

## Incorporating Waivers of Liability into Contracts

**By:** Jassmine Girgis

**Case Commented On:** *Apps v Grouse Mountain Resorts Ltd.*, [2020 BCCA 78 \(CanLII\)](#)

Standard form agreements raise unique contracting issues. They are drafted by the more powerful party, they are take-it-or-leave-it agreements with no room for negotiation, and they typically contain waivers to limit the drafting party's liability. And yet, most providers of services and/or goods use them to transact with the public. Given the fact that consumers rarely read these agreements before signing off on them, how can the requirement of *consensus ad idem* – i.e. a meeting of the minds – be established? Anticipated or expected terms do not give rise to this issue, but, if a clause is particularly onerous or unexpected, such as an “own negligence” clause, the drafting party must establish that the other party was notified of the clause, either through reasonable notice or previous experience. Otherwise, the clause will not be incorporated into the agreement.

These issues were raised in the recent BCCA decision in *Apps v Grouse Mountain Resorts Ltd.*, [2020 BCCA 78 \(CanLII\)](#) (*Apps*), a case involving a snowboarding accident at a British Columbia resort. After a summary of the decision, this post analyses the concept of knowledge when it comes to unsigned documents.

This post also argues that the current state of the law does not require as much as it should of occupiers, given the substantial benefit they derive from these waivers at the substantial cost to plaintiffs. It discusses the public policy choices involved in providing occupiers such broad scope to limit their liability, and proposes stricter rules to govern these kinds of clauses to better protect customers.

### Legislation

The *Occupiers Liability Act*, [RSBC 1996, c 337](#) (*OLA*) imposes a statutory duty of care on the occupier of a premises, in this case Grouse Mountain Resorts Ltd., “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” (section 3(1)). This duty is independent of any contractual obligation. Section 4 of the *OLA* allows the occupier to contract out of that statutory duty, but places conditions on contractual waivers of tort liability. 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).

This provision means that if Grouse Mountain seeks to exclude its liability by an express term of the contract or through express notice, it must take reasonable steps to bring the exclusion clause to the attention of the person who is using the premises (*Apps* at paras 27-29).

## Facts

In December 2015, Mr. Apps, a 20-year-old snowboarder from Australia, bought a season's pass for Whistler Blackcomb (Whistler). To do so, he signed an agreement that included an exclusion of liability clause. He did not read the clause but he did know that it was a release of liability that affected his legal rights (para 11).

In January 2016, the equipment rental shop in Whistler hired Mr. Apps as a ski/snowboard technician. Part of his job included obtaining customers' signatures on equipment rental agreements. There was a release of liability notice in these agreements, which customers had to sign, but Mr. Apps did not read that part of the document (para 12).

On March 18, 2016, Mr. Apps and three friends from Whistler went boarding at Grouse Mountain. Mr. Apps purchased a lift ticket at the ticket office. There was a poster above the ticket booth containing the terms of the waiver. It was printed in large white letters on a red background and read as follows (copied from para 15 of *Apps*):

PLEASE READ EXCLUSION OF LIABILITY ON TICKET
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Below the headings, printed in black letters on a yellow background was the following notice (reproduced from the judgment, which said (at para 15) that it had reproduced it with similar relative font sizes):

<p>NOTICE TO ALL USERS OF THESE FACILITIES</p> <p><b>EXCLUSION OF LIABILITY – ASSUMPTION OF RISK – JURISDICTION</b></p> <p>THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT</p> <p><b>PLEASE READ CAREFULLY!</b></p> <p>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</p>
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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**

The back of the ticket had the same terms, though obviously smaller. Mr. Apps received the ticket from the cashier after he paid for it. The ticket was non-refundable.

Mr. Apps did not read the sign or the ticket, nor did he sign an agreement, as there was nothing for him to sign.

Once they were on the mountain, Mr. Apps and his friends headed to the Terrain Park. There were two large signs posted at the entrance of the park, warning of the possibility of serious injury. The second sign noted that the park contained runs labeled M, L and XL, and advised that those labeled XL were more difficult and were for “Advanced and Experts only.” Mr. Apps considered himself to be an intermediate-level boarder (para 10).

