Two Judicial Treatments of a Novel Question of Law: Invalidating an Occupiers Waiver Through the Application of Ontario's Consumer Protection Legislation

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Two recently released Superior Court decisions offer distinct treatments of the same question and impact the longstanding jurisprudence on exculpatory waivers: Can s. 7(1) of the *Consumer Protection Act 2000*, S.O. 2000, c. 30, Sched. A (the "CPA") operate to nullify the application of the defendant occupier's release of liability contained in its waiver signed by the plaintiff?1

Both cases deal with similar facts. The defendants offer skiing facilities. Both plaintiffs signed a waiver with respect to the use of each of the defendant's premises. Both plaintiffs sustained an injury as a result of the use of those premises. The plaintiff in *Schnarr v Blue Mountain Resorts Limited* 2017 ONSC 114 ("*Schnarr*") was injured while skiing and the plaintiff in *Woodhouse v Snow Valley* 2017 ONSC 222 ("*Woodhouse*") sustained injuries while using the ski equipment.

The theory of liability advanced in each case was based in negligence under s. 3 of the *Occupiers' Liability Act*, R.S.O. 1990, c.O.2 (the "OLA") and contract under s.9(1) of the CPA with respect to failing to provide services of reasonable acceptable quality which is a statutory deemed warranty. The CPA also provides under s. 7(1) that the CPA substantive and procedural rights apply despite any waiver to the contrary. In both cases, the defendants sought to rely on a very broadly worded waiver as a shield from all liability, including liability under the CPA.

Both defendants drew on excerpts from the Official Report of Debates of the Ontario Legislative Assembly (Hansard) in support of the proposition that the legislation was implemented to protect consumers from fraudsters and scam artists but not ski operators. The defendant in *Woodhouse* used this Hansard reference to argue that the CPA did not apply to the circumstances of the case. Although the parties in *Schnarr* agreed that the CPA applied, the defendant made use of the same reference in asking the court to read down the CPA. The Courts did not find either of these arguments to be persuasive.

Notwithstanding the common view that the CPA applied to the waiver at issue, the Court in each case offered a different treatment of the novel question of law of whether the CPA invalidated the defendant's waiver. Ultimately, the Motions Judge in *Schnarr* invalidated the defendant's waiver with respect to the plaintiff's claim under the CPA but enforced the application of the waiver in regards to the plaintiff's claim under the OLA. In contrast, the Motions Judge in *Woodhouse* did not rule on whether the waiver was invalid as to do so, in the Judge's reasoning, would have required evidence, which was not available in the context of the motion before the court. Although the Court in *Woodhouse* held that the offending provisions of the waiver dealing with release from all liability were "presumptively void", the Court found that the offending provisions may be saved under s. 93(2) of the CPA which "invites the court to explore the inequities involved in allowing the consumer not to be bound by the waiver". The Court in *Woodhouse* reasoned that absent definite language in the CPA legislation specifically voiding all waivers with respect to the provision of quality services found in consumer agreements, the Court must consider the equities involved before finally invalidating a waiver. According to the Court in *Woodhouse*, the onus is on the defendant to show that it would be inequitable for the consumer not to be bound by the waiver and specifically those sections of the waiver which may be rendered presumptively void under the CPA. In contrast, the Court in *Schnarr* explained that previous cases considering the saving provision dealt with situations where the plaintiff did not pay despite obtaining the full benefits of the services or goods rendered. Based on this, the Court in *Schnarr* found that the saving provision did not apply to the analysis as the plaintiff, unlike in previous cases considering this provision, did not obtain a windfall.

Both decisions have been appealed. Until the Court of Appeal decides the issue, the decision in *Schnarr* dictates that for an occupier that is also considered a "supplier" under the CPA, the exculpatory waiver, no matter how expansive in scope, can only be used to disclaim liability under the OLA and not the CPA. This is especially concerning as the jurisprudence to-date offers little guidance into the meaning or the standard of care in relation to the deemed statutory warranty of providing services of "reasonable acceptable quality".

1 The novel question of law in *Schnarr* was decided on a Rule 21 motion for a judicial determination of a question of law and the same question in *Woodhouse* was considered in the context of a Rule 22 motion which is a special case motion requesting the court's opinion on a question of law.

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