RISKY BUSINESS:
MANAGING THE POTENTIAL LIABILITY OF HIGH RISK SPORTS FACILITIES

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I. INTRODUCTION

The inherent risks of active sports and recreational activities give rise to a large number of personal injury claims each year. Managing the risk posed by such claims is a key concern of sports resorts, camps, and other recreational facilities. Sports facilities have adapted tools, such as signed releases and waivers, and more recently, ski resorts have printed limitations provisions on lift tickets, in order to further reduce their exposure to liability, particularly deriving from the acts of staff.

A properly executed waiver can be an incredibly effective tool to pass liability from the issuing resort facility to the participant or guest, as it can serve as a full defence to a claim in tort.[2] However, a waiver is not always an absolute shield with respect to liability and there may be circumstances in which a waiver is unavailable, inapplicable, or unenforceable. In these instances, owners of recreational facilities employing instructors, and other staff, should be aware of the impact of the doctrine of vicarious liability.

This paper will provide a comprehensive overview of the use of waivers in the context of high risk sport facilities, including the test for validity pursuant to *Isildar*, printing waivers on individual tickets, and the applicability of summary judgment motions in instances where a valid waiver is in place. Finally, where a waiver is not present, it will explore when a facility is likely to be held vicariously liable for the actions of on-site personnel.

II. WAIVERS

In the world of high risk sports, such as skiing and scuba diving, with all the dangers inherent therein, the potential for employers to be exposed to liability for the negligence of their employees can be significant. These facilities have developed a number of important and evolving legal strategies to limit their exposure to such claims, chief among them being the introduction of increasingly sophisticated waivers.

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[2] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.

The statutory authority that allows an occupier to rely on contractual waivers and releases is set out in the *Occupiers' Liability Act* (the "Act").[3] The Act provides that an occupier can restrict or exclude his or her duty of care by way of a contract with the person to whom the duty is owed. The Act further provides that the occupier's duty of care does not apply in respect of risks willingly assumed by the person entering the premises, so long as the occupier does not act with reckless disregard of the presence of the person.[4]

The test for whether signed releases of liability are valid was set out in the Ontario decision of *Isildar v. Rideau Diving Supply* and affirmed in the recent British Columbia decision of *Loychuk v. Cougar Mountain Adventures Ltd*.[5]

In *Isildar*, the plaintiff met his death in the cold, dark and silty waters of the St. Lawrence River. He drowned at a depth of 88 feet while undertaking a deep dive, a mandatory component of an Advanced Open Water recreational scuba certification program offered by the defendant, Kanata Dive Supply, and led by the defendant, Sarah Dow, a certified Open Water scuba instructor.[6] His widow and son brought a claim for damages against the diving company. The deceased signed a release from liability waiver prior to making the dive.

In *Isildar*, the court held that a three-stage analysis is required to determine whether a signed release of liability is valid. The analysis requires a consideration of the following:

1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signator?

2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant? That is, does the agreement contemplate the type of negligence that occurs, and is it reasonable and clear?

3. Whether the waiver should not be enforced because it is unconscionable?[7]

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[3] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2., 3.3; While the *Occupiers' Liability Act* generally permits for the use of waivers as instruments for decreasing exposure to liability, case law has largely driven the particulars of their application in the context of high risk sports. This runs in stark contrast to other international jurisdictions that have explicitly legislated the use of waivers, and other aspects of liability, in this milieu. *See*,e.g., *Colorado Ski Safety Act*. C.R.S. § 33-44-103.

[4] *Ibid*, at ss. 3(1), 3(3), 4(1), and 5(1).

[5] *Isildar v. Rideau Diving Supply*, 2008 CanLII 29598 (O.N.S.C.); *Loychuk v. Cougar Mountain Adventures Ltd., 2012 BCCA 122 (CanLII)*.

[6] *Ibid*, at 1.

[7] *Ibid*, at 634.

A. First test: Did the Plaintiff know what he was signing?

A common problem for resorts and athletic facilities was the ability of a plaintiff to argue that they had not read the exclusion of liability clause or that it was not brought to their attention.

