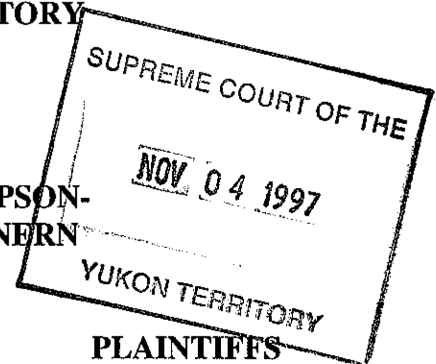
No. 96-A0084
Whitehorse Registry

IN THE SUPREME COURT OF THE YUKON TERRITORY



BETWEEN:

KAREN RENEE SIMPSON and ROBERT HENRI SIMPSON-SPOOK an Infant, by his Guardian Ad Litem ANN McNERN

PLAINTIFFS

AND:

NAHANNI RIVER ADVENTURES LTD., NEIL HARTLING, and HENRY MADISON

DEFENDANTS

ORDER

BEFORE THE HONOURABLE	)	FRIDAY, THE 5th
MR. JUSTICE HUDSON	)	DAY OF SEPTEMBER, 1997.

UPON THE APPLICATION of the Defendants coming on for hearing on the 11th day of August, 1997;

AND UPON HEARING William G. Neen, Esq., on behalf of the Defendants; AND UPON HEARING James D. Vilvang, Q.C., on behalf of the Plaintiffs; AND UPON READING the Affidavit of Neil Hartling sworn the 26th day of February, 1997; AND UPON READING the Examination for Discovery evidence of the Plaintiff set out in the Notice of Motion herein; AND UPON JUDGMENT being reserved to this date.

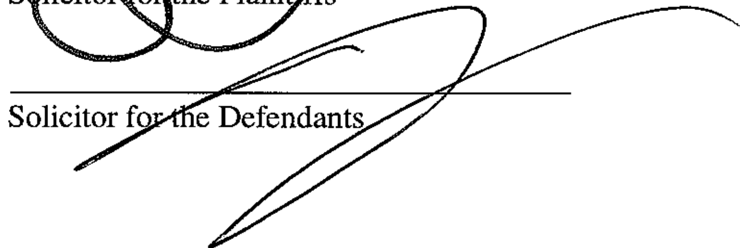
THIS COURT ORDERS that the Plaintiffs' claim be, and the same is hereby dismissed, with costs to the Defendants.

BY THE COURT

Clerk of the Court

APPROVED AS TO ORDER MADE:

Solicitor for the Plaintiffs



Solicitor for the Defendants

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File No: 7084/MLT
Counsel: William G. Neen

Date: 19970905
Docket: 96-A0084
Registry: Whitehorse

SUPREME COURT OF THE YUKON TERRITORY
SEP 05 1997

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

KAREN RENEE SIMPSON and ROBERT HENRI SIMPSON-SPOOK
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PLAINTIFFS

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and HENRY MADISON

DEFENDANTS

REASONS FOR JUDGMENT

This is an application under Rule 18A for an Order dismissing the plaintiffs' claim with costs.

The plaintiffs' action is based on the death of Mr. Harry Spook. Mr. Spook and his wife Karen Renee Simpson had applied for and been accepted as participants in a wilderness canoe tour sponsored and supervised by the defendant Nahanni River Adventures Ltd. As the name indicates, the tour involved a guided canoe trip on the Nahanni River in northwestern Northwest Territories. An activity undertaken regularly on such tours was hiking up creeks contributory to the principal river. The group in which the deceased and plaintiff participated engaged in a hike up Dry Canyon Creek.

The evidence does not disclose whether Dry Canyon Creek was a dry creek bed at the time or whether there was water flowing down it. After a while some of the group, including Mrs. Simpson, decided to return to camp and a few, including Mr. Spook and the defendant Madison, a guide, continued on. Suddenly, with the only warning being an unusual and unexpected noise, a flash flood surged down Dry Canyon Creek and Mr. Spook was carried to his untimely and tragic death by the force of the flow.

