
CANADA / JUDGMENT

Loychuk v. Cougar Mountain Adventures Ltd.

2012 BCCA 122

COURT

British Columbia Court of Appeal

DECIDED

15 March 2012

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2012 BCCA 122 Loychuk v. Cougar Mountain Adventures Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Loychuk v. Cougar Mountain Adventures Ltd.,

2012 BCCA 122

Date: 20120315

Docket: CA038870

Between:

Deanna Loychuk and Danielle Westgeest

Appellants

(Plaintiffs)

And

Cougar Mountain Adventures Ltd.

Respondent

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Bennett

On Appeal from: Supreme Court of British Columbia, February 17, 2011

(Loychuk v. Cougar Mountain Adventures Ltd., 2011 BCSC 193,

Vancouver Registry No. S093741)

Counsel for the Appellants:

K.F. Gurlay and J.S. Stanley

Counsel for the Respondent:

R.B. Lindsay, Q.C. and

M.R.S. Hufton

Place and Date of Hearing:

Vancouver, British Columbia

December 14, 2011

Place and Date of Judgment:

Vancouver, British Columbia

March 15, 2012

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] The issue on this appeal is the enforceability of a release (i.e., waiver of liability) signed by the appellants, Deanna Loychuk and Danielle Westgeest, before going on a zip-line tour operated by Cougar Mountain Adventures Ltd. The appellants were injured when they collided while travelling on the same zip-line. They commenced an action against Cougar Mountain for damages. Cougar Mountain admitted that the accident was caused by the negligence of its employees but asserted that the appellants had waived their cause of action. On a summary trial, Mr. Justice Goepel of the Supreme Court of British Columbia held that the release was a complete defence to the appellants' claims and dismissed their action. This appeal is from that decision.

- [2] For the reasons that follow, I agree with the trial judge that the release is a complete defence to the appellants' claims.

Factual Background

- [3] Cougar Mountain operates zip-line tours at Whistler, British Columbia. The tours involve strapping a person into a harness and trolley which is then sent down a line from a higher platform to a lower one. There is a guide on each platform. Those guides, who communicate by walkie-talkie, are responsible for determining when each person is to be sent down a line.
- [4] At the time of the accidents (on August 18, 2007), Cougar Mountain's website described the tours as follows:

Come out to Cougar Mountain for Whistler's most exciting eco adventure! Our new Skyline is an exhilarating cable line expedition through old growth forests. Skyline's leading edge technology takes you flying side by side on our unique tandem-line system. Ride in a comfortable harness reaching speeds of up to 100 km an hour. The system offers 5 dual Skylines, with the longest ride being over 1,500 feet long, 200 feet off the ground with a 200 foot vertical drop. The lines are connected to each other by a trail system which includes a 150 ft suspension bridge. Our guides will share their wealth of interpretive information and local Whistler knowledge about the ecosystem you will be exploring, giving you a unique Whistler experience.

- [5] The website also contained a link to "Policies and Cancellations". That link opened a page which provided information on a number of things, including:

Waivers:

All guests are required to sign a liability waiver.

...

Cancellations:

Tours cancelled within 24 hours of the tour, and "no shows", are subject to the full price of the tour.

- [6] Ms. Loychuk, who was 41 years old at the time of the accident, went to Whistler as part of a group to celebrate a friend's birthday. That friend suggested they all go zip-lining. She made a reservation for the group and then each person called Cougar Mountain to pay individually by credit card. Ms. Loychuk's payment was made with her husband's credit card, although it is not clear which of them called in. As Ms. Loychuk had never gone zip-lining before, she accessed Cougar Mountain's website to find out more about the activity.

