CITATION: Trimmeliti v. Blue Mountain Resorts Limited, 2015 ONSC 2301
COURT FILE NO.: 08-CV-348736 PD3
DATE: 20150414

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DANIEL TRIMMELITI	)	David Hwang, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
BLUE MOUNTAIN RESORTS LIMITED	)	John A. Olah and Robert A. Betts, for the
	)	Defendant
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** April 8, 2015

JUSTICE S. DUNPHY

[1] The defendant Blue Mountain Resorts Limited ("Blue Mountain") brings a summary judgment motion under Rule 20.04(2) to dismiss a personal injury action brought by the plaintiff Daniel Trimmeliti. The incident in question occurred on February 9, 2006. Mr. Trimmeliti suffered a fractured clavicle when night skiing with two other friends at the defendant's ski resort after colliding with a fluorescent orange mesh ribbon used to close a run.

[2] The defendant's motion alleges that no negligence on its part can be shown as having contributed to the incident and that, in any event, it is entitled to rely upon limitations of liability and waivers contained in the contract between the plaintiff and the defendant under which plaintiff obtained access to the ski hill. As a motion brought under Rule 20.04(2)(a), I must be satisfied that there is no issue requiring a trial or, if there is such an issue, that I may satisfactorily resolve it employing the additional tools found in Rule 20.04(2.1) in each case having regard to the principles established in Rule 1.04, especially the principle of proportionality contained in Rule 1.04(1.1).

[3] I am satisfied that the defendant is entitled to succeed in its motion on both grounds argued. It is in the interests of justice that summary judgment be granted at this point, avoiding

the necessity for an expensive trial at which both parties would be required to deal with potentially complex issues of damages. If, as I find, liability can fairly be dealt with at this point in the process, there is advantage to both sides and the interests of justice in having that answer now.

[4] I have found that there is no genuine issue requiring a trial in regard to the contractual waiver issue on the facts and there is no genuine issue requiring trial having regard to the tools available to the court under Rule 20.04(2.1) in relation to the negligence issue. As the negligence issue requires a somewhat more detailed review of the evidence, at least some of which is conflicting, resort must be had to the enhanced tools contained in Rule 20.04(2.1) to resolve it. I shall consider that matter first in my reasons.

Issue 1: Negligence

[5] We have passed the ninth anniversary of the incident which, of course, occurred over a matter of mere seconds. The Statement of Claim itself was not issued until Monday, February 11, 2008 – the last moment before the expiry of the limitation period - and has proceeded with a similar sense of urgency ever since. In the interim, the plaintiff has been admitted to law school, completed his legal education and is now a practicing lawyer. A lot of things both good and ill can occur over nine years – improved memory is not one of them.

[6] The only issue I am being asked to consider is that of liability. The facts relevant to the liability question are comparatively few and in my view permit a summary resolution, although the conflicts between the evidence of Mr. Smardenka and other evidence does require use of Rule 20.04(2.1) in order to be resolved.

[7] There are but a relative handful of records contemporary to the incident subsisting: an accident report prepared at the scene, relatively poor-quality photographs taken shortly afterwards by a ski patrol employee, better quality pictures and a video taken at night about a month later, signed season pass documentation including relevant waivers and limitations of liability as well as some routine operational records such as "sweep sheets" containing information regarding the state of the various runs and lifts at the resort. With those minor exceptions, virtually all of the evidence we have is from witnesses or experts recording their recollections or observations many, many years after the fact.

[8] I make these observations regarding the state of the evidentiary record not to point a finger of blame at anyone – I am not sitting in judgment on the process which has led us here but on the motion before me. Rather, when considering what use, if any, may be made of the enhanced fact finding tools in Rule 20.04(2.1), it seems to me relevant to note that the evidence of actual recollections of the witnesses is quite thin and there is no basis whatsoever to imagine that such recollections will improve with the passage of still more time before trial were a trial with viva voce evidence to be required. In assessing whether any particular issue requires a trial for its fair resolution in the interests of justice, I may have regard to the potential quality (or lack thereof) of viva voce evidence that might be available at such a trial.

[9] I specifically asked counsel for the plaintiff what evidence regarding the issue of liability would be available to a trial judge that is not available to me now sitting on a Rule 20.04(2) motion. He was able to point to only two matters.

[10] Firstly, Mr. Hwang indicated that there was an outstanding undertaking (from 2015, I might add) to provide the name of the other ski patrol person on duty that evening who had assisted Mr. Campbell in evacuating the plaintiff to the bottom of the ski hill on a toboggan. This request was first made only weeks ago and there is no assurance that the name has been recorded or can be found, or if found, that the witness could now be located or would have any present recollection whatsoever of a comparatively routine skiing accident scene nine years ago. The evidence of Ms. Park (the second ski patrol person on the scene) was that a volunteer "courtesy" ski patrol person would have helped in steering the toboggan containing the plaintiff to the bottom. No record of the name of this volunteer has been found. In short, I find the likelihood of such evidence existing or being useful to be remote and purely speculative. We *do* have the evidence of the two ski patrol employees (as opposed to the unknown "volunteer") who were at the scene both of whom prepared reports that were preserved (no report of the ski patrol volunteer is alleged to have been prepared). Those two employees filed affidavits, one of them was cross-examined and both had only limited memory beyond the written reports which could be drawn upon.

