QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 10**

Date: **2017 01 12**
Docket: QBG 1072 of 2015
Judicial Centre: Saskatoon

BETWEEN:

AARON QUILICHINI,

Plaintiff

- and -

WILSON'S GREENHOUSE & GARDEN CENTRE LTD. and VELOCITY RACEWAY LTD.,

Defendants

Counsel:

Stuart A. Busse, Q.C.	for the plaintiff
Cecilia V. Hoover	for the defendants

FIAT
January 12, 2017

SCHERMAN J.

The Matter to be Decided

[1] The defendants, Wilson's Greenhouse & Garden Centre Ltd. [Wilson's] and Velocity Raceway Ltd. [Velocity], in a summary judgment application, seek an order dismissing the action of the plaintiff, Aaron Quilichini [plaintiff]. The defendants say because the plaintiff executed an electronic form of waiver and release

that is binding on him, and he has no claim enforceable at law. Whether or not this form of waiver and release is binding is the core issue to be decided.

The Claim and Defence

[2] The plaintiff's action claims damages for bodily injury suffered while participating in go-kart racing at a go-kart racing business owned and operated by Velocity. The plaintiff paid for access to Velocity's go-kart racing facility, the use of a go-kart and participation in go-kart races. He alleges the throttle on the go-kart he was operating broke or stuck at full throttle causing him to crash into a concrete barrier with resulting injury. This, he says, was either a breach of a contractual obligation owed to him to maintain the go-kart in a proper and safe working condition or a negligent breach of the same obligation.

[3] The defendants deny any such breach and say the collision was caused by the plaintiff's own fault, including driving at excessive speed. However, the factual disputes arising from the pleadings are not material to the defendants' application. They say the plaintiff's claim should be dismissed because a waiver and release agreement the plaintiff executed prior to participating is binding on him and, thus, he has no claim against them.

The Waiver and Release

[4] The electronic waiver and release reads as follows:

> ***WAIVER & RELEASE***
>
> **ALL PARTICIPANTS MUST READ CAREFULLY AND SIGN AT BOTTOM OF PAGE.**
>
> In consideration of Velocity Raceway Ltd. permitting me access to their premises and use of their equipment and facilities, I hereby acknowledge and agree as follows:

> **ASSUMPTION OF RISK** I understand that this activity is dangerous and may become more hazardous or dangerous during the time I am on the premises of Velocity Raceway. … I am aware that the machines may travel at speeds of up to 80 kilometers per hour and that equipment failures or carelessness of other drivers are always possible. I understand the risk of injury from operating a go-kart is significant, including the potential for serious bodily injury, paralysis and death; that I am aware of all the risks and hazards inherent with my operating a go-kart at Velocity Raceway. It is entirely my choice to take part in this activity, and I therefore, accept and assume responsibility for any possible risk involved in my participating in this sport.
>
> **RELEASE** I hereby acknowledge and forever discharge Velocity Raceway Ltd., its owners, employees, agents and affiliates, as well as their successors and assigns, from any and all claims, liabilities, demands, and/or actions for damages (including legal costs) arising in any way from my participation in go-kart racing on their property. This release includes, inter alia, damages for personal injury, property damage and wrongful death and shall be binding on my heirs, successors and assigns.
>
> …

[5] All persons wishing to participate in Velocity's go-kart races had to proceed through a kiosk system and execute the electronic waiver and release. Within this kiosk system, customers or participants:

i. provide personal information, complete a membership application and pay for such membership;

ii. are photographed;

iii. go through a series of electronic pages on a computer screen and have to click "next" to move from one electronic page to the next; and

iv. agree to the terms of a waiver and release [e-Waiver].

All participants are obligated to click the "I agree" icon or selection on the electronic

waiver and release form presented to them on a screen before they are permitted to participate in a race.

[6] On the day in question, the plaintiff proceeded through the kiosk system, provided personal information, paid a membership fee, was photographed and clicked the "I agree" icon before participating in two go-kart races.

The Parties' Positions

[7] The applicants say that:

(a) The plaintiff's electronic signature effected by clicking on "I agree" is as binding as a hard copy signature.

(b) The e-Waiver is a complete and absolute defence to the plaintiff's claim.

