

What Are The Risks?

Here are the 5 risks associated with child restraint (car seat) and bicycle helmet fitting clinics:

1. A child whose car seat is checked or helmet is fitted is subsequently injured in a car or bicycle accident – due to volunteer/staff error (e.g. helmet not fitted correctly or car seat not installed properly) or the providing of incorrect information.
2. A staff member or volunteer is injured at a clinic (e.g. receives a cut from something sharp in a vehicle, is struck by a vehicle, injures his/her back from lifting or twisting, etc.).
3. A staff member or volunteer is harassed by an angry parent (e.g. by a parent who is told their car seat does not meet safety standards). Apparently this is a rare event. One organization told us that people who come to a clinic are generally coming very motivated and grateful for the help.
4. A vehicle is damaged at a clinic (e.g. cars parked to close together). Apparently this happens quite frequently.
5. Individuals or organizations involved in a clinic are named in a lawsuit that alleges that they are at fault for any of the above. It may be that the parent or guardian in fact made the error or the product itself malfunctioned, but you may still have to defend yourself or your organization from the allegation.

By the way, in our discussions with the MTO, St. John's and others we have only heard of a single lawsuit against a car seat clinic/technician, and even that was unclear. Often organizations have got out of the clinic "business" more so because of the resources it takes and secondarily the concern for possible liability.

Before We Start

As a parent of two children in car seats who have experienced the skill of someone certified in car seat and using bike helmets – thank you for what you do !

Car accidents remain the #1 reason for child death in Canada. That should put car seat clinics as a priority in our society. Thank you for taking the risks you do to get this work done. Our hope is to assist you in ensuring you are taking risks in the safest setting – both in terms of physical and legal safety.

We are not experts at either. We also have had very limited time to work on this given our limited resources. However we have had the opportunity to review the answers provided by SmartRisk's questionnaire that many of you completed, and we have interviewed several leaders within this area. Plus we do have some expertise around areas such as waivers.

Our disclaimer: we are not lawyers or licensed insurance professionals, so we are not capable of giving professional advice. We are providing our suggestions based on others opinion and our own experience. Lawyers and insurance brokers/agents remain the best resources for making final decisions in areas of the law and insurance.

Effective Risk Management: Our Formula

Start with: Leadership that communicates AUTHENTIC CARE (“our #1 priority is to protect you” and not just to “cover our assets from a lawsuit”) **and POSITIVITY EVEN WHEN RESOURCE STRAPPED** (“we can do this and we can do it in practical ways it may take many months to get where we want to be but we’ll start with this next 90 days”)

- + It uses the common sense and experience of many staff & volunteers
- + Who together with the leadership create and follow a plan
- + The plan is communicated frequently, even creatively, especially for high risk/tricky issues
- + The plan is written, it is easy to read (stay away from jargon or legal terms unless necessary) and concise (1 page documents whenever possible are easier to remember)
- + The plan is signed-off on by anyone involved in delivery annually
- + The plan is monitored to make improvements

Specific Risk Management Tips for Car Seat or Bicycle Helmet Fitting Clinics

SmartTip 1: Create a clear, concise, written job/volunteer role description that current and prospective staff and volunteers receive. It should answer these questions:

- what does this role/job look like in writing ?
- what qualifications are necessary ?
- what is expected from the person ?
- what training, assistance or mentoring can be expected by the person ?
- are any expenses covered ?
- what are reasons for dismissal ?
- how long does this role last ?
- what dangers are there ? Explain the ways they could get hurt but also they have the right to decline work when they feel it is unsafe. (Balance this by explaining how rewarding it is.)

On the reverse side of the job/role description have a “Volunteer Agreement” or “Staff Agreement” where the person signs that they understand the job/role description. The above, and the volunteer manager or director or other leader signs on behalf of organization.

Why create a role/job description with an agreement ?

#1 – to protect your volunteers and staff – they go into job/role with eyes wide open about their risks (which helps ensure they stick to risk management protocols)

#2 – to discourage lawsuits or protect leaders and organizations from legal liability in situations where the volunteer or staff member does sue for wrongful dismissal or a lack of understanding of the risks in the job.

