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INSURANCE DEFENCE

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Waivers – Another One Upheld!

Waivers are being effectively upheld with regard to allegations of negligence, as long as they are clearly worded and unambiguous. However, does the waiver always have to be explained? Does a renewal apply also to an extension of the waiver contained in the agreement?

Jensen v. Fit City Health Centre Inc., a 2015 Ontario Superior Court of Justice decision highlights the components required within a waiver and comments on the form of the waiver and the language required within a waiver with regard to effectively waiving negligence. After the Jury decision, Justice Mullins made a ruling regarding the waiver.

Facts

The Plaintiff became a member of the fitness club, Fit City Health Centre Inc. (hereinafter "Fit City"), as of August 2004. The Plaintiff claims to have sustained an injury while using a shoulder press machine on June 3rd, 2008. She brought an action as against Fit City alleging that the machine was in a defective condition, and that the Defendant was negligent in inspecting and maintaining the machine.

Fit City relied upon 2 waivers: one in a Membership Agreement that the Plaintiff entered into on August 23rd, 2004, and another in a renewal that the Plaintiff entered into on September 22nd, 2004.

The Jury decided certain threshold issues relating to the waiver contained in the Membership Agreement, but left the ultimate decision of the validity of the waiver to the Judge. In any event, the Jury found that the Defendant was not negligent and not liable for the Plaintiff's loss. The Jury further found that the Plaintiff signed and entered into the Membership Agreement and subsequent renewal, and that the Defendant had taken reasonable steps to bring the waiver provisions in both Agreements to the attention of the Plaintiff.

The Plaintiff's position was that neither the Agreement nor the renewal were in effect or enforceable on the date of loss.

The Plaintiff's position was that the renewal was with regard to payment obligations, and not the Agreement as a whole.

The Jury found that the Plaintiff had signed a Membership Agreement and agreed that its term was only for a period of 12 months.

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Lastly, the Plaintiff submitted that the Agreement was not valid, as Fit City failed to show that the Membership Agreement was ever properly validated, agreed to and enforceable.

Fit City argued that the Agreement was in effect at the time of the Plaintiff's loss, and its terms excluded its liability for that loss.

According to the Membership Conditions clause, the Agreement automatically renewed on a month-to-month basis, unless the signator provided Fit City with a written notice of cancellation, at least 60 days prior to the renewal date. The Plaintiff conceded that she did not provide a notice of cancellation, and therefore, it was found that the Agreement was in effect on the date of loss.

Fit City submitted that it was not necessary for it to have explained the terms and conditions of the Agreement to the Plaintiff, since the law is, that if a person signs a contract without reading it, they are still bound by its terms, unless there has been fraud, misrepresentation or very onerous term. Since none of those issues were being alleged, the Agreement was found enforceable against the Plaintiff.

A reference was made to the Ontario Superior Court's decision in *Aviscar Inc. v Muthukumaru*, where the Defendant cited the following principle:

> "The law is that if a person signs a contract without reading it, that person is bound by the terms of the contract. That is the general rule. There are exceptions if the signing person can establish that there was fraud, misrepresentation, or there was a very onerous term that a reasonable person would not expect to be in the contract."

The Plaintiff admitted that she utilized waivers in her own fitness business. It was stated that the renewal provision was in large capitalized letters, whereas most of the Agreement was in lower-case letters. There was a place for the member to initial the clause and it was found that she did so.

Justice Mullins found that the renewal clause was not only in relation to payment requirements, but it was a renewal of the actual Agreement itself. "Agreement" means the entire Agreement, and not just the payment provision.

Justice Mullins agreed with the Defendant that the renewal documentation does not supersede the Membership Agreement, but must be read in conjunction with the Agreement.

The opening clause of the renewal document reads as follows:

> "Terms and Conditions: I hereby acknowledge having purchased the following membership from Fit City Health Centres Inc. (the "Club") and agree that the terms and conditions set out below and as set out in the Membership Agreement (the "Agreement") form part of my agreement with the Club."

Was the Defendant Required to Bring the Legal Effect of the Waiver to the Plaintiff's Attention?

