

CW INSURABLE INTEREST

A Publication of Clark Wilson's Insurance Group

March 11, 2011

Zippity Doo Da... What a Wonderful Waiver of Liability!

By Valerie Dixon

A local zipline operator (or at least their CGL insurer) is probably thanking their lawyers for doing such a good job drafting their waiver of liability. In *Loychuk v. Cougar Mountain Adventures Ltd.*, the BC Supreme Court dismissed two claims for personal injuries sustained during an unfortunate zipline accident because of the waivers executed by the plaintiffs prior to the accident.

The Court's decision includes a very useful discussion of the makings of an enforceable waiver of liability. In particular, the Court highlighted the following facts:

1. the tour operator's website disclosed that all participants were required to sign a waiver of liability;
2. the tour operator required every participant to sign the waiver before embarking on the activity and if the participant refused, they were not allowed to go on the tour;
3. if the participant had paid for the tour but refused to sign the waiver, the participant would be given a full refund;
4. the first page of the release contained very clear language in large print alerting the participant that "by signing this document you will waive certain legal rights, including the right to sue or claim compensation following an accident" (immediately adjacent to which the participant was required to provide his or her signature);
5. participants were also required to provide their witnessed signatures a second time, under an acknowledgement that they had read the release and agreed to be bound by its terms;
6. the release contained a description of the tour and its risks; and
7. the release language clearly and unequivocally released the tour operator from all claims, including in negligence, and was set out in bold, capitalized print.

There were, however, some facts at play that might not exist in every case. In particular, one of the plaintiffs owned a fitness business in which she routinely required customers to sign waivers of liability (and thus had to explain the effect of them). The other plaintiff was a graduating law student.

The plaintiffs both asserted a number of other arguments against the enforceability of the release (the Court's discussion of which is very useful) but none convinced the judge. The plaintiffs' claims were therefore dismissed.

This decision is a very useful guide with respect to the elements of an enforceable release. Each case, however, will be dependant on its particular facts and requires a careful analysis of the nature of the risk being released, the language of the release and the circumstances of the execution of the release. And it's always best to have waivers drafted by legal counsel.

Insurable Interest is produced by the [Insurance Group](#) at Clark Wilson. The information and links in this newsletter should not be treated by readers as legal advice and ought not be relied upon without further, detailed legal counsel being sought.