SUPREME COURT OF NOVA SCOTIA
Citation: *Coady v. Burton Canada Company*, 2012 NSSC 257

Date: 20120709
Docket: Tru No 302023
Registry: Truro

Between:

Michael Sampson Coady

Plaintiff

v.

Burton Canada Company and
Wentworth Valley Developments Limited

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	at Halifax, Nova Scotia, on January 27, February 10, February 11, March 14, March 16 and March 21, 2011, in Halifax, Nova Scotia
Written Decision:	July 9th, 2012
Counsel:	**Sean F. Layden, Q.C.,** Counsel for the plaintiff, Michael Coady
	G. Grant Machum and Jennifer White, Counsel for the defendant, Burton Canada Company
	Jocelyn M. Campbell, Counsel for the defendant, Wentworth Valley Developments Limited

By the Court:

A. Introduction

[1] Michael Coady ("Coady") was born June 5, 1991. On Saturday, February 16, 2008, 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") is a manufacturer, distributor and retailer of snowboards. On that day, Burton had set up a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks.

[2] Coady and his friends took Burton up on its offer. After a few runs down the regular ski hills, Coady decided to enter the "Terrain Park". On his first approach to the first feature, a barrel jib, he fell on the icy snow conditions. He suffered a serious fracture of the C-5 vertebrae, with damage to the spinal cord, resulting in partial paralysis.

[3] Coady sued Burton and Wentworth for negligence.

[4] Burton and Wentworth seek summary judgment on the evidence (*new CPR 13.04*).

[5] Coady submits that the summary judgment motions are pre-mature; the applicants have failed to demonstrate that there is no genuine issue of material fact to be determined at trial, and, alternatively, on the undisputed facts, his claim has a real chance of success.

B. Chronology of Litigation

[6] Coady commenced this action against Burton and Wentworth on October 3, 2008. 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] On October 30, 2008, Coady filed a first amended statement of claim containing a minor amendment to his claim.

[8] On December 2, 2008, Wentworth filed a demand for particulars respecting two of the allegations: the failure to warn of the dangerous conditions of the barrel jib feature by way of signs, and the failure to maintain safe snow conditions.

[9] In July 2009, Coady's then-counsel proposed to remove the two allegations for which Wentworth had filed a demand for particulars by filing a second amended statement of claim. A Consent Order to effect this proposal was signed by counsel for all parties and submitted to the

Court; however, it was not in a form consistent with the new *Civil Procedure Rules* and it was not then issued.

[10] On October 8, 2009, Burton filed its defence.

[11] On December 1, 2009, Burton provided Coady's then-counsel with an unsworn affidavit of documents. The only documents disclosed in Burton's Affidavit was a copy of its snowboard catalogue, and the waivers signed by Coady and his two teenage friends.

[12] Wentworth provided an unsworn affidavit of documents on December 7, 2009.

[13] Coady was discovered by counsel for the defendants on December 10 and 11, 2009. During the first day of discovery, Coady's then-counsel advised the defendants that she intended to "reverse" the proposed second amended statement of claim, which had previously been consented to. Apparently the plaintiff believed that the defendants' disclosure, reviewed by Coady on December 9, supported his original allegations.

[14] On December 11, 2009, Coady's then-counsel wrote to the court withdrawing Coady's consent to the Order. Counsel for the defendants wrote to the Court asking that the consented to Order be issued.

[15] In January 2010, Sean Layden became Coady's new counsel. A Notice of Change of Solicitor was filed on January 25, 2010.

[16] On April 27, 2010, Wentworth filed a motion to cause the Order containing the second amended statement of claim, previously consented to, to be issued. Coady, through his new counsel, opposed it. The hearing, originally scheduled for July 13, 2010, was adjourned at the request of Wentworth and was heard on October 5, 2010. Wentworth's motion was dismissed, but Coady was ordered to answer the December 2, 2008, demand for particulars. The answer to the demand was filed on December 23, 2010, and provided to Wentworth on December 31, 2010.

[17] On August 23, 2010, Coady filed a motion to further amend his statement of claim:

a) to expand the types of damages claimed;

b) to add to its allegations of negligence against Burton, a claim that Burton provided him access to free high- energy caffeinated drinks, contrary to the *Food & Drug Act*, the drinking of which, when taken in combination with the use of Burton demo snowboard, caused physical changes and psychological effects that contributed to the accident; and,

c) to add against both defendants allegations that they breached their duties to him pursuant to the *Occupiers' Liability Act*.

[18] The defendants opposed the plaintiff's motion to file a second amended statement of claim until November 23, 2010, the date scheduled for the hearing. A consent Order, authorizing the second amended statement of claim, was issued on December 21, 2010.

C. Chronology of Summary Judgment Motions

[19] On April 9, 2010, Burton filed this motion for summary judgment; shortly thereafter Ski Wentworth filed its motion for summary judgment. No affidavits, briefs or supporting materials were filed with the motions. Burton's motion was originally scheduled for one-half day on September 3, 2010. To facilitate Wentworth's motion being heard with Burton's motion, Burton agreed to its motion being rescheduled for a full day on January 27, 2011.

[20] The first disclosure to the plaintiff of the basis and particulars of the summary judgment motions came on December 21, 2010, when Burton filed an affidavit of its counsel, its brief and a draft Order. The first disclosure of Wentworth's position came on January 12, 2011, when Wentworth filed affidavits of its counsel and two employees (Thor Durning and Sam Rodgers), and its brief. On January 18, Wentworth filed amended affidavits of its two employees, a supplementary affidavit for Thor Durning, and a supplementary affidavit of its counsel. On January 21, Wentworth filed a second supplementary affidavit of its counsel.

[21] On January 20, Coady filed his affidavit, his counsel's affidavit and a brief.

[22] On January 21, Wentworth filed its defence to the action. Burton also filed an amendment to its October 8, 2009, defence.

[23] On January 27, Thor Durning and Sam Rodgers, the Wentworth affiants, were cross-examined on their affidavits. Oral submissions were made by counsel on February 10 and 11, as well as March 14, 16 and 21, 2011.

D. The Test for Summary Judgment on Evidence

[24] The wording of the test for summary judgment on the evidence in the ***new*** (January 1, 2009) *Civil Procedure Rules* differs from the wording in the ***old*** (1972) *Rules*. The *old Rule* had been amended in 2002 to permit defendants to seek summary judgment against plaintiffs. Since 2002, *old Rule 13.01(a)* read:

> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

[25] *New Rule 13.04* reads in part:

> 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.

[26] Since the 2002 amendment to the *old Rule*, the Nova Scotia Court of Appeal has consistently held that the two-step test set out in ***Guarantee Co. of Nova America v Gordon Capital Corp***, [1999] 3 S.C.R. 423, decided in respect of old Ontario *Rule 20*, applied to Nova Scotia applications for summary judgment on the evidence. These decisions include: ***United Gulf Developments v Iskander***, 2004 NSCA 35; ***MacNeil v Bethune***, 2006 NSCA 21; ***Jeffrey v Naugler***, 2006 NSCA 117; ***Huntley v Larkin***, 2007 NSCA 75; and, ***Young v Meery***, 2009 NSCA 47.

[27] Recently the Nova Scotia Court of Appeal held that the same two-step ***Guarantee*** analysis applies to motions under *new Rule 13.04*: ***Ristow v NFBL***, 2010 NSCA 79 and ***2420188 Nova Scotia Limited v Hiltz***, 2011 NSCA 74.

[28] While the two-step ***Guarantee*** analysis applies to both the old and the new *Rule*, the difference in wording between the *old* and *new Rule* affects the analysis. *Old Rule 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." [Court's emphasis]

[29] *New Rule 13.04* does not contain an express provision permitting the Court to "grant any other order or judgment as it thinks just". The *old Rule* granted the court some discretion to deny summary judgment, even in the face of the ***Guarantee*** test, when the motion was premature, or when (to borrow language from the recent ***Combined Air Mechanical Services v Flesch*** decision, 2011 ONCA 764 at ¶¶ 44 to 51) 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.

[30] The *new Rule* includes the following:

> 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.

[31] The *old Rule* was interpreted as requiring the responding party to put his/her "best foot forward". The *new Rule* expressly requires it. The plaintiff's response to both defendants' motions is that he is unable to put his best foot forward for reasons beyond his control. The motions were filed:

(i) immediately after the discovery of the youthful plaintiff (a minor at the time);

(ii) before discovery of the defendants, or the exchange of the sworn affidavits of documents (and supplementary affidavits containing what the plaintiff says is important relevant and material disclosure);

(iii) it was unreasonable to require the plaintiff to produce expert reports until after discovery of, and full disclosure by, the defendants (plaintiff's counsel submits that it would have been costly and inefficient, and therefore unreasonable, to retain experts until he had the defendants' relevant disclosure); and

(iv) the defendants identified the basis and particulars of their motions, by way of their affidavits and briefs, only very shortly before the hearing, long after the motions were filed and set down for hearing.