The written application for inclusion in such a tour has as a constituent part and a requirement the following form of waiver or release which both Mr. Spook and Ms. Simpson had signed. It says *inter alia;*

> *Agreement of terms of participation*
>
> Due to the prevailing insurance situation and legal atmosphere in Canada, we must insist that each participant be familiar with and agree to the following document. If you have any questions regarding any of the contents, please contact us prior to signing the document. The form
>
> must be completed and submitted with your final payment. No one may participate in a Nahanni River Adventure Ltd. trip without submitting this document.
>
> Insurance coverage is the responsibility of each individual participant. Cancellation and travel coverage are available through travel agents. Our agent, listed in the brochure, would be pleased to assist you.
>
> ...
>
> *Please read carefully*
> Please note that this document must be signed and received in the mail at our office before you can depart with the group.
>
> ...
>
> *Definitions*
> *Wilderness canoe and raft trips* – include lake and river canoeing and rafting, hiking, swimming, fishing, use of knives, saws, axes, mountain hiking, scrambling, nature observations, crossing streams while hiking,

lifting, carrying canoe and raft trip equipment and other associated activities.

In consideration of Nahanni River Adventures Ltd. accepting my application I agree to this Release of Claims and Waiver of Liability.

I understand that wilderness canoe and raft tripping involves certain dangers, not all of which can be listed here. Among the more obvious and frequent are:

...

2. Hazards related to travel in and on lakes and rivers
3. Unfamiliar country, where the participant may become lost, get off route or be separated from the rest of the party

...

I am not relying on any oral or written statements made by Nahanni River Adventures Ltd. or its agents, whether in brochures, advertisements, videotapes, in individual conversations or otherwise to lead me to become involved in this program on any basis other than my assumption of the risks involved.

I accept all of the risks and the possibility of death, personal injury, property damage and loss resulting from my involvement with the trip I am taking with Nahanni River Adventures Ltd.

I release Nahanni River Adventures Ltd., its officers, employees, guides, agents and representatives from any and all liability for any personal injury, death, property damage or loss I may suffer as a result of my participation in their trip, for any cause whatsoever on the part of

Nahanni River Adventures Ltd., its officers, employees, guides, agents or representatives

...

I confirm that I have read over this agreement before signing, that I understand it, and that it will be binding not only on me, but also on my heirs, my next of kin, my executors, administrators and assigns.

I agree that the laws of the Yukon Territory govern this contract and that any legal concerns will be handled in the competent and fair courts in Whitehorse, Yukon, Canada.

Medical Information

- Notwithstanding my assumption of risk, the following medical conditions and/or histories should be known by the guide(s):

- I hereby agree to permit other members of the trip to take film and photographic records of my participation in this tour.

The defendants bring this application for an Order pursuant to Rule 18A of the Rules of Court that the plaintiffs' claim be dismissed with costs. The affidavit evidence discloses the following:

1. There is no specific cause of the flash flood that has been determined;
2. (a) Neither the defendant nor it's employees had ever heard of such a flood occurring in the Nahanni National Park;

   (b) A publication called "Nahanni, A River Guide" by Jowett in which the contribution of the defendant Hartling is acknowledged stated:

> Dry Canyon Creek: a caution; be careful hiking here during potential flash flood conditions described on page 19. You could be marooned.

And on an undetermined page number:

> Heavy rainfalls associated with summer thunder storms are relatively common and can dump as much as ninety millimeters of rain in twenty-four hours. This dramatically affects river water levels flooding some of the more constricted valleys and posing a serious threat to hikers who should be wary of flash floods during or shortly after such storms.

3. There was an unusual sound preceding the flash flood;
4. Further facts are described in the defendants' brief and are not contested.

The parties agree that the courts should approach this matter on the assumption that negligence on the part of the defendants is proven. The issue

therefore is: Is the document headed "Agreement of Terms of Participation" effective in fact and in law to bar the plaintiffs' claims?

Sub-issues are:

(a) Is the *contra proferentum* rule to be applied to the facts of this case to negate the effect that the release might otherwise have?

