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BRIEFING NOTE

B.C. Court Addresses the Duty of Care of Backcountry Heli-Skier - *Kennedy v. Coe*, 2014 BCSC 120

The number of people entering B.C.'s backcountry in search of untouched powder and adventure has increased dramatically in recent years. News headlines have supplied a steady reminder of the jeopardy awaiting the unfortunate and unwise among them, with frequent reports of avalanche fatalities and lost snowboarders. What is clear is that mountain accidents can and do occur – often with fatal results. Less clear is whether others can be held legally responsible when disaster strikes.

There have been numerous lawsuits in B.C. over the years targeting commercial skiing operations and professional ski guides. Industry liability waivers have been bolstered over time, and have been enforced by B.C.'s courts (see Adam Howden-Duke's May 2012 *Briefing Note* on *Loychuk v. Cougar Mountain Adventures Ltd.*). As a result, plaintiffs must look to new and novel targets in search of compensation. The BC Supreme Court recently addressed one such novel claim resulting from a fatal skiing accident. In *Kennedy v. Coe*, 2014 BCSC 120, the court answered the question of what, if any, legal duty one "ski buddy" owes another while participating in guided, backcountry heli-skiing.

The Facts:

On January 11, 2009 Mark Kennedy tragically died after becoming immersed in snow while trapped in a tree well. His widow commenced a *Family Compensation Act* claim alleging her husband's "ski buddy" had a duty to watch out for him on that fateful run and immediately alert guides of his disappearance. She alleged that Mr. Coe's failure to do so delayed her husband's rescue and ultimately caused his death.

Both Mr. Kennedy and Mr. Coe were experienced heli-skiers. They were each attending this trip solo and at the start of the day the guide randomly paired them up as "ski-buddies". They did not speak to one another other than to share a mutual nod of acknowledgment. Instructions were given that a ski-buddy system was to be used during forested runs. Buddies were to stay in verbal and visual contact with each other while skiing in the denser, old growth trees, with the aim of mitigating the risk of a skier falling unnoticed into a tree-well.

Mr. Kennedy's accident took place on the final run before lunch. The party had already made their way from the alpine, through the forest, and stood at the top of a 200m logging cut block. This area was open compared to the forested portion of the run, and the guide gave no specific instructions regarding use of

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the buddy system in the cut block. Mr. Coe set off and made it to the bottom of the run. He realized within moments that Mr. Kennedy had not arrived and he alerted the lead guide. Ultimately a search was commenced and within minutes Mr. Kennedy was found in the tree well. He was not breathing. CPR was administered but sadly Mr. Kennedy could not be resuscitated.

The Court's Decision:

The issue before the court was whether Mr. Coe owed a duty of care in the circumstances and if so, whether he breached that duty.

The plaintiff argued that Mr. Coe's duty fell into an established category of "volunteer" or "assumption of responsibility" cases, where a duty is imposed on parties who voluntarily undertake to do something they are not otherwise obligated to do. Madam Justice Fisher found that such cases were not sufficiently analogous to the circumstances before her. In doing so she noted that the case raised certain policy issues that were not adequately addressed in the "volunteer" cases relied upon by the plaintiff. Those included the concern that, 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. On the other hand, it may discourage skiers from agreeing to be ski buddies at all, thus diminishing safety. She also reiterated that the law is a jealous guardian of individual autonomy and does not prevent us from participating in inherently risky endeavours such as heli-skiing. Accordingly, Fisher J. found that the case did not fit into a recognized category of recovery and it was necessary to analyze whether there was sufficient foreseeability and proximity to establish that Mr. Coe owed a duty of care in the circumstances.

Fisher J. concluded that it was reasonably foreseeable that if Mr. Coe failed in his duty as a ski buddy to report Mr. Kennedy's absence, Mr. Kennedy would likely suffer some injury as a result of a delay in rescue. However, foreseeability alone is insufficient to establish a duty of care, and the plaintiff also has to show a sufficient proximity between Mr. Coe and Mr. Kennedy.

In assessing whether there was sufficient proximity between the parties, Fisher J. looked at three factors outlined in the Supreme Court of Canada's decision in *Childs v Desormeaux,* 2006 SCC 18:

1. Creation or control of the risk;
2. Reasonable preservation of autonomy; and
3. Reasonable reliance.

In addressing those factors Fisher J. found that Mr. Coe did not create or control the risk of Mr. Kennedy dying in a tree well. Responsibility for that risk rested with the professional guides. All Mr. Coe could do was assist in minimizing the potential harm that may result from the risk. In addressing the second factor, Fisher J. found that 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. There was no special relationship between the parties, and whatever relationship existed, was defined by the guides and their instructions. As to the third factor, Fisher J. found that there was no evidence that Mr. Kennedy reasonably relied on Mr. Coe to do anything more than to ski with him through the forest, as instructed.

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Fisher J. stated that there is no question that there are many inherent risks in backcountry 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. Fisher J. concluded that a skier participating in guided, backcountry 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. As a result, the plaintiff failed to establish a *prima facie* duty of care and the case was dismissed on that basis.

It should be noted that while the case was dismissed at the duty of care stage, Fisher J. went on to conclude that even if a duty was owed, Mr. Coe met the standard of care by alerting the guides that Mr. Kennedy was missing.

Comment:

The decision in *Kennedy v. Coe* stands as a clear reminder to commercial and organized recreational operators to maintain comprehensive liability waivers, and to consider including a waiver of claims by one guest against the negligence of another.

The media has hailed this decision as a victory for the extreme sports industry, but it should be noted that it appears to have turned on the specific facts before the court, including the instructions given by the guides and the particular portion of the ski run the parties were on when the accident occurred. It does not unequivocally answer the question of what if any duty is owed between recreational backcountry skiers and snowmobilers (those not on commercial trips) who clearly rely on one another to stay safe in the mountains. More and more people are venturing into the backcountry without guides, and in doing so they reasonably rely on friends and strangers to make safe decisions, and to act reasonably in responding if rescue is required. Arguably, such relationships could give rise to the "*more*" described by Fisher J. in *Kennedy v. Coe*, and provide circumstances of sufficient proximity that a duty of care could be established. While the decision will be an important benchmark in analyzing any future claims against participants caught up in backcountry or extreme sport accidents, as one of the professional guides opined in *Kennedy v. Coe* "it is not black and white in the mountains".

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