Said differently, the hearing was premature. The *old and new Rule* were/are both intended to stop unmeritorious claims from going to trial, not to stop a claim from getting to the stage where it was reasonable to determine whether it is meritorious.

[32] In response, the defendants state that the *new Rule* permits the motions to be brought as soon as pleadings are filed and requires the responding party to put his/her best foot forward. A promise of future evidence does not meet the standard.

[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.

[34] As noted, the Ontario Court of Appeal recently interpreted its new summary judgment rule in ***Combined Air***.

[35] There are some similarities between the new Ontario and the new Nova Scotia *Rule* respecting summary judgment on the evidence. One of the notable similarities is the replacement of the word "may" found in the *old Rule* in both jurisdictions with the word "shall" in Ontario and "must" in Nova Scotia.

[36] There are two phrases contained in the new Ontario *Rule* that do not appear in the new Nova Scotia *Rule*.

[37] New Ontario *Rule 20.04(2)* provides that:

> The Court shall grant summary judgment if,
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. (Emphasis Added)

[38] New Ontario *Rule 20.04(2.1)* provides that:

> 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 interests 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. (Emphasis Added)

[39] In 20.04(2.2), the Court may order that oral evidence be given.

[40] At paragraph 44 of ***Combined Air***, the Ontario Court of Appeal notes the change of the phrase "genuine issue for trial" to "genuine issue requiring a trial", and states that the change is more than semantics. At paragraph 45, the Court states that the threshold issue of whether a trial is required for a fair and just resolution of the litigation is determined by the new phrase in 20.04(2.1) - "interests of justice". The Court notes that the analysis is case specific, and, because the dynamics of a trial differ from the dynamics of a summary judgment motion, the fundamental question on summary judgment is whether the Court can get a full appreciation of the evidence and issues required to make dispositive findings.

[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*.

The *Guarantee* analysis

[42] For section E of this decision, I assume 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. To the facts before me, I apply the two-stage ***Guarantee*** analysis, reiterated by the Supreme Court in ***Canada* v *Lameman***, 2008 SCC 14, and repeated by Justice Fichaud in ***Hiltz*** at §§ 19 to 33, in particular, § 24.

[43] Stage one of the ***Guarantee*** analysis requires that the moving party show that there is "no genuine issue of material fact requiring a trial" (described in ***Hiltz*** as "no disputed issue of material fact"). The term "genuine" has been interpreted as implying that that the claim or defence is not spurious. A weak case is not, *per se*, spurious.

[44] If a disputed issue of material fact exists, the court should dismiss the application without engaging in the assessment of the merits (stage two). Whether there is a disputed issue of material fact involves a comparison of both party's evidence and positions. If no disputed issue of material fact exists, the burden shifts to the responding party to show that his or her case has a real chance of success.

E. Burton's Summary Judgment Motion

E.1 Burton's Position

[45] Burton relies totally on the discovery evidence of the plaintiff Michael Coady, held on December 10 and 11, 2009, to discharge its burden of showing that there is no disputed facts material to the plaintiff's four pleaded allegations of wrongdoing by Burton. The only evidence submitted by Burton in support of its motion is an affidavit of its solicitor containing copies of the pleadings, and extracts from the plaintiff's discovery. Burton submits that, based on Coady's evidence, there is no material facts in dispute and the undisputed material facts raise no genuine issue for trial.

[46] Burton's counsel enumerate the four allegations against Burton as follows:

i. Burton failed to warn the plaintiff about the nature and potential danger of the Burton snowboard;

ii. Burton failed to verify the age of the plaintiff before handing over the snowboard;

iii. Burton provided, in connection with unsupervised access to and use of the demo snowboard, easy access to a high-energy caffeinated beverage, contrary to s. 14 of the *Food and Drug Act*, which high-energy drink had physiological effects on the plaintiff that contributed to the accident; and,

iv. with Wentworth, Burton breached its duty as an occupier of the ski resort in respect of the snowboard demo operation, pursuant to the *Occupiers' Liability Act*, which breach included obtaining of the waiver agreement, and providing the demo snowboard and the high-energy drinks.

[47] With respect to the first allegation – the failure to warn about the nature and potential danger of the demo snowboard, Burton submits there is no evidence that the snowboard constituted an unusual danger; that it or its use was inherently dangerous; that it was defective or that it did not meet the standards of the industry.

[48] Burton objects to the admission of published articles by "experts" referring to the inherent dangers of snowboarding contained in plaintiff's affidavits filed in response to the motion.

[49] With respect to the second allegation – the failure to verify the plaintiff's age, Burton states that it did not rely upon the waiver signed by the plaintiff; therefore, it was not relevant to Burton's motion. Burton does not dispute that the plaintiff was 16 years old, a minor at the time of the accident, and appears to acknowledge that its staff knew that the plaintiff was 16 at the time he signed the waiver; however, Burton submits that there was no evidence of a minimum age for a person using a snowboard at the Wentworth resort.

[50] With respect to the third allegation – providing free high-energy drinks, contrary to the *Food and Drug Act*, in connection with the unsupervised access to and use of the demo snowboard, Burton does not dispute that energy drinks were made available by it to the plaintiff contrary to the provisions of the *Food and Drug Act*, but submits that there was no evidence that the consumption of these high-energy drinks had any effect on the plaintiff or contributed to the accident.

[51] Burton objects to the admission of published articles that describe the effects of high-energy drinks contained in the plaintiff's affidavits, and asks the Court not to draw any conclusions in respect of the physiological effects of high-energy drinks from these articles.

[52] With respect to the fourth allegation – Burton acknowledges its presence at Ski Wentworth on February 16, 2008, but notes that there was no evidence of the contractual relationship between Wentworth, the owner/operator of the resort, and Burton. Counsel states that the only evidence of occupation by Burton was of the part of the Wentworth resort where the demonstration display area was situated. It submits there is no evidence that Burton had any control of any other part of the Wentworth resort, including, in particular, the terrain park where the plaintiff was injured.

[53] Counsel submits that it would be a "stretch" to say that Burton occupied the terrain park.

E.2 Coady's position

[54] The plaintiff's factual reply to Burton's motion, for the purposes of the ***Guarantee*** analysis, is found in two affidavits.

[55] The plaintiff's affidavit contained the complete transcript of his Discovery; the signed Burton 'waiver of liability' form; Burton's unsworn Affidavit of Document (containing only its catalogue of snowboards and the three waivers signed by the plaintiff and his two friends) as well as four published journal articles containing expert or opinion evidence respecting snowboard accident liability and injury issues.

[56] The affidavit of plaintiff's counsel included, in additional to items relevant to the prematurity issue, the pleadings, Ski Wentworth's unsworn Affidavit of Documents and a published journal article containing opinion evidence respecting the effects of high-energy drinks on risk-taking.

[57] The plaintiff's January 21 brief, at § 37, listed what counsel described as 34 material facts from plaintiff's discovery evidence that support its pleadings. Plaintiff's counsel submits that these facts, taken together with the other materials in the plaintiff's affidavits, together with the evidence of the Ski Wentworth affiants, leave at least 19 material fact and credibility issues outstanding. These fact issues are set out in § 39 of plaintiff's brief.

E.3 Burton's reply

[58] Burton addresses each of these alleged material factual issues at § 36 of its February 7th reply brief.

[59] I have broken the plaintiff's 19 material fact issues into four groups based on my analysis of how they relate to the plaintiff's four allegations of negligence.

[60] The claimed material facts in dispute are set out as follows: with respect to the first allegation, in §§ 1, 2, 3, 4, 8, 9, 13, 16, 17 and 18; with respect to the second allegation, in §§ 5, 6, 7 and 19 (also 3 and 4); with respect to the third allegation, in §§ 10, 14 and 15; and with respect of the fourth allegation, in §§ 11 and 12.

[61] These groupings are somewhat artificial. The first, second and fourth allegations are closely related, or at least overlap, to a significant degree.

[62] Burton's reply to the alleged material factual issues follows.