(If you are a small organization needing examples of templates for an application, job description, interview guide, reference form etc please email: dhartley@imaginecanada.ca)

SmartTip 2: Ensure that technicians are properly trained

There are no laws governing the training of people conducting car seat checks or helmet fittings. However, it is good practice to require that people doing these activities, on either a paid or volunteer basis, are properly trained.

With regard to car seats, two agencies provide the bulk of the training in Canada: the Infant & Toddler Safety Association (ITSA) and the St. John's Ambulance. Both organizations require that technicians carry out a minimum number of checks per year to retain their certification and that they recertify periodically.

We are definitely suggesting formal certification training for car seat technicians. If there seems to simply not be any training available in your area, make sure by calling local police departments, fire departments, public health and the Ministry of Transportation first. Then you might consider having someone who has been certified training one other volunteer on the job. The question is whether or not you are exposing yourselves to extra liability because of this. For one thing, I would certainly recommend telling parents who is certified and who is not at the very least.

Training for people fitting helmets is more informal, with most organizations involved in this work training their own staff and volunteers using materials they have developed or adapted themselves. The U.S.-based Bicycle Helmet Safety Institute is a good online source for information on this topic. Visit <http://www.helmets.org/fit.htm> for detailed information and a handy checklist.

In addition to the training required to “do the job,” you may also want to consider providing your staff or volunteers with training in health and safety (e.g., proper lifting techniques), customer service, conflict resolution, etc. Supplemental training such as this is not only a good idea from a risk management perspective, but can also help you attract and retain quality staff and volunteers.

Finally, be sure to keep records of the training your technicians have undertaken, how many checks they have completed, and when they need to be recertified.

SmartTip 3: Ensure that technicians are supervised

Good risk management requires that people are not only properly trained for the tasks they are performing, but also properly supervised. However, traditional supervision techniques can be a challenge for nonprofit organizations conducting car seat installations and helmet fittings, especially if they rely heavily on volunteers.

Some ideas for supervision in this environment include:

- Conduct random spot checks.
- Have technicians work in pairs so that they can check each other's work.
- Pair experienced technicians with new technicians.
- Have a third person review and sign off on completed checks.
- Require that technicians who make repeated mistakes be retrained (and don't allow them to continue working until they are).
- If mistakes continue after retraining, reassign the person to other activities.

SmartTip 4: Take your time

Ensure that your staff/volunteers have sufficient time to do the helmet fitting or car seat installation properly. This seems obvious, but it can be difficult in practice. More people may show up for a clinic than anticipated. Volunteers you were counting on may cancel at the last minute. Parents or caregivers may try to rush the process.

Here are some ideas for managing these challenges:

- Track patterns of attendance at clinics. If you know how many people showed up at a given location on a Saturday last May, you will be better able to predict how many will show up at the same location on the same day this May.
- Have some staff/volunteers "on call" in case volume is higher than anticipated
- Inform participants in advance how long the check will take, how long the wait will be etc. Have someone on hand to deal with questions from participants who are waiting for their check to take place.
- Don't allow staff/volunteers to be rushed by participants.
- Consider appointments rather than blitzes if unpredictability of volume and/or availability of staff/volunteers are ongoing problems.

SmartTip 5: Have a clear, concise, written inspection procedure (including checklist)

The first page might include things like how early to arrive, what pre-work has to be done before clients arrive, reminder of do's and don'ts.

The second page could be a sample inspection checklist, with the third page listing how to use it followed by information such as:

- Have the completed check list signed by two technicians.
- Have the completed check list signed by the parent/caregiver (indicating that s/he received the instructions, understood them, and received a copy of the check list).
- Keep a copy of the signed checklist on file.

- Documentation is especially important if there are problems (e.g., the seat isn't correct for the child's height and/or weight, there is no tether bolt etc.).

Ensure all of the key points are written and not just communicated verbally. From a legal standpoint this is crucial. It has several benefits, primarily it proves what was done and it ensures consistency.

