

Review waivers before assuming consent will bar a lawsuit

By Rob Lamberti, [AdvocateDaily.com](#) Contributor



A summary judgment decision last fall should cause lawyers and clients alike to look more closely at waivers before assuming a signed consent form automatically bars a party from filing a lawsuit, says Toronto personal injury lawyer [Jasmine Daya](#).

"There is a list of questions a lawyer should ask before turning away a client and saying, 'You signed a waiver, so you don't have a case,'" Daya tells [AdvocateDaily.com](#).

"We often see consent forms, but are they in fact barred from recovery or is there something more we can do? This decision should make plaintiffs' counsel review these forms more closely."

The plaintiff, in this case, [sued](#) for damages after an injury during a physical training course at a college. The defendants wanted to dismiss the claim

because the student had signed a consent form, says Daya, managing principal of [Jasmine Daya & Co.](#)

"The form acknowledges that injuries or other complications may result due to strenuous exercise or other physical activities offered by a police foundations college course," she says.

"However, in this case, it wasn't the physical activity in and of itself that caused the injury," Daya says. "While doing the activity there was a basketball hoop placed carelessly in an area that appears to be negligent and that caused the injury."

She says the waiver form needs to be examined closely and questions asked: Was the language in the consent form valid? Was the injury caused by something that wasn't covered in the waiver?

The summary judgment, in this case, found the signed waiver does not bar the plaintiff's claim and he was able to proceed, Daya says.

"This judgment demonstrates very clearly that signing a waiver in and of itself does not bar an individual from suing."

She says in another case involving the death of a student in an advanced open-water scuba-diving course, the judge outlined a three-stage analysis when considering the release of liability:

- Is the release valid?
- What is the scope of the release?
- Should the waiver not be enforced because it is unconscionable?

"In some cases, companies are trying to make you waive your rights and it's unconscionable," Daya says. "The question is, does a waiver of liability relinquish all of your basic rights?"

She points to the common practice of school boards having parents sign a permission form when their child goes on a field trip and says that does not bar someone from suing a board.

The waivers are never really explained and if not signed, a child can't go, she says.

"Often, a court will try to assist a minor, especially in serious injury cases, recognizing that they should be properly protected. They aren't able to read and interpret the document signed on their behalf," she says.

"Many schools are trying to help children learn outside of the classroom," Daya says. "There must be protections in place to ensure the kids are in a safe environment. Don't just draw up a blanket document to protect the school board."

She says a waiver should have clear, concise language and if an organization is adding clauses to protect itself, it could have the opposite effect of rendering the document unconscionable.

"They are trying to make you waive your rights but a signature doesn't always mean that you have lost them," Daya says.