

Facility operator dodges damages award because patron waived liability

Contract Law | Litigation | Litigation & Dispute Resolution | Sports Law | Waiver of Liability

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Participating in sports is an activity that is encouraged by many. For example, parents enrol their children in a variety of winter and summer sports so that the children can meet and interact with other kids, gain social skills and learn how to play a game within a controlled and organized environment. Meanwhile, friends reach out to involve their social network in games to stay in touch, get some exercise and socialize. Playing sports is meant to be fun, but sometimes a participant gets injured. Where a sport is played at a sports facility, whether private or public, the facility operator often has a commercial liability policy to protect itself against a large claim. However, the facility operator will also often ask users of the facility to sign a waiver of liability agreement and acknowledge that the user has assumed all of the risks of playing in the sport. A waiver of liability contract essentially protects the facility operator from being liable in damages to a patron who is injured during the playing of a sport and shifts the economic risk to the patron.

In the recent case of *Arksey v. Sky Zone Toronto*, 2021 ONSC 4594 (CanLII), the waiver of liability contract between the plaintiff patron and the defendant facility operator permitted the facility operator to dodge liability and have the patron's personal injury claim dismissed.

The patron had been invited to the facility by a friend to participate in a recreational game of trampoline dodgeball. It was a game that she had never played before.

When she arrived at the facility, she was directed to the friend's game and an automated kiosk to enter into a waiver of liability agreement. The patron interacted with the automated kiosk and eventually joined her friend's game. She received no instructions about the rules of trampoline dodgeball and no employee from the facility was present to monitor the game.

Before the start of an actual game, the patron was struck, while in mid-air, in the back of the knee by a ball thrown from someone on her side. The patron felt a snapping sensation and she stumbled off the trampoline.

A facility employee attended on the patron. The employee did not report the incident to the facility's manager as required under the facility's policies and provided no first aid to the patron. After 20 minutes, the employee suggested that the patron return to the game because the injury did not seem to be significant. The patron did so.

The patron then bounced on the trampoline. Upon landing on her right knee, the patron suffered a right knee medial meniscus tear and an anterior cruciate ligament tear. According to medical evidence, the injury was unrelated to having been struck earlier in the back of the knee.

The facility defended the patron's personal injury action and sought summary judgment on the grounds that the patron's claim was precluded by the waiver of liability agreement she had entered into before participating in the trampoline dodgeball game.

The evidence showed that the Waiver Kiosk had taken the patron through a series of statements and clauses which required the patron to touch the screen with her finger(s) in appropriate places. Some terms appeared in bold type and all capital lettering, including a direction to **"PLEASE READ CAREFULLY!"** prior to the legal terms of the waiver following.

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The patron indicated her express acceptance and agreement to the terms of the waiver and her evidence was that she had all the time she needed to read and sign the waiver. No employee guided her through the kiosk and the patron was not pressured into signing the waiver.

The pertinent parts of the waiver said as follows:

I acknowledge that my participation in Sky Zone trampoline games or activities entails known and unanticipated risks that could result in physical or emotional injury, paralysis, death, or damage to myself, to property, or to third parties. I understand that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activities. **The risks include, among other things:** cuts and bruises; falling off of equipment; muscle and joint sprains and strains; broken wrists, ankles and legs; participants falling on each other resulting in broken bones and other serious injuries; double bouncing (more than one person per trampoline) can create a rebound effect causing serious injury; flipping, running and bouncing off the walls can cause serious injury; colliding with or being landed on by jumpers of a different size. Sky Zone employees have difficult jobs to perform. They seek to create a safe environment but they are not infallible. They might be unaware of a participant's health or abilities. They may give incomplete warnings or instructions and the equipment being used might malfunction. Traveling to and from trampoline locations raises the possibility of any manner of transportation accidents. **I expressly agree and promise to accept and assume all of the risks existing in this activity. My participating in this activity is purely voluntary and I elect to participate in spite of the risks.**

Another paragraph of the agreement provided:

I hereby voluntarily release, forever discharge, and agree to indemnify and hold harmless Sky Zone and to waive any and all claims, demands, or causes of action that I have or may have in the future against Sky Zone and to release Sky Zone from any and all liability for any loss, damage, expense or injury including death that I may suffer or that my family, heirs, assigns, personal representatives and estate may suffer as a result of my participating in Sky Zone trampoline games or activities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS' LIABILITY ACT, R.S.O. 1990 c. O. 2 ON THE PART OF SKY ZONE AND FURTHER INCLUDING THE FAILURE ON THE PART OF SKY ZONE TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF SKY ZONE TRAMPOLINE GAMES OR ACTIVITIES.

Among other terms, the waiver of liability agreement stated: **"By signing this document, you will waive certain legal rights, including the right to sue."**

As a contract, this waiver of liability agreement was subject to the rules of contractual interpretation. In general, the court explained that waivers of liability are narrowly construed against the drafters, but that, absent the defence of *non est factum*, they were neither void nor voidable.

In general, as well, the party relying upon the waiver must demonstrate that reasonable steps are taken to bring the terms of the waiver to the party signing the waiver.

Lastly, given that a waiver of liability creates an exclusion, a waiver cannot be inconsistent with its purpose. Thus, where the word "negligence" appears in a waiver of liability, the court noted that it should not merely appear on its own. The waiver of liability agreement should describe the kind of negligent conduct that is intended to be covered: see *Ochoa v. Canadian Mountain Holidays Inc.*, 1996 CanLII 378 (BC SC) at para. 136.

Among other things, the court found that Sky Zone's waiver of liability was clear, that the facility took reasonable steps to bring the terms of the agreement to the patron's attention, and that the express terms warned of the risks that employees might not give complete instructions and that the risks could result in the employees negligently not protecting patrons from the dangers of playing.

The court also rejected the patron's argument that the agreement was vague.

This case demonstrates that it is not easy for a user who signs a waiver of liability agreement to sue a facility operator for injuries sustained while participating in sports activities at the operator's premises. Indeed, from a public policy perspective, if facility operators were easily held liable for injuries sustained by users and could not limit their liability through waivers, most facilities would be unable to operate. User fees and insurance costs would be prohibitive, and insurers might balk at underwriting any sports facility that permits users to engage in inherently risky activities. As the court recognized in *Arksey*, consumers are entitled to exercise their own autonomy and weigh the risks and benefits of a transaction in order to participate in an inherently risky activity, even though that transaction might affect the patron's legal rights. Accordingly, before lacing up the skates and stepping onto the ice to play hockey or strapping on the skis and racing down



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the ski hill or bouncing onto the trampoline to play aerial dodgeball, participants in inherently dangerous sporting activities must carefully consider whether they want to compromise their legal rights when they sign a waiver of liability agreement. Unless the user has his or her own insurance coverage, a user may wish to think twice before signing a waiver of liability agreement or voluntarily participating in an inherently dangerous sport. Otherwise, he or she may be disappointed to learn that the waiver of liability agreement he or she signed will preclude any compensation for a painful and potentially very serious debilitating injury. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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