Skiers Find The "Fall Line" in Challenging The Constitutionality of Modern Ski Legislation

INTRODUCTION

Big mountains translate to big money for today's ski area operators and for the states in which the ski resorts are situated.[1] In the 1989-1990 season, twenty-one million skiers[2] strapped long narrow strips of fiberglass composite to the soles of their feet, were lifted to the tops of snow-covered mountains and hurled their bodies downhill. At an average lift ticket price of $30 per day,[3] fifty-one million day tickets were sold in twenty-one thousand different ski resorts across the nation to alpine skiers during the last season.[4] With the number of Americans skiing on the rise, the number of persons injured on the slopes has also climbed.[5] Prior to the late 1970's, case law pertaining to the liability of ski area operators, in relation to skiers injured as a result of a fall or collision, developed and remained fairly consistent in turning out opinions generally favorable to the defendant ski resorts.[6]

The tides began to change as a result of several factors, and, following the 1978 benchmark case of *Sunday v. Stratton*[7] which awarded 1.5 million dollars to the plaintiff for his injuries against the defendant ski area operator, many states enacted legislation aimed to limit liability of ski area operators and thereby preserve the economic benefit reaped by the states from the ski industry.[8] Such legislation has come under attack by plaintiffs seek-

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1. Consumers contributed just under three million dollars, toward ski equipment and services, to the national economy last year. Telephone interview with Jeff Palmer, Communications Director of the United Ski Industries Association (August, 1990) [hereinafter Palmer interview].

2. *Id.* Compare this number to fourteen million skiers in 1982 and 3.5 million skiers in 1972. Fagen, *Ski Area Liability for Downhill Injuries*, 49 INS. COUNS. J. 36 n.1 (1982)(citation omitted).

3. *See North America's Top 40 Ski Resorts*, SNOW COUNTRY MAG., September 1990, at 23-93. The average reflects the anticipated 1990-1991 ticket price for a single day, based on the cost of a multi-day pass to one of the top thirty ski resorts in America. *Id.*

4. Palmer interview, *supra* note 1.

5. Fagen, *supra* note 2, at 36. In 1980, over 210,00 skiers injured themselves compared to 105,000 in 1972. *Id.* at 36 n.2 (citation omitted).

6. *See* Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976); Blair v. Mount Hood Meadows Dev. Corp., 48 Or. App. 69, 616 P.2d 525 (1980); Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1978); Davis v. Erickson, 53 Cal. 2d 860, 345 P.2d 943, 3 Cal. Rptr. 567 (1960); Kaufman v. State, 11 Misc. 2d 56, 172 N.Y.S.2d 276 (Ct. Cl. 1958);

7. 136 Vt. 293, 390 A.2d 398 (1978). The change in judicial attitude is at least partially attributable to advances in grooming and maintenance technology, which bear on a ski area operator's ability to alter the mountain face. *Id.* at 300, 390 A.2d at 402.

8. *See infra*, note 39.

ing to persuade courts of the discriminatory character of these statutes.[9] Additionally, plaintiffs have asserted that these statutes impinge an individual's right to due process of the law.[10] Most of the laws attacked have survived the courts' scrutiny and have been found worthy in light of various state and federal equal protection and due process guarantees.[11]

Historical Case Treatment Under the Doctrine of Assumption of the Risk

Early case law regarding liability for skiers injured while attempting to traverse the steep and uneven terrain of snow-covered mountains revealed the belief by courts of that era that skiers assume the risks of those dangers inherent in the sport.[12] In *Wright v. Mt. Mansfield Lift, Inc.*,[13] the Vermont District Court adjudicated a claim by a skier, injured when she collided with a snow covered stump, in favor of the defendant ski area operator.[14] Taking the traditional view that a skier assumes the risk of the sport, the court held that no duty could be imposed on the owner or operator of a ski slope to keep the ski trails level and free of fluctuations in the terrain.[15] Because there was no duty imposed to maintain the slope in any given condition, there was no duty to warn the public against any such variables.[16]

The court in *Wright* based its opinion on the premise that skiing is a sport requiring the ability on the part of the skier to maneuver herself along various conditions of grade, boundaries, obstructions and conditions of the snow.[17] The opinion went on to say that a skier, depending on her particular

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9. *See* Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984); Pizza v. Wolfcreek Ski Dev. Corp., 711 P.2d 671 (Colo. 1985); Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986); Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1986), *appeal denied*, 428 Mich. 864 (1987); Brewer v. Ski-Lift, Inc., 234 Mont. 109, 762 P.2d 226 (1988); Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

10. *See* Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986); Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1986), *appeal denied*, 428 Mich. 864 (1987).

11. *See* Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984); Pizza v. Wolfcreek Ski Dev. Corp., 711 P.2d 671 (Colo. 1985); Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986); Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1986), *appeal denied*, 428 Mich. 864 (1987); Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

12. *See* Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (D. Vt. 1951).

13. 96 F. Supp. 786 (D. Vt. 1951).

14. *Id.* at 787.

15. *Id.* at 791. The court cited Murphy v. Steeplechase Amusement Co. Inc., 250 N.Y. 479, 166 N.E. 173 (1929) for the proposition that "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . .", notwithstanding the fact that the plaintiffs in *Wright* were invitees of the Lift Company, and, as such, the Lift Company owed a duty to the plaintiffs to "advise them of any dangers which reasonable prudence would have foreseen." 96 F. Supp. 786, 791 (D. Vt. 1951).

16. *Wright*, 96 F. Supp. at 791.

17. *Id.* at 790.

experience with the sport, must use her own judgment in determining what sorts of slopes may be managed and that it would be impossible to impute such personal knowledge to a ski area operator.[18] The theory applied, in sum, was that of *volenti non fit injuria*.[19]

Many decisions subsequent to *Wright* harmonized with the doctrine of inherent risks as it pertained to the sport of skiing.[20] However, as grooming technology advanced, and as contributory negligence gave way to comparative negligence theories, the seemingly *per se* rule barring recovery in ski injury suits began to erode.[21]

Cases Lead to Legislative Solutions

In 1971, the Michigan Supreme Court reversed a decision by the court of appeals in that state, reinstating the jury verdict for the plaintiff in *Marietta v. Cliff Ridge Inc.*,[22] who had impaled himself on a sharpened wooden slalom gate.[23] Testimony during the trial revealed that such slalom gates were normally fabricated from a more flexible material than wood, e.g., fiberglass or bamboo.[24] The court held that ski area operators, like any operator of premises, must exercise a standard of reasonable prudence and not merely adhere to those standards currently in vogue in the industry.[25] As an operator of premises, Cliff Ridge also owed a duty to prevent or forewarn of reasonably foreseeable injuries due to hazards on its premises.[26]

In 1978, another downhiller met with unfortunate circumstance when he collided with an unpadded metal pole while skiing through a busy intersection of trails at Mt. Werner in Steamboat, Colorado.[27] In the ensuing litigation, the plaintiff in *Rosen v. LTV Recreation Development, Inc.*[28] alleged that the defendant area operator not only failed to pad the pole, but should have also been more careful in the placement of the pole.[29] The *Rosen* court held that the ski area operator must act as "a prudent person in maintaining

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18. *Id.* at 791.

19. *Id.* The maxim means that if one knowingly and comprehendingly exposes himself to a danger, though not negligent in so doing, one is deemed to have assumed the risk of the danger and is thereby precluded from recovery for an injury resulting from the danger. Black's Law Dictionary 1412 (5th ed. 1979).