(b) Does the unlikelihood of the occurrence of a flash flood alter a decision made respecting the waiver/release which is negative to the plaintiff's interest?

I am referred to the case of *Clarke v. Action Driving School Ltd.* (April 19, 1996), New Westminster 96-09890 (B.C.S.C). The circumstances here are quite similar in that it involves a "waiver of liability" in which the word negligence is not used.

The trial judge in that case relies on the judgment of McLachlin C.J.S.C. in *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (B.C.S.C.). In that case Chief Justice McLachlin said:

> It emerges from these authorities 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. For to stay silent in the face of such knowledge, is in effect, to misrepresent by omission.

And further:

> Applying these rules to this case, we start from the fact that Miss Karroll signed the release knowing that it was a legal document affecting her rights. Under the principles set forth in *L'Estrange v. F. Graucob Ltd.*, she is bound by its terms unless she can bring herself within one of the exceptions to the rule. This is not a case of *non est factum.* Nor was there active misrepresentation. It follows that Miss Karroll is bound by the release unless she can establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

Further in the *Clarke* case, Mr. Justice MacKenzie states:

> The second issue is whether the terms of the waiver are broad enough to include the assumed negligence of the defendant. The key words of the waiver are "release from all responsibility of property damage, bodily injury, liability, cost and expenses and claims of every nature and kind howsoever arising from or in consequence of such students participation in any of the training courses conducted by the school...
>
> ...
>
> The clause does not contain any express explicit reference to negligence. I am satisfied that the use of the words "howsoever "arising in the context here includes liability for negligence. Those and similar words have been given a very wide ambit including negligence in a number of cases....

In the *Clarke* case, the trial judge distinguishes the case of *Smith v. Horizon Aero Sports Ltd.* (1981), 130 D.L.R. (3d) 91 (B.C.S.C.) on the facts. In my view the judgment in *Clarke* very closely proximates the facts before me and I find it very persuasive.

The plaintiff cites the case of *Dyck v. Manitoba Snowmobile Association Inc.* (1985), 18 D.L.R. (4th) 635 (S.C.C.) arguing that by inference since the inherent dangers

of snowmobile racing are not present in the case at bar that the release/ waiver should not be said to include the circumstances in which Mr. Spook met his death. However I am inclined to disagree. The Supreme Court of Canada in the *Dyck* case said:

> 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.

In the *Dyck* case, the "release" or "release/waiver" which was quoted in the judgment and includes reference to "negligence" and which appears to approximate the writing in the case at bar was upheld. I find that in the circumstances and bearing in mind the nature of the activity undertaken, it was reasonable for the defendant Nahanni to protect itself from suit in the same way the Supreme Court decided in *Dyck.*

The content of the document before me spells out the potential dangers that might be met. The words "flash flood" are not to be found but there is reference to "hazards in and on lakes and rivers" and "violent and unpredictable weather".

With respect to the Jowett publication, which appears, reading from the discovery of Ms. Simpson, was made a part of the response to this application without objection. It would appear that Mr. Spook had every opportunity to examine the circumstances

which might give rise to flash floods. Indeed, the book is said to be "My handbook that everyone - - that we had on the trip".

Therefore, two facts conflict. One that neither the defendant Hartling nor his employees had ever heard of a flash flood at this location, whereas on the other hand, the book written by Mr. Jowett indicated that there might be some danger. I do not find it surprising or less foreseeable, but rather find it to be something which even the casual hiker might be aware of, that a water course whose walls constricted the flow of water would on the occasion of increased flow present the possibility of a flash flood. I would find this to be no more surprising than the risk a person might run by walking under a palm tree, that a palm nut might release from the tree and strike one's head. In other words, I don't find this risk so remote that it should be taken to be outside the scope of the totality of the document in question and I would therefore apply *Dyck* as the trial judge there did. In so deciding I note the document is placed in a position of importance. It is clearly made a condition precedent to taking the trip and the acknowledgment of it is repeated close to the signature location.

The plaintiffs' counsel in his argument sets out his points in numbered paragraphs. The first is:

1. The principle of *contra proferentum* requires that any ambiguity in the language used in the waiver is to be construed more strongly against the party who prepared and proffered it.

