

# Liability Waivers for Recreational Use of Land

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In August 1993, the Law Reform Commission of British Columbia published a Consultation Paper on "Recreational Injuries: Liability and Waivers in commercial Leisure Activities".

The LRC paper has some interesting information on the form and usefulness of liability waivers. The Commission's comments are mainly for the situation where recreational opportunities or facilities are available at a fee, with the operator intending to make a profit.

## How Liability Arises

Where an accident occurs on your property, you are not automatically liable. For claim against you to succeed, the claimant must show either negligence, or Occupiers Liability Act (B.C.) responsibility.

Negligence. A claimant has to show that you were negligent and so increased the likelihood of injury beyond what is inherent in the activity. The claimant voluntarily assumes risks inherent in the activity, and the person providing the place for the activity is not responsible for a loss resulting from those risks. The LRC uses an example to distinguish between assumption of inherent risk (non-compensable) and negligence (compensable). "A guide-outfitter who uses an overloaded and poorly maintained aircraft for a fishing trip exposes guests to an unnecessary risk to fatal injury." The guide-outfitter will be liable for an accident resulting from overloading and poor maintenance. If an accident happens from some unforeseeable cause, a court is more likely to find that this is a risk inherent in the activity of flying to remote lakes to fish, and is voluntarily assumed by the claimant.

Occupiers Liability Act. A claimant has to show that you, an occupier, have failed in your duty under the Occupiers Liability Act, to see that the property is "reasonably safe". In considering what is "reasonably safe", courts look at things like:

- the existence of an unusual danger,
- the cost and difficulty of avoiding a specific danger;
- the safety record of the premises;
- whether the occupier can warn users adequately so as to reduce or eliminate a danger, and whether such warning was given.

As an example, failing to repair a rotting wooden platform despite warnings from an employee about its unsafe condition will result in liability under the Occupiers Liability Act, whether or not it was negligent for the occupier not to have repaired the platform.

For landowners putting up with trespassers making recreational use of agricultural land, note section 3(3) of the Occupiers Liability Act:

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person...in respect of risks willingly accepted by that person as his own risks, or...who enters premises that the occupier uses primarily for agricultural purposes and who would be a trespasser under the Trespass Act (B.C.), other than a duty not to...create a danger with intent to do harm to the person or damage to his property, or...act with reckless disregard to the safety of the person or the integrity of his property.

“Premises” includes land.

### **Avoiding Liability**

The people who provide recreational opportunities often try to get out from under the liability to which they might otherwise be subject in providing these opportunities. The means used are one or more of waivers, releases and indemnities.

Waiver and releases are technically different but functionally similar ways of the user giving up his or her right to sue the operator for injury, death, or property damage, including that resulting from the negligence of the operator or his or her employees.

With an indemnity, the user agrees to pay back the operator any amount the operator may become liable to pay as a result of the user’s participation in the recreational opportunity.

The operator does not have to limit himself to only one strategy—all three methods can be incorporated into one document.

These methods have been found to be legally enforceable. There are instances where they have not been enforced—but they have generally been upheld especially where their terms are reasonable and not unconscionable.

Judges are more likely to work around a release if it is being used to protect the operator against his own gross negligence and the claimant’s injuries are serious.

### **Rules for Use of Liability Waivers**

The following make it more likely that your release will be upheld:

1. Use a written release in broad (but reasonable) terms. Have a lawyer draft it.
2. WARN the user that a release is required before he or she participates in the recreational activity. This warning can be given by signage, or in person.
3. Bring the release to the attention of the user BEFORE the user undertakes the activity, and allow the user time to reconsider his or her decision to participate, before signing the release. **UNLESS YOU GIVE NOTICE, THE RELEASE WILL NOT BE EFFECTIVE TO PROTECT YOU FROM LIABILITY.** There is recent case law that says so, even in the face of a signed release
4. The release must then be signed by the user BEFORE he or she participates in the activity.

There are a couple of other essentials to protect yourself and your family from liability:

5. Do not rely on the release to protect you. Take reasonable steps to make the recreational activity safe.
6. Maintain liability insurance.

One final comment with respect to releases, waivers, and indemnities, is that they cannot legally be given by, and will be ineffective against, an under-age child.

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<http://www.marymacgregor.ca/article22.htm>, accessed November 25, 2012.