20. *See* Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976); Kaufman v. State, 11 Misc. 2d 56, 172 N.Y.S.2d 276 (Ct. Cl. 1958); Greene v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1978).

21. *See* Sunday v. Stratton, 136 Vt. 293, 300, 390 A.2d 398, 402 (1978).

22. 385 Mich. 364, 184 N.W.2d 208 (1971).

23. *Id.*

24. *Id.* at 365, 184 N.W.2d at 209.

25. *Id.* at 366, 184 N.W.2d at 210.

26. *Id.*

27. Rosen v. LTV Recreation Dev. Inc., 569 F.2d 1117 (10th Cir. 1978).

28. 569 F.2d 1117 (10th Cir. 1978).

29. *Id.* at 1123.

the premises in reasonably safe condition."[30] In thus maintaining the premises, the defendant-operator was to consider the "probability or foreseeability if any of any injury to others."[31] The appellate court affirmed the jury decision in favor of the plaintiff based on the defendant's shortcomings in its duties owed to the plaintiff.[32]

That same year in Vermont, the former site of the notable *Wright* decision of 1951 which warned skiers of their nearly *per se* bar against ski injury recovery, *Sunday v. Stratton*[33] opened the doors to redress against the previously favored ski area operators and owners.[34] James Sunday, a novice skier negotiating a beginner's trail, fell when his ski caught underbrush hidden beneath the surface of the snow.[35] The fall resulted in quadriplegia and the jury award of $1,500,000 to Sunday was affirmed.[36] The court emphasized the validity of allegations by the plaintiff that Stratton had failed to groom the run in accordance with industry standards or as specifically represented by the area operator itself in its advertising.[37] The court did not expressly overrule *Wright* but instead found the facts of *Wright* not dispositive of the case at bar.[38] An ensuing barrage of ski safety legislation, meant to curtail a potential flood of litigation, followed shortly after the *Sunday* decision.[39]

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30. *Id.* at 1120.
31. *Id.*
32. *Id.* at 1121.
33. 136 Vt. 293, 390 A.2d 398 (1978).
34. *Id.*
35. *Id.* at 298, 390 A.2d at 401.
36. *Id.* at 310, 390 A.2d at 407.
37. *Id.* at 298, 299, 390 A.2d at 402.
38. *Id.* The *Sunday* court concentrated on two factual issues which it employed to differentiate the situation in *Wright*. First, Sunday, a beginner and inexperienced skier, was negotiating a gentle slope when he injured himself, whereas Wright was attempting a more difficult traverse down an intermediate slope. *Id.* at 298, 390 A.2d at 401. Secondly, the facts in *Sunday* reflected the modern methods of care presently available to ski area operators to eliminate the type of obstacle which appeared to have been the cause of Sunday's fall. *Id.* at 298, 299, 390 A.2d at 402. Based on the evidence of the current grooming capabilities, the court found that the brush, which was found to be the cause of the plaintiff's fall, was not an inherent danger of skiing when such an obstacle was present on a novice trail. *Id.* The advanced grooming methods evident in the *Sunday* scenario were impliedly not available at the time of the *Wright* decision. *See id.*
39. *See* ALASKA STAT. § 09.65.135 (1988); COLO. REV. STAT. §§ 33-44-101 to -111 (1990); CONN. GEN. STAT. ANN. §§ 29-211 to -214 (West Supp. 1990); IDAHO CODE §§ 6-1101 to -1109 (1990); ME. REV. STAT. ANN. tit. 26 § 48 (1988); MASS. GEN. LAWS ANN. ch. 143 §§ 71N-71R (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 1985); MONT. CODE ANN. §§ 23-2-731 to -736 (1989); NEV. REV. STAT. §§ 455A.010 to .190 (1989); N.H. REV. STAT. ANN. §§ 225-A:1 to :26 (1989); N.J. STAT. ANN. §§ 5:13-1 to -11 (West 1988); N.M. STAT. ANN. §§ 24-15-1 to -14 (Supp. 1990); N.Y. LAB. LAW §§ 866-867 (McKinney 1988); N.C. GEN. STAT. §§ 99C-1 to -5 (1985); N.D. CENT. CODE §§ 53-09-01 to -11 (1982); OHIO REV. CODE. §§ 4169.02 to .99 (Anderson Supp. 1989); OR. REV. STAT. §§ 30.970 to .990 (19); PA. CONS. STAT. tit. 42 § 7102(c) (1982); R.I. GEN. LAWS § 41-8-1 to -4 (1984); TENN. CODE ANN. §§ 68-48-101 to -107 (1987); UTAH CODE ANN.

THE NATURE OF LEGISLATIVE ENACTMENTS

There are currently at least twenty-five states in the United States that have passed some form of ski safety legislation.[40] Typical of the purposes stated for enacting the legislation in various states is to protect the benefits bestowed upon the state's economy by the ski industry.[41] Almost every piece of legislation approved by the various states directed toward skiers and ski area operators works in some way to limit the liability of ski areas.[42] Restriction of the liability encountered by the operators is achieved in numerous ways, including: the preservation of the doctrine of assumption of the risk as it relates to the sport of skiing in the face of legislation describing the abolition of contributory negligence laws;[43] modification of the assumption of the risk doctrine to make it applicable only under certain circumstances by defining the risks inherent in the sport[44] definition of the responsibilities of both the skier and the ski area operator.[45] In limiting the liability of the ski

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§§ 78-27-51 to -54 (1987); VT. STAT. ANN. tit. 12 § 1037 (Supp. 1989); WASH. REV. CODE ANN. §§ 70.117.010 to .040 (Supp. 1990); W.VA CODE §§ 20-3A-1 to -8 (1985); WYO. STAT. § 6-9-201 (1983). The majority of state legislators added skier and ski area operator duties and responsibilities, in addition to passenger tramway regulations, after 1978.

40. *See supra* note 39.

41. *See, e.g.*, IDAHO CODE § 6-1101 (1990); N.J. STAT. ANN. § 5:13-1 (West 1988); UTAH CODE ANN. § 78-27-51 (1987); W. VA. CODE § 20-3A-1 (1985). In particular, N.J. STAT. ANN. 5:13-1 provides that the "[l]egislature finds that the sport of skiing is practiced by a large number of citizens of this State and also attracts to this State large numbers of nonresidents, significantly contributing to the economy of this State . . ." *Id.*

42. *See, e.g.*, ALASKA STAT. § 09.65.135 (1988)(entitled "Limitations on claims arising from skiing"); IDAHO CODE § 6-1103(10)(which states that "the *operator shall have no duty* to eliminate, alter, control or lessen the risks inherent in the sport of skiing . . .")(emphasis added); MASS. GEN. LAWS ANN. §71P (West Supp. 1990)(entitled "Actions against ski area operators; limitations"); N.M. STAT. ANN. §24-15-14 (Supp. 1990)(entitled "Limitation of actions; notice of claim.").

43. *See* PA. CONS. STAT. tit. 42 § 7102(c)(1982); VT. STAT. ANN. tit. 12 § 1037 (Supp. 1989).