[11] Secondly, counsel made a request (also in 2015) for the name, if available, of the person who had operated the snow guns at the resort that evening. Once again, there is no evidence before me that the name of that specific employee is available to anyone today or that the employee in question would have any likelihood of remembering a random day nine years in the past (the snow making equipment operators obviously did not attend at the scene of the accident). The "sweep sheets" prepared at the start of each ski patrol shift and recording which equipment was running that evening have been preserved. The likelihood of such a witness being located or having any relevant information is remote at best. Both witnesses – if crucial or even material – could and should have been requested by the plaintiff years ago. It is rather late in the day to lean on these speculative dark horse witnesses to justify a request that the court decline a summary judgment motion where the merits would otherwise see it granted. Once again, the likelihood of any useful evidence existing or being introduced at trial from this source is remote and speculative at best.

[12] A far more crucial witness was known and not called by the plaintiff. Mr. McCabe was a friend of the plaintiff and the third member of the plaintiff's ski party that evening. He is the *only* other person who may actually have had eye witness testimony to offer. No affidavit from him was produced by the plaintiff in answer to the motion for summary judgment nor was any explanation whatever offered to explain the absence of his evidence.

[13] The facts – and the handful of disputed matters that are relevant today – may be quickly summarized.

[14] The plaintiff was at the time an intermediate level skier by his own description, having skied for many years. He was a university student of 22 years of age at the time. He was in the habit of skiing several times per year and was generally familiar with the Blue Mountain resort and its runs, having been skiing there on numerous occasions that season and for several prior seasons as well. He had a season pass at Blue Mountain and possessed his own equipment.

[15] On February 9, 2006, the plaintiff decided to engage in night skiing at Blue Mountain. He drove up with one friend (Mr. McCabe) and met another (Mr. Smardenka) up there in late afternoon. The trio of friends skied a number of runs that evening. After several hours of skiing, at approximately 8:53pm, the group, led by the plaintiff, was skiing down a run known as "Waterfall". About a third of the way down the Waterfall run, at a point where the run levels out for a distance, there is a trail which breaks off to the left of the Waterfall run known as "Crooked Oak".

[16] Crooked Oak was closed that day and a retractable flourescent orange reflector-tape ribbon had been strung across the entrance to the run to indicate the fact of its closure to skiers. Boxes containing such retractable ribbons are installed at the opening of runs to enable ski patrol to close runs quickly and safely when necessary. The evidence was that when deployed, the ribbons are attached via bungee cord to the far side of the opening of the run and the tension of the ribbon in "cranked" so that it hangs approximately three feet off of the ground depending upon where one is along its extent. There is some "give" on the ribbon when strung across the run in this fashion.

[17] Crooked Oak was posted as a "single black diamond" run with an associated higher level of difficulty while Waterfall was posted as a "blue square" run. The plaintiff's evidence was that he was familiar with and skied all of the runs at Blue Mountain and had skied there for several years. This was his first year skiing with a season's pass at Blue Mountain and he had been several times that season using his pass.

[18] The "sweep sheet" prepared for that evening was introduced into evidence as a business record. While objection was taken to its use at the hearing, Mr. Hwang could point to nothing in the record that would justify my refusing to accept the document as having been prepared in the ordinary course of business by someone whose job it was to do so. The affidavit evidence so described it and nothing on cross-examination detracted from that assertion. The sweep sheet for that evening notes that Crooked Oak was closed. While two other runs were described as having snow making going on that evening, no such notation appeared in respect of Crooked Oak or Waterfall.

[19] The plaintiff remembers little of what happened. He was leading the group down the hill. He bore left to take the Crooked Oak turn-off and claims to have been unaware that it was closed. The next thing he knew, something hit his collarbone and he was down on the hill. He does not remember seeing a ribbon closing off the run prior to making contact with it. He did not testify to having sought to avoid the ribbon – his evidence was that he did not see it until he

collided with it. He had no specific recollection of snow making equipment being in operation on the hill at the scene of the incident.

[20] The incident was reported as having occurred at 8:53pm. Ski patrol came quickly to the scene (9:03pm) and evacuated the plaintiff down the hill on a toboggan seven minutes later at 9:10pm. He was thus on the hill for less than 20 minutes after the incident while ski patrol was with him for only seven minutes in all on the hill. He was checked out of the defendant's clinic at the bottom of the hill and driven to hospital by friends at approximately 9:53pm.

[21] The ski accident report was prepared by one of the ski patrol who attended, Mr. Campbell. It notes that the plaintiff was approximately 6'1" tall. The report is a standard form used in such incidents. The "patient's description of incident" portion of the report reads: "didn't see ribbon above crooked oak, ran into it, hit on neck and then fell". This description is initialled by the plaintiff. The location of the incident is described as ""at ribbon that closed off crooked oak" (location "F22" on Waterfall). A fracture to the clavicle was reported. The report makes no mention of snow making equipment or lack of lighting contributing to lack of visibility. No reason for failing to see the ribbon was noted.

[22] The report was signed by Mr. Campbell, the "first" ski patrol on site. Ms. Park reviewed the report and added her own name on the report as "second" ski patrol and identified her writing on the report when examined. The names of the plaintiff's two friends are recorded on the form, but their signature was not on it.

[23] The statement of claim alleges that the defendant ski resort was negligent in the manner of closing off the Crooked Oak ski run by using the tape used in this case given the alleged conditions at the location of (i) snow making equipment in operation obscuring vision and (ii) no lighting. These two factors are said to have led to the plaintiff colliding with an obstacle that he could not see and thus could not avoid.

