

# FACING THE RISK: LIABILITY SHIELDS

By Kenneth A. Hall

## INTRODUCTION

As insurance brokers specializing in liability protection and risk management services for Christian charitable organizations we are often asked about the value of using waivers, releases, disclaimers, indemnity agreements, informed consent and permission forms for participants in sponsored activities and events. Collectively these contractual documents are known as “liability shields”.

The most common questions asked are whether they are worth the paper they are written on and whether they will stand up in a Court. Although there is no single liability shield that will guarantee the avoidance of a liability suit, the use of such documents as part of an overall risk management program can dramatically reduce the likelihood and severity of claims for legal damages.

Unfortunately most churches and other Christian charities in Canada lag badly behind other types of organizations and institutions in their use of liability shields to reduce unnecessary and unreasonable exposure to legal liability claims. To provide a better understanding of the benefits and limitations of liability shields, this article will focus on four aspects of their usage;

- 1) An introduction into how liability shields fit into an organization's overall risk management plan;
- 2) An overview of recent legal trends and case law regarding assumption of risk;
- 3) A glossary of definitions for the most commonly used liability shields including the appropriate circumstances for their use;
- 4) General guidelines for the content of an effective waiver or release of liability document.

### (1) Risk Management and Liability Shields

The vast majority of not-for-profit and charitable organizations do not have the financial resources to pay for the potential civil damages due to serious injuries resulting from their operations, activities, ministries and programs. However they do have a wide variety of risk management tools available to them to ensure safety and manage the risk associated with their unique operations, which can generally be divided into the following categories:

- ❖ Avoiding risk by eliminating activities that are particularly hazardous and carry with them an unreasonably high potential for injury to employees, volunteers, members or participants. Unacceptable levels of risk could be due to the inherent nature of the activity or because the organization lacks the proper facilities, equipment, professional expertise or experience to ensure safety in conducting these activities in-house. Examples would include youth activities such as rock climbing, whitewater rafting, tubing, waterskiing, scuba diving, parasailing, skateboarding stunts, etc. These types of activities may not be worth the risk involved, especially if they are not core to your ministry and you may be wise to conclude that they should simply be considered as a private recreational or fellowship activity among individuals in the church or organization.
- ❖ Reducing risk by modifying a program or activity in order to cut out only those elements that are deemed too high risk or by acquiring the necessary resources to ensure reasonable level of safety i.e. hiring expert staff, implementing training programs, purchasing approved equipment and adopting adequate maintenance and

inspection procedures. It is extremely important for the leaders of charitable organizations, including board members and senior staff, to clearly understand their statutory obligations and fiduciary duties in order to ensure that applicable laws and safety regulations are met and that reasonable standards of care are upheld.

- ❖ Transferring risk to other parties. A good alternative to sponsoring high-risk activities directly is to offer them by outsourcing their supervision to other organizations, businesses and outfitters who specialize in these activities. They can provide proper professional supervision, equipment, facilities and proof of primary liability insurance coverage (including your organization as an additional insured). Another form of risk transfer is of course through your organization's own liability insurance protection, which you should review carefully for coverage scope. However relying solely on insurance to transfer risk is unwise and shortsighted. This is because some types of liability claims may be subject to coverage limitation and because a lack of risk management procedures may render an organization uninsurable for certain legal liability exposures. Therefore an essential part of any sound risk management plan is transferring risk through the use of liability shields, especially for the following types of activities and events:
  - Sports and recreational programs
  - Off-premises field trips (daytime or overnight)
  - Volunteer construction or renovation projects
  - Short term missions trips
  - Other activities involving a high degree of risk

### (2) Recent Legal Trends Regarding Assumption of Risk

As a result of recent decisions by the Supreme Court of Canada, the doctrine of “voluntary assumption of risk” as a defence against negligence claims has been greatly eroded. Traditionally this type of defense asserted that an individual who freely and knowingly proceeded with participation in a particular activity should not be entitled to any civil liability damages for injuries suffered as a result of that activity. Under the doctrine a sponsoring organization would therefore not be found liable in respect to injuries from a risk voluntarily assumed and understood by a plaintiff. The insured participant would essentially be considered to be “the author of their own misfortune”.

However Supreme Court decisions over the past decade have so narrowly defined the doctrine of voluntary assumption of risk that it will no longer be possible for defendant organizations to rely on this defence. Not only does the organization have to prove that the plaintiff freely and voluntarily accepted the risk with full knowledge of the nature and extent of risk, but it also now has to prove that the plaintiff agreed to absolve the defendant organization from all legal liability arising out of the activity. Since evidence of “express” or “implied” waivers given voluntarily by a participant will rarely be available, written waivers and other forms of contractual liability shields will be increasingly relied upon by sponsoring organizations in establishing an assumption of risk defence. In other words, the only way for organizations to effectively defend themselves against legal liability in future claims is through the contractual exclusion of negligence by use of appropriate liability shields.