44. *See* ALASKA STAT. § 09.65.135 (1988); CONN. GEN. STAT. ANN. §§ 29-211 to -214 (West Supp. 1990); IDAHO CODE §§ 6-1101 to -1109 (1990); MASS. GEN. LAWS ANN. ch. 143 §§ 71N-71R (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 1985); MONT. CODE ANN. §§ 23-2-731 to -736 (1989); N.H. REV. STAT. ANN. §§ 225-A:1 to :26 (1989); N.J. STAT. ANN. §§ 5:13-1 to -11 (West 1988); N.M. STAT. ANN. §§ 24-15-1 to -14 (Supp. 1990); N.Y. LAB. LAW §§ 866-867 (McKinney 1988); N.D. CENT. CODE §§ 53-09-01 to -11 (1982); OHIO REV. CODE §§ 4169.02 to .99 (Anderson Supp. 1989); UTAH CODE ANN. §§ 78-27-51 to -54 (1987); W. VA. CODE §§ 20-3A-1 to -8 (1985);

45. *See* ALASKA STAT. § 09.65.135 (1988); COLO. REV. STAT. §§ 33-44-101 to -111 (1990); IDAHO CODE §§ 6-1101 to -1109 (1990); MASS. GEN. LAWS ANN. ch. 143 §§ 71N-71R (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 1985); MONT. CODE ANN. §§ 23-2-731 to -736 (1989); NEV. REV. STAT. §§ 455A.010 to .190 (1989); N.H. REV. STAT. ANN. §§ 225-A:1 to :26 (1989); N.J. STAT. ANN. §§ 5:13-1 to -11 (West 1988); N.M. STAT. ANN. §§ 24-15-1 to -14 (1990); N.C. GEN. STAT. §§ 99C-1 to -5 (1985); N.D. CENT. CODE §§ 53-09-01 to -11 (1982); OHIO REV. CODE §§ 4169.02 to .99 (Anderson Supp. 1989); R.I. GEN. LAWS § 41-8-1 to -4 (1984); TENN. CODE ANN. §§ 68-48-101 to -107 (1987); WASH. REV. CODE ANN. §§ 70.117.010 to .040 (Supp. 1990); W. VA. CODE §§ 20-3A-1 to -8 (1985).

area operators, the states sought to facilitate the difficult and costly task of obtaining insurance for such recreational premises and to keep the expense for the insurance premiums to a minimum, thereby controlling the rise in costs of lift tickets and maintaining the industry as a viable source for added state economy.[46] Considerations of the general health and safety of citizens of a particular state also factor into the legislative purpose behind certain skier statutes.[47] In outlining the expected behavior and conduct of skiers and ski area operators, lawmakers made an attempt to furnish those associated with the sport of skiing with a guide to prevent accidents.[48]

Another commonly noted purpose for promoting ski safety legislation is to avoid the onslaught of frivolous suits.[49] In a sport fraught with the challenge of overcoming the ever-changing and sometimes dangerous face of a slippery winter mountainside, the sizeable jury award in *Stratton* left the public with an open invitation to litigate ski injury causation.[50] To cope with the threat of that voluminous forthcoming litigation, specific duties and responsibilities of skiers, ski area operators, as well as certain prohibitions, laid out a guideline for the wounded skier to help determine whether, in fact, a cause of action actually existed.[51] Bearing these purposes in mind, further examination of the statutes presently detailed in state legislation is explored below.

Specific Legislation

Two states, Pennsylvania and Vermont, adhere to legislation that does no more than codify, in brief, the assumption of the risk doctrine prevalent in the courts at the time of the *Wright* decision, which forced skiers to ac-

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See also Fagen, *supra* note 2, at 43. Mr. Fagen discusses four classifications of legislation designed to govern injury liability for ski accidents; 1) pure assumption of the risk; 2) assumption of the risk combined with lists of each party's responsibilities; 3) assumption of the risk modified by a listing of party responsibilities, with the caveat that negligence of the ski area operator may only be found when a skier's injury is causally related to a breach of one of the enumerated responsibilities; and 4) definition of inherent risks. *Id.* at 42-46.

46. *See* Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 675 n.4 (1985).

47. *See* Colo. Rev. Stat. § 33-44-102 (1990)(the general assembly declared "that it is in the interest of the state of Colorado to establish reasonable safety standards for the operation of ski areas and for the skiers using them."); Me. Rev. Stat. Ann. tit. 26 § 488 (1988)(the legislature "recognized that skiing as a recreational sport . . . may be hazardous to skiers . . . regardless of all feasible safety measures which can be taken.").

48. *See* N.Y. Lab. Law § 866 (McKinney 1988)(providing for "the promulgation of a code of conduct for downhill skiers and ski area operators which will minimize the risk of injury to persons and property engaged in the sport of downhill skiing.").

49. *See* Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 679 (1985).

50. *See* 1977 Vt. Laws 119 (expressly stating the *Sunday* decision as the reason for enactment of the statute).

51. *See, e.g.*, N.M. Stat. Ann. § 24-15-2 (Supp. 1990).

cept the dangers inherent in the sport as a matter of law.[52] Both statutes fall under the state code sections describing the enactment and meaning of comparative negligence rules and appear as an exception to the general rule.[53] Although these states indicate their intent to continue to favor the ski area operators in personal injury suits against them, enactment of such regulations has not changed the state of the law and may not serve to bar recovery for plaintiffs in the event of an accident on the slopes.[54] Because both statutes merely require the sportsman to accept the risks which inhere in the

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52. *See* PA. CONS. STAT. tit. 42 § 7102(c)(1982); VT. STAT. ANN. tit. 12 § 1037 (Supp. 1990). Note that the language of the Vermont statute leaves available to the defendant what appears to be a primary assumption of the risk defense with respect to the plaintiff's participation in sports. *See* Sunday v. Stratton, 136 Vt. 293, 301, 390 A.2d 398, 402 (1978). According to Prosser, assumption of the risk in the primary sense "means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone," with the result that the defendant is relieved of all legal duty to the plaintiff. W. PROSSER, LAW OF TORTS, §68 at 440 (4th ed. 1971). Since the defendant owes no duty to the plaintiff, he cannot breach such a duty, and negligence may not, therefore, be charged. *Id.*

Secondary assumption of the risk requires that the plaintiff voluntarily enter into a relation with the defendant, with the knowledge that the defendant will not protect him from the risk. *Id.* In other words, there exists a breach of duty by the defendant and the issue becomes whether or not the plaintiff acted reasonably in accepting the risk caused by the breach. *Id.* The liability based on secondary assumption of the risk, may be viewed as merely a form of comparative negligence. *Id.*

The Vermont statute's language relieves the defendants of any duty with respect to "inherent" risks of the sport of skiing. VT. STAT. ANN. tit. 12 § 1037 (Supp. 1990). Inherent risks include those which may be considered as essential, or obvious and necessary to the sport. *See* THE AMERICAN HERITAGE DICTIONARY 358 (2d ed. 1987). The import of the law, then, is to totally disallow claims by a plaintiff when an injury occurs due to an encounter with an inherent danger, which, by definition, cannot be controlled by the defendant. *See* Sunday v. Stratton, 136 Vt. 293, 301, 390 A.2d 398, 402.

However, by use of the word "inherent" in the statute, lawmakers have left open the possibility that liability on behalf of the defendant may be found when the plaintiff can show that he acted reasonably in accepting the risk, or that the plaintiff did not know or comprehend that the defendant would not protect the plaintiff against those risks. *See id.* at 302, 390 A.2d at 403.

53. PA. CONS. STAT. tit. 42 § 7102(c)(1982), falls under § 7102 entitled comparative negligence; VT. STAT. ANN. tit. 12 § 1037 (Supp. 1990), follows directly after §1036 entitled comparative negligence and is enacted "notwithstanding the provisions of § 1036."

