



by Gail H. Forsythe

# The Sad Tale of the Fluffy Dog Club: *Limiting Liability* INCORPORATION & RELEASES<sup>1</sup>

The Fluffy Dog Club is known for its large and prestigious shows and trials. Although the club is suffering financially, the members are determined to host this year's dog show. After all, they need to protect their reputation and status as a prestigious show giving club; not to mention, their "show dates".

This year, in order to keep expenses down, the members decide to reduce the number of rented shade tents at their outdoor show. The members also agree not to hire anyone to supervise parking. The members are too busy to worry about the parking lot. Exhibitors have attended this show and parked at this venue for many years; they will organize themselves. The club is also hoping to draw a large entry because of the foreign judges on the panel; it is also counting on significant revenue from the "gate".

On the day of the show, it is unusually hot and humid. Unexpected problems develop. Shortly after lunch, and while judging, one of the foreign judges collapses. The judge is unconscious and not breathing. A bystander leaps into the ring and performs CPR. The ambulance attendants are delayed in their attempts to reach ringside because of congestion in the parking lot.

A spectator volunteers to get help. The Good Samaritan takes off running, and then slips and falls, landing on an arm and dislocating it. Eventually, the judge (and the volunteer) receive treatment from the paramedics. Both the judge and the Good Samaritan are hospitalized for several days. A spectator at ringside, who also happens to be a judge, agrees to fill in for the hospitalized judge. The show continues ...

In another ring, an exhibitor is rapidly gaiting a dog. The exhibitor trips and falls over one of the tent ropes. The exhibitor's head grazes the table in the ring. Before anyone can assist, the exhibitor stands up. The exhibitor appears dazed and shaken. The exhibitor has a small gash on the forehead; it is bleeding. The judge inquires if the person is "all right". The exhibitor dismisses this inquiry, puts the dog on the table and says: "Here's my dog...go ahead ...I'm fine." The judge obliges and continues judging.

During group judging late in the afternoon, a dog shows signs of extreme heat distress. There is one wading pool filled with water (now warm) at ringside. Despite signs of severe heat stress, the handler exhibits the dog and wins; it dies only two days later.

Just before Best in Show, the weather takes a sudden turn for the worse. A severe thunderstorm strikes; everyone leaves in a panic. One of the exhibitors had a very disappointing day and is

known for drinking too much. The exhibitor runs out into the middle of the open show grounds during the lightning storm, and begins chanting and yelling. The exhibitor is dancing and chanting. No one pays any attention to this person as the others run for cover. The scene is one of organized mayhem. The grounds are flooded. The remainder of the show weekend is cancelled.

After the show, the Club receives:

1) a letter from a foreign attorney demanding the club pay the foreign judge's medical, ambulance and extra travel costs: total claimed \$175,000. The judge had no medical or travel insurance;

2) a lawsuit filed by an attorney acting on behalf of the exhibitor who tripped and fell. The lawsuit claims that the exhibitor (who was a professional) is no longer employable due to a mild brain injury sustained at the dog show. The claim is for over one million dollars in future lost income. The claim alleges that the club and the judge made the injury worse by continuing with judging, instead of providing prompt medical treatment;

3) a demand for \$40,000 in damages for pain and suffering incurred by the Good Samaritan who slipped and broke an arm;

4) a Small Claims Summons filed by the owner of the dead dog claiming the value of the dog and its unborn progeny: \$15,000; and

5) a \$20,000 bill from the municipality for immediate payment of the 3 days rental fee for the show grounds, failing which legal action will be commenced.

Total: \$1.25 million dollars (excluding the cost of legal defense). Are these events unlikely?? Although the dog club, people and claims listed in items 1-5 are fictitious and used for educational purposes only, each of the events described above did occur at a dog show. Some of these events resulted in lawsuits; others did not. What are the potential consequences if such claims are filed against the club? And, how can club members protect themselves from the devastating financial consequences of such claims?

First, consider the financial planning that went into this show. If a club is under resourced, and unable to comply with appropriate standards to protect people and dogs from reasonably foreseeable harm, then it is better to postpone the show until the club's financial situation improves. Cutting corners in order to adhere to "tradition" or to protect a club's reputation, is a recipe for financial disaster. It just takes one incident to generate a large claim.

Second, incorporate the club before hosting dog shows or other events. If the Fluffy Dog Club is not incorporated, and if the claims against the members succeed, each member could be per-

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# Limiting Liability - INCORPORATION & RELEASES

sonally liable for all, or part, of the damages and costs awarded by the court. If the club is not incorporated, but insured against such losses, the policy deductible or exclusionary clauses may result in significant financial exposure for the club members. It is becoming more and more difficult for unincorporated clubs to obtain personal property liability insurance and other types of coverage. A municipality or commercial landlord may also refuse to rent its facilities if a club does not have proof of adequate insurance. Judging contracts should also specify that it is the judge's responsibility to arrange adequate medical insurance and travel cancellation insurance. Judges and handlers may also have a responsibility to ensure that they do not proceed unless it is safe to do so.