- Clear = no jargon if possible, easy-to-read, step-by-step process, including how to use checklist
- Concise = 1 or 2 pages maximum, use colour print or paper if possible

SAMPLE CAR SEAT INSPECTION CHECKLIST: The other document I forwarded is a checklist sent to me by Amanda Fowlie, a contact in an eastern province who has been a great assistance in understanding the issues she faces. I am not suggesting this checklist is better than any other, as I have only viewed two. Peel Region Public Health is sending us theirs by fax, but has not done so as yet, if you are interested we can give you our contact's info their.

Several things seem quite excellent about the sample checklist. My concern is the waiver. My suggestion would be a separate page with a beefed-up waiver based on our waiver training at the end of this document.

SmartTip 6: Work in pairs

Don't allow staff or volunteers to do installations or fittings on their own. Instead, have them work in pairs and hold events in public places (e.g., police stations, fire stations).

This not only reduces the likelihood of errors, it also protects your staff and volunteers from harm (e.g., physical or verbal abuse, allegations that they did something improper).

SmartTip 7: Make sure parent and child present

Whether you are installing a car seat or fitting a bicycle helmet, it is best to have both the parent and the child present. The child needs to be there so that you can ensure that the seat/helmet is a proper fit for that child. The parent needs to be present to receive instructions and assume responsibility for any follow-up that is required.

There are some organizations that will not install a car seat unless the child is present, others like one St. John's manager have told us they will. You need to have a clear policy on what you will do here.

Another suggestion would be to install it and give the parent written instructions on what to do and possibly request a follow-up appointment.

SmartTip 8: Put the responsibility on the parent/caregiver

Beyond showing the parent how to install, consider getting them to use their own hands to do it while you talk them through it. The benefits:

- Your people will not be in danger of sticking their hands on to a sharp object between their car seat or twisting or straining their back.
- The parent often learns better hands-on, their confidence is built.

Inform parents and caregivers that they are ultimately responsible for keeping their child safe. This is particularly important if follow-up is required (e.g., if a car seat does not meet current standards).

Another idea is to give a list of websites or contact numbers like the MTO (Ontario.CA/Smartlove).

SmartTip 9: Stick within the scope of your knowledge

We tell nonprofits constantly that volunteers often get into trouble not because their heart overrides their brain. Tell your volunteers (and staff) to not help beyond their knowledge, their training. If they are unsure not to guess but to ask for assistance.

SmartTip 10: Don't forget about property damage

A risk that is often ignored by nonprofit organizations running car seat and helmet fitting clinics is the risk of damaging the property of a participant (e.g., their car, their bicycle). Although this is obviously a less serious event than an injured child, it could still harm your nonprofit's reputation and bank account.

Property damage is most likely to occur when space is tight so make sure that you have enough space to carry out your work. In addition, ensure that you have people on hand to direct traffic (four wheeled or two).

SmartTip 11: Give staff & volunteers a place to go for help

Make sure there is someone that staff and volunteers can go to if they have a question or concern (of a technical nature, about health and safety, harassment, etc.).

SmartTip 12: Waivers are critical, but make sure to read our document below

Waivers will not prevent harm or damage from occurring and they will not protect your organization's reputation if harm or damage does occur. However, they can be very effective in protecting your organization's financial assets *if they are worded and administered properly*. For more information on this topic, see our training on the effective use of waivers at the end of this document.

SmartTip 13: Get insurance or Check your insurance

Like waivers, insurance will not prevent harm or damage or salvage your reputation after an adverse event, but it could protect your organization from financial disaster. Insurance is a complex topic. Talk to your insurance professional to ensure that your organization and its staff and volunteers are adequately protected.

Commercial General Liability can protect your organization, staff and volunteers in the event any or all are sued by a parent for harm done. Directors & Officers insurance can insure the same list of people from a lawsuit for mismanagement. Errors & Omissions insurance can insure in the event incorrect information is provided. These and other coverages should be discussed carefully with an insurance broker or agent.

If you are unaware what insurance your organization has: ASK.