54. *See* 1977 VT. LAWS 119 (stating that the purpose of the enactment of § 1037 was to affirm the principles of law in Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (D. Vt. 1951), which established that the inherent dangers of skiing are to be accepted by the skier as a matter of law). Note, however, the continuing applicability of the language used by the *Stratton* court, which argued that:

> every fall [is not] 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 evidence indicates existence or assignment of duty and its breach, that risk is not one "assumed" by the plaintiff. What he then "assumes" is not the risk of injury, but the use of reasonable care on the part of the defendant.

Sunday v. Stratton, 136 Vt. 293, 302, 390 A.2d 398, 403 (1978).

sport, controversy is likely to arise in future litigation regarding what sorts of conditions constitute "inherent risks."

Another class of statutes overcomes some of the difficulties of the pure assumption of the risk theory and attempts to maintain a limited assumption of the risk doctrine by defining those risks which inhere in the sport.[55] The enumerated list of risks usually includes, but is not limited, to changing weather conditions, variations in steepness or terrain, snow or ice conditions, irregularity in surface conditions (i.e., bare spots, undergrowth and rocks), collisions with towers, structures and other obstacles and collisions with other skiers.[56] Arguably, if the list is relatively comprehensive, the operator may continue to avoid liability despite a gross oversight in maintenance of the mountain.[57] Such an oversight, which would normally amount to a negligent act, could still be adjudged one of the above-mentioned inherent risks and could preclude recovery on the part of the injured plaintiff.[58]

In addition to describing what risks are considered to inhere in the sport, some states have promulgated ski safety laws which define the duties of skiers, duties of ski area operators, or both.[59] The aim of these statutes seems to be to establish a code of conduct for skiers and ski area operators to minimize the risk of injury to those participating in the sport and to promote safety in the downhill ski industry.[60] The responsibilities of ski area operators typically included in these sections encompass the posting of signs and the marking of boundaries.[61]

In the *Stratton* court's view, evidence that the plaintiff, a novice skier, lacked the requisite knowledge of potential risks to be assumed, in conjunction with the ski area operator's advertisements boasting of "meticulous grooming" techniques, created a duty on the part of the ski area operator. *Id.* at 299, 390 A.2d at 401. Once such a duty had been established by the evidence, the defense of assumption of the risk was thereby negated. *Id.*

55. *See, e.g.*, UTAH CODE ANN. §§ 78-27-51 to -54 (1987).

56. *See, e.g.*, IDAHO CODE §§ 6-1101 to -1109 (1990).

57. *See* Brewer v. Ski-Lift, Inc., 234 Mont. 109, 762 P.2d 226 (1988), discussed *infra* notes 112-134 and accompanying text.

58. *See id.* The *Brewer* court also discussed, in addition to negligence, the fact that even intentional acts by a ski area operator, leading to an injury to a plaintiff could escape scrutiny if the act or its result could be categorized as an inherent risk. *Id.* at 111, 114, 762 P.2d at 228, 230. *But see* Kelleher v. Big Sky of Montana, 642 F. Supp. 1128, 1130 (D. Mont. 1986)(arguing that operator negligence is not included in the risks defined as inherent in the sport of skiing pursuant to Montana statutes).

59. *See* MONT. CODE ANN. §§ 23-2-731 to -736 (1989); N.Y. LAB. LAW §§ 866-867 (McKinney 1988); W. VA. CODE §§ 20-3A-1 to -8 (1985); Ohio lists the duties of the operator and skier, but fails to include the usual listing of inherent risks. OHIO REV. CODE §§ 4169.02 to .99 (Anderson Supp. 1989).

60. *See* N.Y. LAB. LAW §§ 866-867 (McKinney 1988).

61. *See, e.g.*, COLO. REV. STAT. §§ 33-44-101 to -111 (1990). More specifically, signs may be required to explain instructions or prohibitions for skiers as they board and ride lifts, to direct skiers to various levels of difficulty of runs, to indicate ongoing maintenance of trails or to indicate trails which are closed. *Id.* Designation of man-made structures on the slopes, such as hydrants or water pipes which are not readily visible to skiers from a preselected distance may

The skier usually bears the responsibility for knowing the range of his ability to negotiate any given trail and to ski within that range.[62] He or she also has the duty to maintain control of his or her speed and course and to avoid collision with objects and other skiers.[63] Statutes listing the responsibilities of operators and skiers reflect the intention on the part of the legislature to affirmatively assign duties to both parties.[64] When such duties expressly exist, a breach of duty may result in an action for negligence.[65]

Most ski safety legislation combines the above forms of law and recites the duties of both skiers and ski area operators, the risk elements considered inherent in the sport and further defines that a violation of the duties of the operator, if causally related to an injury sustained by the skier, constitutes negligence.[66] Conversely, a violation of duty purported to belong to the skier will preclude recovery against the ski area operator.[67] A few other jurisdictions work on the same basic principle but fail to include a definition of the inherent risks of the sport.[68]

Even the most comprehensive of statutes, however, cannot anticipate every situation that may arise in a particular ski resort. Because the list of duties cannot be indefinite, the possibility exists that negligence on the part of the operator may cause an accident or injury to a skier and yet no recovery is allowed.[69] Moreover, the duties allotted to the skier are less particular

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also be required. *Id.* Statutes may further mandate that such structures be covered with shock-absorbent material sufficient to lessen injuries in the event that a skier collides with the obstruction. *Id.*

In the future, some states may require even more care on the part of the ski area. For example, there is currently a bill under consideration in New Jersey that would mandate, among other things, that the area offer helmets for rent to young skiers, free orientation sessions to all first-time skiers and that the operator maintain an area on the ski mountain for novice skiers. *See* A. 964, 204th N.J. Leg., 2d Sess., (1991). This bill has passed through the New Jersey Senate and is awaiting a vote in the Assembly's Health and Human Services Committee. New York Times, January 13, 1991, § 12, at 1, col 1. Opponents of the bill claim that if the bill passes, ski centers will have difficulty obtaining insurance. *Id.*

62. *See, e.g.*, N.J. STAT. ANN. §§ 5:13-4 to -5 (West 1988).

63. *Id.*

64. *See, e.g.*, COLO. REV. STAT. § 33-44-102.

65. *See supra* notes 52, 54.

66. *See* ALASKA STAT. § 09.65.135 (1988); IDAHO CODE §§ 6-1101 to -1109 (1990); MASS. GEN. LAWS ANN. ch. 143 §§ 71N-71R (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 1985); N.H. REV. STAT. ANN. §§ 225-A:1 to :26 (1989); N.J. STAT. ANN. §§ 5:13-1 to (West 1988); N.M. STAT. ANN. §§ 24-15-1 to -14 (Supp. 1990); N.C. GEN. STAT. §§ 99C-1 to -5 (1985); N.D. CENT. CODE §§ 53-09-01 to -11 (1982); W. VA. CODE §§ 20-3A-1 to -8 (1985);

67. *See* N.J. STAT. ANN. § 5:13-6 (West 1988).

