
CANADA / JUDGMENT

Kennedy v. Coe

2014 BCSC 120

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 120 Kennedy v. Coe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kennedy v. Coe,

2014 BCSC 120

Date: 20140127

Docket: S110018

Registry: Vancouver

Between:

Elizabeth Ann Kennedy

Plaintiff

And

Adrian Coe

Defendant

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the plaintiff:

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Place and Date of Trial

Vancouver, B.C.

December 2-6, 9-13, 2013

Place and Date of Judgment:

Vancouver, B.C.

January 27, 2014

- [1] On January 11, 2009, the plaintiff's husband, Mark Kennedy, died tragically while heli-skiing with a guided group of skiers and snowboarders in the back-country mountains of British Columbia. He fell into a tree well, became immersed in snow, and suffocated. The plaintiff brings this action under the Family Compensation Act, RSBC 1996, c 126, for the loss of financial support of Mark Kennedy.
- [2] This is a novel claim. The defendant, Adrian Coe, was another skier who had been assigned as Mr. Kennedy's "ski buddy". The plaintiff claims that Mr. Coe owed a duty of care to Mr. Kennedy to immediately alert the guides as soon as he knew that Mr. Kennedy had disappeared. She says that he failed in that duty, that his failure resulted in a delay in the rescue, and that this delay caused Mr. Kennedy's death. In the alternative, she claims that Mr. Coe breached a term of an express or implied contract with Mr. Kennedy.
- [3] Mr. Coe defends this action on numerous grounds. He says that there is no duty of care at law between ski buddies while heli-skiing, and even if there is a duty of care, he met the standard of care required of him in the circumstances. He claims that his role as a ski buddy is one that is covered by the release and waiver of liability signed by Mr. Kennedy. He says that in any event, nothing he did or did not do caused or contributed to Mr. Kennedy's death and Mr. Kennedy himself was entirely or mostly responsible for the accident. Finally, he says that the plaintiff has suffered no financial loss.
- [4] The plaintiff faces many hurdles in this action. On liability alone, her claim that one skier owes a duty of care to another in these circumstances is not one that has been recognized in Canada, and the evidence as to timing and causation is not clear.

- [5] For the reasons that follow, I have concluded that the action in negligence must be dismissed on the basis that Mr. Coe did not owe a duty of care to Mr. Kennedy, and even if he did, he met the standard of care in the circumstances and was not negligent. I have also concluded that the action in contract must also be dismissed on the basis that the plaintiff failed to prove the existence of a contract or that Mr. Coe breached any terms of a contract.

The accident - evidence and findings

- [6] The plaintiff lives in Colorado. She and Mark Kennedy were avid skiers. Mr. Kennedy often took multi-day heli-skiing vacations on his own. At the time of his death on January 11, 2009, he was on his fifth heli-skiing vacation with Mike Wiegele Helicopter Skiing at Blue River, B.C. (Wiegele's).
- [7] Adrian Coe lives in England. He is also an avid skier who, before January 2009, had been heli-skiing 10 to 15 times on one-day trips only. He had been at Wiegele's once before for a day, and this was his first multi-day heli-skiing vacation.
- [8] Both Mr. Kennedy and Mr. Coe were on their own at Wiegele's for this week of skiing, which commenced on January 10, 2009. They did not know each other.
- [9] Wiegele's employs trained ski guides on all heli-ski trips, who accompany each group of skiers in the back-country. On arrival, all guests are required to read and sign a "Release of All Claims, Waiver of Liability and Acceptance of Inherent Risks" (the Release) and attend a safety briefing that includes a safety video. The safety video describes the many hazards encountered in the back-country, including avalanches, crevasses, snow cornices, snow mushrooms, creek beds, snow conditions and tree wells. It also describes the "buddy system" and the use of transceivers to locate missing skiers.
- [10] In the safety video that was in use in January 2009, guests were told that as Wiegele's could not guarantee their full safety, they were to recognize potential hazards, follow their guide's instructions, and ski with their buddies and keep a watch on each other, especially when in the trees, narrow chutes, gullies, creek beds or very deep powder. They were told about the dangers of tree wells and how a skier falling head first into one can suffocate, and they were shown how to dig a person out. They were told to use the buddy system in the trees, stay in contact with their partners, and keep their guide's tracks in sight. If lost, they were told to stop, stay where they were and shout out so the guide could find them.
- [11] The next morning, before setting out, the guests were given another safety briefing that included training on how to use a transceiver.
- [12] Mike Wiegele has been the owner and operator of Wiegele's for 43 years. He testified that the buddy system operates as a "gentleman's agreement" in that guests generally choose who they want to ski with, and the expectation is that buddies will support and look out for each other so that if one is lost the other can give the guides an idea of where his buddy may have gone. He pointed out that guests are not professionals: "we try to educate them but can't

make them experts". He said that there had been numerous incidents in his operation where people fell into tree wells but, prior to January 11, 2009, in only one case did a skier die.

- [13] Mr. Kennedy and Mr. Coe were in a group of 10 guests and two guides. Barry Widas was the lead guide for this group and Scott Streadwick was the tail guide. As lead guide, Mr. Widas was responsible for managing the hazards on the runs, selecting the lines of descent and regroup spots, and advising the guests about the particular terrain they will encounter. The lead guide always descends first. As tail guide, Mr. Streadwick was responsible for ensuring that the guests followed the general direction set by the lead guide, spacing the guests, and assisting guests if they fall on the run. The tail guide always descends last, conducts a sweep of the slope, and is usually the first on the scene if there are any incidents. At every regroup spot the guides do a head count to make sure that everyone in the group is present. A final head count is not done until the tail guide arrives but the two guides are able to communicate by radio at all times.
- [14] January 11, 2009 was the first day of skiing for the week. The incident occurred just before lunch on a run known as Norbert's Nose. This was the group's third run on Norbert's Nose, which had three sections: alpine at the top, old growth forest in the middle, and a log cut at the bottom. The top of the log cut was about 200 meters above the helicopter pick-up spot and area where the group was to meet for lunch. It was considered an intermediate run. It was more open than the forest but there were trees of varying heights scattered throughout the slope.

The forest

- [15] When the group reached the top of the old growth forest, Mr. Widas paired everyone up for the first time. Neither Mr. Kennedy nor Mr. Coe was skiing with friends. Although they had not met each other before this, they were assigned as ski buddies. Both were considered to be expert skiers. Mr. Coe said that they acknowledged this assignment by gestures and neither ever spoke to the other.
- [16] There is some conflicting evidence as to whether Mr. Widas paired everyone up on the first or second tree run, but this is immaterial. There is no question that Mr. Kennedy and Mr. Coe were paired together before the incident occurred. Mr. Coe testified that he followed Mr. Kennedy through the forest on the last two runs before lunch.
- [17] The evidence is not entirely clear as to what instructions were given to the guests when they were first paired up as buddies. According to Mr. Coe, Mr. Widas instructed them to ski in pairs in the forested section and to try to keep each other in vision and to make noise. He said that he and Mr. Kennedy were in the middle of the group and he kept Mr. Kennedy in visual contact by skiing two to three turns behind him through the forest.