In *Crocker v. Sundance Northwest Resorts Ltd.*,[8] the Supreme Court of Canada was faced with a plaintiff who was rendered a quadriplegic after participating in a tube race on a ski resort. The plaintiff was obviously intoxicated while participating in the race and the defendant resort took no steps to prevent the plaintiff from participating. The defendant relied on the liability waiver signed by the plaintiff at the start of the race. The court rejected the defendant's reliance on the waiver because the waiver provision in the entry form was not drawn to the plaintiff's attention, he had not read it, and, indeed, *did not know of its existence*. The plaintiff was under the impression that he was merely signing an entry form for the race. The Supreme Court of Canada concluded that the plaintiff could not have agreed to absolve the defendant of all liability without any knowledge of the existence of such onerous terms.[8]

In light of the above case, to what lengths must a resort go in order to bring the terms of a signed release to the plaintiff's attention? Does a resort have a duty to take reasonable steps to bring an exclusion clause to the attention of the signator?

The high water mark in release cases can be found in *Karroll v. Silver Star*,[9] decided by, then Justice McLachlin. In *Karroll*, the court found that the duty to take reasonable steps is of limited applicability, required only in "special circumstances". The court acknowledged the general principle of contract law that where a party signs a document which *he knows* affects his legal rights, the party is bound by the document even though the party may not have read or understood the document.

The court in *Karroll* set out a non-exhaustive list of factors that are indicative of "special circumstances" that give rise to a duty to take reasonable steps.[10] Where those factors do *not* exist, there is no duty on the facility to take reasonable steps to bring the waiver to the plaintiff's attention and the plaintiff is deemed to have understood the terms of the waiver.

In some circumstances a reasonable person would know that a party signing a document did not intend to agree to the liability release therein. According to Justice McLachlin, in such situations it is incumbent on the party presenting the document to take reasonable steps to bring an exclusion clause to the attention of the signator.[11]

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[8] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.
[9] *Karroll v. Silver Star*, [1988] B.C.J. No. 2266 (B.C.S.C.).
[10] *Ibid*, at 16-20.
[11] Citing *Delaney v. Cascade River Holidays Ltd. et al.* 1983 CanLII 387 (B.C.C.A.).; *Tilden Rent-A-Car v. Clendenning*, [1978] O.J. No. 3260 (C.A.) at 640.

In *Karroll*, the plaintiff signed a release as part of a ski race *knowing* that it was a legal document affecting her rights. The signing of a release was found to be a common feature of ski races and it was also found that the plaintiff had signed similar releases on prior occasions.

In reaching its decision the court ultimately held that it was irrelevant whether the plaintiff had read or understood the release prior to signing it, where the plaintiff had signed a similar release on previous occasions. The court also held that it was not incumbent on the resort to bring the contents of the release to the plaintiff's attention or ensure that they fully read it.

As long as the participant knows that they are signing a release, even if they do not read the contents of the release, the entire release is binding.

In *Mayer v. Big White Ski Resort Ltd.*,[12] the plaintiff was struck by a snowmobile operated by the defendant ski resort. The plaintiff claimed that he did not read the liability release when he signed it, despite the fact that it was highlighted in heavy black ink. The British Columbia Court of Appeal upheld the trial judge's dismissal of the action, as the ski resort took ample steps to bring the release to the plaintiff's attention. Furthermore, with respect to the plaintiff's argument that there was no valid consideration, the Court of Appeal held that the plaintiff received ample consideration for the release: in exchange for signing the contract, the defendant issued a ski pass to the plaintiff.

B. Second test: Is the release sufficiently broad?

In order for a waiver to meet this aspect of the test, it must be worded in a way that is broad enough to encompass the specifics of the injury that the plaintiff suffered, without being so broad that the waiver is unclear.

In *Cougar Mountain*[13], the plaintiffs, Deanna Loychuk and Danielle Westgeest, sought damages for personal injuries sustained in a zip-lining accident. At the time of the accident, the plaintiffs were taking part in a tour offered by the defendant.

Prior to the accident, Ms. Loychuk operated a business that offered kick boxing/fitness programs for women. As part of her business, Ms. Loychuk was familiar with waivers. In fact, she required all of her clients to sign a waiver of liability.[14] Ms. Westgeest had recently graduated from law school. During her examination for discovery, Ms. Westgeest stated that when one of her friends asked about the release, she made a flippant remark to the effect that

[12] *Mayer v. Big White Ski Resort Ltd.*, [1998] B.C.J. No. 2155 (B.C.C.A.).
[13] *Supra*.
[14] *Ibid*, at 7.

based on what she knew from her contracts class, “releases may or may not be binding.”[15] Further, she declared that at the time that she signed the release, she was not aware she was waiving all rights as against Cougar Mountain, including the right to make any claims arising from the company's own negligence.

