THE SNOWBALLING COST OF SKIING: WHO SHOULD BEAR THE RISK?

I. INTRODUCTION

On February 10, 1974, James Sunday, a twenty-year-old novice skier, became entangled in a bush concealed by loose snow as he was skiing down a beginner's slope.[1] His head struck a rock, causing permanent quadriplegic paralysis.[2] Sunday sued the Stratton Corporation for negligently failing to maintain its trails and for failing to warn of the hidden danger.[3] Finding that the defendant was one hundred percent negligent and therefore the cause of Sunday's injuries,[4] the jury awarded Sunday $1.5 million—$250,000 more than he had requested.[5] This award was the largest ever given for a skiing injury and was affirmed by the Vermont Supreme Court on appeal.[6]

In the wake of this landmark case, states across the nation changed their existing skier statutes to protect the ski operator and the ski tourism industry from awards such as the one given to Sunday.[7] This Note will canvass the legislative approaches taken by various states, examining both judicial and statutory re-

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[1] Sunday v. Stratton Corp., 390 A.2d 398, 401 (1978). The bush or clump of brush was located approximately "3 to 4 feet in from the side limits of the travelled portion" of the novice trail. Novice trails are the easiest to ski and, allegedly, the most carefully maintained trails on the mountain.

[2] *Id.* at 400. Sunday was left totally and permanently paralyzed from the neck down as a result of the accident. In its decision the court stated:

> Without belaboring the point, this case is one involving almost incredible damage . . . . We do not propose to evaluate a course of treatment involving eight operations, coma, intensive care, and severe drug reaction. . . . There are problems of urinary and bloodstream infection, and spasmodic pain. There is a propensity to bladder stones . . . . His efforts to complete his education are fraught with incredible difficulties; he can neither work nor father children, and he has recurring fits of depression.

Id. at 407.

[3] *Id.* at 400.

[4] *Id.* "The court ruled that under Vermont's recently enacted comparative negligence statute, the defense of assumption of risk was no longer available. . . ." Note, *Assumption of Risk After* Sunday v. Stratton Corporation: *The Vermont Sports Injury Liability Statute and Injured Skiers*, 3 VT. L. REV.129 (1978) (footnote omitted).

[5] These damages were not unusually high when compared to the total projected financial loss of $3,269,500 which was accepted by the court. This figure was based on an estimate of Sunday's average life expectancy, excluding inflation. It included the following: daily nursing care, $875,000; future hospitilization costs, $1,500,000; loss of future earnings, $300,000; medication, $94,500; and daytime attendant, $500,000. *Id.* at 407. Note, *Ski Operators and Skiers—Responsibility and Liability*, 14 NEW ENG. L. REV. 260, 268 n.65 (1978).

[6] *Sunday*, 390 A.2d at 407.

[7] *See infra* note 33.

sponses to skier injuries. First, an overview of the relevant law in the major ski tourism states shall be presented, followed by a discussion of recent cases, and a proposal for a model law which takes into account protection of both the skiers and the industry. Before *Sunday*, ski-operators were protected from liability under the *volenti non fit injuria* doctrine. *Sunday* explicitly overruled *Wright v. Mt. Mansfield Lifts, Inc.*, a 1951 case with a strikingly similar fact pattern.[8] Florine Wright was skiing at Stowe Mountain when her ski struck a tree stump concealed several inches below the snow.[9] She fell and broke her leg.[10] She argued that the stump should have been removed or marked, or alternatively, that the trail should have been closed.[11] The court held that her injury was the result of a danger inherent in the sport of skiing, and that she had assumed the risk of such a danger when she chose to ski.[12] Applying the *volenti non fit injuria* doctrine,[13] the Vermont Supreme Court set a precedent by affirming a directed verdict against the plaintiff.[14]

The assumption of risk doctrine enunciated in *Wright* was reaffirmed in 1976, when Thomas Nelson, an expert skier, was killed when he collided with an unpadded tower supporting a ski

[8] 96 F. Supp. 786 (D. Vt. 1951). The general principle of *Wright* is that a person "who takes part in such a sport accepts [as a matter of law] the dangers that inhere in it so far as they are obvious and necessary." *Id.* at 791.

[9] *Id.* at 790.

[10] *Id.*

[11] *Id.* at 791. Chalat, *Continuing Changes in Colorado Ski Law*, 13 COLO. LAW. 407 (1984).

[12] *Wright*, 96 F. Supp. at 790-91. In discussing the duty owed to the plaintiff, the court descriptively reasoned in support of its doctrine of *volenti non fit injuria* that:

> [s]kiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rock may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn spots and other manner of skier created hazards.

The court further reasoned that it would "demand the impossible" to expect that the mountain's surface be kept "level and smooth, free from holes or depressions" when so much of the condition of the terrain fluctuates with the weather and constantly changes its "appearance and slipperiness." *Id.* at 791.

[13] "This translates literally as 'one who consents can suffer no injury.'" Chalat, *Ski Law in Michigan*, 63 MICH. B. J. 355 (1984).

[14] *Wright*, 96 F. Supp. at 792.

lift.[15] The district court rejected the plaintiff's argument that two-inch thick foam padding was a reasonable, effective, and available safety measure, holding that the presence of such padding would not have prevented the death of Nelson.[16] Ski lift towers were considered one of the hazards that were "obvious and necessary" to all skiers who skied that trail on that date.[17]

The jury in *Sunday* reached their decision after being instructed that to find Stratton Mountain liable, they would have to find that they were at fault. The judge was careful to stress that skiers accepted those dangers which were "obvious and necessary" to the sport, and that negligence in maintaining slopes was a prerequisite to recovery.[18] Surprisingly, the jury found that Stratton Mountain "had owed a duty to the skier and that [this]

[15] Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781, 784 (D. Vt. 1976) (wrongful death action by decedent's wife, Barbara Leopold, as executrix of Thomas Nelson's estate).

> Although there were no witnesses to the accident, the court recognized that the most plausible explanation for the accident was that the decedent caught a boot or ski on the four foot square concrete base of the tower and was thrown against the eighteen inch tubular steel tower, striking both his pelvis and skull.

Note, *supra* note 5, at 275.

[16] *Leopold*, 420 F. Supp. at 787. There was "expert testimony offered at the trial . . . establish[ing] that at the time of the accident there was available a protective foam padding designed especially for tramway towers . . . ." Note, *supra* note 5, at 275.

> There was testimony that ski areas in some instances place hay bales around the base of towers or other hazardous objects in or near the ski trails. However, David Rock, the former General Manager of Mt. Snow, testified that hay bales absorb and hold moisture. When this moisture freezes, the bales become very hard and lose their elasticity. It appears that they may then become a potential hazard in their own right to those who may strike them.

Id. at 276 n.114, (*quoting Leopold*, 420 F. Supp. at 787 n.3).

[17] *Leopold*, 420 F. Supp. at 786 (quoting *Wright*, 96 F. Supp. 786, 791 (1951)). The court reasoned that the towers were painted bright blue and were in plain view. It was the skier's choice to proceed on that particular trail and, as such, he "willingly assumed all the obvious and necessary risks involved in this descent, including the danger that he might collide with a tower if he lost his control or concentration for an instant." *Id.* at 787.

[18] Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398, 403 (1978). "The clear purport of the charge . . . as a whole, required the jury to find, as a basis for any plaintiff's verdict, a duty on the part of the defendant and a breach of that duty. Liability based upon any 'guarantee' of safety was expressly excluded." *Id.* Although the court never articulated the duty which Stratton had breached, the jury heard conflicting testimony as to whether the brush actually existed as claimed. One photographic expert witness for the defendant "proved conclusively [with infra-red photographs] the absence of any growth under the snow, but his admission on cross-examination [was] that they also showed no growth below the snow where two trees and a rock projected above it." *Id.* at 406. Other damaging testimony was presented by members of the ski patrol who denied portions of their own entries on accident reports, were unable to produce certain documents and admitted to getting together, "pow-wow" fashion, to prepare their testimony before trial. *Id.* Whether or not the brush ever existed will never be known, since the defendant changed the terrain of that trail the following summer. It was apparent that the jury was convinced that the accident happened as the plaintiff reported.

duty had been breached."[19]

Although the defendant maintained that the prevailing reasoning of *Wright* and *Leopold* should govern, and that skiing was an inherently dangerous sport in which Sunday assumed the risk, the trial court refused to allow that defense to bar recovery.[20] Sunday relied upon Stratton's worldwide reputation and advertisements that they had "meticulous grooming" and "top quality cover."[21] The court rejected Stratton's defense that by using the most advanced grooming and maintenance techniques, Stratton had discharged its duty to the skier and furthermore, the court found that it was impossible for them to eliminate all such hazards.[22] The court reasoned that "operators who induce skiers, particularly novices, to rely on the condition of their slopes, should answer for injuries sustained from inferior maintenance of that area."[23] Distinguishing the *Wright* case, the court agreed that "the stump that injured the plaintiff in *Wright* may well be the basis for negligence today in view of improved grooming techniques."[24]

The trial court judge in *Sunday* stated that ski areas should no longer "be allowed to operate. . . 'hiding behind' the philosophy that ski accidents are a risk people assume when they go skiing."[25] Establishing that the ski resort had a duty to provide

19 Note, *Ski Area Liability for Downhill Injuries*, 49 INS. COUNS. J. 36, 41 (1982) (authored by John Fagen) [hereinafter Fagen].

20 *Sunday*, 390 A.2d at 401.

21 *Id.*

22 Fagen, *supra* note 19, at 41.

23 Note, *Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill*, 1980 UTAH L. REV. 355, 360.

24 *Sunday*, 390 A.2d at 402 (*quoting* defendant's brief). In 1949, the trail maintenance was performed by the "communal efforts of individuals, corporations, innkeepers and the like." *Id.* The summertime maintenance program was performed by various residents, innkeepers, employees of the Forestry Department of the State of Vermont, employees of the Lift and "other organizations interested in skiing." Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 788 (D. Vt. 1951). Stratton Mountain, on the other hand, purported to make every effort to achieve a "perfect surface for skiing." *Sunday*, 390 A.2d at 401. Using elaborate machinery they cut trees, stumps and brush from the trails to achieve a "completely new" and "absolutely flat" surface. *Id.* The surface was raked, fertilized and cleared of all stones over three inches. The land was seeded with grass cover to kill other growth, and the remaining growth, including tall grass, was cut by hand or mower. Finally, single shoots were regularly cut and the surface was rolled "as smooth as it [could] be." *Id.* Accordingly, the defense argued that Stratton's excellent grooming practices made the plaintiff's claim of brush beneath the snow impossible. *Id.* at 402. Perhaps the outcome would have been different if Stratton admitted the existence of the brush—acknowleged that they used reasonable care and state-of-the-art technology to keep their premises safe—but that there were certain natural hazards beyond their control.

