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Employees cannot contract out of WSIA protections – "contrary to public policy" Ontario Court of Appeal

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The Ontario Court of Appeal recently released a decision that should be noted by employers who are not covered under the *Workplace Safety and Insurance Act, 1997* ("WSIA"). The decision, in the case of *Fleming v. Massey*, confirms that the employees of such employers can sue them when they are injured in a workplace accident, even if they have signed a waiver. Employers who have employees sign a release or waiver for personal injuries at, say, company sponsored outings or events may in fact have no protection from lawsuits when an employee is injured.

Fleming v. Massey held that the public policy underlying the WSIA precluded an employee from contracting out of its protections. In this case, the employee had signed a waiver which purported to release the employer from liability for damages sustained by the employee in the course of the employment. The issue was whether the employee "contracted out" of his right to sue the employer under Part X of the WSIA, and therefore had voluntarily assumed the workplace risks. In refusing to give effect to the waiver, the Ontario Court of Appeal was clear that the WSIA was a "categorical rejection" of the principle that employees voluntarily assume workplace risks.

In October of 2010, the defendants (respondents in the appeal), Lombardy Karting and the National Capital Kart Club, held a go-kart race at Lombardy Raceway Park (also a defendant/respondent). Mr. Fleming, the plaintiff/appellant, acted as race director for the event. Prior to the race, Mr. Fleming signed a broad waiver which released the respondents from all liability for any damages sustained as a result of Mr. Fleming's participation in the event. During the course of the race the respondent, Mr. Massey, crashed his go-kart and injured Mr. Fleming.

Mr. Fleming commenced an action for damages. The respondents relied on the waiver and were successful in having the action dismissed by way of summary judgement. Mr. Fleming commenced an appeal arguing that he was an employee under the WSIA, and that the waiver should not be enforced as it ran contrary to the intent of the WSIA.

The Court of Appeal agreed that Mr. Fleming was an uninsured employee under the WSIA. This was due to the fact that the Workplace Safety and Insurance Board classifies go-kart tracks as "non-covered". In order to be insured under the WSIA, such facilities must apply for coverage. Since the respondent track did not apply for coverage, Part X of the WSIA (which applies to employees in industries not otherwise captured) was engaged. Section 114(1) of Part X provides uninsured workers with the right to sue employers in certain circumstances. It states:

A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:

1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.
2. The worker is injured by reason of the employer's negligence.
3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment.

Having established that Mr. Fleming had a statutory right under the WSIA to sue the respondent, the next question was whether Mr. Fleming had "contracted out" of that right by signing the waiver. In its reasons, the Court of Appeal discussed at length the public policy underlying workers compensation legislation. It noted that before the advent of such legislation employees were severely restricted in their ability to sue their employer for workplace injuries. This restriction was due to the operation of the following five legal principles:

1. The doctrine of voluntary assumption of risk – the presumption that the worker assumed the workplace risks.
2. The doctrine of "common employment" – the employer was not liable for workplace injuries resulting from the negligence of a co-worker.
3. The principle that an employer was not responsible for workplace injuries caused by defects in machinery, equipment or tools.
4. The principle of contributory negligence – a worker whose own negligence contributes in any degree to the workplace injury cannot recover from the employer.
5. The requirement that the employee had to prove personal negligence on the part of the employer was the direct cause of the workplace injury.

The Court of Appeal went on to state that the policy intent of workers compensation legislation was to remove these barriers, including the notion that workers voluntarily assumed workplace risks. Instead, an insurance scheme would guarantee compensation to employees injured in the workplace, regardless of fault. In return for insurance coverage, employees gave up the common law right to sue their employers for such injuries. The small number of employees that were not covered under the insurance scheme were provided a new statutory right to sue their employer for workplace injuries. This statutory right is currently reflected in Part X of the WSIA.

Given the importance of this public policy, the Court of Appeal concluded that uninsured employees are not permitted to contract out of their WSIA protections. In applying this to Mr. Fleming's case, the Court of Appeal held that the waiver was voided by the WSIA and allowed Mr. Fleming's appeal.

Employers who may be affected by this ruling will want to reconsider the validity of waivers signed in the past or the future and should review existing insurance coverages to make sure they are adequate. They may also want to consider opting in to the WSIA system, which would bar lawsuits for workplace injuries and deal with compensation issues under the provisions of the WSIA.

For further information please contact Kevin MacNeill at 613-940-2767.