[24] There are a small number of disputed facts relating to these questions which I shall now review.

(a) Was there snow making equipment in operation at the time?

[25] The plaintiff was examined for discovery on August 23, 2012. Six and a half years after the incident, he had almost no direct memory beyond stating that he hadn't seen the ribbon and didn't know what had happened. He was unable to state from his own memory whether any snow making equipment was in operation at the time (as is alleged in the statement of claim).

[26] Having no personal memory to draw upon, the plaintiff's claim that operating snow making equipment played a causal role in the accident relies entirely upon the statement of his skiing companion Mr. Smardenka who provided an affidavit upon which he was cross-examined. That affidavit was not sworn until January 14, 2015 and he was cross-examined on March 10, 2015. The distance in time from the incident speaks for itself.

[27] Mr. Smardenka's cross-examination alleges the three men were proceeding down the hill at a "leisurely pace". What he means by that is hard to judge precisely as he identified himself as an experienced to advanced level skier and advanced skiers may have a different description of "slow" and "fast" than less experienced skiers. He had not noticed snow making equipment in operation when looking down the hill from the top, but claims that he had positively noticed it while proceeding down Waterfall prior to the Crooked Oak turn-off. He indicated that the plaintiff was about 100 feet ahead of him and he lost sight of him when he became lost in the plume of snow generated by the snow gun. I reproduce his testimony from this point:

> *Q122: When did you next see him?*
>
> *A: As I—I next seen him when I pretty much ended up right in front of him, basically in the area of the snowmaking plume.*
>
> *Q 123: What was he doing at the point when you next saw him?*
>
> *A: Well, he had just been clotheslined by a thin, red – or orangey tape, almost a little bit transparent that was across the run, which was still up and – yeah, he was on the ground…*

Notably absent from this first description of the incident by Mr. Smardenka was any statement that he had actually witnessed the collision itself. To the contrary, the clear and ordinary sense of his story was that he had not seen Mr. Trimmeliti until *after* he had been "clotheslined". The other point to note was that Mr. Smardenka claimed he could *see the tape* when he emerged from the snow-making area. He described the tape as being "still up".

Whatever distance Mr. Smardenka was back of Mr. Trimmeliti, this account of Mr. Smardenka suggests that Mr. Smardenka (i) saw the tape from his vantage point; and (ii) did not himself enter into collision with it. He may – as he says – have had his attention called to it by Mr. Trimmeliti's accident, but looking in that direction, he clearly stated that he could (and did) see the tape. It goes without saying that skiers proceeding down the hill ought to be looking where they are going and if Mr. Smardenka looking where he was going saw the ribbon *and* the prone Mr. Trimmeliti, one may naturally ask why Mr. Trimmeliti, when he skied past the same spot, allegedly at a slow or leisurely rate of speed did not also see the ribbon? The natural inference is that either he saw it and sought to go under it at speed in a tuck position (also explaining the neck-level injury of a tall man skiing at an obstacle which is only 3 or so feet off the ground level in normal operation for most of its extent) or he was looking in an entirely different direction for whatever reason.

[28] Upon plaintiff's counsel (quite improperly) interrupting the cross-examination at this point to urge the witness to review his recently-sworn affidavit, the witness obliged by reading his own affidavit before proceeding. In his affidavit, Mr. Smardenka had sworn "Daniele Trimmeliti was skiing in front of me, when I saw that he had dropped to the ground as if an invisible barrier had hit him". This obviously differed quite materially from the story he had just

recounted (about losing sight of the plaintiff in the snow and then emerging himself from the cloud of snow *after* incident).

[29] Having been shown his affidavit, Mr. Smardenka obligingly revised his story. His new and improved version was that they were "skiing at a leisurely pace and then reducing speed as we get into this so-called misty area, because he reduced his speed first and I was still going at my same pace because I wasn't yet in the misty area, I kind of closed the gap with him and as I closed the gap and got closer, my visibility improved to be able to see him". Upon emerging from the mist, he describes the plaintiff as going slowly. Mr. Smardenka estimated that he was only about 20 feet away from the plaintiff when saw him hit by an "invisible barrier". Gone from this second version is any indication that he saw the tape at the point of collision.

[30] Mr. Smardenka's "second" version also contradicts the plaintiff's evidence since he denied having slowed down at that point at all.

[31] Detailed measurements of distance and a diagram of the run have been produced in the evidence. The snow making guns are on towers quite high in the air (about 30'). There was a snow gun tower approximately 47 meters uphill from the entrance to the Crooked Oak run (where the incident occurred). This is hardly a "mist" only 20 feet away from the tape. It was more like 120 feet up the hill. The video of the gun in operation makes the limited area of its impact quite clear.

[32] If Mr. Smardenka's second version of events were to be accepted at face value, he would lost sight of the plaintiff approximately 40-50 metres uphill from the accident scene and *then visibility improved sufficiently* for him to regain sight of Mr. Trimmeliti *and the tape* when he was only 20 feet away. While he claims the tape was "invisible" when the plaintiff struck it in this second version, he had only minutes earlier described the same "orangey" tape as being up and quite visible to him as soon as he noticed Mr. Trimmelti had been "clotheslined". The two versions cannot be made to reconcile with each other and given the passage of time since the incident, it is impossible to imagine any basis for Mr. Smardenka's memory to improve to the point that it might become more credible than the internally inconsistent and implausible account of events made in sworn testimony only weeks ago.

