COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Niedermeyer v. Charlton,*
2014 BCCA 165

Date: 20140430
Docket: CA040431

Between:

Karen Niedermeyer

Appellant
(Plaintiff)

And

William Charlton and Ziptrek Ecotours Incorporated

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected at paragraph 41 where changes were made on May 2, 2014.

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: An order of the Supreme Court of British Columbia, dated November 8, 2012 (*Niedermeyer v. Charlton*, 2012 BCSC 1668, Vancouver Docket M102712).

Counsel for the Appellant: W. Mussio
E. Goodman

Counsel for the Respondents: R.C. Brun, Q.C.
S. Harry

Place and Date of Hearing: Vancouver, British Columbia
November 4, 2013

Place and Date of Judgment: Vancouver, British Columbia
April 30, 2014

Dissenting Reasons by:
The Honourable Mr. Justice Hinkson

Majority Reasons by:
The Honourable Madam Justice Garson (p. 26, para. 70)

Concurred in by:
The Honourable Madam Justice Bennett

Summary:

The appellant was injured returning to Whistler Village after participating in a zip line experience operated by the respondent, Ziptrek Ecotours Incorporated ("Ziptrek"), when a bus operated by the respondent, left the road returning from the area where the zip line activities were conducted. On a summary trial, a Supreme Court judge held that the document entitled "Release of Liability, Waiver of Claims Assumption of Risk and Indemnity Agreement" signed by the appellant, was a complete defence to the appellant's claim, and dismissed her action.

Held: The majority held that it is contrary to public policy to permit the owner and /or operator of a motor vehicle to contract out of liability for damages for personal injuries suffered in a motor vehicle accident in British Columbia. British Columbia has a statutory scheme of compulsory universal insurance coverage for damages for personal injury arising from motor vehicle accidents. It would be contrary to public policy to permit the respondents to enforce the release of liability for a claim that arose not from an injury that occurred in the course of the hazardous activity, but rather in the course of transportation to the site of that activity.

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] The appellant was injured returning to Whistler Village after participating in a zip line experience operated by the respondent, Ziptrek Ecotours Incorporated ("Ziptrek"), when a bus operated by the respondent William Charlton, an employee of Ziptrek, left the road leading to and returning from the area where the zip line activities were conducted. On a summary trial, a Supreme Court judge held that the document entitled "Release of Liability, Waiver of Claims Assumption of Risk and Indemnity Agreement" (the "Release") signed by the appellant, was a complete defence to the appellant's claim, and dismissed her action. His reasons for judgment are indexed at 2012 BCSC 1668.

[2] This appeal requires a consideration of the enforceability of the Release. For the reasons that follow, I agree with the trial judge that the Release is a complete defence to the appellant's claim.

Background

[3] The appellant was born and raised in Australia. She holds both Bachelor and Masters University Degrees, and for the twenty years preceding her injuries taught at a school in Singapore. In October 2008, she came to British Columbia with six students from her school to attend an international conference in Victoria. Prior thereto, she had never visited this province and was unfamiliar with the provincial car insurance scheme.

[4] When planning her visit, the appellant received a proposal for a post-conference tour to Whistler, B.C. She was provided with an itinerary offered by a tour company, Tours of Exploration. The itinerary included a zip line tour in the valley between Whistler and Blackcomb mountains on October 12, 2008. The itinerary contained a note explaining that participants were to have their "waiver form completed and ready" for a river trip but did not mention any such requirement with respect to Ziptrek's zip line activity. Tours of Exploration paid the required deposit to Ziptrek and arranged the zip line tour for the appellant and her students under a group contract between the tour company and Ziptrek.

[5] The group contract for the zip line tour included the following:

> I hereby authorize the following credit card to:
>
> > Secure the reservation, commit to cancellation policy and be processed for FULL payment (FULL payment posted on tour date) for the above services requested.
>
> …
>
> * A cancellation policy that "no-shows" within 72 hours of tour departure time will be charged full price to the credit card provided.

[6] On the morning of October 12, 2008, the appellant and her students walked to Ziptrek's kiosk in the Carleton Lodge in Whistler Village where they were asked to wait for Ziptrek's staff to take them to the start of the activity. It was there that the appellant was asked to sign seven copies of the Release; one for herself, and one for each of her students.

[7] The Release included the following:

> TO: ZIPTREK ECOTOURS INC. (the OPERATORS), BLACKCOMB SKIING ENTERPRISES LIMITED PARTNERSHIP, WHISTLER MOUNTAIN RESORT LIMITED PARTNERSHIP, INTRAWEST ULC, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and ALL TOUR OPERATORS WHO PROVIDE OR MAKE AVAILABLE FACILITIES, PREMISES OR SERVICES FOR THE OPERATORS, and their respective directors, officers, employees, agents, guides, volunteers, Independent contractors, representatives, successors and assigns (hereinafter referred to as "The RELEASEES".)
>
> DEFINITIONS
>
> In this Agreement, the term "Adventure Activities" shall include all activities, events or services provided, arranged, organized, conducted, sponsored or authorized by THE OPERATORS and shall include, but are not limited to use of ziplines, suspension bridges; climbing, rappelling; hiking; sightseeing: snow shoeing; travel to and from the tour areas; back country travel; orientation and instructional courses, seminars and sessions; and other such activities, events and services in any way connected with or related to those activities.
>
> ACKNOWLEDGEMENT - SAFETY
>
> I acknowledge that I am required to wear an approved helmet and other safety equipment while participating in certain Adventure Activities. I am aware that there are guides or instructors available to answer any questions that I may have as to the proper use of the equipment. I am aware that the physical exertion required of Adventure Activities and the forces exerted on the body can activate or aggravate pre-existing physical injuries, conditions, or congenital defects. I acknowledge that I should seek medical advice if I know or suspect that my physical condition may be incompatible with Adventure Activities.

ASSUMPTION OF RISKS

I am aware that Adventure Activities involve many risks, dangers and hazards including but not limited to: changing weather conditions; falling trees, limbs, and ice; falling from platforms, cables and bridges; shock, stress or other injury to the body; encounters with wildlife including bears and cougars; equipment malfunction including breakage of cables, tethers, pulleys and harnesses; collision with trees, vans, snow cats, snowmobiles, or other vehicles, equipment or structures: collision with other participants or guides; me failure to remain within designated areas; becoming lost or separated from guides or other participants; negligence of other participants or guides: and NEGLIGENCE ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF ADVENTURE ACTIVITIES. I am also aware that these risks, dangers and hazards referred to above exist on terrain that may be uncontrolled, unmarked and not inspected.

I AM AWARE OF THE RISKS, DANGERS AND HAZARDS ASSOCIATED WITH ADVENTURE ACTIVITIES AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND LOSS RESULTING THEREFROM.

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of THE RELEASEES allowing me to participate in Adventure Activities and permitting my use of their property, ziplines, platforms, bridges, trails, roads, other structures and equipment (hereinafter referred to as The facilities”), and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged. I hereby agree as follows:

1. TO WAIVE ANY AND ALL CLAIMS that I have or may in the future have against THE RELEASEES and TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury including death that I may suffer, or that my next of kin may suffer resulting from either my use of or my presence on the facilities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE UNDER THE OCCUPIERS LIABILITY ACT, R.S.B.C. 1996, c.337, ON THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF ADVENTURE ACTIVITIES REFERRED TO ABOVE;

2. TO HOLD HARMLESS AND INDEMNIFY THE RELEASEES from any and all liability for any damage to property or personal injury to any third party, resulting from my use of or presence on the facilities;

3. This Agreement shall be effective and binding upon my heirs, next of kin, executors, administrators, assigns and representatives, in the event of my death or incapacity;

4. This Agreement and any rights, duties and obligations as between the parties to this Agreement shall be governed by and interpreted solely in accordance with the laws of the Province of British Columbia and no other jurisdiction;

5. Any litigation involving the parties to this Agreement shall be brought solely within the Province of British Columbia and shall be within the exclusive jurisdiction of the Courts of the Province of British Columbia; and

6. To consent to having photos or videos taken of me while participating in Adventure Activities and to the publication of the photos or videos by the Releases for advertising, marketing and promotional purposes.

