

**AVALANCHE LIABILITY LAW
&
SKI LAW IN THE UNITED STATES**

A PRACTICAL GUIDELINE TO SKI ACCIDENT LITIGATION

PREPARED FOR
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GEANNE R. MOROYE, ATTORNEY AT LAW

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JAMES H. CHALAT, ATTORNEY AT LAW
EVAN P. BANKER, ATTORNEY AT LAW
CHALAT HATTEN & KROUPAL PC.
1900 GRANT, SUITE 1050
DENVER, COLORADO (CO) 80203
UNITED STATES OF AMERICA

PHONE: 303-861-1042
FAX: 303-861-0506
Email: jchalat@chalatlaw.com

I. Subject of the presentation.

A Avalanche liability law in the United States

- a. Avalanches are a natural danger of backcountry skiing. In the United States, most avalanche deaths occur when individual sportsmen and women are backcountry skiing, snowboarding, cross-country skiing, or snowmobiling on federal or state public lands. More frequently now, guides, helicopter, or alpine services are involved.
- b. Provided proper warning is given, and absent special circumstances, courts do not allow tort recovery for participants in backcountry activities. See *Oberson v. U.S.. Dept. Of Agriculture*, 514 F.3d 989 (9th Cir. 2008) (Where Forest Service failed to mark a known dangerous slope along a snowmobile trail, negligence claim not barred by Federal Tort Claim Act). Such special circumstances would include: recklessness or gross negligence. Examples include: splitting a guided group into two sub-groups, and then leading the first or higher group across a known avalanche path while the lower group is within the avalanche zone below.
- c. In the context of guided backcountry touring, the guide service typically demands a waiver signed by the participant. Courts usually enforce such waivers against the participant. A waiver may be defeated by showing gross negligence by the guide, by showing the waiver was obtained either unfairly, or under duress, or that the waiver is ineffective against the party bringing the claim.
- d. In-area avalanche deaths and injuries have occurred in the United States as ski area operators open “Extreme” or “E-X” terrain, served by lifts. Three such incidents have occurred:
 - (1) Arapahoe Basin, Colorado. May 20, 2005. Wet slab avalanche caught and killed one skier in-area, in-bounds. <http://avalanche.state.co.us/Accidents/Colorado/By+Season/Accidents0405/20050520.htm>

- (2) Red Pines Chute, Canyons Resort, December 23, 2007. One skier killed, one skier caught and rescued.
<http://www.utahavalanchecenter.com/>
- (3) Mt. Charleston, Las Vegas Ski and Snowboard Resort, Clark County, Nevada, January 9, 2005. Child swept off of ski lift by in-area avalanche. Buried and killed, cause of death asphyxiation and blunt force trauma.
http://www.reviewjournal.com/lvrj_home/2005/Jan-11-Tue-2005/news/25638169.html
- (4) Dutch Draw, adjacent to Canyons Resort. Access through gate marked with "Skull and Crossbones." One snowboarder killed. January 14, 2005. Hard slab avalanche triggered by snowboarder.
<http://www.avalanche.org/proc-show.php3?OID=5453878>
- (5) Snowbird Ski Resort, Utah. December 14, 2008. Avalanche caught and killed one skier in-area, in-bounds.
<http://www.calskisafety.org/documents/Deaths-On-the-Slopes-2008-2009>.
- (6) Aspen Mountain, Colorado. December 14, 2008. Former Aspen ski patrolman killed by avalanche while skiing Aspen Mountain in-area, in-bounds.
<http://www.calskisafety.org/documents/Deaths-On-the-Slopes-2008-2009>.
- (7) Squaw Valley, U.S.A., California. December 25, 2008. Avalanche caught and killed skier in-area, in bounds.
<http://www.calskisafety.org/documents/Deaths-On-the-Slopes-2008-2009>.
- (8) Jackson Hole Mountain Resort, Wyoming. December 27, 2008. Avalanche caught and killed one skier in-area, in-bounds.
<http://www.realestatejackson.com/jackson-hole-news/>
- (9) Squaw Valley, U.S.A., California, March 3, 2009. Ski patrolman killed while doing avalanche patrol.
<http://www.calskisafety.org/documents/Deaths-On-the-Slopes-2008-2009>

Slopes-2008-2009.

B. Ski law in the United States.

- a. Ski law varies from state to state within the United States. Twenty three states have specific ski liability statutes, and each differ substantially. Two states with considerable ski industries, California and Virginia determine cases on a common law basis, with attention to contributory negligence, assumption of risk and inherent danger. *Hoar v. Great Eastern Resort Management, Inc.*, 256 Va. 374, 506 S.E.2d 777, (Va., November 06, 1998) *Van Dyke v. S.K.I. Ltd.*, 67 Cal.App.4th 1310, 79 Cal.Rptr.2d 775, 98 Daily Journal D.A.R. 8586, 98 Daily Journal D.A.R. 12,001, Cal.App. 4 Dist., November 23, 1998 (NO. G021475)
- b. Most states with a ski liability statute also have a body of interpretative case law, relating to skiing.
- c. As a general rule:
 - (1) Most states employ an assumption of risk or inherent risk doctrine which protects ski areas against claims arising from the inherent dangers of downhill skiing & snowboarding. Colo. Rev. Stat. 33-44-101, *et seq.*
 - (2) However, these states allow recovery against ski area operators for injuries caused by those hazards which are not "inherent dangers." These would include open excavations, parked heavy machinery around a blind corner, collisions with moving equipment which is the fault of the operator's employee. Admittedly, however, institutional and pro-industry legislation as part of the American "tort reform movement," do severely limit recovery.
 - (3) Example: 2004 amendment to Colorado Ski Safety Act. "(2) 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. This

requirement shall not apply to maintenance equipment transiting to or from a grooming project.” Laws 2004, Ch. 341, § 3, in subsec. (2), added “This requirement shall not apply to maintenance equipment transiting to or from a grooming project.”

- (4) Most states mandate minimal safety standards for the operation of the ski areas, which if specifically violated, form the basis of a claim against a ski area operator for a downhill skiing/snowboarding accident.
- (5) Throughout the United States, laws hold skiers & snowboarders financially responsible to other skiers for negligent or reckless skiing resulting in a skier/skier collision. Colo. Rev. Stat. 33-44-104, 109.
- (6) Laws typically hold ski area operators to a high standard of care in the operation, use and maintenance of lifts, trams and tows. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 98 CJ C.A.R. 2416, Colo., May 18, 1998 (NO. 97SA145); *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.App.4th 1499, 3 Cal.Rptr.2d 897, Cal.App. 3 Dist., January 28, 1992 (NO. C010279)
- (7) Claims against the United States of America, for mismanagement, alleged unsafe practices, are governed by the Federal Tort Claims Act. The FTCA provides a limited waiver of the sovereign immunity of the federal government. 28 U.S.C. § 1346(b). This waiver of sovereign immunity is limited, *inter alia*, by the discretionary function exception. 28 U.S.C. § 2680(a). *Marquez v. U.S.*, Not Reported in F.Supp., 1996 WL 588918 D.Colo., 1996, September 17, 1996

C. Please note that the term “skier,” includes snowboarder, or any other “snow rider.”

II. Avalanche liability in North America

A. Summary:

1. Most U.S. avalanche deaths occur in the backcountry, on public land—state, or federal: National Forest, or Bureau of Land Management. Absent highly unusual circumstances such as gross negligence, the land owner is typically immune, and if a guide or helicopter service is involved, it is typically shielded from liability by the doctrine of either assumption of risk or waiver under the customary release signed by the participant.
2. Exceptions:
 - a. In-flight accident; *see e.g., Aigner v. Bell Helicopters, Inc., Canadian Mtn. Holidays, Inc., et al.*, 86 F.R.D. 532 D.C.Ill., 1980.
 - b. The waiver can be defeated by gross negligence, in the first instance of gross negligence in guiding, or in rescue efforts. *See e.g., Miller v. Arnal Corp.*, 632 P.2d 987 (Ariz. Ct. App. 1981).
 - c. Third party liability (another party initiates the avalanche, or equipment failure due to product defect).