- [7] Ms. Loychuk is the owner of a business that offers a kick boxing/fitness program for women. She requires her clients to sign a waiver of liability. She explains the waiver to her clients and will not allow anyone who has not signed a waiver to participate. She also franchises her business. The franchise package includes a waiver of liability and assumption of risk agreement. Ms. Loychuk explains the waiver of liability and assumption of risk agreement to potential franchisees.
- [8] When Ms. Loychuk arrived at Cougar Mountain's office she was given a release to fill out and sign. She understood that she would not be allowed to participate if she did not sign the release. In both her affidavit and the answers she gave on being cross-examined on that affidavit, Ms. Loychuk stated that she understood the release would prevent her from suing the zip-line company for certain things, such as if she tripped and broke her leg. Her evidence was that she did not realize that the release gave Cougar Mountain immunity for its own failures, no matter how severe. Ms. Loychuk had previously signed waivers in connection with purchasing family ski passes. She purchased those passes online and signed the waivers when she picked them up.
- [9] Ms. Westgeest was 26 years old at the time of the accident and had recently graduated from law school. She went to Whistler with a group of friends to celebrate the impending marriage of one of them. Ms. Westgeest had discussed the cost and safety of zip-lining with two friends who had accessed Cougar Mountain's website. Based on information on that website they decided to go zip-lining. One of the two friends called in and made a reservation for the group using her credit card.
- [10] When Ms. Westgeest and her friends arrived at Cougar Mountain's office they paid individually by credit card and each was given a release to fill out and sign. At her examination for discovery, Ms. Westgeest said that when one of her friends asked about the release, she made a flippant remark to the effect that based on her contracts class, "Releases may or may not be binding." She further deposed that although she had been aware she was waiving certain rights, she had not been aware she was waiving all rights against Cougar Mountain, including claims arising from the company's own negligence. She had previously signed a waiver in connection with renting a kayak.
- [11] Ms. Loychuk's and Ms. Westgeest's groups were merged into one mid-way through the tour. The 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, was sent down by a guide. With no ability to stop herself, Ms. Westgeest collided with Ms. Loychuk, causing injury to both. Miscommunication between the guides was the sole cause of the accident.
- [12] The release is a one-page document with the following at the top:

SKYLINE WAIVER

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND

ASSUMPTION OF RISKS AGREEMENT

(hereinafter referred to as the "Release Agreement")

BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT

PLEASE READ CAREFULLY!

Signature

[13] Below a list of "Releasees" that includes Cougar Mountain, each participant is required to fill in his or her name and address. There is a space towards the bottom of the release for each participant to fill in his or her weight. Beneath that, there is a signature line under the wording:

I have read the Release Agreement above, and I agree to be bound by its terms.

[14] There is a "Tour Description" in the body of the release, after which there is the following:

ASSUMPTION OF RISKS

I am aware that participating in Eco Activities involves many risks, dangers and hazards including but not limited to: hiking on rough and uneven terrain; changing weather conditions which may cause the tree top trails, suspension bridges, canopy walkways, and Skylines to be slippery; equipment failure; failure to properly adjust or fasten equipment; improper use of equipment; falls; slips and falls while snowshoeing; over-exertion; fear of heights; failure to remain within designated areas; impact or collision with trees, other participants or guides; negligence of other participants or guides; and NEGLIGENCE ON THE PART OF THE RELEASEES, 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 ECO ACTIVITIES. I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of the RELEASEES agreeing to my participation in Eco Activities and permitting my use of their equipment, parking and other facilities, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:

1. TO WAIVE ANY AND ALL CLAIMS that I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Eco Activities, 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, R.S.B.C. 1996, C. 337 ON THE PART OF THE RELEASEES, AND FURTHER 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 ECO ACTIVITIES REFERRED TO ABOVE;

[15] The release also contains the following statement:

In entering into this Release Agreement I am not relying on any oral or written representations or statements made by the Releasees with respect to the safety of participating in Eco Activities, other than what is set forth in this Release Agreement.

[16] In completing their respective releases, Ms. Loychuk and Ms. Westgeest filled in the required information and signed at both the top and bottom of the form.

Trial Judge's Reasons

(2011 BCSC 193, 81 C.C.L.T. (3d) 89)

[17] In unsuccessfully resisting Cougar Mountain's summary trial application for dismissal of their action, the appellants argued that the release was ineffective because it is:

- (a) unenforceable, because a reasonable person should and would have known that the appellants were not consenting to the terms at issue and Cougar Mountain failed to take steps to apprise them of the terms, constituting misrepresentation by omission;
- (b) unconscionable;
- (c) invalidated by s. 3 of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA], because of deceptive and/or unconscionable acts committed by Cougar Mountain; and
- (d) invalid as having been obtained without any, or only past, consideration.