I AM NOT RELYING UPON ANY ORAL OR WRITTEN REPRESENTATIONS OR STATEMENTS MADE BY THE RELEASEES WITH RESPECT TO THE SAFETY OR ADVENTURE ACTIVITIES OTHER THAN WHAT IS SET FORTH IN THIS AGREEMENT.

I CONFIRM THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT PRIOR TO SIGNING IT, AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS, ASSIGNS AND REPRESENTATIVES MAY HAVE AGAINST THE RELEASEES.

FOR PARTICIPANTS OF MINORITY AGE. I HEREBY CERTIFY THAT I, AS PARENT/GUARDIAN WITH LEGAL RESPONSIBILITY FOR THIS PARTICIPANT OF MINORITY AGE, DO CONSENT AND AGREE, TO HIS/HER RELEASE OF ALL THE RELEASEES, AND, FOR MYSELF, MY HEIRS, ASSIGNS, AND NEXT OF KIN, I RELEASE AND AGREE TO INDEMNIFY THE RELEASEES FROM ANY AND ALL LIABILITIES INCIDENT TO THIS PARTICIPANT OF MINORITY AGE'S PARTICIPATION IN THESE ADVENTURE ACTIVITIES.

[8] In addition to signing each copy of the Release, the appellant initialled a box at the top of each copy of the Release that stated:

RELEASE OF LIABILITY, WAIVER OF CLAIMS
ASSUMPTION OF RISK AND INDEMNITY AGREEMENT
BY SIGNING THIS AGREEMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE
PLEASE READ CAREFULLY!

[9] The Release was a precondition to potential customers being allowed to engage in the zip line activity. Ziptrek required its staff to obtain a signed Release from guests but the staff members were not permitted to interpret or comment on an interpretation of the Release to prospective customers. Changes to the Release were not permitted and if a person declined to sign the Release as presented, they were not allowed to participate in any aspect of the activity. The staff members were told that if a customer refused to read the Release, they were required to hand the document back and tell the prospective customer to read it.

[10] The appellant was unable to recall any discussion about the mode of transport to the zip line site. She said that no one explained the details of zip lining to her or her students, but recalled that a guide led them to a shed where they were provided helmets and harnesses. The appellant and her students next walked to Whistler Village where they received some training, following which they were taken to a van in a car park and driven up the mountain. The first part of the roadway they took is a paved surface. The next portion is a decommissioned gravel logging road maintained by Ziptrek. The entrance to the gravel road was restricted by a gate.

[11] It was on the gravel part of the road where the accident occurred. The appellant and her students were returning from the zip line to Whistler Village when the bus they were

travelling in went off the road, overturned, and fell down a hill. The appellant suffered significant injuries in the accident. The respondents admitted that the accident that caused the appellant's injuries occurred due to the negligence of the respondent William Charlton, for whom the respondent, Ziptrek, was vicariously liable, but argued that the appellant's claim was defeated by the Release.

[12] The summary trial judge concluded that the appellant was "not entitled to recover damages due to the [respondents'] negligence because she surrendered that right when agreeing to the waiver and release of all claims as a condition of being permitted to use the defendants' zip line facility".

Issues on Appeal

[13] The appellant raises four issues on this appeal:

a) that the summary trial judge erred in finding that the Release applied to injuries sustained due to the operation of Ziptrek's bus;

b) that the summary trial judge erred in finding that the Release was enforceable even though its contents were not brought to her attention;

c) that the summary trial judge erred in finding that the Release was not unconscionable; and

d) that the summary trial judge erred in finding that the Release was not contrary to public policy.

Standard of Review

[14] The first ground of appeal relates to findings of mixed fact and law made by the trial judge. With respect to the appropriate standard of review, matters of mixed fact and law lie along a spectrum: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. With respect to the interpretation of a release, the standard of review is closer to the legal end of the spectrum. The second, third and fourth grounds of appeal involve questions of law, attracting a standard of review of correctness: *Housen* at para. 8.

Discussion

a) The Application of the Release to Injuries Sustained Due to the Operation of Ziptrek's Bus

[15] In *Keefer Laundry v. Pellerin Milnor Corporation*, 2009 BCCA 273, this Court affirmed the following statement from *Canadian Contractual Interpretation Law* at para. 59:

> A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto the regular ones. This rule comes from*London and South Western Railway v. Blackmore*, an 1870 decision of the House of Lords. The rule in *London and South Western Railway* holds that a release is to

> be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contract interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.

[16] The Release between the appellant and Ziptrek was intended to benefit those named in it. The parties agree that the learned trial judge identified the appropriate analysis to be employed to determine the enforceability of the Release as set out by Mr. Justice Binnie in his dissenting reasons (agreed to on this aspect by the majority at para. 62) in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 121–123 [*Tercon*]:

> The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause wasunconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.
>
> [Emphasis added.]

[17] The appellant's first and second grounds of appeal engage the first issue identified in the above passages in *Tercon*.

[18] At para. 81 of his reasons for judgment, the trial judge observed that the Release contained specific reference to the bus transportation to and from the tour site, as indeed it does. The appellant's evidence at trial was:

> Q … And if you had read it, you would have seen that [the Release] said "travel to and from the tour areas"?
>
> A Yes, but I didn't expect the bus to go up the side of the mountain.
>
> Q I understand that. And you understood that it referred to back country travel, correct?
>
> A Correct.

[19] The trial judge identified the legal principles that apply to a claim pursuant to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*IVA*]. He commented that there was much to be said for the argument that people in B.C. ordinarily expect to receive

compensation for injuries caused by the negligence of the driver of a motor vehicle. He then discussed the references to the universal compulsory vehicle insurance scheme created by that *Act* at para. 45 of his reasons for judgment:

> The relevant sections are as follows:
>
> Plan
>
> 7 (1) Subject to section 2 and compliance with this Act and the regulations, the corporation must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the Motor Vehicle Act, of at least the amount prescribed, to all persons …
>
> Third party rights
>
> 76 (1) In this section and sections 77 and 78, "claimant" means a person who has a claim or a judgment against an insured for which indemnity is provided by the plan or an optional insurance contract.
>
> (2) Even though he or she does not have a contractual relationship with the insurer, a claimant is entitled, on recovering a judgment against an insured or making a settlement with the insurer, to have the insurance money applied toward the claimant's judgment or settlement and toward any other judgments or claims against the insured who is covered by the indemnity.
>
> (3) The claimant may, on behalf of himself or herself and all persons having judgments or claims against the insured who is covered by the indemnity, bring an action against the insurer to have the insurance money applied in accordance with subsection (2).

[20] At paras. 47–51, the trial judge explained his conclusion that the Release applied to the operation of Ziptrek's bus:

> It is a precondition that a claimant either have a judgment or a settlement of a claim against an insured party for which indemnity is provided. However, in this case the plaintiff (the claimant) pre-emptively released the defendants from all claims and therefore does not have a claim for indemnity.
>
> The plaintiff submits that s. 76(6) defeats the argument that the release should be enforceable in the circumstances of this case. Section 76(6) provides:
>
> > 76 (6) The following do not prejudice the right of a person entitled under subsection (2) to have the insurance money applied toward the person's judgment or settlement, and are not available to the insurer as a defence to an action under subsection (3):
> >
> > > (a) assignment, transfer, surrender, cancellation, suspension, waiver or discharge of coverage under the plan or an optional insurance contract or under a provision of the plan or an optional insurance contract, or of an interest in either of them or of insurance money payable under either of them, made by the insured after the event giving rise to a claim under the plan or optional insurance contract occurs;
> >
> > > (b) an act or default of the insured before or after the event giving rise to a claim under the plan or an optional insurance contract in contravention of this Act or the regulations or of the plan or optional insurance contract;
> >
> > > (c) contravention of the Criminal Code or of a law or statute of any province, state or country by the owner, lessee or driver of the vehicle specified in the owner's certificate or policy.

