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Legal Liability in Canada

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AUTHOR'S NOTE: some of the language quoted is biased toward the masculine. This comes from the historical times, when women were rarely part of the law. No offense or gender singularity is intended.

The law hangs like a mist over the ocean and draping the mountains, its fingers flow down valleys and penetrate every tree and alpine flower. It is as omnipresent as winter fog in Vancouver.

We live in a world governed by the rule of law. It gives us stability, certainty, and comfort. The law provides guardrails on how guides and adventure businesses should govern themselves. Society and courts demand from adventure operators a higher degree of professionalism and accountability, including better training, standards, risk management, and insurance. Providers want safeguards to help protect them from liability such as contractual waivers and the doctrine of contributory negligence (Frolick et al., 2017).

Most of the time we're unaware of the law's presence or instead view it as something that operates silently in the background. However, its might and utility become appreciated in times of conflict or injury. In those occasions, the long arm of the law can reach from deep in the wilderness and extend into the courtroom. This chapter explores where and how risk intersects with the law, how clients can avail themselves of the protection of the law, and what businesses can do to defend themselves in the event of a lawsuit.

A distinguishing feature of adventure is that it is inherently dangerous. Its risks are baked into the activity. These risks are inseparable from the very nature or essence of the activity; remove the risk and the activity is no longer the same. Drowning and falling are inherent risks of whitewater rafting and climbing respectively. The only real way to prevent any possibility of that ever happening would be to raft on dry land or revoke the law of gravity. The challenges then, for guides and adventure businesses, are to manage risks in such a manner that the activities can still reward its participants while not unnecessarily exposing the participants to dangers and themselves to legal jeopardy.

The main areas of interest and concern in law for adventure guides and businesses are negligence and releases (alternatively known as waivers). Both are critically important, yet are

often misunderstood. For example, despite the heading at the top of releases commonly used in western Canada that is typically contained in a red-bordered rectangular box with a background highlighted in yellow and text written in all caps which seemingly screams something like, "RELEASE OF LIABILITY, WAIVER OF CLAIMS, ASSUMPTION OF RISKS, INDEMNITY AGREEMENT, AND JURISDICTION AGREEMENT. BY SIGNING THIS DOCUMENT, YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE", many people believe they're still entitled to legal remedies (Griffith-Greene, 2014).

Further, in the largest-ever adventure lawsuit in Canada which arose after nine people were killed by an avalanche while heli-skiing in British Columbia in 1991, the court noted, "It is not unusual for a lay person to [erroneously] think that negligence means making mistakes." (*Ochoa v. Canadian Mountain Holidays Inc*., 1996, p. 135). Madam Justice Koenigsberg of the Supreme Court of British Columbia in *obiter dictum* observed that only one of eight persons, all of whom had considerable education and experience, who signed the release knew what negligence actually meant and that even the founder and then-president of Canadian Mountain Holidays Inc. did not know what negligence in the waiver was specifically intended to cover. Viewed in this light, it's blindingly obvious that greater awareness and education as to the meaning of negligence and application of releases is required for clients, operators, and guides.

Negligence

Negligence refers to conduct that involves a failure to act with the reasonable care that would ordinarily be expected in the circumstances, and resulting in injury to another person. To be negligent means not to act reasonably, or prudently, in the circumstances. The courts, not industry, ultimately determine what is reasonable. For the purpose of this chapter, "guide" will be used to characterize anyone who leads or instructs participants, whether paying adult clients on a commercial trip or school children on custodial programs, such as field trips or camps.

The injured complainant must show that there was a duty owed by the guide that required conformity to a standard of care, that the conduct breached the required standard of care arising from a foreseeable and unreasonable risk of harm, and that the conduct was a proximate cause of the harm suffered. These points will be discussed in detail below.

The first question to consider in an action for negligence is whether the defendant (the person being sued) owed a duty of care to the plaintiff (the party who initiates the lawsuit). This focuses on the relationship between the two parties. It asks whether this relationship is so close that one may reasonably be said to owe the other a duty to take care not to injure the other (*Donoghue v. Stevenson*, 1932, p. 562). The leading case of *Donoghue* invoked the "neighbour" principle, stating that a duty of care is owed to those who are our neighbours. The court characterized a neighbour as someone who is "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called into question" (*Donoghue v. Stevenson*, 1932, p. 562). Whether such a relationship exists depends mostly on foreseeability (*Anns v. Merton London Borough Council*, 1978, p. 728).

