

## Office of Legal Counsel

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### Waivers – Are They Worth the Paper they’re Written on?

When I was in school (many years ago), I can’t remember bringing home a single waiver or release form for my parents to sign. Now having seen two of my three children through high school, I can’t remember my children doing much at school without my signing a waiver. I’ve even signed the releases I drafted for the University when my children attended summer camps here.

Waivers are now a part of doing business and in a society increasingly concerned about risk and liability, waivers may be seen to be the panacea to those concerns. In reality, waivers are simply written proof as to the terms and conditions under which participants agreed to engage in an activity. Whether waivers are actually enforceable will depend on the circumstances, and if courts believe that participants were not sufficiently informed or organizations acted negligently, signed waivers won’t mean anything.

Take the 2009 case of *Gallant v. Fanshawe College*. Ms. Gallant was a participant in a weekend introductory motorcycle course offered by the College. Ms. Gallant was seriously injured during the course and brought an action against the College and the two individual instructors. Prior to starting the course on Friday evening, Ms. Gallant signed a waiver which in part, read:

*“I, Deanna Gallant, hereby agree to release the Canada Safety Council, private and government agencies who support the Motorcycle Training program, Fanshawe College, and all instruction staff from all responsibility, property damage, bodily injury, costs and expenses or claims of every nature and kind arising from, or in consequence of any participation in the motorcycle training course; and to render and save harmless the Canada Safety Council, all private and government agencies who support the motorcycle training program, Fanshawe College, and all instructional staff from all claims and rights of action which might arise through my participation.”*

The jury in the case found the defendants 80% at fault and the defendants tried to appeal the decision based on the existence of the waiver.

Generally speaking, the courts have found that the burden of proving the validity of a waiver is on the party who wishes to rely on it. Further, any ambiguity in a waiver is resolved against the party that drafted it and if the waiver is too ambiguous, it is deemed ineffectual and cannot be enforced.

In the Gallant case, the court found that the wording of the waiver was too ambiguous to cover the negligence of the defendants. The defendants,

*“.....made it clear to the students that they would be learning in a safe environment, with safe equipment and by implication qualified instructors. A party cannot on the one hand make promises and then later attempt to withdraw those promises in a release unless it is done in clear and unambiguous language.”*

On the issue of how the waiver was presented, the court stated,

*“ (t)here was no evidence that the plaintiff was advised she would have to sign a waiver, never mind explain the implication of such a document, when she registered and paid for her course. The waiver was presented at a time when due consideration of its implications were less than ideal. There was one instructor; approximately 30 students; numerous papers were being presented; it was stated that the signing of the waiver was a condition of taking the course yet no offer of a refund if a student decided not to proceed. The explanation of the waiver was limited at best. Most importantly there was no evidence by the defendants as to any explanation given by the defendant Sutton to her students as to what the waiver would protect her from after she undertook to teach in a safe environment. The jury found as a fact that the course was not taught safely or in a safe environment.”*

The defendants were ordered to pay \$292,000 in damages plus interest and costs.

**So, what can be done to strengthen the enforceability of waivers?**

- Advise participants that waivers are required before they register for the activity and provide an alternative if they choose not to sign;
- Use a waiver form that has been reviewed by legal counsel as wording can widely vary;
- Provide specific information on the risks associated with the activity;
- Give participants time to review the waiver and ask questions if they wish; the more hazardous the activity, the greater the need for time



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