COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Apps v. Grouse Mountain Resorts Ltd.,*
2020 BCCA 78

Date: 20200304
Docket: CA46186

Between:

Jason Patrick Apps

Appellant
(Plaintiff)

And

Grouse Mountain Resorts Ltd.

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 30, 2019 (*Apps v. Grouse Mountain Resorts Ltd.*, 2019 BCSC 855, Vancouver Docket S175420).

Counsel for the Appellant:	R. D. Gibbens, Q.C.
Counsel for the Respondent:	R. B. J. Kennedy, Q.C. A. Render
Place and Date of Hearing:	Vancouver, British Columbia January 16, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 4, 2020

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch

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Summary:

The appellant, a snowboarder from Australia, was injured using the respondent's Terrain Park. He brought an action alleging negligence, breach of the Occupiers Liability Act, and failure to warn. The respondent claimed that the exclusion of liability waiver constituted a complete defence to the claims and sought to have the appellant's action dismissed summarily. The judge granted the application and dismissed the appellant's action.

Held: Appeal allowed. In assessing whether the respondent took reasonable steps to notify the appellant of its waiver, the judge erred by taking into account signage that could only have been seen after the appellant purchased his ticket. The judge also erred by finding that the appellant reasonably ought to have been aware of the waiver due to the appellant's dealings with the nearby Whistler Mountain. Thus, given the judge's factual findings that, effectively, both the waiver itself and the own negligence clause contained within the waiver were inconspicuous, the judgment could not stand.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

[1] On March 18, 2016, Mr. Apps, a 20-year-old Australian snowboarder, suffered a catastrophic injury while using the respondent Grouse Mountain Resorts Ltd's Terrain Park for the first time. He did so while attempting a run on the park's XL jump. He suffered a significant spinal injury at the C4/5 level, and is now a quadriplegic. He sued Grouse Mountain for damages, alleging negligence, breach of contract, breach of the *Occupiers Liability Act*, RSBC 1996, c 337 [*OLA*], and breach of the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 [*BPCPA*].

[2] In defence of his claim, Grouse Mountain denied the negligence and breaches alleged, and also pleaded the terms of an exclusion of liability notice that was printed on a sign above the ticket booth where Mr. Apps purchased his lift ticket, and also on the back of the ticket he received after payment (the "waiver"), together with warnings posted on signs at the Terrain Park. Relying on these, Grouse Mountain applied for judgment by summary trial. The trial judge dismissed Mr. Apps' action, finding that he was bound by the terms of the waiver and the signs, precluding his claims. As a result, his allegations have not been tested in court.

[3] Mr. Apps' appeal raises an issue that has troubled the courts ever since the Industrial Revolution: under what circumstances is such a waiver in a contract of adhesion (where the consumer must take it or leave it) binding on the consumer? This has been of particular concern where the

waiver includes words excluding liability for the service provider's own negligence and failures (an "own negligence" clause).

[4] I note parenthetically that in the Internet age, contracts of adhesion have become the electronic norm, and consumers routinely click on digital buttons confirming their acceptance of terms and conditions they have neither read nor understood. Here, however, Mr. Apps did not click on any buttons or sign any forms. What, then, was done to bring the relevant terms of the waiver to his attention is key.

[5] In this case, Mr. Apps argues that the judge erred in finding that the waiver had been incorporated into the consumer transaction between Mr. Apps and Grouse Mountain so as to become binding on him. This turns on whether Grouse Mountain had done all that was reasonable to bring the terms of the waiver to Mr. Apps' attention. Mr. Apps alleges that the judge's conclusion that it had rested upon two errors: (1) taking into consideration what was posted on signage that Mr. Apps could not have seen until well after he purchased his lift ticket; and (2) applying the wrong legal test when dealing with the law of incorporation of knowledge by prior experience.