- [18] Mr. Widas said that he did not talk much that day about what buddies were supposed to do, and when he paired everyone up at the top of the forest, he did not give the group any specific instructions about the buddy system. He could not recall what he said to the group but acknowledged that he normally tells them to yodel or ski either in front of each other or side by side, depending on the terrain. He said that they generally ski with partners "only in the forest".
- [19] Mr. Streadwick did not recall what specific instructions were given to the group that day about the buddy system, but he said that at the time, the concept of skiing with a buddy was introduced when they skied the trees, and the guides always reiterated to the guests to ski with their buddies.
- [20] When ski buddies were assigned at the top of the forest, I find that the guests were given general instructions to ski in pairs through the forested section by trying to keep each other in visual or vocal contact, and that Mr. Coe followed those instructions by skiing behind Mr. Kennedy through that section of the run.

The log cut

- [21] When the guests regrouped at the top of the log cut, they were instructed only to ski to the lunch spot, which was about 200 metres below and visible from the regroup site. Mr. Coe did not understand this to mean that he was to ski with Mr. Kennedy down that cut, and he did not do so. He said that the departure of the guests was not regulated and everyone pushed off around the same time. Dr. Scott Negri, another skier in the group, had the same understanding. He testified that no one in the group appeared to be skiing in pairs, in that people were split up 10, 20 or 30 turns apart on the run in a random fashion.
- [22] Mr. Widas did not recall if he told the group to ski with their partners down the log cut but he did not expect anyone to have difficulty with that section of the run. Mr. Streadwick did not recall what instructions were given at the top of the log cut other than that they were skiing to the lunch spot, which was visible at the bottom of the run. He said that the terrain was not particularly difficult, they had been there before, and there was no confusion about where they were going.
- [23] The plaintiff says that the buddy system continued to apply in the log cut, as tree hazards continued to exist, and the guests were not instructed that the buddy system no longer applied. She submitted that there is no practical distinction between a thick forest and a log cut, where there are trees large enough to create fatal tree wells.
- [24] There is no question that there are tree well hazards in log cuts as well as thick forest areas. However, the terrain and visibility are quite different on a slope like a log cut. According to Mr. Wiegele, there is a common understanding among expert skiers that each is capable of skiing on his own to a visible and obvious location, whether or not hazards such as tree wells continue to be present on a run. This makes common sense, whether or not one considers that the "buddy system" continues to apply in a general sense throughout the day. Tree wells

and many other hazards may be present anywhere on the mountain. As Mr. Streadwick said, every tree has a tree well and thousands are encountered by skiers every day.

- [25] The expert evidence is consistent with this approach. Larry Heywood, a snow and ski safety consultant, opined that the buddy system is most commonly used when skiing trees with fresh, deep, unconsolidated snow, given hazards such as tree wells. Colin Zacharias, an experienced ski guide and trainer, opined that skiing with partners "is encouraged by guides in open terrain and emphasized in forested terrain" but the more open the terrain, the less the buddy system becomes a priority and the less likely guests will want to partner-ski. In the circumstances here, he would have expected guests to make their way down the log cut to the lunch site in accordance with the guide's instructions.
- [26] The evidence does not establish a formal "buddy system" that prescribes how people are to ski together outside forested runs. The practice to keep the other skier in visual or vocal contact while in forested sections makes sense because of the obvious dangers of tree wells and the limited visibility in such terrain. What may be required in other types of terrain is not well defined and will depend on the instructions of the guides. Mr. Streadwick emphasized that every run is different and the guides will focus on the main concerns for the particular section of terrain.
- [27] I find that the guests were not instructed to ski with their assigned buddies down the log cut in the same manner as they had skied together in the forest, and consequently, Mr. Coe and other guests skied on their own down that run to the regroup site at the lunch spot.

The last run down the log cut

- [28] Mr. Coe said that he last saw Mr. Kennedy at the top of the log cut. As he started skiing, he recalled seeing two to three people to his right and thought one of them was Mr. Kennedy. He estimated Mr. Kennedy to have been three to five turns behind him at the top of the cut.
- [29] He said that he skied down the log cut in a tracked area with trees to the right and left. He thought most of the others skied in that same area. He did not stop until he reached the bottom. He thought it took him at most two minutes. At the bottom, he took his skis off, turned around and looked up the slope, as was his habit, and noticed immediately that Mr. Kennedy was not skiing the pitch behind him. He said that he mentioned this to some skiers standing there and called out to Mr. Widas, who walked towards him. He thought that Mr. Streadwick appeared at about the same time. He said that Mr. Widas then began counting everyone, noted that Mr. Kennedy was missing, and asked Mr. Coe who his buddy was. Mr. Coe identified Mr. Kennedy as his buddy and told Mr. Widas he had last seen him four to five turns from the top of the cut. He thought that two minutes and a "fraction" had passed from the top of the log cut to when he alerted Mr. Widas to Mr. Kennedy's absence.
- [30] Mr. Widas did not have clear recollection of what he did when he got to the bottom of the log cut, other than to take his skis off. He said that he saw people from his group come down the hill and he thought Mr. Streadwick also arrived fairly quickly. He said he did a head count

almost right away after Mr. Streadwick arrived and he recalled walking over to Mr. Coe and asking him when he last saw Mr. Kennedy. He called a search very quickly. He thought he had also talked to Crosby Johnson, the lead guide for the group that was immediately behind, and he asked the pilot of a helicopter that happened to be in the vicinity to fly over and do a quick visual search.

- [31] As the tail guide, Mr. Streadwick was the last of the group to arrive at the bottom. He did so after shadowing a slow snowboarder for a few turns, assisting someone who had fallen near a tree well, and sweeping the slope to see if any guests were on the pitch. He estimated that it took him "a couple of minutes" to get down. He, too, said that he and Mr. Widas did a group count and discovered they were one guest short. He said that the group behind them was also skiing into the lunch spot and he recalled asking Mr. Johnston if he had seen Mr. Kennedy on their descent. He thought that less than a minute had passed after he arrived at the lunch spot before he knew Mr. Kennedy was missing.
- [32] Mr. Johnston confirmed that he spoke to Mr. Widas on the radio, having received a call while he was still on the hill (although close to the lunch spot). Mr. Widas said something about missing a skier and Mr. Johnston contacted the tail guide of his group who was still on the slope and instructed her to start looking. After he confirmed that all of his guests were at the bottom, he began searching as well.

