The Educator

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Are waivers still effective in CARICOM's tourism industry?

Background

The claimant, John De Baptiste, was operating a Go Kart at the Belize Go Karting Club, Beausejour Resort, when he allegedly encountered a broken go kart tire. The plaintiff lost control when he struck the tire, veered into a tire barrier and allegedly sustained an injury.

Before the go karting expedition, the claimant had purchased a five-day pass on the resort's website. As part of the purchase process, the claimant was required to agree to the terms of an exculpatory liability waiver/release. On the strength of this release, as well as a general negligence defence, the resort denied liability.

However, the claimant pleads and relies upon the provisions of the Belize [Draft] Model Law on Consumer Protection (CPA) claiming that the Section 98 (1) of the CPA voided those parts of the Resort's waiver that negated the procedural and substantive rights provided by the CPA. Section 98 (1) of the Belize [Draft] Model Law on Consumer Protection Act reads as follows:

> 98. (1) Despite any agreement or waiver to the contrary, the substantive and procedural rights given under this Act apply.

The Law

In some jurisdictions the Occupier Liability Act (OLA) permits an occupier to obtain a waiver of liability, and where it exists, other legislation such as the Belize [Draft] Model Law on Consumer Protection (CPA) may preclude a supplier from obtaining a waiver of liability. In other words, what the OLA permits, the CPA prohibits.

The OLA reflects the fact that the duty of care originates from the statute itself, and it take into account that the statute allows for the modification of the duty and liability arising therefrom.

Relying on the principles of statutory interpretation, there may be a clear and direct conflict between the OLA and the CPA. As such, a Court will apply the statutory interpretation principles of *ejusdem generis*, *expressio unius est exclusio alterius*, the exhaustiveness doctrine, *generalia specialibus non derogant* and the absurdity doctrine to address the conflict between the two statutes.

Central to a Court's analysis will be that the OLA as a complete scheme intended to address the duties of occupiers, and the determination that the OLA dealt with the core issue, where the CPA had more general application. As such, a decision may restore the efficacy of waivers.

Note to students

Procedure to resolve dispute

While not directly related to the issues discussed above, students taking the Insurance Dispute Resolution course should note that the Belize [Draft] Model Law on Consumer Protection contains a provision that states where a dispute over which a consumer may commence an action in the Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law, including mediation offered by the Consumer Affairs Commission.

"Midnight Express"

Students in the Liability Insurance course will recall discussions around the Trinidad and Tobago case of ***Wesley Gabriel v. Royal Bank of Trinidad and Tobago Limited*** [2011], which was before The Honourable Mr. Justice Devindra Rampersad.

According to Mr. Gabriel, he was injured in a race called "Midnight Express" which consisted of 5 teams of 8 men and women who were supposed to hold a PVC pipe, which was between 8" to 10" wide and capped off at both ends, between their legs and walk from the starting line to the finishing line – a distance of about 50 to 100 metres. The first team to completely cross the finish line with the pipe would be the winner. The claimant said that the PVC "log" was filled with an unknown substance and was very heavy and required all 8 people to lift it and move it about. In fact, he said that the race really amounted to them shuffling the distance with the "log" between their legs. He says that, upon completion of the said Log Race, the row of persons next to his row negligently dropped the PVC pipe on his left foot resulting in his injury for which he claims damages.

volenti non fit injuria

In ***Gabriel***, Rampersad J: noted that the defence of *volenti non fit injuria* ('to a willing person, no injury is done') may be raised if an injured person knowingly and willingly puts himself in danger. He cannot sue successfully for all of the damages arising – he is likely to be wholly or contributorily negligent. The Judge noted that Lord Herschell in the English case of ***Smith v. Baker & Sons*** [1891] said:

> *"The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."*

However, is ***Gabriel***, the Court found that the defence of *volenti non-fit injuria* fails for the reasons given in the decision.

In another Trinidad and Tobago Court of Appeal case of ***Tajo Beharry v BWIA International Airways Limited*** [2003], Mendonca JA said that there are three (3) criteria for the imposition of a duty of care and these are:

1. foreseeability of damage,
2. proximity of relationship and
3. justice and reasonableness.

In the English case of ***Caparo Industries v Dickman*** [1990], Lord Bridge of Harwich put the position this way:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.

Lord Bridge went on to observe:

> … the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.

"bouldering"

In the English case of ***Gary Christopher Poppleton v The Trustees of the Portsmouth, Youth Activities Committee (a charity)*** [2007], His Honour Judge Richard Foster considered the instance and claim of the claimant who was injured when he fell whilst participating in an indoor activity comprising low level free climbing without ropes on artificial climbing walls with a well cushioned, level, landing area provided comprising shock absorbent matting called "bouldering". The claimant was an inexperienced climber and, as such, was held by the Honourable Judge to be a beginner or novice. The learned judge held that the defendant was under a duty of care to warn the claimant of specific dangers which might not have been known to him and which might be hidden, and that the consent of the claimant to carry out the particular activity was contingent upon that reliance. That specific danger was in placing too much reliance upon the fact that there was a well-cushioned, absorbent matting on the floor thereby leading the claimant to believe that any fall from the wall would not lead to serious injury. The learned judge went on to consider what is of grave importance when considering the defence of *volenti non-fit injuria*. He said that: "*For a claimant to consent to the danger he must know what that danger is*."

I did it too

I recall during a vacation, my family and I decided to do some zip lining. After a 30 minutes driver to the rain forest and before we can put our safety gear on, we were required to sign a waiver which contained the following:

> I voluntarily assume all risk of personal injury or death sustained during this activity. I recognize that this release means I am giving up, among other things, all rights to sue for injuries, damages or losses I may incur.

I had two options.

Waiver Best Practices

Lord Pearce in ***Imperial Chemical Industries Ltd. v. Shatwell*** *[1965] said:*

as concerns common law negligence, the defence of volenti non fit injuria is clearly applicable if there was a genuine full agreement, free from any kind of pressure, to assume the risk of loss.

As a claimant's attorney, when facing a waiver document, will carefully examine the language of the document and the circumstances surrounding the formation of the contract which includes the waiver to ensure that the limiting condition was properly brought to the attention of the injured party. They will also carefully scrutinize the evidence to determine whether one of the defences to the waiver doctrine such as *non est factum and* misrepresentation are present or whether the circumstances demonstrate that the claimant did not intend to be bound by the document. When considering waivers and assumption of risks, underwriters and risk managers may wish to consider the following best practices:

1. The language in waivers must be drafted carefully to ensure that they cover all forms of potential risk, and all sources legal liability whether in negligence, contract or under a statute.

2. Waivers should be supported by appropriate signage drawing the attention of patrons to the contents of the waiver.

   In doing so, you should ensure that there is clear evidence of the waiver and the signage, so that the resort's efforts to bring the waiver to patrons' attention are clearly communicated.

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