The trial judge dismissed their claims against Cougar Mountain on the basis that the plaintiffs had executed waivers of liability prior to participating in the zip-lining tour.

At the time of the plaintiffs' zip-lining accident, Cougar Mountain operated a zip-line tour in Whistler, British Columbia. The tour involved strapping a person into a harness, which would then be sent down a line, reaching speeds of up to 100 km an hour over a distance, on some lines, greater than 1,500 feet.[16]

Upon arrival at Cougar Mountain, Ms. Loychuk was given a release to fill out and sign. In both her affidavit and upon cross-examination, she stated that she understood that the release would prevent her from suing the zip-line company for certain mishaps, such as if she tripped and broke her leg (thus, the waiver meets the first stage of the *Isildar* test). However, she claimed that she did not realize that the release gave Cougar Mountain immunity for injuries caused by their own employees' mistakes. Ms. Westgeest’s understanding of the waiver was the same as Ms. Loychuk’s.

Ms. Loychuk's group and Ms. Westgeest's group were merged into one mid-way through the tour. Ms. Loychuk was sent down a line but stopped before reaching the lower platform. Ms. Westgeest, who was unable to see Ms. Loychuk suspended on the line, was sent down by a guide. With no ability to stop herself, Ms. Westgeest collided with Ms. Loychuk, causing both women to sustain personal injuries. It was determined that miscommunication between the guides was the sole cause of the accident.

The plaintiff, subsequently, challenged the scope of the waiver. She argued that while she had waived some of her rights in order to use the facilities, she was not aware that she had specifically waived her rights to bring an action for negligence based on the conduct of employees of the facility.

In the body of the release, it was specifically stated, in either bold or capitalized letters, that anyone who signed the document thereby agreed to waive any and all claims with respect to any cause whatsoever, including negligence or a breach of any duty of care owed under the *Occupiers Liability Act*.

[15] *Ibid*, at 10.
[16] *Ibid*, at 3.

The Court of Appeal decided that the scope of the waiver included the plaintiffs' injuries and held that the plaintiffs had waived their right to commence an action in negligence as against Cougar Mountain.

C. Third Test: Is the Waiver Unconscionable?

The language used to express the test for unconscionability has varied over the years. Recently, it was discussed in British Columbia in *McNeill v. Vandenberg,* and mirrored in *Roy v. 1216393 Ontario Inc*.[17] In *Roy*, Mr. Justice Tysoe quoted the following from the judgment of, then Justice McLachlin in *Principal Investments Ltd. v. Thiele Estate*:

> Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud, which the stronger must repel by proving the bargain was fair, just and reasonable.[18]

As explored in *Cougar Mountain*, there is well-established authority in Canada holding that releases relating to recreational sports activities are conscionable. Although the plaintiffs submitted that those authorities should be distinguished on the basis that the operator had total control of the risk, the Court of Appeal did not agree that control of risk by the operator was relevant to consideration of the conscionability of the release.

D. Waivers and Releases Printed on Tickets

As recreational activities at resorts continue to rise in popularity, it may be the case that having each potential plaintiff sign an agreement and having staff take the further step of individually drawing the terms of the waiver or release to a potential plaintiff's attention is not always practical. Ski resorts now often attempt to rely upon terms or conditions printed upon the face or reverse of a lift ticket and on signage displayed prominently in the ski area.

Though less desirable than a signed release or waiver, the courts have found such releases or waivers sufficient where the defendant resort is able to demonstrate that they took all reasonable

[17] *McNeill v. Vandenberg*, 2010 BCCA 583; *Roy v. 1216393 Ontario Inc*., 2011 B.C.C.A. 500.
[18] *Principal Investments Ltd. v. Thiele Estate*, 1987 CanLII 2740 (B.C.C.A.), at 19.

steps to bring the contractual terms regarding the exclusion of liability to the patron's attention. This has become known as the "reasonable steps test".

The courts have examined the issue of whether the "reasonable steps test" is objective or subjective. In *Argiros v. Whistler and Blackcomb Mountain,*[19] the Ontario Superior Court explicitly stated that the determination is objective. In that case the court held the defendant had taken reasonable measures to alert the plaintiff to exclusionary language by posting colourful signs on their premises and highlighting the relevant provisions on the plaintiff's ticket.

