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SKI AND SNOWBOARD LAW IN COLORADO AND BRITISH COLUMBIA: FAIR WAIVER OR UNCONSCIONABLE TERMS?

I. INTRODUCTION

The international history of skiing began thousands of years ago. In fact, the oldest known ski was found in Sweden and is estimated to be over 4,500 years old!¹ Yet, skiing did not start its transformation into the recreational activity of today until the 1930s with the advent of the ski lift and the resultant elimination of laborious treks up the mountain after each run.²

Around this same time, Peckett's Inn in New Hampshire became the first resort in the United States to offer skiing to its patrons, including its own ski school.³ Although Peckett's Inn and numerous other ski areas in the United States with lift installations opened during the same period,⁴ "skiing did not emerge as a significant participant sport until the 1960s."⁵

Not long after Peckett's Inn and similar resorts opened, the first snowboard-like creation came into existence.⁶ It would be more than thirty years, however, before any steps towards improving this prototype were taken,⁷ and over fifty years before the first competitive snowboarding

1. History of Alpine Skiing, <http://www.speedski.com/historyofskiing.htm> (last visited Apr. 7, 2007). Furthermore, cave drawings suggest that skis were used long before this time. *Id.* These earlier skis, however, were not built for skiing in its modern recreational embodiment. *Id.* In contrast to modern skis, which are long and narrow, these skis were short and wide and designed to keep the traveler on top of the snow. *Id.* Thus, their design could be said to resemble a modern-day snowshoe.

2. *Id.*

3. Morten Lund, *A Short History of Alpine Skiing: From Telemark to Today*, SKIING HERITAGE, Winter 1996, available at <http://skiinghistory.org/history.html>. Specifically, Peckett's Inn was located in Sugar Hill, New Hampshire. *Id.*

4. *Id.* Among the ski areas that featured lifts and were opened in the late 1930s were: Cannon Mountain, New Hampshire; Stowe, Vermont; Alta, Utah; and Sugar Bowl, California. 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, 236 (1992).

5. Frakt & Rankin, *supra* note 4.

6. Julian Voje, *The Beginning of Snowboarding*, http://www.sbhistory.de/hist_in_the_beg.htm#1929 (last visited Apr. 8, 2007). The first snowboard was built by M.J. "Jack" Burchett in 1929, and was merely a piece of plywood he secured to his feet using a combination of clothesline and horse reins. *Id.*

7. Lee Crane, *The History of Snowboarding: A 30 Year Time Line*, Dec. 1, 1996, <http://www.transworldsnowboarding.com/snow/howto/article/0,26719,246571,00.html> (follow appropriate links to access various portions of the timeline). *See also* Voje, *supra* note 6.

These subsequent steps culminated with a chemical gas engineer creating the "snurfer." *See* Crane *supra*; Voje, *supra* note 6. This engineer was Sherman Poppen from Muskegon, Michigan. Crane, *supra*. One day Poppen saw his daughter, Wendy, trying to slide down a snow covered hill while

contest.⁸ It was not until 1980, and Jake Burton's introduction of the first snowboard featuring a P-tex base,⁹ that snowboarding developed the potential to become the recreational powerhouse activity that it is today.¹⁰

During 2004, alpine skiers paid over 57 million visits to ski areas in the United States.¹¹ Despite this vast amount of visitors, the most recent statistics suggest that the annual number of snowboarders has surpassed that of alpine skiers.¹² Given the growth of both sports and the sheer

standing up in her sled. *Id.* The rest of the story has become the centerpiece of snowboarding folklore. *Id.* As Poppen explains, he went into his garage and found a pair of children's snow skis. *Id.* He screwed them together, attached dowels to act as foot stops, and attached a rope to the nose for the rider to hold in order to stabilize the snurfer. *Id.*

While it is noteworthy that the snurfer was not technically a snowboard because it did not have bindings, it was nevertheless a crucial step in the conception and creation of the modern-day snowboard. *Id.* Indeed, many winter enthusiasts not only rode the snurfer prototype, but also initiated design and production of their own boards to compensate for its deficiencies. *Id.* Most notably, these enthusiasts included Jake Burton, the founder of the snowboard equipment manufacturing Burton Snowboards Inc., and Demetrije Milovich of the former Winterstock Company. *Id.*

It was Jake Burton who created the first actual snowboard. *Id.* His prototype was similar to the snurfer but with the fundamental addition of bindings to secure the rider's feet to the board. Voje, *supra* note 6. By securing their feet to the snowboard, riders were able to maintain better control which facilitated a dramatic increase in the skill level of all riders. *See id.*

8. Crane, *supra* note 7. Modern competitive snowboarding started with a small contest held during April of 1981 at Ski Cooper in Leadville, Colorado. *Id.*

9. Voje, *supra* note 6. The word "base" used with regard to skis and snowboards refers to the part of the equipment that is intended to come into contact with the snow. Colloquially, this might be referred to as the "bottom" of the ski or snowboard.

The word "P-tex" carries dual meanings. First, P-tex is an ultra-high molecular weight polyethylene, a dense and abrasion-resistant thermoplastic with low friction properties which is used as the base for skis and snowboards. P-tex is also of one of three major brand names in the industry which makes, markets, and sells the actual P-tex product. Snowboard Bases/Ski Bases, <http://www.custom-shop.com/pages/p-tex.htm> (last visited Dec. 27, 2006).

10. Joshua D. Hecht, Comment, *Snowboarding Liability: Past, Present and Future*, 15 MARQ. SPORTS L. REV. 249 (2004). The path to the current popularity of the sport, however, was not without tribulation. Initially, ski resorts did not even allow snowboarding because they felt that snowboarders were nothing more than rebels, and the resorts feared that their presence on the mountain would necessarily hurt the ski industry. *Id.* at 250. Additionally, there was a perception that snowboards themselves made the terrain unsuitable for skiing and ruined the slopes. *Id.*

11. NATIONAL SKI AREAS ASSOCIATION, Downhill Ski Participation 1985–2004, <http://www.nsaa.org/nsaa/press/0506/nsga-ski-part-2004.pdf> (last visited Oct. 21, 2005) [hereinafter NSAA SKI REPORT]. Today, skiers and snowboarders are able to travel "to any of three hundred major alpine resorts around the major mountain chains of forty countries." Lund, *supra* note 3.

12. NSAA SKI REPORT, *supra* note 11; NATIONAL SKI AREAS ASSOCIATION, SNOWBOARDING PARTICIPATION 1990–2004, <http://www.nsaa.org/nsaa/press/0506/nsga-snbnd-part-2004.pdf> [hereinafter NSAA SNOWBOARDING REPORT].

According to these statistics, there were 7.4 million downhill ski participants in the United States in 2002 who were over the age of seven and participated more than once in a calendar year. NSAA SKI REPORT, *supra* note 11. This figure substantially decreased to 6.8 million participants in 2003, and decreased further to 5.9 million participants in 2004. *Id.* In contrast, the number of snowboarding participants was 5.9 million in 2002, and 6.3 million in 2003 where it steadily remained throughout the 2004 season. NSAA SNOWBOARDING REPORT, *supra*.

magnitude of the ski and snowboard industry around the world,¹³ it is not difficult to imagine an abundance of ski and snowboard injuries with a correspondingly profuse body of law.

Naturally, with litigation comes inevitable questions. For example, who is liable when an injury occurs? Should liability vary with differing causes of injury? Is it fair to hold a ski resort liable, or does the skier assume the risks associated with the sport? Because cases with nearly every imaginable fact scenario have been reported, and the outcome of most have been driven primarily by a very fact-intensive analysis, this Note only examines a single category of accidents: those accidents that are caused by, or somehow related to, hazardous terrain located within the resort where the accident occurred.¹⁴ This category can be referred to as Skier v. Resort hazards.

Parts II and III of this Note present a comprehensive evolution of the legal framework related to this particular type of accident in Colorado (United States) and British Columbia (Canada). Part IV undertakes a comparative analysis of the extent to which ski resorts are allowed to insulate themselves from liability for such accidents using exculpatory agreements. Part V then explains how British Columbia's framework encourages flagrant violations of public policy by enabling resorts to unjustly insulate themselves from virtually all liability for injuries caused by hazardous terrain. This Note concludes by proposing that the legal framework in British Columbia for this category of accident should be amended to more closely resemble that of Colorado.

In other words, these statistics illustrate that the number of downhill skiers has decreased steadily by 1.5 million participants over recent years, whereas the number of snowboard participants is continually rising and has surpassed the number of downhill skiers in 2004 by almost five hundred thousand participants.

