COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Revelstoke (City) v. Gelowitz,* 2023 BCCA 139

Date: 20230329
Docket: CA48089

2023 BCCA 139 (CanLII)

Between:

City of Revelstoke

Appellant
(Defendant)

And

Aaron Gelowitz

Respondent
(Plaintiff)

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated January 13, 2022 (*Gelowitz v. Revelstoke (City)*, 2022 BCSC 46, Vancouver Docket S161684).

Counsel for the Appellant:	G. Allen M.T. Hoogstraten T. Gervin, Articled Student
Counsel for the Respondent:	G. van Ert N. Chan
Counsel for the Intervener:	P.D. Ameerali M. Butler
Place and Date of Hearing:	Vancouver, British Columbia January 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 29, 2023

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch

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Summary:

The respondent was seriously injured when he made a shallow dive into a lake and struck an obstacle in the water. He accessed the lake from a park owned by the appellant City but dove from a location on the opposite side of the lake, from land owned by a third party. The trial judge found the City liable in negligence and the respondent contributorily negligent. The City appeals, contending that the trial judge erred in finding that the City owed the respondent a duty of care in circumstances where the accident occurred on land that it neither owned nor controlled, and in finding both factual and legal causation. Held: Appeal dismissed. Although the trial judge erred in finding a duty of care that fell within an analogous category of cases in which a duty has been recognized, she did not err in concluding that the City owed the respondent a duty of care based on the Anns/Cooper framework. In the particular circumstances of this case, the City had a duty to warn the respondent of the known risks associated with the use of the park facility, which included the risks of diving in the area from the park foreshore to the opposite shore at specific locations in close proximity to the City's raft that were known by the City to be accessed by park users. Further, the judge made no factual or legal errors in her findings of factual and legal causation that would justify appellate intervention.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] In the summer of 2015, the respondent, Aaron Gelowitz, was camping at Williamson Lake Park and Campground (the Park) and was seriously injured when he made a shallow dive into Williamson Lake (the Lake) and struck an obstacle in the water. The Park is located on the west side of the Lake on land owned by the appellant, City of Revelstoke (the City). The place from which Mr. Gelowitz dove was on the east side of the Lake on land owned by a third party.

[2] After a trial on the issue of liability, the trial judge found the City liable in negligence and Mr. Gelowitz contributorily negligent. She apportioned liability 35% to the City and 65% to Mr. Gelowitz.

[3] The City appeals, contending that the trial judge erred in concluding that the City owed a duty of care to Mr. Gelowitz in circumstances where the accident occurred on land that it neither owned nor controlled, and in finding both factual and legal causation.

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[4] Although my reasons differ in some respects from those of the trial judge, I would dismiss the appeal.

Background

[5] The Park is accessed by both day users and campers. Located on land owned by the City on the west side of the Lake, the Park has a parking lot, picnic area, playground, office and store, day-use change rooms, mini-golf course and campsites. The Lake is about 500 metres long from north to south and 100 metres wide from west to east. Lake activities are focussed on a sandy beach area, where there is a floating dock affixed to the shore (the Dock) and a floating raft approximately 50 metres from the shore, at the mid-point in the Lake (the Raft). The City maintains the Dock and the Raft and posts “Swim at your own risk” and “No diving” signs along the sandy beach area and “No diving” signs on the Dock and Raft.

[6] The land on the north and east side of the Lake is undeveloped, vacant forest land owned by a private company, Revelstoke Alpine Village Inc. (Alpine). There is a trail that connects the north end of the Lake to the eastern shore. The City does not maintain the trail.

[7] There is no designated swimming area on the Park side of the Lake and therefore no restriction on where people can swim. To the City’s knowledge, Lake users, whether day users or campers, routinely swim across the Lake to the eastern shore and jump back into the Lake from several rocky outcroppings known locally as Big Rock and Little Rock.

[8] On July 27 and 28, 2015, Mr. Gelowitz, his spouse and three children were camping at the Park with friends Jason Stockmann, his spouse and 10-year-old son Ryder. Neither family had been to the Park before. Their campsites were located at the south end of the Park, away from the sandy beach area. On the afternoon of July 28, Mr. Gelowitz, his daughter Ella, Mr. Stockmann and Ryder went swimming. The children went ahead, and Mr. Gelowitz and Mr. Stockmann entered the Lake from a clearing in the foliage south of the sandy beach, an area the judge found to

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be a natural entry point for people walking to the Lake from the south end of the campground. Neither saw any “No diving” signs; the nearest sign was 54 feet away.

[9] Mr. Gelowitz and Mr. Stockmann swam to the Raft. Ella and Ryder were already there. The water in that area was sufficiently deep that the adults were unable to touch bottom. Although “No diving” signs had at one time been placed on the Raft, they were not visible on July 28, 2015.

