Liability Waivers – An Accident Waiting to Happen?

By: John Lawford and Aya Alshahwany

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Madoka: "You're telling me that ridiculous reason is why Mami-san had to die and Sayaka-chan had to suffer so much? That isn't right. It's just too cruel!"
Kubey: "But we ask for and receive your consent for every contract we make. If anything, we've been very accommodating in that respect."
M: "But you do it by deceiving us!"
K: "The act of deception in itself is incomprehensible to us. Why is it that when humans regret a decision based on a misunderstanding, they feel resentment toward the other party?"
M: "I can't even follow what you're saying. I can't accept it at all."
K: "We have a pretty hard time understanding your value system too. Your current population numbers over 6.9 billion and grows by ten every four seconds, so why do you make such a fuss over the life or death of a few people?"
M: "If that's how you think, then you really are our enemy."
—Puella Magi Madoka Magica, Ep. 9, "There's no way I'd allow that"

"Abandon all hope, ye who enter."
—Inscription above the Gates of Hell

INTRODUCTION AND CONTEXT

Common law is often not fair. However, one overarching conclusion of this report is that the present law of liability waivers – which are contractual agreements regarding services or conditional licences to enter premises (notices to consumers) that permit the businesses to avoid any legal and financial liability for service delivery failures that injure or kill consumers – and in particular, those waivers in recreation, leisure or adventure services, are manifestly, exceptionally, and egregiously unfair to consumers.

This unfairness means Canadians are offered substandard recreation, leisure or adventure services. Fairer, more comprehensive legal protections for consumers of recreation, leisure or adventure tourism services are available in Québec, the European Union, the United Kingdom, South Africa and New Zealand. There is no evidence that consumers in other countries that have prohibited or highly regulated liability waivers are deprived of recreation, leisure or adventure services or that those services are significantly more expensive there. What is different in those jurisdictions is that injured consumers or their survivors have a prospect of some compensation for the negligent or wrongful injuries caused by businesses offering leisure services.

To be crystal clear, the use of liability waivers in recreational, leisure or adventure tourism services, where these are allowed, means that all such consumers, are made vulnerable not only to the chance of injury or death but rather that any such misfortune will almost certainly be coupled with a catastrophic loss of compensation for the fatality or to assist with rehabilitation and care, loss of wages and enjoyment of life, in the case of serious injury. Having all consumers sign waivers as a matter of course means that there is a hidden layer of vulnerability in all consumers, which is realized in those cases where the consumer suffers a serious injury or unfortunately dies in the exercise of these consumer services.

The "common law" Canadian provinces' failure to reform liability waivers, coupled with their relatively timid consumer law regimes (compared to those in other modern economies), creates a serious problem

that most Canadian consumers face without effective government oversight or control. This means that most Canadian consumers get a bad deal on recreation, leisure or adventure services.

Consumers in Canada also do not expect this bad deal. Indications from the research for this report, including focus groups with Canadians, indicate consumers do not understand the legal effect of liability waivers. Further, our research indicates that even when the legal effect of liability waivers is clearly explained and consumers are directly confronted with the legal effects of liability waivers, that consumers will mentally resist believing, to a rather extraordinary degree, that they would not be able to obtain legal redress for an injury or death suffered using recreation, leisure or adventure services.

Lastly, allowing liability waivers despite these consumer drawbacks creates bad public policy. If Canadian society wishes to support recreation, leisure or adventure activities for the public, including those delivered by private enterprise, we suggest the public interest includes: keeping Canadians and visitors to Canada reasonably safe from injury and death during their leisure time; supporting injured Canadians and their families if they are injured or killed during such activities; and fairly spreading the costs to society of these injuries and deaths, rather than shifting them wholly to the individual consumers and their families who are harmed. Failing to reform this area of law unduly burdens individuals and families and whatever social services may assist victims for what may be a lifetime of healthcare and support services. In a society where most elements of health care costs fall on provincial governments, there is a clear financial and capacity incentive to reduce the strain on healthcare systems in Canada by reducing the burden on the healthcare system of these injuries, treatment, rehabilitation and care costs around fatalities. In other words, if legal liability is still used to distribute these costs, there is a strong argument to make businesses profiting from such activities (or their insurers) pay for them, not society at large and victim families in particular.

Finally, such a complete shift of liability from businesses to consumers masks potential improvements to tourism and leisure services that could be made in Canada and that have been undertaken in other countries. To the extent that such changes are being retarded by this archaic and unfair legal structure, Canada is the potential loser as it seeks to compete for worldwide tourism business to jurisdictions that have made liability reforms and subsequently professionalized and regulated leisure activities.

These problems with liability waivers are made most manifest in the sports & recreation, outdoor adventure, rides & amusement sector (“SOAR”) in Canada due to the ubiquitous presence of waivers in such services and the heightened risk of catastrophic injury or death when what is being offered is an experience where the consumer must interact for the most part “bodily” with the service and there is usually a “thrill” or element of risk of harm as a central element of the entertainment experience.

These industries, businesses and services also have benefitted disproportionately from a confused and abusive history of common law in relation to harms suffered by visitors on landholders’ property, eventually codified, modified and slightly mollified by statute, into what now is called “occupiers’ liability” law. Secreted in the interstices of occupiers’ liability, and to some extent, birthed out of these dark corners, there remains the trump card, the ‘get out of jail free’ card, available to corporate defendants: the exclusion of liability or ‘waiver’ clause. We fail to see justifications in a modern legal regime for such exclusions of liability, firstly, for businesses simply using property as a means to host and profit from leisure activities (and thereby benefitting from a legal regime historically tilted to private property owners) but secondly, these same businesses being provided the additional contractual liability waivers and land-based protection of ‘conditional licences’ that effect the same legal result.

This report therefore focusses specifically on the issue of “waivers” of legal liability (which liability is based on the legal category of ‘tort’ liability; modulated by contract law principles) for injuries or death

suffered by consumers of recreation, leisure or adventure services, suffered during their enjoyment of the services. This entire area of law, and in particular its application to these consumer services, is not only unfair to consumers in general but, we demonstrate, effectively denies consumers any recovery whatever for transgressions of what would, in many other areas of the law (including the in many ways a similar consumer law area of "product liability" for defective or dangerous goods), be far more generous, or at least passingly fair, to consumers.

This state of affairs must change. We recommend radical change to protect Canadian consumers.

Our proposed changes are simple, and progressive, in both senses of the latter term. First, Canadian common law provinces should reform their occupiers' liability and negligence law to remove the ability of all businesses, and in particular, recreational, sporting and adventure tourism businesses, whether using private property or having the use and control of public lands, or simply offering any consumer services, to disclaim liability for negligence resulting in the death or injury of a member of the public admitted to the business for the purposes of enjoying those services. Second, Canada and its provinces should study the potential of an overarching public insurance scheme for injuries, initially for such consumer services businesses, then consider expansion to other aspects of society, such as coordination with workers compensation but extending beyond these environments to support persons suffering injuries of any kind in Canada. Finally, the removal of liability waivers should spur provincial governments to professionalize and more closely regulate the provision of SOAR-type services, in order to make them safer for consumers (and save healthcare costs) and more attractive to both Canadians and foreign tourists. This change can only help Canada in the long-term as countries begin to compete for outdoor adventure and recreation business.

We make more specific recommendations in the final section of this Report.

The Problem of Waivers

It is the unfortunate reality that Canadian law has ample examples of tragic stories of severe injuries and deaths related to sports and recreation. Two deeply upsetting examples that illustrate the severity of injustice exacerbated by the present law of waivers in most of Canada for victims and their families are the *Isildar* v *Rideau Diving Supply*[1] and the *Loychuk v. Cougar Mountain Adventures Ltd.*[2] cases.

Mr. Isildar was a young amateur diver who tragically drowned in 2003 while taking a diving course with Kanata Diving Supply (KDS), a division of Rideau Diving Supply. He was a recent newcomer to Canada from Turkey, and was a physically active man who participated in many recreational sports and hobbies. Mr. Isildar was completing an Advanced Open Water scuba certification program offered by KDS and performing the mandatory deep dive component of the course when he experienced several challenges, which were met with failed interventions by the diving instructor, and resulted in his passing. A lawsuit was brought forward by victim's widow and child, seeking compensation for the loss of his care, guidance, and companionship, as well as damages claims for the loss of his financial support and funeral expenses. The Superior Court of Justice recognized that the company fell below the industry standard of care in hiring inexperienced instructors, had insufficient equipment, were negligent in their operations, and thus partly at

[1] *Isildar* v *Rideau Diving Supply*, 2008 CanLII 29598 (ONSC).
[2] *Loychuk* v. *Cougar Mountain Adventures Ltd.*, 2012 BCCA 122

fault for the death of Mr. Isildar.[3] However, the liability waiver that Mr. Isildar had signed before the dive was found to be well-written enough that it insulated KDS, even with their fatal mistakes, and left his family with no compensation for their devastating loss.[4]

In August 2007, Ms. Loychuk and Ms. Westgeest were injured in a collision at Cougar Mountain Adventures Ltd.'s ziplining facilities. Both women had been made to sign a waiver before their participation in the ziplining, which they understood to cover certain issues, but not the company's own failures.[5] Through negligent communication mistakes at between Cougar Mountain Staff, Ms. Loychuk was still on a line when Ms. Westgeest was sent down by a guide unknowingly towards Ms. Loychuk. Both women suffered injuries, and Ms. Loychuk brought forward a lawsuit. Cougar Mountain acknowledged that its staff miscommunication and negligence had caused the collision and injuries.[6] Despite this acknowledgement, The Court of Appeal for British Columbia held that the liability waiver, which included protection for the company in cases of its own negligence, was entirely enforceable despite arguments of unconscionability and that the enforcement of such a clause would have harmful implications for public policy.[7] The liability waiver signed by the victims was thus a "complete defence" for Cougar Mountain, and the two women were not compensated for their injuries.[8] It is yet another case where the liability waiver fully insulated the company from any consequences of its own negligence and harmful mistakes.

Both of these cases demonstrate how the treatment of liability waivers in the Canadian legal system has failed consumers. Even when negligence is found, liability waivers can protect companies and leave victims and their families with no compensation for loss of life, or for injuries, pain and suffering, the loss of enjoyment of life, future earning potential, or even for the health care and support of the injured person. Keeping in mind that legal research and reporting often overlooks the human impact of these issues, we aim to centre these victims and their families in the purposes of our research and efforts to shine a light on the injustices of liability waivers, in human terms, in Canada. We remind legal professionals, organizations, and policymakers studying these issues to hold compassion for the people who are most affected by these tragedies. This perspective is sorely lacking in the discussion of liability waivers in Canada.

These two cases should be contrasted with two decisions from Québec. We note below regarding the law in Québec the different enforcement and effect of waivers there (they have no legal effect in Québec).

The first case is a simple result from a lower court in Québec, to show an unenforceable waiver does not somehow remove the ability of operators of sporting or recreational services to defend themselves from lawsuits. In *Dubois* c. *Altiparc inc.*, 2014 QCCQ 2848, a participant in a zipline activity between trees (branded "Arbraska") was found to have signed a "décharge de responsabilité" (a waiver) as a requirement of participating. However, the case turned on the activity of the plaintiff, who was found to have purposely made the zipline "swing" counter to the instructions given, and unfortunately collided with a tree off the straight line of the main zipline path. Nothing turned on the wording of, or more importantly, the legal non-effect of the waiver, which was treated only as informational about 'inherent' risks of ziplining in trees, and the plaintiff and the defendant were free to argue whether the legal responsibility was met by the defendant. In the end, the court, based on the facts and arguments of the usual use of the zipline and the plaintiff's conduct, dismissed the case. Both parties were able to put their best evidence forward – the defendant won.

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[3] *Isildar*, *supra*, at para. 560.
[4] *Isildar*, *supra*, at para. 686.
[5] *Loychuk*, *supra*, at paras. 8, 10.
[6] *Loychuk*, *supra*, at para. 1.
[7] *Loychuk*, *supra*, at paras. 46, 54.
[8] *Loychuk*, *supra*, at para. 2.

The second case is from the Court of Appeal of Québec, *Stations de la Vallée de St-Sauveur inc.* c. *M.A.*, 2010 QCCA 1509, and involves the tragic case of a young child attending a group ski lesson, who was very seriously injured when permitted to ski to the base of a beginner hill unattended by the instructor. The child left the trail and hit a tree, causing massive brain, facial and other injuries. He was permanently disabled by the accident. The Court of Appeal decided the case on the contractual and delictual (tort) principles and found for the plaintiff – awarding over $2 million in damages. No issue of a waiver was discussed – indeed there was no waiver – only whether the instructor failed to supervise the child as implied in the contract for the ski lessons.

What makes Québec different from Ontario and British Columbia, and why and how can the facts there that appear to establish substandard conditions and actions of the defendant not be considered at all, rather than equally weighed against the plaintiff's conduct or lack of ability to control the situation? The answer is the law's validation of liability waivers in common law areas of Canada have pre-empted this fair legal inquiry.

REPORT SCOPE

This report considers exclusions of legal liability (commonly referred to as 'waivers',[9] or 'liability waivers') for the injuries or deaths of consumers via contracts as well as via conditional licences to enter premises (warnings or notices). We examine this problem specifically in the context of three related industries that ubiquitously use these legal devices: amusement, outdoor adventure and recreation (including amateur sports and clubs).[10] We note, however, that liability waivers also can be applied in any consumer context where a business uses its business premises, or land or buildings under its control – because the common law continues to tie legal responsibility for injuries and death to property in this context – known as "occupiers' liability".[11]

We focus on the Canadian sports & recreation; outdoor adventure; and amusement & rides services ("SOAR") sector as they are: a large, growing (despite a serious drop in business during the COVID-19 pandemic – now largely recovered or recovering) consumer services industry; important to Canadian tourism; and are part of the relatively available outdoor and recreational opportunities provided by the geography of Canada. Consumers also are increasingly reliant upon such recreational facilities for entertainment, activities (especially for children) and socialization, as reliance on and access to informal gathering spaces such as city public parks and private homes and yards is reduced for economic and

[9] This term is used in several unrelated manners in common law traditions, including 'waiver of tort' – which generally allows a plaintiff to choose to sue in contract, not tort; waiver of contractual rights by election of a party or by estoppel; or waiver of (evidentiary or litigation) privilege. This report does not deal with these other legal usages, except to note, here, that the wording overlap can and occasionally does lead to conflation of concepts, misinterpretations of case law, and an increased impression of complexity to any of these areas.

[10] Generally, this is encompassed by the Amusement, Gambling, and Recreation Industries: NAICS 713 category. See more on the NAICS classifications, below. Note that we generally exclude gambling establishments from this study due to the refinement of the subject matter to those that involve specific bodily risk, but that gambling is generally considered part of this classification for high level employment and sector financial reporting.

[11] Although less common, businesses organizing activities undertaken on public lands or in public waters also make use of liability waivers to limit liability for negligence per se, that is, not necessarily based upon rules linked to use of private land. These waivers, despite not being linked to occupiers' liability, have been upheld on effectively the same principles by Canadian courts. See, for example, *Isildar* v *Kanata Dive Supply*, 2008 CanLII 29598 (ONSC); *Ochoa* v. *Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026 (B.C.S.C.).

cultural or social reasons. Negatively, they are also major sources of litigation over consumer injuries and deaths and liability waivers are both ubiquitous and uniformly relied upon for the defence of the business.

This report, despite the breadth of the commercial use of waivers, however does not cover other related industries: such as gambling establishments; nor does it analyze unorganized, private-individual-led excursions, even if these are technically undertaken on others' private or public lands, with or without permission (such as "backcountry skiing" or official or unofficial trail hiking); nor liability of homeowners and landlords for invited guests, for tenants and their guests and for casual visitors or even for trespassers; nor does it consider other consumer injuries or deaths caused by consumer products rather than services, that is, products liability – except to the extent that the lack of waivers in products liability law contrasts with the use and abuse of liability waivers for SOAR services.

Finally, safety regulators are an important part of the system which oversees the activities that this report is considering. These regulators are beyond the scope of this report, but should be considered for further research and in relation to their potential role in professionalization of this sector.

METHODOLOGY

For the research methodology of this project, PIAC undertook a secondary literature review of Canadian and selected foreign "common law" jurisdictions, including the U.K., Australia, New Zealand, South Africa and the United States and "civil law" jurisdictions including France and Québec. These inquiries surveyed caselaw, statutes, law journal articles, case comments, law firm blogs, book chapters and textbooks; as well as research in various policy areas including public health (public health statistics and policy papers, comment and government pronouncements); tourism and recreation (government statistics, policy documents, corporate whitepapers, business websites); and insurance (policy papers, government reports and studies).

PIAC sought and received feedback from academic researchers in the field of consumer preferences and decisionmaking prior to undertaking further research steps.

Following preliminary review of the secondary literature, PIAC designed survey forms for businesses, government regulators, schools and lawyers for both industry and consumers. These were distributed in late 2022 and left open for comment until 1Q2023. Only 3 of over 150 surveys were returned, despite two rounds of reminders and confirmation of all emails being received.

Based on these responses and our initial research, PIAC with the help of a national polling and research firm designed focus group scripts and inquiries. Three focus groups (two held in English and one in French) were held via ZOOM, online, in January 2023 and facilitated by the survey firm. PIAC representatives observed the focus groups, which were recorded, without interacting with participants. All participants were made aware of the terms of the research and the purpose of the research and were awarded a modest payment for their participation. Focus groups were limited to 8 participants each to stimulate free discussion and fuller time for answers.

PIAC continued secondary research during the drafting process. The final report was reviewed by an independent legal academic who specializes in Canadian consumer redress systems.

Focus group transcript excerpts are used below throughout the report where appropriate but are used primarily to illuminate common consumer perceptions, and misperceptions, about liability waivers.

SPORTS & RECREATION, OUTDOOR ADVENTURE, RIDES & AMUSEMENT INDUSTRIES (SOAR)

Based on our review of the case law and literature (legal and policy) discussing legal liability waivers, PIAC identified three consumer services industries as heavy users of these legal tools and as particularly likely to lead to consumer injuries and deaths: sports & recreation; outdoor adventure; and amusement & rides services ("SOAR"). These industries are not, however, to be thought of as the sole or even majority source of deaths or injuries or persons engaging in consumer transactions. What makes these areas interesting for our study is the heavy and (COVID-19 effects aside) growing consumer use and enjoyment of these services and the discrete body of law surrounding their use of liability waivers.

SPORTS & RECREATION INDUSTRY

For the purposes of this paper, the "sports & recreation" industry includes activities such as organized sports for both youth and adults (e.g., hockey, soccer, baseball), gyms and fitness classes (e.g., spin, yoga, Pilates), skiing or snowboarding, golf clubs, scuba diving.[12] While many of these activities are performed both outdoors and indoors, what differentiates them from outdoor adventure (see below) is the general pursuance of a common goal or framework, such as an organized game, or an individual physical goal, proficiency or achievement, such as fitness improvement, horseback riding skills and diving competency, rather than an individual thrill or experience where the natural setting plays a major part. Some activities, such as scuba diving, have strong elements of outdoor adventure, depending upon the location of the dive (e.g., in a pool versus a deep natural river). We acknowledge the overlap.

We include in this report information from, and recommendations about, amateur or non-profit sports and recreation,[13] without centering these, as at times it is hard to separate these from business enterprises (for example, high participation fees for amateur sports club membership) and as these activities account for many injuries and some deaths, as well as being one of the most common areas consumers will face signing a liability waiver. The disintermediation of for and non-profit, private and public offering of recreational services, as well as their importance and place in social and economic life, deserves additional study that would inform any more focused inquiry into specific matters such as those covered in this Report.

OUTDOOR ADVENTURE INDUSTRY

The outdoor adventure industry includes activities which often are thrill-seeking and physical in nature and can be, in physical risk-taking, like amusement & rides (see below) but that primarily occur in natural settings and are sold as challenges dependent on the surroundings. They also import an arguably elevated

[12] These are generally within NAICS category 7139 - Other amusement and recreation industries. See: https://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=307532&CVD=307535&CPV=7139&CST=01012017&CLV=1&MLV=5#

[13] We exclude playing or participating in professional sports as a paid participant or player, due to the added contractual elements and limited availability to the general public (although we do include spectators at professional sporting events).

risk vis-à-vis indoor-based activities due to additional natural features such as poor or unpredictable weather, changeable or extreme natural features such as cliffs, mountains and rivers, etc. These activities include: white water rafting, bungee-jumping, hang-gliding, para-sailing, tree top walks, spelunking (caving), and bouldering or rock climbing.[14] There is some evidence that the industry further categorizes these activities along a scale from 'low risk' or easy to 'extreme' – presumably meaning extremely dangerous or risky.[15] This category of consumer entertainment service is the newest of these three categories and is growing worldwide at the fastest rate among them. Some activities can overlap in essence with elements of the amusement and rides industry (e.g., bungee-jumping which can be performed outdoors (on a crane) but not really 'in nature').

RIDES & AMUSEMENT INDUSTRY

This report considers the rides & amusement industry to include: "establishments, known as amusement or theme parks, primarily engaged in operating a variety of attractions, such as mechanical rides, water rides, games, shows."[16] It also includes "indoor play areas" and "family fun centres".[17] Trampoline parks, one of the newest trends, fall in this category but also have important aspects of sports & recreation.

Although the Canadian "amusement" sector, according to the North American Industry Classification System (NAICS) of industries, category 7131, also includes gambling establishments and coin-operated and related gaming arcades, whether in establishments or at fairs, we exclude them, for definitional reasons related to the lower risk of bodily injury or the perception of such risk as not being a feature of these services, but rather, that the risk is largely financial (from gambling losses) or psychological "loss" risk (e.g., "losing" a game of Pacman). However, we acknowledge that severe consequences of financial loss and psychological addiction to these consumer services can cause injuries and deaths (largely from suicide) that are every bit as severe as those studied in this Report: we urge further research of these.

Current State of Industry

While Statistics Canada does not report the individual contributions to gross domestic product ('GDP') for each of these industries, Statistics Canada, using North American Industry Classification System (NAICS) provides reports that on an annual basis the "amusement and recreation" category - what we refer to in this report as "amusement". This category has revenues approaching $865 million annually as

[14] See Guidelines for various of these activities at: www.SupportAdventure.co.nz

[15] See June 2010, New Zealand Department of Labour, Review of Risk Management and Safety in the Adventure and Outdoor Commercial Sectors in NZ final report

[16] Statistics Canada, "North American Industry Classification System (NAICS) Canada 2017 Version 3.0", online: Statistics Canada, <www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=1181553&CVD=1182718&CPV=713110&CST=01012017&MLV=5&CLV=2>. The NAICS definition of "Amusement and Theme Parks" (NAICS 713110) is defined as: "This Canadian industry comprises establishments, known as amusement or theme parks, primarily engaged in operating a variety of attractions, such as mechanical rides, water rides, games, shows, theme exhibits, refreshment stands, and picnic grounds."

[17] See *supra*, NAICS 713120, "Amusement Arcades".

of 2022, exceeding the pre-pandemic figure of $710 million in 2019.[18] What we refer to in this report as "recreation" ("Other amusement and recreation industries" [NCAIS 7139]) is a much larger industry, dropping from around $10 billion in 2019 to a trough of $7.6 billion through the pandemic and rebounding $10.5 billion in 2022.[19] From these figures we can see the significant size of the amusement industry and its resilient ability to recover and flourish after the pandemic.

The global size of the adventure tourism industry is estimated to be "USD 282.1 billion in 2021 and is projected to expand at a compound annual growth rate (CAGR) of 15.2% from 2022 to 2030." With the strong recovery of the industry after the pandemic, we can see that these estimations, while seemingly grand, may be entirely possible. However, it is important to consider that Canadian-specific figures are not estimated and likely to some extents are covered by the NCAIS 7139 classification, however, tourism is specifically excluded from those figures. The result is that there is no reliable estimate of the Canadian adventure tourism industry and how much is driven by domestic or foreign consumers/tourists.

In addition to their contributions to national GDP, these industries also receive significant government funding at both the provincial and federal level. At the federal level, these industries are a significant source of pride when marketing Canada to tourists.[20] Their important impact on tourism was implicitly acknowledged by the federal government during the COVID-19 pandemic, when the federal government offered general wage and benefit supports and small loans. Most support, however, appeared at the provincial level, given the constitutional authority of provinces over most local businesses and generally property and civil rights, with these industries eventually receiving direct support for COVID-19 losses, in some cases after being initially overlooked by COVID-19 business relief efforts.

The effects of the COVID-19 pandemic were felt by all Canadian sectors and industries. However, amusement and recreation businesses were hit exceptionally hard, being often tied to travel, tourism, group activity and physical presence of the consumer. Being heavily dependent on publicly attended in-person events and establishments, these businesses were severely impacted by public health restrictions.

From 2017 to 2019, there was an increase in the total number of sales in the amusement and recreation industries. This changed in the early months of the COVID-19 pandemic when revenues drastically fell.[21] From 2019 to 2020, total sales decreased across the board, with amusement and recreation industries losing 27.7% of their operating revenue and 23.2% of their labour expenses.[22] The arts, entertainment and recreation GDP fell by 50% from $15.6 billion to $7.3 billion. In contrast, GDP for all Canadian industries decreased by 5.6% over the same period.[23]

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[18] Statistics Canada, Table 21-10-0104-01 Amusement and recreation, e-commerce sales. DOI: https://doi.org/10.25318/2110010401-eng November 16, 2022.

[19] *Ibid.*

[20] See, for example, Calgary Chamber of Commerce, "Canada as an adventure tourism destination" (27 July 2022). Online: https://www.calgarychamber.com/canada-as-an-adventure-tourism-destination

[21] Statistics Canada, Table 21-10-0104-01 Amusement and recreation, e-commerce sales. DOI: https://doi.org/10.25318/2110010401-eng November 16, 2022.

[22] Statistics Canada, Financial impacts of the pandemic on the culture, arts, entertainment and recreation industries in 2020, DOI: https://www150.statcan.gc.ca/n1/pub/45-28-0001/2021001/article/00033-eng.htm, August 17, 2021.

[23] House of Commons, "Impacts of the COVID-19 Pandemic on the ARTS, Culture, Heritage and Sport Sectors", DOI https://www.ourcommons.ca/Content/Committee/432/CHPC/Reports/RP11273701/chpcrp04/chpcrp04-e.pdf, April 2021, at 4-5.

The same Statistics Canada reports show that amusement and recreation e-commerce sales have been marginally increasing since 2017. Notably, from 2020 with the introduction of the pandemic, e-commerce sales began to grow more rapidly, likely due to the digitization of industry services.[24] Nonetheless, their growth is relatively minor compared to total sales loss and does not mitigate much of the harm incurred.

COVID-19 also impacted businesses' expenditures. With government efforts to assist businesses by providing nearly $800 million in funding, only roughly 50% of businesses surveyed by Statistics Canada indicated receiving support.[25] Provincial governments, like the Government of Ontario, provided additional support to businesses during the pandemic. The Technical Standards and Safety Authority (TSSA) reduced permit and license fees by 75% for 163 Ontario businesses, including amusement and recreation, until the end of 2022.[26]

Despite government aid, most businesses still experienced falls in salaries, wages, commissions and benefits.[27] Non-governmental revenue sources, which play a significant role in amusement and recreation businesses creating revenues through events, sponsorships, broadcast rights, registration fees, and more, also declined during COVID-19.[28] Between February and May 2020, 180,500 Canadians lost their jobs in the arts, culture, heritage, and sports sectors.[29] This forced businesses to change their operations by downsizing business activities, reducing labour costs, retrofitting the workplace, and adopting a contactless system.[30] Many business called for more government support to cover increased operating costs and financial stresses caused by the effects of COVID-19.[31]

As the world started to return to a sense of normalcy, total sales slowly but surely began climbing back up, with amusement and recreation industries experiencing a 1.9% increase in operating revenues in 2021.[32] By 2022, the figures surpassed the 2019 pre-pandemic levels by 28.8%, in part due to “pent-up

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[24] Statistics Canada, Table 21-10-0104-01 Amusement and recreation, e-commerce sales DOI: https://doi.org/10.25318/2110010401-eng, November 16, 2022.

[25] Statistics Canada, Government relief aid helped minimize the financial impacts of the COVID-19 pandemic in the amusement and recreation subsector, 2020, DOI: https://www150.statcan.gc.ca/n1/daily-quotidien/211202/dq211202c-eng.htm, December 2, 2021.

[26] Ontario Government, Ontario Expands Critical Relief for Tourism Sector. DOI: https://news.ontario.ca/en/release/1001595/ontario-expands-critical-relief-for-tourism-sector,

[27] Statistics Canada, Financial impacts of the pandemic on the culture, arts, entertainment and recreation industries in 2020, DOI: https://www150.statcan.gc.ca/n1/pub/45-28-0001/2021001/article/00033-eng.htm, August 17, 2021.

