

# Release of Liability Found To Be Enforceable In Recent B.C. Decision

By Barry Kwasniewski\*

## A. INTRODUCTION

Many organizations require an individual to sign a waiver of liability as a condition of participating in certain activities, such as sports or recreational activities, where there is the risk of injury. In these kinds of circumstances, a waiver is often used to protect the organization from potential legal liability. When a charity or not-for-profit is organizing events that may entail risks of injury, it is important to consider the benefits of a waiver of liability. The British Columbia Supreme Court decision in *Loychuck v. Cougar Mountain Adventures Ltd.*<sup>1</sup> illustrates the importance of securing waivers as a liability shield in cases of serious personal injury. This article outlines this recent decision, which upheld a waiver releasing a zip-line operator from liability.

## B. FACTS

In the *Loychuck* decision, the defendant, Cougar Mountain Adventures, made an application for summary dismissal of the action by the plaintiffs, Loychuck and Westgeest. The plaintiffs participated in a zipline tour, which was operated by the defendant in Whistler, British Columbia. During their ziplining experience, one of the plaintiffs proceeded down the zipline but did not reach the next platform. The second plaintiff was directed by the tour guide to proceed down the line before the first plaintiff had reached the platform, which caused a collision. Both plaintiffs suffered serious injuries as a result of the collision at such high speeds.

The plaintiffs were required to sign a release waiving liability and assuming the risk of injury before embarking on the tour. Without this form, individuals were not permitted to participate. Both plaintiffs signed the waivers, and had read the defendant's website before the tour to educate themselves on the associated risks. The defendant conceded that the negligence of their

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<sup>1</sup> [2011] B.C.J. No. 254

employees caused the accident, however they claimed that the signing of the waiver was a complete defence to the action. The plaintiffs responded that the release was unenforceable, unconscionable, and invalidated by s. 3 of the *Business Practices and Consumer Protection Act* (“BPCPA”).

### **C. ISSUE**

At issue in this decision was whether or not the release that was signed by the plaintiffs was valid and enforceable and could be used as a defence to the plaintiffs’ claims. A review of the court’s analysis and decision is set out in detail below.

### **D. ANALYSIS**

#### 1. Enforceability of the release

In reviewing the issues relating to the enforceability of the release, the court cited earlier case law, and in particular the principle that a party to a contract (such as a release) has an obligation to take reasonable steps to apprise the other party of any onerous terms to which he would not be expected to consent to. The court held that the defendant’s release clearly stated that by signing the document the right to sue would be waived, which fact was brought to the plaintiffs’ attention prior to signing. The plaintiffs were also given the opportunity to read and ask questions about the release before signing it.

#### 2. Unconscionability of the release

The plaintiffs submitted that the release was unconscionable.<sup>2</sup> However, there was no evidence of duress, coercion or unfair advantage and the plaintiffs participated voluntarily since they were aware that a waiver was required in order to participate. The court also held that there was no rule of law, or statute, prohibiting releases for injuries caused by operator-controlled incidents. In this context, the court was not prepared to find that a release exempting liability from the negligence (ie. lack of reasonable care) was unconscionable.

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<sup>2</sup> Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party. (*Black’s Law Dictionary*)

3. Release void under the Business Practices and Consumer Protection Act

The plaintiffs submitted that the defendant was deceptive and misleading in allegedly misinforming the plaintiffs of the safety risks involved. They alleged that the company website was deceptive, in that it stated it had the safest zip-line system in the world, but failed to mention three accidents since 2007. Deceptive and unconscionable acts or practices are prohibited under the BPCPA. The judge found that the defendant provided accurate representations on their website concerning safety and the risks and dangers involved, and therefore did not breach the provisions of the BPCPA. The fact that there had been some accidents did not lead to a contrary conclusion by the court.

**E. CONCLUSION**

Based on the above considerations, the release was found to be valid and enforceable, providing a complete defence to the plaintiffs' claims. Despite the injuries suffered by the plaintiffs as a result of the defendant's negligence, the action was dismissed. This decision illustrates how meaningful the signing of a release can be in situations where an organization and/or its employees are taking part in high-risk activities. Organizations should be aware of these issues when drafting waivers releasing it from liability.