There can be no doubt as to the case of correctness of this statement of law. However, I do not find in the language of the document the type of ambiguity which would bring into play the *contra proferentum* rule to the advantage of the plaintiff.

> 2. One reason waivers are widely used by providers of recreational activities is that there is a risk of injury in sports which is related to individual behavior by the participant. In this case, the deceased did absolutely nothing to jeopardize his own safety.

I don't find that the evidence here supports this argument or that the argument is applicable to the defendants' application. What is being referred to is a particular kind of risk, and in the case at bar, there is another particular kind of risk. The type of words used in the release waiver here, I find, could apply to both types of risk. In any event, it is not true that the deceased "did absolutely nothing" as alleged. There is no evidence as to what he did. Why did the others survive? What did they do that Mr. Spook didn't?

> 3. The Defendants knew or ought to have known the risk of flash floods and ought to have brought that risk to the attention of Karen Simpson.

I would have thought that this point is taken care of in the assumption of negligence which is the basis for the determination of this application. However there is evidence that the risk of flash floods were capable of being within the knowledge of the deceased and his wife as it was described in a guidebook that they had in their possession (Jowett). I find, as well, that on this point, that the release/waiver covers this risk on the facts before me.

> 4. The deceased was exposed to a risk of harm that was, or should have been, known to the defendants but was not known, or reasonably knowable, to the deceased.

The response to this is subsumed in the response to the third point above.

> 5. There are certain inherent risks in a trip of this nature. Many would be obvious to anyone, others may be specifically referred to in the waiver itself or in other literature made available to potential participants. The risk of a flash flood was not an obvious or stated inherent risk. The Defendants cannot argue that the plaintiff or her husband agreed to accept the inherent risk of a flash flood.

Again this appears to me to be repetitive of the previous two points or at least to be included in them for the purposes of determining whether or not the release/ waiver is effective in the face of the facts in the case. In my view, the defendant Mr. Spook clearly agreed to accept a wide scope of risk including the risk of an occurrence, which caused his death.

> 6. When the Plaintiff and her husband signed the waiver, they agreed to accept certain risks. They did not agree to accept the risk of being caught in a flash flood.

My finding on this point is the same as above. While running the risk of repetition, I find that hiking in the areas of creeks with steep banks, obviously and clearly, carries with it the risk of increased water pressure in the event of increased water supply to the narrowed water course. I will also find that the case of *Mayer v. Big White Ski Resort Ltd.* (March 15, 1997) Doc. Kelowna 26627 (B.C.S.C.) is supportive of my findings here.

I have read the case of *Ochoa v. Canadian Mountain Holidays Inc. et al.* (September 25, 1996) Vancouver C922041 (B.C.S.C.) an unreported judgment of Koenigsberg, J. There are many factual distinctions between that case and the case at bar. The judgment in that case states:

> In order for a court to find the term sufficient to cover any negligent behaviour, it must be satisfied that the individual signing it, if he read it, could reasonably be expected to understand its meaning. I hasten to add that the authorities on this subject do not require that that understanding be objectively found on the waiver alone. It may be gleaned from the circumstances of the individual's knowledge of the activity at issue coupled with the document under consideration. On that basis, I find that the waiver in this case, signed by Mr. Ochoa, meets that test.

In the case at bar, the release/waiver is in plain language and it is referred to as an item of importance, indeed a mandatory act on the part of the applicant, the deceased. Mr. Spook was a literate person, highly educated and in my view undoubtedly read the document. There was an invitation to contact the defendant in the event there was any concern. It says:

> If you have any questions regarding any of the contents please contact us prior to signing the document.

The document was signed on June 22 and the parties planned to arrive in Whitehorse July 6. Even if these dates are approximate, there can be no inference drawn of pressure, or of insufficient time to make an informed decision as to whether or not to sign.

Accordingly the application is allowed. The action herein is dismissed with costs to the defendants.

Hudson, J.

James D. Vilvang	Counsel for the plaintiffs
William G. Neen	Counsel for the defendants