[28] House of Commons, “Impacts of the COVID-19 Pandemic on the ARTS, Culture, Heritage and Sport Sectors”, DOI https://www.ourcommons.ca/Content/Committee/432/CHPC/Reports/RP11273701/chpcrp04/chpcrp04-e.pdf, April 2021 at 17.

[29] House of Commons, “Impacts of the COVID-19 Pandemic on the ARTS, Culture, Heritage and Sport Sectors”, DOI https://www.ourcommons.ca/Content/Committee/432/CHPC/Reports/RP11273701/chpcrp04/chpcrp04-e.pdf, April 2021.

[30] Statistics Canada, Government relief aid helped minimize the financial impacts of the COVID-19 pandemic in the amusement and recreation subsector, 2020, DOI: https://www150.statcan.gc.ca/n1/daily-quotidien/211202/dq211202c-eng.htm, December 2, 2021.

[31] House of Commons, “Impacts of the COVID-19 Pandemic on the ARTS, Culture, Heritage and Sport Sectors”, DOI https://www.ourcommons.ca/Content/Committee/432/CHPC/Reports/RP11273701/chpcrp04/chpcrp04-e.pdf, April 2021, at 26.

[32] Statistics Canada, Table 21-10-0104-01 Amusement and recreation, e-commerce sales

demand" from consumers after two years of restrictions.[33] With global travel returning, the amusement and recreation industries, which rely heavily on tourism, have seen increased revenues. Inflationary price pressures on consumer households are, however, challenging much of this increase, making these industries' future uncertain.

Finally, regarding labour and employment in these industries, the majority of employees are generally low wage employees. Most hold non-supervisory positions and their hours are part-time. Although we were unable to locate comparable statistics for Canada, the US Bureau of Labor Statistics for data from 2022 and some of 2023, reports that, seasonally adjusted, for May 2023, 1.523 million of 1.743 million or 87% of Amusement, Gambling, and Recreation Industries: NAICS 713 employees were in non-supervisory or production roles (that is, not management or ownership). Of these non-supervisory employees, the largest group was "Amusement and Recreation Attendants" (224,500), who were the lowest paid of all such employees in the sector, earning only about $19.40 an hour and averaging about 21 hours per week.[34] Such statistics indicate the distinct possibility, if these statistics are comparable in Canada, that such workers may be poorly trained, supervised or incented to perform their job in a diligent manner, perhaps leading to increased risk of negligent performance of duties and inability to describe the effect of a waiver.

The conclusion regarding the SOAR industry is that it is recovering and surpassing pre-pandemic levels and likely to continue to grow strongly due to the social conditions noted above. The SOAR sector is clearly a high-priority segment of tourism industry and is viewed as a major economic driver, especially at the provincial level. It appears that there are, and likely will continue to be, potential issues with labour/training due to the use of a part-time, younger and poorly paid workforce. All of these trends are coloured by a demonstrable lack of clarity for customers regarding their legal rights and the effect of ubiquitous waiver use, which we detail below. The time is propitious therefore as there is clear room for improvement for the consumer with this being critical timing as the industry is set to continue to grow and be an ever more important part of our economy.

Unique Nature of the SOAR Industry

What these three industries – sports & recreation; outdoor adventure and rides & amusement – have in common besides relying on consumers' leisure time, are the following:

1. directly using consumers' physical bodies (that is, the enjoyment is physical and the consumer must be present, in person);
2. an element of risk of injury or even of death (or at least perception of a risk – *i.e.*, a "thrill" or physical exertion brought about by the movement of the body or otherwise), and
3. use of liability waivers before participation.

DOI: https://doi.org/10.25318/2110010401-eng, November 16, 2022; Statistics Canada, Amusement and recreation industry, 2021, DOI: https://www150.statcan.gc.ca/n1/daily-quotidien/221116/dq221116d-eng.htm, November 16, 2022.

[33] Statistics Canada, Amusement and recreation industry, 2022, DOI: https://www150.statcan.gc.ca/n1/daily-quotidien/231114/dq231114c-eng.htm, November 14, 2022.

[34] Industries at a Glance: Amusement, Gambling, and Recreation Industries: NAICS 713 : U.S. Bureau of Labor Statistics, online: https://www.bls.gov/iag/tgs/iag713.htm

Based on the focus groups participating in the research for this report (see below), analysis of the industry and its marketing, and examination of the waivers required, the existing conceptual framework of this industry has allowed a stunted jurisprudential treatment of this aspect of consumer protection and industry regulation to develop in common law jurisdictions, including all of Canadian provinces and territories outside of Québec. The legal regimes implicated appear to discount in particular the first two factors above once they are framed in the amusement industry and regarded as a consumer service. This permits courts and legislatures to tolerate and validate the third element, the complete waiver of all liability.

In essence, we find that the law in Canada outside Québec ignores or greatly downplays the solicitation of consumers' use of their bodies to experience exertion or a thrill (risk). This discounting of, or blindness of the law to, the simple physical fact of consumer participation in the activities as central and risky has allowed the legal framework to inadequately protect individual consumers. This conceptual oversight has allowed the harsh effect of waivers to flourish in this negative jurisprudential and policy space. Further on, we attempt to find the jurisprudential and historical reasons for the law's attitude to such risk.

Interestingly, this "downplaying" of consumer injuries by the law is echoed in the general attitude of policymakers in Canada towards injuries to its citizens in daily affairs, to which we now turn.

Injuries in General in Canada

Canada, at the federal level, and provinces, at that level, generally do not track injuries and deaths by specific business premises or activities. Instead, general reports tend to be gathered from hospital admissions and categorized by types of injuries not place or activity. Reporting tends to be the governmental responsibility of provincial health ministries or the Public Health Agency of Canada (regarding whose activities, see below).

Injuries are categorized by broad type of injury and generally not with sufficient granularity even to associate certain injuries with particular activities, even when specific injuries are most likely to occur during particular activities. As a result, general statistics on deaths and injuries in the course of the industries covered by this report largely are unavailable in Canada.

What can be gleaned from the few general injuries reports is that the number one cause of accidental injuries and deaths in Canada is falls from a height or on level ground.[35] While children and in particular those over 65 are most likely to die or be seriously injured in a fall, it is either the first or second cause of such events across all age groups. Second to falls by certain measures is contact with inanimate objects, which can include collisions with natural or man-made objects (excluding vehicle collisions).

Such reporting indicates that the types of injury risks in most SOAR activities likely are therefore very common, as many such activities involve heights, jumping, skiing, riding or falling, in a controlled or semi-controlled manner. It is therefore quite likely that were the reporting of such injuries required to be reported by activity and premises or place, and those cross-referenced to business activities, that a better sense of scale of the problem, and the effectiveness of any policy changes, could be more easily

[35] See, for example, the "Parachute" reports, which are irregularly issued, on a national and (some) provincial basis: Parachute. (2015). The Cost of Injury in Canada. Parachute: Toronto, ON; Parachute. (2018). Ontario Injury Data Report 2018. Parachute: Toronto, ON. See also: Economic Cost of Injuries in Alberta, 2020, Injury Prevention Centre, Edmonton, AB: 2020 and Injuries in Alberta: An Overview (May 2023). Online: injurypreventioncentre.ca

measured. Such a responsibility could be joint between health and tourism and consumer ministries but would likely have to be coordinated, negotiated and performed inter-governmentally.

The closest thing Canada has to a standardized and publicized dataset for injuries based on activities in the country is the Canadian Hospitals Injury Reporting and Prevention Program (CHIRPP), which is a data collection system run by the federal Public Health Agency of Canada (PHAC), focusing on injuries and poisonings to people who are seen at a limited number of hospitals in Canada.[36] Hospitals participating in this program identify and collect data on the injured patients, including what the injured person was doing when the injury happened, what went wrong, and where the injury occurred.[37] This information is logged in an electronic database referred to as eCHIRPP, and is later analyzed by PHAC staff and later used to make public health decisions.[38] This system has been used since 1990 to inform and assist researchers and organizations who make requests for the data in their studies.[39]

CHIRPP data has been used to inform public awareness campaigns and changes to safety regulations and requirements for amusement and recreation in Canada both on the localized and the national levels - as seen in the large scan national ban on baby walkers to localized replacements of diving boards in Montreal pools.[40] CHIRPP data has been shown to be largely useful across many safety issues and solutions, including improvements to designs for playground equipment, legislation in Nova Scotia enacting minimum-age for ATV use, public awareness campaigns for concussions in sports, and other positive changes to keep Canadians safer.[41]

Despite these successes, the program is limited in its data sample and scope. There are only 20 major hospitals across the country that participate in this program and therefor only 20 sources of data collection for the program.[42] It is also unclear to the public as to whether the data can be sorted by types of entertainment industries or whether the injuries can be attributed to specific businesses. The data itself is only published in scientific journals relating to specific topics, or directly shared with academics and policy makers performing specific research projects.[43] The raw data cannot be found openly and accessibly on PHAC's website or Statistics Canada's website.

PHAC also recognizes that the system's implementation in mostly urban pediatric hospitals limits its ability to represent data on injuries sustained by people outside major cities. For example, people living in rural and remote areas as well as people First Nations, Inuit, and Metis individuals are often underrepresented in the data.[44] PHAC has also disclosed that the data does not portray the incidents of

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[36] Public Health Agency of Canada, "Canadian Hospitals Injury Reporting and prevention Program" 22 September 2022, online: <https://www.canada.ca/en/public-health/services/injury-prevention/canadian-hospitals-injury-reporting-prevention-program.html>.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid*.
[40] Delsys Research, "Canadian Hospitals injury Reporting and Prevention Program (CHIRPP) and other injury prevention highlights – 25 Year Timeline" July 2015, online: < https://www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/injury-bles/chirpp/assets/pdf/timeline-chronologie-eng.pdf>.
[41] *Ibid*.
[42] *Supra*, note 1.
[43] Public Health Agency of Canada, "National CHIRPP studies and reporting" 22 September 2022, online: <https://www.canada.ca/en/public-health/services/injury-prevention/canadian-hospitals-injury-reporting-prevention-program/injury-reports.html >.
[44] *Supra*, note 1.

death resulting from these injuries, as the hospitals only collect CHIRPP data from individuals who arrive in hospital before passing.[45]

Being a hospital-based reporting system, CHIRPP also does not account for any injuries that do *not* result in an individual going to a hospital and places the burden of the reporting on health care professionals rather than on the establishments where the injury occurred. This adds to the strain on the Canadian healthcare industry unjustly, while potentially negligent owners of recreational establishment bear little responsibility for the injuries sustained within their operations.

Beyond the CHIRPP system, there are sparingly published reports that attempt to identify specific patterns or data related to injury. For example, a 2011 report from the Canadian Institute of Health Information found that over 5600 Canadians are injured every year in winter activities.[46] This report broke down the injuries into specific activities like snowboarding, skiing, and tobogganing. As helpful as these reports are in fostering public awareness and policy development, they would be far more helpful if could be completed and published on a continuous basis, ensuring that data pertaining to the specific activities could continue to be analyzed and used in affecting policy change and regulation.

While it is encouraging to see that there are some workable avenues for data collection and distribution like the CHIRPP system, it is disappointing to see that the potential of these opportunities has not been fully realized.

Focus Group Findings

That negligent, risky or even deliberate conduct of the employees or agents of a recreational, adventure or amusement company, including misguided requirements or policies of the corporate employer, or inadequate or malfunctioning or worn-out equipment failure or any other reason whatever, is completely waived by the consumer signing or accepting a liability waiver, whatever the legal theory, appears to be inconceivable to consumers.[47]

Our focus group research indicates that most consumers likely cannot understand this legal sophistry, but more importantly, that they appear to have a visceral rejection of the idea that the law could exclude all liability whatever. Their rejection of this concept appears to be near total. It appears to create a cognitive dissonance so strong that they will avoid the issue or seek to qualify the potential of this legal result even when directly confronted with the real (legal) outcome of a waiver, which is that the SOAR service

[45] *Ibid.*

[46] Canadian Institute for Health Information, "More than 5,600 Canadians seriously injured every year from winter activities" (Jan. 17, 2012), online: https://www.newswire.ca/news-releases/more-than-5600-canadians-seriously-injured-every-year-from-winter-activities-509453341.html

[47] This is consonant with the findings of the B.C. Law Reform Commission, that waivers are "not worth the paper they are printed on" (*supra*, at p. 34) by which consumers appear to mean that they can still sue and get redress, despite signing a waiver, provided the operator was negligent. See also the list in "Public's Perception of Recreational Liability Waivers" section of Susan E. Gunter, "Waiver of Liability in Recreation Cases", in Annual Review of Civil Litigation, 2017 (Toronto: Carswell), at p. 408, which also includes a public perception that "waivers do not protect operators and occupiers from their own negligence".

provider will pay nothing and indeed the consumer's claim will not even be examined as to whether it is blameworthy or not by a court.

This was dramatically displayed in our focus groups. When the moderator squarely put the almost certain legal effect of the signing of a comprehensive waiver of liability before the group and explained that it meant that the business would in no way be liable, no matter the consequences of the business's own negligence or that of their employees, no matter what, and that the consumer would get nothing in a legal action (not even a partial amount), participants simply refused to accept this could be the result. In reaction, one participant even posited a fanciful, and extreme alternative example that included new, imagined facts, imagined disputation of the signing of the waiver (which was assumed in the question), and the unsupported conclusion that somehow this result could be somehow avoided:

> Moderator: and I'm just gonna kind of circle back. So what if I told you that when you're signing these waivers, that you, you do actually, um, you waive the right … even the right to sue, even if it is at the fault of the facility. How would you feel about that? Is that news to you? What are your thoughts?
>
> D., yes, you're nodding.
>
> Participant D: That's news. Yeah, because say, my child goes skiing, so jumps on a school bus. And that school bus driver is drunk right? I did not sign that form … so, so I would think it would vary. Right?
>
> Moderator: Vary by kind of situation?
>
> Participant D: Yes, yes.

However, this is exactly the situation that potentially would be covered by a comprehensive liability waiver. The focus group participant was emotionally engaged by the question but "changed the game" by changing the assumptions of the question, in order to raise a factual situation that could be outside of the core activity (driving to the ski hill, not the skiing at the ski hill); could result in individual liability of the driver (not the school board or ski school) as possibly the driver conduct could be argued to be outside of their scope of employment (being drunk on the job) or even that the bus driver was not an agent in the employ of the ski hill. He then pivoted to suggest that he "did not sign that form", by which he appeared to imply either that he would argue at the least he did not understand the form, or perhaps even dispute that he signed it (when the question assumed he had done so), or at least that the form would not be comprehensive enough to cover this activity. He then tried to deny the premise of the question in another way by saying the situation would "vary" depending on the situation (depending on these or other facts).

This is precisely contrary to what waivers do. They exclude consideration of the facts and the scope of the defendant's duty. Nothing turns on the facts or the circumstances; nothing "varies": the duty has been disclaimed in writing and the court will not examine the facts or law in relation to it until after it considers the effect of the waiver – which may be to preclude the tort analysis. Yet the focus group participant could

not accept the cognitive dissonance he had between what he had been told was the law and what he thought the law should be. This was a dramatic moment.

The moderator asked the question again to the full group:

> Moderator: What are other people's thoughts on that, that if, if you're signing the waiver, and you actually are signing away your right to sue, even if it is the fault of the organization or the facility?
>
> Participant M: It would definitely make you think, doublethink about signing it before, because, you know, those risks are there.

This participant, when the moderator nonetheless insisted, for the second time, on the actual legal effect of the waiver ("you actually are signing away your right to sue"), stated she would "doublethink", which appeared to be a way of saying "rethink", the signing of such a waiver. This suggests that if consumers were truly confronted with (and were able to comprehend) the real import of a liability waiver – *i.e.*, that no recovery would be possible even if it is the (admitted) fault of the business or defendant – that many consumers would either not sign the waiver, not participate in the activity, or at the least give the waiver far more scrutiny. Other consumers might simply shut down the conversation, like our first participant.

By contrast, our focus group research indicated that consumers have a different conception of liability: they do appear to accept at least some amount of personal "responsibility" for what the industry calls "inherent risk": that is, they accept that if they are just "bad" at an activity, or have an "accident" or "play around" or otherwise do not follow the recommended method or accepted customs of how to, for example, ski, that they should bear that loss. Indeed, almost every participant in our focus groups initially conceived of liability waivers as excluding only such 'inherent risk' that they were 'responsible for' despite the dangerousness of the activity in itself. [From focus group #1]:

> Alanna (Moderator): what does it actually mean when you're signing a liability waiver? Can you still sue for damages? Are there exceptions, or do you feel like you're basically signing your life away. So what does it mean to you? What do you feel like you're doing when you're signing that?
>
> Renee: I? It depends on the circumstances you're waving. You're acknowledging that you accept there's risks. But, like somebody said earlier, it depends on if they're negligent. Like, if I'm – I'm gonna go back to snowboarding […] – if I accept the risk that: 'Yes, I'm going to barrel down a hill at high speeds with my feet stuck to a board, and I may fall in and break a leg' – that's one thing – but if the chair lift fails and I fall off, or something else happens, then that's certainly not my poor snowboarding skills. That's their faulty equipment, so I would like to think that I certainly haven't waived my right to fight over that. If that makes sense.

It seems fairly obvious that the participants in our focus groups, not being lawyers, naturally focused on the factual 'risk' of their performance and contrasted that with the potential factual actions or situations brought about by the SOAR operator and then balanced or judged those facts. In this sense, the focus groups were performing a jury-like function of being the trier of fact. The law, however, is what

determines liability, attribution of degree of fault, etc., and not the fact finder (although findings of negligence can be left to a jury as finder of fact – if a jury and not judge alone tries a case).

While our study was not in-depth enough to definitively determine definitively why consumers had this assumption of the narrow purpose of waivers (as being to cover only such inherent risk and in a way, act only as a 'warning' or 'reminder' to a consumer to take care and perform the activity carefully and prudently and well) there were some revealing statements suggesting possible rationalizations, assumptions and attitudes, as well as consumer preferences:

- Participants thought that on balance, while some activities were dangerous, that nonetheless, they were so part of established leisure activities, that their risk was acceptable to society, and a fair trade-off in order to have the ability to do the activity.
- That there were few public activities that were risk-free (often expressed in relation to assumption of risk of driving a car on a highway, or walking on icy streets) but on balance it was better to do them than sit at home
- That there was a limited scope of activities, especially for children, that required and encouraged physical activity, so to achieve fitness one had to undertake activities such as sports or amusements that had some physical risk.
- That they were responsible for any "normal" consequences of activities that imported a risk – and that the more thrill (danger) involved, the more responsibility the consumer had to "be careful"
- That the business and its employees would be working hard to avoid any injury to consumers as it would be 'bad for business' if consumers were hurt or killed there.
- Most thought that for a very bad injury or death, that some liability could be placed on the business, no matter what they had signed or what notice was posted.
- Most thought courts could void a waiver depending on how "bad" the accident results were or how "badly" the business had been operated.
- Many thought that signing a waiver was not binding on them;
- Many thought crossing out sections of waivers, rewording them, initialling these changes or simply not signing them would help them to avoid the effect of the waiver.

Certainly, our focus group participants expressed concerns about the qualifications, age, diligence and training of non-supervisory employees at recreation centres in Canada affecting their ability to explain or modify waivers of liability (from Focus Group #1):

> Alanna (Moderator): Has anyone ever tried to reach out and ask questions to see clarification about the content and scope of the [waiver]?
>
> Renee: Generally the people administering them are like the high school or college kid who works at the front area. And is … it wouldn't happen [*adopts mocking tone of teenager*] "uh, they just gave it to me, [sign] here". So no, I can't say personally that I have questioned anything, because the person wouldn't have the knowledge or the authority to I suppose, navigate it with me.

and

> Alanna (Moderator): Has anyone in the room tried to reach out or ask questions or standing at the […] No? Scott, you scratch things out. Has anyone been standing at the counter and asked questions about what […] what things mean in the waiver?
>
> Ben: I might have done it once, but it's just like it's very rare, right? So it's not like it's like, what does this mean? Oh, okay, I'm just gonna watch my kid a little more carefully when they're doing something that I think might be a little more dangerous. But I'm like, okay, they don't, really. Yeah. And sometimes they have the, they've had lawyers put the thing together. So it's got a lot of legal terms and, and it's someone at the front. They're, they're not lawyers. So they don't know what they're talking about half the time anyway."

It was also clear from our focus groups that although participants had a fuzzy understanding of the general law of negligence, that they were unclear on its boundaries or exact nature (more on this below).

This is unsurprising, as the concepts are being ever refined by courts, however, at its most basic, negligence is a finding of conduct towards other persons that exhibits a lack of due care causing them harm. Focus group members however easily understood the concept of due care and expected a basic level of such care in services.

THE LAW OF LIABILITY WAIVERS IN CANADA

What is Negligence?

In order to understand liability waivers, one must understand private civil liability law in Canada, in particular, the concept of negligence.[48]

At its most basic, negligence is a finding by a judge or a jury of conduct towards other persons that exhibits a lack of due care causing them harm.

Such a lack of care (either by acting, or, in fewer situations, not acting) can lead to harm for those other persons, who then can sue the "tortfeasor" (the person who did not take care) in negligence. Astute readers will note that the boundaries of this "duty of care" are not easily specified. Common law (which defines much of tort law) in most Canadian provinces has been slightly modified in statutes (written laws) at the provincial level. However, most of common law is determined by case law, that is, decisions of the courts. The Canadian common law follows, to a large extent, the English (United Kingdom) common law which was imported to this country by the settlers from England at the start of the settler-colonial project in Canada.

[48] One should also note that negligence, which is part of a branch of law called "tort law" ("tort" being wrong or harm in Old French, from which the term comes in law) operates separately from contract, meaning that a situation can be governed both by a contract and by tort law or negligence (see more on this key legal debate between contract and tort, below). This adds complications for the law – but also for the average person in understanding their legal options and obligations and no more so than in the area of liability waivers.

This means that we generally follow English "precedents" (case law on the particular subject) in Canada. The scope of the "duty of care" under negligence law in Canada is one of the textbook cases of Canadian law (in the common law provinces), generally following English law.

Canadian common law provinces followed the most important tort case from the U.K., called "*Donoghue* v. *Stevenson*" which is also known as the "snail in the bottle of ginger-beer" case. The English highest court, the House of Lords (at that time), defined the duty of care in this manner:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be–persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[49]

It is not enough to simply say that a party has a duty to another, as noted in *Donoghue* v. *Stevenson*. In order to be held liable, that party (the "defendant") must "breach" the duty by not living up to a "standard of care", that is, a level of conduct that generally would be careful enough to avoid injury to the other party (the "plaintiff"). Besides reducing the potential scope of this duty to the persons reasonably close in proximity to be foreseeably harmed by substandard conduct (see the "neighbour" principle above), the law in this area also requires "causation" – that is, the conduct of the defendant had to have a reasonable relation to the cause of the plaintiff's injuries.

Finally, it is to be noted, especially if one can be responsible for acting or in particular, for not acting, that a party may not only harm another through actions or inactions of that party, they might also harm another person through the personal property they use (as when driving a personal vehicle) or the state of their real property (for example, having unmarked open pits, tripping hazards, broken stairs, etc.). This last type of negligence, in relation to real property, has been dealt with specially by the law, as detailed below, and is called occupiers' liability.

What is Liability?

Liability is a finding of legal fault, usually coupled with a compelled requirement to pay for injuries or loss of another party, as determined by law. In material terms, a finding of legal liability (for example, for being negligent) often results in a "judgment" to pay an amount of money as "damages" to the injured

[49] *Donoghue* v *Stevenson* [1932] AC 562 at 580, per Lord Atkin.

party. Practically, this means finding the money to pay a judgment or order of the Court. Such judgments can be in the millions of dollars, for example, for a catastrophic injury where an injured person requires 24 hour care and rehabilitation for a lifetime. Such occasionally huge sums and many lesser, but still expensive to remediate (compensate) injuries, are however a fairly frequent outcome of SOAR activities in the consumer services market. As a result, besides vigorous legal defence of claims and obtaining business risk insurance, defendant businesses and their lawyers look for methods to defeat or discourage the bringing of such negligence claims: by waiver.

What are liability waivers?

Liability waivers, especially as used in the SOAR industries, are written documents, whether so named or not, or parts of other documents, often bolded or surrounded by a border, or even parts of other contracts, and myriad other or similar documents presented to a consumer wishing to do an activity such as bungee jumping, water-sliding, hang-gliding or trampolining. Before staring the activity, the business requires the consumer to sign the document (or otherwise indicate they agree, ideally but not always, in a way that records the consent, such as "clicking through" a waiver on a computer, tablet or cellphone,[50] or 'signing' a document called a 'waiver' or 'release'). If the consumer does not sign the waiver, the business controlling the activity usually reserves the right to refuse entry to the consumer or otherwise prevent the consumer from doing the activity. The purpose of the liability waiver, today, is to protect the business from potential liability to pay for any accidents, injuries or even its own employees' and servants' negligence, leading to bodily harm if the consumer is injured, or even dies, in participating. Written, signed waivers are treated by courts as a contract or part of a contract – with all of the legal analysis and formal requirements that such a classification brings, and is detailed below, such as agreement of the parties, formalities such as signatures, and an exchange of "consideration" (a form of value in law). Contracts are generally very difficult to challenge in their entirety – that is, on substantive grounds, outcomes or policy arguments – despite several legal theories. We shall return to this legal bias below.

What is a licence?

Before returning to a detailed examination of contractual waivers, we must take a tour through a very closely related, but legally separate mechanism, the "conditional licence" or "notice" that likewise allows "lawful" entry to a venue but attempts to disclaim liability.

"At its most basic, a licence is simply a permission to do something on the land of another," says a well-respected comprehensive overview of English private common law.[51] It should be noted that licences are not contracts, and as such, there are no formal contractual requirements to create a licence. Such a "licence" to enter property of another, is granted upon specified conditions, and is usually exhibited on a prominent sign on the premises near the entry, or is printed on entry tickets or otherwise exhibited at notices at an entrance to a business, theatre, or any other lands controlled by another, performs a similar liability waiver function. While this report focuses primarily on written waivers of liability signed by consumers, it also traces to some extent the parallel development and use of conditional licences (notices)

[50] See, for example, *Quilichini* v *Wilson's Greenhouse*, 2017 SKQB 10 – electronic waiver upheld.
[51] Peter Birks, *English Private Law* (London: Oxford University Press, 2000) at §4.171, *et seq.*

as these can be a method for business to achieve the same result, either independently, or as a backup to the written waiver. Notices of this nature are also widely applied where it is impractical to obtain a written waiver – for example from thousands of spectators at sports arena. Finally, the presence and overlap of effect of both contractual waivers and conditional licences greatly complicates the law regarding liability and leads to much confusion for SOAR businesses, consumers, lawyers, judges and legislators.

Although statutes in most provinces appear on casual examination to have made contractual waivers and conditional licences a distinction without a difference, the legal differences can indeed produce consequential results. However, as implemented in practice, the exact nature of the written or posted waiver or conditional licence (entry notice) in law rarely matters to the usual result: consumers' claims are wholly defeated by waivers be they contracts or conditional licences.

Contort: Contract Trumps Tort

If consumer expectations and understanding of liability waivers are so wrong, why is this legally possible? Why cannot a consumer argue that the offering of a service under the cover of such a waiver of any liability is not itself wrong or negligent? Why are waivers used to override clear negligence and all of tort law?

The answer is that "contract trumps tort" in the common law.[52] In short, under common law, which is the foundation and basis upon which private law (that is, actions brought by or between private persons, including businesses) in each of the Canadian provinces and territories is based (with the notable exception of Québec), a business can, by contract with (or possibly only adequate notice to – see below), a consumer, change the legal outcome that would otherwise apply to a situation. This has been called "private ordering" under common law.[53] The concept of and excuse for this "private ordering" is that private law (that is, between private citizens without the state being involved) promotes a "rational" and "market-based" outcome that is the most "efficient" – at least from an economic point of view. The other justification for private ordering of risk or other consequences of interactions under contract is that it promotes "personal responsibility" and "personal autonomy". Some lawyers even claim private ordering

[52] Fleming, John G.. "Tort in a Contractual Matrix." *Osgoode Hall Law Journal* 33.4 (1995) : 661-678, at 663, citing Peter Cane, *Tort Law and Economic Interests* (Oxford: Clarendon, 1991). DOI: https://doi.org/10.60082/2817-5069.1637 Online: https://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss4/2 Note that this conclusion was relatively recently developed – further below in relation to the course of development of the common law – it was not a certainty or forgone conclusion.