First negligence allegation:

[63] First, whether the plaintiff was given any warning regarding the inherent danger in using the snowboard as it was intended to be used. In his discovery evidence, the plaintiff states that he was not given any warning. Burton says this is not a factual matter in dispute. In effect, Burton does not challenge the plaintiff's statement that he was not warned. Burton says this is a legal issue respecting its duty, not a factual dispute. Burton's position is that there was no duty to warn in the circumstances.

[64] Second, whether the plaintiff was given any specific warning regarding the risks of using unfamiliar equipment to attempt to ride or jump features in the terrain park. Again, Burton says this is a legal issue respecting its duty, not a factual dispute. Burton states that it owed no duty to give such a warning in the circumstances.

[65] Third, what conversations occurred between the plaintiff and Burton's employees? The plaintiff testified in discovery as to conversations. Burton says that no disclosure or discovery is necessary at this point. For the purposes of this motion, Burton accepts the plaintiff's evidence as to conversations that occurred between him and Burton employee(s), and submits that it negates any duty of care, or duty to warn.

[66] Fourth, whether Burton employees assessed the plaintiff's skill level before allowing him to use the snowboard. Burton states that whether or not Burton assessed the plaintiff's skill is not relevant to whether Burton owed the plaintiff a duty to warn or failed to warn him. The plaintiff testified in discovery that he was an experienced skier; therefore, failure to assess his skills did not cause, or contribute to, his injury.

[67] Eighth, whether Burton set up the snowboard in a safe manner for use by the plaintiff. Burton states that this is not a material fact, as it is not relevant to the allegation of negligence alleged in the plaintiff's pleadings.

[63] Ninth, whether Burton provided a snowboard that created a greater risk or potential danger than the plaintiff's own snowboard or other snowboards. Burton's reply is that this is the ultimate issue; it is a disputed legal issue, not a disputed factual issue.

[64] Thirteenth, what Burton's operating and safety policies respecting "DEMO days" consisted of. Burton is unclear how its operating and safety policies respecting "DEMO days" are factually material or in dispute. They have not been disclosed and are not before the Court.

[65] Sixteenth, how many other "DEMO days" Burton runs, and whether, and how many, other injuries have occurred during them. Burton submits that neither fact is relevant to whether it was negligent in any duty it owed to the plaintiff in this case.

[66] Seventeenth, how many Burton staff was onsite during the "DEMO days" at Ski Wentworth on February 16, 2008. Burton submits that this fact is not relevant to whether Burton was negligent.

[67] Eighteenth, what model of snowboard was provided to the plaintiff? Burton states that there is no factual dispute. The actual snowboard was produced at plaintiff's discovery on December 10, 2009.

Second negligence allegation

[68] Fifth, whether the plaintiff read Burton's waiver. Burton does not dispute the plaintiff's evidence, at discovery, that he did not read or review the waiver. Burton states that this fact is not material to this motion since Burton does not rely upon the waiver to exempt itself from liability.

[69] Sixth, whether the plaintiff understood the waiver. Burton does not dispute the plaintiff's discovery evidence that he did not read the waiver and therefore not understand it. Because it does not rely upon the waiver for an exemption from liability, Burton submits that this fact is not material.

[70] Seventh, whether Burton's employees instructed the plaintiff to read the waiver. For the purposes of this motion, Burton acknowledges that no employee instructed the plaintiff to review the waiver. It says it is not relevant as Burton does not rely upon the waiver to exempt it from liability for the purposes of this motion.

[71] Nineteenth, what Burton staff knew of the plaintiff's age and the contents of the waiver the plaintiff signed? Burton acknowledges that the plaintiff wrote his date of birth on the waiver. Because Burton does not rely upon the Waiver, it submits that knowledge of the plaintiff's age or the contents of the contents of the signed waiver are not factually material.

Third negligence allegation

[72] Tenth, what were the physiological effects of the energy drink on the plaintiff? Burton replies that in his discovery evidence, the plaintiff said that the energy drink (or drinks) had no effect on him. Furthermore, whether the energy drink causally contributed to the accident is a question of law, not a question of fact.

[73] Fourteenth, what contracts or agreements existed between Burton and the energy drink providers respecting "DEMO days"? For the purposes of this motion, Burton acknowledges that it provided the energy drink(s). Burton submits that any contract that it had with the drink providers is not factually materially to the plaintiff's allegations or its liability. It notes during discovery the plaintiff stated that the drink had no effect on him.

[74] Fifteenth, how many AMP energy drinks were provided to the plaintiff by Burton? Burton notes that the plaintiff, in discovery, stated that he had one, maybe two, AMP energy drinks. Burton says only the plaintiff would know. Burton does not dispute the plaintiff's evidence. Burton submits that the plaintiff must show that the drinks caused or materially contributed to the fall and injury.

Fourth negligence allegation

[75] Eleventh, whether Burton was an occupier of the ski hill? Burton's submission is that this is a question of law and not a material factual dispute.

[76] Twelfth, whether Burton was responsible for, or had control over, the activities – particularly the use of the demo snowboard at the Wentworth facilities? Burton submits that this too is a question of law, not of material fact. Burton acknowledges that it controlled the area of the kiosk but denies that it had control over any activities beyond the kiosk.

[77] The Court notes that in respect of this issue, there was no evidence as to the contractual arrangements between Wentworth and Burton in respect of Burton's "DEMO days" presentation at the Wentworth facility. The affiants advanced by Wentworth were cross-examined on this issue, and clearly did not have any knowledge of the arrangement between Burton and Wentworth.

E.4 *Guarantee* analysis

[78] The plaintiff enumerated nineteen issues of material fact that he says are disputed between him and Burton (January 19, 2011 brief, § 39). Burton replies to each at § 36 in its supplementary brief of February 8, 2011.

[79] Are there material facts in dispute respecting the first negligence allegation: that Burton failed to warn the plaintiff regarding the inherent danger in using its snowboard as intended, or a

specific warning regarding the risks of using unfamiliar equipment to ride or jump features in the Terrain Park?

[80] Burton acknowledges, for the purpose of this motion, that it did not warn the plaintiff (plaintiff's material facts numbers one and two), and says it owed no duty to warn.

[81] Burton appears to acknowledge, and the limited undisputed evidence before the Court on this motion (of the plaintiff) is, that Burton employees did not assess the plaintiff's skill level or experience before allowing him to use its snowboard (plaintiff's material facts numbers three and four). Burton replies that the fact that the plaintiff, during discovery, stated he was an experienced snowboarder means that the failure to assess his skill level did not cause or contribute to his accident; therefore, it is not material.

[82] Burton submits that whether Burton provided a snowboard that created a greater risk or potential danger to the plaintiff than the plaintiff's own snowboard or other snowboards (plaintiff's material fact number nine) is not a factual dispute, but a legal dispute. I do not agree. The only description of the Burton board and comparison with Coady's board is in Coady's discovery evidence. The plaintiff contrasted his board with the Burton board on several occasions over the two days of discovery. He described his as like wearing "Walmart sneakers as opposed to a nice brand name sneaker", and like riding a "generic second-rate board" compared to a "really high end board". The Burton board was as long but narrower ("less wide") than his. It was lighter and faster than his. Later in discovery, he agreed that the Burton board was different than any other board, based on his experience. He described it as "giving a 16-year-old a sense of false invulnerability to give him a professional board on a hill". He attributed the faster speed of the Burton board (than his own) as one of the two reasons for his accident. Based on Coady's un-contradicted description of the characteristics of Burton's board, it is illogical to suggest that, as a matter of fact, or mixed fact and law, greater speed would not create greater risk and potential danger.

[83] Burton submits that there is no evidence that it set up the snowboard in an unsafe manner (plaintiff's material fact number eight).

[84] Burton submits that neither the operating nor safety policies for running "DEMO Days" (plaintiff's material fact number thirteen), nor how many "DEMO Days" it runs, nor how many, if any, other snowboarders were injured (plaintiff's material fact number sixteen), nor the number of staff manning its "DEMO Days" facilities (plaintiff's material fact number seventeen), are material facts.

[85] The onus is on Burton to show that there are no disputed facts that are material to the legal issues in dispute. Only then does the onus shift to the plaintiff to show that on those undisputed material facts, a genuine issue for trial remains.

[86] There are different frameworks for analyzing the elements of negligence. (See **Alan M. Linden** and **Bruce Felthusem,** *Canadian Tort Law, Eighth Edition*, (Markham, Butterworth, 2008) at pp. 107 to 110) The text writers suggest that all of these frameworks are, to some degree, artificial and simply tools for analysis.

[87] No matter which framework is applied, in a negligence action the plaintiff must establish that the defendant owed a duty to the plaintiff in law and that the conduct of the defendant breached a standard of care established by law.

