COVID-19, sports and waivers: How to limit the risk of legal liability in the “new normal”

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Introduction

Recreational and competitive sport activities came to a halt in mid-March with the arrival of the COVID-19 pandemic. Sport organizations in every Canadian jurisdiction swiftly put an end to sport activities and competitions due to COVID-19’s significant health risks and high risk of transmission through physical or shared contact.

Provincial governments have recently started to discuss plans to ease restrictions on social contact. “Return to play” is in sight for many sports and may begin as early as this spring. However, COVID-19 will continue to be a risk when sport activities resume and the pandemic will introduce new risks for sport organizations, particularly in the area of legal liability.

This article briefly canvasses the use of waivers to protect against liability for transmission of COVID-19 by participants in sport activities.[1]

Sport organizations should consider implementing participant waivers with provisions that specifically and expressly address liability for contraction of COVID-19 for the reasons listed below.

The three paths to exclusion of liability in sport cases

There are three general ways to establish exclusion of liability in sport cases: 1) voluntary assumption of risk; 2) inherent risk; and 3) waiver.

The concept of voluntary assumption of risk applies where a party agrees to assume a risk. The courts have significantly narrowed the scope of this defence over the years. The Supreme Court of Canada has stated that the concept will only apply where it is clear that the participant knew of the “virtually certain risk,” and both parties truly understood that the organization would not be responsible for the participant’s care and safety.[2] This narrow scope makes the concept very difficult to invoke and it is likely not well suited to the novel risk of COVID-19.

The concept of inherent risk recognizes that certain risks in sport activities are inevitable. The concept applies where an injury arises from one of those inevitable risks. Those risks are perceived as a "part of the game," and by participating in "the game," the participant accepts the risk. Risks inherent to the activity are derived from elements of the activity, such as conflict, exertion and physical contact. Illness is not generally accepted as an inherent risk in sport liability cases. On the other hand, COVID-19 is novel and, because it can be transmitted through physical or shared contact with another person, the risk of contraction from engaging in sport activities is arguably foreseeable. It is possible that COVID-19 could be determined by a court at some point to be an inherent risk in certain sports, but it is currently unclear and uncertain.

A waiver is an agreement between the participant in a sport program (athlete, coach, etc.) and the organization providing the program. The participant agrees not to hold the organization liable for injuries he or she might receive as a result of participating in the sport program, including injuries that were caused by the organization's negligence.

Law of waivers in recreational and sport activities

Properly drafted and executed waivers result in a participant's abandonment of a right to a future legal claim: the person signing it knowingly relinquishes the right to sue. Waivers are frequently used in conjunction with providing sport activities, but they typically focus on exclusion of liability for physical injuries rather than contraction of illnesses.

Properly drafted and implemented, the protection that waivers afford could be extended to exclusion of liability for COVID-19 transmission.

I. General requirements for enforceable waivers

Courts have developed several requirements for a valid and enforceable waiver in sport liability cases:

- the waiver must be a clearly written agreement;
- the waiver's language must be clear, unambiguous and easily understood by the average person;
- the waiver must clearly inform the participant that they are giving up their legal right to any and all future claims against the sport organization;
- the waiver must clearly exclude liability for risks or injuries caused by negligence, and must clearly apply to the circumstances of the accident;
- the signing party's attention must be directed to the provision protecting the organization from liability, regardless of whether the waiver was signed;
- the waiver must be brought to the attention of the participant before they agree to participate; and
- the participant must be free to choose to accept the terms.

The requirements relating to the scope of liability covered by the waiver and the attention brought to the exclusion provisions in the waiver have frequently taken centre stage in sport liability cases. As a result, courts have elaborated on these requirements.

II. The scope of enforceable waivers

The scope of a waiver should be broad enough to cover liability in a number of circumstances, including negligence, but must also clearly apply to the specific circumstances of the accident. Although the word “negligence” technically is not required, if the reference to negligence is not clear, the court will apply the waiver narrowly and the waiver will not protect the sport organization from liability caused by their own negligence.[3]

The language used in a waiver must be broad and clear enough to extend coverage to particular situations. Simply knowing the sport organization is using a provision to protect themselves from liability does not suggest that the participant is aware of the extent of the protection.[4] A release of liability applies to those matters that parties were aware of at the time they signed the waiver.[5]

III. The waiver must be brought to the participants’ attention

The court considers a number of factors when determining whether a sport organization took reasonable steps to bring the exclusion provisions to the signing party’s attention, including:[6]

- format and length of the waiver;
- time available to read and understand the waiver;
- competency of the signing party;
- environment the party is asked to sign in; and
- whether the signing party had enough time to review the waiver, but did not review it.

Courts have indicated that provisions that are more serious require the sport organization to use significant effort and measures to draw the attention of the signing party to the provision.[7] These measures may include highlighting the exclusion provision in bold red letters, placing it in a yellow box or informing the signing party to read the waiver carefully.[8]

Courts have been critical of “buried” waivers, so it is important to ensure the waiver is distinct from any other provisions.[9]

The waiver and its exclusion of liability provisions should also be brought to the signing party’s attention before they agree to participate in the sport or activity.[10]

Using waivers to protect against liability from transmission of COVID-19

Because contraction of COVID-19 is a novel area for liability, there is some uncertainty as to how the courts will treat a waiver in relation to liability for contraction of COVID-19. In principle, a COVID-19 waiver should be enforceable if it meets the general requirements for enforceable waivers.

Given the uncertainty, sport organizations should implement as many cautionary measures as possible.