> A plain reading of subsection 6(a) relates to a "waiver or discharge of coverage under the plan". This section does not address a waiver of the Ziptrek's liability for a claim for damages arising from a motor vehicle accident; the Release in this case does not involve a waiver or discharge of coverage; it involves a waiver or release of liability for negligence and damages, including injury caused by the negligence of the Ziptrek's bus operator.
>
> The plaintiff also relied on the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 as support for the proposition that the plaintiff, as an occupant of a vehicle, is to be indemnified for liability imposed on the insured by law for injury or death pursuant to s. 64:
>
> > Indemnity
> >
> > 64 Subject to section 67, the corporation shall indemnify an insured for liability imposed on the insured by law for injury or death of another or loss or damage to property of another that
> >
> > > (a) arises out of the use or operation by the insured of a vehicle described in an owner's certificate, and
> > >
> > > (b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.
>
> In the circumstances of this case, the Release relieves the defendants of any liability that might otherwise [have] been imposed by law for Ms. Niedermeyer's injury. The law does not impose liability on Ziptrek and ICBC is not obliged to indemnify the defendants in the absence of a settlement or judgment in her favour. This section does not support the plaintiff's claim.

[21] The appellant relies on three trial decisions where waivers or releases were found insufficient to defeat claims for personal injuries: *Nesham v. Canwest Trade Show Inc.*, 2012 BCSC 289; *Arndt v. The Ruskin Slo Pitch Association*, 2011 BCSC 1530; and *Okhiro v. 572412 B.C. Ltd*., 2008 BCSC 1161. Each of those decisions was premised on findings that the waivers or releases were unclear. That was not the finding of the trial judge respecting the Release in this case.

[22] I see no error in the trial judge's analysis of the legal principles that apply to a claim pursuant to the *Insurance Vehicle Act* and I am unable to find that he erred in concluding that the Release applied to injuries sustained by her due to the operation of Ziptrek's bus.

[23] The appellant also contends that the summary trial judge erred in his interpretation of the Release by failing to search for an interpretation of the Release that would appear to promote or advance the true intent of the parties at the time the Release was signed.

[24] In *MacMillan Bloedel Ltd. v. British Columbia Hydro and Power* (1992), 98 D.L.R. (4th) 492 (B.C.C.A.), Mr. Justice Cumming wrote at para. 30:

> In the absence of ambiguity words in a contract are to be given their literal meaning: *North Eastern Railway Co. v. Hastings*, [1900] A.C. 260 (H.L.). Words of ordinary use in a contract must be construed in their ordinary and natural sense: *Matsqui (Municipality) v. Western Power Co.,* [1934] A.C. 322, [1934] 1 W.W.R. 483, [1934] 2 D.L.R. 81 (P.C.).The paramount test of the meaning of words in a contract is the intention of the parties:*Grand Trunk Pacific Coast Steamship Co. v. Victoria-Vancouver Stevedoring Co*., 57 S.C.R. 124, [1918] 3 W.W.R. 450, 43 D.L.R. 231. The intention of the parties is to be determined in the objective sense by reference to the surrounding circumstances at the time of signing the contract: *Wenzoski v. Klos*, [1940] 1 W.W.R. 523, [1940] 2 D.L.R., 195 (Man. C.A.).

[25] I am unable to accede to the appellant's contention that the trial judge ought to have searched for an interpretation of the Release that appeared to promote or advance what she argued was the true intention of the parties at the time that the Release was signed as, in my view, the terms of the Release are unambiguous. Absent ambiguity, the words of the Release speak for themselves.

[26] I would not accede to the appellant's first ground of appeal.

b) Enforceability of the Release When its Contents Were Not Brought to the Appellant's Attention

[27] The appellant signed the Release not only for herself, but for the six students for whom she was responsible. As the adult responsible for the students that accompanied her, the appellant would be expected to read the Release before signing the various copies. Indeed, she initialled the box described above on each copy of the Release that she signed. In her evidence she stated:

> Q And I'm going to suggest that you, because you were also signing this on behalf of all of your students, would have carefully read this to make sure that you weren't doing something that could harm your students.
>
> A I don't remember.
>
> Q I'm going to suggest that it is your nature, Mrs. Niedermeyer, as a careful and caring teacher and as guardian of those children, you would have -- those children, you would have carefully reviewed this document before you signed it for yourself and them, isn't that true?
>
> A I accept that, I just don't remember it.

[28] At trial, and again in this Court, the appellant contended that Ziptrek ought to have known that she would not consent to waiving her claims related to bus travel because she was from Singapore and lacked knowledge about the effect of the Release. She further contends that she assumed that all vehicle passengers would be protected from a driver's negligence and indemnified by their insurer.

[29] The trial judge properly referred to the analysis by McLachlin, C.J.S.C.B.C. (as she then was), in *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.) at 166 [*Karroll*] where she wrote that:

> ... there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question that such an obligation arises.

[30] The reasoning in *Karroll* was applied in circumstances similar to those that pertain to the appellant by Goepel J., as he then was, in *Loychuk v. Cougar Mountain Adventures Ltd*., 2011 BCSC 193 [*Loychuk*]. In that case, the plaintiffs each signed a release waiving liability and stating an assumption of risk prior to embarking on a zip line tour. They were

injured when they collided with each other. At paras. 29–33 after reference to *Karroll*, Goepel J. reasoned:

> The Plaintiffs signed the Release knowing that it was a legal document affecting their rights. Under the principles set forth in ***L'Estrange*** they are bound by its terms unless they can bring themselves within one of the exceptions. This is not a case of *non est factum*. Nor was there active misrepresentation. Unless it is unconscionable or invalid for other reasons, they are bound by the Release unless they can establish:
>
> i. that in the circumstances a reasonable person in the place of the defendant would have known that they did not intend to agree to the Release they signed; and
>
> ii. that in the circumstances the defendant failed to take reasonable steps to bring the content of the Release to their attention.
>
> The Release was consistent with the purpose of the contract, which was to permit the Plaintiffs to engage in a hazardous activity upon which they, of their own volition, had decided to embark. The most casual review of the document would have revealed to the Plaintiffs that the Release was a legal document impacting on their legal rights to sue or claim compensation following an accident. They asked no questions concerning the terms of the Release. They never indicated to Cougar that they were not prepared to sign the Release.
>
> There is nothing in the circumstances that would lead Cougar to conclude that the Plaintiffs did not intend to agree to what they signed. In these circumstances, Cougar was under no obligation to take reasonable steps to bring the terms of the Release to the Plaintiffs' attention.

This Court dismissed the appeal in *Loychuk*, 2012 BCCA 122, and leave to appeal to the Supreme Court of Canada was dismissed, [2012] S.C.C.A. No. 225.

[31] The trial judge in this case considered the appellant's submissions that a reasonable person would not release a claim for the negligent operation of a motor vehicle when it was reasonable to assume that there was auto insurance in place, and that the respondents ought to have known that she would not consent to waiving her claims because she was from Singapore and lacked knowledge about the effect of the release. Having done so, he concluded at para. 76 of his reasons that:

> ... the full impact of the Release was disclosed on the face of the single page and there was no demonstrable risk that Ms. Niedermeyer could have misunderstood that the Release governed her transportation to and from the zip line site.

and at para. 81 that:

> ... the defendants were not obliged to point out the waiver clauses, with specific reference to the bus transportation to and from the tour site. There were no distinct features of the bus trip as opposed to the other zip line activities that should have been brought to the plaintiff's attention.

