

"zipping" liability in the bud: zip-line waiver withstands court's scrutiny

The British Columbia Court of Appeal recently upheld a lower court decision that two customers who signed waivers before embarking on a Zip-Trekking outing were prevented from suing Cougar Mountain Adventures Ltd. for serious personal injuries. Evidence suggested that "miscommunication between the guides was the sole cause of the accident."

Cougar Mountain Adventure operates a Zipline and a promotional website that describes the activities' infrastructure noting that a waiver has to be signed by participants. To take part in the Zip Trek activity the Plaintiffs were both required to sign the one page waiver that stated partly in capital letters, "by signing this document you will waive certain legal rights, including the right to sue or claim compensation following an accident." The Plaintiffs "filled in the required information and signed at both the top and bottom of the form." The release included an assumption of risks, a release of liability, waiver of claims and an indemnity agreement (the "Waiver"). The accident occurred when Cougar Mountain Adventures negligently sent one of the Plaintiffs down the zip line before the other Plaintiff was safely out of the way, causing a midline collision. Other than the existence of a waiver of liability, there was no defence to the claim.

The trial judge found that the two Plaintiffs were bound by the signed Waiver and had no claim against Cougar Mountain Adventure. The Plaintiffs attempted to advance an argument that the Waiver was unenforceable, unconscionable and invalidated by

the *Business Practices and Consumer Protection Act*. The Trial Judge rejected those arguments and found that:

- the Participants signed the release knowing that it was a legal document affecting their rights;
- Cougar Mountain Adventures had taken steps to bring the contents of the release to their attention and they had sufficient time to read it;
- there was "no evidence of duress, coercion or unfair advantage resulting from economic or psychological need," that would make the release unconscionable. The release coupled with the statements on the website regarding risks led to the conclusion that they had not been taken unfair advantage of;
- without determining the applicability of the *Business Practices and Consumer Protection Act*, that there was no evidence that the representations on Cougar's website on the structure of the system were untrue and further it did not relate to the zip lines operation rather to its infrastructure; and
- that the Plaintiffs were aware that their participation in the activity was contingent on signing a waiver, and thus the waiver did not fail for lack of consideration.

The Plaintiffs appealed the dismissal of their claims to the Court of Appeal. In addressing the various grounds of appeal advanced by the Plaintiffs, the Court of Appeal made it very plain that it was fully prepared to uphold the Waiver, even when the injuries caused were significant. The Waiver was neither unconscionable nor should be overturned on public policy grounds.

Simply stated, the Court of Appeal decision recognizes that people are free to take part in risky activities but, if they choose to do so and sign a waiver, they are most likely stuck with their bargain. In the words of the court, "it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operation and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity." The fact that the activities were

found to be "inherently risky recreational activities" was not sufficient reason to make the waiver unenforceable. The Court applied the Supreme Court of Canada's recent decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* and that Court's analytical approach to unconscionability of limitation of liability clauses.

The other grounds of appeal such as Cougar Mountain Adventure's website being "deceptive advertising" and a lack of consideration for the signing of the waiver were also considered and rejected by the Court of Appeal.

The lesson for companies using liability waivers in their contracts is that when properly drafted and clearly brought to the attention of the party giving up their rights of civil action, the courts will uphold and enforce such waivers, even in the face of significant injuries or other harm caused by negligent conduct to the innocent party.

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[a cautionary note](#)

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