

CANADA / JUDGMENT

Chamberlin v. Canadian Physiotherapy Association

2015 BCSC 1260

COURT

Supreme Court of British Columbia

DECIDED

21 July 2015

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2015 BCSC 1260 Chamberlin v. Canadian Physiotherapy Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chamberlin v. Canadian Physiotherapy Association,

2015 BCSC 1260

Date: 20150721

Docket: 14-0358

Registry: Victoria

Between:

Rosanna Chamberlin

Plaintiff

And:

Canadian Physiotherapy Association, Physiotherapy Association of British Columbia (A branch of the Canadian Physiotherapy Association), David Koretechuk, Marjorie Belot, Christine Balkwill, Jennifer Lee, and Leif Cope

Defendants

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the plaintiff:

D. Quantz

Counsel for the defendants:

M. Schalke

Place and Date of Hearing:

Victoria, B.C.

August 7 and October 14, 2014

Place and Date of Judgment:

Victoria, B.C.

July 21, 2015

Introduction

- [1] The plaintiff claims she was injured when she participated in a continuing education course that was organized and administered by the defendant, the Canadian Physiotherapy Association (the "Course" and the "CPA").
- [2] The defendants say the plaintiff signed a waiver releasing them from any responsibility for any injuries or losses attributable to her participation in the Course. They also maintain they are not liable because the plaintiff willingly assumed the risks participation in the Course posed to her.
- [3] By notice of application filed 14 June 2014, the defendants seek to have the plaintiff's claims dismissed by summary trial, pursuant to Rule 9-7 of the Rules of Court.

Background Facts

The Parties

- [4] The plaintiff, Ms. Chamberlin, is a physiotherapist registered with the College of Physical Therapists of British Columbia (the "College"). Ms. Chamberlin was a recent graduate when she enrolled in the Course in January 2012.
- [5] The CPA is a professional organization that provides continuing education to practicing physiotherapists. The Physiotherapy Association of British Columbia ("PABC") is a branch of the CPA. The CPA and PABC are separate legal entities.
- [6] David Koretschuk, Marjorie Belot, and Christine Balkwill are registered physiotherapists with the College. They served as CPA-certified instructors for the Course.
- [7] Jennifer Lee and Leif Cope are registered physiotherapists who were, along with Ms. Chamberlin, participants in the Course.

The Course

- [8] The Course that the CPA hosted was entitled "Advanced Manual and Manipulative Therapy: Level 2 Upper Quadrant" and was designed to train physiotherapists in advanced manual and manipulative techniques for upper quadrant musculoskeletal conditions. It took place over a period of four consecutive months, one weekend per month, at the University of British Columbia campus in Vancouver. The actual dates were:
1. Weekend #1: 17 to 19 February, 2012;
 2. Weekend #2: 16 to 18 March, 2012;
 3. Weekend #3: 27 to 29 April, 2012; and
 4. Weekend #4: 18 to 20 May, 2012.
- [9] It appears that a total of 84 hours of training time was scheduled on these dates, inclusive of breaks.
- [10] When Ms. Chamberlin registered for the course in early 2012 she was aware that it had a practical "hands-on" aspect to it that would involve the physical manipulation of her body. She believed Course participants were expected to take part in the practical exercises, but they could "opt-out" where a pre-existing injury would prevent safe participation. She explained that she attended the Course as part of her ongoing professional obligation to the College to remain current in the field of physiotherapy.
- [11] Prior to the commencement of the Course, Ms. Chamberlin received an email from the CPA confirming her registration. Attached to the email was a two-page document which included the address of the Course, the dates and times of the various sessions, and other relevant information. The second page of the document included the following:

LIABILITY

Participants are responsible for their own well being while attending the course. It is also their responsibility to inform the instructor and their fellow participants if there is some contraindication to examination or treatment for a part of their musculo-skeletal system and therefore they should not act as model in the practical sessions.

PARTICIPANT PREPARATION FOR COURSES

It is expected the participant will review the appropriate musculo-skeletal anatomy prior to the course. All participants must be physically able to take part in the practical sessions.

- [12] The end of the document provides in bold: "Proof of completion of previous courses is required for you to start the course." Nowhere in the email or the attachments to it is there any mention of a requirement to sign a waiver.

The Waiver

[13] Ms. Chamberlin says that she first learned of the requirement for her to sign a waiver on 17 February 2012, the first day of the Course. The waiver was included in a course manual that was provided to her and it reads as follows (the "Waiver"):

Canadian physiotherapy association --

Diploma of Advanced Orthopaedic Manual and Manipulative

Physiotherapy courses

WAIVER OF COURSE LIABILITY

I accept that there are risks involved in this course's techniques and procedures and thereby waive any and all claims which I might have at any time have (sic), against the:

1. Canadian Physiotherapy Association,
2. Orthopaedic Division, Education Committee,
3. Provincial Orthopaedic Division Course Representative,
4. Members of 1.-3. staff and agents,
5. Site of Course

in any manner whatsoever relating to my participation in this Diploma of Advanced Orthopaedic Manual and Manipulative Physiotherapy Course.

Diploma of Advanced Orthopaedic Manual and Manipulative Physiotherapy Course Level: ____

Senior or Chief Instructor Name: ____

Senior or Chief Instructor Registration Number: ____

If Applicable:

