

Waiver Agreement Enforced in Zip-Line Accident

A case comment by [Carmen Place](#) and [Max Hufton](#) (Lindsay Kenney LLP)

Waiver of Liability and Assumption of Risk Agreements remain enforceable and resilient to novel legal argument based on the Business Practices and Consumer Protection Act: *Loychuk and Westgeest v. Cougar Mountain Adventures Ltd. et. al.*, 2011 BCSC 193.

The plaintiffs alleged personal injury as a result of colliding with each other on a zip line operated by the defendant Cougar Mountain Adventures Ltd. The defendant conceded that the accident was caused by the negligence of its employees but argued that the claim should be dismissed because the plaintiffs had each signed a waiver releasing the defendant and its employees from any claim. The court noted that other than the waiver, there was no defence to the plaintiffs' action.

The plaintiff Loychuk was the owner of a fitness business which offered kick boxing/fitness programs for women. In pursuit of that business she required her clients to sign waiver of liability and assumption of risks agreements. She would explain to her clients what the waiver was for and advise them that they would not be allowed to participate unless they signed the waiver. She had sold franchises in her business which included in the franchise package a waiver of liability and assumption of risk agreement. She had in the past signed a waiver herself when she had purchased a ski pass. She knew the waiver would prevent her from suing the defendant for certain things like if she tripped and broke her leg but she said she did not realize that it gave the defendant immunity for its own failure, no matter how severe.

The plaintiff Westgeest at the time of the accident had just finished her last semester of law school. She acknowledged that she knew she was signing a waiver of claims if she was injured on the zipline. She recalled signing a waiver on at least one previous occasion when she had rented a kayak. When she signed the waiver, she understood she was waiving certain legal rights. She said, however, she did not appreciate she was waiving all rights against the defendant, including claims arising from its own negligence. She said she did not really think about the waiver because they were in a bit of a rush and she did not think it was a risky activity.

The waiver in question was confined to a single page headed with upper case bold print stating, "RELEASE OF LIABILITY, WAIVER OF CLAIMS AND ASSUMPTION OF RISK AGREEMENT". The waiver continued, "BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT". This was followed by the exclamatory statement, "PLEASE READ

CAREFULLY!”. Guests of the zip line operator were required to initial a box immediately to the right of the final exclamatory statement. Both plaintiffs did so.

The waiver specifically released the tour operator from claims resulting from injury or death “DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS LIABILITY ACT” on the part of the tour operator including, “THE FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF PARTICIPATING” in the tour.

Guests were additionally required to provide their name, address and weight and sign at the bottom of the waiver. Both plaintiffs did so.

The operator advertised the tour on its website. The website advised that the tour would involve travel at speeds up to 100 kph while suspended on the zip line. The website also informed guests that prior to participation they would have to sign a waiver. Both plaintiffs had viewed the website prior to participation.

The Court found the waiver enforceable, noting:

The most casual review of the document would have revealed to the plaintiffs that the release was a legal document impacting on their legal rights to sue or claim compensation following an accident. They asked no questions concerning the terms of the release. They never indicated to Cougar that they were not prepared to sign the release.

The Court rejected the argument that the degree of control exercised by the plaintiffs during their participation in the activity, which on the facts here was no control, was a basis for distinguishing the leading case of *Karoll v. Silverstar Mountain Resorts Ltd.*, noting that *Karoll* is a case of general application which applies to all contracts.

The plaintiffs additionally raised the novel argument that the waiver was void pursuant to the provisions of the Business Practices and Consumer Protection Act. They argued that either the operator secured their participation as a result of deceptive practices, contrary to section 4 of the Act, or that the agreement was unconscionable, contrary to section 8 of the Act. The plaintiffs argued that the defendant engaged in deceptive acts by misleading the safety risks involved and that they failed to warn potential customers that the most common accidents in the zipline industry were person to person collisions such as occurred in this case. They also argued that the defendant placed unfair pressure on them by presenting the waiver immediately before the tour was to depart, that they did not advise them of the risk and that the terms of the waiver were so harsh and adverse to the plaintiffs that they were inequitable.

It was acknowledged that the Act had never been applied in a recreational sports context before, however, assuming that it did apply the evidence did not support that the defendant committed either deceptive or unconscionable acts. There was no evidence that the representation on the defendant's website concerning the safety of the system was anything but true and the fact that there had been some accidents did not lead to a contrary conclusion. The court noted that the description of the zipline activity on the website made it "obvious to any participant that the activity was not free of risk". In addition, the waiver set out in detail the many risks and dangers involved and nobody was forced to participate in the activity as the defendant would have given the plaintiffs a refund if they did not want to sign the waiver. Accordingly, the court found that the defendant did not take unfair advantage of the plaintiffs and that the terms of the waiver were not inequitable.

The Court, again with reference to the fact that signing a waiver as a precondition of participation was stated on the website, rejected the final argument of the plaintiffs that the contract failed owing to lack of consideration.

In the result, the court found that the waiver was valid and enforceable and a complete defence to the claims which were dismissed with costs awarded to the defendants.

The case was argued for the defendants by Mr. [Richard B. Lindsay](#), Q.C. with the assistance of members of Lindsay Kenney's Sports and Recreational Risk Management group.

Richard Lindsay QC, Carmen Place & Max Hufton
Partners & Associate – [Insurance Law & Litigation](#)
Lindsay Kenney – Vancouver Office