NOVA SCOTIA COURT OF APPEAL
Citation: ***Burton Canada Company v. Coady***, 2013 NSCA 95

Date: 20130828
Docket: CA 407433
Registry: Halifax

Between:

Burton Canada Company

Appellant

v.

Michael Sampson Coady and
Wentworth Valley Developments Limited

Respondents

Revised Decision: **The paragraph numbering has been corrected on October 17, 2013. This decision replaces the previously released decision.**

Judges: Saunders, Oland, Hamilton, Fichaud and Beveridge, JJ.A.

Appeal Heard: April 11, 2013, in Halifax, Nova Scotia

Held: Leave to appeal granted but the appeal is dismissed per reasons for judgment of Saunders, J.A.; Oland, Hamilton and Fichaud, JJ.A. concurring; Beveridge, J.A. dissenting.

Counsel: Scott R. Campbell and G. Grant Machum, for the appellant
Robert K. Dickson, Q.C., Sean F. Layden, Q.C. and Ansley Simpson, for the respondent Michael Sampson Coady
Jocelyn M. Campbell, Q.C., for the respondent Wentworth Valley Developments Limited

Reasons for Judgment:

[1] A young man was paralyzed when he fell and broke his neck while snowboarding in February, 2008. He sued the owners of the mountain resort as well as the manufacturer of the snowboard alleging that they were negligent in failing to maintain the site and by enticing him to borrow a professional snowboard without doing anything to verify his age, experience or ability on the hill.

[2] Both defendants argued that the plaintiff could not mount a proper case for trial and each brought a motion in Chambers for summary judgment to have his suit dismissed. Nova Scotia Supreme Court Justice Gregory M. Warner heard the motions in Chambers. After a hearing that lasted six days spread over three months, he dismissed the defendants' request for summary judgment. The snowboard manufacturer appeals the judge's decision to this Court. The ski resort owners have chosen not to appeal.

[3] For the reasons that follow I would dismiss the appeal. I will start by offering a brief summary of the background to this proceeding to provide context for the analysis that follows. A much more detailed recitation of the facts may be found in Justice Warner's decision now reported as 2012 NSSC 257.

Background

[4] Michael Coady was born on June 5, 1991. On Saturday, February 16, 2008, he was 16 years of age. On that day he and two high school friends drove to the Wentworth Valley Ski Resort, owned by Wentworth Valley Developments Limited ("Wentworth") to snowboard. Burton Canada Company ("Burton") manufactures, distributes and sells snowboards. On the day of the mishap Burton had set up a promotional booth at Wentworth which offered snowboarders trial runs on its snowboards and free high-caffeine energy drinks.

[5] Michael Coady and his friends took Burton up on its offer. He signed the waiver document presented by Burton officials, handed over his driver's license as ID, and acquired a snowboard. After a couple of runs down the regular ski hills on his own snowboard, Mr. Coady took the Burton board and followed the same route

for a third run down the hill. Then he decided to enter the "Terrain Park", a section of the resort which was constructed and groomed as a place where snowboarders could try out more challenging jumps, tricks and manoeuvres. On his first approach to the first feature, a barrel jib, Mr. Coady fell due to what he described as slick and icy snow conditions on a snowboard that was much faster and lighter than his own. He suffered a serious fracture of the C-5 vertebrae, with damage to the spinal cord, resulting in partial paralysis. He is now confined to a wheelchair.

[6] On October 3, 2008, Mr. Coady sued Burton and Wentworth for negligence. The judge's decision on the summary judgment motions provides a nice summary of Mr. Coady's allegations against the defendants:

> [6] ... Against Burton, he claimed that it failed to instruct and warn about the potential danger respecting use of its superior snowboard, failed to verify his age before giving him the board to test, and provided him with easy access to free high energy drinks in conjunction with the snowboard. Against Wentworth, he claimed that it failed to supervise or have a system in place to supervise users of the Burton snowboards, especially minors and amateurs like himself, failed to warn of the dangerous condition of the barrel jib feature by proper warning signs, and failed to maintain safe snow conditions.

[7] Over the ensuing 2½ years there was a profusion of interlocutory filings and events which included amendments to the statement of claim; demands for particulars; delivery of unsworn affidavits; limited disclosure; change of counsel; offers and then withdrawals of consent to amend; filing and amendment of defences; ultimately leading to the hearing before Justice Warner.

[8] Justice Warner's decision provides a very detailed and helpful chronology of the multiple steps in pleading, production and discovery which led up to the protracted 6-day hearing that began in January and spread over into February and March, 2011. Hearing days were taken up with the cross-examination of two Wentworth officials who had filed affidavits as well as several other days spent considering counsels' oral submissions. Warner, J. reserved judgment. Sixteen months later, on July 9, 2012, he filed a lengthy 37-page decision dismissing both motions for summary judgment and awarding Mr. Coady his costs of $24,000 plus reasonable disbursements, payable forthwith.

[9] In resisting Wentworth's and Burton's motions for summary judgment, Mr. Coady said the motions were premature and that Wentworth and Burton had failed to satisfy their burden of persuading the court there were no material facts in dispute which would require a trial to resolve. Alternatively, on the undisputed facts, Mr. Coady said his claim had a real chance of success.

[10] After a very detailed analysis Warner, J. concluded that both Burton and Wentworth had failed to satisfy him that there were no material facts in dispute and that as a result this was not a proper case to grant the defendants their summary judgment. He went on to consider the alternative argument raised by Mr. Coady that the defendants' motions for summary judgment were premature and ought to be dismissed on that basis as well.

[11] As noted earlier in these reasons, only Burton has chosen to appeal Justice Warner's decision. Wentworth has elected not to appeal, and is content that the matter proceed to trial. While it won't be necessary for me to refer in detail to Warner, J.'s consideration of the case as it relates to Wentworth, I think a brief review would be helpful since the numerous allegations against both defendants overlap to a certain extent and because I think the exercise will inform the analysis concerning Burton that follows.

[12] In denying Wentworth its motion for summary judgment Justice Warner was satisfied there were material facts that were very much in dispute which related to at least three of the plaintiff's allegations. These are set out in detail at ¶202-230 of his decision. In the context of this appeal it is enough for me to say that as far as Justice Warner was concerned, these were important factual disputes, all of which related to the duty and standard of care owed by Wentworth to Mr. Coady and which deserved to be resolved by a decision-maker after a full trial on the merits. Those issues included:

- Mr. Coady's level of skill and experience snowboarding in terrain parks containing features made from steel pipes, rails and "items other than snow" such as those that were offered at this resort, on the day of this tragic mishap;

- the condition of the take-off to the barrel jib feature at the time Mr. Coady approached it and fell, which would include both the dangerousness of the snow conditions at the time and whether the feature should have been closed on account of it being too icy to brake, and also whether the designation marking the barrel jib as "M" (for medium) was appropriate to describe its degree of difficulty and dimensions;

- whether the barrel jib feature was curved and, if so, whether snowboarders were properly warned about its characteristics, shape and condition; and

- the nature of the relationship, contractual or otherwise, between Wentworth and Burton and, in particular, how Burton conducted its activities while occupying Wentworth's premises and what either or both parties did to fulfill their duty to visitors using their products and facilities.

[13] These then were the principal factual issues the motions judge found to be unresolved and would require a full trial to sort out. Put another way, Wentworth had failed to meet its burden of demonstrating that there were no material facts in dispute. For that reason alone they were not entitled to summary judgment. On this record I am not surprised that Wentworth has chosen not to appeal. In my respectful view Justice Warner's decision reflects a proper application of the law to the evidence before him and has not produced an obviously unjust result.

[14] I turn now to Burton's request for leave to appeal and appeal from Warner, J.'s dismissal of its motion for summary judgment, as well as the judge's award of costs. As far as costs are concerned, Burton complains that the judge erred by dividing the $24,000 costs plus disbursements award to Mr. Coady, evenly as between Burton and Wentworth. Justice Warner's order reads:

> ...
>
> Now upon motion, it is ordered that:
>
> 1. The motions are dismissed.

> 2. Costs in the amount of $24,000.00 plus reasonable disbursements as verified by Affidavit are payable forthwith by the Defendant to the Plaintiff, one half from each of the Defendants.

[15] Burton says this is unfair "because Wentworth was far more active than Burton during the hearing of the motions". It says its exposure should have been limited to $4,000 under the circumstances.

[16] Wentworth has joined the appeal as a respondent saying Burton's appeal of costs ought to be dismissed on the basis that Justice Warner's ruling fell clearly within his broad discretion in such matters. Wentworth seeks its costs on appeal.

Issues

[17] The parties do not agree on how to articulate or characterize the issues. In my view there are only four and I would frame the issues this way:

1. Should leave to appeal be granted?

2. Did the Chambers judge err by refusing to grant Burton summary judgment?

3. Did the Chambers judge err by ruling, in the alternative, that the motion for summary judgment was premature?

4. Did the Chambers judge err in his award of costs?

Standard of Review

[18] The first issue is not subject to a standard of review analysis. The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. See for example, **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 (C.A.); **Michelin North America (Canada) Inc. v. Richard Ross**, 2002

NSCA 102; **Hogeterp v. Huntley**, 2007 NSCA 75; **Hartling v. Nova Scotia (Attorney General)**, 2009 NSCA 130; **Sydney Steel Corp. v. MacQueen**, 2013 NSCA 5; and **Abbott and Haliburton Company v. WBLI Chartered Accountants**, 2013 NSCA 66.

[19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. See for example, **AMCI Export Corporation v. Nova Scotia Power Inc.**, 2010 NSCA 41; **Innocente v. Canada (Attorney General)**, 2012 NSCA 36 at ¶21-29; **WBLI Chartered Accountants, supra**; and **Nova Scotia v. Roué**, 2013 NSCA 94.

[20] Finally, with respect to Justice Warner's award of costs, we will not interfere unless we are convinced that he erred in principle or that his decision is so clearly wrong as to amount to a manifest injustice. See **Frothingham v. Perez**, 2011 NSCA 59; and **Young v. Hayward**, 2013 NSCA 65.

Analysis

[21] Before answering the four questions posed in ¶17, supra, I wish to address some serious shortcomings in how this matter was handled which I find especially troubling. This will require a review of the rationale behind summary judgment and the proper analytical framework to be applied whenever such motions are heard.

<u>Preliminary Matter – The Purpose of Summary Judgment</u>

[22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as

being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[23] By any measure the sequence of events and unnecessary time and resources expended in this case is hardly the standard by which motions for summary judgment ought to be gauged. This ill-fated mishap which caused Mr. Coady to suffer catastrophic injury occurred more than five years ago, yet to this point his litigation has precious little to show for it. During questioning at the hearing counsel acknowledged that this was not the way summary judgment is supposed to work. In fact, this case could serve to illustrate how badly things can go whenever litigants lose sight of the object, goals and directions prescribed by our Civil Procedure Rules.

[24] In this case, respectfully, it would seem that everyone – counsel and the judge – lost their way. There was nothing "summary" about it. Initially the lawyers predicted that half a day would suffice. As it turned out, their assessment was grossly under estimated. The hearings lasted 6 days. A massive record was assembled and filed even though production was limited, and not very productive. Some discoveries were held. Certain affidavits were filed. Lengthy cross-examinations were conducted. The judge's decision was reserved for 16 months and when released totalled 37 densely packed, single-spaced pages comprising 238 paragraphs. The outcome led to a complicated appeal, where we sat a panel of five members of this Court. Six lawyers appeared to argue their respective positions, fighting over a record comprising 11 volumes and forming a pile a foot high. Whereas the publication of the Rules in 1972 heralded a new dawn with rules permitting exceptionally broad discovery designed to prevent "Trial by ambush", we now – in this case – with reliance upon the 2009 revised CPRs see signs or hear complaints of "Chambers by ambush".

[25] These are not the qualities or characteristics one would wish to have associated with a motion for summary judgment. Hopefully the reasons that follow will serve to avert the procedural and substantive flaws that arose in this case, so that they are not soon repeated.

[26] The legal principles applicable to a motion for summary judgment are not complicated. The seminal case in Canada is **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 which has been applied in a long series of cases in Nova Scotia ever since. See for example, **United Gulf Developments Limited. v. Iskandar**, 2004 NSCA 35; **Eikelenboom v. Holstein Association of Canada**, 2004 NSCA 103; **Orlandello v. Attorney General (Nova Scotia)**, 2005 NSCA 98; **Nova Scotia Home for Coloured Children v. Milbury**, 2007 NSCA 52; **Hogeterp, supra**; **Young v. Meery**, 2009 NSCA 47; **AMCI Export Corp.**, **supra**; **Bank of Nova Scotia**, **supra**; **Frothingham**, **supra**; **Globex Foreign Exchange Corporation. v. Launt**, 2011 NSCA 67; and **2420188 Nova Scotia Ltd. v. Hiltz**, 2011 NSCA 74.

[27] In **Guarantee** the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[28] That statement was affirmed by the Supreme Court of Canada in **Canada (Attorney General) v. Lameman**, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:

> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must

> either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[29] The Rules have not changed these well-established legal principles. Rather, they attempt to codify the legal principles that emerge from the case law into a workable, effective matrix of procedural directives and deadlines.

[30] It appears to me that some of the difficulty experienced by counsel and judges in this area of the law may arise because the Rule does not accurately track the test established by the Supreme Court in **Guarantee**. Here, Burton and Wentworth brought their motions for "summary judgment on evidence" pursuant to CPR 13.04 which provides:

> **13.04** (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

> (6) The motion may be made after pleadings close.

[31] The test for summary judgment established in **Guarantee** almost 15 years ago and applied consistently ever since is that any defendant (in this case Wentworth and Burton) who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial". (Underlining mine). The words I have underlined "of material fact" were not repeated in the Rule. As we have seen, CPR 13.04(1) reads:

> (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment. (Underlining mine)

The critical words "of material fact" have been dropped. I think this is unfortunate and may have led to some confusion in both the application of the test and the steps or stages that are triggered during that application.

