BARRIE COURT FILE NO.: 04-B7000
DATE: 20050211

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
STEVEN PASCOE	David F. Longley, for the plaintiff
Plaintiff (Responding Party)	
- and -	
BALL HOCKEY ONTARIO INC.	Thomas J. Hanrahan, for the defendant
Defendant (Moving Party)	
	HEARD: February 8, 2005

DiTOMASO, J.

THE MOTION

[1] The defendant Ball Hockey Ontario Inc. (Ball Hockey) moves for an order granting summary judgment dismissing the plaintiff's claim, pursuant to rule 20.04(2) of the *Rules of Civil Procedure.*

OVERVIEW

[2] The plaintiff Steven Pascoe (Pascoe) suffered a right leg fracture while engaged in a ball hockey game at Ball Hockey's rink on March 13, 2003 at approximately 8:15 p.m. Pascoe

alleges that this injury was caused by the negligence of Ball Hockey in failing to clear ice from the surface of the rink prior to the commencement of play.

[3] Pascoe signed a waiver in favour of Ball Hockey before he commenced play on March 13, 2003. He did not read the waiver before it was signed.

[4] Ball Hockey has denied that there was ice on the surface of the rink where Pascoe sustained his injury and Pascoe was injured in the normal course of play when he lost his balance.

POSITION OF THE PARTIES

Position of Ball Hockey Ontario Inc.

[5] Ball Hockey asks the court to assume that Pascoe can prove negligence which gives rise to the issue of whether or not the waiver applies.

[6] I was referred to the wording of the waiver found at Tab C of Ball Hockey's motion record. It is submitted that the waiver, which contains a hold harmless release, is a full and absolute defence to Pascoe's claim.

[7] There is no issue that Pascoe signed the waiver. It is further conceded that he was not pressured into signing or did not have time to read the waiver before signing it. A factual issue is the nature and extent of the accumulation of ice on the playing surface of the ball hockey rink. Even if there was an accumulation of ice to the extent claimed by Pascoe, the waiver provided an absolute defence to the claim.

Position of the Plaintiff Steven Pascoe

[8] Pascoe submits that a duty of care was owed to him and that duty of care was breached by Ball Hockey by failing to provide a facility in a safe condition on the evening of March 13, 2003 for the purposes of playing a ball hockey game. There is a genuine material factual issue that ought to be left for trial. Said issue would necessarily involve a determination of whether there was an accumulation of ice which caused Pascoe to fall and become injured. Whether or not Pascoe voluntarily assumed the risk of playing ball hockey under such conditions is a genuine and material factual issue best left for trial.

[9] Lastly, it is denied that the contractual waiver served as a complete defence to Pascoe's tort action. The release was not intended to apply in absolving Ball Hockey where hazards were continued by Ball Hockey of which it was aware. The waiver must be considered within the context of the factual scenario where both the legal effect of the waiver and the factual context in which Pascoe was injured are both genuine issues for trial. Pascoe submits that the motion brought by Hall Hockey ought to be dismissed with costs.

ANALYSIS

[10] The rink where the alleged injury took place is located in Barrie and was built in 1994. The surface of the rink is composed of one foot plastic squares which sit on top of an asphalt pad. The flooring is called a plastic outdoor sport court. The tiles are designed for easy removal to facilitate the replacement of damaged tiles. According to Ball Hockey, prior to games, the playing surface is cleared using a plow with a special edge that does not damage the polyethylene surface. In addition, urea, which is a natural ice-melting product, is used to treat individual areas or it can be spread over the entire surface area if necessary.

[11] There is a fundamental dispute as to whether or not Pascoe slipped and fell on an accumulation of ice while participating in a ball hockey game. Ball Hockey denied that he slipped and fell on ice.

[12] However, extensive affidavit evidence was presented on behalf of Pascoe. Pascoe interviewed most of the players from his team who were playing the night of the incident. Eight players in addition to Pascoe filed affidavits in opposition to this motion.

[13] The affidavit evidence by the players demonstrated the following:

(a) There was ice on the surface of the rink on the night the accident occurred and this ice extended from behind the south goal of the rink and up the west boards;
(b) Pascoe slipped on this ice and this caused him to sustain the injury;
(c) No warning was given to the players about icy conditions on the rink by Ball Hockey;
(d) No attempts were made by Ball Hockey to melt or otherwise remove the ice on the surface of the rink;
(e) Maintenance of the rink was generally poor and no maintenance appeared to have been done on the night of the game.

[14] Further, Pascoe relies on the affidavit of Ken Laver. In his affidavit sworn January 29, 2005, Laver deposes that he played a game on the same rink the day before the incident and went to the office located at the rink to complain about ice on the playing surface. Laver's evidence will be that the condition of the rink on March 13, 2003 was the same as the previous evening and no attempts had been made by Ball Hockey to melt or remove the ice. Pascoe relies on Laver's affidavit to allege that the condition which caused his fall was known to Ball Hockey for at least one day prior to the game.

[15] I find that there is a genuine issue of material fact as to the condition of the rink surface on the night of the incident and as to what caused Pascoe to fall.

[16] I agree that the test to be applied on a motion for summary judgment is that the applicant must show that there is no genuine issue of material fact requiring a trial. Once the moving party has met the test, the respondent must then establish his claim as being one with "a real chance of success" in order to resist summary judgment. See *Guarantee Co. of North America v. Gordon Capital Corp.*[1999] 3 S.C.R. 423.

