Whatever happened to … Crocker vs. Sundance

Introduction

Crocker v. Sundance Northwest Ltd (1985) 20 D.L.R. (4th) 552 (Ont. C.A) is one of the most interesting negligence cases in Canada in the last quarter century. It is a unanimous decision from six judges of the Supreme Court of Canada that covered a tragic scenario on a ski hill. The case has numerous issues relating to thrilling, but dangerous, adventure activities and extreme sport competitions, the role of alcohol and legal assignment of responsibility for it, and contract waivers not to sue in the event of an injury. The outcome provides a basis for a lively debate on how far the law ought to protect people from their own foolish actions.

The Canadian Ski and Snowboard industry has more than 300 resorts catering to some 4.3 million participants in alpine and Nordic skiing each year. Maintenance and growth in market share in this industry arise from novel marketing promotions that target young, daring skiers.

Sundance owned and operated a number of tourist destinations, including hotels, restaurants, and ski hills, including a small ski resort near Thunder Bay. As part of an annual "Sundance Spring Carnival," the resort had been promoting inner tube races for several years as a means of generating interest in the resort. The events were designed to generate a party atmosphere: representatives from beer companies such as Molson were in attendance as a part of the promotion. The competition consisted of two participants racing down Hanson Hill, a mogul covered ski slope, on over-sized, inflated inner tubes as crowds of spectators cheered them on. The objective was to reach the finish line as quickly as possible with both members of the team still in the tube. While injuries had occurred in the past, no consideration had been given to altering the event.

Facts

William Crocker was a 29-year-old beginner skier. His membership in the Sundance Ski Resort allowed him unlimited access to Sundance's facility for the winter season. A "heavy drinker," he was a fixture at the resort's bar.

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On the afternoon of March 19th 1980, Crocker and his friend Rick Evoy had been skiing for just over an hour before taking a drink at the resort bar. At the bar, they watched a short promotional video of the previous year's tubing competition. This video inspired them to register in the $200 tubing competition taking place three days hence. They paid the $15 fee to register, and signed and initialed the entry form and a Release (also called a waiver).

Crocker said he did not read the Release, although it was essentially the same as the one on his season's pass. Crocker later said he was not aware that he was signing a legal document like a Release of Liability. He thought it was just part of the registration form. Sundance did not tell him what specific provisions were in the Release, nor was he asked to verify that he understood its contents. The Release read:

I hereby release Sundance Northwest Resorts Limited, any of their agents, from any and all damages sustained and consequences of loss, injury or damage to any personal property, from any or all actions, causes of actions, claims and demands of any nature including, without limiting the generality of the above, all and any recourses resulting from any decision of Sundance Northwest Resorts Limited or their agents.

Three days later, Crocker and Evoy met for breakfast. Crocker mixed a 40 ounce bottle of rye whisky with two cola bottles, much of which they consumed shortly after their arrival at the ski hill. They continued to drink throughout the day, including during the pre-event meeting held for participants, where they were reminded of the risk associated with the event.

Crocker and Evoy had ingested a large quantity of alcohol by the time they made their way to the top of Hanson Hill. They were furnished with a single tube to share the descent. One of the moguls they struck launched them off their tube. Although Crocker was cut above his eye and Evoy cut his finger, they managed to finish the heat in first place and qualify for the second heat.

After the first race, Mr. Crocker met the driver of a Molson beer van who offered him a taste of brandy. "I took the bottle and took two great big slugs of it straight. I can hardly remember going back up the hill," Crocker would later testify. He then went to the ski resort bar with Evoy. With an obvious cut above his eye and his snow-filled bib on, Crocker ordered and received a drink, then a second, from the bar.

The resort owner, John Beals, spotted Crocker. Beals queried Crocker on his injuries and his current mental and physical capacity and suggested to Crocker that he might not be in any state to compete in the tubing competition, particularly if the cut above his eye impaired his vision.[2] Crocker disagreed, becoming belligerent and defensive, insisting on his right to participate.