[32] While a careful reading of the Chambers judge's reasons as a whole satisfies me that he correctly applied the law and properly concluded that Burton's motion ought to be dismissed, his use of language in certain respects might suggest a straddling or conflating of the respective burdens inherent in such analysis as well as the distinct stages such an inquiry includes. While such expressions had no impact on the result in this case they have the potential of leading a decision-maker astray in the next case.

[33] I will refer to certain parts of the judge's decision to illustrate my point. At ¶135 Justice Warner said:

> [135] The purpose of a summary judgment motion is to determine whether there are sufficient undisputed facts which, when the law is applied to them, give rise to a genuine issue for trial. (Underlining mine)

I would respectfully disagree with his reference to "sufficient undisputed facts" on two fronts. First, the judge's statement suggests a blurring of the two distinct stages of inquiry on a summary judgment motion. In the first stage of the analysis the judge's sole focus is on the *disputed* facts. The "undisputed facts" are

irrelevant in the first stage of the analysis. Second, a judge is not to undertake any kind of quantitative or qualitative analysis of the *amount* of facts when deciding whether to grant summary judgment. The court does not enter into an inquiry as to the "sufficiency" of the facts, whether they are disputed or otherwise. With respect, the test is only whether there are *any* material facts in dispute. If there are then a judge must conclude that summary judgment is not available and that a trial is required to resolve the dispute.

[34] There were other comments by the judge which are problematic. I will list them here:

- "Burton submits that, based on Coady's evidence, there is no material facts in dispute (sic) and the undisputed material facts raise no genuine issue for trial." (at ¶45)

- "Applying the ***Guarantee*** test, I conclude that the plaintiff has demonstrated sufficient material facts exist, from his discovery evidence and the waiver agreement, to raise a genuine issue about the duty and standard of care owed by Burton to him ...." (at ¶120)

- "I deny summary judgment on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial." (at ¶148)

- "There is disputed facts (sic) material to the alleged negligence ... Based on the facts on this motion, the plaintiff has satisfied me that genuine issues remain for trial." (at ¶230)

[35] The way the judge has expressed himself might suggest in the mind of the reader that there was some burden upon the plaintiff, Mr. Coady, to show that there *were* genuine issues of material fact in dispute. Further, it might appear that the judge had crossed over, unnecessarily, into an inquiry on the merits as to whether the plaintiff could counter or refute the defendants' evidence, and if not, risk summary dismissal.

[36] While, as I have said, these transgressions had no effect on the result in this case, some clarification is called for. I will do that by describing the analytical framework to be applied on summary judgment motions.

The Proper Analytical Framework

[37] I will deal first with the burden, and then with the sequence of steps that occur when applying the test.

[38] This was Burton's motion for summary judgment. Burton had the burden of satisfying Justice Warner that there were no genuine issues of material fact requiring a trial. That is stage 1 in the analysis. During this stage there was no burden upon Mr. Coady to do anything. Burton had the onus of satisfying the Chambers judge that summary judgment was a proper question for consideration. In order to do that Burton bore the evidentiary burden of showing that there was no genuine issue of material fact which would necessitate a trial. It failed to do so.

[39] Once Justice Warner concluded that Burton had failed to meet its burden, his finding ought to have ended the analysis. He did not have to enter into an inquiry, tangentially or otherwise, into the merits of Mr. Coady's claim or his chances of success. That is stage 2 in the analysis and only arises if the moving party has met the first stage which is to satisfy the court that there are no genuine issues of material fact requiring a trial.

[40] It would only be if Burton had met its initial burden, that the responding party (here Mr. Coady) would be required to show he had a real chance of success with his claim (**AMCI, supra**). This would then engage the second stage of the inquiry.

[41] It is important to remember the difference and the necessary separation between the first and second stage in the analysis. Justice Fichaud (for the majority) put it well in **2420188 Nova Scotia Ltd., supra** at ¶21-28:

> [21] In *Nova Scotia v. Brill,* this Court said:

> [173] ... The applicant must show there is no genuine (or arguable) issue of material fact requiring trial. ***If the applicant does not show this, the application is dismissed. If the applicant shows this, then***, to defeat the application, ***the responding party must show,*** on the undisputed facts, that his claim or defence has ***a real chance of success***: [citations omitted] [emphasis added]

[22] Similarly, in *AMCI Export Corporation. v. Nova Scotia Power Incorporation*, 2010 NSCA 41, Justice Saunders for this Court said:

> 14. ... As the moving party, NSPI had the burden of establishing that there was no genuine or arguable issue in dispute with respect to paragraph 8 which would necessitate a trial, and that therefore entitlement to summary judgment could be properly considered by the Chambers judge. ***Provided NSPI met this initial burden***, then the responding party, ***AMCI, was required to show a real chance of success*** in its defence. [citations omitted]
>
> 15. ... ***Only if he were persuaded that NSPI had satisfied this initial threshold, would he then go on to ask himself the second question***, whether AMCI had demonstrated that it had a real chance of success in advancing the pleading set out in paragraph 8 of its amended defence. [emphasis added]

To similar effect: *Eikelenboom v. Holstein Canada*, 2004 NSCA 103, para. 24; *United Gulf Developments Limited. v. Iskandar*, 2004 NSCA 35, paras. 8-9, 15; *Selig v. Cook's Oil Company*, 2005 NSCA 36, paras. 9-10. In *AMCI*, paras. 16-17, Justice Saunders quoted *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 (C.A.), para. 20, per Pugsley J.A. and *Campbell v. Lienaux* (1998), 167 N.S.R. (2d) 196 (C.A.), para. 14, per Cromwell J.A., stating that "[s]ummary judgment applications are not the appropriate vehicle for determining disputed facts, ...".

[23] *Eikelenboom* is an example of the Stage 1 test being satisfied:

> 30 ... The ***material facts***, as found by the Chambers judge, ***were not in dispute***. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. ***This is not a case where the motions judge had to reconcile competing affidavits from opposing sides.*** The only disagreement between the parties concerned the application of the law of

> waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital*, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding. [emphasis added]
>
> *AMCI*, para. 35 reiterated this passage from *Eikelenboom*.

[24] To summarize these authorities, Stage 1 requires the motions judge to ask whether there is a disputed issue of material fact. If the answer is Yes, the judge should dismiss the application for summary judgment, without engaging in Stage 2's assessment of the merits. I disagree with Mr. Alex's submission quoted above (para. 15) that "... the moving party need not demonstrate that there are no material facts in dispute ...". That is precisely what the moving party must show at Stage 1.

[25] Further, whether there is a disputed issue of material fact involves a comparison of both parties' evidence and positions. A dispute by definition engages more than one party. I disagree with Mr. Alex's submission quoted above (para. 15) that at Stage 1 "... the motions judge is to look only at the evidence presented by the moving party." (Appellants' underlining).

[26] Mr. Alex's submission assumes that Stage 1 assesses the strength of the moving party's case in isolation, then Stage 2 assesses the strength of the responding party's case. This misunderstands the test. Stage 1 assesses whether there is a dispute of fact between the parties. Then Stage 2, if it is engaged, assesses the relative merit of the parties' positions.

[27] The disputed fact under Stage 1 must be "material", ie. essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

[28] Mr. Alex's submissions effectively would circumvent Stage 1 of the summary judgment test, and move directly to Stage 2's qualitative assessment of the merits. That is not the law under Nova Scotia's Rule 13.04 according to the authorities I have cited. The two stages are sequential. Stage 2's assessment of the merits awakens only if Stage 1 (whether there is a disputed issue of material fact) is put to rest. Whether the responding party's evidence refutes the moving party's

> evidence does not relate to Stage 1's issue of whether there is a dispute. Rather it relates to the Stage 2's assessment of the merits of that dispute.

[42] At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is not – as the judge put it here – to see if the "undisputed facts ... give rise to a genuine issue for trial". That is a misstatement of the test established in **Guarantee**. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?

[43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.

[44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:

> *Is there a reasonable prospect for success on the undisputed facts?*

the answer would be yes.

[45] Having described the correct analytical framework both in terms of burden and sequential steps, I will now return to my analysis of the issues listed in ¶17, supra.

#1 – Should leave to appeal be granted?

[46] Here the respondent agrees that the appeal raises issues that are at least arguable on their face. I concur. I would grant leave to appeal.

#2 – Did the Chambers judge err by refusing to grant Burton summary judgment?

[47] In my respectful opinion, he did not. As I see it, there were a variety of significant contested questions of fact, mixed law and fact, or inferences to be drawn from disputed facts which were – as the judge found - ill-suited to a summary judgment proceeding. His decision is replete with such references as well as the links to their evidentiary support in the record. For the purposes of this appeal I intend to only briefly review Justice Warner's findings in this case. They are extensively canvased at ¶45-149 of his decision. It is enough for me to mention the principal material facts in dispute that Justice Warner viewed as defeating Burton's motion for summary judgment. Whether I would have come to the very same conclusion on all of these factual matters had I been hearing the motions, is not the test. Rather, looking at his reasons as a whole, I am not persuaded that they reveal any error in principle.

[48] At the hearing Burton argued that Mr. Coady was an experienced and accomplished snowboarder; that it had no duty to warn him about the nature and potential dangers associated with the use of its snowboard; and that the waiver Burton presented to Mr. Coady was irrelevant to the motion because the company did not rely upon the waiver to exempt itself from liability.

[49] Warner, J. disagreed. He found that the waiver document had some relevance and informed several aspects of the case including a recognition and

acknowledgement of the inherent danger in snowboarding, and the duty and standard of care owed by Burton to those to whom it lent snowboards. As part of its waiver agreement Burton required the signature of a parent or guardian if the user were under the age of 18. Before giving Mr. Coady their snowboard they obtained his driver's license from which they knew or would be presumed to know that he was 16 years of age. With respect, Burton's statement at the hearing that it was not "relying" upon its own waiver for the purposes of the summary judgment motion is far too simplistic. The waiver agreement prepared by Burton and signed by Coady is "evidence" and something upon which Mr. Coady can place reliance. There is no privity or ownership of evidence. On this motion Mr. Coady was entitled to rely upon the waiver and its content in resisting Burton's motion and Warner, J. was undoubtedly able to take it into account as important evidence during his analysis.

[50] Justice Warner reasoned:

> [90] Burton set up its kiosk at Ski Wentworth and offered to lend snowboards to the underage plaintiff and his two underage friends. There is no evidence that Burton's employees made any inquiries of these underage boys as to their skill level or experience; the plaintiff said that they did not. There is evidence that they provided the boys with a waiver agreement. It is reasonable to infer that the Burton employees would have been aware of both the printed contents of the waiver agreement and the entries made - and not made, on the forms by these boys, including the plaintiff. The waiver agreement contains information which, on its face, informs the duty and standard of care owed by Burton to those to whom it lent snowboards.
>
> [91] There is no evidence before the Court on this motion that, having no knowledge of the skill level or experience of the plaintiff, the Burton employee(s) placed any restrictions on where the plaintiff could go or what he could do with the Burton snowboard.
>
> [92] Burton relies entirely upon the discovery evidence of the plaintiff to argue that it is an undisputed fact that the plaintiff was an experienced snowboarder and that Burton's snowboard was a superior snowboard to the plaintiff's snowboard, in the sense that it gave him better control on the hill.
>
> ...

[94] The so-called waiver agreement, titled "Snowboard Equipment Demo/ Rental, Agreement Not to Sue, Waiver of Claims and Assumption of Risk Agreement" signed, but not read, by the plaintiff, except for noticing the requirement for the signature of a parent or guardian if the user was under the age of 18, reads in part: "I am aware that snowboarding involves certain inherent risks, dangers and hazards which can result in serious personal injury or death."

[95] The form, prepared by Burton, requires the signature of the equipment user, the date of birth of the equipment user and the signature of the parent or guardian if the user is under the age of 18 years. Coady was sixteen, and had left the age part of the form blank.

[96] The waiver agreement is evidence that Burton, which is in the snowboard business, believes that snowboarding involves "certain inherent risks, dangers and hazards which can result in serious injury or death."

[97] That acknowledgment is not contradicted by any other evidence. At least for the purposes of this summary judgment motion, it is some material evidence that informs the duty owed by Burton to any user of a demo snowboard pursuant to the agreement and is material to the standard of care owed by Burton to a user, such as the plaintiff. It is not logical that Burton would have no duty, as argued by it, to determine the capacity of those to whom it lends 'really high end boards' to determine the ability of those to whom it lends these boards, to handle such boards in an activity that it warns involves inherent risks, dangers and hazards and for whom it requires the consent of parents or guardians for users under eighteen years of age.

...

[99] For the purpose of this motion, some evidence exists that a duty of care (to warn a snowboarder, particularly a snowboarder under the age of 18, of the inherent risks of snowboarding and of the use of an unfamiliar high-end board) is owed by Burton. I do not accept Burton's submission that, based on the facts before me, it does not owe a duty of care to the users of its demo-boards, particularly under-age users.

...

[101] Based on this acknowledgment and representation by Burton in the agreement, there is material evidence upon which a trial judge may find that

> Burton owed a duty to the plaintiff to warn him regarding the inherent dangers in using the snowboard, the risks of using unfamiliar equipment, and whether the Burton snowboard created a greater risk or potential for danger than the plaintiff's own snowboard, and to determine whether he had the ability to safely use its board.

[51] There is nothing in the judge's reasoning which would cause me to intervene.

[52] Warner, J. also declined to accept Burton's characterization of Mr. Coady's level of proficiency as a snowboarder. As the judge noted:

> [103] The defendants rely heavily upon the plaintiff describing himself as an advanced snowboarder. The term "advanced" was not defined, and was not the plaintiff's word, but the word of the cross-examiner. ...

