THE IMPLICATION OF RELEASE AND WAIVER CLAUSES IN TORTS - *CLARK V ZIP FIJI* [2012] FJHC 1207

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The High Court of Fiji's decision in the case of Clark v Zip Fiji [2012] FJHC 1207 demonstrates a gap found in the law when dealing with a tortious cause of action that arises from a risky recreational activity containing a Release and Waiver. In the absence of statutory intervention, the court extensively relied on contract law principles to interpret the waiver clause in question. This further highlights the complexity of applying contract law principles in cases that are tortious by nature.

Key words: Contract, Release and Waiver Clause, Negligence, Risky Recreational Activity, Lord Morton's Test

INTRODUCTION

Fiji's High Court (the High Court) decision of *Clark v Zip Fiji*[1] illustrates two essential issues in the law of Torts. The first issue is the court's consideration of personal injuries arising out of inherently risky recreational activities. Secondly, and the particular focus of this case, is the incorporation of a 'Waiver and Release' (waiver) clause into the contract of service. Waiver of a tort whereby a plaintiff relinquishes their right for compensatory personal injuries damages for negligence is not straight forward. The case of *Clark* highlights the difficulties that arise around the extent of waiver clauses in the context of participating in risky recreational activities that had serious consequences for the Plaintiff.

The High Court's decision to uphold a broadly worded waiver clause to exclude liability sets a concerning precedent. Apart from the impact this decision may have on future plaintiffs, *Clark* highlights the urgency of introducing legislative provisions that will apply to all service contracts-specifically, the extent to which a waiver can be relied upon when a plaintiff is participating in a risky recreational activity. This case note will analyse the High Court's reasoning around its broad interpretation of the word negligence within the waiver clause. It will also briefly outline the case's facts and legal issues before critically discussing how *Clark* may be a turning point for tort law reform and the consideration of important policies that will allow for the modernisation of torts law in the Pacific.

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[1] [2012] FJHC 1207 (Clark).

THE FACTS AND LEGAL ISSUES OF *CLARK*

The Plaintiff, Gregory Clark, was a pilot who lived in America. Around the 26th of July 2008, the Plaintiff paid the Defendant, Zip Fiji, to participate in a recreational activity called zip lining.[2] Ziplining is an activity where participants are strapped into a harness that is attached to a wheel on a cable line (the zip line) that connects two trees within a tree canopy.[3] Participants (including the Plaintiff) would then travel down the zip line at approximately 60 km per hour at a height of approximately 80 feet above the ground.[4] This recreational activity took place in the Wainadol Rainforest in Pacific Harbour, Fiji.[5]

Before the Plaintiff engaged in this recreational activity, he willingly signed a document, which contained the following waiver clause.

Clause 4 of the waiver specifically stated:

> I hereby agree to assure full responsibility for myself and anyone else over whom I am legal guardian, for bodily injury, death or damages incurred as a result of my participation in the Activity. I further agree to defend, indemnify and hold CANOPY ADVENTURES (FIJI) LTD, and their agents, employees, officers, and owners harmless from any liability WHATSOEVER for any bodily injury, death, loss or personal property or expenses resulting from my participation in the Activity.[6]

The Plaintiff claimed that at some point during the activity, one of the Defendant's employees, a guide, pushed him and yanked on the cable. This caused him to collide with a tree and suffer injuries to his hip and wrist.[7] The Defendant denied this claim by stating that the Plaintiff was solely responsible for the collision because he failed to properly follow instructions.[8] In response to the Plaintiff's claim that his injuries were a result of the Defendant's negligent actions, the Defendant argued that they were not liable under the waiver clause that the Plaintiff had signed.[9]

The main legal issue before the Court was whether the broadly constructed waiver clause could be read to absolve the Defendant's liability for the Plaintiff's injuries since it had failed to expressly state the word 'negligence'.[10]

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[2] Ibid, [2].
[3] Ibid.
[4] Ibid, [2].
[5] Ibid.
[6] Ibid [4].
[7] Ibid [2].
[8] Ibid.
[9] Ibid [1].
[10] Ibid [18].