Duty refers to the nature of the relationship between the parties. It's like a responsibility or obligation to take care of another. The duty of care owed is to take reasonable care to avoid acts or omissions – doing something that shouldn't have been done, or not doing something that should have been done – which are reasonably foreseeable to injure those who ought to be in contemplation of being affected. Just as a duty of care exists between teachers and students, or doctors and patients, a duty also exists between guides and clients.

That duty, however, is not to guarantee that clients will be free from harm. As the British Columbia Court of Appeal in *Scurfield v. Cariboo Helicopter Skiing Ltd. et al.*, 1993) – a case in which two clients died in an avalanche while heli-ski-

ing – stated, "It is not contended that the defendants [the guide and heli-skiing business] had a duty to ensure that their guests were kept away from all places where avalanches could occur – in the context of helicopter skiing that would be impossible" (p. 3). The court went on to say that the duty was "not to expose their guests regarded in the business as unreasonably high" (*Scurfield v. Cariboo Helicopter Skiing Ltd. et al.*, 1993, p. 3).

The second question in a negligence action is whether the defendant's behaviour breached the standard of care. The defendant's conduct must be sufficiently unreasonable that it amounts to a breach of the duty and required standard of care. This is often the crux of negligence cases in adventure programs.

The question of what is reasonable vexes the courts and the outdoor community. Being reasonable doesn't mean you have to be extraordinary. Standards change and evolve and what used to be extraordinary may become ordinary and reasonable over time. The courts do not expect a guide to be judged against the world's most qualified practitioner who may have a PhD with 25 years experience and is internationally industry certified in the discipline. The courts do not expect people to be paragons of perfection, or to never make mistakes or errors of judgement. They are instead to be judged against what is reasonable in the circumstances. The circumstances will likely demand qualifications commensurate or comparable with a reasonable professional in the activity.

For professionals, the standard is that of a reasonably competent person with the training and expertise demanded of that profession. The standard of care expected of a lawyer is that of a "reasonably competent solicitor", synonymous with "the ordinary competent solicitor and the ordinary prudent solicitor" who brings "reasonable care, skill and knowledge to the performance of the professional service" which has been undertaken (*Central & Eastern Trust Co. v. Rafuse*, 1986, p. 52). In discussing a doctor's standard of care, the Court of Appeal for Ontario in S*ylvester v. Crits et al. noted that:*

> *Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability (Sylvester v. Crits et al., 1956, p. 34).*

Guiding associations have contributed to the crafting of the care, skills and knowledge expected of guides. Its overall effect to the adventure industry overall is improved client care and safety practices. Industry certifications and benchmarks will form part of the equation in the court's determination of the standard of care, but it will not be the sole basis for it.

The third point is that a plaintiff who suffers personal injury will be found to have suffered damage. The scope of the harm suffered takes many forms. It can include the loss of life and limb and other physical injury, mental or psychological injury, property damage, and reputational harm.

The fourth and final question to address in a negligence claim is whether the defendant's breach caused the plaintiff's harm in fact and in law. It requires proof, on a balance of probabilities, that the defendant's failure to meet a reasonable standard of care caused the plaintiff reasonably foreseeable loss, damage or injury. The conduct of the defendant must be the proximate cause of the injury, or the harm suffered should not be too remote to warrant recovery. It sounds simple but it isn't. The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct" (Linden & Feldthusen, 2006, p. 360). The principle in law is that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, 1961, p. 424). In other words, failing to think about and reasonably foresee the possibility of harm could give rise to an action in negligence.

Considerable debate has ensued about what this actually means in application. Is a reasonably foreseeable harm one whose occurrence is probable or merely possible? The Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd*. (2008, p. 114) dismissed this question as misleading and a red herring. That court properly described any harm which has actually occurred as "possible" rendering moot whether possibility should be a metric of how reasonable foreseeability is defined. So it's more than whether something could happen, but whether it might happen.

The court in *Bolton v. Stone* (1951, p. 850) – a seminal case involving a plaintiff who, while walking on a residential side road, was injured by a ball hit from an adjacent cricket ground (balls were known to have flown over the fence about six times in the past 30 years) – effectively said that it wasn't enough that something may possibly cause injury, but rather that some greater probability must exist.

The court in *Bolton* held that the duty is to not guard against "fantastic" possibilities like the fantastical odds of winning the lottery, but to instead guard against harm in which there is a "sufficient probability" of eventuating. Further, the degree of probability that would satisfy the reasonable foreseeability requirement has been described as a "real risk", i.e., one which would occur to the mind of a reasonable person and would not be brushed aside as far-fetched (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty*., 1967, p. 617).