Co-Instructor Name: ____

Co-Instructor Registration Number: ____

Lab Assistant Name: ____

Lab Assistant Registration Number: ____

Participant's printed name in full: ____

Participant's Signature: ____

Date signed: _____

- [14] I will note parenthetically at this point, that during his submissions, counsel for the defendants acknowledged that there was grammatical problem with the first full sentence of the Waiver. To correct the problem and to allow the sentence to make grammatical sense, counsel proposed that the second "have" be deleted.
- [15] Attached as an exhibit to Ms. Belot's affidavit #1 sworn 13 June 2014, is a copy of the speaking notes she used during her introductory comments to the participants on the first day of the Course. The notes include the following as the sixth item to address:
- "Signed Waivers (Advocate for yourself and protect your body; give honest feedback)".
- [16] Ms. Belot asked all of the participants to sign and return the Waiver. She also asked them to confirm that they had passed the course's predecessor: "Advanced Manual and Manipulative Therapy: Level 1 Upper Quadrant."
- [17] In evidence is a copy of the Waiver that Ms. Chamberlin completed and returned to the Course organizers. Under the heading "Diploma of Advanced Orthopaedic Manual and Manipulative Physiotherapy Course Level", the phrase "2 Upper Quadrant" is handwritten. The fields relating to senior or chief instructor name and registration number, co-instructor name and registration number, and lab assistant name and registration number are all blank. Ms. Chamberlin's printed name and what appears to be her signature are handwritten on the document. The date of "Feb 17, 2012" is also handwritten.
- [18] There is no dispute among the parties that the Waiver was brought to the attention of the Course participants, including Ms. Chamberlin. However, what Ms. Belot said about the Waiver, and what Ms. Chamberlin understood to have signed, remains contentious.
- [19] Consistent with Ms. Belot's speaking notes, Ms. Chamberlin says the participants were told they were responsible for their bodies and needed to give honest feedback to the instructors. However, she maintains the Waiver was simply presented as a form for participants to review and sign so that the course could continue. According to Ms. Chamberlin, the Waiver and its implications were not otherwise explained to the participants. At paragraph 11 of her affidavit #1 sworn 16 July 2014, Ms. Chamberlin explained how she was made aware of the Waiver and what she was told about it:
- [11] The first I learned of the waiver was when it was presented as part of our course materials. We were told that we were responsible for our bodies and we needed to give honest feedback. The waiver was presented as a form for us to review and sign so we could continue in the course. I was never told about the meaning of the waiver. My review of the waiver was that I would not be able to make any claims about soreness or trips and falls on the premise.

- [20] According to Ms. Belot, she told the participants that they could not proceed in the Course without first reading and signing the Waiver. She also contends that she emphasized the importance of the Waiver and told the participants that they were responsible for their own bodies. At paragraph 6 of her affidavit #2 sworn 28 July 2014, Ms. Belot described what she said to the participants at the outset of the Course:
- [6] In response to paragraph 11 of the Plaintiff's Affidavit, during the first day of the Course I indicated to participants that it was important to read and sign the Waiver, as participants could not proceed with the Course's practical session without having done so. As even the Plaintiff acknowledges, I told participants that they were "responsible for their own bodies" at the same time I asked for the Waiver to be signed. As indicated in my prior Affidavit, I advised of the Course Format. [Emphasis added]
- [21] Aside from confirming that she told the Course participants that it was "important" for them to "read and sign the Waiver" and that they were "responsible for their bodies", Ms. Belot provides no further evidence on the topic of the Waiver or what she said about it, including anything to address Ms. Chamberlin's assertion that she was given no explanation of its meaning.
- [22] In their evidence, both Ms. Lee and Mr. Cope say that Ms. Belot gave the participants sufficient time to read the Waiver. Moreover, they explained that no one appeared to ask any questions about the Waiver during the first day of the course. They say they believed the Waiver would prevent participants in the Course from pursuing a legal claim in negligence against the CPA, the Course instructors, or any of the participants.
- [23] Ms. Chamberlin, however, says that she did not know or understand that by executing the Waiver she might be relinquishing her rights to sue those involved with the Course. At paragraph 12 of her affidavit #1, Ms. Chamberlin explained:
- [12] I had no idea that the CPA meant this document to waive all ability to sue for negligence on the part of the instructors or my fellow participants. Had I know that the CPA wanted to use this waiver for this purpose, I would not have signed it. There are other courses that I could have attended and, in fact, have attended with the CPA that did not require a waiver.

The Injuries

- [24] At the first weekend session of the Course, in February 2012, Ms. Chamberlin participated in all of the practical exercises. At the end of the weekend, she began suffering from headaches and neck pain. Ms. Chamberlin missed a few days of work the following week, and required massage therapy, physiotherapy, and pain medication to alleviate her symptoms.
- [25] In March 2012, at the second weekend session of the Course, Ms. Chamberlin informed the defendant Ms. Balkwill of the injury to her neck from the first session. According to Ms. Chamberlin, Ms. Balkwill showed little concern. Moreover, Ms. Balkwill failed to investigate anything in relation to the complaint or suggest any remedial steps to accommodate Ms.

Chamberlin's situation. Ms. Chamberlin was left with the impression that her symptoms were normal. Ms. Chamberlin knew Ms. Balkwill was a senior, experienced physiotherapist and one of the instructors on the Course. As such, she relied on Ms. Balkwill's judgment and opinion to continue participating in the Course.

- [26] During this same weekend session, Ms. Chamberlin trained with a fellow participant, Mr. Cope. At paras. 20 and 21 of her affidavit #1, Ms. Chamberlin explained what happened during that training session:
- [20] During weekend 2, I was practicing with the Defendant Leif Cope. I was hesitant and did not allow Mr. Cope to perform any techniques on my neck, which made it difficult because the instructors had not authorized me to not participate as a model. Mr. Cope was not able to practice his techniques since there was not enough time in the course for a group of three to practice together. As a result, I allowed Mr. Cope to perform a "lateral shear test" on my neck and he injured me instantly. The moment I stood up I fell to my knees crying, feeling nauseous and light-headed.
- [21] I approached the Defendant Marjorie Belot in tears explaining what happened and that something was wrong. It was only at this point that Ms. Belot conducted an assessment of me and said that my vertebrae were pushed off to the side misaligning my neck. Ms. Belot re-aligned my neck and briefly told Mr. Cope what he did wrong and said that no one else would perform neck techniques on me. As she was doing this, Ms. Belot joked that I had signed the waiver. I went and got an ice-pack and Advil.
- [27] This evidence from Ms. Chamberlin went unchallenged on this summary trial, and in particular Ms. Belot did not address it in her responsive affidavit #2.
- [28] In May 2012, at the fourth weekend session of the Course, Ms. Chamberlin was partnered with the defendant Ms. Lee. Ms. Chamberlin informed the Course instructors and Ms. Lee of a pre-existing condition in her shoulder, which results in hypermobility of her joints. The defendant Mr. Koretechuk used Ms. Chamberlin as a model to illustrate a shoulder test. She says that Mr. Koretechuk commented to her that she had unusual joints, but he did not caution Ms. Lee on using Ms. Chamberlin as a training partner. According to Ms. Chamberlin, when Ms. Lee was performing on her one of the techniques demonstrated by Mr. Koretechuk, Ms. Chamberlin's shoulder made a popping sound that startled Ms. Lee. Ms. Chamberlin says that she reported this injury to Mr. Koretechuk, who was working on a computer and not supervising any of the participants. Mr. Koretechuk did not assess Ms. Chamberlin's shoulder injury. According to Ms. Chamberlin, Mr. Koretechuk joked with her that it was a good thing she had signed a waiver. Aside from offering to place her arm in traction, Mr. Koretechuk offered little other assistance to her.
- [29] During the lunch break, Ms. Chamberlin purchased an ice-pack and some ibuprofen. The pain in her shoulder increased during the afternoon to the point where she could not move her arm. At the conclusion of this last session of the Course, Ms. Chamberlin returned home.