B. American avalanche law; move from ordinary care toward immunity:

1. The Colorado Court of Appeals has held that a ski area operator owes a duty of reasonable care to protect skiers from avalanches. The court indicated ski area operators should furnish trail maps warning of the danger, post warning signs, install fence or rope barriers, and patrol, inspect, and maintain the signs and barriers to confirm they are in a good state of repair and visibility. *Mannhard v. Clear Creek Skiing Corporation*, 682 P.2d 64 (Colo. Ct. App. 1983).
2. An avalanche is within the inherent risks of skiing, however, a plaintiff can maintain a claim of ski area operator negligence if the plaintiff proves that the area negligently opened without reasonable safety precautions in areas known to be avalanche prone. *Kelleher v. Big Sky of Montana*, 642 F. Supp. 1128 (D. Mont. 1986).
3. In a claim against the United States Forest Service, the Colorado federal

district court held that it could not hold the United States responsible for an avalanche death, absent willful or malicious failure to guard or warn against a known dangerous condition. *Marquez v. United States of America*, No. CIV.A.95-S-346, 1996 WL 588918 (D. Colo. 1996). Compare *Twohig v. United States of America*, 711 F. Supp. 560 (D. Mont. 1989) (holding the state “recreational use” statute did not bar the claim).

- C. In Canada: *Ochoa v. Canadian Mountain Holidays, Inc.*, 1996 WL 1777049 (B.C.S.C. 1996); [1996] CarnswellBC 2034, decedent, a paid customer of a backcountry helicopter skiing service, was one of nine killed, March 12, 1991, in an avalanche in the Bugaboo Mountains. His widow sued seeking wrongful death damages. Decedent Ochoa had signed a waiver and release. The court held the waiver was enforceable, and conscionable in barring a simple claim of negligence. The court held that the widow could recover only if she proved the defendant committed “criminal negligence,” the essential elements of which are defined as “carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so.” *Id.* at para. 19-22.
- D. Heli-skiing is considered an unreasonably hazardous avocation, sufficient such that an avalanche death would be excluded from \$4 million life insurance policy coverage. *West Coast Life Ins. Co. v. Hoar*, 505 F.Supp.2d 734 (D.Colo. 2007) (Heli-skiers approximately 19,000 times more likely to die in an avalanche than someone skiing within bounds at a ski resort, release that applicant signed, stating backcountry skiing posed hazards beyond those of typical downhill skiing, and the fact that it was accepted practice among life insurers to apply additional rating for heli-skiers, and guide's admission that he only measured risk levels subjectively factors in court's holding).
- E. Jurisdiction of American courts for foreign actions is usually sought on behalf of American visitors to foreign countries. See, *Aigner v. Bell Helicopters, Inc.*, 86 F.R.D. 532 (N.D. Ill. 1980). *Aigner* did not involve an avalanche, but rather the crash of the helicopter operated by the Canadian heli-skiing guide service. The court held that the Canadian corporation would be subject to United States jurisdiction because its representative made solicitations, maintained regular mail contact with its former customers in the U.S., solicited travel agencies to book tours, and solicited its former customers to purchase equipment. Further, the court reasoned that if it did not exercise jurisdiction, the plaintiff, would probably be unable to obtain relief anywhere else in the United States.
- F. Resources:

- a. Commentary: John E. Fagan, *Avalanche Control: Negligence Over Strict Liability*, 20 U.S.F. L. REV. 719 (1986).
- b. Arthur N. Frakt & Janna S. Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 IDAHO L. REV. 227 (1991-1992).
- c. Liability of United States for Death or Injury Sustained by Visitor to Area Administered by United States Forest Service or Army Corps of Engineers Under Federal Tort Claims Act (28 U.S.C.A. §§ 1346(b), 2671 et seq.) 193 A.L.R. Fed. 1 (Originally published in 2004)
- d. Wilson, "Lee V. Sun Valley Company: Public Duty Or Abdication Of Free Will And Personal Responsibility?" 41 Idaho L. R. 429 (2005).
- e. Henkel, "Ski resort's liability for skier's injuries resulting from condition of ski run or slope" 55 A.L.R.4th 632 (Updated 2004, Originally published in 1987)

III. Ski law in the United States

A. Summary:

1. Ski law varies from state to state. Thus, each state's statutory, common law, and regulatory schemes apply different treatment to the duties, immunities, and liabilities of ski area operators, lift operators, skiers, snowboarders, and related parties differently.
2. The highly competitive and refined nature of the modern ski industry in the United States contrasts sharply with the rustic European origins of the sport. Resort operators are now sophisticated, automated, well-financed, high-tech businesses. The ski industry readily exercises the considerable power of capital in the political, transportation, labor, and insurance markets. Once the exclusive pastime of wealthy urban adults, skiing, snowboarding, and other snow-riding activities have evolved from sports into "recreational activities." Many different groups of people, including the very young and a disproportionately large cohort of participants over age 60, enjoy these activities.

3. Ski Area Management or Ski Resort Operations degrees are increasingly offered by trade and four year colleges. University of Maine-Farmington, Ski Industries Certificate Program Recreation Resource & Ski Resort Management; Lyndon State, Vermont, B.S. degree; Ski Area Management Program; Gogebic Community College, Michigan, Associates degree; Colorado Mountain College, Ski Area Operations.
4. Approximately 10.6 million Americans either ski or snowboard. During the 2008/2009 season, the U.S. ski industry reported 57.4 million skier visits. National Ski Areas Association (www.nsa.org)
5. The Canadian Ski Council reported 18.9 million Canadian skier visits for 2002/2003. (last year for which data is available) *Id.*
6. Snowboarders now account for 45% of all ski traffic in the United States, and potentially more than half, as many skiers also snowboard.

B. Safety statistics:

1. Death:
 - a. In 2008/2009 statistics indicate there were 57.4 million skier/visits in the United States per year. This is an increase from 55.1 million skier/visits in the 2006/2007 season.
 - b. On average, 39.8 people die each year in the United States while skiing or snowboarding for an overall death rate of 0.40 deaths per million skier visits. (2.07 fatalities per million participants) Another 43.5 suffer severe, yet nonfatal, injuries, including paralysis and brain trauma. (The rate of serious injury in 2008/2009 was .77 per million skier/snowboarder visits) National Ski Areas Association, *Facts About Skiing/Snowboarding Safety* (October 8, 2009), available at <http://www.nsa.org/nsaa/press/facts-ski-snbd-safety.asp>.
 - c. Who suffers skiing deaths in the U.S.? Colorado ski resorts recorded approximately 8 - 10 million skier visits per year. During the ten years of a retrospective study undertaken by the Colorado Department of Health between 1983 and 1992, the study recorded 126 skier deaths. The retrospective study, based on an examination of death certificates and records of skiers who died while skiing, included backcountry skiers and those suffering non-traumatic deaths such as heart attacks. The study concluded that male skiers account for 83 percent of skier deaths. Skiers from 20 to 29 years of age made up 44 percent of the deaths. At 36

percent, "Striking Object" was the leading cause of death. Avalanches caused 35 percent of deaths. Most deaths occurred in the afternoon, during March and within ski area boundaries. *Colorado Snow Skier Deaths*, Health Statistics Section, Colorado Dept. Of Health (1993).

