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WAIVING GOODBYE TO LIABILITY: THE ENFORCEABILITY OF WAIVERS AND RELEASES OF LIABILITY IN RECREATIONAL SPORTS

Many recreational activities, such as for instance, skiing, rock-climbing, horse-back riding, go-carting, sky-diving, zip-lining, bungee jumping and other extreme sports are widely known to carry inherent risks and dangers. It is not surprising then that recreational operators offering such activities require their patrons to execute waivers of liability as a condition of participating in the activities. Although their language varies, these waivers generally state that in the event of an injury, the participant waives his or her right to sue the operator, even if the injury was caused by the operator's negligence.

In a typical scenario, the patron – eager to participate – quickly skims through the waiver, and signs it without giving much consideration either to the contents of the waiver or the rights being waived. Then, when an injury occurs, the patron offers a slew of excuses in an effort to challenge the waiver's validity. Many of these excuses involve a variation or a combination of the following:

- *"I didn't read it."*
- "*I didn't understand it."*
- *"It was all in fine print."*
- *"It was all legalese, and I am not a lawyer."*
- *"I didn't know what I was signing".*
- *"The legal consequences weren't explained to me.*"
- *"English is not my first language."*
- *"I didn't waive my right to sue for gross negligence."*
- *"I didn't waive my right to sue for serious injury."*

In most cases, these excuses have met with little success. Courts have consistently held that a properly executed waiver of liability constitutes a complete bar to the plaintiff's claim in negligence and under the *Occupiers' Liability Act* (the *"OLA"*).[1] Circumstances could conceivably arise, however, where a waiver would not protect the operator, such as, for instance, where it was not brought to the attention of the person signing it, or where enforcing it would be unconscionable or contrary to public policy.

So when can the operator expect that a waiver will be enforced? In what circumstances would a signed waiver be invalid? Would a release protect the operator in the event of a catastrophic injury? What if the injured party is a minor? In this article, we endeavor to answer these and other questions by examining the recent developments in caselaw.

I. WHAT IS A VALID WAIVER?

In the 2015 case of *Jensen v. Fit City Health Centre Inc.*,[2] the court set out the requirements for a valid waiver and, even more importantly, identified what is *not* required of a waiver in order for it to be enforced.

Jensen involved a personal injury sustained by the plaintiff while using equipment at a fitness club. The plaintiff alleged that the equipment was defective, and that the defendant club was negligent in failing to maintain, inspect, or warn her of its risks. In response, the defendant relied upon the waiver contained in the Membership Agreement the plaintiff signed when joining the club 4 years prior, as well as another waiver contained in the renewal documentation signed shortly thereafter.

In concluding that the waiver was a full defence to the plaintiff's claim, the court outlined the requirements

[1] *Occupiers' Liability Act*, RSO 1990, c. O.2.
[2] *Jensen v. Fit City Health Centre Inc.*, [2015] O.J. No. 7091 (SCJ).

that must be met in order for a waiver to be upheld. It held that the waiver must: (1) be clearly worded; (2) be unambiguous; (3) be sufficiently broad in scope to exclude liability for negligence alleged; and (4) must have been brought to the attention of the person signing the waiver.[3]

In addition, in rejecting several of the plaintiff's arguments, the court identified what is ***not*** required of a waiver in order for it to be enforceable. Specifically:

1. It is not necessary that the waiver be read by the person signing it. By signing the waiver, a person is bound by its terms, regardless of whether he or she has read the agreement, unless the signing person can show fraud, misrepresentation, or a very onerous term that a reasonable person would not expect to be in the contract.
2. It is not necessary that the waiver specifically use the word "negligence", provided it is otherwise clear that negligence is covered. In this case, the use of the words "*claims of every nature and kind howsoever arising*" was sufficient to exclude liability for negligence.
3. It is not necessary to specifically refer to the *Occupiers' Liability Act*, provided that the waiver is specific and broad enough to cover claims made under the *OLA*.