[53] The judge then went on to refer at length to portions of Mr. Coady's discovery evidence which established that as far as Mr. Coady was concerned the snowboard he obtained from Burton was lighter and faster than his own, such that he gained much more speed than he was anticipating as he approached the barrel jib where he fell. And so, quite apart from the surface conditions or the shape, location, dimension and warning markings related to this feature, Mr. Coady believed that the high end professional snowboard he was given was a factor in his accident. Clearly these were important factual matters which Burton disputed. They sought to absolve themselves from any liability based on their assertion that Mr. Coady was a very experienced snowboarder, well versed in the inherent danger of the sport, fully capable of manoeuvring at that site and that neither the board they gave him nor the waiver agreement they neglected to have properly completed played any role in the permanent, disabling injury he sustained.

[54] To all of this the judge said:

> [107] Absent evidence from Burton, and relying solely upon the evidence before the Court on this motion, there is some evidence that snowboarding involves inherent risks, dangers and hazards, and that the snowboard provided to the plaintiff was faster and lighter, and performed differently than the plaintiff's own

> snowboard. Burton acknowledges, for purposes of this motion that it did not warn of these risks.
>
> ...
>
> [111] However, Burton did create a waiver agreement that it required users to sign and which required the signature of a parent or guardian of a user under the age of 18. Moreover, Burton acknowledged in the waiver agreement that snowboarding involved inherent risks. This is evidence that informs the duty and standard of care on Burton to warn the plaintiff with respect to the use of its snowboard. The plaintiff was a minor whose evidence in discovery on December 11, 2009, at the top of page 279, the only evidence before the court, was that he did not appreciate the risks and potential dangers of using Burton's snowboard, a board that was faster and lighter than, and which performed differently from, the plaintiff's own snowboard.
>
> ....
>
> [120] Applying the ***Guarantee*** test, I conclude that the plaintiff has demonstrated sufficient material facts exist, from his discovery evidence and the waiver agreement, to raise a genuine issue about the duty and standard of care owed by Burton to him and the possibility that breaches of Burton's duty of care caused, subject to waiver and contributory negligence, Coady's accident and injuries.

[55] This brief summary of important factual matters which are very much in dispute makes this case entirely distinguishable from my reasons in *Eikelenboom v. Holstein Canada*, 2004 NSCA 103, where I wrote:

> [30] ... With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories .... This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. ...

[56] These findings on the part of the judge were fully supported on the record and reason enough to reject Burton's motion for summary judgment on the basis

that Burton had failed to meet its evidentiary burden under stage 1 of the inquiry. There is nothing in the judge's assessment which would cause me to intervene.

[57] Accordingly, there was no need for the judge to move into stage 2 of the analysis. Whether Mr. Coady will succeed in proving his other allegations which seek to attribute liability to Burton and/or Wentworth on the basis of supplying him with high-energy caffeinated beverages and/or some application of occupiers' liability law should – as the judge determined – be left to be decided during a trial on the merits.

[58] On this record it is obvious that a whole host of genuine issues emerge from the cause of action and the defences advanced in this case. They would include: causation; foreseeability; negligence; duty of care; standard of care; breach of the duty of care; contributory negligence; risk; degree of danger; warning; consent; and waiver. From my reading of Justice Warner's reasons he was alive to how a resolution of these matters would require a full trial on the merits. After a painstaking review of the record Warner, J. recognized that a summary judgment hearing was not the proper forum to decide such difficult and hotly contested issues.

[59] I will elaborate on one point that was central to Burton's submissions. Burton's factum [para. 54(a)] "does not dispute that it owed a duty of care to the Plaintiff". Burton focussed instead on causation, for which Burton submitted that Mr. Coady fails both branches of the summary judgment test. Burton's factum says:

> 54(d) There is no factual dispute about causation. ...
>
> 75. This does not mean, however, that the Plaintifff thus established a "real chance of success" of its claim Instead, and for the reasons already explained, the Plaintiff cannot establish the element of causation as required by law. ...

[60] I respectfully disagree. There is a "genuine issue for trial" under Rule 13.04 on this matter. I say this for the following reasons.

[61] Mr. Coady was 16 years old at the time of the accident. His youth is a factor that may elevate Burton's standard of care. Lewis N. Klar et al, *Remedies in Tort*, looseleaf (consulted on 6 June 2013) (Toronto:Carswell, 1987) Chap. 20 at para. 37 says:

> A manufacturer has no duty to warn consumers of the dangers of use or misuse which are so apparent or well known to the ordinary prudent person that a warning is unnecessary in law. One example would be a sharp knife; another, the effect of high voltage electricity on a person. However, a child and an adult have different capacities in their ability to appreciate risks. A risk which is obvious to an adult may not be obvious to a child. The principles employed in determining the standard of care of a child beyond tender years, namely, what is reasonable for a child of like age, intelligence and experience, should be used in determining whether a risk is reasonably obvious to a child.

Similarly, in **Crocker v. Sundance Northwest Resorts Ltd.**, [1988] 1 S.C.R. 1186, para. 21, Justice Wilson for the Court said:

> 21 ... The common thread running through these cases is that one is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury. The plaintiff's inability to handle the situation in which he or she has been placed--either through youth, intoxication or other incapacity--is an element in determining how foreseeable the injury is. ...

[62] In Mr. Coady's case, the degree, if any, to which Mr. Coady's youth may affect Burton's standard of care likely will be pivotal. The definition of the standard of care involves issues of fact, including the drawing of inferences from the evidence: see **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120, which discussed the topic at length.

[63] The evidence on this summary judgment record has meagre pickings from Burton. But one item we do have is Burton's "SNOWBOARD EQUIPMENT DEMO/RENTAL, AGREEMENT NOT TO SUE, WAIVER OF CLAIMS AND ASSUMPTION OF RISK AGREEMENT". This document says (1) "snowboarding involves certain inherent risks, dangers and hazards which can result in serious personal injury or death." (2) "THE RISKS INHERENT IN THE SPORT OF SNOWBOARDING CAN BE GREATLY REDUCED BY TAKING

LESSONS, RIDING WITHIN MY ABILITIES AND USING COMMON SENSE AT ALL TIMES" and (3) "I HEREBY FREELY AGREE TO ASSUME AND ACCEPT ANY AND ALL KNOWN AND UNKNOWN RISKS OF INJURY WHILE USING THIS EQUIPMENT." [capitalization on the form] There is a line for signature of the Equipment User, beside which there is another line over the words "Signature of Parent or Guardian if user Under the Age of 18". Mr. Coady signed without reading it. But there was no signature by his parent or guardian, and apparently no insistence by Burton that his parent or guardian sign before Burton gave the snowboard to Mr. Coady.

[64] Mr. Coady suggests that, for the definition of Burton's standard of care to a minor, Burton's form supports the inference that Burton has adopted a standard – i.e., that the parent is to lay eyes on the warning, which gives the parent an opportunity to talk sense into the child before the child uses the snowboard. As to causation, Mr. Coady's parents were at home in Enfield, over an hour's drive away. So, if Burton had insisted on a parent's signature, likely Mr. Coady would not have obtained the snowboard that day, meaning the accident and injury would not have occurred.

[65] Burton, on the other hand, says that the form requires the parent's signature solely because otherwise the waiver would be legally invalid, and the form carries no inference as to the standard of care.

[66] Which of these competing views is preferable involves the drawing of inferences from the evidence – i.e., from the form itself and from the testimony of witnesses who may speak to the circumstances surrounding the form, its creation and use. This is a classic "genuine issue for trial" under Rule 13.04.

[67] For all of these reasons I would not disturb the judge's order.

#3 - Did the Chambers judge err by ruling, in the alternative, that the motion for summary judgment was premature?

[68] At the hearing before Justice Warner, Mr. Coady advanced two other arguments as a basis for the court's rejection of the defendants' motions for

summary judgment. First, Mr. Coady said the motions were premature. Second, he said the motions were not in the interests of justice. In his decision the judge described these "two other reasons" as "inter-related" (at ¶123).

[69] Counsel for Burton challenged the plaintiff's position. At the hearing before Warner, J. Mr. Machum, counsel to Burton, made this submission:

> My Lord, we provided you with a brief on February 8th dealing with the issue of a motion for summary judgement being premature, and I would simply say, My Lord, that although there might have been decisions of this court previously looking at the issue of prematurity, my position in this brief is that the new rule, you either have to - - you have to either grant summary judgement or not grant summary judgement, and I would submit that adding in this layer of being able to assess whether something is premature or not goes against the reading of the rule. If you have that first step in there, then the words within the rules say that you must grant or dismiss summary judgement have no effect. You could decide prematurity on every case and get around having to grant summary judgement or dismissing it. So my brief, you would have seen, takes the position that there is no authority on you under that rule to determine whether something is premature or not. (p. 1133)

[70] Respectfully, on this point I agree with Burton. Under CPR 13.04 as presently worded there is no residual inherent jurisdiction or discretion which would enable a judge to refuse a motion for summary judgment on the basis that it was premature, or because other interests of justice might preclude it.

[71] In the court below Justice Warner rejected Burton's submissions. He decided, in the alternative, that Burton's motion was premature and that he retained an inherent judicial discretion, notwithstanding the new wording for the test for summary judgment under CPR 13.04, to refuse the motion for other reasons. Justice Warner stated the issue concisely as:

> [33] ... whether the wording of the *new Rule* for summary judgment on the evidence still permits the motions judge to exercise discretion to refuse motions, apart from application of the ***Guarantee*** test, on the basis that the plaintiff has not yet had a fair opportunity to put his best foot forward or for other juridical reasons.

[72] After citing at some length the decision of the Ontario Court of Appeal in **Combined Air Mechanical Services Inc. v. Flesch**, 2011 ONCA 764, Warner, J. reasoned that notwithstanding the differences in wording between the old **1972 Civil Procedure Rules**, and the new January 1, 2009 **Civil Procedure Rules** (canvassed at ¶24 *ff*. of his decision) he could still decline to grant summary judgment in cases where he thought the justice of the situation required it. To the extent that Warner, J. relied upon **Combined Air** as a basis for his conclusion I would, respectfully, say that he erred. That case is entirely distinguishable from this one and concerned the Ontario Court of Appeal's review of the 2010 amendments to their Rule 20, in particular, the enhanced powers given to motions judges when dealing with summary judgment applications. In my opinion neither the subject-matter of those consolidated proceedings nor the explicit changes to their Rule have any bearing on this case.

[73] In **Combined Air** the Ontario Court of Appeal considered that province's new summary judgment rule 20.04(2.1) which provides:

> In determining under Clause 2(a) whether there is a genuine issue requiring a trial, the Court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the best interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence. (Underlining mine)

[74] With respect, I think Warner, J. applied far too broad an interpretation to the new CPR 13.04 and read into the Rule words which are no longer applicable. While nothing turns on it in this case, his erroneous interpretation should be corrected for cases arising in future.

[75] In Nova Scotia the (1972) CPR 13.02 read in part:

> On the hearing ... the Court may on such terms as it thinks just, (a) give directions as may be required for the examination of any party or witness or for the production of any books or documents or copy thereof, or for the making of any further inquiries . . . (k) grant any other order or judgment as it thinks fit." (Underlining mine)

[76] New Rule 13.04 does not contain an express provision permitting the Court to "grant any other order or judgment" "as it thinks just." Thus, under the old Rule the judge retained a discretion to deny summary judgment, even where the moving party had been successful in satisfying the **Guarantee** test. Such relief would be available when, for example, the motion was premature, or when (to borrow the language in **Combined Air, supra**) a fair and just resolution, based on a full appreciation of the evidence, could not be achieved by summary judgment, or for other juridical reasons.

[77] With respect, there is nothing in our new Rule to suggest or imply that any remnants of an overarching inherent jurisdiction to refuse summary judgment, are retained. On the contrary, our new Rule provides:

> 13.04(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment. [Court's emphasis]
>
> . . .
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> . . .
>
> (6) The motion may be made after pleadings close. (Underlining mine)

[78] In my respectful opinion, CPR 13.04 permits the motion for summary judgment to be brought as soon as the pleadings are closed. Each side is then obliged to put his/her best foot forward. A complaint of prematurity, or surprise, or a promise of future evidence will not be enough to defeat the motion. Rather,

the judge will hear the motion and if the judge is satisfied that the two stages of the inquiry mandated under **Guarantee** have been met, the judge will be required to grant summary judgment. There is – in those circumstances – no retained inherent jurisdiction to refuse the request for summary judgment, such as there would appear to be in Ontario with the escape valve its Rule provides "unless it is in the best interest of justice for such powers to be exercised only at a trial".

[79] In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion was premature or that other juridical reasons ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent discretion by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

[80] All of this is not to say that a party drawn into a summary judgment hearing who is not at that time adequately prepared to resist it, is suddenly without a remedy and doomed to fail. Nor do these conclusions mean that a responding party will be forced to put his "best foot forward", at the peril of summary judgment, before he has access to the relevant evidence possessed by the moving party. The granting and denial of summary judgment are not the judge's only options under Rule 13.04. The judge also may adjourn, as an element of his procedural discretion.

[81] Before addressing the utility of an adjournment in the summary judgment context, I will review the disclosure between Mr. Coady and Burton:

a) On December 10 and 11, 2009, Mr. Coady was discovered by counsel for Burton and Wentworth. The transcript was dated March 12, 2010. On April 9, 2010, Burton filed this motion for summary judgment.

b) Burton, on December 1, 2009, provided Mr. Coady with an unsigned affidavit of documents, which only included a 130 page

> Burton Dealer catalogue describing the variety of boards, boots, bindings and other accessories offered by the company and Burton's Snowboard Equipment Rental Agreements, signed by Mr. Coady and by his two companions, Messrs. Oulton and Churchill. Mr. Coady has not had the opportunity to discover Burton's witnesses. Mr. Coady's counsel requested discovery of Burton's witnesses, and suggested dates, but the scheduling was not arranged before the hearing of Burton's motion for summary judgment. On the summary judgment motion, Burton's only sworn evidence was its solicitor's affidavit that attached the pleadings and excerpts from Mr. Coady's discovery transcript.

