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COLORADO SKI LAW

In 1996-1997, Colorado resorts drew about 11.35 million skier visits. The Colorado ski industry is a leading economic force in Colorado's $6 billion tourism trade. A ski industry study completed in 1991 stated that skiing generated direct and secondary sales attributable to skiing and associated resort operations in excess of $2.5 billion. In 1992, Colorado's Gross State Product was approximately $85.4 billion.[1] Based on these figures, skiing accounts for 3 percent of Colorado's Gross State Product. Moreover, skiing remains the Western Slope's largest industry, outstripping traditional industries such as agriculture, mining, and petroleum. Operating profit for the ski areas in the Central Rockies, as a percentage of gross fixed assets, has been stated as high as 17.4 percent. “In terms of dollars, the average ski resort in the Central Rockies is the most profitable of any region in the country.”[2]

Colorado ski law reflects the growth and complexity of the industry. Colorado ski areas have been at the center of major cases dealing with antiturst and environmental protection, as well as ski safety. The legal principles at work in all types of cases involving the industry, when viewed as a whole, manifest the social, political, and economic interests fostered by the remarkable growth and consolidation of the ski industry in this state.

Ski cases are tort cases. Given the absolute volume of injuries, and the economic significance of skiing, it is almost certain that any Colorado lawyer whose practice includes tort cases is certain to have a ski case come his or her way.

The author last reviewed the subject of ski law in *The Colorado Lawyer* in 1986, twelve years ago.[3] This article updates the practitioner on Colorado ski law since that time, focusing first on the background of legislative changes and case law. The article then discusses the types of skiing accidents and how the law treats them. The article also compares some out-of-state cases with Colorado's recent case law. Finally, the article suggests some practical tips, from a plaintiff attorney's viewpoint, to assist the practitioner in handling a ski case.

BACKGROUND

Before 1985, courts relied on the Colorado Ski Safety Act of 1979 (“1979 Ski Act”) and the case law interpreting it when dealing with ski accident cases.[4] The 1979 Ski Act provided some protection to the ski area operator against negligence claims.[5] It established specific duties of skiers and ski area operators. However, in 1985, the Colorado Supreme Court narrowly construed the extent of that protection by holding, in the case of *Pizza v. Wolf Creek Ski Develoment Corp.*, that the 1979 Ski Act gave ski area operators a rebuttable, but not a conclusive presumption, that a ski accident was the skier's fault.[6] *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 skiers' fault.

Then in 1987, in the case of *Peer v. Aspen*,[7] a jury found that the presumption in favor of the ski area had been rebutted by the plaintiff and awarded the plaintiff $5 million, the largest verdict in the history of Colorado ski law. In response to the *Peer* verdict, the ski industry returned to the General Assembly in 1990 and lobbied for Senate Bill (“S.B.”) 90-80, which would

have amended the 1979 Ski Act to broaden a ski area's immunity from liability for downhill skiing accidents that did not arise from a breach of a specific statutory duty.

The General Assembly adopted S.B. 90-80 after numerous amendments and, in doing so, amended the 1979 Act. The core of the 1990 amendments ("1990 amendments" or "Ski Act") were the "inherent danger" amendments[8] and damage limitations. However, the ski industry's proposals were limited in the legislative process, and the intention of the General Assembly, as interpreted by the Colorado Supreme Court, has been held to modify but not discard the original liability scheme of the 1979 Ski Act.

Under the 1990 amendments, the skier (including snowboarders and tobogganers) assumes the risks of the inherent dangers of skiing.[9] Inherent dangers include weather, snow, surface and subsurface conditions, collisions with natural and manmade objects, skier collisions, and the failure of skiers to ski within their own ability.[10] A ski area operator has specific statutory duties to mark its trails, boundaries, and the difficulty level of its trails and slopes.[11] Manmade objects not otherwise ***6** visible from 100 feet away must be padded.[12] Limitations are imposed on damages collectible against ski area operators for downhill skiing accidents,[13] but there are no limitations on damages for ski lift accidents.[14] The amendments specifically excluded lift-related accidents and skier versus skier collisions from the inherent danger scheme.[15]

The court's interpretation of the Ski Act's 1990 amendments appeared in its 4-3 decision in *Graven v. Vail Associates, Inc.*[16] In this case, the court found that the "inherent danger" amendments did not extend full immunity to ski area operators, but rather would allow some cases to go the jury on the question of whether or not a hazard was "inherent."