Significantly, while the waiver must be brought to signor's attention, there is no further requirement that the occupier fully explain the legal effect of the waiver to that person.[4] It is also notable that a valid waiver could be either electronic or executed in hardcopy. The law applicable to waivers generally applies equally to e-waivers executed by touching a computer screen or clicking a designated area.[5]
In *Jensen*, all of the necessary requirements were satisfied, and the waiver served as a complete bar to the plaintiff's claim in negligence and her claim for breach of the *OLA.*

II. POSSIBLE CHALLENGES TO A SIGNED WAIVER

In *Arif v. Li*,[6] after suffering personal injuries while rock climbing, the plaintiff brought an action against the operator of the course, as well as its owner, the municipal Conservation Authority.

Prior to participating in the rock climb, the plaintiff signed 2 waivers, one for the operator, and one for the Conservation Authority. After the waivers were signed, the operator provided a "safety talk", explaining the inherent dangers of rock climbing, including the risk of personal injury. In addition, when entering the conservation area, the plaintiff had to pay an entrance fee, and received a receipt that contained a release of liability. Finally, a notice posted at the start of the trail also included an exclusion of liability for the Conservation Authority.

The defendants brought a motion for summary judgement to dismiss the plaintiff's action on the basis of the Releases. The plaintiff contested their enforceability on the basis that:

(i) he did not understand the legal effects of the Releases;
(ii) the Releases did not absolve the defendants from gross negligence; and
(iii) he did not know he would be rock-climbing (the plaintiff claimed he thought he was just going hiking because it was his son-in-law who purchased the tickets).

The motions judge held that a person is bound by a signed release, unless one of the following exceptions can be established:

- ***Non Est Factum*** – the signer, <u>*through no carelessness on his or her part*</u>, is mistaken as to the nature of the document;
- ***Fraud or Misrepresentation*** – the signer is induced to sign by fraud or misrepresentation;
- ***Objective Lack of Consensus Ad Idem*** – (1) where it is unreasonable for a person relying on

[3] **Note**: This is required by common law, as well as s. 5(3) of the *OLA*, which provides that "*where an occupier is free to restrict, modify or exclude the occupier's duty of care… the occupier* ***shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed*****".**
[4] See *Arif v. Li*, [2016] O.J. No. 4013. Although discussed in the decision, the court did not rule on this issue in *Jensen* because it was not properly plead by the plaintiff.
[5] *Quilichini v. Wilson's Greenhouse & Garden Centre Ltd.*, [2017] S.J. No. 24 (SCJ).
[6] *Arif v. Li*, [2016] O.J. No. 4013 (SCJ).

the signed contract to believe that the signer agreed to its terms; and/or (2) where the person relying on the release failed to take reasonable steps to bring the content of the release to the signor's attention;

- ***Unconscionability*** –the contract was formed in unconscionable circumstances;
- ***Public Policy*** – there is an overriding public policy that outweighs the very strong public interest in the enforcement of contracts.

The motions judge rejected the argument that the defendants were obliged to ensure that the plaintiff understood the legal effect of the Releases prior to signing them, and confirmed that there is no such obligation on the person seeking to benefit from a release. As McLachlin C.J.S.C. (as she then was) stated in *Karroll v. Silver Star Mountain Resorts*:

> …there is no general requirement … to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises.[7]

Further, the motions judge rejected the plaintiff's argument that the Releases did not bar a claim in gross negligence, finding that "gross negligence" was not a separate cause of action from negligence. In any event, gross negligence was covered within the phrase "*all manner of action, causes of action, suits, claims or demands of whatsoever nature or kind*" in the waiver.

The motions judge further found that by the time the plaintiff had read the Releases, he was well aware that he would be going rock climbing, rather than hiking. The plaintiff was well-educated, and fluent in English. The Releases were not unconscionable or contrary to public policy. As none of the relevant exceptions were applicable, the court concluded that the waivers barred the plaintiff's claim and his action was dismissed.