This was held despite the fact that the Court accepted the plaintiff's contention that no one directed his attention to the back of the tickets and vouchers containing the terms of the exclusionary language. The Court also accepted that no one explained these conditions to him. However, the court stated that these arguments were not relevant since the "reasonable steps test" was objective. As with a signed release, once the defendant had taken reasonable steps to alert the plaintiff to exclusionary language, the plaintiff was bound by the terms of the exclusion whether he chose to read them or not.

The court's analysis and ultimate decision as to whether reasonable steps have been taken are very much tied to the particular facts of a given case. For instance, the courts will look for the printing of the terms on the lift ticket and the posting of bright coloured signs displaying the terms of the liability waiver throughout the premises. If the court is not satisfied that the patron would have seen the wording, the defendant will not be able to rely on the release.[20]

In *Cejvan v. Blue Mountain Resorts Ltd.*[21] the Court held that the fact that a waiver was printed on the back of a ticket, rather than in the form of a signed waiver, did not undermine its effect, even if only written on the reverse of the ticket. In making this finding, the court reasoned that by virtue of the motor skills required to tear the ticket from the wax paper and affix it to the holder, a plaintiff must actually look at the reverse of their ticket. This action, in conjunction with clear, legible, consistent, and visible signs throughout the premises was found to amount to sufficient notice of the terms of the liability exclusion to the patrons.

The location of any signs is also important, as the courts require evidence that the plaintiff had reasonable opportunity to see any signs. For example, in *McQuary v. Big White Ski Resort Ltd.*[22] the plaintiff was using a multi-day lift pass purchased several days before the accident. The lift pass contained a comprehensive exclusion of liability clause, but the plaintiff denied having read the clause on the ticket and did not recall seeing signs posted adjacent to the ticket window which mirrored the exclusion clauses on the ticket.

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[19] *Argiros v. Whistler and Blackcomb Mountain,* [2002] O.J. No. 3916 (S.C.J.).
[20] *Champion v. Ski Marmot Basin,* 2005 CarswellAtla 977 at paras 17-18.
[21] *Brown v. Blue Mountain Resort Ltd.* (2002) CanLII 7591 (ON S.C.).
[22] *McQuary v. Big White Ski Resort Ltd.,* [1993] B.C.J. No. 1956 (S.C.).

However, the court in *McQuary* upheld the waiver provision on the back of the lift ticket. It looked at the drafting, design, and colour of the tickets and of the signs at the resort. It agreed with the defendant that reasonable steps had been taken to alert the plaintiff to the exclusionary language. There was also a finding that the plaintiff had a reasonable opportunity to read the waiver clauses and was not rushed by the ski resort. The court ultimately found that the defendant ski resort had succeeded in bringing the waiver provisions to the plaintiff's attention.

By contrast, in *Greeven v. Blackcomb Skiing Enterprises*,[23] the defendant was not successful. The evidence about the placement of the signs was found to be too vague and the plaintiff's lift ticket was found to contain no colour and no large print. Further, the plaintiff was not familiar with the Canadian ski industry and it was her first time at the resort. Based on these findings the defendant's motion to dismiss the claim was denied.

With respect to signage, the courts will look at the wording, the nature, extent and location of the signs employed as well as the potential plaintiff's familiarity with the premises. The court will look at the steps taken by the defendant in placing signs located throughout the premises, including at the ticket booth, equipment rental locations, near or on lifts, and along trails.

The courts, including those in Ontario, have also found that sufficient notice has been given to patrons where the signs remind the patrons to read the liability waivers on their lift tickets.

E. Summary Judgment Motions

Given that the applicability of signed releases and waivers acts as a full defence, issuing facilities may seek to expediently defeat a plaintiff's claim by bringing a summary judgment motion.[24]

This issue was discussed in the Ontario decision of *Brown v. Blue Mountain Resort Ltd*.[25] In *Brown*, the defendant ski resort sought to dismiss the plaintiffs' claim and brought a summary judgment motion pursuant to Rule 20.01(3). The defendants argued that the plaintiffs agreed to a complete and total waiver of any claim of liability prior to entering onto the ski areas.