13. Lund, *supra* note 3. Skiers and snowboarders are now able to choose from among several thousand lift-served slopes, stretching from Alaska to the Chilean Andes, and from the Spanish Mediterranean west to the Pamirs of central Asia, and even on to Korea on the Pacific Rim. *Id.* In the Pacific itself, there is skiing in Australia and New Zealand. *Id.* Furthermore, participants can ski or snowboard in places as unlikely as Manchuria, Kazakhstan, South Africa, India, and even Antarctica occasionally. *Id.*

14. See James H. Chalot, *Colorado Ski Law*, COLO. LAW, Feb. 1998, at 5, 8. Other common types of ski accidents that are beyond the scope of this Note include accidents between multiple participants, accidents occurring during a lesson with a ski instructor employed by the ski resort, accidents related to avalanches, and accidents occurring during races or other competitions. See *id.*

II. THE EVOLUTION OF COLORADO SKI LAW

A. *Narrow Interpretation of Common Law Principles*

During the period between the introduction of skiing and that of snowboarding in the United States, the legal dimension of this fast-growing sport essentially paralleled the evolution of the sport itself. In the beginning, the predominant legal theories set forth by skiers and resorts litigating accidents allegedly caused by hazardous terrain were the traditional common law claims for negligence, with their corresponding defenses, such as assumption of risk and contributory negligence.¹⁵ Many factors caused Colorado courts to be especially receptive to these defenses, which provided the “infant ski industry with a protective legal environment.”¹⁶ Among these factors were the “exotic” and “obviously risky” nature of the sport, and the “rigid, largely enterprise-oriented principles and rules” of personal injury law at the time.¹⁷

As ski and snowboard law evolved, however, it began to favor plaintiffs who were injured by the hazards that are typical to ski resorts. In *Rosen v. LTV Recreational Development, Inc.*,¹⁸ for example, the plaintiff was injured after colliding with a steel pole.¹⁹ The pole was set in concrete and situated in a flat area where a chairlift ended, intersecting a run.²⁰ In rejecting the argument that the plaintiff assumed the risk of his injury, the Tenth Circuit held that a plaintiff has no opportunity to voluntarily assume a risk where he has no antecedent knowledge of that risk.²¹

In response to the disparate results reached by different courts, the Colorado General Assembly enacted the Ski Safety Act of 1979 (the Act) in order to clarify ski and snowboard liability by specifically defining the legal responsibilities of skiers and ski area operators.²² Even if *Rosen* had

15. Frakt & Rankin, *supra* note 4, at 237–38.

16. *Id.* at 237.

17. *Id.*

18. 569 F.2d 1117 (10th Cir. 1978).

19. *Id.* at 1119.

20. *Id.* More specifically, the plaintiff was proceeding down Heavenly Daze, a run at Steamboat Springs Ski Resort. *Id.* Haffelder, another skier who had just unloaded from the chair lift, was traveling at a relatively slow rate of speed toward plaintiff. *Id.* Failing to reduce his speed as he proceeded through the intersection, the plaintiff first collided with Haffelder, and ultimately with the metal pole. *Id.* The court found these facts legally inconsequential. *See* text accompanying note 21.

21. *Id.* at 1121. In approving the trial court’s jury instruction, the court further held that it was the plaintiff’s burden to prove that the condition created by the defendant was reasonably capable of producing an injury. *Id.* at 1120. In effect, this burden is no different than the burden any civil plaintiff has to meet in order to establish a *prima facie* case.

22. *See* COLO. REV. STAT. ANN. §§ 33-44-101, 102 (1989).

been decided under the Act, the outcome would likely have been the same.²³ The court's holding in *Rosen* is representative of the effects the Act, in its entirety, would have in most cases.²⁴ Indeed, Colorado courts have repeatedly expressed concerns that reasonable constructions of the Act could provide ski resorts with much more limited liability than common law principles would bear.²⁵

B. A Narrow Interpretation of the Ski Safety Act of 1979

*Pizza v. Wolf Creek Ski Development Corp.*²⁶ marked the first opportunity that Colorado courts had to address the concern about resorts' limited liability under the Act. The alleged hazard in *Pizza* was "a drop-off to a snow covered service road which traverse[d] the lower portion of the run."²⁷ Substantial evidence was presented concerning "the unusual shape of the lower headwall"²⁸ [of the run] and its tendency to cause skiers to

Realizing the dangers that inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed, the purpose of this article is . . . to further define the legal responsibilities of ski area operators and their agents and employees; to define the responsibilities of skiers using such ski areas; and to define the rights and liabilities existing between the skier and the ski area operator and between skiers.

Id. See generally COLO. REV. STAT. ANN. §§ 33-44-103, 106-110 (1989) (defining "inherent dangers of skiing" and setting forth the duties of both ski area operators and skiers).

23. Section 109(2) of the Ski Safety Act of 1979 (the Act) originally provided: "It is presumed, unless shown to the contrary by a preponderance of the evidence, that the responsibility for collisions by skiers with any . . . man-made structure marked in accordance with section 33-44-107(7) is solely that of the skier or skiers involved and not that of the ski area operator." COLO. REV. STAT. ANN. §§ 33-44-109(2). The 1990 Amendments to the Act deleted this sentence. *Id.*

Section 107(7) provides: "The ski area operator shall mark . . . all . . . 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 adequately and appropriately cover such obstructions with a shock-absorbent material that will lessen injuries." COLO. REV. STAT. ANN. § 33-44-107(7) (emphasis added).

While it is unclear whether the steel pole in *Rosen* would have to be marked and padded by the resort, this is entirely irrelevant. Section 109(2) of the original Act was a tautologous statement of the traditional common law presumptions against, and burdens borne by, civil plaintiffs. Therefore, the presumption would always necessarily be against the plaintiff and the plaintiff will always have the burden of persuasion, irrespective of whether § 107(7) requires the resort to mark the hazard and whether the ski area operator did in fact mark it. Before the amendments to the Act, the plaintiff bore the burden of "show[ing] to the contrary (that the responsibility should be borne by the resort) by a preponderance of the evidence." *Rimkus v. Northwest Colo. Ski Corp.*, 706 F.2d 1060, 1067 (C.A. Colo. 1983). In *Rosen*, the plaintiff faced this burden and, according to the trial court, he overcame it.

24. See *Chalat*, *supra* note 14, at 5 (stating that the Act only "provided *some* protection to the ski area operator against negligence claims") (emphasis added).

25. See generally *infra* notes 26-39 and 55-62.

26. 711 P.2d 671 (Colo. 1985).

27. *Id.* at 674.

28. The term "headwall" refers to any point on the face of a mountain where the gradient of the slope increases dramatically.

become unexpectedly airborne.”²⁹ This is exactly what happened to the plaintiff and caused him to severely injure his spine.³⁰ The jury returned a verdict for the defendant ski resort and, on appeal,³¹ the Colorado Supreme Court was forced to interpret the presumption against the skier in a collision “with any person, natural object, or man-made structure marked in accordance” with the Act.³²

The court seized the opportunity to illustrate its distaste for the immunity from liability the Act granted to resorts. The court first noted that the statutory language had two plausible interpretations: one which would provide resorts with virtually absolute protection from liability, and another that would provide resorts with substantially less protection.³³ The court ultimately construed the language consistently with common law principles pre-dating the Act, holding that a skier can rebut the statutory

29. *Id.* at 682.

30. “After traveling through the air for an unknown distance, he landed in such a manner as to severely damage his spine.” *Id.* at 674. Although the distance the victim traveled while airborne is uncertain, his “eyeglasses and ski poles were found approximately 20 to 25 feet from the downhill side of the service road and he was found lying approximately 60 to 75 feet below the service road.” *Id.*

31. *Id.* Plaintiff’s original action against the defendant resort claimed negligent failure to warn him of the run’s dangerous condition, and negligent failure to eliminate that condition. *Id.* On appeal, the plaintiff contended that the evidentiary presumption contained in Section 109(2) violated the Fourteenth Amendment because it was vague, not founded on a rational evidentiary basis, and violated his right to equal protection under the law. *Id.* at 674–75.

These constitutional concerns were dismissed in short order. The court first dismissed the vagueness concerns, reasoning that the text must merely satisfy a rational basis standard of review because it “does not involve civil or criminal penalties[,] . . . does not threaten to inhibit the exercise of constitutionally protected rights,” and involves “an economic regulation.” *Id.* at 675.