The cases following *Graven* manifest a trend toward establishing standards of care for the different types of skiing cases, reflecting the tension that exists when claims of ski area immunity collide with claims that modern ski areas can and should improve ski safey. This tension recently was expressed by a trial judge who wrote:

> Read in its plain language ... the [inherent danger amendments were] patently unfair and unjust and probably violated the equal protection clause; *i.e.*, [there was] no rational relationship between the legitimate goal of protecting ski area operators from frivolous lawsuits and a ski area operator being protected from its own negligence causing skier injury. However, in light of ... *Graven* and the requirement that courts now analyze whether an inherent danger or risk is also integral, there is a rational relationship between the legitimate legislative concerns and [what is] accomplished through a reasonable scheme related to the stated legislative purpose.... [T]he Supreme Court's end result ... is quite equitable and restores balance to the Act while still allowing ski area operators protection for "inherent dangers and risks."[17]

Due to these 1990 amendments and, particularly with regard to the so-called *Graven* Rule, Colorado lawyers and judges have changed the manner in which they evaluate and conduct Colorado ski accident cases.

Graven v. Vail Associates, Inc.

In the *Graven* case,[18] David Graven sued Vail Associates, Inc. for injuries he suffered when he fell down a steeply pitched ravine adjacent to the west side of the Lower Prima run at Vail, at about the point where Lower Prima is intersected by two catwalks (both rated easiest) named Flapjack (skiers travel west) and Sundial (moving east).

The trial court entered summary judgment against Graven, holding that, as a matter of law, the ravine into which he fell was an "inherent danger" of skiing.[19] Thus, the court held that Vail had no duty to mark or warn under CRS § 33-44-107(2)(d),

and recovery was barred.[20] The Court of Appeals affirmed,[21] but the Colorado Supreme Court reversed and remanded for trial. The Supreme Court held:

> Skiing is a dangerous sport. Ordinary understanding tells us so, and the legislature has recognized the dangers inherent in the sport.... Not all dangers that may be encountered on the ski slopes, however, are inherent and integral to the sport, and this determination cannot always be made as a matter of law.[22]

The court interpreted the language of the Ski Act defining inherent dangers. The court reasoned that the inherent dangers as set out in the statute were narrowly intended to describe only those dangers that were an integral part of skiing.

The Supreme Court drew support for its narrow construction of the definition of inherent risks and dangers from the statements made by legislators during hearings on the passage of the 1990 amendments and from the necessity to reconcile the Act's requirement that "danger" areas be marked.[23]

Senator Tilman Bishop, who sponsored the amendments, stated that they were not intended to "reduce the responsibilities of the ski area operators," referring to the Supreme Court's earlier ruling in *Peer v. Aspen*. In that regard, Senator Bishop stated that even under the inherent danger amendments, a four-foot drop-off such as that implicated in the Peer accident would still cause ski area operators to "give some indication of caution or of where these are considered as a danger beyond that of what would be considered inherent."[24]

Therefore, based on the explicit language of the Ski Act and the legislative history of the amendments, the court concluded that Graven's case must proceed to trial. The court reasoned:

> As a consequence of the conflicting descriptions of the accident area and the necessity to resolve that conflict in order to determine whether the plaintiff's injuries resulted from the inherent dangers and risks of skiing, we hold that a genuine issue of material fact exists. Summary judgment was therefore inappropriate on this issue.[25]

The court's ruling presents two immediate questions for attorneys and trial judges. First, which ski accidents are actionable ski cases under the *Graven* Rule? Second, how are juries to be instructed in cases in which the ski area operator argues that the injury was caused by a specifically listed inherent risk of skiing, while the skier argues that the cause of the accident was a hazard not integral to the sport and that could have been warned against or mitigated?