- d. Updated statistics show some decrease in deaths and increase in severe injuries. Recreational fatalities in Colorado. <http://www.cdphe.state.co.us/hs/Briefs/recdths.pdf>; Xiang, Stallones, "Downhill skiing injury fatalities among children" 10 *Inj. Preventon* 99 - 102 (2004) **Objective:** Young skiers are at increased risk for injury, however, epidemiological data on skiing related fatal injuries among child skiers are scarce. This study aimed to provide information needed to develop injury control and prevention programs. **Design and setting:** Study subjects came from Colorado, USA and were identified using a death certificate based surveillance system. Fatal injuries were limited to events that occurred at established commercial ski resorts in Colorado, and subjects were classified as child skiers (0–17 years) or adult skiers (≥ 18 years). **Main outcome measure:** Type and external cause, time, and week day of injury, gender and residency of the decedents. **Results:** During the study period from 1980–2001, 149 fatal injuries associated with downhill skiing were identified; 21 (14.1%) occurred among child skiers aged ≤ 17 years. The age of the youngest decedent was 7 years. In females the proportion of fatal injuries among child skiers was nearly three times that of adults. Traumatic brain injuries were the leading cause of death (67% of all deaths) among children, while multiple internal injuries and traumatic brain injuries accounted for almost equal proportions of fatal injuries among adults. Collision was the leading external mechanism of fatal injuries, accounting for more than two thirds of fatal injuries in both child and adult skiers. **Conclusions:** Traumatic brain injury was the leading cause and collision was the leading external injury mechanism of fatal injuries associated with downhill skiing among child skiers. This underscores the importance of brain injury prevention strategies, including the use of ski helmets and prevention of collisions on ski slopes.

2. Injury:

- a. According to updated statistical studies of skier and snowboarder related injuries, the overall weighted injury rate for all participants is 3.37 injuries per 1000 snowboarder skier/visits (SV).
- b. Beginning skiers are much more likely to be injured than experienced skiers. Novice male skiers have an injury rate of 8.38/1000 SV. Advanced male skiers have an injury rate of .88/1000 SV. Novice female skiers have the highest injury rate of

9.48/1000 SV. Advanced female skiers have an injury rate of .94/1000 SV. Knees are the most frequently injured body part in skiing: 32.7 percent. Jasper E. Shealy, *Overall Analysis of NSAA/ASTM Data on Skiing Injuries for 1978 through 1981*, 5 SKIING TRAUMA AND SAFETY (1985); Shealy & Sundman, *Snowboarding Injuries on Alpine Slopes*, 7 SKIING TRAUMA AND SAFETY (1989).

- c. Applying the overall injury rate, to the frequency of skier visits in the United States, indicates that approximately 200,000 ski related injuries occur annually, in the United States.
 - (1) Knee injuries are the most frequent skiing related injury. One study indicates that the cost of ski-related knee injuries in the United States exceeds \$250 million annually; more than skiers spend on equipment each year. Ouch! *Knee-Injury \$\$ May Soon Surpass Ski Spending*, INSIDE TRACKS, Jan. 1, 1998, at 12

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Skier Injuries in the United States

Total U.S. skier/visits (s/v) 2008-2009	57,400,000
Average Injury Rate	3.37/1,000 SV
Predicted Annual number of Total Skier Injuries in the U.S.	193,438
Average Percentage of Total Skier Injuries caused by Collisions	6.4%
Predicted Annual number of Collision Injuries in the U.S.	12,380
Total Colorado skier/visits (s/v) 2008-2009	11,085,000
Predicted Annual # of Total Skier Injuries in Colorado @ 3.37/1000 s/v	42,330
Predicted Annual # of Collision Injuries in Colorado @ 6.4%	3702
NSAA Estimated Annual number of Expected Skier Deaths in U.S.	35.8
Experiential annual rate of Skier Deaths in Colorado (Colo. Dept. of Health).	10
Expected Severe injuries in Colorado at .73/million	8

IV. Ski accident liability law in the United States

- A. Ski law is tort law. Thus, the basic elements of civil tort law are at issue: Duty, Breach, Causation, and Damages.
- B. The unique issues in ski cases are duty, assumption of risk, and causation. Competent plaintiffs' counsel will shift the focus from liability to damages. *See Generally*, Arthur B. Ferguson, Jr., *Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles*, 67 DENV. U. L. REV. 165 (1990); Diane Bernstein, Note, *The Snowballing Cost of Skiing: who should Bear the Risk*, 7 CARDOZO ARTS & ENT. L.J. 153 (1988); James Fleming, JR., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).
 1. Regarding liability, the fundamental question in any ski accident case is whether the skier's injury or death relates to a skier assumed risk. Often, the nature of the accident resolves the question. When skiing downhill, skiers typically assume risks inherent in the sport. However, skiers typically do not assume the risk of another skier's negligence. The question of precisely which risks are "inherent"- especially in the context of modern, highly groomed, controlled, and heavily marketed skiing, - is debatable in many cases. If it is in question, then it is an issue for the finder of fact, if it is not a question, then the case is either disposed of summarily; or, if the hazard or accident was clearly not caused by an

inherent danger, then the assumption of risk/inherent danger issue is not submitted to the jury or finder of fact.

- a. But see *Rusnak v. Walker*, 729 N.W.2d 542 (Mich. App. 2006) (Michigan Ski Safety Act provides that “collisions... with other skiers” are an inherent risk of skiing, while also placing on each skier the duty “not [to] act or ski in a manner that may contribute to his or her injury or to the injury of any other person,” essentially taking a “sometimes accidents just happen” approach).
2. However, skiers typically do not assume the risk of other skier’s negligence; thus, in collision cases, the doctrine of assumption of risk does not protect the defendant.
- C. When the skier is riding a chairlift, the duties of the ski area operator are enhanced, so that the ski area operator owes the highest duty of care to the passenger.
- D. Therefore, for analytical purposes, the practical lawyer must determine what type of ski case is before him or her, and from that fact inquiry, one can determine the duty of care. Thumbnail sketch of duties of care:
 1. Downhill skiing case—skier skis into manmade object, or natural object, skier skis off run into dangerous terrain, or finds himself in terrain above his ability. Inherent danger rules typically bar the claim, except when the skier can show that the ski area operator knew or created a hazard which was not open, obvious, or fairly to be expected while skiing; or if the ski area operator deviates from a statutory safety standard.
 2. Collision with another skier or snowboarder. Ordinary duties of care apply. Typically, the law holds the uphill skier/overtaking skier responsible.
 3. Lift accidents. American ski area operators have enhanced duties of care in the connection with the design, installation, construction, maintenance, and operation of ski lifts. Skier injured in ski accident can claim damages if accident is due to faulty design, operation or maintenance (lift failure) thus, the injured skier will prevail. If accident due to negligent operation—failure to stop lift to clear ramp, etc.—skier may prevail. Industry standards are plainly set out in the ANSI B-77 code.
 - a. In Colorado, the above duties of care are set forth in the Ski Safety