The court next determined that the statute was founded on a rational evidentiary basis because the legislature has imposed duties on the operator, the skier is under a duty to maintain control and keep a proper outlook, and, most important, that the sport is inherently risky . . . there is a rational and natural relation here between the fact proved [collision] and the fact presumed [skier’s sole responsibility].

Id. at 678–79.

The court also summarily dismissed the equal protection claim, noting that “[s]kiers as a group do not constitute a suspect class, and being free from a legislatively imposed rebuttable presumption of negligence is not a fundamental right.” *Id.* at 679.

32. *Id.* at 680. The relevant part of the Act to which the court referred provides that:

Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects It is presumed, *unless shown to the contrary by a preponderance of the evidence*, that the responsibility for collisions by skiers with any person, natural object, or man-made structure . . . is solely that of the skier or skiers involved and not that of the ski area operator.

COLO. REV. STAT. ANN. § 33-44-109(2) (1989) (emphasis added).

33. *Pizza*, 711 P.2d at 677. The first plausible interpretation was that in order for a skier to rebut the presumption that she was solely responsible for the collision, she must prove that she was *not at all* responsible for the accident. *Id.* The second interpretation, which the court adopted, was that the skier must merely prove that she was *not solely* responsible for the accident by showing negligence by the ski area operator. *Id.*

presumption that she was solely responsible for the injury by proving that negligence on the part of the ski area operator contributed to the accident.³⁴ The court reasoned that “if the legislature had intended anything greater than such a showing . . . it would have specifically so provided.”³⁵ This was not the only rule of law to emerge from *Pizza*; the case also substantially contributed to the evolution of Colorado’s statutory framework for ski and snowboard liability.

The plaintiff in *Pizza* alleged, *inter alia*, negligent failure to warn of a dangerous condition and negligent failure to eliminate that condition.³⁶ Notably, these allegations are common law claims rather than claims of specific violations of the Act. Consequently, the court’s opinion included an implicit holding that the provision of the Act, which provides that violations of the Act constitute negligence *per se*,³⁷ is not exhaustive of the claims which can be brought against a ski resort.³⁸ In other words, the court held that the Act did not strip prospective plaintiffs of the ability to bring both common law tort claims and claims alleging a specific violation of the Act.³⁹

Shortly thereafter, the Colorado Supreme Court reaffirmed this narrow interpretation of the Act in *Aspen Skiing Co. v. Peer*.⁴⁰ In *Peer*, the plaintiff encountered a hazard similar to the one at issue in *Pizza*: a sharp drop-off in the slope and transition to a service road.⁴¹ Upon encountering

34. *Id.*

35. *Id.* at 678. The court specifically reasoned that in an “ordinary negligence case, the burden is already on the plaintiff to prove by a preponderance of the evidence that the defendant is negligent and that such negligence caused the plaintiff’s injury.” *Id.* at 677. Because the “plaintiff in a ski accident case already bears the burden of proving negligence and causation by a preponderance of the evidence,” “the presumption is rebutted whenever a plaintiff establishes by a preponderance of the evidence that the defendant’s negligence caused the collision in which the plaintiff was injured.” *Id.* at 677–78. In other words, the presumption is rebutted when the plaintiff discharges their common law burden. *Id.*

36. *Id.* at 674.

37. *See id.* Section 104(1) of the Act provides: “A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement.” COLO. REV. STAT. ANN. § 33-44-104(1) (1989).

38. Chalot, *supra* note 14, at 5. “*Pizza* essentially held that claims that were founded on a theory of general negligence, rather than on a breach of a specific statutory duty, could nevertheless be maintained, so long as the jury was instructed on the presumption of skier’s fault.” *Id.*

39. *Pizza*, 711 P.2d at 684–85. A third holding from *Pizza*, which also strongly cuts against limited liability of resorts, was the court’s rejection of the holding of the trial court—that the Act precluded exemplary damages. *Id.* at 684. In so holding, the court reasoned that the Act manifested no intent to abolish the applicability of the Colorado statute that provides for exemplary damages to civil actions concerning skiing injuries. *Id.*

40. 804 P.2d 166 (Colo. 1991).

41. *Id.* at 168.

the drop-off, the plaintiff became airborne and sustained a broken neck, thus rendering him a quadriplegic.⁴² In an unpublished opinion, the Colorado Court of Appeals affirmed the trial court's 1987 judgment⁴³ awarding the plaintiff over seven and a half million dollars against the resort.⁴⁴ The Colorado Supreme Court granted certiorari and affirmed this tremendous verdict without hesitation.⁴⁵

C. A Legislative Response to the Narrow Interpretation of the Ski Safety Act of 1979

In response to multiple perceived defects of the Act (amplified by a consistently narrow interpretation of the Act and the large judgment in *Peer*), the ski industry lobbied for amendments to broaden their immunity from liability for accidents not resulting from the breach of a specific statutory duty.⁴⁶ The Colorado legislature eventually addressed these concerns in 1990 by adopting Senate Bill 90-80, which amended the Act.⁴⁷ The amendments increased immunity from liability for ski area operators.⁴⁸

The 1990 amendments limited the maximum amount of damages a skier could recover from a ski area operator to one million dollars, unless the court determined, upon good cause, that such a limitation would be unfair.⁴⁹ These amendments also forced each skier *or snowboarder*⁵⁰ to

42. *Id.*

43. *Id.* at 172. The date of the trial court's judgment is especially relevant because the original award of damages in *Peer* was the proverbial straw, compelling the Colorado General Assembly to amend the Ski Safety Act of 1979.

44. *Id.* The judgment included two and a half million dollars for interests and costs. *Id.*

45. *Id.* at 175.

46. Chalal, *supra* note 14, at 5.

47. *Id.*

48. *See generally infra* notes 49–65.

49. Section 113 of the amended Ski Safety Act, entitled "Limitation of Liability," provides in pertinent part:

The total amount of damages which may be recovered from a ski area operator by a skier who uses a ski area . . . shall not exceed one million dollars, present value, including any derivative claim by any other claimant, which shall not exceed two hundred fifty thousand dollars, present value, and including any claim attributable to noneconomic loss or injury . . . whether past damages, future damages, or a combination of both, which shall [also] not exceed two hundred fifty thousand dollars. If, *upon good cause shown, the court determines* that the present value of the amount of lost past earnings and the present value of lost future earnings, or the present value of past medical and other health care costs and the present value of the amount of future medical and other health care costs, or both, when added to the present value of other past damages and the present value of other future damages would exceed such limitation and that *the application of such limitation would be unfair, the court may award damages in excess of the limitation* equal to the present value of additional future

assume the risk of any of the inherent dangers and risks of skiing,⁵¹ including weather, snow, surface and subsurface conditions, collisions with natural or man-made objects, collisions between skiers, the failure of other skiers to ski within their ability, and variations in terrain.⁵²

Moreover, these amendments created an affirmative duty for ski area operators to mark their trails, including level of difficulty and trail boundaries, in a manner readily visible under ordinary conditions of visibility.⁵³ Lastly, ski area operators were required to pad man-made objects not visible under ordinary conditions from a distance of at least one hundred feet.⁵⁴

D. The Colorado Supreme Court Addresses the Scope of the 1990 Amendments to the Ski Safety Act

*Graven v. Vail Associates, Inc.*⁵⁵ marked the Colorado Supreme Court's first opportunity to interpret the 1990 amendments to the Act. In accordance with its narrow interpretation of the Act prior to these

damages, but only for the loss of such excess future earnings, or such excess future medical and other health care costs, or both.

COLO. REV. STAT. ANN. § 33-44-113 (1990) (emphasis added).

50. COLO. REV. STAT. ANN. § 33-44-103(8) (1990) (defining a skier as "any person using a ski area for the purpose of skiing, which includes, without limitation, sliding downhill or jumping on snow or ice on skis, a toboggan, a sled, a tube, a snowbike, a snowboard, or any other device").

51. Section 109(1) was amended, adding in pertinent part:

Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. Notwithstanding any provision of law or statute to the contrary, *the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another.*

COLO. REV. STAT. ANN. § 33-44-109(1) (1990) (emphasis added).

52. The statute specifically provides that inherent dangers and risks of skiing include:

those dangers or conditions that are part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, extreme terrain, and trees or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities.

COLO. REV. STAT. ANN. § 33-44-103(3.5) (1990).

53. COLO. REV. STAT. ANN. § 33-44-107(1)-(6) (1990).

54. *Id.* ¶(7).