The search

- [33] Mr. Streadwick quickly began to climb back up the slope, taking off his skis to make faster progress. Using his transceiver, he was able to locate Mr. Kennedy within a very short period of time. He first saw a ski tip and then a patch of a red jacket inside a tree well. He found Mr. Kennedy's head and cleared the snow away. By then, Mr. Widas, a doctor and another guide had arrived and together they were able to pull Mr. Kennedy from the tree well and administer CPR. Unfortunately, Mr. Kennedy was hypoxic and unresponsive.
- [34] Mr. Johnston thought he was about 20 metres from the lunch spot when he began his search. He made is way up the hill but soon learned from Mr. Streadwick and Mr. Widas, who were within shouting distance, that they had found Mr. Kennedy.
- [35] There is no question that Mr. Kennedy was found very quickly after Mr. Widas initiated the search. The radio logs establish that Barbara Quinn, the base radio operator, received his call for the rescue at 13:39 and Mr. Kennedy was found at approximately 13:43 - a period of about four minutes. Ms. Quinn testified that her notation of "approximately 13:43" was an estimate within that one minute. She was certain of the times because she had a digital clock in front of her when she made her notes.

Timing

- [36] The issue, according to the plaintiff, is the period of time that elapsed from when Mr. Coe reached the bottom of the log cut to when he alerted Mr. Widas that Mr. Kennedy was missing. She says that he did not act immediately and only after being asked by the guide. She submitted that this was an unreasonable delay in the circumstances. Had Mr. Widas been alerted sooner, he would have been able to alert Mr. Streadwick, as well as the guides of the group behind, while they were still up the hill, thus enabling an easier search from above rather than below.
- [37] There is no evidence which establishes with any precision when Mr. Kennedy fell and when he died.
- [38] An autopsy determined the cause of death to be asphyxiation and the coroner classified the death as accidental. Dr. John Butt, a forensic pathologist, provided an expert report about the survival time for snow immersion victims. He stated that the range of time reported in the literature was 15 to 30 minutes. He also stated that a victim would lose consciousness within 15 to 20 seconds after an obstruction to ventilation, and after four to six minutes there is a serious threat of brain swelling, which leads to depression of centres in the brain stem that control vital functions such as respiration and heartbeat. Without cardiopulmonary resuscitation after a four-minute "down time", recovery is inversely related to time so that with each minute beyond four minutes there is about a 10% reduction in survival.
- [39] Dr. Butt also stated that the following factors would influence when a person in Mr. Kennedy's position would first experience an oxygen reduced environment:
- posture of person in the snow mass;
 - depth of immersion of victim notably as related to the density i.e. weight of the snow pack (as related to water content) including weight of snow limiting breathing movements/excursion of the chest i.e. traumatic asphyxia;
 - composition of snow: wet snow contains less air/oxygen;
 - conscious level and wariness of victim e.g. ability to assume a posture and to make an air pocket versus random struggling;
 - size of air pocket (also related to density snow);
 - blunt trauma to victim especially blood loss or head injury;
 - panic increasing pulse and respiratory rate;
 - aspiration of foreign material (debris, blood, vomit);
 - ice forming on the face (ice mask) from water condensate on warm skin;

· rescue.

[40] I understand this evidence to mean that a person's chance of survival diminishes quickly after four minutes of unconsciousness due to lack of ventilation, and the average survival range of 15 to 30 minutes depends on multiple factors.

[41] Mr. Streadwick found Mr. Kennedy at a location measured by Mr. Widas to be 138 vertical feet above the lunch spot, which was about one-third to one-half the way down the run. He was inside the cone of the tree well on his back with his head buried one to two feet. The snow was loose and unconsolidated. Mr. Kennedy's hands were not by his face and there was nothing in his airway. His lips were blue, his face was pale grey and he was not breathing. There is evidence that the amount of water content in the snow in the area was 71 kg per cubic metre.

[42] The plaintiff asserts that Dr. Butt's evidence establishes at least a 15 minute window for survival and an unaccounted for period of about seven minutes. Reasoning backwards from the time Mr. Kennedy was found and CPR was first initiated, she says that the evidence demonstrates the following time line:

13:30 - 13:32 (2 minutes)

Mr. Coe skis down the log cut. Within this period Mr. Kennedy falls into the tree well.

13:32 - 13:39 (7 minutes)

Mr. Streadwick sweeps the slope and assists guests. Dr. Negri and then Mr. Streadwick reach the bottom of the cut. Mr. Widas counts the group, questions Mr. Coe and Mr. Negri, and radios Mr. Johnston and a helicopter.

13:39 - 13:43 (4 minutes)

Mr. Widas calls in the search and Mr. Streadwick finds Mr. Kennedy.

13:43 - 13:45 (2 minutes)

The rescue team extricates Mr. Kennedy and begins to perform resuscitation.

[43] With respect, it is my view that the evidence does not establish any precise time frame. First, as I indicated above, there is no evidence which establishes when Mr. Kennedy fell and when he died. Mr. Heywood gave evidence about the speed of a skier in deep powder snow, which I found quite speculative given the various factors that would affect this. Dr. Butt's opinion about the 15 to 30 minute range for survival was a general one in response to a question about survival times suggested by the literature. He did not explain how the factors shown in the evidence would have affected Mr. Kennedy. His evidence provides general information only and does not opine as to how long Mr. Kennedy would likely have survived given the specific factors applicable here.

- [44] Second, and not surprisingly, none of the witnesses were able to provide a precise measure of the time between the group's departure from the top of the log cut, their arrival at the bottom, and Mr. Coe's notification to the guide of Mr. Kennedy's absence.
- [45] Mr. Coe testified that it took him two minutes at most to ski down the log cut and it was two minutes and a "fraction" from the top of the log cut to when he alerted Mr. Widas. Dr. Negri, one of the last skiers to arrive at the bottom, thought it took him five to six minutes to get down, as he was taking his time. Mr. Streadwick, who was the last of the group to arrive at the lunch spot, estimated that it took a "couple of minutes" to get down. None of this provides anything more than general estimates based on each witness' after-the-fact perception of time.
- [46] In fact, the tenor of the evidence from all witnesses is that each perceived the entire sequence of events to have occurred very quickly. Mr. Coe said that all the events at the bottom "seemed to flow instantly". Mr. Widas said that Mr. Streadwick "came fairly quickly right away" and that "it seemed like we all came together quite quickly" at the bottom of the log cut. There is no reliable evidence which establishes a precise time frame as to when Mr. Coe and the other skiers left the top of the log cut, arrived at the bottom, and when Mr. Kennedy's absence was made known to Mr. Widas, but it was all a matter of minutes.
- [47] It is clear that the run was relatively short, 200 metres. I find that Dr. Negri and Mr. Streadwick were not far behind the others in the group, and the entire time frame from Mr. Coe's departure from the top of the log cut to Mr. Streadwick's arrival at the bottom was within a range of about three to six minutes. I also find that both Dr. Negri and Mr. Streadwick became aware that Mr. Kennedy was missing when or very shortly after they arrived at the bottom of the log cut. Dr. Negri said that as he arrived, Mr. Widas asked him if he had seen Mr. Kennedy. Mr. Streadwick said that he became aware that Mr. Kennedy was missing less than a minute after he arrived. This shows, and I find, that Mr. Coe notified Mr. Widas about Mr. Kennedy's absence before either of these two arrived at the lunch spot. Given the overall time frame, this likely occurred within about one to three minutes after he reached the bottom. However, it was not until Mr. Streadwick arrived (which was very quickly) that the guides were able to confirm, through a head count of the guests, that Mr. Kennedy was in fact missing.

