MOTHER MAY I? THE EFFECTIVENESS OF WAIVERS AND PERMISSION FORMS IN CASES OF INJURED MINOR PLAINTIFFS

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As school boards across the country look to deliver a more holistic and well-rounded educational curriculum, the use of extracurricular activities and field trips as a tool to compliment in-class learning is becoming increasingly frequent. Moreover, while customary extracurricular activities such as football and track and field still form the core of the sports experience, increased consideration is being given to outdoor education, adventure sports and less traditional sporting activities such as hiking, kayaking and others. Some schools in the Greater Toronto Area's York Region District School Board currently organize ski and snowboard teams during the winter months[1] while schools in the Toronto District School Board allow students to attend a multi-day retreat at Muskoka Woods Camp, located two hours north of Toronto.[2]

The emphasis on holistic learning has led to an increase in field trips and physical activities that are both further from students' schools and are inherently more dangerous than traditional school activities. This has greatly increased the potential for student accidents and injuries. Many schools attempt to shield themselves from liability by forcing students, and students' parents, to sign permission forms and/or waivers of liability. However, the content of these forms, and the difference in their purposes, has a tremendous impact on whether or not the Courts will accept these documents as a barrier to potential liability. While a permission form is largely an informative document, providing parents information about the suggested activity and seeking their consent, waivers are contractual documents that prevent the signatory from exercising their right to sue for personal injuries in certain circumstances.[3]

Permission Forms

The issue of whether permission forms alone are sufficient to protect a school board and its teachers from liability is of concern for insurers and school boards alike. In *Thomas v. Hamilton (City) Board of Education,*[4] the 16 year old plaintiff was rendered quadriplegic after breaking his neck while making a tackle during a high school football game. His family sued his three coaches, the Hamilton Board of Education, the City of Hamilton and any other party they deemed involved or responsible.[5] The action was dismissed at the trial level and the plaintiff appealed on multiple grounds, one of which was whether or not the risk of injury came within the protection afforded by the "Interscholastic Athletic Permission Form" signed by the plaintiff and his mother. The Ontario Court of Appeal dismissed the plaintiff's appeal and upheld the Trial

[1] Westmount Collegiate Institute, *Athletics*, online: York Region District School Board <http://www.westmount.ci.yrdsb.edu.on.ca/athletics.html>.

[2] Lawrence Park Collegiate Institute, *Trip to Muskoka Woods October 24, 25 & 26, 2012,* online: Lawrence Park Collegiate <http://schoolweb.tdsb.on.ca/Portals/lawrenceparkci/docs/Muskoka%20Woods%20Permission%20Form%20Package%202012.pdf>.

[3] Robert McGlashan, "Identifying and Addressing the Limitations of Waivers and Permission Forms in a School Setting" (2011) 10:2 Risk Management in Education.

[4] Thomas et al v Board of Education of the City of Hamilton et al (1994), 20 OR (3d) 598, 85 OAC 161 [Thomas].

[5] *Ibid.*

Judge's decision, stating that the plaintiff was aware of the inherent dangers of participating in a football game and that the injury was a result of normal gameplay that was within the ambit of those inherent risks.[6] Before the plaintiff, Thomas, had been allowed to join the team, he and his mother had to sign the aforementioned consent form, and the plaintiff had to get a medical certificate from his family physician stating that he was fit to play. The Court stated that, in this case, the permission form effectively denied the plaintiff a right to sue. Interestingly, the Court commented on the effect of permission forms on actions based in negligence, stating that, "[the plaintiff] did not, through his consent to participate (and that of his mother), assume *all the risk of injury* to the extent that the school authorities were relieved of the duty of care that they owed to him (emphasis added)."[7] While there was no negligence on the part of any of the named defendants in *Thomas*, if there had been an action based in negligence, the Court stated in obiter that the permission form would not have been sufficient to bar such an action from proceeding.