[33] From where he claims to have witnessed the collision – a mere 20 feet away according to his second version - Mr. Smardenka does not claim anybody or anything was shrouded in snow making machine mist. For reasons unknown, neither Mr. Smardenka (on this second version of his story) nor the plaintiff claim to have seen the bright, fluorescent orange reflector ribbon marked "closed" strung across the opening to the ski run beneath very bright night skiing lights illuminating the whole area. Of course, only minutes earlier, Mr. Smardenka had said the exact opposite – his first account was that he *could* see the tape from his vantage point on emerging from the snow-gun mist (which the objective evidence would place about 100' further up the hill than Mr. Smardenka remembers it being). For Mr. Smardenka, allegedly only 20 feet away and travelling along with Mr. Trimmeliti at a "slow" rate of speed, the ribbon appeared as some sort of invisible barrier that he was fortunate to have missed himself.

[34] Mr. Smardenka's self-contradictory evidence of the appearance of the ribbon at this spot on the run in night conditions is not the only evidence we have to rely upon. Photographs from the night of the incident, from a night about a month later and a video taken in 2014 all are available and satisfy me beyond any doubt that the mesh ribbon was visible to anyone looking at it at a distance considerably greater than 20 feet (likely closer to 100 feet with snow making equipment in operation – farther without), I find Mr. Smardenka's two accounts of the accident to be highly implausible and, as noted, internally inconsistent.

[35] Other than Mr. Smardenka, not a single other bit of evidence confirms the plaintiff's claim that there was snow making equipment in operation which dangerously obscured his ability to see and react to the orange ribbon closing the Crooked Oak run.

[36] The following evidence contradicts Mr. Smardenka's (recent) evidence:

- The pictures taken by Ms. Park at the scene approximately one hour later show no sign of snow making equipment in operation nor is any fresh snow visible on the ground that might indicate the machines had been operating immediately prior.

- The "sweep sheet" for that evening shows snow making on other runs but not on Waterfall or Crooked Oak and is routinely filled out by ski patrol personnel at the start of their shift.

- The expert (Mr. Gow) who examined, among other things, Ms. Park's photographs, concurred that snow making equipment had not been in operation on that run that evening since signs of its recent operation would have been visible in Ms. Park's photographs given the places from which she took her pictures.

- Mr. Gow's independent expert evidence was also confirmed by Mr. Weatherall with many years' experience on the hill.

- There is no suggestion in the incident report – initialed by the plaintiff – as to any reason why he failed to see the ribbon.

[37] The plaintiff has specifically alleged in the statement of claim that the presence of snow making equipment operating so near to the closed run played a causative role in the incident and was at least one basis of the alleged negligence of the defendant. He bore the burden of proof in establishing this contested fact.

[38] I note that the plaintiff did *not* produce any evidence from his other skiing companion from that evening (Mr. McCabe) to corroborate Mr. Smardenka's story nor did he offer an explanation why this had not been done. Rule 20.04(2.1)(1-3) permits me to weigh evidence, evaluate credibility of a deponent and make reasonable inferences from the evidence. In the absence of a reasonable explanation regarding Mr. McCabe's absent evidence, the contradictory evidence of Ms. Park's photos and the opinion of Mr. Gow (and Mr. Weatherall) thereon, the

lack of any mention of the snow making equipment as a factor in the incident report prepared at the scene and initialled by the plaintiff, all lead me to the conclusion that I cannot attach credibility or weight to Mr. Smardenka's uncorroborated story regarding snow making equipment being in operation. His (late) evidence proved too unreliable in key respects to be given much if any weight.

[39] On the balance of probabilities, I find the plaintiff has failed to discharge his burden of proof as regards the allegation that the snow making equipment was in operation that evening and contributed to the incident. Mr. Smardenka's evidence is contrary to every piece of objective evidence available, is lacking in credibility and is not to be preferred. Accordingly, I find that the snow making equipment was *not* operating at the time of the incident on the Waterfall/Crooked Oak run area.

[40] I must at this stage ask myself whether a trial judge might be in a better position to assess this evidence than I can using Rule 20.04(2.1) and whether any such advantages might require a trial. I find that this is not the case.

[41] After nine years, the evidence of eye witnesses has faded to the point of near uselessness except where refreshed with notes or contemporary documents. I read the entirety of all of the transcripts, including those of the plaintiff and Mr. Smardenka. Both had exceptionally limited specific recollections of matters relevant to the event in question. Mr. Smardenka's evidence was virtually the *only* evidence the plaintiff had upon which to anchor this key aspect of his negligence claim. Mr. Smardenka's recollection of the accident itself, as told the first time through in his own words prior to being "telegraphed" to review his affidavit by counsel, was quite unhelpful to the plaintiff's case and essentially amounted to a denial that he had even seen the accident at all. After being prompted to revisit his story, he backtracked and attempted to re-formulate the story along lines more consistent with the Statement of Claim and his affidavit sworn only weeks before. Even so, his story lacked in plausibility (including as to allegations of the group slowing down by 50% from what was already described as a "leisurely pace" and not seeing the bright orange reflector-tape ribbon even when virtually upon it in a well-lit area). There is no reason to expect that his story will improve in the re-telling nor is there any other evidence to be anticipated with viva voce testimony given the record of the cross-examination.