[6] If the judge did not err in incorporating the terms of the waiver into the consumer transaction, then Mr. Apps alleges that the judge erred (3) in her interpretation of the waiver, and (4) in failing to hold it void under the *BPCPA*, as well as on the bases of public policy and unconscionability.

[7] In the particular circumstances of this case, given the specific findings of fact made by the judge below, I consider that Mr. Apps' appeal should succeed on grounds (1) and (2). It is therefore unnecessary to consider the errors alleged in grounds (3) and (4).

[8] The effect of my conclusion is not that Grouse Mountain is liable to Mr. Apps. That remains to be litigated. It means only that Mr. Apps may proceed with his claim.

2.0 BACKGROUND

[9] Mr. Apps grew up in Australia. He left high school in grade 11, and had just completed an apprenticeship in carpentry before leaving Australia to travel to Canada in November 2015, some four months before he was injured. He turned 20 on January 9, 2016.

[10] In Canada, it was Mr. Apps' intention to spend two years living, working and snowboarding at Whistler Mountain. He had been snowboarding since the age of 14, and by the time of his accident, he considered himself to be an intermediate-level boarder.

[11] In December 2015, Mr. Apps bought a season's pass for Whistler. To do so, he was obliged to sign an agreement that included an exclusion of liability clause. He did not read it, but was aware that it was a release of liability that would affect his legal rights.

[12] In January 2016, Mr. Apps was hired as a ski/snowboard technician at an equipment rental shop at Whistler, where he worked until the accident. In that capacity, part of his job included

obtaining customers' signatures on equipment rental agreements. These agreements included a release of liability notice that the customers were required to sign, but Mr. Apps did not read that part of the document.

[13] The question arising in the second ground of appeal includes whether his familiarity with the practice at Whistler that persons buying season's passes and renting equipment sign release of liability documents fixes him with knowledge of the specifics of Grouse Mountain's waiver, particularly the own negligence clause.

[14] On the evening of March 18, 2016, Mr. Apps and three friends from Whistler decided to go boarding at Grouse Mountain. Mr. Apps purchased a lift ticket at the ticket office.

[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 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 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.

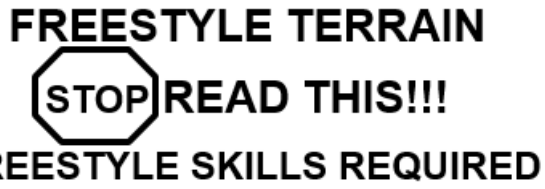
THE SKI AREA OPERATOR'S LIABILITY IS
EXCLUDED BY THESE CONDITIONS

**PLEASE ADHERE TO THE ALPINE RESPONSIBILITY CODE
AND BE RESPONSIBLE FOR YOUR OWN SAFETY
IN ALL ACTIVITIES**

[16] These same terms were repeated in a similar format, though naturally much smaller, on the back of the ticket that Mr. Apps received from the cashier after he paid for it. The ticket was said to be non-refundable.

[17] Mr. Apps read neither the poster nor his ticket, and, of course, he did not sign anything as there was nothing for him to sign.

[18] Once they were up the mountain, Mr. Apps 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.

[20] The second sign advised that the park contained features marked M, L and XL. It warned, among other things, that features marked XL were the most difficult, and were for "Advanced and Experts only".

[21] Mr. Apps did not recall reading either of these signs. Similar signs had been located at the terrain park at Whistler.

[22] The question raised in the first ground of appeal is whether the judge could have regard to the content of these signs in determining whether Mr. Apps had reasonable notice of the conditions in the waiver.

[23] Mr. Apps was injured catastrophically when he attempted the XL jump, and landed upside down on the knuckle before the landing slope. In his lawsuit, he alleges that Grouse Mountain was negligent, and in breach of contract and the *OLA*, in the design, construction, maintenance and inspection of the jump. In particular, he maintains that there was no safety aspect to the design of the jump; instead, he pleads, its design maximized the risk of injury, rather than minimizing it, if a boarder lost balance, or snow conditions were slow.