[18] The trial judge found that each appellant signed the release knowing that it was a legal document affecting her rights and that there was nothing in the circumstances that would have led Cougar Mountain to conclude otherwise. He further found that Cougar Mountain had taken steps to bring the contents of the release to their attention and that they had sufficient time to read it. The judge did not accept that the general law relating to waivers of liability should be limited to hazardous activities in which participants have some measure of control over the risks they are assuming.

[19] The trial judge held that the releases were not unconscionable. He found that there was "no evidence of duress, coercion or unfair advantage resulting from economic or psychological need." He also found that the appellants voluntarily went zip-lining, knowing that they had to sign a release to do so.

[20] The appellants' arguments with respect to the BPCPA focused, in part, on the following representation as to the safety of Cougar Mountain's zip-line; they tendered the statement as being from the "Frequently Asked Questions" page on the company's website:

Q: Is it safe?

A: The Skyline system is fully engineered and certified. Skyline is the safest cable ride system in the world because it utilizes a permanent rock anchor system rather than anchoring cables into trees. The cables used are also 3 times the thickness of conventional zip line systems.

[21] The appellants contended that this statement was misleading because two other accidents had occurred on Cougar Mountain's zip-line in August 2007; one before and one after their accident. They also submitted that Cougar Mountain failed to warn potential customers that the most common accidents in the zip-line industry involved person-to-person collisions, and that Cougar Mountain placed unfair pressure on them to sign the release just before the tour was to start. In response, Cougar Mountain submitted, in part, that the BPCPA does not apply to recreational sports activities such as zip-lining.

[22] Without determining the applicability of the BPCPA, the trial judge held that the appellants had not established a breach of its provisions. He found there was "no evidence that the representation on the website ... is anything but true." He noted that "[t]he answer relates to the structure of the system, not its operation" and "[t]he fact that there have been some accidents does not lead to the contrary conclusion."

[23] The trial judge further held that, having regard to the information about zip-lining on Cougar Mountain's website, and the statements in the release as to the risks and dangers involved, it could not be said that the company had taken unfair advantage of the appellants. The judge referred to a statement in the affidavit of one of Cougar Mountain's directors that the company's policy is to give a full refund to anyone who, having paid in advance for a zip-line tour, declines to sign a release.

[24] Last, the trial judge rejected the appellants' argument that the release failed for lack of consideration because it was not part of their respective contracts with Cougar Mountain when their tours were booked. In this regard, the judge stated:

[49] ... The [appellants] had both accessed the website which disclosed that all guests were required to sign a liability waiver. The parties were advised before commencement of the activity that they must sign the waiver or they would not be allowed to participate. Further, the Release itself specifically sets out that the consideration for the Release is Cougar's agreement to allow the [appellants] to participate in Eco Activities.

[25] It is convenient to mention here that the only finding of fact by the trial judge challenged by the appellants is the statement that Ms. Westgeest personally accessed Cougar Mountain's website. They say this finding is unsupported by the evidence. They are correct in that regard.

Grounds of Appeal

[26] In their factum, the appellants allege that the trial judge made the following errors:

- a. He erred in finding the Release was not unconscionable pursuant to s. 8 of the BPCPA;
- b. He erred in holding that he was bound by prior authorities to conclude that the Release is not unconscionable;
- c. He erred in failing to consider and apply the reverse onus provisions of ss. 5(2) and 9(2) of the BPCPA; and
- d. He erred in finding that there was consideration in exchange for the signing of the Release.

Analysis

Is the Release Unconscionable or Unenforceable at Common Law?

[27] The Supreme Court of Canada considered unconscionability in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, a case dealing with the enforceability of an exclusion of liability clause relating to a tendering process. Although Mr. Justice Binnie dissented in the result, his analytical approach was adopted by the majority: see para. 62. The following from his judgment is apposite:

[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.]

[28] In the case at bar, the parties agree that the first step in the Tercon analysis is satisfied, i.e., the release applies in the circumstances. Where they part company is with respect to the next two steps. The appellants' position is that the release was unconscionable at the time it was signed and that even if it was not unconscionable, it should be held unenforceable on public policy grounds. Cougar Mountain's position is that it did not act unconscionably in obtaining the release and, further, that the appellants have not established that it should be invalidated for public policy reasons.

[29] The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713 (B.C.C.A.):

[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].

