The clearer the better: Child's waiver does not bar parent's suit

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In *Paksa v. Ontario Gymnastics*, 2019 ONSC 7019 *(Paksa),* a summary judgment motion brought by the defendant, the Court considered whether a waiver signed by the plaintiff was a complete bar to her claim against a gymnastics company.

In *Paksa*, the plaintiff enrolled her son in a toddlers' gymnastics program operated by the defendant. On the first day of class, she signed a waiver of liability. During the next class, she was injured while supervising her son when she stepped down from a mat and fell to the floor. She alleged the mat was unstable.

The decision

The Court considered whether the waiver the plaintiff signed applied to her own injuries or whether the waiver only related to possible injuries suffered by her son. In arguing that the waiver contemplated claims pursued by the plaintiff herself, the defendant argued that the waiver applied to the participant's next of kin. In particular, the waiver included the following (emphasis added):

> In consideration of Quantum Niagara Gymnastics Inc. accepting my application to participate in this activity,
>
> I agree:
>
> […]
>
> **2.** To release the Quantum Niagara Gymnastics Inc. AND OTHERS from any and all liability for any personal injury, death, property damage, expense and related loss of income that I **or my next of kin** may suffer as a result of my participation in this activity, due to any cause whatsoever, including negligence, breach of contract or breach of any statutory duty of care.

In this regard, the Court found that the focus of the waiver was on the result of the child's participation. Also, the reference to "personal injury, death, property damage, expense and related loss of income that […] **my next of kin** may suffer" related to

claims brought by the next of kin arising out of the child's participation rather than claims made by the next of kin directly. The waiver also stated [emphasis added]:

> **4.** That this agreement is binding on not only myself **but my next of kin**, heirs, executors, administrators and assigns.
>
> I HAVE READ THIS AGREEMENT AND UNDERSTAND IT. I AM AWARE THAT BY SIGNING THIS DOCUMENT I AM WAIVING CERTAIN RIGHTS WHICH I **OR MY NEXT OF KIN**, HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS MAY HAVE AGAINST QUANTUM NIAGARA GYMNASTICS INC. AND OTHERS.

With respect to this language, the Court found that phrases of this nature relate to claims people other than the named individual might make in lieu of the child. Further, the Court found: "at the very least it is ambiguous that the scope of the waiver extends to the plaintiff and to any injury suffered by her. That ambiguity must be resolved against the defendant who created the document."

The Court also explained that the defendant's practice with respect to who could accompany the child at gymnastics also supported the Court's conclusions. In particular, the owner of the defendant confirmed there was no requirement that the same adult who signed the waiver accompany the child on each occasion or that a new waiver be signed if the child was accompanied by a different adult.

Takeaway

A waiver is a document that can have significant implications in barring claims. Accordingly, the courts continue to examine waivers closely and will continue to resolve any ambiguity in the waiver against the drafter (*i.e.* the party seeking to rely on it). In light of this, waivers need to be carefully drafted using unambiguous language in a way that clearly addresses the contemplated risk.

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