25 *Id.* at 405. This remark was published in the Burlington Free Press and was read by one of the jurors. The defendant moved for a mistrial claiming that the prejudicial article would influence the jury's decision. Relying on Fraser v. Blanchard, 83 Vt. 136, 73 A. 995 (1909), in which the court refused to set aside the verdict even though two jurors had read an 'improper article,' the Sunday court found no evidence of prejudice and the motion for mistrial was denied. *Id.* Apparently, Stratton elected to ask the jurors how many of them had seen the newspaper article. Based upon these responses the defense could not make a showing of prejudice.

reasonable care to the skier,[26] the court concluded that the mountain breached its duty and created the risk which caused Sunday to fall. This risk was not one which should have been assumed by the skier; Sunday had a right to assume that reasonable care would be provided by the mountain.[27] However, as a result of this judgment, concealed natural obstacles were not considered inherent risks to the sport of skiing, nor were operators found to have a duty to protect skiers from such dangers. Furthermore, "there was no duty to warn" or to "extinguish such dangers."[28] The court did not enunciate Stratton's duty, nor did it suggest any methods of grooming or maintenance which would have discharged Stratton of its duty.[29]

It had been suggested by the defendant that the jury's verdict in *Sunday* was based on an overwhelming sympathy for him, rather than on justifiable legal reasoning.[30] The Vermont Supreme Court acknowledged that in circumstances such as these, the physical condition of the plaintiff could evoke such a

26 *Id.* at 402. The rule applied was that of plaintiff as "business visitor" which was enunciated in Garafano v. Neshobe Beach Club, Inc., 126 Vt. 566, 572, 238 A.2d 70, 75 (1967)

> In the discharge of its duty, [defendant] was bound to use reasonable care to keep its premises in a safe and suitable condition so that plaintiff would not be unnecessarily or unreasonably exposed to danger. If a hidden danger existed, known to the defendant, but unknown and not reasonably apparent to the plaintiff, it was [defendant's] duty to give warning of it to the latter. In those circumstances he had a right to assume that the premises, aside from obvious dangers, were reasonably safe for the purpose for which he was upon them, and that proper precaution had been taken to make them so.

Sunday, 390 A.2d at 402. Although the plaintiff in Garafano was a softball player injured on the field when he stepped in a hole, the principle was applied to a plaintiff injured when he fell on a slippery surface on the premises of a ski resort. *See* Stearns v. Sugarbush Valley Corp., 130 Vt. 472, 474, 296 A.2d 220, 222 (1972). The *Stearns* court held that the ski area operator's "responsibility toward its customers [was] expressly the same as that of any business." *Stearns*, 296 A.2d at 222.

27 *Sunday*, 390 A.2d at 403. *See* Fagen, *supra* note 19, at 40.

28 Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278, 279 (1979).

29 Nor did the court claim that Stratton had prior knowledge of the hidden hazard, thereby imputing this knowledge and holding the mountain to what appeared to be a "reasonable person" standard. Stratton Mountain, "[an] occupier of premises who invites business visitors to enter, . . . [was] charged with the duty of the affirmative action which would be taken by a reasonable person in their position to discover dangers of which they may not be informed." W.P. KEETON, D. DOBBS, R. KEETON, D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS 185 (5th ed. 1984) (footnotes omitted) [hereinafter PROSSER].

30 *Sunday*, 390 A.2d at 404. The defendant claimed that the overall impact of the charge was prejudicial. In reaching its conclusion that "[a]ny claim of lack of impartiality [was] not sustained by the record", the Vermont Supreme Court reviewed 1,094 pages of testimony. *Id.*

reaction. However, careful scrutiny of the trial transcript did not support this claim.[31] As a result of this decision, it was no longer clear which risks were "inherent" and which risks were "obvious and necessary."[32] Previously, hidden brush was determined to be inherent to the sport while lift towers were determined to be "obviously necessary."

II. LEGISLATION

The new Vermont statute, coincidentally enacted three years to the day after James Sunday's devastating injury, "reaffirmed the assumption of risk defense in cases involving sports injuries."[33] Assumption of risk has been categorized as either primary or secondary. The risk is considered primary if "the plaintiff reasonably and voluntarily assumes a known risk in a situation where the 'defendant owes no duty . . . to the plaintiff.' "[34]

31 *Id.*

32 Fagen, *supra* note 19, at 42. *See also* RESTATEMENT (SECOND) OF TORTS § 496E(2) (1985), which states that

> The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

"Arguably the skier could avert the harm by not going skiing at all." Lisman, *Ski Injury Liability*, 43 U. COLO. L. REV. 307, 311 (1972). California's government code immunizes any public entity or employee from liability "to any person who participates in a hazardous recreational activity" and is injured as a result of that participation. CAL. GOV'T CODE § 831.7(a) (West 1988). Downhill skiing is included in the list of hazardous activities along with, but not limited to equestrian competition, hang gliding, motorized vehicle racing, rock climbing, rodeo, sky diving, and parachuting. *Id.* at § 831.7(b)(3).

33 *See* Fagen, *supra* note 19, at 43. VT. STAT. ANN. tit. 12 § 1037 (1987) (effective Feb. 7, 1978), provides that "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary." The only reference to skiing in the Vermont Annotated Code prior to 1978 was § 513 entitled, "An act concerning the liability of the operators of ski areas." This section imposed a one-year statute of limitations for all actions "to recover for injuries sustained while participating in the sport of skiing . . . ." VT. STAT. ANN. tit. 12 § 513 (1973). However, the legislative intent following § 1037 stated:

> Since 1951, the law relating to liability of operators of ski areas in connection with downhill skiing injuries has been perceived to be governed by the doctrine of *volenti non fit injuria* as set forth in the case of Wright v. Mt. Mansfield Lift, Inc. . . . In 1976, in the case of Leopold v. Okemo Mountain, Inc., . . . the doctrine of assumption of risk was held to be applicable in a downhill skiing injury case, despite the adoption of a comparative negligence statute by the Vermont General Assembly in 1970. . . . It is a purpose of this act . . . to state the policy of this state which governs the liability of operators of ski areas with respect to skiing injury cases . . . by affirming the principles of law set forth in Wright v. Mt. Mansfield Lift, Inc., and Leopold v. Okemo Mountain, Inc., which established that there are inherent dangers to be accepted by skiers as a matter of law.

34 Fagen, *supra* note 19, at 37.

> The distinction between primary and secondary assumption of risk was not crucial when contributory negligence also provided an absolute bar to recovery. However, adoption of comparative negligence necessitated finding relative fault, and thus the distinction became crucial. In theory, primary assumption of risk should coexist with contributory negligence because there is no duty or breach of duty, and thus no negligence. On the other hand, secondary assumption of risk is subsumed within the framework of comparative negligence since it is merely an aspect of contributory negligence.

Id. at 37-38.

Primary assumption of risk involves no fault because it refers to dangers that cannot be alleviated by reasonable care. Thus, it can be said that the defendant did not owe a duty to the plaintiff.[35] The risk is considered secondary when an established duty by the defendant has been breached and the plaintiff has not acted reasonably.[36] In other words, the defendant negligently created a dangerous situation that the plaintiff knowingly subjected himself to.[37] Essentially, this is a form of contributory negligence because the plaintiff failed to exercise reasonable care for his own safety.[38]

The principles of law which had been expressed in *Wright* and *Leopold*, and rejected by *Sunday*, were adopted as the basis for the new Vermont statute.[39] Although many states opted for a "laundry list" of specific risks which the skier assumed,[40] and specific duties for which the mountain was held responsible, the Vermont legislature merely stated that "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necesssary,"[41] leaving the words "inhere," "matter of law," and "obvious and necessary" open to interpretation. The new statute implied, as the *Wright* court held, that "holes or depressions" or "mutations of nature" or "roots or rocks" "hidden under a thin cover" were inherent in the sport of skiing and that skiers assumed the risk of these dangers in choosing to ski.[42] Consequently, there has been less litigation in Vermont, where a defense attorney can claim that the risk of any and all injuries are assumed by the skier, than there has been in Colorado, where the most litigation has occurred and the longest list of enumerated duties is found.

35 Note, *supra* note 23, at 358.

36 Fagen, *supra* note 19, at 37.

37 Note, *supra* note 23, at 359.

38 "If the plaintiff acted reasonably, and thus was free from negligence, there is no assumption of the risk in the secondary sense." Fagen, *supra* note 19, at 37.

39 *See* Note, *supra* note 23, at 358 and accompanying text.

40 *See, e.g.*, Colorado, Massachusetts, Montana, Michigan, and New Mexico. The operator duties and skier responsibilities enumerated in these statutes cover the following areas: *signs, lifts, equipment, obstacles, skier conduct, skier speed and collisions.*

41 *See supra* note 39, at 356 and accompanying text.

42 Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 790-91 (D. Vt. 1951).

The ruling in *Sunday* shook the entire ski industry.[43] States with major ski tourism industries perceived "problem[s] with respect to the inherent dangers of skiing and the need for promoting safety, coupled with the uncertain and potentially enormous ski area operators' liability."[44] Most legislators responded to the problem by enacting laws that enumerated the obvious inherent risks of the sport, while leaving these categories open-ended. This frequently resulted in decisions relieving operators from liability for negligent acts based on the defense that the risk was inherent.[45] This approach served the legislative intent by favoring the ski industry often at the expense of the injured skier.[46] Other legislators preferred to say as little as possible, merely reiterating their policy that skiing is a sport which carries inherent risks which are assumed by the skier.[47]

The Michigan Ski Area Safety Act of 1962, the oldest ski statute, was amended in 1981.[48] Primarily concerned with the safe operation of ski lifts,[49] the Act created a ski safety board consisting of seven members[50] who are responsible for promulgating rules and regulating all ski areas and ski lifts as "necessary for [the] protection of the general public."[51] Any skier, passenger or operator who violated this Act was "liable for that portion of the loss or damage resulting from that violation."[52]

Montana's skier statute, enacted into legislation in 1979,[53] was essentially the same as Michigan's in defining inherent risks and thereby barring recovery if the injury was due to one of those enumerated inherent risks.[54] This new statute was based on the theory that "[a] skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participating in the sport of skiing by virtue of his participation."[55]

The Colorado Ski Safety Act of 1979, a comparative negligence statute,[56] contained the most exhaustive list of requirements for ski operators as well as the duties of skiers, with penalties for noncompliance.[57] There were some significant

43 The ruling in *Sunday v. Stratton* galvanized the National Ski Area Association and its insurers into an intense, national lobbying effort to get specific standards of care for skiers and ski area operators. Ski area operators wanted a definitive law setting forth their duties to skiers to discourage litigation of negligence cases based upon the breach of a duty not enumerated in the legislation.
Chalat, *Continuing Changes in Colorado Ski Law*, 13 COLO. LAW 407-08 (1984).

