



Question

Sally goes skiing in the Perisher Valley every year. In order to ski in the valley and to use the ski lift and locker room facilities, skiers are required to purchase a ticket at the central office of Perisher Valley Enterprises Pty Ltd. The season ticket states in bold print on the front:

"See conditions on reverse side".

The condition on the reverse side was in the following terms:

"Perisher Valley Enterprises Pty Ltd will not be responsible for any loss or damage however caused. Under no circumstances shall the company be liable for any physical injury sustained on the company's snow fields"

There was a large sign in the office area to the same effect. All the snow field operators in New South Wales impose similar conditions.

Before Sally purchased the ticket, she asked about safe storage of her gear. The salesperson said:

"Oh she'll be apples. Nothing ever happens here."

A ski attendant who disliked Sally pushed a chair lift at her. The chair struck Sally causing a fracture to her left leg. After two days hospitalisation Sally returned to the snow fields to collect the belongings she left in her locker. She discovered that the locker in which she had left her watch, camera, wallet and some clothing was empty. The locker room staff knew nothing about the matter and could only suggest that the items had been stolen.

Sally seeks compensation with respect to her personal injuries and the loss of her property. Perisher Valley Enterprises Pty Ltd refuses to pay and relies on the terms of the contract.

Advise Sally.



Answer Plan

Under Common law

- Unsigned document (Ticket Case) – construction of the term
- The legal effect of oral statement
- Does the exclusion clause cover what has occurred?

The implied term by Statutes

- Consumer transaction
- Fair and reasonable term
- Liability –Personal injury and negligence under TPA?

Does the exclusion clause form part of the contract?

In the case of unsigned documents, which contain an exemption clause, a party who does not know of the exemption clause will only be bound by it if the following is shown:

- It would be assumed by a reasonable person to be a contractual document:
Causer v Browne.

Here, a ticket would be considered to be document, which contains contractual terms forming the basis of contract. Today many consumers would be aware that tickets or dockets handed to them may contain contractual terms, and thus it is less likely that such consumer would be in position to prove this element.

- Reasonable steps were taken to give the class of person, to which the recipient belonged, notice of the existence of the term: *Parker v South Eastern Railway Company; Mendelssohn v Normand*.

Here, the print was in bold print on the front and there was a large sign in the office area to the same effect. It is therefore the company had give notice to the existence of the term.

- The term still be enforceable if the client has had 'previous dealing' with the company: *Balmain New Ferry Co Ltd v Robertson (1906)*.

Sally has been skiing in the Perisher Valley every year; therefore the court may infer that the she has already received sufficient notice of the disclaimer.



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- The above steps were taken before or when the contract was made: *Thorton v Shoe Lane Parking*.

Here, the ticket was given when the contract was entered into.

It appears all three requirements are satisfied. Hence the exclusion clause does not form part of the contract.

What is the legal effect of Salesperson's oral statement?

The statement can be one of four things: a puff, a representation, a term of the main contract or a term of collateral contract. It is unlikely that the statement could be viewed as a puff as it appears that a reasonable person would not have dismissed the statement as mere sales talk. Is it a representation or a term? The general test is what is the intention of the parties? The intention is ascertained objectively, that is what would a reasonable third person have understood the statement to be? *Oscar Chess Ltd v Williams*. As it is difficult to determine the parties' intention here, it is necessary to look to the subsidiary tests:

- ***Time***

If there is a long interval between the making of a statement and the conclusion of the contract, it is probably not a term of the contract but merely a representation: *Routledge v McKay*. Here, it appears the statement was made prior to entering the contract, thus suggesting it is a term.

- ***Importance in the minds of the parties***

If the statement was important in the mind of the parties, it is probably a term. It must be important in the minds of the parties: *Couchman v Hill*.

Sally is assertive enough to make it clear that she was not prepared to contract on the basis of the exclusion clause. And she was willing to enter the contract on her own terms (displace the exclusion clause).

Here it appears this test could be satisfied, therefore the statement may be a term.



- **Special skill and knowledge**

If the party who made the statement is in a better position than the other party to ascertain the accuracy of the statement, it is probably a term: *Oscar Chess Ltd v Williams* (1975) 1 WLR 370. Here, the salesperson is the person give assurance to Sally that the storage was safe. Lord Denning in *J Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* “ When a person gives a promises, or an assurance into a contract, and he intending that he should be act on it by entering into a contract, and he does act on it by entering the contract, we hold that it is binding”. And the salesperson is in a better position than Sally to know the truth of the Statement. Thus, the statement may be a term.

It appears that the statement is more than likely a term of the contract even though it does not appear in the contract.

The question then is, *what type of term it is?*

It appears, though, that the term is one, which Sally would not have entered into the contract unless she was assured of strict or substantial performance of it and thus it appears to be a **condition of contract**. Breach of which gives rise to a right to terminate and / or claim damages no matter how small the breach.

What has occurred?