68. COLO. REV. STAT. §§ 33-44-101 to -111 (1990); TENN. CODE ANN. §§ 68-48-101 to -107 (1987).

69. *Compare* N.C. GEN. STAT. § 9C-2 (1985) (listing seven general duties of ski area operators) *with* COLO. REV. STAT. §§ 33-44-106 to -108 (1990)(listing numerous specific duties of operators including type and color of signs required to be posted).

and more subjective than those delegated to the operator and leave open for question whether in fact a violation has occurred.[70]

LITIGATION AFTER LEGISLATION

Although the ski safety laws were enacted in various states, injured plaintiffs continued to seek redress against the ski area operators.[71] Because of the general trend to limit ski area operator liability by statute, injured skiers, in pursuing their recovery, began to attack the constitutionality of ski safety statutes.[72] Most of these assaults have been unsuccessful.[73]

In 1984, Stephen Schafer failed in his attempt to persuade the United States District Court for the District of Colorado that the Colorado Ski Safety Act of 1979 violated the equal protection guarantees of the fourteenth amendment of the United States Constitution and certain other guarantees as provided for in the Colorado Constitution.[74] Schafer brought an action against the Aspen Skiing Corporation in March of 1983 for injuries he sustained in a skiing accident in February of 1980.[75] Schafer appealed the dismissal of the action by the trial court which barred recovery based on the applicable Colorado statute of limitations governing ski injuries.[76] The plaintiff argued that Colo. Rev. Stat. § 33-44-111, which limits actions brought against a ski area operator to those brought within three years after the claim for relief arises, violated federal constitutional rights to equal protection as well as Colorado constitutional provisions governing special legislation, grants of special privileges or immunities and access to the courts.[77]

In determining whether the statute violated the equal protection clause, the court looked to the question of whether there was a rational relationship between the classification and some legitimate purpose in enacting the legislation.[78] The court relied on the proposition cited in *Schweiker v. Wilson*,[79]

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70. *Compare* MICH. COMP. LAWS ANN. §§ 408.326(a)(requiring, of operators, certain equipment, signs, etc. to be located in a particular spot) *with* § 408.342 (requiring that the skier, among other things, "maintain reasonable control", and "stay clear" of various objects).

71. *See supra* notes 9 and 10 and accompanying text.

72. *Id.*

73. *See supra* note 11 and accompanying text.

74. Schafer v. Aspen Skiing Corp., 742 F.2d 580 (10th Cir. 1984). U.S. CONST. amend. XIV § 1 provides in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id. See also* COLO. CONST. art. II, §§ 6, 11, art. V, § 25, prohibiting the enactment of special legislation, the grant of special privileges or immunities and giving individuals a right of access to the courts. *Id.*

75. *Schafer*, 742 F.2d at 581.

76. *Id.* Claims for relief based on common law negligence are normally subject to a six-year limitation in Colorado. *Id. See also* COLO. REV. STAT. § 12-80-110 (1990).

77. *See* U.S. CONST. amend. XIV; COLO. CONST. art. II, §§ 6, 11; art. V, § 25.

78. *Schafer*, 742 F.2d at 583 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); New Orleans v. Dukes, 427 U.S. 297 (1976).

During the late 1960's, equal protection questions were made subject to a "two-tier" approach analysis. *See* Gunther, *Forward; In Search of Evolving Doctrine on a Changing Court:*

that the task inherent in the legislature of drawing distinctions between classes for the purposes of enacting laws, cannot feasibly be carried out with perfection.[80] In deference to the law-making branch, the court concluded the opinion in favor of the defendant-operator, stating that the ski industry makes a substantial contribution to the state's economy, that the state has a legitimate interest in its economic well-being and therefore, the statute section 33-44-111 rationally related to the government's objectives.[81]

In 1985, another Colorado case challenged the constitutionality of the provision in Colo. Rev. Stat. § 33-44-109(2) which presumes that, unless shown to the contrary, the responsibility for collisions by skiers belongs solely to the skier.[82] In *Pizza v. Wolf Creek Development Corp.*,[83] the plain-

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A Model for Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). In addition to the traditional "means" analysis, employed until that time, which required merely that the classification in the statute reasonably relate to the legislative purpose, a more intensive review evolved which mandated looking to both the means and the ends. *Id.* at 20. The Warren Court deemed this "strict scrutiny" review appropriate for resolution in cases involving a "suspect" classification or an impact on "fundamental" rights. *Id.* at 8. The former usually include distinctions based on race or gender, while the latter involve such interests as voting, criminal appeals, and the right to interstate travel. *Id.* at 8-10.

The Burger Court decisions have indicated a tendency toward relaxation of the rigid two-tier structure. *See* Craig v. Boren, 429 U.S. 190 (1976)(establishing an intermediate level of review for gender classification). The decisions of the Burger Court have further expanded the spectrum of review within the tiers themselves. Gunther, *supra*, at 24. In particular, it has been suggested that the traditionally deferential scope of review for the "rationality" tier has sporadically required heightened criteria in meeting the test for rationality. *Id.* Rather than the legislative classification merely bearing some relation to a state objective, the classification must substantially further that objective. *Id.* at 20. Moreover, in McGinnis v. Royster, 410 U.S. 763 (1973), Justice Powell expressed the Court's dissatisfaction with the old standard in McGowan v. Maryland, 366 U.S. 420 (1961), of upholding statutory discrimination when any state of facts could be conceived for its justification, indicating that the state purpose had to be "articulated." *Id.*

79. 450 U.S. 221, 234 (1981).

80. *Id.*

81. Schafer v. Aspen Skiing Corp, 742 F.2d 580, 583, 584 (10th Cir. 1984). The court cited Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (1982), in a case upholding another statute which was claimed to have violated provisions of the Colorado Constitution, for the proposition that "since no fundamental right or suspect class, such as race, sex or national origin, is involved here, our scrutiny of the statute need go no further than determining whether the statutory classification is reasonably related to a legitimate state objective." *Id.* Other than this reference in its analysis, the court did not differentiate between the federal and state constitutional provisions. *See Schafer*, at 584.

82. COLO. REV. STAT. § 33-44-109(2)(1990). The statute provides:

> 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. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him. *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-mad 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.

tiff testified at trial that while skiing down a trail he became airborne due to a variation in terrain, and, upon his fall, sustained severe injuries to the spine.[84] Pizza sued Wolf Creek, alleging negligent failure to warn of dangerous conditions on the trail and failure to eliminate the condition.[85] The jury found in favor of Wolf Creek.[86]

The plaintiff first attacked the verdict by asserting that certain words and phrases in the statute were unconstitutionally vague under the due process clause of the fourteenth amendment.[87] The court then examined the factors to consider in resolving the level of scrutiny to be applied when adjudicating a challenge to a statute on the grounds of vagueness.[88] The justices determined that the presumption at hand may be considered merely an economic regulation and as such, is a "civil statute which regulates constitutionally unprotected conduct and which has no effect on speech or expression."[89] The court went on to state that the words and phrases in question here were readily comprehensible terms which did not require special definition for the purpose of Colo. Rev. Stat. section 33-44-109.[90]

The court next proceeded to explain that a natural and rational relationship between the fact presumed (the skier is solely responsible) and the fact to be proven (the collision) existed and therefore no violation of due process occurred.[91] Because the legislature had assigned responsibilities to both the skier and the operator and because the sport is inherently risky, the court concluded that the evidentiary presumption contained in section 33-44-109(2) was not unconstitutional.[92]

Finally, the court touched on the challenge to the statute in relation to the equal protection clause of the fourteenth amendment.[93] More particularly, Pizza argued that the presumption holding the skier responsible for

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Id. (emphasis added).

83. 711 P.2d 671 (Colo. 1985).

84. *Id.* at 674.