[88] For this motion, Burton has the onus of establishing that there are no disputed facts, material to these legal issues – whether a duty of care was owed, what the standard of care in the circumstances was, and whether the standard was breached.

[89] On the undisputed facts before the Court, I have difficulty with Burton's statement that it owed no duty to the plaintiff to warn him about the nature and potential dangers associated with the use of its snowboard.

[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.

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

[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.

[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.

[102] A review of Coady's discovery evidence offers further relevant insight, even though Coady was still a minor at the time of the discovery.

[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. It arose early on the first of two days of discovery, in this series of questions:

> **Q.** At any time when you were snowboarding in grade seven, eight, nine or 10 did any of the people with you ever suffer any injuries snowboarding?
>
> **A.** No.
>
> **Q.** Did you ever see anybody suffer injuries snowboarding or skiing?
>
> **A.** No.
>
> **Q.** Presumably you heard about that, though, correct?

A. Yes.

Q. Now, at the date of the accident how would you describe your snowboarding capability?

A. Pretty good snowboarding ability that had come with like eight years' experience.

Q. Would you call yourself an advanced snowboarder?

A. Yes.

Q. And prior to your accident had you ever gone in any snowboarding competitions?

A. No

[104] His evidence regarding his experience with the Burton snowboard was that, not only was the snowboard "awesome", but it was lighter and faster than the plaintiff's own snowboard. It was so much faster that the plaintiff stated he gained more speed than he was expecting as he approached the barrel jib feature where he fell.

[105] The plaintiff had no experience with the sensation of being on a snowboard of the configuration and high quality of the Burton board. The plaintiff believed that the snowboard was a factor in his accident in that it contributed to his increase in speed.

[106] The plaintiff's evidence on this point includes the following:

Q. But this is the allegation that's made against Burton and I want to know, what is it about the snowboard that you say that caused this accident?

A. I believe not only that it was light and faster and - - but it gives you a sense of false - - a 16-year-old a sense of false invulnerability to give him a professional board on a hill.

Q. Sorry, to give a professional board?

A. Yes

Q. How do you know it's a professional board and not just a recreational board?

A. Burton just has a reputation for having professional boards.

Q. So, you haven't looked to see what category that falls under in the - - you said you couldn't find it in the brochure, right?

A. That's correct.

Q. Okay. Do you agree with me that by the time you hit that jump you were familiar with that board? I know you don't remember much about the runs but you've

made a few runs on it by this stage. Do you agree with me that you were familiar with the board by that stage?

A. I would agree with you that I was more familiar with the board.

Q. Right. You'd gone through all the different types of snow conditions getting to that terrain park, hadn't you?

A. Correct.

Q. And you'd gone over ice, you said?

A. Correct.

Q. You knew its characteristics on ice.

A. Correct.

Q. You knew what it was going to do with respect to speed on ice?

A. I knew it - - what the speed was like on the ice.

Q. Right. Do you have any evidence that your own board would have acted any differently going over that jump?

A. I don't - - can I get just a clarification on "evidence"?

Q. Any facts, anything that you are aware of - - you're the one that was on the board, you're the one that used your own board. Can you tell me whether your own board would have acted any differently that the Burton board going down toward that jump, over the ice that you say was there and going over the curve of that jump?

A. Slower.

Q. Slower?

A. Correct.

Q. Okay. Do you agree with me that you could have slowed that board down?

A. My board?

Q. No, the Burton board.

A. Yes.

Q. Okay. And do you also - - -

A. Let me rephrase. Yes, until Point 1 on the diagram, Exhibit - - I believe it was 11.

MR. DUNPHY: 10

THE WITNESS: 10.

- - - BY THE WITNESS:

A. Yeah, Exhibit 10.

Q. Do you agree with me that the Burton board, because it had good edges, would have assisted you from turning - - would have assisted you in turning away from the jump probably more efficiently than your own board?

A. Potentially.

Q. Okay. Do you agree with - - and again your whole theory here is that the Burton board on ice would go faster than your board?

A. Correct.

Q. Okay.

A. As well, as I mentioned before, that it gives a 16-year-old a sense of false invulnerability.

Q. Okay. And that's because of what?

A. the nature of 16-year-olds as well as - - -

Q. No, but what about the board does that?

A. Its reputation.

Q. The reputation, okay. But you're on top of the board, you know what it's doing, you know the speed of the board, you're in control of it, correct?

A. Correct.

Q. Let me suggest to you that the reason why you fell on that day is not because of the ice, not because of the jump, but that you simply lost control and leaned backwards.

A. I disagree.

Q. You disagree? I'm going to suggest to you that when you hit the jump you lost balance that that's why you fell.

A. I would disagree.

[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.

[108] Another element of the law of negligence is the onus on the plaintiff to establish that the breach of the standard of care owed by the defendant to the plaintiff was the proximate cause of or contributed substantially to his injury.

[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.

[110] The second negligence allegation is that Burton failed to verify the age of the plaintiff before handing over the snowboard. Burton admits that it did not check Coady's age, and that he was 16 years old at the time. It submits that, separate from its reliance upon the waiver as an exemption for any negligence on its part, failure to verify his age is not, by itself, evidence of negligence.

[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.

[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.

[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 Drug 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.

[116] The fourth negligence allegation is whether Burton was an occupier of Wentworth in respect of its "DEMO Day" promotion and, in particular, the activities of those who were using its demo snowboards.

[117] In oral argument, Burton argues that Burton is no more liable for what happened in the terrain park, over which it had no control, than a BMW car dealer who permits a customer to take a test drive, has over the highway upon which BMW is driven. The car dealer is not, for the purposes of a lawsuit, the occupier of the highway.

[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.

[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.

[121] Burton's representations about its waiver agreement are contra-indicative of its submissions that no facts exist upon which a court could conclude that snowboarding is inherently dangerous, and underage users must obtain the consent of a parent or guardian, and whether there was a duty of care owed to Coady and that duty may have been breached. Evidence exists that the Burton board was lighter and faster than the plaintiff's, and that the plaintiff believed that this capacity for faster speed caused the accident. The waiver agreement and discovery evidence is material evidence that Burton would not let a minor use its snowboard without the knowledge and consent of a responsible adult familiar with the minor. This evidence informs the duty of care, and is suggestive of negligence in giving a minor a superior board, without any inquiry as to his familiarity with the board, to carry out an inherently dangerous activity.

[122] Burton's motion is premised on its view that there is no evidence that snowboarding is an inherently dangerous activity, that it owed no duty to warn the plaintiff of certain inherent risks, or that it breached any duty of care. In ***Lameman***, the Supreme Court stated that the motions judge may make inferences of fact based on undisputed facts before the court as long as the inferences are strongly supported by the facts. As noted by Cromwell J.A. (as he then was) in ***Campbell*** *v.* ***Lienaux*** [1998] NSJ No. 142 (NSCA) at §14, "summary judgment applications are not the appropriate vehicle for determining … difficult questions about the appropriate inferences to be drawn from the facts." There are sufficient facts upon which a reasonable

properly-instructed trier of fact could find in favour of the plaintiff on the issue of the duty of care owed by Burton and whether it was breached.

F.1 Prematurity and procedural fairness analysis

[123] The plaintiff advances two other reasons for not granting. The motion is premature and it is not in the interests of justice. These two reasons are inter-related.

[124] Regarding prematurity, counsel refers the Court to ***Flewelling v Scotia Island Property Ltd***, 2009 NSSC 94, particularly §§ 15 and 16; ***Veritas Geophysical (Nigeria) Ltd v Energulf Resources Inc***, 2010 BCSC 1253, particularly §§ 931 and 934; and ***Bank of Montreal v Scotia Capital***, 2002 NSSC 252. He lists several relevant facts that might be elicited from discovery of representatives of the defendants, which discoveries had been scheduled but had not held. He argued that he should be permitted to conduct discoveries of the defendants before this motion is determined. He argues that the defendants have provided incomplete disclosure of material facts, and lists several material facts that may be disclosed by further disclosure.

[125] Regarding the interests of justice, counsel cites ***MacNeil v Bethune***, 2006 NSCA 21, particularly §34. This decision was made under the *old Rule*, and Roscoe J.A. based her statement at §34 on *Rule 13.02(a)* and *(k)*. Counsel acknowledges the absence of equivalent clauses in the *new Rule*, but he argues that the Court has inherent jurisdiction to do justice. In this case, it is not in the interest of justice to determine the summary judgment motion at this time because: the plaintiff's present counsel was only retained in 2010 and was busy dealing with other motions respecting pleadings in 2010; discovery of representatives had not occurred; it was premature to obtain the opinion of a liability expert, whose report could only be meaningful if based on the disclosure and discovery evidence; and there has no undue delay on the part of the plaintiff in pursuing his claim.