[8] The plaintiff says that:

(a) A trial is necessary to determine whether the Plaintiff actually signed the e-Waiver, pointing out that a screen print of the e-Waiver form provides spaces for both the participant's signature and a staff member's signature. Thus, he says a trial is necessary to decide whether the plaintiff actually executed the e-Waiver.

(b) Exclusion of liability clauses are narrowly construed by courts, and the language of this e-Waiver does not expressly waive or release the defendants from their own negligence. He argues that his claim is based on the defendants' negligence in failing to properly maintain their go-karts. Since the e-Waiver does not

operate as a release from claims based in negligence, a trial is necessary to determine whether the defendants were negligent or breached contractual obligations by failing to properly maintain their equipment.

The Law and Analysis

1. Electronic Agreements

[9] Section 18 of *The Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22 [*Act*], provides as follows:

> **Formation and operation of contracts**
> **18**(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:
>
> (a) by means of information or a document in an electronic form; or
>
> (b) by an action in an electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.
>
> (2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation.

[10] The legislation is clear. Agreement to contractual terms can be expressed by touching or clicking on an appropriately designated icon or place on a computer screen. The fact that the contract could have alternatively been executed by printing a hard copy and having a participant sign a hard copy form does not detract from the foregoing. The fact that there are optional ways to execute the contract does not lead to the conclusion that using only one of those options does not constitute agreement.

[11] As s. 18(1) of the *Act* provides, "Unless the parties otherwise agree ...", the formation of a contract may be expressed in electronic form. There is no evidence here of the parties having agreed otherwise.

[12] I do not need a trial or to hear further evidence. I can make a fair and just determination of the issue of whether or not the plaintiff provided agreement in electronic form based on the affidavit evidence before me. I am satisfied from the uncontradicted evidence of the applicants that the plaintiff had an opportunity to read the waiver and release on screen while progressing through the kiosk system and that he, in fact, indicated his agreement to these terms in an electronic form.

[13] The fact that there was a hard copy alternative for a traditional signature does not alter the fact that the plaintiff gave an electronic agreement to the waiver and release. I am satisfied from the evidence that had he not done so, he would not have been permitted to participate in the go-kart races in question.

[14] As stated in *Fraser Jewellers (1982) Ltd. v Dominion Electric Protection Co.* (1997), 148 DLR (4th) 496 (Ont CA) [*Fraser*]:

> [30] As a general proposition, in the absence of fraud or misrepresentation, a person is bound by an agreement to which he has put his signature whether he has read its contents or has chosen to leave them unread. *Cheshire, Fifoot & Furmston's Law of Contract*, 13th ed. (Toronto: Butterworths, 1996) at p. 168. Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. A businessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them. The fact that Mr. Gordon chose not to read the contract can place him in no better position than a person who has. Nor is that fact that the clause is in a standard pre-printed form and was not a subject of negotiations sufficient in itself to vitiate the clause. *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 at 403; *Craven v. Strand Holidays (Canada) Ltd.* (1982), 40 O.R. (2d) 186 at 194, 142 D.L.R. (3d) 31 (C.A.).
>
> [31] This is not a case in which the clause limiting liability was so

> obscured as to make it probable that it would escape attention. This contract was printed and contained on essentially one sheet of paper. The limitation provision was highlighted in bold block letters. The language is clear and unambiguous. There was no need to resort to a magnifying glass to see it or a dictionary to understand it. Nothing was done to mislead a reader. Had Mr. Gordon perused the contract, he would have been aware of the limitation. The fact that he did not is irrelevant to the question of the fairness or conscionability of the contract.

[15] While *Fraser* was a decision dealing with a businessman signing a contract for commercial services, that principle has consistently been applied to contracting parties generally. See CED (online), *Contracts* "Formation of Contract – Offer and Acceptance" (II.6) at paras 91-94 (WL) (9 January 2017), and in particular those cases listed under footnote 10 dealing with releases signed by participants in activities sometimes classified as dangerous.

[16] *Karroll v Silver Star Mountain Resorts Ltd.* (1988), 33 BCLR (2d) 160 (BCSC), sets out the test to be applied in determining whether a waiver or release from liability is enforceable. Chief Justice McLachlin (as she was then) ruled, at page 164, that the applicable legal principles are as follows:

> The key, in my opinion, is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances.
>
> One must begin from the proposition set out in *L'Estrange v. F. Graucob*, supra, at pp. 406-407, that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents". ...

