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RELEASE AND WAIVER OF LIABILITY UPHELD IN ZIP-LINE ACCIDENT CASE

Richards Buell Sutton Insurance Law Newsletter

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On September 27, the Supreme Court of Canada dismissed an application for leave to appeal from the judgment of the B.C. Court of Appeal in *Loychuk and Westgeest v. Cougar Mountain Adventures Ltd.,* 2012 BCCA 122. In doing so, the Supreme Court of Canada has effectively upheld the appeal court and the trial court decisions which enforced a release and waiver of liability agreement to dismiss an action brought by two customers of a zip-line tour who were injured in an accident that was caused by the admitted negligence of Cougar Mountain employees. The courts refused to draw a distinction between the use of releases in recreational activities where the participant controls the activity (like skiing or snowmobiling) and activities where the operator controls the activity (like zip-lining). The courts also refused to use B.C. consumer protection legislation to declare the release to be unconscionable under the *Business Practices and Consumer Protection Act* (the "*BPCPA*") or unconscionable at common law.

THE FACTS

Cougar Mountain operates zip-line tours in Whistler, British Columbia. The zip-line is operated by guides, who communicate by walkie talkie, and are responsible for deciding when each person is to be sent down one of the zip-lines. The customer is strapped into a harness and trolley which is sent down a cable line from a higher platform to a lower one. A guide is posted on each platform.

This accident occurred when Ms. Loychuk was sent down a line but stopped before reaching the lower platform. Ms. Westgeest, who was unable to see that Ms. Loychuk was suspended on the line below, was sent down the same line by a guide. With no ability to stop herself, Ms. Westgeest collided with Ms. Loychuck, causing injury to both. Miscommunication between the guides was the sole cause of the accident. The sole defence was a release and waiver of liability form which both participants were required to sign before being allowed to ride the zip-line.

Both participants were familiar with, and had previously signed, releases and waivers of liability. Ms. Loychuk owned a kick boxing/fitness business in which she required her clients to sign a waiver of liability. She had also previously signed waivers in order to purchase family ski passes. Ms. Westgeest was

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a law school graduate who had previously signed liability waivers for sporting activities.

THE TRIAL JUDGE'S DECISION

The trial judge found that Ms. Loychuk and Ms. Westgeest had each signed the release knowing that it was a legal document, affecting their rights. He found that Cougar Mountain had taken steps to bring the contents of the release to their attention and that they each had sufficient time to read the document before signing. The trial judge refused to accept the argument that the law relating to waivers of liabilities should be limited to hazardous activities in which participants have some measure of control over the risks they are assuming. He found that the releases were not unconscionable. He also found that Ms. Loychuk and Ms. Westgeest voluntarily went zip-lining, knowing that they had to sign a release to do so.

THE DECISION OF THE COURT OF APPEAL

The B.C. Court of Appeal upheld the trial court's decision to enforce the release and dismiss the action. The primary ground of appeal was based on an argument that the release was either unconscionable at common law or under the *BPCPA,* or unenforceable on public policy grounds.

In its decision, the Court of Appeal referred to a three part inquiry to be undertaken when challenging the enforceability of an exclusion of liability clause, as set out in *Tercon Contractors Ltd. v. B.C. (Transportation and Highways),* 2010 SCC 4:

1. Does the exclusion of liability clause apply to the facts of the case? If it does then,
2. Was the exclusion clause unconscionable at the time the contract was made? If it was not unconscionable then,
3. Should the court nevertheless refuse to enforce the valid exclusion clause because of some overriding public policy consideration that outweighs the very strong public interest in the enforcement of contracts?

The parties conceded that the first step in the three part inquiry was satisfied: i.e. the release applied to the circumstances of the case.

The appellants, however, argued that the second step had not been satisfied and that the release was unconscionable at the time it was signed. The Court of Appeal referred to a well-established line of authorities in Canada holding that releases relating to recreational sports activities are not unconscionable. The appellants tried to distinguish those case authorities on the grounds that they did not relate to activities in which the operator had total control of the risk, like zip-lining. The Court of Appeal, however, concluded that it was not unconscionable for the operator of a recreational sports facility to require a person who

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wishes to engage in risk activities, to sign a release that bars all claims for negligence against the operator and its employees. If a person doesn't want to participate on that basis, then he or she is free not to engage in the activity.

The appellants argued that, even if the release they signed was not unconscionable at common law, then it was unconscionable by virtue of section 8 of the *BPCPA*, which requires a court, in determining whether a consumer act or practice is unconscionable, to consider whether the terms or conditions on which the consumer entered into the consumer transaction "were so harsh or adverse to the consumer as to be inequitable". The Court of Appeal concluded that the essential elements needed to establish unconscionability at common law were the same as those under the *BPCPA*. Since the facts didn't support a finding of unconscionability at common law, neither did they support such a finding under the *BPCPA*.

The third and last step in the analysis was to determine whether the appellants could establish some overriding public policy reason for not enforcing the release. The Supreme Court of Canada has previously held that comprehensive releases are not contrary to public policy: *Dyck v. Manitoba Snowmobile Association,* [1985] 1 SCR 589. Although a B.C. Law Reform Commission had previously recommended the enactment of legislation to preclude commercial recreational operators from excluding or limiting liability for personal injury or death from risks such as the unsafe operation of mechanical equipment or recreational apparatus by the operator's employees, that Law Reform Commission recommendation did not establish an overriding public policy that would justify a court striking down an agreement which was knowingly and voluntarily entered into by a person wishing to engage in an inherently risky recreational activity. The Court of Appeal noted that these types of releases have been in use for many years and have consistently been upheld by the courts. If there are public policy reasons why such releases should not be enforceable when an activity is totally within the control of an operator, then the Court of Appeal concluded that any change in the law was properly a matter for the legislature.

PRACTICAL CONSIDERATIONS FOR INSURERS AND RISK MANAGERS

By dismissing the application for leave to appeal from the decision of the Court of Appeal, the Supreme Court of Canada has endorsed the view that there is no distinction between releases used in high risk activities which are within the control of the participant (eg. skiing and snowmobiling) and activities which are within the control of an operator (eg. zip-line tours).

A well drafted release and waiver of liability which is filled out and signed by the participant before being allowed to engage in the activity, and after the operator has taken steps to bring the contents of the release to their attention and given them sufficient time to read it, will be enforced by the courts.

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