In accordance with the test applied in summary judgment motions, the court was required to determine if a "real and genuine requiring trial" existed. The court held that "the plaintiff provided adequate preliminary evidence and argument to show that there is a real issue to be

[23] *Greeven v. Blackcomb Skiing Enterprises*, 1994 CanLII 2252 (B.C.S.C.).
[24] Pursuant to Rule 20.01(3) of the *Rules of Civil Procedure*, a defendant may, after delivering a statement of defence, move with supporting material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
[25] *Brown v. Blue Mountain Resort Ltd.*, 2002 CanLII 7591 (O.N.S.C.).

tried... the issues of negligence and the waivers of liability are matters to be determined at trial".[26]

It is important to note that the "reasonable steps test" discussed in *Argiros* was seemingly met in this case. The court in *Brown* found that a) the daily ski ticket issued to the skier contained explicit waiver wording, b) the ticket offices *prominently* displayed a notice on a big red sign advising skiers to read the exclusion of liability on the ticket and c) the notice sign itself contained waiver wording including waivers against "negligence", *inter alia*.

Despite these findings, the extent to which waivers and/or signs constituted an exclusion of liability was an issue to be determined at trial.

Brown was decided prior to the January 2010 amendments to Rule 20 of the *Rules of Civil Procedure*. Those amendments permit a judge to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence.

After the amendments, the court in *Borre v. St. Clair College*[27] considered whether to grant summary judgment in the context of an injury that occurred during a motorcycle training course. In *Borre*, the plaintiff was a student registered in the Motorcycle Training Course offered by the defendant in the summer of 2006. Before participating in the course, the plaintiff signed a waiver that read:

> I understand that by taking the motorcycle training course that certain risks and dangers are inherent. I agree to follow safety procedures as outlined by College representatives and to question procedures which I do not fully understand. I further acknowledge that my personal safety is primarily my responsibility and I am fully accountable for my actions. I will consult with the College representatives in situations in which I am unsure of appropriate safety practices or considerations. I will not hold the Ontario Safety League, Canada Safety Council, St. Clair College of Applied Arts and Technology, or their servants/agents, responsible for any loss or injury incurred as a result of my taking this course. I have read and understand the registration regulations.

At the examination for discovery of the plaintiff, when asked what she understood the waiver document to mean, she stated:

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[26] *Ibid*, at 17.
[27] *Borre v. St. Clair College*, 2011 ONSC 1971 (CanLII).

> "Basically that I understood what the course was and the risks involved in the course and that my personal safety was my responsibility, as stated in the waiver, and that I wouldn't hold St. Clair College or the others mentioned in the waiver, their servants or agents, that I would not hold them responsible for any loss or injury incurred as a result of my taking this course."[28]

Though the first test in *Isildar* is clearly met, Justice McDermid determined that a genuine issue for trial existed and that summary judgment could not be granted. His Honour indicated that a number of outstanding questions remained, including:

Did the waiver reflect *the reasonable expectations* of the parties at the time they entered into the contract? Was *additional consideration* given for the waiver at the time it was signed? Was the *negligence the plaintiff alleges against the defendant reasonably contemplated* at the time they entered into the contract? Was the manoeuvre in which the plaintiff was engaging at the time she was injured *beyond the scope* of the course for which she had registered? Was the defendant's motorcycle that she was operating at the time she was injured in proper working condition? Was the motorcycle's working condition a contributing factor in causing the injury she sustained? Was there a sufficient instructor to student ratio to provide adequate supervision over an inherently dangerous activity?

The questions posed by Justice McDermid ultimately address the unclear scope of the waiver that the plaintiff signed. If the waiver specifically indicated that the defendant was not to be held liable for any negligence, causing injury, and more clearly defined the types of manoeuvres that the plaintiff would be engaging in, it is very possible that the motion would have had the opposite result.

Counsel for high risk sports facilities can benefit from the questions posed by Justice McDermid if they are included in the defendant's questions while examining the plaintiff for discovery. Justice McDermid's questions are also helpful to the high risk sports resort when drafting waivers and releases of liability; as they show how specific, yet all encompassing the waivers must be.

As the summary judgement rule has seen amendments so recently, the interpretation of the rule and how it should be applied continues to be debated by members of the bench. As summary judgment motions continue to be heard, Judges and counsel should have greater clarity concerning what constitutes a "genuine issue for trial". Though both above motions were not decided in favour of the defendant, this should not serve as a deterrent for future defendants to

[28] *Ibid*, at 5.

attempt relief in the form of summary judgment when properly executed waivers (i.e. meeting the test as set out in *Isildar*) have been signed and/or brought to the attention of the plaintiffs.