[30] That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583, and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500. In *McNeill*, Madam Justice Garson stated:

[15] In order to set aside a bargain for unconscionability, a party must establish:

- (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
- (b) proof of substantial unfairness in the bargain.

This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A) at 173 and reiterated in *Klassen v. Klassen*, 2001 BCCA 445.

[31] In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263 (C.A.):

Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

- [32] The appellants acknowledge that there is a well-established line of authority in Canada holding that releases relating to recreational sports activities are not unconscionable. However, they submit those authorities are inapplicable because they do not relate to activities in which the operator has total control of the risk. I disagree.
- [33] To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release or waiver as a condition of participating.
- [34] The Supreme Court of Canada dealt with this question in *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589. In order to participate in a snowmobile race run by the association, Mr. Dyck was required to sign a form releasing the association and others from liability however caused, including by their negligence. He was injured when he attempted to swerve around and then collided with a race official who was standing in the track. He commenced an action for damages against both the association and the official. In holding that the release was a complete defence to Mr. Dyck's claim, the Court stated (at p. 593):

Nor does the relationship of Dyck and the Association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.

[Emphasis added.]

- [35] In *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24 (C.A.) aff'g (1981), 34 B.C.L.R. 62 (S.C.), the issue arose in the context of a release signed by Dr. Delaney in order to go white water rafting. Before boarding the raft he was given a life-jacket. However, the life-jacket's buoyancy was inadequate for the river conditions. Dr. Delaney was thrown from the raft when it struck a rock. He was swept away by the current and drowned. Mrs. Delaney sued the rafting company on behalf of herself and her children. The trial judge found that the company had been negligent in failing to provide a more buoyant life-jacket, but dismissed the action on the basis that the release was a complete defence. This Court dismissed Mrs. Delaney's appeal. Writing for the majority, Mr. Justice McFarlane first found against Mrs.

Delaney on the issue of causation, holding that she had failed to prove that the failure to provide a more buoyant life-jacket caused, or contributed to, Dr. Delaney's death. Mr. Justice McFarlane then went on to agree with the trial judge that the release was a bar to the action. In so doing, he held (at p. 44) that there was no basis on which to "rescind" the release as a "consumer transaction involving a deceptive or unconscionable act or practice" under what was then s. 22(1)(b) of the Trade Practice Act, R.S.B.C. 1979, c. 406.

- [36] The question of unconscionability also came before this Court in two skiing accident cases. In *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 74 B.C.L.R. (2d) 159 (C.A.), aff'g (October 7, 1991), New Westminster C901348 (S.C.), Mr. Ocsko, an experienced skier, obtained a free ski pass from Cypress Bowl in exchange for volunteering to be a first aid attendant and a member of the ski patrol. He signed a release and indemnity agreement to obtain the pass. While skiing one day, he had to take evasive action to avoid a bare rock and was injured. Mr. Ocsko sued Cypress Bowl, alleging that it had been negligent in several ways, including, by failing to inspect the run after it had been closed for lack of snow and failing to adequately mark the rock or draw it to the attention of skiers. Cypress Bowl brought a summary trial application which resulted in the action being dismissed on the basis that the release was a complete defence to the action. In upholding that dismissal, the Court held that it was not unconscionable for Cypress Bowl to rely on the release: para. 15.
- [37] More recently, in *Mayer v. Big White Ski Resort Ltd.* (1998), 112 B.C.A.C. 288, Mr. Mayer, who had signed a release to obtain a ski pass, was injured when he collided with a snowmobile driven by a Big White employee and sued the company. In upholding the dismissal of that action, the Court rejected a submission that it was contrary to public policy and unconscionable to permit the company to rely on the release: paras. 4, 15
- [38] In addition, there are two trial decisions involving skiing accidents that I wish to mention. The first is *Knowles v. Whistler Ski Corp.*, [1991] B.C.J. No. 61 (S.C.). Mrs. Knowles was injured when the binding on one of her rented skis did not release properly. She sued the rental company, alleging that the employee who adjusted her bindings had been negligent. In submitting that the release she signed should be found unconscionable, Mrs. Knowles argued that it was a standard-form one-sided contract that had been entered into without any opportunity for negotiations between two parties in unequal bargaining positions. In rejecting that submission and dismissing the action, Madam Justice Huddart, as she then was, stated:

I disagree. I cannot see anything in the nature of the Release Agreement or in the circumstances in which it was signed divergent from community standards of commercial morality.

