
LIABILITY WAIVER UPHeld BY B.C. COURT OF APPEAL

*By Barry W. Kwasniewski**

A. INTRODUCTION

Liability waivers are familiar to most of us; we see them when we wish to go downhill skiing, participate in running races or engage in other activities that entail some risk of personal injury. Consumers are frequently required by service-providers to sign forms that release the service-provider from any liability for a consumer's injury. Liability waivers are also often used by charities and not-for-profits as a legal liability shield, particularly where the organization is carrying out activities which may pose a risk of injury to participants. Over the years, there have been numerous cases across Canada where courts have been asked to determine the enforceability of liability waivers in a variety of circumstances. Most recently, the British Columbia Court of Appeal in *Loychuk v. Cougar Mountain Adventures Limited*¹ has affirmed that a properly drafted waiver, that is understood and signed by the participant, may even protect an organization from liability for serious injuries or even death caused by the negligence of its own employees.² This *Charity Law Bulletin* outlines this decision, which upheld a waiver releasing a zip-line operator from liability.

B. THE FACTS OF THE CASE

Cougar Mountain Adventures is a business that offers zip-line tours in Whistler, BC. The tours are conducted in groups and involve strapping a person into a harness and trolley and the trolley is sent down a

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Michelle Thériault, B.Soc.Sci. J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

¹ 2012 BCCA 122 (released March 15, 2012).

² The decision of the lower court in the matter was addressed in *Charity Law Bulletin* No. 251, which is available at: <http://www.carters.ca/pub/bulletin/charity/2011/chylb251.htm>.

line from a higher platform to a lower one. Guides are stationed on each platform and communicate with one another by walkie-talkie in order to determine when the next person should be sent down the line. This case was an action for damages brought by two participants in a zip-line tour, Deanna Loychuk and Danielle Westgeest, who were injured when they collided while travelling on the same zip-line.

Cougar Mountain Tours admitted that the accident was caused by the negligence of one of its employees, but argued that the plaintiffs had waived their causes of action when they signed liability waivers. Both plaintiffs read and signed the waivers of liability and understood that they would not be able to participate in the zip-line tour if they did not sign the waivers. They also both understood that in signing the waiver, they would be waiving the right to sue. However, both plaintiffs claimed to not have understood that they would be waiving the right to advance claims arising from the company's own negligence.

C. THE DECISION OF THE LOWER COURT

The plaintiff's lawsuit was initially dismissed at trial by the Supreme Court of British Columbia. The defendant successfully brought a summary trial application to have the action dismissed on the grounds that the liability waiver was a complete defence to the plaintiffs' claims. In resisting the dismissal, the plaintiffs argued that the release was ineffective because it was:

1. Unenforceable on the grounds of misrepresentation by omission because a reasonable person would have known that the plaintiffs were not consenting to the terms at issue and the defendant failed to take steps to apprise them of the terms;
2. Unconscionable;
3. Invalidated by the *Business Practices Consumer Protection Act* (BPCPA) because of deceptive and /or unconscionable acts; and
4. Invalid because there was no "consideration."³

The trial judge found that the defendant had taken the necessary steps to bring the contents of the waiver to the plaintiffs' attention and that they had sufficient time to read it, that the waiver was not unconscionable because there was no duress, coercion or unfair advantage, and that the defendant had not deceived the

³ "Consideration" is a legal component to a contract. It refers to the benefit or detriment that must be exchanged between parties to a contract in order for the contract to be valid.

plaintiffs or behaved unconscionably under the BPCPA. Finally, the trial judge held that there was adequate consideration to form a contract, the consideration being the defendant allowing the plaintiffs to participate in the activity. The trial judge therefore dismissed the action. The plaintiffs appealed this decision to the British Columbia Court of Appeal.

D. DECISION OF THE COURT OF APPEAL

The appellants (referred to herein as the plaintiffs) appealed the decision of the trial court on four grounds, alleging that the trial judge made following errors:

1. Holding that he was bound by previous authorities to conclude that the release was not unconscionable;
2. Finding that the waiver was not unconscionable under the BPCPA;
3. Failing to apply the reverse onus requirements of the BPCPA; and
4. Finding that there was consideration in exchange for signing the release.

In considering the unconscionability of the waiver, the Court first examined the status of the common law on the enforcement of waivers. This examination revealed that there is a well-established line of authority that releases in relation to recreational sports are not unconscionable, even when, as in this case, the activity is totally within the control of the service-provider. Further, the Court found that the principle demonstrated by these cases is “that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.”⁴

The Court next considered whether there was an overriding public policy reason to not enforce the waiver. The plaintiff argued that it was against public policy to enforce a waiver that allowed service-providers to escape liability for injury and death resulting from negligence in sporting and recreational activities. The Court reviewed the Supreme Court of Canada’s decision in *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*,⁵ stating that the power to decline enforcement of a waiver must be rarely exercised in the interest of stability of contractual relations. The Court determined that in order to decline to

⁴ *Loychuk*, *supra* note 1 at para 40.

⁵ 2010 SCC 4.

enforce a waiver on the grounds of public policy, the party relying on the waiver must have “engaged in conduct so reprehensible that it would be contrary to the public interest to allow it to avoid liability”.⁶ As these conditions were not present in this situation, the Court found that the waiver was not unenforceable on the grounds of public interest.

The Court then disposed of the ground of appeal relating to unconscionability under the BPCPA, finding that the elements to establish unconscionability were the same as under the common law discussed above. As such, the waiver was not unconscionable under the BPCPA, and that the defendant had met the reverse onus in this regard.

Finally, the Court considered the claim that the waiver was unenforceable for lack of consideration. The plaintiffs argued that they entered the contract to go on a zip-line tour at a different time than when they signed the waivers. They claimed therefore that when they signed the waiver, which is a contract, no consideration changed hands so the contract was not legally formed. The Court determined however that the consideration that the plaintiffs received was the ability to participate in the zip-line tour, which they did in fact do, albeit with unfortunate results.

E. CONCLUSION

This decision is important to charities and not-for-profits for two reasons. Firstly, it further increases the likelihood that a properly drafted and executed liability waiver will insulate service-providers from liability. However, it is important to note that this is a decision of the British Columbia Court of Appeal and is therefore influential, but not binding outside of that province. Secondly, this decision illustrates the importance of ensuring that a liability waiver is properly drafted and executed. The liability waiver was found to be enforceable by the trial judge and the Court of Appeal because it was clear, drew attention to the impact of the waiver in terms of liability of the service-provider, and gave the plaintiffs the opportunity to read and understand its terms. It is also noteworthy that the Court considered the plaintiffs’ capacity to understand the waiver. Where these conditions are not present, a liability waiver will be less likely to be legally enforceable if challenged.

⁶ *Loychuk*, *supra* note 1 at para 46.



Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

Ottawa · Toronto
Mississauga · Orangeville
Toll Free: 1-877-942-0001

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2012 Carters Professional Corporation