[10] Mr. Gelowitz then swam from the Raft to the eastern shore with Ryder. They got out of the water at the Little Rock (identified by the trial judge as Rock A) and walked down the trail a short distance to a smaller rocky outcropping (Rock B). The judge found that Mr. Gelowitz dove from Rock B. She accepted his evidence that the water in that area appeared to be sufficiently deep to permit a shallow dive.

[11] Unfortunately, Mr. Gelowitz struck his head on an obstacle under the water that was found likely to be a tree stump, and suffered catastrophic injuries, resulting in quadriplegia.

Duty of care

[12] The trial judge concluded that the City owed a *prima facie* duty of care to Mr. Gelowitz, as an invitee to facilities owned and controlled by it, to warn him of the known risks of diving associated with the use of the Park facility. She found that this duty fell within an analogous category of cases in which owners of waterfront facilities were found to owe a duty to warn invitees of dangers associated with the use of their facilities, including the risks associated with diving: *Gerak v. British Columbia* (1984), 59 B.C.L.R. 273 (C.A.); *Woods v. Ontario (Minister of Natural Resources)*, [2003] O.J. No. 1165 (C.A.); *Keenan v. Brown*, 2009 NBCA 81 at paras. 143, 150.

[13] The judge rejected the City’s argument that the location of the dive—from land owned by a third party—was relevant to the existence of a duty of care. She considered this argument to mischaracterize the nature of the duty advanced by Mr. Gelowitz, which focused on the relationship between the City, as the owner of a

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waterfront facility, and Park users who take up the invitation to use the facilities. She accepted that there was a relationship of proximity that imposes a positive duty on the City to warn of risks known to the City arising from the use of its facilities: at paras. 141–142, 144.

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[14] In the event she was wrong in concluding that this case fell within an analogous category of cases, the trial judge conducted an analysis of the requirements of foreseeability and proximity under the *Anns/Cooper* test (*Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79). The judge described the two analytical steps in the *Anns/Cooper* framework at para. 126:

> i. Is the harm suffered by the plaintiff a foreseeable consequence of the defendant's acts or omissions, and is there a sufficient relationship of proximity between the parties that it is just and fair to impose a duty of care?
>
> ii. If so, are there residual policy considerations outside of the relationship between the parties that may negate the imposition of a duty of care?

[15] At the first step of the analysis, the judge had no difficulty concluding that the risk of injury to Park users from diving into the Lake was reasonably foreseeable to the City. She found that the City was expressly put on notice of the potential for underwater hazards by a 2011 Risk Control Survey, "and alerted to the possibility of injury to swimmers diving off a structure such as the Raft or Dock". She also found that the risks were in fact foreseen by the City due to the placement of "No diving" signs on the Raft, Dock and along the Park foreshore: at para. 146.

[16] The judge also found the circumstances established a relationship of proximity between Mr. Gelowitz and the City:

> [147] … In this case, the plaintiff suffered foreseeable physical harm, and therefore the case "engages one of the core interests protected by the law of negligence": [*Nelson (City) v. Marchi*, 2021 SCC 41] at para. 31. The City owned and controlled the Park and campground. The City invited members of the public, including the plaintiff, to visit and camp at the Lake, and to use the Lake for water activities. Park users were therefore invited to the risk by the City. The City intended that Park users would engage in activities around the Lake, including

> swimming. The City was aware that the potential presence of underwater hazards posed a risk of harm to invitees who might dive into the Lake. It was reasonably foreseeable to the City that a failure to warn Park users about the risks of diving into the Lake could lead to serious physical harm. Conversely, Park users would reasonably expect that the City would warn them of risks associated with the use of the facilities, including the risks of diving into the Lake.

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[17] The judge went on to consider the City's arguments under the second step of the analysis: (1) that imposing a duty of care to warn of hazards on property that the City does not own would create indeterminate liability, and (2) such a duty would expand the scope of liability faced by property owners for risks they did not create on property owned by others. She did not agree that these policy considerations arose in this case:

> [152] … As I have already explained, the plaintiff does not allege that the City owed the plaintiff a duty to warn of hazards specific to diving from the eastern shore. The plaintiff says that the City had a duty to warn invitees of the risk of diving into a lake that is integral to the Park facilities that the City offered to the public. The City had notice of the potential presence of underwater hazards in the Lake. The duty of care alleged by the plaintiff is not, as the City maintains, disconnected from the City's control over its own waterfront facility.

[18] She was therefore not satisfied that the City had identified "any second stage policy considerations that would warrant insulating the City from liability in negligence in these circumstances": at para. 153.

[19] The City submits that the trial judge erred (1) in finding that the asserted duty of care fell within an existing category of a recognized duty; and alternatively, (2) in concluding that a duty of care was established on a full *Anns/Cooper* analysis.