Burton's Position

[126] Burton states that the *new Rule* does not permit dismissal for prematurity. The *Rule* contemplated summary judgment at an early stage. *Civil Procedure Rule 1.01* says: "These Rules are for the just, speedy, and inexpensive determination of every proceeding." The *Rule* does not require completion of disclosure or discoveries. *New Rule 13.07* only provides the Court with authority to address issues of production and discovery if a summary judgment motion is unsuccessful.

[127] Burton cites ***MacNeil v Nova Scotia (Attorney General)***, 2010 NSSC 138, at § 7, to the effect that it is not necessary to exchange affidavits of documents or that all disclosure is provided before a summary judgment motion is made.

[128] In this case, Burton provided an affidavit of documents (unsworn) in December 2009 and had not received a request for any additional documents until the plaintiff's brief on this motion dated January 19, 2011.

[129] Burton distinguishes the circumstances in this case from those in ***Welton v Mercier***, 2004 NBCA 83, where the Court overturned a summary judgment on the grounds that included the fact that the defendant failed to deliver an Affidavit of Documents compliant with the *Rule*,

which, if delivered, should have led to the disclosure of the very document related to the matter in issue (§§ 26 and 27). Counsel notes that Burton provided an Affidavit of Documents in December 2009 and submits that all of the relevant evidence that is required for the plaintiff to put his best foot forward has already been provided to the plaintiff.

[130] Counsel submits that Sam Rodger's evidence answers the material facts respecting the allegation of statutory liability (occupier's liability), and the plaintiff's own evidence showed that the energy drink or drinks did not cause or materially contribute to the accident.

[131] Burton submits that the statement made by the Court in ***SAR Petroleum Inc v Peace Hills Trust***, 2009 NBQB 197, at §§ 47 and 48, where the Court found "no answers to controversial questions within documents held exclusively by one party. Everything is known and undisputed" should apply to this case.

[132] Burton refers the Court to ***6459652 Ontario Inc v Guardian Insurance***, 1989 CarswellOnt 884 (OSCJ) where the Court overturned a local judge who adjourned the summary judgment motion without day until undertakings had been complied with. In that case the plaintiff's lawyer had adjourned a discovery examination to review an Affidavit of Documents delivered during the discovery.

[133] For each of the nine factual circumstances that the plaintiff says it would be clarified by discovery of a Burton representative (plaintiff's January 19 brief, § 32), Burton responds that, in respect of four of them, there are uncontradicted facts before the Court, and that the other five "facts" are not relevant.

[134] In his January 19 brief, at § 39, the plaintiff submits that there are 19 factual, credibility and complex legal issues outstanding. Burton replies that three of the "issues" are legal questions, three others are not relevant to the plaintiff's claims as pled, and the remaining 13 issues are factual statements that Burton does not dispute for the purposes of its summary judgment motion or are within the exclusive knowledge of the plaintiff.

Analysis

[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. This purpose is in furtherance of *CPR 1.01* – the just, speedy and inexpensive determination of proceedings.

[136] During oral argument, this Court expressed concern that, before completion of some pretrial disclosure and discovery processes, it may not be reasonably possible to determine if the plaintiff's case includes facts upon which a trier of fact may find in his favor.

[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.

[138] Procedural rules are intended to promote justice, not to circumvent it. The exercise of discretion involves balancing the right of the moving party to an early end to a claim or defense that has no genuine chance of success at trial, with the right of the responding party, if they act diligently, to sufficient disclosure of the moving party's case (by production and/or discovery) that the proceeding is determined on the basis of the available evidence and not on the basis of non-disclosure.

[139] The issue in each case, and in this case, is where the balance lies.

[140] While Justice Hood did state, in ***MacNeil v. Nova Scotia***, 2010 NSSC 138, at § 7, that it is not necessary that full disclosure processes be completed, this was qualified by her observation that "it is, of course, necessary that there be sufficient material before the motions judge to make a determination . . . each case, of course, will require different material".

[141] An example of the exercise of discretion in a circumstance where the responding party claimed not to be able to put its best forward, and where the Court exercised discretion to adjourn a summary judgment motion, is Justice Duncan's decision in ***Halifax (Regional Municipality Pension Committee) v State Street Global Advisors Ltd***, 2012 NSSC 160. While I may not endorse Justice Duncan's statement that "disclosure is presumed to have been completed before a summary judgment is determined", or that the criminal concept of "full answer and defense" informs the exercise of discretion in the civil context, I agree that a discretion exists, and that the facts in that case - an inability to put the responding party's best foot forward, despite diligent pursuit, because of information in the moving party's control - supported the discretion exercised.

[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.

[143] This test allows a proper balancing of the competing interests and principles. Failure to retain that discretion may encourage machinations that have no place in civil litigation.

[144] How does this test apply in this matrix?

[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.

[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.

[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.

[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.

G Wentworth's Motion for Summary Judgment

G.1 Wentworth's Position

[150] Wentworth relies heavily upon the plaintiff's discovery evidence for the factual basis of its motion. However, unlike Burton, Wentworth also advanced affidavits of two employees, both of whom were cross-examined.

[151] In its submission of the law respecting summary judgment, counsel for Wentworth emphasizes the requirement for the responding party to put his best foot forward, regardless of the state of pretrial disclosure and discovery, and that the Court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial.

[152] Wentworth notes that the plaintiff's five allegations of negligence:

i. failure to supervise the terrain park;

ii. failure, by signs, to warn the plaintiff of the dangerous condition of the barrel jib feature;

iii. failure to have and maintain safe snowboarding snow conditions;

iv. failure to have a system to supervisor visitors, especially minors and amateurs, using Burton's demo snowboards; and,

v. providing easy access to free high-energy drinks, contrary to the *Food and Drug Act*, in combination with failure to supervise the users of Burton's boards.

[153] Wentworth submits that, in this case, unlike many negligence cases, expert evidence is necessary to assist the trier of fact. It cites: ***Cherny v GlaxoSmithKline*** 2009 NSCA 68; ***Civitello v Ski Sundown Inc.*** (unpublished but cited as 2000 WL 804598); ***Santopietro v New Haven***, 239 Conn 207, 682 A.2d 106 (1996), ***O'Brien v Ski Sundown Inc***.(unpublished but cited as 2003 WL 1228070) (Conn. Super.2003).

[154] Wentworth argues that allegations that the barrel jib feature was dangerous involve issues of design, engineering and industry standards; the allegations that snow conditions were unsafe and that the supervision of the terrain park and the snow board demonstration was inadequate requires evidence of industry standards; and the allegations that energy drinks contributed to the plaintiff's false confidence and energy are matters of science.

[155] Counsel notes that the plaintiff, in discovery, acknowledged that he was not in a position to know that the barrel jib feature was dangerous, other than the icy condition of the snow. Counsel argues that if it eludes him, it would elude an ordinary trier of fact.

[156] Later in its brief (page 89 beginning at § 192), Wentworth sets out its position with regards to each of the five allegations of negligence.

[157] Before doing so, Wentworth makes its submissions regarding the *Occupiers' Liability Act* and its application to the facts in this case. Wentworth cites ***Langille v Bournier***, 2010 NSSC 402, ***Smith v Atlantic Shopping Centers Ltd***, 2006 NSSC 133, and refers to the non-exhaustive collection of principles enumerated by Cameron J.A. for the Newfoundland Court of Appeal in ***Gallant v Roman Catholic Episcopal Corp.***, [2001] N.J. No. 118 (NLCA) at § 27.

[158] Wentworth notes that Nova Scotia's legislation is unique in that s. 4(3) specifically outlines a non-exhaustive list of factors that the Court shall consider in determining whether the reasonable standard of care has been discharged. It is these six factors that infuse the occupier's duty, described in s. 4(1), as a duty to take such care as in all the circumstances as reasonable to see that each person entering the premises and the property brought on the premises, are reasonably safe in respect of:

i. the condition of the premises;

ii. the activities on the premises; and,

iii. the conduct of third parties on the premises.

[159] After citing the six factors in s. 4(3), Wentworth then reframes those six factors into four factors that it submits are essential to the Court's determination of the appropriate standard of care in this case. These four factors are:

a) The plaintiff's duty to take reasonable care for his own safety;

b) The inherent risks of snowboarding and the plaintiff's knowledge of those risks;

c) The plaintiff's duty to snowboard in control; and,

d) The effort made by the defendant Wentworth to warn visitors of the risk of snowboarding.