3.0 DISCUSSION

3.1 Overview

[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.

[28] The notion of contract returns, however, in section 4, which permits the occupier to contract out of that statutory duty:

> **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.
>
> (2) An occupier must not restrict, modify or exclude the occupier's duty of care under subsection (1) with respect to a person who is
>
> (a) not privy to the express agreement, or
>
> (b) empowered or permitted to enter or use the premises without the consent or permission of the occupier.
>
> ….
>
> (4) This section applies to all express contracts.
>
> [Emphasis added.]

[29] Consequently, whether it seeks to exclude its duty of care by express term of the contract or express notice, the occupier must take reasonable steps to bring the exclusion to the attention of the person using the occupier's premises.

[30] As Lord Denning MR stated in *Thornton* at p 170 in reference to an admission that the defendant company did not do what was reasonably sufficient to give the plaintiff notice of the exempting condition it relied on:

> That admission was properly made. I do not pause to inquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the Court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in J. Spurling Ltd. v. Bradshaw, [1956] 1 W.L.R., 466. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it – or something equally startling.

[31] Here, Grouse Mountain argues that if the notice it gave was not sufficient to bind Mr. Apps to all of its conditions, then nothing would be. Mr. Apps contends that, given the findings of the trial judge, the conclusion that the notice was sufficient cannot be sustained in law.

3.2 The Trial Judgment

[32] Here, the trial judge described the issue of the efficacy of the waiver as turning on the answers to two questions: first, did Grouse Mountain, in all the circumstances, take sufficient steps to give reasonable notice to the plaintiff of the risks and hazards of using the XL jump; and second, did Grouse Mountain, in all the circumstances, take sufficient steps to give reasonable notice to the plaintiff of its exclusion of liability for its own negligence?

[33] The trial judge answered both questions in the affirmative. The appellant challenges only the answer to the second question, and argues that the trial judge conflated the two questions.

[34] The judge then turned to review the law, including sections 3(1) and 4 of the *OLA*, and the principle that, while an occupier cannot force a person to read the waivers, it must take reasonable steps to draw the exclusion to their attention. On the question of what constitutes reasonable notice for onerous terms, the judge reviewed the decision in the *Interfoto* case before reviewing litigation in cases dealing with ski accidents:

> [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 *(by trial judge)*.]

[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.
>
> [Emphasis added.]

[35] Next, the judge reviewed the contents of the poster at the ticket booth, repeated on the ticket (as set out in para 15 above). She found as follows:

> [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.
>
> [Emphasis added.]

[36] The judge then went on to consider what was posted on the signs at the entrance to the Terrain Park, concluding:

> [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.

[37] The appellant submits that the proposition stated by the judge at para 32 of her reasons, that, at least in ski hill ticket cases, the courts consider all notices—"those posted for view before and after purchase of the ticket as well as the waiver on the ticket"—is an error of law: it is only what was brought to the consumer's attention before or at the time that the contract purporting to exclude liability was entered into that may be taken into account. On this analysis, what was posted on the signs at the Terrain Park becomes irrelevant to the issue of notice about the waiver of Grouse Mountain's own negligence; it relates only to the question of the risk of using the Terrain Park.

[38] As to the former, the judge said this:

> [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.
>
> …
>
> [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.
>
> [Emphasis added.]

[39] This leads us directly to the two bases of alleged error: (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. After discussing these alleged errors, I will turn to the standard of review.

[40] In considering these issues, it is helpful to bear in mind that this is not a signed contract case, where a presumption arises that the person signing intends to be bound by the terms of the contract he executes (see, for instance, *L'Estrange v Graucob, Ltd*, [1934] 2 KB 394 (CA)). As counsel for Mr. Apps acknowledged, if his client had signed the contract, they would not be here.

