Case Study: Apps v. Grouse Mountain Resorts Ltd.

Defence + Indemnity

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Sports liability waivers must be clear and contain all relevant information and reasonable notice of the waiver must be brought to the customer's attention before or at the time of entering into the contract. A customer's pre-contract experience with different waivers at a different resort is also not relevant.

***Apps v. Grouse Mountain Resorts Ltd*, 2020 BCCA 78, per Grauer J.A.**

Facts and Issues

On the evening of March 18, 2016, the Plaintiff/Appellant and three friends decided to go snowboarding at Grouse Mountain, a ski resort operated by the Defendant/Respondent. The Plaintiff purchased a lift ticket at the ticket office. Above the ticket booth was a poster that contained the terms of a sports liability waiver:

[15] Above the ticket booth was a poster that contained the terms of the waiver. Printed at the top in large white letters on a red background was this:

PLEASE READ

EXCLUSION OF LIABILITY ON TICKET

Below that, printed in black letters on a yellow background were these words (I have not tried to reproduce the relative font sizes):

NOTICE TO ALL USERS OF THESE FACILITIES

EXCLUSION OF LIABILITY – ASSUMPTION OF RISK – JURISDICTION

THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS

INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION

FOLLOWING AN ACCIDENT

PLEASE READ CAREFULLY!

As a condition of use of the ski area and other facilities, the ticket holder assumes all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to: the risks, dangers and hazards of skiing, snowboarding, tubing, tobogganing, cycling, mountain biking, hiking and other recreational activities; the use of ski lifts, carpet lifts and tube tows; collision or impact with natural or man-made objects or with other

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persons; slips, trips and falls; accidents during snow school lessons; travel within or beyond the area boundaries; or negligence, breach of contract or breach of statutory duty of care on the part of the ski area operator and its associated companies and subsidiaries, and their respective employees, instructors, guides, agents, independent contractors, subcontractors, representatives, volunteers, sponsors, successors and assigns (hereinafter collectively referred to as the "Ski Area Operator"). The ticket holder agrees that the Ski Area Operator shall not be liable for any such personal injury, death or property loss and releases the Ski Area Operator and waives all claims with respect thereto. The ticket holder agrees that any litigation involving the Ski Area Operator shall be brought solely within the Province of British Columbia and shall be within the exclusive jurisdiction of the Courts of the Province of British Columbia. The ticket holder further agrees that these conditions and any rights, duties and obligations as between the Ski Area Operator and the ticket holder shall be governed by and interpreted solely in accordance with the laws of the Province of British Columbia and no other jurisdiction.

THE SKI AREA OPERATOR'S LIABILITY IS

EXCLUDED BY THESE CONDITIONS

PLEASE ADHERE TO THE ALPINE RESPONSIBILITY CODE

AND BE RESPONSIBLE FOR YOUR OWN SAFETY

IN ALL ACTIVITIES

The same terms were repeated in a similar format on the back of the ticket the Plaintiff received from the cashier. The ticket was said to be non-refundable. The Plaintiff did not read the waiver nor did he sign anything because there was nothing for the Plaintiff to sign.

Once the group was up the mountain, the Plaintiff and his friends headed to the Terrain Park. At the entrance to the park, there were large signs that contained a description of the freestyle terrain, instructions for its use and a description of course difficulty:

[18] Once they were up the mountain, the Plaintiff and his friends headed to the Terrain Park. At the entrance to the park, two large signs were posted. The first bore the following heading in large letters:

[19] There followed, in smaller print, a description of the freestyle terrain and instructions for its use. Below that were two segments, the first in white letters on a red background, and the second in black letters on an orange background:

Freestyle Terrain use, like all skiing and snowboarding,

exposes you to the risk of serious injury.

AIRBORNE MANOEUVRINGS INCREASE THE RISK

INVERTED AERIALS SUBSTANTIALLY INCREASE THE

RISK OF SERIOUS INJURY AND ARE NOT RECOMMENDED

When using the freestyle terrain, you assume the

risk of any injury that may occur. The ski area

operator's liability for all injury or loss is excluded

by the terms and conditions on your

ticket or season pass release of liability.