Ask the following in writing by email (or email the following to the person in your organization who deals with insurance to forward on to your broker/agent) with regard to your clinics:

- who is covered (list the groups involved: volunteers, staff, others)
- who is not covered
- List what the clinic does specifically and where the clinics occur and ask if there is anything not covered by your current insurance
- Is there any coverage we currently do not have that you as an insurance professional believe we should have.

You want these answers in email or letter. In writing. Keep with insurance documents.

Note 1): As a volunteer you may have some liability coverage extending from your personal homeowner's insurance or tenant's policy. Phone and ask. If they say yes or no, ask to see how they got the answer from your policy wording, look along with him/her to see exactly. If the answer is yes you are covered, but you can't see it clearly in the wording, ask for an email confirming from the broker (keep that email in a safe place in case you ever need it).

Note 2): As a volunteer possibly you have some coverage from your workplace. It is a rare possibility, but you can ask. One group told us that two of their technicians, who worked with the RCMP and local police, were both covered by their work policies.

Waivers: Definitely Worth It !

(This is our Centre's Training on the Effective Use of Waivers).

Why have participants sign a waiver?

There are a variety of reasons to have participants sign a waiver. For example:

- **It is a warning device.** It warns participants what dangers they will be facing from the activity. It also warns them that they are waiving their right to sue if anything goes wrong.
- **It discourages lawsuits.** It discourages aggrieved parties from suing. It doesn't *prevent* them from suing, however.
- **In the event of lawsuit, it can be a strong defense – if done correctly.** It helps your lawyer defend you by demonstrating that the participant was made aware of the potential risks of the activity and that he/she intended to sacrifice certain legal rights. It also eliminates allegations that an individual would have refrained from the activity had only he/she known of the dangers involved.

For those who believe that waivers “aren't worth the paper they are written on,” email me at dhartley@imaginecanada.ca and request the paper presented to the Ontario Bar Association (“Exclusion Clauses & Waivers”) on October 15, 2007 by John Olah and Ashley McInnis of the Toronto law firm Beard Winter. After reading that 31-page report, you will have a different sense based on 18 Canadian court cases.

- **It provides a list of participants.** If something does happen, the signed waivers will allow you to create a list of people who could serve as witnesses.

There is significant Canadian legal precedent that if the wording and practice are done properly, a waiver can be very effective in protecting your organization.

What is a waiver?

1. “A waiver is a legal contract between two parties: the participant in a ... program ... and the organization providing the program.”
2. In this contract, **the participant “agrees not to hold the organization liable for injuries he or she might receive as a result of the ... program, including injuries that might have been caused by the organization's negligence.”**
3. “It is generally accepted under Canadian law that an individual consents to the physical risks of an activity or sport simply by participating willingly and voluntarily. Legal risks [e.g., the risk that the event organization will behave negligently], on the other hand, can only be consented to by means of a written agreement or contract such as a waiver.”
4. “Of all contracts, a waiver of liability is one of the most onerous because the person signing it knowingly relinquishes the right to sue those who are named in the waiver contract.”

5. “Courts have upheld waivers and in so doing, have precluded participants . . . from receiving compensation for their injuries, even where these injuries resulted from the negligence of the organization or its employees.”

Source: “Waivers – A Risk Management Technique” published by the Centre for Sport and Law. To read the full article, go to http://www.sportlaw.ca/articles/riskmanagement_waivers.php.

How do we prepare effective waivers and administer them effectively?

SmartTip 1: An effective waiver should include these ingredients

- The name of the person who wants to participate in the activity.
- The name of the organization(s) the waiver is attempting to protect. Use the proper corporate name.
- Include all possible persons you want protected by the waiver (e.g., directors, officers, employees, volunteers, coaches, officials, site supervisors, etc). Be as clear and specific as possible about roles or positions. List as many potential parties involved in the activity as possible.
- The activities covered. Again, be specific and clear.
- The specific foreseeable risks or dangers of the activity. For example: “The participant understands that serious accidents occur during *hiking and canoeing* and that participants in these activities occasionally sustain life-threatening or serious personal injuries and/or property damage.”
- If there will be travel to or from the event, list this risk as well.
- It should use the word “negligence.” You are stating that even if your organization, staff, volunteers are negligent the participant is still waiving the right to sue. They are giving up a lot of rights. With regard to negligence, there is even a question of whether it is fair to ask them to give up these rights. In return, however, they receive the right to participate. Wording is very important for your organization’s protection.
- If applicable, include a statement that medical personnel will not be available at the site of the activity.