[53] *BG Checo* v *BC Hydro*, [1993] 1 SCR 12, at p. 27:

> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering-the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished.
>
> The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way.

is the basis of the entire common law[54] – which is only arguably the case in contract law, and certainly not in tort law – which is focused on the community's view of acceptable behaviour (the duty to others), and only very tenuously, if at all, in other legal areas.

However, under this conceptualization of the efficient operation of the market, the customer is free to take the service or to leave it. A waiver, then, is a contractual agreement not to impose a duty of care on the business (a tort law duty to keep a customer reasonably safe in using the business's services) even if that business or its employees carelessly hurts a customer or has equipment or premises that otherwise were dangerous or used or maintained improperly.

This is the pat and usual explanation of the legal situation, namely that the courts have declared waivers to be fair, or at least legal, even if sometimes misunderstood by the public, and the supposedly rational economic rules underlying it. Susan E. Gunter, a leading defence lawyer, in her leading paper on waivers, expresses this idea in her closing paragraph:

> Courts use traditional contract law principles to ensure that the waivers are fair and case law specific to recreation liability waivers attempts to address the reality that the participant is often unaware of the significance of the consent being provided. Courts will continue balancing the interests of the public in ensuring protection in recreational endeavours and the importance of freedom of contract, all against the backdrop of evolving Canadian contract law and public policy in favour of government programs. But, the public, individual and corporations deserve a better understanding of the consequences of signing waivers in recreational activities.

Such an explanation appears difficult to challenge in any way, positing in essence a normative reality, that it was and always shall be thus, and therefore, like it or not, it is just. This is not true. Waivers are clearly unjust to consumers, and are perceived as such by them. As to the law, it has not always been thus – indeed we trace the contorted path of the law that led to the enforceability of waivers in Canada. Finally, there is another structural legal factor, however, in Canada and other common law jurisdictions, that also leads to the upholding of contractual waivers. It is far more rooted in the historical development of the law and is less essentialist and more plausible than Gunter's assertion that it is the natural order of things

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[54] See Susan E. Gunter, "Waiver of Liability in Recreation Cases", in Annual Review of Civil Litigation, 2017 (Toronto: Carswell), at p. 406, where the author is discussing new attempts to limit the scope of liability waivers in light of public legislation:

> "Courts are increasingly being asked whether it is against public policy to contract out of government compensation regimes and government consumer protection legislation. If these arguments find favour in the courts, the law of liability waivers may find more fact-based exceptions on enforcement dependent on whether there is an applicable government public policy that supersedes *the well-grounded freedom to contract on which our common law is based*." [Emphasis added.]

While in the emphasized part of this statement Ms. Gunter gets a little 'over her skis' so to speak, the author's paper is comprehensive, essential, and a clear statement of the defendant bar's viewpoint which is that although waivers can be harsh, they are enforceable and that is the law but in fairness consumers, businesses and lawyers are all uninformed or mistaken about the applicability and enforceability of waivers. This paper is therefore a sometimes fair and often compassionate discussion of consumer confusion and the difficulty of navigating the law of waivers by all involved in the recreation business. Hereafter, "Gunter".

that waivers should be upheld. Professor Fleming, arguably the leading tort law scholar, provides the clue about the conditions underlying the creation and reliance upon waivers, namely the confluence of contract and tort law and the law's hesitation and confusion about their roles, until it was settled in the late 1900s:

> As an introduction to these "contort"[fn8] problems, the basic "concurrence" question should first be briefly addressed. ***English law, in contrast to the French,[fn9] eventually took the view that a contractual obligation between the parties does not preclude the concurrence of a tort duty in the same respect, so that the injured party has the option to pursue either a contractual or a tortious remedy.*** Initially encountered mainly in relation to claims for personal injury and property damage, application of this principle has been greatly increased by the contemporaneous expansion of negligence liability for economic loss, especially in its application to professional services by accountants, bankers, and lawyers.[fn10] The motivation behind this development seems to have been to make procedural and other advantages of tort, such as contribution or a more favourable starting point for the period of limitation, available to the claimant. Moreover, it makes no sense to withhold these advantages from recipients of contractual, as opposed to gratuitous, services. *But the tort duty is subject to contractual modifications, such as a lower standard of care or limitation of liability, in deference to the belief in the primacy of private ordering.*[fn11] In short, the starting point for tort in a contractual matrix is, to borrow Peter Cane's pithy axiom, that "**contract trumps tort**."[fn12] [Emphasis added.][Footnotes omitted.][55]

So, the common law, in dealing with a fundamental problem of jurisprudence, namely "concurrence", or how a system of law will deal with the overlap in private law between "private ordering" (usually, "contract") with semi-public duties to the community not to cause undue harm ("tort" law in common law and "delict" in civil law), eventually settled the matter by allowing the overlap. The common law took time to face the problem, as until business to consumer commerce grew to be a common occurrence, the matter was minor and avoidable. However, as commerce increased and "consumer" culture was birthed in the late 1800s and 1900s, the matter of whether consumers could sue only on a contract, or also in tort, first for products, and then services, had to be answered.

The common law eventually settled on the law that defendants could be sued under both tort and contract concurrently. This is the reason why the leading "tort" case of *Donoghue* v. *Stevenson* (the "snail in the bottle" case) referred to above, from 1929,[56] is so important. The defendants (ginger beer manufacturers) argued they did not have a contract with Ms. Donoghue, who drank the ginger beer (with snail in it) after it was purchased for her by a friend at a café (which was reselling the ginger beer). The manufacturer had no contract with the consumer, so no contractual liability. The U.K. House of Lords found that even though the defendants would be liable to her if she had bought the bottle at the factory directly (a consumer contract) that they also were liable on tort principles if she was a *likely consumer of the product* in a non-contractual chain to the ultimate person drinking the ginger beer.

The common law therefore finally settled that it would allow concurrent liability in contract and tort, which would expose defendants to not one but two possible legal regimes and sources of liability to the

[55] John G. Fleming, "Tort in a Contractual Matrix" (1995), Osgoode Hall Law Journal 33.4 (1995) : 661-678 at 663. DOI: https://doi.org/10.60082/2817-5069.1637 ; https://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss4/2

[56] [1932] A.C. 562 (H.L).

plaintiff. However, in a series of cases, the common law courts *reduced* the potential effect of overlapping liability on defendant businesses by providing the contracting parties with the ability to avoid the semi-public tort duties and restrict the plaintiff to only the liabilities contracted for. It is notable that civil law (which is the basis of the law in Québec) does not have overlapping tort (delict) and contract duties. In the Québec Civil law system, the defendant cannot disclaim tort duties. The defendant can only argue that their arrangement is solely a contract without overlap on a wide public. This is difficult in regards to consumer recreation services such as those studied in this report. Indeed, as we shall see, Québec and French civil law explicitly prohibits even the attempt in contract to alter liability to the public, or to state it is a totally private contract, in part for this reason.

If the answer the courts gave to society's question about what should or should not be allowed to be in contracts seems harsh, we first answer that there is a deep structural answer or bias in common law that goes some way to explain this incongruous and certainly heartless result is that (recall): contract trumps tort. Once contract controls, the only hope for consumers is contract interpretation. Contract has never served consumers well.

Contractual Requirements of Waivers

To say that limitation of liability clauses have exploded since this legal shift to concurrent liability is not an exaggeration. As Professor Fleming continues in his article, the law since has been "obsessed" with trying to deal with the scope of the power left to parties to contract out of tort duties (that is, to enforce, or not to enforce, waivers). We turn to those problems of form and enforcement of waivers now in the context of consumer SOAR services.

The formal requirements of concluding waivers as a special subset of contracts are often battlegrounds between businesses that seek to enforce them and consumers looking to avoid them. We deal with some of these formalities below but consumers would be far better protected with a full prohibition of waivers.

We note that the battle over formal requirements of the wording, form, coverage (what liabilities and risks were excluded) and execution (signing) of waivers is pure contract law and does not affect the core enforceability of waivers as legal documents that can exclude liability of SOAR operators. Such formalities can be done "wrong" and the waiver thereby found not to exclude liability only because the formalities were not followed properly. These "mistakes" in good waiver practice appear to be what defence lawyers incessantly refer to in their papers on this issue as the "uncertainty" of waivers or that their enforceability is a "toss up" or that there is somehow a continuing debate as to the enforceability of waivers as a legal instrument.[57] This is untrue: if waivers are correctly worded, presented and executed,

[57] This spurious or at least misleading argument is a central feature in Gunter, *supra*, at 406-7: "Whether a court will enforce a waiver is a gamble. In a case law review, in Ontario, the same number of cases found the waiver unenforceable as enforceable there was a 50-50 chance that the waiver. would be upheld." What is not noted is that in the 50% rejected – all were on contractual formation formalities – on the other 50% all were upheld once the formalities were met. This means that 100% of the time, the plaintiffs' arguments of unconscionability of waivers, or that they offended public policy, or were unfair in some manner to consumers – were rejected.

they are now invariably upheld by courts as "legal" impediments to suing. In other words, waivers are, if done right, actually 100% effective.

Briefly, the law on the formal contractual requirements of waivers is stated in the leading *Karroll* v. *Silver Star* case (decided by then B.C. Superior Court Chief Justice Beverley McLachlin – who became the first woman to be the Chief Justice of Canada's Supreme Court) as well as the *Isildar* case, *Loychuk* case, noted above, and an old chestnut of a case from England, *L'Estrange* v. *Graucob*.[58]

Karroll v. *Silver Star* established the ground rules for the contractual formalities of contractual waivers. The Court there reconciled two lines of authority – one from *L'Estrange* v. *Graucob* that had found that consumers were bound by contracts they sign, whether they read a contract or not, and could only escape the contract terms if they proved "non est factum" (literally, "not my act") which means they thought they were signing something other than what the contract was; or positive misrepresentation of the terms of the contract by the company offering the contract which caused the plaintiff to sign it. The other line of authorities required contract terms that excluded liability were brought to the attention of the consumer to be binding. Justice McLachlin squared this particular circle by stating the requirement to bring onerous terms to the attention of the customer was only when *the company* offering the contract *had reason to think* that the customer did not know what they were signing nor its import.

While this "eye of the beholder" standard seems a clever fix, it leads to a factual analysis in each case of the circumstances of the signing of the waiver, of the clarity of its language, and even the font size and legibility of the wording. Some regard also is had to the available time to read the document and its length. In *Karroll*, the plaintiff in part failed because she admitted the one page waiver would have been readable, had she read it, in 1-2 minutes. In short, due to the plaintiff's ability to read, time to read, understanding of the intended legal effect in general and the plaintiff's familiarity with such waivers, the Court concluded the defendant could objectively believe the waiver was understood by the plaintiff and so did not need to bring the waiver specifically to the attention of the plaintiff.

Even so, the Court went on the find that despite the lack of need to highlight the waiver's purpose, the defendants had indeed brought its purpose to the attention of the plaintiff and its import was clear.

In addition, the wording of the waiver had to be objectively wide enough to cover the harm that actually befell the plaintiff and the liabilities disclaimed described broadly enough to cover the defendants actions (usually the negligence of the defendant or its servants or agents). This the waiver did in an economical and understandable way, that clearly disclaimed even the operators' own negligence. It read in part:

> … in respect to death, injury, loss or damage to my person or property, wheresoever and howsoever caused, arising out of, or in connection with, my taking part in the Event and notwithstanding that the same may have been contributed to or occasioned by any act or failure to act (including, without limitation, negligence) of Resorts and/or any one or more of its Agents.

[58] [1934] 2 K.B. 394 (Div. Ct.). Note that then Chief Justice of B.C. McLachlin cites this as the U.K. Court of Appeal. This is a common misconception of the authority of the court pronouncing on this important point. It was in fact only a Divisional Court. See J. R. Spencer, "Signature, Consent, and the Rule in L'Estrange v. Graucob" (1973) 32:1 Cambridge LJ 104 at para. 2: "It is often mistaken for a decision of the Court of Appeal, e.g., McCutcheon v. MacBrayne [1964] 1 W.L.R. 125 at p. 134, per Lord Devlin, quoted post, p. 1.17. This has probably given the case a weight of authority it does not really possess."

At a certain point, this law crystallized into a 'test' of formal legal contractual requirements, plus an additional substantive challenge to waivers on the basis of "unconscionability". Thus, in *Isildar*, the court stated a three part test for 'waiver validity' (at para. 634):

> 634 Based on case law as it has developed, a three staged 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?
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> 2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
>
> 3. Whether the waiver should not be enforced because it is unconscionable?

Point 1 recapitulates the 'new' requirement from *Karroll* v *Silver Star* about the company having no reason to believe the consumer did not understand he or she was signing a waiver or know that that would affect their legal rights.

Point 2 also was dealt with in *Karroll*.

Point 3 appears new. What is an 'unconscionable' contract?

After this case, it remained only for a court considering a waiver to add to the contractual formalities discussed above the contractual defences related to the unfairness of the contract in general, on public policy terms. In contract law, these are extremely limited, due to the common law's jealous guarding of enforcement of private contracts. Nonetheless, this bias meant lawyers tried other contractual arguments, such as unconscionability, noted above, but also, voidness on 'public policy' grounds and "fundamental breach". All of these also were doomed to fail as attacks on contractual waivers. We detail this fall now.

Unconscionability, Public Policy and Fundamental Breach

During this period, in Canada, the *Loychuk* case came to crystallize this view of waivers as a battle over whether such a contract was "enforceable", but also in dealing with substantive policy, rather than just formal legal, requirements. In *Loychuk*, after canvassing the law to date, Court of Appeal stated that in addition to the legal contractual formalities arguments that the test of contractual validity also included an examination of whether the contract were "unconscionable" and secondly, that the contract not be contrary to "public policy" which is tied up in an analysis of whether the contract was "fundamentally breached". In short, waivers were to be judged against societal norms (as the law saw them).

The Court of Appeal noted that in general in recreational tort cases, the courts in Canada had concluded that most waivers were not unconscionable, as such. Unconscionability requires a finding of two factors: first, that there is a serious imbalance of power in the contracting parties, but one that is, quoting an

earlier B.C. case, "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."

In general, the relative lack of familiarity with waivers in recreation has not been held by courts to be this level of difference in bargaining power. Generally, courts find that since consumers must have such clauses drawn to their attention, with wording such as "this affects your legal rights" or "rights to sue", that consumers are aware enough to make the decision to leave and not do the activity or to go ahead and participate and sign. Therefore the power imbalance is not of the abusive nature required for unconscionability at law, as the consumer has free will and is considered a "rational" economic agent. Issues of peer pressure and distraction have been raised as counter-arguments in many papers by plaintiff, and even some defence, counsel, but this has not impressed Canadian judges. In any case, the Court noted the unconscionability finding also requires a second factor: the "substantial unfairness in the bargain".

Again, Canadian courts have found that the "deal" consumers get, namely a physically challenging activity, or at least one experienced physically, often outdoors for "fun" or "recreation", is indeed a good enough bargain, even if the wages of this particular thrill may be death. In *Loychuk*, the Court of Appeal noted in remarkably direct and simple language their conclusion on unconscionability:

> To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release or waiver as a condition of participating. (at para. 33)

This is the ultimate issue, after all, to be examined in this paper. In this case, from the defendant perspective, the "boundaries of waiver enforcement in Canada were pushed the farthest", [59] and from the plaintiff side, the "Perfect Storm",[60] in Canada. Again, the Court of Appeal here ultimately justified this extremely harsh position on the freedom of the consumer to "walk away":

> The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity. (para. 40)

For good measure, the Court of Appeal in *Loychuk* also dealt with a final argument, that of "public policy" which once was separate from, but has since been categorized by the Supreme Court of Canada as simply a factor in analysis of what was once called "fundamental breach".

The argument from plaintiff's counsel, in *Loychuk*, was that waivers are contrary to "public policy" and should be voided, or that waivers essentially remove the entire benefit of the contract, indeed, the "thing contracted for" (such as the physical thrill noted above) as no one would consent to the opposite of physical, 'thrill' with pain, suffering or even death. They also added that ziplining left no control or performance to the consumer, so they could not take steps to avoid injury. The Court of Appeal rejected this last argument based on a recent Supreme Court of Canada case: "*Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, a case dealing with the enforceability of an exclusion of liability clause relating to a tendering process."

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[59] Gunter, *supra*, at p. 422.

[60] W Danial Newton, "Signing Your Life Away? An Update on Waivers", A paper delivered at the OTLA Spring Conference, 2012, Tab 9, at pp. 1, 10.

This case seems removed from liability waivers in a consumer context. What good would a case dealing with bidding for major government road paving contracts have with a ziplining case? Within the realm of "contract" law, however, concept of public policy or fundamental breach of contract was raised in many cases of contract that have sorely tested the limits and overlap of contract and tort (see "Contort" below). Since contract law in a common law system takes no notice of the "type" of contract, and assumes all parties, big or small, are freely contracting agents, cases applicable in one domain are applied in others and affect the law, and which party bears monetary losses, including which insurance will pay.

Tercon established that there is no longer an independent legal concept known as fundamental breach. No longer could a party argue that the entire benefit of the contract was removed by a waiver or exclusion clause. This extreme position was tempered only by the Supreme Court of Canada saying that there was now a final, faint hope argument of an 'overriding' public policy, but one which would have to bow to the interest of enforcing contracts in all but the most exceptional cases:

> If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. (per Binnie J., at para. 123)

Needless to say, and as indicated by previous hostility of Canadian courts to finding fundamental breach or loss of benefit of the entire contract in the realm of recreational torts, where the consumer was hurt while doing the activity he or she contracted for, both in *Loychuk* and *in all subsequent cases* we examined, precisely none of them have found any 'overriding public policy' (a hugely high legal barrier); the proof of which falls on the consumer – meaning they have to find such evidence of "overriding public policy", that would "the very strong *public interest* in the enforcement of contracts" against waivers in consumer transactions. This is in essence an impossible legal burden and is so designed to be.

Consideration

Briefly, we must also deal with the contractual concept of "consideration". This is because sometimes plaintiffs attack the waiver on the basis that there was no consideration for the contract (waiver) or that the consideration was given for a separate contract and the waiver was signed later, without fresh consideration to ground that separate contract, rendering it an unenforceable agreement.

A contract requires consideration to be validly concluded. Consideration is an "act or forbearance of one party, or the promise thereof" to secure the promise of performance of the contract by the other party. Both parties must give consideration for a contract to be valid, not just one party. The common law requires this mutuality of consideration for simple contracts to differentiate them from 'bare promises' that it will not enforce (one party only promising something of value).[61] Usually the consideration is a sum of money but it also could be forgoing some right or advantage that has, in the eyes of the law, a value. Courts have traditionally found almost any sum or advantage, and likewise any forbearance from an advantage, as of sufficient value, so that a consideration is present and the contract is valid.

Usually, there is no issue with consideration. A consumer enters a recreational business and signs a waiver (the promise to forgo the pursuit of negligence or other claims against the business) in exchange for the

[61] Note that civil law (as in Québec) does not have a consideration requirement to form an enforceable contract.

right to partake in the activity. In addition, in most cases, the consumer also pays an entry fee, lift ticket or other admission price.

Where the issue arises often is where the SOAR business provides instruction, lessons or some other advantage and takes payment for that service (say, learning to rock climb), then, later, just as the customer is about to start lessons, indeed the very lessons for the activity originally contracted for), demands that the customer then sign a waiver. In theory, such a promise by the consumer not to sue is not supported by 'new consideration' by the business for this new promise – as the customer has already paid for and be admitted to learn to rock climb. In short, the business has not offered any new value to the activity to extract this important promise from the customer.

We say 'in theory' because although there have been cases where consideration was found to be wanting if the waiver was signed after the initial payment for lessons, entry to the SOAR business, etc., recent cases since the *Karroll* case have nearly uniformly found either that the waiver was indeed a continuation of the original contract despite timing or, more frequently, that the actual participation by the consumer in the activity was the recompense offered by the business. So, in Isildar, the court opined that Mr. Isildar could have studied for diving in the dive course, but signed the waiver and then was permitted to actually go on the dives. This is obviously a strained interpretation to any sensible non-legal thinker.

Unfortunately, cases from Karroll and especially since Isildar onwards, have taken this approach of finding the actual activity to be the benefit to the consumer of the detriment given (the waiver). So, now, the law actually finds contract consideration to be in essence this: you make a bad bargain by signing a liability limiting waiver, and in return are offered a chance to be killed or injured by company negligence.

In our analysis, this is the natural outcome of the harshness of the extreme test for setting aside contracts as decided by the Supreme Court of Canada in *Tercon*. Courts are instructed, in effect, to find consideration and to drive over any common sense objections that the consideration is indeed valueless in a human sense, and only considered valuable by a legal system that has lost touch with basic humanity.

Contra proferentem

This last exception, or hope for plaintiffs, of limiting the scope or effect of a contractual waiver is the theory of contract construction referred to by its latin name: *contra proferentem*. This doctrine holds that where one party wholly writes and presents another with a standard contract with no real opportunity for negotiation, such as a waiver presented upon entry to a SOAR business, that if there are any ambiguities in the wording of the waiver, those words will be strictly construed against the drafting party and any benefit of the doubt be decided in the favour of the receiver of the contract (here the plaintiff or consumer). Courts routinely do find waivers to be standard form and subject to little or no modification by consumers and therefore claim to read waiver contracts contra proferentem. An example would be a waiver that did not refer to "negligence" only to "harms however caused" as not being specific enough to exclude negligence claims. Even more aggressively, courts have said that failure to have specific examples of the types of negligence that likely might arise in the context of the particular activity might mean a consumer would not be bound by a disclaimer only of "negligence" if it could be established that the consumer did not understand the concept of negligence.

Again, however, recent case law shows even this tactic of some trial or motion judges to now minimize aggressive use of *contra proferentem*. This again is likely a direct result of the harrowing admonition of

the Supreme Court of Canada in *Tercon*. In that case, the Supreme Court majority decided the case in part on a *contra proferentem* basis for the contractor against the Province of B.C.

However, it is the minority's extreme position that only 'overriding public policy' concerns, not contract construction, that should guide interpretation of waivers and exemption clauses has carried the day. Effectively, *contra proferentem* is related to efforts to find a way for a plaintiff to avoid a harsh result.[62] In both Canadian and English law, this has been effectively stamped out.

Defence lawyers continue to assert that it is a 'toss-up' between cases enforcing waivers and those that do not.[63] This is untrue. In fact provided operators follow the contractual rules laid down by courts the law on enforceability of waivers assures a nearly 100% win rate of those that are properly presented and executed. Since the latest articles in 2015, no plaintiffs have prevailed on any basis but the maladroit wording of waivers or their improper presentation to consumers, on the facts. The issues of unconscionability, public policy and fundamental breach, as noted above, are also effectively dead.

Development and Use of Liability Waivers

Comprehensive waivers[64] are meant to exclude all liability, whether in "tort" or by contract and, where drafted properly and as noted above, have the purported effect of removing an operator's duty of care to participants (in tort) and performance of contract duties (in contract) and therefore, in consequence, remove an operator's obligation to compensate participants in the case of accidents or injuries, no matter on what theory of legal liability the plaintiff frames the case. Legal liability for injuries or death, "howsoever caused" is typical wording.[65] Negligence and breach of a duty of care to consumers, including injuries or deaths caused by the undisputed or even admitted negligence of an operator or their employees is the main goal, but most waivers also exclude other potential liability for contractual performance, non-performance or any other breach of contract, property loss or damage and any other basis of liability (such as 'unjust enrichment' or other forms of restitution). Comprehensive waivers, as noted above, seek to protect the business and its employees in the course of employment or for their actions or failure to act (omissions) or for otherwise defective or unsafe equipment, poor or unsafe state of the premises, or any other reason.

Notices (of a conditional licence to enter a business – meaning a public sign or signage, rather than a signed document) disclaiming liability at venues have been required by the insurers of SOAR-type businesses for over 50 years.[66] In the last 30 years, written contractual waivers (that is, at the least a

[62] Liron Shmilovits, "Deus ex Machina: Legal Fictions in Private Law", PhD Dissertation, Downing College, Faculty of Law, University of Cambridge (May 2018), see Chapter 3, Section X, "Reading Down Exclusion Clauses".
[63] See Susan E. Gunter, supra, at p. 407, quoting statistics from the now dated Manitoba Law Reform Commission report of 2009 to the effect that in "44 cases spanning 4 decades" that the plaintiffs avoided the waiver's intended effect in 22 cases and the defendant was able to enforce the intended effect in 22 cases.
[64] There are two different types of waivers: specific and comprehensive. Specific waivers are meant to exclude liability for particular aspects of a business' activities. Exclusions such as waivers of responsibility for lost or stolen goods when deposited with a venue, such as a theatre, are a common example. This report, however, seeks to deal with comprehensive waivers.
[65] See *White* v. *Blackmore*, [1972] 2 QB 651, [1972] EWCA Civ 11 and *Isildar* v *Kanata Dive Supply et al*, 2008 CanLII 29598 (ON SC), at para. 676.
[66] See *White* v. *Blackmore*, [1972] 2 QB 651, [1972] EWCA Civ 11, per Lord Denning:

separate document signed by a participant in an activity, such as 'tubing' down a ski hill[67]) covering some eventualities and specifically seeking to exclude negligence liability, developed in Canada and elsewhere in the common law world. Gradually, these documents have tended to be incorporated into other conditions of entry to a premises or to be included in contractual service documents.

This led to a period where many cases turned on the prominence of the liability waiver in any contractual document or other form signed by the consumer to participate in the activities in question. A leading case in Canada is *Crocker* v. *Sundance*, the "snow-tubing" case mentioned above,[68] in which the Supreme Court of Canada found a disclaimer that was not prominent enough nor adequately brought to the attention of the consumer (who said he had only signed an "entry form") was not an enforceable waiver.

Comprehensive liability waivers have become a requirement of amusement and recreation operators' insurance policies. It is difficult to obtain copies of such policies but there is clear secondary evidence that this requirement exists – even that the insurance company suggests or provides the wording.

Our efforts to obtain liability waivers directly from SOAR industries were largely unsuccessful. We obtained only three directly from requests to SOAR businesses in Canada. PIAC was provided, however, with a number of waivers, including those involved in fairly well known legal precedents, by the Ontario Trial Lawyers Association. These are found in Appendix 2.

PIAC also sent questionnaires (see Appendix 3 for representative examples) to various stakeholders in the SOAR space to elicit comment on when, why and how waivers were used in business as well as soliciting reactions to possible reforms of waiver law and practice. This included SOAR operators in all indoor and outdoor recreational sectors; regulatory agencies (provincial government and voluntary associations); membership-based sports and recreation associations; safety advocacy and public interest groups; subject matter experts and academics studying adjacent issues; plaintiff lawyers and industry groups; and to school boards.

In the end, only three of these 130 surveys were returned, and all claimed confidentiality. Two were from recreational operators and one from a plaintiff lawyer.

All three expressed concerns with the questions, which focused on several issues: general use and views of the necessity of waivers, including their presentation online; potential reform by the creation of a socialized insurance scheme based on the New Zealand scheme (see below), and costs of such; and finally, reform of waivers to more clearly describe liability for minors (children).

The operators' answers to the opening questions regarding the use of and need for waivers made very clear that use of waivers was ubiquitous and invariable. Insurance coverage and the defence and deterrence of liability claims were stated as imperative reasons for waiver use. Interestingly, one operator

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> It was disclosed in evidence that the organisers had insured against accidents such as this: and that the warning notices were put up because the insurance company so required. So the insurance company are behind all this.

[67] See *Crocker* v. *Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186.

[68] *Crocker* v. *Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186.

mentioned the waiver as an indirect method of warning participants to take care on their part and to consider usual and common dangers of the activity (rock climbing) – essentially outlining the concept of 'inherent risk' dealt with below – and clearly contrary to the main use and effect of a liability waiver. This is interesting, as participants in our focus groups commonly expressed the view that an important (and in some cases, the only) reason for waivers was to remind consumers to take care on the premises or in their behaviour during the activities. To the extent that businesses represent waivers as warnings about inherent risk and taking due care, therefore, such statements could be seen as misleading representations.

Both SOAR operators and even the plaintiff lawyer opposed a socialized insurance scheme – see below – the operators due to cost which they expected would be passed on to their operations. The lawyer felt that a proper reform of waiver law (to reduce their effectiveness or to ban them) would allow private insurance that the operators already purchased for this exact risk to be justly called upon to pay out meritorious claims of the lawyer's clients.

Likely SOAR businesses refused to answer our survey in part because they feared management reaction to answering could affect insurance coverage. Although outside the scope of this report, the possibility of insurance coverage being made contingent on confidentiality of agreements that the public arguably should have access to in order to judge the justness of waivers, is an area for future research.