Act (SSA). In the case of lift accidents, those duties are enumerated by the Passenger Tramway Safety Board and incorporated in the SSA. The Colorado Supreme Court has recently held that the SSA is controlling in all ski injury cases. *Stamp v. Vail*, 172 P.3d 437 (Colo. 2007)

4. Duty to rescue. Once a rescue is initiated, ordinary care is required.
5. Duty to render reasonable first aid. Ordinary care is required. *Spence v. Aspen Skiing Co.*, 820 F.Supp. 542 (D. Colo. 1993)
6. Equipment cases. DIN standards purportedly apply; however, waivers generally bar claims. Gross negligence may defeat the waiver. Failure to comply with technical qualifications implied by the contract may defeat the waiver.
7. Criminal cases. Reckless skiing causing severe injury or death may result in a criminal felony prosecution.
8. States each take their own position on how to treat pre-injury release waivers. Generally, a waiver signed by an adult in his or her own capacity is enforceable. See *Tunkl v. Regents of the University of California*, 383 P.2d 441, 445-6 (Cal. 1963). However, some states with statutes defining the liability of skiers and ski areas, all release waivers have been deemed unenforceable as contrary to public policy. See *Rothstein v. Snowbird Corp.*, 175 P.3d 560 (Utah 2007).
9. It is not unusual for parents to be required to waive the negligence claims of their children before they are permitted to rent equipment, ski or enroll in ski lessons. The general trend is that parents may waive their children's rights. *City of Santa Barbara v. Superior Court*, 161 P.3d 1095 (Cal. 2007). However, Utah follows the more well reasoned rule that parents may not waive children's claims. *Berry v. Greater Park City Co.*, 171 P.3d 442 (Utah 2007).
10. States which allow parents to waive the rights of their children: Massachusetts (*Sharon v. City of Newton*, 769 N.E.2d 738, 744-48 (Mass. 2002); Ohio (*Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 204-07 (Ohio 1998); Colorado (Colo. Rev. Stat. § 13-22-107(3)).
11. States where all pre-injury negligence waivers are unenforceable: Vermont (*Spencer v. Killington, Ltd.*, 702 A.2d 35, 37-38 (Vt. 1997); Virginia

(*Hiett v. Lake Barcroft Community Ass'n*, 418 S.E.2d 894, 895-97 (Va. 1992); New York, by statute (74 N.Y.St. 27, 28)

V. History of ski law in the United States:

A. In the first significant ski case, a skier in Vermont was hurt when her ski caught on a tree stump, below the snow surface, in the middle of an open run. On summary judgment against her, the court held that ski injury cases should be governed by the doctrine of inherent danger: "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary." *Wright v. Mount Mansfield Lift, Inc.*, 96 F. Supp. 786, 791 (D. Vt. 1951). The Vermont court relied partly on an earlier ruling by the noted New York Court of Appeals Chief Judge Benjamin Cardozo who ruled in an amusement park accident case that "[t]he antics of the clown are not the paces of the cloistered cleric. . . . [The plaintiff] took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home." *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 183 (N.Y. 1929)

1. Note: the decision in *Wright* nevertheless suggested that manmade hazards might lead to actionable claims:

It isn't as though a tractor was parked on a ski trail around a corner or bend without warning to skiers coming down. It isn't as though on a trail that was open work in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.

Wright, 96 F Supp at 791.

B. Nearly 30 years after *Wright*, the Vermont Supreme Court ruled that the inherent danger rule should be limited in its application to ski cases, given the large-scale changes that had taken place within the industry. The plaintiff, in a case remarkably similar to that of the *Wright* case, suffered a paralyzing injury when his ski caught on a bush. He sued, arguing that the ski area should have removed shrub. The jury agreed. On appeal, the Vermont Supreme Court affirmed the verdict. *Sunday v. Stratton Corp.*, 390 A.2d 398 (Vt. 1978).

The court refused strict application of the inherent danger rule, as urged by the defendant, holding: "[t]he claim is that the brush was an inherent danger of the sport... is the equivalent of, and better put as, a claim that defendant owed

plaintiff no duty with respect thereto, sometimes referred to as “primary” assumption of risk.” *Id.* at 402 – 403. The court applied to the ski area operator the same rule of ordinary care that business owners owe to visitors on their premises.

Vermont’s high court disposed of the inherent danger rule in ski cases by stating that not every fall is a danger inherent in the sport:

If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one “assumed” by the plaintiff, thus, what the plaintiff “assumes” is not the risk of injury, but the use of reasonable care on the part of the defendant.
Id. at 403.

C. Legislative response sponsored by industry:

1. In response to *Sunday v. Stratton Corp.*, ski area operators went to state legislatures with the express purpose to nullify *Sunday*’s precedent and re-establishing the inherent danger law in skiing. Wendy A. Faber, Note, *Utah’s Inherent Risks of Skiing Act: Avalanche from Capitol Hill*, 1980 UTAH L. REV. 355 n.3 (1980).
2. State legislatures, sensitive to the economic influence of a billion-dollar business, were receptive to claims by ski area operators that the Vermont ruling could result in a “wave of litigation.” Since 1978, all but three states with any significant ski industry have adopted a form of ski safety legislation that in some way limits the liability of ski area operators in ski cases. Orwellian titles to the statutes, often called “ski safety” legislation, disguise what in truth, are non-duty, special interest, immunity legislation.
3. Predictably, ski statutes vary, and states treat identical accidents differently due to variations in the laws. An injured plaintiff may be able to recover damages under the ski laws of one state, while another claimant, injured under identical circumstances but in another state, may have no claim.
4. Current efforts to amend ski area immunity statutes:
 - a. Michigan - In the wake of a fatal collision between 7 year old

Timmy Vachon of Michigan and a snowmobile operated by a ski area employee, the Vachon family is pushing the state legislature for a change in the law. Michigan law provides no liability for the negligent operation of snowmobiles at a ski area. The proposed "Timmy's Law" (House Bill No. 5538) would amend Michigan's Ski Area Safety Act to codify the reasonable care a ski area must take in the operation of a snowmobile.

- b. California - <http://www.calskisafety.org/> formed subsequent to the death on February 5, 2006 of Jessica Gregorie at Alpine Meadows.

VI. Ski liability law - Downhill Skiing Cases.

- A. Downhill skiing accidents - history of the liability of ski law before statutory immunity. 45 AM. JUR. PROOF OF FACTS 3d 115 (1998).

1. The doctrine of assumption of risk embodies two separate and distinct ideas: primary and secondary assumption of risk, both of which are affirmative defenses. David K. DeWolf & Deborah G. Hander, *Assumption of Risk and Abnormally Dangerous Activities: A Proposal*, 51 MONT. L. REV. 161, 166-168 (1990). Under primary assumption of risk, no duty is owed to the participant. The rule, as applied to a ski case, dictates that the ski area operator has "no duty" to mitigate the so-called "inherent" dangers or risks of the activity. Under 'primary assumption of the risk,' the defendant owes no duty to protect the plaintiff from risk of injuries, which are 'inherent' in the sport. Defendants still owe a duty, however, not to increase the risks of injury beyond those that are inherent in the sport. The law often equates the doctrine of primary assumption of risk to the "inherent danger rule," without regard to the balancing tests of determining if the risk is "inherent" or if the risks were increased by the ski area's conduct.

