

terms in an acknowledgment form which do so should have no legal effect.

The practice of extracting agreements from parents to indemnify operators in respect of legal actions on behalf of their children also contravenes the public policy of protecting minors' interests. They are clearly intended to discourage a parent from pursuing a child's rights. If there is doubt about the unenforceability of such indemnities, it should be removed.

Arguments for giving binding effect to waivers by minors or their parents based on the fact that the *volenti* defence can be raised against a minor are unconvincing. That defence usually succeeds today only where the plaintiff's conduct is imbued with illegality or is unusually foolhardy. Treating a minor who engages in obviously dangerous conduct as being conscious of the natural consequences of his or her acts is not analogous to holding the minor to the terms of a binding legal document, the contents of which may be deceptive even to adults.

### ***The Legislative Framework***

[40] The B.C. Law Reform Commission has expressed the view that signed waivers in connection with minors' participation in sports activities are unenforceable under the *Infants Act* [RSBC 1996] C. 223. That is so only if the *Act* codifies the law in relation to contracts entered into by or on behalf of infants in British Columbia.

[41] Part 3 of the *Act* addresses contracts entered into by infants. Part 4 addresses the power of guardians to enter into contracts that will be binding upon infants.

### ***Contracts Entered into by Infants***

[42] Part 3 provides:

When infants' contract enforceable

19 (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is

- (a) a contract specified under another enactment to be enforceable against an infant,
- (b) affirmed by the infant on his or her reaching the age of majority,
- (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
- (d) not repudiated by the infant within one year after his or her reaching the age of majority.

(2) A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

[43] There is a procedure for seeking relief from the Courts in the event it is thought to be inequitable to permit a minor to avoid the consequences of a contract entered into on his or her own behalf. The *Act* does not appear to give the Court the authority to order specific performance of the contract. Compensation and restitution are the only available remedies:

## Application for relief

- 20 (1) If a contract is unenforceable against an infant under section 19 (1),
- (a) the infant, or
  - (b) if the infant has repudiated or is in breach of the contract, another party to the contract,
- may apply to a court of competent jurisdiction for relief against
- (c) a party to the contract, or
  - (d) subject to subsection (5), any person who has acquired a right to or interest in property transferred under the contract.
- (2) In an application under subsection (1), the Court may order that
- (a) compensation be paid by or to any of the parties to the contract,
  - (b) there be restitution of property,
  - (c) the parties to the application be discharged from further obligations under the contract or with respect to property transferred under the contract, or
  - (d) compensation be paid to a person, not a party to the contract, who has been ordered to make restitution of property.
- (3) Before making an order under subsection (2), the Court must consider
- (a) the circumstances surrounding the making of the contract,
  - (b) whether the infant induced any person to enter into the contract by misrepresenting his or her age,
  - (c) the subject matter and nature of the contract,
  - (d) in the case of a contract relating to property, the nature and value of the property,
  - (e) the age and means of the infant,
  - (f) whether any party to the application has so changed the party's position that it would be unfair or inequitable to make an order against the party, and
  - (g) any other relevant circumstances.

[44] A minor, on the other hand, may seek an order from the Public Trustee or the Court ratifying the contract before or after its execution.

## Application to Public Guardian and Trustee

- 22 (1) The Public Guardian and Trustee may, on an application made on behalf of an infant, make an order granting contractual capacity or ratifying a specific contract that the infant proposes to enter into or has entered into, if the Public Guardian and Trustee considers that the making of such an order would be in the interest of the infant.
- (2) Before making an order under subsection (1), the Public Guardian and Trustee must consider
- (a) the nature, subject matter and terms of the contract,
  - (b) the requirements of the infant, having regard to his or her particular circumstances,
  - (c) the age and means of the infant, and

(d) the wishes of the infant's parent or guardian.

(3) Section 19 (1) does not apply to a contract made by an infant in accordance with an order made under subsection (1).

[45] Section 25 of the *Act* preserves certain legal defences in claims arising out of or connected with voidable contracts entered into by a minor but cannot be said to lend legitimacy to a defence that does not arise by rule of law but is found in the voidable contract itself:

Liability in tort

25 Nothing in this Act affects the rule of law by which a person is not liable in tort, if the action in tort

- (a) is connected with,
- (b) arises out of,
- (c) was contemplated by, or
- (d) is an indirect means of enforcing

a contract that is unenforceable against the person under section 19 (1).

[46] By s. 29, marriage settlements entered into by infants are excepted from the rule that infants' contracts are voidable.