SmartTip 2: Title and headings matter

Your waiver should be appropriately titled. “Sign-up Sheet” is not appropriate. Here is what John Olah and Ashley McInnis of the law firm Beard Winter suggest as an effective title for a waiver in their paper presented to the Ontario Bar Association:

**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!

SmartTip 3: An effective waiver should be easy to read

- It should be written in clear and understandable language.
- It should have reasonably sized type (e.g., the size you use for most documents or larger). This is not the time to use small print. This in itself could affect a judge's decision.

SmartTip 4: Have a one-page, stand alone waiver form

- A waiver form should be a stand-alone document. It should not be incorporated as a middle page in a much larger document with rules and regulations for program participation or tacked onto the end of a document that includes multiple terms and conditions not related to the rights being waived. If you "bury" the waiver, a court may well decide that it was not sufficiently conspicuous.
- John Olah and Ashley McInnis argue that you should limit the waiver form one page. If multiple pages are needed, ensure each page is initialed by the participant.

SmartTip 5: "Just tell me where to sign" is a red flag

- Give participants enough time, at a convenient time, to read and sign the waiver and ask questions if they have them.
- Ontario lawyers John Olah and Ashley McInnis recommend that you "take steps to ensure that individuals have advanced warning that signing a release of liability is a precondition to participating in the activity ... if possible, include the terms of the waiver in the invitation or advertisement."
- You are looking for informed consent. You do not simply want a signature. A signature alone may end up being worthless. A court will want to see evidence of a process that ensures that the participant knew what they were signing.
- Someone should ask the participant clearly "did you fully read and understand this waiver of liability ... do you understand what you are signing," get a clear positive response, and witnesses the signature (see below for more information).

SmartTip 6: Have a staff member or a mature volunteer witness signatures

- Best practice includes having a witness signature line as well. According to Olah and McInnis, “a witness impresses upon the individual the importance of the agreement ... considering that this witness may one day have to testify in court, make sure he or she is mature and responsible ... have the witness print his or her name on the waiver so that you can later, if necessary, locate the employee.”
- Whoever is communicating the need to sign the waiver, including the person(s) “at the table,” needs to take their role seriously. A waiver is a serious contract – it is certainly “worth the paper it’s written on” when it is done correctly. If your staff or volunteers treat them casually, participants will too and a court will likely take that into account.
- Waivers should be signed in the witness’ presence, not mailed to be signed at home. That way you can ensure time was taking to read and understand what was being signed.
- Olah and McInnis suggest having your witness give a “verbal warning to individuals when the waiver is being signed.” They suggest the following: “This is a Waiver agreement. Please make sure you have read the Waiver carefully. By signing the release you are giving up certain legal rights, including the right to sue. Please take your time when reading the Waiver and I am here if you have any questions. When you have read and understood the Waiver, please sign and date the bottom.”

SmartTip 7: If the participant is not an adult (18 and over in Ontario), their parent or guardian must sign the waiver

- Children can contract with you. A 16-year old can buy a car for instance. However they can reverse their decision later which makes contracting with them tricky. Therefore, if a participant is under 18 years of age, you should ask for the signature of the participant *and* his/her parent(s) or guardian(s). Even with the parent’s signature, it is unclear how effective the waiver will be in court. However, until the case law in this area is clear, it makes sense to obtain the signature of both parties.
- Definitely use a waiver. It would be negligent not to ensure that parents know about activities their children are embarking on and the specific risks involved in these activities. It would be best practice to have the parent and child both sign in front of your witness if possible. That may not be possible, and that is even more reason to ensure your one-page waiver is crystal clear in wording and heading.
- If there is travel involved, you should also consider getting permission from the parent to make necessary medical decisions.
- If you are not sure if someone is 18 or over, ask. If you are still not sure, ask for proof.