[82] Topics that might have generated pertinent evidence on a discovery of Burton's witnesses include why Burton's standard consent form required signed parental consent before a minor, such as Mr. Coady, could obtain the snowboard, and why Burton did not request that parental consent before giving the board to Mr. Coady on February 6, 2008. Neither by way of discovery nor at the summary judgment hearing has Burton advanced a witness who could speak to these topics.

[83] Burton asserts that the Rules, strictly interpreted, mean that whether or not the plaintiff's counsel had an opportunity to discover the defendant's witnesses is immaterial. Rule 13.04(3) says "the question of a genuine issue for trial depends on the evidence presented". Burton's factum to the Court of Appeal (para. 92) says bluntly:

> 'There either is sufficient evidence or there is not sufficient evidence.'

If the motion record has insufficient evidence to support the claim, urges Burton, the action should just be dismissed without idle speculation whether any potentially pertinent evidence may rest in the knowledge of the defendant's undiscovered witnesses. From a similar perspective, Burton's written submission to the Chambers judge said:

> 18. Burton submits that by permitting parties to bring motions for Summary Judgment after pleadings close, the Rules contemplate bringing Summary Judgment prior to the completion of discovery in their stated

> purpose of determining every proceeding in a just, speedy and inexpensive manner.

This latter passage invokes the "Object of these Rules" prescribed by Civil Procedure Rule 1.01:

> **1.01** These Rules are for the just, speedy and inexpensive determination of every proceeding.

[84] I respectfully disagree with Burton's interpretation of Rule 1.01.

[85] The "just" determination that Rule 1.01 mandates does not contemplate a summary judgment – because the responding party failed to put his "best foot forward" – before this responding party has had a reasonable opportunity to "better" his case with discovery of the relevant evidence that is possessed by the moving party. Ambush is not a criterion for the just, speedy and inexpensive determination of a proceeding. The lever to achieve the "just" result, in these circumstances, is an adjournment.

[86] If the motions judge is satisfied that the responding party reasonably requires disclosure, production or discovery, or an opportunity to present expert or other evidence before he is in a position to "put his best foot forward", then the judge should adjourn the motion so that those steps may be taken. Whether the adjournment is without day, or to a fixed date, or attaches conditions and a schedule for production, discovery, and the like, will turn on the judge's appreciation of the circumstances in each case. Of course, if the judge is satisfied that the responding party does not reasonably require further information, and is just procrastinating to forestall summary judgment, then an adjournment should be denied.

[87] Before turning to the final issue raised on appeal, I wish to provide a quick summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation. From the jurisprudence to which I have referred as well as the case law cited therein, a series of well-established legal principles have emerged. I will list these principles in the hope that their enumeration will serve as

a helpful checklist or template to guide counsel and judges in their application. In Nova Scotia:

1. Summary judgment engages a two-stage analysis.

2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

This brings me to the last issue which concerns the judge's disposition on costs.

#4 - Did the Chambers judge err in his award of costs?

[88] In disposing of costs Warner, J. said this:

> [234] The parties made oral submissions on costs at the end of argument. Tariff C applies.
>
> [235] This was a complex matter. It was of great importance to all parties, as success on the motions would have ended the litigation. The possible quantum of damages is unknown, but the injury to the plaintiff appears to have been very serious. The motion, scheduled for one day, consumed six days. The starting point for a six day chambers motion, without application of a multiplier, is $12,000.00.
>
> [236] In my view, the complexity and importance of the matter to the parties merits a multiplier of at least two.
>
> [237] The plaintiff should have his costs in the amount of $24,000.00, plus reasonable disbursements as verified by affidavit, one half from each of the defendants.
>
> [238] This litigation is likely to continue for some time. There is no evidence that either defendant is impecunious or would be unable to continue this litigation if it paid costs forthwith. For the reasons expressed in ***Merks Poultry Farms v Wittenberg***, 2010 NSSC 395, costs should be payable forthwith.

[89] Burton raises three objections. It says the judge ought not to have applied a multiplier under Tariff C. He should have recognized "the ostensible agreement" between Burton and Mr. Coady that "Burton should only have to pay $4,000 in the event that it is unsuccessful". Finally "because Wentworth was far more active

than Burton" during the hearing of the motions it was unfair for the judge to have ordered that the costs of $24,000 plus reasonable disbursements be divided equally between each of the two defendants.

[90] At the hearing in this Court counsel for Burton urged that we comment upon this aspect of the case and "breathe new life" into the application of the Tariffs in motions such as this.

[91] I decline to do so. The transcript of Mr. Coady's extensive discovery examination demonstrates to me the close collaboration between counsel for Burton and Wentworth in framing questions and building upon the responses each obtained during the lengthy sessions. I have no doubt the defendants would continue to co-operate in defending the action and pursuing common tactics whenever it worked to their mutual advantage. Further, from my review of the transcript, counsels' submissions on costs at the end of the hearing seemed hurried and superficial. They hardly establish the kind of record we would wish to have before considering a variation of the judge's order. On the contrary, his disposition seems fair and sensible to me. I am not persuaded that there is any good reason to disturb Justice Warner's costs award.

Conclusion

[92] With great respect to my colleague Justice Beveridge who writes in dissent, it is obvious that he and I have a very different view of the evidence, the facts, the inferences that a trier might draw from the facts, and the reach of the pleadings against Burton.

[93] I agree with Justice Warner's conclusion that there are many material facts in dispute which ground a variety of important issues that will require a full trial to resolve. Mr. Coady deserves to have his lawsuit against Burton and Wentworth tried on its merits. In reaching that conclusion Justice Warner did not err in principle; neither did his decision produce a patently unjust result.

[94] While he was wrong to decide, in the alternative, that he had a residual inherent jurisdiction to dismiss the summary judgment motions on the basis that they were premature, that error does not change the result in this case.

[95] The judge's disposition of costs was well within his discretion and I see no reason to disturb it.

[96] Accordingly, I would grant leave, but would dismiss the appeal. In accordance with counsels' submissions at the appeal, I would award Mr. Coady his costs on appeal in the amount of $1,500 plus reasonable disbursements. I would award the respondent Wentworth its costs on appeal in the amount of $1,000 plus reasonable disbursements.

Saunders, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.

Fichaud, J.A.

Dissenting Reasons Beveridge J.A.:

[97] I have had the privilege of reading, in draft, the reasons of my colleague, Justice Saunders. With great respect for his views, I am unable to agree with his analysis, and conclusion that the motions judge made no error in principle in refusing to grant summary judgment in favour of Burton. I also do not agree that a justice of the Supreme Court is deprived of his or her inherent jurisdiction because of the amendment to *Civil Procedure Rule* 13.04(1); nonetheless, the judge erred in concluding that he would also refuse to grant summary judgment on the basis of prematurity.

[98] I do not disagree with my colleague's careful articulation of the traditional test to be applied on a motion for summary judgment (¶26-28; ¶42-45). It is how this test was applied to the record before the motions judge with which I disagree. I will elaborate.

[99] As between Burton and the respondent Coady, there were no differing accounts to be resolved. Burton accepted, for the purposes of the summary judgment motion, the evidence of Mr. Coady. No issues of credibility or reliability of evidence needed to be resolved in a trial. The facts were as outlined in the sworn evidence given on discovery by Mr. Coady. The task of the motions judge was to apply the law to those facts. With respect, he declined to do so.

[100] Saunders J.A. , for the Court, in *Eikelenboom v. Holstein Canada*, 2004 NSCA 103 reviewed the leading cases of the Supreme Court of Canada in *Hercules Management* and *Guarantee*. In reference to the latter, he wrote of the recognized duty of a motions judge to apply the law to the facts:

> [24] At ¶28, the Court expressed its concurrence with the motions court judge's finding that "the only disputes were on the application of the law." Notwithstanding the complexity of factual and legal issues surrounding the claim, and that the application of the law to the circumstances of the case was strongly contested, the Court held that it was an appropriate case for summary judgment. Iacobucci and Bastarache, J.J., writing for a unanimous five member Court, described the test and shifting burdens of persuasion that arise in an application for summary judgment at ¶27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." *Hercules*, supra, at para. 15.

In allowing the appeal, setting aside the judgment of the Ontario Court of Appeal and restoring the decision of the motions court judge granting summary judgment in favour of the fidelity insurer, the Court stated:

> [28] The limitation period defence raises mixed questions of fact and law. O'Brien J. found that the only disputes were on the application of the law. We find no reason to disturb this finding.
>
> ...
>
> [35] We agree that there is no legal issue to be resolved at trial. The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
>
> ...
>
> [36] We would therefore conclude that the motions judge committed no error in determining that this was a proper case for summary judgment. **Gordon** has not met the evidentiary burden to show there is a genuine issue for trial.

[Emphasis in original]

[101] Justice Saunders found in *Eikelenboom* that the motions judge erred in declining to grant summary judgment – there were no evidentiary matters in dispute, and hence should have proceeded to decide rather than defer to a trial judge. His analysis is worth repeating:

> [30] For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered would it be possible to decide if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in **Gordon Capital**, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
>
> [31] For the reasons stated, this motion is one that required an application of the law to the undisputed facts. The Chambers judge erred in declining to resolve the matter before her by way of summary judgment. As cases like **Hercules** and **Gordon** have shown, while such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigours of summary judgment.

[102] With these principles in mind, I will turn to the claims Mr. Coady made against Burton. Because Coady's response to the summary judgment motion was primarily a complaint of prematurity, and the motions judge declined

summary judgment also on that basis, I will also refer to the chronology of events surrounding the summary judgment motion since that informs the issue of prematurity.

[103] Mr. Coady's claims of liability against Burton were four: it owed a duty to warn Mr. Cody about the "nature and potential danger of the new snowboard" he was about to use; Burton was an occupier of the Wentworth Ski Resort, and as such owed a duty of care under the *Occupiers' Liability Act*, S.N.S., 1996, c.27; it failed to verify Mr. Coady's age before handing over the snowboard; it provided a high energy caffeinated drink in contravention of the *Food and Drugs Act*, R.S.C. 1985, c.F-27.

[104] The particular pleadings against Burton were as follows:

> [8] The Plaintiff suffered catastrophic personal injuries of a permanent nature, including, but not limited to, a burst fracture in the CS vertebrae with damage to the spinal cord resulting in partial paralysis. The Plaintiff states that these injuries would not have occurred but for the negligent acts of the Defendant Burton, particulars of which are as follows:
>
> (a) failed to warn the Plaintiff about the nature and potential danger of the new snowboard;
>
> (b) failed to verify the age of the Plaintiff before handing over the snow board;
>
> (c) provided the Plaintiff easy access to a [*sic*] high energy caffeinated beverages, a Natural Health Product, contrary to s. 14 of the *Food and Drugs Act*, R.S. C. 1985, c. F-27, in combination with free new snowboard demos without proper, or any, supervision, particulars of which are as follows:
>
> i. The Plaintiff obtained an Amped energy drink, free of charge, at the Burton Kiosk, from a Burton representative, at approximately the same time as obtaining [a] demo snowboard and the Plaintiff consumed the Amped energy drink prior to his accident;

ii. The Amped energy drink had physiological effects on the Plaintiff which contributed to this accident including, but not limited to:

1. Stimulatory effects on the central nervous system;

2. Changes in blood pressure;

3. Changes in heart rate:

4. Changes in mood; and

5. Changes to the decision making process;

(d) and such other negligence as may appear.

[105] Mr. Coady was discovered on December 10 and 11, 2009. On April 9, 2010 Burton filed its motion for summary judgment. Burton's motion was scheduled to be heard on September 8, 2010, as a half day hearing. Then Wentworth filed its motion for summary judgment on April 27, 2010.

[106] The record before us does not disclose the exact sequence of events, but at least by the beginning of October 2010, both summary judgment motions were scheduled for the full day of January 27, 2011. All parties agreed that the motions by Burton and Wentworth be heard together.

[107] Examinations for discovery of representatives of Burton and Wentworth had been scheduled. For reasons not disclosed in the record, the examinations were cancelled by Coady. "Throw away costs" were requested for the late cancellation.

[108] In October 2010 the lawyers for Coady proposed dates in March 2011 for discovery of the Burton and Wentworth representatives. On October 15, 2010 counsel for Burton wrote to the lawyers for Coady and Wentworth that it was not

looking for any further discovery at this stage since there was a pending motion for summary judgment.

[109] Coady never sought an adjournment of the summary judgment motion in order to request further production of documents or to do discoveries of representatives of Burton or Wentworth; or to obtain expert or any other kind of evidence.

[110] Burton filed its motion materials on December 21, 2010. The materials consisted of a 12 paragraph affidavit of Ms. Jessica White and a detailed brief on why summary judgment should be granted. I will later set out the substance of the submissions made to the motions judge.

[111] Ms. White's affidavit simply set out the history of the proceedings, attached copies of the pleadings and excerpts from the examination for discovery of Mr. Coady of December 10 and 11, 2009.

[112] Wentworth filed its motion materials on January 12, 2011. These materials consisted of a detailed brief and affidavits from Messrs. Sam Rodgers and Thor Durning. These individuals described the process involved in building the Terrain Park, its contours, markings, pre-opening testing of the Park, and the snow conditions on February 16, 2008.

