

Risk Management

A Recent Canadian Court Decision Strengthens the Importance of Due Diligence

Although liability insurance is intended to protect entities against third party claims brought about by negligence, the importance of controlling one's risk is vital. By managing and mitigating the risk exposures inherent with one's operations, the likelihood of sustaining a damaging claim is reduced. This control not only aids to ensure that liability coverage will be more available within the market, but it also serves to keep the related insurance premiums from increasing not to mention the increased good will standing within the community.

The importance of due diligence therefore becomes paramount.

Over the past while, I have received many calls from a number of community associations regarding liability exposures related to soccer and other sports related programs.

Although the current insurance program is designed to cover the liabilities of the associations from claims arising out of negligence brought about from participants in sporting activities, ensuring that measures are taken to reduce the exposure to injury are of course important.

It has been common practice that waivers are signed by parents on behalf of their children upon registration in sport programs to somewhat help mitigate the exposure by doing one's due diligence to inform the parent of the inherent risks associated with that particular activity.

These waivers however are intended to only be a small

part of the overall risk mitigation process as, depending on the injury and the circumstance surrounding it, these waivers may not stand up in court as protection against the organization.

A case from British Columbia Supreme Court in 2009 serves as a prime example of how a waiver signed by a parent, was not effective in protecting an organization from legal responsibility.

In this case a minor was injured while participating at a well established and licensed karate school and suffered injuries as a result of those lessons.

The defense in this case in part, looked to the signed waiver of the parent as a means of protecting the organization from being responsible for the child's injuries.

The argument however was that the minor had not authorized his mother to waive his rights on his behalf. As stated above, there have been many cases that have dealt with the settlement of claims arguing the strength of waivers, "however no case existed that properly addressed the issue of whether a parent can effectively execute a pre-tort release on behalf of a minor".

The judge in this case therefore reviewed and interpreted section 40 of the Infants Act and found that "the intention of the act is to allow legal guardians the right to sign waivers for such things as consent of health care and schools trips. The act does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort".

As a result, the waiver signed by the mother on behalf of the child was not allowed as mechanism for defense and the organization was to be held responsible for the damages/injuries.

Although not all the details of the case have been published above, it does illustrate the importance of ensuring that all activities and actions run by organizations are well managed and that every precaution be reasonably taken as well as documented to ensure the protection of that organization not to mention those participating in that organization's activities.

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