
ELECTRONIC LIABILITY RELEASE HELD ENFORCEABLE

*By Barry Kwasniewski**

A. INTRODUCTION

On January 12, 2017, the Court of Queen's Bench for Saskatchewan released its summary judgment decision in *Quilichini v Wilson's Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd.* (the "decision").¹ The decision focuses on the enforceability of an electronic liability waiver. Aaron Quilichini ("Quilichini"), the plaintiff, claimed damages for negligence causing bodily injuries and/or breach of contractual obligations against Wilson's Greenhouse & Garden Centre Ltd.² and Velocity Raceway Ltd. ("Velocity") (collectively the "defendants"). The injuries were suffered during a go-kart race which took place in a venue operated by Velocity. Quilichini claimed that the throttle on the go-kart he was operating did not work, which caused him to crash into a cement barrier at full speed. The defendants sought a summary judgment dismissing the claim of Quilichini on the basis that he executed an electronic liability waiver. The judge determined that the executed electronic liability waiver was as binding as a signed hard copy. As many organizations, including charities and not-for-profits, are using electronic forms of liability waivers instead of traditional hard copy forms, the decision upholding the enforceability of the electronic format waiver is an example of the law adapting with use of technology.

B. RELEVANT FACTS

For the purpose of the summary judgment motion, Quilichini's allegations with respect to the throttle on the go-kart that he operated being broken were not reviewed in any detail by the Court. Instead, the Court

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¹ *Quilichini v Wilson's Greenhouse*, 2017 SKQB 10, online: <http://canlii.ca/t/gx39z>.

² The decision does not explain how Wilson's Greenhouse & Garden Centre Ltd. was involved in the case.

focused upon the wording of the liability waiver and the process by which the Quilichini's consent to that waiver was secured prior to his participation in the go-kart races.

Quilichini paid to access and use Velocity's go-kart racing facility.³ As with all individuals participating in Velocity's go-kart activities, Quilichini had to enter the facility through a kiosk system.⁴ The kiosk system collects personal information, a membership application, payment, a photo, and an electronic waiver from each person passing through it.⁵ The electronic waiver read:

WAIVER & RELEASE

ALL PARTICIPANTS MUST READ CAREFULLY AND SIGN AT BOTTOM OF PAGE.

In consideration of Velocity Raceway Ltd. permitting me access to their premises and use of their equipment and facilities, I hereby acknowledge and agree as follows:

ASSUMPTION OF RISK I understand that this activity is dangerous and may become more hazardous or dangerous during the time I am on the premises of Velocity Raceway. ... I am aware that the machines may travel at speeds of up to 80 kilometers per hour and that equipment failures or carelessness of other drivers are always possible. I understand the risk of injury from operating a go-kart is significant, including the potential for serious bodily injury, paralysis and death; that I am aware of all the risks and hazards inherent with my operating a go-kart at Velocity Raceway. It is entirely my choice to take part in this activity, and I therefore, accept and assume responsibility for any possible risk involved in my participating in this sport.

RELEASE I hereby acknowledge and forever discharge Velocity Raceway Ltd., its owners, employees, agents and affiliates, as well as their successors and assigns, from any and all claims, liabilities, demands, and/or actions for damages (including legal costs) arising in any way from my participation in go-kart racing on their property. This release includes, inter alia, damages for personal injury, property damage and wrongful death and shall be binding on my heirs, successors and assigns.⁶

Participants were required to click "I agree" to the liability waiver at the kiosk before participating in the race, which Quilichini did. The defendants sought a summary judgment dismissing the claim of Quilichini because he signed the electronic waiver, which they argued was legally binding and enforceable.

³ *Supra* note 1 at para 2.

⁴ *Ibid* at para 5.

⁵ *Ibid*.

⁶ *Ibid* at para 4.

C. ARGUMENTS

The defendants argued that Quilichini's execution of the electronic waiver was as binding as a hard copy signature, and that the waiver was a complete defence to his claim.⁷ Quilichini argued that a trial was necessary to determine if he had actually executed the document.⁸ He also argued that the exclusion of liability clause did not expressly waive or release the defendants from negligence claims.⁹ In the result, his position was that the case was not appropriate to be determined on a summary judgment motion, which relied solely on affidavit evidence of the parties. He requested that the motion be dismissed so the case could proceed to a trial of the issues.

D. COURT'S ANALYSIS – ELECTRONIC WAIVER VALID

With respect to the enforceability of electronic agreements, Justice Scherman cited Saskatchewan's *The Electronic Information and Documents Act, 2000* as authority for the expression of consent being valid when expressed by touching or clicking on a screen, unless the parties agree otherwise.¹⁰ The Province of Ontario has similar legislation in force.¹¹ The judge determined that the fact that there was a hard copy alternative to the kiosk's electronic waiver did not mean that the electronic waiver was any less valid.¹² If Quilichini had not agreed to the waiver, the judge noted that he would not have been permitted to participate in the go-kart race. The judge also found that "Velocity took reasonable measures to ensure that its customers received notice of the waiver and release provisions."¹³

While the judge acknowledged that many courts have "said that a rule of strict construction applies to exclusion of liability clauses," he also stated "that proposition must not turn strict construction into strained construction."¹⁴ The judge cited the three-step analysis followed in other decisions for determining if a liability waiver is valid:

1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability

⁷ *Ibid* at para 7.

⁸ *Ibid* at para 8.

⁹ *Ibid*.

¹⁰ *Ibid* at paras 9-10, citing *The Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22, s 18, online: <http://canlii.ca/t/52vxl>.

¹¹ *Electronic Commerce Act, 2000*, SO 2000, c 17, at ss 11, 19, online: <http://canlii.ca/t/52hvc>.

¹² *Supra* note 1 at para 13.

¹³ *Ibid* at para 17.

¹⁴ *Ibid* at para 21.

release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signator?

2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendants?
3. Should the release not be enforced because it is unconscionable?¹⁵

Applying these tests, the judge concluded that the release was understandable and expressly provided a discharge of the defendants' liability.¹⁶ The judge expressed that "In my opinion, there can be no question but that when the plaintiff clicked "I agree", he was intending to accept and assume responsibility for any possible risk involved and knew he was agreeing to discharge or release the defendants from all claims or liabilities arising, in any way, from his participation." Further, the plaintiff did not make any arguments that the waiver should be declared void and unenforceable on the basis that it was unconscionable or against public policy. For these reasons, the court concluded that the electronic waiver was enforceable and dismissed Quilichini's claim, with costs.

E. CONCLUSION

The law respecting the enforceability of liability waivers continues to evolve. The *Quilichini* decision is an example where the factual circumstances and the wording of the liability waiver led to a judicial finding of enforceability. Whether or not electronic liability waivers or releases will have the same degree of legal enforceability as hard copy forms in other provinces remains to be seen as the case law develops. As a liability waiver can put a quick end to a legal claim, even for serious injuries or death, they are the subject of fairly frequent litigation. For charities and not-for-profits, the use of liability waivers can be an important part of a risk management strategy, coupled with liability insurance and injury prevention/safety policies.

¹⁵ *Ibid* at para 24, citing *Isildar v Rideau Diving Supply*, 2008 CanLII 29598 (ON SC), at para 634, online: <http://canlii.ca/t/lxmgh>.

¹⁶ *Ibid* at para 31.