[160] I am not satisfied that, in reframing of six non-exclusive factors listed in s. 4(3) into four factors, three of which focus on the plaintiff's duty and only one of which touches on the defendant's duty, Wentworth has addressed many of the important considerations affecting Wentworth's duty and standard of care.

[161] However, I next deal with the four factors identified by Wentworth.

G.1.A. Wentworth Factor #1: The plaintiff's duty to take reasonable care for his own safety

[162] Wentworth describes this factor as whether the plaintiff exercised reasonable care in light of his knowledge and experience. This factor is described in *OLA*, s. 4(3)(d) as: "the ability of the person entering the premise to appreciate the danger."

[163] Wentworth cites ***Epp v Ridgetop Buildings Ltd***, [1978] A.J. No. 702 (ABQB). In ***Epp***, the plaintiff, an employee of a survey company, attended a construction site in connection with the preparation of a certificate of survey for mortgage financing. In the face of a strong Chinook wind, that kept the contractor's crew off the site at the time, the plaintiff worked on the site until a wall blew over onto him. The plaintiff admitted awareness of the danger of a wall falling over from a strong Chinook wind and elected to take a chance.

[164] The trial court rejected the defence of *volenti*, but found that the wall construction conformed to industry standards and that the plaintiff, being fully aware of the danger of going under the wall as well as the practices in the industry, was the author of his own misfortune. Further express warnings by the defendant of the danger would not have increased the plaintiff's knowledge. The plaintiff's claim was dismissed.

[165] The assumption that a visitor will exercise reasonable care for his own safety in light of his own knowledge is one possible factor in fixing the standard of care to which the occupier is obliged to observe.

[166] Wentworth argues that, based on the plaintiff's admission in discovery, he was an experienced, "advanced" snowboarder, who regularly snowboarded at Wentworth for years and was very familiar with the ski hill and terrain park. It submits this affects the duty and standard of care owed by Wentworth.

G.1.B Wentworth Factor #2: The inherent risks of snowboarding and the plaintiff's knowledge of those risks

[167] Wentworth submits that the standard of care on a ski hill operator is not as high as on other occupiers. It cites the following cases: ***Potozny v Burnaby***, 2001 BCSC 837; ***Rozenhart v Skier's Sport Shop (Edmonton)***, 2002 ABQB 509; ***Feniuk v Bulkley Valley School District No. 54***, [1991] BCJ No. 2163 (BCSC); ***Abbot v Silver Star Sports***, [1986] BCJ No. 3203 (BCSC); ***Roumanis v Mt. Washington Ski Resort***, [1995] BCJ No. 844 (BCSC); and, ***Tremblay v Whistler Mountain Ski Corp***, [1997] BCJ No. 1325 (BCSC).

[168] It submits that the source for guidance as to the inherent risks of skiing and snowboarding is found in American legislation. Wentworth cites New Hampshire's *Skiers, Ski Area and Passenger Tramway Safety Act*, Michigan's *Ski Area Safety Act of 1962*, and Pennsylvania's *Skiers Responsibility Act*, which was considered in two Pennsylvania trial court decisions: ***Heide v Seven Springs Farm Inc.***, Court of Common Pleas of Somerset County No. 598 Civil 2009(unpublished), and ***Hughes* v *Seven Springs Farm Inc.***, 563 Pa. 501, 762 A.2d 339.

[169] Wentworth argues that based on his discovery evidence, the plaintiff was aware of the inherent risks (i) of snowboarding; (ii) of falling and potentially getting injured; and, (iii) of the icy conditions at Wentworth.

G.1.C Wentworth Factor #3: Plaintiff's responsibility to ski and control

[170] As authority for this proposition, Wentworth cites ***Abbot*** v ***Silver Star Sports***, [1986] BCJ No.3203 (BCSC). It notes the plaintiff's discovery evidence, where the plaintiff acknowledged:

i. the importance of making sure he was in control when snowboarding;

ii. when he looked at the barrel jib feature from the top of the hill it appeared to be a straight feature;

iii. he would not have attempted the feature if it was curved;

iv. he only realized that the feature was curved when he approached it and tried to abort the feature;

v. he could not tell it was curved until he was close to it;

vi. his speed may have been a factor as to why he did not realize it was curved until too late;

vii. the curvature of the feature was a surprise because it was not marked as such by a sign and appeared to be straight from the top of the hill;

viii. he "supposed" it was his responsibility to determine whether the feature was curved or straight; and,

ix. the feature was too hard for his level of competence and comfort.

[171] In effect, the accident was not the result of the characteristics of the barrel jib feature or the snow conditions, but the plaintiff's failure to take reasonable care to ensure he snowboarded in control.

G.1.D Wentworth Factor #4: Wentworth's effort to warn visitors of risks

[172] Wentworth directs the Court to the signage posted by it:

i. the large signs posted at the ticket purchase wicket (which mostly advised about Wentworth's exclusion from liability but on which the last two lines read: "Please ski carefully. Be aware. Ski with care."

ii. the ten point alpine responsibility code posted in the ticket purchase area.

iii. the three signs at the entrance to the terrain park: one of which advises the visitor to look before leaping and familiarize himself or herself with the terrain before attempting any features; and

iv. the "designation" signs at each feature, which describe the feature as either "S", "M", "L" or "XL" meaning small, medium, large or extra-large.

[173] Finally, Wentworth responds to the plaintiff's five allegations of negligence, relying largely on the evidence of Thor Durning, terrain park manager, and Sam Rodgers, assistant terrain park manager.

G.1.E First Allegation: Wentworth failed to adequately supervise

[174] Wentworth relies upon the uncontradicted evidence of Sam Rodgers respecting the pre-opening quality control measures, the quality control checks, the riding of the features by him and other employees continuously during the day of the accident, and the presence of employees watching visitors, as conclusive evidence that Wentworth adequately supervised the ski hill and terrain park.

G.1.F Second Allegation: Wentworth failed to warn the plaintiff of the dangerous condition of the barrel jib feature and terrain park

[175] This allegation has two aspects: the feature was dangerous and Wentworth had a duty to warn that it was dangerous.

[176] With respect to whether the barrel jib feature and terrain park were dangerous, the plaintiff alleges that: (i) the park and feature were not properly constructed and maintained, (ii) icy conditions on or near the feature takeoff and landing created a dangerous condition, and (iii) the feature was not marked as curved.

[177] Wentworth notes that, after the rain of February 13 and 14 washed out the terrain park, the park and barrel jib feature were rebuilt on February 15. Durning and Rodgers inspected and tested the park including the barrel jib feature several times. Rodgers shaped the barrel jib feature prior to the opening of the terrain park on the morning of February 16 and tested it during the day. Rodgers' evidence was that the snow conditions were fine on February 16 and the same at the barrel jib feature as at the rest of the ski hill, and that he would have closed the park and the feature if he had any concerns. He rode the barrel jib feature before and after the accident, and noted no concerns.

[178] Wentworth says that the plaintiff adduced no evidence that the snow condition at the takeoff and landing areas were dangerous or unusual.

[179] In the alternative, Wentworth argues that the very packed snow or ice at the takeoff and landing areas of the features are inherent risks of snowboarding, and that it had no duty to warn. For this, it cites the Michigan and Pennsylvania legislation and the ***Heide*** decision.

[180] Wentworth relies in part on the plaintiff's acknowledgement at discovery that he was not in a position to say whether the barrel jib feature was dangerous. Wentworth's witnesses' evidence is that a barrel jib feature was and remains a common feature at Wentworth and at terrain parks across Canada. The barrel jib feature is not designed to project a snowboarder or skier into the air for a long distance. The uphill sloping takeoff is common. The transition into the takeoff, allowing for a little lift, is common. This barrel jib feature was spray-painted by Rodgers to make its characteristics more visible.

[181] Respecting the second aspect of this allegation - failure to warn, Wentworth submits that it had no duty to warn that the feature had a curved takeoff. Features are categorized by their degree of difficulty and size. The industry designation of difficulty and size are the letters: "S", "M", "L" and "XL" - for small, medium, large and extra-large. Features and jumps are not categorized in any other manner.

[182] The barrel jib feature was designated by Durning; based on his experience, as "medium" and a sign with the letter "M" was in place on February 16.

