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## COURT UPHOLDS ROCK CLIMBING WAIVER

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*By Barry W. Kwasniewski\**

### A. INTRODUCTION

A decision, released on July 13, 2016, of the Ontario Superior Court of Justice in [Arif v Li](#)<sup>1</sup> again highlights the importance of liability waivers as an effective liability shield. Mr. Arif (the “plaintiff”) suffered injuries while rock climbing and sued several parties he alleged were legally responsible. On a motion for summary judgment brought by the defendants, they relied on signed liability waivers as a full defence to the lawsuit.<sup>2</sup> The defendants in this case were Zen Climb, its president Mr. Xiaoping Li, and the Halton Region Conservation Authority, which owned the property where the climb took place. The court upheld the executed liability waivers, granting summary judgment dismissing the action against all defendants.<sup>3</sup>

For charities and not-for-profits, an important part of risk management in relation to programs, events and activities is the consistent use of liability waivers. A well-drafted waiver may provide a complete defence to injury or property damage claims.<sup>4</sup>

### B. FACTS

The plaintiff, age 62, and two family members decided to go rock climbing in June of 2013.<sup>5</sup> Zen Climb offers an introductory rock climbing course for which the plaintiff registered.<sup>6</sup> Zen Climb’s online

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<sup>1</sup> [Arif v Li](#), 2016 ONSC 4579.

<sup>2</sup> *Ibid* at paras 1-2.

<sup>3</sup> *Ibid* at para 3.

<sup>4</sup> See [Charity & NFP Law Bulletin No 375](#) (25 November 2015); [Charity & NFP Law Bulletin No 284](#) (29 May 2012).

<sup>5</sup> *Supra* note 1 at para 5.

<sup>6</sup> *Ibid* at para 6.

registration form also included a liability waiver as part of the booking conditions, in addition to the hard copy waiver documents discussed below.

The rock climbing course took place within the Rattlesnake Point Conservation Area, operated by the Halton Region Conservation Authority. When entering the Conservation Area, visitors are issued a receipt for their entrance fee which must be displayed on their vehicle dashboard.<sup>7</sup> The back of the receipt said in capital letters “LEGAL NOTICE TO ALL USERS PLEASE ENSURE ALL MEMBERS OF YOUR GROUP ARE AWARE OF THIS NOTICE EXCLUSION OF LIABILITY – ASSUMPTION OF RISK - JURISDICTION AND CHOICE OF LAW” and in red continues “THE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM FOR COMPENSATION FOLLOWING AN ACCIDENT.”<sup>8</sup> Details of the liability waiver appear in a bright yellow box, framed in red.<sup>9</sup> The receipt also includes the line “PLEASE BE RESPONSIBLE FOR YOUR OWN SAFETY IN ALL ACTIVITIES.”<sup>10</sup> The plaintiff says that he received the receipt but did not see the reverse side.<sup>11</sup> The same liability waiver appears on a sign at the entrance to the trailhead. The plaintiff said that he did not see it.<sup>12</sup>

The participants of the introductory rock climbing class met in the parking lot, where Mr. Li supplied the plaintiff with both the Zen Climb and the Conservation Area waiver forms, the wording of which is reproduced in the decision.<sup>13</sup> The plaintiff signed the waivers and returned them to Mr. Li without asking any questions.<sup>14</sup> The plaintiff did not read all of the clauses in the waiver but did acknowledge that the titles of the waivers indicated their purpose.<sup>15</sup> There was also a safety talk provided.<sup>16</sup>

During his second climb, having fallen without injury on the first, the plaintiff fell from a height of two metres and injured his leg.<sup>17</sup> The plaintiff sued for damages arising from his injuries.

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<sup>7</sup> *Ibid* at para 9.

<sup>8</sup> *Ibid* at paras 10-11.

<sup>9</sup> *Ibid* at para 12.

<sup>10</sup> *Ibid* at para 13.

<sup>11</sup> *Ibid* at para 14.

<sup>12</sup> *Ibid* at para 17.

<sup>13</sup> *Ibid* at para 19.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at para 20.

<sup>16</sup> *Ibid* at para 28.

<sup>17</sup> *Ibid* at paras 29-31.