Mr. Apps did not recall reading these signs. There were similar signs at the terrain park in Whistler.

While attempting the Terrain Park’s XL jump, Mr. Apps fell and was severely injured, suffering a spinal cord injury that rendered him a quadriplegic. He sued Grouse Mountain for damages, alleging negligence, breach of contract, breach of the *OLA*, and breach of the *Business Practices and Consumer Protection Act*, [SBC 2004, c 2 \(BPCPA\)](#).

Grouse Mountain defended the claim by denying negligence and the breaches of contract and statutory duty, and also pleaded there was sufficient notice of the exclusion of liability clause, which waived its liability for negligence.

### **Trial Decision**

Grouse Mountain applied for judgment by summary trial. The trial judge dismissed Mr. Apps' actions, precluding his claims on the basis that he was bound by the exclusion of liability clause and by the signs on the ski hill ([2019 BCSC 855 \(CanLII\)](#)).

The trial judge determined whether Mr. Apps had waived his right to sue Grouse Mountain by considering two questions, both of which were answered in the affirmative:

1. Whether Grouse Mountain took sufficient steps to give reasonable notice to the plaintiff of the risks and hazards of using the XL jump; and
2. Whether Grouse Mountain took sufficient steps to give reasonable notice to the plaintiff of its exclusion of liability clause.

Mr. Apps appealed this ruling.

### **The Appeal**

The British Columbia Court of Appeal had to decide whether the contract of adhesion (a take it or leave it consumer contract), which exempted liability for the service provider's own negligence, was binding on the consumer. If the exclusion of liability clause had been incorporated into the transaction between Mr. Apps and Grouse Mountain, then Grouse Mountain could rely on the waiver. This incorporation could have occurred in one of two ways. First, if Grouse Mountain had reasonably brought the clause to Mr. Apps' attention prior to or at the time of signing the contract, or second, if Mr. Apps knew of the clause based on his previous experience with these types of contracts.

The Court determined that it was not necessary to consider the interpretation of the waiver or whether it was void under the *BPCPA*, under the doctrine of unconscionability, or on the basis of public policy.

The Court found that the trial judge had erred because (1) she considered post-contractual notice when determining whether Grouse Mountain had given reasonable notice of the condition in the waiver excluding liability for its own negligence, and (2) she had applied the wrong legal test in considering Mr. Apps' past experience. The Court noted that the presumption that a person signing a contract intends to be bound (*L'Estrange v F Graucob Ltd*, [1934] 2 KB 394 (CA) (the *L'Estrange* principle)), did not arise here, since this contract was not signed.

### ***Reasonable notice***

First, the Court considered when notice of waiver clauses should be given. It noted that the trial judge had conflated the issue of whether the Terrain Park signs on the mountain, which were

only viewable after the contract was created, were sufficiently clear with whether reasonable notice had been given for the exclusion of liability clause in the contract. Once the Court of Appeal took the Terrain Park signs out of the equation, it was left with the trial judge's conclusions about the contractual waiver, namely, that it was difficult to read, it was not highlighted, there were many commas and semicolons, and that it was "unrealistic to believe that a person approaching the ticket booth would stop in front of the window to read the sign" (at para 59).

Finding that a waiver of an occupier's own negligence is one of the most onerous types of clauses, and also, that the amount and type of notice should be commensurate with how onerous the clause is, the Court found that Grouse Mountain had not discharged its onus of bringing the onerous clause to Mr. Apps' attention (at para 65).

The Court contrasted this notice with the notice provided in Grouse Mountain's season's pass contract form, which is a signed document. On this topic, it said (at para 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."

The Court concluded that the notice in the signed season's pass contract form catches one's attention and clearly outlines the waiver of legal rights to anyone who reads it, but it was not able to similarly conclude that this was the case for the notice on the ticket booth or on the ticket. Based on these findings, Grouse Mountain had not contracted out of its *OLA* statutory duty of care by virtue of the notice on the ticket booth or on the ticket.

### ***Mr. Apps' previous experience***

Having found that Mr. Apps did not have reasonable notice of the clause, the Court turned to consider whether he nonetheless had sufficient notice due to his previous experience with ski resorts. Mr. Apps had signed a season's pass agreement with Whistler and had witnessed his customers sign the waivers when they rented equipment. Although Apps had not read these waivers, his experience led the trial judge to find that, "[he] 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" (as quoted at para 71 of the BCCA decision).

