

Case Comment – Niedermeyer v. Charlton, 2014 BCCA 165 (leave to appeal to SCC refused in 2014 SCCA No. 285)

Facts:

- Plaintiff signed up for zip lining operated by the Defendants
- Was required to sign a release in order to participate
- Signed release and participated in zip lining activity
- Release included transportation to and from site
- On the way from the zip line site, but left the road and went down a hill
- Bus was operated by the zip line tour operator
- Plaintiff brought an action for damages

Summary Trial

- Judge found the release (which included transportation) was fatal to the Plaintiff's case and dismissed claim

Plaintiff's Appeal

Grounds

1. Release did not apply to operation of the bus;
2. Release was not enforceable because contents were not brought to her attention;
3. Release was unconscionable; and
4. Release was contrary to public policy

BCCA

1. Release applied to injuries sustained due to operation of the bus
 - a. Release was clear and easy to read
 - b. Travel to and from the zip line was expressed as one aspect of the release
2. Brought to Plaintiff's attention
 - a. Defendants were not obligated to point out the waiver clauses with specific reference to transportation
 - b. Would have been in the contemplation of a reasonable person who had read the release
3. Release was not unconscionable
 - a. Plaintiff chose to participate in a high risk activity
 - b. Not unconscionable for the Defendants to require a person who wished to engage in the activities they offered to sign a release that barred claims of negligence against them
4. HOWEVER, release was contrary to public policy
 - a. Public policy does not allow owner/operator of a motor vehicle to contract out of liability for damages for injuries sustained in a motor vehicle accident
 - b. Especially in BC where there is a statutory scheme of compulsory universal insurance for personal injuries arising from motor vehicle accidents
 - c. Plaintiff's injuries occurred as a result of motor vehicle accident, not directly from zip lining activity
 - d. Defendants cannot contract out of the statutory rights to which the Plaintiff was entitled