The balancing test is actually a two-step process. First, the court must evaluate whether the hazard in question was truly "inherent." Second, the court must determine whether the defendant's conduct increased the risks beyond those inherent to the sport. An additional layer of divergence exists in the case law as to which dangers are inherent in skiing, and whether such determination is a question of law, or a question for the jury.

Secondary assumption of risk allows a jury to consider the reasonableness of the plaintiff's conduct, in view of a known danger, as a component of contributory or comparative negligence. It delegates to the finder of fact the questions of whether the risk was inherent, or if the defendant's

conduct increased the risk.

B. Since 1978, all but three states with any significant ski industry have adopted a form of ski safety legislation that in some way limits the liability of ski area operators in ski cases. The statutes, often called “ski safety” legislation, are in truth, non-duty provisions, solely benefiting special-interest political constituents.

1. Six states have laws that generally preserve the doctrine of ordinary care.

a. NEV. REV. STAT. 455A.010 to .190 (2001); N.J. STAT. ANN. § 5:13-1 to -11 (West 2001); N.M. STAT. ANN. §§ 24-15-1 to -14 (Michie 1991); N.Y. GEN. OBLIG. LAW §§18-101 to -108 (McKinney 2001); N.C. GEN. STAT. §§ 99 C-1 to -5 (2001); WASH. REV. CODE ANN. §§ 79.45.010 to .060 (West 2001).

2. Seventeen states have statutes that include some form of the inherent danger doctrine.

a. ALASKA STAT. §§ 05.45.010 to .020 (Michie 2000); COLO. REV. STAT. ANN. §§ 33-44-101 to -114 (West 2000); IDAHO CODE §§ 6-1101 to -1109 (Michie 2000); ME. REV. STAT. ANN. tit. 32 §§ 15202-227 (West 2000); MASS. GEN. LAWS ANN. ch. 143 §§ 71H to 71S (West 2001); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 2001); MONT. CODE ANN. §§ 23-2-733 to -736 (2001); N.H. REV. STAT. ANN. §§ 225-A: 1 to : 26 (2001); N.D. CENT. CODE §§ 53-09-01 to -11 (1999); OHIO REV. CODE ANN. §§ 4169.01 to .99 (West 2001); ORE. REV. STAT. §§ 30.970 to .990 (1999); 42 PA. CONS. STAT. ANN. § 7102 (West 2001); R.I. GEN. LAWS §§ 41-8-1 to -4 (2000); TENN. CODE ANN. §§ 68-48-101 to -107 (2000); UTAH CODE ANN. §§ 78B-4-401 to 404 (2008); VT. STAT. ANN. tit. 12, §§ 1037-38 (2000); W. VA. CODE §§ 20-3A-1 to -8 (2000).

(1) Note, Colorado courts have narrowly interpreted the inherent danger rule and allocate responsibility between skiers and ski area operators. COLO. REV. STAT. ANN. §§ 33-44-105 to -109 (West 2001); *Rowan v. Vail Holdings Inc.*, 31 F. Supp.2d 889 (D. Colo. 1998); *Graven v. Vail Assocs.*, 909 P.2d 514 (Colo. 1995).

b. Ordinances in five California counties have been held to establish an inherent danger standard. Alpine County, Cal., Ordinance 562-94 (2001); AMADOR COUNTY, CAL., CODE § 12.48.101 (2001); EL

DORADO COUNTY, CAL., CODE §§ 9.20.010 to .070 (2001); NEV. COUNTY, CAL., CODE § G-IV, ART. 19-19.9 (2001); PLACER COUNTY, CAL., CODE §§ 9.28.10 to .90 (2001). CAL. PENAL CODE § 602(q) (West 2001), provides that it is a misdemeanor to ski on a closed ski trail, and §§653(i) makes leaving the scene of a skiing accident punishable by a fine of up to \$1,000.

- c. In Wisconsin, inherent dangers reduce recovery in any recreational accident case, as a component of contributory negligence. WIS. STAT. ANN. § 895.525 (West 2001).
 - d. In Wyoming, the Recreation Safety Act sets out various standards of conduct and assumption-of-risk rules that cut across a broad range of recreational activities. WYO. STAT. ANN. §§ 1-1-121 to -123.
 - e. Neither Arizona nor Virginia has statutes explicitly referring to ski liability, although both states have ski areas within their jurisdictions. Ironically, the only reported Arizona ski injury case, *Miller v. Arnal Corp.*, is the leading case on the duty to rescue, and in Virginia, a jury entered the largest verdict ever awarded in a downhill ski injury case. *Hoar v. Great E. Resort Mgmt.*, 506 S.E.2d 777 (Va. 1998).
- C. The critical element of each state's jurisprudence is that the plaintiff proves a breach of a statutory standard of care thereby placing responsibility for the accident on the defendant.
- 1. "The Ski Safety Act sets forth safety standards for the operation of ski areas and for the skiers using them." *Doering ex rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202, 1212 (10th Cir. 2001). *See also*, COLO. REV. STAT. § 33-44-102 (2003). "A violation of any provision of the Act applicable to skiers constitutes negligence on the part of the skier. *Barrett*, 259 F.3d at 1212. *See also* COLO. REV. STAT. § 33-44-104 (2003).
 - 2. Any violation of the statute's provisions applicable to skiers constitutes negligence on their part; in tandem, any violations by a ski area operator of the Ski Safety Act or the Tramway Act constitute negligence as to the acts. *See*, COLO. REV. STAT. § 33-44-104 (1997). The effect of these statutory provisions is to make violations of the Ski Safety Act and/or Tramway Act negligence per se. *Bayer v. Crested Butte Mountain Resort*, 960 P.2d 70, 74 (Colo. 1998).

- D. Absent a specific statutory standard, the presumption in favor of the ski area operator that the accident was a result of an inherent danger is only rebuttable through evidence that the accident was not an “inherent danger.” Thus, the old exceptions, noted by *Wright*; downed telephone wires, or heavy equipment parked around a blind corner, still apply.

Examples:

1. Skier on a beginner slope slides over an unmarked embankment. *Graven v. Vail Assocs.*, 909 P.2d 514 (Colo. 1995). Held: for the jury to decide whether the circumstances were within the definition of inherent risk as set out in the statute.

Skiing is a dangerous sport. Ordinary understanding tells us so, and the legislature has recognized that dangers inhere in the sport. *See*, COLO. REV. STAT. § 33-44-102 (2003). Not all dangers that may be encountered on the ski slopes, however, are inherent and integral to the sport, and this determination cannot always be made as a matter of law. In the present case, the plaintiff describes the terrain that precipitated his injuries as a steep ravine or precipice immediately next to the ski run. This description conjures up an image of a highly dangerous situation created by locating a ski run at the very edge of a steep dropoff. [sic] If such a hazardous situation presents an inherent risk of skiing that need not be marked as a danger area, the ski area operator's duty to warn under section 33-44-107(2)(d) is essentially meaningless. Therefore, we do not construe section 33-44-103(3.5) to include such a situation within the inherent dangers and risks of skiing as a matter of law. *Id.* at 520.