The Failure of Canadian Law Reform Commissions to Reform Waivers

The ubiquity of waivers in SOAR businesses together with the obvious injustice of liability waivers has, to be fair, been noted and studied by provincial law reform commissions – the bodies that are charged with reforming laws to reform them, ideally to make them more just and up-to-date.[69] Citizens and consumers rely to a large extent on the law reform commissions to ensure the law is fair and up-to-date and to view legal problems holistically – a view that may elude courts, as they develop the law incrementally; and baffle legislators, who are not adequately legally trained to address technical legal changes without assistance. The trouble is that law reform commissions have likewise failed to reform waivers of liability to return fairness and a good deal to consumers.

Thirty years ago, in 1994, the British Columbia Law Reform Commission released its report on liability waivers in recreation. The report was called for by the B.C. Attorney General. In 1991 and 1992, several provincial ministries received complaints about comprehensive liability waivers in recreation. At the same time, a western ski area association was lobbying the government to pass the *Ski Area Safety Act*, which was similar to US legislation on liability in alpine skiing.[70] Repeatedly, in both formal and informal

[69] See, for example, "Welcome" statement on the Manitoba Law Reform Commission website: "The Manitoba Law Reform Commission is an independent law reform agency created in 1970 by The Law Reform Commission Act. Its role is to **improve, modernize and reform the law and administration of justice in Manitoba**. Projects of law reform are initiated in response to suggestions from the public, the legal profession and Manitoba's Minister of Justice and Attorney General. The Commission carries out research and consultation and makes formal recommendations for law reform to the Minister of Justice and Attorney General. The Commission's work is funded by grants from the Government of Manitoba and the Manitoba Law Foundation." [Emphasis added.] Online: http://www.manitobalawreform.ca

[70] Law Reform Commission of British Columbia, "Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities" (October 1994), at p. 2. Hereafter, "BCLRC Report".

consultations, the Commission heard that waivers "are not worth the paper they're written on" or that they "don't hold up in court."[71] Over thirty years later, these and other fallacies (see our focus group findings, above) not only persist but have been demonstrably shown to be false, in numerous legal decisions.

Fifteen years following the BC report, in 2009, the Manitoba Law Reform Commission released a similar report titled *Waivers of Liability for Sporting and Recreational Injuries*. The report's purpose was to consider "whether it remains good policy in the twenty-first century to permit providers of sporting and recreational activities to allocate the burden of their negligence to the consumers of these activities."[72] While the MLRC Report primarily recommended abolishing waivers for death or serious injury in recreational service, and secondarily at least that such waivers be "reasonable" in all the circumstances, the Manitoba Legislature only adopted the milder "reasonableness" requirement.[73]

This reformist hand-wringing at the provincial level continues to this day. In 2023, the last province without a statutory or judicial update to its occupiers' liability law, Saskatchewan, released a Consultation Report questioning why liability waivers should have the harsh and unjust effect they do upon consumer liability claims that are otherwise proven to be based on the negligence of the recreation business.[74] No question of removing this tool from the industry was, however, recommended in the Consultation Report.

In June 2024, the Final Report, "Reform of Occupiers' Liability Law in Saskatchewan", was released.[75] This report likewise recommended continuation of the ability of recreational service providers and other businesses to restrict liability by contract (via a signed waiver) but now with the same ineffective "reasonableness" requirement as Manitoba. Interestingly, the SLRC did take the step of abolishing the ability to exclude liability by posting a sign (see above regarding a "conditional licence") – which is used in some situations in a way analogous to contractual waivers. Other law reform commissions seemed oblivious to the distinction and leave such conditional licences largely unaddressed. This is the only positive and potentially impactful reform from all of the commissions over 30 years. Note, however, that despite this one minor positive change, the SLRC still based its proposed 'new' Occupiers' Liability Act upon a draft originally suggested in … 1980.[76]

This is the pattern of provincial "law reform": weak and peripheral reform stretching over years, based on old and decayed legal theory that discounts personal injury to the vanishing point and, if confronting the real issue of abolishing the ability to write a waiver of liability for death or bodily injury, not proceeding to outlaw such an outrage. We note that there is not much reform of the law going on here.

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[71] BCLRC Report, at p. 34.

[72] Manitoba Law Reform Commission, "Waivers of Liability for Sporting and Recreational Injuries" (January 2009) at p. 2. Hereafter, "MLRC Report".

[73] We address the ineffective legal result of a reasonableness requirement, below.

[74] Law Reform Commission of Saskatchewan, Consultation Report, "Reform of Occupiers' Liability Law in Saskatchewan" (March 2023). Hereafter: "SLRC Consultation Report 2023". Online: https://lawreformcommission.sk.ca/Occupiers-Liability-Consultation-Report-Final-03-23-2023.pdf).

[75] Law Reform Commission of Saskatchewan, "Reform of Occupiers' Liability Law in Saskatchewan" (June 2024). Hereafter: "SLRC Final Report 2024" Online: https://lawreformcommission.sk.ca/Occupiers_Liability_Final_Report.pdf . See paras. 77-79 re: waivers.

[76] See the previous Law Reform Commission of Saskatchewan, report: "Proposals for an Occupiers' Liability Act" (October 1980), ISSN 0701-6948. Online: https://lawreformcommission.sk.ca/Occupiers_Liability_Act_Proposals.pdf

Business Conception of Liability Waivers and 'Inherent Risk'

Law reform commissions have concluded that properly drawn and presented waivers are effective at giving businesses the desired effect of avoiding payment of any kind of liability. They also conclude, however that it is indeed harsh to deny all redress to consumers despite injury or death. How can this cognitive dissonance be maintained? The answer is that SOAR businesses do not see the dissonance because they conceptualize waivers of liability differently from consumers.

SOAR businesses conceptualize liability waivers as a "risk allocation" tool. Given the physical nature of most SOAR businesses, and their general reliance on a "thrill" of physical exertion or some form of controlled fall, some consumers will be injured and possibly even die. This is conceived, in a capitalist enterprise, as a 'risk' – that is, a contingent cost to be managed, not a moral failing to be avoided or atoned for should it come to pass. This heartlessness come through in submissions to, and even the parroting of, this view in law reform commission reports. For example, the British Columbia Law Reform Commission, in its 1994 report, "Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities" stated:

> Agreements allocating legal risk to the user, commonly called waivers, are common in the recreational sector. So are exclusionary terms printed on admission tickets. The reason for their prevalence is obvious: the risk of injury in sports is greatly dependent on individual behaviour in an atmosphere of vigorous exertion and competition. It is unpredictable, even under the best conditions. This makes risk management more difficult than in some other fields.

The reference to "agreements" above means contractual terms; the reference to "exclusionary terms printed on admission tickets" is to a conditional licence. Both are stated to assist with "risk management".

The "risk" referred to in the quote, however, is not a true legal concept (more on this below). It is describing the "inherent risk" of injury or death in an activity. This is a reference to the fact that the participant in an activity, by the manner in which that person physically performs at least part of the activity, can to some extent guide or influence the outcome of the activity. The classic example is of a skier falling down due inattention to terrain or obstacles, or due to "lack of skill" for example by executing a poor turn and sustaining an injury. Liability for this factual "inherent risk" (that is, risk that the skier – according to the view of the ski hill operator –could have avoided by taking care to ski "more carefully" or "within their ability") is actually a different legal inquiry, on the basis of negligence law and, in relation to property control, as well on the basis of principles of occupiers' liability law (which we describe in detail, below). It is a common refrain on behalf of SOAR service providers that the factual inquiry into a fall and the consumers' level of physical responsibility for that fall somehow determine the legal responsibility for any resulting harm. This is legally inaccurate but it does reveal the mindset of running a SOAR business: the desire to avoid liability for all accidents as risk avoidance, rather than go through the legal inquiry into the other circumstances as well as the performance of the factual physical activity by the participant. This desire on the part of businesses is a key concept for understanding the genesis and ubiquity of liability waivers in SOAR activities and also for understanding their misuse.

In short, businesses attempt to use liability waivers not only to protect themselves from any liability (financial risk) but also to dissuade even litigation in pursuance of claims, or, at least, the ability to quickly end this litigation in the early stages by pleading a validly executed waiver (or conditional licence).

This conceptualization of 'risk' is reflected in the B.C. Law Reform Commission's opening line: liability waivers are "[a]greements allocating legal risk to the user".[77] That is, waivers are intended, in this description, to be a form of 'risk-shifting' to ensure that the consumer cannot argue that the activity in itself or even as offered, unduly exposes the consumer to negligent risk (that is, there should be no such thing as skiing, as it is too dangerous, since some skiers will fall and hurt themselves as a simple consequence of skiing down a hill, or at the least that some aspects of the hill are too dangerous to navigate for many skiiers). "Risk-shifting" language assumes, accepts and blesses the conflation of consumer participation (doing the activity, not walking away) with the legal acceptance (confusingly called in some legal articles, 'legal risk') of a shift of liability or responsibility, 100% – not shared with the business – to the consumer or participant.

Thus, waivers disclaiming this fulsome potential liability for even offering the activity (here, skiing) are conflated by SOAR businesses (and often by law reform commissions) with the personal performance of the activity by the consumer. That is, if the consumer is just "bad" at skiing, and falls in consequence, the waiver (and the concept of "inherent risk" which the business now associates only with the performance of the bodily participation of the activity by the consumer and not with any amount of danger created by the fact of offering skiing down a snowy slope at all) states to the consumer that this result is wholly the responsibility of the consumer. The consequence of their failure to ski "well" (and any falls), absent some other condition of the ski hill or act of the ski hill operator, is not only not compensable, but in fact deemed to be not ever negligent (or in some waivers, that there is no liability even for negligence of the business). This concept of 'inherent risk', together with the waiver language which purports to allocate 'inherent risk' wholly to the consumer, therefore purportedly removes any chance of a successful legal case for the consumer. What such a framing does, however, is to try to absolve the ski hill from any responsibility for any falls and injury. It also appears, on a casual reading of many waivers – which can in the majority of the text in excruciating detail describe inherent risk – to absolve them from any negligent action or omission of their staff that is manifestly dangerous or risky to the consumer and for any broken, deficient, unmaintained, unsafe or inadequate machines, equipment or grounds used by the business.

However, 'inherent risk' is not in itself a defence to negligence or occupiers' liability, despite SOAR businesses' wishes. The legal treatment of the concept is more nuanced and is actually part of the treatment of negligence. It is this legal treatment that makes most of the language in waivers (relating to inherent risk) superfluous: creating longer, more complicated waivers that are harder for consumers to understand and possibly even misleading; in any case, the surplusage also weakens the SOAR operators' chances of not accidentally confusing a consumer in the formal contractual manners noted above.

[77] Unstated, but assumed in this risk allocation model of waivers, is that a waiver may allocate all risk to the consumer. That is, a consumer will not be held partly liable (referred to as "contributory negligence" – see below) and the business partly liable, for this outcome, depending on the facts. Instead, the business may shift the entire liability only to the consumer, even if it could be argued the consumer's poor performance of the activity was only a partial cause of any injuries or death.

Inherent Risk

SOAR businesses have long been concerned with avoiding any lawsuits at all for what they define as the 'inherent risk' of their particular activity. In defining the scope of this concept, business can greatly affect, therefore, the allocation of this "risk" by the law.

As we saw above with the general duty of care in *Donoghue* v. *Stevenson*, not all conduct nor all "risk" is in the realm of that which a party may or may not be found by a court to be legally responsible (that is, no 'negligence' is found, or the 'standard of care' demanded of the defendant was met, but the accident still happened). Therefore, with or without a waiver or contractual re-allocation of these 'risks', be they 'inherent' or otherwise, liability rests on the principles of that leading case and the particular facts.

Casting liability waivers as avoidance of all 'risk', and therefore as an aspect of the vague general term 'risk management' makes it easier to blame the victim and to place undue emphasis on the often inadequate appreciation of such "risks" by the participant, when the real question waivers are concerned with is the distribution of legal liability for any resulting injuries or death – and on the inevitably one-sided allocation of all 'risk' away from the business to the consumer in waivers or notices. This bloodless definitional conceptualization of waivers as simply 'risk allocation' is precisely what the BC Law Reform Commission does at the end of the quote noted above, where it unduly conflates the concept of "inherent risk" with all 'risk allocation' (risk being defined inevitably in waivers as wider than the harms for which the business would be required to answer in law) and thereby implicitly approves the exclusion by waivers of potentially very specific, blameworthy failures of the business to take reasonable measures (whether to make premises or equipment safe, or to hire, train and monitor competent and careful employees and agents) to avoid often debilitating injuries or tragic deaths in the course of offering their services. The consequential serious legal question of which party should bear what measure of legal liability (that is, who will be responsible to pay for damages in an after-the-fact effort at a measure of justice or restitution) on the established legal standard in *Donoghue* v. *Stevenson* would be, on this view, never determined by a court or even confronted by the legal system.

A better explanation of the real purpose of liability waivers – and the actual inquiry a court would make – that more accurately reflects their true purpose and effect, in law, (as well as one that better centers consumers and their protection), is that found in the later Manitoba Law Reform Commission Report (2009), entitled *Waivers of liability for sporting and recreational injuries*, which defines waivers (at p. 4):

> Waivers are generally designed to negate the civil liability of the providers of sporting or recreational activities for the personal injury or death of a consumer caused by their negligence or other forms of misconduct. [Emphasis added.]

This definition more accurately defines the intended legal effect of a waiver as denying consumers the legal opportunity to raise issues of the alleged negligence of the SOAR operator at all. That is, the concept of tort liability and all of its rules and case law has, it is asserted, been completely excluded by the waiver. This above definition also has a more accurate and open statement of the intended effect of a liability

waiver: the word "negate" means there can be no sharing of liability between the consumer and the business – even if the consumer was only partly (or not at all) to blame in law for the injury or death, the whole responsibility, legally, for remedying that injury or death is the consumers not that of the business.

To return to the concept of inherent risk and its conflation with the proper legal inquiry into negligence or other occupiers' liability, we turn again to the explanation of the Manitoba Law Reform Commission, which notes the unfortunate overlap of the concept of inherent risk and risk management with the narrower legal concepts of negligence, even in recreation services.

The Manitoba Law Reform Commission report concluded the following factors lead consumers to misconstrue the legal effect of waivers:

> The primary reason against the enforceability of waivers is the continuing disparity of information, knowledge and understanding of the function of waivers between providers and their legal advisers and consumers. Much of the misunderstanding centres on the legal dichotomy between risks that are inherent in the activity and are unavoidable by the exercise of due care and risks created by the negligence of the provider or its employees. It is likely that consumers tend to focus on the inherent risks of which they have good knowledge and a willingness to assume. Indeed those are the risks that make many activities attractive and provide the challenge that the consumer seeks. Consumers are less likely to consider the possibility of the provider's negligence. Consequently it is likely that consumers in signing waivers believe that they are assuming only inherent risks. That is not, of course, the purpose of most waivers. The purpose of most waivers is to immunize the provider and its employees from liability for risks generated by their negligence. The confusion is understandable. Even the Supreme Court has expressed this dichotomy in confusing language. [Emphasis added.]

Again, all of these perceptions are indicative of consumers in our groups thinking through the factual matrix of various situations, as would a good jury. The only exception was their (largely erroneous) guesses of what the law would do to assist them in reaching a legal verdict that accorded with their common-sense, "factual" perception of the situation. Again, for consumers and non-lawyers, this is normal and appropriate, but it is discouraging that the folk-wisdom that law would align with their sensible approach is not accurate in most of Canada.

Courts have, however, somewhat muddied the waters of this dichotomy between the business use, and common non-legal understanding of 'inherent risk' or 'risk' as just the performing of the recreational activity in question with the legal test for negligence.

This started with a line of cases that considered liability in sports. The leading case is from the Australian High Court. In *Rootes* v. *Shelton*,[78] the High Court stated:

[78] *Rootes* v. *Shelton* (1967), 116 C.L.R. 383 (Australia H.C.).

> 6. By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.

Therefore, what the Court was trying to express here is that the law will allow some additional incidental contact between participants (in accordance with rules of the game), or between participants and the premises, to not be considered 'negligent' but rather, normal game play or normal recreational performance of the activity. In essence, the court has lowered the standard of care in sports and recreation cases to an operator usually being able to rely upon contact or accidents happening during "fair play" by players or falls or injuries suffered within a sphere of expected "competent performance" of the activity in recreational activities. It is only where the operator of the SOAR business has unsafe premises (occupiers' liability) or is otherwise negligent in its activities or condition of the business or place, that the negligence inquiry and inquiry into the standard of care will be undertaken. This special standard of care for sports or recreation is what is referred to in some cases, as simply 'inherent risk' of the activity in legal judgments, and is used as a somewhat specific, and to be frank, lazy or shorthand way of describing the special, lower standard of care in sports and recreation (SOAR) services.

Canadian cases took to this distinction with alacrity.[79] Most use the term 'inherent risk' when it would be more appropriate to speak of the special standard of care for expected performance or game play. Not enough emphasis is placed in the Canadian cases, in our view, on the fact that above this lowered standard, negligence or breach of an occupiers' liability 'common duty of care' (see below) is still possible.

It seems that both SOAR businesses, but also, disturbingly, consumers, have been misled by these legal nuances, but in different ways. To business, like ski operators, it appears that 'inherent risk' should be a magic wand to waive away not only all liability in their type of business, but even the prospect of litigation – hence their insistence in most waivers of needless repetition of their own views on what is an 'inherent risk' (particular standard of care) – that will have to be judged by a court on all of the evidence in any case (not from their characterization of it).

To consumers, the inherent risk accords only with their common understanding of their relative performance ability of the activity – totally missing the implied legal effect (either the actual court standard or the businesses' desired standard). They are focused on the physical doing of the activity, not the abstract effect or characterization of it. Thus in our focus groups what became crystal clear is it consumers do not understand the intended legal effect of liability waivers (as stated clearly in the

[79] See, for example: Arif v. Li, 2016 ONSC 4579 (S.C.J.); Nichols v. Sibbick, 2005 CarswellOnt 2888, [2005] O.J. No. 2873 (S.C.J.); Champagne v. Cummings, 1999 CarswellOnt 2409, [1999] O.J. No. 3081 (S.C.J.); Temple v. Hallem, 1989 CarswellMan 177, [1989] M.J. No. 203 (C.A.), leave to appeal refused (1990), 65 Man. R. (2d) 80 (note) (S.C.C.).

Manitoba Law Reform report). Instead, they believe that liability waivers are ***only*** the exclusion of liability for certain performance behaviours of the participant (how well they ski, for example – what is often called by the industry the 'inherent risk'), or of certain risks that the customer has been warned about explicitly, or even "obvious" or "stupid" risks.

Our focus group research indicated that consumers appear to accept at least some amount of personal "responsibility" for what the industry calls "inherent risk": that is, they accept that if they are just "bad" at an activity, or have an "accident" or "play around" or otherwise do not follow the recommended method or accepted customs of how to, for example, ski, that they should bear that loss. Indeed, almost every participant in our focus groups initially conceived of liability waivers as excluding only such 'inherent risk' that they were 'responsible for' despite the dangerousness of the activity in itself. [From focus group #1]:

> Alanna (Moderator): what does it actually mean when you're signing a liability waiver? Can you still sue for damages? Are there exceptions, or do you feel like you're basically signing your life away. So what does it mean to you? What do you feel like you're doing when you're signing that?
>
> Renee: I? It depends on the circumstances you're waiving. You're acknowledging that you accept there's risks. But, like somebody said earlier, it depends on if they're negligent. Like, if I'm – I'm gonna go back to snowboarding […] – if I accept the risk that: 'Yes, I'm going to barrel down a hill at high speeds with my feet stuck to a board, and I may fall in and break a leg' – that's one thing – but if the chair lift fails and I fall off, or something else happens, then that's certainly not my poor snowboarding skills. That's their faulty equipment, so I would like to think that I certainly haven't waived my right to fight over that. If that makes sense.

Interestingly, the BC Law Reform Report makes the real point of waivers quite clear, if perhaps too strongly later (at p. 30), that the analysis of a court will be short-circuited if an enforceable waiver is invoked; that is, the occupier or business can indeed exclude the legal consequences of the duty of care (the basis of most tort law) but even goes as far as to state a waiver may <u>remove the duty</u> even to take such care:

> The effect of a properly drafted comprehensive waiver is that the operator <u>has no duty of care towards the user and therefore no obligation to compensate the user for any mishap</u>.
> […]
> The advantage a waiver holds for recreational operators is that it provides a contractual defence that is much more reliable than the fact-dependent tort defences: exercise of reasonable care, contributory negligence, inherent risk, and *volenti*. Where there is an enforceable contract excluding or limiting the operator's liability, it is decisive insofar as its terms extend. <u>If the terms cover the accident in question and there is nothing in law to detract from their enforceability, a court will not look into the facts behind it to determine if liability should be imposed.</u> [Emphasis added.]

We do not agree that the effect of such a waiver is to remove the duty of care ("has no duty of care towards the user") but agree rather that the purported effect of the waiver in law is that the consumer

cannot rely on a court even advancing to the stage of considering if the business met even the lower standard of care expressed to exist in sports and recreational activities. Instead, the consumer will not even get the chance to argue that they met the performance expected even in the legal conception of inherent risk of the activity but that there was negligence above and beyond this that caused the damage. As noted by the B.C. Law Reform Commission, once a waiver is accepted to be valid, "a court will not look into the facts behind it to determine if liability should be imposed".

Children- Signing waivers on behalf of minors – or "Do you 'have to be this tall' to sign a waiver?"

Nothing in our focus groups got the participants more engaged, concerned, strident, or angry, as the suggestion that their children could be hurt and the parents not be permitted to seek recovery for them due to either the parents, or the child(ren) signing a waiver, or entering a SOAR business "at their own risk".

As noted, most participants in our focus groups expected a duty of care would be observed by a SOAR business but they anticipated that they could expect a particular (lower) standard of care for sports or recreation (but they assumed negligence would still be the responsibility of the operator). However, for parents, this sense of the legal duty of care was strongest for their children.[80] They resisted the idea that this duty could not exist for children.

In fact, the law around waivers of liability to minors (children), and the related concept of parental indemnity clauses, is shockingly unclear and confused in Canadian common law jurisdictions. While occupiers' liability statutes (see below) generally require the property owner or occupier to have special regard to children (in effect, a slightly elevated duty of care), the ability to disclaim liability in a waiver or conditional licence is not equally qualified, meaning it appears possible to demand a waiver of a child or the parents or guardian on behalf of a child and then to try to enforce them if the child is hurt or dies during SOAR activities.

There are some reasons why parents intuitively understand that children receive special protection in the law against harsh contractual provisions like a liability waiver.

In general, at common law, minors can make contracts but only for their benefit: any clause that would subject them to a detriment is unenforceable by the other party to the contract (provided the child has not pretended to be an adult). This general principle is buttressed by, and premised upon, the courts' "parens patriae" jurisdiction to ensure the best interests of the child. This jusridiction means that courts can intervene to protect children from harsh results of the legal system. These common law (equitable) rights and court powers now are largely codified in family law and civil procedure statutes, among others.

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[80] Focus Group 2, Transcript, paras. 375-9:

> Cynthia: I think, for, for adults we tend to be a lot more aware of our surroundings, and there are certain hazards and what risks are. And for children there's just so many unknowns, and they don't – they're not very aware spatially or anything. And so we just we definitely need more assurances. We want to make sure that the facility is following duty of care, and that they are, you know, upholding the highest standards in terms of like even just operating. So yeah, I definitely think it's a lot more involved when it's for minors for sure.

What this means, to the surprise of even parents, is that a court will be required to seek the permission of the Public Guardian or Trustee (usually an office in the provincial government) for the approval of any court order or settlement involving a minor, even if the parents have 'approved' the result as good in their eyes.

Therefore, in theory, waivers should be unenforceable if signed by the child (no contract can be enforced against the child to his or her detriment) and equally the parent should not be able to sign away the child's rights by signing a binding waiver affecting their own legal rights (or approve a settlement without the Public Guardian having a say and the courts making a final determination of the best interests of the child).

Although we would like to say, definitively, case closed, that children are not subject to waivers, it is not that easy. This is Canada, after all.

Before considering how other jurisdictions have approached this challenge, it is important to note one approach, in B.C.: the *Infants Act.* The *Act* addresses contracting with infants (minors, or children), on the assumption that younger persons are generally more vulnerable in the marketplace and therefore deserving of additional protection.[81] It is in essence a codification of the common law with some additional protections.

Part 3 of the *Act* addressing 'Infants' Contracts.'[82] Section 19(1) clarifies that contracts made while someone is an infant are unenforceable unless:

(a) a contract specified under another enactment to be enforceable against an infant,
(b) affirmed by the infant on his or her reaching the age of majority,
(c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
(d) not repudiated by the infant within one year after his or her reaching the age of majority.[83]

Despite the unenforceability against infants under the *Act*, subsection 19(2) allows an infant to enforce a contract against an adult party of the contract "to the same extent as if the infant were an adult at the time the contract was made."[84]

The British Columbia Supreme Court considered the application of the *Infants Act* to a case involving a sports-injury at a martial arts school.[85] In *Wong (Litigation Guardian of) v Lok's Martial Arts Centre Inc.*, the plaintiff was injured after being thrown during a sparring match.[86] When the plaintiff enrolled at the martial arts school, he was 12 and so his mother signed the membership form on his behalf which included a waiver. The membership agreement included the following waiver:

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[81] Peter Bowal, Thomas D Brierton & John Rollett, "The Law of Infant Waivers: Wong v Lok's Martial Arts Centre Inc" (2011) 44 UBC L Rev 407-421.
[82] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96223_01
[83] *Ibid.*
[84] *Ibid.*
[85] *Wong (Litigation guardian of) v Lok's Martial Arts Centre Inc*, 2009 BCSC 1385 [*Wong v Lok*].
[86] *Ibid* at para 2.

> CONDITIONS OF MEMBERSHIP AND RELEASE
>
> It is expressly agreed that all exercises and treatments, and use of all facilities shall be undertaken by the student's sole risk. LOK'S HAPKIDO SCHOOL and its affiliated studio's (Flying Eagle Hapkido, Flying Tiger Hapkido Studio and any other studio's) shall not be liable for any injuries, past/future medical complications, any claims, demand, injury, damages, actions or cause of actions whatsoever, including without limitation, those resulting from acts of active or passive negligence on the part of Lok's Hapkido School.
>
> YOU ARE RESPONSIBLE FOR ALL INJURIES![87]

In addition to the waiver, the martial arts school had also posted notice in the studio that participants were responsible for their own injuries (a conditional licence). Despite the Defendant's argument that the court should not limit parental authority and a finding that the release was broadly worded enough to "bind the infant,"[88] the court ruled that the *Infants Act* "does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort."[89]

It is important that the judge in that case found the law in other provinces and at common law not clear that the child could not be so bound by the waiver, especially if also signed by the parent. The court only felt constrained by the very explicit *Infants Act* to reject the waiver's application.

Contrast this outcome with one of the few other cases involving a young person and a waiver, this time in New Brunswick: *Dewitt (Litigation guardian of) v Strang*.[90] Thomas Dewitt was rendered paraplegic in April 2009, following a tragic accident. Thomas' father had signed a waiver on his behalf. In its decision, the New Brunswick court referenced the decision in *Long v Wok*, finding it "little help" in this instance since there was no *Infants Act* in New Brunswick.[91] Ultimately, the motion to strike the waiver from the defence failed, as the plaintiffs had argued, based on the general common law above, that pleading that the waiver could even bind a child was scandalous. The court's ruling was not, therefore, that the waiver stood, only that the court ultimately hearing the case on the merits would have to hear argument on whether the waiver signed by the parent could be enforced against the child. This is in effect a questioning of the settled common law expectation that minors cannot be subject to negative contractual clauses.

These two cases demonstrate the important difference in answers to the policy question "as a society, do we want parents to be able to sign waivers on behalf of children"? In all but one province, the answer is, perhaps, maybe?

Even worse, parents are often put in the position of signing waivers on behalf of other people's children. In both the English and French focus groups, parents expressed their concerns about signing waivers on behalf of other people's children. Parents also expressed that often, however, in these moments they are under immense pressure to sign the waivers since the alternative is that the children will not be allowed to

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[87] *Wong v Lok* at para 4.
[88] *Ibid* at para 58.
[89] *Ibid* at para 61.
[90] *Dewitt (Litigation guardian of) v Strang*, 2016 NBQB 28 (affirmed by the Court of Appeal [INSERT CITATION]) [*Dewitt v Strang*].
[91] *Ibid* at para 32.

participate in whatever activity. Whether a court would start to consider agency of a friend's parent for another parent and the tenuousness, and inhumanity of such an inquiry, is thus still open to question (outside of B.C. and Québec).

Despite the legislation in British Columbia, it is important to note that waivers are still presented incessantly to parents or guardians across the country and even in B.C. For example, Gymnastics BC's waiver includes a section for parents or guardians to sign on behalf of a participant under 19:[92]

GYMNASTICS B.C.