In most jurisdictions, if people incorporate as a not for profit society, the relevant provincial, state or federal legislation limits member liability (unless a member breaches a fiduciary duty while acting as an officer or director). For example, if incorporated in the Province of British Columbia, the Societies Act<sup>2</sup>, s. 5 applies:

*"A member of a society is not, in the member's individual capacity, liable for a debt or liability of the society".*

People recognize that limited liability is one of the benefits of incorporating a company. The same principle applies to not for profit clubs. Even so, most dog clubs fail to incorporate because members perceive the step as too complex or too costly. There may also be a false assumption that because club members are volunteers, that they are not held to the same standard of care as the operators of a business.

## Who can incorporate and what does it take?

In most jurisdictions, a not for profit society may be incorporated for any "lawful purpose". For example, Section 3(1) of the British Columbia statute provides that "5 or more persons may apply for incorporation by sending all of the following to the Registrar:

- a) a copy of the club constitution and bylaws;
- b) a list of persons who will be the first directors, including their names and addresses;
- c) the address of the proposed society; and
- d) the prescribed fee." [usually nominal compared to incorporating a business]

Most dog clubs already operate with a "constitution" that consists of a statement of club objects or purpose and by-laws. Most jurisdictions have "model by-laws" that can be adapted and customized to meet the needs of club members. Approval from either the Canadian Kennel Club or the American Kennel Club to host dog show events should not be confused with incorporating under either provincial law, state law or federal law. The incorporation formalities, cost of annual returns, and audit requirements are nominal when compared to the risk of financial exposure (as illustrated by the Fluffy Dog Club claims)!

## Which claims are likely to be successful?

Let's look at the claims of the foreign judge and the bulldog owner. A court will examine the evidence and may conclude that

the club was negligent for failing to provide adequate shade and water for the judge and the exhibitors with their dogs. Further, the club has a duty to ensure that people and dogs can obtain medical attention quickly. The need for shade and medical attention due to heat stroke at this type of an event is reasonably foreseeable. Regardless if the club is run by volunteers or paid employees, a reasonable standard of care is required. If the judge (or bulldog owner) failed to protect their person (or their bulldog) from the weather, then the judge (or bulldog owner) may be held contributorily negligent to that extent. If so, the damage award and the club's obligation to pay might be reduced accordingly.

The exhibitor's claim for personal injury and the Good Samaritan's fall, lead us to the topic of releases and waivers. Releases are part of a "contract" that is created when you enter your dog or when you pay your admission to enter the dog show grounds. A release is an attempt to limit claims by injured persons. If a release is clearly worded and a competitor has adequate opportunity to consider its impact before signing, and signing is a normal part of the conditions that an exhibitor expects for an event, then a release will usually be upheld by the court. Have you read the reverse side of an AKC entry form? It contains a form of release.

In *Karroll v Silver Star Mountain Resorts*<sup>3</sup> the British Columbia Supreme Court noted that ski resort operators have been quite successful in limiting their liability by including a release in the body of ski resort day tickets or season pass applications. In *Karroll*, the court concluded the release on the season's pass application was effective because the wording suggested that it was an important legal document; that the person signing "waives certain legal rights, including the right to sue". In that jurisdiction, if a person signs a release, the terms of the release will govern even if the person did not read it - unless one of three exceptions apply: 1) the person's act was not their own i.e. signed under duress or while intoxicated; 2) the agreement is misrepresented or induced by fraud; or 3) the person who will benefit from the release knew the person signing was mistaken as to its purpose.

The British Columbia Court of Appeal case of *Kettunen v Sicamous Fireman's Club*<sup>4</sup>, illustrates that if a person is required to quickly sign a release (sometimes referred to as a waiver) as a condition of entry to a show grounds, and that person does not have a reasonable opportunity to read, understand or be informed about the release, then it will not be binding. However, Canadian courts are quick to interpret releases and waivers in a manner that narrows or significantly reduces their effectiveness.

The outcome of the injured exhibitor's case, and the Good Samaritan's case, will turn on the wording of the release and the circumstances around its signing. This analysis is reinforced in a 2005 case<sup>5</sup>. Regardless if the Club's defence is successful, an unincorporated and uninsured Club (and its members) will incur significant legal defence costs along the way.

If your club is going to host events, take protective measures: 1) incorporate; 2) retain a lawyer to draft a properly worded release; and 3) purchase appropriate and adequate insurance.

<sup>2</sup> R.S.B.C. 1996, c.433

<sup>3</sup> (1988), 33 B.C.L.R. (2d) 160, 47 C.C.L.T. 269, 40 B.L.R. 212 (S.C.)

<sup>4</sup> 1125 1999 BCCA 719 Docket: CA026325 Registry: Vancouver 1999

<sup>5</sup> *Goodspeed et al v Tyax Mountain Lake Resort Ltd. et al*, 2005 BCSC 1577