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Another advantage of liability shields is their value in establishing a partial defence based on “contributory” negligence. This doctrine is based on the principle that although the sponsoring organization may have been partially or contributorily negligent, the extent of the damages awarded can be reduced by the participant’s own negligence. For example, with the introduction of apportionment legislation in Canada, such as the Negligence Act, the plaintiff can be held to be 90% at fault and only recover 10% of their damages. Contractual liability agreements can therefore help to define and limit the extent of a sponsoring organization’s contributory negligence.

While waivers and other liability shields are not an appropriate substitute for the careful supervision of an organization’s activities, recent case law has demonstrated that a properly worded and executed release of liability agreement can prove to be an effective defence to claims based on negligence.

### **(3) Liability Shields Defined**

Liability shields are written contracts or agreements between a sponsoring organization and a participant, or if the participant is a minor, the participant’s parents or legal guardian. These shields operate to identify the risks associated with a particular activity and to reduce or eliminate the potential legal liability of the sponsoring organization. The type of shield, or combination shields, to be used is dependent on the nature of the activity, the age of the participant and any applicable laws which may govern or restrict the use of such contracts. Following is a brief description of some of the more commonly used liability shields:

**Waiver or Release of Liability** - A contractual agreement between two parties whereby one party (the participant or “releasor”) agrees to voluntarily release the other party (the sponsoring organization or “releasee”) from legal liability in certain circumstances. In addition to releasing the sponsoring party, most waivers also contain an express voluntary assumption of risk by the releasor for the described activity. The terms “waiver” and “release of liability” are

frequently used interchangeably. This type of agreement usually takes the form of a written contract signed by the releasor. It is important to note that the legal principle of “contra preferendum” applies to such contracts, meaning that any ambiguity in interpreting the contract is construed against the party drafting the agreement, usually the releasee, thereby making it imperative that the description of the activity and the nature of the release be worded clearly and in plain language. Courts often invalidate waivers on the grounds that the participant did not fully appreciate the rights being waived or the nature of the risks associated with the particular activity. Courts have also ruled that contractual limitations of liability do not apply to releases signed by minors, who lack the legal capacity to enter into such agreements. However if properly drafted and executed, a waiver may help block or limit liability. Moreover an individual who has signed a waiver is less likely to initiate a legal action, especially if it is over a matter which is essentially frivolous or without merit.

**Disclaimers** - An express disavowal, repudiation or limitation of legal liability by one party, usually the sponsoring organization, to another party, usually the participant or visitor. Disclaimers differ from waivers in that they are unilateral declarations. They are of limited risk transfer value as the participant who may sustain injury has not

agreed to the limitation. The primary purpose of a disclaimer is to serve as a warning or advisory of risks associated with a particular event or premises and to reinforce the fact that the sponsor or property owner has not assumed any special or extra duties of care for participants, volunteers, attendees or visitors. For example, an organization conducting a special event may put attendees on notice through signs or on messages printed on the backs of ticket stubs that they are not responsible for personal security, for damage to vehicles in parking lots or for lost or stolen items of clothing in a cloak room. Posted written disclaimers are also appropriate for permanently installed outdoor playground equipment, playing fields and parking lots that may be used by third parties without permission or supervision.

**Indemnity Agreement** - Usually forming part of a waiver agreement, it serves as a formal undertaking by the participant to indemnify, save and hold harmless the sponsor from any litigation expenses, legal fees and liability damage awards. Where allowable by law, indemnification by the releasor means that the participant will pay for the cost to reimburse legal damages and defence costs incurred by the sponsoring organization arising out of their participation in the activity, regardless of which party is legally responsible for injury or damage resulting from the described activity.

**Informed Consent** - Also forming part of a waiver agreement, it is a clearly worded description of the proposed activity or event that includes a thorough explanation of the inherent risks associated with participation in that activity. A consent form does not relieve an organization from responsibility for its own negligence. It seeks only to relieve the sponsor for the inherent risks of the activity itself and allows it to make a defence of liability claims on the basis of assumption of risk by the participant. To be effective, the form must fully disclose to the participant, or their parents/guardians, the specific risks associated with the proposed activity. By signing the consent a participant acknowledges that they have both read and understood the risks involved and agree not to initiate any legal action for harm resulting from the described risks. This type of disclosure is particularly effective for children’s programs where poor communication and a lack of knowledge about the nature of an activity can create anger, resentment and greater motivation on the part of parents to bring suit on behalf of their child, even in circumstances where the injuries are relatively minor. The key to an effective informed consent is clear and thorough identification and explanation of the risks inherent in the proposed activity.

