

CANADA / JUDGMENT

Apps v. Grouse Mountain Resorts Ltd.

2019 BCSC 855

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 855 Apps v. Grouse Mountain Resorts Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Apps v. Grouse Mountain Resorts Ltd.,

2019 BCSC 855

Date: 20190530

Docket: S175420

Registry: Vancouver

Between:

Jason Patrick Apps

Plaintiff

And

Grouse Mountain Resorts Ltd.

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiff:

R.D. Gibbens, Q.C.

Counsel for the Defendant:

R.B.J. Kennedy, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

February 21, and

March 11-13, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2019

Introduction

- [1] In March 2016 the plaintiff was seriously injured in a snowboarding accident on the defendant mountain ("Grouse"). In June 2017 he brought an action against Grouse for alleged negligence and breach of the Occupiers Liability Act, R.S.B.C. 1996, c. 337 ["OLA"]. The plaintiff also alleges that the defendant failed to warn him of the risks, dangers and hazards of using the jump.
- [2] Grouse seeks dismissal of this action on the basis that the exclusion of liability notice constitutes a complete defence to the claims.
- [3] The parties agree that this application is suitable for summary trial. They further agree that the alleged negligence of the defendant and the alleged contributory negligence of the plaintiff are not in issue on this application.

Background

- [4] The plaintiff Mr. Apps, an Australian, started skiing while he was in elementary school. He switched to snowboarding when he was 14. Before travelling to Whistler, his skiing and snowboarding was all done in Australia.
- [5] Mr. Apps left high school after grade 11 and successfully completed a three year carpentry program. He finished his apprenticeship shortly before he left Australia.
- [6] He was 19 when he arrived in British Columbia in November 2015. His plan was to live, work and snowboard in Whistler for two years.
- [7] On December 1, 2015 Mr. Apps bought a Whistler Blackcomb season's pass. In order to complete the purchase he had to sign the Whistler Blackcomb waiver of liability. He testified at examination for discovery that he did not read the document but was aware when he signed it that it was a release of liability.
- [8] In January 2016 Mr. Apps obtained employment as a ski/snowboard technician at an equipment rental shop in Whistler and worked there until his accident. Part of his job involved having rental customers sign a release of liability.

- [9] Mr. Apps snowboarded 54 days during the 2015/2016 season. On approximately 80% of those days he went into terrain parks where he was mostly interested in the jump features.
- [10] Mr. Apps was comfortable attempting medium or large jumps but stayed away from the extra large ("XL") jumps in the Whistler Blackcomb terrain parks as he felt them to be beyond his abilities.
- [11] By March 2016, Mr. Apps considered that he had gone from a novice to an intermediate snowboarder.
- [12] On the evening of March 18, 2016 the then 20-year old plaintiff and three friends went night skiing at Grouse. It was Mr. Apps' first time there.
- [13] He bought a ski area ticket at the ticket booth, attached it to his jacket and headed up the gondola to the ski area.
- [14] He does not recall seeing an exclusion of liability sign at the ticketing area. Nor did he read his ticket.
- [15] Once they arrived at the top of the mountain Mr. Apps and his friends went directly to the terrain park.
- [16] There are two signs at the entrance to the terrain park warning of the risks of using freestyle terrain and waiving the mountain's liability. Mr. Apps testified at his examination for discovery that he did not see them. He had seen similar signs at Whistler Blackcomb but had not read them.
- [17] That evening Mr. Apps went off an XL jump in the terrain park and fell suffering catastrophic life altering injuries.

Issue

- [18] At issue is whether it would be fair or reasonable in all the circumstances to hold the plaintiff bound by Grouse's waivers of liability.
- [19] The issue turns on the efficacy of notice given by Grouse to the plaintiff. The following two questions must be answered:
 - 1) whether Grouse, in all the circumstances, took sufficient steps to give reasonable notice to the plaintiff of the risks and hazards of using the XL jump; and
 - 2) whether Grouse, in all the circumstances, took sufficient steps to give reasonable notice to the plaintiff of the waiver of the mountain's own negligence.

The Law

[20] Under the OLA an occupier of premises owes a duty to take reasonable care in all of the circumstances to see that a person will be reasonably safe using the premises: OLA s. 3(1). That duty of care extends to the condition of the premises and activities on the premises.