The Court of Appeal disagreed, maintaining that previous dealings are only relevant if they show actual knowledge, not constructive knowledge (at para 73). It found that since Mr. Apps had never before dealt with Grouse Mountain, and since Grouse Mountain had not done what was

reasonable to bring the waiver to his attention, he could not be bound by the waiver clause simply because he had signed a similar agreement with Whistler (at para 74). This was so especially because actual knowledge from Whistler was not proven or even seriously alleged (at para 74).

The Court drew a distinction between signed and unsigned documents, finding that it is not only more realistic to expect a person to read a contract before signing it (at para 81), but that the law presumes signed contracts are read. As the contract with Grouse Mountain was unsigned, the presumption did not arise. Additionally, any presumption arising from Mr. Apps having signed a contract with Whistler cannot be transferred to Grouse Mountain such as to allow Grouse Mountain to satisfy its obligation to contract out of its duty under the *OLA* (at para 83).

### ***Conclusion***

In conclusion, the Court maintained that contracting out of the *OLA* required Grouse Mountain to show that Mr. Apps had either known and understood the waiver of liability or that Grouse Mountain had reasonably brought his attention to the exclusion clause. Given that Mr. Apps had neither read the document nor understood that the inclusion of the waiver of liability was standard, the first part of the test was not discharged. Given the insufficiency of Grouse Mountain's notice, neither was the second part.

The Court allowed the appeal and set aside the order dismissing the plaintiff's claim based on negligence, breach of contract, and breach of the *OLA*.

### **Analysis**

The issue in this case was whether the exclusion clause was incorporated into the contract. If so, Grouse Mountain could rely on it to limit its liability.

By entering into an agreement, parties are consenting to taking on the particular rights and obligations in that agreement. That consent of course presumes that parties know what is in the agreement; absent that, one of the fundamental requirements of contract law, *consensus ad idem*, or a meeting of the minds, cannot be satisfied.

Exclusion clauses sometimes challenge this principle, particularly in contracts of adhesion, or "standard form agreements." These agreements, which are both beneficial and costly, are used when businesses recurrently transact with the public or consumers. Since transaction costs would be too high if businesses transacted individually with each customer, they use these agreements for the sake of efficiency and purport to pass their savings onto consumers (though this theory has been disputed – see for example, Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, (2009) 58 Emory LJ 1401 at 1409). Since the drafting party typically limits its own liability while broadening the liability of the other party, consumers typically bear the costs of these agreements.

In spite of the costs, consumers know that if they want a particular product or service, they cannot negotiate with the provider, but rather have to agree to all the terms of these take-it-or-

leave-it contracts. As a result, many simply do not read the contract before signing or paying. How then can *consensus ad idem* be established if a party does not read the contract before entering into it? The answer is that the act of entering into the contract implies knowledge of and consent to its provisions, though this does not mean that any term in that contract, no matter how onerous, will automatically be binding. Rather, when it comes to an onerous term – and exclusion of liability clauses are typically seen as one of the more onerous clauses – the party entering into the contract must be seen as having accepted it before the other party can rely on it. This analysis plays out differently depending on whether the contract is signed or unsigned.

As shown in the *Apps* case, acceptance of a waiver clause can be established in one of two ways: first, by showing that the party seeking to rely on the clause gave reasonable notice of it to the other party before or at the time of contracting, or second, by showing that the party entering into the contract knew of the waiver as a result of previous experience.

This principle has been repeated by courts for decades. In *Thornton v Shoe Lane Parking Limited*, [1970] EWCA Civ 2, Lord Denning maintained:

...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. (at 169)

Similarly, in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.*, [1987] EWCA Civ 6, the English Court of Appeal, adopting *Thornton*, said:

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. (at 173)

Let's explore these two issues, reasonable notice and past experience, in more depth.