III. NO GENUINE ISSUE FOR TRIAL

As the 2015 case of *Trimmeliti v. Blue Mountain Resorts*[8] illustrates, where a waiver is clear, unambiguous, and has been appropriately brought to the patron's attention, the courts will not hesitate to dismiss the plaintiff's claim on a summary basis.

The plaintiff in *Trimmeliti* was a university student in his 20s who had skied at the Blue Mountain on numerous occasions during the 2015 ski season and several prior seasons. He described himself as an intermediate level skier and held a Blue Mountains season pass. The incident occurred when the plaintiff, while night-skiing, entered a trail that was closed off and fractured his collarbone after colliding with the orange fluorescent tape used to mark the trail closed.

When acquiring his season's pass, the plaintiff executed a "RELEASE OF LIABILITY, WAIVER OF CLAIMS, ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT". The title was capital letters in bold type and highlighted in yellow. The plaintiff was also informed that "BY SIGNING THIS DOCUMEMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE. PLEASE READ CAREFULLY"![9]

In addition, the agreement contained an explicit "assumption of risk" clause whereby the plaintiff acknowledged being aware that skiing involved serious "RISKS AND DANGERS" and fully assumed the "THE POSSIBILITY OF PERSONAL INJURY…RESULTING THEREFROM".[10] The waiver was expressly stated to apply to all claims, including negligence, breach of statutory duty under the *OLA* and any failure on the part of the resort to protect patrons from the dangers and hazards of skiing.

The court concluded that it would have been impossible for any literate person to have signed this document – even if they only scanned the heading – and remain ignorant of its general purpose and intent. As a person of above average literacy and sophistication, the plaintiff must have understood and

[7] *Arif v. Li*, supra, at para 58 citing *Karroll v. Silver Star Mountain Resorts Ltd*. (1988), 33 B.C.L.R. (2d) 160, para 24.

[8] *Trimmeliti v. Blue Mountain Resorts Ltd*., [2015] O.J. No. 1825 (SCJ).

[9] All emphasis in the original.

[10] All emphasis in the original.

agreed with the "thrust" of the document and what it was about in a "general way" (regardless of his claim that he did not read it in full), and chose not to inform himself further.

The motion judge found that the key wording was not expressed in fine print, but rather by way "*a loud proclamation placed in a…highlighted bold type text box*". He further took into account that the plaintiff was familiar with the waiver wording because it was included on the lift tickets he purchased during the previous 5 years of skiing at the resort. Since the lift ticket were affixed to the plaintiff's jacket, as well as displayed in public areas, the motion judge was hard pressed to imagine what more the resort could have done to bring the waiver to the plaintiff's attention.

The court also emphasized personal responsibility and free will as follows:

> If the plaintiff chose to sign the form and ignore the consequences, ***that was a decision freely made by the plaintiff***. The plaintiff was not free unilaterally to contract out of the waiver that he knew or ought to have known was a condition of his access to the resort.[11]

Stressing that the release was not particularly unusual, the motions judge concluded that it was, by its terms and ordinary meaning, a complete answer to the plaintiff's claim. Accordingly, there was no genuine issue for trial, and the plaintiff's claim against the resort was dismissed.

IV. A NOVEL ARGUMENT – REJECTED IN *SCHNARR V. BLUE MOUNTAIN RESORTS*

Following these, and several other decisions where waivers of liability were unambiguously upheld, the plaintiffs have attempted to find more and more creative ways to attribute liability to defendant resorts in personal injury actions. Most recently, in *Schnarr v. Blue Mountain Resorts Ltd.*,[12] the Court of Appeal took the opportunity to clarify the law in respect of two cases dealing with the liability of ski resorts for injuries sustained by their patrons.

