

Webinar for Motor Coach Canada COVID-19 Considerations: Risks and Mitigation Measures

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Presented by



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Agenda

- **Understanding the risks**
 - Tort law (negligence)
 - Occupiers' liability
 - Government regulation
- **Waivers as a mitigation measure**
- **Concluding thoughts**



Understanding the Risks

- **Tort law (negligence)**
 - What is negligence?



Understanding the Risks

- **Tort law (negligence)**
 - Injured passenger sues carrier
 - Claim based on contracting COVID-19 on coach, and carrier's failure to take appropriate measures to protect the passenger



Understanding the Risks

- **Tort law (negligence)**

- Successful negligence claims require person suing (called the plaintiff) to prove:
 - Carrier owed the plaintiff a *duty of care*
 - Carrier breached its duty, by failing to meet the applicable *standard of care*
 - Carrier's failure to protect the plaintiff *caused* damage or loss to the plaintiff
 - Damage was not too *remote* a consequence of carrier's breach of its standard of care



Understanding the Risks

- **Tort law (negligence)**
 - Duty of care: Settled that a motor carrier owes a duty of care to its passengers
 - You must take reasonable steps to keep your passengers safe



Understanding the Risks

- **Tort law (negligence)**

- Standard of care: Must take the same precautions, as would “ordinary, reasonable, cautious and prudent person” in your “position and circumstances”
- What is “reasonable” will depend on the facts of each case:
 - How likely is the harm?
 - How serious would the harm be?
 - What costs would be needed, to prevent the harm?
- Higher standard expected of “common carriers”



Understanding the Risks

- **Tort law (negligence)**

- Breach of standard of care and causation
- First, did the carrier fail to take reasonable precautions to avoid harm to its passengers (breach of standard of care)?
- Second, if the carrier did not take reasonable precautions, was its breach of its standard of care a cause of the harm to the passenger?
 - The law uses a “but for” test – without the negligent conduct, would the passenger have been harmed?



Understanding the Risks

- **Tort law (negligence)**

- Remoteness

- Passenger must establish that the carrier's negligence was a "legal" or "proximate" cause of their injuries
- Was the harm sufficiently related to the carrier's negligence?
- Harm must have been reasonably foreseeable to the carrier (a "real risk", rather than merely a far-fetched risk)



Understanding the Risks

- **Occupiers' liability**

- An “occupier” has a duty to take reasonable steps to protect visitors on its premises against known or foreseeable risks of harm
- Common carriers can be “occupiers”, for the purposes of occupiers' liability laws – own and/or have responsibility over coaches, terminals, ticket offices, etc.



Understanding the Risks

- **Government regulation**

- Recommendations regarding cleaning and disinfecting protocols, social distancing, temperature checks, facial coverings, etc.
- See Transport Canada:
 - *Use of non-medical masks or face coverings in the Canadian transportation system*
 - *Federal safety guidance to protect drivers and limit the spread of COVID-19 in commercial vehicle operations*



Mitigation Measures

- Consider the “mad goat” defence – if you face litigation, you want as many defences as possible
- Your neighbour says your goat ate their cabbages:
 - “You had no cabbages”
 - “If you had cabbages, they weren’t eaten”
 - “If they were eaten, it wasn’t by a goat”
 - “If they were eaten by a goat, it wasn’t my goat”
 - “If it was my goat, my goat was insane”



Mitigation Measures

- Job No. 1: take reasonable measures to protect your passengers
- Have passengers acknowledge inherent risks of travel
- Implement COVID-19 policies and procedures for your staff
 - For example, with respect to social distancing, sanitization, staying away from work if experiencing symptoms, etc.
 - Failure to train staff on proper procedures can increase risk of infection, and be indicative of a failure to take proper care to keep passengers safe

Mitigation Measures

- Causation arguments:
 - The passenger contracted COVID-19 some other way
- Remoteness arguments:
 - No one could have reasonably foreseen the harm that was caused



Mitigation Measures

- **Waivers as a mitigation measure**
 - What's a waiver?
 - Also known as a liability release, or a release
 - Person assumes the risks of attendance/performance of an activity at a particular location and agrees not to hold the organization liable for harm or losses that are addressed in the waiver