Further, in *Moddejonge et al. v. Huron County Board of Education et al.*[8] the Ontario High Court of Justice (as it then was) found a teacher liable for negligence, regardless of the presence of a signed permission form, for failing to supervise students during a field trip to a lake in a conservation area. This specific lake had a steep drop 25 feet from shore. The defendant coordinator of the school's outdoor education program had warned the students of the location of this drop, but failed to safeguard against a breeze that caused a surface current, dragging the two young plaintiffs into the deep water where they drowned.

Some school boards have engaged in the practice of including on permission forms a statement indicating that the "participant assumes all risks." Based on the aforementioned case law, it appears that these statements will hold minimal, if any weight, and will more than likely be disregarded by the Courts. Further, the proposition that permission forms will only act as a bar against claims that are not based in negligence appears to be the law of the land not only in Canada, but in some other jurisdictions as well.[9]

Waivers of Liability

Whereas permission forms cannot be used to prevent a finding of liability in negligence as against a teacher or schools board, waivers of liability, as previously mentioned, are contractual documents that attempt to accomplish just this.[10] A waiver of liability is rooted in the doctrine of *volenti non fit injuria*, that is, "to a willing person, injury is not done." A waiver is an onerous contract which attempts to force a participant to voluntarily assume specified legal risks.[11] As a waiver of liability asks signatories to waive basic legal rights, Courts are hesitant in enforcing them without adequate evidence supporting their validity. In *Isildar v. Canada Diving*

[6] *Ibid.*
[7] *Ibid.*
[8] *Moddejonge et al v Huron Country Board of Education et al,* [1972] 2 OR 438, 25 DLR (3d) 661 (Ont HC) [Moddejonge].
[9] For England, see: *Chittock v Woodbridge School*, [2002] EWCA Civ 915, [2003] PIQR 96.
[10] *Supra* note 3.
[11] Rachel Corbett, Hilary Anne Findlay, and David Lech, *Legal Issues in Sports: Tools and Techniques for the Sports Manager (*Toronto: Emond Montgomery Publications, 2008).

Supply,[12] Justice Roccamo of the Ontario Superior Court of Justice outlined the law on releases of liability (also known as waivers):

> Based on case law as it has developed, a three staged analysis is required to determine whether a signed release of liability is valid. The analysis requires a consideration of the following:
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> 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 (sic)?
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> 2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
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> 3. Whether the waiver should not be enforced because it is unconscionable?[13]

The first stage of the analysis, namely that the plaintiff knew what they were signing, has been thoroughly scrutinized by the Courts. In *Dyck v. Manitoba Snowmobile Association Inc,.* the Supreme Court of Canada held that a waiver of liability was valid as the injured party had full knowledge of the fact that the waiver was meant to exempt the party asking for its execution from all liability as a result of, amongst other things, negligence claims.[14] However, in *Crocker v. Sundance Northwest Resorts Ltd.,* the Supreme Court held that the waiver of liability was not a bar to a negligence claim because the specific waiver provision was not brought to the attention of the injured party at the time of signing and he was not aware that he was waiving this right.[15]

The second stage of the analysis to determine validity of a waiver of liability requires a trier of fact to examine the scope of the release and whether the language used was broad enough to include the defendant's misconduct. The test was discussed in the British Columbia Court of Appeal's 2012 decision in *Loychuk v. Cougar Mountain Adventures Ltd.*[16] In *Loychuk*, two women were seriously injured on a zipline tour operated by the defendant, who conceded that the accident was a direct result of employee negligence. The women had each signed a waiver of liability which explicitly stated that it included protection against the negligence of the service provider. The Court held that the big, bold type face on the waiver of liability was sufficiently clear and unequivocal so as to meet the requirements of the second aspect of the test for waiver validity. This reinforced the position espoused in *Crocker,* that is, that the intent