The plaintiffs/appellants, Schnarr and Woodhouse both purchased ski tickets at the Blue Mountain and Snow Valley resorts, respectively. Both executed waivers of liability as a condition of their tickets. Both were injured on the resorts' premises. Both took the position that they were not bound by the waivers because their terms were contrary to the *Consumer Protection Act*. The appeals from lower courts' rulings were heard together, as they raised common issues.

The parties were in agreement that the appellants were "consumers", the ski resorts were "suppliers", and the waiver of liability agreements they had entered into were "consumer agreements" within the meaning of the *CPA*. The appellants took this further, arguing that despite having signed waivers of liability, their rights were protected under the deemed warranty provisions in section 9(1) of the *CPA*. They also relied on section 7, which states that the rights under the *CPA* apply "*despite any agreement or waiver to the contrary*". The appellants thus took the position that the resorts could not rely on the terms of the waivers as they were contrary to the *CPA*.

1) Nordheimer J.A.'s Analysis in *Schnarr*

According to Nordheimer J.A., the answer to the novel question of law raised by the appeals lay in the purpose and intent underlying the *OLA* and the *CPA*.

Turning first to the *OLA*, Nordheimer J.A. observed that it was intended to establish a comprehensive duty of care that an occupier would owe to persons entering their premises. This is clear from section 2, which states that the *OLA* applies "in place of" the applicable rules of common law governing occupiers' liability.

The critical provisions of the *OLA* are contained in ss. 3 and 4. The duty, requiring the occupiers take reasonable steps to ensure that persons are "*reasonably safe*" while on their premises is set out in ss. 3(1) and (2).

However, section 3(3) then permits the occupiers to "*restrict, modify or* ***exclude***" the occupiers' duty, while under s. 4 the duty of care does not apply in respect of "***risks willingly assumed***" by a person

[11] *Trimmeliti*, supra, at para 82.
[12] *Schnarr v. Blue Mountain Resorts Ltd*., [2018] O.J. No. 1664 (ONCA).

entering the premises. (Although in that case, the occupier owes a duty not to create a danger "*with the deliberate intent of doing harm"...* or to act "*with reckless disregard*").

As Nordheimer J.A. emphasized after reviewing the Discussion Paper issued by the Attorney General shortly before the *OLA* came into force,[13] the intent for including ss. 3(3) and 4 in the *OLA* was to "promote the availability of land for recreational activities" by encouraging private landowners to voluntarily make their property available for such activities by allowing them to limit their liability.

Nordheimer J.A. then considered the *CPA*, including, in particular, sections 7(1) and 9 which formed the basis of the argument put forward by the appellants.

Section 7 states that the rights under the CPA apply "***despite any agreement or waiver to the contrary***". Section 9 provides that a supplier is deemed to warrant that the services supplied under a consumer agreement are of "***a reasonably acceptable quality***". Sections (2) and (3) go further, stating that any term that purports to negate or vary the deemed warranty is ***void***.

Examining the consultation papers explaining the intent behind the enactment of the *CPA*, Nordheimer J.A. observed that two factors were of note:

First, the *CPA* was not intended to apply to transactions already governed under industry- and sector-specific legislation that adequately addresses consumer protection.[14]

Second, the consultation paper did not identify any problems with the existing legislation relating to occupiers or consumer transactions involving occupiers. The principal concern of the *CPA* was with financial transactions. As Nordheimer J.A. concluded, there was nothing in the background to the passage of the *CPA* or the provisions of the *CPA* itself that would suggest that it was intended to regulate liability arising from the use of premises that were subject to the *OLA.*

Nordheimer J.A. next considered whether s. 9 of the *CPA* conflicts with s. 3 of the *OLA* and held that indeed, there was a direct conflict between these provisions. Since the *CPA* expressly prohibits what the *OLA* permits, the *CPA* and the *OLA* are irreconcilable and in conflict. To resolve this conflict, Nordheimer J.A. held that the more ***specific*** provisions of the *OLA* ought to prevail over the more general provisions of the *CPA.*