55. 909 P.2d 514 (Colo. 1995).

amendments,⁵⁶ the court avoided granting ski resorts absolute immunity from liability for all accidents related to the “inherent dangers and risks of skiing.”⁵⁷

In *Graven*, the plaintiff’s skis failed to properly function⁵⁸ at the edge of a run, which caused him to slide several feet before plunging down over forty feet into an unmarked ravine.⁵⁹ In reversing the trial court’s judgment, which had been affirmed by the Court of Appeals,⁶⁰ the Colorado Supreme Court found that not all dangers encountered on the slopes are inherent and integral to skiing, notwithstanding the fact that the sport is inherently dangerous.⁶¹ The court held that the inherent danger of a particular hazard is not necessarily a question of law, and that summary judgment was inappropriate under those particular facts.⁶²

56. See, e.g., *supra* Part II.B.

57. Chalot, *supra* note 14, at 6 (stating that “[m]any lawyers recognized that the 1990 amendments were subject to challenges, both as to their construction and the constitutionality of the amendments”).

58. Skis and snowboards are designed to have both a P-tex base and sharpened metal edges surrounding the base. A P-tex base, specifically when treated with glide wax, creates a hydrophobic surface that facilitates movement by reducing friction, which would otherwise slow or prevent the equipment from sliding. Without wax to keep it lubricated, oxidization will cause the P-tex to dry out, which in turn creates excessive friction. To prevent oxidization, the P-tex has microscopic holes to absorb the wax.

The sharpened metal edges, which are typically made from stainless steel, facilitate turning and generally enhance a rider’s overall control. In contrast to the P-tex base, sharpened edges do this by *creating* friction to grip or cut into the snow. Virtually any maneuver on skis or a snowboard requires the rider to dig their edge into the snow in order to alter their course, and sharpened metal edges are simply the best mode of doing so.

For example, consider a snowboarder turning on a ski slope. To complete a turn, she must shift her weight so as to cause the edge of her snowboard that would be facing uphill after the desired turn, to dig into the snow. Similarly, both skiers and snowboarders stop by digging their edges into the snow. This stops the rider by simultaneously taking the base of the equipment that creates the layer of ice causing it to slide out of contact with the snow, and using the edge to anchor the equipment into the snow.

When a skier or snowboarder, such as the plaintiff in *Graven*, loses an edge in slushy snow, it means that the snow into which they dug the edge to stop was not solid snow, and could not support their weight. Consequently, it could not prevent their equipment from sliding in the wrong direction.

59. *Graven*, 909 P.2d at 515.

60. *Id.* at 516. The court of appeals affirmed the district court’s holding that the plaintiff’s injuries were caused by “inherent dangers and risks of skiing” and that his claims were barred as a matter of law. *Id.* Specifically, the court found that the causes of plaintiff’s injury were “the slush, the trees, and the ravine.” *Id.*, quoting *Graven v. Vail Assocs., Inc.*, 888 P.2d 310, 315 (Colo. App. 1994). “The court found it unnecessary to reach the issue of whether the plaintiff failed to ski within his own abilities.” *Id.*

61. *Id.* at 520.

62. *Id.* The court’s reasoning was twofold. First, the court found that the language of the Act defining inherent dangers, specifically the “references to the source of the variations as ‘a result of slope design and of snowmaking or grooming operations’ . . . strongly suggest[ed] that the variations in steepness or terrain described are those occurring within skiable areas and do not necessarily include those that might be encountered adjacent to the runs.” *Id.* at 519. Second, the court reasoned that if the

Over time, *Graven* has been cited for the proposition that “[c]ases in which a downhill skiing accident involves a hazard that could have been mitigated by padding, marking, or ordinary grooming and that creates a sudden emergency or unreasonable unmarked danger[,] should not necessarily be considered ‘within the inherent dangers and risks of skiing as a matter of law.’”⁶³

III. THE EVOLUTION OF BRITISH COLUMBIA SKI LAW

A. Common Law Negligence Principles

British Columbia’s legal framework regulating ski and snowboard accidents related to resort hazards has enjoyed a much more modest evolution than that of Colorado. Certain aspects of the legal framework became antithetical to the corresponding framework in Colorado and the results Colorado courts would reach in similar cases. In early cases, British Columbia courts primarily relied on the same common law negligence principles that guided Colorado courts. However, while Colorado courts soon began favoring injured plaintiffs, the British Columbia courts went in the opposite direction.⁶⁴ Similarly, without a comprehensive statutory framework, the law in British Columbia is more speculative than Colorado due to primary reliance on common law principles.⁶⁵

*Abbott v. Silver Star Sports Ltd.*⁶⁶ was the first attempt by British Columbia courts to set forth a comprehensive analytical framework for deciding cases arising from injuries due to resort hazards. While traversing a transition,⁶⁷ the plaintiff in *Abbott* fell and suffered a spinal injury,

conditions that occasioned plaintiff’s injuries “present[ed] 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.” *Id.* at 520.

63. *Chalat*, *supra* note 14, at 6, quoting *Graven*, 909 P.2d at 520.

64. This conclusion is inferred from the pro-defendant results British Columbia courts consistently reached, as compared with the opposite results typically reached by Colorado courts. It is unclear, however, whether such results are attributable to the application of the principles used by those courts, or the actual principles themselves.

65. Although in *Pizza*, the Colorado Supreme Court affirmed a plaintiff’s right to bring both common law and statutory claims, *supra* notes 36–39 and accompanying text, claims brought under the common law provide courts with more flexibility than that which would occur under a comprehensive statutory framework such as the Ski Safety Act.

66. [1986] 6 B.C.L.R.2d 83.

67. The term “transition,” when used in a way related to skiing or snowboarding, refers to any portion of terrain that forms an acute angle leading from one area of terrain, typically with a downward slope, to another area that typically slopes downward towards the first area. For example, the transition in *Abbott* was a ravine connecting, or in between, two downward slopes. *Id.* at [**9]. An example of a transition that does not connect two slopes angling downward towards one another is the curved part

rendering her a paraplegic.⁶⁸ She claimed that the defendant resort violated the Occupier's Liability Act⁶⁹ by negligently failing to ensure the transition was in a reasonably safe condition. In the alternative, the plaintiff argued that the resort was negligent due to its failure to warn skiers of the potential hazard presented by the transition.

The British Columbia Supreme Court began its analysis by assessing the comparative fault of both the plaintiff and the defendant ski resort.⁷⁰ The court determined that the proper standard to assess the plaintiff's negligence was whether she was skiing "under control."⁷¹ It selected this standard in accordance with the Skier's Responsibility Code,⁷² which is

of a halfpipe wall, which connects the flat bottom and the vertical wall.

68. *Id.* at [**1]–[**3]. The accident occurred at Silver Star Mountain near Vernon, British Columbia. For a skier in the High-T area of the mountain to reach the Atridge face, he or she must proceed west down the gradual slope of the east bank to an area known as the top of the Christmas Bowl. The downward slope from the Christmas Bowl gradually increases toward a breakover. The breakover is located between the Christmas Bowl and the transition, approximately 100 to 130 feet above the ravine which marks the bottom of the transition. *Id.* at [**8]–[**9].

The ravine becomes fully visible to a skier in a tuck position approximately 30 to 40 feet above the breakover. In other words, such a skier can see the ravine from approximately 130 to 170 feet away. The ravine is a transition because at its bottom, the downward slope of the east bank turns into the upward slope of the west bank. *Id.* at [**9].

Skiers normally go into a tuck position at the top of the High-T area and they maintain this position through the transition in order to gain sufficient momentum to carry them up to the Atridge face. This avoids the tiring process of side-stepping up the west bank to the Atridge face. *Id.* at [**23]–[**28].

69. *Id.* at [**2]. Occupier's Liability Act, R.S.B.C., ch. 337, § 3 (1996) provides in pertinent part:

(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises . . . will be reasonably safe in using the premises. (2) The duty of care referred to in subsection (1) applies in relation to the . . . condition of the premises.

70. *Abbott*, 6 B.C.L.R.2d at [**41]–[**54]. The court does not explicitly engage in a comparative fault analysis. In fact, it first evaluates the plaintiff's negligence and then, under the heading "*Contributory Negligence*," assesses the negligence of the defendant and liability flowing therefrom. Under this portion of the opinion, however, the court determines and then compares the negligence of both parties, and in no way addresses the absolute defense that the plaintiff negligently contributed to her own injury. *Id.* at [**49]. The court must therefore be using the phrase "contributory negligence" to denote the idea that the defendant literally contributed to the plaintiff's injury contrary to the traditional connotation as an absolute defense to a negligence claim.