The two men returned to the summit for the second race. Crocker fell and bumped his tube, sending it down the hill before the start of the race. Having witnessed Crocker's intoxication, the resort manager and race marshal, Ms. Durno, told Crocker "that it would be a good idea if he did not continue the competition" but Crocker intended to conquer the hill and claim the $200 prize. Durno, feeling that she had done everything she could to dissuade Crocker from competing, and believing a signed Release was in place, allowed him to compete in the second heat.

The steep moguls were too much for these two drunken men. This time they crashed hard. Crocker was ejected from the tube, flew through the air and landed on his head. He broke his neck and was instantly rendered a quadriplegic.

The Negligence Lawsuit

Crocker sued Sundance to compensate him for his serious injuries. The trial judge found in favour of Crocker in the amount of $200,000. Both Crocker and Sundance appealed to the Ontario Court of Appeal, which overturned the trial judge.

Eight years later, the Supreme Court of Canada restored the trial ruling. The Court said there was a proximate relationship requiring Sundance to take care to prevent foreseeable harm to Crocker. The Sundance Spring Festival was a promotional event that charged a fee to compete and earned money at the bar from selling Crocker alcohol. Accordingly, the resort owed Crocker a reasonable measure of care to prevent him from harming himself. He was engaged in a dangerous event but was able to buy drinks at the resort's bar wearing his competitor's bib. At different times and locations, Beals and Durno could each see Crocker was in a vulnerable condition participating in a dangerous competition. They allowed him to compete. Sundance's negligence in setting up this inherently dangerous competition and allowing Crocker to compete drunk caused his injuries.

The Court said there was a proximate relationship requiring Sundance to take care to prevent foreseeable harm to Crocker.

Did Crocker voluntarily assume this risk of injury when he contractually signed away his rights to sue Sundance in that Release? The Court said Crocker did not, either by word or conduct, voluntarily assume either the physical risks or the legal risk involved in competing, given that his mind was clouded by alcohol at the time. The Release Crocker signed did not relieve Sundance of liability for its negligent conduct because the ski resort failed to draw his attention to it. It did not ensure that he even read the Release.

Perhaps Crocker contributed to his injury by his own negligence? Crocker chose not to read or ask about what he signed and initialed. He chose to get drunk and recklessly compete in a dangerous competition. He stubbornly waved off two interventions that would have prevented his injuries if he had withdrawn from the race.

The Supreme Court of Canada concluded Crocker's own bad behaviour counted for 25% of the total legal responsibility and his compensatory damages were offset by that amount to arrive at a final net award of $200,000.

Update on the Parties

Crocker spoke to the *Globe and Mail* after the judgment of the Supreme Court. He sighed, "I put my faith in the system, and the system worked for me. It's been a long time, eight years, three months and five days but I feel as if 10,000 pounds have been lifted off my shoulders."[2] Crocker was able to leave the care of a nursing home, but he is still restricted by his injuries and must use a wheelchair.

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Sundance ski resort was sold to the Government of Ontario for $540,000 in 1983 to be used solely as a training ground for ski jumpers and Nordic skiing.[3] The facility was renamed "Big Thunder" and was considered one of the best ski jumping facilities in North America, but it *closed* in 1996 and has remained abandoned ever since.

In the early 1990s, John Beals developed the Nor'Wester Hotel and Conference Centre to promote the Thunder Bay area as a tourist destination. The hotel is now owned and operated by Best Western. He is a restaurateur in Thunder Bay.

Notes:

[1] Court of Appeal decision at para 64.

[2] Fraser G. (1988) *Resort judged 75% liable for drunken inner-tube ride,* Globe and Mail July 1st, Retrieved from http://global.factiva.com.ezproxy.lib.ucalgary.ca/ha/default.aspx

[3] Globe and Mail (1983) *Ontario purchases ski-jumping hill,* May 11th, retrieved from http://global.factiva.com.ezproxy.lib.ucalgary.ca/ha/default.aspx