44 In Michigan, for example, it was the legislature's intent to promote safety, reduce litigation and stabilize the economic conditions in the ski resort industry. "[T]he Legislature decided to establish rules in order to regulate the ski operators and to set out ski operators' and skiers' responsibilities in the area of safety." Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 478, 400 N.W.2d 653, 655-56 (1986).

45 Note, *supra* note 23, at 365. This inequitable result could be avoided by "holding that the defined risks are 'inherent' only in the absence of resort negligence." *Id.*

46 *Id.* at 364. In Utah, for example, recovery is barred when the injury results from collision with other skiers even if they collide at a "blind intersection of trails negligently designed by the operator"; or collisions with resort employees including ski patrol or instructors; or collisions with ski lift towers even if they are unpadded. *See, e.g.*, IDAHO CODE § 6-1106 (1987).

47 VT. STAT. ANN. tit. 12, § 1037 (1987); N.J. REV. STAT. § 5:13-1 (1987); N.H. REV. STAT. ANN. § 225A:1 (1987). Utah's statute further declared that:

> few insurance carriers [were] willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers [had] risen sharply in recent years due to confusion as to whether a skier assume[d] the risks inherent in the sport of skiing. It [was] the purpose of [the] act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks [were] inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

UTAH CODE ANN. § 78-27-51 (1987).

48 MICH. COMP. LAWS § 408.321-344 (1985 and Supp. 1988).

49 *Id.* § 408.321-344. Ski areas; conduct of skiers; acceptance of risks. Section 22(2) of § 408.342 was added in 1981 and provided that "[e]ach person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary." Subsurface snow or ice condition collisions with properly marked snow-making equipment, and collisons with ski lift towers were all considered risks the skier assumed.

50 *Id.* § 408.323. The ski area safety board consisted of three ski area managers, one engineer with skiing experience, one member of the central United States ski association, and two people from the general public with skiing experience.

51 *Id.* § 408.326(1). "The board shall promulgate rules for the safe construction, installation, repair, use, operation, maintenance, and inspection of all ski areas and ski lifts . . . based upon generally accepted engineering standards, formulas, and practices." *Id.*

52 *Id.* § 408.344 (24).

53 MONT. CODE ANN. § 23-2-731-737 (1987).

54 Fagen, *supra* note 19, at 45-46.

> It is recognized that there are inherent risks in the sport of skiing that are essentially impossible to eliminate by the ski area operator but that should be known by the skier. It is the purpose of 23-2-731 through 23-2-737 to define those areas of responsibility and affirmative acts for which the ski area operator is liable for loss, damage, or injury and those risks for which the skier expressly assumes or shall be considered to have voluntarily assumed the risk of loss or damage and for which there can be no recovery.

MONT. CODE ANN. § 23-2-731. The ski area operator has a duty to mark all trail vehicles with flashing or rotating lights when in motion, to warn of all snow-making equipment, and to post trail boards displaying which trails are open and closed. *Id.* at 23-2-733.

55 *Id.* 23-2-736(1). A skier's assumption of responsibility and duty "includes but is not limited to injury or loss caused by the following: variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof, pole lines, and plainly marked or visible snowmaking equipment." *Id.* Additionally, the skier assumes sole responsibility for collisions with other skiers and "[n]otwithstanding any comparative negligence law . . . a person is barred from recovery . . . for loss or damage resulting from any risk inherent in the sport of skiing as described in 23-2-736." *Id.* 23-2-737.

56 Colorado Ski Safety Act of 1979, COLO. REV. STAT. §§ 33-44-101-111 (1987). The Colorado legislature, "[r]ealizing the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed," established safety standards for operators and for skiers. *Id.* § 33-44-102. *See* Fagen, *supra* note 19, at 46.

57 COLO. REV. STAT. § 33-44-109 (1987). Skiers are solely responsible for collisions with other skiers, with natural objects or "man-made" structures. *Id.* § 33-44-109(2).

changes in the newly amended Act.[58] First, the prerequisite ninety-day notice for filing an action was eliminated. Second, the standard of proof to overcome the presumption of the skier's negligence was reduced from "clear and convincing" to a "preponderance of the evidence."[59] Third, all man-made obstacles now required padding as well as markers if "not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet."[60]

Utah's comparative negligence statute[61] simply declared that "as a matter of public policy, no person engaged in [the sport of skiing] shall recover from a ski operator for injuries resulting from those . . . risks" inherent in the sport of skiing.[62] The state's policy was formulated so that residents and nonresidents would continue to ski, and thus contribute to the economy of the state. Because the legislature found that "few insurance carriers [were] willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers [had] risen sharply in recent years due to confusion as to whether a skier assume[d] the risks inherent in the sport of skiing," it was their objective to bar recovery for injuries sustained from inherent risks.[63] Similar to other jurisdictions in listing specific dangers and conditions constituting inherent risks, the 1979 Utah Inherent Risks of Skiing Statute included but was not limited to "changing weather conditions, variations or steepness in terrain;

The penalty for violating any of the duties imposed upon a skier is a fine of not more than three hundred dollars. *Id.* § 33-44-109(12). *See* Fagen, *supra* note 19, at 46-47.

58 Chalat, *Ski Tips—A Review of Colorado's Ski Safety Act*, 9 COLO. LAW. 452, 458 (1980). "The ski area operator, upon finding a person skiing in a careless and reckless manner, may revoke that person's skiing privileges." COLO. REV. STAT. § 33-44-108(5).

59 COLO. REV. STAT. § 33-44-109(2). "It is presumed, unless shown to the contrary by a preponderance of the evidence, that the responsibility for collisions by skiers . . . is solely that of the skier or skiers involved and not that of the ski area operator." *Id. See* Chalat, *supra* note 58, at 460.

60 COLO. REV. STAT. § 33-44-107(7).

> The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall cover such obstructions with a shock-absorbent material that will lessen injuries.

Id.

61 UTAH CODE ANN. §§ 78-27-51 to -54 (1987).

62 *Id.* § 78-27-51.

63 *Id.*

> It is the purpose of [the] act to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

Id. Similarly, the "[h]azards inherent in . . . mountaineering, skiing and hiking . . . are assumed by the skier or other sportsm[e]n." *Id.* § 63-11-37.

snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski within his own ability."[64] Furthermore, there was only one duty required of ski operators — to post trail boards in each area listing the inherent risks of skiing and the limited liability of the operators.[65] There were no corresponding duties imposed upon the skier.

In contrast, the State of Maine imposed several duties upon the skier[66] and no enumerated duties upon the operator. It placed the "legal responsibility for any injury . . . arising out of [the skier's] participation in the sport of skiing, unless the injury or death was actually caused by the negligent operation or maintenance of the ski area by the ski area operator, its agents or employees,"[67] on the skier.

The Massachusetts assumption of risk statute specifically listed duties and responsibilities for both skiers and ski operators.[68] As in most of the other eastern states, there was no re-

64 *Id.* § 78-27-52(1): " 'Inherent risks of skiing' means those dangers or conditions which are an integral part of the sport of skiing, including . . . a skier's failure to ski within his own ability." *See also* COLO. REV. STAT. § 33-44-109(1)(1987); MONT. CODE ANN. § 23-2-736(2) (1987); N.M. STAT. ANN. § 24-15-10B (1986); N.Y. COMP. CODES R. & REGS. § 54.4(b)(2) (1983); N.J. REV. STAT. § 5:13-4d (West Supp. 1988).

65 UTAH CODE ANN. § 78-27-54. "Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act." *Id.* Utah's responsibilities for operators are the "least stringent." *See supra* note 23, at 358 n.20.

66 ME. REV. STAT. ANN. tit. 26, § 489 (1987). Skiers were required to embark and disembark from lifts only in designated areas. *Id.* § 489(1). Skiers were precluded from doing any act, including throwing objects, which would interfere with the running of the lift. *Id.* § 489(2). Skiers were prohibited from placing any objects on trails which would cause damage to a person or to the tramway. *Id.* § 489(3). Skiers were prevented from skiing on closed trails, tampering with any sign, or skiing in wooded trails not open to the public. *Id.* §§ 489(4)-(6).

67 *Id.* § 488:

> It is hereby recognized that skiing as a recreational sport and the use of passenger tramways associated therewith may be hazardous to skiers or passengers, regardless of all feasible safety measures which can be taken . . . . [However], [t]his section shall not prevent the maintenance of an action against a ski area operator for the negligent design, construction, operation or maintenance of a tramway.

68 MASS. GEN. L. ch. 143, §§ 71H-71S (1988). Section 71N, articulates the duties of operators which include posting signs and notices on equipment, trails, hydrants and putting lights on emergency vehicles, concluding that "ski area operators shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing." *Id.* § 71N. Section 71O regulates the conduct of skiers with penalties for violations. These duties include, but are not limited to, avoiding collisions with any "person or object." *Id.* § 71O. Such collisons were deemed to be solely the skier's responsibility and not that of the operator. Persons who failed to heed warnings could have their lift tickets revoked. Section 71P indicates that in an "action brought against a ski area operator based on negligence, it shall be evidence of due care

quirement that the lift towers be padded.[69] This statute differed slightly from that of other states because of its requirement that the jury consider whether the ski area operators exercised due care, whether the injury resulted from the skier's negligence, and whether the injury was a result of the inherent risk of the sport.[70] Because compliance with the enumerated duties did not automatically relieve the ski operator of liability, a great deal of discretion was left to the jury.[71]

The ninety-day notice requirement for filing an action against the operator and the one-year statute of limitations had to be explained in "plain language" on the back of all lift tickets.[72] Other sections of the Code permitted the imposition of a fine of not less than $100 for leaving the scene of an accident and not more than $200 for operators violating any of the safety provisions of the statute.[73] The purpose of these sections was to provide an added incentive to increase safety.[74] However, fining operators a mere $200 fails to encourage operators' compliance.

where the conduct of an operator has conformed with the provisions of this chapter." *Id.* § 71P.