It is in this context that guides make go/no-go decisions based on their perception of the probability of the risk materializing. Risk is always a probability issue (British Standards Institute, 2016, p. 2). Guides effectively take into account the odds of success versus how much is wagered when making risk management decisions. It's ultimately a risk-reward or cost-benefit issue and it boils down to whether the risk is worth it, or if it's justifiable. Is it worth it to ski this slope, raft that river, or climb a particular route? What is the probability of that slope avalanching, of the raft flipping, or being hit by rockfall?

To the extent those questions can be truthfully answered – after all, just as the Supreme Court of Canada implied in *Mustapha*, the probability is 100%, if the slope avalanched, the raft flipped, or clients were hit by falling rock – will determine if the risk was reasonably foreseeable. Liability will attach, if the decision wasn't justifiable and the risk wasn't worth it.

An example of this happened, beginning on the north face of the Tour Ronde, a subsidiary peak of Mont Blanc in the French Alps in 1990 and ending in a courtroom four years later (*Woodroffe-Hedley v. Cuthbertson*, 1994). The guide – aware that he and his client were behind schedule and moving too slow and that the temperature was hotter than expected (Scott, 1998, p. 191) – decided it was preferable to move rapidly to avoid being hit by falling rock caused by the unexpected heat, rather than spend additional time conforming with "best practice" of placing two ice screws at the anchor point. In his need for speed, the guide left his client connected to one ice screw and intended to move quickly out of the fall line of the face beneath a rocky section which offered protection from falling rock above. Unfortunately, the guide fell, pulling out the anchor to which the client had been connected, and both fell down the face, stopping when the rope snagged on a rock. The client was killed almost instantly. The guide survived and was successfully sued in 1994 for negligence. The judge found him liable saying that the guide's concern over the immediate or imminent risk of rockfall was outweighed by the possibility of a foreseeable fall (Liability Issues, 1997).

The Supreme Court of Canada summarized the law of negligence in *Jordan House Ltd. v. Menow* (1973, p. 247) thusly:

> *The common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. This is the generality which exhibits the flexibility of the common law; but since liability is predicated upon fault, the guiding principle*

> *assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. Moreover, in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have to run, it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures.*

This is where things can get tricky. Cooked into the calculus of what constitutes negligence are concepts of reasonableness and foreseeability. Were the risks, which eventuated and harmed the plaintiff, reasonably foreseeable and were the actions of the defendant reasonable? As the Supreme Court of Canada said in *Mustapha* while citing Linden and Feldthusen (2006), conduct is negligent if it creates an unreasonable risk of harm.

To a layperson, there is nothing remotely reasonable about adventure. Reasonable people, after all, don't jump out of perfectly good airplanes or climb mountain faces relying on skinny ropes to save their backsides! The public might regard parachuting and mountain climbing as being unreasonably risky. This complicates the determination of what constitutes unreasonable risk. However, it boils down to what is reasonable in the circumstances and even high-risk adventure sports have lines which cross into the unreasonable.

The Supreme Court of Canada in *Crocker v. Sundance Northwest Resorts Ltd.* (1988, no page) – a case involving an intoxicated plaintiff who broke his neck after being permitted to participate in a tubing competition on a ski hill – encapsulated the totality of the issues nicely:

> *People engage in dangerous sports every day. They scale sheer cliffs and slide down the sides of mountains. They jump from airplanes and float down white water rivers in rubber rafts. Risk hangs almost palpably over these activities. Indeed, the element of risk seems to make the sports more attractive to many. Occasionally, however, the risk materializes and the result is usually tragic.*

The court in *Crocker* held that there was a duty owed by the defendant ski hill, which required conformity to a standard of care regarding intoxication, that the conduct breached the required standard of care arising from a foreseeable and unreasonable risk of harm, and that the conduct was a proximate cause of the harm suffered.

Two main ways that liability can be limited, once it has been established that the defendant guide or business has been negligent, are transferring the legal risk back to the plaintiff through the doctrine of contributory negligence and enforcement of a previously administered waiver of liability.

Contributory Negligence

Even though a plaintiff may have suffered injury attributable to the defendant's negligence, the plaintiff's claim to damages may be reduced or eliminated if the plaintiff failed to take reasonable care for their own safety, and their own negligence contributed to their loss. If the plaintiff's own negligence or carelessness contributes to their injury, their right to fully recover for that loss may be correspondingly diminished.