[42] I conclude that snow making equipment was not in operation and was thus not a factor in the accident. In any event, for reasons which follow, even if the equipment had been operating, I have also found that the ribbon was still visible from a reasonable distance and thus issues of visibility of the ribbon would not have contributed to the accident in either case.

(b) Was the scene of the incident illuminated?

[43] The Statement of Claim alleges the scene of the incident was not lit and attributes negligence to the defendant for this lack. The overwhelming evidence is that this claim was simply untrue. A light tower was present above the scene of the accident and photographs taken

clearly show the area to have been well illuminated. The point was not pressed by the plaintiff in oral argument for good reason. Lighting was not a factor in the accident.

(c) Did anyone at the scene admit the closed run was inadequately marked?

[44] The plaintiff filed two affidavits (of himself and Mr. Smardenka) dated from January of 2015. These two affidavits contain allegations raised for the first time of alleged admissions against interest by unnamed employees of the defendant on the ski hill who are alleged to have attended Mr. Trimmeliti at the scene of the incident and commented that the run had not been "properly closed". They are then alleged to have proceeded to close the run with pylons.

[45] The allegation is repeated in essentially identical terms by both the plaintiff and Mr. Smardenka in an affidavit drafted by the plaintiff and sworn before him. The plaintiff made no mention of this alleged admission by employees of the defendant during his discovery in 2012 which claimed little memory of the events.

[46] Both ski patrol employees (Ms. Park and Mr. Campbell) filed affidavits denying pylons were used to close runs as claiming no memory at all of having made such a statement. Mr. Hwang sought to make something of the lack of the "courtesy" patrol person who was a volunteer. Whether or not that name could have been found if requested earlier is moot. Mr. Trimmeliti clearly attributed the comment to one of the persons assisting him on the ground. The clear evidence is that the volunteer was *not* the person providing immediate aid to the accident victim and both of the parties who had that responsibility denied having any memory of saying so. The likelihood of a mystery volunteer being located nine years later *and* recalling overhearing a random piece of conversation of this sort at this point is precisely nil.

[47] Mr. Smardenka's claim about seeing "plyons" being installed by the ski patrol people at the scene was abandoned almost as soon as he repeated it on cross-examination. Pylons morphed into sticks and the entire story became quite hazy and imprecise. As noted, the two employees who were there deny that there was any such practice then in use. The story appears to be the product of imagination or fantasy – no foundation in fact can be attributed to it.

[48] Mr. Smardenka's affidavit also specifically claims that, following the accident, the snow making guns were turned off. The evidence of Mr. Weatherall, which was uncontradicted, was that the snow guns at the site of the incident could only be turned off manually and that only snow making personnel could have done so. The likelihood of such personnel being summoned and seen attending on the scene in the short seven minutes that ski patrol personnel were on the scene attending to the plaintiff is remote in the extreme and it is clear ski patrol personnel could not have done so on their own. I cannot accept this specific claim in Mr. Smardenka's affidavit and its implausibility contributes to the overall implausibility of much of what he had to recount.

[49] I can attach no weight to this late-breaking claim of admissions against interest from parties unknown. The uncontradicted evidence of the defendant was that pylons are not used to close ski runs and thus would not have been used in this case. The expert testimony establishes

that the method used to close the run – fluorescent orange reflector ribbon - was neither unsafe nor out of the ordinary. It is possible the plaintiff or Mr. Smardenka had a vague memory of employees planting *skis* uphill of an incident to warn other skiers away while Mr. Trimmeliti was being attended to. That *would* have been standard procedure in some cases. Whether time and wishful thinking have transformed this vague memory into something quite different shall never be known. Whatever the origin of the story, the story is counterfactual and cannot be given weight by me in assessing this motion. I do not find a trial is required to inquire further about this allegation.

(d) Was the means selected to close the run safe or prudent having regard to the facts?

[50] As the hearing of the summary judgment motion progressed, it became increasingly clear that the plaintiff relied quite entirely upon the proposition that the means of closing this run at this location on the hill was unsafe because of the addition of the factors of night time and snow making machinery reducing visibility. The evidence was that the tape or ribbon used was quite standard and ordinary in the industry and no expert evidence was called by the plaintiff to suggest it was unusual, deficient or dangerous. As a skier of some years of experience at this very resort, the plaintiff might be taken to be familiar with the normal means of closing off runs and to have included that information in his mind when assessing risk as he proceeded downhill and planned his route.

[51] The defendant filed two affidavits of witnesses who measured the features on the hill and took a video of the location of the incident. There was one set of pictures and videos taken in March, 2006 (with no snow guns operating) and then a higher quality video in 2014 (with the snow guns in operation). Affidavit evidence confirmed that the physical aspects of the scene had not changed since 2006 – the snow making equipment and other major pieces of infrastructure were the same.

[52] The 2006 photographs and video from Mr. Tonn's affidavit clearly show that the fluorescent orange tape is visible a considerable distance uphill from the site of the accident (as well as confirming the more than adequate state of illumination on the hill at the actual scene of the accident). These photos and video were taken by Mr. Tonn in Mr. Weatherall's company and Mr. Weatherall was able to confirm that the photos, if anything, understated the level of illumination. The snow gun was not operating in these images.