CONTROL AND THE VALIDITY OF THE WAIVER

The Plaintiff in this case raised two arguments. The first argument attempted to establish a distinction concerning the measure of control participants had in ziplining and other recreational activities.[11] The second (and main) argument pertained to the applicability of the waiver clause. Although the Plaintiff acknowledged his signing of the document, he argued that the waiver clause was ineffective and invalid owing to its unenforceability and unconscionability.[12]

It became apparent through the proceedings that there was no Fijian precedent that addressed unconscionable waiver clauses within the context of risky recreational activities and unfair contracts.[13] Due to the absence of statute, the Plaintiff relied on the case of *Loychuk v Cougar Mountain Adventure Ltd*[14] (*Loychuk*) for their first argument regarding the measure of control a participant in a risky recreational activity would have. *Loychuk* involved two Plaintiffs who partook in a zipline tour operated by the Defendant- Cougar Mountain Adventure. Before ziplining, the Plaintiffs signed a release waiving their legal rights. During the activity, the zipline tour guides had miscommunicated and ended up sending the Plaintiffs down the same zip line. This resulted in a collision where both of the Plaintiffs sustained injuries. The Supreme Court of British Columbia held that a waiver that released a Defendant from liability for negligence was not unconscionable within the context of recreational activities that were inherently risky.[15] The court's decision in *Loychuk* proved to be relevant in *Clark* because the Supreme Court of British Columbia relied on a line of Canadian case authorities that also established the extent to which waiver clauses could operate in negligence claims. The Plaintiff in *Loychuk* argued that the cases the Defendant relied upon to validate their Release involved recreational activities distinct from ziplining- such as rafting. This distinction was between how participants were more dependent on zipline operators for their safety than they would be in other recreational activities. The Supreme Court of British Columbia rejected the argument that ziplining was distinguishable because once signed, a Release still released an operator from negligence.[16] Nevertheless, the Plaintiff in *Clark* relied on the argument of distinction used in *Loychuk* to convince the court that ziplining was a distinct recreational activity where he had no control over the potential risks.[17]

By relying on *Loychuk*, the Plaintiff in *Clark* argued that ziplining was a distinct recreational activity whereby participants had zero control over the nature of risk.[18] He further argued that the significance of having some measure of control over a recreational activity such as rafting was to give participants a better chance to avoid accidents. Compared to ziplining, the latter does not

[11] Ibid [26].
[12] Ibid [25].
[13] Ibid, [14], [30].
[14] [2011] BCSC 193.
[15] Ibid.
[16] Ibid [37].
[17] *Clark*, above n 2 [11].
[18] Ibid.

allow a participant enough control to evade potential disasters. Instead, the zipline operator controls the activity and oversees the safety of the participants.

The Plaintiff's second and main argument concerning the construction of the waiver clause was that it did not expressly mention the word *negligence.*[19] The absence of this word within the waiver clause allowed the Plaintiff to argue that the Defendant could not rely on the waiver clause as a complete defence.[20] The Plaintiff asserted that if the Defendant's employees were negligent, the waiver clause did not fully cover them because it had failed to mention the word *negligence*. In an attempt to advance their argument the Plaintiff stated that in the absence of any legislative provisions governing waiver clauses, failure to expressly mention negligence could not indemnify the Defendant.[21] The significance of this argument to the Plaintiff's case raises the possibility that the Defendant could be held liable for negligence as the waiver, although signed by the Plaintiff, does not cover negligence.

The Defendant submitted to the High Court that the Plaintiff's negligence claim should be struck out pursuant to Order 18, rule 18 and Order 33 rule 7 of Fiji's High Court Rules.[22] In arguing this, the Defendant contested that the Plaintiff had no cause of action in negligence based on the waiver clause.[23] Clause 4 stated that the signee would be agreeing to '...defend, indemnify and hold CANOPY ADVENTURES (FIJI) LTD and their agents, employees officers and owners, harmless from any liability WHATSOEVER for any bodily injury, death, loss, or personal property or expenses…'.[24] The words contained within this clause were relied upon by the Defendant to release them and their servants from liability for claims for damages because it specifically mentioned bodily injuries. The wide range of circumstances covered by Clause 4 further allowed the Defendant to use it as a defence against negligence claims in the absence of statutory intervention.

The Defendant further argued that the Plaintiff, a well-educated man, had willfully signed a Release and Waiver that clearly stated that he would be waiving his legal rights. The court in *Loychuk* also addressed this issue concerning the plaintiff's claim that the Release was ineffective because a reasonable person would have known that they were not consenting to the terms at issue.[25] In *Loychuk,* the court rebutted this by establishing that waivers of risky recreational activities were not unconscionable in cases where an operator took reasonable steps to ensure that participants understood the terms. The court held that nothing in the circumstances suggested that the plaintiffs were not consenting to what they had signed.[26] The Defendant in *Clark* used this reasoning to support his argument. He stated that the Plaintiff could have refused to sign the

[19] Ibid [18].
[20] Ibid.
[21] Ibid [30].
[22] *The High Court Rules 1988 (Fiji)* OO 18, 33 rr 17, 7.
[23] *Clark,* above n 2 [1].
[24] Ibid [5].
[25] *Loychuk,* above n 15 [25].
[26] Ibid, [34].