[32] I see no basis upon which this Court could overturn these conclusions of law by the trial judge, and would not accede to the appellant's second ground of appeal.

c) Is the Release Unconscionable?

[33] This ground of appeal engages the second enquiry described by Binnie J. in *Tercon*: whether the exclusion clause was unconscionable at the time the contract was made.

[34] At para. 89 of his reasons, the trial judge held that the Release was not unconscionable:

> It is not unconscionable for the operator of a recreational sports facility to require persons to sign releases as preconditions to the use of that facility. Although the defendants' bus may have been insured by ICBC, I do not accept that the failure to disclose the existence of the insurance, and the fact that the release would operate in favor of the defendants in the case of a motor vehicle accident, rises to the level of an unfair advantage to the defendants obtained as a result of the imbalance of the relative strengths of the parties. This is not a case where "the transaction seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded" as per Lambert J.A. in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 at 177 (C.A.).

[35] The reasoning of the trial judge is supported by that of the Supreme Court of Canada in *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589, where a snowmobiler who signed a waiver was injured in a snowmobile race. At 593, the Court held:

> Nor does the relationship of Dyck and the Association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.

[36] In *Loychuk*, Mr. Justice Frankel, for this Court, held at para. 40:

> The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.
>
> [Emphasis added.]

[37] The dispute that was before the trial judge was between the appellant and the respondents, and did not involve the respondents' insurers. While it is true that motor vehicle insurance is mandatory in this province, I am unable to accept that a release which relieves a party from liability for injuries or damage caused by the negligent operation of a motor vehicle results in the loss of a statutory right.

[38] Here, the appellant wished to participate in what she accepted was a high risk activity. The basis upon which the respondent Ziptrek was prepared to permit her to do so was only if she signed the Release. Her choice was to refuse, and not participate, or to sign the Release which required her to waive any claims she might have against the respondents arising from “travel to and from the tour areas” and “back country travel”. It was in the course and scope of those activities that she sustained her injuries.

[39] I see no basis upon which to distinguish the appellant’s circumstances from those of the plaintiff in *Loychuk*, and like Frankel J.A., find that it is not unconscionable for the respondents to require a person who wishes to engage in the activities they offer to sign a release that bars all claims for negligence against them and their employees. I would not, therefore, accede to the appellant’s third ground of appeal.

d) Is the Release Contrary to Public Policy?

[40] This ground of appeal engages the third enquiry described by Binnie J. in *Tercon*: whether the Court should refuse to enforce a valid exclusion clause because of the existence of an overriding public policy.

[41] The concept of “public policy” is ancient; however, the foundations of the modern doctrine were not laid until the eighteenth century. Since that time, judicial attitude toward the doctrine has been varied, but cautious. In*Richardson v. Mellish* (1824), 130 E.R. 294 at 303 (Eng. C.P), Burrough J. famously compared public policy to an unruly horse:

> If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;--it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.

[42] In that case, the plaintiff had made a contract with the defendant whereby the plaintiff resigned his command of a ship in favour of the defendant’s nephew on the condition that if the nephew died, the plaintiff would regain his command. The defendant’s nephew died and the defendant refused to reappoint the plaintiff. The defendant argued the contract was contrary to public policy because the by-laws of the East India Company prohibited pecuniary sales of an office and an act of parliament prohibited the sale of public offices. Burrough J. was in the majority when he concluded that the by-law was only concerned with pecuniary sales, and the command of the ship was not a public office.

[43] In *Printing & Numerical Registry Co. v. Sampson* (1875), L.R. 19 Eq. 462 (Eng. Rolls Ct.), the plaintiff purchased a patent from the defendant and the defendant agreed that any further discoveries of his that produced the same product would also belong to the plaintiff. The defendant argued that a contract by which an inventor agrees to sell what has not yet been invented is contrary to public policy. At p. 465 Jessel M.R. said:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further.
>
> [Emphasis added.]

[44] The application of the doctrine of public policy has been heavily influenced by precedent. To confine the reach of the doctrine, categories of public policy developed to strike down contracts as contrary to certain fundamental values. The categories are:

- contracts injurious to the state;
- contracts injurious to the justice system;
- contracts involving immorality;
- contracts affecting marriage; and
- contracts in restraint of trade.

[45] These categories were strictly followed. In *Janson v. Driefontein Consolidated Mines Ltd*., [1902] A.C. 484 (H.L.), Lord Lindley pointed out that “public policy is a very unstable and dangerous foundation on which to build until made safe by decision”. Lord Halsbury at 491 went so far as to deny the court had the ability to invent a new head of public policy. This approach was subsequently followed in Canada: *Wadgery v. Fall*, [1926] 4 D.L.R. 333 at 335 (Sask. C.A.).

[46] The trial judge here dealt with the public policy issue at paras. 90–92 of his reasons:

> The plaintiff argues that the Release is contrary to public policy because it abrogates the protection and benefits that are afforded by the statutory scheme of mandatory public and auto insurance. The plaintiff reviews a number of cases in dealing with human rights issues, cell phone contracts and employment contracts.
>
> On this issue, I accept the plaintiff’s argument that contracts precluding one party from taking advantage of statutory rights may, in some circumstances, constitute an impermissible undermining of public policy.
>
> However, in this case, the Release does not impact public policy or the statutory automobile insurance scheme. This Release deals only with the plaintiff’s right to recover damages from the defendants caused by the defendants’ negligence. The statutory scheme is not engaged until there has been a determination, or settlement, of a complainant’s entitlement to money as compensation for injury suffered as a result of the negligence. In my view, the plaintiff’s argument does not engage a debate about public policy.

[47] The appellant contends that this analysis may apply to a high risk activity, but should not apply where the risk that emerges has nothing to do with the high risk activity. Indeed, the appellant goes further and contends that public policy in British Columbia has brought about universal compulsory vehicle insurance, and that policy cannot support the application of the Release to the injuries sustained by the appellant while travelling in Ziptrek's bus.

[48] In my opinion, the conclusion of the trial judge in this case is fully supported by the approach articulated by Binnie J. in *Tercon*. In laying to rest the doctrine of fundamental breach at paras. 121–123, Binnie J. articulated an approach to deciding the enforceability of an exclusion clause that involves three considerations:

1. Does the exclusion clause apply in the circumstances?
2. Was the exclusion clause unconscionable at the time it was made? (For example, due to unequal bargaining power between the parties.)
3. Should the court refuse to enforce the valid exclusion clause because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts?

[49] It is the third consideration that has caused some uncertainty insofar as what is meant by public policy.

[50] I agree with the approach articulated by B. Kain and D.T. Yoshida in their article "The Doctrine of Public Policy in Canadian Contract Law", in Todd L. Archibald and Randall S. Echlin, eds, *Annual Review of Civil Litigation, 2007*, (Toronto: Thomson Carswell, 2007) 1, referred to by Binnie J. in *Tercon* at para. 116. The authors contend that although "illegality" and "public policy" are often treated as the same concept, because of the distinction between illegality and public policy, the most accurate classification is a tripartite division consisting of:

(1) statutory illegality;

(2) common law illegality; and

(3) public policy.

[51] The concept of statutory illegality encompasses contracts that are prohibited by statute, or contracts that are entered into with the object of doing an act prohibited by statue or require performance of an act prohibited by statute. Common law illegality involves contravention of an obligation imposed by common law principles. In contrast, a contract that violates public policy is one which contravenes a value deemed so fundamental that it necessitates the intervention of the courts in spite of the fact that there has been no contravention of a legal obligation: see Kain and Yoshida at 15–16.