69 Note, *supra* note 5, at 275. It seems inconsistent that the purpose of the Massachusetts statute, as declared by one state legislator, is "to require the application of reasonable safety measures in order to decrease the number and seriousness of ski accidents" and yet, not include padding requirements. *Id.* On November 1, 1988, a new law in New York will require all ski area operators to pad the uphill sides of all lift towers to protect skiers who may collide with them. New York Newsday, September 25, 1988, at 39, col. 1. *See also* IDAHO CODE §§ 6-1102-6-1109 (1988), which defines the duties of skiers and ski operators, excluding the "padded tower" requirement.

70 MASS. GEN. L. 143 § 71P. *See* Fagen, *supra* note 19, at 44.

71 Fagen, *supra* note 19, at 44. There is always the chance that this discretion will be abused, and the Massachusetts statute does not eliminate the uncertainty in determining when the operator has discharged his duty. The only way to resolve this problem would be to set forth a thorough list of all possible accidents and to identify who is the responsible party in each scenario. Because of the enormous variety of possible injuries, this remains an unrealistic objective.

72 MASS. GEN. L. ch. 143, § 71N(5): The notice should be "conspicuously place[d] within the ski area, in such form, size and location as the board may require, and on the back of any lift ticket issued notice, in plain language, of the statute of limitations and notice period . . . ."

73 *Id.* § 71Q,

> Any person who is knowingly involved in a skiing accident and who departs from the scene . . . without . . . clearly identifying himself and obtaining assistance knowing that any other person involved in the accident is in need of medical or other assistance shall be punished by a fine of not less than one hundred dollars.

Id. Section 71R provides that,

> [An operator who] violates . . . any rule . . . shall be punished by a fine of not more than two hundred dollars; provided, however, that any person who operates a recreational tramway, after the license . . . has been suspended . . . shall be punished by a fine of one hundred dollars for each day of such operation.

Id. § 71R.

74 Note, *supra* note 5, at 272-73.

In New Mexico, legislation was adopted which included assumption of risk and also enumerated the duties for each party; however, it "require[d] the jury to find the injury [was] causally related to a breach of one of the enumerated [statutory] duties."[75] The duties of the ski area operator were governed by the common-law principles of negligence.[76] The strict wording of this statute decreased the chances of recovery for injuries due to inherent risks.[77] As a result of its clearly defined standards, the New Mexico statute tried to eliminate jury discretion but may also have eliminated recovery for some legitimate claims because of its brevity.[78]

Ironically, New Mexico was one of the few states requiring area operators to carry liability insurance in the event of a lift accident.[79] For areas with more than three lifts, the operator must maintain a minimum of $100,000 insurance per injured individual and $300,000 per accident.[80]

To further its interest in establishing "rules of conduct and care" to "protect downhill skiers from undue, unnecessary and unreasonable hazards, and to . . . promote safety in the downhill ski industry,"[81] New York requires ski area operators to patrol every open trail at least twice a day, to log data regarding surface terrain, "obstacles or hazards other than those which may arise from . . . weather variations . . . or mechanical failure of snow

75 Fagen, *supra* note 19, at 44. N.M. STAT. ANN. §§ 24-15-1 to -14 (1986) requires a breach of an enumerated duty as a prerequisite to finding liability. Duties of ski area operators include providing warnings and marks on all vehicles, hydrants and trails. Duties of skiers include the recognition that "skiing as a recreational sport is inherently hazardous to skiers, and it is the duty of each skier to conduct himself carefully," and that "[t]he responsibility for collisions by any skier . . . with any person or object, shall be solely that of the individual . . . except where . . . such collision resulted from any breach of duty imposed upon the ski area operator under the provisions [set forth]."

76 Ski area operators are held liable when the "violation of duty is causally related to the loss or damage suffered, and shall continue to be subject to liability in accordance with common law principles of vicarious liability for the willful or negligent actions of its principals, agents or employees which cause injury to a . . . skier." Similarly, the ski operator is not liable "where the violation of duty is causally related to the loss or damage suffered." N.M. STAT. ANN. at § 24-15-11.

77 N.M. STAT. ANN. § 24-15-14A: "Unless a ski area operator is in violation of the Ski Safety Act, . . . and the violation is a proximate cause of the injury complained of, no action shall lie against such ski area operator by any skier . . . ." *See also* Fagen, *supra* note 19, at 45.

78 Fagen, *supra* note 19, at 45. *See supra* note 69 and accompanying text.

79 New Hampshire is another state requiring the operator of the lift to "maintain liability insurance with limits of not less than $300,000 per accident." N.H. REV. STAT. ANN. § 225-a:25(II) (Supp. 1987). *See also* Chalat, *supra* note 58, at 464-65.

80 N.M. STAT. ANN. § 24-15-4.

81 N.Y. LAB. LAW § 865 -868 (McKinney 1988). The legislature found that downhill skiing was a major recreational sport "not without some inherent risks," and a major industry within New York. *Id.* § 866.

grooming or emergency equipment which may position such equipment within the borders of a slope or trail."[82] New York's concern about controlling reckless skiers is evidenced by the statute's requirement that area operators develop "a written policy for situations involving . . . reckless[ness]," including procedures for warning, approaching and dealing with such skiers.[83] The statute also mandates operators of trail maintenance equipment and passenger tramway attendants to be trained in the safe operation of their equipment.[84]

Notwithstanding the provisions of its comparative negligence standards, New Jersey's assumption of risk statute[85] protects the area operator by barring recovery to skiers when injured on trails beyond their "ability to negotiate,"[86] from a collision with an unpadded lift tower,[87] or by subsurface hazards.[88] However, duties such as "[r]emov[ing] as soon as practicable obvious man-made hazards"[89] and "[g]rooming . . . at the discretion of the operator"[90] are so vague as to be almost meaningless in the courtroom when compared to other, more specific language in

[82] N.Y. COMP. CODES R. & REGS. tit. 12, § 54.5(f) (1985).

[83] *Id.* § 54.5(g)(1), (2). This statute requires the operator to "[d]esignate personnel to implement the ski area's policy on reckless conduct." *Id.* § 54.5(h). On November 1, 1988, a new "Safety in Skiing Code" was enacted which further defines the duties of skiers. These include the duty:

> not to ski in closed slopes, not to leave the scene of an accident and not to stop on a trail in a spot likely to cause collisions. Skiers must also yield to other skiers when entering a trail, overtake other skiers safely and use runaway straps or ski brakes.

New York Newsday, Sept. 25, 1988, at 39, col. 1.

[84] N.Y. COMP. CODES R. & REGIS. tit. 12, § 54.5(c). This requirement applies to all operators of maintenance equipment, lift attendants and personnel who are involved in the safe management of the area.

[85] N.J. STAT. ANN. §§ 5:13-1 to -11 (West Supp. 1988). The purpose of this law is to

> make explicit a policy of this State . . . recognizing that the sport of skiing . . . involve[s] risks which must be borne by those who engage in such activities and which are essentially impractical or impossible for the ski area operator to eliminate. It is, therefore, the purpose of this act to state those risks which the skier voluntarily assumes for which there can be no recovery.

Id. § 5:13-1(b).

[86] *Id.* § 5:13-4(d) provides that a "skier shall be the sole judge of his ability to negotiate any trail, slope, or uphill track and shall not attempt to ski or otherwise traverse any trail, slope or other area which is beyond the skier's ability to negotiate."

[87] *Id.* § 5:13-4(c). "Every skier shall maintain control . . . and shall stay clear of any snow grooming equipment, any vehicle, any lift tower and any other equipment on the mountain." *Id.*

[88] *Id.* § 5:13-3(b)(2). "The new ski law has been bitterly criticized as a 'special interest bill' which will result in 'an improper erosion of sound tort law principles' by granting immunity from liability for any conduct or omission, 'no matter how negligent,' and by reintroducing 'the harsh and inequitable concept of contributory negligence.'" 103 N.J.L.J. 197 (1979), *quoted from* 102 N.J.L.J. 548 (1978).

[89] N.J. STAT. ANN. § 5:13-3(3).

[90] *Id.* § 5:13-3(c).

the statute.[91] Although less stringent than New York's requirements, New Jersey also imposes upon the operator the duty of making daily reports either orally or in writing concerning the conditions of the slopes.[92] Unlike New York, however, there is no duty imposed upon the skier to use safety straps or ski brakes to prevent runaway skis.[93]

The Connecticut legislature went beyond defining the duties and responsibilities for both the operator[94] and the skier.[95] It provides a "special defense" consisting of six factors that would activate the law of comparative negligence for civil actions.[96] The statutory language, however, was so vague that recovery for the injured skier became almost impossible. For example, under this statute, a skier would recover if he "maintain[ed] reasonable control" and skied within the limits of his own ability. To establish this, the skier need only show that he correctly assessed his ability, skied on trails designed for his particular level, and obeyed warning signs.[97]

III. DECISIONS

Practically all of these statutes have been unsuccessfully challenged under the fourteenth amendment.[98] In a recent decision, a United States district court held that the Montana "skier statute" did not deprive the injured plaintiff of access to the courts,

[91] *See generally* Prosser's discussion of the problem of "gaps" in statutory prescriptions left open by virtue of ambiguous terminology. The responsibility for "answering the unanswered questions " is left to the court. PROSSER, *supra* note 29 § 3.

[92] "It shall be the responsibility of the operator to . . . [m]ake generally available either by oral or written report or otherwise, information concerning the daily conditions of the slopes and trails." N.J. STAT. ANN. § 5:13-3(2)(2).

[93] N.Y. COMP. CODES R. & REGS. tit. 12, § 54.4(12) (1985) provides: "Skiers shall wear retention straps or other devices to prevent runaway skis."

[94] CONN. GEN. STAT. ANN. § 29-211 (West 1987).

[95] *Id.* § 29-213.