III. Vicarious Liability

A. DIFFERENTIATING EMPLOYEES FROM PRIVATE CONTRACTORS

Vicarious liability applies only to instances of employer-employee relationships. If the relationship is deemed to be one between a principal and independent contractor, the principal is not ordinarily held vicariously liable for harm caused in the performance of a task by an independent contractor.[29] The distinction between these two categories, defined by the differentiation of conferring of authority versus actuality of function, was recently adjudicated in the Ontario Superior Court of Justice in *Isildar*.[30] In this case, the plaintiff, Mr. Ali Isildar, enrolled in an advanced open water scuba diving certification program. During a dive of 85-feet, the plaintiff and his diving buddy encountered severe conditions that progressed into zero visibility. After becoming separated from his diving partner, Mr. Isildar was discovered with no signs of life and later pronounced dead.[31] Although, at the conclusion of the trial, Justice G. Toscano Roccamo dismissed the plaintiffs' case by reason of a Liability Release and Assumption of Risk Agreement signed by Mr. Isildar,[32] one of the major issues that was discussed was whether the diving school, Kanata Diving Supply ("KDS"), was vicariously liable to the plaintiffs (the estate of Mr. Isildar as well as his family as per the *Family Law Act*) for any loss caused by any conduct on the part of Mr. Isildar's inexperienced instructor, Sarah Dow.[33]

The defendant, KDS, argued that Ms. Dow was a private contractor and not an employee. In support of this position, KDS relied on evidence of the relationship between themselves and Ms. Dow, including the lack of tax and other deductions from her pay cheque; the choice vested in her to teach or not to teach any KDS dive program as she saw fit; and the assumption of full control over dive planning and dive briefing, including the deep dive of June 7, 2003 (Mr. Isildar's dive).[34] On the other hand, the plaintiffs took the position that the court "should look beyond the label of independent contractor assigned by KDS to its instructors, including Sarah Dow, and should hold KDS vicariously liable for any actionable wrong Ms. Dow committed in the course of the weekend and specifically on the deep dive of June 7, 2003."[35]

The court affirmed that there is no universal test for determining whether a person is an employee or a private contractor. The court quoted Major J. in the leading Supreme Court of

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[29] *The Law of Torts, supra* note 2 at p 413.
[30] *Supra*.
[31] *Ibid*.
[32] *Ibid*, at 725.
[33] *Ibid*, at 6.
[34] *Ibid*, at 567.
[35] *Ibid*, at 566; The circumstances of the relationship between an instructor and an adult student in a course of instruction may attract a high degree of care where the activity is especially risky and the student is inexperienced; *Smith v. Horizon Aero Sports Ltd. et al.* 1981 CanLII 300 (B.C.S.C.), (1981), 130 D.L.R. (3d) 91 (B.C.S.C.) at 15.

Canada case on the topic of determination of type of employment; *Sagaz Industries,*[36] which itself drew upon the judgment of Cooke J. in *Market Investigations*[37] in stating that:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.[38]

The court also made certain to state that this list is not exhaustive, nor is there a set formula for its application. Further, the Judge stated that the weight of each of these factors will vary depending on the specific facts of any particular action.[39]

Testimony from KDS indicated that although the diving school organized classes and signed up students, diving instructors were free to sign up to teach courses depending on their availability on a list at the KDS office. Moreover, it was submitted that although courses were usually taught at KDS' premises, instructors had the autonomy to determine the schedule for the courses, including the date for the orientation night, what dives are undertaken, all logistical needs, and the dive site. However, the instructor usually told the KDS manager where they were going and what they were going to do in order to facilitate equipment rental from KDS.[40] With regards to findings on this issue, the court stated that:

> On the totality of the evidence and based on the reasoning in *Sagaz Industries, supra*, I conclude that KDS **employed** Ms. Dow to instruct students, including Mr. Isildar, in the AOW program in June, 2003 as an integral part of the dive shop's operation and its responsibility to deliver PADI certified programs. In making this determination, I have had regard for the underlying level of control

[36] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 (SCC) at 47.
[37] *Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 All ER 732.
[38] *Supra*, at 47.
[39] *Ibid*, at 48.
[40] *Supra*, at 580.