### ***Contracts Entered into by Parents***

[47] Section 40 regulates the Power of guardians to enter into agreements. Such agreements, subject only to certain specific exceptions, require either the approval of the Public Trustee or the Court:

Power of guardian to enter into agreements

40 (1) In subsections (7) and (11), "order" means an order of the Provincial Court if the Provincial Court has jurisdiction over the proceeding for recovery of the unliquidated damages.

(1.1) A guardian may make a binding agreement for an infant,

- (a) if the agreement involves a consideration not greater than \$10 000, with the consent of the Public Guardian and Trustee, or
- (b) in a case other than one referred to in paragraph (a), with the approval of the Court by order made on the petition of a party to the agreement.

(2) Subsection (1.1) does not apply to an agreement to settle a claim by an infant for unliquidated damages.

(3) An agreement to indemnify a person as a result of the person making an agreement with another person for an infant is void unless consented to or approved under subsection (1.1).

(4) If an agreement to settle a claim by an infant for unliquidated damages is proposed before a proceeding for recovery of the unliquidated damages is commenced and the proposed amount is not greater than \$50 000, exclusive of interest and costs,

- (a) a guardian, with the consent of the Public Guardian and Trustee, or

(b) the Public Guardian and Trustee

may make a binding agreement for the settlement of the claim.

(5) If an agreement to settle a claim by an infant for unliquidated damages is proposed before a proceeding for recovery of the unliquidated damages is commenced and the proposed amount is greater than \$50 000, exclusive of interest and costs,

(a) a guardian of the infant, or

(b) the Public Guardian and Trustee,

on receipt of a court order granting approval, may make a binding agreement for the settlement of the claim.

(6) An application for approval of the Court under subsection (5) must be made by application of a party to the proposed agreement.

(7) If an agreement to settle a claim by an infant for unliquidated damages is proposed after a proceeding for recovery of the unliquidated damages is commenced and the proposed amount is not greater than \$50 000, exclusive of interest and costs, a litigation guardian, with the consent of the Public Guardian and Trustee, may consent to an order awarding damages in favour of the infant.

(8) If an agreement to settle a claim by an infant for unliquidated damages is proposed after a proceeding for recovery of the unliquidated damages is commenced and the proposed amount is greater than \$50 000, exclusive of interest and costs, a litigation guardian, on receipt of a court order granting approval, may consent to an order awarding damages in favour of the infant.

(9) An application for approval of the Court under subsection (8) must be made

(a) to the Court in which the proceeding has been commenced, and

(b) by application of a party to the proceeding.

(10) Before a party, other than the Public Guardian and Trustee, applies for approval of the Court under subsection (5) or (8), the party must obtain written comments from the Public Guardian and Trustee with respect to the proposed agreement to settle and must provide the written comments to the Court.

(11) After a proceeding described in subsection (7) or (8) has been commenced, the litigation guardian, with the consent of the Public Guardian and Trustee, may consent to an order dismissing all or part of the infant's claim.

(12) If the Public Guardian and Trustee makes an agreement or consents to an agreement under this section, the agreement or consent must be signified by the seal of the Public Guardian and Trustee. [emphasis added]

[48] Section 41 describes exceptions to this rule:

Application

41 (1) Section 40 does not apply to any settlement or contract referred to in section 29, [marriage settlements] or to a lease, surrender or renewal of a lease referred to in sections 32 to 39.

(2) Section 19 [providing that infants' contracts are unenforceable] does not apply to an agreement entered into in accordance with section 40.

[49] If this is a complete code, parents and guardians cannot enter into binding contracts on behalf of infants except in strict accordance with the provisions of the *Act*.

[50] Does the description of circumstances in which a guardian may enter onto a binding agreement on behalf of a minor imply that the guardian otherwise has no such power? Section 40 (1.1) is broadly worded. Its plain reading suggests a guardian cannot enter into any binding agreement other than the specific excepted contracts unless the contract is approved by the Public Trustee.

[51] The *Act* has some of the hallmarks of an attempt to codify the law. It expressly provides for marriage settlements, leases, settlement of claims for liquidated and unliquidated damages (before and after proceedings) and contracts made by infants themselves. The common law with respect to contracts by minors for necessities appears to have been considered and subsumed into the provisions of s. 20. The *Act* also provides for contracts expressly addressed in other statutes.