The test for contributory negligence is consistent with proving negligence. The Supreme Court of Canada in *Bow Valley Jusky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*. (1997, p. 76) adopted the test for that was set out by Lord Denning in the old English case of *Jones v. Livox Quarries*, (1952, p. 615):

> *Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings*

he must take into account the possibility of others being careless.

Provincial statutes codify how liability and costs are apportioned. For example, the British Columbia Negligence Act (1996) states that, "If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault." It further says that "the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss" (Negligence Act, p. 1). In other words, a plaintiff's carelessness, misjudgment, mistake, or inattentiveness may limit the defendant's liability and reduce the damages to be paid out.

Waivers

The other principal method for a guide or business to limit their legal liability is through the use of waivers. It's possible for a defendant guide or business who has caused an accident or has been negligent to not be liable for the injuries sustained if the plaintiff client has signed a waiver prior to participation. The term waiver is being used here in an all-encompassing way which includes releases of liability, waiver of claims, assumption of risks, indemnity agreements (a risk transfer workaround, whereby one party agrees to cover the costs for the losses of another party) and covenants not to sue. These are different, but are lumped together here for ease of explanation.

Basically, a waiver uses exclusionary language that allocates legal responsibility for personal injury to the person who signed it and not to the adventure operator that administered the waiver and possibly may cause an injury. Waivers are ubiquitous in sport and society. People sign waivers as a condition of participation when climbing at a gym, rafting on commercial guided trip, or even skiing or snowboarding at a resort.

Due to their popularity, many people hold a mistaken belief that waivers don't work, that they're not worth the paper they're printed on, and even allow people to sue even though the header to the waiver typically says something like: "By signing this agreement you will waive certain legal rights including the right to sue or claim compensation following an accident." Further, a 2014 survey showed that more than half of the respondents didn't understand what they were signing and thought they could sue still even if the operator was negligent (Griffith-Greene, 2014).

However, the reality is that a properly prepared and presented waiver can be upheld and enforced by the courts. Waivers are a complete defence in Canadian law. If the party attempting to rely on the waiver can show the court that it is applicable and valid, then the plaintiff can't succeed in their claim. A valid waiver can act as a bullet-proof claims defence to the extent that it cannot be penetrated even in instances where the plaintiff is injured due to the carelessness of the defendant operator or guide.

This is well-illustrated in the ziplining case of *Loychuk v. Cougar Mountain Adventures Ltd* (2011, p. 193). At a ziplining park in Whistler in 2007, Danielle Westgeest and Deanna Loychuk were injured after Westgeest was authorized to be sent down by the guide unaware that Loychuk didn't reach the bottom platform and was stuck, suspended on the zipline. Westgeest slammed into Loychuk at high speed causing both women to be injured. At trial, Cougar Mountain Adventures conceded that the negligence of its employees caused the accident, but successfully argued that the waiver provided a complete defence. The decision was affirmed on appeal.

The turning point for the enforceability of waivers occurred in the 1975 snowmobile racing case of *Dyck v. Manitoba Snowmobile Association* (1985). At the end of a snowmobile race in Beausejour, Manitoba, Ronald Dyck collided with a race official who was signaling an end to the race by moving mid-track onto the course and subsequently struck a wall suffering serious injuries. The Supreme Court of Canada upheld the Manitoba Court of Appeal's decision which found

that the race official was negligent and that the association was vicariously liable for the official's negligence, but that the waiver of liability clause in the race entry form applied to the official and the association.

The clause in the entry form mentioned injury caused or contributed by the negligence of officials. The Supreme Court of Canada said the clause was neither unfair nor unreasonable in application to what actually happened. The court also didn't find it unconscionable nor against public policy to uphold such a clause. It concluded that "the races carried with them inherent dangers of which the appellant [Dyck] should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers" (*Dyck*, 1985, p. 10). *Dyck* is the first adventure case decided by the Supreme Court of Canada that upheld a waiver for injuries caused by negligence.

The next landmark adventure case to be dealt with by the Supreme Court of Canada was *Crocker v. Sundance Northwest Resorts Ltd* as referenced earlier. William Crocker was, at the time of the incident, a 29 year-old beginner skier and a heavy drinker. He registered for a tubing competition at the resort's bar and signed the waiver. The resort did not point out the specific provisions in the waiver, nor was he asked to verify that he understood its contents. Two days later Crocker and his friend, after having drunk large quantities of their own alcohol and even more from the resort bar, competed in the race.