The circumstances in which Mrs. Knowles signed the Release Agreement are far-removed from the hurried execution of a document containing a release that only the most attentive could read such as rent-a-car and other standard form contracts. There is no evidence of duress, coercion, or unfair advantage, resulting from economic or psychological need or the inability to understand the nature of the contract. This is the evidence generally adduced when the validity of a

consumer contract is challenged. This is not a case where the party seeking to rely on the waiver of liability clause was seeking to avoid all the burdens of the contract. The ski shop provided the ski equipment at a cost of \$36.00.

Nothing that was said or done could have led anyone to believe the waiver would not apply. Mrs. Knowles understood fully what she was signing and why. One of the risks she assumed when she skied that day was that the technician at the ski shop might have been negligent in setting the binding adjustment or otherwise. The Release Agreement not only says that, it also sets out specifically the risks inherent in the ski-boot binding system. If Mrs. Knowles did not want to waive any claim in negligence she could have done what her counsel suggest others in her situation will do. She could have refused to ski.

[Emphasis added.]

(The reference to "community standards of commercial morality" in the first paragraph of the above quotation is to *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 at 177 (C.A.), wherein Mr. Justice Lambert, in discussing unconscionability, stated that 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 also: *Gindis v. Brisbourne*, 2000 BCCA 73, 72 B.C.L.R. (3d) 19 at paras. 42-44.)

[39] The second trial decision is *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026 (S.C.). Mr. Ochoa was killed when he was caught in an avalanche while heli-skiing. His wife sued the heli-skiing company and two of its guides. In holding that the release Mr. Ochoa had signed was not unconscionable, Madam Justice Koeningsberg stated (at para. 139):

It is true that the promotional materials emphasized that the guiding would be careful, meet a high standard of professionalism and minimize risks inherent in the sport of heli-skiing. However, it did not purport to be a guarantee of no mistakes or lapses in judgment in the exercise of skill and judgment. Reading all the literature and seeing how the operation was carried out, in fact, Mr. Ochoa as a reasonable person would likely have understood the waiver to address the possibility that human error, even in the form of the exercise of judgment falling below the standard of care in the industry, might occur. If such a thing occurred as an isolated incident, in my view, it would arguably be negligence but would not remove from the contract the very thing being contracted for.

[40] The principle evinced by the foregoing authorities is that 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 operator 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.

[41] This brings me to the third inquiry set out in *Tercon* (at para. 123), namely, whether the appellants in this case have established "an overriding public policy" for not enforcing the release. Although the Supreme Court of Canada in *Dyck* (snowmobile racing) and this Court

in Mayer (skiing) held that comprehensive releases are not contrary to public policy, the appellants submit that the present facts should lead to a different conclusion because zip-lining is an activity totally within the control of the operator. For example, they say that unlike skiers who have some control over where and how they ski, zip-liners have no control whatsoever once they are sent down a line.

- [42] The appellants reply on two law reform commission reports. The first is the Law Reform Commission of British Columbia's Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities (October 1994), which recommended the enactment of legislation to preclude commercial recreational operators from excluding or limiting liability for personal injury or death from a number of sources of risk, including the unsafe operation of mechanical equipment or recreational apparatus by the operator's employees: pp. 47-49. The second is the Manitoba Law Reform Commission's Waivers of Liability for Sporting and Recreational Injuries (January 2009), which recommended the enactment of legislation to prohibit completely the use of waivers of liability for personal injury and death resulting from negligence in sporting and recreational activities: p. 43. In the alternative, the Manitoba Law Reform Commission recommended that such waivers be prohibited except where they are "in all the circumstances ... fair and reasonable". The circumstances to be considered in determining whether a particular waiver is fair and reasonable include: (a) the representations made to the consumer at the time the waiver is obtained; (b) the steps taken to bring the waiver to the consumer's attention; (c) whether the hazard causing the injury or death is exclusively under the control of the operator; and (d) the relationship between the consumer and the operator: p. 44.
- [43] For its part, Cougar Mountain referred to the British Columbia Law Institute's Consultation Paper on Proposals for Unfair Contracts Relief (December 2010), in which the Unfair Contracts Relief Project Committee set out tentative recommendations for a proposed Contract Fairness Act, but did not recommend the inclusion of any provisions focusing on exclusion clauses: pp. 187-190. In explaining why it had come to that conclusion, the Committee stated (at p. xxvii):