[21] Section 4 permits the occupier to contract out of that duty of care. It reads in part as follows:

4 (1) Subject to subsections (2), (3) and (4), if an occupier is permitted by law to extend, restrict, modify or exclude the occupier's duty of care to any person by express agreement, or by express stipulation or notice, the occupier must take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person. [Emphasis added.]

[22] With respect to waivers of liability, it is recognised that while an occupier can not force a person to read the waivers it must take reasonable steps to draw the exclusion to their attention. This principle is established by the well-known ticket cases such as *Parker v. South Eastern Railway Co.* (1877), 2 C.P.D. 416 (Eng. C.A.).

[23] What constitutes reasonable notice for onerous terms was discussed by the English Court of Appeal in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1987] EWCA Civ 6, in which Dillon L.J. stated as follows:

When for instance one condition in a set is particularly onerous does something special need to be done to draw customers' attention to that particular condition? In an obiter dictum in *J. Spurling Ltd. v. Bradshaw* [1956] 1 W.L.R.461 at page 466 (cited in *Chitty on Contracts* 25th Ed. Vol. 1 at page 408) Lord Justice Denning stated that "Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient".

Then in *Thornton v. Shoe Lane Parking Ltd.* (1971) 2.Q.B. 163 both Lord Denning M.R. and Lord Justice Megaw held as one of their grounds of decision, as I read their judgments, that where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party. Lord Denning at pages 169H-170D re-stated and applied what he had said in the *Spurling* case, and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way. Lord Justice Megaw deals with the point at pages 172F-173E where he says:

"I agree with Lord Denning M.R. that the question here is of the particular condition on which the defendants seek to rely, and not of the conditions in general. when the conditions sought to be attached all constitute, in Lord Dunedin's words [1918] A.C. 846, 847, 'the sort of restriction ... that is usual', it may not be necessary for a defendant to prove more than that the intention to attach some conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required as

being, in the words of Lord Justice Mellish L.J., 2 C.P.D. 416, 424, 'reasonably sufficient to give the plaintiff notice of the condition', depends upon the nature of the restrictive condition.

In the present case what has to be sought in answer to the third question is whether the defendant company did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause - a few words embedded in a lengthy clause - which Lord Denning M.R. has read, by which, in the midst of provisions as to damage to property, the defendants sought to exempt themselves from liability for any personal injury suffered by the customer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by statute, The Occupiers Liability Act 1957. True, it is open under that statute for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go upon the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable."

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At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v. Shoe Lane Parking*, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

[Emphasis added.]

- [24] There has been much litigation over what constitutes "reasonable steps" to notify users of premises of exclusion clauses. In the cases that deal with ski accidents while there are factual distinctions between signed waiver cases and day ticket cases where the user of the mountain does not sign anything, the principles of law are the same: *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership*, [1994] B.C.J. No. 2602 (S.C.) at para. 14.
- [25] In *Karroll v. Silver Star Mountain Resorts Ltd.*, [1988] B.C.J. No. 2266 (S.C.), a case dealing with a signed release, *McLachlin J.*, as she then was, discussed the factors relevant to determining whether reasonable steps had been taken to draw attention to the waiver of liability at page 6:

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case. [Emphasis added.]

- [26] In *Repap British Columbia Inc. v. Electronic Technology Systems Inc.*, 2002 BCSC 539, *Kirkpatrick J.*, as she then was, held that previous dealings between contracting parties may be relevant if they prove actual knowledge and consent to the terms imposed (at para. 11).
- [27] In *McQuary v. Big White Ski Resort Ltd.*, [1993] B.C.J. No. 1956 (S.C.), *Blair J.* held that the plaintiff's failure to read the exclusion clause on their ski ticket was irrelevant when he not only knew there was writing on the ski ticket he purchased from the defendant, but was also aware the writing contained conditions concerning the defendant's liability in case of an accident. That was a case involving the plaintiff's negligence.
- [28] This Court in *Dawe v. Cypress Bowl Recreations Ltd.*, [1993] B.C.J. No. 2892 came to a similar decision in a case in which the plaintiff alleged the mountain's own negligence.
- [29] Counsel for the defendant drew my attention to many cases dealing with exclusion of liability cases based on a breach of the OLA and inherent risk of recreational activities including:
- *Blomberg v. Blackcomb Skiing Enterprises Ltd.*, [1992] B.C.J. No. 196 (S.C.);
 - *Braun v. Whistler Mountain Resort Limited Partnership*, 2016 BCSC 2259;
 - *Dawe v. Cypress Bowl Recreations Ltd.*, [1993] B.C.J. No. 2892 (S.C.);
 - *Dixon v. B.C. Snowmobile Federation et al*, 2003 BCCA 174;
 - *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589;