[52] In my opinion, “public policy”, as articulated and discussed *Tercon*, was used by Binnie J. as a broad term (“Public Policy”) encompassing the concepts of statutory illegality, common law illegality and the doctrine of public policy, and was not intended to expand the doctrine of public policy beyond the previous jurisprudence. This is the most logical interpretation given the historical application of illegality and public policy and is consistent with the jurisprudence following *Tercon*.

[53] Binnie J. applied the contractual enforcement concepts of illegality and the doctrine of public policy to a particular clause in a contract: the exclusion clause. At para. 117 he accepted that “Public Policy” may operate to give relief against enforcement of an exclusionary clause, just as it might operate to give relief against enforcement of the entire contract.

[54] In discussing “Public Policy” Binnie J. referred to a hypothetical in which a milk supplier sells toxic milk intended for babies. He reasoned that a clause excluding liability would not be given effect to in such a case. In this example, he was clearly referring to an exclusion clause which would not be enforceable for reasons of statutory illegality.

[55] Binnie J. then considered *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd*., 2004 ABCA 309, as an example of a case where the court would not give effect to an exclusion clause even where conduct did not rise to the level of criminality or fraud. In that case, the limitation of liability clause was unenforceable because Dow was in fundamental breach of its contract. In putting to rest the doctrine of fundamental breach, Binnie J. fit the result of this case into the third inquiry when considering the enforceability of an exclusion clause, Public Policy. Dow was in breach of the implied conditions in the *Sale of Goods Act*, R.S.A. 2000, c. S-2, and although parties may contract out of the implied conditions, it must be done clearly and explicitly. If this case were decided under the rubric articulated by Binnie J. in *Tercon* the exclusion clause would not be enforced because of statutory illegality; the limitation of liability clause did not clearly waive the statutorily implied conditions.

[56] In both cases discussed by Binnie J., it is clear he was not referring to the “doctrine of public policy” he was referring to “Public Policy”. This distinction is important. If Binnie J. was referring to “Public Policy” then he was not expanding the court’s “ultimate power” to refuse to enforce a contract. Therefore, the court, as before *Tercon*, does not have the power to refuse to enforce a contract because it is contrary to the nature of a statutory scheme or the interests of the public identified by the legislature in its enactments. A court can only refuse to enforce a contract, or exclusion clause, if it is statutorily illegal, illegal by common law, or contrary to one of the categories in the doctrine of public policy.

[57] Jurisprudence since *Tercon* reflects the interpretation that public policy has not broadened. As this Court observed in *Loychuk* at para. 44:

> Releases such as the one in issue here have been in use for many years and have consistently been upheld by the courts. If, as the appellants submit, there are policy reasons why such releases should not be enforceable when an activity is totally within the control of an operator, then any change in the law is properly a matter for the Legislature.

[58] In *Lam v. University of British Columbia*, 2010 BCCA 325, this Court considered a clause limiting the liability of the University for damage to sperm samples stored at the University. This Court found at para. 72, that the trial judge committed a reversible error in conflating unconscionability with public policy and refused comment on the appellant's argument that it was contrary to public policy to require a contractual liability release from clients before storing sperm.

[59] Contracts may be unenforceable in the sense that their creation or performance may be prohibited by legislation. If the contract, when it is made, is explicitly prohibited by the legislation, the court will not enforce it. For example, in *Association des couriers et agents immobiliers du Quebec v. Proprio Direct Inc.*, 2008 SCC 32, the *Real Estate Brokerage Act*, R.S.Q. c. C-73.1, explicitly restricted freedom of contract by making the language of the compensation clause a mandatory requirement of the contract.

[60] Where a contract is not prohibited by statute, but rather performance may be prohibited by a benefit provided by statute to one party, the court will consider whether that benefit may be waived. For example, in *Bank of Montreal v. Fennell* (1991), 26 A.C.W.S. (3d) 565, the B.C. Supreme Court considered an agreement contrary to the *Law and Equity Act*, R.S.B.C. 1979, c. 224, which provides a benefit to a surety, entitling a surety who discharges liability to an assignment of the securities. The court found that the benefit conferred by the statute could be waived, citing *Bank of Montreal v. Thornber et al.*, [1986] B.C.J. No. 1305, at para. 19:

> Unless it can be shown that the Legislature used very express words to show that it intended that a person shall not be allowed to contract out of an Act of the Legislature, as a general rule the entire freedom of contract is preserved.
>
> …
>
> Where the Legislature denies legal effect to instruments it frames its intention in express language, as in s. 22 of the Sale of Goods on Condition Act …

[61] Where a benefit is given by statute, in general, the benefit may be waived by contract. However, sometimes a waiver of the benefit is expressly prohibited by statute, as in *Mandos v. Ontario New Home Warranty Program*(1993), 105 D.L.R. (4th) 627 (Ont. Div. Ct.), where warranties were established against vendors of new homes, and in *Tongue v. Vencap Equities Alberta Ltd*., [1994] 5 W.W.R. 674 (Alta. Q.B.), where releases of liability were unenforceable to protect directors of a corporation from violation of insider trading provisions. Where a waiver of a benefit is expressly prohibited by statute the waiver will not be enforced.

[62] The only cases where parties have not been allowed to contract out of statutory rights, despite no prohibition against contracting out, are cases of discrimination or other human rights violations. For example, in *Etobicoke (Borough) v. Ontario (Human Rights Commission)*, [1982] 1 S.C.R. 202 [*Etobicoke (Borough)*], two firefighters filed a complaint under the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, when, as provided for in their collective agreement, their employment was terminated when they reached the age of sixty. A Board of Inquiry decided that the compulsory retirement of the appellants amounted to a refusal to employ, or to continue to employ them, contrary to s. 4(1)(b) of the *Code*. The Divisional Court allowed an appeal from the Board of Inquiry, and the Ontario Court of Appeal upheld the decision of the Divisional Court. The Supreme Court of Canada held at 213 that:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.

[63] However, the court in *Etobicoke (Borough)* also went on at 214 to quote *Halsbury's Law of England*, 3rd ed., vol. 9, p. 289, para. 421:

> Contracting out. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.
>
> By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.

[64] The exclusion clause at issue here is not prohibited by statute and is therefore not statutorily illegal. The *Insurance (Vehicle) Act* does provide for universal compulsory vehicle insurance, but it does not prohibit drivers and passengers from contracting out of the scheme between themselves. If the legislature had intended that the primary insurance policy could not be contracted out of then it would have to be expressly stated in the *IVA*.

[65] For example, like the *IVA*, in the United Kingdom, the *Road Traffic Act 1988* (U.K.), c. 52, s. 143, provides for compulsory vehicle insurance. However, unlike the *IVA*, the *Road Traffic Act 1988*, s. 149(2) explicitly prohibits agreements between drivers and passengers which purport to restrict the driver's liability to that passenger in respect of risks for which compulsory insurance coverage is required:

> 149 (2) If any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held—

> (a) to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 145 of this Act to be covered by a policy of insurance, or
>
> (b) to impose any conditions with respect to the enforcement of any such liability of the user.

[66] I am unable to accept the contention that the effect of the Release is to permit the respondents to contract out of the statutory rights to which the appellant was entitled. We were advised that the appellant is eligible for no-fault benefits through ICBC as a result of the bus accident. In my view, this is consistent with public policy in this Province, whereby those injured in motor vehicle accidents receive certain benefits, regardless of fault. This is also consistent with the ability of operators of motor vehicles, who are insured, from arranging their business activities so as to exclude their liability for the operation of their motor vehicles by obtaining releases or waivers of liability from those who will travel in the motor vehicles as part and parcel of a greater activity which exposes their customers to high risks.

[67] If the legislature of B.C. had intended for drivers to be prevented from contracting out of their primary insurance coverage the *IVA* would include a similar provision.