### ***Reasonable notice***

There is one rule that applies to both signed and unsigned documents: “a limitation or exemption clause is not imported into a contract unless it is brought home to the other party so prominently that he or she must be taken to have known it and agreed to it” (*Trigg v MI Movers International Transport Services Ltd*, [1991 CanLII 7363 \(ON CA\)](#), 4 OR (3d) 562 (leave to appeal to SCC ref'd, [1991] SCCA No 469)). This rule manifests differently, depending on whether the contract is signed or not. With signed documents, a presumption arises that the person signing the contract knew what the contract contained, thereby intending to be bound by its contents (the *L'Estrange* principle); the presumption can be rebutted in cases of *non est factum* (if the

signature was not that of the plaintiff's), if the agreement was induced by fraud or misrepresentation, or if the party seeking to rely on the exclusion had reason to believe that the signor was mistaken as to its terms (*Karroll v Silver Star Mountain Resorts Ltd.*, [1988 CanLII 3094 \(BC SC\)](#), 33 BCLR (2d) 160 at para 24)). There is no such presumption with unsigned documents (historically known as the “ticket cases”). In unsigned documents, if the person receiving the ticket did not know that there were terms containing conditions, as in, the person had not been given reasonable notice, then the person will not be bound by the conditions (*Parker v South Eastern Railway Co.* (1877), 2 CPD 416 (Eng CA)).

The type of notice required in each case will depend on the condition at issue: more notice will be required where the condition is onerous or unexpected (see *Thornton and Interfoto*, *supra*). Even if consumers expect their contracts to contain limitation of liability clauses, they would not necessarily know the contents of these waivers or expect the type of liability excluded. In the *Apps* case, the exclusion clause was an “own negligence” clause, which is particularly onerous as it exempts a party from liability for its own negligence. The Court of Appeal noted that consumers who engage in sporting activities may “expect a service provider to exclude liability for the consumer’s 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” (at para 26).

In this case, the onerousness of an own negligence clause required clear and unambiguous notice to be placed in an obvious location. The trial judge found that the notice given at the ticket booth was “difficult to read” and that the “own negligence exclusion was ‘not highlighted or emphasized in any way’, but was buried in small print among many commas and semi-colons” (CA decision at para 59, relying on the trial judgment at paras 36-38). Additionally, the Court of Appeal compared Grouse Mountain’s season’s pass contract form, which required a signature and contained clear notification of the waiver of liability clause as well as a definition of negligence, to the waiver at issue. It found that, contrary to the waiver, the Court could “have confidence that anyone who read [the season’s pass form] would be well aware of the extent of the waiver” (at para 68).

### ***Previous experience***

As noted above, knowledge of the contractual terms can also be established by the party’s previous experience, such as having signed the same contract in the past. Here, actual knowledge, not constructive, is required (*Repap (aka Skeena) v Electronic Technology Systems, et al.*, [2002 BCSC 539](#)). As the House of Lords said in *McCutcheon v David MacBrayne*, [1964] 1 WLR 125 at 134:

The fact that a man has made a contract in the same form ninety-nine times 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... If previous dealings show that a man knew of and agreed to a term on ninety-nine occasions, there is a basis for saying that it can be imported into the hundredth contract without an express statement... at least by proving knowledge the essential beginning is made. Without knowledge there is nothing.



The trial judge found that Mr. Apps had the requisite knowledge of the waiver in the Grouse Mountain contract by considering his personal circumstances, including his age, level of education and previous experience with waivers of the same or similar recreational areas. Mr. Apps had a season's pass with Whistler, which required him to have signed a document waiving his liability, and he was employed as a ski/snowboard technician, where he was required to obtain customers' signatures on equipment rental agreements containing liability clauses. These waivers had similar wording to the one used by Grouse Mountain (trial judgment at para 53). The trial judge also found that the notices at Whistler looked similar and contained "virtually identical language" to the ones at Grouse Mountain, [such that]... [a] reasonable person would expect the mountains to have similar waivers" (at para 55). As a result of this previous experience, the court affixed Mr. Apps with knowledge of Grouse Mountain's own negligence waiver.

On appeal, the BCCA judges disagreed as to whether these experiences amounted to actual knowledge, finding that "[a]ctual knowledge from Whistler was not proven, or even seriously alleged" (at para 74), and therefore, "what he did not read at Whistler" does not "fix him with knowledge of what he did not read on the sign at Grouse" (at para 72). The Court also took issue with using the plaintiff's personal circumstances to affix him with knowledge of the waiver in the unsigned contract, maintaining that personal circumstances should be used to assess whether he knew of the risk of injury while participating in the activity, not whether he had knowledge of the waiver (at para 76).