The Plaintiff's assumption of risk

- [30] The defendants, who deny the plaintiff's account of the events, say that Ms. Chamberlin had pre-existing medical conditions relating to her neck and shoulders. They also contend that she failed to adequately inform her instructors, the CPA, or her fellow participants about these conditions.
- [31] The defendants submit that Ms. Chamberlin's circumstances and conduct evidence a knowing and willing acceptance on her part of the risks involved in participating in the Course. In support of this position, the defendants point to Ms. Chamberlin's evidence where she acknowledges a medical history with respect to her shoulders and a pre-existing condition resulting in hypermobility of her joints. The defendants also refer to a lawsuit from 2009, where they say Ms. Chamberlin claimed compensation for injuries to her neck, shoulders, and back that she attributed to a motor vehicle accident.
- [32] In response, Ms. Chamberlin says that she did not think or believe that the Course was a risky activity. While she knew that some of the exercises might cause her to feel mildly stiff or sore afterwards, she did not anticipate or expect that her participation could result in serious injuries. She believed that the CPA would provide a safe and well-structured learning environment. She says that participants were told to report any issues to their instructors, which she did at the start of the Course, at the start of the third weekend, and after each successive injury.

Issues

- [33] In his written submissions, counsel for the defendants explained the foundation of their application as follows:
1. The Defendants ask that the Plaintiff's action against the Defendants be dismissed, and that the Plaintiff pay the Defendants' costs, because:
 - (a) the Defendants are entitled to rely upon the Waiver;
 - (b) to the extent that the Waiver does not bar the Plaintiff's claim in respect of some or all of the Defendants, the Plaintiff with full knowledge of the format of the Course and the risk of injury or damage to herself, willingly accepted the risk of participating in the Course and its practical sessions, thereby waiving any claim with respect to injury, loss damage or expense which might have been occasioned to her, per the doctrine of *volenti non fit injuria*; and / or
 - (c) in specific reference to the Defendant PABC, in the event that neither the Waiver nor the doctrine of *volenti non fit injuria* bar the Plaintiff's action against the Defendant PABC, the Plaintiff's action against the Defendant PABC still ought to be dismissed because the Defendant PABC had no role in arranging or administering the Course.
- [34] Using this as a framework for this application, there are four questions that need to be addressed and answered:

1. Are the matters raised on this application suitable for determination by summary trial?
2. Does the Waiver bar the plaintiff from claiming against the defendants?
3. Does the doctrine of *volenti non fit injuria* bar the plaintiff from claiming against the defendants?
4. Did the PABC have any role in the Course and if not should the plaintiff's action against it be dismissed?

Preliminary Evidentiary Objection

- [35] Before addressing the substantive issues raised on this application, I first need to rule on a number of evidentiary objections raised by counsel for Ms. Chamberlin.
- [36] In support of its application, the defendants seek to rely upon the following evidence:
1. Ms. Belot's affidavit #2;
 2. Ms. Lee's affidavit #1, sworn 28 July 2014; and
 3. Mr. Cope's affidavit #1, sworn 28 July 2014.
- [37] The plaintiff objects to the admissibility of these affidavits on two grounds. First, the plaintiff maintains that the affidavits do not comply with Rule 9-7(8) of the Rules of Court in that they are not proper rebuttal evidence. Supplementing that ground of objection, the plaintiff also contends that the affidavits contain impermissible hearsay, speculation or argument.
- [38] The defendants say the affidavits are necessary and appropriate in that they respond to and address issues raised in the plaintiff's application response and the evidence she has marshalled in support of her position on this application. As for the alleged hearsay, the defendants submit this evidence should be admitted under the principled approach to the hearsay rule. With regard to any portions of the affidavits that the court finds to be argumentative, the defendants submit those extracts can be redacted from the affidavit.
- [39] I begin by observing that where a contested application can result in a final order, the chambers judge hearing the application must be vigilant to ensure the evidentiary foundation presented in support of the application complies with the appropriate rules of evidence (See: *Cotton v. Wellsby*, [1991] B.C.J. No. 2783 (C.A.)). Hearsay evidence tendered as proof of the truth of the fact asserted, evidence based on information and belief, and evidence that amounts to speculation or argument will generally be ruled inadmissible on applications for final orders (See: *Kour Estate v. Bhandar*, [1996] B.C.J. No. 2379 (S.C.); *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145; 0690860 *Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535.).

[40] In my opinion the affidavits in question properly respond to the evidence presented by the plaintiff on this application and therefore they do not run afoul of Rule 9-7(8). However, I also find portions of the affidavits are inadmissible because they contain impermissible hearsay, speculation or argument.

Ms. Belot's Affidavit #2

[41] At paragraph 4, Ms. Belot attests to the fact that the College "does not expressly require a physiotherapist to take a continuing education course". Aside from her being a physiotherapist who is registered with the College, it does not appear that Ms. Belot has any official or administrative role with the College that would permit her to testify about what the College actually requires of its members. I take it Ms. Belot's evidence is based on her personal experience and what she believes the College's rules to be. In the context of this case, that evidence is not admissible for the truth of its contents. A similar concern arises with respect to paragraph 5. In this paragraph Ms. Belot indicates that "continuing education courses put on by the Defendant CPA routinely if not always require execution of a waiver at the outset". Once again, there is no evidence that Ms. Belot has been authorized to provide evidence on behalf of the CPA. While she can testify about her personal experience at CPA sponsored events, in my view the suggestion she makes that the CPA regularly requires waivers to be signed is beyond her competency as a witness.

[42] In paragraph 7, Ms. Belot provides her opinion of what a reasonable person would conclude if they were given the same information that Ms. Chamberlin had at the outset of the course. This is not evidence; this is argument in the guise of evidence and it should not have found its way into Ms. Belot's affidavit.