## C. THE COURT'S ANALYSIS

Relying on the waivers, the defendants brought a motion for summary judgment to have the lawsuit dismissed without a trial. The court may grant a summary judgment order if it determines that there is no genuine issue requiring trial.<sup>18</sup> This *Bulletin* focuses on the court's review of the waivers. In considering the enforceability of the waivers, the court reviewed two questions, as follows:

1. Is the plaintiff bound by the terms of the waivers?

The court summarized the current state of the law, by noting that a person is generally bound by a signed waiver unless:

- The signer, through no carelessness on his or her part, is mistaken as to the document's nature and character (the principle of *non est factum*);
- The signer is induced to sign the contract by fraud or misrepresentation;
- It is unreasonable for a person relying on the signed waiver to believe that the signer really did assent to its terms;
- The waiver was entered into in unconscionable circumstances; or
- There is an overriding public policy that outweighs the very strong public interest in the enforcement of contracts, including waivers.<sup>19</sup>

The plaintiff did not rely on *non est factum* or fraud/misrepresentation, so the court only addressed the remaining three factors. The court noted that it was reasonable for the defendants to rely on the plaintiff's signature.<sup>20</sup> The nature of the waivers was clearly communicated, the plaintiff was aware that he would not be permitted to climb without signing the documents, and the plaintiff agreed that he could have asked for more time to review the documents and was not rushed to sign.<sup>21</sup> The plaintiff argued that the defendants had a legal obligation to explain the legal consequences of the

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<sup>18</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194 at r 20.

<sup>19</sup> *Ibid* at para 50.

<sup>20</sup> *Ibid* at para 57.

<sup>21</sup> *Ibid*.

waiver to the plaintiff. The court ruled that there was no such obligation, and affirmed that the defendants satisfied their obligation to bring the content of the waiver to the plaintiff's attention.<sup>22</sup>

Commenting on the unconscionability argument, the court observed that there was no inequality of bargaining power, and the plaintiff was not preyed on by the defendants.<sup>23</sup> It was entirely reasonable for the defendants to seek a waiver where the plaintiff participates in an inherently dangerous activity.<sup>24</sup> Therefore, the court held it would not be unconscionable to enforce the waiver.

Finally, the court held that there was no "well accepted and substantially incontestable" public policy that would justify avoiding the effects of signing a waiver.<sup>25</sup>

2. Do the releases cover the plaintiff's claim?

At the outset of the motion, the plaintiff was granted leave to amend his Statement of Claim to plead "gross negligence", and argued that as the waiver did not specifically bar claims for "gross negligence", the waiver should be interpreted to not release the defendants for that tort.<sup>26</sup> The court ruled that given the broad and unambiguous language of the waivers, any claims alleging gross negligence would fall within their intended scope.<sup>27</sup>

#### **D. THE COURT'S CONCLUSIONS**

The court concluded that the signed waivers were enforceable against the plaintiff. Accordingly, there were no genuine issues for trial, and the action was dismissed, with legal costs payable by the plaintiff to the defendants in the amount of \$15,000.00.

It is important to note that the court relied only on the waivers actually signed by the plaintiff. As the on-line registration was completed by the plaintiff's son-in-law (using the plaintiff's credit card to pay), the online waiver was found not to have come to the plaintiff's attention. Likewise, the court ruled that the waiver wording on the reverse side of the parking receipt or the posted notices did not come to the

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<sup>22</sup> *Ibid* at paras 58-62.

<sup>23</sup> *Ibid* at para 65.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 69, citing *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010 SCC 4 \(CanLII\)](#), [2010] 1 SCR 69.

<sup>26</sup> *Supra* note 1 at para 72.

<sup>27</sup> *Ibid* at paras 78-81.

plaintiff's attention. Therefore, only the actual hard copy signed waivers were found to be binding and enforceable in this case.

## E. LIABILITY WAIVERS

Liability waivers remain an important risk management tool for charities and not-for-profits. Substantial care must be taken to properly draft a waiver, as in the event of a serious injury and lawsuit the wording of the waiver is likely to be challenged and will be closely examined by the court. Courts will also review the adequacy of the processes for obtaining the signer's consent to the waiver. With many organizations now relying solely on online waivers as part of an event or activity registration process, charities and not-for-profits need to be mindful that the person completing the online form needs to be the same person who is actually registering. Accordingly, and particularly in relation to activities which entail a substantial injury risk, a signed hard copy waiver may be the preferred method of proving to a court that the signer agreed to waive injury and damage claims, as opposed to solely relying on an online waiver.



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