[52] There is at least one apparent gap in the legislation. The *Act* suggests that a parent may consent to medical care for an infant but provides no means to do so. S. 17 expressly provides for cases where an infant has the capacity to consent to medical care:

Consent of infant to medical treatment

17 (2) Subject to subsection (3), an infant may consent to health care whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person, and if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian.

(3) A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent to the health care for the purposes of subsection (2) unless the health care provider providing the health care

(a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and

(b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.

[53] The description of circumstances where "it is not necessary to obtain a consent to the health care from the infant's parent or guardian" implies that consent can and must otherwise be obtained from an infant's parents or guardians. The *Act* provides no means for parents or guardians to effectively consent without the approval of the Public Trustee. It is unreasonable to suggest the legislature intended to require parents to seek the approval of the Public Trustee to routine medical care. In consent cases, at least, the legislature appears to have left some room for parental consent without state involvement. Giving consent in the context of medical care however is not equivalent to waiving a child's right to legal recourse for negligence, despite the fact that consent is a defence to a claim in battery.

**DISPOSITION**

[54] On a summary trial application I am unable to resolve the conflict in the evidence with respect to whether the notice bringing the limitation of liability to customers' attention was posted and ought to have been seen by the Plaintiff's guardian or the Plaintiff prior to the sparring match in which he suffered his injury. I am not able to address any claim that the infant plaintiff or his mother on his behalf voluntarily assumed the risk of injury in this case. I can, however, address the question whether the release signed on enrolment is an effective bar to the infant plaintiff's claim.

[55] The release is a simple document. It clearly states that the club shall not be liable for injuries, damages, actions or causes of actions whatsoever, including without limitation those resulting from acts of negligence on the part of the Hapkido school.

[56] While employees are not expressly released by the form signed by Ms. To, Mr. Lok himself could rely upon the release as a bar to the Plaintiff's claim if the contract is not void. Here, as in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 the release must have been intended to protect the employees who will discharge the contractual obligations of Lok's Hapkido School Inc. The allegations made against Mr. Lok in the pleadings are that he failed to perform the very services the Plaintiff expected from the Hapkido School. In fact Mr. Lok and the school are difficult to distinguish. On the material they appear to be one and the same. The benefit of the clause should be extended to Mr. Lok.

[57] The wording of the release is broad. It was submitted that the initial words limit the scope of the release. The release begins with the words: "It is expressly agreed that all exercises and treatments, and use of all facilities shall be undertaken at the student's sole risk."

[58] The Plaintiff suggests the sparring match that resulted in injury cannot be described as "exercise", "treatment" or "use of facilities". While I am of the view that the sparring match might be considered to be an "exercise" that question need not be answered in the Plaintiff's favour. The sentence cited is in the nature of a recital. It is followed by the statement "Lok's Hapkido School ... shall not be liable for injuries, damages, actions or causes of actions whatsoever, including without limitation those resulting from acts of active or passive negligence on the part of the Hapkido School". A release from "any causes of action whatsoever" has usually been considered to be broad enough to constitute a general release of claims in negligence. The wording of the release is broad enough that if it is effective to bind the infant plaintiff, the claim should be dismissed against the applicants.

[59] I have considered the defendant's submissions that the Court should not limit the full range of parental authority. I am also cognizant of the policy reasons for permitting parents to

sign limited releases (considered in the Washington State cases *Scott v. Pacific West Mountain Resort*, 834 P. 2d 6 (Wash. 1992); and *Wagenblast v. Odessa School Dist.* (1988), 110 Wn.2d 845, 758 P.2d 968) and the arguments that such releases are permissible in the common law. (Malamud and Karyan “Contractual Waivers for Minors In Sports-Related Activities” (1991-1992) 2 Marquette Sports L.J. 151; Doyice J. Cotten & Sarah J. Young, in “Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools” (2007) 17 J. Legal Aspects Sport 53; Robert Nelson, “The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive their Children’s Tort Liability Claims” (2001-2002) 36 U.S.F. L. Rev. 535)

[60] I am of the opinion, however, reading the *Infants Act* as a whole that the legislature intended the *Act* to establish the sole means of creating contractual obligations that bind minors. In coming to this conclusion I place some weight upon the fact that the rationale for prohibiting parents and guardians from releasing infants’ claims after a cause of action has arisen applies with some force to pre-tort releases as well.

[61] The *Act* does not permit a parent or guardian to bind an infant to an agreement waiving the infant’s right to bring an action in damages in tort. The Defendant’s application is therefore dismissed.

“Willcock J.”

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The Honourable Mr. Justice Willcock