3.3 The first issue: post-contract notice

[41] The principles concerning the timing of reasonable notice for exemption clauses in contract cases were discussed by the Ontario Court of Appeal in *Trigg v MI Movers International Transport Services Ltd*, (1991), 4 OR (3d) 562 (leave to appeal to SCC ref'd, [1991] SCCA No 469). This involved a signed contract where the clause limiting liability was not drawn to the plaintiff's attention at the time of the contract, and the *L'Estrange* presumption was rebutted due to a misrepresentation by the defendant. The limitation clause was, however, brought to the plaintiff's attention some 14 months later, before the loss occurred. The court said this about the timing of notice at pp 567–568:

> Once the issue is framed so that the adequacy of the notice determines whether the clause was imported into the agreement, then the timing of the notice becomes crucial. Essentially, a term cannot be included in an agreement unless it was contemplated at the time that the agreement was concluded, or was added thereto by a proper variation or modification. As stated in Cheshire, Fifoot and Furmston: *The Law of Contract*, 11th ed. by M.P. Furmston (London, Butterworths, 1986) at p. 152:
>
> > The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. A belated notice is valueless.
>
> [Emphasis added.]

[42] The adequacy of the notice is, of course, precisely the question that arises under section 4 of the *OLA*.

[43] The law was similarly stated by the English Court of Appeal in the *Interfoto* case, which concerned an unsigned contract, adopting what was said in *Thornton* at p 173 in a passage quoted by the trial judge:

> 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."
>
> [Emphasis added by trial judge.]

[44] In *Thornton*, Lord Denning further highlighted the importance of the timing sequence at p 169:

> …the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made: see Olley v. Maryborough Court Ltd. [1949] 1 K.B. 532. The ticket is no more than a voucher or receipt for the money that has been paid (as in the deckchair case, Chapelton v. Barry Urban District Council [1940] 1 K.B. 532) on terms which have been offered and accepted before the ticket is issued.

[45] Before us, Grouse Mountain did not contend that the law permitted the court to take into consideration notice given after the formation of the contract. Instead, Grouse Mountain argued that the judge did not rely on post-contractual notice, but correctly found that reasonable notice had been given prior to and contemporaneous with contract formation: the notice at the ticket window and on the ticket itself. That is a proposition to which I will return.

[46] Before the trial judge, however, Grouse Mountain's position was different. In its notice of application, it asserted that the case "involves exclusion of liability wording on a ticket and on posted notices", and indicated that it relied on the "exclusion of liability notice posted at the Grouse Mountain ticketing area and Terrain Park". This led to the judge's consideration of the signs at the entrance to the Terrain Park as part of her analysis of whether Grouse Mountain had taken sufficient steps to give reasonable notice.

[47] In doing so, the judge conflated the two issues to which she referred at para 19 of her reasons: first, whether Grouse Mountain took sufficient steps to give reasonable notice of the risks and hazards of using the XL jump, and second, whether Grouse Mountain took sufficient steps to give reasonable notice of the waiver of the mountain's own negligence.

[48] In addressing the first of those questions, the judge stated at para 45 that both the waivers at the ticket booth and on the ticket made it clear that skiing and snowboarding were risky activities, and the signs at the entrance to the Terrain Park emphasized the dangerous nature of doing jumps.

[49] The appellant does not take issue with that conclusion, except to the extent it spills over into the second issue. That takes us to what the judge said in paras 47 and 48 about the own negligence clause, which I set out again for ease of reference:

> [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.

[50] Here, the conclusion is inescapable that, in relation to her analysis of the waiver of the mountain's own negligence, the judge considered not only the sign at the ticket booth, but also the signs at the entrance to the Terrain Park. Respectfully, this is wrong in law—unless, as indicated by the judge at para 32 of her reasons, there is an exception in the case of ski hill tickets.