[53] In the 2014 video the approach to the site from the top of the hill was filmed on several occasions. The snow gun in the vicinity of Waterfall and Crooked Oak had been turned on to simulate the conditions as alleged by the plaintiff and the video was taken in the evening at approximately the same time. The video shows the snow guns creating a plume of snow mist quite high in the air which then descends to the ground. The thickness of the plume is greatest higher in the air and the plume becomes more and more transparent closer to the ground. The plume is however fairly localized, covering only a relatively short distance (five or perhaps ten meters) uphill and downhill of the gun.

[54] The video does confirm that the orange trail closing ribbon would have been somewhat obscured by the snow from the snow making equipment at a distance. However, the video confirms the existence of a strong light illuminating the area where the orange ribbon was pulled across the entrance to the run and further confirms that even with the snow gun in operation, the ribbon comes clearly into view only a few feet after passing the snow gun uphill from the ribbon. Mr. Gow's measurements indicate that the snow gun in question was 47 metres uphill from the site of the incident.

[55] In other words, even with the snow gun operating, a skier would have been able to see the ribbon if looking at it from no less than about 40 meters away (or about 120 feet). Mr. Tonn's photographs from 2006 amply demonstrate that a skier operating in the absence of snow guns would have had no difficulty in seeing the ribbon from an even further distance away. Indeed, in his video from that time, the ski hill was quite crowded and not a single skier appeared to have any difficulty in noticing and avoiding the ribbon. Even those that approached it more closely easily turned away in time to rejoin the Waterfall run.

[56] In short, I find that the photographic and video evidence corroborated by the affidavit evidence of Mr. Gow, Mr. Weatherall and Mr. Tonn all establish to my entire satisfaction that any reasonably prudent skier keeping a proper lookout could not have failed to notice and react in time to avoid the mesh ribbon used to close the Crooked Oak run. This is so *whether or not the snow guns were in operation*. This evidence was not seriously challenged by the plaintiff and is much to be preferred to the evidence of Mr. Trimmeliti (which was essentially non-existent on all material points) and Mr. Smardenka (which I find to be entirely deficient and unreliable when compared to the above).

[57] Proper lookout implies to me that a skier is maintaining a rate of speed and control consistent with his or her actual field of vision and stopping distance. A skier must be under sufficient control as to be able to stop or avoid obstacles or dangers as they become visible within the field of vision permitted by conditions at all times. This hazard was visible to anyone looking at it. The defendant refers to the Alpine Responsibility Code copies of which were posted at the resort. I prefer to refer to common sense when engaging in a somewhat to fairly risky sport, particularly in night conditions.

[58] Based upon the foregoing, the foundation of the plaintiff's claim is fatally undermined. The snow making equipment was not in operation. The site was lit by a high intensity light judged by an expert to be quite adequate for night skiing. The ribbon was visible from a reasonable distance away to a skier keeping a proper lookout and skiing in control and at a rate of speed allowing him or her to react and to stop within the range of possible hazards within range of vision. The ribbon was of a sort commonly used by the defendant and would have been known to the plaintiff from his prior experience at the same resort over several years. All relevant industry standards were complied with.

[59] Even if the snow making equipment were in operation, the evidence makes it plain and obvious that the plaintiff should have been able to see the ribbon in time to react to it *if* he was

skiing in the manner and at the speed claimed by Mr. Smardenka. I cannot find that a trial is *required* for the sole purpose of assessing whether his evidence is to be preferred to the objective and contemporary evidence reviewed and I am well able to assess his evidence using Rule 20.04(2.1)(1-3) and determine its appropriate weight. I have weighed the evidence and have no hesitation in rejecting Mr. Smardenka's evidence as lacking in credibility and plausibility and is internally inconsistent.

[60] The defendant has put its best foot forward, including filing expert reports. They have clearly done homework in preparing to meet this case. The plaintiff took almost nine years to commit to affidavit form the critical elements of its story and had no objective or contemporary evidence upon which to rely in seeking to meet his burden of proof. The plaintiff failed to call an obviously important eye witness (his friend, Mr. McCabe) nor to explain his absence. The plaintiff's story lacked in plausibility and credibility and is contradicted by reliable, objective and contemporary evidence. The plaintiff has no expert evidence to point to.

[61] Nothing in the plaintiff's evidence explains the failure of the plaintiff to have noticed the ribbon *at all*. If the plaintiff was looking in the direction he was heading, he should have seen the mesh ribbon well before collision with it. Even in poor lighting conditions, he should have seen it.

[62] I therefore find no negligence can be attributed to the defendant ski resort operator on the facts of this case. The true cause of the accident may be attributed to any number of factors known only to the plaintiff or the other two parties skiing with him that evening. I am however fully satisfied that whatever factors contributed to the collision, negligence of Blue Mountain was not among them. I am also satisfied that I am able to reach these conclusions using the "toolbox" of Rule 20.024(2.1) and that a trial is not required to assess this evidence and reach this conclusion in this case.

[63] I have not found it necessary to consider the defendant's arguments regarding the Alpine Responsibility Code. The plaintiff's application for a season's pass included an acknowledgment that he had read and understood the Code and copies of the Code were posted prominently at various points in the ski resort. The Alpine Responsibility Code corresponds quite neatly to simple common sense in any matter material to this case at least. I can see no material difference between the Alpine Responsibility Code and the standard I have applied in assessing negligence in the circumstances of this case. Rule 1 of the Code is "Always stay in control. You must be able to stop or avoid other people or objects". Skiing under control and with proper lookout having regard to conditions at all times needs no Code to be common sense and the law of negligence will seldom stray far if at all from the dictates of good common sense.