[96] *Id.* § 29-214 provides:

> It shall be a special defense to any civil action against an operator by a skier that such skier: (1) Did not know the range of his own ability to negotiate any trail or slope marked in accordance with subdivision (3) of section 29-211; (2) did not ski within the limits of his own ability; (3) did not maintain reasonable control of speed and course at all times while skiing; (4) did not heed all posted warnings; (5) did not ski on a skiing area designated by the operator; or (6) did not embark on or disembark from a passenger tramway at a designated area. In such civil actions the law of comparative negligence shall apply.

But see id. § 52-572h(b), which provides for recovery for the plaintiff "if the negligence [of the plaintiff] was not greater than the combined negligence of the person or persons against whom recovery is sought;" *See also* PROSSER, *supra* note 29, 473.

[97] CONN. GEN. STAT. ANN. § 29-214.

[98] Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986); Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671 (Colo. 1985); Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1986).

nor did it deprive the skier of due process or equal protection.[99] The plaintiff argued that the Montana "skier statute" which stated that "[a] skier assumes the risk and all legal responsibility for injury to himself . . . that results from participating in the sport of skiing by virtue of his participation" operated as a complete bar to recovery for his injuries.[100] The court held that the "skier statute" did not constitutionally deprive the plaintiff of access to the courts if the ski area was found to be negligent and its negligence proximately caused his injuries.[101]

The plaintiff in *Kelleher* also challenged the skier statute on the grounds that it discriminated in favor of the ski resort and deprived him of due process and equal protection under the law. Applying the "rational basis test," the court reasoned that "[t]he ski industry makes a substantial contribution, directly and indirectly, to Montana's economy" and the statute was "reasonably related to a legitimate state objective."[102]

A recent Michigan decision resulted in a similar outcome when the plaintiff, Michelle Grieb, argued that "the safety of the citizen is a higher interest than the economic well-being of the ski industry and the state."[103] The Court of Appeals held that this argument went to the "wisdom of the legislation, [and] not the constitutionality."[104] The court also reasoned that the purpose of this legislation "include[d] safety, reduction in litigation and economic stabilization of an industry which substantially contribute[d] to [the state's] economy."[105] The "safety and economic rationales" of the statute were "reasonably related" to those legitimate objectives, thus overriding the plaintiff's claims.[106]

Skier statutes have also been challenged on the grounds that

99 *Kelleher*, 642 F. Supp. at 1129 (skier suffered injuries in avalanche). The courthouse doors are open to skiers if it can be determined that their injuries are a result of the "negligent operation of a ski area." *Id.* at 1130. The issue as to "whether the avalanche . . . was the result of natural or manmade conditions" was not reached. *Id.* at 1131. The Court held that this was a genuine issue of material fact to be determined by the trier of fact. *Id.*

100 *Id.* at 1129 (*quoting* MONT. CODE ANN. § 23-2-736(1) (1987)).

101 *Id.* at 1130.

102 *Id.* at 1130-31. "The state has a legitimate interest in its own economic vitality."

103 Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 487, 400 N.W.2d 653, 656 (1986).

104 *Id.* This legislation was challenged on socioeconomic grounds, and as such, the test used for judicial review was "whether the legislation bears a reasonable relation to a permissible legislative objective." *Id.* The plaintiff was unable to overcome the presumption of constitutionality. Clearly, the Ski Area Safety Act served a public purpose and there was a reasonable relationship "between the statutory means adopted and the public purpose sought to be achieved by [the] legislation." *Id.*

105 *Id.*

106 *Id.*

the language used "[is] unconstitutionally vague."[107] In *Pizza v. Wolf Creek Ski Development Corp.*, the plaintiff challenged the constitutionality of the evidentiary presumption that the skier assumes the responsibility for collisions with other skiers or with natural or man-made objects unless the plaintiff can show otherwise by a preponderance of the evidence. The plaintiff argued that "the word 'responsibility,' and the phrases 'natural object' and 'unless shown to the contrary by a preponderance of the evidence' [were] . . . vague" and violated his due process rights under the fourteenth amendment.[108] Rejecting this claim, the Colorado Supreme Court reasoned that "the legislature is not constitutionally required to specifically define the readily comprehensible and every-day terms it uses in [its] statutes."[109] In this case, the skier's injury was unrelated to any one of the operator's enumerated duties and the legislature chose "to create a rebuttable presumption that the skier [was] solely responsible for the collision."[110] The court concluded that "[a] presumption is valid if there is a 'natural and rational evidentiary relation between the facts proved and those presumed."[111] In the case at bar, the fact proved was the collision, giving rise to the presumption that the skier was at fault.[112]

This same plaintiff further claimed his fourteenth amendment rights were violated because he was being treated differently than swimmers, golfers, ice skaters, and all other individuals who were not presumed to be solely responsible for collisions with other persons, and/or natural or man-made obsta-

107 Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 675 (Colo. 1985).

108 *Id.* Because there are no specific standards that determine the constitutionality of a civil statute such as the one at bar, the court looked to standards applied in the criminal context for guidance. Determining that this statute had economic overtones as its basis, the court concluded that because "economic regulations are subject to a less exacting vagueness standard than penal statutes or laws regulating first amendment rights," this statute was constitutional. *Id.* at 676. Moreover, the court construes "statutory language in such a manner as to avoid finding it unconstitutional on the basis of vagueness whenever reasonable and practicable." *Id.* at 675.

109 *Id.* at 676 (quoting People v. Blue, 190 Colo. 95, 101, 544 P.2d 385, 389 (1975)). There was no doubt "that a person of ordinary intelligence would have to speculate as to their meaning." *Id.* (quoting *Blue*, 544 P.2d at 387). Relying on guidelines set forth in *Blue*, the court held: "[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *Id.*

110 *Id.* at 678. The facts proved in this case that there was a collision. This validated the presumption that *Pizza* assumed sole responsibility for the collision.

111 *Id.* at 678 (citing Bishop v. Salida Hospital District, 158 Colo. 315, 318, 406 P.2d 329, 330 (Colo. 1965)).

112 *Id.*

cles.[113] However, the court justified its position that skiers were not a "suspect class"[114] and that there were valid reasons supporting their unique treatment. Principally, the purpose of the presumption was to "reduce the number of frivolous lawsuits and . . . the rapidly rising cost of liability insurance . . . to operators."[115] The unequal treatment afforded skiers was justified on the ground that the "ski industry [was] an important part of the . . . economy."[116] Accordingly, the legislators rationally decided to protect the ski area operators in furtherance of the "legitimate state interest of preserving an important area of the state's economy."[117]

Skiing injuries are common. These injuries are diverse and frequently serious. In 1980, the United States Department of Commerce estimated that $262,000,000 was spent on ski trauma.[118] Disastrous harm has resulted from airborn collisions and impact with the slope,[119] collisions with sno-cats,[120] collisions with ski towers,[121] and collisions with other skiers.[122]

113 *Id.* at 679.

114 *Id.*

115 *Id.*, (citing Hearing on S.B. 203 Before the Senate Judiciary Comm., 52nd General Assembly, 1st Sess. (Jan. 17, 1979)).

116 *Id.* at 679. The court further held that "being free from a legislatively imposed rebuttable presumption of negligence is not a fundamental right." *Id.* Accordingly, the applicable standard of review is "whether the legislation has some rational basis in fact and bears a rational relationship to legitimate state objectives." *Id.*

117 *Id.*

118 Ferguson, *Liability of the Ski Industry for Equipment-Related Injuries in Alpine Skiing*, 5 J. PROD. LIAB. 41 (1982). In 1982, it was estimated that there were more than 9 million downhill skiers and that the sport was growing at a rate of 15-20% annually. With the increase in the sport's popularity came an increase in injuries. *Id.*

119 *Pizza*, 711 P.2d 671, 674 (while skiing on the lower headwall of a trail, skier unexpectedly became airborne due to variation in the terrain and severely damaged his spine when he landed). *See also* Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060 (10th Cir. 1983) (expert skier encounters drop-off and falls onto rock outcropping).

120 Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. App. 1983) (skier collides with a sno-cat as he comes around a blind corner). A sno-cat is defined as a "track-laying vehicle designed for travel on snow." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

121 Vogel v. West Mountain Corp., 97 A.D.2d 46, 470 N.Y.S.2d 475 (N.Y. App. Div. 1983) (participant in a ski race injured when she lost control and struck the concrete base of a lift tower was unable to recover from sponsor of athletic event). *See also* Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1979) (nine-year-old skier who collided with unpadded utility pole was found 51% negligent on the grounds that the pole was "obvious" and "observable"); Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976); Smith v. Seven Springs Farm, Inc., 716 F.2d 1002 (3rd Cir. 1983) (skier falls and slides into telephone-like pole and snow-making pipes).

122 Goss v. Allen, 70 N.J. 442, 360 A.2d 388 (1976) (17-year-old skier lost control, struck and injured plaintiff, a first-aid advisor on ski patrol who was not moving). *See, e.g.*, IDAHO CODE § 6-1106 (1988), which specifically protects the ski area operator from liability resulting from collisions between skiers. "The responsibility for collisions by any skier while actually skiing, with any person, shall be solely that of the individual or individuals involved in such collision and not that of the ski area operator." *Id.*

In *Phillips v. Monarch Recreation Corp.*,[123] John Phillips, a self-proclaimed expert skier, collided with an upward moving "sno-cat as he came around a blind corner at the bottom of [an intermediate] run," injuring his knee and face, and losing several teeth.[124] The jury awarded him $50,000 in damages for future expenses and lost earning capacity in spite of testimony that he was seen traveling "at a high rate of speed," and was known at times to ski out of control.[125] The skier argued that he was traveling slowly and that no warning had been provided that the sno-cat was on the trail. In the closing argument, the jury was told that the sno-cat was proceeding upward on a downhill run and that since it was going in the wrong direction, the skier had the right of way and that the ski area was negligent in failing to warn skiers of the sno-cat's presence in the area.[126]

In its defense, the Monarch ski area stated that the Colorado Ski Act required a warning sign only when "grooming" and maintaining the slope.[127] The Court of Appeals disagreed, holding that public policy demanded that the Act be broadly construed and that warning signs be posted when equipment is present on ski slopes, even if "not actively 'grooming' in that particular location."[128]

Although there was a statement on the back of Phillips' lift ticket that he was purported to have assumed the risk of skiing, the court held that statutory provisions could not be modified by private agreement if they were in violation of public policy.[129] The purpose of the Ski Safety Act was to allocate respective duties to the parties—skier and operator—with regard to safety pro-

123 668 P.2d 982, 984. (Colo. App. 1983). "This was the first case tried under Colorado's new Ski Safety Act [of] 1979." Trine, *Ski Litigation: Elements of the Successful Case*, 18 TRIAL 32, 76 n.23 (1982).