Existing or analogous category

[20] The trial judge found the duty of care to fall within an analogous category of diving cases and described the duty as follows:

> [143] … owners of waterfront facilities owe a duty of care to warn invitees of dangers associated with the use of their facilities, including the risks associated with diving into the water…

[21] In the City's submission, the jurisprudence establishes that existing categories of recognized duties are to be construed narrowly, citing *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 and *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19. It says the trial judge, in relying on the diving cases of *Gerak*, *Woods* and *Keenan*, ignored a key distinction between the parties' relationship in those cases and the parties' relationship in this case: "whether the plaintiff dove from land or a structure owned or controlled by the defendant". The City submits that imposing a duty of care in circumstances where an invitee who dives from land owned or controlled by others is a significant and unjustified expansion of the pre-existing category of cases.

[22] Mr. Gelowitz reiterates his submission before the trial judge, that the existing category of diving cases establishes that owners of waterfront facilities who invite people to use those facilities have a duty to warn of the risks associated with accepting the invitation.

[23] The City's submission raises questions of law that are reviewable on the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[24] The importance of a relationship that falls into an existing category already recognized as giving rise to a duty of care cannot be understated: when the duty at issue is not novel, there is generally no need to embark on the full two-stage *Anns/Cooper* framework. As the Supreme Court of Canada stated in *Nelson (City) v. Marchi*, 2021 SCC 41:

> [19] … In such cases, "the requisite close and direct relationship is shown" and the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 26). The second stage of the *Anns/Cooper* test will rarely be necessary because residual policy considerations will have already been taken into account when the duty was first established (*Cooper*, at paras. 36 and 39; *Livent*, at paras. 26 and 28…) .

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[25] For this reason, the Supreme Court has cautioned courts to avoid identifying established categories in an overly broad manner: *Livent* at para. 28; *Rankin* at para. 28.

[26] In determining whether the relationship at issue is truly analogous to a previously established category of duty, courts must consider the particular factors that justified recognizing that prior category: *Marchi* at para. 27; *Livent* at para. 28. The exercise is necessarily highly fact specific.

[27] In *Marchi*, the plaintiff suffered physical injury on a city street when she attempted to cross a snowbank created by the city in its snow clearing operations. The Court found a duty of care that fell within the duty established in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, where the province was found to owe a duty of care to a plaintiff injured when a boulder fell onto his car from a slope above a public highway. In *Just*, the Court's finding of proximity under the first stage of the *Anns/Cooper* test was based on the fact that the injury occurred on a highway to which the public was invited, where users could expect that the highway would be reasonably maintained and there was a reasonably foreseeable risk that harm might befall highway users if it was not.

[28] A substantial number of cases have applied the *Just* category. The Court in *Marchi* recognized the factors uniting these cases as: a public authority undertook to maintain a public road or sidewalk to which the public was invited, and the plaintiffs alleged they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition: at para. 29.

[29] In all three of the diving cases relied on here, the relationships were between the owner of a waterfront facility and an invitee to that facility, and the foreseeable harm was occasioned by the failure of the owner to warn of the dangers of diving from the owner's property into the water. In *Gerak*, the plaintiff dove into shallow water from a public wharf in Cultus Lake Provincial Park. The plaintiff in *Woods* dove off a low wall built out into shallow water from a beach (a groyne) located on Lake

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Huron in the City of Sarnia. In *Keenan*, the plaintiff dove into shallow water from the end of a dock at the summer home of the defendants.

[30] It is not disputed that the City in this case owed a duty of care to Mr. Gelowitz to warn him of the dangers of diving into the Lake from the Park. The difference here is that Mr. Gelowitz did not dive into shallow water from the Park, but rather from undeveloped land located outside the Park boundary that the City neither owned nor controlled. The trial judge considered this fact to be relevant to the standard of care and causation but not to the existence of the duty of care to warn invitees to the Park about the risks of diving: at para. 142.

[31] Respectfully, I consider the location of Mr. Gelowitz's dive to be relevant to the question of a duty of care. I view this factual difference to be significant enough to conclude that this case is not analogous to the other diving cases. In my opinion, the trial judge erred in relying on Mr. Gelowitz's characterization of the relationship as simply between the City, as the owner of a waterfront facility, and Park users who take up the invitation to use the facilities. This resulted in the judge identifying the established category very broadly as a duty of care on owners of waterfront facilities "to warn invitees of dangers associated with the use of their facilities, including the risks associated with diving into the water": at para. 143.

[32] This characterization does not take into account whether the relationship of proximity changed after Mr. Gelowitz swam away from the City's facilities. Nor does it take into account the fact that liability in all three diving cases was based on the defendants being "occupiers" of the place where the plaintiff accessed the water.

[33] The duty of care recognized in *Gerak* and *Woods* was grounded in the applicable provincial *Occupiers Liability Act* (R.S.B.C., 1996, c. 337; R.S.O. 1990, c. O.2), which defined "occupier" as a person who is in physical possession of premises, or has responsibility for, and control over, the conditions of premises, the activities conducted on those premises and the persons allowed to enter those premises.