71. *Id.* at [**32]. The court defined "under control" by negative implication, stating that "a skier is not skiing under control when he or she cannot stop or take appropriate avoiding action within the range of his or her vision." *Id.*

72. The Skiers Responsibility Code for downhill skiing provides as follows:

THERE ARE ELEMENTS OF RISK IN SKIING THAT COMMON SENSE AND PERSONAL AWARENESS CAN HELP REDUCE(:) 1. Ski under control and in such a manner [that] you can stop or avoid other skiers or objects. 2. When skiing downhill or overtaking another skier, you must avoid the skier below you. 3. You must not stop where you obstruct a trail or are not visible from above. 4. When entering a trail or starting downhill, yield to other skiers. 5. All skiers shall use devices to help prevent runaway skis. 6. You shall keep off closed trails and posted areas and observe all posted signs.

posted at virtually all ski resorts (including Silver Star) adjacent to the lift lines.⁷³ In a somewhat incongruent fashion, the court held that it simply could not determine whether plaintiff was skiing under control, and thus, whether she was negligent.⁷⁴ However, it assessed the defendant's negligence and resulting liability for the plaintiff's injuries.⁷⁵

The court framed the issue as whether the defendant exercised reasonable care to determine if the plaintiff would be reasonably safe using the transition to the Atridge face.⁷⁶ The court determined that the defendant had exercised reasonable care by posting a caution sign in an appropriate location (adjacent to the transition) to warn skiers traversing the west bank of the possible condition at the bottom of the transition to the east bank.⁷⁷ The court also determined that the plaintiff assumed the risk of falling when she entered the transition aggressively, even though she was familiar with its existence.⁷⁸ The court noted that the defendant would not have been liable even if it had not posted the caution sign, reasoning that there is no duty to warn someone of a potential danger for which they have assumed the risk of injury.⁷⁹

Manitoba Association of School Trustees, *Skier's Responsibility Code Downhill* (2005), available at http://www.mast.mb.ca/student_safety/ski%20safety/refguide.htm#responsibility.

73. *Abbott*, at [**13]. The court also noted that the plaintiff was familiar with this code. *Id.*

74. *Id.* at [**34]–[**36]. The court reasoned as follows:

either she was [skiing] out of control in that she was proceeding at too, [sic] high a speed to take appropriate avoiding action when she became aware of the depth and angle of the bottom of the transition . . . and as a consequence she could not avoid the fall which resulted in her very serious injury, or she was skiing under control and she could have taken appropriate action to avoid a fall . . . if she had considered it necessary. The fact that she did not attempt to slow down or stop or take other avoiding action when she became aware of the depth of the transition is consistent with her opinion that she could proceed through the transition without mishap. . . . In such circumstances we have no evidence of what actually caused the plaintiff to fall. . . . We do know, however, that the configuration of the transition could have been the cause, since the plaintiff, if she had been skiing under control, had the opportunity to assess that configuration and adjust her skiing accordingly and thereby avoid falling. In such a scenario the unfortunate injury sustained by the plaintiff is one caused by accident, pure and simple, for which no one was responsible. . . . This conclusion, however, does not finally resolve the issue, since the question remains whether the defendant was also negligent, thereby contributing to the plaintiff's injuries."

Id. at [**34]–[**36].

75. *Id.* at [**37]–[**46].

76. *Id.* at [**40].

77. *Id.* at [**42].

78. *Id.* at [**43]. Specifically, the court noted that

[b]efore she went into a crouch she was aware she would have to pass through the transition, that she had never skied through it previously that season and . . . stayed in her crouch as she entered the transition . . . [and that a]lthough she stated she could have stopped at that point in time, she continued on into the transition and fell at the bottom of it.

Id. at [**29].

79. *Id.* at [**43]–[**44] (citing PROSSER'S LAW OF TORTS 649 (4th Ed. 1971)). Specifically, the

The *Abbott* analysis has remained the authoritative approach in British Columbia for injuries caused by hazards at ski resorts. There has been significant evolution, however, in the way courts apply that analysis,⁸⁰ as illustrated in *Simms v. Whistler Mountain Ski Corp. Inc.*⁸¹ In *Simms*, the plaintiff's husband was killed when he skied over the edge of a drop-off, traveling approximately 20 feet through the air.⁸² He landed in ungroomed terrain where his skis became lodged in a hole, flinging him out of his bindings and causing him to land in a creek bed.⁸³

Utilizing the comparative fault analysis set forth in *Abbott*, the British Columbia Court of Appeals found that the details surrounding the plaintiff's death indicated that he was negligently skiing out of control.⁸⁴ In reaching this conclusion, the court further held that the "under control"

court stated that "there is no duty on the part of the defendant to warn an expert skier of the obvious, namely, that a skier runs the risk of falling and sustaining an injury when skiing 'out of control' through a blind area. The presence or absence of a sign was not a cause of this accident." *Id.* at [**45].

While it is unclear whether the court intended this statement to be a general proposition regarding the duty to warn, that is not the best interpretation. Not only is this language dicta, but the court's meaning is ambiguous at best. The court declared that "there is no duty to warn an expert skier of the obvious." *Id.* "[T]he obvious" to which it was referring is that it is dangerous to ski out of control through a blind area. For this proposition to abrogate a ski resort's duty to warn, the skier must therefore be skiing through a blind area.

This statement is dicta because the bottom of the transition in this case became visible to a skier in a tuck position at least 130 feet—and up to 170 feet—prior to reaching it. It therefore cannot be characterized as "blind" as that word is commonly understood. Because the court clearly found this proposition applicable to the case before it, what exactly it meant by "blind" remains elusive.

The transition was not blind in the sense that it was hidden from sight. Therefore, I argue, when the court refers to a "blind" area it must mean an area with which a skier is unfamiliar. Because of the court's ambiguous language, however, this concept should not be interpreted as a generally applicable proposition of law.

80. Anomalously, this was often cited by lower courts. *See, e.g., infra* notes 81–88.

81. [1990] Carswell BC 1390, 1990 WL 1053232 (Mar. 23, 1990). Paradoxically, the modification in the application of the *Abbott* analysis was performed in a lower court by the same judge who wrote the opinion for the higher court in *Abbott*.

82. *Id.* at [**6]. Mr. Simms traveled over two drop offs before landing in the creek bed that caused his death. The first drop off caused him to travel approximately twenty feet through the air before landing in ungroomed terrain approximately four feet below the elevation from which he became airborne. His momentum apparently prevented him from stopping, carrying him forward over a second drop off, to the creek bed approximately ten feet lower in elevation from where his skis became stuck in a hole, thus flinging him forward. As a direct result, he landed head-first in the creek bed, resulting in his death. *Id.*

83. *Id.*

84. *Id.* at [**18]–[**21]. The court first noted that the decedent became airborne for twenty feet and landed in an ungroomed area, "in which it was conceded by all that it would be folly to ski." *Id.* at [**18]. It then quoted the proposition from *Abbott* that "a skier is not skiing under control when he or she cannot stop or take appropriate avoiding action within the range of his or her vision." *Id.* at [**19] (internal quotations omitted).

standard is a subjective standard, such that an “expert skier may well comply with the standard while skiing aggressively.”⁸⁵

However, the court held that the resort had breached its duty to the plaintiff under the Occupier’s Liability Act, *notwithstanding a caution sign posted adjacent to the drop-off*, because the drop-off created a real risk that could have been eliminated with little difficulty.⁸⁶ To support this conclusion, the court cited evidence that skiers frequently skied this run at excessive speeds, action encouraged by the upward slope to the chair lift at the end of the run.⁸⁷ The court also cited the fact that the embankment at the edge of the groomed run, which surrounded the ungroomed terrain between the runs, created a blind area that was marked only by a mere caution sign instead of ropes.⁸⁸

IV. CONTRACTUAL WAIVER OF SKI RESORTS’ DUTIES TO SKIERS

All resorts invariably require that buyers of lift tickets sign some form of exculpatory agreement. Such agreements are generally printed on the reverse side of lift tickets and include a separate waiver form that the participant must sign. These purported waivers of liability vary in their terms, but the sole purpose of the waivers is to limit the ski area operators’ potential liability to an injured participant.

A. Colorado Waiver Law

Colorado’s law governing contractual waivers of liability existed well before the first ski accident case was filed. The Supreme Court of Colorado declared as early as 1959 that parties may neither violate public policy nor abrogate statutory requirements through private agreements.⁸⁹

85. *Id.* at [**19].

86. *Id.* at [**24].

87. *Id.* at [**24].