[43] Paragraph 9 of Ms. Belot's affidavit consists of the following:

[9] I am advised by the lawyer for the Defendants that:

- (a) he received a package from the Plaintiff's lawyer in this action on July 18, 2014 which purported to contain copies of the documents listed under Part 1 of the Plaintiff's List of Documents in this action; and
- (b) contained in this package were the employment agreement and a practitioner registration form, both attached as Exhibit "A". [Emphasis in original.]

[44] I begin by noting that Exhibit "A" contains much more than what Ms. Belot says it does. Beyond the employment agreement and practitioner registration form that Ms. Belot refers to, the exhibit also includes:

1. excerpts from an employment manual;
2. a form entitled "Personal Information Collection, Use and Disclosure"; and
3. an "Agreement" involving the Medical Services Plan.

- [45] The employment agreement appears to have been signed by Ms. Chamberlin. It is not signed by any authorized representative of the purported employer. A number of the other documents also have Ms. Chamberlin's name on them and what appears to be her signature. Ms. Belot does not attest to the veracity of any of these documents nor does she say they were in fact signed by the plaintiff and are in force. The defendants seek to rely upon the documents in Exhibit "A" as proof of the truth of the facts asserted in them. In my opinion, the evidence contained in paragraph 9 and Exhibit "A" cannot be admitted on this summary trial as it is hearsay.
- [46] The same concern applies to paragraph 10 of Ms. Belot's affidavit. This paragraph reads:
- [10] Attached as Exhibit "B" are documents from British Columbia Supreme Court Action (Victoria Registry), namely an Amended Writ of Summons and Statement of Claim, Statement of Defence and two Trial Briefs. To my knowledge the Plaintiff never disclosed to anyone in the Course any of the injuries specified in Exhibit "B". [Emphasis in original.]
- [47] In the same vein as paragraph 9, the defendants seek to rely upon paragraph 10 and the documents in Exhibit "B" for the truth of their contents. Nowhere in her affidavit does Ms. Belot say anything about whether the plaintiff in the present action is the same person as the plaintiff in the action referenced in paragraph 10. Although the plaintiffs in both cases are named Rosanna Chamberlin, the plaintiff in the present case resides in Victoria, B.C. whereas the plaintiff in the other case resides in Edmonton, Alberta. Ms. Belot seems to presume or speculate that the plaintiffs are one and the same person. She may be correct, but I have no evidence that this is so. Even if I were to accept that the plaintiffs are the same person, Ms. Belot has no personal knowledge of these documents, beyond what she has been told by her counsel, and in any event she does not and cannot attest to the truth of their contents. Given the purpose for which the defendants seek to rely upon paragraph 10 and Exhibit "B", I find the evidence is hearsay and therefore inadmissible.
- [48] Finally, there is paragraph 12, which reads:
- [12] My understanding is that the Plaintiff had been a registered, practicing physiotherapist in British Columbia for over a years at the time of the Course.
- [49] Ms. Belot does not explain the foundation for her "understanding" that she expressed in paragraph 12. Whether it was her legal counsel or someone else who told her or some document that she reviewed, I find the contents of this paragraph to be inadmissible hearsay.

Ms. Lee's Affidavit #1 / Mr. Cope's Affidavit #1

- [50] The affidavits of Ms. Lee and Mr. Cope are, except for the affiant's name, word-for-word identical. While this fact can go to the weight to be attributed to the evidence, it does not on its own render the affidavits automatically inadmissible.

- [51] I am satisfied the affidavits are responsive to the plaintiff's evidence and therefore they do not breach Rule 9-7(8).
- [52] At paragraph 4 of their respective affidavits, Ms. Lee and Mr. Cope explain what they understood the Waiver to mean and what they did as a result of that understanding. They also add what they would have done if they had objected to the Waiver. At paragraph 5, they attest that they were not surprised to learn of the Waiver on the first day of the Course and that similar waivers were required for other CPA courses they had attended. What Ms. Lee or Mr. Cope thought of the Waiver, what they understood it to mean, and what they did as a result of the Waiver, is of little relevance or consequence to this summary trial application. While I will admit the evidence, I find it of little assistance in determining the issues that are currently before the court.

The Law

Waiver of liability

- [53] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, Mr. Justice Binnie explained the legal principles relating to the enforceability of a contractual clause excluding liability at paras. 121-123:
- [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
- [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462). This second issue has to do with contract formation, not breach.
- [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. [*Italics in original.*]
- [54] Although Binnie J. was one of four justices who dissented in the result, his approach to assessing the validity of contractual provisions that purport to exclude or limit liability was endorsed by the majority (See: *Tercon*, at para. 62).

[55] In essence, when assessing the enforceability of a contractual clause excluding liability, the court must determine:

1. whether, as a matter of contractual interpretation, the exclusion clause applies to the facts of the case;
2. whether the exclusion clause is unconscionable; and
3. whether the court should otherwise refuse to enforce the exclusion clause on public policy grounds.

Does the exclusion clause apply to the factual circumstances?

[56] In addressing this first line of inquiry, Finch C.J.B.C. in *Keefer Laundry v. Pellerin Milnor Corporation*, 2009 BCCA 273 at para. 59 adopted the following remarks of Geoff R. Hall in *Canadian Contractual Interpretation Law*, 2ed, (Markham, Ont.: LexisNexis, 2012), at para. 7.10:

A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto the regular ones. This rule comes from *London and South Western Railway v. Blackmore*, an 1870 decision of the House of Lords. The rule in *London and South Western Railway* holds that a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contract interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible. [Emphasis added]

[57] In *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.), a decision that predated *Keefer Laundry*, McLachlin C.J.S.C. (as she then was) framed the issues as twofold: whether the terms of the release are broad enough to encompass the claims brought by the plaintiff against the defendants; and whether the plaintiff is bound by the terms of the release. The first issue is concerned with the construction of the terms of the contractual waiver and thus aligns with the first line of inquiry described by Binnie J. in *Tercon*. The second issue addresses the question of whether the signing party read and understood the release. It arises in light of the special rule that applies to the interpretation of releases as described by Hall in *Canadian Contractual Interpretation Law*. In this context, McLachlin C.J.S.C. opined at para. 24 that:

[24] there is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them.

[58] To this general rule, however, McLachlin C.J.S.C. identified the following three exceptions:

1. where the document was signed by a plaintiff in circumstances in which it was not his or her act (*non est factum*);
2. where the agreement was induced by fraud or misrepresentation; and
3. where the party seeking to enforce the document knew or had reason to know that the signing party was under a mistake as to its terms.

