THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (905) 415-5889 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Personal Injury

Liability waivers becoming a foe, not friend to the public interest | Sandra Kovacs

By **Sandra Kovacs**

Sandra Kovacs

(August 3, 2017, 8:45 AM EDT) -- Any Canadian consumer who has engaged in a sporting or recreational activity of any kind likely has some familiarity with liability waivers. In most instances, however, the average consumer does not take the time to read the document before signing, let alone understand what he or she is signing away.

Inevitably, under the current state of the law, this leads to a consumer giving up the right to compensation in the event of injury — even where that injury could have been prevented by the operator who has chosen to profit from the particular recreational activity.

A recent decision from British Columbia, *Jamieson v. Whistler Mountain Resort Limited Partnership* 2017 BCSC 1001, has once again sparked the recurring debate over the virtues of protecting for-profit recreational operators from liability and compensating consumers who are injured in the course of a recreational activity.

In *Jamieson,* a mountain biker suffered a spinal cord injury after he was thrown over his handlebars. On a summary trial motion the court determined the waiver he signed was valid and enforceable such that his action was dismissed. While these facts arguably conform to what is a reasonable balance struck between commercial and public safety interests — limiting liability against an operator for injuries caused by a recreational consumer's own negligence — the problem is that the effectiveness of liability waivers has extended much further, providing absolute protection to a for-profit operator even where that operator's negligence is the sole cause of the injury.

For example, in *Loychuk v. Cougar Mountain Adventures Ltd.* 2011 BCSC 193, affirmed 2012 BCCA 122, leave to appeal to refused [2012] S.C.C.A. No. 225, two zip line participants were seriously injured when they collided after a communication failure between their guides. The claims were found to be barred by a waiver that protected the zip line company from liability even in the event of its own negligence.

Loychuk followed a long line of other decisions enforcing broadly worded liability waivers even where the injury was caused by the negligence of the commercial operator in circumstances beyond the ordinary risks of the recreational activity. For example, in *Mayer v. Big White Ski Resort Ltd*. [1998] B.C.J. No. 2155, a waiver was found to be effective where a skier suffered injury after a collision with a snowmobile operated by a ski hill employee.

Courts have, in rare circumstances, imposed some limits on the effectiveness of waivers. In *Niedermeyer v. Charlton* 2014 BCCA 165, the plaintiff suffered serious injuries in a bus crash when returning from a zip lining trip. The Supreme Court of B.C. summarily dismissed her action on the basis of a waiver she endorsed. B.C.'s Court of Appeal reversed the decision, clarifying that in certain circumstances public

policy takes precedence.

The narrow circumstance applicable in *Niedermeyer* was the fact of universal and compulsory motor vehicle liability insurance coverage as defined by statute: the court reasoned it would be contrary to public policy to permit a motor vehicle owner or operator to contract out of liability for damages for personal injuries sustained in a motor vehicle accident, as this would undermine the legislative purpose and history of compulsory universal motor vehicle coverage for injuries. Of significance, the dissenting judge reasoned that the waiver was not contrary to public policy because if the B.C. legislature intended to prohibit the ability to contract out of motor vehicle insurance, it would have expressly stated as much in the governing statute.

What is clear from both the majority and dissenting judgments in *Niedermeyer* is that the judiciary will rarely, if ever, rely upon public policy considerations to displace a waiver in the absence of statutory authority.

In my view, the judicial decisions on liability waivers over the past two decades have swung the pendulum too far. Permitting operators to contract out of liability for injuries caused by their own negligence results in an inequitable favouring of commercial interests over consumer safety interests. This, in itself, is contrary to public policy.

For example, while a consumer should be prepared to accept the ordinary risks associated with the hazardous activity of skydiving — i.e. a hard landing resulting in injury — a skydiver should not be required to assume the risk of the operator's negligence in not appropriately packing the parachute or maintaining the aircraft.

But the current state of the law permits this immunity to prevail, purportedly for the purpose of allowing operators to keep insurance premiums accessible such that they can stay in business for the benefit of all recreational enthusiasts.

Yet if the operator can never be held liable for any error or omission, howsoever caused, why should that operator bother purchasing liability insurance at all? Moreover, why should the operator bother to invest in safety management systems and improvements if there are zero repercussions for not doing so?

It is time for legislators to engage in law reform in order to strike a more reasonable balance between protections for commercial interests and the safety of consumers by prohibiting the ability of operators to contract out of liability for injuries or losses caused by the operator's own negligence, particularly where there is no contributory negligence on the part of the consumer.

Otherwise, injured consumers will continue to be left without appropriate compensation for their cost of care and economic losses — through no fault of their own — in circumstances where the injury could have been avoided by the operator. The continued absence of tort compensation in these circumstances inevitably places the burden of supporting the injured party on the public taxpayer, a result that is detrimental to the public interest but creates a windfall for the for-profit operator.

A more equitable regime would require operators to invest in insurance premiums that will allow them to assure customers that they have, at minimum, taken reasonable steps to reduce or eliminate avoidable and unnecessary risks in what is otherwise accepted by both contracting parties to be a potentially hazardous recreational activity. This investment, however, will only be incentivized if operators are exposed to the risk of loss arising from their own negligence — and this in turn can only happen if our legislators statutorily prohibit operators from contracting out of their own negligence.

Sandra Kovacs is a plaintiff's personal injury lawyer with KazLaw.