

Identifying and Addressing the Limitations of Waivers and Permission Forms in a School Setting

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Introduction

It is common practice for schools to offer enhancements to the curriculum in the form of field trips and extra curricular activities. These trips and activities may have certain risks associated with them depending on the activity. Examples of activities with risks associated are football, rugby, ski trips and climbing.

Two options to manage the risks associated with these types of activities are waivers and permission forms.

Permission forms provide parents and students with a description of the activity and seek consent for participation in the activity.

A waiver is a contract between the participant and service provider through which the participant agrees not to pursue an action in tort. A waiver is more onerous on a participant as it prevents the participant from bringing an action even in cases of negligence.

The purpose of this article is to review judicial decisions to compare waivers and permission forms and then evaluate their usefulness in risk management in a school setting relating to field trips and extra-curricular activities. The article will also review judicial decisions regarding the effect of school permission forms on legal actions involving students who have been injured during school field trips and extra-curricular activities.

The case law suggests that permission forms will be more useful than waivers and that waivers between school and student are unlikely to be upheld. Permission forms can be used to indicate proof of consent to the risk posed in the natural course of an activity, but they do not release the school from the duty of care owed to the plaintiff or create a defence with respect to injuries that occur outside the course of the activity or through negligence. In order for permission forms to be effective, they should be short, clear and concise.

Waivers

In *Dyck v. Manitoba Snowmobile Association*, the Supreme Court ruled that a waiver signed by a plaintiff in full knowledge of the defendant's intention to exempt itself from liability relieved the defendant from negligence claims. The Supreme Court of Canada has confirmed that a contractual waiver clause can serve as a full defence to a claim in

tort.¹ The negligent conduct occurred when a race official signalled the end of a race by moving on to mid-track causing the plaintiff to strike a wall. In enforcing the waiver, the Supreme Court noted that the race official's conduct was not radically different from the type of conduct the parties contemplated. The Supreme Court of Canada also noted the absence of any valid reasons not to enforce the contract. For example, there had been no social or economic pressure imposed on the plaintiff to sign the waiver and there was no inequity in bargaining power requiring that the contract be voided on the basis of it being unconscionable or against public policy.

In *Crocker v. Sundance Northwest Resorts Ltd.*, the Supreme Court of Canada again confirmed that a contractual waiver clause can serve as a full defence to a negligence claim. However, on the facts of the case, the waiver signed by the plaintiff did not relieve the defendant of liability for its negligent conduct, because, the plaintiff had not read the form and did not appreciate that it was a waiver which exempted the defendant from liability. The Supreme Court of Canada noted that there was a significant difference between *Dyck* and *Crocker*. The difference was that in *Dyck*, the plaintiff signed the waiver with full knowledge of the defendant's intention to exempt itself from liability. This was not the case in *Crocker*.

In the recent case of *Isildar v. Kanata Diving Supply a Division of Rideau Diving Supply Ltd.*, Justice Rocco for the Ontario Superior Court dismissed the plaintiffs' claim on the basis of a waiver. In this case, the plaintiffs brought an action in tort and contract on behalf of the husband and father of the family who died while participating in a scuba diving course. The plaintiffs claimed damages for past and future loss of financial support, the loss of household services and for funeral expenses. The plaintiffs alleged that the defendants owed a duty of care to the deceased to provide competent and professional diving instructions and to rent diving equipment in good working order. The deceased had signed a release from liability prior to making the dive. The court dismissed the plaintiff's claim. Despite the defendant's breaches of the standard of care, the valid contractual release of liability signed by the deceased operated to bar the plaintiff's claim.²

The cases discussed deal with the application of waivers in commercial settings. It is unlikely that a School Board will be able to contract out of liability for negligence to the same extent. This is because of the nature of the fiduciary relationship between educators and students. Given this relationship, it is unlikely that the court would uphold agreements where a board rules to contract out of its duty.

¹ *Dyck v. Manitoba Snowmobile Assn. Inc.*, [1985] S.C.J. No. 34, [1985] 1 S.C.R. 589 and *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] S.C.J. No. 60, [1988] 1 S.C.R. 1186.

² *Isildar v. Kanata Diving Supply a Division of Rideau Diving Supply Ltd.*, [2008] O.J. No. 2406, at paras. 726 and 727.

Permission Forms

Permission forms help protect boards from liability for injuries that flow from school activities and outings. Permission forms advise the parents of the activity and the risks associated with it. By signing the form, students and parents indicate that the risk is acceptable to them. A permission form protects the school from the allegation that the plaintiff's parents did not know about the activity and would not have let the student participate.

An example of this type of case is *Thomas v. Hamilton Board of Education*.³ In *Thomas*, the Plaintiff was rendered quadriplegic due to a foot ball accident. The student's parents had signed a permission form for the student to participate in football. The court held that the Plaintiff was appropriately and progressively coached. The Plaintiff was an excellent athlete who excelled at a number of sports. His equipment was adequate. The injury occurred during routine play. While the consequences of the injury were devastating, the injury was within the ambit of the risks inherent in the sport. The court of appeal held that the consent would not overcome negligence on the part of the Board or the coaches but that the Plaintiff and his mother consented to the normal risks of the game.

The court held that where a plaintiff has their parent's consent and their family doctor's certificate stating that they are fit to participate in a sport that has inherent risks such as football or other contact sports and the plaintiff knows that the sport carries with it the risk of serious injury and the plaintiff took precautions to avoid serious injury indicating they were aware of the risk, the court will find that the plaintiff specifically contemplated the risk but intended to participate in spite of the risk.⁴

A permission form indicates that the plaintiff has consented to the normal risks of the activity and where a student's injuries flow from that risk and were not caused by negligence, the student's case will be dismissed.⁵

The jurisprudence with respect to this issue is clear. Permission forms make clear a party's acceptance of the risks normally associated with the activity and that the board ought not to be held responsible when those risks materialize.