[51] As I read the cases cited by the judge and by counsel, there is no such exception. While it is true that the courts have sometimes considered notices other than those posted for view before the purchase of the ticket, they did not do so in the context of whether reasonable steps had been taken to bring a contractual exclusion clause to the notice of the skier, as opposed to whether adequate warning had been given of the risks of using a particular ski hill feature.

[52] *Jamieson* is a helpful example. There, Madam Justice Sharma considered the case of a doctor who was an avid skier, ski-racer, and ski patroller, and who signed a release form. The judge reviewed the relevant portions of the release, and also noted signs in the park. The issues she considered were, first, whether the release was valid and enforceable, and second, whether there was adequate warning of the risks of using the park. In considering the first issue, she observed that Whistler relied on the signs at the park to submit that it took reasonable steps to warn the plaintiff of the *risks*. She found the signs consistent with the content of the release, but did not go beyond the release itself to find that it was comprehensive, clear and blunt, and that the plaintiff understood what he was signing.

[53] *Loychuk* and *Karroll* both concerned signed releases, and turned on contractual principles. In *Karroll*, where the proposed defendant ski club was not an occupier (as defined under the *OLA*), Chief Justice McLachlin (then of the BC Supreme Court), referred at p 164 to the need to recognize

> the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances.

[54] Here, of course, we are not dealing with a signed contract, but with a notice purporting to exclude the duty of care under the *OLA*. Neither *Loychuk* nor *Karroll* is authority for the proposition

that an assessment of whether reasonable steps were taken to bring an exclusion of liability to the attention of the other party can include notices given after the issuance of the waiver in question.

[55] In *McQuary*, the court considered a situation closer to ours: whether the plaintiff was bound by the waiver set out on his ski pass and on a notice posted where he purchased the ticket. He did not sign anything.

[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.

[59] Once we take the "clear and easy to read" signs at the Terrain Park out of the equation, as we must, we are left with the trial judge's unequivocal findings at paras 36–38 and 47:

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

[60] These findings of fact distinguish this case from cases such as *McQuary,* and *Fillingham v Big White Ski Resort Limited*, 2017 BCSC 1702, where Madam Justice Adair found the sign in question to be large, highly visible, and posted at all ticket locations.

[61] Grouse Mountain argues that, notwithstanding these findings, the judge nevertheless observed that the heading at the top of the notice was easy to read. Grouse Mountain asserts that this was all that was required to put Mr. Apps on notice that his ticket included an exclusion of liability that he should read. As Blair J. said of the plaintiff in *McQuary* at para 21, "The defendant succeeded in

bringing the exclusion of liability conditions to the plaintiff's attention. It could not force him to read them."

[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.

[63] It is in this context that we must assess the reasonableness of Grouse Mountain's actions.

[64] In the *Mile* case, the plaintiff who attended a Club Med resort was aware that the brochure he reviewed contained an exclusionary clause, but had not read it. The court noted that in words that were not in small print or hidden in any way from even the casual reader, the resort provided that it "shall not be liable, for any injury, illness, damage, loss, accident, expense, delay or other irregularity resulting from a member's participation in any activity …". This is similar to the language towards the top of the notice that Grouse Mountain posted. But in the court's view, that wording was not sufficient to do more than exclude liability with respect to the normal risks involved in sports. Knowledge, in short, of the existence of exclusionary language does not of itself indicate awareness of the fact that the extent of the exclusion goes beyond what would normally be expected.

[65] In our case, the waiver made specific reference to Grouse Mountain's own negligence. But, as the trial judge found, that reference was buried in a difficult-to-read section, among colons and semicolons, with no attempt to highlight it or emphasize it in any way, in a notice posted where it would be unreasonable to expect anyone to stop and read it. It follows from this that the judge's observation that the first lines of the notice were emphasized and in large print cannot be taken as indicating that Grouse Mountain had done what was necessary to bring the onerous own negligence clause to Mr. Apps' attention.

[66] In this regard, it is enlightening to consider the terms of Grouse Mountain's season's pass contract form, which must be signed by all persons who purchase season's passes.

