

**SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY**

JAN - 4 2011

S-110018



No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ELIZABETH ANN KENNEDY

PLAINTIFF

AND:

ADRIAN COE

DEFENDANT

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF(S)

Part 1: STATEMENT OF FACTS

1. The Plaintiff resides at 2475 E. Long Lane, Greenwood Village, Colorado. She was the wife of Mark Frank Kennedy, deceased and brings this claim pursuant to section 3(4) of the *Family Compensation Act* R.S.B.C. c. 126.
2. The Defendant, whose occupation is unknown, is believed to be a resident of the United Kingdom
3. On or about the 11 of January 2009 Mark Kennedy, the Defendant and others were part of a group of skiers participating in a helicopter skiing vacation in British Columbia. The vacation was provided by Mike Weigele Helicopter Skiing and Caribou Helicopter Skiing (88) Ltd. who provided transportation and qualified mountain guides so that the skiers could participate in the sport of heli-skiing.
4. One of the risks of heli-skiing is that a skier might fall into a 'tree well' and be unable to extricate himself without assistance. Associated with the risk of falling into a tree well is the risk of suffocation if the skier is unable to keep his head clear of the powder snow after he has fallen into a tree well.
5. In order to minimize the risks posed, *inter alia*, by tree wells, it is a standard and accepted practice for each individual member of a group of heli-skiers to ski with a "buddy" when they ski runs with trees and to be assigned a "buddy" before the skiers start down a run with trees. It is the mutual responsibility of each "buddy" to:
 - (a) ski in close proximity to his buddy, so that if either buddy encounters a problem, the other can assist or get assistance of the guides or other skiers,
 - (b) keep his "buddy" in his peripheral vision,

- (c) keep track of and be aware of his “buddy’s” progress down the slope,
 - (d) assist his “buddy” if he observes that his “buddy” needs assistance, and
 - (e) immediately alert the guides and other skiers if his “buddy” needs assistance, particularly if he cannot provide assistance himself.
6. On January 11, 2009, before starting to ski a run known as Norbert’s Nose, the Defendant and Mark Kennedy were assigned to one another as “buddies” and expressly or impliedly agreed to ski together as “buddies”.
7. Before completing the run, Mark Kennedy fell into a tree well, was unable to extricate himself and was asphyxiated.
8. At all material times the Defendant was in breach of his obligations as the “buddy” of Mark Kennedy and in particular:
- (a) he did not ski in close proximity to Mark Kennedy, and did not assist Mark Kennedy or get assistance of the guides other skiers when Mark Kennedy fell into the tree well,
 - (b) he did not keep Mark Kennedy in his peripheral vision,
 - (c) he did not keep track of Mark Kennedy’s progress down the slope,
 - (d) he did not stop to assist Mark Kennedy when he fell into the tree well and instead carried on to the assigned meeting place,
 - (e) he did not immediately alert the guides or other skiers to the fact that:
 - (i) Mark Kennedy has fallen into a tree well, or
 - (ii) he was unaware of Mark Kennedy’s whereabouts.
9. When the guides learned that Mark Kennedy had not reached the meeting place, the Defendant was unable to assist in locating him. The guides were forced to conduct a search of the run to locate Mark Kennedy and were materially delayed in locating him and coming to his assistance.
10. As a result of the Defendants failure to perform his duties as a “buddy” as set out in paragraph 8, Mark Kennedy died.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims:
- (a) damages for loss of financial support of the deceased Mark Kennedy,

- (b) hospital and funeral expenses,
- (c) costs,
- (d) such further and other relief as counsel may advise.

Part 3: LEGAL BASIS

1. The Plaintiff pleads and relies upon the provisions of the *Family Compensation Act R.S.B.C. 1996, c.126*
2. The Plaintiff says that at all material times, the Defendant, as Mark Kennedy's "buddy" owed a duty of care to Mark Kennedy and as a result of breaching that duty, the particulars of which are set out in paragraph 8, the guides and other skiers were unable to assist Mark Kennedy in a timely way.
3. In the alternative, the Defendant says that when Mark Kennedy and the Defendant agreed to accept the responsibilities of being "buddies" they entered into a contract with each other to do so. At all material times the Defendant's failure to perform his responsibilities was a breach of the contract between Mark Kennedy and the Defendant, which breaches caused the death of Mark Kennedy.