[64] In this case, the obstacle with which the plaintiff collided was visible from a reasonable distance under both the conditions that I find did prevail *and* the conditions the plaintiff has alleged but failed to prove prevailed. A prudent, in control skier should and would have been able to stop or avoid it. The plaintiff did not do so and I need speculate no further as to why this was so once I have concluded that negligence of the resort operator was not a contributing factor.

Issue 2: Waiver/Limitation of Liability

[65] I shall deal briefly with the matter of the contract between the plaintiff and the defendant. I find that the terms of the contract also provide the defendant with a full answer to the Statement of Claim and warrant a dismissal of this action.

[66] When Mr. Trimmeliti acquired his season's pass from the defendant on December 16, 2005, he executed a "Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement". That is the actual title of the document and cannot have failed to put him or anyone on inquiry as to the nature of the contractual terms that followed. The title is in capital letters in an enclosed box at the top of the page in large, bold type and highlighted in yellow.

[67] In the same, bold-typed yellow box are the words "By SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE. PLEASE READ CAREFULLY!". Mr. Trimmeliti initialed a box immediately to the right of that bold type, yellow highlighted warning. He also signed at the bottom of the page, beneath a bold typed statement as follows: "I HAVE READ AND UNDERSTOOD THIS AGREEMENT AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS AND REPRESENTATIVES MAY HAVE AGAINST THE RELEASEES". His signature was witnessed by a Blue Mountain employee and the form clearly indicates that signing this agreement was required in order to be issued a season pass.

[68] It would have been impossible for any literate person to have signed this document - even if they did no more than scan the heading– and remain ignorant of its general purpose and intent. It was impossible to buy a season's pass as the plaintiff did without signing this document before a witness. The plaintiff was of more than average literacy and sophistication. He had a university-level education and had either applied or would soon apply for law school with the degree of aptitude and literacy that is implied by that qualification. Whether he read the agreement in full (and he claims that he did not), he cannot fail to have understood what the agreement was about in a general way and must necessarily have determined that he understood and agreed with its thrust and chose not to inform himself further.

[69] I find the terms set forth in the paragraphs below the title were in fact of the sort that most people fully expect at ski resorts. Skiing is a potentially dangerous sport and, unfortunately, accidents and injuries are an almost inevitable outcome of the activity for some people some of the time. Ski resorts have trained accident response personnel, medical facilities and evacuation equipment all for the purpose of dealing with these. Accidents in fact do happen. Skiers understand that and know that ski resorts are not providing them with blanket personal injury insurance when they undertake to go skiing. If a resort is seeking a waiver of liability, it is necessarily seeking a waiver of matters which, but for the waiver, might be the responsibility of the resort. At the very least, the concept of a waiver would bring to the ordinary customer's mind a waiver of claims of negligence attributed to the operator of the resort. That is what an

ordinary customer would expect to find in the "fine print" of such a document and that is exactly what is there.

[70] The "fine print" contained, among other things, a very explicit "assumption of risk" clause by which the signatory acknowledges being "aware that skiing and snowboarding involve many risks, dangers and hazards including, but not limited to…changes or variations in the terrain which may create blind spots or areas of reduced visibility…collision with …fences…or other … structures…the failure to ski safely or within one's own ability or within designated areas…and NEGLIGENCE ON THE PART OF THE SKI AREA OWNERS AND OPERATORS OR ITS STAFF INCLUDING THE FAILURE ON THE PART OF THE SKI AREA OWNERS AND OPERATORS AND ITS STAFF TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF SKIIING…I am also aware that the risks, dangers and hazards referred to above exist throughout the ski area and many are unmarked ... I AM AWARE OF THE RISKS…AND FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY…RESULTING THEREROM" (all emphasis in the original).

[71] The "fine print" also contained a waiver. This was not so much "fine print" as a loud proclamation placed in a further highlighted, bold type text box. The waiver applied to all claims including negligence, breach of the statutory duty under the *Occupiers' Liability Act*, R.S.O. 1990, c. O-2 or failure to protect from the dangers or hazards of skiing referred to above.

[72] In addition to the waiver agreement signed by the plaintiff in this case, there were other factors to bear in mind in terms of assessing the reasonable expectations of Mr. Trimmeliti as to the contract he was entering into with the defendant in purchasing his season's pass and entering upon the resort with it.

[73] Mr. Trimmeliti had skied at this resort for a number of years in the past. Without a season ticket, he would have needed a day pass. Each skier purchasing a day pass in at least the five prior years was given a lift ticket to affix to their jacket that had a similarly prominent, bold-typed and highlighted warning. The front side reads "BLUE MOUNTAIN RESORTS LIMITED'S LIABILITY IS EXLCUDED BY THESE CONDITIONS." The reverse side of the 2000-2001 ticket reads:

> *"As a condition of use of the ski area 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 inherent risks of skiing and snowboarding, the use of ski lifts, collision with natural or man-made objects…negligence, breach of contract or breach of statutory duty of care including any duty of care under the Occupiers' Liability Act, R.S.O. 1990, c. o-2…"*

[74] Substantially identical language was used on the lift tickets that Mr. Trimmeliti would have been required to purchase in each of the following years prior to his season ticket purchase in 2005-2006. Since he admitted to skiing over the preceding years at this resort, he knew or

ought to have known of the type of release that Blue Mountain required of its customers and, even had he not read the actual agreement before him before signing it, his prior experience would have given him every reason to expect that the language would be similar to that which he had previously seen in his dealings with them. In fact, it was.

