

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Peters v Soares, 2019 BCSC 189 (CanLII)

Supreme Court of British Columbia, Mathews J, 19 February 2019

Effect of waiver of liability for injuries, Canada, British Columbia, sport

1. This was a case involving liability for injuries and whether a signed waiver precluded liability and damages entirely. The plaintiff claimed that he was injured in a jiu-jitsu competition held by the defendants, jiu-jitsu instructor Marcus Soares and the corporate defendant Carlson Gracie Jiu-Jitsu/MMA Inc (the latter made no appearance). The plaintiff contended that the defendants were negligent in causing him to compete against a participant in a higher weight class and in a competition where stand up skills were required. The plaintiff, who had taken jiu-jitsu classes given by the defendant Soares prior to the competition, claimed that he had no experience or training in stand up skills. He also claimed breach of statutory duty.
2. The defendant denied the allegations of negligence and breach of statutory duty. He argued that the plaintiff voluntarily assumed the risk of injury, engaging the *volenti non fit injuria* doctrine. He also asserted that two waivers applied to bar the plaintiff's claims. The first waiver was part of the membership agreement the plaintiff signed when he enrolled in classes at the defendant's academy. The second waiver was part of an online registration form the plaintiff completed to participate in the competition in which he was injured.
3. The waiver issue was heard separately in this hearing. The membership waiver signed when the plaintiff first enrolled in classes was held not to preclude the liability and damages issue. Neither party had the competition in contemplation when this waiver was signed, so it had no effect on possible liability for injuries sustained in the competition. The on-line waiver for the actual competition was entitled "Waiver Form for Liability and Release". It was held that the defendant, who claimed no knowledge of the wording of the waiver and release, did not establish that the online registration form excluded the plaintiff's claims, since the actual wording was not made clear to the court.
4. As the court held that the membership agreement clause did not apply to the plaintiff's claims and that there was no evidence of the exclusionary language in the online registration form, the application to dismiss the plaintiff's claim on the basis of a waiver and release of liability was dismissed.

IMPLICATIONS



Australia has a special set of civil liability rules established after the public liability insurance crisis in 2002-3 which does not apply in Canada. This decision is of note for charities and nonprofits which use liability waivers to manage the risk of public liability, in that it demonstrates that courts will closely scrutinise the language of liability waivers to determine if they are to be enforced. Waivers are an important risk management tool and can be an effective shield from liability claims in limited circumstances. However, the court held both waivers unenforceable in this case. In doing so, the court affirmed the importance of using language that can demonstrate what each party was contemplating at the time of signing, and the need for organisations to keep proper records of waiver agreements in order to be able to identify the exact terms to which a participant had agreed.

The use of an online waiver was particularly of interest. These can be enforceable, but need to be managed well by charities and nonprofits. All versions of online waivers need to be archived if the wording changes over time, so that the exact version applicable can be made available. In addition, it does not relieve an entity of liability to outsource the management of online waivers to a third party.

Australian charities and nonprofits need to refer to the appropriate civil liability provisions in their jurisdiction to understand the effect of their waiver clauses.

VIEW THE CASE



This case may be viewed at: <https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc189/2019bcsc189.html>

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Date of creation: 31 March 2019

Number of case: 2019-25

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