Plaintiff's address for service:

D. Ross Clark Q.C.
Davis LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

Fax number address for service (if any):

604.687.1612

E-mail address for service (if any):

drclark@davis.ca

Place of trial:

Vancouver, British Columbia

The address of the registry is:

800 Smithe Street
Vancouver, BC V6Z 2E1

January 4, 2011
Dated

Davis LLP
Signature of lawyer for plaintiff
Davis LLP (D. Ross Clark)

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

Form 11 (Rule 4-5(2))

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiff, Elizabeth Kennedy, claims the right to serve this pleading on the Defendant, Adrian Coe, outside British Columbia on the grounds that:

- a. it concerns contractual obligations which were to a substantial extent to be performed in British Columbia, and
- b. it concerns a tort committed in British Columbia, pursuant to s.10 (e) and (f) of *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c.28.

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Plaintiff's claim against the Defendant is for loss and damages arising from the Defendant's negligence or breach of contract, pursuant to which the Defendant breached his duty to advise other skiers and the guides if Mark Kennedy needed assistance. As a consequence of these breaches of duty, Mark Kennedy died.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

- none of the above
- do not know

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case.]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws

Part 4: THIS CLAIM INVOLVES:

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]

***Family Compensation Act, R.S.B.C. 1996,
c. 126***



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BETWEEN:

ELIZABETH ANN KENNEDY

PLAINTIFF

AND:

ADRIAN COE

DEFENDANT

RESPONSE TO CIVIL CLAIM

Filed by: The Defendant, Adrian Coe

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant’s Response to Facts

1. The facts alleged in paragraph 3 of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 6, 8, 9 and 10 of Part 1 of the Notice of Civil Claim are denied.
3. The facts alleged in paragraphs 1, 4, 5 and 7 of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 – Defendant’s Version of Facts

1. The Defendant Adrian Coe (“Mr. Coe”) was on the heli-ski trip set out in paragraph 1 of Part 1 of the Notice of Civil Claim. Mr. Coe did not know Mr. Kennedy before meeting him on January 10, 2009.

2. On or about Saturday, January 10, 2009, Mr. Coe, Mr. Kennedy, and others in the group of skiers who participated in the subject heli-skiing trip, were given a safety briefing on the dangers of heli-skiing, including the dangers of tree wells. This presentation was provided by the operators of the heli-ski enterprise: Mike Wiegele Helicopter Skiing and Caribou Helicopter Skiing (88) Ltd. ("Mike Wiegele").
3. In advance of any skiing, Mike Wiegele also provided information, directions and instructions to its guests, including Mr. Kennedy, about heli-skiing, the Mike Wiegele operation and the various dangers of heli-skiing, including the risks associated with tree wells. As part of that process, the guests, including Mr. Kennedy, were told of the importance of skiing in close proximity while in forested sections and to listen to and follow the directions of the guides leading the ski group.
4. Mr. Coe was not accompanied by anyone else he knew on the heli-skiing trip. As a result, the lead guide with the group of skiers paired Mr. Coe and Mr. Kennedy together for the purpose of skiing forested portions of any runs to be skied. This pairing was arranged without any consultation with Mr. Coe.
5. Immediately prior to Mr. Kennedy's disappearance, the ski group of which he was a member regrouped part way down a ski run known as Norbert's Nose. At this point, the group had just finished a forested portion of the run and had congregated, at the lead guides' direction, at the top of a logged section of the hill (the "Cut Block"). The Cut Block was not forested but had small trees that were just visible above the snow and rolling terrain of a gentle grade. At the bottom of the Cut Block, about 200 metres away, the helicopter could be seen at rest at the pick-up location. The group, including Mr. Kennedy, had already skied the Cut Block twice that day.
6. At the top of the Cut Block, the lead guide instructed the group, including Mr. Kennedy and Mr. Coe, to ski down the Cut Block and meet by the helicopter for lunch. The group, including Mr. Kennedy, set off down the Cut Block together.
7. At the bottom of the Cut Block, Mr. Coe alerted the guides as soon as Mr. Coe noticed that Mr. Kennedy was no longer with the group. This was approximately one minute after the group, including Mr. Coe, arrived at the bottom of the Cut Block.