[12] *Isildar v Kanata Diving Supply,* [2008] OJ No 2406, [2009] WDFL 2790 at para 634 [Isildar]. For supplementary reasons for judgment see [2008] OJ No 2728.
[13] *Ibid* at para 634.
[14] *Dyck v Manitoba Snowmobile Association Inc.,* [1985] SCR 589, 4 WWR 319.
[15] *Crocker v Sundance Northwest Resorts Ltd.,* [1988] 1 SCR 1186, 44 CLTT 225.
[16] *Loychuk v Cougar Mountain Adventures Ltd.,* 2012 BCCA 122, 31 BCLR (5th) 23 [Loychuk]. For a detailed discussion of the enforceability of waivers of liability in a commercial setting and the effect of *Loychuk*, see: J Tomlinson, A Nicolini, and D Olevson, *UPDATE: Liability Waivers,* Online: McCague Borlack LLP Articles and Publications <http://mccagueborlack.com/emails/articles/liability-waivers.html>.

to limit the legal right of another must be made extremely clear and must be brought to the attention of any potential signatories.[17]

An instance where the aforementioned step may have a direct impact on school boards can be seen when examining the waiver of liability that the Toronto District School Board requires students' parents to sign before students can attend the aforementioned camping trip to Muskoka Woods and is to the benefit of Muskoka Woods.[18] The "Muskoka Woods Individual Guest Waiver" states that:

> For valuable consideration, the receipt of which is hereby acknowledged, the undersigned hereby releases and forever discharges Muskoka Woods, Muskoka Woods Youth Camp Inc., Gwitmoc Foundation (formerly John Albert Boddy Youth Camp Foundation) and Lawrason Bay Foundation (formerly Marie Boddy foundation) an their respective members, agents, volunteers, employee, officers and directors (the "Releasees") from any and all actions, causes of action, claims and demands resulting from any loss, injury or damage to person or property which has arisen or may arise from any and all use of Muskoka Woods including any program or otherwise, unless any such loss, injury or damage may have arisen by reason of the negligence of the Releasees.[19]

This waiver releases Muskoka Woods and its employees, agents and others from liability from a claim based in tort, and further, specifically excludes causes of action in negligence. There is no direct reference to a release of the School Board, its teachers or supervisors who are not related to Muskoka Woods, thus allowing a cause of action against these parties in tort. Moreover, the waiver only applies to those actions commenced as a result of the direct use of Muskoka Woods and its property, meaning that an accident that might occur on the bus during transportation, or potentially as a result of students leaving the Muskoka Woods grounds, may still be permitted. These are all issues that may result in potential liability for a school board and its teachers, even with a signed waiver.

At the third stage of the analysis, a Court must decide whether a waiver should not be enforced because it is unconscionable. The test to determine same requires an analysis of whether or not there is an inequality of bargaining power, and whether there is a substantial unfairness in the 'bargain' obtained by the stronger party.[20] If both of these elements are satisfied, there is a presumption of unconscionability which must be disproved by the more powerful party.[21]

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[17] *Supra* note 12.
[18] *Supra* note 2.
[19] *Ibid.*
[20] *Principal Investments Ltd. v Thiele Estate* (1987), 12 BCLR (2d) 258, 37 DLR (4th) 398. Reaffirmed in *McNeill v Vandenberg,* 2010 BCCA 583, 2010 CarswellBC 3473 (WL Can). and *Roy v 1216393 Ontario Inc.,* 2011 BCCA 500, 345 DLR (4th) 323.
[21] *Ibid* at para 263. For a further assessment see J Tomlinson, A Nicolini, and D Olevson, *UPDATE: Liability Waivers,* Online: McCague Borlack LLP Articles and Publications <http://mccagueborlack.com/emails/articles/liability-waivers.html. As referenced above. [21] *Supra* note 2.

Overall, a waiver of liability is a powerful tool that can serve to absolve a party of liability for any reason. As such, proper drafting and execution must occur in order to ensure that a waiver will be deemed enforceable by the Courts.