88. *Id.* In apportioning fault, the court found itself bound by statute to assess liability equally between the plaintiff and defendant. *Id.* at [**25]–[**26].

These facts are almost perfectly analogous to those in *Abbott*. In both cases, there was terrain that invited skiers to ski at excessive speeds toward a blind area (although in *Abbott* it was not entirely blind) to avoid having to side-step or pole up an incline further down the run. In both cases the resort provided no warning other than a caution sign adjacent to the hazardous terrain. Moreover, both courts determined whether the resort involved in each case had violated the Occupier’s Liability Act.

The results reached by the respective courts are remarkable for two reasons. First, there are no cognizable differences between the facts that can result in the disparate outcomes. Second, under a common law approach, the Court of Appeals deciding *Simms* should have been bound by the principles previously articulated by the Supreme Court in *Abbott*.

89. *Univ. of Denver v. Indus. Comm’n of Colo.*, 335 P.2d 292, 294 (Colo. 1959).

*Jones v. Dressel*⁹⁰ is the seminal Colorado case repeatedly cited for its explanation of the legal framework for contractual waivers of liability. In *Jones*, the Colorado Supreme Court declared that

[i]n determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.⁹¹ The Court further held that “in no event will . . . [an exculpatory] agreement provide a shield against a claim for willful and wanton negligence.”⁹²

In the context of ski and snowboard litigation, *Phillips v. Monarch Recreation Corp.* was one of the pioneer cases examining such exculpatory agreements.⁹³ While skiing at the defendant’s ski area, the plaintiff in *Phillips* came around a blind corner at the bottom of the run and collided with a trail grooming machine.⁹⁴ On appeal, the defendant claimed, *inter alia*, that the trial court erred in excluding evidence pertaining to the contractual waiver language printed on the reverse of the plaintiff’s lift ticket.⁹⁵

In holding that the trial court properly excluded the purported agreement, the court reasoned that private agreements may not modify statutory provisions if doing so would violate the public policy expressed

90. 623 P.2d 370 (Colo. 1981).

91. *Id.* at 376. Quoting the California Supreme Court, the court further delineated some common characteristics of cases where exculpatory agreements will be held invalid. These characteristics include situations where

[the] business [is] of a type generally thought suitable for public regulation . . . [t]he party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity . . . [a]s a result of the essential nature of the service . . . the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services . . . the agreement “makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence . . . as a result of the transaction, the person . . . is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. (quoting *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441)

92. *Id.* at 376.

93. 668 P.2d 982 (Colo. Ct. App. 1983).

94. *Id.* at 984. A jury found the defendant liable for the plaintiff’s injuries and assessed liability accordingly. *Id.* at 985.

95. *Id.* at 987. Unfortunately, the Colorado Court of Appeals provided neither the actual language of the waiver on the back of the ticket nor any meaningful application of the general propositions of law set forth to resolve the appeal.

in the statute.⁹⁶ The court determined that the public policy behind the Ski Safety Act of 1979 was to allocate the respective duties of skiers and ski resorts with regard to the safety of skiers.⁹⁷ The court further found that the agreement on the reverse side of the lift ticket violated this public policy.⁹⁸

Rowan v. Vail Holdings, Inc.,⁹⁹ another ski and snowboard liability case, laid out one of the most comprehensive applications of these principles. In determining whether a duty is owed to the public, the court held that the most important issue is whether the service is a matter of public importance and necessity.¹⁰⁰ The *Rowan* court stated, as a matter of law, that recreational skiing and snowboarding is never a matter of great public importance or necessity.¹⁰¹ The court held that allowing visitors to ski trails is not an essential service.¹⁰² The district court further held that where the skiing or snowboarding is recreational, the exculpatory agreement will generally be found to have been entered into fairly.¹⁰³

96. *Id.*

97. *Id.*

98. *Id.* The clear implication of this holding is that the public policy behind statutes allocating duties and responsibilities includes, at a minimum, the allocation of the same duties and responsibilities. Thus, in all cases where these duties are changed, the agreement will be void for violating the public policy driving the statute.

99. 31 F. Supp. 2d 889 (D. Colo. 1998). The relevant facts of the case are as follows: the plaintiff was a national-caliber racer who was glide-testing skis and waxes for the upcoming World Cup Downhill. *Id.* at 982. The testing took place over a three-day period. *Id.* at 893. On the third morning, plaintiff was asked to sign, and did sign, an exculpatory agreement. *Id.* Under this agreement plaintiff agreed to “expressly assume all risk associated with participating in or training for the Event, including, without limitations, using ski lifts,” in addition to assuming “the risk of any injury to person or property resulting from any of the inherent dangers and risks of skiing.” *Id.* at 893. Later that day, plaintiff was killed when he fell near the finish line of the race course, sliding into an unpadding wood support of a picnic deck. *Id.* at 893.

100. *Id.* at 897.

101. *Id.*

102. *Id.* (citing *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472, 474 (D. Colo. 1992)).

103. *Id.* at 898. The court reasoned, in part, that “there must [be] a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation, or that the services could not be obtained elsewhere.” *Id.* at 897, quoting *Bauer*, 788 F. Supp. at 474–75. Notwithstanding this proposition, the court found in favor of the plaintiff, citing the fact that “(1) [he] was asked to do glide testing as part of his work . . . , (2) the testing depends on consistency—the same or very similar conditions must exist during the testing; and (3) [the plaintiff] was asked to sign the release in the middle of the glide testing.” *Id.* at 898. The court reasoned that “the fact that Rowan was assigned to do [the] testing as part of work, not as a part of recreation, means that the element of choice normally present in signing a release was absent,” because “if Rowan chose not to sign the release, this could have impacted his employment or his standing with his employer.” *Id.*

This lack of choice was exacerbated by the fact that the resort gave Rowan the release on the final day of his testing “when Vail knew that the testing needed to be completed on the same or similar conditions . . . in order for the testing results to be valid . . . [t]herefore, the services regarding the glide testing simply could not be obtained elsewhere.” *Id.* The court further reasoned that “the release was

By illustrating the proper application of the waiver of liability factors to resorts' exculpatory agreements, the *Rowan* court enabled ski resorts to contractually waive liability for all types of garden-variety negligence. The *Rowan* court also reaffirmed the proposition from *Jones* that an exculpatory agreement cannot release one from willful and wanton conduct,¹⁰⁴ and defined the same as "conduct which an actor realizes is highly hazardous and poses a strong probability of injury to another but nevertheless knowingly and voluntarily chooses to engage in."¹⁰⁵

B. British Columbia Waiver Law

The Occupier's Liability Act is the primary statute upon which plaintiffs rely when suing ski resorts in British Columbia. This act allocates a duty to the occupier of the premises to ensure that the person or property of anyone using the premises will be reasonably safe in such use.¹⁰⁶ However, the next section of the statute permits an occupier to modify or altogether avoid this duty of care to an individual by entering into a contract with that individual.¹⁰⁷ The ability to contract around this duty is subject only to the requirement that the occupier take reasonable

offered to Rowan only after Vail was put on notice of several close calls that the testers had with the picnic deck, including notice of an actual injury." *Id.*

The court also found that the release was in fact ambiguous. *Id.* at 899. It noted that the release "recites the risks being assumed in the broadest possible language when it states, 'I expressly assume all risk associated with participating in or training for the event, including without limitations, using ski lifts.'" *Id.* The court further noted, however, that the next paragraph addressed the assumption of the risk using the "inherent risks and dangers of skiing" language as defined by the Ski Safety Act. *Id.* The court reasoned that "[t]he two paragraphs are ambiguous when read together because they set out a different standard of the risk." *Id.*

104. *Id.* at 900.