> maintained by KDS over delivery of key aspects of the PADI programs. Not only did KDS advertise for courses, including the AOW program in which Mr. Isildar participated, KDS picked the dates, organized the courses, provided the classroom facilities, arranged for pool sessions, provided equipment for rent to divers and booked the boat charters. While KDS paid instructors a modest $10.00 per hour and issued T-4As to them with no source deductions from their pay, as would be typical in the employer/employee relationship, nonetheless KDS set the price for PADI programs, and received payment directly from students for the course of instruction, the rental of gear, and usually for the boat charters utilized by students to dive sites.[41] [emphasis added]

As such, in this particular case, it was held that there was in fact an employment relationship and not merely one of a private contractor, as KDS had submitted. While the factors previously laid out by the decision in *Sagaz* provide assistance to determine whether that a particular individual is a private contractor, it can be difficult to give a precise definition of this distinction (as indicated by Lord Denning in *Stephenson Jordan*).[42] Similarly, John Fleming, in "The Law of Torts", acknowledged that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations....".[43] Accordingly, employers should exercise an abundance of caution and afford personnel intended to be categorized as independent contractors the maximum amount of independence possible.

B. Is an Employer Vicariously Liable for an Instructor?

The law on vicarious liability has been debated before all levels of courts in Canada and abroad, with the results having a significant impact on the management of extreme sports facilities. An employer's vicarious liability only applies to incidents "in the course of the servant's employment."[44] This basic principle limits the outward boundaries of responsibility of an employer. In this respect, it seeks to balance the "social necessity" of protecting injured parties by making an employer liable for the actions of employees acting within the scope of their employment, and the inequity of making an employer blindly liable for *all* actions executed by their employees.[45] The application of this threshold by the courts has been to impose vicarious liability based not on the authority conferred to the employee, but by the actual function and operation that is performed.[46] The classic articulation of this standard was enunciated in *Bugge v*

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[41] *Ibid*, at 590.
[42] *Stephenson, Jordan & Harrison Ltd. v. MacDonald & Evans*, [1952] 1 TLR 101 (England CA) at 111.
[43] *The Law of Torts*, *supra* note 2 at p 416.
[44] Fleming, John G, *The Law of Torts* (Sydney: Carswell Ontario, 1998) at p 420 *[The Law of Torts]*.
[45] *Ibid*, at 421
[46] *Bugg v. Brown*, [1919] 26 CLR 110 at 132 (High Court of Australia). Referred to in *The Law of Torts*, *supra* note 2 at p 421.

Brown, wherein the court held that "when [an employee] so acts as to be in effect a stranger in relation to his employer with respect to the act which he has committed [the employer will not be held vicariously liable]."[47] As an example, a fork lift operator that moves a truck blocking his path must be distinguished from an operator that takes the truck around town to assess his proficiency in maneuvering it.[48]

In *Isildar*, had there not been a waiver of liability executed by Mr. Isildar that was held to be binding, KDS would have been vicariously liable for his death, and would have had to face the legal repercussions therefrom, including all *Family Law Act* claims.

Cases involving ski instructors have also been adjudicated in a similar fashion. In *Jaegli Enterprises Ltd.*,[49] the Supreme Court of Canada overturned the Court of Appeal for British Columbia and restored the trial judge's decision.[50] In this case, two teenage girls were taking a semi-private ski lesson. On one particular run, their instructor, Mr. Ankenman, skied down the slope as the girls followed. Ankenman sped ahead and reached the bottom of the run first. He turned to see one of the girls descending near a blind spot in a crest in the mountain. Suddenly, an off-duty ski lift operator at the mountain and an on-call ski patrol, Lacasse, flew over the crest at extremely high speeds. His skis left the ground, and by the time they touched the snow, he could not avoid the collision with the girl, knocking her unconscious.[51] Amongst others, the injured party sued Ankenman in negligence, and alleged Jaegli Enterprises Ltd., an employer, to be vicariously liable for the negligence of its ski instructor.[52] The trial judge and Supreme Court of Canada[53] found that Ankenman was not negligent and that fault rested solely with Lacasse, the actions against both Ankenman and Jaegli Enterprises Ltd. were dismissed.