- Jamieson v. Whistler Mountain Resort Limited Partnership, 2017 BCSC 1001;
- Karroll v. Silver Star Mountain Resorts Ltd. (1998), 33 B.C.L.R. (2d) 160 (S.C.);
- Loychuk v. Cougar Mountain Adventures Ltd., 2011 BCSC 193;
- Mayer v. Big White Ski Resort Ltd., [1997] B.C.J. No. 725, aff'd [1998] B.C.J. No. 2155; and
- McQuary v. Big White Ski Resort Ltd., [1993] B.C.J. No. 1956 (S.C.).

[30] Counsel for the plaintiff relies on cases dealing with exclusion clauses in general. They include:

- Gallant v. Fanshawe College of Applied Arts and Technology, [2009] O.J. No. 3977 (S.C.J.);
- Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd., [1987] EWCA Civ 6;
- Ochoa v. Canadian Mountain Holidays Inc., [1996] B.C.J. No. 2026 (S.C.);
- Thornton v. Shoe Lane Parking Limited, [1970] EWCA Civ 2;
- Tilden Rent-A-Car Company v. Clendenning, [1978] O.J. No. 3260 (C.A.); and
- Trigg v. MI Movers International Transport Services Ltd., [1991] O.J. No. 1548 (C.A.).

[31] I take the following from the cases provided:

- 1) The more onerous the exclusion clause the more explicit the notice must be;
- 2) A waiver of an occupier's own negligence is among the most onerous of clauses;
- 3) The form, location and architecture of the notice are factors to be considered when assessing the reasonableness or efficacy of the notice; and
- 4) Although reasonableness of the notice is an objective test, the circumstances of the plaintiff are to be taken into consideration. This includes the plaintiff's age, level of education and previous experience with waivers of the same or similar recreational areas.

[32] The plaintiff urges that the critical time for notice is before the contract is entered into, which in the case of a ticket is before it is purchased. While that may be so in some circumstances, in the case of ski hill tickets I disagree. In all of the authorities presented to me the courts considered all notices - those posted for view before and after purchase of the ticket as well as the waiver on the ticket. In the present case the signs in the terrain park warning of the increased danger and the waiver of liability are both relevant and significant.

[33] With the law in mind I now turn to analyse the notice given to the plaintiff.

Analysis

[34] Prior to buying their ticket the only notice of the waiver of liability to ski area day pass users at Grouse is a bright yellow poster with a red border measuring approximately 38 cm by 50 cm posted in the window of the ticket booth above the head of the ticket seller.

[35] It reads as follows:

PLEASE READ

EXCLUSION OF LIABILITY ON TICKET 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 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

[36] After the heading PLEASE READ CAREFULLY the poster is difficult to read. As can be seen above, it is one long paragraph with many commas and semi-colons.

[37] The mountain's own negligence exclusion, in issue here, is buried about a third of the way down. It is not highlighted or emphasized in any way.

- [38] It is unrealistic to believe that a person approaching the ticket booth would stop in front of the window to read the sign. It is positioned away from where the purchaser is focussed in order to make the transaction. The ticket seller is not instructed by Grouse to say anything about the waiver to ticket purchasers.
- [39] However the waiver in virtually the same language and in the same format is also on the back of the ticket.
- [40] As well, at the entrance to the terrain park are two large signs.
- [41] The first is entitled in big font FREESTYLE TERRAIN and under it in large red bold capitals beside a red stop sign "READ THIS!!!"
- [42] About three-quarters of the way down the sign in a bright red box is the following caution:
Freestyle terrain use, like all skiing and snowboarding, exposes you to the risk of serious injury.
AIRBORNE MANOEUVRES INCREASE THE RISK
INVERTED AERIALS SUBSTANTIALLY INCREASE THE
RISK OF SERIOUS INJURY AND ARE NOT RECOMMENDED
- [43] Under that in a bright yellow box is another warning:
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.
- [44] The second sign describes and grades the jumps in the park with XL being the biggest. XL jumps are stated to be for advanced and expert skiers/ snowboarders only.
- [45] With respect to the question of whether Grouse took sufficient steps to give reasonable notice to the plaintiff of the risks and hazards of using the jump, besides being self evident, the waivers at the ticket booth and on the ticket make clear that skiing and snowboarding are risky activities. The signs at the entrance to the terrain park make clearer that using the features in that area including the jumps is dangerous and that users do so at their own peril.
- [46] At his examination for discovery while being cross-examined about the signage at the entrance to the terrain park, Mr. Apps conceded that he was aware of the risk of using the features:

939 Q. If you go down, there's a portion in red highlighting with white lettering. Do you see that?

A. Yes.

940 Q. And it says, "Freestyle terrain use, like all skiing and snowboarding, exposes you to the risk of serious injury." I take it that's something you were aware of as of March 2016, is that correct, that there was a risk of serious injury in snowboarding?

A. I didn't think it would be this serious, but yes.

[47] Regarding the waiver of the mountain's own negligence, although I find the sign at the Grouse ticket booth difficult to read, that does not end the analysis.

[48] The sign at the entrance to the terrain park is clear and easy to read.

[49] In addition Mr. Apps had considerable experience with waivers of liability at Whistler Blackcomb in the months leading up to the evening of the accident.

[50] As set out above, approximately 3.5 months prior to his accident Mr. Apps purchased a season's pass for Whistler Blackcomb. In order to do so he signed a release of liability agreement acknowledging that he had read and understood the release agreement and that by signing he was "waiving certain legal rights" he may have against the mountain. The waiver of the mountain's own liability is clearly written and highlighted in two places in the release. It is in much the same language as the waiver at Grouse.

[51] Mr. Apps testified at his examination for discovery that he did not read the document but was aware when he signed the document that it was a release of liability and would affect his legal rights.

[52] In addition Mr. Apps dealt with releases of liability that contained a waiver of the mountain's own negligence as part of his employment. The waiver at his workplace reads as follows:

I AGREE TO WAIVE ANY AND ALL CLAIMS that I have or may in the future have against the Releasees and TO RELEASE THE RELEASEES from any and all liability for any damage, expense or injury including death that I may suffer, or that my next of kin may suffer, resulting from or arising from or arising out of any aspect of my use of the Equipment, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF STATUTORY DUTY OF CARE INCLUDING ANY DUTY OWED UNDER THE OCCUPIERS LIABILITY ACT, R.S.B.C., 1996, c. 337, in respect of the selection or maintenance of the Equipment or in respect of the provision or failure to provide any warnings, directions or instructions as to the use of the Equipment or the risks, dangers and safely and hazards of skiing and snowboarding.

[53] Again the wording of the mountain's own negligence exemption in the workplace waiver is similar to that used by Grouse. It is in capital letters in a bright yellow box outlined in red.

- [54] Mr. Apps was trained to administer the waiver to each customer that rented equipment. It was his duty to witness their signature acknowledging that they had read and understood the release. It can reasonably be assumed that that was a fundamental aspect of his job. While Mr. Apps claimed that he did not read the liability waiver on the forms at his work place he dealt with them regularly. At his examination for discovery he identified his signature on over 35 forms from February 2016.
- [55] Mr. Apps' extensive experience with waivers of liability cannot be ignored. The fact that the waivers pertained to Whistler Blackcomb is inconsequential - it is a mountain in British Columbia a short distance from Grouse. The notices at Whistler Blackcomb look similar to the signs at Grouse and use virtually identical language. The conditions are standard for ski hills. A reasonable person would expect the mountains to have similar waivers.
- [56] Given his experience Mr. Apps should have known of the waiver of liability for the mountain's own negligence. That he chose not to read the waivers does not render them invalid or inapplicable to him.
- [57] Having regard to all of the circumstances and all of the evidence, I am satisfied that Grouse gave reasonable notice to Mr. Apps of the risks of snowboarding and use of the jumps and of the exclusions of liability including exclusion of the mountain's own negligence.

Conclusion

- [58] I find that Mr. Apps is bound by the terms and conditions set out in the notice posted on the ticket booth at Grouse which preclude him from recovering from the defendant for any injury, loss, damage or expense sustained as a result of his accident on March 18, 2016.
- [59] Accordingly his action against the defendant is dismissed.
- [60] Costs were not addressed. Unless there is an agreement as to costs that I am unaware of, the defendant is entitled to costs. The parties are at liberty to appear before me if there is an issue.

"The Honourable Madam Justice Murray"

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