[17] The evidence here satisfies me that Velocity took reasonable measures to ensure that its customers received notice of the waiver and release provisions. Their kiosk system was designed so as to ensure the waiver and release page was presented

to its customers and customers had to indicate acceptance before they could participate. The plaintiff's evidence does not challenge the evidence of the defendants in this respect. Further, the activity involved was of a nature where it was normal for participants to expect to have to sign a waiver and release. The plaintiff would have understood that if he did not sign a release, he did not get to participate. He had freedom to choose.

[18] The plaintiff had a full opportunity to read the waiver and release and that there was nothing obscure in the presentation of waiver and release or the choice whether to accept or not. The plaintiff does not suggest in his reply affidavit that he did not have an opportunity to read the waiver and release nor that he did not know what he was agreeing to when he clicked his agreement.

[19] Having concluded that the plaintiff did, in fact, execute the e-Waiver, the remaining issue is whether, as submitted by the plaintiff, the e-Waiver operates as a release of claims based in negligence and/or a trial is necessary to determine whether the defendants were negligent or breached contractual obligations by failing to properly maintain their equipment.

The Proper Interpretation of the Waiver and Release

[20] In *Bank of British Columbia Pension Plan v Kaiser*, 2000 BCCA 291, 137 BCAC 37, the court, dealing with the interpretation of exclusion of liability clauses in contracts, said:

> [17] **Chitty on Contracts** sums up the relevant case law with respect to the interpretation of a discharge of a contract or release as follows (pp. 1074-5):
>
> 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.

> 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
>
> 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
>
> 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
>
> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

[21] While various courts have said that a rule of strict construction applies to exclusion of liability clauses, that proposition must not turn strict construction into strained construction. In *Hunter Engineering Co. v Syncrude Canada Ltd.*, [1989] 1 SCR 426, the court said there is nothing inherently unreasonable about exclusion clauses and they should be applied unless there is compelling reason not to give effect to the agreement of the parties. At page 462, it stated:

> ... If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties should the courts interfere with agreements the parties have freely concluded. ...

[22] In *Tercon Contracting Ltd. v British Columbia*, 2010 SCC 4, [2010] 1 SCR 69 [*Tercon*], a case involving the unique considerations of contract tendering, the Court held (summarized in the headnote (QL) to the decision) that:

> ... With respect to the appropriate framework of analysis the doctrine of fundamental breach should be "laid to rest". The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to

> which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. …

[23] In *Isildar v Kanata Diving Supply,* 2008 CanLII 29598 (Ont Sup Ct), the Ontario Superior Court of Justice considered the enforceability of a waiver and release of liability signed by a participant who died in a diving accident. In a decision, after a lengthy trial, negligence on the part of the defendants was found. The issue then was whether the release signed by the deceased protected the defendants from liability or, as stated in *Tercon*, whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence.

[24] In a detailed judgment of over 700 paragraphs, Roccamo J. held that a three-stage analysis was required to determine whether a waiver of liability in such circumstances was valid and enforceable. The elements of his analysis are as follows:

1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to

the attention of the signator?

2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendants?

3. Should the release not be enforced because it is unconscionable?

[25] These same three elements, albeit expressed in somewhat different language, were also used by MacKenzie J. in his decision in *Clarke v Action Driving School*, 1996 CanLII 2649 (BCSC) [*Clarke*], where he dismissed, on a summary application, the plaintiff's claim for damages based on allegations of negligence. The release did not expressly state the release was to operate where there was negligence. The defendant's position was that the language of the release was wide enough to encompass negligence.

[26] The words of the waiver read, in part:

> I hereby release the ACTION DRIVING SCHOOL LTD. ... from all responsibility of property damage, bodily injury, liability, cost and expenses and claims of every nature and kind howsoever arising from or in consequence of ... participation in any of the training courses conducted by the school, and agree to save harmless the ACTION DRIVING SCHOOL LTD., its officers, instructors and any agency sponsoring from all claims and rights of action which may arise through my participation in the course. I am also aware of the fact that in learning to ride a motorcycle there is a risk of injury to myself. [Emphasis added]

[27] Mackenzie J. said:

> [10] The second issue is whether the terms of the waiver are broad enough to include the assumed negligence of the defendant. The key words of the waiver are
>
> > "release...from all responsibility of property damage, bodily injury, liability, cost and expenses and claims of every nature and kind howsoever arising from or in consequence of such students participation in any of the training courses