105. *Id.*, quoting *Brooks v. Timberline Tows*, 127 F.3d 1273, 1276 (10th Cir. 1997). The court held that there was evidence of willful and wanton conduct on the part of the defendant, reasoning that the defendant had notice of the danger posed by the picnic deck support and did not add any protection to the support despite having the ability to do so. *Id.* Additionally, the court emphasized that "on the third and final day in the middle of the glide testing, with knowledge that the testing had to be completed in the same conditions, Vail made Rowan sign a release as a condition to completion of the testing." *Id.* Whatever weight the court gave this fact, it could not have been dispositive under the Tenth Circuit's definition of willful and wanton conduct. The only conduct the defendant engaged in that posed "a strong probability of injury" to the plaintiff was the failure to add protection to the support, as it is nonsensical to argue that forcing plaintiff to sign the exculpatory agreement posed a strong probability of injury to him. *Id.*

106. Occupier's Liability Act, R.S.B.C., ch. 337 § 3 (1996). See *supra* note 65 and accompanying text.

107. Occupier's Liability Act, R.S.B.C., ch. 337 § 4 (1996) provides in pertinent part: "(1) . . . if an occupier is permitted by law to . . . restrict, modify or exclude the occupier's duty of care to any person by express agreement, . . . the occupier must take reasonable steps to bring that . . . restriction, modification or exclusion to the attention of that person." *Id.* § 4.

steps to bring any modification of the statutory duty of care to the attention of the other contracting parties.¹⁰⁸ As a matter of fact, cases involving ski areas that use exculpatory waivers of liability have focused primarily on whether reasonable steps were indeed taken to bring the modifications of liability to the attention of the plaintiff.¹⁰⁹

The most prominent case illustrating a practical application of the waiver section of the Occupier's Liability Act is *Karroll v. Silver Star Mountain Resorts Ltd.*¹¹⁰ In *Karroll*, the plaintiff was required to sign an agreement releasing the defendant resort from all claims arising out of a race, irrespective of their cause, before being allowed to participate. The broad language of this agreement naturally precluded all claims for injuries caused by the defendant's acts or omissions which could be considered willful and wanton.¹¹¹

In determining whether the plaintiff was bound by the terms of the release, the British Columbia Supreme Court eviscerated the Occupier's Liability Act's requirement that the occupier take reasonable steps to bring modifications of liability to the attention of the other contracting party.¹¹² The court held that "[i]t is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises."¹¹³ The

108. *See id.* §§ 3–4.

109. *See infra* notes 110–21 and accompanying text.

110. [1988] 12 A.C.W.S. (3d) 354. The plaintiff in *Karroll* broke his leg while participating in a downhill skiing competition at defendant's resort near Vernon, British Columbia. *Id.* at [**2].

111. *Id.* at [**4]. The heading of the release read "RELEASE AND INDEMNITY—PLEASE READ CAREFULLY," and the body provides in pertinent part:

I agree to: RELEASE, SAVE HARMLESS; and INDEMNIFY Resorts and/or its Agents from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to my person or property, wheresoever and howsoever caused, arising out of, or in connection with, my taking part in the Event and notwithstanding that the same may have been contributed to or occasioned by any act or failure to act (including, without limitation, negligence) of Resorts and/or any one or more of its Agents.

Id. Although the language does not explicitly state that the resort is not liable for willful and wanton negligence, the language is so broad as to give rise to a reasonable inference that the drafters intended for such negligence to be included within the waiver's scope.

112. *Id.* at [**25] (stating that "there is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands [them]").

113. *Id.* at [**25]. The court stated that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents [subject to three exceptions]." *Id.* at [**19] quoting *L'Estange v. Grafcob, Ltd.* [1934] 2 K.B. 394 (C.A.) 403. The first exception is "where the document is signed by the plaintiff in circumstances which made it not her act [i.e. duress] . . ." *Id.* The second exception is "where the agreement has been induced by fraud or misrepresentation." *Id.* Finally, the third exception is "[w]here the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms." *Id.* at [**20]. The court then explicitly set forth the proposition that there is a duty to inform of onerous

court also provided a non-exhaustive list of factors relevant to the inquiry of whether there is a duty to bring modifying terms to the attention of the offeree, such as the consistency of the exculpatory clause to the purpose of the contract, the length of the contract, and time available for reading the contract.¹¹⁴

Five years later, in *McQuary v. Big White Ski Resort Ltd.*,¹¹⁵ the court found another plaintiff bound by the terms of a very similar exculpatory agreement.¹¹⁶ In *McQuary*, the agreement was displayed in bright colors both on the face of the lift tickets and on numerous signs located throughout the resort. The agreement stated that ticket holders assume *all* risk resulting from any cause whatsoever.¹¹⁷ The *McQuary* court held that the plaintiff was bound by the terms due to his actual knowledge that the agreement contained conditions limiting the defendant's liability.¹¹⁸ The court thus abrogated the *Karroll* holding insofar as that holding eviscerated the duty under the Occupier's Liability Act to take reasonable steps to bring modifications of liability to the attention of participants in order for the modification to be legally binding.¹¹⁹

terms or ensure that the offeree needs the agreement only where a reasonable person should have known that the offeree was not consenting to the terms. *Id.* From this proposition, in addition to the general circumstances surrounding the signing of an exculpatory agreement, it can be inferred that the court is holding that the first two exceptions have little or no application in such a case.

114. *Id.* at [**26]. The court ultimately held that there was no obligation for the defendant resort to take reasonable steps to bring the contents of the release to the attention of the plaintiff, and in the alternative, that such steps had been taken. *Id.* at [**31]–[**32]. The court noted that “the release was consistent with the purpose of the contract . . . [which] was to permit Miss Karroll . . . to engage in a hazardous activity upon which she, of her own volition, desired to embark.” *Id.* at [**28]. In other words, the court determined that “[t]he exclusion of legal liability was consistent with the purpose of permitting her and others to engage in this activity, while limiting the liability of the organizations which made the activity possible.” *Id.*

The court further noted that “the release was short, easy to read, and headed in capital letters ‘RELEASE AND INDEMNITY—PLEASE READ CAREFULLY.’ The most casual glance would reveal to a reasonable person that this was a legal document calculated to release those staging the race from liability.” *Id.* at [**29]. “Third, it emerge[d] from the evidence that signing such releases was common feature of this ski race. Miss Karroll herself had signed such releases on previous occasions before similar races.” *Id.* at [**30].

115. 1993 Carswell BC 1831, 1993 WL 1440688.

116. *Id.* at [**22].

117. *Id.* at [**7]–[**9]. The waiver read, in pertinent part, that “AS A CONDITION OF USE OF THE SKI AREA FACILITIES THE TICKET HOLDER ASSUMES ALL RISK OF PERSONAL INJURY, DEATH OR PROPERTY LOSS RESULTING FROM ANY CAUSE WHATSOEVER . . .” *Id.* (emphasis added).

118. *Id.* at [**15].

119. *Id.* at [**11]. The court stated that “if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions.” *Id.* at [**11]. Conversely, “if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions.” *Id.* The court elaborated, stating “that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions,” he would be bound “if the

Less than one year later, in *Greeven v. Blackcomb Skiing Enterprises Ltd.*,¹²⁰ the British Columbia Supreme Court reaffirmed the ski resort practice of contractually waiving liability for accidents irrespective of their cause. The *Greeven* court also affirmed the *McQuary* notice requirements. When purchasing a lift ticket, the plaintiff in *Greeven* was forced to sign a waiver exculpating the defendant resort from “all liability for personal injury resulting from ‘any cause whatsoever.’”¹²¹ Like *McQuary*, the terms of the agreement were displayed on the reverse side of the lift tickets, as well as on notices posted in the ticket area.¹²² The plaintiff was later injured by a drop off, which was both unknown to the plaintiff and unmarked by the resort.¹²³ In one of its few rulings favorable to a plaintiff, the court held the agreement void.¹²⁴ The court’s reasoning, however, had nothing to do with the broad language of the waiver. Rather, the court focused solely on the lack of evidence that the resort had taken reasonable steps to bring the terms limiting liability to the attention of the plaintiff.¹²⁵

V. ANALYSIS

This Note proposes that British Columbia replace the Occupier’s Liability Act with legislation founded upon the principles the United States used in these areas of law. It has long been settled in both tort and contract law, as interpreted by United States courts, that contracts exempting tort liability for willful or wanton conduct are void as a matter of law.¹²⁶ United States courts invariably hold such contracts void because they violate public policy,¹²⁷ and it is anomalous that British Columbia’s courts and legislature openly condone them.

delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.” *Id.*

120. 1994 Carswell BC 1118.

121. *Id.* at [**4].

122. *Id.* at [**5]–[**8].

123. *Id.* at [**2].

124. *Id.* at [**18]–[**20].

125. *Id.* at [**16]–[**20]. The court first noted that in *McQuary*, *supra* notes 111–14, it resolved this issue in favor of the resort based on facts very similar to the case before it. *Id.* at [**15]–[**16]. The court then distinguished the circumstances in *McQuary*, noting that there the “plaintiff had skied many times at the same and other mountains and was aware, at least in a general way, of the existence of exclusionary clauses.” *Id.* at [**17]. The court contrasted the fact that “it ha[d] not been shown that the plaintiff [in the case at bar] had any similar degree of knowledge . . . [as] [s]he was a stranger to the country and to the mountain and purchased the ticket at the very beginning of her visit.” *Id.* at [**18].