(See: Karroll, at paras. 18 and 24.)

[59] In my opinion, the first two exceptions to the general rule do not apply to the present case. The third, however, is relevant. In Karroll at para. 25, McLachlin C.J.S.C., described the circumstances in which the third exception might arise as follows:

[25] Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. The list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

[60] Consequently, it is only where the party tendering the document for signature knew or ought to have known that the signing party was not consenting to the terms in question that the obligation arises to take reasonable steps to advise the signing party of the details and implications of the waiver. To use the language of Hall in *Canadian Contractual Interpretation Law*, the party tendering the document must have been reasonably satisfied that the waiver, including any onerous terms, were in the specific contemplation of the signing party at the time the document was signed.

Is the exclusion clause unconscionable?

[61] Even if the language of the release applies in the circumstances, the court may find the exclusion clause unconscionable.

[62] In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 112 at para. 30, Frankel J.A. confirmed that a party who seeks to set aside a contract because of unconscionability must prove:

1. inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him or her in the power of the stronger; and
2. substantial unfairness in the bargain.

- [63] If those elements are present, then burden shifts to the party seeking to rely on the contract, who must then prove the agreement was otherwise fair, just, and reasonable. Overall, the "single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded" (See: *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 at 177 (C.A.)).
- [64] The jurisprudence with respect to releases has most often involved sporting activities that carry inherent risks of injury. In the context of recreational sports such as zip-lining, skiing, white-water rafting, and snowmobiling, the Court of Appeal has held that it is not unconscionable to require a person who wishes to engage in such activities to "sign a release that bars all claims for negligence against the operator and its employees" (See: *Loychuk*, at para. 40).

Are there public policy grounds to find the exclusion clause unenforceable?

- [65] The third and final line of inquiry of the *Tercon* analysis recognizes the residual power of the court to decline enforcement of a release on grounds of overriding public policy. At para. 117 in *Tercon*, Binnie J. noted this power will rarely be exercised "in the interest of certainty and stability of contractual relations". He continued by providing examples of when it would be appropriate to decline enforcement, such as where a party knowingly or recklessly provides a substandard product or service resulting in public harm. At para. 120, he concluded that "conduct approaching serious criminality" or "egregious fraud" are "well accepted" examples where public policy considerations may override freedom of contract. In contrast, with respect to inherently risky recreational activities, the court at para. 46 in *Loychuk* found that releases for such activities do not give rise to public policy concerns that would justify declining enforcement.

Voluntary assumption of risk

- [66] The doctrine of voluntary assumption of risk is captured in the maxim *volenti non fit injuria* ("to the willing person, no injury is done"). It provides a complete defence to a negligence claim. The persuasive burden lies on the defendant, who must prove the plaintiff expressly or by implication agreed not to hold the defendant responsible for the injury. The law on voluntary assumption of risk was summarized in *Joe v. Paradis*, 2008 BCCA 57, where, at para. 14, Mackenzie J.A. cited the decision of *Lehnert v. Stein*, [1963] S.C.R. 38 at 44. Both *Joe* and *Lehnert* quoted with approval the following passage from *Glanville Williams, Joint Torts and Contributory Negligence* (1951) at 308:

It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law. [...]

To put this in general terms, the defence of volens does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

[67] In Joe the court also cited the majority judgment in *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 173, where McLachlin J. (as she then was) stated:

The defence of volenti is available only if it can be established that the plaintiff, with knowledge (objectively determined) of the risk, freely accepted it.

[68] McLachlin J. further noted that the volenti defence is to be "narrowly applied". MacKenzie J.A. writing for a unanimous court in Joe, noted that commentators are generally critical of the doctrine in that the complete bar to recovery of the volenti defence is inconsistent with the apportionment of responsibility (See: Joe, at para. 16, citing Clerk & Lindsell on Torts, 19th ed. (London: Sweet & Maxwell, 2006) at s. 3-103). MacKenzie J.A. also noted that "the nominal standards of an implied waiver of legal liability will rarely be met" (See: Joe, at para. 16, citing Lewis N. Klar, Tort Law, 3rd ed. (Toronto: Carswell, 2003) at 482). As Professor Klar writes: "It is not realistic to impose this implied agreement upon parties who are frequently unaware of the legal niceties surrounding these types of events, and who are not deliberating upon the physical or legal risks of dangerous conduct" (See: Joe, at para. 16).

Discussion / Analysis

Issue #1: Are the matters raised on this application suitable for summary trial?

[69] On this application the defendants seek to have the plaintiff's claims against them dismissed because the Waiver she signed legally prohibits her from pursuing those claims and/or because she knowingly and willingly accepted the risk of personal injury that participation in the Course entailed. In short, the defendants seek to have the court determine the validity and enforceability of the Waiver and whether the doctrine of volenti non fit injuria applies in the circumstances of this case.

[70] In her application response filed 17 July 2014, Ms. Chamberlin agreed that the issue of the Waiver and whether it barred her from pursuing damages against the defendants could be resolved by summary trial. However, she opposed having the question of whether her action against the defendants was also prohibited on account of her voluntary assumption of the risks involved in the Course determined by summary trial. Her opposition was based upon what she maintained was an insufficient evidentiary record before the court and the fact that there appeared to be questions of credibility that could not be resolved by affidavit.

[71] During his submissions, counsel for Ms. Chamberlin informed the court that the plaintiff had changed her position and was now content to proceed with a summary trial on all of the issues raised in the defendants' notice of application.

[72] Given the parties' positions on this issue, and having reviewed the materials contained in the application record, I am satisfied that the issues before me can be resolved by summary trial.

Issue #2: Does the Waiver bar the plaintiff from claiming against the defendants?

As a matter of contractual interpretation, do the terms of the exclusion clause of the Waiver apply to the facts of this case?

[73] Applying the legal framework set out in *Tercon* and *Karroll*, the first step is to consider the construction of the Waiver itself. The key principle of contractual interpretation is that the words excluding liability must not be read in isolation but rather considered in harmony with the rest of the agreement and in light of its purposes and commercial context (See: *Tercon*, at para. 64.) It is clear that the purpose of the Waiver was to shift some of the risks of the Course onto the signing party. What remains unclear is the nature and scope of the risks that each party reasonably agreed to assume in these circumstances.