Many lawyers recognized that the 1990 amendments were subject to challenges, both as to their construction and the constitutionality of the amendments. Therefore, before the *Graven* Rule, the benchmarks for evaluating a ski case not brought under a specific *per se* claim under the Ski Act were twofold: (1) whether the facts would form the basis for an actionable theory under the pre-1990 statute and decisions (notably *Peer* or *Pizza*)[26] and (2) whether a claim was so thinly transparent as to be deemed frivolous, thus serving to demonstrate that ski area operators deserve the full immunity of a broadly construed "inherent danger" rule.

The first benchmark is still instructive. Cases 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."[27] The second benchmark is even more important in view of the comments of the dissent in *Graven*, suggesting that frivolous lawsuits might proliferate after the decision.[28]

The Supreme Court gave no explicit guidance for jury instructions, but it is clear that the concept of inherent dangers versus unnecessary hazards must be given to the jury. Under the *Graven* decision, a determination must be made with the following reasoning: "[I]f an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside" the ambit of inherent risks.[29]

Graven clarified how to handle accident cases that involve no specific breach of a statutory duty under the Ski Act. However, it gave little guidance on several other ***8** important types of ski cases, such as skier versus skier collisions, cases involving collisions with either natural objects or manmade objects, and lift accidents. Counsel, therefore, must look beyond *Graven* to other precedents and sources for guidance in handling such ski accidents.

SKI ACCIDENTS AND TORTS

It is impossible to classify every skiing accident, as there are now reported cases of every possible variety, each of which had unique facts that controlled its outcome. Historically, the cases were classified by the type of accident; for example, collisons with manmade obstacles, lift cases, and skier versus skier collisions. However, the laws in each state vary to such a degree that an accident in one state may be actionable, while an identical accident in another state may be altogether barred by either statutory enactment or judicial adoption of the rule of primary assumption of risk.[30] Keeping this in mind, classifications are as follows.

Types of Ski Accident Cases

The first type of downhill accident case is a collision with a manmade object.[31] For example: in *Rosen v. LTV Corporation*,[32] the skier collided into an unpadded metal post; in *Stratton v. Vail Associates*,[33] a racer, practicing on the slope, fell and slid into an unpadded light post. Under the Ski Act, collisions with manmade objects are an inherent danger of skiing (subject to the *Graven* Rule) unless the object was not readily visible from 100 feet away and as long as any padding or marker is not itself a hazard.[34]

Second, there are accidents caused by manmade or natural terrain features, such as drop-offs, culverts, ditches, and roadcuts. For example, in both *Peer*[35] and *Pizza*,[36] the plaintiffs were thrown out of control by a roadcut across a ski run. In *Graven*,[37] the plaintiff fell into a ravine adjacent to a ski run and ultimately smashed into a tree at the bottom of the ravine. Subject to the *Graven* Rule and to statutory provisions that the ski area operator mark danger areas,[38] collisions with natural objects are deemed inherent risks.[39]

Third are collisions between skiers, which produce a separate type of case. In a downhill skiing accident case, the standard of care of a ski area operator is diminished to some extent by a doctrine of assumption of risk, as expressed in the Ski Act and as interpreted by case law. However, in a skier/skier collision, there is no assumption of risk, but an operating presumption that the uphill skier is at fault and is responsible for damages.[40] These damages are without limitation, other than as in a general tort case;[41] for example, up to $500,000 in pain and suffering damages if proven by clear and convincing evidence,[42] and no limit for physical impairment and disfigurement or economic loss.[43]