This conclusion was consistent with principles of statutory interpretation, including the objective of avoiding absurdity. Here, Nordheimer J.A. considered the *Ontario Trails Act*[15] which amended the *OLA* to provide protection to occupiers who permitted their premises to be used by the public for recreational hiking, portaging, or snowmobiling. According to Nordheimer J.A., it was difficult to accept that the Legislature would amend the *OLA* to encourage occupiers to open their property for use by members of the public, all to have rendered of no force and effect by the *CPA.*

In the result, Blue Mountain's appeal and Snow Valley's cross-appeal were allowed. The waivers of liability were a complete defence to the appellants' claims.

Despite the strongly worded ruling in *Schnarr*, the plaintiffs/appellants have brought a motion seeking leave to appeal the decision to the Supreme Court. We will be watching closely for any decision by the Supreme Court on the motion for leave to appeal, as well as any steps that the Ministry of Government and Consumer Services (who had been granted intervenor status during the proceedings) may take to amend the existing legislative framework in response to the Court of Appeal decision.

V. CATASTROPHIC INJURY

In most cases, a validly executed waiver of liability will operate as a complete defence to the plaintiff's

[13] *Schnarr*, supra, para 28 citing the *Discussion Paper on Occupiers' Liability and Trespass to Property* issued by the Ministry of the Attorney General in May, 1979.

[14] *Schnarr*, supra, at para 35 citing Ministry of Consumer and Commercial Relations (now, Ministry of Government and Consumer Services) Consultation Paper entitled "*Consumer Protection for the 21st Century*".

[15] *Ontario Trails Act*, 2016, S.O. 2016, c. 8 Sched. 1.

claim even in the event of a catastrophic injury or death.

In *Isildar v. Kanata Diving Supply*,[16] the court considered the enforceability of a release signed by a participant who died in a diving accident. The defendant diving school and its instructors were found have been negligent (by, *inter alia*, failing to provide competent diving instruction and failing to rent diving equipment that was in good working order and suitable for the requirements of each dive). The issue before the court was whether the release signed by the deceased protected the defendants from liability.

In a lengthy decision, Roccamo J. held that the following three-stage analysis was required to determine whether a release was enforceable:

1. Did the plaintiff know what he was signing? Alternatively, if a reasonable person would know that a party signing did not intend to agree to the release, did the party presenting the document take reasonable steps to bring it to the attention of the signator?
2. Was the scope of the release broad enough to cover the conduct of the defendants?
3. Should the release not be enforced because it is unconscionable?

Despite breaches of the standard of care by the diving company and the dive instructors, as well the contractual breaches by the company, the release signed by the deceased operated as a complete bar to the plaintiffs' claims. The bar operated in relation to claims in tort, in contact and pursuant to the *Family Law Act*.

VI. AN OUTSTANDING ISSUE - WAIVERS ON BEHALF OF MINORS

It is clear that a waiver signed by a minor alone is unenforceable.[17] However, to date, Canadian jurisprudence has not adequately addressed the question of whether a parent or a guardian is able to sign a binding release waiving a minor's rights on his or her behalf.

In British Columbia, the *Infant Act*[18] (legislation unique to British Columbia) deals with circumstances where a guardian may enter into a binding contract on behalf of a minor. Pursuant to the *Infant Act*, a guardian cannot enter into a binding agreement on behalf of a minor unless the agreement is approved by the Public Guardian and Trustee or by the Court.[19] Since, in virtually all cases, a recreational waiver signed by a parent on behalf of a minor would not be compliant with the *Act* (i.e. it wouldn't be approved by the Public Guardian or the Court), such waivers are generally unenforceable in British Columbia.[20]

In Manitoba, upon reviewing of the law, the Law Reform Commission of Manitoba has described the validity of parental waivers as "doubtful", whereas in Ontario there appears to be a complete absence of jurisprudence or academic commentary on the question of whether parental waivers are enforceable. Until some much needed guidance on this important issue is provided by jurisprudence or through a legislative initiative, commercial occupiers in Ontario offering recreational activities to the public cannot confidently rely on any release signed by a parent or guardian on behalf of minor.