Permission Forms Do Not Indicate a Voluntary Assumption of Risk of Negligence for Students

It is important to note that the principles described above should not be interpreted to suggest that permission forms or informed consents can be equated with the voluntary assumption of risk. A voluntary assumption of risk defence is not applicable where the facts disclose a teacher-student relationship.

³ [1994] O.J. No. 2444.

⁴ *Ibid.* at para. 89.

⁵ *Ibid.* at para. 90.

In *Zaba v. Saskatchewan Institute of Applied Science and Technology*, the Plaintiff brought an action alleging negligence with respect to injuries received while the plaintiff was participating in a nursing program. The Plaintiff injured himself while attempting a patient lift. The defence of voluntary assumption of risk is inapplicable where the facts disclose the teacher-student relationship. In such case, the activity, insofar as the plaintiff is concerned, has been approved by his teacher. It can hardly be said that by participating in the activity which the teacher has approved, the plaintiff agrees to absolve the defendant from liability for negligence.⁶

Permission Forms Do Not Release a School from Its Duty

Thomas is not saying that permission forms can be used to suggest the Plaintiff has waived any right of action for negligence or that the plaintiff has waived the duty of care owed. This is not the case.

Permission forms do not signal acceptance of negligent conduct on the part of the school board or the teachers. A student does not, through their consent to participate or that of their parent, assume all risk of injury to the extent that the school authorities are relieved of the duty of care that they owe a student. If a student participates in a football team or other risky activity of their own free will and is aware of the risk of injury, even serious injury, that is inherent to participation in this sport, he or she did assume the risks inherent to the sport, the student does not assume the risk of negligence.

Permission Forms Need to Be Clear and Concise

Permission forms should verify a parent's consent to the child's participation in the activity and clearly and concisely educate the parent about the activity so that the parent can make an informed decision.

In *Thomas*, the permission form required that the student supply a doctor's certificate attesting to the student's physical fitness. By doing so, the school was able to further protect itself from any allegation that, despite the parent's consent, the school knew or ought to have known, that the particular student in question should not have been allowed to participate in the activity. The medical certificate allows the School Board to argue that the coaches had a medical certificate from a qualified doctor stating the student was fit to participate.

It is also important that permission forms be kept as concise as possible and that they emphasize important parts with underlined text, different colour type, large type or stylistic elements to draw attention to certain passages. By insuring that permission forms are short, the Board will not face an argument that the plaintiff or the plaintiff's parent did not read the form due to its length. Also, stylistic elements help to ensure that certain risks are clearly brought to parents' attention.

⁶ *Zaba v. Saskatchewan Institute of Applied Science and Technology*, [1995] S.J. No. 701 at para. 24.

Permission Forms Are Not Effective If There is a Deviation from the Itinerary Described

A permission form will not be effective if the activity is subsequently altered so that it ends up being significantly different from the activity for which the permission was originally granted. For example, in *Bain v. Calgary Board of Education*, the plaintiff sought damages against the teacher and the Board of Education for injuries suffered when he fell off a mountain cliff while on a school trip. The trip was a forestry products tour with a detailed itinerary which did not include mountain climbing. Permission for the plaintiff's participation on the tour was given by the plaintiff's mother on the basis of the written itinerary shown to her. The defendant teacher allowed five students, including the plaintiff to climb a mountain. During the climb, the plaintiff fell and sustained injuries. The defendant Board of Education pled no duty of care, contributory negligence and voluntary assumption of risk.

The court held that the teachers owed the plaintiff a duty of care on the basis of the student-teacher relationship and/or on the general basis where the determination of the existence of the duty of care, the existence of a close enough relationship between the parties that reasonable people would expect that one would take care not to expose the other to an unreasonable risk of harm. Likelihood of harm in allowing inexperienced young men to climb a mountain unsupervised would have been apparent to reasonable persons who would have also known that injury, if it did occur, could be serious or even life-threatening. The court found the teacher negligent in permitting the climb, allowing the students to climb unsupervised, and failing to adequately prepare the students for a non-supervised climb. All of those failures continued to be operative up to and including the time of the accident and were legal causes of the accident. The plaintiff did not assume the legal risk involved in the climb.

The court held that there was an agenda for the student's activities on the forestry tour. It did not include mountain climbing. The agenda was the basis for the school board approving the off-campus activity, and it was the basis upon which the plaintiff's mother signed the form allowing the plaintiff to participate. It was not an outdoor recreation event. When the defendant teacher was called upon to give his permission for the mountain climb, there was placed upon him a higher duty of care because the proposal fundamentally changed the nature of the program in which the students would be involved and increased the risk of the student coming to harm.⁷

Conclusion

Waivers are generally not enforceable between teachers and students due to the teacher's fiduciary duty to the student. Therefore, permission forms are more appropriate in a school setting with respect to field trips and extra-curricular activities such as athletics. Permission forms can be used to indicate proof of consent to the risk posed in the natural course of an activity, but they do not release the school from the duty of care owed to the

⁷ *Bain v. Calgary Board of Education*, [1993] A.J. No. 952 at paras. 45 and 54.

plaintiff or create a defence with respect to injuries that occur outside the course of the activity or through negligence. In order for permission forms to be effective, they should be short, clear and concise.

[Originally published Risk Management in Education Vol 10 No. 2

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