8. The guides immediately set out to look for Mr. Kennedy. Mr. Kennedy was found by the guides within a short period of time. It is unknown to Mr. Coe where or in what condition Mr. Kennedy was found. It is also unknown to Mr. Coe how or why Mr. Kennedy apparently ended up in a tree well.
9. The guests, including Mr. Coe, were not asked or authorized to participate in the search for Mr. Kennedy and were not told until much later that he had been found and had died.
10. In specific response to paragraphs 5 and 6 of Part 1 and the whole of the Notice of Civil Claim, Mr. Coe denies that he and Mr. Kennedy were skiing together as each others “buddy” for the Cut Block, that they expressly or impliedly agreed to do so for the Cut Block or that they were instructed by anyone to do so for the Cut Block.
11. In specific response to paragraph 8 of Part 1 of the Notice of Civil Claim, Mr. Coe denies that he was in breach of any obligations to Mr. Kennedy as alleged or at all. At the time Mr. Kennedy apparently fell into the tree well, the group of skiers with whom Mr. Coe and Mr. Kennedy were skiing were not skiing in pairs or as “buddies” as alleged or at all. Further, Mr. Coe was unaware Mr. Kennedy had apparently fallen into a tree well. At the meeting place at bottom of the Cut Block, Mr. Coe and others alerted the guides to Mr. Kennedy’s absence at the earliest reasonable opportunity.
12. In specific response to paragraph 9 of Part 1 of the Notice of Civil Claim, there was no material delay in locating Mr. Kennedy or coming to his assistance as alleged or at all.

Division 3 – Additional Facts

1. Mr. Kennedy had been on heli-skiing trips with Mike Wiegele on at least four previous occasions and was well aware of the terrain and aware of the risks attendant in heli-skiing, including those associated with tree wells.
2. On or about January 10, 2009, Mr. Kennedy signed a release (the “Release”), the material portions of which include:

“In consideration of the Operator [Mike Wiegele] accepting my application for and my being permitted to go on the Operator’s helicopter skiing vacation or other activities on lands owned by the Province or

elsewhere, involving travel on a helicopter owned or operated by the Carrier, I agree to this release of claims, waiver of liability and assumption of risks (collectively called "this Agreement").

On behalf of myself, my heirs, executors, successors, administrators, assigns and whomever else may have an interest either at common law or by operation of statute, I hereby waive any and all claims I or such parties may have now and in the future, and release from all liability and agree not to sue the Operator, the Carrier and the Province, their officers, directors, employees, representatives (collectively the "Releasees") for any and all personal injury, death, property damage or loss sustained by me as a result of my participation in a helicopter skiing trip or helicopter trips and/or use of the climbing wall and fitness centre facilities with the Operator due to any cause whatsoever, including, without limitation, negligence on the part of the Releasees. For the purposes of this Agreement, "helicopter skiing trip" shall extend from the time of my initial arrival in the town of Blue River / Albreda or designated by the guest or pick up with the Operator to my final departure therefrom and includes any and all activities occurring at any time and anywhere in that town, on the surrounding ski hills or elsewhere, including all helicopter, van, snowmobile, snow cat and/or other means of travel whether or not for the purposes of skiing.

I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in the sport of skiing (being loss of control, collisions with other skiers, trees, rocks and other man-made or natural obstacles, failure of equipment, etc.), and certain additional dangers and risks, including but not limited to:

...

2. MOUNTAIN TERRAIN – mountainous areas with steep slopes in their natural state have many obstacles and hazards (such as cliffs, crevasses, breakable snow crust, ice, wild animals, etc.), may not have been skied previously, are not regularly patrolled or examined, may require cross-country skiing or trekking, where skiers maybe lost or separated from their guide or other skiers and where communication is difficult and rescue and medical treatment may not be available.

...

7. THE OPERATOR AND OTHER SKIERS – the conduct, including negligence of the Operator and of other skiers. This includes skiing under the control of the helicopter skiing guides, whose advice and direction may differ from skiing practices elsewhere.

...

I accept all the inherent risks and dangers of helicopter skiing and other activities and the possibility of personal injury, death, property damage or loss resulting therefrom.

...

In the context of this agreement, and without limiting the generality of the term, negligence shall include any act or omission relating to guiding, use of the helicopters, prediction of avalanche danger, choice of skiing terrain, prediction of weather conditions or any other conditions or factors that may amount to a departure from the standard of care which a person of common prudence usually takes into his own concerns having regard for the activity of helicopter skiing.”

3. Each group of skiers at Mike Wiegele, including those in Mr. Kennedy’s group, were assigned at least two guides: a lead guide who provides instruction and direction to the group and leads it down the hill and a tail guide who follows the group down the hill to keep track of all members of the group and provide assistance to skiers that require it.
4. Mr. Kennedy’s death was not caused by his fall into a tree well. Rather, immediately before he fell into the tree well, Mr. Kennedy suffered some type of fatal or near fatal medical distress, likely a cardiac arrest or similar event. As a consequence of this medical distress, Mr. Kennedy was either already dead when he fell into the tree well or his medical condition was so grave as to be beyond recovery before he fell into the tree well.