[67] That document begins with a yellow box outlined in red indicating that it is a release of liability, waiver of claims, assumption of risk and indemnity agreement, and it admonishes the consumer to read it carefully. Below that box, it sets out terms concerning the assumption of risks, and others relevant to the release of liability and waiver of claims. The specific waiver clause is then again placed in a yellow box outlined in red, and the own negligence clause is in capital letters. It makes specific reference to the *OLA*, and includes a definition of negligence: "I UNDERSTAND THAT NEGLIGENCE INCLUDES FAILURE ON THE PART OF THE RELEASEES TO TAKE REASONABLE STEPS TO

SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS REFERRED TO ABOVE."

[68] The document, in short, highlights and explains the own negligence clause in conformity with Lord Denning's "red hand" comment (see para 30 above). To the extent one's attention is directed to this document (as it would be by requiring a signature), the court can have confidence that anyone who read it would be well aware of the extent of the waiver. On the judge's findings here, that cannot be said of the notice posted by Grouse Mountain at the ticket booth and printed on the ticket.

[69] The question then arises whether Mr. Apps must nevertheless be taken to have been aware of the contents of the waiver because of his previous experience at Whistler Mountain. This leads us to the second issue.

3.4 The second issue: pre-contract experience

[70] The underlying legal question is whether Grouse Mountain contracted out of its duty of care under the *OLA*. In the context of this case, it could only do so by taking reasonable steps to bring the own negligence clause to Mr. Apps' attention. We have seen that it cannot be said to have done so through the ticket window notice itself, given the judge's findings after excluding consideration of post-contract notices.

[71] Did Mr. Apps nevertheless have sufficient notice because of his previous experience? The judge concluded that on the basis of that 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."

[72] There is no doubt that Mr. Apps signed a season's pass agreement at Whistler Mountain. Of course, having signed it, he would be bound by its terms in relation to Whistler Mountain notwithstanding that he did not read it. He also witnessed the signatures of customers who rented equipment and signed waivers. But does what he did not read in the agreements at Whistler fix him with knowledge of what he did not read on the sign at Grouse? I do not think it does.

[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.

[75] I turn back to the fourth point that the judge took from the ski cases provided to her, as discussed at para 31 of her reasons for judgment:

> 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.

[76] It is correct to say that the circumstances of the plaintiff may be taken into consideration. For instance, if the plaintiff spoke no English, it would be very difficult for the mountain to show that it had given reasonable notice. In *Jamieson*, Sharma J took account of the plaintiff's extensive background, including his advanced education, his experience in the specific park in question with ski racing, Heli-skiing, and many years of downhill skiing (all of which involved signing similar documents), together with his personal involvement with incidents at the park as a first responder. But much of that was considered relevant to the question of whether he was aware of the possibility of spinal injury resulting from biking in the park.

[77] This harkens back to the same problem of conflating the two questions of knowledge of risk, and awareness of Grouse Mountain's own negligence clause. In *Jamieson*, the judge found as a fact that Dr. Jamieson understood the release, noting further that in any event, his understanding did not matter, given that he signed the contract.

[78] Like *Jamieson*, other decisions relied on by the respondent where experience was discussed, such as *Karroll*, *Mayer, Schuster,* and *Blomberg*, concerned signed contracts. Relying on an *obiter* comment in *Schuster*, the judge concluded at para 24 that the principles of law are the same as between signed waiver cases and day ticket cases. But in terms of the question of the efficacy of notice, there is a significant difference, and the signed contract cases are of little assistance.

[79] In cases involving signed contracts, knowledge of what the contract contained is presumed. Consequently, as pointed out in *Karroll* at p 164, as a matter of contract law, "the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention" is "a limited principle, applicable only in special circumstances." Accordingly, it is generally no excuse to say, "Although I signed the contract, I did not read it."

