

COURT OF APPEAL: EMPLOYEE INJURY WAIVER DECLARED VOID

*By Barry Kwasniewski**

A. INTRODUCTION

On January 26, 2016, the Ontario Court of Appeal released a significant decision concerning the enforceability of personal injury liability waivers affecting the legal rights of employees to sue their employers for injuries arising in the course of their employment duties. In *Fleming v Massey*.¹ (“*Fleming*”), the Court of Appeal held that the waiver signed by the employee was not enforceable as a matter of public policy. In allowing the appeal, the Court of Appeal overturned the judgment of the trial judge, who had granted summary judgment dismissing the employee’s lawsuit based on the waiver. This *Charity & NFP Law Bulletin* will review the *Fleming* decision, which has implications for all Ontario employers, including charities and not-for-profits.

B. FACTS

On October 3, 2010, Derek Fleming, the appellant, suffered an injury while he was directing a race at a go-karting event when the driver, Andrew Massey, crashed into a corner during the race, which had been co-organized by Lombardy Karting and National Capital Kart Club at a track operated and owned by Lombardy Raceway Park and Lombardy Agricultural Society (collectively the “Respondents”). On the day of the race, the person who was to act as Race Director was not available, so Mr. Fleming was asked to fill the role. Prior to doing so, the Mr. Fleming signed a waiver that released the Respondents from

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¹ *Fleming v. Massey*, 2016 ONCA 70 (CanLII), online:<<http://canlii.ca/t/gn2qn>>.

“liability for all damages associated with participation in the event due to any cause, including negligence.”²

The Respondents sought dismissal of the action on the basis that Mr. Fleming was a volunteer who signed the liability waiver with knowledge that it was a document affecting his legal rights and which was legally enforceable.

At the summary judgment hearing before the Ontario Superior Court of Justice,³ the motions judge dismissed Mr. Fleming’s action, accepting the respondents’ arguments that he was a volunteer who had signed a waiver with the understanding that it was “broad enough to cover all eventualities.”⁴

Mr. Fleming appealed that decision, arguing that the motions judge erred in not finding that Mr. Fleming was an employee, and as a consequence of his employment status, the waiver should be declared unenforceable for public policy reasons by reference to the protections afforded workers under the *Workplace Safety and Insurance Act, 1997* (“WSIA”).

C. DISCUSSION

1. Appellant’s Argument

On appeal, Mr. Fleming argued, in reliance upon the WSIA, that the waiver should have been void since Mr. Fleming was an employee and that the waiver violated public policy. The Court of Appeal agreed that he was an employee as, during examinations for discovery, the representative of the respondent National Capital Kart Club admitted that he was a paid employee on the day of the accident and the Respondents did not resile from that admission. As discussed below, the Court of Appeal’s ruling on the employment status of Mr. Fleming is central to the subsequent ruling with respect to the waiver.

2. WSIA and Non-covered Employers

Surveying the history of employees’ workplace injuries, the common law that developed around such injuries, and the advent of statutory worker compensation benefits, the Court of Appeal noted that

² *Supra* note 1 at para 2.

³ *Fleming v Massey*, [2014] O.J. No. 6196.

⁴ *Supra* note 1 at para 3.

prior to workers' compensation schemes, the common law rules regarding employee injury presented significant challenges for employees. These challenges often resulted in an employee's failure to recover expenses, lost wages, or damages for injuries suffered on the job. In response to these challenges, workers' compensation legislation was introduced to provide a compensation benefit scheme to displace the limited common law rights of action of employees against their employers.

While the WSIA generally prevents common law rights of action against employers subject to the WSIA, there are some exceptions in the statute that allow an employee the right to certain actions. In particular, Part X of the WSIA allows uninsured workers some rights of action against employers for damages.

Under the WSIA, employers are classified either as Schedule 1 employers or Schedule 2 employers, and the Workplace Safety and Insurance Board administers claims under both Schedules. The difference between the two categories is that Schedule 1 employers "operate under a collective liability insurance principle" while Schedule 2 employers do not.⁵ Schedule 2 employers, however, do not operate under the collective liability scheme and are individually responsible for the full cost of claims their employees may file. Where employers are covered under the Schedule 1 and Schedule 2 schemes, employees are precluded from taking action against their employers.⁶ However, in circumstances where workers are not covered under Schedules 1 or 2, Part X of the WSIA allows workers some rights of action for damages against the employer.

In the present case, go kart tracks are classified as "non-covered" and, therefore, workers for "non-covered" employers are not insured unless the employer applies for WSIA coverage. The Respondent employers did not apply for WSIA coverage.

3. Public Policy Argument

As a matter of public policy, the Court of Appeal concluded that "absent some legislative indication to the contrary, it would be contrary to public policy to allow individuals to contract out of the

⁵ Ontario, Workplace Safety Insurance Board, "Schedule 2", online: http://www.wsib.on.ca/WSIBPortal/faces/WSIBDetailPage?cGUID=WSIB015583&rDef=WSIB_RD_ARTICLE&_afLoop=2595031126005943&_afWindowMode=0&_afWindowId=null#%40%3FcGUID%3DWSIB015583%26_afWindowId%3Dnull%26_afLoop%3D2595031126005943%26rDef%3DWSIB_RD_ARTICLE%26_afWindowMode%3D0%26_adf.ctrl-state%3D1cpfl1x757_4

⁶ *Supra* note 1 at para 24.

protection of the WSIA.”⁷ The Court arrived at this conclusion for a number of reasons. First, the Court noted that under Part X, where the worker is uninsured, there are a series of provisions that provide actionable rights of the worker who suffers an injury.⁸ Second, the Court noted that in addition to these actionable rights, s. 116(3) provides that a worker is not barred from recovery where they may be contributorily negligent, nor, under s. 116(2) are they considered to voluntarily incur risk of injury that results from the actions of a co-worker.⁹ Finally, the Court noted that s. 116(1) of the WSIA limited the common law doctrine of voluntary assumption of risk as it applies to workers, thereby revising the common law.¹⁰

As a result, the Court concluded that Part X statutory actions clearly serve the public policy objective of the WSIA to ensure that workers receive compensation for injuries suffered in the workplace.¹¹ As the Court of Appeal held there was no contrary legislative intention in the WSIA that would allow workers to contract out of the protections afforded by this statute, it ruled that the waiver in question was not enforceable. Therefore, the result of this decision is that it is against public policy to contract out of the worker protections provided by Part X of the WSIA. Mr. Fleming’s action was therefore allowed to proceed to trial.

D. CONCLUSION

The *Fleming* decision raises two important issues for charities and not-for-profits. First, whenever a person is paid for their work (even if it is described as a “stipend”) the issue arises as to whether or not a person will be deemed at law to be a volunteer or an employee. As *Fleming* demonstrates, even someone employed for a single day may be afforded protections under the WSIA, including the right to sue the employer for injuries. Second, liability waivers, while an important part of risk management, are subject to legal scrutiny by our courts, and may be set aside for various reasons, including violation of public policy. Therefore, charities and not-for-profits should consider other risk management measures by which they may be protected from claims by not only employees, but volunteers as well, including liability

⁷ *Ibid* at para 29.

⁸ *Ibid* at para 26.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ *Ibid* at para 28.

insurance coverage and written volunteer and employment agreements specifying the legal nature of the relationship.