85. *Id.*

86. *Id.*

87. *Id.* The U.S. CONST. amend. XIV provides, in pertinent part, that "No State . . . shall deprive any person of life, liberty or property, without due process of law." *Id.* The plaintiff specifically claimed that the word "responsibility," and the phrases "natural object" and "unless shown to the contrary by a preponderance of the evidence," were unconstitutionally vague. Pizza v. Wolfcreek Dev. Corp, 711 P.2d 671 (1985).

88. *Pizza*, 711 P.2d 671, 675. According to the court, the strictness of the vagueness test depends on whether the statute is an economic regulation, imposes penalties, contains a scienter requirement and may chill the exercise of protected rights. *Id.* These factors were borrowed from the criminal case, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)(citing High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984)).

89. Pizza v. Wolfcreek Dev. Corp., 711 P.2d 671, 676 (Colo. 1985).

90. *Id.* at 676-78.

91. *Id.* at 678.

92. *Id.* at 679.

93. *Id.*

collisions arbitrarily and unreasonably treated skiers differently than other individuals.[94] The court reiterated the reasoning in *Schafer* and stated that since the statute involves neither a suspect class nor a fundamental right, the proper standard of review is the rational relationship test.[95] While admitting that certain classes may be treated differently without offending constitutional guarantees, the court stated that a statute differentiating between classes could only be invalidated if no facts justify the different treatment.[96] According to the court, the enactment of the statute at issue served the rational purpose of protecting the ski industry by reducing frivolous lawsuits and limiting the cost of liability insurance incurred as a result of such suits.[97] The court thus held that the presumption in section 33-44-109(2) had a rational basis and was reasonably related to the state's interest in protecting an area of the state's economy.[98]

Montana's ski legislation withstood challenges to the constitutionality of section 23-2-736(1) of the Montana Code, in a case decided in 1986.[99] In *Kelleher v. Big Sky of Montana*,[100] David Kelleher argued that the above-cited statute operated unfairly as a complete bar to recovery for his injuries sustained when he was caught in an avalanche in 1982 on the premises of the defendant's ski resort.[101] The plaintiff claimed that the bar to recovery violated his right of access to the courts as provided by the Montana Constitution as well as his right to equal protection as guaranteed by the United States Constitution.[102] The court quickly disposed of the former issue by simply stating that the statute neither precludes recovery against the ski area operator nor limits the amount of such recovery.[103]

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94. *Id.*

95. *Id.*

96. *Id.* (citing Bushnell v. Sapp, 194 Colo. 273, 280, 571 P.2d 1100, 1105 (1977)).

97. Pizza v. Wolf Creek Dev. Corp., 711 P.2d 671, 679 (Colo. 1985). *See also* Nebbia v. New York, 291 U.S. 502 (1934)(stating the general rule that the use of property and the making of contracts should be free from government interference). There exists, however, an admitted legislative power to correct existing economic ills by the appropriate regulation of business. *Pizza*, 711 P.2d at 679.

98. *Pizza*, 711 P.2d at 679.

99. Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986). The Montana Code provided in part, that "a skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participation in the sport of skiing by virtue of his participation." MONT. CODE ANN. § 23-2-736(1) (1988) (amended 1989).

100. 642 F. Supp. 1128 (D. Mont. 1986).

101. *Id.* at 1129.

102. *Id.* MONT. CONST. art. II, § 16 provides in part: "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." *See also* U.S. CONST. amend. XIV.

103. Kelleher v. Big Sky of Montana, 642 F. Supp. 1128, 1129 (D. Mont. 1986). The court came to this conclusion based on a comparison to two cases cited by the plaintiff in support of his case, Pfost v. State of Montana, 219 Mont. 206, 713 P.2d 495 (1985); White v. State of Montana, 203 Mont. 363, 661 P.2d 1272 (1983).

As to the equal protection issue, the plaintiff argued that the statute discriminated in favor of the ski area operators, and, since the right to bring an action for personal injury is a fundamental right in the state of Montana, the violation of the right must force the statute to undergo a strict scrutiny review.[104] The court opined that, because the statute challenged here did not limit the amount of damages recoverable in an action against an operator nor the ability to bring the suit, no fundamental right had been abridged.[105] The court then proceeded to apply the rational basis test and concluded that sections 23-2-731 to -37 of the code were reasonably related to the legitimate state objective of providing continued economic vitality.[106]

Similarly, the court of appeals of Michigan used the opportunity presented in *Grieb v. Alpine Valley Ski Area, Inc.*,[107] to find that Michigan's skier statutes comport with equal protection and due process clauses.[108] The *Grieb* court immediately stepped into a discussion of the rational relationship test and the inquiry of whether any state of facts could afford support for the Michigan statute at issue.[109] Almost as quickly, the court identified the promotion of safety and the limitation of ski area operators' liability as legitimate state interests.[110] The same arguments relating to reduction in litigation and economic stabilization of the ski industry were also used to prevail over the due process challenge.[111]

In 1988, however, the Supreme Court of Montana held that portions of that state's "skier responsibility" statutes violated equal protection guarantees.[112] In *Brewer v. Ski-Lift, Inc.*,[113] the plaintiff appealed from a grant of summary judgment in favor of the defendant.[114] The plaintiff originally brought the action to recover damages he sustained when he collided with a tree stump which he contended was turned upside down, with the roots facing upward.[115] The plaintiff further alleged that the stump was located in a dangerous spot along the trail, and that proper maintenance would have eliminated such a hazard.[116] The district court noted that, according to the statute, a skier may not recover from a ski area operator if the skier sustained injuries as a result of a "risk inherent in the sport of skiing."[117] Upon

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104. *Kelleher*, 642 F. Supp. at 1130.
105. *Id.*
106. *Id.* at 1131.
107. 155 Mich. App. 484, 400 N.W.2d 653 (1986), *appeal denied*, 428 Mich. 864 (1987).
108. *Id.* at 484, 400 N.W.2d at 654. The plaintiff, Michelle Grieb, was injured while skiing when another skier struck her. *Id.*
109. *Id.* at 488, 400 N.W. at 655.
110. *Id.*
111. *Id.* at 489, 400 N.W.2d at 656.
112. Brewer v. Ski-Lift, Inc., 234 Mont. 109, 762 P.2d 226 (1988).
113. 234 Mont. 109, 762 P.2d 226 (1988).
114. *Id.*
115. *Id.* at 110, 762 P.2d at 227.
116. *Id.*
117. *Id.*

examination of the facts and the statute, the district court granted summary judgment in favor of the defendant.[118]

Brewer contended that the skier safety statutes conflicted with art. II, section 16 of the Montana Constitution which guarantees the right to full legal redress.[119] He argued that because the statutes shield the ski area operator from any liability, regardless of whether the operator was negligent in its actions, an injured skier has no course for recovery.[120] Brewer further explained that such a denial of full legal redress abridged his right to equal protection.[121] The point of Brewer's argument, couched in terms of equal protection, was that the skier statutes classified and treated skiers differently than others who engage in equally dangerous sports by requiring skiers alone to bear the full responsibility for their injuries.[122] Brewer also asserted that the ski area operators received different treatment than other operators of recreational areas due to the wording of the statutes.[123]

The Montana Supreme Court's analysis began with the presumption that the statutes, as enacted, were constitutional.[124] In examining other case law debating the constitutionality of similar statutes in regard to equal protection issues, the court declared that if a class distinction is made by the state, the law permitting the distinction must fail unless the law rationally furthers a legitimate state purpose.[125]

The court found the purposes behind the statute legitimate in this case and deemed the legislation proper for state involvement.[126] The court, however, found difficulty with the wording of the regulations describing the skier's duties.[127] The court interpreted these sections to mean that a skier could not seek legal redress against a ski area operator, even if the injury

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118. *Id.* at 110, 762 P.2d at 227. The section of the Montana Code in question provided that inherent risks of skiing include collisions with objects while skiing. MONT. CODE ANN. § 23-2-736 (1988) (amended 1989).