Reference is made to various sections of the *Occupiers' Liability Act*. Section 3(1) of the *OLA* provides that the Defendant owed a duty of care to Ms. Jensen:

> 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> 3(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Subsection 3(3) provides that an occupier may exclude this duty:

> 3(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

Section 5(3) of the *OLA* also stated that:

> 5(3) Where an occupier is free to restrict, modify or exclude the occupier's duty of care or the occupier's liability for breach thereof, the occupier shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed.

The Plaintiff's position was that Fit City must not only bring the waiver to the attention of the Plaintiff, but must explain its legal effects, pursuant to *Gallant v. Fanshawe College of Applied Arts & Technology*, a 2009 Ontario Superior Court decision. The Defendant argued that the Plaintiff did not plead in reply or argue that the Defendant was required to demonstrate the legal effect of the waiver provision in addition to taking reasonable steps to bring the waiver to the attention of the Plaintiff. The Defendant argued that the *Occupiers' Liability Act* only requires that the waiver provision be brought to the attention of the Plaintiff. **There is no additional requirement that the Defendant must take the further step of explaining the legal effect of the waiver to the Plaintiff.**

The Plaintiff did not plead nor canvass this argument at Trial, and the Plaintiff therefore, cannot now ask the Court to make this determination and ignore the arguments at Trial, and the findings of the Jury. The only issue to decide was whether the waiver covered the negligence alleged.

Justice Mullins then analyzed whether the waiver was broad enough to cover the negligence alleged by the Plaintiff. The waiver provision stated the following:

> The Member forever releases and discharges the Club and its respective directors, operators, employees, agents, instructors or any other individual who the Club is in law responsible, from:
>
> (c) any and all claims, demands, rights of action, or causes of action, present or future, whether the same be known or unknown, anticipated or unanticipated, resulting from the Member's use of the facilities, equipment or services of the Club.

In order to cover the negligent conduct of the Defendant, Courts have held that **the waiver must specifically state that it covers negligence.**

Justice Mullins states:

> "It is well established that a general release purporting to protect a defendant against claims for damages will be confined in its application to loss occurring through causes other than negligence, unless liability in respect of negligence is specifically excluded in clear terms."

However, Courts have found that it is not necessary to use the word "negligence" if the waiver otherwise clearly covers the Defendant's negligence.

The second issue is whether the terms of the waiver include the assumed negligence.

Equivalent words, used such as "howsoever arising" and "whatsoever arising" are equivalent words. Furthermore, "in any manner arising" has been found to be equivalent.

In this specific case, it was found that the waiver specifically included claims for personal injuries arising from the negligence of Fit City, its directors, officers and employees. Justice Mullins found that this was "clearly and unambiguously covers the claim that was made against the Defendant".

Specifically, the clause makes mention of the Member's use of the equipment at the Club. Although the waiver does not use the word negligence, Justice Mullins found that the waiver was clear. The Plaintiff argued that it was necessary for the Defendant to refer to their duty under the *Occupiers' Liability Act*, for the waiver to be valid.

However, there were a number of cases that stated that failure to mention the *Occupiers' Liability Act* did not detract from the scope of language contained in the waiver, and Justice Mullins appeared to favour that line of authority.

Specifically, Justice Mullins stated:

> "... By expressly excluding liability for negligence in subclause (a), the defendant expressly excludes the duty of care owed under the *OLA*. Further, the broad language of subclause (c), which excludes liability for "any and all claims, demands, rights of action, or causes of action", may reasonably be seen to include claims for breaches of the statutory duty under the *OLA*. Therefore, it is not necessary to specifically mention the *OLA* in the waiver, provided that the waiver is specific and broad enough to cover claims made under the *OLA*, as I find it does here".

Accordingly, Justice Mullins found that the Membership Agreement was a valid and enforceable agreement, and that the Defendant took reasonable steps to bring the waiver provision in this agreement to the attention of the Plaintiff. Furthermore, the scope of the waiver was broad enough to cover both the negligence alleged by the Plaintiff, and any breach of duty owed under the *Occupiers' Liability Act*. Another win for an effectively drafted waiver!