Claim Case Studies & Legislation: Apps v. Grouse Mountain Resorts Ltd., 2019 BCSC 855

While snowboarding at the Defendant's facility, the Plaintiff suffered catastrophic, life altering injuries which included a spinal injury that rendered him quadriplegic. He brought an action against Grouse for negligence and breach of the *Occupiers' Liability Act*. The claim also included an allegation that the Defendant failed to warn the Plaintiff of the risks, dangers and hazards of using the jump.

The Defendant sought to have the claim dismissed by summary trial based on the Defendant's position that their exclusion of liability notice was a complete defence to the claims. A summary trial is a streamlined process that can be utilized if the issues are not complicated and material facts are not in dispute. Both parties agreed to a summary trial.

Background

In December 2015, the Plaintiff purchased a season's pass at Whistler Blackcomb at which time he signed a waiver of liability. He testified that, although he did not read the waiver, he was aware of the nature of the document.

In January 2016, the Plaintiff commenced work as a ski/snowboard technician at an equipment rental shop in Whistler. One of his duties was to have rental customers sign a release of liability.

Throughout the 2015/2016 ski season, the Plaintiff reported having snowboarded on 54 days. On a majority of these days he was snowboarding in parks where he was mainly interested in the jump features. The Plaintiff testified that he avoided the XL jumps because he felt they were beyond his abilities; however, he was comfortable attempting medium and large jumps as he considered himself to be an intermediate snowboarder.

On the day of the incident, the Plaintiff and some friends went night skiing at the Defendant's facility; Grouse Mountain Resorts Ltd. When he bought his ticket, the Plaintiff claims he did not recall seeing an exclusion of liability sign at the ticket purchase counter and did not read the back of his ticket.

Upon arrival at the top of the mountain, the Plaintiff went directly to the terrain park. Although there are two signs at the entrance to the terrain park warning of the risks and waiving the mountain's liability, the Plaintiff testified that he had not seen the signs.

Issues

1. Did the Defendant take sufficient steps to give reasonable notice to the Plaintiff of the risks and hazards of using the XL jump?
2. Did the Defendant take sufficient steps to bring the waiver of the Defendant's own negligence to the attention of the Plaintiff?
3. Do the Defendant's waivers of liability and warnings act as a complete defence to the Plaintiff's claims?

Legislation

Pursuant to the *Occupiers' Liability Act* (OLA), an occupier owes a duty to take steps to ensure that people on their premises are reasonably safe.

The Act further states that this duty can be modified or excluded through the use of a waiver and/or release or proper notice. The occupier must take reasonable steps to bring this modification or exclusion of its duty to the attention of the person.

Judge's Analysis

After reviewing several previous cases that dealt with exclusion of liability in the case of an accident, the Judge opined that:

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.[1]

The Defendant had posted notice its waiver of liability on a bright yellow poster with a red border in the window of the ticket booth which users could see prior to purchasing a ticket. The notice read:

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!

Followed by one long paragraph in which the facility's negligence exclusion is located without highlight or emphasis of any kind.

The Judge felt that it was unrealistic to believe that a person approaching the ticket booth would stop in front of the window to read the sign. He added that the ticket seller is not instructed by Grouse to say anything about the waiver to ticket purchasers.

Judge's Decision

The Judge decided that the Plaintiff was bound by the terms and conditions as posted and dismissed the action against the Defendant.

The Appeal

The Plaintiff appealed and the Appeal Judge allowed the appeal and set aside the Trial Judge's decision.

The Appeal Judge's decision was based on the fact that the Defendant intended to exclude its own liability, however, he did not find that sufficient notice of the exclusion had been given to the Plaintiff.

This does not mean that the Defendant was liable, it means that the Plaintiff may proceed with his claim. We will monitor this case and post an update when the outcome is decided.

1 Apps v. Grouse Mountain Resorts Ltd., 2019 BCSC 855

Take Away

Although the Trial Judge and the Appeal Judge came to completely different decisions, the Trial Judge also noted that the Grouse staff had not been instructed to bring the notice of the limitation of liability to the attention of users and that it was unrealistic to think that a person approaching the ticket booth would take time to read the sign.

In this case, the wording of the waiver was not the issue. It was the opinion of the Judge that the waiver had not been reasonably brought to the Plaintiff's attention especially consider the Defendant intended to exclude its own liability for negligence. This case reminds us that administration of the waiver is as important as the content.

While Intact Public Entities Inc. does its best to provide useful general information and guidance on matters of interest to its clients, statutes, regulations and the common law continually change and evolve, vary from jurisdiction to jurisdiction, and are subject to differing interpretations and opinions. The information provided by Intact Public Entities Inc. is not intended to replace legal or other professional advice or services. The information provided by Intact Public Entities Inc. herein is provided "as is" and without any warranty, either express or implied, as to its fitness, quality, accuracy, applicability or timeliness. Before taking any action, consult an appropriate professional and satisfy yourself about the fitness, accuracy, applicability or timeliness of any information or opinions contained herein. Intact Public Entities Inc. assumes no liability whatsoever for any errors or omissions associated with the information provided herein and furthermore assumes no liability for any decision or action taken in reliance on the information contained in these materials or for any damages, losses, costs or expenses in a way connected to it. Intact Public Entities Inc. is operated by a wholly owned subsidiary of Intact Financial Corporation. Intact Design® and Risk Management Centre of Excellence® are registered trademark of Intact Financial Corporation or its affiliates. All other trademarks are properties of their respective owners. TM & © 2021 Intact Public Entities Inc. and/or its affiliates. All Rights Reserved.

[intact] public entities