Summary of findings

- [48] Mr. Kennedy and Mr. Coe did not know each other and never spoke to each other. When they were assigned to be ski buddies at the top of the forest, they acknowledged each other by gestures only. Mr. Widas instructed the guests to ski in pairs through the forest by trying to keep each other in visual or vocal contact. Mr. Coe followed those instructions and skied behind Mr. Kennedy through that section of the run.

- [49] At the top of the log cut, Mr. Widas did not instruct the guests to ski with their assigned buddies in the same manner as they had skied together in the forest. Mr. Coe did not ski with Mr. Kennedy down that run, but rather, like other guests, skied on his own to the regroup site at the lunch spot.
- [50] After he reached the lunch spot and took off his skis, Mr. Coe noticed that Mr. Kennedy was not on the slope and notified Mr. Widas. This likely occurred within about one to three minutes after he reached the bottom. Mr. Widas proceeded to make inquiries about Mr. Kennedy until Mr. Streadwick appeared. At that point, the two guides did a head count and confirmed Mr. Kennedy's absence. Mr. Widas then sought the assistance of a nearby helicopter to conduct a quick visual search of the slope, and when it was confirmed that Mr. Kennedy was not visible, he called a formal search. Mr. Streadwick began his ascent up the slope and located Mr. Kennedy within about four minutes of the formal search being recorded in the radio log notes.

The issues

- [51] The Family Compensation Act, in s. 2, permits a person in the position of the plaintiff to bring an action where the death of a person is caused by "wrongful act, neglect or default" and such act, neglect or default would have entitled the person to maintain an action had death not resulted. The plaintiff essentially steps into the shoes of Mr. Kennedy. To found a wrongful death claim in negligence, the plaintiff must first establish that Mr. Coe owed a duty of care to Mr. Kennedy.
- [52] This is the primary issue for determination: whether Mr. Coe, in the particular circumstances here, owed a duty of care to Mr. Kennedy as a ski buddy while participating in guided, back-country heli-skiing. If he did not, it is unnecessary to consider the other issues related to liability in tort or the question of damages. However, given my findings of fact and the novelty of this issue, I have also considered whether, assuming there is a duty of care, Mr. Coe met the standard of care.
- [53] The plaintiff also makes an alternative claim for breach of contract. It not clear to me whether such a claim is one that is contemplated under the Family Compensation Act, as causing death by wrongful act, neglect or default would not usually include a breach of contract. However, this issue was not raised at trial, so I have considered whether Mr. Coe breached a contractual duty to Mr. Kennedy.
1. Establishing a duty of care
- [54] The modern law of negligence is based on "the general public sentiment of moral wrongdoing for which the offender must pay" but legal duties are distinguished from moral obligations: *Donoghue v Stevenson*, [1932] AC 562 (HL) at p. 580. The concept of a legal duty extending to a "neighbour" as established in *Donoghue* was discussed by Chief Justice McLachlin in *Childs v Desormeaux*, 2006 SCC 18 at para. 10:

Legal neighbourhood is "restricted" to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" ([Donoghue at] p. 580). This concept, sometimes referred to as proximity, remains the foundation of the modern law of negligence.

[55] In determining whether a duty of care should be imposed, the court is not being asked to adjudicate on the morality of the defendant's conduct. Rather, it is being asked to determine, as a matter of law, whether it is fair and just to impose the cost of the plaintiff's loss (assuming there is a loss) on the defendant: Childs at para. 25.

[56] *Anns v Merton London Borough Council*, [1978] AC 728 (HL) established a two-part test for determining whether a duty of care arises, which was adopted and re-cast by the Supreme Court of Canada in *Kamloops (City of) v Nielsen*, [1984] 2 SCR 2 and described in Childs as follows (at para. 11):

- (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
- (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

[57] The first stage focuses on factors arising from the relationship between the parties while the second is concerned with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper v Hobart*, 2001 SCC 79 at paras. 30, 37. In *Cooper*, the court posed these questions (at para. 37) in respect of the second stage:

Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[58] The plaintiff bears the burden of establishing a duty of care, but once she establishes a *prima facie* duty of care under the first part of the test, the evidentiary burden shifts to the defendant to show that there are policy considerations that negative or limit the scope of the duty: Childs at para. 13.

[59] In *Cooper*, the court indicated that where a relationship was within one of the recognized categories of relationships previously found to give rise to a duty of care, it is not necessary to conduct a full analysis under the *Anns* test. In particular, the court pointed out that the second stage of the *Anns* test generally arises only where the duty of care asserted does not fall within a recognized category of recovery. The categories in which proximity has been recognized were described at para. 36. They include situations where a defendant's act foreseeably causes physical harm to a plaintiff or a plaintiff's property (including nervous shock); negligent misstatement; misfeasance in public office; a duty to warn of the risk of danger; negligent inspection of housing developments by municipalities; negligent road maintenance by governmental authorities; and relational economic loss (related to a

contract's performance) in certain situations.

- [60] The plaintiff did not suggest that this case falls within one of the categories described in Cooper but submitted that it falls within "volunteer" or assumption of responsibility cases, where liability has been imposed on parties who voluntarily undertake to do something they are not otherwise obligated to do. This principle was summarized by Newbury J.A. (concurring) in Goodwin v Mainroad North Island Contracting Ltd, 2007 BCCA 81 at para. 26:

there is a long and respectable line of authorities which have imposed liability where an actor, particularly one with public duties, has voluntarily undertaken to provide some kind of assistance to another, but does so negligently and causes foreseeable harm to that other person. The authorities go back as far as Coggs v. Bernard (1703) 2 Ld. Raym. 909, 92 E.R. 107 (K.B.), where Gould J. stated:

And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. [At 108.]

As Low J.A. noted in Wiens v. Serene Lea Farms Ltd. 2001 BCCA 739, (2001) B.C.L.R. (3d) 282, the principle established by Coggs v. Bernard was usefully restated in Skelton v. London and North Western Railway Co. (1867) L.R. 2 C.P. 631: "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it." (At 636.) Low J.A. also noted that the principle had been restated by McLachlin J. as a trial judge in Wise v. Courtney [1985] B.C.J. No. 777, as follows:

It is clear that where one person undertakes an activity the law does not ordinarily impose on another the duty to assist him in that regard; however, where a promise is given by one person that he will assist, performance of that promise is embarked on, and the other person relies on that performance, liability may lie: Coggs v. Bernard (1703). [At para. 6.]