[183] Another aspect of the plaintiff's "failure to warn" allegation is the failure to warn of the dangerous conditions of the barrel jib feature and terrain park. Wentworth notes that the "failure to warn" allegation is repeated in plaintiff's first, second and fourth allegations. Wentworth argues that the signs in place on February 16 were sufficient to warn visitors that snowboarding carries inherent risks for which the plaintiff is responsible. There is no duty to warn what is obvious or already known. It cites ***Melnychuk v Ronoghan***, 1999 ABCA 170, and ***Lebrun v Ingram***, [2000] OJ No. 2577 (OSCJ).

[184] Wentworth notes that the plaintiff acknowledged that any "exclusion of liability" terms on any sign or ticket, if read by him, would not have affected his intention to snowboard that

day. The plaintiff stated at discovery that he was not aware, nor had he seen the signs, categorizing the terrain park features as “S”, “M”, “L” and “XL” nor was he familiar with the categories captured by these designations. The plaintiff did not see the signs at the top of the terrain park because he claimed that he entered the terrain park from the side, where no signs were located. He acknowledged that it was not his practice to “read too many signs around Wentworth anyway”. Wentworth notes that its affiants state that there was no side entrance to the terrain park - only a single entrance where the warning signs were located.

[185] Finally, Wentworth submits that it had no duty to warn the plaintiff of the risk of consuming energy drinks. Even if a duty existed, the plaintiff had consumed other types of energy drinks before February 16 and the only effect upon him had been: “maybe a little bit more wakefulness if I was tired at the time”. When asked whether the energy drink or drinks had made him more “revved up”, he replied “Not noticeably”. In effect, no evidence was adduced that there was a risk of adverse effect by consuming the energy drink in combination with snowboarding in the terrain park.

G.1.G Third Allegation: Wentworth failed to have in place and maintain safe snowboarding conditions

[186] Wentworth simply submits that the plaintiff adduced no evidence that the snow conditions were unsafe on February 16, while the Wentworth affiants gave evidence of their quality control checks and that conditions on the ski hill were good on February 16.

G.1.H Fourth Allegation: Wentworth failed to have a system in place to supervise visitors using Burton’s demo snowboards

[187] Wentworth’s reply to this allegation is that the plaintiff had failed to lead evidence that a system of supervising visitors using demo snowboards should have been in place and what that system should have been, and, in any event, the plaintiff’s own discovery evidence revealed that the demo snowboard was not the causal factor in his accident.

[188] Wentworth quotes from plaintiff’s discovery his statement that the Burton board was “really a high end board” compared to his “more of a generic, second rate board”, and, to the leading question that because the Burton board was faster it would give him better control, he replied “I suppose so, yes.”

[189] On both counts, Wentworth says there is no genuine issue for trial.

G.1.I Fifth Allegation: Wentworth provided easy access to use of free high energy, caffeinated beverages contrary to section 14 of the Food Drug Act, in combination with free new snowboard demos without proper or any supervision

[190] Wentworth's brief submission is that it did not provide easy access to the energy drink, and, if it did, Burton's argument of the absence of any evidence of its effect upon the plaintiff is a full answer and leaves no genuine issue for trial.

G.2 Plaintiff's Position

[191] The plaintiff submits that the evidence before this Court leaves several factual issues outstanding.

[192] In his discovery evidence, the plaintiff made statements about the icy conditions of the ski hill and, in particular, the unexpected icy and hard-packed conditions of the approach and landing areas of the barrel jib feature. He attributed the icy condition of the takeoff to the feature, and the unfamiliar characteristics of the Burton board, as the two reasons for his unexpected increase in speed and loss of control.

[193] The plaintiff assumed the snow conditions around the barrel jib feature would be similar to the conditions where he was standing at the top of the hill; he says that they were not similar. He further testified that it was unusual for ice to be on a jump. He testified that the barrel jib feature was too icy for him to brake.

[194] Coady's evidence as to the condition of the barrel jib feature is contrary to the evidence of Sam Rodger, who affirmed that the snow conditions were safe and, if they had not been, he would have closed the terrain park and barrel jib feature.

[195] Plaintiff's counsel notes that in Wentworth's disclosure, part of which was attached as Exhibit K to counsel's affidavit, it is noted at p. 56 (in what I believe are notes of Sam Rodgers) that the terrain park jumps, which had been washed out by rain, and closed for part of February 13 and all of February 14, and rebuilt on February 15, were closed on February 17 because they were "too icy and hard". Plaintiff's counsel also notes that that the statement of Daniel Gillis, an experienced ski patroller, on duty at Wentworth that day (who statement is pp. 45 to 48 of Exhibit K to counsel's affidavit) noted that "the snow around the rail was all hard packed".

[196] A second area of factual dispute is whether the barrel jib feature was curved (as stated by Coady) or straight (as stated by Wentworth). While Wentworth argues that either way, it was not the industry practice to give notice that a feature was curved, the designation of the feature, by Wentworth, is based on its difficulty and size. If the feature was curved, this characteristic may impact upon the designation. Durning stated that the designation was a matter of his exercise of judgment.

[197] On one hand, Wentworth objects to the admissibility of expert articles tendered by the plaintiff of the standard of care owed by ski hills to warn visitors of the difficulty of features. On

the other hand, it submits that the Court should take guidance respecting the duty and standard of care to warn visitors from some U.S. state statutes, and the practice of Canadian ski hills as described by Durning and Rodgers, neither of whom were qualified as experts.

[198] Another factual dispute relates to whether Wentworth provided adequate warning in the terrain park. Coady stated there were no warning signs where he entered the terrain park. He believed he may have entered from a side entrance.

[199] In the same vein, the plaintiff states that there was no spray painting at the barrel jib feature; Sam Rodgers stated that he spray painted the barrel jib feature to highlight the characteristics of the approach to the feature. Photographs were not taken contemporaneously; photographs taken later did show some spray painting.

[200] The plaintiff also challenges Wentworth's position that it had no duty in law to warn the plaintiff of the risks faced in the terrain park compared to regular ski runs. The plaintiff cites ***Slaferek v TCG International***, [1998] 3 WWR 600 (ABQB); ***Wishneski v Harper Mountain Lifts***, [1990] BCJ No. 354 (BCSC) and ***Murrao v Blackcomb Skiing Enterprises***, 2003 BCSC 558.

[201] Finally, the plaintiff argues, as it did in respect of the Burton summary judgment motion, that it is premature to grant summary judgment and would be contrary to the interest of judgment on the basis that:

i) the defendant had not filed a defence until shortly before the hearing of the motion (after the filing of the motion); and

ii) because there was significant non-disclosure by the defendants, and no evidence of the relationship between Wentworth and Burton (in respect of the *Occupiers' Liability Act claim*), either before the hearing of the motion or available through the affiants put forward by the defendant Wentworth. Evidence as to who was in control of the premises on which the users of the Burton demo boards snowboarded, and the relationship between the defendants, was solely within the defendants' knowledge.

G.3 Analysis

[202] Wentworth has not discharged the onus of establishing that facts material to at least three of the plaintiff's allegations of negligence are not in dispute. Coady has satisfied me that the disputed facts raise genuine issues for trial.

[203] In its brief, Wentworth is selective in the quotes abstracted from the plaintiff's discovery about his experience and expertise. The selection is obviously intended to support its submission that the plaintiff was an experienced and advanced skier to whom either no duty of care of was owed (in respect of the inherent risks of snowboarding) or, alternatively, in respect of which a significantly lower duty and standard of care was owed in respect of the condition of the barrel jib feature, and the duty to warn.

[204] Coady's discovery, taken when he was 18 years of age, lasted two days and was conducted by two very competent counsel. Their questions were often leading (as they are permitted to be) and involved asking for agreement with suggestions that they put to the witness. The word "advanced" was, for example, a term suggested by one of the counsel in a series of questions about the plaintiff's experience. Wentworth's ski accident report described Coady as having intermediate ability (as opposed to the other categories: beginner, advanced or expert).

[205] I am satisfied that the discovery of the plaintiff, taken as a whole, does not establish that the sixteen-year-old plaintiff was an advanced snowboarder, or had such skill and experience that it would eliminate or lower the duty of care and standard of care owed by Wentworth to him.

[206] All of the case law submitted by counsel says that the duty and standard of care are fact specific to the circumstances of the case. Section 4 of the *Occupiers' Liability Act* says that the duty is to take reasonable care in all the circumstances.

[207] I am satisfied from the discovery that the plaintiff had snowboarded for eight-and-a-half years. The extent of his snowboarding varied from year to year. He had very limited experience with terrain parks. He did not typically enter them. He had not participated in any competitions or races. While he understood what "rails" and "boxes" were, it is clear from the totality of his evidence that his primary experience with terrain parks was in respect of mounds of snow that permitted a snowboarder to get some air and jump, not with features, whether "rails" or "boxes", which contained steel pipes, rails or items other than snow.