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[34] Only in *Keenan* was liability grounded in negligence but the nature of the duty was found to be similar to that in *Gerak* and *Woods*. The trial judge determined that the owners owed a positive duty to act where they invited others to an inherent or obvious risk that they had created or controlled, and the question of duty of care was abandoned on appeal.

[35] In all of these cases, the defendants had created or controlled the conditions of the premises from which the dive occurred. I would therefore identify this category of cases to establish a duty of care on owners of waterfront facilities to warn invitees of dangers associated with the use of their facilities, including the risks associated with diving into the water from the facilities which they own, maintain or control.

[36] It bears mentioning that Alpine, the owner of the land from which Mr. Gelowitz dove into the Lake, was found not liable under s. 3(3) of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337. As the trial judge noted, that section limits the liability of an occupier of rural land that is vacant, undeveloped and forested:

> 3 (3) … an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
>
> (a) create a danger with intent to do harm to the person or damage to the person's property, or
>
> (b) act with reckless disregard to the safety of the person or the integrity of the person's property.

[37] I agree with the City that the trial judge erred in concluding that the location of Mr. Gelowitz's dive was not relevant to the existence of a duty of care. The location of his dive distinguishes this case from the previously accepted category of diving cases in which a duty of care of a person in the position of "occupier" was found to exist. It is therefore necessary to consider the judge's *Anns/Cooper* analysis.

Anns/Cooper analysis

[38] In *Marchi*, Justices Karakatsanis and Martin, for the Court, succinctly summarized the two-stage *Anns/Cooper* framework that applies in novel duty of care cases:

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> [17] … Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> [18] If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:
>
>> Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[39] A "close and direct" relationship may involve physical proximity but it is more broadly concerned with whether the actions of a defendant have a close or direct effect on a plaintiff such that the defendant ought to have had the plaintiff in mind as a person potentially harmed: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 29.

Stage 1

[40] As noted, the trial judge concluded that the risk of injury to Park users from diving into the Lake was not only reasonably foreseeable to the City but also foreseen in fact due to the placement of "No diving" signs on the Raft, Dock and along the Park foreshore. She also found that the 2011 Risk Control Survey put the City on notice of the potential for underwater hazards in the Lake and the possibility of injury to swimmers diving off the Raft or the Dock: at para. 146.

[41] In concluding that the circumstances established a relationship of proximity between Mr. Gelowitz and the City, the judge relied on the fact that the City (a) owned and controlled the Park and campground; (b) invited members of the

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public to visit and camp at the Lake and to use the Lake for water activities, including swimming; and (c) was aware that the potential presence of underwater hazards posed a risk of harm to invitees who might dive into the Lake: at para. 147. She found the relationship to fall within the first situation identified in *Childs v. Desormeaux*, 2006 SCC 18, where a defendant intentionally attracts and invites third parties to a risk they created or controlled: at para. 149.

[42] In the City's submission, the trial judge erred by finding a relationship of proximity based on mere foreseeability of harm, effectively conflating foreseeability and proximity, and failing to account for the fact that Mr. Gelowitz's dive took place on the opposite side of the Lake from land the City neither owned nor controlled. It says that this latter fact severed any relationship of proximity that may have been created by the City's invitation to use the Park facilities. The City also submits that the judge misapprehended the 2011 Risk Control Survey, which identified potential hazards only in the area of the Dock and Raft, and this led to an error in her finding that the risk to Mr. Gelowitz in diving from the opposite side of the Lake was a risk known to the City.

[43] In Mr. Gelowitz's submission, the trial judge properly considered foreseeability of harm separately from proximity, considered relevant facts in doing so, and made no material error in interpreting the 2011 Risk Control Survey. He contends that property ownership is not a hallmark of proximity, no authority supports the City's position that effectively creates zones of proximity based on ownership of underlying lands, and in any event, the Lake itself is not owned by the City. It is important, he says, that he accessed the opposite shore from the City's Raft and the entire area looked to him as a single place.

[44] Whether a duty of care exists is a question of law reviewable on a standard of correctness: *Rankin* at para. 19. Whether the trial judge misapprehended the 2011 Risk Control Survey is a question of fact, reviewable on the standard of palpable and overriding error: *Housen* at para. 10.

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[45] The trial judge's analysis under Stage 1 was grounded on a relationship of proximity based on the City intentionally attracting and inviting third parties to a risk it created or controlled, regardless of who owned the land on the opposite side of the Lake. She did not make a specific finding that the City was aware of the risks of underwater hazards in the vicinity of the land on the eastern shore but did find that the City was aware of "the risks associated with diving into the Lake". This finding, which grounded her conclusions on both reasonable foreseeability and proximity, was one that in my view was open to her on the evidence.