- [61] Therefore, the first question is whether the plaintiff's claim falls within a relationship previously recognized as giving rise to a duty of care.

Does this case fall within a relationship previously recognized as giving rise to a duty of care?

- [62] The plaintiff relies primarily on Wiens v Serene Lea Farms Ltd, 2001 BCCA 739, Goodwin, and Brown v Port Edward (District of), [1996] BCJ No 2465 (SC). In Wiens, a person who voluntarily undertook to secure a ladder was found to owe a duty of care to the ladder's user. In Goodwin, a highway maintenance contractor who represented that it would alert a crew to black ice on an area of road over which it had no responsibility was found to owe a duty of care to third party users of the road. In Brown, a defendant who volunteered to clean up an oil spill on a road was found to owe a duty of care to persons using the road. In all of these cases, the volunteer failed to carry out the undertaking or did so negligently; in Goodwin and Brown, the undertakings resulted in the authority or individual legally responsible for maintaining or cleaning up the road taking no action due to reliance on those undertakings.

- [63] While these "volunteer" cases bear some similarities here, they are distinguishable primarily because in each there was a clear undertaking made to perform a specific task in circumstances very different from those in this case. I note that in *Goodwin*, Prowse J.A. (for the majority) did not find the circumstances in other "undertaking" cases (including *Coggs v Bernard* (1703), 92 ER 107 (KB) and *Wiens*) to be sufficiently analogous to dispense with the need for a full Anns analysis to determine whether a duty of care existed there (see para. 43). *Newbury J.A.* (who wrote concurring reasons) found those cases analogous but in the context of a full analysis under the Anns test (see paras. 30-32).
- [64] The same applies here. The circumstances in these cases are not sufficiently analogous to those where a person volunteers to be a ski buddy in the context of a high-risk sport that is organized with professional guides and where the expectations and duties of a ski buddy may not be clearly articulated and vary with the circumstances on the mountain. It is important to note, as did the court in *Cooper* (at para. 39) that if an alleged duty fits within an established category, generally that is taken as sufficient proof that there are no overriding policy considerations which would negate it. Consequently, the court must be persuaded that the "volunteer" cases have adequately canvassed the type of policy concerns that arise on these facts. In my view, they do not.
- [65] Here, Mr. Kennedy voluntarily sought to engage in a high-risk sport with full knowledge of its attendant risks. He paid a third party for the opportunity to participate in that sport, and signed a waiver of liability. He participated in a buddy system that was flexibly applied depending on the terrain, the conditions and the instructions of the guides. By contrast, none of the plaintiffs in the "volunteer" cases were involved in high risk sports where the scope of their undertakings varied with the circumstances, nor did they seek out or rely on the expertise of a third party to regulate their conduct.
- [66] These differences are germane to the policy issues at play. They bear on the law's allocation of risk when it comes to high-risk and thrill-seeking sports. As a "jealous guardian of individual autonomy" (*Childs* at para. 31), the law does not prevent us from participating in inherently risky endeavours, and there are competing policy issues pertaining to the mitigation and allocation of risk. On the one hand, establishing a duty of care as between ski buddies may result in skiers performing that role with greater diligence, thus enhancing safety, as suggested by the plaintiff. On the other hand, establishing such a duty of care may discourage skiers from agreeing to be ski buddies at all, thus diminishing safety, as suggested by the defendant. Mitigation and allocation of risk in activities such as back-country skiing are issues that do not arise in the "volunteer" cases relied upon by the plaintiff. Accordingly, I consider it necessary to conduct an analysis under the Anns test to determine whether Mr. Coe owed a duty of care to Mr. Kennedy in the circumstances here.

Stage one of the Anns test: a prima facie duty

- [67] At the first stage of the Anns test, the plaintiff must prove that there is a sufficiently close relationship between the parties, or "proximity," to establish a prima facie duty of care: Childs at paras. 11, 13.
- [68] Foreseeability and proximity are considered at the first stage. In *Odhavji Estate v Woodhouse*, 2003 SCC 69, the court referred to foreseeability and proximity as separate elements, but in *Childs* this was considered not to change the Anns test but rather to clarify that proximity will not always be satisfied by reasonable foreseeability; "foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a prima facie duty of care arises" (at para. 12).
- [69] Where an overt act of the defendant has directly caused foreseeable physical harm to the plaintiff, foreseeability alone may establish a prima facie duty of care, but where the allegation is that the defendant failed to act, "something more" is usually required: *Childs* at para. 31; see also *Cooper* at para. 29. This is because a duty to take positive action "in the face of risk or danger" is not free-standing. As the Chief Justice said in *Childs*, "the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved" (at para. 31). This distinction was recognized by Prowse J.A. in *Goodwin* (at para. 35).
- [70] Both parties approached the allegation against the defendant as a failure to act. The defendant submitted that any failure to act did not give rise to foreseeable harm to Mr. Kennedy and there is nothing in the relationship between them sufficient to give rise to a positive duty of care. The plaintiff submitted that the relationship between the defendant and Mr. Kennedy meets the requirements of foreseeability and proximity sufficient to establish a prima facie duty of care.
- [71] In this case, the difference between a failure to act and an overt act directly causing physical harm is an important distinction in the proximity analysis. In *Childs*, the proposed duty was to take care to prevent harm caused to the plaintiff by a third party. Here, the proposed duty is to take care to prevent harm caused to Mr. Kennedy by a risk inherent in a sport in which he chose to participate.
- [72] As reviewed in *Childs* (at paras. 34-37), three situations have been identified where courts have imposed a positive duty to act in the face of an alleged failure to act: (1) where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls; (2) in the context of paternalistic relationships of supervision and control; and (3) where a defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

[73] These situations are not strict legal categories but simply factors which can lead to the conclusion that sufficient proximity exists to give rise to a *prima facie* positive duty to act: see Childs at para. 34; Fullowka v Pinkerton's of Canada Ltd, 2010 SCC 5 at para. 35. However, in all of these situations, the defendant is materially implicated in the creation of the risk or his control of a risk created by others.

[74] There are two further concerns. The first relates to the autonomy of those affected by the positive action proposed, as discussed at para. 39 of Childs:

The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

[75] The second is "the theme of reasonable reliance", described at para. 40 of Childs:

A person who creates or invites others into a dangerous situation, like the high-risk sports operator, may reasonably expect that those taking up the invitation will rely on the operator to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. Similarly, a teacher will understand that the child or the child's parents rely on the teacher to avoid and minimize risk. Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.

Foreseeability

[76] The defendant submitted that agreeing to be designated as a ski buddy did not foreseeably raise the possible harm that Mr. Kennedy would die by asphyxiation in a tree well, as this was a rare event that had occurred only once before at Wiegele's. I think this approach is too narrow. While the risk of death in this manner was not high, the risk of falling into a tree well was, and the question with respect to foreseeability is not whether the specific injury suffered by Mr. Kennedy was reasonably foreseeable, but whether it was reasonably foreseeable to a person in Mr. Coe's position that carelessness on his part in reporting Mr. Kennedy's absence would likely cause some injury to Mr. Kennedy. I take this from the following passage in Anns at 751-2:

[in the duty of care analysis] [f]irst one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a *prima facie* duty of care arises. [Emphasis added.]