[113] Coady filed his motion materials on January 20, 2011. His materials comprised affidavits from counsel, Sean Layden, Q.C., and Mr. Coady, and a lengthy brief. Both affidavits were short. In Mr. Layden's, he averred that he had consulted an expert in 2010 on the issue of liability which "may blossom into a full-fledged litigation expert report" once discoveries of the parties were complete. Attached to his affidavit was an article written in 2008 titled "Wired: Energy Drinks, Jock Identity, Masculine Norms, and Risk Taking", published in the *Journal of American College Health*.

[114] Mr. Coady's affidavit attached: photos of the Burton Demo Kiosk, copies of the Waivers he and his friends had signed on February 16, 2008; a complete copy of his examination for discovery; a copy of the Burton

documentary disclosure; and four articles written by different authors about snowboarding and skiing injuries.

[115] Before turning to the substantive arguments of Burton and those of Mr. Coady, it is appropriate to be clear about what evidence was admitted, and was hence available for the motions judge to consider.

[116] Burton objected to the admissibility of any of the various articles that were attached to the affidavits of Mr. Layden and Mr. Coady. Counsel for Mr. Coady acknowledged that there was no basis under the *Rules* to admit the articles any more than if the articles were tendered before the Court without an affidavit. The motions judge announced that he accepted the submissions of Burton --- the articles were hearsay and would be given no weight.

[117] Counsel for Mr. Coady advised that he wished to cross-examine the affiants Messrs. Rodgers and Durning. Rather than deal with the issue of prematurity, the motions judge announced that he would allow cross-examination first. For reasons that are not clear, the issue of prematurity was postponed until after the cross-examinations. The examination of the Wentworth affiants took up the balance of the day. Burton asked no questions.

[118] It was agreed by the parties that all of the evidence adduced during the hearing was available to be considered by the motions judge on both motions for summary judgment. There is no need to set out the details of the evidence adduced during the examination of the Wentworth witnesses. With some minor exceptions, which I will set out later, the evidence was not relevant to Burton's motion for summary judgment.

[119] My colleague has expressed the view (¶21) that there were serious shortcomings in how this matter was handled. Although I am troubled by the 16 month delay from the end of the hearing until the motions judge delivered his reasons, I see no basis to criticize counsel for how this matter was handled. Counsel did not "lose their way"; nor was there any complaint at any time during the process of "Chambers by ambush". The word ambush, or the concept it conjures up, does not appear anywhere in the record.

[120] As I will now demonstrate, the parties were well aware of the relevant legal tests and how they should be applied. The motions judge was not asked to embark on any new approach to summary judgment motions. Indeed, on appeal, there was no request to re-visit, re-state, or refine the rule. It was simply a matter of a complaint of error in how the judge applied the traditional test.

[121] The only possible novel or new issue was the question of the jurisdiction of a judge, under *Rule* 13.04, or otherwise, to dismiss a summary judgment motion as being premature.

[122] I will focus on the submissions of Burton and Mr. Coady, as the dismissal of the Wentworth summary judgment motion is not before us. Burton's submissions were straightforward. It set out: the traditional test for summary judgment as described by Justice Saunders in *Eikenenboom v. Holstein;* the allegations made by the plaintiff that were said to potentially attract liability; and the uncontested evidence.

[123] It is useful to repeat what those allegations were: a failure to warn about the nature and potential danger of the new snowboard; a failure to verify the age of the plaintiff before handing over the snowboard; providing an energy drink; and breaching their duty under the *Occupiers' Liability Act*.

[124] The uncontested evidence came from Mr. Coady. As of February 16, 2008 he was four months shy of his 17th birthday. He and his two friends drove to Wentworth to snowboard for the day. Mr. Coady had been snowboarding since he was in grade 1 or 2 – in other words, since he was about eight years old. He snowboarded each winter and had taken numerous lessons over the years. He was familiar with the hill at Wentworth and had been in its Terrain Park doing jumps and going over "features". One would do so in order to "get good air".

[125] As of February 16, 2008, Mr. Coady considered himself to be "an advanced snowboarder".

[126] Mr. Coady's evidence tendered before the motions judge was that he had done a couple of runs down the ski hill with his own board, but without his

helmet. He said he was familiar with the snow conditions on the hill that morning. He and his friends decided to demo the Burton boards. Burton representatives fitted him with a board and bindings. His friends also signed up for the opportunity to use one of the Burton boards. While in the kiosk, Mr. Coady helped himself to a free energy drink called "Amp".

[127] Mr. Coady then retrieved his helmet and did at least one run with his friends. He decided to go into the Terrain Park. He explained that he was fully aware of the risks of going over a jump, including the approach, the landing, getting "air"; and the risks associated with those activities, including falls and injuries.

[128] The relevant parts of his evidence about knowledge of the risks is as follows:

> *Q. Now, these various falls that you talked to me about, not the -- the falls that occurred prior to the 16th of February when you'd fall going over a jump or a box or something, is it fair to say that those falls were just falls that you recognized were inherently part of snowboarding?*
>
> *A. Yes.*
>
> *Q. And they were just the risks associated with snowboarding?*
>
> *A. Yes.*
>
> *…*
>
> *Q. Well, let's go back. You said there's a higher degree of risk and then you talked about falling. So, is it your understanding then that there's more likelihood that you would fall in the terrain park than if you're out on the main part of the hill?*
>
> *A. That's correct.*
>
> *Q. Okay. And why is that?*

A. Because there's jumps.

Q. Because there's jumps?

A. Correct.

Q. Okay. And features as well, right?

A. And features as well.

Q. And so there's things to go over and things to snowboard on that could cause greater injury to yourself?

A. Yes.

Q. And you knew that going into that terrain park, right?

A. Correct.

Q. Okay. But you still went in?

A. Correct.

[129] As to the difference he and his friends had noticed about the Burton boards they were using, they thought the boards were "awesome". When asked to describe his experience with the demo board, he replied:

Q. And how did you find the Burton board?

A. I found it was a little bit quicker and that -- more quick, sorry, and the turns were a lot more crisp.

Q. So, is crisp good?

A. Yeah.

Q. Okay. Now, it's fair to say that your level of experience on a snowboard at the time you were using that Burton board, you were able to effectively turn, stop and slow down, correct?

A. Correct.

[130] Mr. Coady described how he had better control when using the Burton board than his own:

Q. Okay. So, did you like the board?

A. Yes, I did.

Q. And what did you like about it?

A. That it seemed to turn faster, it felt lighter and it felt a little bit faster.

Q. So, lighter meaning better control?

A. Lighter meaning less heavy.

Q. And the fact it would turn faster, does that give you better control?

A. I suppose so, yes.

Q. And good edges?

A. Correct.

Q. So, better control?

A. Correct.

[131] He also admitted that there was nothing unusual about how the Burton board handled:

> *Q. So, you took that one run down. Can you describe any problems that you had controlling the board.*
>
> *A. No, I cannot.*
>
> *Q. Is it fair to say that if you had to stop that board at any time you could do that?*
>
> *A. It was yes.*
>
> *Q. You could stop it at any time, correct?*
>
> *A. Except for on the icy surfaces, you still slide.*
>
> *Q. Right. That's the same with any board, though, right?*
>
> *A. Correct.*
>
> *Q. Okay. So, there was nothing unusual then about that board on the snow surface?*
>
> *A. Correct.*

[132] Burton argued to the motions judge that it owed no duty to warn the plaintiff since the dangers of using the snowboard were obvious. Falling and being injured is not only an obvious risk, it was one that was specifically well known to the plaintiff. In addition, Burton submitted that even if there was somehow a duty to warn, there was no evidence that the accident would not have happened in any event.

[133] As to the verification of age, Burton argued there was no genuine issue of material fact requiring trial. The uncontradicted evidence of Mr. Coady was that he showed the Burton representatives his driver's licence which demonstrated his age as being 16. He did not read the "Waiver" form.

[134] The only reason age was arguably relevant was that the "Waiver" stipulated that if the intended equipment user was under the age of 18, the signature line had an additional space for "Signature of Parent or Guardian if User Under the Age of 18".

[135] Burton disavowed any intention of relying on the Waiver on the summary judgment motion. Instead, it submitted that it owed no duty to verify Coady's age or decline to provide him with a demo board absent a parent's signature. It said snowboarding is not an activity that has a minimum age requirement.

[136] Burton did not deny that it was an "occupier" of the kiosk where it set up its snowboard demonstration, but argued that the accident did not happen there; it occurred in the Terrain Park – a place it was not in physical possession of, and over which it had no control. In other words, the *Occupiers' Liability Act* was not relevant.

[137] As to the energy drink, Burton denied that providing it to the plaintiff violated the *Food and Drugs Act*, or that the evidence could possibly support the allegation that the drink caused or contributed to the accident. Burton pointed to the evidence of Mr. Coady that he had previously purchased energy drinks such as Rockstar and Red Bull at convenience stores, and that consumption of such drinks only made him more wakeful.

[138] More significantly he was asked on discovery to describe what effect the drink had on him the day of February 16, 2008. He said he it had no effect on him and did not cause or contribute to the accident. His sworn testimony was:

> *Q. So, on the day of the accident were you able to feel any effects from having consumed the Amp? Because I had understood that the only effects these energy drinks would have on you would be when you're tired they'd make you more awake, correct?*
>
> *A. No, I didn't notice any effect.*

> *Q. Okay. So, the energy drinks themselves, based on your perception, there was no effect whatsoever from drinking them from what you could tell on the day of the accident?*
>
> *A. That's correct.*
>
> ...
>
> *Q. And is it fair to say that based on your feelings about how it affected you, you don't see that drinking the energy drink had anything to do with your accident?*
>
> *A. That's correct.*
>
> *Q. Or caused or contributed to your accident in any way?*
>
> *A. That's correct, in my opinion.*

[139] Mr. Coady in his pre-hearing submissions to the motions judge agreed with Burton's characterization of the relevant legal issues arising out of the cause of action pleaded against Burton. The plaintiff's pre-hearing brief said the following:

> [36] The Plaintiff submits that the relevant legal issues plead in respect to the action against Burton are: Whether it was negligent in failing to warn the Plaintiff about the nature and potential danger of a snowboard; whether it was negligent in failing to comply with its own policies to verify that the Plaintiff was the age of majority prior issuing the Snowboard to the Plaintiff; whether it was negligent in providing the Plaintiff with an energy drink which is a "drug" in violation of s. 14 of the *Food and Drugs Act* and whether this contributed to this accident, and whether Burton, as an occupier, breached the *Occupiers' Liability Act*?

[140] I won't repeat all of the various submissions made by the plaintiff. In brief, he argued the summary judgment motion was premature. In addition, he suggested there was a host of factual issues that needed to be determined, including resolution of credibility. He summed up his position as:

> [41] It is respectfully submitted that the testimony of various witnesses will have to be assessed and determinations made concerning credibility, particularly the credibility of the Plaintiff and the employees and management of Burton. Once that occurs, a Court can then reach conclusions concerning who bears responsibility for this loss, including whether Burton is at least partially liable, on some basis.

[141] Most of the so-called matters requiring "determination" were irrelevant to the cause of action pleaded against Burton. It must be stressed that at no time before, during, or after the summary judgment motion has the plaintiff suggested that the board or bindings provided by Burton were in any way defective, not properly adjusted and fitted, or failed to perform as intended.

[142] The issues as between Burton and the plaintiff on the summary judgment motion were:

1. Was the motion for summary judgement premature?

2. If not, had Burton satisfied its onus that there were no genuine issues of material fact requiring a trial?

3. If not, did the plaintiff satisfy its onus that he nonetheless had a reasonable chance of success at trial?

[143] The motions judge did not approach his task in this sequence. With all due respect to the learned motions judge, the analysis that led to his conclusions is, at times, difficult to follow. I will set out his analysis when considering the appellant's complaints of error.

ISSUES

[144] The appellant identifies the issues on appeal to be:

I. Should leave to appeal be granted?

II. Did the motion judge commit a reviewable error by failing to grant summary judgment in respect of:

(i) the Plaintiff's claim that Burton was negligent by its failure to warn;

(ii) the Plaintiff's claim that Burton was negligent by its failure to confirm that the Plaintiff was not the age of majority;

(iii) the Plaintiff's claim that Burton was negligent by its provision of complimentary energy drinks;

(iv) the Plaintiff's claim that Burton otherwise breached its duties under the Nova Scotia *Occupiers' Liability Act*?

III. Did the motion judge commit a reviewable error by his alternative finding that the motion for summary judgment was premature?

IV. Did the motion judge commit a reviewable error in his award of costs?

[145] There is no dispute that the appellant has met the test for leave to appeal, and I agree with my colleague that leave should be granted.

[146] In terms of the remaining issues, I will first address the question of prematurity; then set out the reviewable errors committed by the motions judge when he considered the merits of the summary judgment motion. It is unnecessary for me to consider the issue of costs.

PREMATURITY

[147] My colleague has already set out the difference in wording as between the *CPR* 13.04 and its predecessor, 13.01 (¶72-76). The current rule says if there is no genuine issue for trial, the judge *must* grant summary judgment. The previous rule contained permissive language.

[148] As I read the reasons of my colleague, he concludes that the motions judge was wrong to dismiss the summary judgment motion due to "prematurity". His principal reason is that the wording of *CPR* 13.04 permits no residual discretion to refuse a summary judgment motion because it is premature or that the interest of justice somehow precludes it (¶69). In addition, he concludes that due to the wording of *CPR* 13.04, a motions judge's inherent jurisdiction has been eliminated.

[149] I agree with my colleague that the motions judge erred in purporting to dismiss the summary judgment motion for prematurity, but I do so by a different route. As I will develop later, in my opinion, the inherent jurisdiction of a motions judge to ensure justice is done between the parties is not eliminated by the wording of *CPR* 13.04. But the judge, in these circumstances, erred in relying on such jurisdiction to dismiss the motion.

