

**An Update on Waivers: A Comment on *Gallant v. Fanshawe College et al.*
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The issue of whether and in what circumstances a waiver is a defence to an action for negligence is important and complex. The recent case of *Gallant v. Fanshawe College et al.*¹ articulates the court's considerations with respect to when a waiver is a defence to an action for negligence. *Gallant* outlines the factors considered by the court including, the circumstances in which the contract is signed, the intentions of the parties, and the type of activity that is involved.

In *Gallant*, the plaintiff brought an action for injuries sustained in a motorcycle accident that occurred during a steering exercise in an introductory motorcycle course. The parties signed a waiver on the first day of the course in favour of the defendant.

The parties agreed on damages. Liability was tried by a jury who found the defendant 80% at fault and the plaintiff 20% contributorily negligent. The validity of the waiver was determined by the judge after the jury made its findings. The judge's decision in *Gallant* provides a careful and detailed analysis of the factors the court will consider in determining a waiver's validity.

Circumstances of signing the waiver

The waiver was presented and signed well after registration occurred and payment for the course had been received. No refunds were offered to students who decided not to sign the waiver. Students were not told that they would have to sign a waiver when they registered and paid the fee. The waiver was also presented after the plaintiff had made hotel arrangements for the week. The waiver was one of a number of pieces of paper, including a manual presented to the students at the first class.

The plaintiff's evidence was that she did not remember the waiver, but she acknowledged that it was her signature on it. The plaintiff also acknowledged that she would have read the waiver and that she now understands, as a result of this litigation, the defendants' position that she has no right to sue.

Text of the waiver

The waiver read:

"I Deanna Gallant, hereby agree to release the Canada Safety Council, private and government agencies who support the motorcycle training program, Fanshawe College, and all instructional staff from all responsibility, property damage, bodily injury, costs and expenses, or claims of every nature and kind arising from, or inconsequent of my participation in the motorcycle training course; and to render and save harmless the Canada Safety Council, all private and government agencies who support the motorcycle training program, Fanshawe College, and all

¹ *Gallant v. The Board of Governors of the Fanshawe College of Applied Arts and Technology et. al.*, 2009 CanLII 50755 (ON S.C.)

instructional staff from all claims and rights of action which might arise through my participation".

Positions of the parties with respect to the waiver

Plaintiff's position

The plaintiff's position was that the waiver was not valid because it was ambiguous. The plaintiff further argued that if the waiver was valid, then it did not encompass the negligence found by the jury. The plaintiff also argued that even if the court found that the waiver encompassed the negligence in question, it should not be enforced as it would be unfair and unreasonable to do so in all of the circumstances.

Defendants' position

The defendants' position was that consideration was given for the waiver and that it was a valid contract. Furthermore, the wording of the document was broad enough to exclude the claims of the plaintiff. The defence also argued that there was no evidence that would support any substantial unfairness or improvidence in the bargain between the parties such that the waiver should not be enforced.

3 propositions with respect to waivers

The court carefully analyzed the jurisprudence with respect to waivers and found that there were three legal propositions with respect to waivers. First, that the onus of proving the validity of a waiver lies on the party who claims it. Second, any ambiguity is interpreted against the drafter of the waiver. Third, if the waiver is found to be ambiguous, then it is ineffective and cannot be enforced.

Findings of the Court

The Court found that the signing of the waiver was a perfunctory exercise with little explanation by the instructor. The instructor did not remember the specific explanation she would have given to the plaintiff but that she "likely would have said that there were risks in learning to ride motorcycles and that motorcycle riding was not "basket weaving". The instructor also would have stated that "we offer you a safe motorcycle and a safe learning environment but we can't ride the motorcycle for you and by signing the waiver, you are taking responsibility".

While there was no bad faith in misrepresentation on the part of the instructor to induce the plaintiff into signing the waiver and the defendants brought the waiver to the attention of the plaintiff, the terms and meaning of the waiver were not adequately brought to the attention of the plaintiff. Accordingly, the court held that the waiver was ambiguous and that it was not broad enough to encompass the negligence of the defendants.

The waiver is ambiguous

From a drafting perspective, the court found that the waiver was ambiguous. The absence of words and phrases such as "for any", "negligence", "liability" or "howsoever caused" created ambiguity about the scope of the waiver.

A party cannot on one hand make promises and then later attempt to withdraw those promises by a release unless this is done in clear and unambiguous language. The defendants had made clear to the students that they would be learning in a safe environment. Thus, the defendants could not contract out of any responsibility to provide such an environment absent clear and unambiguous language.

The waiver is not broad enough to encompass the negligence of the defendants

The Court cited the Supreme Court of Canada decision in *Dube v. Labsey*² for the proposition that "common sense dictates that only rarely will a plaintiff genuinely consent to accept the risks of a defendant's negligence".

Waivers seeking to cover negligent conduct must contain more than the word negligence. The waiver must provide context and describe the types of conduct that may amount as negligence which are being excluded by the operation of the waiver.

The plaintiff was not told she would have to sign a waiver or the implication of the waiver when she registered and paid for the course.

The Court held that the waiver was presented at a time when due consideration of its implication was less than ideal. There was one instructor and approximately thirty students; numerous papers were being presented; it was stated that signing the waiver was a precondition to taking the course; yet there was no offer of a refund if a student decided not to proceed. The explanation of the waiver was limited at best and there was no evidence by the defendants to suggest that any explanation was provided as to what the waiver would protect the defendants from. Moreover, in promoting the course, the defendants undertook to provide a safe learning environment. The jury had found that the course was not taught in such an environment.

The Court held that when a waiver is signed before partaking in a potentially hazardous activity, the defendant must ensure that each participant understands the legal effect of the waiver if she intends to rely on it against a claim. It must be made clear to participants that they are foregoing all rights to make a claim howsoever arising.

The Court held that there was no evidence by the defendants that they questioned the students as to their understanding of what the implications were to their signing the waiver.

The Court interpreted the waiver as it was drafted as stating that the students assume their own risks but in a safe environment. The root of the agreement between the plaintiff and the

² [1986] S.C.J. No. 29

defendants was that the safety of the students would be foremost and of primary importance. Therefore, the waiver was not broad enough to encompass the negligence of the defendants.

The Court held that it would be unfair and unreasonable to give effect to the waiver and thereby exonerate the defendants from responsibility as a result of their failure to live up to the very promises they made to encourage participation in the course. The Court found that the waiver was invalid.

Gallant is significant as it articulates the considerations to be applied in the analysis of waivers. The decision makes it very clear that the burden of proof with respect to being able to rely on waivers lies with the defendant. Furthermore, if a waiver is found to be ambiguous, then it is deemed ineffective and cannot be enforced. *Gallant* indicates that these propositions are rigidly applied and that a party seeking to rely on a waiver will have to be very mindful in drafting the waiver to make sure that the negligence to be excluded is clearly defined. A party seeking to rely on a waiver will also have to make sure that the waiver is adequately disclosed in advance of registration and payment.