School Board Considerations

Special circumstances exist with regards to the enforceability of permission forms and waivers of liability in a school setting. Certainly one of the most relevant considerations is the fact that most students are minors. The common law has traditionally accepted that a contract with a minor can be made voidable at any time, but only by the minor.[22] This means that a party cannot enforce a contract signed by a minor, but that a minor can enforce the contract against the other party. The sole exception to this rule pertains to contracts made for the necessities of life for the child. If the non-minor party can establish such a contract, then it will not be voidable.[23] The term necessities of life has been defined to include items that are necessary to survival, such as food, drink and lodging, and also includes items purchased for real and substantial use, as opposed to luxuries.[24] As a contract barring a child's ability to claim for personal injury cannot be considered a necessity, this may prevent the enforceability of a contract with a minor.

The modern day solution to the above issue appears to be the requirement that parents/guardians sign a permission form or waiver on behalf of their child; however, this presents its own concerns. While Ontario Courts have not been asked to adjudicate a case on this aspect of law, other provinces have heard cases in this regard. In the British Columbia Supreme Court case of *Wong v. Lok's Martial Arts Centre Inc.,*[25] the Court was asked to determine the validity of a waiver of liability, executed by the young teenaged plaintiff's mother. The waiver was to the benefit of the defendant and its merits were called into question when the defendant brought a motion to dismiss the plaintiff's action, which the plaintiff brought as a result of injuries sustained during sparring. In upholding the plaintiff's right of action and rendering the waiver unenforceable, the Court relied on British Columbia's *Infants Act*[26] which clearly voids contracts with minors; however, there was a large discussion of the right of parents to bind their children.[27] Overall, there does not appear to be any clear indication that a parent does not have the right to contractually bind a child, although there is much obiter suggesting that a waiver signed by a parent on behalf of a child will not be enforced. This is certainly a consideration that must be taken into account by school boards who may attempt to rely on a waiver signed by a child and/or their parents.

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[22] For further information, see J Wilson, *Wilson on Children and the Law*, 3d (Toronto: Butterworths, 1994).
[23] *Johnstone v Marks,* (1887) 19 QBD 509, 1887 WL 11176.
[24] H Beale, *Chitty on Contracts*, 30th ed, vol 1 (London: Sweet & Maxwell, 2008) at p 674. For further information about the validity of a waiver signed by a guardian on behalf of minor in a commercial setting, see Law Reform Commission of British Columbia, Ministry of the Attorney General, Province of British Columbia, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities,* (Vancouver: Law Reform Commission of British Columbia, 1993).
[25] *Wong v Lok's Martial Arts Centre Inc.,* 2009 BCSC 1385
[26] *Infants Act,* RSBC 1996, c 223.
[27] For arguments in favour of allowing parents to contractually bind their children please see: *Anson v Anson* (1987), 10 BCLR (2d) 357, and *Young v. Young* 1990 CanLII 3813, 29 RFL (3d) 113 (BCCA), both of which increase the proposition that parents and guardians have a "plenitude of parental power." However, those rights which are included in "plentitude" are not defined. Also see *M. v. Sinclair* (1980), 15 CCLT 57 for a reference to parents being able to bind their children, but wherein the waiver was held to be invalid for other reasons. For arguments against allowing parents to contractually bind their children, please see: Rachel Corbett, Hilary Anne Findlay, "*Waivers and Other Agreements"* (Edmonton: Centre for Sports and Law, 1993) and *Stevens v Howitt*, [1969] 1 OR 761 (Ont HC), regarding the setting aside of a release signed by a parent *after* an accident has occurred.

Interesting issues may arise when students with disabilities participate in physical activities with classes as a whole. This is especially true with extracurricular activities and field trips, where the refusal to allow certain students to participate would further alienate students who may already feel isolated from their peers. The issue of teacher supervision of students with varying cognitive abilities was considered in *Bain v. Calgary Board of Education.*[28] In that case, the defendant teacher was supervising a group of students on a weekend school trip. On an evening that the students were to be watching a movie as a group, the teacher allowed a group of students, including the plaintiff who had a cognitive impairment, to deviate from the planned movie night and to climb a mountain face, unsupervised. The plaintiff fell and was severely injured. In finding the defendant teacher negligent, the Alberta Court of Queen's Bench held that the permission form signed by the plaintiff's parents was invalid as the permitted activity had not been on the agenda and thus was not agreed to by the parents. The Court further found that the standard of care for the teacher was elevated due to the plaintiff's inexperience with climbing. *Bain* reaffirmed the watershed case of *Myers* which affirmed that the relationship of student and teacher creates a duty of care.[29] Although *Bain* and *Myers* do not directly comment on the standard of care owed by teachers to students with disabilities, they do raise issues and questions that, although currently not addressed by the Courts, must be taken into account.