124 *Phillips*, 668 P.2d at 984. Trine, *supra* note 123, at 35.

125 *Phillips*, 668 P.2d at 984. Trine, *supra* note 123, at 76.

126 Trine, *supra* note 123, at 35.

127 *Phillips*, 668 P.2d at 984. *See* COLO. REV. STAT. § 33-44-108(2)(1984):

> Whenever maintenance equipment is being employed to maintain or groom any ski slope or trail while such ski slope or trail is open to the public, the ski area operator shall place or cause to be placed a conspicuous notice to that effect at or near the top of that ski slope or trail.

128 *Phillips*, 668 P.2d at 985-86. *See* Chalat, *supra* note 11, at 408.

129 *Phillips*, 668 P.2d at 987. *See also* Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1123 (10th Cir. 1978), where a skier was not barred from recovery by the stipulation on the back of his season pass which "SET FORTH AN ACKNOWLEDGMENT THAT SKIING WAS A HAZARDOUS SPORT AND THAT HAZARDOUS OBSTRUCTIONS EXISTED IN ANY SKI AREA." *Id.* at 1122. The court reasoned that this was not a contract negotiated by both sides, but was in fact, a one-sided adhesion contract which courts refuse to interpret broadly. 3 A. CORBIN, CORBIN ON CONTRACTS § 559, at 270-71 (1960).

visions and those duties could not be altered.[130]

The jury found the plaintiff five percent negligent for skiing at excessive speeds, but did not find that this five percent caused the collision. Consequently, the court awarded him the full amount of the verdict.[131]

Prior to Colorado's enactment of its new skier statute, James Rosen sued LTV Recreational Development, Inc., the operator of a ski resort in Steamboat Springs.[132] Rosen, skiing downhill, collided with another skier getting off a lift and was then catapulted into an unpadded metal pole set in concrete and located in the "midst of the intersection."[133] The jury awarded him $200,000 in damages[134] based on a "foreseeability" test.[135] The court reasoned that the operator was to "[act] as a reasonably prudent person in maintaining the premises in a reasonably safe condition considering the probability or foreseeability if any of injury to others."[136] As such, the jury found that the unpadded sign post, which was capable of causing serious injury where it was located, was dangerous in itself, regardless of the collision with the other person.[137] *Rosen* is distinguished from *Leopold v.*

130 *Phillips*, 668 P.2d at 987.

131 *Id.* at 985. *See* Trine, *supra* note 123.

132 *Rosen*, 569 F.2d at 1118. However, there would have been no difference in the outcome if this took place subsequent to the enactment of Colorado's new skier statute, because the new statute specifically requires that all towers be padded and the operator would have been guilty of violating the statute. COLO. REV. STAT. § 33-44-107(7)(1984).

133 *Rosen*, 569 F.2d at 1121.

134 *Id.* at 1119. The plaintiff suffered serious permanent injuries, "including multiple fractures of the large bone (tibia) in his leg," . . . "fracture of the fibular neck, [and] midshaft fibular of the left leg." *Id.* at 1119, 1123. He was in a full cast for eleven months and was unable to work. The permanent injuries consisted of "loss of motion at the knee, a shortened leg, and a permanent limp, plus permanent scars. Also, he [had] a permanent arthritic condition" and was in continuous pain. *Id.* at 1123.

135 *Id.* at 1120.

136 *Id.* The trial court judge instructed the jury that the ski area operator had a duty "to use reasonable care to maintain [the] premises in a reasonably safe condition in view of the probability or foreseeability if any of injury to others." *Id.* The jury was asked to consider: (1) the plaintiff's reason for being on the premises; (2) whether the operator "reasonably could have foreseen" that the plaintiff would come onto the premises for that purpose; (3) "whether there was a condition on the premises which created an unreasonable risk of injury" to the plaintiff who would not be able to discover it for himself; (4) whether the operator was aware of that condition; and (5) whether the operator used "reasonable care" or warned of its existence. *Id.*

137 *Id.* at 1123. The court rejected the defendant's analogy and argument that automobile manufacturers were "not under a duty to design automobiles so as to protect occupants from serious injuries resulting from collisions." *Id.* at 1121. The defendant's "negligence consisted of maintaining [the] steel pole set in concrete at the place where it was." *Id.* at 1119. *See* Chalat, *supra* note 58, at 455. *But see* Smith v. Seven Springs Farm, Inc., 716 F.2d 1002 (3d Cir. 1983) (the court reasoned that plaintiff, Smith, voluntarily chose to ski a trail which was marked as a "most difficult" slope; it had been observed that skiers were having trouble "negotiating [the] steep icy slope," and that the slope was lined with unpadded telephone-like poles. *Id.* at 1009. Thus, "Smith absolved [the]

Okemo, where the plaintiff's husband was killed when he collided with an unpadded lift tower that was viewed as "necessary" to the sport.[138] The *Rosen* court maintained that the placement of the metal signpost in an open area was negligent and foreseeably dangerous.[139] This difference in outcome may be attributed to the fact that the court in *Leopold* was governed by the Vermont assumption of risk statute barring recovery for any injuries sustained as a result of the "obvious and necessary" risk of the sport;[140] the *Rosen* court was governed by Colorado's comparative negligence statute permitting recovery for breach of an operator's duty of care.[141]

On January 8, 1980, Ellen Vogel, an experienced skier, participated in a race at West Mountain, New York, sponsored by the Miller Brewing Company.[142] She was injured when she "lost control and struck the concrete base of a ski [lift] tower."[143] She claimed that since the sponsor of the athletic event induced her to enter the race and enjoyed the financial benefits as sponsor,[144] Miller therefore owed her a "duty to ensure that the event was conducted in a safe manner."[145] The Appellate Division rejected this argument and held that the sponsor was without sufficient control over the event to have prevented the negligence, and that financial gain alone did not "give rise to a legal obligation."[146] Thus, although there may have been negligence regarding the arrangement of the slalom race course, the defendant sponsor was not held to have owed the skier a duty.

Frequently, accidents have occurred when ski shops have negligently fit bindings which did not release properly.[147] In the absence of signed waivers, if the injured skier can establish that the malfunctioning of the ski bindings resulted from the rental shop's negligence, recovery is generally permitted.

defendant of any obligation to exercise care for his protection" and was therefore deemed to have assumed the risk. *Id.*).

138 *Leopold*, 420 F. Supp. at 781, 786 (D. Vt. 1976).

139 *Rosen*, 569 F.2d at 1123.

140 VT. STAT. ANN. tit. 12, § 1037 (Supp. 1987).

141 COLO. REV. STAT. § 33-44-104 (1984).

142 Vogel v. West Mountain Corp., 97 A.D. 2d 46, 470 N.Y.S.2d 475, 476 (App. Div. 1983).

143 *Id.*

144 *Id.* at 477. West Mountain promoted the event in a Miller marketing manual as the "First Annual Miller Ski Club Slalom" which was "A Race for Skiers of All Abilities * * * Sponsored by Miller Brewing Company." *Id.* at 476.

145 *Id.* at 477.

146 *Id.* at 478.

147 *See also* Kasten v. YMCA, 173 N.J. Super. 1, 412 A.2d 1346 (Super. Ct. App. Div. 1980) (recovery granted to a plaintiff who claimed rental ski equipment was in disrepair and improperly fitted).

In *Meese v. Brigham Young University*,[148] a student rented skis for the first time. The employee who fit her with the skis "did not have her twist or turn to see if the bindings would release under such movement."[149] The Utah Supreme Court found that Brigham Young University's failure to direct the student "to at least go through the necessary motions to test the release mechanism of the bindings" proximately caused the student's injuries.[150] The court, however, affirmed the district court's finding that the plaintiff was twenty-five percent contributorily negligent due to her inattentiveness during class, where she did not follow the teacher's directions to try to twist out of her bindings.[151] The court rejected the University's claim that the student voluntarily assumed the risk of her injury at the time, and should have known from class that her bindings would not release.[152] The court reasoned that a beginning skier could not realize the danger of bindings which do not release properly, knowledge of which is an essential element for a successful assumption of risk defense.[153]

In *Zimmer v. Mitchell & Ness*,[154] a case with a similar fact pattern to *Meese*, an exculpatory agreement issued by a Pennsylvania ski rental shop and signed by its customers was upheld, thereby protecting the shop from liability for failing to test and adjust ski bindings which subsequently failed to release.[155] The court relied on the test for determining the validity of exculpatory clauses as set forth in *Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n*.[156] This required that: (1) the contract must not contravene any policy of the law; (2) the contract must relate to the private affairs of individuals; and (3) "each party must be a

148 639 P.2d 720 (Utah 1981).
149 *Id.* at 723.
150 *Id.*
151 *Id.* at 724.
152 *Id.*
153 *Id.* Utah adopted a Comparative Negligence Law in 1973. UTAH CODE ANN. § 78-27-38 (1987). This court, relying on prior rulings, "recognize[d] the doctrine of 'assumption of risk' as an aspect of contributory negligence in Utah law." *Meese*, 639 P.2d at 725(footnotes omitted). As such, assumption of risk should be "treated in a comparative manner as an aspect of contributory negligence." *Id.* at 726 (*quoting* Moore v. Burton Lumber and Hardware, Co., 631 P.2d 865 (Utah 1981)).
154 253 Pa. Super. 473, 385 A.2d 437 (Super. Ct. 1978) (first-time skier rented skis, boots and poles, and signed a waiver before accepting equipment; he sustained numerous injuries, including a spinal fracture of the left distal fibia when he fell and the bindings did not release).
155 *Id.* at 437. The agreement stated that the safety bindings were reasonable and designed to reduce the risk of injury, and that they will not release under all circumstances. Additionally, the agreement purportedly released the defendant from all liability for personal injury caused by the rented equipment. *Id.*
156 423 Pa. 288, 224 A.2d 620 (Pa. 1966).

free bargaining agent."[157] Additionally, the contract must be strictly construed against the ski shop and the intent of the parties must be clear.[158]