[46] First, I do not accept the City's submission that the trial judge misapprehended the 2011 Risk Control Survey. As the judge noted, this Survey was part of a broader safety audit conducted in September 2011 at several recreational facilities that included the Park. Prior to this, the City had installed one "No diving" sign in front of the Dock. Subsequently, in 2012, the City installed four additional "No diving" signs along the lakeshore and painted similar signs on both the Dock and the Raft: at paras. 19–21.

[47] The portions of the Survey that are in the record before us only briefly describe a "Hazard Description" that the Raft and Dock lacked "No diving" signs, with the following "Cause and Effect":

> Injuries may occur to the diver or swimmers as a result of diving off structures. There may be unforeseen obstacles in the water.

[48] The Survey therefore recommended the installation of "No diving" signs on both structures.

[49] The judge expressly recognized that the Survey alerted the City to the possibility of injury to swimmers "diving off a structure such as the Raft or Dock". Importantly, she relied, not on the Survey itself, but on the City's response to it, in drawing an inference that the City was aware more broadly of "the risks associated with diving into the Lake". The City's response was to place "No diving" signs on the Raft and Dock *in addition to* those along the Park foreshore: at para. 146. The

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placement of signs on the Park foreshore is not consistent with known risks only in the vicinity of the Dock and Raft.

[50] Second, there is other evidence that supports the judge' conclusions on foreseeability and proximity:

a) Lake users routinely swim or canoe across the Lake to the eastern shore: at para. 14;

b) The areas on the eastern shore are sufficiently familiar to locals that they refer to the rocky outcroppings as "Big Rock" and "Little Rock", people jump off Big Rock and Little Rock into the Lake and swim to the Raft, and the City was aware of this: at para. 14;

c) A vice-president of Alpine observed the "vast majority" of people who swim to the eastern shore come from the area of the Park and campground: at para. 15;

d) The Lake area from the Park to the eastern shore is small, only 100 metres across and 50 metres from the Raft, there is no designated swimming area, no apparent delineation of land ownership, and, as the judge found, the City facilitates access to the eastern shore by maintaining the Raft: at para. 180.

[51] I agree with the City that an invitation by itself is not sufficient to establish creation and control of a risk. However, in the unique and particular circumstances of this case, it is my view that:

(a) the risk of injury from diving into the Lake from the Park foreshore, the Dock, the Raft and the known rocky outcroppings of Big Rock and Little Rock on the eastern shore was reasonably foreseeable to the City;

(b) a sufficient relationship of proximity between the City and Mr. Gelowitz was established by the City's invitation to access the Lake from the

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Park, which extended from the Park foreshore to the areas on the eastern shore at Big Rock and Little Rock that were known by the City to be accessed by Park users; and

(c) it would be reasonably foreseeable to the City that failing to warn Park users of the risks associated with diving in the Lake from the Park foreshore, Dock, Raft and nearby eastern shore could cause harm to those invited to access the Lake from the Park.

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[52] The conclusion I have reached in this case is responsive to the unique contextual factors arising from the evidence: the distance across the Lake from the Park foreshore to the eastern shore is short; Park users were known to swim across the Lake and jump into the water from Big Rock and Little Rock; and the Raft in the middle of the Lake was maintained by the City, which the judge found facilitated access to the eastern shore.

[53] I wish to make clear, however, that there may undoubtedly be other circumstances in which a relationship of proximity will be severed where an individual suffers an injury from a place that is not owned or controlled by the owner of a waterfront facility, not routinely accessed from the facility, or is simply too far away from the facility. In all cases, the question is whether the parties are “in such a ‘close and direct’ relationship that it would be ‘just and fair having regard to that relationship to impose a duty of care in law upon the defendant’”: *Marchi* at para. 17, citing *Cooper*.

[54] While my Stage 1 analysis differs somewhat from that of the trial judge, I agree with her conclusion that the City owed a *prima facie* duty of care to Mr. Gelowitz. I consider it important, however, to describe this duty more narrowly than did the judge given the unique circumstances of this case. I would describe it as a duty to warn Mr. Gelowitz as a Park user of the known risks associated with the use of the Park facility, which includes a duty to warn of the risks of diving in the area extending from the Park foreshore to the eastern shore at Big Rock and Little Rock, locations in close proximity to the City’s Raft, which were known by the City to

be accessed by Park users. This duty would not require the City to post warning signs on the eastern shore but simply post clear, visible "No diving" signs in appropriate locations in the Park that warn of underwater hazards in the Lake.

Stage 2

[55] The trial judge was not satisfied that the imposition of a duty in these circumstances would create indeterminate liability or expand the scope of liability for property owners, as argued by the City. She did not consider the duty of care asserted by Mr. Gelowitz to be disconnected from the City's control over its waterfront facility.