- Personal injury

A ski attendant acted by intentionally pushed a chair lift at Sally had caused a fracture to her left leg and consequently she need to be hospitalised for two days. This act by the Ski attendant in tort is an act of Battery. Since it fulfil the 5 element regarding a battery such as Direct act, intentional act, contact with the body of the plaintiff (Sally), knowledge of the contact (the plaintiff need not know of the contract at the time of contact but will be necessary to show evidence of contact and consent.

Sally will most likely to succeed in acquiring remedy by the court since the ski attendant has done an intentional act for the express purpose of doing physical harm and in fact succeed in causing physical injury: *Birds v Holbrook* (1982)

Under the recognition of action for personal injury, Sally can sue for economic loss, which includes compensation not only for loss of earning capacity caused by



injury, but also damages for the cost of care (the expenses incurred for medical, hospital and nursing care)

- Loss of property

Negligence for the purpose of the tort of negligence can be defined as failure to take necessary steps to eliminate reasonable foreseeable and significant risk of injury to the plaintiff (Francis Tin dad, 1999)

The Perisher Valley Enterprise Ltd owed a duty of care to provide facility and security for their consumer. The company must take reasonable care to avoid act of omission which can be reasonable foreseen would be likely to injure your neighbour (objective test): *Donoghue v Stevensen*.

The company should also provide standard of care as to provide security to their consumer storage facility. Failed to do so would be a breach and in this case it has caused the loss of Sally's properties (watch, wallet, and some clothing)

Thus, Sally can sue the company for a breach under the tort of negligence for the loss property.

Does the Exclusion clause cover what has occurred?

The general rule is that an exemption clause is determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole: *Darlington Futures*.

However, there are a number of rules of interpretation, which the courts turn to for assistance in interpreting exclusion clauses. Here, the most relevant are:

- The clauses will construed strictly: *Wallis v Pratt*.
- In the case of negligence, according to *Canada Steamship Lines Ltd v The King* and *TNT (Melbourne) Pty Ltd v May and Baker (Aust) Pty Ltd*:
 - o An express exclusion is effective.
 - o Where the only possible cause of action against the defendant is an action for damages in negligence, then the court will interpret a 'wide clause to recover the defendant's liability for negligence: *Rutter v Palmer*.



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- Where a cause of action may be based on same ground other than negligence (that is breach of contract), a 'wide' clause must be confined to the heads other than negligence (that is, the breach of contract):
White v John Warwick Ltd.

Here, as there appears to be two possible causes of action, a breach of contract as well as an action in negligence, the third rule of Canada Steamship that if the clause expressly excludes liability for negligence then it can be given effect. So the clause is probably effective only against a breach of contract action and not an action in tort for negligence if that can be proven: *White v John Warwick*. Thus, innocent party -Sally- has the right to terminate the contract and sue for damage.



Implied term by statutes

In this content Sally is regarded as consumer (s.4B) and therefore can take advantage to consumer protection legislation.

Section 68 of the Trade Practise Act declares void any disclaimer, which excludes, restricts or modifies the conditions or warranties implied by the Act. The implied that the service provided should corresponded with its description, be fit for its stated purpose and be merchantable quality apply despite any disclaimer.

Furthermore, the Sale of Good Act (NSW) s.64 (1) states that:

‘Any provision in, or applying to, a contract for a consumer sale and purporting to exclude or restrict the operation of any of the provisions of section 18, 19 and 20 or any liability of the seller for a breach of condition or warranty implied by any provision of those section is void.’

It can be seen from this excerpt that the exclusion clause is void because implied terms cannot be excluded. The exclusion clause may only apply where the implied terms are not relevant because the various requirements and test have not been met.

As s.68 (1), consumer also protected against the unfair and reasonable terms.

Sally can claim that the exclusion terms provided by Perisher Valley enterprise Ltd falls into the unfair and unreasonable category.

The exclusion clauses are unfair, in this case, that it was represented to customer on take-it-or-leave-it basis and they are also of very broad so that the Perisher Valley Enterprise Ltd is essentially saying that they are not liable to customer, however poorly the service they provide.

This is a breach of the Consumer Protection legislation. As mentioned in TPA, a corporation risks prosecution if it attempts to limits its liability in anyway. Any attempt to do so is in breach of s.53 (g) of TPA, which prohibits the making of false or misleading representations about a consumer’s rights.

Sally can therefore, sue under Trade Practise Act 1974 Part V Div 2-Offences relating to unfair practises. Furthermore, under s.74 (1) of the TPA there are implied warranties that service by corporation to consumer must be carried out with due care and skill.



Conclusion

Legal action against Defendant (Perisher Valley):

- **In Common Law**

- **Sally can sue for breach of condition but it might be difficult to win – proving as it is term or representation difficult (it is difficult to determine the parties' intention) also in common law the court will show that the company have provide reasonable/enough notice. – Also address defence arguments by Perisher Valley Enterprise.**

- **In Tort**

- **Sally may can survive – should also address issue related and possible defence arguments provided by Perisher Valley Enterprise.**

- **In Implied term**

- **This is probably the most recommendation ways to sue again Perisher Valley Enterprise since it was clear that the company has breach the Consumer Protection Legislation. Perisher Valley Enterprise relies on the exclusion term against the entire claim made by Sally. This act is a breach of s.53 (g).**