Waiver presented to him before ziplining since he was free to choose whether he would participate in the activity. Thus, this reinforced the Defendant's argument that the Waiver was not unconscionable for the type of activity the Plaintiff signed up for since he must have been aware of the nature of the Release and the risk he was assuming.

LORD MORTON'S TEST

In addressing the Plaintiff's first issue of unconscionability- the court in *Clark* found that the Defendant's waiver clause was not unconscionable.[27] In making this decision, the High Court out rightly rejected the Plaintiff's argument of distinction based on *Loychuk.* The High Courts' decision suggests that the court failed to give significant consideration to the concept of control within an inherently risky recreational activity. It further demonstrates that the courts are not prepared to properly characterise an inherently risky recreational activity. This missed opportunity by the court in *Clark* to constitute this expression also suggests that the courts are unprepared to develop a relevant standard between a trivial risk and one that would occur to allow the participant to be significantly informed of the risk and physical harm.

The preferred approach taken by the court here was to follow contractual principles rather than consider the grave consequences of altering the law on liability. In finding that the contract of service was not unconscionable, the court was satisfied that there was no power imbalance between the Plaintiff and Defendant and that it was clear that there was no unfair advantage by the Defendant here.[28] The court further acknowledged that the Plaintiff could not base his arguments on any existing statute since there were no Fijian legislative provisions concerning unfair terms of contracts. Consequently, the court had to follow contractual law principles.[29] The court applied *Lord Morton's three prone [sic] tests* established in the 1952 Canadian case of *Canada Steamship Lines Ltd*[30] to determine whether or not the Defendant could rely upon the waiver – despite no express mention of the word *negligence*. Lord Morten, who presided over this case, used this test as a way to interpret such waiver clauses. The court cited several case authorities[31] that discussed this same issue and applied these three tests. Lord Morten's first test states that if there are words within a clause that expressly exempt the proferens from liability for negligence- then the court must give effect to that provision. In applying this first test, the court in *Clark* emphasised that the Plaintiff was a professional, well-educated person.[32] Given the Plaintiff's profession as a pilot in the USA, the court held that he must have been well aware of the nature of the Release when he read the bold writing in front of the document that stated that the Release would affect his legal

[27] *Clark*, above n 2 [12].
[28] Ibid [33].
[29] Ibid [14].
[30] [1952] AC 192.
[31] *Lamport & Holt Lines LTD. v. Coubro & Scrutton (M. & I.) LTD. and Cobro & Scrutton (Riggers and Shipwrights) LTD.* [1982] 2 Lloyd's Rep 42; *J. Lauritzen A.S. v Wijsmuller B.V* [1990] 1 Lloyd's Rep 1 ; *Smith and others v South Wales Swithgear Ltd* [1978] 1 All ER 18; *Ian Reid v Bay Cruise* [1999] FJHC 133
[32] *Clark*, above n 15 [27].

rights.[33] In making this finding, the court has insofar permitted scenarios where the plaintiff is not so well-educated or a minor. The Plaintiff's case was that the non-express mention of the word *negligence* in the waiver clause meant that the waiver did not cover negligence. However, not expressly stating the word *negligence* within a clause does not necessarily mean it is not covered. Other words still need to be interpreted to determine whether they are wide enough to cover negligence. Since the first test failed, the second and third tests had to be applied.

Lord's Morton's second test determines whether the words contained in a clause are wide enough in their ordinary meaning to cover negligence if it is not expressly mentioned. The court found that the words in clause 4 stating that the participant agreed to hold the company and its servants harmless from any liability whatsoever for 'bodily injury, death, loss or personal property or expenses' were wide enough in their ordinary meaning to cover the Defendant's negligence.[34] The express reference to bodily injury and death was also a strong indication that the waiver was for negligence.[35] The application of the second test to the waiver clause significantly revealed that the Plaintiff's contention was incorrect because the words within the clause could still be interpreted to cover negligence.

