CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW BULLETIN NO. 444

MARCH 28, 2019

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: NANCY E. CLARIDGE,
RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

WAIVER HELD UNENFORCEABLE FOR NOT CONTEMPLATING CIRCUMSTANCES OF CLAIM

By Barry W. Kwasniewski*

A. INTRODUCTION

On February 19, 2019, the Supreme Court of British Columbia released its decision in *Peters v Soares,* in which the court refused to enforce two liability waivers with respect to an individual who had been injured in a competition as a jiu-jitsu student of a martial arts academy.[1] In holding both waivers unenforceable, the court affirmed the importance of using language that can demonstrate what each party was contemplating at the time of signing, and the need for organizations to keep proper records of such waiver agreements in order to be able to identify the exact terms to which a participant had agreed. This decision is important for charities and not-for-profits which utilize liability waivers, in that it demonstrates that courts will closely scrutinize the language of liability waivers to determine if they are to be enforced.

B. BACKGROUND

Joe Peters (the plaintiff) registered for and participated in jiu-jitsu classes, instructed by Marcus Soares, at a martial arts academy, Carlson Gracie Jiu-Jitsu/MMA Inc (both defendants). While participating in a jiu-jitsu competition held by the academy, Mr. Peters was injured and subsequently sued the defendants for allegedly negligently causing him to compete against others from a higher weight class and in a manner that required certain skills in which he had no experience. In response, Mr. Soares brought an application to sever the issues of liability and damages. In seeking to resolve the issues and dismiss the lawsuit on a summary trial, Mr. Soares asserted that Mr. Peters had voluntarily assumed the risk of injury by signing two waivers that bar such claims, and also invoked the legal doctrine of *volenti non fit injuria*, which is a

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office. The author would like to thank Christina Shum, B.M.T., J.D., Student-at-Law for her assistance in preparing this Bulletin.

[1] 2019 BCSC 189

common law maxim holding that, where a plaintiff has willingly placed himself in a situation that could result in harm, that plaintiff is barred from bringing a claim should injuries occur as a result.

The court declined to sever the issues of liability and damages and also declined to examine the *volenti* argument advanced by Mr. Soares. However, the court focused, by way of summary trial, on the issue of whether the waivers had been signed and accepted by Mr. Peters, and if so, whether the waivers barred him from making his claim. As such, the court examined the two waivers at issue: the waiver within the membership agreement that was signed by Mr. Peters when he joined the academy, and the waiver included in the online form that Mr. Peters completed when signing up for the competition.

C. ANALYSIS AND DECISION

The court found that both waivers were insufficient in barring the claim of negligence made by Mr. Peters against the academy and Mr. Soares, as the membership agreement clause did not apply to Mr. Peters' claims, and there was no evidence indicating the terms of the online form. Drawing on the basic principles of contract law interpretation, the court affirmed that, while general rules of interpretation apply to the interpretation of releases and waivers, "releases only cover matters specifically in the contemplation of the parties at the time the release was given."[2] The court also referenced the leading decision on exclusion clauses, which includes waiver provisions, *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* ("*Tercon*"), [3] and acknowledged that the waiver must "be read in harmony with the rest of the agreement and in light of its purposes and commercial context."[4] In analyzing whether the waiver should be enforced, the court noted three broad considerations which originated from *Tercon* and was summarized in *Chamberlin v Canadian Physiotherapy Association*:

> a) whether, as a matter of contractual interpretation, the exclusion clause applies to the facts of the case;
>
> b) whether the exclusion clause is unconscionable; and
>
> c) whether the court should otherwise refuse to enforce the exclusion clause on public policy grounds.[5]

---

[2] *Ibid* at para 14.
[3] *Tercon Contractors Ltd v British Columbia (Transportation and Highways),* 2010 SCC 4.
[4] *Soares, supra* note 1 at para 15.
[5] *Chamberlin v Canadian Physiotherapy Association,* 2015 BCSC 1260 at para 55.

In deciding that both waivers were unenforceable, the court framed the analysis in two parts: 1) determining whether the waiver terms were broad enough to include the claim brought forth by Mr. Peters, and 2) whether Mr. Peters would be bound by the terms of the waiver. Waivers that contain language that is imprecise, vague, or ambiguous could render the waiver unenforceable. However, the court clarified that including language in the waiver expressly absolving a party of negligence would not, in itself, bar a negligence claim. Specifically, the court stated that the "failure to use the word negligence may still bar a claim in negligence if all the words of the clause, considered collectively, clearly convey the concept that the waiver prohibits a claim against the party tendering it for that party's negligence."[6] With respect to determining whether the plaintiff is bound by the terms of the waiver, the court affirmed that the party tendering the waiver does not generally need to take reasonable steps to ensure that the signing party is aware of and understands the "onerous terms" of the agreement. However, such an obligation may arise where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question.[7]

1. <u>Membership Agreement</u>

The court held that the waiver provisions in the membership agreement did not satisfy the first factor of the *Tercon* considerations, in that the words of the waiver did not effectively include the circumstances of a *competition*. The court noted that the wording of the waiver provisions in the membership agreement, reproduced below, did not reference "competitions" but only specified "classes":