- [77] In my view, it was reasonably foreseeable that if Mr. Coe failed to perform his alleged duty as a ski buddy to report Mr. Kennedy's absence, or did so negligently, Mr. Kennedy would likely have suffered some injury as a result of a delay in his rescue. The defendant appears to concede this in his submission where he states, "[a]t best, it can be argued that a failure to act by Mr. Coe may foreseeably result in Mr. Kennedy not being rescued from harm in a timely way". Where time is of the essence in the backcountry, it is reasonably foreseeable that a delay in commencing a search and rescue operation would likely contribute to the injury or death of a person who becomes buried in snow.
- [78] In this circumstance, however, foreseeability alone is insufficient to establish a prima facie duty of care. The plaintiff must also establish a relationship of sufficient proximity between Mr. Coe and Mr. Kennedy.

Proximity

- [79] Referring to the three factors identified in Childs (risk-control, reasonable preservation of autonomy, and reasonable reliance), the plaintiff submitted that (1) Mr. Coe specifically undertook to assume the duties associated with being Mr. Kennedy's buddy and in this way was implicated in and exacerbated the risk of tree wells by inviting Mr. Kennedy to rely on him as a potential rescuer; (2) recognizing a positive duty to act would not unjustifiably impinge on either Mr. Coe's or Mr. Kennedy's autonomy because they both voluntarily agreed to assume the responsibility of skiing as buddies; and (3) the fact that Mr. Kennedy in fact skied with Mr. Coe rather than someone else, indicates that he relied on Mr. Coe's undertaking.
- [80] The defendant submitted that this case does not fit into any of the factors identified in Childs. More particularly, Mr. Coe did not create or control the risk of tree wells, nor did he entice Mr. Kennedy to heli-ski, and the risk that caused Mr. Kennedy's death had nothing to do with him. The defendant stressed that he and Mr. Kennedy did not have a close relationship in that they did not know each other before being assigned as ski buddies and did not discuss their mutual expectations of their duties as buddies. He further submitted that there is no evidence that Mr. Kennedy had any expectation that Mr. Coe would be responsible for his safety on the mountain. He relied on the fact that Mr. Kennedy, by signing the Release, acknowledged the risks associated with heli-skiing, including the conduct of "other guests" and that there was risk of death.
- [81] The first factor, risk-control, requires the defendant to have been materially implicated in the creation or control of a risk to which others have been invited: Childs at para. 38. In this case, it is clear that Mr. Coe cannot be said to have been implicated at all in the creation of the risk, but the question is whether he is materially implicated in the control of it. In my view, he is not.

[82] Agreeing to participate as a ski buddy for the purpose of mitigating risks does not mean that the participant is able to control those risks - clearly Mr. Coe could not control what Mr. Kennedy did on the mountain and what hazards he encountered. All a ski buddy can do is assist in minimizing the potential harm that may result from those risks. By keeping track of each other, ski buddies may be able to directly assist each other if they witness a problem or indirectly assist each other by notifying others responsible for searching and rescuing. In the context of guided heli-skiing, a skier who fails to notify the guide of his partner's absence in a timely way is not materially implicated in the control of the risk itself. He is implicated only in the potential consequences resulting from the risk (here falling into a tree well).

[83] In Childs, hosting a house party where alcohol is served, without more, was not considered sufficient to implicate the host in the creation or enhancement of the risk of injury to third parties as a result of the conduct of a guest. The "more" could involve the following situation, discussed at para. 44:

It might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a prima facie duty of care to third parties, which would be subject to contrary policy considerations at the second stage of the Anns test.

[84] This indicates that the host would have to be materially implicated in both the risk itself (continuing to serve alcohol to a visibly inebriated guest) and the risk of harm to third parties who may be injured by the intoxicated guest (knowing the inebriated guest will be driving home). A ski buddy who fails to notify the guide of his partner's absence in a timely way may affect the speed with which his partner can be found, but he has only a limited control over the potential consequences of the risk itself. In a guided situation, it is the primary responsibility of the guides to keep track of their group. While a tail guide can be alerted by radio to a missing skier while he is still on the slope, confirmation that a skier is in fact missing is usually done when the tail guide arrives at a regroup site. In such circumstances, it cannot be said that a ski buddy is materially implicated in the control of the risk.

[85] In Goodwin, the defendant contractor was not implicated in the creation of the risk of black ice on the road, but was found to have effectively taken control over that risk (which it knew had already materialized) and undertaken to manage it. Moreover, because the contractor prevented the danger from being controlled or eliminated by virtue of its undertaking, the third party was left in a worse position: see paras. 53 and 55. Therefore, the first factor in Childs was satisfied.

[86] The same cannot be said in this case, where it was the role and responsibility of the guides to do their part to mitigate the risk of injury or death from tree wells by alerting skiers to the risk, keeping track of the group, and managing a search and rescue where required. Unlike the contractor in Goodwin, Mr. Coe did not take effective control over or undertake primary

responsibility to manage or mitigate the risk and consequences of Mr. Kennedy falling into a tree well. Moreover, he did not know that the risk had actually materialized. Nor can it be said that Mr. Coe's agreement to be Mr. Kennedy's ski buddy put Mr. Kennedy in a worse position. It may have prevented Mr. Kennedy from being paired with another skier but any other skier would have been in the same circumstances and subject to the same directions from the guides as Mr. Coe.

- [87] When Mr. Coe agreed to be Mr. Kennedy's ski buddy in the circumstances here, he did not invite Mr. Kennedy to rely primarily on him to mitigate the potential risk of injury or death resulting from the hazards inherent in back-country skiing. Mr. Coe could neither control the inherent risks nor Mr. Kennedy's conduct. Any role that Mr. Coe played did not place him in a position where he was materially implicated in the control of the risk of Mr. Kennedy falling into a tree well and dying from asphyxiation. He did not assume responsibility for Mr. Kennedy's safety. He was not responsible for calling a search and conducting a rescue operation. This was the role of the experienced guides and support staff employed by Wiegele's.
- [88] The second factor, reasonable preservation of autonomy, may be satisfied where the defendant has a special relationship to the person in danger or a material role in the management of the risk. While Mr. Coe was not simply another skier on the mountain, I do not agree with the plaintiff that because he agreed to assume the responsibility of being Mr. Kennedy's buddy knowing the risks of heli-skiing, he put himself into a special relationship with Mr. Kennedy. Whatever relationship was created when the two agreed to be ski buddies, it was defined by the guide's instructions to the group at the top of the forest (to keep each other in visual and vocal contact in the forest) and more generally by the instructions provided in the safety video (to use the buddy system in the trees, stay in contact with their partners and keep the guide's tracks in sight). Mr. Coe and Mr. Kennedy never spoke to each other. There is no evidence of any mutual understanding as to what their roles as ski buddies entailed outside of this context. Moreover, Mr. Coe did not have a material role in managing the risk, as discussed above.
- [89] In my view, a skier who accepts a buddy relationship does not park his autonomy at the bottom of the mountain, and remains responsible for his own actions. Applying what the Chief Justice said in *Childs* at para. 45, "short of active implication in the creation or enhancement of the risk", one ski buddy is entitled to respect the autonomy of the other. I do not accept the view that Mr. Coe and Mr. Kennedy voluntarily surrendered all of their autonomy by agreeing to be ski buddies. They did so to a limited extent. Except when Mr. Coe followed Mr. Kennedy through the forest, each continued to ski as and where he wished without reference to the other.
- [90] The plaintiff drew an analogy to *Fallowka*, where the court held that a private security firm hired by a mine owner to provide security services owed a positive duty of care to the miners to take reasonable precautions to reduce the risk of a third party planting a bomb (with devastating results) during a long and violent strike. In doing so, it found that the