A further factor to be considered, as raised in *Bain,* is the age of the student. The plaintiff, Bain, was 19 years of age and above of the age of majority in Alberta. However, Justice Virtue held that the age of the student does not detract from the duty of care created by the teacher-student relationship.[30] In arguing that the plaintiff was contributorily negligent, the defendant school board submitted that the 19 year old plaintiff should be held to the standard of a reasonable adult. Although the Court found that the plaintiff was 25% at fault for his own injuries, there was no comment as to the effect of the defendant's argument.[31] With reference to the student-teacher relationship, the Court emphasized that such a relationship can be created outside of a school setting, as occurred in *Smith v. Horizon Aero Sport Ltd.* where the same duty of care was found to be owed by a parachute jumping instructor vis-à-vis his 24 year old student.[32]

The principle to be extracted from *Bain* and *Smith* is that if a student injures themselves while engaging in an inherently dangerous activity while on a school field trip, the school and school board cannot, in their defence, suggest that the injury would have occurred regardless of whether the student was on a school trip or not. In practical terms, if an 18 year old student breaks his leg on a school skiing trip, a school board may be held liable even though a ski resort would likely be able to rely on the waiver of liability printed on the back of the students' ski pass. It is irrelevant that the same student may very well have been injured in the same manner had they not been on a school trip but instead skiing with their parents or friends. Where a student is injured in a school trip setting, a personal injury action may still be commenced against a

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[28] *Bain (guardian ad litem of) v Calgary Board of Education*, [1993] AJ No 952, 2 WWR 468 [Bain].
[29] *Myers v Peel County Board of Education,* [1981] 2 SCR 21, 123 DLR (3d) 1.
[30] *Supra* note 28 at para 38.
[31] *Supra* note 28 at para 58.
[32] *Smith v Horizon Aero Sport Ltd.*, [1991] 19 CCLT 89, 130 DLR (3d) 91 (BCSC) [Smith].

school board, even if barred against the ski resort, unless a valid and enforceable waiver of liability is separately signed which would serve to protect the board.

Conclusion

To conclude, although the issues of permission forms and waivers of liability can be contentious, particularly where injured minor plaintiffs are involved, the Courts' decisions rendered on these subjects are helpful. It is also interesting to note that such matters do not often proceed to trial. There are several motivations to settle cases outside of the courtroom, and therefore, facts are not judicially scrutinized in a public forum and settlements go unreported.

However, available jurisprudence has indicated that permission forms cannot be used as a bar against claims based in negligence. Further, past case law suggests that the inclusion of an indemnification clause in a permission form will not also act as a bar to negligence claims, nor will it give more weight to a permission form than would otherwise be given.

As above, waivers of liability are simply contractual documents that seek to specifically exclude certain claims from being acted upon. In order for a waiver of liability to be enforceable, it must be unequivocally clear and straightforward. Courts will not enforce waivers where there is ambiguity or a question as to their applicability in a particular situation. Lastly, there are special considerations with regards to school boards. There is case law that suggests that permission forms or waivers of liability are unenforceable against minors, regardless of whether or not the parent or guardian of the minor signed the document as well as, or on behalf of, the child. This issue has not been definitively adjudicated, but it appears that Canadian Courts are leaning towards not accepting these documents as binding.

Overall, it has been determined that the standard that a school owes to its students is higher than that owed to students by commercial entities. Thus, a waiver that a resort, for example, may be able to enforce will not always be enforceable by a school, regardless of whether the student has reached the age of consent. As such, due care must be given when considering school excursions and activities. While accidents always happen, school boards must be aware of the potential consequences that may result and take all possible steps to protect themselves.