[75] Not only was this language contained on his lift ticket (which went with him everywhere and stayed on his jacket until he cut it off each time), it was also loudly and boldly displayed in public areas at the hill including the ticket area.

[76] I am hard pressed to imagine what more the defendant could have done to bring the defendant's required conditions of access to the ski hill in terms of waiver and release of liability to the plaintiff's attention in this case. In point of fact, the very thing which occurred is what the agreement was designed to apply to. The plaintiff collided with an obstacle (the fluorescent orange ribbon used to close the run). He is now alleging negligence and invokes the statutory duty of care under the *Occupiers' Liability Act*.

[77] It is perfectly clear that the defendant took steps to secure a release of the precise claim which the plaintiff has brought in this case. It is also clear that the plaintiff was either aware of the defendant's efforts to secure an enforceable release or chose not to inform himself of the details of what they sought while being quite well aware of its general purport and intent. The release is not by its terms repugnant or even particularly unusual. It is, by its terms and giving the words their ordinary meaning, a complete answer to the claim before the court. On what basis should it not be enforced?

[78] The defendant's factum has extensively reviewed the law with respect to waivers and limitations of liability, particularly in relation to ski resorts. While many of the cases dealt with ski race and similar situation, the principles are the same throughout.

[79] In *Goodspeed v. Tyax Mountain Lake Resorts Ltd.* [2005] B.C.J. No. 2515 Silverman J. provided a simple summary of when such waivers might not be enforced (at para. 94):

> *"Where a party has signed a waiver form, it is immaterial that he or she did not read it, except in three situations:*
>
> 1. *Where there has been non est factum.*
>
> 2. *Where there has been misrepresentation.*
>
> 3. *Where the defendant knows that the plaintiff does not intend to be bound by the form, and therefore there is a duty to bring its terms to the plaintiff's attention."*

[80] None of these factors are applicable in this case. There is no pleading and there are no facts to bring (1) or (2) into consideration. Whether (3) above applies may be a matter for debate in individual cases. Whether or not the defendant had a duty to bring the terms of the waiver to the plaintiff's attention in every case, the defendant certainly did in fact take all reasonable

precautions necessary to do so in this one. There is nothing *per se* unreasonable or unlawful about limiting or excluding liability for this sort of accident. If this waiver brought to this plaintiff's attention in this fashion is not up to the job of legally doing so, what possibly could?

[81] The law is not at all clear on exactly when such clauses need to be the subject of extra attention to obtain the valid assent of the customer. Justice MacLachlin C.J.S.C. (as she then was) was certainly of the view that a general duty to bring such clauses to the attention of a party cannot be presumed in *Karroll v. Silver Star Mountain Resorts Ltd.* (1988) B.C.L.R. (2d) 160. There is no suggestion that the type of release found here is "inconsistent with the overall purpose of the contract" for example or that the plaintiff was not given an opportunity to review it. Closing runs with ribbon of this sort is hardly unusual and limiting liability for those running into the tape is not beyond the order of expectations of parties. I find no need to decide whether there was a duty to bring the clause to the attention of the plaintiff as I have found that the defendant did in fact employ all reasonable measures to do so.

[82] If the plaintiff chose to sign the form and ignore the consequences, that was a decision freely made by the plaintiff. The plaintiff was not free unilaterally to contract out of the waiver that he knew or ought to have known was a condition of his access to the resort.

[83] The defendant has cited *Blomberg v Blackcomb Skiing Enterprises Ltd.* 1992 CanLii 191 (B.C.S.C.) and *Isildar v Kanata Diving Supply*, 2008 ONSC 29598 (CanLii) in support of its argument. While I found the cases helpful, they do not materially alter the principles derived from *Karroll* as summarized succinctly by Silverman J. in *Goodspeed*. *Isildar* suggest the additional criterion of unconscionability may be added to the analysis. Whether that is an additional or unique ground for not enforcing such an agreement or merely an aspect of analyzing the applicability of the other criteria matters little – there is no basis to argue unconscionability in this case.

Disposition

[84] Accordingly, I have endorsed the record that the defendant's motion is granted and the plaintiff's claim is dismissed. I direct the defendant to deliver its submissions as to costs (limited to three pages exclusive of an outline of costs) within fourteen days of the date hereof. The plaintiff shall deliver his response (same size limitations) within seven days thereafter and the defendant shall deliver his reply submissions, if any (limited to one page) seven days after that. I would ask the defendant to assemble and collate ALL submissions as above and submit them to me (with a copy to the plaintiff) when complete via my assistant through electronic mail or by fax to judge's reception, room 107 at 361 University Avenue.

Justice S. Dunphy

Released: April 14, 2015

CITATION: Trimmeliti v. Blue Mountain Resorts Limited, 2015 ONSC 2301
COURT FILE NO.: 08-CV-348736 PD3
DATE: 20150414

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIEL TRIMMELITI

Plaintiff

– and –

BLUE MOUNTAIN RESORTS LIMITED

Defendant

REASONS FOR JUDGMENT

Justice S. Dunphy

Released: April 14, 2015