The fourth variant of ski accident occurs during a lesson conducted by a ski instructor employed by the ski area operator.[44] There is no statutory provision explicitly dealing with such a case, although courts have held the ski instructor has a duty of due care.[45] The fifth type of case involves negligently administered first aid or negligent rescue, but no provision in the statute contemplates such a case. In *Spence v. Aspen*, the court held that the ski patrol has a duty to exercise "reasonable care" in the care and treatment of an injured skier, even if the skier injured herself from a lack of due care.[46]

Other types of accidents include those related to avalanches, which have, on several occasions, led to lawsuits.[47] Avalanches, again subject to *Graven*, are treated as inherent risks. In addition, there are cases involving ski equipment failures[48] and racing accidents.[49] However, these cases are often determined on summary judgment in favor of the defendant, on the basis of waiver.[50] Moreover, accidents occur involving snow cats and snowmobiles on the slopes. In *Phillips v. Monarch*,[51] a skier collided with a snow-grooming snow cat. The court held that the duties set out in the Ski Act, pertaining to warning skiers of grooming operations, could not be abrogated by the waiver printed on the lift ticket. Currently, under the 1990 amendments, collisions with moving equipment are not included as an inherent danger of skiing.[52]

As noted above, not every accident can fit neatly into a category. Therefore, lawyers need to understand something about the common types and frequency of injuries that serve as causes of action in ski cases.

Skiing Injuries: Types And Statistics

Types of Ski Accidents

Over the past twenty-five years, the number and causes of skiing injuries have been closely studied, under industry grants funded through the American Society for Testing and Materials ("ASTM")[53] and by the Colorado Department of Health. The most common injury is the Grade III knee sprain, defined as a complete rupture of at least one of the knee ligaments (usually the anterior cruciate). These injuries account for 22 percent of all skiing injuries. The Grade III knee sprain is now even more common in skiing than the lower leg fracture which, before the modern alpine release binding, was the most frequent injury.[54]

Fractures of the lower leg are still common, as are impact fractures to the femur, acetabulum, clavicle, and the thumb. Infrequent, but severe injuries and deaths occur due to traumatic brain and spinal injury, facial fractures, hypothermia, and other high-altitude illnesses such as HAPE (High Altitude Pulmonary Edema), hypoglycemia (especially in diabetic patients), and heart attack. Deaths caused by avalanche are attributable to asphyxiation.[55]

Statistical Incidence of Injuries and Deaths

Statistically, measured by the number of participants who engage in the activity, skiing is safer than swimming or cycling. The National Safety Council notes 17 drowning deaths per million participants occurred in 1995 and 7.2 cycling fatalities occurred per million participants, while there were only 3.5 deaths per million skiing participants. Other studies have determined that the per capita traumatic death rate is 2.67 deaths per million skiing participants. When measured on the basis of skier visits-that is, one skier coming to the slopes for one day-statistics indicate that skiers suffer a national death rate of 0.55 deaths per million skier visits.[56]

Colorado's statistics reflect a higher incidence of death and injury, over the national statistics, because of the popularity of back country skiing. The Colorado Department of Health studied skier deaths during sixteen seasons and recorded 194 skier deaths over that period of time. The study included back country skiers and those suffering a non-traumatic death such as a heart attack. Young men account for the overwhelming majority of skier deaths. "Striking object" was the leading cause of death, followed by avalanches. Most deaths occurred in the afternoon, during the month of March, and within ski area boundaries.[57]

According to another well-recognized statistical study of ski-related injuries, the national injury rate for downhill skiers is ***9** 3.37 injuries per 1,000 skier visits ("SV"). Injury rates for snowboarders are 3.03 injuries per 1,000 SVs. An SV is defined for purposes of the study in the same way as a skier visit is defined when measuring the annual number of skiers in Colorado: one skier visiting the slopes for one day.