[56] The City submits that the trial judge failed to engage with the second stage policy considerations put before her. It asserts a risk of indeterminate liability due to a broad risk of liability to owners of waterfront properties if invitees injure themselves anywhere in the water, and no meaningful way to mitigate this risk.

[57] The Attorney General, as intervenor, submits that the trial judge's articulation of the duty of care is too broad to be sustainable, as it does not consider the City's lack of control of access to the Lake or circumstances that could have severed a relationship of proximity prior to the moment of injury. The Attorney says that the judge's reasons place an unprecedented obligation on property owners who give access to wilderness recreational opportunities they do not own or control to warn of risks associated with those opportunities.

[58] Mr. Gelowitz counters these submissions by pointing to the specific facts of this case and the careful findings of the trial judge, which create no risk for indeterminate liability and provide an easy way to mitigate the risk by simply posting adequate signage on Park property.

[59] In my view, the City has not identified any stage 2 policy considerations that would serve to insulate it from liability. I agree with Mr. Gelowitz, especially given my narrow description of the duty of care, which confines the City's liability to a close and immediate area in the Lake that is accessed from the Park to the knowledge of

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the City. This case does not establish a precedent that would ground liability on owners of waterfront properties for injuries suffered by invitees at locations that are remote from the location of known risks associated with the use of the waterfront on the owner's own property.

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[60] I also agree with Mr. Gelowitz that the City has a meaningful and relatively simple way to mitigate this liability risk, by posting signage on the Park property as I have described above.

[61] I would therefore not accede to this ground of appeal.

Factual causation

[62] Factual causation requires a plaintiff to show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act: *Marchi* at para. 96, citing *Clements v. Clements*, 2012 SCC 32 and *Resurfice Corp. v. Hanke*, 2007 SCC 7. The trial judge's finding on factual causation is clearly subject to a standard of palpable and overriding error.

[63] The trial judge concluded that the City failed to meet the standard of care by not placing warning signs at locations along the lakefront where swimmers might reasonably be expected to enter the Lake (which included the place where Mr. Gelowitz had entered from the south end of the campground), and not maintaining the painted "No diving" signs on the Raft. She also concluded that this failure was the cause-in-fact of Mr. Gelowitz's injury.

[64] In doing so, the judge accepted Mr. Gelowitz's evidence that he would not have attempted a shallow dive in front of the children in the face of signs warning against diving. While recognizing that such hindsight evidence is not in itself a basis for inferring a causal link, the judge relied on evidence beyond this bare assertion: that Mr. Gelowitz was generally a law-abiding person with no history of non-compliance with laws or regulations; he worked as a firefighter, a profession where compliance with safety rules was particularly important; and he was motivated to set a good example to Ella and Ryder on the day in question: at para. 176.

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[65] The judge also found that the risks of underwater hazards were not clearly apparent to Mr. Gelowitz when he dived, as the water appeared dark. She found his evidence that he would not have dived had he seen a warning sign “either on the lakeshore or the Raft” to be consistent with the surrounding circumstances and with expert evidence tendered by the City that warning signs educate users about potential risks and thereby influence behaviour: at paras. 177–178. She therefore concluded:

> [178] … The evidence as a whole supports the inference that the plaintiff would not have attempted a shallow dive from the eastern shore if he had seen a sign warning against diving as he entered the Lake or on the Raft. I find, therefore, that the plaintiff has established that the City’s failure to install and maintain warning signs at his point of entry to the Lake and on the Raft is cause-in-fact of his injury.

[66] The City challenges the trial judge’s finding that its breach of the standard of care was the cause-in-fact of Mr. Gelowitz’s injury. The City submits that the judge made a palpable and overriding error in finding that Mr. Gelowitz’s assertion that he would not have dived had he seen a warning sign “either on the lakeshore or the Raft” is not supported by his evidence, as he said nothing as to the location of a warning sign, nor was his evidence sufficiently buttressed by other evidence. It further submits that the judge erred by failing to consider Mr. Gelowitz’s admission that he was aware of the dangers of diving into unknown waters as well as the different conditions between the areas at the Raft and on the shore.

[67] Mr. Gelowitz submits that the judge made no palpable and overriding error in making this factual finding despite his admissions.

[68] Mr. Gelowitz clearly admitted his awareness of the dangers of diving into shallow or unknown water. However, I would not describe his evidence about his awareness of the dangers specific to the location of his dive to be “overwhelming” as asserted by the City.