RELEASE OF LIABILITY, WAIVER OF CLAIMS,
ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT
(hereinafter the "Release Agreement")

BY SIGNING THIS RELEASE AGREEMENT, YOU WILL WAIVE OR GIVE UP CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE FOR NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF THE OCCUPIERS LIABILITY ACT OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT

PLEASE READ CAREFULLY! **INITIAL**

Name of Participant	Last		First		
Parent or Guardian if participant under age 19	Last		First		
Address	Street		City		Prov./State
	Country	Postal/Zip Code	Email	Date of Birth: Day / Month / Year	Age

The bottom of the waiver above, interestingly, also includes a spot for both participants 12 and over and the parents or guardians of a participant under the age of 19 to sign:[93]

In entering into this Release Agreement I am not relying on any oral or written representations or statements made by the Releasees with respect to the safety of gymnastics activities, other than what is set forth in this Release Agreement.

I CONFIRM THAT I HAVE READ AND UNDERSTAND THIS RELEASE AGREEMENT AND I AM AWARE THAT BY SIGNING THIS RELEASE AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS, ASSIGNS AND REPRESENTATIVES MAY HAVE AGAINST THE RELEASEES.

Signature of participant (12 and over)	
Please print name of participant	Signature of witness (for parent/guardian signature)
Signature of parent/guardian if participant is under age 19	Please print name of witness
Please print name of parent/guardian	Date:

Given that this waiver should not be upheld under the *Infants Act*, based on the case law to date, why is it still being proffered? In their 1994 report, the British Columbia Law Reform Commission queried the same issue. The Commission stated, in 1994, that "while contracts made by minors are unenforceable

[92] https://gymbc.org/public/uploads/GYMNASTICS-BC-RELEASE-UPDATED-August-2022.pdf
[93] *Ibid.*

[due to the *Infants Act*], it is common practice to have minors sign a waiver before they are allowed to participate in certain athletic activities."[94] This practice clearly still exists. The Commission opined that perhaps, despite their unenforceability, the waivers are used to inform parents and their children about possible injuries.[95] As noted above, this borders on misrepresentation and plays upon consumer confusion that waivers, with their long lists of 'inherent risks' that consumers simply assume are recitations of the expectations of the standard of care and expected ability of consumers to undertake the activity, not a liability waiver. The B.C. Law Reform Commission expressed concerns, however, that parents could be misled into thinking that they could not make a claim because they had signed the waiver.[96] This accords with our view that the SOAR industry uses waivers in part to dissuade consumers from even considering or bringing litigation.

In focus groups, most parents were not aware of the *Infants Act* and its implications for any waivers they had signed on behalf of their children. Yet when focus group participants were asked if a ban on signing away their children's rights to sue, such as the B.C. *Infants Act* was a good idea or not, they enthusiastically supported such legislation:

The final concern is that certain waivers purport to require parents to indemnify the SOAR business should it be found liable to the parent's own child in negligence. If the parent signs this, the business argues it is the parent's own contractual promise and it can be enforced.

Here is typical wording or an indemnity clause from a trampolining waiver:

> If the participant is a minor, I agree that this Waiver, Release of Liability, Indemnity and Assumption of Risk Agreement (this "RELEASE") is made on behalf of that minor participant and that all of the releases, waivers and promises herein are binding on that minor participant. I represent that I have full authority as Parent or Legal Guardian of the minor participant to bind the minor participant to this Release. If the participant is a minor, I further agree to defend, indemnify and hold harmless [trampolining company] from any and all claims or suits for personal injury, property damage or otherwise which are brought by, or on behalf of the minor, and which are in any way connected with such use or participation by the minor, including injuries or damages caused by the negligence of RELEASED PARTIES, except injuries or damages caused by the gross negligence or willful misconduct of the party seeking indemnity.

In the Gunter paper,[97] the author says the indemnity issue is not an issue, based on disapproval by the B.C. Law Reform Commission and one Ontario case from 1969:

> Recreation operators and occupiers sometimes require parents to sign indemnity agreements whereby they promise to indemnify or reimburse the provider for any damages it is required to pay to the child. The intended effect of this kind of contract is to dissuade parents from litigating on behalf of their children. Although still occasionally used, these types of agreements have been held to be against public policy and therefore unenforceable. The B.C. Commission said such indemnifying agreements are unenforceable, since they also "contravene the public policy of

[94] BC LRC Report page 31.
[95] *Ibid* page 32.
[96] *Ibid* page 32.
[97] Gunter, *supra*, at p. 442.

> protecting minors' interests. They are clearly intended to discourage a parent from pursuing a child's rights. If there is any doubt about the unenforceability of such indemnities, it should be removed." In *Stevens* v. *Howitt*, the High Court held a post tort liability indemnity signed by the parents of the plaintiff was void as against public policy.

While we would like to agree with the learned author that such indemnities are unenforceable, some time has passed since the *Stevens* v *Howitt* case in 1969, and the *Dewitt* case's stubborn refusal to dismiss the parental waiver out of hand, we are concerned. It is true that: "The intended effect of this kind of contract is to dissuade parents from litigating on behalf of their children. […] they also "contravene the public policy of protecting minors' interests. They are clearly intended to discourage a parent from pursuing a child's rights."

Nonetheless, we would agree with the statutory certainty proposed by Manitoba's Law Reform Commission, in its report, recommendation 5 (not implemented), which recommended:

> RECOMMENDATION 5
> Manitoba should enact legislation that provides that providers of sporting or recreational activities must not require:
> (a) a minor or a minor's parent or guardian to agree to a term excluding the provider's liability for personal injury or death of the minor, or
> (b) a minor or a minor's parent or guardian to agree to indemnify the provider of sporting or recreational activities in respect of any damages or other amount to which a minor may become entitled or an expense associated with a legal action on behalf of the minor.

So the law on children and waivers sits in a dangerous liminal space, like a trap waiting to be tripped.

This is unacceptable given the millions of children participating in SOAR activities each year, whether in for profit or not-for-profit settings, during school and with their families. At the least, a prohibition on minors signing, parents waiving and parental indemnities being offered, should be mandated.

Occupiers' Liability and the Effect on the Law on Waivers

Unfortunately, the legal difficulties and complexities regarding waivers cannot be appreciated or judged only on the standards of negligence as expressed in *Donoghue* v. *Stevenson* about having due care for one's neighbours.

As noted above, although waivers can apply to all tort or contractual duties, whether or not linked to a particular place, the vast majority of SOAR activities take place on lands or premises owned or controlled by the particular business offering the services. Indeed, access to the site of the activity is precisely what is controlled by an admission fee that earns the SOAR operator its revenue.

There is a special set of legal rules linked to land ownership and entry onto that land by others. It is referred to as the law of occupiers' liability. Due to the wide range of these rules and their overwhelming effect when an activity is carried out on another's land (as in most SOAR activities), this area of law must be considered in addition to negligence and is even primary or controlling in some ways, of waivers and conditional licences. Therefore, we reluctantly have to take a long detour through this law below.

Historically, recreation started to be 'sold' to all classes of the public (once hours of work were reduced from Industrial Revolution highs and the 'weekend' developed)[98] by businesses utilizing land, for example, at racetracks and later, 'amusement parks', which only developed along with consumer culture and leisure in the late 19th century.[99] Although occupiers' liability law was not developed specifically for leisure use of property, it fit the new development perfectly in terms of subject matter and the parallel timing of its development, and therefore was found to control at least the 'static condition of the premises' if not all 'activities' of these businesses by courts instantly. Therefore we must describe the development of occupiers' liability to understand the legal regime that was applied to SOAR services. The law in this area is not simple to understand and has followed a twisted path to Canada.

Common law prior to the occupiers' liability statutes

Prior to the definition of "occupiers liability", the common law as developed in England and those other countries (like Canada, which derived its common law from England), was well-developed but not in perfect synchronization with the development of English society, at least by the 19th century and the industrial revolution.

English common law in particular derived from, and protected holders of real property (land rights), in particular, those of the landed gentry and it was particularly favourable to these landholders. The entry of other persons onto the landholders' 'estates' was controlled by social status and connection to the landholder's household. In short, the landholder probably had servants, who would be directly in the employ of their "land lord" on his (almost always a he) estate, or who lived on the landholder's land and would owe either feudal, or later, quasi-employment-like fealty to the landholder. Even if one was hurt on the estate of the landholder, such parties generally were excluded from (due to duties of fealty or the requirement to bring these cases in the manor courts – the court of the very lord that had dangerous lands), or avoided bringing, lawsuits in tort (non-contractual) liability law.

Therefore, the categories of those who would enter onto land (and in particular an estate or manor house) to engage with either the land or its owner was somewhat limited. However, though few in number, over time, as society urbanized and developed into a production economy, there were increasingly situations where persons did enter onto another's land but were not part of the household. This could include tax inspectors, mail delivery, and other government officials, as well as persons entering onto or even leasing parts of the land for business, or otherwise doing business with the landholder. In addition, as society

[98] See, generally, Witold Rybczynski, *Waiting for the Weekend* (New York: Penguin Books, 1992).
[99] Peter J. Beck, "Leisure and Sport in Britain." in Chris Wrigley, ed., *A Companion to Early Twentieth-Century Britain* (2008): 453–469.

became more democratized and less hierarchical, increasingly, casual guests of the landholder would be invited to visit the home of the landholder rather than meet in a public space.[100]

The common law of tort, at this stage, up to about 1800, thus had not differentiated formally between what later became fairly rigid categories of "entrant", of which more below, but it should be noted that these entrants were invited or permitted or allowed by law on the land without expectation they might sue.

However, one category of "entrant" the law had always known and treated differentially, was "trespassers", that is, persons on the land without the permission of the landholder. The common law essentially provided no rights of protection to trespassers and indeed, the common law provided, at first, no real limits on the wrath of the landowner towards trespassers, and certainly no tort liability. By the close of the 18th century and beginning of the 19th, the common law only had just managed to allow for liability of landholders for traps they deliberately set to injure trespassers.[101] This animosity to trespassers continues, in part, in the common law to this day, where even statutory occupiers' liability acts provide very limited protection to trespassers as opposed to others, or there are specific trespassers acts which for the most part do not protect or provide a standard of care towards trespassers but rather insulate, from any liability whatever, certain 'unauthorized' uses of the land that are thought of as socially beneficial (at least from the perspective of the then-government).[102]

Indermaur v *Dames* creates the "categories of entrant"

The common law case that sought to define the new "categories" of entrants onto land (besides trespassers) that were more and more numerous was the 19th century case of *Indermaur* v. *Dames*.[103] This case finally faced the fact that many entrants came onto land for many purposes, and could be hurt while there. The case divided those who entered on the land with some legal justification largely into two distinct, separate categories and therefore clarified the developing law that the whole of occupiers' liability could be sorted into four categories (including trespassers and those entering under contract). We explore those categories below as their influence on the law, even as reformed later, is immense.

Trespassers

First, as we have seen, trespassers were a category of entrant onto land before *Indermaur*. The *Indermaur* case did not affect trespassers. This law was maintained in the *Indermaur* case on the logic that

[100] See THE LAW COMMISSION, WORKING PAPER NO. 52, "Liability for damage or injury to trespassers and related questions of occupiers' liability" (U.K.) (1972), at paras 4-6. Online: https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2016/08/No.052-Liability-for-Damage-or-Injury-to-Trespassers-and-related-questions-of-Occupiers-Liability.pdf

[101] See *Bird* v. *Holbrook*, (1828) 4 Bing. 628, 130 E.R. 911.

[102] For example, "Saskatchewan has addressed the liability of landowners or occupiers to those snowmobiling, hunting, or using an ATV on land owned or controlled by the former in The Snowmobile Act, The Wildlife Act, 1998, and The All Terrain Vehicles Act." (See: Law Reform Commission of Saskatchewan, Consultation Report, "Reform of Occupiers' Liability Law in Saskatchewan" (March 2023).

[103] *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 288, aff'd L.R. 2 C.P. 311 (Ex. Ch.). ("*Indermaur*").

trespassers were neither invited on nor had legal business on or with the land. They were held to have only a right deliberately set upon by the landowner but otherwise were there at their own risk.

Professor Fleming in his "Law of Torts", 6th Ed., at p. 442, puts it colourfully and accurately with the main authority cited, in the "Trespassers" section of his chapter on "Dangerous Premises", under the heading "The Draconian Formula":

> But once classified as a trespasser, the plaintiff got but short shrift from the older law. Its sheet anchor was the rule propounded in 1929 by the House of Lords in *Addie v. Dumbreck* that an occupier was liable only for "some act done with deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of [his] presence." In other words, he was under no duty at all until becoming aware of his trespasser's presence, and then only to abstain from intentional or reckless injury. [footnote to citation omitted][104]

Professor Fleming then spends many pages describing the courts' attempts to circumvent the harshness of the rule towards various trespassers and in particular innocent ones such as children playing on the land. It should be noted that the law regarding trespassers has been updated in case law, and for the most part, in statute revisions, to be less harsh to trespassers and to provide for a new test of "common humanity" towards them by the occupier.[105] Many commenters since have argued the law is still too harsh on trespassers.

As we shall discover below, trespassers are therefore less protected by occupiers' liability law than most other visitors such as those coming on to the land to enjoy recreation or adventure services. They do at least avoid signing away rights of action by contractual waiver – although they may have seen and been bound by a notice, which may indicate a conditional licence controls the liability (more on this below) or by signs saying 'no trespassing', meaning no(?) licence and therefore application of the law noted above.

Contractual entrants

Second, *Indermaur* created (or at least confirmed that) at the other end of the spectrum from trespassers, a category of entrants who came onto land under a contract, often to perform services such as construction or repair, or otherwise, was distinct from the other categories. Any potential liability of the landowner for this category of "contractual" entrants was firstly governed by the actual contract which, if it specified the consequences of behaviour or outcome that might result from any accidents, was presumed to govern, and ousted any tort rules. To this "contractual exception" we shall return in the context of occupiers' liability acts and eventual comprehensive modern waivers (the "contractual waiver"). However, if the contract was silent or unclear or incomplete on this matter, which it often was, the entrant would be categorized as one of the two remaining types.

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[104] *Addie* v. *Dumbreck*, [1929] A.C. 358 at 365. Note that the House of Lords reversed the decision in *Addie* in *British Railways Board* v *Herrington*, [1972] AC 877, introducing a duty of "common humanity" to trespassers.
[105] See *Veinot* v *Kerr-Addison Mines Ltd*, [1975] 2 SCR 311.

Common Law Aversion to Nonfeasance as a Basis of Liability

The "messy middle" two categories that were created in *Indermaur* were "invitees" and "licensees". These categories were conceptually distinct but often factually overlapping or often presented various aspects in both categories. What made them confusing and hard to tease apart, but more importantly, that which made their difference extremely consequential legally, has its roots in the state of the common law development that until then had generally not forced any party in tort to do a positive act (referred to as "no liability for nonfeasance") to avoid harm.[106] That is, until *Indermaur*, generally, parties, and in particular, landowners, did not need to "make things safe" (such as repairing a staircase) for most visitors. The duty was only not to harm visitors by setting traps (this applied even for trespassers) or not mentioning hidden dangers that would not be obvious to any visitor upon a visual inspection. That is, there was a strong common law presumption against finding liability for doing nothing (nonfeasance) and leaving the visitor to take the property as it was, and no duty on the landowner to 'make it safe'.

However, in *Indermaur,* a gas-fitter workman permitted on the site of a sugar refinery fell through a second floor hole, used in the production process. It was dark during the workman's visit and there was neither a guardrail around the hole nor was the workman warned of this risk by the owner or his agent. As a result of this situation, the workman fell through the hole and was injured. This rather egregious example was the fact situation that the Court finally faced up to, to create the two new entrant categories and ensure that for at least some visitors, the owner or occupier of the property would have a duty to take positive steps to warn of dangers or to make the property reasonably safe to be visited.

Invitees

Here is an initial confusion for present-day consumers or even lawyers: the 'invitees' category created in the *Indermaur* case – despite the modern use of the term as suggesting an "invited" guest – was not the casual guests of the landowner or occupier, but rather a category of persons coming onto the land, who were 'invited' or 'solicited' to be there as their presence did, or potentially did, advantage (usually economically) the landowner/occupier. A shopper was usually (but sometimes not) held to be the "invitee" of the shopkeeper who at the least offered them goods. Third-party workers – and indeed the gas-fitter plaintiff in *Indermaur* v. *Dames*, who came in to inspect gas burners and fell through the unmarked, unfenced hole in an upper story factory floor – were in this category.

What distinguished the "invitee" category after *Indermaur* v. *Dames*, and which made it a much sought after category for plaintiff lawyers, was that this group, again, somewhat counterintuitively, received the highest level of liability protection. The standard of care for these individuals was stated to be:

> " . . . with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage *from unusual danger*, which he knows or ought to know; and

[106] See Philip H. Osborne, "The Occupiers' Liability Act of Manitoba", (1986), 15 Man. L.J. 177 at 178: "it reflected the traditional common law reluctance to impose liability for nonfeasance"; and *White* v. *Imperial Optical Co. Ltd.*, [1957] O.W.N. 192 (C.A.)

> that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."[107] [Emphasis added.]

We shall return to this famous statement of the common law by Willes J., as it has been controversial from the date of the decision forward, as doing two things: first, requiring the occupier to make the premises reasonably safe for visitors (*i.e.*, nonfeasance was no longer a defence) [see underlining in the quote above] and, secondly, importing a change to the actual standard for negligence that had not until then existed, namely, the reference to "unusual danger",[108] and which made the plaintiff's burden of proof higher and therefore more difficult to prove [*see the italicized portion of the quote above*] as well as conceptually, or at least textually, overlapping with the duty to the next category of entrants, licensees.[109]

The profound change in the law meant that suddenly all occupiers were potentially liable for "unsafe" premises and had to think about entrants' safety and how to ensure it.

Such a huge change in the law was, however, greatly tempered by Willes J. reference to "unusual danger", the scope and meaning of which was untested and undetermined (and would spawn thousands of cases across the common law world in an effort to define these words and this standard), as until that time, no negligence cases made reference to it.

What readers should understand for the purposes of eventual waivers law is that the second "unusual danger" test could often be addressed to remove liability for the occupier <u>if that person or business warned the invitee of such dangers in advance</u>. This warning could be delivered orally in person or, eventually, would lead to cases accepting warning by signs ("warning signs"), text printed on tickets ("conditions of entry") or even similar notes in contracts. The path to separate documents called waivers or "disclaimers" – and their overlap with warnings of 'unusual dangers' from this era of this law is one of the sources of confusion in subsequent statements of the law of occupiers' liability and waivers.

Licensees

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[107] *Indermaur*, *supra*, at p. 288, and at p. 313 (Ex. Ch.).

[108] Allen M. Linden, "A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation" (1967) 45:4 Can B Rev 831, at p. 839:

> "One cannot escape the conclusion that there was no authority prior to *Indermaur* v. *Dames* to support Justice Willes in so far as he employed the phrase "unusual danger"." On the contrary, prior to the *Indermaur* v. *Dames* decision, the duty to an invitee was merely to use reasonable care for his protection."

[109] Linden, supra, at 841:

> "It has been suggested that snow and ice cannot be an "unusual danger" in a Canadian winter, but there is no hint anywhere that it could not amount to a "concealed danger" or "trap". If this were so, a licensee, who is normally entitled to less care than an invitee, might recover, while an invitee, who is owed more care, would be denied recovery. This cannot be so! Furthermore, despite the historic protection accorded it, a municipality might be held liable for gross negligence in failing to clear ice and snow from the highway," while a private business in similar circumstances might escape liability. This cannot be right either!"

Again, counter-intuitively for those laypersons or even lawyers thinking of the present-day understanding of "licence" with its legalistic-sounding connotations, the second new category of entrant created under *Indermaur*, was called a "licensee" and was owed a lower standard of care that was extended to all persons the landowner allowed onto the property or who came on it lawfully but without "gain" to the landholder. This included all invited guests (social, non-paying) and those officials and others with lawful business who entered onto the land without payment or other advantage, but were not 'trespassers', due to their invitation or other lawful reason to come onto the property, were in effect given an implicit "licence", (sometimes fictitiously implied by law) to enter. The landowner was required to offer the licensee the following lesser standard of care:

> The occupier must warn a licensee of any concealed danger (or trap) *of which the occupier knows*.[110] [emphasis added.]

This was roughly the law prior to *Indermaur* for most entrants but there was new confusion post-*Indermaur* in the courts over the concept of "unusual danger" for invitees and this lower standard for licensees, as there may be a semantic or legal overlap between the "unusual danger" concept and "concealed danger" or "trap".[111] More importantly for the eventual development of waivers, we note that the duty to licensees, low as it was, could be discharged, again, by a warning (often expressed on a notice board on the property); however, the crucial difference was that landowners were only required to warn of dangers of which they had *actual knowledge*. The discharge of this level of duty will be discussed in the development of 'conditions' of licence to enter a property – still potentially active today in most of Canada – which has caused the parallel development of an exceptions to liability outlined below that has been described as 'endless and horrifying'.

Even apart from this semantic similarity, the categories of licensee and invitee were somewhat overlapping and fluid, depending on the facts of the case and many judicial decisions struggled with the categorization – especially as the consequence of which category often meant the difference between receiving damages or not. In *Indermaur*, for example, had the workman not been classed, ultimately, as an invitee, he would have been a licensee and very likely received nothing, as the defendants argued, and the court there accepted, that having a hole in the floor was a normal part of a sugar refinery and not a trap or 'concealed' danger but a regular feature of sugar refineries at the time, but, as the court found the gas-fitter was indeed an invitee, the defendants had to make the place safe from at least 'unusual danger' – which the court found was the case with the open hole in the floor (especially in low light).

Unfortunately, as hinted at before, the law then meandered through many contradictory cases, in particular in Canada around snow and ice and snow clearing, and snow melting, etc.,[112] and the "unusual danger" criterion for liability to invitees in each factual situation, or 'concealed dangers' for licensees, making potential liability hopelessly difficult to predict and left the law in this area to say the least, confused.

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[110] Winfield & Jolowicz on Tort, 10th Ed., at p. 169.
[111] Linden, *supra*, at p. 841.
[112] Linden, *supra*, at pp. 842-5, and 848.

Volenti non fit injuria

Before we leave the subject of the historical categories of entrant to land in occupiers' liability under the common law, we must take another small detour to deal with the defendant's tort and other defences, as these defences and their interpretation affect not only the subsequent development of statutory occupiers' liability acts to 'reform' this area of law but also affect the attitude of defendants in industries, like SOAR activities, that wish to deflect liability to customers and ideally, avoid lawsuits altogether.

Recall that Willes J. in his famous statement of occupiers' liability under common law stated the following regarding how defendants could discharge this newly restated duty to visitors by taking reasonable care, now that the law clearly put positive duties to make a place safe on occupiers:

> […] where there is evidence of neglect, the question whether such reasonable care has been taken, *by notice, lighting, guarding, or otherwise*, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact. [Emphasis added.]

The first of these defences is signage warning of dangers or other safeguards. Given the historical development of the law, dealt with subsequently below, we treat that first category defence of signage, etc., [in the italicized part of the quote, above], after the second defence [in the underlined portion] – the latin maxim *volenti non fit injuria*. This defence or doctrine is succinctly and brilliantly summarized by Professor Jodi Gardner, who has written extensively on the subject:

> The defence of *volenti non fit injuria* translates as "to a willing person, no injury can be done" and works as a complete defence to deny the claim in its entirety. While there are ongoing debates on the number and make-up of the different elements associated with *volenti*, it is grounded on notions that people should not accept risks of harm and then claim damages if that risk arises and they are harmed.[fn2] *Volenti* has long caused confusion in the common law; it highlights a tension between the law's desire to protect individuals who have been harmed (particularly from physical injury and death) whilst also respecting personal responsibility.[fn3] As outlined by Gordon, "few branches of English case law are as confused and inconsistent as the decisions on a man's right to complain of physical injury after he has knowingly incurred danger".[fn4] Some of the more controversial applications of the defence have been removed, such as the dangerous employment conditions, but others remain and continue to cause practical complexities and philosophical challenges.[113]

The hidden legal value of *volenti*, and what made it the first of the defences to be relied upon by defendants, was its procedural value. Before reform of tort law in the 1900s, it was a "complete defence" to the plaintiff's claim because at that time, liability was not apportioned between parties of both were found partially at fault for an outcome. Therefore, if the plaintiff could be shown to have in some way "authored their own misfortune" by negligently contributing to the bad outcome, the defendant won outright and was not held liable (and therefore did not pay the plaintiff damages).

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[113] See Jodi Gardner, "A Risk by Any Other Name": Rejecting *Volenti* in Australian Tort Law", in *Australian Tort Law in the 21st Century* (Sydney: Publisher, 2024), ch. 7, pp. 138-158, at 138; footnotes omitted.

Thus when Willes J. refers to “contributory negligence in the sufferer”, he means that if the defendant can establish some aspect of contribution to the result by the plaintiff, that the defendant will succeed. However, the defendant had to prove this element in court – usually by cross-examining to the plaintiff and trying to show the plaintiff did something to cause the outcome. This is difficult, as many appeal cases from this era show.[114] Therefore, the defendants turned to the ancient and somewhat unused (before that time) defence of *volenti non fit injuria*, and tried to revive it as a form of contributory negligence, in that the plaintiff had consented to being harmed.

The trouble, as outlined by the courts when this was attempted to be shown by the defendant, is, unlike having the plaintiff admit contribution the outcome, usually by physical steps taken, *volenti* required an inquiry into the mind of the plaintiff, to establish that they: 1. had known of the risk (or should have since it was obvious); 2. had considered the risk and nonetheless agreed, either explicitly or implicitly, to accept it and its legal consequences. The first element, knowledge of the risk, is referred to in the caselaw again by a latin term, this time “scienter” (meaning “to know”) and the second element, referred to in latin, is “volenti” (meaning “to consent”).

The most famous recitation of the requirement not only to establish knowledge but also consent to establish the full defence of *volenti*, was made in *Thomas* v *Quartermaine*, where Lord Bowen stated:

> "The maxim, be it observed, is not 'scienti non fit injuria,' but 'volenti.' It is clear that mere knowledge may not be a conclusive defence ... The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger ... Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete."[115]

The story then continues with a Canadian case: *Letang* v. *Ottawa Electric Railway*.[116] This is one of the Canadian cases that ended up decided by the U.K. Judicial Committee of the Privy Council, when Canadian Supreme Court cases were still reviewed by the colonial power in London (until 1949).

In *Letang*, a woman looking to climb a hill in Rockcliffe to take the then new (in 1923), and still somewhat thrilling in itself electric tram into Ottawa, slipped on unmaintained icy stairs on the Railway’s property and leading to the platform, in winter. The Court found the stairways were intended to invite business to the Railway, so the plaintiff was an “invitee” and as such the Railway was required to make the premises reasonably safe. The Railway did not seek to defend the case on providing a notice of the danger of the stairs because they neither posted a notice nor took any steps to clear the stairs of ice, but instead pleaded only *volenti*. That is, the Railway sought to rely on the woman’s mere use of the stairs as indicating not only knowledge of danger but full acceptance of the danger and consent to take responsibility for the danger upon herself. That was their defence. The Privy Council denied this attempt:

> 15 To apply these illustrations to the present case, there is no evidence whatsoever that the appellant's wife, holding on as best she could to the handrail, had a full knowledge of the nature and extent of the danger; or that, knowing this, she freely and voluntarily, with full knowledge of

[114] See for example, Osborne v. L. & N.W.R. (1888), 21 Q.B.D. 220; *Thomas* v. *Quartermaine* (*infra*); *Letang* v. *Ottawa Electric Railway* (*infra*).
[115] Thomas v. Quartermaine (1887), 18 Q.B.D. 685, at pp. 696-7.
[116] [1926] AC 725, [1926] 3 D.L.R. 457, [1926] J.C.J. No. 4 (P.C.).

> the nature and extent of the risk she ran, encountered the danger. As to this it is to be noted that she was merely traversing the same steps and under the very same circumstances as many hundreds of tramway passengers. Probably the legal situation is answered by the observation already made that neither the woman's knowledge nor will was made the subject of cross-examination at all. It rather appears that the judgments, in so far as sustaining this defence, are based solely upon the fact that there was some danger from slipperiness apparent to anybody on the steps. Unless, however, the defendant company, who had invited the woman to use that access and were accordingly bound to keep it reasonably safe, could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence fails. All that the defence put to the woman was whether she held on to the rail and should not have saved her fall in that way. They elicited the answer: "Je le tenais, comme il faut," and there the defence founded on the maxim *volenti non fit injuria* came to an end.