Drawing a hard line between previous experience that factors into the plaintiff's knowledge of the risk involved in the activity as opposed to his knowledge of a specific waiver being in the contract, is challenging. Previous experience with the same or a similar risky activity can often translate to having previous experience signing the waiver and understanding the rights being signed away, making it easy to conflate the questions. However, in signed document cases, if none of the exceptions to the *L'Estrange* principle apply, whether a plaintiff knew of or understood a waiver is irrelevant, as he is presumed to have knowledge of what the contract contained (*Apps* at para 79, *Jamieson v Whistler Mountain Resort Limited Partnership*, [2017 BCSC 1001](#) at para 129), leaving the only issue to be whether the plaintiff knew of the risk involved in the activity. As the BCCA noted in *Apps*, "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" (at para 81).

In *Jamieson*, the plaintiff was seriously injured while mountain biking at a park. The court found it relevant that the plaintiff had experience at the park, in addition to experience with ski-racing, heli-skiing, and downhill skiing, all of which utilize clauses limiting liability. The court maintained, "[t]hus, this was not the first exclusion of liability clause he had signed" (at para 118). At times, the court appears to conflate the plaintiff's awareness of the waiver with his awareness of the risk involved in the sport, but overall, much of what was considered in *Jamieson* was applicable to the question of whether the plaintiff was aware of the possibility of injury from biking in the park (at para 76). There is a similar ambiguity in *Blomberg v Blackcomb Skiing Enterprises Ltd.*, [1992 CanLII 191 \(BC SC\)](#), [1992] BCJ No 196 where the

discussion dealt with both the plaintiff's awareness of the risk of the sport (skiing) as well as his intention in signing the document. In *Blomberg*, the court determined that the plaintiff's knowledge and experience as an expert skier and well-educated businessman were relevant to his knowledge of the waiver he had signed. It noted "... the plaintiff had executed similar waivers in the previous years. It must be presumed that he was familiar with the procedure for signing a waiver as well as with the purpose of the document" (at para 21) and that the plaintiff "was aware from past experiences with waivers of the effect of the exclusion clause in the waiver" (at para 26).

*Jamieson* and *Blomberg* both dealt with signed contracts. With unsigned contracts, as in *Apps*, establishing knowledge based on previous experience is much more difficult because the plaintiff is not presumed to have read the contract. In other words, unless actual knowledge is established, or the plaintiff understands that inclusion of these clauses is standard, knowledge cannot be attributed to a plaintiff simply based on him having entered into a similar unsigned document in the past. This severely limits the previous experience part of the knowledge analysis in relation to unsigned documents, effectively leaving only the first part of the test – whether there was reasonable notice – to determine whether the plaintiff had knowledge. The BCCA in *Apps* properly recognized this, noting that "in notice cases..., the reasonable steps rule is not of limited applicability. It is the whole point, and no presumption arises" (at para 82).

## **Concluding Thoughts**

Occupiers have a broad scope to limit their liability. Their waivers preclude patrons from suing, not only for injury resulting from inherently risky activities, but also for injury resulting from the occupier's negligence. Under the *OLA*, occupiers do have a duty of care to ensure visitors are reasonably safe, but they can exclude that liability by express agreement as long as they take reasonable steps to bring it to the visitor's attention. Factors to determine whether reasonable steps have been taken and when they are required are found in case law.

The current state of the law does not require as much as it should of occupiers, given the substantial benefits they derive from these waivers at the substantial costs to plaintiffs. Occupiers are the sophisticated parties; they draft the contracts and carry insurance. Plaintiffs are the individuals who sustain injuries for which they may need a lifetime of care. If the waivers are effective, plaintiffs are denied compensation. That is not to say that these waivers should be prohibited (though I am not saying they should not be) or that they are inherently unconscionable. It is to say, however, that discharging the duty should be more difficult.