**Permission Forms** - Christian charitable organizations such as churches, day cares, schools, colleges, campgrounds and other youth-oriented ministries and associations should consider the use of permission slips for activities involving minors or other persons who are not legally competent to sign a waiver or informed consent. Permission forms have been in widespread use by schools for many years and are usually a prerequisite for student participation in certain activities, such as field trips and sports activities. Although it does not absolve a sponsoring organization of legal liability, a well-drafted permission slip ensures parental knowledge and consent for their children’s participation. When parents are informed about the nature and extent of the proposed activity and its risks, they will feel more involved in the decision-making process and will be less likely to claim that, “had I known, I would never have let my child participate”. Also with a properly worded and signed permission form that includes consent for emergency medical treatment and disclosure of any existing medical conditions, a parent or guardian will be less likely to claim

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that the organization infringed on their authority, control or custody over the child. Remember that your organization's relationship with the parents of children in your programs should be a partnership and permission slips are an excellent way to promote good communication and avoid misunderstanding.

## **(4) Guidelines For An Effective Waiver Or Release Of Liability**

Despite clear guidelines that have been laid down in a number of cases heard in Canadian Courts, organizations continue to draft release of liability agreements that are legally unenforceable for various reasons. Although it is not the intent of this article to provide professional legal advice, following is a series of general guidelines which may be of assistance to your organization in reviewing an appropriate release of liability program with your lawyer:

- i) Provide advance notice of the requirement to sign a waiver as a prerequisite for participation in the proposed activity, preferably forming part of the initial information and registration package. This avoids the argument that the participant was pressured into signing the agreement at the "last minute".
- ii) Provide advance notice of the requirement to sign a waiver as a prerequisite for participation in the proposed activity, preferably forming part of the initial information and registration package. This avoids the argument that the participant was pressured into signing the agreement at the "last minute".
- iii) The waiver language should include a clear and objective description of the inherent risks associated with the proposed activity or event. The document should be worded by your lawyer to address allegations of both negligence and breach of contract, including any breach of duty owed under common law or statute. It should also make specific reference to assumption of risk on the part of the participant.
- iv) The design, format and content of a waiver document should be clear and in plain language. Emphasis should be placed on boldly printed headings such as "release of liability", "waiver of claims", "waiver of legal rights including the right to sue", "please read carefully", and so on, so that there is no uncertainty as to the intent of the document.
- v) The participant should be clearly identified on the waiver form, including information such as name, address, telephone number, date of birth, signature, witness and date, in order to defend allegations that the document was never signed.
- vi) Waivers should be limited to no more than a single page in order to avoid any legal challenge that the length of the document made it incomprehensible or that the releasor only looked at the signature page.

- vii) Most liability shields are contracts and as such must include reference to consideration or an exchange of value i.e. the participant must receive something of value, such as the opportunity to participate, in exchange for his or her signature.
- viii) The person signing the agreement must be competent under the law. Courts do not recognize as competent: minors, other persons with a legal guardian, or anyone the Court deems as "incompetent".
- ix) Extraneous explanations or representations about the intent or terms of the waiver form should be avoided as they may undermine enforcement of the document.
- x) Some form of control procedure should be instituted to ensure that waivers have been properly executed by all participants before the activity or event takes place.
- xi) Completed waivers should be kept on file for a period of not less than seven years, or the applicable statute of limitations term, as release of liability documents must be physically produced in order to serve in defence of a legal liability action.

## **CONCLUSION**

Christian charitable organizations should strongly consider utilizing liability shields as an important tool in their risk management program. Not all sponsored activities or events easily lend themselves to risk transfer through contractual release of liability and you should check with your lawyer to determine the appropriate circumstances for their use. However recent case law indicates that they may be one of the few remaining ways of avoiding or limiting claims based on negligence for activities involving inherent risk. In fact, in cases where a high degree of risk cannot be avoided, properly executed liability shields may be the only available solution to allow an event or activity to proceed at an acceptable level of liability exposure for the sponsoring organization.

Liability shields serve as an effective risk transfer technique by bolstering legal defence based on contractual assumption of risk and/or contributory negligence. They also provide better communication between the sponsors and participants, create a legal and psychological deterrent to legal action and reduce expectations on the part of plaintiffs in recovering excessive civil damages. In an increasingly litigious society, liability shields are one of the few remaining options available to charitable organizations in discouraging unnecessary and unreasonable levels of legal liability exposure.