Thus *Letang*, a leading case in Canada and elsewhere in the Commonwealth, effectively made defendants liable in most invitee circumstances, unless they were able to find proof of the plaintiffs actively taking steps that would lead to contributing to their own harm or fully agreeing in advance to run a risk that was not only known but fully appreciated.

Notice and Signs

This development and clarification then led to the second type of defence mentioned by Willes J. in *Indermaur*, namely: “by notice, lighting, guarding, or otherwise.” What defendants started pleading, and started to use in practice, was “notice”. This was a matter that the business could control. Although physical protective steps could be taken (lighting, guardrails and the equivalent) it should be noted that notice, either when given verbally, or especially when posted on a public sign near the entrance, or printed on an entrance ticket, was the easiest, cheapest, quickest and theoretically, the most comprehensive, provided courts would accept that the warning in these notices to consumers or entrants on land was enough to satisfy their duty of care.

Therefore, by the 1950s, notices of this nature, again mostly displayed on public signs, and occasionally given orally at the entrance, were commonplace. Insurers also began to require such notices – on the assumption that this “notice” of risks would be a defence to tort claims.

What happened in practice, again, however, was that businesses and insurers began to be more complete in such notices and to try to describe an ever wider area of hazards (usually related to property conditions) than before to ensure a defence.

Horton’s Case: You have been warned

The apex of this type of notice was *London Graving Dock* v. *Horton*, a case from the U.K. House of Lords in 1951.

In Horton's case, the House of Lords held that notice (here, verbal notice and the acceptance of the condition of premises – that an independent contractor, a welder, an invitee, had tolerated over several days of work) was sufficient for the defendants to satisfy the duty of care to the invitee. The welder had fallen off scaffolding inside a ship while moving off scaffolding that was found to be out of the ordinary and dangerous enough to be considered an "unusual danger". Nonetheless the duty of care was met by the knowledge of the invitee independent contractor alone. It was not necessary to show the plaintiff had a full appreciation of the danger and had fully assented to run the risk – only that he was aware – in fact, had 'notice' of it – as Willes J.'s remarks about defences appear to imply.

Horton's case was immediately savaged in the popular press, the legal academy and by other judges. It was in part responsible for the U.K.'s decision to enact the first *Occupiers' Liability Act*, in 1957. The report that called for reform of this area of law, commented in particular about Horton's case that: "The gloss on the rule contained in *London Graving Dock* v. *Horton* that full knowledge and appreciation of the nature and extent of the risk is a bar to any action by the injured invitee is likely to work injustice."[117]

Horton's case was later overruled by the House of Lords, but for several years in the 1950s, it was still "good law" but no competent judge would directly rely upon it. It is at this stage that the next development to create a defence to invitee liability was hatched.

Ashdown's Case – "The possibilities seem endless and horrifying"

In the most poorly timed "development" of the common law, ever, the highly coincidental and unexpected decision of the English Court of Appeal in *Ashdown* v. *Samuel Williams & Sons, Ltd.*,[118] (hereafter, *Ashdown*) radically changed the law just months before the 1957 *Occupiers Liability Act* was passed. "Ashdown's case" created the possibility of new notices, not for the purpose of fulfilling the duty to warn invitees of unusual dangers, but to disclaim all liability, by simple posting of a sufficiently clear notice, of any negligence duty of occupiers (including for their "activities") towards all entrants, and to treat even the otherwise negligent actions of occupiers (or their servants, employees or agents) committed on the land on the same basis as the static condition of the land. That is, for all entrants (again, no matter the "category" of entrant) they were now deemed to 'agree' to the posted "licence" (usually on a sign) to legally enter on the land upon conditions of the occupier owing no duty of care for any injuries or even death, even otherwise "negligently" caused, and even by the activities (otherwise negligent) of the occupier or his servants. In effect, the court held that notices now had a new function: to bind those entering to a 'conditional licence', the main term of which being that entry forbade suing for negligence.

This case came down just months before Parliament in the UK approved the new *Occupiers Liability Act*, 1957, which we detail below. Due to the timing, and the wording of the new OLA, 1957, the effect of *Ashdown* was carried forward despite the reforms in the new statute.

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[117] The Law Reform Committee, Third Report, "Occupiers' Liability to invitees, Licensees and Trespassers" (Cmnd 9305, (1954). See also Odgers, [1955] C.L.J. 1; Heuston (1955) 18 M.L.R. 271; Bowett, "Law Reform and Occupier's Liability" (1956) 19 M.L.R. 172.

[118] [1957] 1 Q.B. 409 ([U.K.]C.A.) (affirming the judgment of Havers J. [1956] 2 Q.B. 580).

The facts of Ashdown's case were that a landowner, who had permitted employees of a nearby business to cut across its railway tracks to get to another business to go to work, to post a notice board, warning such employees of the other business reachable only by traversing its property, that it would not be held liable for any injuries or deaths due to operations on the land. A worker was then injured by the landowner's servants, who sent rail cars moving along the tracks with no warning to those cutting across the land. The worker who brought the case was injured by one of these moving railcars, which the landowner admitted were otherwise being moved in a "negligent" manner (without due care as to the presence of persons on the land) but then claimed benefit of the signage wording to completely disclaim the duty. The worker's evidence made it clear that she did not understand the full meaning of the sign, which was quite convoluted and lengthy in its attempt to disclaim all negligence or other liability, not to mention the fact it was asserting a completely legally novel waiver of "activity" liability that until that time was the law (see below). The lower court, affirmed by the Court of Appeal, nonetheless held the defence provided by the notice board not only was allowed, but denied any duty, and therefore any liability, to the worker-plaintiff, even for the activities of the landowner's servants' actions (again, rather than just the static state of the premises). The Court of Appeal, in particular, refused to require "actual notice" or other full understanding of the sign by the worker, despite caselaw which appeared to support this requirement if the usual negligence standard for "activities" had been applied. In effect, the posting of a notice was now good to disclaim even negligent activities of the occupier or his servants on the land, and not merely dangers caused by the condition of the land and premises, simply by virtue that it was an activity taking place on that land and that there was a notice put up that could be seen and read by entrants.

UK case law had held,[119] just prior *Ashdown* and to the passing of the UK *Occupiers Liability Act*, 1957, that there was a different duty of care for "activity duties" of the occupier towards entrants, unlike duties related to the static condition of the premises.[120] Activities of the occupier were judged on "normal" negligence principles and applied to *all entrants*, even before the 1957 Act, no matter their "category" under the *Indermaur* test. This meant that for "activities" of the occupier (like leaving a furnace burning without supervision or driving recklessly on one's own private roads) the occupier could not treat entrants as mere "licensees" who only had to be warned of "concealed danger" or even as "invitees" who, even at this late date also could be informed by a well-placed a sign noting "unusual dangers" to escape liability under Horton's case. Instead, the occupier owed *all legal entrants* a duty of care not to negligently hurt the entrant, just as he or she would on public land, or someone else's, land. This promising hope for plaintiffs also ended with *Ashdown* and its insistence on the occupiers new ability to require as a condition of entry that all negligent conduct and unsafe premises were accepted by the entrant.

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[119] *Slater* v. *Clay Cross Co. Ltd.*, [1956] 2 Q.B. 264, per Denning L.J., at p. 269:

> "At any rate, the distinction [between invitees and licensees] has no relevance to cases such as the present where current operations are being carried out on the land. If a landowner is driving his car down his private drive and meets someone lawfully walking upon it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift. That is made clear by the decision of this court in *Dunster* v. *Abbott*, [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572, which was applied by Finnemore J. very recently in *Slade* v. *Battersea and Putne Hospital Management Committee*."

[120] This distinction was also recognized in Ontario, prior to the passing of the *Occupiers Liability Act* (Ontario), dealt with below. See *Szengut* v. *Koslowsky*, [1968] O.J. No. 395 (H.C.J.), per Lacourciere J., at paras. 8-17. See also Fleming on Torts, 6th ed., at pp. 438-9, citing *Slater*, *supra*, and *Perkowski* v. *Wellington Corp.* [1959] A.C. 53.

These changes to the law were viciously criticized by leading law professors and lawyers.[121] The first article, by L.C.B. Gower, entitled "A Tortfeasor's Charter?", which was criticizing only the lower court decision (the Court of Appeal decision not yet being made), stated of the lower court decision that: "the possibilities seem endless and horrifying".[122]

The second article, published after the Court of Appeal decision, by F. J. Odgers, "Occupiers' Liability: A Further Comment" (1957) 15:1 Cambridge LJ 39, states at 46:

> So that, whether we like it or not, *Ashdown* is an authority that the liability of an occupier can be excluded by conditions attached to a licence, provided the occupier has taken all reasonable steps to bring the conditions to the licensee's notice. Although the point is never expressly made in the case, it is submitted that the Court of Appeal is saying that the plaintiff, in such a case, fails because he is *volens* either expressly or by inference. It is his agreement, based on the terms of the licence notified to him, that prevents his suing. It makes no difference whether his agreement is given by a contract or by acceptance of a gratuitous licence.

The Odgers article quotes for authority the law report of *Ashdown* in the Court of Appeal [UK] at 1116, per Jenkins L.J.:

> "I can see no difference in principle between the case of a contract and a licence subject to conditions. In both cases the person claiming exemption must show that he did all that was reasonable in the circumstances to bring the conditions to the other party's notice. Once that is proved it cannot, in my judgment, make any difference that the other party acted unreasonably or deliberately in not reading the conditions."

The article then states:

> Such then is the position in law today, as decided by the Court of Appeal. And, in this respect, it will be the same if the Bill [which became the *Occupiers Liability Act*, 1957] becomes law in its present form. The occupier's duty can be excluded by contract. It can be excluded by "agreement," not amounting to a contract.

The author in the quote above then contends this new 'conditional licence' appears based on the same principle that allows *volenti non fit injuria* (the consent-based exception to liability in tort, dealt with above, which courts had just managed to constrain). So, again, at p. 46, Odgers writes:

> This, it is submitted, is an application of the *volens* maxim— "some sort of intercourse or communication between plaintiff and defendant from which it can reasonably be inferred that the plaintiff has given an assurance to the defendant that he waives any right of action he may have in respect of the conduct of the defendant." Such agreement can be achieved by an adequate notice sufficiently brought to the attention of the visitor. The duty can be excluded "otherwise " in so far as the occupier is free to exclude it, e.g., by rules and regulations, made and published under by-laws or other statutory authority, which are binding whether "agreed to" by the visitor or not.

Whether this is true or a conflation with an older concept is arguable and it certainly leads to additional legal confusion. It seems to be unrelated, as the *volenti* principle is based on the plaintiff's free consent,

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[121] *Contra*, see, D. Payne, 'The Occupiers' Liability Act 1957' (1958) 21 MLR 359 at 364-5; 369-70.
[122] L.C.B. Gower, "A Tortfeasor's Charter?" 19 Mod L Rev 518, 532 at 533.

while the conditions of the licence are imposed by the occupier and accepted by the entrant upon entering the land with notice.

In any case, we note that it is more likely two other factors led to the radical development in *Ashdown*. First, it appears related to the statutory reform of the common law of contributory negligence in the U.K., see: *Law Reform (Contributory Negligence) Act*, 1945.[123] The change there made 'contributory negligence' on the part of the plaintiff no longer a bar to any recovery. Instead, any partial negligence by the plaintiff that contributed to the accident was apportioned by the court to the plaintiff and any damages reduced by that percentage or amount but no longer allowed the defendants a complete defence to the action. This meant that many more cases were potentially ones where a plaintiff could (partially) recover damages.

Secondly, the ongoing controversy of Horton's case and the law reform it kickstarted towards a comprehensive statutory reform of occupiers' liability law made it impossible for the Court of Appeal in *Ashdown* to cite *Horton* or rely upon its traditional holding from *Indermaur* that "notice" can be meet the duty of care. Indeed, despite its clear relevance and indeed dispositive nature for *Ashdown*, the Court of Appeal refused to cite Horton's case. It is our contention that this deliberate omission led the court to search for a new method to achieve the same result without directly relying on law now seen as toxic.

The *Ashdown* case and subsequent decisions following it, as well as other commentary of the time therefore made it crystal clear that by this new type of notice that one might exclude any liability – even for death or injury, 'howsoever caused' – even by negligence of the occupier or his or her servants and employees – and that it is an independent right in the property owner or occupier to exclude such liability as the consequence of granting the 'conditional licence' with this exact condition of waiving one's rights to sue for death or injury, just to enter upon the land.

The results were indeed shown to have been the horror that Odgers feared. These new notices turned up everywhere there were recreational businesses and were included in club rules and similar documents.

It is at this exact moment, in 1957, that the U.K. fatefully finally went forward with reforming, by statute, the confused, hotly contested and unpredictable common law of occupiers' liability. Unfortunately, the reform somewhat allowed, and indeed prepared the ground, for businesses to come to use waivers of liability and to rely as well on conditional licences to the same effect: to avoid liability.

The *Occupiers' Liability Act*, 1957 [U.K.]

Around mid-century in the 1900s, there was a strong movement to reform the common law of occupiers' liability, even as "clarified" by *Indermaur*. This reform began in the United Kingdom,[124] before traversing, belatedly, the Atlantic ocean to eventually be received in modified form, in some, though not

[123] See a good explanation of the huge effect of abolishing the absolute defence aspect of contributory negligence in *Slater* v. *Clay Cross Co.*, [1956] 3 W.L.R. 232 (C.A.).

[124] For a fascinating recitation of this process, see S H Bailey, Occupiers' Liability: The Enactment of 'Common Law' Principles, online: . An edited version of this paper was published in T.T. Arvind and Jenny Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2012).

all, Canadian provinces. As this statutory reform to the common law of occupiers' liability set the stage for the entrenchment of modern liability waivers, and conditional licences having the same effect, and we turn to this history in some detail now.

In 1957, the inconsistencies of the *Indermaur* categories of entrants were collapsed under statute in the UK, resulting in a single duty to any legal entrant (invitees, licensees and contractual entrants) but providing no new rule for *illegal* entrants (that is, trespassers).[125]

The new rule was a "common duty of care" to make premises reasonably safe for all lawful entrants. Section 2 was the operative clause and we quote it in full, as it has formed the basis (with some changes) of almost all provincial occupiers' liability statutes in the common law provinces of Canada with such laws):

> *2 Extent of occupier's ordinary duty*
>
> (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> > (a) an occupier must be prepared for children to be less careful than adults; and
> >
> > (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—
>
> > (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
> >
> > (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an

[125] Fleming, *supra*, at page 470.

independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

The goal of the *Occupiers Liability Act* of 1957 in the UK was therefore to abolish the old categories of entrant and the varying duties towards people coming on to property depending on their purpose or relation to the owner or occupier.

Gower and Odgers, once again, somewhat like Statler and Waldorf in the *Muppet Show*, also heckled, with some justification, the new law. They predicted that under the new UK *Occupiers' Liability Act*, 1957, the new 'conditional licence' exception in *Ashdown* would be preserved by the new Act, as well as the new Act's destruction of the 'activities' distinction, previously favourable for all lawful entrants 'harmed by activities' on the premises. They also predicted that the older "*volenti non fit injuria*" defence was still in the text of the relevant sections of the new Act and would therefore continue to bedevil the law and plaintiffs, like a non-exorcised spectre.

They were right on all counts. As in the case of *Ashdown*, the effect of permitting a conditional licence and notice capable of excluding all liability (even for death or injury) was passed through in subs. 2(1) of the 1957 Act by the following wording: "An occupier of premises owes the same duty, the "common duty of care", to all his visitors, *except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement **or otherwise***.") [emphasis added].

The "or otherwise" appears to have been intended to include licences with conditions upon notice. The "by agreement" refers to contract or a written waiver; "or otherwise" refers to a licence upon conditions. This is the interpretation of the provision by Gower and Odgers as noted, and also the editor of the leading law journal at the time, the Law Quarterly Review, Professor A.L. Goodhart.[126]

To add insult to injury, so to speak, as noted above (and as confused Gower), *volenti non fit injuria* indeed appeared to be permitted to continue,[127] under s. 2(5) of the 1957 Act, thanks to the following wording:

> "The common duty of care does not impose on an occupier any obligation to a visitor in respect of *risks willingly accepted as his by the visitor* (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)." [emphasis added].

It would now appear, even post-UK *Occupiers' Liability Act,* 1957, that owners and occupiers of any business could disclaim all liability for all conditions of the premises and all actions upon it, either by

[126] See Prof. Goodhart's note on *Ashdown* at first instance, in (1956), 72 L.Q.R. 470 at 471.
[127] See Douglas Payne, "The Occupier's Liability Act" (1958) 21:4 Mod L Rev 359, at 362.

obvious signage or by otherwise showing evidence that the plaintiff (customer) knew of, and, because of a posted sign or initialed or otherwise clearly was presented with language, whether in another legal document such as a "contract" or "waiver", which stated the conditions of entry, accepted the legal consequences of the notice – the legal consequences therefore being a complete removal of any duty to him or her – and no matter the harshness of this result. The case law confirming this came soon enough.

It's in Black and White: *White* v. *Blackmore*

The major case demonstrating this terrible result of passing through the new "Ashdown" notice was *White* v *Blackmore* in 1972. In this case, a competitor at "jalopy races" came back to watch races, free, as being competitor, he was permitted to do. The headnote of the case states: "Notices warning the public of the danger of motor racing were displayed which stated that it was a condition of admission that the organisers were absolved from all liabilities from accidents "howsoever caused " to spectators." After a car wheel tangled the safety rope near the competitor, he was thrown by the movement of the rope and killed. The Court of Appeal (Denning L.J. dissenting) held that there was no appreciation of, or agreement to, the risk that would have allowed the defendants to plead "volenti", *i.e.*, that the competitor/spectator had agreed to run this particular risk, but that, nonetheless, the sign absolved the defendant of any duty to the competitor watching the races due to the operation of subs. 2(1) of the *Occupiers' Liability Act*, 1957 (which allowed the defendants to exclude liability "by agreement or otherwise" – the "otherwise" being a licence condition). That is, *Ashdown*, had been followed, even after the passing of the *OLA* 1957. The professors' horror had come true: the widow suing for her husband's wrongful death got nothing.

This result was not unprotested in *White* v. *Blackmore*. Denning M.R. was on the panel of judges deciding the case and specifically referred to the Gower articles and stated he would have been inclined to agree with the argument, but the articles were not brought by the parties to the court's attention. Denning M.R. then rested his judgment on the argument that he believed that a contract provision was necessary to limit duties to any entrant to the event, just as a contract provision was required to limit common law duties to invitees. This argument appears to assume that all invitees were on the land subject to a written or oral or implied contract of some kind. Denning L.J. for example drew analogy to passengers in cases of common carriage (where, for example, on a railway or ship, there were underlying contracts of carriage, whether written or implied by law). The trouble is that for most events at which spectators enter in large numbers, such as the jalopy races here, there is no written contract and we have been unable to find cases where a contract is implied by law in this situation to all members of a crowd.

In any case, although it is a long passage, it is worth quoting in full to allow the reader to make his or her own assessment of Denning's view of the law and to demonstrate that Denning M.R. both opposed the majority's continuation of Ashdown's holding post *OLA*, 1957, but also that the matter was crucial enough for him to comment upon at length under his heading "*Ashdown* v. *Williams*":

> In an effort to show that they are exempt "otherwise" [referring to the wording in new subs. 2(1) of the *OLA*, 1957] the defendants rely on a case decided shortly before the *Act* was passed. It is *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957) 1 Q.B. 409, where people took a short cut over the defendant's land. There was no contract by which they entered. They just walked across the land. The defendants put up notices which were clearly visible to all of them. The notices told

these bare licensees that they took the short cut at their own risk. The notices were held to be effective to protect the occupier, They did little more than tell the licensees the position at common law: for, as we all know, a bare licensee came at his own risk. One hundred years earlier, when people took a short cut across a piece of land, the courts said: "He must take the permission with its concomitant conditions, and, it may be, perils": see *Hounsell* v. *Smyth* (1860) 7 C.B.N.S. 731, 743. See also the cases collected in *Latham* v. *R. Johnson & Nephew, Ltd.* [1913) 1 K.B. 398, 404-405; and the law summarised by Lord Hailsham L.C. in *Robert Addie D & Sons (Collieries) Ltd.* v. *Dumbreck* [1929] AC. 358, 365.

That case of *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957] 1 Q.B. 409 has been vigorously criticised by Professor Gower in the Modern Law Review, vol. 19 (1956), at pp. 532-537 and vol. 20 (1957) pp. 181-183. He pointed out the consequences of it, if carried to its full length. He gave good reasons for thinking that a licensor could not exempt himself from liability to his licensee except by contract. Unfortunately his criticisms were not brought to our attention. I am disposed to agree with them. But, even accepting the case as rightly decided, it only applies to the case of a bare licensee. Towards an invitee, who entered by virtue of a contract, the occupier could never exempt himself from liability except by a condition contained in the contract or incorporated in it. In every single case when a carrier has sought to rely on conditions to exempt himself from liability to a passenger, the sole question has been: was the condition part of the contract? As Lord Dunedin said in *Hood* v. *Anchor Line (Henderson Brothers)* [1918] AC. 837, 846:

> "Duty may arise from contract or it may arise from the rules of the common law, ... The duty of a carrier by sea or land ... may be ascribed to either of the two. But it is clear that when the carrier alleges an exception to that duty the exception must rest on contract. The question, therefore, always comes to this when such an exception is alleged: Was that the contract between the parties?"

Other and subsequent cases with similarly bad outcomes for plaintiffs thereafter followed thick and fast in the U.K.: there were those where a car-share rider was transported on the condition that they accept the ride without being able to sue the driver for negligence and it was found that the driver owed them no duty for negligently driving: *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145; *Bennett* v. *Tugwell* [1971] 2 Q.B. 267; *Birch* v. *Thomas* [1972] 1 W.L.R. 294. All of these found the driver's sign or condition disclaiming liability effective on the same basis. This result was so offensive, and affected so many English drivers, that the U.K., in the *Road Traffic Act*, 1972, at s. 148(3) [now s. 149(3)] prohibited such waivers of liability. This provision simply deemed that any "willing accept[ance]" of risk by the passenger, however established (that is, by sign or evidence of the passenger's "agreement" to be carried "upon conditions" – that is, by *volenti* or by "licence") could not to be used by the driver or his or her insurer to "negative responsibility".[128] These changes spread across the common law world rapidly by statute for drivers and passengers, but not to recreational businesses, such as those in the nascent SOAR sector.

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[128] *Road Traffic Act*, 1988 (U.K.) c. 52, s. 149:

149 Avoidance of certain agreements as to liability towards passengers.
(1) This section applies where a person uses a motor vehicle in circumstances such that under section 143 of this Act there is required to be in force in relation to his use of it such a policy of insurance F1047... as complies with the requirements of this Part of this Act.

Legislative Reforms of Liability Waivers

After these cases, and in particular *White* v. *Blackmore*, the United Kingdom realized that other consumer transactions, in particular with regard to recreational or leisure businesses with an element of danger, also were different than arms-length commercial transactions between nominally equal bargaining power companies. Instead, the consumer was at a distinct disadvantage and effectively given no choice but to "take it or leave it", much like the passenger in another's car. Notices and waivers had become ubiquitous for these activities and many other consumer premises and activities.

The fine distinction between contract and "licence upon conditions" also was treated as essentially what it was, an unfair and bad deal for the consumer, and a distinction without a difference, at least in relation to the business offering the service being able to escape all liability to consumers, no matter what the facts.

The result, in the U.K., was a provision banning all business to consumer notices, clauses and waivers (that is, based on licences or contracts) in the *Unfair Contract Terms Act*, 1977 (we detail this below) excluding any duty regarding, or liability for, death or personal injury (and subjecting any property loss waivers to those that are "reasonable"). The importance of this sweeping reform cannot be overstated. The U.K. had realized the unfairness to consumers of services being offered on the basis that they were running a risk of injury or death without any chance for compensation simply by being so naïve as to participate in the activity.

The horror was therefore not endless, but ended, in the U.K., from 1977 forward. In the common law provinces, however, in Canada, and elsewhere in the common law world, it continued and continues to today to be unending and still quite horrible.

What protected consumers in the U.K., however, was not imported into our law, so that now *contra proferentem*, fundamental breach, findings of public policy violation, lack of consideration and even unconscionability are the only hope for consumers, even as the courts tighten access to these remedies beyond the possible for most litigants and on most fact situations. What the U.K. did was to unabashedly protect consumers by reform in a statute that worked to limit waivers. We turn to consideration of that important statute now which we consider as a potential model for reform in the Canadian provincial law milieu, especially given failed attempts to use provincial statutes and other tools to limit waivers in Canada.

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(2) If any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held—
(a) to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 145 of this Act to be covered by a policy of insurance, or
(b) to impose any conditions with respect to the enforcement of any such liability of the user.
(3) The fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such liability of the user.
(4) For the purposes of this section—
(a) references to a person being carried in or upon a vehicle include references to a person entering or getting on to, or alighting from, the vehicle, and
(b) the reference to an antecedent agreement is to one made at any time before the liability arose. [Emphasis added.]

Law Reform that Worked – *Unfair Contract Terms Act 1977* [U.K.]

The U.K. *Unfair Contract Terms Act 1977*,[129] (the "UCTA 1977") as noted above, was a watershed moment for consumer services transactions and the unfair disclaimer of liabilities by businesses. The exact wording and mechanics of the legal change are crucial to understanding how waivers might be limited in a reasonable manner, so we detail them here. The key section, section 2, reads:

> *Avoidance of liability for negligence, breach of contract, etc.*
>
> 2.-(1) A person ***cannot by reference to any contract term, or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence***.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
>
> (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk. [Emphasis added.]

Not only did the UCTA 1977 reverse the effect of *White* v *Blackmore* and void reliance on signs, contractual terms or separate waivers of tort liability for negligence of any business service intended for the general public in subs. 2(1), but it also made it impossible, without more, to use signs or waivers as evidence of defences such as *volenti*. (see subs. 2(3) of the UCTA, above).

Section 2 is drafted in such a way as to focus on negligence, and by its open wording to ensure not only contractual waivers, but also licence conditions, and indeed any other legal theory of waiver of consumer rights to sue in negligence, was removed. It is admirably focused, clear and concise while being comprehensive. It does this by focusing directly on preserving a consumer's right to sue for negligence.

The UCTA 1977 also explicitly removed the ability of businesses dealing with other consumer contractual clauses, including contractual non-performance provisions, to purport to relieve those businesses of any contractual liability for providing services not in accordance with warranties or other contractual obligations. (Section 3).

Finally the UCTA 1977 dealt with a matter which will arise in our discussion below of waivers and children. The Act explicitly forbade any effort by a business to have any consumer party "indemnify" another (that is, agree to repay the defendant for any liability it did incur) by making such indemnifications "except in so far as the contract term satisfies the requirement of reasonableness". (Section 4). Making parents or guardians indemnify defendants for negligence in harming a child thus is not a reasonable requirement.

It should be noticed that the U.K. in Parliament specifically dealt with industry arguments that such a removal of the ability to totally waive liability for death and personal injuries of consumers was going to

[129] 1977 c. 50 [U.K.].

be either a business expense that could not be borne or that it would lead to businesses shutting down to avoid potential liability; in other words, that the law could be an "unnecessary killjoy" and cause the loss of amusement and other activities for consumers.[130] The U.K. rejected these arguments and placed the potential liability for consumer deaths and injuries on the businesses and their insurers. Since that time, there has been no evidence of a lack of amusement or other activities for U.K. consumers and such businesses have not closed or shut down due to insurance costs; nor have insurers so increased premiums that such businesses cannot operate in the U.K.

It should be noted that the legislation does not bar the defendant business from arguing it is not liable in the circumstances, that is, that the business can show on other legal grounds that it did not breach its duty of care to the consumer (that is, that it acted carefully enough – to the standard of what was reasonable) as well as any other defence (remoteness of damage; lack of causation, foreseeability, etc.). The only thing the U.K. legislation removes is a business's ability to rely upon a waiver to claim it does not even owe the consumer a duty of care in providing a service. This is based on the belief that the business is the least cost avoider and can most easily obtain insurance and operate in a safe manner, as opposed to visiting the full cost of a tragedy upon a consumer with little means to shoulder the huge burden of a loss, whereas a small increase in entry price to pay for such insurance would be a much better policy for consumers.[131]

Since this time in the U.K., the effect of the UCTA 1977 was continued in the by the *Consumer Rights Act 2015*, ss. 62 and 65, which continue these prohibitions on waivers of liability and unreasonable indemnities under a more comprehensive consumer law originally designed to accord with EU law.[132]

Canadian provinces have not seen fit to follow suit in their consumer protection acts, despite also being modern economies, like the UK and the EU. We turn now to the development of occupiers' liability and liability waivers in Canada, the lack for statutory reform such as the *Unfair Contract Terms Act, 1977* in Canada, and the state of the present Canadian law in common law provinces (that is, excepting Québec, which is dealt with separately, below) – which still allow the full effect of waivers to be visited upon consumers.