Upon successfully applying Lord Morton's second test, the third test requires the court to consider whether the head of damage can be based on any other grounds other than that of negligence.[36] In applying this test, the court must not consider grounds that are too 'fanciful or remote'.[37] If the words used within a clause are interpreted to cover grounds other than that of negligence, it would be detrimental to the proferens. By entertaining the possibility that the waiver clause did not cover the Defendant's negligence, the court in *Clark* held that there would be a lack of subject matter- which would render the waiver meaningless. In the interpretation of Clause 4, the court stated that it was clear that liability for bodily injury and death could only result from the Defendant's negligence.[38] By reading the waiver clause in its entirety, the court further stated that there were no other possible grounds for liability.[39] Furthermore, the Plaintiff's failure to specify other possible grounds meant that the waiver clause could have only covered the Defendant's liability for negligence.[40] Thus, this reinforces the statement made by the court that the Plaintiff's main contention was erroneous.

The court's findings in Fijian legislative provisions concerning unfair terms of contract could not be submitted to the judge by the Plaintiff owing to its non-existence. Subsequently, the judge needed only to follow contractual law precedent when deciding the issue. Furthermore, South

[33] Ibid.
[34] Ibid, [32].
[35] Ibid, [33].
[36] Ibid, [34].
[37] Ibid.
[38] Ibid, [35].
[39] Ibid, [35]-[36].
[40] Ibid [37]-[38].

Pacific jurisprudence is unclear as to whether or not claims can succeed in circumstance, which was another reason why the court relied only on contractual law precedent.

Clark is following and affirming *Lord Morton's three tests* as the preferred approach to the construction of waiver clauses in the Pacific in the context of recreational adventures.

CONSIDERING UNFAIR CONTRACT LEGISLATION

In this case, there is an overlap seen with contract law and torts. The heavy reliance on contract law prevented the court from considering the implication of altering the law on tortious liability. The High Court's focus on the applicability of the waiver to the incident through the lens of contractual principles rather than adequately considering risk and harm within the context of recreational activities illustrates this. While this approach was taken in the absence of unfair contract legislation in Fiji, the concern is that without consumer protection statute around fraud, misrepresentation, and unconscionability- broadly or poorly worded contractual waivers may be effective with significant implications for a plaintiff.

The court in *Clark* did not take the traditional, cautious approach in interpreting waiver clauses that attempt to exclude liability for negligence. The determinations made by the court do not seem to take into consideration the difficulties that arise from waivers that leave a plaintiff without any rights. This outcome is concerning.

Further consideration of law reform in Fiji as to the relationship between contracts and tortious liability concerning risky recreational activities is needed. To continue to uphold the general principle established by this case would allow operators of risky recreational activities to become quite reckless in their operations due to the extensive protection provided by their Releases and Waivers. Zero protection is afforded to the participants of these risky recreational activities if clauses that cover a wide range of negligence continue to be sufficient in the eyes of the law. There is a greater danger for illiterate persons who sign these waivers without fully understanding the risk of waiving their legal rights away. Thus, the development of unfair contract legislation and how far it will protect these participants are subject to the Parliament of Fiji. How consumer protectionism would look in statute in terms of inherently risky recreational activities is an area that must be further examined.

Nevertheless, the interests of plaintiffs and that of business operators must continue to be balanced. The issue of unconscionability was absolved by the court in Clark when it was held that businesses have the right to require participants to sign waivers before partaking in the activity offered. The danger and excitement that come with inherently risky recreational activities is the driving force that attracts participants to these establishments in the first place. Hence, to a certain extent, a participant is aware of what they are signing up for when they engage in these activities. However, without legislative intervention in Fiji, these waivers will continue to operate in full effect. The measure of control plaintiffs have over the nature of risk will not hinder this. Therefore, developing a standard where courts distinguish between inherently risky recreational activities depending on

the amount of control over the risks may afford plaintiffs the protection needed. A less restrictive approach must be reflected upon when determining the applicability of exclusion clauses.

CONCLUSION

By following Lord Morton's three tests, Fiji seems to recognise that Releases concerning risky recreational activities are not unconscionable. The High Court in Clark still enforced a waiver clause that did not expressly mention or incorporate the essential word *negligence* (writer's emphasis). The implication of upholding broadly worded waivers could be further analysed by the Fiji Law Reform Commission and the Parliament of Fiji. From the decision of *Clark*, other South Pacific jurisdictions may consider developing their unfair contract legislation to address the legal issues highlighted here.