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Canada Update

Court finds recreational waivers bar recovery for volunteers & employees

A Canadian first on the law of waivers was decided on a successful motion for summary judgment by the defendants, a London Market Syndicate, argued by Clyde & Co's Susan Guzzo and Katarina Germani in the Ontario Superior Court of Justice on 18 November 2014.

In *Fleming v Massey et al* [not yet reported] Mr. Justice Byers agreed with the defendants, that a waiver aimed at participants in a recreational activity also covers volunteers and employees.

According to Justice Byers, the waiver signed by Derek Fleming, a volunteer track official, was a complete bar to recovery for any damages arising from his injuries in a Go-Kart racing accident. Justice Byers stated that even if Mr. Fleming had been an employee, "the waiver is wide enough to cover all the eventualities".

Mr. Fleming acted as the Race Director and Steward for a Go-Kart race held in October 2010 at the Lombardy Raceway Park in Lombardy, Ontario. He was paid a stipend of $150 by the not for profit Go-Kart racing clubs that ran the event, National Capital Kart Club (NCKC), and Lombardy Karting.

Prior to entering the event, Mr. Fleming signed a waiver that all participants (including drivers, spectators, volunteers and employees) were required to sign. As Justice Byers said, Go-Karting "is an inherently dangerous recreational activity. That is why everybody that participates has to sign a waiver".

The waiver used by NCKC and Lombardy Karting is a standard-form waiver provided to Go-Kart clubs by ASN Canada FIA, the Canadian motor sports governing authority.

The waiver header read: "release of liability, waiver of claims, assumption of risks and indemnity agreement. By signing this document you will waive certain legal rights, including the right to sue. Please read carefully!"

The body of the waiver details the risks of participation and the legal rights waived by execution, and includes a statement that "I am familiar with and accept that there is a risk of serious injury and death in participation, whether as a competitor, student, official or worker, in all forms of motor sport and in particular in being allowed to enter, for any reason, any restricted area".

The wording clearly states that track officials and employees are covered by the waiver. The waiver, according to Justice Byers, was "aimed at participants", and "any additional status ie. employee, is extra, not 'instead of'". This means that volunteers and employees are, first and foremost, participants in a recreational activity.

Arguments by Mr. Fleming's counsel that the *Occupational Health and Safety Act* or the *Employment Standards Act* were breached by use of the waiver were not accepted by the Court. There was no public policy reason preventing the waiver from being enforced as a complete bar to recovery.

The decision has important ramifications for the recreational industry, as event and activity operators may require that volunteers and employees sign the same waivers used for participants. Damages incurred by a volunteer or employee will not be recoverable if they are injured due to negligence on the part of the operator, or any other releasee. The use of waivers may become a means of limiting the risk associated with any inherently dangerous activities.

Canadian common law recognizes that if a participant in a recreational activity assumes the physical and legal risks, by signing a waiver, an operator (or other releasee) may rely on the defence of *volenti fit injuria*, or the voluntary assumption of risk. The defence of volenti fit injuria, according to the Supreme Court in *Crocker v. Sundance Northwest Resorts Ltd.* 1988 CanLII 45, "is based on the moral supposition that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it".

In order to rely on a waiver, recreational event and activity operators must ensure that the waiver is valid and enforceable, as per the common law – applying *Karoll v. Silver Star Mountain Resorts*, 1998 CanlLII 3094 (BC SC) on validity, and on enforceability, either *Isildar v. Kanata Diving Supply*, 2008 CanLII 29598 (ON SC) or *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 (BC CA).

A waiver will be valid if it meets the three requirements set out in *Karroll*:

1. The purpose of the waiver must be to permit the participant to engage in a hazardous activity upon which she, of her own volition, desires to embark;
2. The waiver must be short, with the content obvious and easy to read; and
3. Signing such a waiver must be a common feature of the activity.

A valid waiver will be enforceable if it does not fall into the exceptions set out in *Isildar* or *Loychuk*. *Isildar* is an Ontario decision and *Loychuk* is a British Columbia decision, but both should be considered when using a waiver in order to avoid any issues.

The exceptions are:

Isildar	*Loychuk*
1. It is unfair or unreasonable to give effect to the waiver; or	1. The waiver does not apply to the circumstances; or
2. The waiver is unconscionable.	2. The waiver was unconscionable at the time that it was signed; or
	3. Public policy concerns that outweigh the very strong public interest in the enforcement of contracts have been raised by the plaintiff.

It remains to be tested whether the decision in *Fleming v. Massey et al* endorses waivers signed by volunteers or employees in other industries. Participation in recreational activities and events is considered at common law to be voluntary, and waivers are a standard means of preventing liability for an operator. It was therefore appropriate for Justice Byers to find that volunteers and employees in recreational activities and events are subject to waivers. It may be more complicated to convince a court that a waiver signed by a food services employee, for example, should stand. However, it will be interesting to see the effects of the decision in the future.

For assistance in drafting an appropriate waiver, please contact Susan Guzzo or Katarina Germani.

Further information

If you would like further information on any issue raised in this update please contact:

Susan Guzzo
E: susan.guzzo@clydeco.ca

Katarina Germani
E: katarina.germani@clydeco.ca

Clyde & Co Canada
401 Bay Street, Suite 2500 P.O. Box 25,
Toronto, Ontario, M5H 2Y4, Canada

T: +1 416 366 4555
F: +1 416 366 6110

Further advice should be taken before relying on the contents of this summary.

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