2. Ski racer on practice run collides into grandstands placed too close, and previously noted by other racers as a hazard. Held, for the jury to decide. *Rowan v. Vail Holdings*, 31 F.Supp.2d 889 (D. Colo. 1998). The jury found for the defendant.
3. A ski area opens a new run without the designer's intended high visibility barricade at the steep drop-off to skier's left. *Hoar v. Great Eastern Resort Mgmt.*, 506 S.E.2d 777 (Va. 1998).

VII. Skier collisions

A. There are four basic categories of skier collisions.

1. High traffic areas, such as near the lodge, or lift loading and unloading areas. In *Rosen v. LTV Recreational Development, Inc.*, 569 F.2d 1117 (10th Cir. 1978), the accident occurred in the lift unloading area of a lift, which terminated part way up the mountain at a busy ski run. See also, *Dillworth v. Gambardella*, 970 F.2d 1113 (2d Cir. 1992).
2. High speed collision between two moving skiers; usually a skier moving at a speed above his ability bears down on a slow skier whose turns are wide and whose progress is slow. *Ulissey v. Shvartsman*, 61 F. 3d 805 (10th Circ. 1995).
 - a. Note: these cases often involve children who, while skiing, seem to be at a disproportionately higher risk of collision and who generally suffer injuries that are more serious. Additionally, this category includes cases of skier versus snowboarder, which implicate either the snowboarder's backside, or blind spot. *Brown v. Kennedy*, No. 92-F-1975 (D. Colo. 1993) (unpublished decision).
 - b. For example, in *Cheong v. Antablin*, 946 P.2d 817 (1997), it appears that the parties were skiing side by side.
 - c. See, Martin Burtscher & Michael Philadelphy, *Skiing Collision Accidents: Frequency and Types of Injuries*, 10 SKIING TRAUMA & SAFETY 73-76 (1996).
3. Collisions between a moving skier who is descending a slope and a skier who is either in a blind spot, such as below a knoll, or makes a jump only to find another skier in the landing zone. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989). Another variant is the "sudden move" case in which a downhill skier turns directly into the path of the overtaking skier. In one case, the elements of both these patterns were combined where it was established that the defendant jumped over a knoll on the slope and ran into the plaintiff, while the defendant testified the plaintiff made a sudden move into the defendant's path. *Gray v. Houlton*, 671 P.2d 443 (Colo. Ct. App. 1983).
4. Fourth, are cases involving a collision between a ski area employee and a

member of the public. For example, a ski instructor skiing into the plaintiff. *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977). A restaurant employee was involved in the collision in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991). In *Nolan v. Mt Bachelor, Inc.*, 856 P.2d 305 (Or. 1993), a ski patroller crashed into a guest. See also, *Kaufman v. Hunter Mountain Ski Bowl, Inc.*, 657 N.Y.S.2d 773 (N.Y. App. Div. 1997).

In the case of *Kotun v. S.H.*, a minor, the defendant was an off-duty junior ski instructor, skiing at Snowbird ski resort. He took a jump off a terrain change, and performed a 360. He landed, carved two wide arc turns and collided with the plaintiff at approximately 42 mph. Plaintiff sustained severe injuries with permanent impairment. The facts did not meet the detailed requirements of *respondeat superior* under the Utah case of *Clover v. Snowbird*, 808 P.2d 1037 (1991) and therefore Snowbird was not a defendant in the case. Utah's ski safety statute does not impose per se liability on the uphill skier in a skier collision case. *Ricci v. Schoultz*, 963 P.2d 784 (1988). We approached the case against the hitter under a "risk enhancement" theory. The parties settled for the defendant's policy limits of 1.5 Million.

- B. Studies suggest that over thirty per cent of skier collisions result in head injuries. The same study indicated that children were especially vulnerable to head injuries due to skier collisions, and recommended that youngsters wear helmets. The Burtscher Study was conducted in Austria between 1986 through 1991. It was generally consistent with Ekeland study of children's ski injuries, which was conducted in Norway from 1982 through 1986. Both of these European studies indicated that skier collisions consist of about 5% of the overall skiing injury picture. Both studies underscored that the most frequent cause of fatality in skiing was impacting a fixed object, usually a tree, but that skier collisions cause more severe injuries than ordinary falls on the slope.
1. Arne Ekeland et al., *Alpine Skiing Injuries in Children*, SKIING TRAUMA & SAFETY 43 (1993). See also, Jenkins et al., *Collision Injuries in Downhill Skiing*, 5 SKIING TRAUMA & SAFETY 358-66 (1985).
 2. According to the studies, children are at much greater risk for severe injuries, especially head injury, in skier collisions. The Norwegian study bluntly recommended "children and adolescents ought to wear protective helmets while skiing." See also, Harald Lystad, *Collision Injuries in Alpine Skiing*, 7 SKIING TRAUMA AND SAFETY 69, 72-73 (1989).

3. *Skiing Helmets: An Evaluation to Reduce Head Injury*, United States Consumer Product Safety Commission, Washington D.C. (Jan. 1999). Bluntly recommending the use of helmets, especially for children, while skiing.

C. Development of a duty of care - "skiing is not a contact sport."

1. Ordinary negligence standards governed the respective duties of the skiers involved in the first reported skier collision case, *Ninio v. Hight*, 385 F.2d 350, (10th Cir. 1967).
2. In *LaVine*, the court held admissible and relevant the evidence that the uphill skier had the duty to yield to the downhill skier.

[T]he jury in a ski slope case tends to view the entire skiing scene as one involving a high degree of hazard in which the skier assumes a degree of risk by merely taking to the slopes.... Assuming this is the attitude, it is inappropriate for us to reach out, so to speak, in an effort to change the result.

LaVine, 557 F.2d at 735

The court did not give an assumption of risk instruction in either *Ninio* or *LaVine*. Thus, the genesis of the rule of law in collision cases embodied principles of ordinary negligence and repeated references to the custom and practice that the overtaking skier was to yield to other skiers below. *Seidl v. Trollhaugen, Inc.*, 232 N.W.2d 236 (Minn. 1975).

3. In *Novak v. Virene*, 586 N.E.2d 578 (Ill. App. Ct. 1991), the court specifically held that skiing was not a contact sport. Thus, the court held that there was no limited contact rule, which would allow a defendant to argue that, absent recklessness, a skier collision was a risk assumed when skiing. Similarly, in *Martin v. Luther* the court held that "while a participant in a sporting event generally assumes the risks inherent in the sport he does not assume the risk of another participant's negligent play which enhances the risk." *Martin v. Luther*, 642 N.Y.S.2d 728, 729 (N.Y. App. Div. 1996).

D. Development of the statutory duties of care in skier/skier collision cases.

1. The manner in which a state's ski statute is applicable to a skier collision case requires a two-step analysis. First, it is necessary to determine

whether the state statute has preserved the general common law approach to ski safety such that the doctrine of ordinary care is merely tempered by, rather than wholly displaced by, the inherent danger rule. Secondly, it must be determined whether there is a specific provision on which to base a claim against another skier.