Part 2: RESPONSE TO RELIEF SOUGHT

5. The Defendant opposes the granting of the relief sought in paragraph 1 of Part 2 of the Notice of Civil Claim.
6. The Defendant seeks the cost of this proceeding.

Part 3: LEGAL BASIS

1. Mr. Coe denies that he owed a duty of care to Mr. Kennedy as alleged in the Notice of Civil Claim, or at all.
2. In any event, by agreeing to go heli-skiing, Mr. Kennedy voluntarily and freely, with full knowledge of the nature and risk of the enterprise, expressly or impliedly agreed to assume both the physical and legal risks involved in the activity of heli-skiing, including the risks presented by tree-wells and the risk of death. As a consequence, no right of action arises from Mr. Kennedy's death, however caused.
3. Further, prior to going heli-skiing, Mr. Kennedy executed the Release the effect of which was to release any and all claims he or the Plaintiff may have otherwise had which arose from his participation in the heli-ski trip. To the extent Mr. Coe owed Mr. Kennedy any duty of care or contractual responsibilities, which is denied, Mr. Coe was in that capacity a representative of Mike Wiegele and entitled to the benefit of and was covered by the terms of the Release.
4. In the alternative, if Mr. Coe owed a duty of care to Mr. Kennedy, which is denied, then Mr. Coe met the standard of care required of him.
5. Further, Mr. Coe denies that he accepted any responsibility to Mr. Kennedy, as a "buddy" or otherwise, and denies that he entered into any contract to that effect with Mr. Kennedy.
6. In the alternative, if Mr. Coe was in any type of contractual relationship with Mr. Kennedy, which is denied, then he did not breach the terms of that contract.
7. In the further alternative, if Mr. Coe breached any duty of care owed to Mr. Kennedy or the terms of any contract between them, which is denied, then any such breach of that duty of care or contract did not cause or contribute to Mr. Kennedy's death as alleged or at all.
8. Mr. Kennedy's death was caused or contributed to by his own negligence. The particulars of Mr. Kennedy's negligence included:
 - (a) Failing to ski in sufficiently close proximity to other members of the ski group;

- (b) Failing to abide by the directions and instructions of the guides and the operator;
 - (c) Failing to advise anyone of medical conditions he suffered and which could reasonably be expected to affect his ability to ski;
 - (d) Failing to ski in a reasonable and prudent manner given the prevailing conditions, including:
 - (i) failing to wear a helmet;
 - (ii) failing to remove his ski pole straps;
 - (iii) skiing too close to trees and other foreseeable dangers;
 - (iv) failing to make noise while skiing to indicate to others his whereabouts; and
 - (v) failing to ski in sufficient proximity to any other member of the group;
 - (e) Using ski equipment that was unfit for the prevailing conditions or which had not been properly maintained;
 - (f) Failing to carry with him any device that would allow him to contact third parties remotely;
 - (g) Struggling or otherwise conducting himself once in the tree well in such a manner as to bringing more snow down upon himself, thereby reducing his available supply of oxygen;
 - (h) Failing to discuss with Mr. Coe the protocol or conduct of ski partners when Mr. Kennedy knew or ought to have known Mr. Coe had limited experience heli-skiing; and
 - (i) Such further and other particulars as counsel may advise.
9. In the further alternative, Mr. Kennedy's death was caused or contributed by the conduct or negligence of others not parties to this proceeding.
10. Mr. Coe pleads and relies on the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.
11. In any event, Mr. Coe denies that the Plaintiff suffered any of the loss or expense as alleged or at all.
12. In the alternative, if the Plaintiff suffered any of the loss or expense as alleged or at all, then Mr. Coe says that the Plaintiff was under a duty to mitigate those losses and expenses and has failed to do so.

Defendant's address for service is c/o the law firm of Lawson Lundell LLP, whose place of business and address for service is 1600 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2 (Attention: Peter J. Roberts).

Fax number address for service is: (604) 669-1620.

E-mail address for service is: proberts@lawsonlundell.com

Dated at the City of Vancouver, in the Province of British Columbia, this 18th day of May, 2011.



Lawson Lundell LLP
Solicitors for the Defendant
Adrian Coe

This Response to Civil Claim is filed by Peter J. Roberts, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2.

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Barristers & Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
V6C 3L2

Phone: (604) 685-3456
Attention: Peter J. Roberts

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