[208] The plaintiff had no experience with terrain parks, "rails", "boxes" or other features, when he was a young snowboarder in Calgary or later when he lived in Cape Breton and snowboarded at Ben Eoin. He had some experience with what he thought was a terrain park at Martock, but that terrain park, to the extent of his experience, consisted of mounds of snow that allowed one to get air and he did not experience any "rails" or "boxes" if these existed at Martock.

[209] The plaintiff had snowboarded at Wentworth since Grade 7 – for about three-and-a-half years before his accident. He did not recall when he was first aware of features in the terrain park at Wentworth. As far as he knew, they may have always been there. In Grade 7 he did not use any of the features. In Grade 8 he did a box a couple of times. Over the next few years (Grade 9 and 10) he had tried a couple of rails but they were scary to him because of the metal and it was his evidence that he did not enter the terrain park very often. Prior to the accident, he had only gone on a rail six or seven times. The plaintiff clearly stated that he had never gone over a barrel jib feature before.

[210] His description of the "rails" that he rode were of features where snow was built up at the end of the rail so that he slid across the rail and slid down the snow at the other end; said differently, he did not exit the rail into the air such as one does with a "jump".

[211] The plaintiff's experience with jumps was generally limited to jumping over mounds of natural snow, both within a terrain park and on other ski trails. His snowboarding experience in terrain parks over three-and-a-half years was limited to less than 15% of his time at the ski hills, maybe three runs lasting not more than one hour.

[212] I am not satisfied that the discovery evidence of the plaintiff establishes that his experience and skill set, especially in respect of terrain parks and features such as the barrel jib feature, can reasonably be described as that of an advanced snowboarder so as to eliminate a duty of care or reduce the standard of care owed by the ski hill operator.

[213] All parties, and the case law, agree that the duty and standard of care is specific to each matrix. Wentworth places great emphasis on the knowledge and experience of the plaintiff. I am satisfied that the discovery evidence of the plaintiff shows his inexperience with terrain parks and features, such as the barrel jib feature.

[214] To the extent that Wentworth's motion is based on the plaintiff being an "advanced" snowboarder, the totality of the discovery evidence suggests otherwise and this informs the duty and standard of care on Wentworth.

[215] A second factual dispute is the condition of the take-off to the barrel jib feature.

[216] The plaintiff described it on several occasions over two days of discovery as unexpectedly icy and that this condition, not apparent until he was too close to the feature to safely abort, was one of the two reasons that he was going too fast and lost control.

[217] While the plaintiff acknowledged that other parts of the ski hill were icy on that day. On one occasion, he stated that it was not usual for the take-off to a jump to be so icy.

[218] Sam Rodgers, the acting terrain park manager on February 16, stated that he inspected the terrain park and barrel jib feature and went over the feature several times that day, both before and after the accident, and that the snow conditions around the feature were good. If they had not been, he would have closed the park and/or the feature.

[219] The written disclosure provided by Wentworth to the plaintiff, attached as Exhibit K to Mr. Layden's affidavit, suggests that on February 17, the day after the accident, the jumps were closed because they were "too icy and hard" is some independent corroboration of the plaintiff's evidence of the snow conditions at the take-off to the barrel jib feature.

[220] I conclude there is a factual dispute about the dangerousness of the snow conditions at the barrel jib feature. The extent of that danger is a factor relevant to at least two of the plaintiff's allegations of negligence: first, whether it was too dangerous and the feature should have been closed; second, whether the designation of the feature as "M" was appropriate in the circumstances existing at the time.

[221] Another area of factual dispute is whether the barrel jib feature was curved. The plaintiff says it was; Wentworth says it was not. Assuming that the evidence of Thor Durning respecting the signage code, in which evidence he said that he follows (and which he said all ski hills in Canada follow) is accepted, and the only designation of difficulty and size of a feature under that code is the use of one of the letters: "S", "M", "L" or "XL" with no separate identification of a feature as curved, there is still the issue of whether the designation of the barrel jib feature as "M" for medium is appropriate designation for that feature, if it was found to be curved. It would be reasonable to infer that a curved feature would have a higher degree of difficulty than a straight feature. How much is a matter for evidence at a trial. Mr. Durning said that the

designation of the appropriate letter was a matter of judgment for someone with his experience and responsibility. I conclude that the disputed fact, as to whether the barrel jib was curved, is relevant to the duty and standard of care owed by Wentworth to warn, and therefore what the appropriate sign was for the feature at that time.

[222] The plaintiff and Wentworth dispute whether there was more than one entrance to the terrain park. Wentworth's defence to the allegation that it did not meet the standard of care owed to users of the terrain park to warn them is based on there being only one entrance and three signs being located at this entrance. The plaintiff testified that he entered the park by a side entrance where no signs existed. This factual dispute is material to the allegation of failure to warn.

[223] With respect to the allegation that Wentworth failed to properly warn visitors to its ski hill and, in particular, to the terrain park, Wentworth submits, citing ***Epp*** for the principle, that even if there was a failure to have or maintain appropriate signs or warn, that, based on the plaintiff's admission in discovery of his nonchalance towards, and disregard of, some signs, the failure to warn was not material to the cause of the accident.

[224] My reading of the discovery evidence as a whole leaves me with a difference sense. The plaintiff did acknowledge that the content of any signs which he did not read would not have affected whether he went snowboarding that day. He did not say that he did not read any of the signs. On at least one occasion, he stated that he may have read the signs that he saw. He clearly states that he saw no signs from the entrance he used to access the terrain park, and that he did not see the "M" sign near the barrel jib feature (and that he would not have understood it if he had seen it).

[225] There is at least one other factual that is material to the duty and standard of care owed by Wentworth and which, in my view, is a basis for finding a genuine issue for trial.

[226] In Nova Scotia, the standard of care owed by Wentworth is described in s. 4 of the *Occupiers' Liability Act*. Section 4(1) imposes a duty on Wentworth to take such care as is reasonable to see that each person entering the premises, and the property brought onto the premises, are reasonably safe in respect of three things: the condition of the premises, the activities on the premises, and the conduct of third parties on the premises.

[227] Wentworth says that it has no duty or standard of care in respect of Burton's "DEMO Day" activities conducted on its premises. Clearly the *Occupiers' Liability Act* imposes a duty and standard of care to see that each person entering its property is reasonably safe in respect of what it permitted Burton, a third party, to do on its property. The plaintiff had no knowledge of the relationship between Burton and Wentworth on February 16. This was solely within the knowledge of Wentworth and Burton. The affiants for Wentworth had no knowledge of the relationship between Wentworth and Burton. When asked, they referred the question to the manager of the park.

[228] In an earlier part of this decision, this Court found some facts (or disputed facts between Burton and the plaintiff) that left a genuine issue for trial as to whether Burton was negligence in

the manner in which it gave the free use of its 'high-end' snowboard in conjunction with free energy drinks to underage snowboarders.

[229] The evidence that Burton was carrying on its activity on the Wentworth ski hill, possibility in a negligent manner, does not automatically mean that Wentworth breached the duty and standard of care it owed pursuant to s. 4 of the *Occupiers' Liability Act*. However, in the factual matrix before this Court, there is no evidence of what steps, if any, Wentworth took to fulfill its duty to visitors, and the two persons responsible for the terrain park stated that they had no knowledge of the arrangements or relationship between Burton and Wentworth or of how Burton conducted its activities while on the Wentworth premises. From these facts an inference could be drawn by a trial court that Wentworth failed to take reasonable care contrary to s. 4 of the *Occupiers' Liability Act*.

[230] For all these reasons, I am not satisfied that Wentworth has discharged the first part of the ***Guarantee*** test. There is disputed facts material to the alleged negligence of Wentworth. Based on the facts on this motion, the plaintiff has satisfied me that genuine issues remain for trial.

[231] The plaintiff objected to the motion for summary judgment by Wentworth on the basis that Wentworth filed its defence late and that it had not disclosed all of the evidence in its possession that may be relevant to the cause of action against it. Because of this Court's determination that there are disputed facts material to the plaintiff's allegations of negligence against Wentworth that exist by reason of which the plaintiff has established a genuine issue for trial, it is unnecessary to deal with the plaintiff's submission that this motion is premature.

[232] However, if I am wrong in the application of the Guarantee test, I adopt the analysis in section F of this decision. A full appreciation of the evidence was not achievable, based in the evidence presented in this motion.

H. Conclusion

[233] Both motions for summary judgment are dismissed.

[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.

J.