VIII. The Colorado model for skier/skier collision cases.

- A. The writer's practical experience is principally in Colorado. There, the law provides that a violation of the Colorado Ski Safety Act is negligence *per se*. See, *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo. Ct. App. 1983). The Act provides that the risk of a skier collision is neither an inherent risk nor a risk assumed by either party in an action. The primary duty to avoid a collision with another skier rests upon the uphill or overtaking skier.
- B. Typically, our district court trial judges instruct our juries in skier collision cases that if they find by a preponderance of the evidence that the plaintiff was downhill of defendant then the law presumes (absent a preponderance of rebutting evidence) that defendant was negligent because he breached the primary duty to avoid the collision. CJI-Civ. 4TH 3:5A.

[T]he General Assembly imposed upon a skier the duty to avoid collisions with any person or object below him. See, § 33-44-109(2). Although this statute may not form the basis of criminal liability, it establishes the minimum standard of care for uphill skiers and, for the purposes of civil negligence suits, creates a rebuttable presumption that the skier is at fault whenever he collides with skiers on the slope below him. (citations omitted). A violation of a skier's duty in an extreme fashion, such as here, may be evidence of conduct that constitutes a "gross deviation" from the standard of care imposed by statute for civil negligence. *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000) (emphasis added)

- C. "[W]hen a collision occurs, the [Ski Safety Statute, C.R.S. §33-44-109(2)] creates the presumption that the uphill skier, if there is an uphill skier, had the better opportunity to avoid the collision. However, the Colorado Supreme Court has stated the statutory presumption remains rebuttable." *Ulissey v. Shvartsman*, 61 F.3d at 809 (citing *Pizza v. Wolf Creek*, 711 P.2d 671, 679 (Colo.1985)).

IX. Lift accidents

- A. In contrast to the doctrine of assumption of risk and any variant of the inherent danger rule, the law typically holds a ski area operator to a high duty of care concerning the construction, operation and maintenance of its lifts. In the earliest ski lift cases, such as *Wright*, where the court found precedent in Justice Cardozo's ruling in the amusement park accident case of *Murphy v Steeplechase Amusement Co.*, courts looked to the law regarding amusement parks in order to determine the standard of care applicable to the operation of ski lifts. In the earliest reported cases, courts imposed a high standard of care, as if the ski lift was an amusement ride. In Colorado, and elsewhere, the courts held that a ski area operator had a duty to exercise its lifts with the enhanced duties of care. Thus in Colorado, the court held that the ski area operator owes the "highest degree of care commensurate with its practical operation." *Summit County Dev. Corp. v. Bagnoli*, 441 P.2d 658 (Colo. 1968) (citing *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933 (Colo. 1964)). The court reaffirmed this doctrine of highest duty of care in *Bayer v. Crested Butte*, 960 P. 2d 70.
- B. The majority of all lift accidents occur while loading and unloading. A lift attendant has the duty to stop the lift in the event that a situation develops which would endanger a passenger.
- C. The American National Standards Institute ("ANSI") has adopted the universally regarded authoritative code for the operation of lifts and it provides that lift attendants are to "maintain orderly passenger traffic conditions." ANSI also sets out the duty of the operator/attendant to "stop the aerial lift immediately ... if a condition develops in which the continued operation of the lift might endanger a passenger." ANSI B-77 § 4.3.2.3.3 (1999).
1. Thus, the United States District Court for the District of Colorado held an operator liable for the injuries to a skier who misloaded and was carried 275 feet up the line before the lift was stopped. *Sabo v. Breckenridge Lands, Inc.*, 255 F. Supp. 602 (D. Colo. 1966). In a similar case, the plaintiff was carried 195 feet beyond the loading ramp, before operators stopped the lift and instructed her to "point her skis downhill and drop" from about 25 feet above the snow. *Trigg v. City and County of Denver*, 784 F.2d 1058, 1059 (10th Cir. 1986).
 2. Unloading cases typically involve maintenance of the unloading ramp, or the fall of a skier who then blocks the unloading ramp. If the operator fails to stop the lift, then either the fallen skier or the next passengers on the ski lift are at risk for injury, as a pileup quickly develops on the unloading ramp.

3. Young children, who enroll in ski school and then board onto a chair lift without adequate ski instructor supervision or safety bars, often fall from the lift. *See, MacKinnon v. Waterville Co.*, 1994 WL 369550 (D. N.H. 1994). Risk of injury inherent in entering, riding and exiting from chairlift at ski resort is not of such magnitude as to eliminate all duty of care and thereby insulate resort owner from claims of negligent supervision and training of lift operator or negligent maintenance and operation of lift itself, since such negligence may unduly enhance level of risk assumed.
- D. Catastrophic lift failures. There are no reported decisions involving catastrophic lift failure cases because the cases typically settle before trial. A number of serious ski lift accidents have occurred in the past, involving: (1) the failure of bullwheel welds, causing a partial deropement, injuring 40 and killing one passenger at Keystone, Colorado; (2) the failure of a cable on a gondola at Vail, Colorado, causing numerous fatalities; (3) Failures of Yan manufactured chair lift hangars which hold chairs to the cable. As a general principle, such cases are advanced under principles of negligent maintenance by the ski area and, to the extent that the ski area operator may be deemed a manufacturer, the ski area may be liable under principles of strict liability in tort. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Claims of strict liability, negligence and breach of warranty are advanced against the ski lift manufacturer. Other negligence or products liability claims may be brought against any person(s) who may have had inspection responsibility or who modified the ski lift.
- E. A primary concern in lift cases is the interplay between the pertinent statutory scheme and any common law claims for negligence. Generally, the governing principle is that a defendant's compliance with a safety statute or regulation is a circumstance courts weigh against other factors; it is not, by itself, conclusive on the issue of due care or negligence. *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481 (10th Cir. 1987); *United Blood Serv.s v. Quintana*, 827 P.2d 509, 520 (Colo. 1992); RESTATEMENT (SECOND) OF TORTS § 288(C) (1965).
- X. Duty to rescue, Duty to render reasonable first aid.
- A. The Duty to Rescue
1. Good Samaritan Protection for Volunteers. Typically, "Good Samaritan" statutes protect unpaid volunteers and rescue squad members from liability, except in circumstances of "gross negligence." The Colorado provision of the Good Samaritan law is similar to many throughout the country. COLO. REV. STAT. § 13-21-108 (1990).

2. Gross negligence is typically defined either as conduct purposefully committed by the actor, who either realized, or should have realized, that the conduct was dangerous, or conduct undertaken, heedlessly and recklessly, without regard to the consequences, rights and safety of others, particularly the plaintiff.
 3. Nevertheless, the ski area operator, as an organization supervising, and controlling a volunteer ski patroller, may have vicarious liability when the volunteer acts negligently. The statute merely immunizes the individual volunteer, it does not grant organizational immunity. The protections of the Good Samaritan statute do not extend to the paid professional patroller.
- B. The exercise of reasonable care by the paid professional patroller. *Spence v. Aspen Skiing Co.*, 820 F. Supp. 542 (D. Colo. 1993). A skier is not contributorily negligent for the consequences of poor first aid care, simply because the skier contributed to her own injury or illness which necessitated treatment.
- C. Persons providing medical treatment—whether they be hospitals, doctors, nurses, or EMT's—should expect to treat not only patients who fall ill or are injured through no fault of their own, but also those whose own neglect or intentional conduct has placed them in the precarious position of requiring medical treatment. Indeed the latter category of patients is probably as numerous as the former category. All patients, regardless of how they sustain an illness or injury, may reasonably expect competent treatment from those into whose hands they have placed themselves. *Spence v. Aspen Ski Co.*, 820 F. Supp. 542 (D. Colo. 1993). All patients, regardless of how they sustain an illness or injury, may reasonably expect competent treatment from those into whose hands they have placed themselves. *See Martineau v. Nelson*, 311 Minn. 92, 247 N.W.2d 409, 415 (1976) (“availability of a contributory negligence defense in a malpractice case is limited because of the disparity in medical knowledge between the patient and his doctor and because of the patient's right to rely on the doctor's knowledge and skill in the course of medical treatment”). It would be inconsistent with the reasonable and normal expectations of both parties for the court to excuse or reduce the provider's liability simply because it was the patient's own fault that she required care in the first place.
- D. *Miller v. Arnal Corp.* is the only reported ski rescue case. Plaintiffs, on ground not owned by the ski area, were on the mountain when a blizzard moved in. Rescue efforts were reasonably attempted but failed. The Arizona Courts exonerated the patrol of liability.