The committee decided not to propose specific reforms tailored to exclusion clauses. In its view, the timing is not right. The latest Supreme Court of Canada decision [Tercon] should be given some time to operate, to see if it will have a beneficial impact on the law. In addition, the committee's general proposals in relation to unconscionability and good faith performance may ameliorate many of the problems caused by unfair exclusion clauses.

Cougar Mountain says that this is an indication that the current law works well.

- [44] While the law reform commission recommendations are interesting, they do not establish an overriding public policy that would justify judicial nullification of an agreement knowingly and voluntarily entered into by a person wishing to engage in an inherently risky recreational activity. Releases such as the one in issue here have been in use for many years and have consistently been upheld by the courts. If, as the appellants submit, there are

policy reasons why such releases should not be enforceable when an activity is totally within the control of an operator, then any change in the law is properly a matter for the Legislature.

- [45] As Binnie J. stated in *Tercon*, "The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised": para. 117. He then provided examples of when it would be appropriate for a court to refuse to give effect to an exclusion clause. The first involves food suppliers who knowingly or recklessly sell toxic products to the public: para. 118. The second example, which Binnie J. described as "less extreme", involves a company that knowingly supplies defective plastic resin to a customer who uses it to make natural gas pipelines: para. 119. After giving these examples, he stated (at para. 120):

Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract.

- [46] What those examples have in common is that the party seeking to rely on an exclusion clause either knew it was putting the public in danger by providing a substandard product or service, or was reckless as to whether it was doing so. In other words, that party engaged in conduct that is so reprehensible that it would be contrary to the public interest to allow it to avoid liability. I am not convinced that where a participant is injured through the negligence of an operator, there is such a difference between situations where participants have some measure of control and those where they do not, that the latter rises to this high level of public policy. In both cases the injury was caused by negligence which cannot itself be controlled by the participant.
- [47] I, therefore, find that the release signed by the appellants is neither unconscionable nor unenforceable at common law.

Applicability of the BPCPA

- [48] The appellants submit, with reference to the definitions in s. 1 of the BPCPA, that: (a) they were "consumers"; (b) Cougar Mountain was a "supplier"; and (c) their contracting for and participating in the zip-line tour was a "consumer transaction". On the basis that the BPCPA applies to their relationship with Cougar Mountain, they rely on its provisions dealing with unconscionable or deceptive acts and practices.
- [49] I do not find it necessary to decide whether the BPCPA applies to the recreational sports activities industry to dispose of this appeal. Like the trial judge, I have concluded that even if the BPCPA does apply, the provisions relied on by the appellants do not lead to the invalidation of the release. Accordingly, the discussion below is based on the assumption that the Act applies.

Is the Release Unconscionable by Reason of the BPCPA?

[50] The appellants submit that even if the release they signed is not unconscionable at common law, it is unconscionable by virtue of s. 8 of the BPCPA. That provision, which is in Part 2 ("Unfair Practices") / Division 2 ("Unconscionable Acts or Practices"), reads, in part:

8(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
 - (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
 - (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
 - (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
 - (f) a prescribed circumstance.

[Emphasis added.]

[51] The appellants submit that as the BPCPA is consumer protection legislation, it is to be interpreted generously in favour of the consumer. They say that "inequitable" in s. 8(3)(e) should be interpreted to mean "unfair" or "unjust" and that, as a result, the bar for unconscionability is lower under the statute than it is at common law.

[52] The difficulty with the appellants' position is that it equates "unconscionable" with "inequitable". This ignores the fact that s. 8(3) merely directs a court to consider the listed "circumstances" in coming to a determination as to whether a particular transaction is unconscionable.

[53] When the BPCPA was enacted there was a well-developed body of judicial authority setting out the high standard to be met before a contract could be set aside on the basis of unconscionability. The degree to which a contract can be said to be unfair has always been a factor in that determination. However, it has never been the only factor and I cannot read s. 8(3)(e) as having defined "unconscionable" to mean "inequitable". Had the Legislature intended such a result then it could easily have done so.

