

Facts

[2] The plaintiff was a student in the College's Police Foundations program. Mr. Greaves is an instructor and the coordinator of that program.

[3] On September 9, 2013, the first day of class, the plaintiff signed the following document (the "Consent Form") in class:

Informed Consent Form for Physical Activities

Confederation College

Police Foundations

MUST BE COMPLETED BY ALL STUDENTS

I understand that the activities, programs and classes offered by Confederation College, Police Foundations may involve strenuous physical exertion. I acknowledge that injuries or other complications associated with exercise or other physical activities may result from my participation. I will consult my physician if I am concerned about any of the risks to my health or well-being that may result from my participation in activities while in the Police Foundations. I acknowledge that it is my responsibility to follow instructions for any activity or use of equipment, and to seek help from staff if I have any questions.

In exchange for being presented the opportunity to participate in the activities, programs and classes offered by the Police Foundation I am aware of and willing to assume the risks associated with these activities. I knowingly and voluntarily agree to waive and release Confederation College and any and all of its trustees, officers, employees and agents from any and all claims of liability or demands for compensation as a result of injuries I may suffer or damages or losses I may incur as a result of my participation in any of the activities offered by the Police Foundations.

I agree to abide by and follow all rules and policies outlined by the College.

[4] This document was prepared by Mr. Greaves. The College did not approve the Consent Form and, in fact, Mr. Greaves did not tell the College about the Consent Form. At discovery, Mr. Greaves testified that he gave the students a number of forms to sign that day and instructed the students to read the Consent Form carefully. He said that he did not read the form to the students.

[5] The plaintiff, Mr. Anderson, testified on his examination for discovery about the circumstances surrounding the signing of the form with Mr. Greaves as follows:

What I remember is we just showed up and then the instructor at the time explained how eventually we were going to be doing physical activity, such as learning self-defence, that, where we could get injured and we (sic) wanted to sign this so that if we are to get injured during the physical defence part we couldn't sue.

[6] On March 25, 2014, while participating in a class, "Fitness and Lifestyle Management II", the plaintiff was completing a 1.5 mile race on the College's fitness centre track when he struck his head on a basketball hoop standard. It is alleged in the statement of claim that "a freestanding steel basketball hoop situated near the running track was folded down in such a manner that caused the elbow of the basketball hoop to protrude over the far left lane of the track" thereby creating a hazard.

Position of the Parties

[7] The defendants argue that the intent of the Consent Form is clear and unambiguous and that the intent is to bar the plaintiff from suing the defendants for personal injuries suffered in the course of his participation in any activity offered by the Police Foundations program. The defendants argue that it is not necessary to use the word "negligence" or any other particular combination of words as long as the intention to exclude liability for negligence is clear.

Further, the defendants argue that it is the “waiver” section of the Consent Form that is operative and stands alone from the balance of the document.

[8] The plaintiff argues that the “waiver” does not apply in the circumstances because the unforeseen obstacle on the track was not a risk normally associated with the classes and that, read as a whole, the intent of the Consent Form was to bar claims concerning health related risks.

The Law

[9] The parties agree that the following enquiries as enumerated by Binnie J. in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, are to be addressed when the plaintiff seeks to escape the effect of an exclusion clause:

122 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 was unconscionable 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.

123 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.]

[10] As to the first issue, which is whether the exclusion clause even applies to the circumstances, I must look not only at the meaning of the words, but also at the context. See for example *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633 at para. 48:

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. [page658] v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115] [Emphasis added.]

[11] Also, as *Tercon* instructs at para. 64, “the key principle of contractual interpretation... is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context.”

Analysis and Disposition

[12] Following *Tercon* and *Sattva* I conclude that the Consent Form must be read as a whole document and that the waiver portion cannot be read in isolation from that which precedes it. I have highlighted portions of the form that inform my conclusion.

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Police Foundations

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responsibility to follow instructions for any activity or use of equipment, and to seek help from staff if I have any questions.

In exchange for being presented the opportunity to participate in the activities, programs and classes offered by the Police Foundation I am aware of and willing to assume the risks associated with these activities. I knowingly and voluntarily agree to waive and release Confederation College and any and all of its trustees, officers, employees and agents from any and all claims of liability or demands for compensation as a result of injuries I may suffer or damages or losses I may incur as a result of my participation in any of the activities offered by the Police Foundations.

I agree to abide by and follow all rules and policies outlined by the College.

[13] As was stated in *Sattva*, citing *Investors Compensation Scheme Ltd.*, “the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.” As the plaintiff, Mr. Anderson, testified, the explanation he received was that “we were going to be doing physical activity, such as learning self-defence, that, where we could get injured and we (sic) wanted to sign this so that if we are to get injured during the physical defence part we couldn’t sue.”

[14] The emphasis on “strenuous physical exertion”, “injuries or other complications associated with exercise or other physical activities” and the reference to consulting with a physician all inform the waiver that follows. I conclude that the correct interpretation is as Mr. Anderson testified. The waiver concerned the risk of harm from health related issues and physical activity such as self-defence. It was not directed at liability for defective premises as under the *Occupiers’ Liability Act*, R.S.O. 1990, c. O-2. Had the College wished to have students sign such a clear and precise waiver, the College could have required the students to do so, rather than having the instructor prepare his own document without authorization or direction.

[15] If my interpretation is incorrect I would hold that the language of the Consent Form is at least ambiguous. Any ambiguity in the contract requires that the clause be interpreted against the College and in favour of the plaintiff (see *Tercon* at para. 79).

[16] Having determined that the waiver does not apply to these circumstances, it is unnecessary to move on to the other *Tercon* enquiries.

[17] Therefore, pursuant to Rule 20.04(4), I conclude that the waiver does not bar the plaintiff's claim.

[18] In accordance with the agreement of the parties, the plaintiff shall have his costs of this motion fixed in the amount of \$4000.

“Original signed by”
The Hon. Mr. Justice W.D. Newton

Released: September 28, 2017

CITATION: Anderson v. Confederation College, 2017 ONSC 5791
COURT FILE NO.: CV-16-0104-SR
DATE: 2017-09-28

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KYLE DANIEL ANDERSON

Plaintiff

- and -

THE CONFEDERATION COLLEGE OF
APPLIED ARTS AND TECHNOLOGY,
PHILIP GREAVES, and TAVIS MACLEAN
SCHMERK

Defendants

DECISION ON MOTION

Newton J.

Released: September 28, 2017

/sab