[150] The wording of the previous summary judgment rule and the current one are set out at length in the reasons of the motions judge (¶24-31). I need not repeat them. After referring to the change in language, and the new summary judgment rule in Ontario, the motions judge clearly identified the prematurity issue as:

> [33] An issue before this Court is whether the wording of the *new Rule* for summary judgment on the evidence still permits the motions judge to exercise discretion to refuse motions, apart from application of the *Guarantee* test, on the basis that the plaintiff has not yet had a fair opportunity to put his best foot forward or for other juridical reasons.

[151] His initial comments appeared to indicate his agreement that he did not have a discretion to do anything but apply the two-stage *Guarantee* test. He wrote:

> [41] The new Nova Scotia summary judgment *Rule* appears to mandate application of the ***Guarantee*** two-stage test to the evidence before the motions judge and requires a party wishing to contest a motion, regardless of when the motion is made, to put his or her best foot forward. The Nova Scotia *Rule* does not contain the language interpreted in ***Combined Air*** as granting the motions judge the kind of discretion that existed under the old Nova Scotia *Rule*.

[152] The motions judge then embarked on his "*Guarantee*" analysis, which he prefaced by saying he assumed that "the new Nova Scotia Rule does not grant discretion to deny or defer a decision on the basis of unfairness or prematurity in the absence of material pre-trial disclosure and/or discovery by the moving party, or despite the timing of the motion" (¶42).

[153] After considering each of the allegations made, he dismissed Burton's motion for summary judgment. I will set out later the basis for his decision. What is important is that after deciding that Burton was not entitled to summary judgment by his application of the *Guarantee* analysis, the motions judge then turned to the submissions of the plaintiff that the motion should not be granted because it was premature or not in the interests of justice (¶123).

[154] The motions judge set out the respective positions of the parties on the prematurity issue. He concluded that despite the change in the wording of the rule governing motions for summary judgment, a judge still had a discretion to "defer or dismiss" such a motion on the basis of unfairness. His words were:

> [137] I conclude that, despite the change in the wording of *CPR* 13.04, a judicial discretion still exists to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at <u>any</u> time after pleadings close may, in some circumstances, be unfair and unjust.

[155] He formulated a test on how this discretion should be exercised. It was:

> [142] Discretion should remain with the motions judge to defer, dismiss or otherwise determine a motion for summary judgment on the evidence, in addition to the criteria in the ***Guarantee*** test, when the following circumstances arise:
>
> (1) the responding party has been unable to obtain the material evidence, and
>
> (2) the relevant material evidence is likely available from sources that are identified and/or identifiable, and

> (3) the responding party has been diligent in pursuing that evidence.

[156] The motions judge said that this test would allow for a proper balancing of the competing interests and principles, and that failure to retain this discretion may encourage machinations that have no place in civil litigation (¶143).

[157] The problem is, the motions judge started to apply his announced test, but then abandoned his analysis as being unnecessary. He wrote:

> [147] In this case the balancing of the request by the plaintiff to dismiss this motion for prematurity against the failure of the plaintiff to exercise diligence in pursuing disclosure of the "facts" he identifies as material, is unnecessary.
>
> [148] I deny summary judgment on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial.

[158] It is at this juncture that the motions judge announced an alternate basis to deny the summary judgment motion – it was premature. His reasons were:

> [149] If I am wrong in my application of the *Guarantee* analysis to Burton's motion, I would find that the motion is premature. I am unable, from the gaps in the "facts", to get a full appreciation of the evidence required to make a dispositive finding that there is no genuine issue for trial. The plaintiff has not yet had a fair opportunity to put his best foot forward. He has not acted without diligence. The purpose of summary judgment is to stop unmeritorious claims from going to trial, not to prevent claims from reaching the point where it is reasonable to determine whether it is meritorious.

[159] There are two problems with the dismissal for prematurity. First, the motions judge had already decided that he had sufficient material to determine that there were genuine issues of material fact requiring a trial. It is illogical to

then reason that the plaintiff, and he, did not have sufficient material to determine that very issue.

[160] Second, the motions judge had earlier considered the list of "areas of questioning" that the plaintiff said he needed to pursue, and had agreed with Burton that these were issues already covered by the evidence or were otherwise not relevant. It is necessary to set out his reasoning:

> [145] It is likely that further documentation in the possession of, disclosure of and discovery of a fully-informed representative of Burton will produce relevant evidence. **I agree with Burton's counsel that of the nine "areas of questioning" that the plaintiff advances as being relevant to Burton's liability, some of those areas are already covered by evidence which is before the Court in this motion, and the plaintiff has not demonstrated how some other "areas" could advance facts that would inform the duty and standard of care on Burton. This may be, in part, because Burton (and Wentworth) did not file the affidavits and briefs in support of their motions until shortly before the hearing date - several months after they filed their motions. In the case of Wentworth, its defence was filed only six days before the hearing commenced.**
>
> [Emphasis added]
>
> [146] The chronology of this litigation, summarized in sections B and C of this decision confirms that the plaintiff was preoccupied with other motions in 2010, and does not suggest a lack of diligence in the pursuit of his claim. The disclosure by Burton has been minimal, and does not include many material facts that the plaintiff properly says are only in Burton's knowledge. One is the absence of evidence as to the agreement between Burton and Wentworth as to responsibility for those to whom Burton lent demo-boards and gave free energy drinks on Wentworth's premises.

[161] I fail to see any relevance as to when and what Wentworth filed in support of its summary judgment motion. I see nothing in their materials that could possibly assist the plaintiff in resisting Burton's summary judgment motion on any basis.

[162] The motions judge excused the plaintiff's inability to demonstrate how other areas of proposed questioning were relevant because Burton did not

file its brief and affidavit material until "shortly before the hearing date". I cannot agree.

[163] Burton filed its motion materials six weeks before the hearing date. The materials could not have been a surprise – the materials were the pleadings and excerpts from the discovery of the plaintiff done in December of 2009.

[164] The motions judge made no mention of the fact that Coady never requested any further documentary disclosure from Burton, despite being provided with its list of documents in December 2009. The motions judge made no mention that Coady was well aware of the pending motion for summary judgment, but did not request discovery of any Burton representative until after the scheduled hearing date of the summary motion – nor was there any request for an adjournment of the summary judgment motion.

[165] In my opinion, the motions judge erred in law in failing to take into account matters relevant to a proper exercise of his discretion. Furthermore, I have carefully reviewed the list of so-called areas that the plaintiff said it wanted to pursue on discovery with representatives of Burton. I see no relevance of these matters to any of the particulars of the cause of action pled against Burton.

[166] Considerable deference is usually owed to a decision based on exercise of discretion where a balancing of factors has been carried out (see *Aliant Inc. v. Ellph.com Solutions Inc.* 2012 NSCA 89). But where a decision maker ignores relevant matters and takes into account irrelevant ones, appellate deference dissipates (*Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (N.S.C.A.) at para. 10-11). In my opinion, the motions judge erred in law in purporting to dismiss Burton's summary judgment motion on the basis of prematurity. The remedy, in appropriate circumstances, is an adjournment.

[167] I want to stress two things. First, I have no hesitation in saying that the inherent jurisdiction of a judge of the Supreme Court is not ousted by rules of court. Chief Justice MacDonald in *Central Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39, provided the following definition of inherent jurisdiction:

> [34] Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned, cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. **It is a jurisdiction sourced independently from any rule of court or statute.**
>
> [Emphasis added]

[168] The legal principles that shed light on what is meant by inherent jurisdiction, and how it might be relied upon by a judge, were recently explored by this Court in *Smith v. Lord*, 2013 NSCA 34. Farrar J.A., for the Court, reviewed many of the relevant authorities and academic discussion, and quoted, with apparent approval, Professor Charles in his recent article "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010), 33 *Dalhousie L.J.* 63 where he summarized this Court's views on inherent jurisdiction (p.82):

> … It is primarily a procedural concept which the courts must be cautious in exercising and [which] should not be used to make changes in substantive law.
>
> Action taken pursuant to inherent jurisdiction requires an exercise of discretion. This discretion must always be exercised judicially.
>
> A judge does not have an unfettered right to do what is thought to be fair as between the parties. A court's resort to its inherent jurisdiction "must be employed within a framework of principles relevant to the matters in issue." [Footnotes omitted]

[169] Professor Charles is, in my respectful view, quite right to recognize that the existence of inherent jurisdiction does not give a judge *carte blanche* to change the substantive law (p. 70), and that the power subsumed under the heading of inherent jurisdiction is one to be exercised cautiously. Similar words of limitation are found in Halsbury's Laws of England, I.4(5)(b)(ii):

> Although a judge has an inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to create or ignore substantive legal rights or obligations, make decisions on behalf of the parties, or interfere with decision making by the parties …. Moreover, the courts possess no inherent

> jurisdiction to prevent a party from asserting its legal rights, merely because the court believes that it is "unfair" in the circumstances for that party to enforce those rights.

[170] In my respectful view, the law is clear: the inherent jurisdiction of a judge of the Supreme Court is not ousted by the specific rules of court. There may still be exceptional cases that make it appropriate and just to grant relief in seeming contradiction to the court's procedural rules.

[171] The ability to invoke the court's inherent jurisdiction in the face of arguably contrary provisions of rules of court was specifically addressed by this Court in *Central Halifax Community Association v. Halifax (Regional Municipality)*. Kennedy C.J.S.C. was asked to extend the filing deadline for an application for an order in the nature of *certiorari*. The rules of court mandated that the time limit was six months. The normal rule permitting extension of time was made inapplicable to this deadline (*CPR (1972)* 56.06).

[172] Glube C.J. (as she then was), in exceptional circumstances, had exercised her inherent jurisdiction in the context of a *CPR (1972)* 56.06 application (*Blue v. Board of Education of Antigonish District* (1990) 95 N.S.R. (2d) 118 (T.D.). Chief Justice Kennedy declined to exercise his inherent jurisdiction. In the course of his decision he said the following:

> ... This limitation period is strict and not the subject of the Court's discretion to extend or abridge time, or its inherent jurisdiction to control its own proceedings

[173] Chief Justice MacDonald concluded that, in isolation, this statement of the law was not correct. He wrote:

> [43] In light of my comments above, such a suggestion, at least considered in isolation, would constitute an error of law. However, the Chambers judge, in another passage, appeared to acknowledge that he could indeed use his inherent jurisdiction but that he was declining to do so on the facts of this case:
>
> > Similarly, I agree that I should not use the Court's inherent jurisdiction to control its own process to abrogate a specific rule made by the Court.

> That, of course, would represent a legitimate use of discretion.

[174] Inherent jurisdiction is not unlimited. It cannot be invoked in contravention of an express statutory provision (see *R. v. Carron*, 2011 SCC 5 at paras. 32-34). This limitation was at the heart of the recent 4-3 decision of the Supreme Court of Canada in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42. However, in this case, we are dealing not with a provincial statute, but with civil procedural rules drafted by the court in an effort to guide litigants and judges to effectively and fairly resolve disputes. Such rules may well have a status as subordinate legislation by virtue of the *Judicature Act*, R.S.N.S. 1989, c. 240, s.46, but the rules are meant to assist, not handcuff.

[175] Karakatsanis J. in *Conseil scolaire* (in dissent) quoted with approval the words of Master Jacob about the appropriate relationship between inherent jurisdiction and the rules of court:

> [73] While the specific exercise of inherent jurisdiction may be ousted by applicable and relevant legislation, the power is otherwise broad and supplementary. As Jacob writes,
>
> > **The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case.** The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction. [p. 25]
> >
> > (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23)

[176] I see no disagreement by the majority with this principle.

[177] The second thing I want to stress is that if the motions judge were to grant a remedy to the plaintiff in this case, in the exercise of his inherent jurisdiction, it was not a dismissal of Burton's summary judgment motion, but an

adjournment of the motion. This, he did not do. For reasons already outlined, it would have been inappropriate to have done so.

[178] I will now turn to the merits of the summary judgment motion. As already set out, there were four claims Mr. Coady advanced against Burton. Each was analyzed separately by the motions judge. I will deal with each in turn.

DUTY TO WARN

[179] The analysis by the motions judge of this claim is found at ¶78-109 of his decision. Nowhere in that analysis does the judge deal with the substantive law. In my opinion, it is impossible to properly consider a motion for summary judgment without reference to the substantive legal issues – these will define what would be the live issues at a trial; and will be the guide to understanding if there is a genuine issue of material fact requiring a trial.

[180] This fundamental requirement is accurately set out by Robert J. Van Kessel in *Dispositions Without Trial,* 2nd ed (Markham, Ontario: LexisNexis Canada Inc., 2007) at p. 213:

> The determination of a genuine issue of material fact is made with reference to the applicable substantive law. For example, if the dispute were over the existence of a contract, there would have to be clear evidence on the motion of an offer, acceptance and consideration. If the dispute were in tort, the evidence would have to factually support each element of the cause of action and so on, with actions in equity. If the motions judge determines that a genuine issue for trial does not exist, the court must grant summary judgment to the defendant moving party.

[181] *CPR* 13.04(3) directs the parties and the court that it is the pleadings and substantive law that inform the inquiry as to what facts are material to a claim or defence; it is then up to the court to determine, based on the evidence presented, if there is a genuine issue of material fact for trial:

> 13.04 (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

[182] What then were the substantive law principles engaged by the pleadings? There was no apparent contract between the plaintiff and Burton. The plaintiff alleged that Burton was negligent by failing to "warn the Plaintiff about the nature and potential danger of the new snowboard".

[183] The essential elements of a negligence claim are: (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3).

[184] It is obvious that the plaintiff was injured. It is the other essential elements that, in my opinion, mandate summary judgment in favour of the appellant.