[68] I would not accede to the appellant's fourth ground of appeal.

Conclusion

[69] I would dismiss the appeal.

"The Honourable Mr. Justice Hinkson"

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[70] I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Hinkson (now Chief Justice of the Supreme Court of British Columbia). I agree with his analysis and conclusions with respect to the first three issues he outlines at para. 13 of his reasons for judgment. For convenience I reproduce that passage here:

> [13] The appellant raises four issues on this appeal:
>
> a) that the summary trial judge erred in finding that the Release applied to injuries sustained due to the operation of Ziptrek's bus;
>
> b) that the summary trial judge erred in finding that the Release was enforceable even though its contents were not brought to her attention;
>
> c) that the summary trial judge erred in finding that the Release was not unconscionable; and
>
> d) that the summary trial judge erred in finding that the Release was not contrary to public policy.

[71] However, and with great respect, I reach a different conclusion on the fourth question.

[72] In my opinion, it is contrary to public policy to permit the owner and /or operator of a motor vehicle to contract out of liability for damages for personal injuries suffered in a motor vehicle accident in British Columbia. British Columbia has a statutory scheme of compulsory universal insurance coverage for damages for personal injury arising from motor vehicle accidents, as well as other types of insurance not pertinent to this discussion. In the face of the legislature's intention in enacting that statutory scheme, and for the reasons that follow, I believe it would be contrary to public policy to permit the respondents to enforce the release of liability for a claim that arose not from an injury that occurred in the course of the Ziptrek activity, but rather in the course of transportation to the site of that activity.

[73] The trial judge found that the Release did not impact public policy or the statutory automobile insurance scheme that is compulsory and mandatory in this province. In his view, the Release functioned only to prevent the appellant from recovering damages in negligence from the respondents. Because a provision of the scheme allows indemnification of an insured only when liability has been established, the trial judge found the statutory scheme was essentially irrelevant in the circumstances of this case and thus there was no public policy interest at play. I cannot agree. The longstanding statutory scheme is a strong indication that there is a public policy interest engaged when motor vehicle accidents are at issue, but it is the interest the legislature was attempting to address in enacting the scheme that overrides freedom of contract in this case.

Discussion

a. The Common Law Test for the Enforceability of Exclusion Clauses

[74] I begin my analysis by turning to Mr. Justice Binnie's discussion of the public policy branch of the test laid out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, for determining the enforceability of an exclusion clause, also known as a release of liability. Though Binnie J. was dissenting in the result, the Court was unanimous on the correct approach to exclusion clauses, including on the question of public policy.

[75] First, I note that Binnie J. made clear why public policy interests are not closed to judicial consideration when courts are asked to determine the enforceability of a contract. He wrote:

> [115] I agree with Professor Waddams when he writes:
>
> > [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

> [116] While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief against enforcement. As Duff C.J. observed:
>
> > It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
> >
> > (*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)

[76] Thus, the Court rejected the notion that the heads of public policy were closed to all but those well recognized in the jurisprudence: contracts in restraint of trade, injurious to the justice system, injurious to the state, affecting marriage or immoral contacts: Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1 at 18-28. That said, Binnie J. continued to endorse significant judicial restraint when invoking public policy as justification for interfering with a contract freely entered into by competent adults. He cautioned courts to remember that, "Freedom of contract will often, but not always, trump other societal values": para. 117.

[77] Citing with approval the comments of Duff C.J. in *Re Millar Estate*, [1938] S.C.R. 1, Binnie J. recognized that given the importance of the "certainty and stability of contractual relations" only where harm to the public is "substantially incontestable" will the court use its residual power to decline to enforce a contract: para. 117. The examples given in *Tercon* illuminate the high threshold a party must meet in order to defeat an otherwise valid exclusion clause. A court should not allow the party responsible to escape civil liability simply because the relevant contracts included waiver clauses if, for example, a milk supplier uses a toxic compound in baby formula to increase profitability at the cost of sick or dead babies or if toxic cooking oil is recklessly sold creating a public health crisis: para. 118. Despite what could be considered the clear moral blameworthiness enshrined in these examples, Binnie J. made clear that the conduct resulting in a breach of contract "need not rise to the level of criminality or fraud to justify a finding of abuse": para. 118.

[78] Indeed, a somewhat less egregious example Binnie J. draws on is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309. In that case, Dow knowingly sold a defective compound that was subsequently used in natural gas pipelines that eventually began to degrade, causing considerable property damage and a risk to public health. Dow tried to defend itself by relying on a limitation of liability clause. The Alberta Court of Appeal found this conduct unconscionable and refused to enforce the clause. Binnie J. found that what *Plas-Tex* demonstrated was that Dow was "contemptuous of its contractual obligation and reckless as to the consequences of its breach" such that it

forfeited the assistance of the Court: para. 120. In that case, the public policy interest at stake was curbing the abuse of freedom of contract and the Court found that enough to outweigh the freedom of individuals to enter into contractual relations of their choosing.

[79] As is perhaps evident from the preceding paragraphs, the discussion of public policy in *Tercon* tends to focus on the conduct of the party who seeks to rely on the exclusion clause. This Court has similarly focused on the public policy interest in disavowing the knowing or reckless misconduct of a party who endangers the public and then points to a limitation of liability clause in answer: *Lam v. University of British Columbia*, 2010 BCCA 325 at para. 71;*Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 46 leave to appeal ref'd [2012] S.C.C.A. No. 225. However, it is important to note that there is nothing in *Tercon* that limits the consideration of public policy to the conduct of the party relying on the exclusion clause. Indeed, the Court recognizes in *Tercon* that the nature of the breach or the contract itself could give rise to a public policy interest capable of overriding freedom of contract: para. 117.

[80] What *Tercon* requires is that a plaintiff seeking to avoid the effect of an exclusion clause identifies the public interest that he or she says outweighs enforcement of the contract freely entered into. In my view, Ms. Niedermeyer has done so.

b. Statutory Scheme

[81] Next, I turn to the statutory scheme itself, collectively found in the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228, the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the *Insurance (Vehicle) Act, Regulations* B.C. Reg. 447/83, and the *Motor Vehicle Act*, R.S.B.C. 1996, c.318. Importantly for this analysis, I note that the scheme does not explicitly prohibit or permit an owner or driver and a passenger from entering into a contract to exclude liability. However, as I will explain, such a waiver or release is, in my view, contrary to the nature of the scheme itself and the interests identified by the legislature in its enactment.

[82] The *Motor Vehicle Act* provides for the licensing of motor vehicles and drivers, the operation of motor vehicles and establishes penalties for violations. It includes provisions outlining which vehicles must be insured and in what circumstances: See, for example, ss. 2, 3, and 3.1. Its relationship to the insurance scheme indicates how the legislature's concern with compensation is inextricably linked to road safety.

[83] The Insurance Corporation of British Columbia ("ICBC") administers what it calls a "universal compulsory vehicle insurance" scheme for residents of British Columbia*:* *Insurance (Vehicle) Act*, s. 1 and Part 1; *Insurance (Vehicle) Regulation*, ss. 1.1 and 64. It provides mandatory coverage up to the amount of the statutory limits prescribed in s. 1 of Schedule 3 to the *Regulations*. It is a provincial Crown corporation governed by the *Insurance Corporation Act*. As long as ICBC is authorized by the Lieutenant Governor

in Council to operate the plan, it must do so in accordance with the *Insurance (Vehicle) Act*, according to s. 2 of that Act. The scheme combines no-fault insurance benefits with those that require a claimant to first establish liability before ICBC will indemnify an insured motorist for the injuries suffered by the claimant. It is the latter category of benefits that would be precluded if this Court enforces the Release signed by the appellant.

