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BRITISH COLUMBIA COURT OF APPEAL: YOU CANNOT WAIVE LIABILITY FOR MOTOR VEHICLE ACCIDENTS

Richards Buell Sutton Insurance Newsletter

By RBS Lawyers

The BC Court of Appeal recently ruled that waivers purporting to exclude liability for motor vehicle accidents are unenforceable because such waivers are contrary to public policy. The decision may spark debate outside of the insurance industry as it raises a fundamental philosophical question: when, if ever, should freedom to contract yield to protection of the public good?

The public good at issue in *Niedermeyer v. Charlton*, 2014 BCCA 165 of course relates to minimizing harm arising from the use of motor vehicles, and regulating the flow of compensation for that harm. Stated in wordier fashion, it is in the collective interest of British Columbians to enjoy roads that are safe and regulated in accordance with the policy initiatives reflected in British Columbia's universal compulsory motor vehicle insurance scheme. The court has ruled, though not unanimously, that this collective interest is akin to the protection of fundamental human rights, and as such, one cannot contract out of it.

The Facts

Ms. Niedermeyer was badly injured during a zip-line excursion at Whistler in 2008. The injuries arose not during the actual zip-line activity, but afterwards while the plaintiff was riding back to Whistler Village on the zip line operator's bus. The comprehensive waiver in issue contained language excluding claims for injuries arising during "travel to and from the tour area".

The Ruling At Trial

The case was heard on a summary trial, where the plaintiff challenged the waiver on a number of fronts. She argued that it was unconscionable, that it was never properly brought to the plaintiff's attention and that it was contrary to public policy. Each argument failed. On the public policy issue, the court decided the issue was not engaged at all, stating that this debate would arise only in the event that the universal motor vehicle insurance scheme was somehow triggered and it was not triggered because the release itself precluded the advancement of a claim.

The Ruling at Appeal

The Court of Appeal disagreed with the trial judge only on the public policy issue. The court found the trial judge too technical in rejecting the public policy argument. Because an otherwise enforceable release might shut a claimant out from the benefits of the statutory motor vehicle scheme, reasoned the higher court, this does not oust a public policy analysis. The policy debate is much wider than that. The fact of the "long-standing statutory scheme" the court wrote "is a strong indication that there is a public policy interest engaged when motor vehicle accidents are at issue". In other words, the analysis is immersed in the policy debate from the get-go where a contract purports to eliminate liability for losses caused by a car crash.

The Court of Appeal's reasons go on to trace the history of government initiatives to deal with the destructive reality of cars, including the genesis of British Columbia's compulsory auto insurance scheme and the establishment of the Insurance Corporation of British Columbia in 1973. In the discussion, certain aspects of the scheme are highlighted, such as its compulsory nature, the minimum prescribed policy limits, the availability of compensation for loss caused by uninsured and unidentified motorists and ICBC's growing role in provincial road safety initiatives.

Practical Considerations for Insurers

On a public policy level, the Court of Appeal has stated that the need to look after each other in the face of danger posed by cars is paramount to values that underpin freedom to contract. We are left to wonder where the application of public policy may lead if it gains momentum. Is there a reasonable argument that federal legislation that now regulates boaters, for example, is evidence of a "social contract" that should prohibit exclusion of liability for boating accidents?

On a practical level, the impact of the decision is obvious for primary and excess automobile insurers in both the private and commercial motorist contexts. For example, insurance policies written in the recreation and tourism industry, where waivers may be material to the risk insured, ought to be reviewed and the risk reconsidered. Further, claims handlers must be mindful of the need to determine if the injuries arose out of the use or operation of a motor vehicle for if they did, waivers of liability for such injuries, for the moment, are unenforceable.

Having said this, certainly there is no reason to stop using these sorts of waivers. The dissent at the Court of Appeal is an indicator that the final word on this issue may still come from the Supreme Court of Canada.