergency exits, safety equipment, etc.), and the testing of various components (for example, mirrors, heater, and roof hatch performance).

The vehicles are further classified into Types A1, A2, B, C or D depending on body construction, engine placement, service door location and vehicle weight.

Vehicle manufacturers who meet this Standard will be able to affix a label of compliance to the vehicle. The Standard does not apply to any after-market retrofits of equipment; these changes come under existing Provincial legislation.

Although the Standard is to be considered National, it is up to the individual provinces to adopt its use. At press time, British Columbia had announced it will adopt the standard, Alberta has advised that it will introduce legislation in the fall to reflect the new standard, and New Brunswick has indicated it will consider adopting the standard.

It is not possible to speculate if the New Brunswick accident could have been avoided had the CSA standard been issued and adopted. However, having a Standard for MFABs will allow organizations to once again put safety first in vehicle selection and operator training.

At the Frank Cowan Company, we would strongly encourage our clients to carefully review the provisions of CSA D270, copies of which can be purchased from the CSA website at: <http://www.shopcsa.ca>.

BMX Facilities – “Managing the Extreme”

What is BMX All About?

BMX stands for Bicycle Motocross. It began in the late 1960's on vacant lots in California by kids on bicycles imitating motocross riders. In the last decade, the popularity of BMX riding has grown immensely. It's become such a popular sport that it debuted as an Olympic sport at the 2008 Beijing Games.

In Canada, the trend is no different and BMX bike sales are on the rise. Along with BMX bikes come the different “parks” that kids use for riding. Some BMX enthusiasts ride in skateboard parks while others build their own “parks” on private or municipal property. In order to decrease the amount of “rogue” parks being built on their property, many municipalities are building BMX facilities.

What is a BMX Facility?

A BMX facility is an artificially developed course that incorporates a variety of dirt tracks and jumps at various levels of difficulty. The ideal locale is one with suitable soil, slope, drainage and a water supply for jump construction and repair. The site should be visible (prevent vandalism), located near washrooms, have ample parking, be easily accessible for emergency vehicles, built away from busy roads and not too close to residential areas.

What Are The Risks?

All sports facilities have risks and BMX parks are no exception. Potential liability exposures exist for injury to participants, bystanders and spectators. Liability can arise because of improper design and maintenance, lack of inspection and supervision, inappropriate signage, lack of facility rules and failure to warn of dangerous conditions.

Managing The Risks

A comprehensive risk management process can go a long way to mitigate many of the risks associated with BMX facilities. The process should incorporate planning, design, consultations with the user community and biking associations, regular inspection and maintenance, effective signage, clearly outlined facility rules and proper documentation.



The Risk Management Process – Some Considerations

- 1) Begin by choosing an appropriate site – not just “any site”.
- 2) Hire an experienced designer and work with them from start to finish. An experienced designer will have good working knowledge of safety features and how to incorporate these features into the design.
- 3) Enter into a contract with the designer. The contract should include a Hold Harmless/Indemnification Clause as well as a requirement for a Commercial General Liability Policy and Errors & Omissions Insurance. This allows for a contractual transfer of the risks involved in design.
- 4) If a third party is building the park, enter into a formalized agreement that includes a Hold Harmless/Indemnification Clause and a requirement for Commercial General Liability and Environmental Coverage. Transfer the construction risks.
- 5) Engage your BMX and local biking community to share their thoughts on the design. Let them speak with the designer so they can get a feel for what is and isn't possible. If they understand what can and can't be incorporated into the design, they might be discouraged from trying to redesign certain aspects after the facility is completed.
- 6) Continue to engage this community into the process to build a strong support system. While building skateboard parks, some municipalities encouraged skateboarders to host fund-raising events to assist in the funding of their parks. This helped to create a community of skateboarders that were tied to their facility and its upkeep.
- 7) Develop a regular inspection schedule and a maintenance system.
- 8) Document each inspection and any completed maintenance.
- 9) Develop facility rules to oversee the operation of the facility.
- 10) Post your facility rules in visible locations. We recommend that signage be geared towards the level of understanding of the user group. Incorporate their “lingo”. Use pictures.
- 11) Consult with other municipalities who have built such parks. They've already gone through the learning curve so they can provide you with “do's” and “don'ts”.

Our Risk Management Department has developed a document that addresses all of the above in greater detail. For a copy, please call 1-800-265-4000 and ask for Barb Szychta or Cheryl Fitzsimons.

Frank Cowan Company
4 Cowan Street East
Princeton, ON N0J 1V0
Toll free: 1-800-265-4000
Phone: 519-458-4331
Fax: 519-458-4366
www.frankcowan.com