[74] The Waiver Ms. Chamberlin signed is one page in length and states at the top of the page "WAIVER OF COURSE LIABILITY". The operative terms of the release state:

I accept that there are risks involved in this course's techniques and procedures and thereby waive any and all claims which I might have at any time have [sic], against the [Defendants] in any manner whatsoever relating to my participation in this Advanced Orthopaedic Manual and Manipulative Physiotherapy Course.

[75] The defendants argue that the language of the Waiver fully extinguishes the right of the plaintiff to bring any action against them. They submit that the Waiver is clear and unambiguous in this regard, using "simple, easy-to-understand language" rather than "complicated, dense legal jargon." They say the simplicity of the Waiver is a fact that supports its enforceability. In advancing this position, counsel for the defendants cites *Arnold v. Bekkers Pet Care Inc.*, [2010] O.J. No. 2153 (Ont. S.C.); *Atlantis Marine Inc. v. Beaudoin Holdings & Management Ltd.*, 2003 ABPC 77; *Redshaw v. CCI Thermal Technologies Inc.*, 2010 AHRC 2; and *Marathon Canada Limited v. Enron Canada Corp*, 2008 ABQB 408.

[76] Ms. Chamberlin, in response, submits that the release in the Waiver is ambiguous and nonspecific. She contends that clear and precise language is required if the defendants wish to absolve themselves of liability for their own negligence. In support of this argument, counsel for Ms. Chamberlin relies upon a number of authorities including *Gallant v. Fanshawe College of Applied Arts and Technology*, [2009] O.J. No. 3977 (Ont. S.J.). In *Gallant* the plaintiff was a participant at an introductory motorcycle riding course. The plaintiff had never previously ridden a motorcycle. On the first day of the course, the plaintiff was presented with and signed a waiver that indicated:

I ... agree to release [the defendants] ... from all responsibility, property damage, bodily injury, costs and expenses, or claims of every nature and kind arising from, or in consequence of my participation in the motorcycle training course ...

[77] Ms. Gallant was seriously injured while participating in the course. Litigation ensued and the defendants sought to have her claim dismissed on the grounds that the waiver was a complete defence. The court denied the defendants' application. In doing so, it found that the waiver as drafted was not broad enough to absolve the defendants of responsibility for their own negligence. Similarly, Ms. Chamberlin says that the Waiver she signed was not sufficiently broad or clear in its language to protect the defendants in the present case. To underscore the point, counsel for Ms. Chamberlin notes that the word "negligence" is nowhere to be found in the Waiver.

[78] In reply, the defendants rely on *Delaney Estate v. Cascade River Holidays Ltd.*, [1983] B.C.J. No. 476 (C.A.), as a case where a waiver with somewhat similar wording to the one in the present case was held to be enforceable. In *Delaney*, the estate of a man who drowned on a white-water rafting excursion claimed damages against the rafting company. The waiver that the deceased had signed prior to embarking upon the excursion, reproduced at para. 19, provided as follows:

DISCLAIMER CLAUSE: Cascade River Holidays Ltd. is not responsible for any loss or damage suffered by any person either in travelling to the location of the trip, before, during or after the trip, for any reason whatsoever including negligence on the part of the company, its agents or servants.

AGREEMENT: I agree to assume all risks involved in taking the trip including travelling before and after, and agree to pay the cost of any emergency evacuation of my person and belongings that may become necessary. I agree to Cascade River Holidays Ltd. its agents and servants relieving themselves of all liability for losses and damages of all and every descriptions.

[79] In my view, *Delaney* is distinguishable from the present case for at least two reasons. First, the waiver in *Delaney* was more clearly drafted and it specifically referenced negligence. Second, given the nature of the white-water rafting activity, a reasonable person would expect that in signing the document, he or she was assuming full responsibility for any injury. The defendants in the present case are correct to emphasize that at para. 38 *Macfarlane J.A.*, writing for the majority of the court, held that a waiver must be interpreted in light of the "whole purpose of the relationship between the deceased and the corporate respondent". Later in that same paragraph *Macfarlane J.A.* observed that the purpose of the contractual relationship in that case was "an exciting and thrilling challenge of the power of the Fraser River in the Canyon". In the present case, the defendants say that the purpose of the relationship was not for Ms. Chamberlin to receive physiotherapy as a patient from the CPA or the Course instructors. I agree. The purpose of the relationship was for Ms. Chamberlin to obtain continuing education as a reasonably new member of her professional organization. An "exciting and thrilling challenge" this was not. Ms. Chamberlin says that

she expected the course to be provided in a safe and well-structured learning environment, and this expectation, in my opinion, was not unreasonable. While it is one thing to expect Ms. Chamberlin to do her part and bring concerns about her body to the attention of the Course instructors and practice partners, it is quite another to construe the relationship in this case as one where the nature of the activity was such that all risks were to be wholly shouldered by the Course participants.

- [80] The defendants also cite *Davis v. Robertson*, [2000] O.J. No. 1712 (Ont. S.J.), where a waiver also similar to the one in the present case was found to be enforceable. In *Davis*, the plaintiff's sailboats were damaged while stored at a non-profit boating club. The plaintiff had signed a one-page waiver that did not expressly reference negligence. Reproduced at para. 6 of the *Davis* decision, the waiver indicated that the defendants would "not be held responsible for loss or damage to the personal property, however caused, during any part of the storage of any vessel". While there is no reference to negligence in the waiver, at para. 13 of his judgment Lederman J. concluded that the intention to encompass negligence was otherwise "adequately expressed". He also noted that there was no expectation from the contracting parties that the defendant boating club would insure its member's boats. The court in *Davis* also concluded that the parties must have contemplated that any risk flowing from loss or damage would be allocated to the boat owners' respective insurance companies. For these reasons, I find the language of the waiver in *Davis*, when read in the context of the activity in question and the parties' relationship, bears little resemblance to the language in the Waiver and the parties' relationship in the present case. In my view, unlike *Davis*, the intention to encompass negligence has not been otherwise adequately expressed in the Waiver.
- [81] *Clarke v. Action Driving School Ltd.*, [1996] B.C.J. No. 953 (S.C.) is another case where the waiver in question did not specifically use the word "negligence". The plaintiff, Mr. Clarke, was injured in a motorcycle riding lesson at the defendant's driving school. The waiver he had signed released the defendant "from all responsibility of bodily injury and claims of every nature and kind howsoever arising from or in consequence of such student's participation in any of the training courses" (See: para 2). MacKenzie J. (as she then was) found that the use of the words "howsoever arising" contemplated negligence. The plaintiff, however, argued that the clause should be strictly construed, relying on *Smith v. Horizon Aero Sports Ltd.*, [1981] B.C.J. No. 1861 (S.C.), where a similar waiver was found not to bar the plaintiff's claims for injuries suffered in a parachute jump. The release in *Smith* waived "any claim " which " might arise out of or in any manner connected to the undersigned's jumping" (See: *Smith* at para. 25). In finding in favour of the defendant, the court distinguished the case on the basis that the phrase "howsoever arising" or similar language was not found in the waiver in *Smith*.
- [82] In my opinion, the Waiver Ms. Chamberlin signed falls somewhere between the language of the waivers in *Smith* and *Clarke*. It broadly refers to "any and all claims which I might have at any have [sic] in any manner whatsoever relating to my participation". However, unlike