[185] It is critical to recognize that the issue of whether a duty of care is owed in any particular circumstance is a question of law (see *Salmond and Heuston on the Law of Torts* (18th ed., Sweet & Maxwell 1981, p.183; *Fleming, The Law of Torts* 8th ed. The Law Book Company 1992, p. 136; *Clerk & Lindsell on Torts* 16th ed., Sweet & Maxwell 1989, p.428). These learned authors are fully supported by the authorities (*Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All E.R. 294 (H.L.). This fundamental precept is implicit in a multitude of cases (see for example *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165).

[186] It was explicitly recognized by the Supreme Court of Canada in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201where Major J., on behalf of an unanimous Court, referred with approval to the decision of this Court in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241:

> 21 The first step in the negligence analysis is to determine whether the Railways owed a duty of care to the appellant with regard to the configuration of the Store Street tracks. If such a duty is found to exist, it must then be determined whether the Railways exercised the standard of care necessary to avoid breaching that duty. The relationship between the duty and the standard of care was explained by MacDonald J.A. of the Nova Scotia Court of Appeal in *Nova Mink Ltd. v. Trans-Canada Airlines,* [1951] 2 D.L.R. 241, at p. 254:

> **It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant** and if so, to define the measure of its proper performance; it is for the [trier of fact] to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty.
>
> . . .
>
> > The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This element of reasonable prevision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty. . . .
>
> Thus, a discussion of duty centres around its existence, while the standard of care clarifies what the content of the duty is. **Where there is no duty there is no negligence.**
>
> [Emphasis added]

[187] That the issue of duty of care is a question of law, upon which a lower court must be correct, was most recently reiterated by this Court in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43 at paras. 20-21. (See also *Galaske v O'Donnell*, [1994] 1 S.C.R. 670; *Los Angeles Salad Co v Canadian Food Inspection Agency*, 2013 BCCA 34 at para. 7)

[188] The plaintiff did not allege that Burton owed Mr. Coady a duty of care not to let him "demo" a snowboard; or that it failed to exercise reasonable care in selecting a proper sized board, or in affixing the bindings for Mr. Coady. He only alleged that Burton owed a duty to warn him about the nature and potential danger of the new snowboard. For this alleged duty, I agree with the appellant that it is defined by the law on products liability, or if you will, by the law as to the duty on a person who provides a chattel to another for use.

[189] In these circumstances, the law simply does not recognize a duty of care on Burton to warn the plaintiff. The plaintiff referred to no case law that has recognized such a duty. The authorities are to the contrary.

[190] In *Schulz v. Leeside Developments Ltd*. (1978), 90 D.L.R. (3d) 98, [1978] B.C.J. No. 1319, the British Columbia Court of Appeal quashed a finding of negligence. An 18 year old plaintiff rented a motor boat with a 50 horsepower outboard motor. No warning about operation or where to sit was given. The plaintiff sat on the bow of the boat while it was being driven by a 14 year old. The boat lurched. The plaintiff fell and was rendered a paraplegic when struck by the propeller. In a thorough judgment that canvassed leading American and Canadian authorities, Seaton J.A. found no duty to warn. He wrote of the circumstances where a duty may or may not be owed:

> 29 We can put aside instrumentalities that have a defect or hidden danger about which a warning ought to be given. Apart from that there may still be a duty to warn, but that duty is limited. The specific limitation that in my view is applicable here is set out most clearly in Prosser's Law of Torts, 4th ed., p. 649:
>
> > Obvious Dangers
> >
> > One limitation commonly placed upon the duty to warn, or for that matter the seller's entire liability, is **that he is not liable for dangers that are known to the user, or are obvious to him, or are so commonly known that it can reasonably be assumed that the user will be familiar with them**. Thus there is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger. There is a close analogy here to the rule that the possessor of land is not liable to an invitee for similar dangers.
>
> [Emphasis added]

[191] I also find apposite Justice Seaton's referral to some of the American authorities about the duty to warn:

30 A leading United States case on this issue is Jamieson v. Woodward & Lothrop (1957), 247 F. (2d) 23 (U.S. Court of Appeals, District of Columbia Circuit), per Prettyman, Circuit Judge, from which I take the following (p. 26):

> The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an "inherently dangerous" object; but, if a person accidentally slips and falls on a pencil-point in his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly "inherently dangerous", because they might slip ... A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers.
>
> ...
>
> If a hand slips in a normal operation with a non-defective device, a knife will cut and a lighted stove will burn and an automobile will crash into a tree; but no authority holds that manufacturers must warn of such contingencies. All this is firmly established commercial law and custom. We doubt that any book of instructions given with a car warns that, if a user accidentally steps on the accelerator instead of on the brake, he may be hurt; nevertheless, so far as we are able to ascertain, no case has yet held the manufacturer liable under such circumstances.

[192] These principles are echoed in Canada – there is no duty to warn of dangers that are either obvious or are known to the user of the product. The following statement is found in *Halsbury's Laws of Canada* (First Edition) – Torts, 2012 Reissue (Markham: LexisNexis, 2012) at 385, para HTO-104:

> A manufacturer is not obligated to give a superfluous warning, however. As the B.C. Supreme Court explained, there is no duty to warn if the danger is "so clearly evident so as to make any warning silly". Consequently, one need not warn that a knife will cut or that a match will burn, that pork must be cooked, that a food processor blade will cut, that use of rat poison will create a risk of dead rats stinking up one's house, or that one might fall while in-line skating for the first time. As the Ontario Court of Appeal has stated, "a manufacturer of a butcher knife is not under a legal duty to warn consumers that a butcher knife may cut flesh". Nor must the renter of a boat warn of the danger of falling off in the event that a passenger rides on its bow. In other words, there is no requirement to "warn of dangers that would be as apparent to the consumer as to the manufacturer", as no imbalance of knowledge exists in such cases. "It is dangers that have no way of being known to the consumer that give rise to a duty to warn, not dangers that are reasonably evident but go unconsidered."…

[193] To these authorities, I would add: *Alchimowicz v. Schram* (1999), 116 O.A.C. 287 at para. 10, leave denied [1999] S.C.C.A. No. 127; *Lemieux v. Porcupine Snowmobile Club of Timmins Inc*. (1999), 120 O.A.C. 292, para. 8; *Thomson v. Cosgrove*, [1998] B.C.J. 789 (S.C.) at para. 16*; Deshane v. Deere & Co*. [1993] O.J. No. 2233 (Ont. C.A.), leave denied,[1993] S.C.C.A. No. 494); *Melnychuk v. Ronaghan*, 1999 ABCA 170 at paras. 15-16).

[194] I have already quoted at some length the uncontested evidence of the plaintiff. There is no contrary evidence that would require a trial to sort out what the facts are. The plaintiff was a very experienced snowboarder. He agreed that he was "advanced". He acknowledged knowing of the dangers of snowboarding; of doing so in the Terrain Park; and of the dangers associated with snowboarding on a new board. On this latter issue, his evidence was:

Q. And why did you get a helmet at that point?

A. Just to be cautious.

Q. And was that because you were using the new snowboard?

A. Yeah.

Q. Because you knew you were basically going to be taking the same route as you had taken, right?

A. Yes.

Q. And is that because you recognized that because you weren't used to the snowboard there might be more risk snowboarding with that snowboard?

A. Correct.

[195] It is difficult to follow the logic of the motions judge where he found a duty to warn. In arriving at his conclusion he said:

> [93] Burton argues that there is no inherent risk or danger in snowboarding.

[196] This is incorrect. Burton always argued that snowboarding is an inherently risky endeavour. Yet it is this reversal of Burton's true position that then led the motions judge to rely on wording in the "Waiver" form as evidence that Burton believes that snowboarding involves inherent risks and dangers, and a trial was necessary to sort this out. He reasoned:

> [97] That acknowledgment [in the Waiver form] is not contradicted by any other evidence. At least for the purposes of this summary judgment motion, it is some material evidence that informs the duty owed by Burton to any user of a demo snowboard pursuant to the agreement and is material to the standard of care owed by Burton to a user, such as the plaintiff. It is not logical that Burton would have no duty, as argued by it, to determine the capacity of those to whom it lends 'really high end boards' to determine the ability of those to whom it lends these boards, to handle such boards in an activity that it warns involves inherent risks, dangers and hazards and for whom it requires the consent of parents or guardians for users under eighteen years of age.
>
> [98] It may be that, at trial, evidence is advanced that snowboarding is not inherently dangerous. The defendants objected to the admission of expert articles describing the dangers of snowboarding, but Burton's own document acknowledges the inherent risks and dangers of snowboarding, let alone the use of an unfamiliar 'high-end' board, especially for under-aged users.

> [99] For the purpose of this motion, some evidence exists that a duty of care (to warn a snowboarder, particularly a snowboarder under the age of 18, of the inherent risks of snowboarding and of the use of an unfamiliar high-end board) is owed by Burton. I do not accept Burton's submission that, based on the facts before me, it does not owe a duty of care to the users of its demo-boards, particularly under-age users.
>
> [100] Conduct is negligent if it creates an unreasonable risk of harm. The waiver agreement constitutes an acknowledgment that snowboarding involves inherent risks, dangers and hazards which can result in serious personal injury and death.
>
> [101] Based on this acknowledgment and representation by Burton in the agreement, there is material evidence upon which a trial judge may find that **Burton owed a duty to the plaintiff to warn him regarding the inherent dangers in using the snowboard, the risks of using unfamiliar equipment, and whether the Burton snowboard created a greater risk or potential for danger than the plaintiff's own snowboard, and to determine whether he had the ability to safely use its board.**
>
> [Emphasis added]

[197] There are at least three problems with this analysis. First, as already identified, the appellant did not dispute that snowboarding is an inherently dangerous activity. There was therefore no need to refer to the possibility that evidence may be led at trial that it is not. Second, there was no allegation that Burton owed a duty to determine the capacity of those to whom it lends snowboards. Third, and most importantly, there cannot be an actionable breach of a duty to warn about things that the plaintiff already knows.

[198] I do not overlook the fact that the plaintiff said the Burton board he used was faster than his, and it was the speed at which he approached the barrel jib feature that made him abort the jump, and land on his bottom, leading to his catastrophic injury. The motions judge referred to this in one of his various paragraphs in which he expressed his reasons for denying the motion. He wrote:

> [107] Absent evidence from Burton, and relying solely upon the evidence before the Court on this motion, there is some evidence that snowboarding involves inherent risks, dangers and hazards, and that the snowboard provided to the

> plaintiff was faster and lighter, and performed differently than the plaintiff's own snowboard. Burton acknowledges, for purposes of this motion that it did not warn of these risks.

[199] The problem is the plaintiff testified that before he entered the Terrain Park where the accident happened, he had already used the demo board and knew it was lighter and faster. How can there be a breach of a duty to warn if the plaintiff already knew of these characteristics? As to the comment that the board "performed differently", Mr. Coady's evidence was that it was a better board: it had better edges and he had better control. How is it possible that the law imposes a duty on Burton to warn potential users of its boards that they better be careful because they will have better control? In my opinion, in these circumstances the law does not impose a duty to warn. Without a duty, there can be no viable cause of action.

[200] Quite apart from there being no genuine issue of material fact requiring a trial on the alleged existence, and consequent breach, of a duty to warn, there was no evidence presented by the plaintiff that he would have acted any differently had he been warned (or as apparently intimated by the motions judge, Burton had first satisfied itself that the plaintiff was "capable of handling its board"). In other words, there was no basis to establish causation.

[201] Causation must be established on a balance of probabilities at trial. The appellant argued to the motions judge in its submissions of December 21, 2010 that there was no genuine issue of material fact about causation. *CPR 13.04 (4)* directs the party who wishes to contest the motion must provide evidence of in favour of its claim by affidavit or otherwise. Mr. Coady did so by his affidavit attaching his complete examination for discovery.

[202] Based on the evidence before the motions judge, there was no genuine issue of material fact requiring a trial about causation.

[203] The issue of causation with respect to a duty to warn is succinctly set out by Dean F. Edgell in *Product Liability in Canada* (Toronto: Butterworths, 2000) at 78:

> The manufacturer that has failed to give a proper warning may still argue that its negligence did not cause the plaintiff's loss. This leads to the question: Would the plaintiff have acted differently had a proper warning been given? This issue of causation can also arise where the danger was already appreciated by the plaintiff, perhaps because the danger was obvious.

[204] This statement of the law is fully supported by the authorities cited by the learned author, including *Baker v. Suzuki Motor Co.* (1993),12 Alta. L.R. (3d) 193, [1993] A.J. No. 605 (Q.B.); *Amin (Litigation guardian of) v. Klironomos*, [1996] O.J. No. 826 (Gen. Div.).

[205] The plaintiff was required to lead trump or risk losing. He had ample opportunity to submit affidavit or other evidence to demonstrate that there were material facts in dispute about causation or that he had a reasonable chance of success. He did not. The record is devoid of any evidence that could possibly satisfy the "but for" test required to establish liability.

[206] The absence of any evidence to support causation is fatal to a negligence claim even if the law recognized a duty of care, and the defendant breached that duty (see: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at paras. 64-68).

[207] The motions judge acknowledged (¶108) that a plaintiff must establish that the putative breach of a duty caused his injury. His analysis on this issue is found in the ensuing paragraph:

> [109] The plaintiff's opinion that, based on eight years of snowboarding, he was an advanced snowboarder, is not a determination that is so obvious on the facts before me that it precludes the real possibility that the failure of Burton to warn about the features of the snowboard it lent to the plaintiff was a proximate cause of the plaintiff's injury.

[208] With respect, the motions judge appears to have asked himself the wrong question. He should have asked: is there any dispute in the evidence that

requires a trial to resolve that had Burton warned the plaintiff that the board was faster and lighter, the accident would not have happened? In my opinion, there was absolutely no evidence the plaintiff would have acted any differently had Burton given him the requested warning. There was no genuine issue of material fact requiring a trial, nor did the plaintiff demonstrate a reasonable chance of success.