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[130] See the U.K. debates excerpted in the Manitoba Law Reform Commission Report, at Chapter 6, pp. 26-28 (see especially footnotes 4 to 7). Note that the Manitoba Report concluded, in relation to the U.K. prohibitions on waivers that (at p. 28):

> "This legislation [*UCTA, 1977*] may not provide a template for reform in Manitoba because of the technical nature of the legislation arising from its inter-relationship with other English legislation but it does provide a precedent for the prohibition of some waivers of liability and unfair behavior and offers some evidence that this option is a practical and tried response for the protection of consumers."

[131] *Ibid*., at footnote 6: "Do I take it that the hon. Gentleman is happy to accept that a small number of individuals should incur costs of frightening proportions because of some misadventure, rather than that some tiny sum should be added, through the generality of business transactions, to the costs of goods and services?" and, at footnote 7: "[B]usinessmen may think in future, as no doubt most do already, that it is far better to apply forethought to avoiding being negligent than to avoiding their liability for negligence."

[132] Note that during the period before "Brexit" the UK was also subject to EU rules also prohibiting disclaimers of liability for death or injury due to "acts or omissions" of business to consumer products or services: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, art. 3, and Annex, s. 1(a) and (b).

Québec civil law prohibits liability waivers

New France [Québec], even upon its conquest by the British from the French in 1759, and formalized under the Treaty of Paris in 1763, imported and validated the "Coutume de Paris" (that is, French law as it stood at the time). Under the English law at the time, it "did not deal with the law of property and civil rights, but it was a principle of English law at that time, that a change of political allegiance did not involve a repeal of the private law. That law remained in force until modified by the new authority."[133]

The Royal Proclamation of 1763 nonetheless still set off a dispute as to which legal system would be used, English common law or French civil law, and this was settled only with the Québec Act of 1774 and the subsequent creations of Upper (Ontario) and Lower Canada (Québec). In Québec, it was then settled that French law would continue for most property and civil rights. Québec eventually codified French law in the post-Napoleonic era into the *Code civil du Bas Canada*, which became the *Code civil du Québec*. This followed the structure and at times, the actual text, of the Code Napoléon. The Code Napoléon generally frowned upon waivers of liability for "delicts" which are the rough equivalent of tort in common law. The civil law thus declared that certain provisions of contract could be contrary to "public order". This generally included clauses denying liability waivers for delict, but those for contract could be permitted.[134]

Civil law also, however, defines particular relationships as subject to additional rules, due to the power imbalance between parties. This is true of contracts of adhesion (where only one party sets the terms, which are not negotiable by the other party) and in particular, consumer contracts. Consumer contracts that are abusive or unreasonably disadvantage consumers are "nulle" or void under art. 1437 of the *Code civil du Québec*.[135]

Apart from this, art. 1474 "prevents anyone from excluding or limiting their liability "for material injury caused to another through an intentional or gross fault" or "for bodily or moral injury caused to another." The 'bodily injury' referred to in the second paragraph is personal injury or death. The second paragraph of art. 1474 thus makes clear that bodily injury or death cannot be disclaimed in any way. Note that this prohibition is <u>not</u> limited to "gross negligence", as is the case for material loss to possessions or goods:

> ***Elle ne peut aucunement exclure ou limiter sa responsabilité pour le préjudice corporel ou moral causé à autrui.***
>
> ***[He may not in any way exclude or limit his liability for bodily or moral injury caused to another.]***

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[133] J.G. Castel, *The Civil Law System of the Province of Québec* (Toronto: Butterworths, 1962), at p. 20. See also: *Donegani* v. *Donegani* (1835), III Knapp. 63; 12 E.R. 571 (Privy Council), at p. 84-5 [580].

[134] *Glengoil Steamship Co.* v. *Pilkington* (1897) 28 S.C.R. 146.

[135] C.c.Q. art. 1437 : La clause abusive d'un contrat de consommation ou d'adhésion est nulle ou l'obligation qui en découle, réductible.
Est abusive toute clause qui désavantage le consommateur ou l'adhérent d'une manière excessive et déraisonnable, allant ainsi à l'encontre de ce qu'exige la bonne foi; est abusive, notamment, la clause si éloignée des obligations essentielles qui découlent des règles gouvernant habituellement le contrat qu'elle dénature celui-ci.

Finally, the *Loi sur la protection du consommateur*, c. P-40.1, at art. 10, to be more certain, states not only the business in a consumer service, but also any person representing the business cannot disclaim the consequences of his or her action.[136]

Thus, Québec civil law absolutely prohibits liability waivers in consumer services of all kinds, including the SOAR sector. Similarly, national law in France,[137] the directives of the European Union,[138] and consumer law in South Africa,[139] prohibit consumer waivers. Japan prohibits total consumer waivers and partial ones involving "gross negligence". This is not the case in the rest of Canada, however.

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[136] L'Article 10 reads: "10. Est interdite la stipulation par laquelle un commerçant se dégage des conséquences de son fait personnel ou de celui de son représentant." ["10. Any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative is prohibited."]

[137] 'Clauses abusives' prohibited by Article L.132-1 du Code de la consommation. Note that there is a list of "black clauses" of no effect whatever, and "grey clauses" that a defendant bears the burden of justifying. In the list of black clauses is the limitation of delictual liability of a business towards a consumer: "6. Supprimer ou réduire le droit à réparation du préjudice subi par le non-professionnel ou le consommateur en cas de manquement par le professionnel à l'une quelconque de ses obligations".

[138] See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which at article 3(3) reads: "The Annex shall contain an indicative and non-exhaustive list of the terms which maybe regarded as unfair." The first of these unfair terms, which cannot be enforced, is the first listed in this Annex:

> 1. Terms which have the object or effect of:
>
> (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier[.]

[139] *Consumer Protection Act* 68 of 2008, as amended ("the CPA"). As per section 48(1)(c) of the CPA a consumer agreement may not contain an exemption clause which is "unfair, unreasonable or unjust".

Section 48(1)(c) provides that a supplier must not—

"(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction."

Section 48(2)(a) provides that a contractual term or condition is "unfair, unreasonable or unjust" if —

"(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) [it is] so adverse to the consumer as to be inequitable;"

The CPA Regulations provide further clarity on unfair contractual terms in consumer agreements. As per Regulation 44(3), in consumer agreements concluded between suppliers "operating on a for-profit basis and acting wholly or mainly for purposes related to [their] business or profession" and individuals who enter into such agreements for purposes unrelated to their business, the following contractual terms are presumed to be unfair:

44(3)(a) – clauses excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission by a supplier subject to section 61 (1) of the Act;

44(3)(b) – clauses excluding or limiting the legal rights or remedies a consumer has against a supplier who breaches or partially breaches a consumer agreement;

44(3)(d) – clauses which limit a supplier's vicarious liability;

44(3)(e) – clauses which compel a consumer to indemnify the supplier against liability incurred by it to third parties;

Canadian "Common Law" Provincial Occupiers' Liability Acts Import the Flaws

Canadian 'common law' provinces (that is, excluding Québec) imported the UK law of occupiers' liability including the *Indermaur* categories, as each became provinces and eventually joined Canadian confederation, in the late 19th and early 20th centuries.

Some Canadian provinces then followed the U.K. trend to abolish the common law categories of entrant for occupiers' liability and to replace it with common statutory duties to all entrants, with several provinces passing comprehensive occupiers' liability statutes with a common statutory duty to make premises "reasonably safe" to all entrants: Alberta (1973); B.C. (1974); Ontario (1980); Manitoba (1987); and Nova Scotia (1996).[140] The three territories, however, and the Province of Saskatchewan, still to this day, rely on the common law.[141]

These "reformist",[142] and indeed, most populous Canadian common law provinces, however, also imported the flawed exceptions from the UK *Occupiers' Liability Act*, 1957, permitting both *Ashdown* notices and preserving the defence of *volenti non fit injuria*.

In so doing, the usual pattern of importation of U.K. law into Canada took hold. First, the process took years, with these Canadian provinces only passing such reforms between the 1970s and 1990s, and then doing so in slightly different (but material) ways for each province, and finally, by mixing restating legal concepts in new manners and at new conjunctures. Amendments since that time have only made the laws more harsh, as some provinces (B.C.; Ontario; Manitoba) even reduced liability towards trespassers (often snowmobilers or off-road vehicles crossing agricultural or other rural private land (even if minors 12 years of age and up);[143] or by allowing more unpaid use by hikers, backcountry skiiers, etc., of private land with only a duty not to deliberately harm or recklessly disregard the possible presence of these persons.

Further, as per section 51(1)(c)(i) of the CPA, a consumer agreement cannot include a clause exempting a supplier from liability arising from its gross negligence. – from Dunsters Attorneys: When can parties exclude liability? Cape Town, 2024-08-27, 2:45 PM; online: https://www.dunster.co.za/blog/exclusions-of-liability/

[140] While B.C., Alberta, Manitoba, Ontario, P.E.I., Nova Scotia have reformed their law to have a common duty of care to all entrants by statute, Newfoundland and Labrador has largely reformed their law to have a common duty of care to all entrants by judicial decisions and New Brunswick has "abolished" the common law of occupiers' liability and replaced it with statutory direction to decide cases on the standard principles of negligence: *Law Reform Act*, RSNB 2011, c 184, s 2.

[141] The Law Reform Commission of Saskatchewan released a Consultation Report entitled "Reform of Occupiers' Liability Law in Saskatchewan" in March 2023 (online: https://lawreformcommission.sk.ca/Occupiers-Liability-Consultation-Report-Final-03-23-2023.pdf). No results have been posted on this Report or consultation to date and no Bill introduced. See also Law Reform Commission of Saskatchewan, "Proposals for an Occupiers' Liability Act" (October 1980), ISSN 0701-6948. Online: https://lawreformcommission.sk.ca/Occupiers_Liability_Act_Proposals.pdf

[142] Fleming, *Law of Torts*, 7th ed., at p. 451, and footnote 46.

[143] For example, *The Petty Trespasses Amendment and Occupiers' Liability Amendment Act*, SM 2021, c. 54, Part 2, ss. 6 and 7. Online: https://web2.gov.mb.ca/laws/statutes/2021/pdf/c05421.pdf

The ability to disclaim liability with a sign, or a 'waiver' document, or clause in another document, thus appears to have been preserved in Canada by blind copying of U.K. law, misadventure and perhaps a lack of critical inquiry or full understanding when importing the English law to Canadian provinces in mid-20th century.

This report focuses on four provinces – Nova Scotia, Ontario, Alberta and British Columbia – and the three territories, Nunavut, Northwest Territories and the Yukon.[144] As the table in Appendix 1 shows, each of the studied provinces' occupier's liability statute includes language which could be argued allows an occupier to modify their duty to an entrant to permit an argument based on *Ashdown* or *volenti*. Essentially, this law still allows occupiers to modify their duties to entrants who are coming to participate in activities via a liability waiver. As noted above, this is a nearly ubiquitous SOAR business practice in these provinces.

Ontario *Occupiers' Liability Act* as an Example

We go into some detail now for the Ontario *Occupiers' Liability Act*, to show exactly how each waiver-supporting provision is carried forward.

The two provisions in the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, of Ontario that support consumer waivers are found within s. 3 and s. 4. We deal with s. 3, in particular subs. 3(3), below, in relation to using the Ontario *Consumer Protection Act, 2002* as a foil to the *Occupiers' Liability Act*.

The second provision, which we deal with here first, also potentially grounding waivers and notices, is subsection 4(1), which appeared to preserve the common law defence of *volenti non fit injuria* and appears to be based on subs. 2(5) of the UK *Occupiers Liability Act 1957*:

> **Risks willingly assumed**
>
> **4** (1) ***The duty of care provided for in subsection 3(1) does not apply in respect of risks willingly assumed by the person who enters on the premises***, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property. R.S.O. 1990, c. O.2, s. 4 (1). [Emphasis added.]

This apparent adoption in subs. 4(1) of *volenti* in Ontario by the statute then became the subject of a Supreme Court of Canada case, *Waldick* v. *Malcolm*, that in turn, ironically became the next link in the chain leading the law and industry practice in common law Canada to veer towards the full enforceability of liability waivers, and their ubiquity, not to their weakening.

[144] Each of the territories, however, continues to rely upon the common law under the *Indermaur* case, as does Saskatchewan, as there are no occupiers' liability statutes there, which makes for a rather bizarre contrast with the provincial decisions and law. As a result, the *Ashdown* signs and waivers and the *volenti* defence also continue to govern there, as it is, arguably, part of the "common law" in the U.K. prior to the *Occupiers Liability Act 1957*. The only difference in Canada is the extent to which courts in these jurisdictions feel free to depart from the U.K. statements of common law after their accession to Canadian confederation.

Various provincial law reform Commissions were seized with importing the U.K. occupiers' liability reforms into the several common law provinces, most beginning in the 1970s (B.C. was earlier). In Ontario, the then Ontario Law Reform Commission produced a report, and a draft Act, in 1972. In this draft Act, s. 6 stated that: "Nothing in this Act shall impose any obligation on an occupier to any person entering on the premises in respect of risks willingly accepted by that person." The report then commented on this draft section that:

> "Comparable provisions are found in subsection (5) of section 2 of the English Act, subsection (3) of section 2 of the Scottish Act, subsection (7) of section 4 of the New Zealand Act, and subsection (3) of section 2 of the Uniform Act.
>
> This proposed section attempts to preserve the rules of common law concerning the application of the legal maxim "*volenti non fit injuria*", even though its scope has been significantly narrowed by recent Canadian decisions.[fn34]"

One would think that this would make it tolerably obvious to lawyers in Ontario, that once the law was passed as the *Occupiers' Liability Act*, and subs. 4(1) in particular, in Ontario, that *volenti* had been preserved as a defence and that it would operate largely as defined by the U.K. and comparable Canadian provincial common law.

However, in the 25 years following the introduction of the Ontario *Occupiers' Liability Act*, as well as similar acts in Alberta, British Columbia and Nova Scotia, two lines of cases had developed. One required the *volenti* defence not only to have the plaintiff realize and accept the physical risk but also to know and accept the *legal effect* of taking the risk, which had to be conveyed either in writing, orally or by unequivocal conduct confirming consent to this acceptance of the legal risk. Since consumers generally were hard to school in the fineries of the law, this meant a line of cases finding *volenti* usually did not apply. The other line of cases in effect sought to reduce the statutory acceptance of risk section to the *Ashdown* principle, *i.e.*, that once a clear physical risk was known to the plaintiff, and evidenced either by notice or in an agreement with the defendant, or perhaps because the plaintiff's conduct showed he or she was taking the physical risk (by continuing to be on the premises or doing the desired activity on the premises after such a warning), then that implicit consent was enough to discharge the defendant's duty.

The Supreme Court of Canada in *Waldick* v. *Malcolm* settled the issue by finding that *volenti* (in Ontario, at least) required the full appreciation and acceptance of not only the physical risk but also the legal consequences of accepting the risk.[145] This was done largely as finding that this section instead meant mere knowledge of some risk by an entrant would allow the defendant to deny any duty would effectively erase the positive "common duty" of care to make premises "reasonably safe" which was, after all, the primary purpose of the reform of occupiers' liability law as it stood under *Indermaur* and the common law. This was Canada's anti-Horton's case moment; in fact, the Supreme Court took the somewhat unusual step of signaling this by explicitly "disapproving" Horton's case in Canada, even though it arguably did not bind Canadian courts (being from the U.K. House of Lords not the Privy Council).

[145] [1991] 2 S.C.R. 456. See especially pages 474-480.

In short, this decision favoured plaintiffs and made reliance on *volenti* by defendants more onerous. Notably, it did not deal with a notice, licence or contractual waiver potentially under s. 3(3) of the Ontario *Occupiers' Liability Act*, as the plaintiffs and defendants were family members in a social situation.

What resulted in other provinces was, however, an "industry freak out" at the result of *Waldick* v *Malcolm*. The B.C. Alpine Association (then the Canada West Ski Areas Association (CWSAA)) – the ski hill operators of British Columbia, immediately demanded reform of the law, a report, etc.,[146] which led, after considerable consultation, to the B.C. Law Reform Commission Report referred to above, in 1994.

This is because in B.C., the modification of the UK law when it was imported into the jurisdiction, earlier, had been written such that the waiver or notice possibility left open under the *Ashdown* exception was modified into a conflation with express contractual waivers and regarding notices, had also used the word "express" in s. 4 of the BC OLA [the text here from RSBC 1990, c. 303]:

> *Contracting out*
>
> 4. (1) Subject to subsections (2), (3) and (4), where an occupier is permitted by law to extend, restrict, modify or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

This change perhaps explains such a vociferous reaction by the ski industry to preserve a scope of implicit liability protection (in the *volenti* concept, as understood by the industry at that time) as the *Ashdown* exception was in essence conflated with "express" contractual exemptions or at the least "express" notice.[147]

What appears to have happened is that the incoherent importation of the UK *Occupiers' Liability Act*, 1957 and its exceptions, as well as the braided, unresolved issues of *Ashdown* waiver and notices, the *volenti* defence, and even "activity duties" were not settled holistically by the Supreme Court of Canada. The ski industry apparently had "inherent risks" confused with negligence (see above), and *Ashdown* notices confused with *volenti* – with the result that that industry believed the *Waldick* v *Malcolm* case had made its present practice of posting signs and printing conditions on lift tickets ineffective in regard even to simple cases of "inherent risk" (that is, the consumer might try to sue for simply "falling down" at the ski hill and the signs and lift ticket conditions would not be effective to exclude or easily dismiss such actions).

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[146] See Law Reform Commission of British Columbia, "Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities" (October 1994), Executive Summary, at p. 1:

> The reference to the Commission arose from two roughly parallel developments. Around the beginning of 1992 several provincial government ministries received complaints about the breadth of some waivers used by recreational operators. At about the same time, the Canada West Ski Areas Association (CWSAA) resumed its efforts on behalf of the skiing industry to secure the enactment of a Ski Area Safety Act modelled on American legislation dealing with risk and liability in alpine skiing. The Commission was also asked to review the draft Act proposed by the CWSAA.

[147] "Express" in law usually means being required to show some positive proof of acceptance or at least acquiescence – not just posting a sign or printing conditions on a lift ticket, which is 'implicit' – but rather the customer signing the text or at the least stating/admitting they had seen it and agreed with it

While the B.C. Law Reform Commission Report was not, as noted above, perfect in its separation of inherent risk, risk allocation and negligence, it did at least resist the overreaction of the ski industry and noted that the defence of signed waivers (at least contractual ones, and probably "tort" ones, as in *Ashdown*) should still be available to ski hill and other recreation operators. The result of this review and reform was, however, that since the industry did not receive what it perceived to be the 'correct' answer on avoiding liability from the Supreme Court, the B.C. ski industry would now insist on signed waivers.

The Master's Tools: *Schnarr* v. *Blue Mountain* and *Woodhouse* v *Snow Valley*

As noted above, another problem with the Ontario *Occupiers' Liability Act* specifically is its subs. 3(3), which continues the "horror" of contractual liability waivers by permitting occupiers to exclude liability. The duty, and the ability to avoid it, reads:

> **Occupier's duty**
>
> **3** (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> **Idem**
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.
>
> **Idem**
>
> ***(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.*** R.S.O. 1990, c. O.2, s. 3. [Emphasis added.]

Subsection 3(3) in effect allows an occupier to rely upon a contractual waiver or the law as expressed in *Ashdown*, that is, a prominent notice, contract provision or separate waiver can disclaim any duty to the consumer, including for negligence of any kind or based on the unsafe conditions of the premises (provided the waiver conditions are brought to the attention of the consumer, [148] and wide enough to cover the alleged harm). Defendants in Ontario had relied upon subs. 3(3) to disclaim liability either by signed contractual waivers or by posting prominent signs disclaiming liability, including their own negligence.

This changed when the province introduced reforms to certain sections of the Ontario *Consumer Protection Act, 2002*.

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[148] This requirement to bring it to the notice of the consumer was a minimal requirement of *Ashdown*, and is thus continued in the Ontario Act, in subs. 3(3): *Zaky* v. *2285771 Ontario Inc. (c.o.b. Sky Zone Indoor Trampoline Park)*, 2020 ONSC 4380, [2020] O.J. No. 3095, in which summary judgment based on the waiver was declined due to the effect of subs. 3(3). Note that it was not based on subs. 5(3): "Where an occupier is free to restrict, modify or exclude the occupier's duty of care or the occupier's liability for breach thereof, the occupier shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed." R.S.O. 1990, c. O.2, s. 5. This provision appears to be used more in the context of a contract not a mere licence.

Two cases that reached the Ontario Court of Appeal simultaneously had tried a new approach: the injured parties challenged ski resort waivers' enforceability under Ontario's consumer protection legislation.[149] The relevant questions on appeal were whether a conflict existed between section 9 of the *CPA, 2002,*[150] and section 3 of the *OLA*, and where they could not be read harmoniously, how should the statutes be interpreted.[151] Justice Nordheimer held that the *CPA, 2002* did not void the waiver, which, as noted, was allowed under the *OLA.*[152] The decision explored the two schemes, noting that the specific and fundamental purpose of the *OLA* that would be frustrated were the *CPA* to supersede.[153] In effect, the Court of Appeal held that the consumer protection legislation was too general and unspecific to override a complete code of liability protection such as it was rationalized under the *Occupiers' Liability Act*.

The Court of Appeal stated (regarding the breadth and effect of the waiver preserving subs. 3(3)):

> [48] The OLA permits an occupier to "restrict, modify or exclude" the duty imposed by the statute regardless of whether a claim is founded in contract or in tort. The waivers in the instant appeals dealt with both Blue Mountain's and Snow Valley's contractual and tort obligations. The effort to avoid a conflict between the statutes on the basis that the OLA deals with tort liability and the CPA deals with contractual liability is not only artificial, it does not reflect the fact that the duty of care originates from the statute itself, nor does it take into account that the statute allows for the modification of the duty and liability arising therefrom. Moreover, adopting such a restricted interpretation of s. 3(3) of the OLA would go against the development trends in private law. As the majority noted in BG Checo, at p. 21, "the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions [tort versus contract], thereby reducing the significance of the existence of the two different forms of action".

This effort was, we think, doomed from the outset. The attachment of common law courts to the long history of occupiers' liability, the importance of property rights in the law, and the preservation of the control of the level of liability in the *Occupiers' Liability Act* all meant that the plaintiff lawyers' valiant attempts to dismantle the master's house with the master's tools was doomed to failure. Provincial consumer privacy law was new, couched in contractual warranty language, not specifically aimed at reversing or at least being an exception to, occupiers' liability and generally treated as lower-level, secondary legislation by courts. We submit that only a negligence-based, broadly aimed, reform statute like the U.K. *Unfair Contract Terms Act 1977* applying as it does to ALL consumer transactions, not just SOAR sector ones, would stand a much greater chance of success in eliminating waivers.

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[149] *Schnarr v Blue Mountain Resorts Ltd*; *Woodhouse* v. *Snow Valley Resorts (1987) Ltd.*, 2018 ONCA 313. Leave to appeal to S.C.C. denied.

[150] Section 9 of the *Consumer Protection Act, 2002*, essentially voids consumer agreements that disclaim warranties of acceptable quality services. The argument for the plaintiffs was that the waivers they had signed were aimed at stopping their lawsuits for poor quality services – ones that caused them injury.

[151] *Schnarr,* at para 21.

[152] *Schnarr,* at para 73.

[153] *Schnarr,* at para. 73.

Manitoba- Keeping it 'Reasonable' as in the Same

One other approach to at least blunting the harshness of waivers on consumers came out of the Manitoba Law Reform Commission report. As noted, it had primarily recommended, like the UCTA 1977 in the U.K., the absolute abolition of such waivers, at least in recreational settings. However, as a backup, the MLRC stated a secondary recommendation that any waivers should only be upheld if "reasonable" based on "all the circumstances of the case" and with certain criteria to guide the court. This was enacted.

The Manitoba *Occupiers' Liability Act*, R.S.M. 1987, c. O8, now controls waiver clauses for "reasonableness":

> *Restriction, etc. to be reasonable*
>
> 4(2) No restriction, modification or denial of the duty referred to in subsection 3(1) [duty to make premises reasonably safe], whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include
>
> > (a) the relationship between the occupier and the person affected by the restriction, modification or denial; [*unconscionability inquiry*]
> >
> > (b) the injury or damage suffered and the hazard causing it; [*facts of the case*]
> >
> > (c) the scope of the purported restriction, modification or denial; and [*does waiver wording cover the negligence or other source of potential legal liability*]
> >
> > (d) the steps taken to bring the restriction, modification or denial to the attention of the persons affected thereby. [*waiver brought to the attention of the plaintiff*]
>
> *Notice of restriction, etc.*
>
> 4(3) Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty referred to in subsection 3(1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed. [*waiver brought to the attention of the plaintiff – we assume said twice to really make the point*]
>
> [*Commentary* by authors of this PIAC report, are noted in *italics and in square brackets*.]

Such a new requirement does nothing to change the outcome of waiver cases. To our knowledge, no Manitoba case has since concluded a waiver has been unreasonable based on "all the circumstances of the case" since the factors listed refer in effect to previous law.

This timidity to void a waiver for 'reasonableness' is disappointing but predictable, as the factors in subsection 4(2) simply describe the present 'test' or inquiry from *Karroll*, *Loychuk* and *Isildar*, that the court already goes through to establish that a waiver was formally legally valid and not unconscionable. Such a provision is useless; worse, it is an attractive nuisance, providing false hope to potential plaintiffs and their lawyers. They will lose.

SOAR as businesses, not occupiers

All of this bad and confusing law, lack of ability to reform it, and poor results for consumers who get no redress despite being injured even by defendants' negligence reveals the myopic view taken by the law in this area.

Reconsidering it from a consumer point of view allows new approaches and a more humane and fair treatment for consumers, and, ideally better recreational services. This analysis is below.

SOAR businesses sell to consumers leisure time activities. They do not sell "access to land" or experiences that primarily are enjoyment of the landscape. They sell a thrill.

Such businesses use their property as a space or tool to offer the ride, activity, thrill or other pursuit rather than the use of property for any other purpose or for the simple traversing of it.

Businesses use consumers' own bodies as an input for the service. Bodily autonomy is highly prized and zealously guarded by law (think medical malpractice and battery, for example) in other contexts. It is incongruous how little regard SOAR businesses must have for the fact their services operate upon real human beings.

That being so, the law should treat such businesses primarily as consumer recreation service providers and not as occupiers of a private estate. In pursuing a business activity that uses or needs a premises, land or space, as the primary purpose for property ownership, rather than attracting the public to that space or land simply to walk on it or enjoy the land as land, it is sensible and fair from a consumer transaction perspective to treat legal obligations of these businesses like those of any other consumer service business, and not as a special category of "land-based" business. In short, they should not be permitted to benefit, when selling SOAR services, from occupiers' liability law and the waivers that have sprouted from this and related law.

However, the movement of the law towards treating SOAR services more like a consumer product or service and less like a landlord of the manor deigning to allow the public to walk the grounds of the estate is too slow and in particular, held back by highly favourable liability rules that only property owners or occupiers can enjoy. These property rights and the law that uphold them are too entrenched to dismantle by piecemeal case law or general consumer protection statutes.

Therefore, since these businesses' legal defences and lawyers so thoroughly rely upon the special land-based rules in repelling consumer lawsuits for death or injuries, it is necessary to exclude or to severely limit their reliance on the special rules of "occupiers' liability". As a first step, as done in the U.K., E.U. and as never permitted in Québec, reform to the law prohibiting waiver of liability in any legal form for all consumer services, and SOAR in particular, should be passed by all provinces.

Recommendations

In the effort to encourage a meaningful approach to resolving the barriers and injustices that people face when seeking compensation after injury, PIAC outlines the following seven recommendations as suggestions for a starting point in achieving a fair outcome for victims and their families. These recommendations are outlined only at a high level and would require further study and strategic planning to implement.

Recommendation #1: Outlawing Liability Waivers and Conditional Licences and Implementing Strategies from Other Jurisdictions

The first and most important recommendation is for policymakers to look to other similar jurisdictions for effective strategies to implement at home to outlaw and prevent predatory waivers from being offered to consumers.