[69] In cross-examination, Mr. Gelowitz was asked about his observations from both Rock A and Rock B, the latter being the location from which he was found to have made his dive. He admitted that he did not think it was safe to jump from Rock

A because he knew how shallow it was, having climbed out of the water there and observed obstructions under the surface. He also admitted that he did not need a sign at Rock A to tell him not to dive there. In contrast, he described what he saw from Rock B as follows:

> Q Now, you described in your evidence that at point B, you could see some rock go underneath about 2 to 3 feet from the water's edge; correct?
>
> A No, going into the water, like just straight down.
>
> Q Okay. But you saw that there was rock going into the water?
>
> A Yes.
>
> Q Okay. And it's the same shoreline as rock A?
>
> A That's correct.
>
> Q And wouldn't it be reasonable to assume that it would have similar shallowness on that – on rock B as well?
>
> A Not necessarily. The topography could be different. There could be a drop off, which is what I had assumed by looking at it.
>
> Q But, again, all -- but you didn't wade in to check the water depth?
>
> A No.
>
> Q And what you saw was, you said, dark water?
>
> A Yes.
>
> Q And based on that alone, you assumed it was safe to dive in?
>
> A Yes.

[70] I do not accept the City's submission that this evidence goes "beyond contributory negligence" because it demonstrates that Mr. Gelowitz was already "specifically aware of the risk". In my view, this evidence supports the trial judge's finding that the risks were not clearly apparent to Mr. Gelowitz at the moment he made his dive. I do not consider this finding incompatible with his general awareness of the dangers of diving into shallow or unknown waters. This was clearly a careless decision—one in respect of which he "knew better"—that in hindsight had the most tragic of consequences.

[71] Nor do I consider this finding incompatible with Mr. Gelowitz's admitted awareness of the differences between the water conditions at the shoreline and the Raft. He testified that he found nothing unsafe about diving off the Raft as the water

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there was deep, which says nothing about his perception of the risk he faced at the shoreline.

[72] Mr. Gelowitz was not specific about the location of a warning sign that he asserted would have caused him not to dive. However, the judge’s finding that he would not have dived had he seen a warning sign “either on the lakeshore or the Raft”, and more precisely “at his point of entry to the Lake and on the Raft” is an inference that was open to her on the evidence; it was only at those two locations that Mr. Gelowitz would have seen warnings signs, had they been there to be seen.

[73] I accept that a witness’ own opinion as to what he would have done in particular circumstances is inherently self-serving and must be approached “with a healthy skepticism”: *Century Services Corp. v. LeRoy*, 2018 BCCA 279 at para. 74. The judge also accepted this premise and therefore looked to other evidence to assess the reliability of Mr. Gelowitz’s assertion. It was open to her to conclude that “the evidence as a whole” supported the inference that Mr. Gelowitz “would not have attempted a shallow dive from the eastern shore if he had seen a sign warning against diving as he entered the Lake or on the Raft”: at para. 178.

[74] It is not the role of this Court to re-weigh the evidence and I see no palpable and overriding error in the judge’s conclusion on this question.

Legal causation

[75] For a breach of duty to be the legal cause of a loss, the harm must not be too remote. The actual injury must be a reasonably foreseeable result of a defendant’s negligent conduct. The remoteness inquiry, which focusses on the actual injury, is distinct from the reasonable foreseeability analysis within the duty of care, which focusses on the type of injury: *Marchi* at para. 97. The remoteness inquiry requires an objective analysis, the principle being that it is the foresight of the reasonable person in the position of the defendant which determines responsibility: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 12–13.

[76] The trial judge considered the location of Mr. Gelowitz's dive as "most relevant" to the question of legal causation. However, she rejected the City's argument that the actual injury suffered by Mr. Gelowitz was not a reasonably foreseeable consequence of any breach of the standard of care because any "No diving" warning the City was obliged to provide could not have extended to a dive from land it did not own. She reasoned as follows:

> [180] In considering the City's argument, [it] is necessary to have in mind the layout and operation of the Lake and the City's Park facilities, as well as the established practices of Park users. The Lake is only 100 metres across from east to west, which is roughly the length of a soccer field. The Raft, which is maintained by the City, is located in the middle of the Lake, approximately 50 metres from the land owned by Alpine Village on the eastern shore. There is no restriction on where Park users can swim in the Lake. There is no apparent delineation of land owned by the City as opposed to Alpine Village. The Raft is a convenient resting point for swimmers on their way across the Lake from the Park shore. The evidence is that, as of the time of the accident, the eastern shore was, to the City's knowledge, visited by Park users with sufficient frequency that locals had adopted names—Big Rock and Little Rock—for the rocky outcroppings on the eastern shore. The evidence also indicates that a majority of the people who enter the land owned by Alpine Village on the eastern shore are Park users who swim across the Lake. The City facilitates access to the eastern shore by maintaining the Raft. The City is also aware that people do, on occasion, jump into the Lake from Big Rock and Little Rock.
>
> [181] In these circumstances, I conclude that it is reasonably foreseeable that Park users might dive into the Lake from locations on the eastern shore after swimming across the Lake. The risk that materialized—a diver striking an underwater hazard—was the same in character whether a Park user was diving off the Raft, or diving off the eastern shore 50 metres away from the Raft in an area that appeared to be of sufficient depth to allow a safe shallow dive. It was reasonably foreseeable that such hazards might be present at the eastern shore, which is an area that Park users, to the City's knowledge, routinely travelled to. The actual injury suffered by the plaintiff in diving from the eastern shore was, therefore, a foreseeable consequence of the City's breach of the standard of care in failing have visible signs warning against diving at the point the plaintiff entered the Lake and on the Raft.