> conducted by the school...."
>
> The clause does not contain any express explicit reference to negligence. I am satisfied that the use of the words "howsoever arising" in the context here includes liability for negligence. Those and similar words have been given a very wide ambit including negligence in a number of cases, including *Pyman Steamship Co. v. Hull & Barnsley Railway Co.*, [1915] 2 K.B. 729 (C.A.); *Swiss Bank Corp. v. Brink's-Mat Ltd.*, [1986] 2 Lloyd's Rep. 79, 92-93; *White v. Blackmore*, [1972] 2 K.B. 651, 671 (C.A.).

[28] In *Simpson v Nahanni River Adventures Ltd.*, [1997] YJ No 74 (QL) (Yu SC) [*Simpson*], an application was made to dismiss the claim on the basis that, given the terms of a waiver and release, there could be no liability. Negligence of the defendants was assumed for the purposes of the application. The waiver did not specifically reference negligence. It read, in part:

> I accept all of the risks and the possibility of death, personal injury, property damage and loss resulting from my involvement with the trip I am taking with Nahanni River Adventures Ltd.
>
> I release Nahanni River Adventures Ltd., its officers, employees, guides, agents and representatives from any and all liability for any personal injury, death, property damage or loss I may suffer as a result of my participation in their trip, for any cause whatsoever on the part of Nahanni River Adventures Ltd., its officers, employees, guides, agents or representatives. [Emphasis added]

[29] Hudson J., citing with approval *Clarke,* found that the language of the release covered death by negligence and dismissed the claim.

[30] The language of the "Assumption of Risk" portion of the subject e-Waiver is in plain English and expressly makes the points that:

(a) the activity is dangerous; and

(b) equipment failures are always possible.

It continues with the participants stating they understand the risks and that it is entirely their choice to participate in the activity and that they accept and assume responsibility for "any possible risk involved ...."

[31] The language of the "Release" portion of the e-Waiver is similarly plain English and expressly provides a discharge "from any and all claims, liabilities, demands and/or actions for damages (including legal costs) arising in any way from my participation in go-kart racing ...."

[32] As stated in *Tercon,* the first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. There can be no question but that the plaintiff understood that the assumption of risk and waiver of claims set out in the e-Waiver applied to his participation in the go-kart races. His acceptance was required for him to participate. The choice for him could not have been clearer.

[33] In my opinion, there can be no question but that when the plaintiff clicked "I agree", he was intending to accept and assume responsibility for any possible risk involved and knew he was agreeing to discharge or release the defendants from all claims or liabilities arising, in any way, from his participation. The words "all claims, liabilities, demands and/or actions for damages (including legal costs) arising in any way from my participation in go-kart racing" mean what they say and include claims arising from negligence. This language is at least as encompassing as words such as "howsoever arising" or "from any cause whatsoever" as used in *Clarke* or *Simpson*.

[34] I am of the opinion that while the e-Waiver does not include the word negligence, it was clear the intent of the document was to release the defendant

Velocity from liability of all claims or liabilities arising from his participation which includes claims that may be based on negligence of the defendants and should have reasonably been so understood by the plaintiff. The affidavit evidence establishes that Velocity was the sole owner and operator of the go-kart racing facility and that Wilson's, while a related corporation, was in no way involved.

[35] The pleadings do not allege that the e-Waiver was unenforceable by reason of it being unconscionable or contrary to public policy. The plaintiff has led no evidence to suggest that the waiver is unenforceable on either of these grounds. The law is clear that the burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement.

Conclusion

[36] Having found that the plaintiff has agreed to the terms and conditions set forth in the e-Waiver and that those terms, on a proper interpretation, operate as a release to Velocity of all claims, including negligence, the applicants have established entitlement to the summary judgment they seeks. I am satisfied that I do not need a trial or to hear evidence to make a fair and just determination. The evidence before me permits me to make the limited factual findings that I have. The balance of my decision involves applying the law to the facts as I have found them. The decision largely turns on legal issues which did not require a trial and were fully argued by counsel before me.

[37] I dismiss the plaintiff's claim for the reasons stated above. The defendants shall be entitled to the costs of the proceedings to be taxed.

J.

B. Scherman