119. Brewer v. Ski-Lift, Inc., 234 Mont. 109, 111, 762 P.2d 226, 228 (1988).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id. See also* Goodover v. Dep't. of Admin., 201 Mont. 92, 95-96, 651 P.2d 1005, 1007 (1982). The court noted the accepted philosophy of Professor Lawrence Tribe, which required that the basis for treating classifications of persons differently must be reasonable in light of the purpose as intended by the legislature. *Brewer*, 234 Mont. at 112, 762 P.2d at 229.

125. *Brewer*, 234 Mont. at 113, 762 P.2d at 229 (citing Zobel v. Williams, 457 U.S. 55 (1982)(noting the irrational distinction between certain state residents affecting which individuals receive certain payments of monies); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)(distinguishing between state residents allowed a tax exemption for having served in the Vietnam War, based on the length of their state citizenship)).

126. Brewer v. Ski-Lift, Inc., 234 Mont. 109, 113, 762 P.2d 226, 229 (1988).

127. *Id.* The portions troublesome to the court are as follows:

> Section 23-2-736. Skier's assumption of responsibility - duties. (1) A skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participation in the sport of skiing by virtue of his participation . . . .

claimed is a result of the negligent or tortious actions of the operator.[128] In explaining that the statutes fail the rationality test discussed previously, the majority found that portions of the statutes were "needlessly broad and clearly go far beyond the stated purposes of the statutes."[129] According to the court, the legislation did not adequately explain a reason which would require that a skier assume all risks and responsibilities for his injuries and that the statutes, as written, neglected to assign any responsibility for collisions to the operator.[130] Hence, skier responsibility statutes conflicted with the state's comparative negligence laws.[131]

Attacks on a skier responsibility statute failed once more when, in February of 1990, the Supreme Court of Idaho concluded that Idaho's skier safety legislation did not violate the equal protection clause of either the United States Constitution or the equal protection clause of the Idaho Constitution.[132] In *Northcutt v. Sun Valley Co.*, the plaintiff sustained severe injures after colliding with another skier at the intersection of several ski runs and striking a signpost located at the merge of the runs.[133] The plaintiff alleged that his injuries were caused by the defendant's negligence in the placement and rigid construction of the sign post.[134] After losing his claims at the trial court level, Northcutt appealed to the Idaho Supreme Court, where one of the issues raised on appeal questioned the constitutionality of the skier safety act (the Act).[135]

The justices recognized that the Act, while substantially limiting the liability of ski area operators, imposed liability on the operator for some acts.[136] The *Northcutt* court described three possible standards of review for

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(2) [T]he responsibility for collisions with a person or object while skiing is the responsibility of the person or persons and not the responsibility of the ski area operator.

Section 23-2-737. Effect of comparative negligence. Notwithstanding any comparative negligence law in this state a person is barred from recovery from a ski area operator for loss or damage resulting from any risk inherent in the sport of skiing as described in § 23-2-736.

MONT. CODE ANN. §§ 23-2-736 to 737 (1988) (amended 1989).

128. Brewer v. Ski-Lift, Inc., 234 Mont. 109, 114, 762 P.2d 226, 230 (1988).

129. *Id.*

130. *Id.*

131. *Id.* The Montana legislature has since revised its skier responsibility laws. *See* MONT. CODE ANN. § 23-2-736 (1989). The provisions burdening the skier with all legal responsibility for injuries due to participation in skiing have been replaced with specific affirmative duties for which the skier is responsible. *Id.* Further, § 23-2-737, excepting ski injury claims from use of the state's comparative negligence laws, has been repealed. MONT. CODE ANN. § 23-2-737, *repealed by* Sec. 5, ch. 429, L. 1989.

132. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

133. *Id.* at 327, 787 P.2d at 1160.

134. *Id.*

135. *Id.* at 356, 787 P.2d at 1164. *See also* IDAHO CODE §§ 6-1101 to -1109 (1990).

136. *Northcutt*, 117 Idaho at 357, 787 P.2d at 1165. Specifically, failure to follow duties listed in IDAHO CODE §§ 6-1103 and 6-1104 created liability on the part of the operator. *Id.* at

statutes which have been attacked on equal protection grounds.[137] A classification based on a "suspect" classification or which involves a "fundamental right" is reviewed under "strict scrutiny" test.[138] A "means-focus" test is employed where the discriminatory character of a challenged statute indicates a lack of relationship between the class and the legislative purpose.[139] The skier statute, however, fell under the third standard of review, reserved for cases other than the types listed above, or that of the "rational basis" test.[140]

The plaintiffs argued that the "strict scrutiny" test should be applied since, pursuant to the Idaho Constitution, individuals are guaranteed a speedy remedy for their injuries and such a guarantee should be considered a "fundamental right."[141] The court flatly rejected the argument by offering prior case law stating that article I, section 18 of the state constitution allowed for legislative modification of common law actions.[142] The discussion of the equal protection issue resulted in a declaration by the court that the legislative purpose of protecting the ski industry's contributions to Idaho's economy bore a rational relationship to the ski safety act as enacted.[143]

CONCLUSION

While the recent decisions of several courts reveal the intent of the judiciary to support the lawmakers' commitment to the protection of the ski industry by upholding the validity of legislature limiting ski area operator liability, the *Brewer* decision proves that some ski statutes may be prone to successful attack. The unusual outcome in *Brewer*, however, is as likely attributable to the particular fact situation as it is to the unconstitutionality of the statutes as found by the Montana Supreme Court. Unlike other cases challenging the constitutionality of "ski safety" statutes, the facts in *Brewer* involved what most closely resembled an affirmative negligent action on the part of the operator. The location of the tree stump in *Brewer* betrayed the knowledge, imputed to the operator, that the stump had been removed from its natural position and then placed in the spot where it became the alleged source of injury. This situation differs vastly from the scenario where the operator may or may not know of potential natural hazards (i.e., bare spots,

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356, 787 P.2d at 1164. IDAHO CODE § 6-1103 provides: "[t]hat except for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho code, the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code;" IDAHO CODE § 6-1103 (1990).

137. Northcutt v. Sun Valley Co., 117 Idaho 351, 357, 787 P.2d 1159, 1165 (1990).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (citing Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976)).

143. *Northcutt*, 117 Idaho at 358, 787 P.2d at 1166.

icy patches, avalanches), which often appear suddenly, due to rapidly changing weather conditions or heavy usage of the trail by skiers, and which are often beyond the immediate knowledge and control of the operator.[144] The factual circumstances in *Brewer* also differ from those cases where the operator has erected or placed man-made structures on the mountain which are necessary to the function of the ski area (i.e., lift towers, snow-making equipment, trail signs), or where the operator has made certain alterations to the mountain face (i.e., access roads, snowcat trails). Conditions so created by the operator seem to be looked at by the courts with an eye toward balancing the utility of the condition against the risk that it tenders. The factual situation, although not emphasized in the court's discussion, undoubtedly influenced the court in reaching a result favorable to Brewer and may account for the difference in the outcomes by separate courts interpreting the same statute.