It is important to develop a waiver with specific and express provisions dealing with contraction of COVID-19. If organizations already use waivers, they should not assume that the waivers they have in place will apply. Organizations should develop new language specifically addressing contraction of COVID-19.

It is also important to ensure that participants indicate their agreement to a waiver BEFORE THEY AGREE TO PARTICIPATE. Again, if sport organizations currently have practices in place around registration or waiver agreements, they should not assume those practices will be sufficient in the current circumstances. They should develop new practices that ensure participants indicate their agreement to a waiver before they agree to participate in sport activities sanctioned by or offered by the sport organization. Note that we have intentionally emphasized that waivers should be finalized before participants *agree to participate* as opposed to before they *actually begin to participate*. For example, it may not be sufficient to get a participant's signature when they show up to the field, days or weeks after they registered and paid money for a skills clinic. The more appropriate time to get a signature is before registration and payment.

Further, it is essential that sport organizations implement as many measures as possible to inform participants of the exclusion of liability contained in the waivers they are signing, before they sign, and, again, before they agree to participate.

Specific considerations for COVID-19 waivers

In addition to the general steps outlined above, sport organizations may consider implementing the following suggestions:

- The waiver and its exclusion provisions should not be buried among other forms or documents. It should be distinct and clearly indicate that it is a waiver of liability for all claims.
- The waiver should be provided before, or at least at the same time as, the agreement to participate in the activity.
- If registration for the sport or activity is completed online, the waiver should be included in the registration process and agreeing to it should be a required step to complete registration.
- The waiver should be on a separate page that indicates at first glance that it is a waiver of claims and release of liability.
- An online waiver should require active participation with the webpage in order to agree to it, such as scrolling down to click to agree and provide an e-signature.
- The contents of the waiver should clearly suggest that the organization and its employees will not be liable for contraction of COVID-19 arising from participation in the sport.
- The waiver should clearly provide that the organization and its employees will not be liable for injury or illness caused by their own negligence.
- The waiver should use language that clearly indicates the sport organization and its employees will not be liable for injury or illness arising from participation in the activity, and the signing party is giving up their legal right to any and all future claims.
- The language used throughout the waiver should be easy for the average person to understand.

- The waiver should clearly inform the signing party to read the waiver carefully. This may be done by simply including the phrase “PLEASE READ CAREFULLY” at the top of the waiver.
- Sport organizations should use distinct formatting to draw the signing party’s attention to the exclusion provision. This may include yellow boxes, red letters, bold font, a larger size font and capital letters. Formatting can be a useful tool to attract a party’s attention, but a large amount of different formatting may diminish its impact and level of distinction.
- It may be prudent to take extra precautions to supplement the waiver and draw the participants’ attention to the sport organization’s exclusion of liability. This may involve displaying at the site of play clearly visible and easy-to-read signage, such as a sandwich board or poster, indicating the organization and its employees will not be liable for the contraction of COVID-19.
- It may also be prudent to give notices or warnings before participating in the activity, but these will likely not be sufficient evidence of reasonable steps taken to draw parties’ attention to exclusion of liability. If verbal notices are used, organizations should have a policy outlining this verbal notice requirement, and must ensure that the statements do not conflict with the waiver or create confusion. Verbal notices may also be more effective in an environment where the participants attention is likely captured, such as at an initial meeting or sign-in event.

Conclusion

COVID-19 is a risk in the “new normal,” and sports in particular may be affected by this risk.

By fulfilling the waiver requirements set out by Canadian courts, sport organizations may increase the likelihood that they will be protected from liability in relation to a participant’s contraction of COVID-19. Unfortunately, however, it is impossible to predict with certainty how the courts will interpret and enforce a COVID-19 waiver, so it is prudent for organizations to take as many cautionary measures as they are able to.

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[1] This article does not address Québec law applicable to waivers, which is materially different than the common law provinces and territories as a result of s. 1474(2) of the *Civil Code of Quebec*.

[2] *Dube v Labar*, [1986] 1 SCR 649 at para 6.

[3] *Collins v Richmond Rodeo Riding* (1966), 55 WWR 289 at paras 17-19, 56 DLR (2d) 428 (BCSC).

[4] *Apps v Grouse Mountain*, 2020 BCCA 78 at para 64 [*Apps*].

[5] *Chamberlin v Canadian Physiotherapy Association*, 2015 BCSC 1260 at para 56.

[6] *Karroll*, *supra* note 11 at para 25; *Tilden*, *supra* note 10 at paras 23-24 ; *Swanson v Henkel Enterprises Ltd*, [1972] 3 WWR 241 at para 51, 26 DLR (3d) 201 (MBQB),

[7] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd,* [1989] QB 433(CA)

[8] *Thornton v Shoe Lane Parking Ltd*, [1971] 2 QB 163 [*Thornton*]; see *Schnarr v Blue Mountain*, 2018 ONCA 313 where a valid waiver included the instruction "PLEASE READ CAREFULLY!" and a caution to the party that they were giving up certain legal rights was set out in a yellow box with a red border; see *Mayer v Big White Ski Resort Ltd*, [1998] BCJ No 2155, 112 BCAC 288 where a valid waiver included a signature line that was below writing in heavy black ink identifying the agreement as a release of liability, waiver of claims, and assumption of risks and indemnity agreement and included the words "PLEASE READ CAREFULLY!".

[9] See *Parker v Ingalls*, 2006 BCSC 942; and *Levita v Crew*, 2015 ONSC 5316.

[10] *Apps*, *supra* note 8 at para 44 citing *Thornton*.

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