The legal rules governing waivers of liability arise from public policy choices. In contract law, the principle of freedom of contract allows parties to contract as they wish, but waivers of liability undermine the tort law principles requiring fair allocation of costs to wrongdoers and fair compensation to those injured. Freedom of contract prevails as a public policy choice when occupiers are permitted to waive liability for their own negligence. Favouring freedom of contract, however, does not mean that stronger measures cannot be taken to protect consumers.

More protection for consumers can come in the form of legislating the use of specific waiver language for these clauses, leaving less discretion with occupiers to determine how to notify

patrons. A fixed, *ex ante* (before the fact) requirement explaining the substance of the clause in plain language would ensure anyone with basic literacy skills can comprehend the rights being signed away. It would go further than the current requirements, which draw attention to the legality of the document and to the fact that the customer would be unable to sue in the event of an injury arising from the activity, by making it as clear as possible that an own negligence clause means the customer cannot sue even when the occupier is at fault. Requiring certain language for these waivers does not impede on freedom of contract, as it does not change the substance of the agreement, only the wording.

Additionally, introducing a baseline concrete requirement in every case would bring some certainty to this area of law, which currently relies on a broad legislative requirement and various common law factors that take into account the circumstances under which the document was signed, as well as the customer's personal characteristics or previous experience, to determine whether the occupier discharged its duty.

In *Jamieson*, the BCSC noted that the plaintiff had been given time to sign the waiver and the guest services agent had asked, "Have you read and understood what you have signed?" In that resort, there was a policy that agents would not witness a patron's signatures without a "yes" response to that question (at para 22). But going through those motions, and even providing sufficient time to read the contract, does not mean the customer signing the contract understands the gravity of the clause. In other words, a person's failure to ask questions or indicate a lack of comprehension should not be taken as indications of comprehension. Notices posted around a ticket window and the wording, highlighting or font size used in the contract, are going to draw attention to the clause and alert the reader to its legality, but they do not speak to its substance. If the clause contains terminology such as "covenants not to sue", "releasees", or "statutory duty of care", which is frequently used in waivers, and language that is not part of basic discourse, and it fails to explain in plain language what it means, then it is likely most people do not know what they are signing, nor would they necessarily know that they are failing to comprehend the most onerous part - that they are signing away their ability to sue if they are injured when the resort is at fault.

Add to that the fact that plaintiffs have no reason to ask about the contract or indicate they have not read it, as they know it cannot be altered.

Take, for example, the waiver from *Jamieson* (at para 14):

TO WAIVE ANY AND ALL CLAIMS I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Mountain Biking, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS LIABILITY ACT, ON THE PART OF THE RELEASEES, AND FURTHER INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO

SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF MOUNTAIN BIKING REFERRED TO ABOVE;

It is not abundantly clear that anyone reading this waiver would understand it to mean, “if you are hurt or killed while mountain biking on our trails, you or your estate cannot sue us, *even if our negligence caused your injury or death*”.

The waiver for Calgary’s B-Line Indoor Bike Park, one of my children’s favourite places to bike, is slightly better, but also not as clear as it should be, and certainly not to someone with an untrained eye. The relevant parts of [B-Line’s one-page waiver](#), as they appear in the document, are:

I hereby release, waive, and discharge the Bike Park...from any and all liability... of every nature and kind whatsoever, which I or the Minor ever had, now have, or which I or the Minor may at any future times have against the Released Parties... arising out of or in any way connected with my or the Minor’s participation in any activity at the Bike Park, including claims that allege negligent acts or omissions of the Released Parties, **or claims arising from any statute, including, without limitation, the Occupiers’ Liability Act, R.S.A. 2000, c. O-4.**

...

I appreciate that this Agreement applies whether the Released Parties are at fault or not and it limits the liability of all the Released Parties...

Occupiers should be required to use commonplace, plain language in the contract, either instead of, or in addition to, the legal language, to warn of these clauses, and to explain the clause to customers before they sign, possibly using the language italicized above. The person signing should not be expected to ask for clarity no matter how much time is provided; that clarity should be given in every circumstance, before or at the time of entering into the contract.

Whether it is good public policy to allow occupiers such broad scope to limit their liability is a question for another post. But if these waivers are used, their language should be plain and obvious to any person who has basic literacy skills.

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