Civil liability and personal injury: A harsh decision for a winter sports centre

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The Court of Québec released an interesting judgment in December in a case involving civil liability and personal injury.[1]

On February 23, 2013, Plaintiff, Ms. Bourgault, went to Village Vacances Valcartier ("VVV") to take part in a snow rafting activity. During a descent, she was twice thrown toward the rear of the inflatable boat. The violent impacts caused her to break a vertebra. She sued VVV for damages arising out of the incident.

On that day, 6,660 customers slid down the VVV slopes. The conditions were described as perfect, and the trails well maintained. The evidence also was that only two accidents were reported out of the 168,312 people who went to the centre during the 2012-2013 winter season: one on the same day as the plaintiff and the other the following day. Both accidents occurred on the same trail.

The terms and conditions printed on the back of the ticket stated that the customer agreed to abide by VVV's rules of conduct and acknowledged and accepted the risks inherent in sliding, and assumed full liability for any property or bodily damage.

Plaintiff had not noticed or seen the signs and instructions.[2] She did know that snow rafting involved going over humps and that the route taken might be rougher[3] than others.

In its analysis, the Court underlined the principles that apply here:[4]

> The victim must prove fault on the part of the defendant and its employees in the operation of the centre, in particular regarding the safety of the users, on a balance of probabilities. The victim must also prove the nature of her damages and the causation between the damages and the fault;
> The mere occurrence of an accident in the course of an activity does not automatically result in a reversal of the burden of proof;
> The operator of the centre has a duty of supervision and vigilance, which is an obligation of means. It must act reasonably to ensure customers' safety and avoid foreseeable accidents. Its trails must have no traps, taking into account reasonable foreseeability;
> The operator of the centre is not the insurer of customers who suffer an accident while engaging in the recreational or sports activity in question;
> It is considered to be tacit acceptance of the risks inherent in engaging in the recreational or sports activity in question;
> However, acceptance of the risks does not extend to exceptional or unreasonable risks that are not foreseeable or that go beyond what is inherent in engaging in the recreational or sports activity;
> To conclude that there was acceptance of the risks, there must have been a clear risk, express or implied knowledge of the risk, and sufficient information regarding the activity and its inherent risks to enable the participant to make a free and informed choice, and it must be possible to identify the acceptance (formal or tacit) of the risk by the victim. In the case of exacerbated risk, or if an unforeseen risk materializes, the initial acceptance cannot be a defence;

> Notwithstanding the theory of the acceptance of risks, the operator may be liable if it is established that it did not act diligently and exposed the user to undue risks;
> The extent of the acceptance of the risks is related to the user's level of experience and skill and to all of the circumstances and specific warnings given to the user, by whatever means may have been used (signs, etc.).

The Court also reiterated the principles relating to the rules governing presumptions of fact, which must be serious, specific and consistent, based on the facts introduced into evidence.[5]

The Court acknowledged that serious *prima facie* evidence was presented by VVV regarding the adequacy of the measures in place to ensure the safety of the participants and for the maintenance and supervision of the trails, both for the 2012-2013 winter seasons and for the day of the accident.[6]

In the opinion of the Court, however, there were certain details that clouded the picture, and it was of the view that the safety instructions were virtually non-existent or vague. The Court also stated that it was troubled by that fact that the only other two accidents recorded took place on the same trail, within a short period of time, in spite of the alleged maintenance.[7] It further noted the inconsistency between the plaintiff's and defendant's evidence regarding the exact location of the humps that were the source of the accident. The testimony referred to violent bouncing beyond the experience that VVV sought to provide its customers. The Court concluded that there was plainly an irregularity on the trail in question.[8]

As for the reason that might explain the irregularity, the Court agreed that it was a riddle wrapped in a mystery inside an enigma.[9] However, it concluded that the presumptions were sufficient to establish that the raft hit bumps twice, the passengers came off their seats, Plaintiff lost hold of her cord, and she fell into the bottom of the boat and was injured. In the opinion of the Court, the boat should not have lifted off the ground and that is probably a result of a flaw in the design of the humps on the slope.[10]

With respect to the acceptance of the risks and the limitation of liability, in particular regarding what was printed on the back of the ticket, the Court stated that it could not be argued that Plaintiff had accepted risks of every nature related to the activity. In the opinion of the Court, if the safety instructions had mentioned that violent impacts would take place that could cause injuries, the Plaintiff would not have gone down the slope.[11] It also held that Plaintiff had released VVV from liability in relation to the accident. The Court referred to section 1474 of the C.C.Q., which prohibits such exclusion or limitation of liability for bodily or moral injury.[12]

Finally, the Court made a distinction between activities where the participant is in motion and chooses his or her own direction (for example, downhill skiing or riding on inner tubes, flying saucers or sleds) and activities like snow rafting that do not call for any special ability or require a route to be chosen, in which the participant is virtually immobile.[13] In that case, the operator's obligation of means is more stringent when it comes to the configuration and maintenance of the site.

The case has not been appealed. It will certainly be a precedent to be considered for personal injury cases that involve recreational and sports activities.

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1. Bourgault c. Village vacances Valcartier inc., 2017 QCCQ 16300.
2. The other witnesses also had not: paras. 20, 34, 41, and 51 of the decision.
3. Par. 45 of the decision.
4. Par. 99 of the decision.
5. Par. 100-101 of the decision.
6. Par. 103-104 of the decision.
7. Par. 111 of the decision.
8. Par. 107-122 of the decision.
9. Par. 123 of the decision.

10. Par. 124-125 of the decision.
11. Par. 138 à 140 of the decision.
12. Par. 127-129 of the decision.
13. Par. 142 of the decision.