Clarke, it does not refer to "claims of every nature and kind howsoever arising", and unlike the waiver in Smith, it includes the additional words "all" and "whatsoever". In my view, arriving at a conclusory interpretation solely on the basis of these slight differences would be unduly formalistic. The fact that courts have diverged in the enforcement of similarly worded waivers says more about differences in the factual matrices of these cases than any differences in the contracts themselves.

- [83] In my opinion, even when applying a literal meaning to the Waiver in this case, ambiguity remains. Despite the generality of phrases such as "any and all claims", "I might have at any time", and "in any manner whatsoever", I am not convinced that the Waiver, when read in its entirety, is sufficiently clear or specific to encompass negligence. The Waiver mentions that there are "risks" involved in the Course's "techniques and procedures", but it does not identify or provide examples of those risks, or even specify the nature of the risks or their degree of severity. It is therefore unclear what risks the signing party would be accepting to bear by waiving "any and all claims" against the defendants. In my view, negligence does not necessarily fall within the reasonable contemplation of the risks posed by the "techniques and procedures" of a continuing education course in physiotherapy. The phrase "in any manner whatsoever relating to my participation in this [course]" is, in the context of this case, similarly ambiguous. Despite the generality of the first portion of the clause, the second portion may be interpreted consistently with the instruction that participants are responsible for their own bodies. In my opinion this responsibility does not necessarily extend to the negligent conduct of others beyond the participants' control. In other words, without specific reference to the negligence of others, a literal reading of this clause suggests Ms. Chamberlin has not waived her right to bring an action "unrelated" to her participation in the course. A claim in negligence against an instructor, the CPA, or a fellow participant is more properly construed as a claim "relating" to the respective defendant's instruction, organization, or participation, not Ms. Chamberlin's participation. As a result, in my view, it cannot be said that the Waiver is as plain and clear as the defendants suggest.
- [84] In my opinion, it is quite plausible and reasonable to construe "any and all claims" and "relating to [Ms. Chamberlin's] participation in the course" consistently with the plaintiff's interpretation of the Waiver and the supporting extrinsic evidence. Ms. Chamberlin was told that she was responsible for her own body. She did not infer from this explanation that she was agreeing to waive or abandon her right to sue in negligence. Instead, she says that she understood the Waiver as referring to pain or soreness resulting from the physical manipulation of her joints. Combined with the fact that the Waiver was explained to the participants with reference to the physical rather than legal risks of the Course, Ms. Chamberlin's interpretation does not seem objectively unreasonable. In my view, having regard to the language of the Waiver and the factual circumstances in which it was proffered, explained and signed, it is not sufficiently clear or specific such that it necessarily encompasses negligence. Rather, I find the Waiver admits of ambiguity in this regard. Applying the principle of *contra proferentem*, the ambiguity should be resolved against its drafters and in favour of Ms. Chamberlin.

Was the plaintiff otherwise bound by the terms of the release?

- [85] Even if the Waiver were to be given the interpretation advocated by the defendants, the issue still remains whether it was in the specific contemplation of Ms. Chamberlin that in signing the document she was waiving her right to sue in negligence. As noted in Karroll, a party tendering a document for signature is generally not required to take steps to apprise the signing party of onerous terms or to ensure that the party reads and understands them. However, this general rule does not apply where the party tendering the document knew or had reasons to know that the signing party was under a mistake as to its terms. The defendants frame this exception as a question of "whether a reasonable person, in the circumstances of this case, would know that the plaintiff did not intend to agree to a liability release." They say that a reasonable person would indeed conclude that Ms. Chamberlin agreed to the waiver of her right to sue because she signed the document. However, in my view, this argument suffers from a deficiency akin to the fallacy of composition. It infers that because something might be true of the whole, it must also be true of its parts. Just because Ms. Chamberlin may have intended to agree to a liability release does not necessarily mean that she agreed to the specific term of waiving her right to sue in negligence. Indeed, Ms. Chamberlin concedes that she was bound by the terms of the Waiver as she understood them, but disagrees that she was bound according to the broad interpretation proposed by the defendants. As McLachlin C.J.S.C. noted at para. 25 in Karroll:
- [25] The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term.
- [86] Given the circumstances surrounding the signing of the Waiver, I am of the view that a clause excluding liability for negligence would run contrary to the normal and reasonable expectations of the Course participants in this case. Extrinsic evidence from both sides indicates that the physical rather than legal risks of the Course were emphasized to the participants.
- [87] Further, while the defendants submit there is nothing in Ms. Chamberlin's evidence to indicate she was confused by the Waiver, her assertion that the document was simply presented as a form to sign and return is supported by the fact that she did not complete, nor was she asked or told to complete, the entire document. The defendants, in response, say that the plaintiff's handwriting on the Waiver is "very neat", which suggests she was not rushed. Both facts could be true: Ms. Chamberlin may not have been rushed in signing the document, but she may also still not have fully understood it or been cognizant of the specific legal rights she was been asked to waive. In any event, Ms. Chamberlin says that she was never told about the meaning of the Waiver, and there is no evidence before me to contradict that assertion. More to the point, there is nothing in the evidence that indicates the participants were informed that by signing the Waiver they were assuming all of the risks, both physical and legal, associated with their participation in the Course. Rather, the

emphasis on participants being "responsible for their own bodies", particularly in the context of physiotherapy, can reasonably take on a more circumscribed meaning as cautioning the participants about the Course's physical risks. It is therefore not surprising that Ms. Chamberlin understood the Waiver more narrowly than the defendants. In my view, even if the defendants' interpretation of the Waiver is accepted, it would not be unreasonable to conclude that Ms. Chamberlin would have been under a mistake as to its terms.

