

ClubPac News

October 2007

Waivers & Indemnity Agreements

There are a three “old chestnuts” about liability and waivers that just keep popping up and which are just not completely true.

- “You can’t waive negligence”,
- “Participants assume a certain amount of risk when they decide to golf”, and
- “Waivers are not worth the paper that they are printed on”.

“**You can’t waive negligence**” might be true in the purest sense of negligent acts and reckless actions or disregard for peoples’ safety, but the fact of the matter is that most injury suits that we see against golf clubs are NOT based upon negligence.

Most of the claims are based upon Occupier’s Liability Acts, Host Liquor Acts, and Contracts. While these statutes clearly impose a “Duty of Care” beyond obvious “negligence” they also allow for some latitude on the issues of “WAIVERS”. Members can sign waivers and releases which are perfectly legal, valid and enforceable.

Before looking at WAIVERS, let’s clear the Voluntary Risk issue. “volenti non fit injuria” or the **Voluntary Assumption of Risk** defense (by itself) was basically put to death back in the 60’s. In order to invoke this defense, not only must the participant be aware of the risks, he/she must clearly assume responsibility for them and clearly acknowledge that he/she is giving up or bargaining away their legal right to subsequent action. Without a WAIVER this is a complete non-starter.

So WAIVERS; do they work ? The answer is YES, if they are properly drafted, clear and unambiguous and it can be clearly shown that the participant knew or should have known that they were signing a waiver.

The western Canadian ski hill operators have led the way in the use of waivers at sporting facilities and they have been extremely successful in defending and defeating lawsuits for bodily injuries against them. Ski hill operators across the country have followed their lead. Many of the people who buy and use “season passes” at ski hills are the same ones who buy “golf club memberships”, so why aren’t golf clubs following the example of the ski hills ?

Need more examples ? Look at minor and recreational hockey, mountain biking, cycling clubs, snowmobile clubs, soccer leagues, go-kart tracks. They all require waivers to be signed.

How do you make WAIVERS work ?

- Waiver agreements must just be part of a comprehensive **Risk Management Program**. You still have to make your premises and activities as safe as reasonably possible. (And

be able to prove it.) You cannot abandon maintenance, security, safety and housekeeping processes and expect the waivers to stand on their own.

[Remember too that waivers signed by parents on behalf of minors are very difficult to enforce. Your Duty of Care with regards to children is extremely high and these activities require the attention of your most experienced staff and the application of child appropriate supervision and rules & regulations.]

- Where possible give **Advance Notice** that waivers are to be included and signed. Club newsletters, circulars, renewal notice letter, new member advertising should all include statements that Waivers & Indemnity agreements will be part of the membership application / renewal process.
- Use **Clear, bold and unambiguous** wording, especially on titles. The ski industry in Western Canada uses a standard form with the following BOLD print:

Release of Liability, Waiver of Claims, Assumption of Risk and Indemnity Agreement.

By Signing this Document You Will Waive Certain Legal Rights, Including the Right to Sue.

Please Read Carefully !

Reducing or eliminating unwarranted and unreasonable lawsuits by opportunistic members and their lawyers is good for the club and its general membership. You don't need to hide waivers or apologize for them.

- If possible print the waiver / release on **One Separate Page**. It is important that the signing participant is made aware of the document and that it is important. Ensure that employees do not make "extraneous comments" like "its not important it's just the rules".
- **Set Up a Process** to ensure that all participants are aware that they are signing a waiver and be prepared to prove it. Instruct employees to point out the waiver form. Have the signature "witnessed" by the employee and have signs and notices posted in appropriate places that restate and/or reinforce the wording on the waiver.
- Instruct employees not to allow **intoxicated or impaired participants** to sign waivers or participate in club activities.
- **Keep the waivers / releases on file** in such a way that they can be easily obtained when needed. Waiver forms should be keep at least three (3) years and preferably seven (7).
- Do not disregard the value of "**Unsigned Waivers**" either. While certainly not as good as a signed document these disclaimers have their place and value. Waivers & Indemnity agreements on "tickets"; on Cart Rental Agreements, Warning Stickers on Golf Carts, Signs at the ProShop and the Starter's Shack, Signs Warning of Steep Hills, Deep Water and Out of Bounds areas are all good Risk Management practices and help in establishing the efforts that your club makes to ensure a safe premises.

Where to Use Waivers & Indemnity Agreements:

- Membership Applications and Renewals.
- Day Passes & Greens Fee Receipts
- Tournament Contracts
- Event Contracts (Weddings, Banquets, Conferences.)
- Power Cart Rental Agreements
- Subcontractor Agreements and Leases

ClubPac BONUS:

Virtually all commercial policies today (including ClubPac) contain a LIABILITY DEDUCTIBLE clause. This is the amount that you must contribute to any liability claim paid or defended. In order to recognize the efforts of clubs who have implemented formal waiver programs, the ClubPac Insurers will WAIVE the deductible in any case where the club can produce a signed waiver which is applicable to the claim even if it is not successfully defended.

CLUBPAC NEWS is provided at no charge to participants of the CLUBPAC program. It is intended to assist clubs in implementing good loss control practices and to keep them informed of trends and issues in the area of golf industry insurance. Clubs should refer to local "experts and authorities" for specific information about any "technical" or "legislative" issues mentioned.