126. RESTATEMENT (FIRST) OF CONTRACTS § 575 (1932).

127. See *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs., Ltd.*, 611 N.E.2d 282, 283–84 (N.Y. 1993) (holding that “[p]ublic policy . . . forbids a party’s attempt to escape liability, through a

Willful and wanton negligence “exists where a defendant had actual knowledge that because of its actions, a danger existed to the plaintiff and the defendant intentionally failed to prevent a harm that is reasonably likely to result.”¹²⁸ The following hypothetical is illustrative of the truly egregious nature of British Columbia’s waiver law. Imagine a jump leading up to a blind,¹²⁹ fifteen-foot drop-off. Not only is this drop-off unmarked, but the transition¹³⁰ is extremely steep and fraught with trees. Furthermore, assume that several people were seriously injured by this jump in the past seven days, the ski resort had notice of all of these injuries, and it has failed to ameliorate the problematic aspects of the jump. To be sure, this scenario would constitute willful and wanton negligence by the ski resort. As previously discussed, ski resorts worldwide invariably require participants to sign exculpatory contracts when purchasing lift tickets. What differs from one resort to another is the substance of these agreements. In Colorado, such agreements would likely waive, *inter alia*,¹³¹ all liability of ski resorts for general garden-variety types of negligence. In contrast, the language of similar agreements in British Columbia will very likely waive *all* liability of ski resorts resulting from *any cause whatsoever*, or language similarly broad in scope.¹³²

Applying the aforementioned approaches to exculpatory agreements to the ski jump hypothetical, it is clear that Colorado would not preclude a claim against the resort for its failure to either close the jump or correct its problems (i.e., its willful and wanton negligence). In contrast, British Columbia would undoubtedly preclude such a claim. This outcome is

contractual clause, for damages occasioned by grossly negligent conduct”) (internal quotations omitted). Public policy, as used in this Note, is “the principle that a person should not be allowed to do anything that would tend to injure the public at large.” BLACK’S LAW DICTIONARY 571 (2d pocket ed. 2001).

128. *New Light Co., Inc. v. Wells Fargo*, 525 N.W.2d 25, 30 (1994). *See also Rowan*, 31 F. Supp. 2d at 900 (holding that “willful and wanton behavior requires a mental state of the actor consonant with purpose, intent, and voluntary choice . . . conduct which an actor realizes is highly hazardous and poses a strong probability of injury to another but nevertheless knowingly and voluntarily chooses to engage in”) (internal quotations omitted).

129. The term “blind” is intended to connote that the ski resort has erected absolutely no warning of the drop off created by the jump.

130. The transition is that area of the slope below the jump upon which the participant lands. Transitions are generally downward-sloping and have been cleared of obstacles. Moreover, they are generally groomed to eliminate substantial inconsistencies in the snow, creating as smooth of a landing surface as possible.

131. This exculpatory agreement would very likely contain language which would effectively waive the resort’s liability for the negligence of the ticket holder resulting in his own injury, among other things. For purposes of this Note however, the only language of the agreement that is relevant would be that which addresses the negligence of the ski resort.

132. *See, e.g., McQuary*, 1993 Carswell BC 1831.

problematic because it blatantly condones violations of public policy, provides incentives to create negative externalities, and evidences legislative indifference to constituents' interests.

A. Blatant Violation of Public Policy

Broad exculpatory agreements violate public policy in multiple ways. First, any scenario where willful and wanton negligence is likely to physically injure the public at large, as demonstrated by the previous hypothetical, violates public policy by definition. Indeed, allowing anything that tends to harm the public at large, including physical harm such as broken bones, violates public policy. Permitting a ski resort to exculpate itself from liability for committing violations of public policy would, itself, be tacit approval of such violations.

Moreover, allowing violations which tend to injure the public as a whole perpetuates not only initial physical injuries, but also non-physical injuries that will likely flow from the original injury because of a lack of incentives to prevent them. The most obvious non-physical harm which occurs is the economic loss—an injury distinct from the original physical harm—to individuals forced to bear the cost of their injury. In Colorado, these individuals have a legal right to sue the ski resort to compensate them for this loss, thereby shifting the consequential burden to the resort. In contrast, in British Columbia this loss is necessarily born by the injured party.

Of course, there are other losses ameliorated by legal redress as well. Such injuries might include the psychological effects of having no opportunity for vindication of perceived rights and the negative effect this has on the ability to obtain closure. The right to redress tends to provide the public with benefits to ameliorate these injuries flowing from the initial injury (in this case economic compensation and the psychological benefits of vindication and closure).

One could argue that since failing to provide the right to redress is inaction rather than action, such failure does not violate public policy. Nevertheless, it becomes clear that this failure violates public policy when considered in light of the spirit of public policy. The principle of public policy dictates that one should not be allowed to do anything that would tend to injure the public at large. The Occupier's Liability Act, by failing to maintain the right to redress, is the mechanism that *allows* ski resorts to create conditions that tend to injure the public at large. Therefore, any consequential injuries resulting from the same action or inaction of the

resort that caused the initial injuries will be permitted by the same shortfall of the Occupier's Liability Act.

While these harms are arguably less tangible than broken bones, they are no less likely to injure the public at large, thus violating public policy. Therefore, eliminating the opportunity of redress should be deemed no less violative of public policy than the actual injuries sustained by willful and wanton negligence. All injuries are examples of how the Occupier's Liability Act allows ski resorts to act (or fail to act) in ways that tend to injure the public at large without legal repercussions.

B. Incentives for Externalities

British Columbia waiver law permits ski resorts to externalize a substantial portion of the cost of doing business. Furthermore, facilitating such negative externalities simultaneously creates an incentive to actually create externalities by reducing the cost of doing business. Where ski resorts can waive all liability to participants, they have an incentive to spend as little money as possible on ensuring the safety of their terrain. It does not take an economist to realize that with an incentive structure like this, ski resorts in British Columbia will be less concerned about the safety of their slopes than they otherwise would or should be. After all, every dollar not spent implementing prophylactic measures making their slopes safer is one more dollar of profit for the ski resort.

C. Indifference to Constituents' Interests

The most alarming aspect of waiver law in British Columbia is the existence of the Occupier's Liability Act itself.¹³³ It would be anomalous for the legislative assembly of a sovereign province to stand idly by while its courts give legal force to exculpatory contracts for willful and wanton negligence. It is a particularly egregious anomaly, however, that a sovereign province, through its legislative assembly, has affirmatively declared exculpatory contracts for willful and wanton conduct legally enforceable. In doing so, the legislative body not only ratified the ski resorts' practice of taking advantage of their patrons, but also provided incentives for ski resorts to do so. That a legislature would endorse such a statute is at best absurd. The ultimate irony, however, lies in the fact that this is the same legislative assembly that theoretically represents the will

133. Occupier's Liability Act, R.S.B.C., ch. 337 § 4. *See supra* note 103 and accompanying text.

of its constituents, many of whom will be the very individuals adversely affected by the Occupier's Liability Act.

VI. CONCLUSION

It cannot be seriously contested that a failure by a ski resort to ameliorate a hazard, of which it had actual notice, is deeply unsettling. Such inaction contravenes all traditionally accepted notions of morality. To be sure, ski resorts enjoy tremendous benefits as the result of the British Columbia legislature's determination that an occupier can absolutely eliminate their liability. However, the cost of these benefits is far too high for individuals visiting the ski resorts of British Columbia. Because allowing ski resorts to contractually waive their liability for willful and wanton negligence so flagrantly violates public policy and creates such absurd incentives for ski resorts vis-à-vis their visitors, it is unconscionable that the law of British Columbia recognizes such contracts as enforceable.

"Common sense tells us that the greater the risk to human life . . . , the stronger the argument in favor of voiding attempts by a party to insulate itself from damages caused by that party's . . . willful and wanton misconduct."¹³⁴ This Note proposes that the British Columbia legislature replace the Occupier's Liability Act, as applied to ski resorts, with legislation preventing courts from enforcing any contractual waiver of willful and wanton negligence. This proposal would have multiple benefits. Such legislation would provide redress for parties injured by willful and wanton negligence of ski resorts. It would discourage ski resorts from externalizing a substantial cost of doing business. It would eliminate incentives to violate public policy. Most importantly, it would ensure that ski resorts are held accountable for conduct that would almost universally be characterized as reprehensible.

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134. *New Light Co.*, 525 N.W.2d at 30.

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