[209] To those that say causation is fundamentally a question of fact, and therefore cannot be determined in a summary judgment motion, but only at trial, I say that in these circumstances, the law does not stand for such a proposition. For example in *Guarantee*, the defendant relied on the limitation provisions in the indemnity bond. The motions judge made findings of fact and granted summary judgment. A key witness for the plaintiff had sworn affidavits that were contradictory about when the plaintiff knew of the loss. The Ontario Court of Appeal overturned the motions judge, finding that there were serious factual disputes about when there was discovery of the type of loss covered by the Bond. In joint reasons, Iacobucci and Bastarche JJ., for the Court, reversed.

[210] The ability of a motions judge to draw appropriate inferences was later recognized by the Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14. My colleague earlier quoted the statement of the Court as to the guiding principles. It bears repeating:

> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: 1061590 *Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. **The chambers judge may make**

> **inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts:** *Guarantee Co. of North America*, at para. 30.

[211] While there are certainly cases where the issue of causation may raise difficult legal and factual issues that may require a trial to resolve, this is not one of them. There is no evidence that the plaintiff would have acted any differently had he been warned. This issue is one that was particularly within his knowledge, yet he said nothing.

[212] Whether a warning would have made any difference may well be a purely subjective test (see *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paras. 44-47). I need not decide this issue. But if it is, the plaintiff did not offer any evidence that a warning would have made any difference. If there is some objective component, in my opinion, the only reasonable inference on the undisputed facts before the court is that he would not have done anything differently.

[213] The existence of a duty of care is a question of law. On this question, the motions judge must be correct. No deference is owed. In my opinion, he erred in law in his implicit finding of a duty to warn. Without a duty there is no cause of action. In addition there is no evidence of causation in fact. The motion for summary judgment should have been allowed.

DUTY TO VERIFY THE PLAINTIFF'S AGE

[214] The plaintiff alleged that Burton was negligent because it "failed to verify the age of the Plaintiff before handing over the snowboard". This allegation begs the question: what duty did Burton have to do so? The plaintiff failed to cite any case that would impose such a duty.

[215] The motions judge refers to no facts, material or otherwise, that would require a trial to resolve. The undisputed facts are that snowboarding is not an activity that requires participants to meet a minimum age requirement. There is no evidence of any licencing requirement, and those under the age of majority, or under the age of 18, were allowed to ski and snowboard at Wentworth.

[216] Mr. Coady testified that he had been snowboarding each winter since he was in Grade 1 or 2. He had been a regular attendee at Wentworth without his parents. He testified that they put no limits on his boarding; they had no difficulty with him going into the Terrain Park.

[217] Much has been made of the "Waiver" form that was presented to the plaintiff which provided an additional signature line "Signature of Parent or Guardian if User under the Age of 18". Even to be arguably effective as a means to escape liability for otherwise negligent conduct, a waiver must be signed by someone who has the capacity to contract. Except for necessities, individuals under the age of 19 years are minors. They lack the capacity to contract. In my opinion, the signature line on the "Waiver" is irrelevant. It does not create a duty on Burton to withhold lending a snowboard to a 16 year old young man who presented a driver's licence as proof of his age and identity.

[218] It would be a novel proposition indeed that every renter of bicycles, skateboards, roller skates, or like chattels owes a duty not to rent to minors absent parental consent. Are ski hills also breaching a duty when they issue lift tickets to anyone under the age of majority without parental authorization?

[219] In fact, the motions judge seemed to accept that the issue of age did not create a cause of action in negligence. But rather, it was only relevant to the existence of a duty on Burton to warn and do some kind of competency assessment. He said this:

> [112] The fact that the waiver agreement prepared by Burton requires the age of the user, and the signature of the parent or guardian of a user under the age of 18, is some evidence that Burton recognized that a duty of care was owed to a user under the age of 18, and that the standard of care owed differed from that owed to a user of at least 18 years of age.
>
> [113] **This Court's reference to the waiver agreement in this analysis relates only on the duty owed by Burton to the plaintiff to satisfy itself that the plaintiff was capable of handling its board, and to warn, and to the associated standard of care.**
>
> [Emphasis added]

[220] The claim of negligence in the so-called failure to verify the plaintiff's age should have been dismissed. I would do so.

[221] Before leaving this section, I want to be clear; Burton never disputed that it owed a duty to exercise reasonable care in outfitting the plaintiff. There was absolutely no allegation that it breached that duty. As to a duty to warn this plaintiff, there was no such duty. Even if there was such a duty, and also a duty to assess the plaintiff's capability (not pled against Burton), the evidence was clear and uncontradicted: the plaintiff was obviously an advanced and thoroughly capable snowboarder. Such claims would fail for the reasons outlined earlier.

COMPLIMENTARY ENERGY DRINK

[222] Again, with respect, I have difficulty understanding the basis upon which the motions judge dealt with this claim. His analysis is found in the following two paragraphs:

> [114] The third negligence allegation is the provision to the plaintiff of one or possibly two high-energy caffeinated beverages, contrary to s. 14 of the *Food and Drug Act*, at the same time as the offer of the free use of a superior snowboard without supervision. The plaintiff relies upon an article in a medical journal and has not yet retained an expert. The plaintiff says, for what his opinion is worth, that he was not affected by the drink; at the same time, he says that he had never consumed that particular drink before. On the undisputed facts, the giving of the drinks to Coady was contrary to the *Food and Drugs Act*. The breach of the statute, standing alone, does not establish a breach of the duty and standard of care owed by Burton to Coady.
>
> [115] On the undisputed material facts before me, I cannot determine that the consumption of the energy drink affected the plaintiff's assessment of what risks were reasonable and not reasonable.
>
> [Emphasis in original]

[223] Earlier in his reasons, the motions judge observed that " Burton does not dispute that energy drinks were made available by it to the plaintiff contrary to the provisions of the *Food and Drugs Act*" (¶50). This is incorrect. Burton made no such admission. I fail to see how making the energy drink available to the plaintiff was contrary to the *Food and Drugs Act*.

[224] Leaving aside whether such conduct was a breach of a statute, the motions judge appeared to recognize (¶114) that this would not amount to a viable cause of action against Burton. Furthermore, the only admissible evidence before the motions judge was the plaintiff's clear evidence on discovery that the consumption of the energy drink had no effect whatsoever, and did not cause or contribute in any way to his accident.

[225] In an ironic twist, the motions judge appears to have weighed what appears to be the very clear evidence of the person in the best position to offer evidence on the past effect of such drinks on his behaviour, and on that day. In the course of weighing it, he discounted it: "The plaintiff says, for what his opinion is worth, that he was not affected by the drink…" (¶114) That was not his role. It was to determine if the law imposed a duty of care and if so, were there any genuine issues of material fact requiring a trial.

[226] The plaintiff wanted to rely on an article about consumption of energy drinks and risky behaviour; and some intimation that an expert may yet be located and retained. But the law is clear. It is set out in the unanimous reasons of the Supreme Court in *Lameman*:

> 19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. **A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future**. This applies to Aboriginal claims as much as to any others.

[Emphasis added]

[227] There was no duty of care in these circumstances. Nor were there any genuine issues of material fact requiring trial of this claim. It should have been dismissed. I would do so.

DUTY AS AN "OCCUPIER"

[228] The record discloses no genuine issues of material fact requiring a trial, nor did the plaintiff demonstrate a reasonable chance of success on this claim, should there be a trial.

[229] The *Occupiers' Liability Act,* S.N.S. 1996, c. 27 replaced the common law with respect to determining the potential liability of an occupier towards persons who enter property (s. 3). The law would no longer be burdened by fine and artificial distinctions about invitees, licensees and trespassers.

[230] The duty of an occupier is defined in s. 4 of the *Act.* In a broad sense, it is a requirement of the occupier to use reasonable care that persons entering on its premises are reasonably safe. It says:

> 4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;
>
> (b) activities on the premises; and
>
> (c) the conduct of third parties on the premises.

[231] Burton did not dispute that it was an occupier of the kiosk where it had set up its snowboard demonstration. The kiosk was at the base of the ski hill. The accident where the plaintiff was injured was in the Terrain Park. The *Act* defines what is meant by an "occupier".

[232] It is a person who is in physical possession of the premises or who has responsibility for, and control over, the condition of the premises or the activities conducted on the premises or the persons allowed to enter the premises. Section 2(2) sets out the wording:

> 2 In this Act,
>
> (a) "occupier" means an occupier at common law and includes
>
> (i) a person who is in physical possession of premises, or
>
> (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,
>
> and, for the purpose of this Act, there may be more than one occupier of the same premises;

[233] There was no evidence that Burton was an occupier of the Terrain Park. The law could not be clearer – a named defendant owes no duty to a person injured on premises that it did not occupy, maintain or control (*Taylor v. Halifax 1658 Bedford Highway Inc.*, 2006 NSSC 172; *Trenholm v. Langham & West Insurance Ltd.*, [1990] N.B.J. No. 129 (Q.B.); *Reid v. Mimico (Town)*, [1927] 1 D.L.R. 235 (Ont.C.A.); *Bowden v. Withhrow's Pharmacy Halifax (1999) Ltd.*, 2008 NSSC 252, paras. 42-54).

[234] The motions judge dispensed with this issue in two paragraphs. With all due respect, I have difficulty understanding how he could do anything but dismiss this claim. What he said was:

> [118] I agree with Burton that it would be novel to extend the definition of an "occupier" to an area not under the control or occupancy of the defendant. There is, however, no evidence before the Court as to the relationship between Burton and Ski Wentworth in respect of the snowboard "DEMO Day" and who, as between Burton and Ski Wentworth, was responsible for the conduct of persons using the Burton demo snowboards.
>
> [119] **Applying the *Guarantee* test, and without consideration of the plaintiff's procedural fairness issue, there is no evidence that Burton controlled the portion of Wentworth where Coady fell**. This determination would not foreclose the plaintiff from arguing at trial that Burton owed a duty to control, and should have controlled, where users of it snowboards, such as the plaintiff, used them.
>
> [Emphasis added]

[235] The only evidence about Burton's supposed control over the Terrain Park was from the plaintiff's cross-examination of Sam Rodgers from Wentworth, who testified that Burton would have no say about who does or does not go into the Terrain Park. Furthermore, the Terrain Park and the ski conditions in it were obviously completely within the sole possession and control of Wentworth.

[236] The motions judge seemed to have accepted that there was no genuine issue of material fact on this claim requiring a trial when he observed that there was no evidence that Burton controlled the area where Mr. Coady fell. He then appeared to dismiss the summary judgment motion on this claim by saying, "This determination would not foreclose the plaintiff from arguing at trial that Burton owed a duty to control … where users of its snowboards … used them."

[237] Not only did such a notion have nothing to do with occupiers' liability, it was not even a claim pleaded by the plaintiff. The motions judge erred in law by not dismissing this aspect of the claim. I would now do so.

SUMMARY AND CONCLUSION

[238] Although the motions judge possessed inherent jurisdiction to adjourn the summary judgment motion, he erred by purporting to exercise such a jurisdiction to dismiss it. The respondent Coady did not request an adjournment. If he had, and the motions judge granted one, different considerations may well apply. But here, the motions judge did not do that.

[239] Instead, he reserved his decision, and some sixteen months later released his reasons. He found there was sufficient evidence to determine the summary judgment motion using the well-established two step test set out by the Supreme Court of Canada in *Guarantee*.

[240] However, in applying this test, the motions judge appeared to place a burden on the plaintiff, by saying that he was satisfied that the plaintiff had demonstrated sufficient material facts existed to raise a genuine issue about the duty and standard of care owed by Burton (¶120). This is the wrong test. It was up to the appellant Burton to demonstrate that there were no genuine issues of material fact that required a trial. It would then be up to the respondent Coady to demonstrate that he would nonetheless have a reasonable chance of success at trial.

[241] Nowhere did the motions judge say what the genuine issues of material fact were that required a trial. What facts are material in any given case is determined by the pleadings and the substantive law. The motions judge erred in law in failing to carry out such an analysis. There was no dispute about the facts. They were as set out in the plaintiff's examination for discovery.

[242] Taking the facts as revealed by that evidence (and there was no countervailing evidence to reconcile it with), the plaintiff was well aware of the inherent risks and dangers of snowboarding, including doing so with a new board. There was nothing unusual or dangerous about the Burton demo board. It gave the plaintiff better control. As to being lighter and faster, the plaintiff said he was aware of these characteristics before he decided to go into the Terrain Park.

[243] As a matter of law, in these circumstances, there was no duty to warn. The judge erred in law in not granting the motion for summary judgment.

[244] Even if one could imagine a duty to warn, the inescapable conclusion was that the plaintiff would have done nothing different. He offered no evidence to demonstrate the fundamental requirement to link a putative breach of a duty to the loss he suffered.

[245] As a matter of law, there were no genuine issues of material fact requiring a trial about a duty of care to verify the plaintiff's age, hand out complimentary energy drinks, or to determine that Burton was not an "occupier" of the premises where the unfortunate accident occurred.

[246] The motions judge erred in law in failing to apply the law to the uncontested facts properly before him. I fail to see where the judge found that, based on the evidence and the existing pleadings, the plaintiff had demonstrated a reasonable chance of success at trial. I am not satisfied that this is the case since there can be no reasonable chance of success in a negligence claim without a legal duty of care.

[247] I would grant leave to appeal, allow the appeal, and grant the appellant's motion for summary judgment. I would also quash the award of costs against the appellant Burton.

[248] At the conclusion of the motion before Warner J., Burton took the position that if it was successful, it was not seeking costs. Accordingly I would make no award of costs to the appellant for the proceedings in the Supreme Court, but would award it costs in this Court of $4,000, inclusive of disbursements.

Beveridge, J.A.