security firm had surrendered much of its autonomy by its contractual undertaking with the employer to become involved. I do not find this analogy particularly helpful in the first stage analysis. This case is not one founded on a contractual undertaking (as I have concluded below) and the facts in Fullowka are remarkably unique and distinguishable. Further, the discussion about autonomy was in the context of policy considerations under the second stage of the Anns test, not the proximity analysis under the first stage.

- [91] With respect to the third factor, reasonable reliance, there is little evidence about Mr. Kennedy's expectations.
- [92] The plaintiff submitted that the nature of the buddy system made it reasonable for Mr. Kennedy to rely on Mr. Coe to minimize the risks associated with heli-skiing because he agreed to be Mr. Kennedy's ski buddy in circumstances where both parties had full knowledge of the seriousness and content of that role. She also submitted that Mr. Kennedy in fact relied on Mr. Coe as shown by the evidence that they skied together.
- [93] The defendant countered this by referring to the lack of evidence of any expectation by Mr. Kennedy that Mr. Coe would be responsible for his safety on the mountain, as well as evidence of the opposite: by signing the Release, Mr. Kennedy acknowledged and assumed the risks of heli-skiing, including risks posed by the conduct of "other guests".
- [94] While it may have been reasonable for Mr. Kennedy to rely on Mr. Coe to ski with him as his buddy in the forest, there is no evidence which suggests that Mr. Kennedy's expectations went further than that. As noted above, the two men never spoke to one another. The only evidence of a mutual agreement to ski as partners is Mr. Coe's acknowledgement that this was so (apparently through a mutual nod) at the time Mr. Widas assigned buddies at the start of the forest.
- [95] There is some evidence of what Mr. Kennedy understood about the danger of tree wells and the use of the buddy system prior to January 2009. In an email he sent to the plaintiff in 2008 during a previous trip to Wiegele's, Mr. Kennedy wrote:

I was reminded today that [skiing in the trees] is not without dangers. As you know, there are two big risks. Hitting a tree, which isn't too dangerous because most are pine trees covered with snow. The real danger, and it can be deadly, is tree wells. To minimize the dangers, the practice is to ski with a buddy so your partner can dig and let other people know of the situation.

Well I found out today that practice does save lives. I was paired up with a boarder for a few runs this afternoon. Ten or 15 turns down the hill, I heard a scream to my left and made a hard turn and stopped to be able to hear. The guy was hanging down head-first, on his back in a tree well. It took me over 10 minutes to remove the board and dig the guy out. The boarder is truly thankful for me saving him from a really dangerous situation. If I had not found him, it could have taken us hours to locate him in a search. [Emphasis added.]

- [96] The underlined passages show that Mr. Kennedy's understanding of the buddy system was that it applied on runs in which he was specifically paired with a buddy, and in this context the buddy's responsibility included notifying others when his partner got into trouble. The rest of the message shows that Mr. Kennedy was well aware of the risks of skiing in the trees and that if he fell into a tree well in circumstances where his partner had not seen or found him, it could take a long time for others to find him. There is no evidence which suggests that Mr. Kennedy relied on Mr. Coe to do more than ski as his buddy in the trees or that he expected this to continue down the log cut. To the contrary, there is evidence from both Mr. Coe and Dr. Negri that they did not expect to ski with their assigned buddies down that run, which is consistent with the evidence of the guides that no such instruction was given.
- [97] There is no basis on which to find that Mr. Kennedy reasonably relied on Mr. Coe to do anything more than ski with him through the forest in accordance with the instructions of the guides.
- [98] The plaintiff relied on an admission of Mr. Coe that he was required to notify the guide immediately if his buddy disappeared, submitting that this admission defined the duty of care. However, this admission was made by Mr. Coe in an examination for discovery (which answers he confirmed were true) in response to questions that were posed regarding the guide's instructions about keeping his buddy in sight at all times. The evidence and my findings establish that these instructions were given in the context of skiing through the forest run only. Therefore, such an admission does not define the duty of care of a ski buddy outside that context.
- [99] There is no question that there are many inherent risks in back-country heli-skiing such that all skiers and snowboarders who agree to be buddies should look out for each other so far as is practicable in whatever circumstances they may find themselves. However, translating a moral obligation into a legal one requires as a first step a relationship of proximity that meets the factors established in the jurisprudence I have reviewed. For the reasons I have outlined, I conclude that none of the three factors in Childs support the imposition of a positive duty to act in the circumstances of this case, and the plaintiff has failed to establish a prima facie duty of care. A skier participating in guided, back-country skiing who agrees to be assigned as a ski buddy with another skier on a particular run is not, without more, in a relationship of sufficient proximity to give rise to a duty of care to the other skier when they are not skiing as buddies on other runs. The "more" may require clear instructions from the guides or a clearly defined mutual understanding between ski buddies of their roles and responsibilities to each other in varying terrain, snow conditions and other circumstances, which would be subject to an analysis of the contrary policy considerations at stage two of the Anns test.
- [100] Given this conclusion, it is not necessary to consider the second stage of the Anns test.

2. The standard of care

[101] In light of the findings I have made and the novelty of the issue of proximity, I consider it appropriate to address the question of whether Mr. Coe met the standard of care, assuming that he did owe a duty of care to Mr. Kennedy.

The evidence and findings

[102] Despite the fact that Mr. Coe had not skied the log cut with Mr. Kennedy, he nevertheless looked out for him once he reached the regroup spot at the bottom. He testified that when he reached the bottom and took off his skis, he looked up the slope "as I always do" and immediately noticed Mr. Kennedy's absence, at which point he alerted Mr. Widas.

[103] The plaintiff submitted that Mr. Coe's evidence about this should not be accepted because it is inconsistent with the evidence of the guides, neither of whom said that Mr. Coe approached them, and it is inconsistent with two prior written statements Mr. Coe made about these events. I do not accept this submission.