[80] In a signed contract case where the *OLA* applies, the occupier goes a long way to satisfying the reasonable steps requirement by requiring consumers to take the contracts in hand and sign them, thereby directly confronting the own negligence clause. Here, the judge found that clause to be buried in small print in a sign positioned where it would be unrealistic to expect a person to read it.

[81] It is not only much more realistic to expect a person to read what he is holding in his hand and has to sign, but it is also presumed under the law of contract. Naturally, the expectation rises even

further where the person is familiar with such contracts.

[82] But in notice cases like ours, the reasonable steps rule is not of limited applicability. It is the whole point, and no presumption arises.

[83] As the judge observed, the own negligence clause was among the most onerous of terms, requiring Grouse Mountain to provide the most explicit notice. But, in law, I do not think the fact that Mr. Apps had some previous awareness that when he signed an agreement at Whistler, he was waiving legal rights of some sort, can satisfy that obligation in this case. While as between him and Whistler, he must be *assumed* to have understood what he was signing because he signed Whistler's document, as between him and Grouse Mountain, that assumption is not transferable to satisfy Grouse Mountain's obligation when purporting to contract out of its duty of care under the *OLA,* and no inference can arise—at least in the absence of an express appreciation by Mr. Apps that such terms were standard and expected. No such express appreciation was found here (bearing in mind the brief history of his time in Canada, and his experience at only two mountains). As counsel for the appellant submitted, to find otherwise would be to drive a truck through Lord Denning's "red hand" principle.

[84] We have, then, a situation where Mr. Apps had neither actual knowledge of the term, because he did not read it, nor an express understanding that its inclusion was standard. That situation is by no means fatal to Grouse Mountain's position. It will not avail the consumer to say, "I did not read the notice", if the mountain took reasonable steps to draw the own negligence clause to the consumer's attention. On the findings of the judge, it cannot be held to have done so. There was accordingly no basis for the judge's conclusion that "Given his experience Mr. Apps should have known of the waiver of liability *for the mountain's own negligence*" [emphasis added].

3.5 Standard of review

[85] Grouse Mountain nevertheless argues that the judge's conclusion was one of mixed fact and law, and entitled to deference: *Housen v Nikolaisen*, 2002 SCC 33; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 76. The judge stated her conclusion this way:

> [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.

[86] I accept that this determination concerns the application of legal standards to a set of facts. Accordingly, it gives rise to a question of mixed fact and law. Here, the underlying set of facts found by the judge are not questioned. It is the legal standards that give rise to concern. As noted in *Teal Cedar* at para 44 and *Housen* at paras 33–34, 36, where there is an error in characterizing the legal standard or, if in the course of its application, the underlying legal test may have been altered, then a legal question arises. Questions of law are reviewed on a standard of correctness: *Teal Cedar* at para 76.

[87] With respect to the first issue, I have concluded that, in considering whether reasonable notice of the waiver had been given, the judge incorrectly took into consideration what was posted on signage that Mr. Apps could not have seen at the time that he purchased his ticket, being the signage posted at the entrance of the Terrain Park. That, in my view, was an extricable error of law because, legally, she was only permitted to consider what was posted on signs Mr. Apps could have seen at or before the time he purchased his ticket. As I have explained above, the judge's wider consideration was an error that was material to her conclusion.

[88] With respect to the second issue, the situation is the same. In my view, the judge incorrectly attributed to Mr. Apps knowledge that, in law, he did not have, in the context of factual findings that could not support a conclusion that Grouse Mountain had done what was reasonable to give notice to Mr. Apps of the own negligence clause. Once again, this was an error of law that materially affected her conclusion.

[89] Absent these errors, the findings of fact made by the trial judge cannot support the dismissal of Mr. Apps' action.

4.0 CONCLUSION

[90] I would allow the appeal, and set aside the order dismissing Mr. Apps' claims based on negligence, breach of contract, and breach of the *OLA*.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Fitch"