[84] That the legislature intended to make the statutory scheme universal seems incontrovertible. Part 1 of the *Insurance (Vehicle) Act* is titled "Universal Compulsory Vehicle Insurance". Section 2 of Part 1 states:

> **Corporation to provide universal compulsory vehicle insurance**
>
> 2. If, under the Insurance Corporation Act, the Lieutenant Governor in Council authorizes the corporation to operate the plan of universal compulsory vehicle insurance, the corporation must operate the plan of universal compulsory vehicle insurance in accordance with this Act and the regulations.
>
> [Emphasis in original.]

[85] Section 7 of the *Act* mandates the comprehensive and universal nature of the plan and, in broad terms, addresses the scope of coverage. This section, along with the provisions I will outline below, exemplify the intention of the legislature to create a universal insurance scheme to address the identified public policy interest. It reads:

> 7 (1). Subject to section 2 and compliance with this Act and the regulations, the corporation must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the *Motor Vehicle Act*, of at least the amount prescribed, to all persons
>
> (a) whether named in a certificate or not, to whom, or in respect of whom, or to whose dependants, benefits are payable if bodily injury is sustained or death results,
>
> (b) whether named in a certificate or not, to whom or on whose behalf insurance money is payable, if bodily injury to, or the death of another or others, or damage to property, for which he or she is legally liable, results, or
>
> (c) to whom insurance money is payable, if loss or damage to a vehicle results
>
> from one of the perils mentioned in the regulations caused by a vehicle or its use or operation, or any other risk arising out of its use or operation.

[86] "Certificate" here refers to the document issued by ICBC evidencing enrollment of a vehicle in the insurance plan. The "perils" relevant to this case involve those liabilities imposed by law on an insured person for injury to another party that arises out of the use by the insured of a vehicle described in a certificate which will be indemnified by the Corporation: *Insurance (Vehicle) Regulation*, s. 64. Other perils include death and property damage. This section makes it clear that third parties to the scheme, those people who are not drivers resident in British Columbia and therefore not in a contractual relationship with ICBC, may nonetheless be eligible for compensation under the *Insurance (Vehicle) Act*.

[87] Of course, s. 7 is not the only provision that speaks to the universality of the scheme. For example, ICBC is not empowered to exempt motorists from the insurance scheme; rather, s. 94(2) of the *Insurance (Vehicle) Act* leaves that power with the Lieutenant Governor in Council who can exempt any person or class of persons from the *Act* and its regulations. Notably, only vehicles owned, leased or operated by the government of Canada or the government of another province are expressly exempted from the scheme: *Insurance (Vehicle) Act*, s. 43. The reason for this exemption is that those vehicles are insured or self-insured by the appropriate level of government.

[88] The appellant rightly points to ss. 20 and 24 as examples of the legislature's intent to make compensation available to all those injured in British Columbia. The former provides for payment of damages to an injured party where the negligent driver is without insurance and the latter addresses the circumstances by which an injured party can receive compensation via the insurance scheme despite being injured by an unknown party. In both cases, these provisions specify that the accident must have occurred on a "highway". Although neither of these sections is directly applicable to Ms. Niedermeyer, these sections are indicative of the legislature's intention to provide for the universality of coverage even in the absence of insurance.

[89] The appellant further points to s. 22 as proof of the government's interest in all accidents arising out of the use of motor vehicles. That ICBC, an agent of the government, is required under s. 22 to be given notice of any action for damages caused by a vehicle in the province speaks to its interest in ensuring it is involved in all litigation involving motor vehicle accidents. Undoubtedly, this is because the statutory scheme ensures that in a wide range of circumstances, ICBC will be in a position to indemnify the at fault party's loss: *Insurance (Vehicle) Regulation*, ss. 64, 76, 148.1.

[90] While it is clear that none of these provisions on their own invalidates the exclusion clause here at issue, it is my opinion that the scheme taken as a whole lends support to the appellant's argument that there is a compelling public policy interest at stake in this case. The public policy embraced by the legislative scheme is to provide a universal, compulsory insurance program as part of the legislature's efforts to ensure safety on the roads and access to compensation for those who suffer losses when those measures fail.

[91] Moreover, it would seem to me that to interpret the legislative scheme, in its entirety, as permitting an owner or driver to exclude by contract the operation of the "universal compulsory vehicle insurance" is contrary to generally accepted principles of statutory interpretation.

[92] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, Iacobucci J. said, in the oft-cited passage:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, Driedger on the *Construction of*

> *Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[93] Reading the words of this legislative scheme in its entire context, harmoniously with the whole of the scheme and purpose of it, supports the appellant's view that the legislature could not have intended vehicle owners and operators to have the ability to exclude the operation of the otherwise universal compulsory insurance.

[94] In dismissing the appellant's claim, the trial judge referred to s. 76 of the *Insurance (Vehicle) Act* as proof that the insurance scheme was not engaged in this case. It reads:

> 76 (1). In this section and sections 77 and 78, "claimant" means a person who has a claim or a judgment against an insured for which indemnity is provided by the plan or an optional insurance contract.
>
> (2) Even though he or she does not have a contractual relationship with the insurer, a claimant is entitled, on recovering a judgment against an insured or making a settlement with the insurer, to have the insurance money applied toward the claimant's judgment or settlement and toward any other judgments or claims against the insured who is covered by the indemnity.

[95] The *Insurance (Vehicle) Regulations*, s. 64, further clarifies the rights of third parties under the scheme. It reads:

> 64. Subject to section 67, the corporation shall indemnify an insured for liability imposed on the insured by law for injury or death of another or loss or damage to property of another that
>
> > (a) arises out of the use or operation by the insured of a vehicle described in an owner's certificate, and
> >
> > (b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

[96] It is true, as the trial judge pointed out, that liability must first be found or admitted for ICBC to indemnify the insured and the Release in this case, if enforced, prevents that from occurring. However, as I have said, I do not believe this apparent distance from the scheme defeats the appellant's public policy argument.

c. Legislative History

[97] A review of the legislative history of universal vehicle insurance in this Province is also helpful in considering the public policy at stake.

[98] The roots of the contemporary insurance scheme date back to the 1960s, when the legislature was confronted with a dramatic increase in the number of motor vehicles on the province's roads and a corresponding rise in accidents, injuries and losses associated

with property damage: Eleanor Gregory and George Gregory, *The Annotated British Columbia Insurance (Vehicle) Act*, 2nd ed. (Carswell: Toronto, 2014) at 5-6. On review of the *Hansard*from that period, it is clear that for the legislature addressing the compensatory needs of traffic accident victims was but one part in the larger governmental project aimed at increasing road safety.

[99] One of the early legislative efforts to ensure those injured in accidents would have recourse to compensation came in 1966 when the legislature made it an offence under the *Motor Vehicle Act*, R.S.B.C. 1960, c. 253, to operate a motor vehicle in the province without the prescribed liability insurance. At the same time, the legislature appointed a Royal Commission to examine and make recommendations on motor vehicle insurance. I will discuss the Commission's findings below but for now note that one of the immediate consequences of that report was for the legislature to adopt, in 1969, certain no-fault coverage while retaining the tort system. In the speech from the throne that opened the following session of the legislature, the Lieutenant Governor succinctly expressed the purpose of those policies and the ongoing nature of the project, saying:

> At the last sitting of the Legislature my Government, by means of amendments to the *Motor-vehicle Act* and the *Insurance Act*, made provision for a new and practical approach to the inseparable problem of highway safety and automobile-insurance coverage. On January 1st much of this legislation was proclaimed. A Committee of this Legislature will be asked to give further study to certain aspects of the new automobile insurance plan and to make recommendations for its improvement: British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 29th Parl., 1st Sess., 22 January 1970 at 5.

[100] In 1973 the legislature determined that the best way to ensure all motorists had access to a basic, affordable automobile insurance package was to establish a Crown corporation that addressed motorists' insurance needs. In 1973, the *Insurance Corporation of British Columbia Act*, S.B.C. 1973, c. 44 and the *Automobile Insurance Act*, S.B.C. 1973, c. 6, were passed.