[104] As outlined above, I have found that Mr. Coe told Mr. Widas of Mr. Kennedy's absence after he noticed that Mr. Kennedy was not visible on the slope above the lunch spot, and that this occurred before either Dr. Negri or Mr. Streadwick arrived. Mr. Widas did not have a clear recollection of the sequence of events before he called the search. He said that they did a head count as soon as Mr. Streadwick arrived and he remembered asking Mr. Coe when he last saw Mr. Kennedy. This is not inconsistent with Mr. Coe's assertion that he had already notified Mr. Widas before Mr. Streadwick arrived. Mr. Streadwick simply noted that they would not know they were one person short until he, as the tail guide, arrived at the pick-up, or lunch spot.

[105] In Mr. Coe's first statement, made on January 14, 2009, he did not mention that he called Mr. Widas over but rather stated that Mr. Widas asked who was missing, and he answered "Mark". In his second statement, made March 24, 2011, Mr. Coe stated that he discussed Mr. Kennedy's absence with others in the group and notified the "rear guide".

[106] Mr. Coe quite candidly acknowledged that his prior statements differed from his testimony but maintained that he called Mr. Widas over to say that Mr. Kennedy was missing, adding that Mr. Streadwick appeared as this conversation was going on. I found Mr. Coe's evidence to be consistent with the evidence of Mr. Streadwick, who said that he knew Mr. Kennedy was missing less than a minute after he arrived, and with the evidence of Dr. Negri, who said that Mr. Widas asked him if he had seen Mr. Kennedy as he arrived.

[107] As discussed above, the evidence does not establish with any precision how long it took Mr. Coe to notify Mr. Widas once he reached the lunch spot. However, I accept Mr. Coe's evidence that he did so shortly after he took off his skis, looked up the slope, and noticed that he could not see Mr. Kennedy. This likely occurred within about one to three minutes in light of my finding that the entire time frame from Mr. Coe's departure from the top of the log cut to Mr. Streadwick's arrival at the bottom was within a range of about three to six minutes.

The standard of care in negligence

[108] Both counsel referred to the description of the standard of care in negligence set out in *Ryan v Victoria (City of)*, [1999] 1 SCR 201 at para. 28:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[109] The plaintiff submitted that the standard of care of a reasonable and prudent ski buddy required Mr. Coe to maintain contact with Mr. Kennedy and to alert the guides as soon as he determined that Mr. Kennedy was missing. She did not rely on a failure to maintain contact but argued that Mr. Coe breached the standard of care by failing to immediately notify the guides, as any delay in the context of back-country skiing is unacceptable.

[110] In my view, in the context of guided, back-country skiing, there cannot be a strict requirement of immediacy in notifying the guides of a missing skier. Timing will depend on the circumstances and the information available to a skier.

[111] The evidence of the guides and the expert witnesses shows that skiers often become separated from their partners or their group for a variety of reasons. Mr. Widas noted the difficulties of keeping in contact due to the terrain, the various hazards, trees, shrubs or rocks. Mr. Streadwick said that it is common for ski buddies to become separated on almost every forest run, as it is virtually impossible to keep in constant visual or vocal contact. If someone is late arriving at a regroup spot, it is a matter of common sense to wait several minutes before assuming that a search needs to be called. His description that "it is not black and white in the mountains" is an apt one.

[112] This was demonstrated earlier in the day on January 11, 2009. At the top of the log cut, one of the guests arrived at the regroup site without his buddy, and the group waited some time for the buddy to arrive, possibly between 5 and 10 minutes according to Mr. Coe and Dr. Negri.

[113] Mr. Zacharias' view was consistent with Mr. Streadwick's observations that maintaining visual or vocal contact can be difficult and frequently skiers arrive at regroup sites without their partners. In his opinion, unless a skier witnesses his partner falling, a temporarily missed partner is assumed to be en route to the next regroup site, and it is reasonable to expect people to wait several minutes for their partner to appear before informing the guide. He also pointed out that the seriousness of any situation will be more apparent to an experienced guide than it will be to a guest. Mr. Heywood advocated a more proactive approach, but agreed that it is human nature to wait a few moments before notifying the

guide.

- [114] All of these comments were made in the context of skiers who become separated from their buddies while partner skiing, but they are nonetheless relevant in any situation where a skier notices that another skier with whom he or she has skied is missing.
- [115] The log cut was described by the guides as intermediate terrain and they did not expect any of the skiers in the group to have difficulty with it. At the same time, it was reasonably easy to see the skiers as they descended the slope. In this context, I have found that Mr. Coe notified Mr. Widas of Mr. Kennedy's absence shortly after he reached the bottom of the log cut, within about one to three minutes. In my opinion, this was a reasonable period of time in the circumstances. Mr. Coe also told Mr. Widas where he thought he last saw Mr. Kennedy. I agree with the defendant's submission that this was all that was expected of him. Once the guides were aware of the situation, the obligation to assess the situation and institute a search was theirs, and Mr. Coe had no further role to play.
- [116] Therefore, if there is a duty of care, I am satisfied that Mr. Coe met the standard of care required of him and was not negligent.

3. Breach of contract

- [117] The plaintiff submitted that the requisite elements of offer, acceptance and consideration are present on the facts of this case: Mr. Coe agreed to be Mr. Kennedy's ski buddy and in exchange, Mr. Kennedy agreed to be Mr. Coe's ski buddy. She says that at a minimum, the terms of the contract between the two included the duties of a ski buddy, which in turn included the duty to ski in close proximity to each other and to immediately alert the guides if the other needed assistance or disappeared.
- [118] It is my view that the nature of any obligations assumed by Mr. Coe and Mr. Kennedy was not contractual. There is no basis on which to find the existence of a contract or any contractual intention. Even if there was an agreement that included the terms asserted by the plaintiff, such terms could only have applied in the forest, given my finding that Mr. Kennedy did not reasonably rely on Mr. Coe to do anything more than ski with him through the forest in accordance with the instructions of the guides. Moreover, there is no basis on which to find that Mr. Coe was in default of any obligation to immediately alert the guides, given my finding that Mr. Coe notified Mr. Widas of Mr. Kennedy's absence within a reasonable time after he reached the bottom of the log cut.
- [119] Accordingly, the claim in contract cannot succeed.

Conclusion

- [120] Given these conclusions, it is unnecessary to consider the issue of causation, the defences raised or the question of damages.

[121] The plaintiff's claim is dismissed. It is indeed very sad that Mr. Kennedy met a tragic and untimely death, but he did so after a terrible accident while participating in a high-risk sport and responsibility for his death cannot be placed on Mr. Coe.

[122] Neither party made submissions on costs nor sought a later opportunity to do so. As the successful party, the usual rule applies and the defendant is entitled to his costs, which I will set at Scale B.

"Fisher, J."

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