The clearer the better: Waiver's unclear indemnity is not enforceable

January 29, 2020

In *McCallum v. Jackson*, 2019 ONSC 7077 the Court considered the issue of whether the language of an indemnity provision in a waiver was clear enough to be enforced. Upon review, the Court found that the indemnity provision was not binding because it did not adequately convey its meaning.

Background

The plaintiff was a cyclist participant in the Ironman race. When registering to enter the race, the plaintiff electronically accepted a Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement (the Release) absolving Ironman and a defined list of third parties of liability from any race mishaps.

During the race, the plaintiff's bicycle came into contact with a vehicle operated by the defendant, Jackson. The plaintiff sustained injuries and subsequently commenced a claim against Jackson and the Ironman organization. Jackson cross-claimed against Ironman in the action and Ironman counterclaimed against the plaintiff, arguing that there was no genuine issue with regards to their liability.

The plaintiff eventually discontinued the action against Ironman; however, the defendant Jackson's crossclaim against Ironman continued. Ironman brought a summary judgment motion for an order dismissing Jackson's crossclaim; for an order granting Ironman's counterclaim against the plaintiff; and for costs of the motion as well as defending the crossclaim and advancing the counterclaim.

During the course of argument, two discrete issues were raised: first, whether the Release could be enforced against the plaintiff and second, whether the Release acted as a bar to the claims against both Ironman *and* Jackson.

Outcome

With respect to the first issue, the Court accepted that the plaintiff signed the Release electronically, but did not read it. There was little dispute that the plaintiff understood that he waived the right to sue Ironman. However, the plaintiff disagreed that he

understood that he would have to indemnify Ironman in circumstances where another party brings a crossclaim against Ironman.

The Court began its analysis by setting out the first issue to be determined: whether the indemnity provision of the Release was sufficiently brought to the plaintiff's attention. In that regard, the Court points out that the Release had capitalized letters, words of warning and nothing was "buried in the fine print". Indeed, the Court pointed out that there was little argument that the collision between the plaintiff and the defendant Jackson was exactly the type of "collision" covered by the Release. The Release explicitly stated that there is a risk of "losing control and falling from the bike, colliding with objects or people (including co-participants or spectators)". The issue, therefore, was whether or not the indemnity portion of the Release was "front and center".

The Court found that it was not. The Court found that the "dense legalese" lost the quality of plain language and, as a result, this portion of the Release was "quite a slog" even for a legally trained reader. Accordingly, the Court concluded that the plaintiff could not have consented to the indemnity terms in question because they had no discernable meaning.

The next question the Court grappled with was whether Jackson was a third party beneficiary of the waiver. The relevant portion of the Release stated as follows:

> TO RELEASE AND NOT TO SUE THE WORLD TRIATHLON CORPORATION (WTC), WEC, OAT, EVENT SPONSORS, EVENT ORGANIZERS, EVENT PROMOTERS, EVENT PRODUCERS, RACE DIRECTORS, EVENT OFFICIALS, EVENT STAFF, ADVERTISERS, ADMINISTRATORS, CONTRACTORS, VENDORS, VOLUNTEERS, AND ALL PROPERTY OWNERS AND *PROVINCIAL, CITY, TOWN, COUNTY, AND OTHER GOVERNMENTAL BODIES, AND/OR MUNICIPAL AGENCIES* ***WHOSE PROPERTY AND/OR PERSONNEL ARE USED AND/OR IN ANYWAY ASSIST IN LOCATIONS WHERE THE ACTIVITIES TAKE PLACE****, AND EACH OF THEIR RESPECTIVE* PARENT, SUBSIDIARY AND AFFILIATED COMPANIES, ASSIGNEES, *LICENSEES,* OWNERS, OFFICERS, DIRECTORS, PARTNERS, BOARD MEMBERS, SHAREHOLDERS, MEMBERS, SUPERVISORS, INSURERS, AGENTS, EMPLOYEES, VOLUNTEERS, CONTRACTORS AND REPRESENTATIVES **AND ALL OTHER PERSONS OR ENTITIES ASSOCIATED OR INVOLVED WITH THE ACTIVITIES (INDIVIDUALLY AND COLLECTIVELY REFERRED TO IN THIS AGREEMENT AS "RELEASED PARTY")** [emphasis added].

Accordingly, Ironman argued that Jackson was in a place, doing an activity, and constituting a risk anticipated in the agreement. Additionally, Ironman argued that the Release extended to Jackson because she was a licenced driver.

The Court rejected this argument, noting that it cannot be that releases deprive registrants, like the plaintiff, of all rights in relation to all wrongdoers just because they have a licence to be in a location walking, driving, or carrying on other activities that people generally have a license to do. As such, the court found that there must be "some parameter" around who is intended to be included among the list as a "Released Party", and it did not include Jackson.

Takeaway

This case serves as an example that a Court may not enforce a portion of a waiver or release that does not use “plain language” in order to determine whether a party signing such a document consented to its terms. Consequently, care consideration should be given when drafting releases to ensure that the language is clear and concise.

By

Natalie D. Kolos, Samantha Bonanno

Expertise

Disputes, Insurance Claim Defence, Insurance

BLG | Canada’s Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG’s privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.