[54] In my view, whether one is considering unconscionability at common law or under the BPCPA, the essential elements are the same. As the facts here do not support a finding of unconscionability at common law, neither do they support such a finding under the BPCPA.

In saying this, I am mindful of the fact that s. 9(2) of the BPCPA places the burden of proving that a transaction was not unconscionable on Cougar Mountain. It satisfied that burden by establishing that the appellants knowingly and voluntarily signed releases in order to participate in an inherently risky recreational activity.

Is the Release Void Because of Deceptive Advertising?

[55] The appellants contend that the trial judge failed to properly take into consideration their allegation that Cougar Mountain's website contained information that was deceptive and designed to mislead consumers regarding the safety of zip-lining. For ease of reference, I will repeat the statement from the "Frequently Asked Questions" page upon which they rely:

Q: Is it safe?

A: The Skyline system is fully engineered and certified. Skyline is the safest cable ride system in the world because it utilizes a permanent rock anchor system rather than anchoring cables into trees. The cables used are also 3 times the thickness of conventional zip line systems.

[56] In advancing their argument, the appellants rely on the following provisions found in Part 2 ("Unfair Practices") / Division 1 ("Deceptive Acts or Practices") of the BPCPA:

4(1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or
- (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

...

5(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

- (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[57] In addition, reference was also made to the following provision, found in Part 10 ("Inspections and Enforcement") / Division 5 ("Court Proceedings") of the BPCPA:

171(1) Subject to subsection (2), if a person, ... has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

(a) supplier,

...

who engaged in or acquiesced in the contravention that caused the damage or loss.

[58] The appellants say that the combined effect of ss. 4 and 5 of the Act requires Cougar Mountain to prove that the question and answer referred to above did not have "the capability, tendency or effect of misleading a consumer".

[59] My first difficulty with this argument is that there is nothing to indicate that either Ms. Loychuk or Ms. Westgeest was aware of, or relied on, the impugned question and answer. Neither provided direct evidence that she did so. The only evidence with respect to Cougar Mountain's website is in an affidavit sworn on January 14, 2011, by a paralegal at the law firm of the appellants' counsel. Attached as exhibits to that affidavit are copies of five Cougar Mountain webpages. Each of the first four pages is described as "a true copy of an Internet Printout dated August 28, 2007" (i.e., ten days after the accident). The last page, which contains the question and answer, is described as "a true copy of an [sic] Web archive". However, there is nothing in the affidavit stating that this page was on the website around the time of the accident. In other words, there is no evidence that the question and answer had anything to do with either appellant's decision to go zip-lining.

[60] Deceptive statements cannot be pleaded in the abstract. A consumer cannot allege that a statement was deceptive--either in support of an assertion that a transaction was unconscionable or as an independent basis for damages--without establishing that he or she relied on that statement in entering into the transaction in issue. Absent such a nexus a statement would not be a "representation", as it would not have been "used or relied upon by a supplier in connection with a consumer transaction."

[61] In any event, even if the appellants had read and relied on the question and answer, their position would be no better. This is because the answer is not capable of bearing the meaning the appellants seek to place on it, i.e., that zip-lining at Cougar Mountain was represented to be a safe, risk-free, activity. In particular, it cannot be understood as making a representation with respect to the skill, training, and safety of guides. Rather, the answer relates only to Cougar Mountain's infrastructure.

[62] Section 5 of the BPCPA does not require a defendant to prove that an impugned statement is true, but that "the [alleged] deceptive act or practice was not committed". While affirmatively proving that an impugned statement is true would be one method of proving it is not deceptive, in this case Cougar Mountain has met its burden of showing that it did not commit the deceptive act alleged because that allegation rests on giving the statement a broader meaning than it is capable of bearing.

[63] It is, therefore, unnecessary to decide the effect of the clause in the release which excludes reliance by a participant on any representations or statements about the safety of zip-lining other than those set out in the release: see para. 15 above.

Is the Release Unenforceable for Lack of Consideration?