VII. CONCLUSION

So what can the insurers take away from recent legal developments concerning waivers of liability?

The starting point is that in most cases, an executed liability waiver will serve as a complete defence to the plaintiff's claim, provided that it is (i) clear and unambiguous, (ii) sufficient in scope to exclude liability for the negligence alleged, and (iii) has been brought to the attention of the person signing it.

This does not mean that any attempt by a commercial occupier to exclude or limit liability would automatically constitute a valid waiver. Simply hanging a sign that says "Enter (or participate) at Your Own Risk" will not be enough for example, since such a sign is neither sufficiently broad in scope to exclude negligence, nor meets the requirement that the waiver be brought to the attention of the patron.

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[16] *Isildar v. Kanata Diving Supply*, [2008] O.J. No. 2406 (SCJ).

[17] *Regina v. Leduc*, 1971 CanLII 482 (ON SC); *Pyett v. Lampman*,1922 CanLII 573(ONCA).

[18] *Infants Act* [R.S.B.C. 1996] C. 223.

[19] Certain exceptions to this (such as for instance, agreements for unliquidated damages) are not applicable here.

[20] *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*, [2009] B.C.J. No. 1992 (B.C. Sup. Ct.).

Similarly, a waiver will not be valid where the signer was induced to sign by **fraud** or **misrepresentation**, or where he or she (through no carelessness of their own) was **mistaken** as to the nature of the document. Nor will a waiver be enforceable where there was **no *consensus ad idem*** – that is, where it is unreasonable for a person relying on the waiver to believe that the signer agreed to its terms. This would apply if, for instance, the occupier was aware that signor did not speak any English, or if it was clear that the signor was incapable of understanding the terms of the waiver because of say, an intellectual disability or an impairment caused by alcohol or drugs. Finally, a waiver will not be enforceable in circumstances where it would be **unconscionable** or contrary to **public policy** for the waiver to be enforced.

On the other hand, it is clear that none of the typical excuses used by plaintiffs to challenge the validity of waivers have gained any traction with the courts. Thus, it is no answer to a signed waiver for the plaintiff to say that he or she:

- did not read the waiver;
- did not understand (or was not explained) the legal consequences of the waiver;
- did not understand the "legalese" contained in the waiver;
- did not intend to waive right to sue for serious injury; or
- did not intend to waive right to sue for gross negligence.

Rather, the Ontario courts have repeatedly emphasised personal responsibility, observing that if a person chooses to sign a waiver knowing that this is a precondition of participating in an inherently risky activity, that person must be taken to accept the consequences of his or her actions. This approach is consistent with the basic tenets of contract law, and underscores the commercial realities associated with inherently dangerous recreational activities. It recognizes that in order to encourage commercial occupiers to make their properties available to the public for risky activities, it is necessary to allow the occupiers a means of limiting their liability. It also reflects the premise underlying the defence of *volenti* available to commercial occupiers that "*no wrong can be done to one who consents*".

While the Ontario law concerning waivers of liability generally is well settled, some questions still remain, including, for instance, whether a waiver signed by a parent or guardian on behalf of a minor child is valid and enforceable. Also, although the Court of Appeal, in its strongly worded decision in *Schnarr* confirmed that the specific provisions of the *OLA* prevail over the more general provisions of the *CPA*, it remains to be seen whether the Supreme Court will agree with this reasoning. It also remains to be seen whether the Legislature will decide to address the Court of Appeal's decision through a legislative amendment of the *CPA* and/or the *OLA*. We will certainly be watching closely for any developments in these areas, and will update you if it becomes necessary.

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