> 5. In consideration of my being permitted to participate in the Classes, I for myself, my heirs, executors, administrators, successors, assigns and anyone else who may claim on my behalf hereby waive any and all claims, liability and damages I may now or in the future have against The Club, its directors, officers, instructors and staff and all persons acting under its authority and their respective heirs, executors, administrators, successors and assigns, arising by any means whatsoever, including, but not limited to death, injury, damages to or loss to my person or property of any kind whatsoever, no matter how caused arising from or in connection with my participation in the Classes, however caused.
>
> 6. I further hereby release, remise and forever discharge Brazilian Martial Arts, its owners, directors, officers, partners, instructors and staff and all persons acting under its authority and their respective heirs, executors, administrators, successors, and assigns from and against all demands, claims, actions, damages, costs and expenses arising from or with respect to death, injury, damages or loss to my person or property of any kind whatsoever, no matter how caused arising from or in connection with my participation in the Classes whether or not caused by, in

[6] *Soares, supra* note 1 at para 18.
[7] *Ibid* at para 19.

> whole or in part, negligence or gross negligence, breach of contract, breach of any statutory or other duty of care, including any duty owed under the Occupiers Liability Act (British Columbia).[8]

Additionally, the court found that no evidence had been provided to the courts indicating that either Mr. Peters or Mr. Soares had contemplated the circumstances of a competition at the time that Mr. Peters signed the membership agreement. As such, the court held that both Mr. Peters and Mr. Soares did not have the competition in mind when Mr. Peters signed the membership agreement. Because the first *Tercon* consideration was answered in the negative, the court did not proceed to the remaining two factors.

2. Online Competition Form

The court also found the online competition form to be insufficient in barring a claim made by Mr. Peters, as there was no evidence to establish what language was used in the form. During examination for discovery, Mr. Peters deposed that he did not understand that the waiver also released the defendant from injuries arising by fault of the defendant, but had thought the waiver merely applied to injuries arising from his own conduct. However the court was unable to confirm the language used in the online waiver. Specifically, while the form submitted to the court stated "WAIVER FORM FOR LIABILITY AND RELEASE", the actual provision was not included; instead the form contained an arrow next to the heading, possibly indicating that the form contained a drop down menu, expanding mechanism, or a link to more content.

While another document, entitled "Waiver Form for Liability and Release", was submitted to the court, Mr. Soares deposed that he did not know whether such document was the form used for the online registration to the competition. Mr. Soares testified that he was not responsible for creating the online competition form, but had hired a company to manage the registration of the students. Further, while Mr. Soares was provided the opportunity to file additional affidavit evidence to clarify the issue, he declined to do so. As such the court could not confirm whether Mr. Peters had, based on the terms of the online competition form, released the defendants from injuries arising from the alleged wrongdoing of the defendants. As such, the court held that the online competition form also did not satisfy the first *Tercon* consideration, and was unenforceable.

[8] *Ibid* at para 23.

D. CONCLUSION

Waivers, as previously discussed in the *Charity & NFP Law Bulletin No. 391*,[9] are an important risk-management tool and can be an effective shield from liability claims. Liability waivers are also complex legal documents and are subject to close scrutiny by courts, given that the effect of a waiver would be to deprive an injured person of their legal rights to seek compensation for their injuries. This decision is a reminder for charities and not-for-profits to examine their waivers and to ensure that these waivers appropriately address the circumstances in which they are meant to apply. Organizations providing a broad range of activities should ensure that the appropriate waivers are used for the appropriate programs, or that a general waiver contemplates all of the organization's programming.

Online waivers, which were also discussed in the *Charity & NFP Law Bulletin No. 404,*[10] have become much more prevalent in recent years, and have been found enforceable by various courts. However, as demonstrated in this decision, such online waivers need to be carefully documented and maintained in a way that can confirm the precise terms to which a participant of a program agreed. Hiring a third party company to create and manage online waivers does not exempt the organization from needing to be aware of the terms of agreement. Also, while online terms may be easily updated, charities and not-for-profits must keep track of changes made to these online agreements, as the current version of an agreement may not apply to a participant who had agreed to the online waiver years before. Because the terms of the waiver are essential to the determination of whether it should be enforced by the courts, charities and not-for-profits should keep track of all historical versions of these online waivers as a part of their recordkeeping practices.

CARTERS

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
Toronto · Ottawa · Orangeville
www.carters.ca **www.charitylaw.ca** **www.antiterrorismlaw.ca**
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. © 2019 Carters Professional Corporation

00366161.DOCX

[9] Barry W. Kwasniewski, Charity & NFP Law Bulletin No. 391, "Court Upholds Rock Climbing Waiver" (29 September 2016), online: http://www.carters.ca/pub/bulletin/charity/2016/chylb391.pdf.
[10] Barry W. Kwasniewski, Charity & NFP Law Bulletin No. 404, "Electronic Liability Release Held Enforceable" (25 May 2017), online: http://www.carters.ca/pub/bulletin/charity/2017/chylb404.pdf.