PLEASE READ: WAIVERS OF LIABILITY MUST BE CLEARLY IDENTIFIED TO BE EFFECTIVE

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Operators of riskier recreational activities such as big-game hunting, parachuting, skiing, white-water rafting, bungee jumping and scuba diving, to name just a few, have long relied on exclusion of liability clauses (also known as "waivers") to prevent customers from suing operators for injuries received while participating in such activities.

In the recently released decision of *Apps v. Grouse Mountain Resorts Ltd.*,[1] the British Columbia Court of Appeal considered when and how those waivers must be brought to the customer's attention before they will be considered binding. Mr. Apps originally sued Grouse Mountain for his injuries alleging negligence, breach of the *Occupier's Liability Act* ("***OLA***"),[2] and failure to warn. Grouse Mountain defended the claim on the basis that an exclusion of liability clause (or "waiver") constituted a complete defence to the plaintiff's claims and brought a summary motion to dismiss. The trial judge sided with Grouse Mountain and dismissed Mr. Apps' action. The Court of Appeal disagreed, and reversed the trial judge's decision.

Background

In 2016, Mr. Apps, a snowboarder from Australia, was seriously injured while using the terrain park at Grouse Mountain Resorts Ltd. ("**Grouse Mountain**"). Mr. Apps was an experienced snowboarder and had bought a season's pass for Whistler Blackcomb. Mr. Apps had also spent a few months working as a ski/snowboard technician at an equipment rental shop at Whistler. Part of this job included obtaining customer's signatures on equipment rental agreements, which included an exclusion of liability clause.

Above the Grouse Mountain ticket booth where Mr. Apps bought his ticket was a poster containing the terms of the waiver, which included an exclusion of liability for Grouse Mountain's own negligence. The waiver was also replicated on the back of the ticket that Mr. Apps received from the cashier after he paid for it. Lastly, a sign was posted at the entrance to the terrain park, which warned of the risks of using the terrain park and included a reference to the exclusion of liability clause on the back of the ticket.

Section 3(1) of the *OLA* 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. However, section 4 of the OLA permits the occupier to contract out of that duty, provided the occupier takes all reasonable steps to bring the exclusion to the attention of the person using the occupier's premises.

In this case, Mr. Apps did not acknowledge that he had read the waiver by clicking on any buttons or signing any forms. The key question for the Court was whether Grouse Mountain did enough to bring the terms of the waiver to Mr. Apps' attention in order to make the waiver binding.

Trial Decision

The trial judge found that while the sign at the ticket booth was difficult to read, the sign at the entrance of the terrain park was clear and easy to read. Further, the trial judge concluded that Mr. Apps had considerable experience with waivers of liability at Whistler Blackcomb in the months leading up to the accident. Given this experience, the trial judge found that Mr. Apps should have known of the waiver of liability for Grouse Mountain's own negligence. The fact that he chose not to read the waiver did not render it invalid or inapplicable to him.

Appeal Decision

Mr. Apps alleged that the trial judge erred in finding that Grouse Mountain had done all that was reasonable to bring the terms of the waiver to his attention by:

1. taking into consideration what was posted on signage that he could not have seen until well after he purchased his lift ticket; and
2. applying the wrong legal test when dealing with the significance of Mr. Apps' knowledge by prior experience.

With respect to the first issue, the Court found that the trial judge impermissibly took into account post-contract notice. The Court held that an exclusion or limitation clause must be adequately brought to the other party's attention before or at the time when the contract is made, not after. As a result, the trial judge should have only considered the steps that Grouse Mountain took before and at the time that Mr. Apps purchased his ticket. The Appeal Court noted that by the time Mr. Apps arrived at the terrain park he had already paid for his non-refundable ticket and 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.

After removing the "clear and easy to read" signs at the terrain park from consideration, the Court was left with the trial judge's unequivocal findings that:

- the sign at the ticket booth was difficult to read;

- the "own negligence" exclusion was not highlighted or emphasized in any way, but rather was buried in small print; and
- it was unrealistic to believe that a person approaching the ticket booth would stop in front of the window to read the sign.

Grouse Mountain argued that the trial judge had observed that the heading at the top of the sign at the ticket booth, which read "**PLEASE READ – EXCLUSION OF LIABILITY ON TICKET**", was easy to read. Grouse Mountain asserted that this was all that was required to put Mr. Apps on notice of the existence of the exclusion of liability and that he should read it. The Court held that the more onerous the exclusion clause, the more explicit the notice must be. The waiver of an occupier's own negligence is among the most onerous of clauses. As a result, it is not sufficient to simply provide notice that something in the contract limited the consumer's rights. In such a case, the own negligence exclusion itself must be brought to the consumer's attention. In short, knowledge of the existence of exclusionary language does not of itself indicate awareness of the extent of the exclusion or that it goes beyond what would normally be expected. In this case, the reference to Grouse Mountain's own negligence was buried in a difficult to read section, with no attempt to highlight or emphasize it in any way, and was posted in a location where it would be unreasonable to expect anyone to stop and read it. As a result, the fact that the first lines of the notice were emphasized and in large print could not be taken as indicating that Grouse Mountain had done what was necessary to bring the onerous waiver of "own negligence" clause to Mr. Apps' attention.

On the second issue, the Court found that the trial judge incorrectly attributed knowledge to Mr. Apps that he did not have. The Court held that only actual knowledge of a term through previous dealings is relevant. Constructive knowledge is not sufficient; meaning that although Mr. Apps had signed a season's pass agreement at Whistler Blackcomb containing a similar waiver and witnessed customers who rented equipment sign waivers, he had never dealt with Grouse Mountain before. As a result, the fact that Mr. Apps may have had some awareness that he was waiving some legal rights when he signed the Whistler Blackcomb agreement, could not lead to an inference that he was aware of the terms of the Grouse Mountain waiver.

Takeaways

If requiring a consumer to sign a contract is not feasible or practical, party's seeking to enforce an exclusion of liability clause should be mindful of the timing and the content of the notice. As Court has made clear in this case, an exclusion or limitation clause will not be enforced unless it has been adequately brought to the attention of the other party ***before or at*** the time the contract is made. It is also important to keep in mind that the more onerous the clause, the more explicit the notice must be. This means that going forward something more than "**PLEASE READ – EXCLUSION OF LIABILITY ON TICKET**" must be stated. The appeal court left no

doubt that an effective waiver must be fully communicated to customers, as well meeting other legal requirements such as being clearly written, unambiguously worded, and clearly excluding operator negligence.

Interestingly, the Court noted that this was not a case involving a *signed* contract, where knowledge of what the contract contained and an intention to be bound can be presumed. Party's seeking to enforce an exclusion of liability clause would be wise, particularly in cases where the OLA applies, to require consumers to take the contract in hand and sign it (or otherwise actively indicate acceptance of the terms), thereby directly forcing them to confront and consider the exclusion of liability clause. The Court noted that doing so would go a long way towards satisfying the reasonable steps requirement.

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[1] 2020 BCCA 78[ps2id id='1' target=''/]
[2] RSBC 1996, c. 337[ps2id id='2' target=''/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.