Beginning skiers are much more likely to be injured than experienced skiers. Advanced men skiers are least likely to suffer injury (.88/1,000 SV), while beginning female skiers are at the most risk (9.48/1000 SV).[58] When applying the overall injury rate to the frequency of skier visits in Colorado-11 million SVs-the statistics indicate that there will be approximately 33,000 ski-related injuries each year in Colorado.[59] One study has indicated that the cost of skiing-related knee injuries in the United States exceeds $250 million annually.[60]

Regarding lift-related accidents, 85 percent occur while the skier is loading or unloading.[61] A lift-loading accident occurs when a skier fails to load properly.[62] Another type of lift-loading accident involves a misload or "hanger," where the passenger never gets seated properly in the chair and is carried by the chair up the line seated incorrectly, and then falls.[63] Ski lift unloading accidents account for 50 percent of the lift-related injuries, and ski-lift loading accidents account for 35 percent of lift-related injuries.[64] The most serious accidents involve the failure of the cable or carrier. Although only 2 percent of all lift-related accidents involve such a failure, these accidents account for half of all ski lift-related deaths.[65] Mechanical failures typically result from design or manufacturing defects, often in concert with maintenance errors.[66]

Rights, Responsibilities, Liabilities, and Immunities

The Ski Act establishes guidelines for determining the responsibilities of skiers and ski area operators in connection with three types of cases: collision cases, accidents caused by *per se* violations of the Ski Act, and lift accidents.

Collision cases are determined on a *per se* basis, under the statute, which requires all skiers to ski in control, maintain a lookout, and avoid collision with skiers below.[67] In an action between skiers, the risk of a skier/skier collision is not an "inherent risk." Thus, the "hittee" has a right of recovery against the negligent "hitter."[68] A rebuttable presumption arises against the uphill skier that is similar to the presumption against the following car in a rear-end car accident case.[69]

Often, a claim will arise against a ski area operator for a *per se* violation of one of the statutory duties imposed by the Ski Act. These common-sense responsibilities include the duty to mark trails and slopes, give warning of trail grooming operations, and cover manmade obstacles not readily visible from 100 feet away.[70] Skiers have concomitant duties to ski within their abilities, to maintain control and a lookout, and to avoid collisions with objects and skiers below them.[71]

Ski areas must operate their lifts in accordance with the rules and regulations of the Colorado Passenger Tramway Board.[72] A failure to do so, which causes injury, is an actionable claim. Passengers are responsible for having the skill and dexterity to board and unload the lift safely, follow instructions, obey signs, and act safely.[73]

The threshold question that must be addressed in every downhill skiing accident, ***10** such as a fall down into a ravine, a collision into a manmade object, or a loss of control due to an alleged surprise in terrain, is whether the hazard involved a risk clearly inherent in the sport or whether the hazard would be the type of "highly dangerous situation" that caught the court's attention in *Graven*.[74]

The doctrine of assumption of risk embodies two distinct doctrines: primary and secondary assumption of risk.[75] Under primary assumption of risk, no duty is owed to the participant. Secondary assumption of risk allows a jury to consider the reasonableness of the plaintiff's conduct, in view of a known danger, as a component of contributory or comparative negligence. It delegates to the finder of fact the questions of whether the risk was inherent or if the defendant's conduct increased an inherent risk to an unreasonable degree.[76]

In theory, the rule, as applied to a ski case, acts as an immunity for the ski area operator that has "no duty" to mitigate the so-called "inherent" dangers or risks of the activity.[77] In practice, the theory breaks down into a two-step process as the determination is made whether the hazard was truly "inherent." Step one is to review the applicable law to see if the hazard falls into a legally defined "inherent danger," and step two is a determination of whether the hazard could have been mitigated in the exercise of care. An additional layer of divergence exists as to whether the determination is a question of law or a question for the jury.

Secondary assumption of risk allows a jury to consider the reasonableness of the plaintiff's conduct, in view of a known danger, as a component of contributory or comparative negligence. It places skiers on constructive notice of all "inherent dangers" and then delegates to the finder of fact the questions of whether the skier accepted the risk and whether the defendant's conduct increased the risk.