In terms of the challenge to the constitutionality of the statutes themselves, the *Brewer* Court found that a fair reading of certain sections of the Montana Code flatly prohibited the opportunity for the plaintiff to recover from the ski area operator, even when the operator was clearly negligent. In reaching this finding, the court determined that it was unconstitutional to word skier statutes in such a way as to 1) leave the skier to assume all legal responsibility for events resulting from his participation in the sport, 2) hold the skier solely responsible for any and all collisions with objects and with other skiers, and 3) essentially eliminate the otherwise statewide comparative negligence rules as they might pertain to the sport of skiing.

While no other state statutes, as currently written, contain all three of the above provisions, certain states maintain on their books one or two of the provisions found unconstitutional by the Montana Supreme Court, and might therefore remain vulnerable to a challenge. A statute section similar to the first provision, burdening the skier with all legal responsibility for injuries, is likely to be struck down in many courts because of its uncompromising nature.[145] The provision is clearly overbroad because it would protect the ski area operator from liability for intentional torts as well as negligent actions. Statutes containing the same provision, yet additionally and specifically allowing recovery by a plaintiff for the defendant's breach of a responsibility noted elsewhere in the statute, may fair better.[146]

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144. *Compare* Brewer, v. Ski-Lift, Inc. 234 Mont. 109, 762 P.2d 226 (1988)(injury due to improper and dangerous relocation of stump by operator) *with* Pizza v. Wolfcreek Ski Dev. Corp., 711 P.2d 671 (Colo. 1985)(fall and injury due to man-made design of slope) *and* Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1987)(injury due to collision with another skier) *and* Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986)(injury from avalanche).

145. *See, e.g.*, OHIO REV. CODE § 4169.02 (Anderson Supp. 1989); W. VA. CODE § 20-3A-1 (1985).

146. *See, e.g.*, IDAHO CODE §§ 6-1106, -1107 (1990)(noting the operator's potential liability for failure to comply with §§ 6-1103, -1104); N.D. CENT. CODE §§ 53-09-06, -07, (1982)(noting

The less constitutionally questionable and more common approach assigns responsibilities to both skiers and ski area operators. While serving as a guide for all, it is clear that the scope of such responsibilities, as described in the laws, bears directly on the ability of the plaintiff to recover. An exiguous description of duties stands to leave both parties, and, potentially a jury, perplexed on the issue of liability. Another approach is to ensure that a plaintiff's responsibility is tied strictly to the inherent risks of the sport.[147] Definitive apportionment of these sorts of responsibilities and a description of the risks inherent in the sport facilitate the courts' decision-making functions during ski injury litigation as well as the decision by a potential injured plaintiff to initiate a suit against an operator. The specificity of some of the duties, especially those assigned to the operators, present a lessened need for determination of disputed facts by the courts, because the responsibilities and the breach thereof are expressly stated.

The section of the second provision holding skiers responsible for collisions with objects should likewise fail.[148] Inclusion of collisions as inherent risks could bar almost any injured skier from litigation with the operator. Practically speaking, most injuries sustained in the course of the sport involve some sort of collision, if only with the ground. Under a a provision of this kind, an operator could intentionally construct an obstacle on a trail and escape liability from suit by subsequently injured plaintiffs. More realistic, but as potentially disastrous for a plaintiff, would be the case where an employee of the operator mistakenly leaves a piece of maintenance equipment on a trail in a location not readily visible from above.

Similar difficulties could be encountered with the inclusion of various natural characteristics of the mountainside as inherent risks. Any natural conditions, e.g., trees or rocks, which occur on a given run and are not visible from above, present a hazard for the skier, and potential for a collision, especially when the hazard is present on a beginner's trail. Whether the statute expressly terms collision responsibility as belonging to the skier or deems collisions an inherent risk for which a skier is automatically responsible, the defendant may avoid liability per se under such laws. Elimination of the collision responsibility sections and the retention of the requirement that the plaintiff prove, by a preponderance of the evidence (as in normal negligence actions), that the defendant bore the responsibility of the impact, would cure the defect in the statute which otherwise precludes a plaintiff

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the operator's potential liability for failure to comply with §§ 53-09-03, -04). *See also* Northcutt v. Sun Valley Co., 117 Idaho 351, 357, 787 P.2d 1159, 1165 (1990)(court recognizing that the Code imposed liability on the operator for some acts).

147. *See* MONT. CODE ANN. § 23-2-736 (1989).

148. *See, e.g.*, COLO. REV. STAT. §§ 33-44-109 (1990); IDAHO CODE §§ 6-1106 (1990); MICH. COMP. LAWS ANN. §§ 408.342 (West 1985); N.M. STAT. ANN. § 24-15-10 (Supp. 1990); N.D. CENT CODE § 53-09-06 (1982); OHIO REV. CODE. §§ 4169.08 (Anderson Supp. 1989); TENN. CODE ANN. § 68-48-103 (1987); UTAH CODE ANN. §§ 78-27-52 (1987); W. VA. CODE §§ 20-3A-5 (1985).

from pursuing a perfectly valid cause of action.[149] Many states overcome the overreaching effects of collision responsibility statutes by providing a caveat which releases the skier from sole responsibility when the operator is found to have been negligent.

The third provision, precluding the use of comparative negligence theories in suits against ski area operators and substituting the assumption of the risk doctrine may stand in other jurisdictions,[150] since it is possible for the assumption of the risk doctrine to apply in a limited fashion only to those risks which inhere in the sport.[151] As long as the assumption of the risk is associated with the actual inherent risks of the sport, this provision should survive. If the statutory list of inherent risks is unrestricted, however, this type of provision must also fail.

When taken together, the skier responsibility sections of the Montana Code formed a blanket rejection of the claims in *Brewer*, when, based on the facts, the claim should have been allowed. However, taken separately or in parts, the provisions might have withstood the constitutional challenge by creating ambiguities within the Code that would have rightly been subjected to the court's interpretations or to examination of the evidence by the trier-of-fact. Statutes enacted in other states which effectively obliterate a skier's right to recover against a ski area operator are certain to be tested when the facts indicate that the actions of the operator resemble negligence.

In order to clarify liability questions regarding ski injuries, the following model statute is proposed in regard to responsibilities of the skier:

> Assumption of the risk - Each skier shall assume the risk of and legal obligations for any injury to his person or property arising out of the hazards, risks or dangers inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area operator, its agents or employees, and can be proved by the plaintiff by a preponderance of the evidence. Such risks include but are not limited to changing weather conditions, variations in steepness or terrain, and snow or ice conditions.

Responsibilities of the ski area operator should, at a minimum, include the marking of trails and designation of degree of difficulty, the marking of objects on trails not visible by a skier from a preset distance above, and the marking of any irregularities in surface conditions, with particular care paid to conditions on novice slopes. Moreover, statutes should reflect a duty on the part of a ski area operator to rectify a situation where two or more injuries have occurred in the same location as the result of a single hazard.

Due to the innumerable fact patterns which may give rise to litigation of ski injury claims, no statute can serve to take the place of judge or jury.

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149. *See* COLO. REV. STAT. § 33-44-109 (1990).
150. *See* MONT. CODE ANN. § 23-2-737 (1988) (repealed 1989).
151. *See supra* notes 52 and 54.

The ease with which a trier-of-fact determines fault may be facilitated by statutes enumerating responsibilities of both skier and area operator. Statutory responsibilities, however, in keeping with state and federal constitutions, cannot provide an impass to a skier with a valid cause of action simply because the facts leading to an injury were unanticipated by the state legislature.

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