- [88] Notwithstanding what Ms. Lee and Mr. Cope had to say about their identical understandings of the Waiver and its legal implications, I am of the opinion that a reasonable participant at the Course would not have understood or expected that he or she was agreeing to such onerous legal risks, particularly given the general language of the Waiver and its lack of specificity with respect to negligence. Ms. Chamberlin contends that she understood the Waiver to be similar to waivers used in her practice, which she says "prevent any lawsuits for soreness or minor pain after treatment." The circumstances of this case are not analogous to recreational sporting activities like skiing, racing, white water rafting, zip-lining, or scuba diving, where, given the inherent risks and social expectations surrounding the allocation of risk, a willing participant in such activities reasonably expects that he or she assumes all risks of injury.
- [89] By contrast, in the context of a physiotherapy training course, I find it unlikely that a participant would expect that it was a condition of his or her participation to assume personal responsibility for the negligence of the professional organization and its agents. While the defendants argue that Ms. Chamberlin, a registered physiotherapist, "knew or ought to have known" of the Course's potential risks, I fail to see how the risk of an instructor breaching his or her professional standard of care would be one of the potential risks that a participant would be mindful of at the time a waiver was signed. This is particularly so given the lack of specificity in the release itself. Therefore, even assuming the defendants' generous interpretation of the Waiver is correct, the CPA or the instructors ought to have brought this interpretation to the attention of Ms. Chamberlin, as it cannot reasonably be said to have been in her specific contemplation at the time the release was given.
- [90] The plaintiff has not raised the second or third lines of inquiry articulated in *Tercon*. That is, the plaintiff has not argued that there is an element of unconscionability that invalidates the Waiver or that there are public policy grounds to refuse to enforce the Waiver. In light of this, there is no need for me to address these issues.
- [91] In my opinion the defendants' application to dismiss the plaintiff's action on the ground that the Waiver provides them with a complete defence cannot succeed.

Issue #3: Does the doctrine of *volenti non fit injuria* bar the plaintiff from claiming against the defendants?

- [92] The parties agree that this issue can be decided based solely on the evidentiary record before the court.
- [93] The defendants point to Ms. Chamberlin's own affidavit evidence, where she says she had a family history of hypermobility in her shoulders. Moreover, the defendants note that Ms. Chamberlin says she was aware that the Course was hands-on, involving physical manipulation of her body. On the basis of this evidence, the defendants submit Ms. Chamberlin "voluntarily assumed the risk of injury due to negligence or breach of contract when she forged ahead" in the Course.
- [94] In my opinion, while it is true that Ms. Chamberlin was informed that she was responsible for her own body, and put on notice that it was up to her to articulate her concerns to her instructors and the other participants, these facts do not amount to a voluntary assumption of risk on her part. The defendant's position on this point may more properly be an assertion of contributory negligence on Ms. Chamberlin's part, or otherwise a consideration that goes to the issue of whether or not there has been a breach of the requisite standard of care. The defendants have not pointed to any persuasive evidence, aside from the plaintiff's execution of the Waiver itself, that would indicate Ms. Chamberlin expressly or by implication agreed not to hold the defendants responsible for the injury. It is useful at this point to once again quote the following passage of Williams in *Joint Torts and Contributory Negligence* (1951) at 308, cited in *Joe* at para. 14:

It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law. [...]

To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. [Emphasis added.]

- [95] The most compelling evidence that the defendants can provide in this regard is that Ms. Chamberlin deposed that Ms. Belot, after re-aligning her neck, "joked that I had signed the waiver." The argument of the defendants is that, because Ms. Chamberlin chose to continue with the practical sessions even after Ms. Belot made this comment to her, her conduct communicated a waiver of her right of action. In my view, this evidence fails to establish the *volenti* defence. It does not prove Ms. Chamberlin's continued participation communicated an implied agreement that she had voluntarily assumed all liability for her injuries.
- [96] Consequently, I am of the view that the defendants' application for summary dismissal of Ms. Chamberlin's action on the basis of *volenti* should not succeed.

Issue #4: Should Ms. Chamberlin's claim against the PABC be dismissed because it had no role in the Course?

- [97] The PABC maintains it was not involved with the organization or administration of the Course and therefore irrespective of the court's ruling on the Waiver and the volenti defence, the plaintiff's action against it should still be dismissed. This position was clearly articulated in the defendants' notice of application and the written submissions of counsel for the defendants. The plaintiff's application response did not specifically address this portion of the notice of application.
- [98] When counsel for the defendants began his submissions on the first day of the hearing, counsel for Ms. Chamberlin interjected and informed the court that the plaintiff did not take issue with what the PABC was seeking. More specifically, counsel for Ms. Chamberlin advised that he had instructions to "withdraw the action against the PABC". I took that to mean the plaintiff would be formally discontinuing her claim against the PABC, pursuant to Rule 9-8.
- [99] Given plaintiff's counsel's concession, counsel for the defendants made no further submissions on the issue of the plaintiff's claim against the PABC being dismissed.

Conclusion

- [100] The defendants have failed to persuade me that the Waiver provides a valid and complete defence to the plaintiff's claims against them. Furthermore, I am not satisfied that the defendants have met their evidentiary burden to prove that the plaintiff voluntarily and knowingly assumed the risks posed by her participation in the Course such that the doctrine of volenti non fit injuria bars her from pursuing the defendants for damages.
- [101] The plaintiff has declared her intention to discontinue her claim against the PABC. As a result of that, I did not hear submissions on the question of whether that claim should be dismissed. I expect that the plaintiff has or will be complying with Rule 9-8 and that a filed notice of discontinuance has or will be served on all of the parties.

Order

- [102] On the basis that the plaintiff's action against the PABC has or will be formally discontinued and that in the result the PABC is no longer a defendant in this action, the application of the remaining defendants for a summary dismissal of the plaintiff's action against them is denied.
- [103] The parties have leave to apply in the event there is a need to further address anything in relation to the plaintiff's action against the PABC, including the status of that action.
- [104] If the parties wish to address the issue of costs of this summary trial, they must so inform the court within 30 days of the date of these reasons. Otherwise, costs will be in the cause.

"G.R.J. Gaul J."

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