

## Trampoline Injury: Defendant's Motion to Enforce Waiver Dismissed

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In [Zaky v. 2285771 Ontario Inc.](#), 2020 ONSC 4380, the plaintiff went to an indoor trampoline and fun park, Sky Zone, in Mississauga, Ontario. While attempting a backflip, he landed hard on his head and sustained a fractured vertebrae in his neck that required surgery.

The defendant brought a summary judgment motion seeking a dismissal of the action on the basis of an electronic waiver document that was signed by the plaintiff. The waiver purported to release Sky Zone from all claims.

The plaintiff provided unchallenged evidence that he was told to be “quick” in signing the waiver at an electronic kiosk or else his jump time on the trampoline would be reduced or delayed. Further, according to the plaintiff, the defendant did not communicate anything to him about the contents of the waiver.

Justice Conlan agreed with prior case law that, where a plaintiff has signed a written contract, it is immaterial that the plaintiff has not read the document and does not know its terms. If a person chooses to sign a form and ignore its consequences, that is a decision freely made by that person.

However, there are three exceptions to the general enforceability of waivers:

1. where the circumstances establish *non est factum*, meaning that the signature on the waiver was not truly the act of the plaintiff;
2. where the plaintiff's signature was induced by fraud or misrepresentation; and
3. where the defendant knew or ought to have known that the plaintiff did not intend to be bound by the waiver and, therefore, the defendant had a duty to bring the terms of the waiver to the plaintiff's attention.

The third exception applies in circumstances where a reasonable person should have known that the person signing the waiver did not intend to be bound by its terms.

In such circumstances, the defendant must do more than simply hand the waiver over to be signed. Rather, the defendant is obliged to take reasonable steps to draw the terms of the waiver to the signer's attention. Failure to do so amounts to misrepresentation by omission.

The factors to consider in determining whether the third exception applies, include:

1. whether an exclusion of liability is inconsistent with the overall purpose of the document and is, therefore, contrary to the party's normal expectation;
2. the length and format on the document, and whether the exclusion of liability is buried in small print;
3. the time available for reading and understanding the document; and
4. whether the signer asked any questions regarding the terms of the documents or ever indicated that he or she was not prepared to sign it.

Justice Conlan agreed with a prior case, which indicated that, if the contents of the document are contrary to what the ordinary person would expect (for example, unusually onerous), or the circumstances are such that it should be clear that the person signing it did not know the terms (for example, if it was clear the person signing had not read the terms because they were not afforded enough time or proper conditions to do so), then the party seeking to rely on the document will have reason to know that the person signing it did not intend to agree to the terms.

As indicated, the plaintiff stated that he was rushed into signing the waiver. Justice Conlan held that it would be dangerous to conclude that there is no genuine issue for trial on the question of whether Sky Zone took reasonable steps to bring the terms of the waiver to the plaintiff's attention. As a result, the defendant's summary judgment motion was dismissed.

Although a person who signs a waiver without reading it does so at his or her own risk, the safest course of action for recreational operators is to implement and follow a policy which requires instructions to be provided to all participants to take their time to carefully read waivers and to ask questions if there is anything they do not understand.

The waiver in question stated "PLEASE READ CAREFULLY!" However, such a caution may be insufficient if the participant is not afforded sufficient opportunity to read the waiver.