Mitigation Measures

- **Waivers as a mitigation measure**
 - How do waivers work?
 - Contractual agreement to transfer risk from your business to the individual
 - Eliminates the individual's right to sue your business for harm or losses that are experienced as a result of participating in an activity or otherwise attending your place of business
 - So, waivers provide a *defence* to a legal action



Mitigation Measures

- **Waivers as a mitigation measure**
 - Beware enforceability issues
 - Use clear language and take steps to bring the waiver to the person's attention: at time of purchase (in person or online), on ticket, during boarding
 - Not a “get out of jail free” card - still a requirement to comply with applicable Public Health orders and to take reasonable steps to follow health care guidelines, enforce social distancing and sanitization, to further reduce their risk of an attendee contracting the virus



Mitigation Measures

- **Waivers as a mitigation measure**
 - Be clear and specific
 - Indicate the passenger is assuming the risk of the potential to contract the virus on the motor coach, and that they are agreeing they won't hold the carrier responsible for any related harm or injury that might result



Mitigation Measures

- **Waivers as a mitigation measure**
 - Be clear and specific
 - Provide an opportunity to read and understand the waiver – a signed waiver provides strong proof that the person has accepted the waiver's terms; but a signature is not a precondition to validity and enforceability
 - Use a system that documents acceptance of the waiver's terms



Mitigation Measures

- **Waivers as a mitigation measure**
 - Be clear and specific
 - NB: *Contra proferentem* rule – terms and potentially ambiguous clauses within the waiver will be given the narrowest possible interpretation against the interests of the drafters of the waiver



Mitigation Measures

- **Waivers as a mitigation measure**
 - Waiver might indicate the passenger understands:
 - Travelling on a commercial motor coach is a potentially dangerous activity and involves the risk of serious injury, illness, disability or death
 - Contagious nature of COVID-19 and that contracting it, by travelling by motor coach, may result in serious injury, illness, disability or death
 - While the carrier has taken reasonable preventive measures, it can't guarantee there will be no exposure or infection



Mitigation Measures

- **Waivers as a mitigation measure**
 - Refer to specific types of liability you want to disclaim
 - Injury, illness, disability, death
 - Related expenses
 - Under negligence, other torts, contract and occupiers' liability
 - Include carrier's own negligence, and the negligence of others (e.g., other passengers)



Mitigation Measures

- **Waivers as a mitigation measure**
 - Indicate passenger accepts and assumes the risk of commercial travel
 - Confirm the passenger is in good health, not experiencing symptoms, has not been out of the province/country in the last 14 days (when applicable, depending on Public Health restrictions)



Mitigation Measures

- **Waivers as a mitigation measure**
 - Notice and acceptance options:
 - Set out waiver language on signs that are prominently placed at the carrier's location and on motor coaches
 - Print the waiver language directly on an admission ticket - common with sporting events (e.g., lift tickets at ski resorts)
 - Prepare scripts for ticket agents
 - Include banner/flasher for online sales



Mitigation Measures

- **Waivers as a mitigation measure**
 - Insurance considerations:
 - Many insurers are now inserting specific COVID-19 exclusions, or are clarifying language within their policies to make it clear that virus exposure is excluded
 - Review your insurance portfolio to ensure you have appropriate liability insurance to respond to claims
 - Ask how your policies would respond to a COVID-19 claim



Mitigation Measures

- **Waivers as a mitigation measure**
 - Dealing with minors
 - Separate enforceability issue
 - At law, the enforceability of any agreement that has been entered into, by a minor, may be challenged either by the minor, or by a parent or guardian, on their behalf
 - Consider having a parent or guardian provide a waiver, on behalf of the minor



Concluding Thoughts

- Effectiveness of any waiver will always be fact specific - no guarantees
- Waivers (even if effective) don't:
 - Keep people from suing – time and nuisance to respond
 - Shield from negative media exposure
- May be a turn-off for passengers
- A complement to (but not a replacement for) adequate liability insurance
- All that said, still a very helpful protection measure

Questions?



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