[64] The appellants contend that they entered into their respective contracts to go zip-lining before going to Whistler and that, therefore, the releases were given without any consideration. Ms. Loychuk says her contract was entered into when a reservation was made using her husband's credit card. Ms. Westgeest says her contract was entered into when her friend made a reservation for their group using her own credit card or, alternatively, that it was complete 24 hours prior to the start of her tour because of the 24-hour cancellation policy on Cougar Mountain's website. Their argument rests on the dissenting judgment of Chief Justice Nemetz in Delaney.

[65] As previously mentioned, Dr. Delaney drowned while white water rafting and his widow's action against the rafting company was dismissed at trial. One of the issues at trial was whether the release signed by Dr. Delaney was unenforceable for lack of consideration. In dealing with this point, the trial judge stated (at pp. 64, 67):

The next morning the party assembled in the hotel parking lot where they were met by Cascade's employees, including the reservation manager, Louella Morrison, and the defendant Reambeault. At this juncture, Morrison attended upon the members of the group including Delaney and requested each to read and sign a liability release form. She indicated that those who refused to sign would not be permitted to participate in the white water adventure. All members of the party signed.

...

It was submitted by counsel for the plaintiff that the consideration herein was past consideration and consequently the contract is not valid and enforceable. But the deceased Delaney paid his money on the morning of 5th May at or about the time the release was signed. See the reservation log, Ex. 32. Cascade employees were in the hotel parking lot at Yale only a few minutes, just enough time to load the van and have the release signed. It would therefore be unreasonable to conclude that Delaney did not have actual or imputed knowledge at the time he paid his fee and received a ride ticket that a liability waiver would be required before embarkation. There was valid consideration.

[66] This Court divided on the consideration question. Chief Justice Nemetz would have found the release unenforceable. He held that Dr. Delaney did not have notice of the terms of the release or even its existence contemporaneous with the formation of the contract which, in the Chief Justice's view, occurred the very moment the company accepted payment. He opined that once the contract had been entered into, the company had no more right to require Dr. Delaney to sign the release than it would have had to require him to pay a higher fare: p. 33.

[67] The majority, however, was of the view that the release did not fail for lack of consideration. In this regard, McFarlane J.A. stated (at p. 44):

Upon the basis of [the trial judge's] findings which are fully supported by the evidence I think the argument of "past consideration" must fail. It seems clear that the deceased was informed that unless he signed the release form he would not be taken on the trip. The immediate consideration which he received was therefore that he was permitted to enter the van and carry on with the venture.

[68] Delaney was applied in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd on other grounds (1987), 49 B.C.L.R. (2d) 99 (C.A.). Mr. Milina entered into a performance contract in Vancouver with the organizers of an acrobatic ski event to take place in Toronto. The night before the event, the organizers explained to all the performers that they had no insurance and could not accept responsibility for the risks involved in any of the performances. The performers were told they would not be allowed to perform unless they signed a waiver. Mr. Milina did so. He was injured while performing and sued the organizers and a number of other parties.

[69] The enforceability of the waiver was an issue at trial. The organizers' position was that the waiver constituted an independent contract, the consideration for which was allowing Mr. Milina to perform. He contended that the contract had been entered into in Vancouver and that the waiver was an attempt by the organizers to vary that agreement without any new consideration being given. In accepting the organizers' position, McLachlin J. held that Delaney was dispositive. After summarizing the majority judgment in that case, she continued (at p. 73):

In [Delaney], as in the case at bar, the parties had entered into a contract prior to the release being presented and signed (I cannot accept the distinction offered by counsel for the plaintiff that Delaney proceeded on the basis there was no prior contract.). In that case as in this, the plaintiff was told that he would not be allowed to pursue the activity in question unless he signed the release. If permission to continue with the activity in question constituted consideration for the waiver in Delaney, so must it in the case at bar.

To put the matter another way, [the organizers] owed no duty under the contract made in Vancouver to allow the plaintiff to perform (although they might have been obliged to pay him in any event). The plaintiff wanted to perform. He was allowed to perform in consideration for signing the release. That was not past consideration, as the plaintiff contends, but new consideration.

[70] The reasoning of the majority in Delaney, which is binding on this division, is also dispositive in the present case. The consideration the appellants received for signing the release was being allowed to participate in the zip-lining activity. Whether either of them had read the statement on the Cougar Mountain website regarding the requirement to sign a waiver is immaterial.

Conclusion

[71] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Bennett"

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