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Insurance Insights

Waivers and extreme sports

Marks v Skydive Holdings Pty Ltd [2021] VSC 21

Key takeaways

- Where an organisation wishes to rely on a waiver to bar all future claims against it, the waiver must be brought to the attention of the party in a sufficient manner.
- It is sensible to force a party to review and agree to the terms of a waiver at the time of purchase, before contractual relations are created.
- A waiver should be tailored for a company and be specific to the service they provide.
- Liability may be difficult to prove when injuries have been sustained while participating in activities with an inherent risk, such as skydiving and other 'extreme sports', where safety can be affected by uncontrollable elements like the weather.

Background

The Plaintiff was injured while tandem skydiving with her boyfriend on his 30th birthday. Both the Plaintiff and her boyfriend had instructors on their back controlling the 'jump'. While the boyfriend and his instructor landed safely, the Plaintiff and her instructor landed heavily. In doing so, the Plaintiff suffered a fractured lumbar spine requiring surgery, in addition to ongoing mental health issues.

The Plaintiff brought a claim against the skydiving company, 'Skydive Holdings', in negligence, breach of contract and breaches under the Australian Consumer Law. She alleged that her injuries were caused by a lack of care and skill on the part of her instructor. Skydive Holdings, on the other hand, attempted to rely on a waiver they argued barred the Plaintiff's claims entirely. Skydive Holdings also contended that the unfortunate heavy landing was due to a random and short-lived weather event (called 'downdraft').

Victorian Supreme Court decision

While the Victorian Supreme Court found the waiver could not be relied on by Skydive Holdings to bar the plaintiff's claim, the Court ultimately dismissed the plaintiff's claim.

Waiver

The Court held that the waiver did not form part of the contract. In arriving at this conclusion, the Court pointed out that the waiver in question was presented to the Plaintiff after she had booked the non-refundable jumps as part of a membership application to the Australian Parachute Foundation (APF). Skydive Holdings encouraged, but did not make membership of APF a requirement before skydiving.

Also, the waiver did not include any reference to the company Skydive Holdings, how it was related to the APF and how it was protected under the waiver. While there was evidence that the Plaintiff had completed the APF application, the Court was not satisfied she had seen or accepted the terms of the waiver at the time she made the booking.

Materialisation of an inherent risk – what went wrong?

The Court considered expert evidence, including two skydiving experts and a meteorologist, as well as witnesses of the incident, including the skydiving instructor that jumped with the plaintiff, in determining 'what went wrong' in the jump.

It was concluded that the incident was caused by an 'unfortunate random event' of a downdraft of wind on landing, a form of turbulence that was the cause of the rapid descent and heavy landing.

The Court determined that the injuries were not caused by a lack of care and skill by the Plaintiff's instructor. As a result, the Court found there was no basis to find Skydive Holdings liable in negligence, contract or under the ACL.

The Court went on to note that the effect of its finding as to the cause of the incident is that liability for negligence was excluded under section 55 of the Wrongs Act 1958 (Vic). Section 55 stipulates that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk, that could not be avoided by exercise of reasonable care.

Implications

This case is important for organisations who rely on waivers as part of their contracts. The case highlights that where a waiver is to be relied upon, it must be stated in clear terms and be sufficiently brought to the attention of the consumer at the time of purchase. We do caution that the legislation around the country regarding waivers differs and the Court may apply rulings on waivers according to the legislation in the particular state in question.

While the Court appreciates how unfortunate this accident is, the decision emphasises that there can be difficulties in proving negligence when the injury has occurred while participating in an activity with an 'inherent risk'. While this decision was made in context of the Victorian Wrongs Act, Courts may consider similar provisions in Civil Liability legislation in other Australian jurisdictions, to make a similar finding of no liability, in situations where harm has resulted during activities with an inherent risk and where safety can be affected by uncontrollable elements, like the weather.

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