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ARTICLE

Above and beyond: simply signing a waiver may not be enough

Occupiers of premises often use waivers as risk management tools to disclaim liability. Despite their popularity, including in the age of COVID-19, waivers represent instruments that are difficult to enforce in court. The recent Superior Court of Ontario decision in [Zaky v. 2285771 Ontario Inc., 2020 ONSC 4380](#) stands as a reminder of the challenges associated with enforceability of waivers as a full defence. The Court reiterated that simply making it a requirement to sign the waiver before participation was not enough in many cases.

Background

The plaintiff visited the defendant's indoor trampoline park. While utilizing the defendant's facilities, the plaintiff landed on his head when attempting a back flip, resulting in a fractured vertebra that required surgery. Prior to using the defendant's facilities, the plaintiff signed a mandatory electronic waiver at a computer kiosk at the defendant's premises. The plaintiff's evidence that he was rushed through the process of signing the waiver went unchallenged.

The plaintiff sued the defendants for negligence and for breaching the *Occupiers' Liability Act*. In turn, the defendant moved to dismiss the plaintiff's action on the basis of the waiver signed by the plaintiff, which disclaimed liability for injuries or damage suffered by the signee caused by negligence or breach of the *Occupiers' Liability Act* as follows:

"I hereby voluntarily release, forever discharge, and agree to indemnify and hold harmless Sky Zone and to waive any and all claims, demands, or causes of action that I have or may have in the future against Sky Zone and to release Sky zone from any and all liability for any loss, damage, expense or injury including death that I may suffer or that my family, heirs, assigns, personal representatives and estate may suffer as a result of my participating in Sky Zone trampoline games or activities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS' LIABILITY ACT, R.S.O. 1990, C. O. 2 ON THE PART OF SKY ZONE AND FURTHER INCLUDING THE FAILURE ON THE PART OF SKY ZONE TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF SKY ZONE TRAMPOLINE GAMES OR ACTIVITIES."

Court's reasoning

The Court confirmed that exclusion of liability clauses in waivers for dangerous activities are reasonable and that it makes no difference whether the waiver is signed electronically or manually. It also does not matter if the participant reads the waiver before signing. For a waiver to be enforceable, however, the circumstances under which it is signed are important, given the requirement to bring the terms of the waiver to the attention of the participant. In many cases, efforts that go beyond simply making the waiver mandatory should be followed in order to bring its terms to the participant's attention.

The Court found that the trampoline park made almost no effort to alert the participant to the terms of the waiver. The only thing they did was to make it mandatory to sign the waiver before participating. Accordingly, the plaintiff's claim for his injuries was allowed to proceed, with the issues surrounding the waiver and its enforceability requiring a trial.

Takeaway

In the context of inherently dangerous activities, a waiver requirement may not be enough to protect the provider. Specific attention and thought should be given to the ways in which the participant's attention can be drawn to the effect of the waiver before execution. This includes website alerts, posted signs, highlighted or bolded text at the top of the waiver, additional areas of the waiver where the participant must initial to confirm understanding and agreement to the most onerous terms, and customer service (in-person) efforts to explain the purpose of the waiver or specific terms. Providing sufficient time for a participant to examine the document without being rushed is also important.

Providers should consult their legal team for further advice on best practices in light of this decision. To reach BLG's focus group on waivers, send an email to RLove@blg.com or RSquires@blg.com.

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