Between the first heat – which they won – and the second, Crocker drank large swallows of brandy offered by a driver of a Molson beer van and was sold two more drinks at the bar. At the top of the hill, before the start of the second heat, Crocker fell down and his inner tube slid down the hill. The event organizers got him and his friend a new inner tube. The manager of the resort saw Crocker and knew he was drunk, but did nothing to dissuade him from continuing to compete in the race. Crocker went down the hill, crashed, broke his neck and was rendered quadriplegic. The court found that Crocker did not, either by word or conduct, voluntarily assume the legal risk involved in competing. The court did not uphold the waiver, because no attempt was made to draw the release provision to Crocker's attention, noting that he did not read it nor know of its existence. Crocker honestly thought he was signing a race entry form. Therefore, Sundance had no reasonable grounds for believing that the waiver truly expressed Crocker's intention. The Supreme Court of Canada restored the trial court's judgment which found Crocker 25% liable for his injuries and Sundance 75% contributorily negligent. Sundance was found at fault, because it breached its positive duty to take steps to remove an obviously inebriated Crocker from the competition.

The next big waiver case was *Karroll v. Silver Star Mountain Resorts* (1988). Karroll sustained a broken leg after colliding with another skier while competing in a downhill race at a ski resort in British Columbia in 1986. The court in *Karroll* built on the decision in *Crocker* by outlining the circumstances when and how an operator should take an extra step in bringing to the attention of the person signing the waiver the terms to which they will be bound. The decision in *Karroll* was written by Beverley McLachlin, Chief Justice of the Supreme Court of British Columbia, before she became a Justice of the Supreme Court of Canada and later Chief Justice of Canada.

In upholding the waiver and finding in favour of the ski resort, McLachlin was mindful of the principle in general contract law that where a person signs a document, which they knows affects their legal rights, they're bound by it in the absence of fraud or misrepresentation, even though they may not have read or even understood the document. It was further acknowledged that the party seeking to rely on a waiver which the signing person has not read must show that they have made a reasonable attempt to bring the signing person's attention to the terms contained in it if they wish to rely on the waiver. Ever since, the expectation is that operators must make reasonable efforts to apprise the person signing the waiver of the terms contained in it.

McLachlin added a third test which is that a waiver should not be enforced, if the party seeking to enforce it knew or had reason to know of the other's mistake as to its terms, because, if it runs contrary to the signing person's normal expectations, it is fair to assume that they do not intend to be bound by the terms. In other words, if the operator or guide believes or suspects that the person signing the waiver doesn't really know what they're signing, then it won't be enforced in court.

The judgment in *Karroll* identified a number of non-exhaustive factors that should be taken into account in assessing whether reasonable steps have been taken. These include the length and format of the contract and the time available for reading and understanding it.

The principles in *Karroll* have been applied in many adventure cases since 1988. In the heli-skiing case of *Ochoa v. CMH (1996),* in which nine people were killed in an avalanche, the Supreme Court of British Columbia assessed whether the waiver would have been valid. The Court would have enforced the waiver – there was no finding of negligence and so the waiver question was actually unnecessary – because the plaintiff had a history of heli-skiing with the operator, had signed a waiver three times previously, knew what he was signing, and the waiver covered the alleged negligence.

The Ontario Superior Court of Justice enforced a waiver in the 2016 rock climbing case of *Arif v. Li* (2016, p. 4579). Mohammed Arif was injured while climbing during an introductory rock climbing and rappelling course. He fell to the ground from a height of about two metres resulting in an injury to his right leg. In its summary judgment, the Court found that Arif was bound by the waiver and that its scope covered the alleged wrongful conduct of the defendants. In so doing, the Court noted that the title of the waivers was written in bold capital letters, clearly communicating the purpose of the waiver, and that the hazards and risks being fully assumed by the plaintiff included negligence on the part of the operator. It was also noted by the Court that when booking the climbing course, the operator's website provided Arif with a copy of the waiver and notified him that all participants would be required to sign the waiver as a condition of participation. The operator's website had the waiver on it and notified heading of the waiver stated "PLEASE READ CAREFULLY" in bold capital letters which helped satisfy the requirement that the operator bring to the attention of the plaintiff the onerous terms contained within the waiver.

Conclusion

This chapter has examined, in the context of adventure guides and businesses, the elements of negligence (injury, duty, breach of duty requiring conformity to a standard of care, proximate cause) focusing on the concepts of reasonableness and foreseeability. It has also described how contributory negligence and previously administered waivers can transfer the legal risk back to the plaintiff and limit the adventure provider's liability.

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