The Plaintiff did not recall reading either of the signs.

The Plaintiff was injured catastrophically when attempting a jump, landing upside down on the knuckle before the landing slope. He suffered a significant spinal injury and became a quadriplegic. He sued the Defendant/Respondent ski resort for damages, alleging negligence, breach of contract, breach of the *Occupiers Liability Act*, RSBC 1996, c. 337 (the "*OLA*") and breach of the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 (the "*BPCPA*"). The Defendant argued that the "own negligence" exclusion of liability, contained in the waiver, constituted a complete defence to the claims and that the Plaintiff's prior experience with waivers put him on reasonable notice as to the conditions of its waiver.

The trial judge concluded that the Defendant, in all the circumstances, took sufficient steps to give reasonable notice to the appellant of the risks and hazards of using the jump and took sufficient steps to give reasonable notice to the Plaintiff of its exclusion of liability for its own negligence. The trial judge found, *inter alia*, that:

1. The ticket booth sign was "difficult to read";
2. "the own negligence exclusion was 'not highlighted or emphasized in any way', but was buried in small print among many commas and semi-colons" and
3. "It is unrealistic to believe that a person approaching the ticket booth would stop in front of the window to read the sign."

In concluding that reasonable notice to the Plaintiff had been given, the trial judge considered both the waiver postings before the Plaintiff purchased his lift ticket and the signs he could not have seen until after he has bought the ticket.

The Plaintiff had previous experience with liability waivers at a previous ski resort (Whistler) and had worked in a job at the equipment rental shop at Whistler as a ski/snowboard technician. In that role he was responsible for getting customers to sign rental agreements, which "included a release of liability notice that the customers were required to sign; but Mr. Apps did not read that part of the document".

The Plaintiff appealed the judge's decision on four grounds:

1. "that the judge impermissibly took into account post-contract notice in the form of what was posted at the Terrain Park in assessing whether Grouse Mountain had given reasonable notice of the condition in its waiver excluding liability for its own negligence"; and
2. "that the judge applied the wrong legal test in dealing with the significance of Mr. Apps' past experience".

HELD: Appeal allowed; order dismissing the appellant's claims based on negligence, breach of contract and breach of the *OLA* set aside.

1. The Court set out the law regarding the onus on a resort to provide the consumer with reasonable notice of liability waivers, especially those purporting to exclude liability for the resort's own negligence.

a. The Court of Appeal noted the enforceability of a waiver depends on whether reasonable steps are taken to bring it to the consumer's attention. The more onerous the condition, requirement of what constitutes reasonable notice becomes higher. "Own negligence" clauses, such as the one the respondent relied on, were considered to be a more onerous condition:

[24] In 1877, the Court of Appeal of England considered a clause on the back of a ticket, given for the deposit of luggage, that purported to exempt the railway from any kind of responsibility for any articles left: ***Parker v South Eastern Rail Co.*** (1877), 2 CPD 416. Then, as now, the waiver's enforceability depended on whether reasonable steps had been taken to bring the condition to the attention of the claimant. The mere fact of providing a ticket on which there was printing was insufficient to put the claimant on the necessary notice.

[25] Just how much is required in order to be "reasonably sufficient to give the plaintiff notice of the condition" (***Parker*** at p 424) will depend upon the nature of the restrictive condition: see, for instance, ***Thornton v Shoe Lane Parking Ltd***, [1971] 2 QB 163 at 173 (CA). The more onerous the condition, the more rigorous will be the requirement for what constitutes reasonable notice: ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd***, [1989] QB 433 (CA).

[26] Among the more onerous of conditions is the own negligence clause. This is particularly so in the field of sports activities where consumers might well expect a service provider to exclude liability for injury or loss arising from the inherent risks of the activity, but would be taken aback by an exclusion of liability for that provider's own carelessness. This was discussed in ***Mile v Club Med Inc***, [1988] OJ No. 426 (H Ct J) in relation to resort scuba diving.