SmartTip 8: Do not use the same waiver for different activities

It is impossible to have a single waiver and follow the tips above – especially the explicit description of the activity and its risks. Although it may be tempting to create a single waiver and use it for all of your events, activities, trips, etc. don’t do it! If you expect a waiver to work as a

warning device and as insulation against claims, you need to devote the time to crafting thoughtful waivers.

According to Olah and McInnis, “Context provides the court with an idea as to the type of negligence that is excluded by the agreement. The waiver should be tailored to the specific activity involved rather than ‘an off the shelf’ waiver.”

SmartTip 9: Every participant must sign

Ensure that every participant sign the waiver prior to participating in the activity or event. If they don't sign, they don't participate. No exceptions.

SmartTip 10: Never use a waiver without first having it reviewed by a lawyer

A waiver is a contract. Do not contract without legal review. Many Ontario-based nonprofits can get free legal assistance for issues like this one. To see if your nonprofit qualifies, go to www.volunteerlawyers.org.

Example of a Waiver

The sample waiver below is reprinted from *Waivers: A How-To Guide* by Rachel Corbett. Rachel works at the Centre for Sport and Law (www.sportlaw.ca), a Canadian consulting company offering services and practical resources on legal and risk management issues. You can download the full article at: <http://www.sportlaw.ca/articles/flash/Waivers-AHowToGuide-2002.swf>.

Note: This example is provided for illustration purposes only. You should not use this or any other example as a template for your organization's waiver. Please read all the SmartTips above before creating a waiver and have it reviewed by a lawyer.

FACULTY OF PHYSICAL EDUCATION AND RECREATION
UNIVERSITY OF ALBERTA - GYMNASTICS PROGRAM

PARTICIPANT'S AGREEMENT

DESCRIPTION OF RISKS

I am aware that there are physical risks and hazards inherent in gymnastics and in my participation in gymnastics activities at the University of Alberta, including my use of equipment such as climbing ropes, rings, balance beam, uneven bars and even parallel bars, pommel horse, vault, tumbling and floor mats, horizontal bar, runway, foam pit and trampoline.

The risks and hazards of gymnastics include, but are not limited to:

- injuries from executing strenuous and demanding physical techniques in gymnastics;
- injuries from collisions with the wall and any gymnastics apparatus, or falls to the floor or mats;
- injuries from physical contact with other participants (including spotters whose role is to enhance my safety and learning);
- injuries resulting from my failure to properly use any of the gymnastics apparatus; and
- injuries resulting from the mechanical failure of any of the gymnastics apparatus.

Furthermore, I am aware:

- that injuries sustained in gymnastics can be severe and even fatal;
- that the rules posted in the gymnastics room are designed to enhance the safety of myself and others and are to be followed at all times;
- that the trampoline poses a greater risk of injury than other equipment in the gymnastics room, and that the trampoline requires special training and safety precautions; and
- that my risk of injury increases as I become fatigued.

RELEASE

I agree to be solely responsible for any injury, loss or damage which I might sustain while participating in gymnastics and while using gymnastics equipment at the University of Alberta, and I agree to release the University, the U of A Gymnastics Club, the U of Agers and their respective directors, officers, employees, instructors, coaches, students, volunteers and members of all responsibility for such injury, loss or damage.

ACKNOWLEDGMENT

I acknowledge that I have read this agreement and that I fully understand, appreciate and accept the physical risks associated with my participation in gymnastics activities and my use of gymnastics equipment at the University of Alberta.

Printed Name of Participant

Signature of Participant

Printed Name of Parent or

Signature of Parent or

Although the above seems quite strong we recommend: Add the title given in SmartTip #2, a date field and a witness signature field.

Thank you for joining us for today's webinar. We wish you tremendous success in the good work you are doing !