The exculpatory agreement in question stated that the "bindings [would] not release under ALL circumstances," that there were "no guarantee[s] of . . . safety," and that the defendant ski shop was released from "any liability for . . . injury . . . resulting from the use of this equipment."[159] The court rejected the plaintiff's argument that "because the word 'negligence' [did] not appear in the rental agreement, the exculpatory language [did] not cover his claim."[160] The *Zimmer* court applied a common sense interpretation, holding that the word negligence should be construed within the meaning of "any liability," as implied by the clause absolving the ski shop.[161]

Furthermore, ski lift operators have been accused of failing to properly attend to the seating of passengers as well as negligently operating chair lifts.[162] Colorado, among other states,[163] requires that lift operators help skiers properly seat themselves when requested to do so.[164] Sara Trigg, a high school student, was using a triple chair lift for the first time in Winter Park, Colorado, when she slipped out of the chair and fell twenty-five feet.[165] After determining that she had not been properly seated by the lift attendant, the court held that a *per se* negligence charge should have been given to the jury, because there was sufficient evidence that the governing regulations were violated.[166] The

157 *Zimmer*, 385 A.2d at 439.
158 *Id.* at 439.
159 *Id.* at 438 (emphasis in original).
160 *Id.* at 439. The skier argued that the title of the agreement he signed merely stated: "RENTAL AGREEMENT AND RECEIPT," without any indication that he was signing a "release from liability." *Id.* He argued that the agreement was unenforceable since it lacked "necessary clarity." *Id.* The court held that the agreement, when looked at as a whole, "clearly [defined] in laymen's terms the fact that Mitchell and Ness [were] released from liability for damages and injury." *Id.*
161 *Id.* at 440. An interesting analysis was presented in the dissenting opinion. The phrase, "result[ing] from the use of this equipment," was interpreted to mean that the "exculpatory clause applies only to damage resulting from the use of the equipment and does not apply to damage arising from [the ski shop's] negligence." *Id.* at 442 (Hoffman, J. dissenting). Because the damage in the case did not arise from the use of the equipment but, rather, from the alleged negligence of the ski shop in failing to test and adjust the binding, the exculpatory clause did not apply. *Id.*
162 Blanc v. Windham Mountain Club, 115 Misc.2d 404, 454 N.Y.S.2d 383 (N.Y. Sup. Ct. 1982) (club member's wife allegedly injured from the negligence of an employee who had been attending the chair lift).
163 Ski Safety Act of 1979, COLO. REV. STAT. § 33-44-101 (1979).
164 COLO. REV. STAT. at § 33-44-106(1)(a).
165 Trigg v. City and County of Denver, 784 F.2d 1058, 1059 (10th Cir. 1986). Ms. Trigg fell on the snow, suffering serious injuries to both her knees.
166 *Id.* at 1060.

United States Court of Appeals rejected the claim that a *res ipsa loquitor* jury instruction was warranted.[167] This decision was based on the fact that Trigg had failed to eliminate the possibility that factors other than operator negligence could have caused the injury.[168]

The standard of care to which courts have held ski area operators ranges from the "reasonable man"[169] to that of "ordinary care."[170] Frequently, however, the "requirements of the prudent man rule vary with the circumstances" and the duty of a defendant's care is often described in terms such as "ordinary," "reasonable," or "due," which are used interchangeably.[171] As the foreseeable risk of the operation increases, so does the operator's duty of care.[172] Thus, the area operator's standard of care is not clearly defined. Moreover, there are many ways a skier may be contributorily negligent, such as by misjudging his own ability, by standing in a place where he cannot be seen by other skiers, by disregarding warnings, or by skiing out of control when fatigued.[173]

When a skier was impaled by a maple sapling used as a slalom pole, instead of the flexible and more commonly used bamboo or fiberglass poles, the Michigan Supreme Court found Cliffs Ridge Ski Resort negligent.[174] The court, in applying a standard

[167] *Id. See also* PROSSER, *supra* note 29, at 244. "[T]he event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent." *Id.*

[168] *Trigg*, 784 F.2d at 1060. The court reasoned that "[t]he doctrine of *res ipsa loquitur* is typically used to supply a deficiency of proof as to negligence, and it operates to permit an inference of negligence when the evidence does not directly establish how the injury occurred." *Id.*

[169] Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 681 (Colo. 1985). There, the court found that the operator owed the skier only a duty of reasonable care since skiing was not such an inherently dangerous activity that an operator should owe the highest degree of care. Acknowledging that ski area operators "possess expertise in operating ski areas," the court held that the risks associated with skiing were not analagous to "selling explosive gases, supplying electricity or operating an amusement park, all of which have been found . . . to constitute inherently dangerous activities." *Id.* at 683. *See also* Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1979) (nine-year-old skier who collided with utility pole carrying communication lines and power to ski lift argued unsuccessfully that the defendant should owe a standard of care to a business visitor or invitee higher than that of ordinary care); Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978). *See* Lisman, *supra* note 32, at 317.

[170] *Green*, 137 Vt. at 310, 403 A.2d at 280. The trial court defined negligence as being the "want or lack of ordinary care." *Id.*

[171] *Id.*

[172] The defendant must bear the burden of proving that the plaintiff was contributorily negligent. This has been defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." PROSSER, *supra* note 29, at 451.

[173] Lisman, *supra* note 32, at 317.

[174] Marietta v. Cliffs Ridge, Inc., 385 Mich. 364, 189 N.W,.2d 208 (Mich. 1971). Allegedly, on Dec. 31, 1964, minor plaintiff, Neil Marietta, "was skiing in a slalom course when he struck a pole constructed of wood . . . [which] ran through his body from the groin to the lower left back." *Id.* at 214 n.4.

of reasonable prudence, required the operator to prevent or warn of dangers which were known to the operator or which, in the exercise of reasonable care, should have been discovered. In its defense, Cliff's Ridge argued that it had exercised "a degree of care equal to the average in the trade or industry in which it was engaged and therefore [was not] negligen[t]."[175] The court never found that the defendant had actual knowledge but imputed such knowledge to the defendant.[176]

IV. STANDARDS

It has become apparent that there is a need for a uniform set of skier safety laws. The nature of the sport is such that skiers rarely ski only in their home states, but are forever seeking new and challenging terrains elsewhere.[177] Skiers are entitled to the same protection whether they ski in New York or in Utah. Just as many industries are nationally regulated to protect health and safety, so must ski area operators be held to standardized safety regulations.[178]

There are several issues which must be addressed in establishing a code of Model Ski Operator Safety Regulations. The first is to attempt to clarify the "inherent" risks of the sport, so that ski area operators will know what is within their capacity to improve and what is beyond their responsibility.[179] Ironically,

[175] *Id.* at 209. In finding the defendant negligent, the Michigan Supreme Court observed:

> The standard by which the negligent or non-negligent character of the defendant's conduct is to be determined is that of a reasonably prudent man under the same or similar circumstances. The customary usage and practice of the industry is relevant evidence to be used in determing whether or not this standard has been met. Such usage cannot, however, be determinative of the standard.

Id. at 209 (citation omitted).

[176] *Id.* at 211. *See* Fagen, *supra* note 19, at 41, 42. "[I]mputing knowledge to the ski area where no actual knowledge of a danger exists makes the areas insurers of their skiers' safety." Fagen, *supra* note 19, at 42.

[177] Most statutes are prefaced with a statement of legislative intent, indicating that "the sport of downhill skiing is practiced by a large number of citizens of this [state] and also attracts to this [state] large numbers of nonresidents significantly contributing to the economy of this [state]." 42 PA. CONS. STAT. ANN. § 7102(c) (Purdon 1982).

[178] For example, the airline industry is regulated by the Federal Aviation Administration, and the sale of pharmaceuticals is regulated by the Food and Drug Administration.

[179] Lisman, *supra* note 32, at 312. Skiers are considered business invitees on the mountain. Fagen, *supra* note 19, at 37. They rely on the mountain operator to advise them "of any danger which reasonable inspection would discover." Lisman, *supra* note 32, at 313. Prosser defines this as the "economic benefit theory," placing an affirmative duty of care "to make the premises safe . . . upon the person in possession as the price he must pay for the economic benefit he derives, or expects to derive, from the presence

for many advanced skiers the inherent risks found in the most precipitous and narrow trails is the attraction of the sport. Weather conditions which make terrain and visibility highly variable also impose inherent risks.[180] A breach will be more easily determined if the duty is more clearly defined.[181] Failure to comply should result in a prima facie case of negligence, notwithstanding the doctrines of "last clear chance,"[182] avoidable consequences,[183] and "contributory negligence."

The second issue which has repeatedly arisen in liability actions across the nation is whether or not concealed natural objects are within the control of the mountain operators or are an inherent risk. Since the need for a uniform ruling is apparent, it would seem reasonable to hold ski area operators responsible for removing or adequately placing a warning on all man-made obstacles. However, it would be unfair to hold the operator liable for natural objects which cannot be readily seen. Nevertheless, the ski area operator is in a better position to prevent an injury caused by concealed hazards than the skier. The skier would not normally expect the danger, whereas the operator could take precautions to locate such hazards. It is, then, the area operator's responsibility to remove or to mark the hazard since the operator is in the best position to prevent the accident. The basic premise must be that liability should be imposed on the party in the best

of the visitor. . . ." PROSSER, *supra* note 29, at 420. This principle was established in an 1866 English case, Indermaur v. Dames, 35 L.J.C.P. 184, *aff'd*, L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1866). This case held:

> that as to those who enter premises upon business which concerns the occupier, and upon his invitation express or implied, the latter is under an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover.

PROSSER, *supra* note 29, at 419.

180 Lisman, *supra* note 32, at 313.

181 *Id.* Defining the operator's duty is difficult: "skiers cannot be pampered as, say, beginning swimmers; on the other hand it is unreasonable to set them entirely at their own peril as if mountain climbers." *Id.*

182 Prosser defines this doctrine as follows: "[I]f the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a 'proximate cause' of the result." PROSSER, *supra* note 29, at 463 (footnote omitted).

183 The doctrine of "avoidable consequences" bars "recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff." *Id.* at 458. This is similar to the notion of contributory negligence. Both doctrines rely on the

> fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standard of the reasonable person under the circumstances . . . . [I]f [a skier] is injured [and fails to] obtain proper medical care for his broken leg [the doctrines] will bar [recovery for] damages [sustained] for the subsequent aggravated condition of the leg.