Whether a case is treated under a primary assumption of risk analysis, with the threshold question of inherent danger, or under a secondary assumption of risk analysis will depend on the precise facts. However, the result is essentially the same. Colorado has joined the growing majority of states[78] that strike a reasonable balance between a strict application of the "no duty rule" and the pre-1979 doctrine of "reasonable care."[79] There appears to be no hard and fast rule to define the so-called inherent risk of skiing, which, if it is the cause of the accident, bars the claim as a matter of law. In this situation, the ski area operator has no duty to mitigate the risk.

A statement that the court will "know it when it sees it" is probably as applicable to the inherent risk rule as it is to pornography.[80] This author has proposed that the most consistent rule would be if the skier was unfairly surprised by a hazard or, in a skier versus manmade object case, to consider whether the ski area used reasonable means to pad the object or otherwise protect against impact.[81] In practice, then,

> [t]he Colorado Supreme Court, without labeling the determination of the "integral" part of skiing as a duty analysis, has added a new duty for ski area operators-*i.e.*, whether the ski area operator using reasonable care could have eliminated the "inherent danger or risk" of skiing, in determining whether the dangers and risks are integral.[82]

Practitioners need to keep up with recent case law to evaluate their own cases, whether it is a *per se* case or a lift or skier versus skier accident.

RECENT CASE LAW

Skier Versus Skier

In *Ulissey v. Shvartsman*,[83] the trial court granted summary judgment on liability, in favor of the plaintiff, finding that all of the undisputed material facts showed the plaintiff was downhill and in plain view of the defendant when the two skiers collided. The trial court held that the uphill skier, under the Ski Act, was wholly at fault, and the case was tried on damages. After the jury verdict of $2.1 million, the defendant appealed. Although the Tenth Circuit Court of Appeals has consistently affirmed summary judgments in favor of ski areas and against skiers in ski accident cases,[84] in this case, the court reversed this unusual result of a plaintiff's summary judgment.

The uphill skier is presumed to have the better opportunity to avoid, but the Tenth Circuit Court held that all skiers have the duty to maintain a lookout so as to avoid collisions, to ski within their ability, to remain in control, and to refrain from acting in a manner that may cause or contribute to injury of the skier or others.[85] The appeals court found sufficient facts of record to remand the case for trial on liability.

The 1990 amendments explicitly abolished the defense that the risk of being hit by an out-of-control or unobservant skier is a risk inherent in the sport:

> Each skier also has a duty to ski in control-maintaining a safe speed and course trajectory to facilitate a proper lookout. While the uphill skier has the better opportunity to observe people and objects below, that skier's duty to keep a proper lookout is considered primary but nothing in the statute makes that skier's duty exclusive. Thus, when a collision occurs, the statute creates the presumption that the uphill skier, if there is an uphill skier, had the better opportunity to avoid the collision. However, the Colorado Supreme Court has stated the statutory presumption remains rebuttable.[86]

CRS § 33-44-109(1) reads: "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." This provision was specifically intended to be used in cases involving skier versus skier collisions. The intent was to prohibit the "hitter" from arguing that the "hittee" assumed the risk of skier collisions when taking to the slopes.[87]

Skier Versus Skiing Area Employee

In *Glover v. Vail Corporation*,[88] the court held that the risk of a ski area employee colliding with a skier was a risk inherent in the sport. The court stated: "If the application of a clearly written statute produces an unfair result, it is the province of the legislature, not the judiciary, to change it."[89] The court seemed to believe that the express language of the statute mandated a grant of immunity to the ski area operator, even though such a grant of immunity may be fundamentally unfair.

In the *Glover* case, Michelle Glover was the victim of a skier/skier collision that occurred on "Born Free" trail on Vail Mountain in February 1994. Phillip Glasser, a Vail ticket seller (arguably on his own time, and only partially in uniform) collided into Glover. Glasser was skiing at a very high speed, on an intermediate run, toward the end of the ski day. He was killed by the impact; Glover was severely injured.