[77] The City's argument on this issue is essentially the same as its argument on factual causation except that it asserts a correctness standard of review. It submits that the trial judge erred by assessing Mr. Gelowitz's actions subjectively, based on his own opinion evidence, rather than from the perspective of a reasonable person in his circumstances. Because Mr. Gelowitz knew that he should not dive into unknown

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water, the City says that no causal link could be established. It refers to several cases in which diving was found to be unforeseeable: *Duddle v. Vernon (City)*, 2004 BCCA 390; *Schweizer v. Fredericton (City)*, 2008 NBQB 192; and *Alchimowicz v. Schram*, [1999] O.J. No. 115 (C.A.).

[78] Mr. Gelowitz submits that a fair reading of the trial judge's reasons shows that she was focussed on what a reasonable Park user would do, all of her factual findings were based on evidence, and the cases relied on by the City are too different from this case to be helpful.

[79] I find the City's submission on this ground of appeal to be without merit.

[80] First, the correctness standard of review is not engaged because the judge considered legal causation, made no extricable error of law, and the City's real complaint is that she reached the wrong conclusion. In this circumstance, this is a question of mixed fact and law to which the palpable and overriding standard of review applies: see *Tellini v. Bell Alliance*, 2022 BCCA 106 at para. 37.

[81] Second, the submission conflates the remoteness inquiry with the reasonable foreseeability analysis within the duty of care. Rather than focussing on the actual injury suffered by Mr. Gelowitz, the City focusses on the foreseeability of a person diving from the eastern shoreline or "at the very least from the shoreline generally". It challenges the judge's conclusion that signs at the entry point and on the Raft would have caused swimmers to exercise caution in diving throughout the Lake, asserting:

> This is a legal error, as it is the foreseeability of the reasonable man in the defendant's position alone which establishes proximity. The application of [Mr. Gelowitz's] own subjective view is an error.

[82] The question of legal causation is whether the *actual injury* suffered by Mr. Gelowitz is sufficiently related to the City's breach. I do not agree with the City that the trial judge applied a subjective standard to the question of legal causation. As discussed above, the judge was alive to the dangers of accepting a plaintiff's hindsight opinion as to what he would have done and looked to other evidence to determine if the harm would have occurred but for the City's failure to post warning

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signs in locations where Mr. Gelowitz would have seen them. Factual causation having been established, I see no error, legal or factual, in the trial judge's analysis of legal causation and her conclusion that the type of harm suffered by Mr. Gelowitz was reasonably foreseeable.

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[83] The cases cited by the City are distinguishable from the circumstances of this case and unhelpful to the remoteness inquiry.

[84] In *Duddle*, the defendant City had placed numerous signs on and around a pier that prohibited diving and warned that the water surrounding the pier was shallow. The plaintiff, who was gravely injured when he dove from the pier, admitted he was aware of the warning signs, knew it was dangerous to dive into the water, and understood the consequences. No causal link was available on the evidence. *Schwiezer* is a case where no duty of care was established. The plaintiff was injured when he dove from an old bridge pier into a river in a location that was not a swimming area. No finding of reasonable foreseeability of injury and proximity was available on the evidence. In *Alchimowicz*, the plaintiff suffered catastrophic injury after he dove from the railing of a dock into shallow water at night while grossly intoxicated. The Court of Appeal upheld the dismissal of his negligence claim on the basis of the trial judge's findings that "No diving" signs would not have increased his knowledge of the risk given that he was intoxicated, he had been told by others not to jump into the water, he had been at the location before during the day, he was trained as a lifeguard, and he was aware of the dangers of swimming at night and of diving without first checking the depth of the water.

[85] Much of the City's submission seeks to re-interpret and re-weigh the evidence, which is not the role of this Court. As I have already noted, the judge's findings are supported by the evidence and her legal analysis is sound. There is no basis on which this Court can intervene on the question of legal causation.

Conclusion

[86] For all of these reasons, I would dismiss the appeal.

[87] In doing so, however, I consider it important to re-state the precise nature of the duty of care that has been established in this case: it is a duty to warn Mr. Gelowitz as a Park user of the known risks associated with the use of the Park facility, which includes a duty to warn of the risks of diving in the area extending from the Park foreshore to the eastern shore at Big Rock and Little Rock, locations in close proximity to the City's Raft, which were known by the City to be accessed by Park users.

[88] I wish to thank all counsel for their able submissions, which were of great assistance to the Court.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Fitch"

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