Id.

position to reasonably prevent the injury.[184] Once it has been determined that the mountain operator has taken precautions to maintain and groom its trails, as required by the Model Code, it must be left to the courts to determine on a case-by-case basis whether the requirements were complied with. It would be impossible to place all dangers in static categories, since the sport and the technology constantly change, but many of the potential dangers could be categorized.[185]

It is of paramount importance that programs of summer maintenance be established to eliminate those trees, bushes, stumps, rocks, gullies, and crevices that create winter hazards. A determining factor must include the cost to the operator of grooming the mountain during the summer months. Will it be economically efficient for the operator to assume these costs? Will there be differences in the costs between states? For example, will the New England states have a greater or lesser expense than the western states? How much of these costs will be passed on to the skiers by increasing the price of lift tickets? How many of these safety procedures will result in lower insurance premiums to the operators?

Finally, ski schools are a profitable operation in the ski industry.[186] As such, the ski area operator has the same duty of care towards the school, its instructors and its students, as it does towards skiers.

There is a need to require that all area operators maintain prescribed levels of liability insurance coverage for ski accidents.[187] This will have the dual benefit of reducing the number of ski injury cases which go to trial, as well as providing financial compensation to the injured skier.[188]

Although several area operators have placed waivers on the

184 Fagen, *supra* note 19, at 46-49. The skier is assumed responsible for all obvious obstacles since he has the control to avoid them. Likewise, collisions with other skiers are generally risks assumed by the skier. This may sometimes provide harsh results, however, when the injured skier is the one who, through no fault of his own, has been knocked down.

185 *See* Note, *supra* note 23, at 361. It was apparent that ski area operators "desired to curtail judicial power to interpret the inherent risks on a case-by-case basis by placing certain dangers into permanently defined . . . categories. . . ." *Id.* In addition, insurance companies pressured the state legislators to enact more comprehensive statutes which set forth the duties for both area operators and skiers. *Id.*

186 Note, *supra* note 5, at 274.

187 Massachusetts, like most states, does not require ski area operators to maintain liability insurance. Act of July 17, 1978, Mass. Laws, ch. 455. The N.M. STAT. ANN. § 24-15-4 (1978), on the other hand, requires that such insurance be maintained.

188 Note, *supra* note 5, at 277. "An insurance settlement would also decrease the possibility of negative publicity concerning the operator which might result from a trial." *Id.*

back of their lift tickets which state the inherent risks involved in the sport, the courts have declined to enforce them.[189] However, signed waivers may be of assistance to defense attorneys, who, during negotiations or litigation, will be able to show that the plaintiff was fully aware of the inherent risks in the sport of skiing.[190]

V. Proposal for Model Ski Operator Safety Code:

(1) All mountain grooming equipment and machinery must be equipped with rotating lights and a beeper siren. Both lights and beeper must be on, whether machinery is stationary or in motion while on the mountain. Trails must be closed to skiers during grooming. Trails closed because of grooming must be conspicuously marked.

(2) All man-made obstacles, including but not limited to lift towers and snow-making equipment, must be padded with a "shock-absorbent material that will lessen injuries."[191]

(3) All man-made structures which are not visible from a distance of at least one hundred feet must be marked with either wooden poles or bright orange flags, and placed so that the marker itself "does not constitute a serious hazard to skiers."[192]

(4) "Dangerous intersections, potential snowslide areas, and the official boundaries of the ski area, beyond which skiing is prohibited," must be marked.[193] Closed trails must be roped or fenced off. Whenever there is insufficient snow to cover the surface, or where there are protruding rocks and stumps, the hazardous area must be conspicuously marked and separated from the safer areas by portable fencing.[194]

(5) The ski patrol is required to inspect all trails at least twice each day,[195] and all natural hazard areas must be marked with bamboo poles or similar structures each morning, before

189 Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1122 (10th Cir. 1978). Plaintiff's season pass "SET FORTH AN ACKNOWLEDGMENT THAT SKIING WAS A HAZARDOUS SPORT AND THAT HAZARDOUS OBSTRUCTIONS EXISTED IN ANY SKI AREA." *Id.* This was followed by a waiver of operator liability for negligence and carelessness of other skiers. The court rejected this as a valid contract, concluding that it was a one-sided adhesion contract that did not relieve the operator from liability arising from the negligent operation of the ski area. *Id.* at 1122-23.

190 Missar v. Camelback Ski Resort, 30 D & C 3d 579 (1984). The court found no evidence that the skier signed any document, and thus held exculpatory the disclaimer on the top of the ski lift ticket stub to be unconscionable and unenforceable.

191 Colo. Rev. Stat. § 33-44-107(7) (1984).

192 *Id.*

193 Lisman, *supra* note 32, at 313.

194 Colo. Rev. Stat. § 33-44-107(4) (1984).

195 N.Y. Comp. Codes R. & Regs. tit. 12, § 54.5(f) (1978).

the area opens.[196] "As they patrol the mountain during the day[,] the ski patrol [must] mark other hazards that appear as snow conditions change due to the weather and the skiers."[197] These poles are to be retrieved at the end of the day when the area has closed.[198]

(6) Each ski area is required to have signs at chair lifts advising skiers to "Remove Pole Straps from Wrists," "check for Loose Clothing and Equipment," "Prepare to Unload," "Keep Ski Tips Up" and to ask the operator for assistance if unfamiliar with the lift.[199] It is the operator's duty to be sure the signs are present and clearly visible.[200] The uniform sign system developed by the National Ski Patrol symbolizing the "relative difficulty of runs" must be prominently displayed, and "danger" signs must be used when appropriate.[201]

(7) Duties of skiers must be posted. These should include obligations of skiers who are witness to an accident, skiers who ski in a reckless manner,[202] or while intoxicated,[203] will be excluded from the slopes.

196 Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060, 1063 (10th Cir. 1983).

197 *Id.* at 1063.

198 Trine, *supra* note 123, at 34. "The poles . . . are taken back down in the late afternoon after the ski area has closed so that snow cats will be free to work the slopes." *Rimkus*, 706 F.2d at 1063.

199 Chalat, *supra* note 58, at 461. *See* Colo. Rev. Stat. § 33-44-106-108 (1984).

200 Chalat, *supra* note 58, at 461. *See* Colo. Rev. Stat. § 33-44-106(3)(1984).

201 *See* N.H. Rev. Stat. Ann. § 225-A:24 (1977). It states:

> A color code is hereby established in accordance with the following: (a) Green circle: On area's easiest trails and slopes. (b) Black diamond: On area's most difficult trails and slopes. (c) Blue square: On area's trails and slopes which fall between the green circle and black diamond designation. (d) Yellow triangle with red exclamation point inside with a red band around the triangle: Danger areas. (e) Octagonal shape with red border around white interior with a black figure in the shape of a skier inside with a black band running diagonally across the sign from the upper right hand side to the lower left hand side with the word "closed" beneath the emblem: Trail or slope closed.

See also Colo. Rev. Stat. § 33-44-107 (1984).

202 *See* Colo. Rev. Stat. § 33-44-108(5) (1984). To achieve the goal of increased safety on the mountain and more courteous manners, Mt. Snow in Vermont organized a Ski Courtesy Ambassador Program in December 1986. These 48 ambassadors were instructed to reward courteous skiers and to reprimand reckless skiers. Depending on the nature of the courteous behavior, skiers were rewarded with vouchers ranging from free hot chocolate to free skiing. On the other hand, discourteous skiers first received a warning, as evidenced by a slash on his or her ticket; a second violation denied the skier lift privileges until after attending a "Skier Responsibility Training" session. It is apparent that skiers who purchased daily tickets could escape this requirement whereas season passholders could not. The educational training session included the viewing of "Tony's Flight," a "fifteen minute presentation that impresses upon skiers the serious ramifications of reckless and irresponsible skiing." Letter from Anne Marie Lyddy, Skier Education Supervisor at Mt. Snow, to all season passholders (Feb. 5, 1988).

203 *See, e.g.*, N.M. Stat. Ann. § 24-15-10(4) (1986).

(8) Skiers are required to use ski brakes or straps.[204] Signs must be posted displaying that requirement.

(9) There must be a minimum requirement for the number of ski patrols per skiing acre, trained in first aid[205] with responsibilities including warning and segregating those skiers who are skiing out of control or on terrain which is beyond their ability. "While the primary duty of the patrol is to evacuate injured skiers," ski patrollers must encourage safety on the mountain and take all steps necessary to prevent collisions between skiers.[206] All members of the patrol shall be registered by the National Ski Patrol Assocation.[207]

(10) No beginner's ski class "shall be conducted upon any trail within the ski area . . . unless [the] trail [is] used solely for the purpose of instructing beginner . . . skiers."[208] This area must be roped or fenced off, with clearly visible signs notifying skiers that the area is restricted.

(11) Operators should be restricted from selling unlimited tickets which benefit them financially but cause overcrowded conditions, frequently leading to collisions among skiers.[209]

(12) Summer maintenance programs must include removing all large rocks, stumps, brush and growth from trails, and seeding with grass cover to kill other growth. Trail cutting should be "within one foot of the tree line."[210]

(13) Fines must be imposed on all skiers who

> depart from the scene of a skiing accident when involved in the accident without leaving personal identification, including name and address, or before notifying the proper authorities and obtaining assistance when such skier knows that any other skier involved in the accident is in need of medical or other assistance.[211]

(14) Each operator must maintain a current insurance policy

204 N.Y. COMP. CODES R. & REGS. tit. 12, § 54.4(12)(1978).
205 *See* N.M. STAT. ANN. § 24-15-7(G) (1986): This "training [must meet] the requirements of the American Red Cross advanced first aid course."
206 Lisman, *supra* note 32, at 314 n.52.
207 Note, *supra* note 5, at 277.
208 *Id.* at 274.
209 Lisman, *supra* note 32, at 314.
210 Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398, 401 (Vt. 1978).
211 CONN. GEN. STAT. ANN. § 29-213(6) (West Supp. 1988). *See* MASS. GEN. LAWS ANN. ch. 143, § 71Q (West Supp. 1988); R.I. GEN. LAWS § 41-8-3 (1984).

with adequate liability for personal injury, death and property damages.[212]

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212 *See* N.M. STAT. ANN. § 24-15-4 (1986). Assuring the financial ability of the ski area operator to pay, may well result in the ski area operator and insurer deciding "that proceeding with a trial may not be in their best interest and that their wisest course is to settle out of court." Note, *supra* note 5, at 277.