Glover sued Vail, arguing that Glasser was acting in the course of his employment, and asserted various other theories of vicarious liability against Vail. The court found that Colorado law barred any claim against a ski area operator for a skier/skier collision, even if the collision was caused by an employee's negligence, acting within ***12** the scope of his or her employment. The court noted that the Ski Act provides that "no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing,"[90] which are defined as "those dangers or conditions which are an integral part of the sport of skiing, including ... collisions with other skiers...."[91]

The plaintiff argued that the court should be guided by precedent allowing claims to be advanced against ski areas on ski collision cases allegedly caused by negligent employees.[92] However, the court was unpersuaded by these precedents, referring to the language of one opinion as "tortured."[93] The court dismissed the *Graven* Rule by stating that it cannot believe "a majority of the Colorado Supreme Court would permit the plaintiff to maintain her case where, as here, the language of the Act unequivocally prohibits it."[94]

After Glasser died, no estate was opened for him by any party, and thus no claim was brought against that estate by Glover as a skier versus skier claim under the express provision of CRS § 33-44-109(1), which allows one skier to sue another in collision cases.

Thus, Glover failed to play her strongest card by failing to join Glasser. Glover could have argued that CRS § 33-44-109 (1) would specifically allow a claim such as that against Glasser.[95] The question of the risks assumed by Glover, whether in the sense of primary assumption of risk or secondary assumption of risk, are resolved by § 109(1). The sole remaining question would have been whether the ski area operator was responsible for Glasser's acts under traditional notions of vicarious liability (*e.g.*, injury in the course of employment, negligent supervision, negligent hiring, and failure to warn).[96]

The Glover opinion points up the uncertainties in Colorado's ski law with regard to ski area employees colliding into paying guests of the ski area. On the one hand, a Colorado skier is entitled to expect other skiers to use reasonable care in avoiding skier collisions.[97] On the other hand, *Glover* seems to hold that ski area employees can ski without regard to the ordinary rules of the road applicable to all other skiers, such as the requirement that skiers ski within their abilities, maintain a lookout, and avoid skiers below them.[98] Moreover, in other states that permit actions by one skier against another for simple negligence, the ski area operator has typically been held accountable for the negligence of its employees acting within the course and scope of their employment.[99]

Lift Accident Cases

In *Trigg v. City and County of Denver*,[100] a mixup at the loading ramp caused the plaintiff to be half in and half out of the chair, while the lift continued to run for 195 feet up the line before it was stopped. The plaintiff fell twenty-five feet to the ground and was injured. At trial, the plaintiff tendered the *per se* negligence instruction, along with the pertinent regulations requiring the operator to comply with the Tramway Code.[101] The trial court refused the tendered instruction. The jury returned a verdict of no liability.

The Tenth Circuit held that there was sufficient evidence of a statutory or regulatory violation to warrant giving a negligence *per se* jury instruction and the "highest duty of care instruction."[102] The court reviewed the Ski Act and noted that the regulations required the operator to assist passengers, maintain surveillance over the lift, and stop the passenger tramway immediately in the event of trouble or danger. The case was remanded for a new trial for the jury to be given *both* the *per se* instruction under C.J.I. Civ.2d 9:14 *and* the higher standard of care instruction under C.J.I. Civ.2d 12:13.

In *Peck v. Vail Associates*,[103] the plaintiff was injured while unloading. Her ski hooked an orange safety cone that had been placed on the edge of the ramp to demark the route unloading skiers were to take. The court affirmed a summary judgment for defendant, finding that the cones were an "inherent danger" of skiing. This case may have had a different result if an argument were made that the unloading ramp was integral, under the regulatory scheme, to the safe operation of the lift, and that the customary "highest duty of care" or *per se* duty would be applicable.