[17] In my view, in respect of the factual issue relating to the condition of the playing surface on the night in question, there is a genuine issue of material fact requiring a trial. In any event, Pascoe has demonstrated a "real chance of success" in order to resist summary judgment on this basis.

[18] In respect of the waiver, the hold harmless relief contained in the waiver provides:

> I/we assume all risk and hazards incidental to such participation, including transportation to and from the activities and I/we hereby waive, release, absolve indemnity and agree to hold harmless the supervisors, participants, officials, sponsors, organizers and corporation owners of the premises.

[19] For the purposes of this motion, Ball Hockey has assumed that Pascoe could establish negligence which, in turn, would give rise to the applicability of the waiver.

[20] When considering the waiver, the primary issue is whether it provided a complete defence to the tort claim advanced by Pascoe based on the circumstances in which he found himself on March 13, 2003. Ball Hockey asserts that the standard of care owed to Pascoe was satisfied pursuant to section 3(1) of the *Occupiers Liability Act* R.S.O. 1990, c. O.2. Further, Pascoe voluntarily assumed the risk of playing ball hockey when he signed the waiver absolving Ball Hockey of liability. In this event, section 3(1) of the *Occupiers Liability Act* does not apply by operation of section 4(1) of the *Act*.

[21] The standard of care is dependent on context. See *Crocker v. Sundance Northwest Resorts Ltd.* [1988] 1 S.C.R. 1186.

[22] The context advanced by Ball Hockey is that it took reasonable steps in utilizing a floor system that allowed damaged portions to be replaced hence maintaining a safe playing surface. Ball Hockey also employed individuals to clean the ice, if necessary prior to start of the game. Further, referees at the game in question, notified both teams prior to the start of play that some ice had formed on the surface and that urea had been applied to melt the ice.

[23] The context relied upon by Ball Hockey is not only denied by Pascoe but a very different factual context has been advanced on behalf of the plaintiff. As I have stated, this raises a genuine issue of material fact against which the applicability of the waiver ought to be considered. Does the contractual waiver signed by Pascoe without fraud, duress or mistake operate as a complete defence to Pascoe's tort action? Contractual waiver clauses have barred plaintiffs from recovering any damages after sustaining injuries while engaging in a number of sporting activities. See *Crocker v. Sundance Northwest Resorts Ltd.* (supra); *Dyck v Manitoba Snowmobile Assn. Inc.* [1985] 1 S.C.R. 589; *Karroll v. Silver Star Mountain Resorts* [1988] B.C.J. No. 2266; *Simpson v. Nahanni River Adventures Ltd.*[1997] Y.J. No. 74.

[24] Courts have granted summary judgment based on the plaintiff signing a contractual waiver. See *Karroll v. Silver Star Mountain Resorts* (supra); *Simpson v. Nahanni River Adventures Ltd.* (supra).

[25] Many of the cases cited by counsel for Ball Hockey are British Columbia cases decided pursuant to Rule 18A of the *British Columbia Supreme Court Rules*. Both the wording of the rule and the test for summary judgment contemplated by Rule 18A are different from our Rule 20. The Rule 18A test for summary judgment is *not* based on the Court being satisfied there is no genuine issue for trial with respect to a claim on defence as in our Rule 20. Given the application of a similar test, I find these cases are not particularly persuasive.

[26] Pascoe's claim against Ball Hockey is for damages as a result of personal injuries sustained by him "due to hazards which were unexpected". According to Pascoe, the unexpected hazard was the sheet of glare ice which existed on the southwest portion of the playing surface of the rink. It is alleged that Ball Hockey knew, or ought to have known, about the dangerous condition and took no steps to give warning to Pascoe. Further, Pascoe asserts that no steps were taken to delineate or sequester the hazard.

[27] Pascoe fell and was injured because of the condition of the surface of the rink and not because of any activity normally associated with the playing of the game. Further, Pascoe contends that Ball Hockey should not be immunized from his action by virtue of the waiver. It was never contemplated that the waiver would protect Ball Hockey from "all risk and hazards incidental to such participation" when the very risk and hazards themselves were created and perpetuated by Ball Hockey. Pascoe maintains that the applicability of the waiver provision is a genuine issue for trial. I agree. See *Brown v. Blue Mountain Resort Ltd.* [2002] O.J. No. 3650.

[28] I am satisfied that there is a genuine issue for trial regarding the waiver as it applies to Pascoe and that the applicability of the waiver is intimately connected to the factual context to be determined at trial.

[29] Accordingly, I find that the issue of negligence, the factual determinations relating thereto and the applicability of the waiver are matters to be determined at trial.

[30] I am not satisfied that Ball Hockey has demonstrated there is no genuine issue for trial. See Rule 20.04(2) of the *Rules of Civil Procedure*.

DISPOSITION

[31] Accordingly, the motion for summary judgment is dismissed with costs. Counsel have agreed that the issue of costs can be determined by way of written submissions. Counsel shall deliver written submissions consisting of not more than two pages together with supporting documentation, i.e. Bill of Costs, docket summaries, etc. within the next 14 days by submitting same to the trial co-ordinator at Barrie.

DiTOMASO, J.

Released: February 11, 2005