[101] The legislature was concerned with a pressing public safety problem − the dangers presented by motor vehicles − and the consequences to its citizens and social programs when those dangers were realized. In response it created, amongst other things, a public statutory regime of comprehensive universal automobile insurance. Commentators have fairly characterized automobile insurance in this context as "a product with a decidedly public purpose, a social contract": Erik S. Knutsen, "Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes through a Public Regulatory Framework" (2011) 48:3 Alberta Law Review 716 at 717.

[102] The policy choices the legislature made in establishing the automobile insurance scheme were informed by the report of the Royal Commission on Automobile Insurance: British Columbia, *Royal Commission on Automobile Insurance*, (Victoria: Queen's Printer, 1968). The profound concern with the dangers presented to drivers, passengers and

pedestrians by automobiles animated the Royal Commission's entire project. The Commission wrote at 10:

> Before advancing further it should be said, as is quite apparent, that automobiles have become a great problem to all communities having them. With that we have the problems of the safety of the citizen, his healing and recovery when he is injured, his rehabilitation, and his compensation, and the compensation of his dependents if he be slain upon the highway.

The ubiquity of the danger and the need to ensure compensation to all those injured compelled the legislative response. However, the Royal Commission was alive to the need to ensure that compensation came about fairly.

[103] Again emphasizing the collective good achieved through universality, the Commission put it this way at 580:

> It appears to be quite generally appreciated that compulsory accident cover would aid in the attainment of effective compensation for those sustaining injury through motor vehicle accidents. Through the principle of insurance it would fairly allocate a selected share of accident costs as a cost of motoring. In consequence, such costs would neither be forced onto those motorists already paying their fair share nor shifted through a welfare agency to society at large…[W]ere the basic policy not made mandatory, it is likely that the spouse injured while a pedestrian, the child hurt while a bicyclist, or the neighbour maimed while a passenger, would eventually look to general welfare sources or else some type of fund supported by financially responsible drivers who are already bearing their fair share of motoring accident costs.
>
> [Emphasis added.]

[104] A universal automobile insurance scheme was, in the Commission's view, necessary to effectively compensate those injured, but it would also ensure that the necessary financial support did not come from other government programs; rather, it would come from other drivers via insurance premiums. See also, *Knutsen* at 717. These multi-faceted public policy interests, which continue to animate the scheme, add weight to its importance.

[105] Of course, there were those who objected to a universal compulsory scheme. The Commissioners considered submissions from those opposed to compulsory insurance and identified restricting the freedom of choice as one of the principal objections. The Commission addressed this saying at 568:

> [S]ome compulsions and restrictions on individual freedoms are necessary to protect, preserve, and permit a free society to prosper. In the field of insurance, in its broadest meaning, we find compulsion in workmen's compensation, unemployment insurance, hospital insurance, and automobile coverage for minors.

For the Commission, restricting freedom of choice, which in this context implicates freedom of contract, was clearly justifiable on policy grounds. The fact that the legislature adopted the Commission's recommendation suggests that it did as well.

[106] Ultimately, the legislature chose to enact and maintain a scheme that combines liability under tort law with no-fault benefits. This diverged from the Royal Commission's

recommendations in that it had advocated an entirely no-fault system. This difference in how to operate the scheme does not detract from the policy concerns that propelled the government to adopt universal coverage. It is not enough, in my view, for the respondents to argue that in order to come within the scope of certain of the current scheme's provisions, the appellant must first establish liability and, if she has waived her right to pursue such a finding, the legislation is irrelevant. In my view, the scheme must be considered in a manner that is consistent with the public policy interest it was designed to address.

[107] That universal and compulsory insurance coverage for injuries sustained in motor vehicle accidents achieved a high level of societal acceptance is illustrated by the fact that, in one form or another, every province in Canada has enacted such legislation: Craig Brown & Thomas Donnelly, *Insurance Law in Canada*, loose-leaf (consulted on 20 March 2014), Toronto: Carswell, 2002), ch. 17 at 17-3. Such a strongly expressed public policy as is found in this legislative scheme is inconsistent with the notion that individuals may contract out of the legislation. In my view, this public policy does outweigh the strong interest in freedom of contract. Permitting individuals to contract out of the scheme through a release of liability clause would undermine the social contract that the government has made with those who use its roads.

[108] The appellant points to some examples of the mischief to which such releases might lead. One could think of many such examples. Could sporting organizations transporting their members escape liability in the case of a negligent driver by asking passengers to sign a release prior to boarding? Could a taxi driver? That damages for a motor vehicle accident would be non-compensable, where a compulsory universal insurance scheme operates, is precisely the type of harm that is described by Binnie J. in *Tercon* as "substantially incontestable" and should lead to a finding that enforcement of the contract is contrary to public policy.

d. Analogous Jurisprudence

[109] Counsel have not drawn our attention to any case that addresses the question of exclusion clauses for motor vehicle accidents in British Columbia or any other jurisdiction where compulsory universal insurance schemes exist. However, the appellant argues that cases in the human rights context provide a useful analogy and I agree.

[110] The appellant argues by analogy that many courts have declined to enforce contractual releases that would be contrary to legislation that might be described as broadly conferring social benefits on the community. While none of these cases are binding on us, in my opinion, they demonstrate the reluctance of courts to undermine social policy type legislation by enforcing contractual releases. Three such examples relate to an individual's inability to contract out of human rights legislation.

[111] In *Etobicoke (Borough) v. Ontario (Human Rights Commission)*, [1982] 1 S.C.R. 202, two firefighters had their employment terminated when they reached the age of sixty, as set out in the collective agreement which governed the mandatory retirement age of firefighters within the Borough of Etobicoke. McIntyre J. found that it would be contrary to public policy to permit the mandatory retirement provisions of the collective agreement to operate in a manner that effectively contracted out of the provisions of the *Human Rights Code*. McIntyre, J. notes at 213:

> Although the [*Human Rights Code*] contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effects are void, as contrary to public policy. In Halsbury's *Laws of England*, 3rd.ed., Vol. 36, para. 673, the following appears:
>
> > **Waiver of statutory rights**. Individuals for whose benefits statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.
>
> And in the fourth edition of the same work the following is to be found in Vol. 9, p. 289, para. 421:
>
> > **Contracting out**. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.
> >
> > By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.
> >
> > [Emphasis in original.]

[112] In *Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board)* (2006), 148 L.A.C. 369 (Ont. G.S.B.), an employee filed a grievance after being transferred to a different branch when it was discovered that she was married to another employee at the same branch. Her husband had previously signed a memorandum of settlement, agreeing not to pursue any other action. As such, the employer sought a motion to dismiss the grievance. The motion was dismissed as it was found that neither the employer nor the individual employee could contract out of the *Human Rights Code.*

[113] In *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, a teacher, as part of the collective agreement governing her employment, was subject to mandatory retirement at the age of 65. She sought a declaration that the mandatory retirement age contravened the *Human Rights Act* and was thus invalid. The Manitoba Court of Appeal upheld the decision. The *Human Rights Act* was legislation declaring public policy and therefore could not be avoided by private contract. The parties could not contract out of

the *Act's* provisions by agreeing to the mandatory retirement age clause of the collective agreement.

Conclusion

[114] In my view, the ICBC regime is intended as a benefit for the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime. As such, to the extent that the Release purports to release liability for motor vehicle accidents it is contrary to public policy and is unenforceable. The judge erred in finding that the public policy interest exemplified in a compulsory universal insurance scheme was incapable of defeating society's interest in freedom of contract.

Disposition

[115] I would allow the appeal and remit the case to the Supreme Court to assess Ms. Niedermeyer's damages.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Bennett"