NEELY v MACDONALD: GOOD NEWS FOR THE ENFORCEMENT OF INDEMNITY CLAUSES

Aaron Atkinson

With recent public attitudes and the law coalescing against drinking and driving, many golf courses do not wish to take responsibility for the risk of guests drinking and driving golf carts at tournaments held on their course. It is open to the golf course to require an indemnity from the organisation or company wishing to host such a golf tournament for claims by third parties (i.e. guests) for personal injury associated with driving and use of golf carts.

The Ontario Superior Court of Justice recently confirmed in *Neely v MacDonald* [2014] O.J. 2285 that parties are free to allocate risk in contract as they see fit through the use of indemnity clauses. The Court found that indemnity clauses will be interpreted to discern the objective intention of the parties in accordance with the business sense of the words used by the parties. This is good news for parties seeking to shift the risk of loss to another party.

Background

The plaintiff was a guest at a golf tournament hosted by Canadian Litigation Counsel Inc. ("CLCI") in the summer of 2010. The tournament was held at a golf course owned by Clublink Corporation. The plaintiff was allegedly injured when the driver of the golf cart in which she was a passenger lost control while driving down a steep hill. The driver "bailed" from the golf cart leaving the plaintiff with no driver. The plaintiff eventually jumped out of the golf cart, but injured herself in the process.

The plaintiff commenced an action against the driver and the golf course owner in negligence. The golf course owner claimed over against CLCI seeking to be indemnified under the terms of the agreement by which CLCI booked the tournament. The relevant clauses of the contract are as follows:

> "CUSTOMER IS LIABLE FOR ALL DAMAGE CAUSED BY CUSTOMER AND/OR THEIR GUEST(S)
>
> The Customer and/or their guest(s) agree to hold Clublink Corporation and its officers and employees free and harmless from any damage or claims of any nature that may arise from or through the use of a golf cart.
>
> It is the Customer/s and/or their guest(s) responsibility to fully understand the safe operating instructions of the golf cart and to return it immediately following completion of the round of golf in as good condition as was received."

CLCI claimed the golf course owner's liability to the plaintiff was clear because it knew of two prior minor incidents when golf cart drivers had complained that their carts went too fast down the hill. Following the incident with the plaintiff, the golf course owner remodelled the cart path to reduce the grade of the hill.

CLCI argued that the application of the indemnity clause advocated for by the golf course owner would let a tortfeasor escape liability and transfer the financial impact of their liability to an innocent party. The Court noted that both CLCI and the golf course owner had insurance and stated "it is somewhat rich to hear an insurer complain about the onerous, unfair burdens of contractual exclusions." The Court noted that there is a significant difference between an exclusion clause and an indemnity clause. The former is interpreted strictly to avoid allowing a party to escape the consequences of its failure to do the very thing for which the parties contracted. In contrast, an indemnity clause does not let a liable party "escape" liability. An indemnity clause is not a defence to liability and, in the circumstances of this case, if CLCI did not pay or was insolvent, the golf course owner would not be reimbursed.

The Court noted that an indemnity clause is an allocation of the burdens of particular risks like any number of other terms in a commercial contract. The fact the indemnifier did not cause the loss that it undertook to indemnify has little bearing on the interpretation of the terms of the indemnity clause.

CLCI's Arguments Against Enforcement of the Indemnity Clause

CLCI argued the indemnity clause applied only to damage to the golf course owner's property by CLCI and its guests, particularly damage to golf carts. CLCI based this argument on the wording of the title and the second clause regarding user responsibility to return golf carts in good condition.

The Court noted the indemnity clause was very broadly drafted and by its express terms, it applied to more than just damage caused by guests to the golf course owner's property. The Court found that if all that was encompassed by the indemnity clause was CLCI paying for damage caused to golf carts, then the words "or claims" would be surplusage. Further, damage caused "from or through the use of a golf cart" grammatically meant more than just damage to the golf cart itself. All of the words used in the agreement must be considered to determine the intention of the parties. Accordingly, the Court concluded that the indemnity clause included at least the obligation of CLCI to indemnify the golf course owner for claims by third parties (i.e. guests) for personal injury associated with driving and use of golf carts.

In the alternative, CLCI argued the indemnity clause could not require CLCI to indemnify the golf course owner for its own negligence without expressly saying so. CLCI relied on *ITO-International Terminal Operators Ltd v Miida Electronics Inc* [1986] 1 S.C.R. 752, for the proposition that a clause exempting a person from liability will not be held to include an exemption from claims of negligence unless negligence is expressly mentioned in the clause or there is no other possible interpretation of the clause.

The Court found that *ITO-International* does not require that exemption clauses must always be interpreted to exclude negligence unless there is no other possible interpretation. Instead,

ITO-International prescribes an approach to guide interpretation when the intentions of the parties from the words they have used are in doubt. Contracts are interpreted under the general rule giving the words used their plain ordinary meaning with all other presumptions and subsidiary rules applying only in cases of ambiguity or doubt. The Court cited the following passage from *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd v Scotts Food Services Inc* [1998] O.J. No. 4368 (Ont. C.A.) at para. 27, with approval:

> *"Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity [1]. Rather, the document should be construed in accordance with sound commercial principles and good business sense [2]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.*
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> *[1] City of Toronto v. W.H. Hotel Ltd. (1966), 56 D.L.R. (2d) 539 at 548 (S.C.C.).*
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> *[2] Scanlon v. Castlepoint Development Corporation et al. (1992), 11 O.R. (3d) 744 at 770 (Ont. C.A.)."*

The Court found that the intentions of the parties in this case were not in doubt. According to the indemnity clause, CLCI undertook to indemnify the golf course owner from any "claims of any nature that may arise from or through the use of a golf cart." The most obvious claims are personal injury claims arising out of accidents in which the golf course owner's liability is necessarily tortious. The Court noted that while the title of the indemnity clause could be seen to suggest a limitation of liability to damage caused by guests, the wording actually used carries with it claims made against the golf course owner in tort in connection with the use of the golf cart. To hold otherwise would undermine the business rationale of the indemnity clause to allocate the risk of safe operation of golf carts to CLCI by excluding the dominant type of claims one would expect to see arise from or through the use of a golf cart and leave the indemnity clause with virtually no application. As a result, the golf course owner was granted summary judgment in the third party claim.

Conclusion

This decision is encouraging for parties seeking to allocate risk through the use of indemnity clauses. The Court concluded by noting that "while an insurer should not be saddled with liability to which its customer is not properly subject, there is no egregious unfairness in the allocation of the benefits and burdens of this commercial arrangement." *Neely v MacDonald* demonstrates that parties are free to allocate risk in contract as they see fit and the Court will uphold indemnity clauses when the wording clearly sets out the intentions of the parties.

Aaron D Atkinson is a Barrister & Solicitor with Harper Grey LLP.
He can be contacted at aatkinson@harpergrey.com