E. Historical background on the duty to rescue

1. The question of whether there arises a duty to rescue, and thus a concomitant liability for the failure to attempt or achieve a rescue, dates back to the earliest laws of the sea. Generally, under maritime law, “a master who abandons a missing seaman while there is yet a reasonable opportunity to save him, acts at his own risk.” *Gardner v. National Bulk Carriers*, 310 F.2d 284 (4th Cir. 1962)
2. The RESTATEMENT OF TORTS (SECOND) § 314 (1965) provides that there is no duty to take action to rescue or aid a person, except when a special relationship arises which gives rise to a legal duty to take action and aid a person. One such relationship is the relationship between a possessor of land and its invitees. The Restatement thus holds that a possessor of land owes to its invitees the duty “to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.” RESTATEMENT TORTS (SECOND) § 314A(b) (1965). Comments to this section make clear that the duty owed is to “exercise reasonable care under the circumstances.” RESTATEMENT TORTS (SECOND) § 314A(b) Comment e (1965).
3. Ski area operators are possessors of land, and skiers are invitees of ski area operators. Thus, ski area operators have, apart from the long standing custom and practice of providing a ski patrol, a duty to rescue injured or ill skiers while they are guests of the ski area operator.
4. There is no requirement that one risk one’s own life or limb. Heroics are strictly voluntary in this society. RESTATEMENT OF TORTS (SECOND) § 323 Comment c (1965).

F. The rules are different in the operation of a ski area when its own skiers are endangered. The ski area is the possessor of land, and the skiers are business invitees. Several states require the ski area to provide a ski patrol. IDAHO CODE §§ 6-1103(1)-(10); North Carolina; N.C. GEN. STAT. §§ 99C-1 to 5. The maintenance of a ski patrol, at the ready to assist injured guests and customers is absolutely the standard at every ski area in the United States. *See generally*, NATIONAL SKI PATROL SYSTEM, THE SKI PATROLLER’S MANUAL OF THE NATIONAL SKI PATROL SYSTEM, INC. (1982 Ed., Rev. 11th Ed. 1982).

1. The National Ski Patrol is a volunteer association. Members of the National Ski Patrol work at ski areas, typically in exchange for

complimentary lift passes. The National Ski Patrol is a federally chartered, tax-exempt, nonprofit corporation. 36 U.S.C. §1501.

2. Professional ski patrollers are full time seasonal employees of the ski area operator, and as noted previously, the ski area is responsible for negligent acts of its paid patrollers.
3. Standards, documents, and manuals are available from the offices of the National Ski Patrol, headquartered at 133 Van Gordon, Lakewood, Colorado. <http://www.skipatrol.org>
4. The ski area operator and the ski patrol are obligated to exercise the reasonable standard of care in the industry. That standard is set out in the standards underlying certification for Winter Emergency Training, or Outdoor Emergency Training. See, Warren D. Bowman, *Need-Oriented Emergency Care: The Development of Emergency Care Training in the National Ski Patrol System*, 10 SKIING TRAINING AND SAFETY 9-14 (1996).

XI. Practice guides for United States ski accident cases

- A. Every ski area maintains a risk management department, even if it is merely a filing cabinet with a few forms, files and a camera. At most ski areas, the department is operated under guidelines established by the ski area's insurer, with forms written by counsel and staffed by personnel trained by and working closely with in-house and insurance counsel. There are only a few insurers who underwrite liability insurance for ski areas and so the practices are relatively uniform throughout the industry.
- B. For every injured person with whom the ski patrol comes into contact there should be a basic Ski Accident Report, or First Aid Report, typically generated at the patrol room and/or nearby first aid clinic. Generally, serious injury accidents will also cause an accident report to be filled out on a form similar to a traffic accident report. Witnesses will generally give statements either on a small index card sized form, which can easily be carried by a reporting patroller, or the witness statement may be more complete and written out in the patrol room on a multi-part form. Ski patrol typically has the injured party either write a statement, or give a signed statement.
- C. It is a common practice for ski areas to dispatch an extra patroller to an accident scene for the express purpose of conducting an "accident investigation." The patroller will take along a pre-packed backpack or kit containing a checklist, a camera, measuring tape, flags, survey tape, paper, pens, statement forms, and trail

maps. The ski patrol does not have a legal duty to identify another skier involved in a skier/skier collision, in order to protect the plaintiff's litigation interest, even though most ski safety statutes make it mandatory for a skier involved in an accident to remain on the scene and give identifying information to the ski patrol.

- D. In the case of ski lift accidents, the materials noted above are typically generated and in addition, the lift attendant, lift department and lift operator or supervisor will write out statements. In some states, the administrative agency with supervisory authority over the tramway will require the submission of a written report that is then available as a written record.
- E. In either a downhill skiing accident case, or a ski lift case, relevant evidence may be located within the permit issued by the Forest Service or the lease with the landowner. Topographical maps of the area of the incident, which were filed with the Forest Service as part of the permitting process, will accurately depict the elevations and design of the ski trail. Blueprints of the lift in question are typically available at the supervisory tramway agency along with the original construction documents for the lift.
- F. Of course, trail maps of the ski area, issued for the season during which the accident occurred, any season pass, written agreement, or waiver, along with the lift ticket of the skier, all comprise part of the record of evidence relevant to the case. Some practitioners use visual analysis based upon topographic maps, aerial photos and other data available to the public
- G. National and international standards. The American Society of Testing and Materials annually publishes a Skiing Trauma and Safety International Symposium. These materials provide a wealth of information on skiing safety, statistical information on accidents and on standards for the marking of hazards. Penniman, *The Custom and Practice for Identification and Mitigation of Common Hazards at U.S. Ski Areas—An Opportunity for Standards*, 9 SKIING TRAUMA AND SAFETY (1993). The National Ski Patrol publishes a handbook on ski patrol practices and procedures. NATIONAL SKI PATROL SYSTEM, THE SKI PATROLLER'S MANUAL OF THE NATIONAL SKI PATROL SYSTEM, INC. (1982 Ed., Rev. 11th Ed. 1982).
- H. Most of the larger ski areas have some form of Safety Plan on public file with the Forest Service. Most areas also have an internal policy manual for site-specific maintenance, hazard marking and evacuation and first aid procedures. The ski area's lift department, typically generates a similar handbook for the training of new employees. Reports of prior accidents at a particular location, or correspondence between the ski area and the trail designer, or the lift

manufacturer, can shed light on a case involving questions of safety and prevention may similarly be available.

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