As previously discussed, legislation like the United Kingdom's *Unfair Contract Terms Act 1977* [154][UCTA] offers new and innovative ways of implementing protections for consumers in the context of liability waivers. Perhaps the most harmful piece of many liability waivers in Canada is the requirement to waive the rights to sue the operator even in cases where negligence is found. Another predatory practice that occurs often is the indemnification of operators by parents on behalf of their children. The UCTA provides express prohibitions against restriction of liability in cases of negligence resulting in injury or death (section 2) as well as prohibition of indemnification of operators by parents on behalf of children (section 4).[155] These measures have shown to be successful in protecting consumers while also maintaining the success of SOAR businesses in that country and across the European Union where similar rules apply.

PIAC recommends that Canada implements the same or similar provisions in legislation that would standardize and limit how liability waivers can be structured or used to rebut claims from consumers after injury or death at SOAR facilities. This process would entail public study of the applicability of these provisions in Canada, the effects for Canadian businesses and consumers, and the drafting of similar legislation at both the provincial and federal levels. The existence of the Québec *Civil Code* and *Consumer Protection Act* prohibitions on such waivers in that province show that SOAR businesses can be successful without this legal structure. Legislation in other provinces therefore could target liability waivers in specific, or unfair contract terms for consumers at a broader and more encompassing scope. PIAC specifically asks the that Uniform Law Conference of Canada undertake this specific project either separately or as part of occupiers' liability reforms, with a view to harmonizing common law provincial law with that of Québec.

Recommendation #2: Extinguishing *volenti* and occupier's liability provisions as defences

As discussed in this paper, the defence of *volenti non fit injuria* has historically worked as a defence to deny injury claims in cases where the plaintiff has only partially contributed to the bad outcome. Today, the

[154] *Unfair Contract Terms Act* 1977 c. 50 [U.K.].
[155] *Ibid* at sections 2, 4.

concept of using "assumed risk" as a defence is still alive in provincial occupier's liability statues such as in Ontario's *Occupier's Liability Act*, where section 4 explicitly insulates operators against liability for "risks willingly assumed by person who enters on the premises". These provisions, as was explained earlier in this paper, have been a critical link in the chain that has strengthened the enforceability of liability waivers against consumers to their detriment.

It is important to note that in jurisdictions where other legislative and common law changes have been made to support consumers in these cases, the persistence of *volenti* and similar principles has still resulted in consumers being unable to hold operators responsible for injuries or deaths.[156] This makes the issue of *volenti* and occupier's liability critical to address in the process of making the system of SOAR liability fair to consumers in Canada.

PIAC recommends that that the defence of *volenti* be abolished. This is to prohibit operators from hosting high-risk activities presented to consumers as being conducted in a controlled and safe environment and later insulating themselves from liability when injuries ultimately occur as the risks may not have been as controlled as they appeared.

The concept of *volenti* has long been a controversial area of law that continues to be divisive and confusing for legal practitioners, consumers, and industry operators. It is time for policymakers to target this area of law head-on in order to clear the way for a consumer to have a more transparent and clear legal structure. While this defence persists, there will continue to be unnecessary confusion at law and in the public in knowing what it means to "consent" to different risks and how that may affect their ability to make injury claims.

It is also time to prohibit the misuse of occupier's liability legislation to enact injustices towards victims of injuries at businesses that host high-risk activities. One must remember that SOAR businesses are not simple "occupiers" on land but are active sellers of leisure services that in many cases require consumers to undertake certain risks to become customers and fund their business model. In other words, these businesses whose economic models are entirely reliant on the victims' "assumption" of the risky activities they offer should not be able to claim the status of a simple "occupier" and thus be immune from liability under those protections. PIAC thus also recommends that SOAR businesses be excluded from the "occupier's liability" protections for injuries and deaths directly relating to the activities they offer.

Recommendation #3: Formation of a federal *SOAR Safety Act* and provincial equivalents

Policymakers can make broader and more innovative changes to tourism and SOAR practices in Canada through the creation of a comprehensive series of federal and provincial SOAR Safety Acts that include safety requirements and reporting measures for SOAR operators as well as provisions for what consumers can expect to occur in case they are injured in a SOAR operation.

The federal Act would require reporting of injuries an performance at a national scale and tie federal tourism funding to such performance.

[156] Jodi Gardner, "A Risk by Any Other Name": Rejecting *Volenti* in Australian Tort Law", in *Australian Tort Law in the 21st Century* (Sydney: Publisher, 2024), ch. 7, pp. 138-158

A provincial SOAR Safety Act could also set the authority and basic requirements for the creation of individualized self-regulating bodies for various SOAR industries and the minimum safety standards those regulatory bodies would have to impose on their licensed businesses.

Minimum general safety requirements could include broad requirements that can apply to various industries, while the industries could be free to set their own standards based on their own safety needs, as long as they at least meet the general minimums.

For example, a provincial Act could give the authority for an industry regulator of trampoline parks to have the power to implement prescribed basic minimum standards and give out licenses for those businesses who qualify under its own standards. This could include regulations based on industry-based safety-expert knowledge like minimum equipment standards, specific trampoline safety training for its employees, required ratios of staff-to-jumpers, standardized protocol for emergencies, etc. Businesses who choose to operate indoor trampoline parks would then be required to register under the industry regulator, implement its requirements, and regularly report back to the body.

Industry regulators could also use the authorities and safety foundations built into the provincial Acts to impose penalties for businesses who do not comply with standards or revoke licenses for businesses who have repeated negligence-related injuries or death in their operations, allowing only verified “lower risk” operators to continue to practice.

SOAR Safety Acts at the provincial level should also include a more stringent legislated system for healthcare cost recovery for injuries occurring in SOAR industries. For example, provisions could entail that all accidents occurring in relation to a specific SOAR industry are presumably compensable to the province in question by the industry’s regulatory body, regardless of whether a waiver was invoked.

The intended effect of increased enforcement of healthcare recovery cost systems is two-fold. First, as is plainly stated, the system will allow provinces to recover healthcare costs they incur because of injuries sustained high-risk business operations. Second, the system would hopefully encourage SOAR industries and their regulatory bodies to take safety more seriously, knowing they will be held accountable for the costs of recovery. This would allow the regulatory bodies to reward the businesses that uphold the highest safety standards while holding accountable operators that show problematic patterns, similarly to regulatory insurance schemes for doctors and lawyers.

Forming a legislative basis for many different solutions to SOAR safety related issues which ultimately impact consumer safety and compensation provides a blank canvas for innovation and creativity in problem solving in this area of law. This type of legislation should continuously be monitored and altered alongside changes in the industry and consumer needs.

Recommendation #4: Public Insurance Scheme

As we have outlined throughout this paper, the justice system often holds up impenetrable barriers for people seeking the supports and compensation they need. In response to these challenges, one consideration would be to provide victims of accidents and their families in SOAR an alternative to the justice system being the only path to receiving support and compensation for their losses. This idea is not so far-fetched, as Canada is no stranger to universal health programs, which have recently been expanded to include dental and pharmacare.[157]

In New Zealand, a public insurance scheme is available to compensate people who are injured in SOAR activities and other accidents. Based on the five guiding principles below penned by the Royal Commission of New Zealand in 1967, the *Accident Compensation Act* was passed in 1972, forming the bases of New Zealand's public insurance scheme.[158]

1. Community responsibility: "no satisfactory system of injury insurance can be organised except on a basis of community responsibility;"
2. Comprehensive entitlement: "wisdom, logic and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment;"
3. Complete rehabilitation;
4. Real compensation: including "income-related benefits for income losses, payment throughout the whole period of incapacity, recognition of permanent bodily impairment as a loss itself;" and,
5. Administrative efficiency. [159]

As it is today, the Accident Compensation Corporation ('ACC'), established in 1974, administers the public insurance scheme.[160] The *Accident Compensation Act 2001* outlines which injuries are covered by the insurance, including injuries caused by accidents for any person who suffers an injury *in* New Zealand, including foreigners travelling to the country.[161] The scheme covers both treatment for the injuries as well as financial support and income supplements for those who are un able to work due to their injuries. [162]

The focus of this scheme is on the injury, rather than the cause of the injury.[163] This approach recentres the human being and their wellbeing at the centre of each case, which our justice system does not always do.

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[157] Pharmacare and dental care : https://www.canada.ca/en/health-canada/news/2024/05/moving-forward-on-pharmacare-for-canadians.html; https://www.canada.ca/en/services/benefits/dental/dental-care-plan.html

[158] *Accident Compensation Act 2001* (NZL): https://www.legislation.govt.nz/act/public/2001/0049/latest/DLM99494.html

[159] Royal Commission of Inquiry (NZL), "Compensation for Personal Injury in New Zealand: Report" (December 1967) age page 20.

[160] https://www.acc.co.nz/about-us/who-we-are/our-history/

[161] Section 20(1): https://www.legislation.govt.nz/act/public/2001/0049/latest/DLM100687.html

[162] https://www.acc.co.nz/newsroom/media-resources/injury-claim-statistics

[163] Royal Commission of Inquiry (NZL), "Compensation for Personal Injury in New Zealand: Report" (December 1967) age page 20.

The scheme is a no-fault scheme, which means that where an injury is covered under the *Act*, and someone has access to coverage, then they are barred from making a claim in tort law. In theory, therefore, damages are unavailable to victims but, and arguably more importantly, they have access to comprehensive coverage without having to go through a trial where they must recount and therefore relive and potentially very tragic accident. They would also not have to deal with the realities that are long timelines in many courts across Canada.

The public insurance scheme is paid for by levies. Levies are collected from a number of services and go into ACC's five different accounts: Work Account for injuries at work; Earners' Account to fund injuries during activities like sports; Motor Vehicle Account for injuries involving motor vehicles; Non-Earners' Account for those injured who do not pay levies such as children, visitors or students; and, Treatment Injury Account which goes towards injuries which happen during medical treatments.[164] Essentially, what this means is that everyone in New Zealand contributes to the levies in different ways and in different amounts because the beneficiaries of the insurance scheme are everyone in New Zealand.[165]

Being an economy that largely relies on tourism, the New Zealand public insurance scheme is indicative of the way the country's government values the safety and reputation of its tourism industry, as well as the protection of individuals who participate in SOAR activities across its territory.[166] As Canada continues to see tourism as a growing economic sector, it is important to consider ways to ensure that the industry remains viable with a strong reputation of safety and fairness for victims of accidents.[167]

A public insurance scheme like that in New Zealand provides an interesting opportunity to be studied and explored. We recommend a comprehensive assessment of the potential feasibility and effectiveness of a public insurance scheme be completed, taking into account the current social and economic costs of SOAR injuries measured against public funding needed to create such a program.

Regardless of whether such a program is implemented, an assessment of these ideas should inspire other "outside the box" ideas for carving pathways to support for victims of accidents through publicly supported systems.

Finally, we note that a majority of our focus group participants were in favour of exploring such a public insurance scheme for SOAR activities.

Recommendation #5: Comprehensive and Openly Accessible Data Collection

As discussed in this report, there is a wide gap in the collection of data on injuries within SOAR activities. We simply do not have the systems in place to know and educate the public on how pervasive SOAR-related injuries are. Incomplete and infrequent reporting measures like the Public Health Agency of Canada's CHIRPP can offer limited and small insights to those who seek out information from hospitals.

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[164] https://www.acc.co.nz/about-us/our-levies/what-your-levies-pay/
[165] https://www.acc.co.nz/about-us/our-levies/what-your-levies-pay/
[166] Tourism New Zealand, "Tourism Impact"; online: https://www.tourismnewzealand.com/insights/tourism-impact/
[167] See Destination Canada, "Canadian Tourism Data Collective" (June 2024); online: https://www.tourismdatacollective.ca This newly created website has interactive graphics of the Canadian tourism sector.

Canada lacks an intentional injury reporting system that can identify which injuries are occurring in relation to specific SOAR activities, allowing analysts to identify which areas need policy adjustments, regulation, and enforcement. it is also critical that these records are publicized, so that Canadians can make informed choices about which activities they feel comfortable participating in, and where they feel most comfortable in doing so.

It is also important that the burden of injury reporting is not unfairly placed on the public health system, which is already strained for resources and funding. SOAR operators should bear the majority of the responsibility in tracking injuries that occur through their operations. This reporting can then be verified alongside healthcare provider data, to ensure that companies are not downplaying the injuries occurring in their industries.

Beyond collecting data on injuries, policymakers and the public alike should be made aware of other helpful statistics, including the number of injury-related legal claims made or won against operators within a given industry. This is helpful given that most civil personal injury claims are settled out of court, making it difficult for the public to have a bird's eye view of how many claims have been made against a business or SOAR sector.

It may also be helpful to track the number of emergency response call made to specific SOAR operators within a given jurisdiction. Access to this type of information can also inform where consumers can feel comfortable participating in SOAR activities. This would also provide information on whether certain SOAR sectors are contributing unfairly to increased costs for a region's local healthcare and emergency response systems.

Recommendation #6: Collected Data Should Feed into Regular Reporting and Policy Making

Once Canada has established strong systems for data collection on injuries in SOAR operations, the next critical task is to ensure that the data is properly analyzed and used for decision and policy making. Intergovernmental communication between provincial governments along with the federal government is important for knowledge sharing and allowing governments to assess whether particular trends are concerning.

Intergovernmental data sharing also helps inform nationally consistent policy-making that allows Canadians to have at least a similar experience with liability waivers and their enforcement across the country. This is especially critical in SOAR activities tied to tourism, where participants may know little about the legal jurisdiction they are in.

Regular federal and provincial reports analyzing the data collected by regulatory bodies, industry, legal professionals, insurance companies, healthcare providers, and the public should be published every set number of years to trace any concerning patterns of injury prevalence and to identify problematic practices within SOAR industries. Provincial and Federal Ministers responsible for SOAR-related policy should have ready access to information regarding the safety of SOAR industries and where issues may lie. Regular reporting also keeps governments accountable to the public in ensuring that these issues are being regularly monitored.

Recommendation #7: Data Analysis Should Inform Strong Public Awareness Campaigns

The final step in allowing data collection to reach its full potential in benefiting consumers is to have the data be used in increasing public awareness. This can range from a national media campaign informing people about the importance of reading liability waivers and public safety announcements relating to specific activities to small scale transparency initiatives that inform consumers about the safety-rating of each business.

Using gathered data, an independently administered legal "grading" system can be created and implemented to assess how "risky" a specific operator or sector is for consumers. This can be measured both in terms of their history with injuries/deaths in their operations alongside how much of the consumer's legal rights their liability waivers take away. These grades can form public records similar to the public health information available for restaurants in major cities like Ottawa. Consumers should be able to visit a regulatory website, search for the name of the organizer they've booked their SOAR activity with, and find information about their safety standards, how their rating compares to other similar operators, and which legal rights they require the participants to waive. Operators that waive all consumer's rights to sue for injuries and deaths should be given the highest risk rating.

Ratings should also be made publicly available on-site, in a highly visible location like the front entrance or reception of the establishment, with a large font indicating the rating. In addition, a QR code that leads to an online page for consumers to learn more should also be provided on the sign. A similar strategy is used in some cities in the restaurant industry, where health code letter-grades are posted in windows by the front entrances, letting consumers know about the expected safety of the products offered by the establishment. For consumers who are unable to access the online report on a SOAR operator, a physical copy of the information should be made available to them on-site.

Public awareness campaigns should also focus on debunking pervasive myths and misconceptions about liability waivers and their enforceability. As previously discussed in this report, misinformation about which waivers are enforceable and "tricks" people can do to still be able to sue a SOAR operator are widespread and harmful. It is important that a public awareness campaign properly informs people not only of their legal rights in cases of injury, but also of the limits of those rights. This ultimately will inform whether people continue to choose to sign a specific waiver or patronize a particular operator. A core part of this type of education will be to ensure people understand the importance of carefully reading the waivers that they sign – so that they are not be surprised by the language later. It is also important for people to understand what it means to sign a waiver on behalf of a child and that the law, until reformed, is uncertain.

It is quite likely that were the reporting of injuries required to be reported by activity and premises or place, and those cross-referenced to business activities, a better sense of scale of the problem and the effectiveness of any policy changes could be more easily measured. Such a responsibility could be joint between health and tourism and consumer ministries but would likely have to be coordinated, negotiated and performed inter-governmentally**.**

This reporting would permit politicians at the provincial and federal level, the public and policymakers to have a sense of the scope and scale of injuries and deaths resultant from SOAR activities and businesses and therefore a baseline measurement for legal and policy changes that could be tracked to see if such injuries and deaths could be reduced or prevented.

Appendix 1 – Chart of Provincial/Territorial Occupiers' Liability Acts

Province/Territory	Occupier's Liability Provision related to Waivers
Nova Scotia	*Occupiers' Liability Act*, 2019 c 9, s 9[168] **Section 7: Agreements modifying duties** **7(1)** An occupier may, by express agreement, express stipulation or express notice, (a) extend or increase the duty created by subsection 4(1); or (b) restrict, modify or deny the duty created by section 4(1) subject to any prohibition or limitation imposed by this or any other Act of the Legislature, against or on, the restriction, modification or denial of the duty. **(2)** No restriction, modification or denial of the duty pursuant to clause (1)(b), whether by express agreement, express stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in the case, in determining the reasonableness of any restriction, modification or denial or duty, the circumstances that should be considered include (a) the relationship between the occupier and the person affected by the restriction, modification or denial; (b) the injury or damage suffered and the hazard causing it; (c) the scope of the restriction, modification or denial; and (d) the steps taken to bring the restriction, modification or denial to the attention of persons affected thereby. **(3)** Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty created by subsection 4(1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed. **(4)** An occupier of premises shall not restrict, modify or deny the duty imposed by subsection 4(1) with respect to a person who is empowered or permitted by law to enter to use the premises without the consent or permission of the occupier.

[168] https://nslegislature.ca/sites/default/files/legc/statutes/occupiers%27%20liability.pdf

	(5) This section applies to express agreements, stipulations and notices that are made prior to or after the coming into force of this Act.
Ontario	*Occupiers' Liability Act*, RSO 1990, c O.2[169] **Section 3(3) Occupier's duty** **(3)** the duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.
Alberta	*Occupiers' Liability Act*, RSA 2000, C 0-4[170, 171] **Variation of duty of care** **8(1)** The liability of an occupier under this Act in respect of a visitor may be extended, restricted, modified or excluded by express agreement or express notice but no restriction, modification or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor. **(2)** This section does not apply with respect to a visitor who is an entrant as of right.
British Columbia	*Occupiers Liability Act*, RSBC 1993 c 337[172], [173] **Contracting Out** **4**(1) Subject to subsections (2), (3) and (4), if an occupier is permitted by law to extend, restrict, modify or exclude the occupier's duty of care to any person by express agreement, or by express stipulation or notice, the occupier must take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person. (2) An occupier must not restrict, modify or exclude the occupier's duty of care under subsection (1) with respect to a person who is (a) not privy to the express agreement, or (b) empowered or permitted to enter or use the premises without the consent or permission of the occupier. (3) If an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to those persons must, despite anything contrary in that contract, not be restricted, modified or excluded by it. (4) This section applies to all express contracts.
Yukon	No occupiers' liability statute; but has Moveable Soccer Goals Act
Northwest Territories	No occupiers' liability statute
Nunavut	No occupiers' liability statute

[169] https://www.ontario.ca/laws/statute/90o02
[170] https://kings-printer.alberta.ca/1266.cfm?page=O04.cfm&leg_type=Acts&isbncln=9780779814909
[171] Note that there is a specific section for duties to Recreational Users under s 6.1; however, the statute enumerates them as being those entering on to golf courses when not open, utility rights-of-way, recreational trails and rural premises. These are, however, the types of recreation that this study is covering.
[172] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96337_01
[173] Section 3(3.2)(b)(i) addresses those who enter on to land for recreational purposes but do not pay the occupee. They are considered trespassers under the *OLA* but this report considers paid entrants.

Appendix 2 – Waiver Examples

Please consult PIAC's archive of waivers, available at: https://www.piac.ca

Appendix 3 – PIAC Questionnaires

PIAC Study: Liability Waivers – An Accident Waiting to Happen?

Questions for [Defence] Lawyers

Section 1: Your experience with liability waivers

1. **From your experience, what are the challenges or barriers you face trying to support clients dealing with liability waivers matters?**

[please type your answer here]

2. **Can you comment specifically on barriers or challenges with regards to clients dealing with a liability waiver matter where the liability waiver was signed on behalf of those who are minors or who lack capacity to sign for themselves?**

[please type your answer here]

Section 2: Considering Public Insurance for Injuries from Accidents

New Zealand has a no-fault public insurance scheme which covers anyone in New Zealand injured in an accident. The national insurance scheme is paid for by levies charged to all individuals and businesses in New Zealand. The coverage includes medical bills, home help, income assistance and treatments. Read more about the scheme here: www.acc.co.nz.

1. **What do you think about a scheme like this for Canada?**

[please type your answer here]

2. **Would a scheme like this would impact your operation and/or costs? If so, how?**

[please type your answer here]

Section 3: Waivers Signed on Behalf of Minors

It is common practice for guardians or parents to sign waivers on behalf of their dependents as minors do not have legal capacity at law to sign waivers for themselves. In BC, the *Infants Act* prohibits anyone from signing away a minor's rights on their behalf, which effectively invalidates any waivers.[174]

3. **If similar legislation were passed in your province or territory, preventing guardians or parents from signing liability waivers on behalf of minors, would this affect your operation? If so, how?**

[please type your answer here]

Please return your completed questionnaire by email to Amy Hill at ahill@piac.ca by January 23, 2023. We thank you for your participation!

[174] For example, in *Wong v Lok's Martial Arts Centre*, the BC Supreme Court prevented the enforcement of a waiver signed by a mother on behalf of her son. In a similar case, *Dewitt v Strang*, a New Brunswick court enforced a waiver since there was no authority to do otherwise as there is in BC.

PIAC Study: Liability Waivers – An Accident Waiting to Happen?

Questions for Industry Stakeholders

Section 1: Your Experience and Perspective of Liability Waivers

3. **Please describe your experience and perspective on online and/or in-person consumer liability waivers for any activities related to amusement, recreation or outdoor adventure.**

[please type your answer here]

4. **If you run a business, what is your experience with online waivers specifically? Is your waiver online? If not, do you have any plans to move it online – why or why not?**

[please type your answer here]

Section 2: Considering Public Insurance for Injuries from Accidents

New Zealand has a no-fault public insurance scheme which covers anyone in New Zealand injured in an accident. The national insurance scheme is paid for by levies charged to all individuals and businesses in New Zealand. The coverage includes medical bills, home help, income assistance and treatments. Read more about the scheme here: www.acc.co.nz.

1. **What do you think about a scheme like this for Canada?**

[please type your answer here]

2. **Would a scheme like this would impact your operation and/or costs? If so, how?**

[please type your answer here]

3. **What percentage of your total expenditures annually go to insurance costs?**

[please type your answer here]

Section 3: Waivers Signed on Behalf of Minors

It is common practice for guardians or parents to sign waivers on behalf of their dependents as minors do not have legal capacity at law to sign waivers for themselves. In BC, the *Infants Act* prohibits anyone from signing away a minor's rights on their behalf, which effectively invalidates any waivers.[175]

1. **If similar legislation were passed in your province or territory, preventing guardians or parents from signing liability waivers on behalf of minors, would this affect your operation? If so, how?**

[please type your answer here]

Please return your completed questionnaire by email to Amy Hill at ahill@piac.ca by January 20, 2023. We thank you for your participation!

[175] For example, in *Wong v Lok's Martial Arts Centre*, the BC Supreme Court prevented the enforcement of a waiver signed by a mother on behalf of her son. In a similar case, *Dewitt v Strang*, a New Brunswick court enforced a waiver since there was no authority to do otherwise as there is in BC.

PIAC Study: Liability Waivers – An Accident Waiting to Happen?

Questions for [Plaintiff] Lawyers

Section 1: Your experience with liability waivers

5. **From your experience, what are the challenges or barriers you face trying to support clients dealing with liability waivers?**

[please type your answer here]

6. **Can you comment specifically on barriers or challenges with regards to clients who are minors or lack capacity to sign for themselves?**

[please type your answer here]

Section 2: Considering Public Insurance for Injuries from Accidents

New Zealand has a no-fault public insurance scheme which covers anyone in New Zealand injured in an accident. The national insurance scheme is paid for by levies charged to all individuals and businesses in New Zealand. The coverage includes medical bills, home help, income assistance and treatments. Read more about the scheme here: www.acc.co.nz.

4. **What do you think about a scheme like this for Canada?**

[please type your answer here]

5. **Would a scheme like this would impact your operation and/or costs? If so, how?**

[please type your answer here]

Section 3: Waivers Signed on Behalf of Minors

It is common practice for guardians or parents to sign waivers on behalf of their dependents as minors do not have legal capacity at law to sign waivers for themselves. In BC, the *Infants Act* prohibits anyone from signing away a minor's rights on their behalf, which effectively invalidates any waivers.[176]

6. **If similar legislation were passed in your province or territory, preventing guardians or parents from signing liability waivers on behalf of minors, would this affect your operation? If so, how?**

[please type your answer here]

Please return your completed questionnaire by email to Amy Hill at ahill@piac.ca by January 23, 2023. We thank you for your participation!

[176] For example, in *Wong v Lok's Martial Arts Centre*, the BC Supreme Court prevented the enforcement of a waiver signed by a mother on behalf of her son. In a similar case, *Dewitt v Strang*, a New Brunswick court enforced a waiver since there was no authority to do otherwise as there is in BC.

PIAC Study: Liability Waivers – An Accident Waiting to Happen?

Questions for Regulatory, Member Groups and Expert Stakeholders

Section 1: Your Experience and Perspective of Liability Waivers

7. Please describe your experience and perspective on online and/or in-person consumer liability waivers for any activities related to amusement, recreation or outdoor adventure.

[please type your answer here]

Section 2: Considering Public Insurance for Injuries from Accidents

New Zealand has a no-fault public insurance scheme which covers anyone in New Zealand injured in an accident. The national insurance scheme is paid for by levies charged to all individuals and businesses in New Zealand. The coverage includes medical bills, home help, income assistance and treatments. Read more about the scheme here: www.acc.co.nz.

8. What do you think about a scheme like the New Zealand scheme above for Canada?

[please type your answer here]

9. From a regulatory perspective, do you see this scheme impacting regulators and their costs?

[please type your answer here]

10. Do you have any other thoughts on this scheme that you have not been able to share above?

[please type your answer here]

Section 3: Waivers Signed on Behalf of Minors

It is common practice for guardians or parents to sign waivers on behalf of their dependents as minors do not have legal capacity at law to sign waivers for themselves. In BC, the *Infants Act* prohibits anyone from signing away a minor's rights on their behalf, which effectively invalidates any waivers.[177]

11. If similar legislation were passed in your province or territory, preventing guardians or parents from signing liability waivers on behalf of minors, would this affect your organization and team? If so, how?

[please type your answer here]

Please return your completed questionnaire by email to Amy Hill at ahill@piac.ca by January 20, 2023. We thank you for your participation!

[177] For example, in *Wong v Lok's Martial Arts Centre*, the BC Supreme Court prevented the enforcement of a waiver signed by a mother on behalf of her son. In a similar case, *Dewitt v Strang*, a New Brunswick court enforced a waiver since there was no authority to do otherwise as there is in BC.

PIAC Study: Liability Waivers – An Accident Waiting to Happen?

Questions for Stakeholders from Schools

Section 1: Your experience with liability waivers

12. From your experience, what are the benefits or challenges you experience with liability waivers?

[please type your answer here]

13. Can you comment specifically on benefits or challenges of waivers for minors or persons who lack the capacity to sign a liability waiver for themselves?

[please type your answer here]

Section 2: Considering Public Insurance for Injuries from Accidents

New Zealand has a no-fault public insurance scheme which covers anyone in New Zealand injured in an accident. The national insurance scheme is paid for by levies charged to all individuals and businesses in New Zealand. The coverage includes medical bills, home help, income assistance and treatments. Read more about the scheme here: www.acc.co.nz.

7. What do you think about a scheme like this for Canada?

[please type your answer here]

8. From your experience, would this scheme have an impact on your school? If so, how?

[please type your answer here]

Section 3: Waivers Signed on Behalf of Minors

It is common practice for guardians or parents to sign waivers on behalf of their dependents as minors do not have legal capacity at law to sign waivers for themselves. In BC, the *Infants Act* prohibits anyone from signing away a minor's rights on their behalf, which effectively invalidates any waivers.[178]

9. **If similar legislation were passed in your province or territory, preventing guardians or parents from signing liability waivers on behalf of minors, would this affect your school? If so, how?**

[please type your answer here]

Please return your completed questionnaire by email to Amy Hill at ahill@piac.ca by January 23, 2023. We thank you for your participation!

[178] For example, in *Wong v Lok's Martial Arts Centre*, the BC Supreme Court prevented the enforcement of a waiver signed by a mother on behalf of her son. In a similar case, *Dewitt v Strang*, a New Brunswick court enforced a waiver since there was no authority to do otherwise as there is in BC.