In a similar action, the Court of Appeal for Quebec, in *Stations de la Vallee*,[54] dismissed the appeal by the defendant and reaffirmed the trial judge's holding finding a ski instructor, and consequentially his employer, liable for the injuries sustained by a young ski student. In *Station de la Valee*, a nine year old child was enrolled in a ski lesson at Mont Olympia, north of Montreal. Midway through the lesson, the instructor made the decision to stay behind with a struggling student and asked the remainder of the class to continue down the hill unsupervised. Now skiing alone, the plaintiff careened off of the run and was seriously injured when he struck

[47] *Ibid*, at 118
[48] *Kay v. IRW*, [1968] 1 QB 140 (CA). The less precise the defined scope of the employee's duties, the more likely that the deviation will be regarded as a mere mode of performing his authorized tasks: *LCC v Cattermoles*, [1953] 1 WLR 997. As referred to in *The Law of Torts, supra* note 2 at p 422.
[49] *Jaegli Enterprises Ltd.* v. *Ankenman*, [1981] 2 SCR 2 (SCC).
[50] *Taylor v. R*, [1978] 95 DLR (3d) 82 (B.C.S.C.).
[51] *Ibid*.
[52] *Ibid*, at 3.
[53] *Taylor v. R*, [1980] 21 BCLR 155 (B.C.C.A.) at 30.
[54] *Stations de la Vallée de St-Sauveur Inc. v. M.A.*, [2010] Q.J. No. 8224.

a tree. He was diagnosed with, *inter alia*, two punctured lungs, a cranial fracture, and injuries to four lobes of his brain.[55]

The trial judge held that instructor was responsible for the accident. In finding that the ski resort was also liable, the appellate court engaged in a more thorough analysis. The court found that there was a contractual relationship between the resort and the plaintiff, in the form of the contract for lessons, that not only acted as an undertaking to teach students to ski, but had an implicit obligation to provide them with safe supervision. Evidence of this implicit obligation was demonstrated by the fact that the ski school hired instructors with training in technique *and* ski safety.[56] The court relied on *Quail* to reinforce that a ski resort's contract with its customers included an implicit contractual duty of safety.[57] Further case law relied upon included *Bouchard*,[58] which stands for the principle that a sporting facility has a contractual duty to ensure the safety of its patrons. In furtherance of that principle, *Dibbs v. Proslide Technology Inc.*,[59] a case brought before the Superior Court of Quebec, held that both a ski school and its instructors must take reasonable precautions to protect the safety of their students.

These cases are relevant to employers of instructors of extreme sports because even if it is found that a private contractor relationship exists, the resort may still be found liable by way of direct contract for lessons, and the implicit undertakings made therein. It should, however, be noted that the analysis employed in the Quebec courts, discussed above, has not been thoroughly considered in Ontario. That said, facilities should be cognizant of the possibility of exposure to liability on this basis and take extra precautions to ensure a valid waiver is in place and, where it is impractical to hire independent contractors, that employees are properly trained and supervised.

IV. Conclusion

It ought not be assumed that a party injured while engaging in a high risk activity will be considered the author of his or her own misfortune. Rather, despite the risks inherent in certain sporting and recreational activities, facility operators and managers may be exposed to liability arising from the injuries of their patrons.

Responding to this concern, sports facilities and resorts should be aware that waivers are their first and best defence against personal injury claims. Securing a signed and well-worded waiver or release from every potential plaintiff is best practice. However, where doing so is impractical, a system providing clear notice to potential plaintiffs through bold and highly visible wording provided on signs and tickets can suffice. The key is ensuring that there is a system in

[55] *Ibid*, at 12.
[56] *Ibid*, at 20.
[57] *L'Écuyer v. Quail*, [1991] RRA 482 (Que CA).
[58] *Bouchard v. Drouin*, 1974 WL 156021.
[59] *Dibbs v. Proslide Technology Inc.*, [2003] RRA 234.

place which renders notice of such terms unavoidable by all potential plaintiffs. As we have seen, absent an effective waiver, employers wishing to avoid the imposition of vicarious liability should exert as little control as possible over personnel intended to be considered as independent contractors.

Ultimately, while high risk sports may provide a fertile source of litigation, the case law and emerging trends discussed above suggest that by implementing sound liability management strategy, including executing waivers and utilizing independent contractors to the extent possible, facilities possess powerful tools for defeating plaintiffs' claims.