

Court Upholds Waiver

Isildar v. Kanata Dive Supply is a decision of the Ontario Superior Court, released on June 9. The lengthy decision is an important one for any business or other entity trying to limit its liability by means of contract. In this fatal accident claim, although the trial judge made all of the factual and legal findings necessary to support the imposition of liability on the defendants, the action was dismissed because of the wording of a release that had been signed by the deceased.

While this decision happened to involve a business as a defendant, it is equally applicable to municipalities and hospitals, as well as any other type of enterprise. In each case, if the entity tries to limit or extinguish its liability to potential claimants, a court will undertake the same sort of analysis that was done in the *Isildar* case, in order to decide whether or not the released is enforceable.

In this case, the defendants avoided what would otherwise have been a very substantial judgment because they invested a modest amount in (a) drafting an appropriately- worded release and (b) ensuring that the document was signed and its effect adequately explained to potential claimants. Thus, the decision is a cautionary tale that will instruct all sorts of institutions in the law of releases.

The trial judge was Madam Justice Giovanna Toscano Roccamo. The action arose out of an incident in which the deceased, a novice diver, drowned in the St. Lawrence River while receiving instruction as part of a scuba certification program. The suit was brought by the wife and child of the deceased, against the individual instructor who was leading the dive when the accident occurred and against the organization that had offered the certification course.

Much of Justice Toscano Roccamo's lengthy reasons consist of a detailed review of the evidence. Ultimately, she found that both defendants had fallen below the applicable standard of care and that their actions "were a necessary and proximate cause temporally and substantially connected to the tragic outcome".

However, the action was dismissed on the strength of a release or waiver that had been signed by the deceased prior to diving. Her Honour approached the analysis as one having three stages:

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 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 defendant?
3. Whether the waiver should not be enforced because it is unconscionable?

Her Honour concluded that in this case, all of these questions should be answered in the defendants' favour.

The actual text of the release does not appear in the reasons, but the document provided in part, that the deceased agreed to waive his legal rights and to exempt the released parties from "all liability or responsibility whatsoever for personal injury, property damage or wrongful death however caused, including, but not limited to, the negligence of the released parties, whether passive or active."

The evidence satisfied Toscano Roccamo J., that one of the instructors had reviewed the wording of the release in the presence of the deceased at the initiation meeting at which he had signed the document.

The evidence also indicated that the deceased had signed three other releases in the past, which apparently had had similar wording. Her Honour said of this release, that it was "contained on one page, easy to read and there was no fine print".

She rejected the argument, made by counsel for the plaintiff, that this was a case of fundamental breach of contract, such that the release should not be enforced. She also concluded that the document was not unconscionable, nor did it diverge from community standards of fairness and morality.

On this basis, the action was dismissed. We have heard that both an appeal and cross-appeal are being considered.

One other interesting aspect of Justice Toscano Roccamo's decision is that she applied the Court of Appeal's decision in *Snushall v. Fulsang* to the issue of contributory negligence. In *Snushall*, the Court of Appeal held that it would be unreasonable to apportion to a plaintiff who has been injured in a motorvehicle accident contributory negligence of more than twenty-five percent for failing to wear a seatbelt. Justice Toscano Roccamo said that that reasoning should not be limited to seatbelt cases:

I have heard no argument of any force to persuade me that the reasoning in Snushall, supra, should not be applied to other circumstances where a defendant creates an unreasonable risk of harm causally connected to the injury that results and in which a plaintiff may have averted injury or damage.

Her Honour assessed 15% contributory negligence against the deceased. She likened this case to *Snushall* in this way:

The responsibility of a plaintiff who fails to wear a seatbelt, as in Snushall, supra, and Mr. Isildar's failure to remain with his dive buddy are similar, that no matter what the degree of the defendants' responsibility for causing the accident, he might have averted injury by following safety precautions.

As mentioned above, this might not be the last word on the subject of this release, as it appears that the Court of Appeal will be asked to review the case.