[27] In the circumstances of this case, these issues fall to be considered in two legal contexts: the law of contract, as discussed in the cases noted above, and the *OLA*, which in section 3(1) imposes a statutory duty on an occupier of premises (such as Grouse Mountain) "to take that care that in all the circumstances of the case is reasonable to see that a person … will be reasonably safe in using the premises." This duty is independent of any contractual obligation.

b. The trial judge was held to have correctly considered these legal principles:

[62] But in the circumstances of this case, this submission begs the question of what it was that had to be brought to Mr. Apps' attention. At para 31 of her reasons, the judge rightly recognized a waiver of an occupier's own negligence as "among the most onerous of clauses", and that "The more onerous the exclusion clause the more explicit the notice must be". It does not follow that because there may have been adequate notice that something in the contract limited one's rights, enough had been done to bring to the consumer's attention the fact that the contract included a clause so onerous as to exclude liability for the service provider's own negligence.

2. However, the Court held that the trial judge had erred in considering the notices which the Plaintiff could not have seen until after he had purchased his ticket (when the contract with the Defendant resort was formed).
    a. The fact that the notices up the mountain at the entrance to the Terrain Park were held to be sufficient by the trial judge was something that the trial judge ought not to have considered:

[56] In finding that the plaintiff was indeed bound, Mr. Justice Blair had regard to the wording on the ticket and its structure, and to signs placed by the defendant at a number of locations at the resort where ski tickets were sold, all of which would have been visible before the purchase of the ticket, and of which the plaintiff had acknowledged his awareness. There was no reference to signs posted elsewhere that could not have been seen until after the transaction.

[57] In the absence of a ski hill exception, it follows that only the steps Grouse Mountain took before and at the time of the issuance of the ticket can be taken into account in assessing whether Grouse Mountain took sufficient steps to give reasonable notice to Mr. Apps of the terms of its waiver, and in particular of the inclusion of the own negligence clause.

[58] What was said on the signs at the entrance to the Terrain Park is relevant only to the question of whether it gave reasonable notice of the risks of using that park, a question that is not before us. By the time Mr. Apps arrived at the Terrain Park, he had paid for his non-refundable ticket, taken the lift up the mountain, and had begun snowboarding. It was far too late to give notice of what was in the waiver. That had to be done at or before the ticket booth.

b. The Court held that, accordingly, the Defendant could only rely on the notices available to the Plaintiff up to the point that he purchased his ticket. This was held not to exclude the Defendant resort's liability because the trial judge had made findings of fact that such notices were insufficient.
3. The trial judge was held to have erred in considering that the Plaintiff had sufficient notice of the Defendant's waiver by reason of his previous experience at a different ski resort (Whistler). The Plaintiff's previous job experience in signing up customers of the other ski resort to rental agreements was also not relevant to his contracting to ski at the Defendant Grouse Mountain. The Court held that it is only the consumer's previous experience with the waiver of the Defendant resort at Bar which is relevant:

[73] As a matter of contract, it is only actual knowledge of the term through previous dealings that is relevant. Constructive knowledge will not do: ***Repap (aka Skeena) v Electronic Technology Systems, et al***, 2002 BCSC 539. As the House of Lords stated in ***McCutcheon v David Macbrayne Ltd***, [1964] 1 WLR 125 (UK HL) at 134:

The fact that a man has made a contract in the same form 99 times (let alone three or four times which are here alleged) will not of itself affect the hundredth contract in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them.

[74] Here, of course, the question is not whether the own negligence clause can be implied into the contract. It was expressly included. But Mr. Apps had never dealt with Grouse Mountain before. The question is whether Grouse Mountain did what was reasonable to bring it to Mr. Apps' attention. If it did not, then, as a matter of contract law, Mr. Apps cannot be bound by the own

negligence clause in Grouse Mountain's waiver because he previously signed a contract with Whistler that included a similar one. Actual knowledge from Whistler was not proven, or even seriously alleged.

COMMENTARY:

The takeaway principle here is that liability waivers must be clear and contain all relevant information and reasonable notice of the waiver must be brought to the customer's attention before or at the time of entering the contract. Courts may not consider post-contract notice or pre-contract experience as sufficient for providing notice of relevant terms of a waiver.