Highest Duty of Care/Safety Bar Controversy

Precedent held that Colorado ski lift operators were obligated to exercise the highest duty of care in connection with their operation of lifts and tows, and, moreover, that the assumption of risk instruction was generally inapplicable to lift accident cases.[104] However, in *Bayer v. Crested Butte Mountain Resort, Inc.*, the trial court held that the 1990 amendments repealed the common law duty of highest duty of care in the operation and maintenance of ski lifts.[105] The court indiciated that the applicable standards were preempted by the Ski Act and the Colorado Passenger Tramway Safety Act,[106] which, in turn, incorporates the standards adopted by the Tramway Board, including the industry standard for the operation and maintenance of passenger tramways.[107] The contention is that a jury could find that, in the exercise of the highest standard of care, the ski area operator would be required to install safety bars on its lifts. In fact, the Ski Act amendments explicitly left untouched the then-existing standard of care framework.

Extensive trial court litigation had occurred in connection with the 1985 failure of the Teller lift at Keystone.[108] Lawyers from both sides of that case testified during the hearings on the 1990 amendments. Several of the proposed 1990 amendments explicitly addressed the issue of ski lift liability. For example, CRS § 33-44-113, a section imposing limitations on damages, was modified explicitly to exclude lift accident cases. The heart of the inherent danger amendments, CRS § 33-44-103(3.5), was modified to provide:

> The term "inherent dangers and risks of skiing" does not include the negligence of a ski area operator as set forth in section 33-44-104(2). Nothing in this section shall be construed to limit the liability of the ski area operator for injury caused by the use or operation of ski lifts.

CRS § 33-44-104(2) deals explicitly with the duty of the ski area operator to abide by the Passenger Tramway rules and regulations and establishes the "negligence *per se*" standard of care that the *Trigg* court held was required to be given to the jury *along with* the common law duty of highest standard of care.[109]

Counsel will need to study the *Bayer* opinion carefully to determine what standard is applicable in specific ski lift accident cases in Colorado.

Colorado Law Compared To Other States

Colorado ski law has evolved based on other state law as well Colorado precedent. A review of selected cases in other states may help practitioners understand how situations in other states have affected Colorado law.

Narrow Construction of Inherent Danger Rule

The *Graven* case marks the rapid acceptance, among state supreme courts, of ***13** a moderate interpretation of inherent danger statutes. With the *Graven* Rule, Colorado has joined other states in this interpretation. The key issue presented in the *Graven* case was whether the Ski Act established exclusive duties beyond which no injured skier could claim general negligence. This question had been previously put to several leading courts, and a majority held that an inherent danger statute is not a bar to legitimate negligence claims.

For example, the North Dakota Supreme Court unanimously limited the effects of the North Dakota Skiing Responsibility Act.[110] In a case involving a skier death resulting from a collision with a tree, the court held that inherent dangers are limited to those dangers that cannot be mitigated by the ski area operator. Not every danger encountered on the slope is necessarily "inherent" in the sport. If a danger can be mitigated in the excercise of reasonable care, then it is not inherent and may be the basis for a negligence claim.[111]

Utah has reached a similar result. In *Clover v. Snowbird Resort*,[112] a resort employee, arguably on duty, came over a roadcut and collided into the plaintiff. Utah's statute imposes on skiers the risk of hazards inherent to the sport,[113] which includes changing weather conditions, impact with lift towers, collisions with other skiers, and losing control.[114] Nevertheless, the Utah Supreme Court held that Utah's ski act requires a case-by-case determination to decide whether any particular hazard truly is integral to the sport. In that case, the court held that an injury caused by an unnecessary hazard that could have been eliminated in the exercise of ordinary care is not "inherent" and the skier may recover from the area operator.[115]

In Vermont, the ski statute provides, "Notwithstanding the provisions of [the comparative negligence statute] a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[116] However, the Vermont Supreme Court has held that inherent dangers do not include hazards that the ski area can mitigate.[117]

Colorado has simply followed the emerging majority of jurisdictions that hold that not every danger is necessarily inherent to the sport, especially if an operator's negligent or intentional acts are a cause of the injury.[118] Such decisions have mitigated the one-sided, strict immunity ski area operators have argued is implied by inherent danger statutes. The cases generally hold that a jury may consider whether the danger in question is or is not one to be considered so integral in the sport as to be considered "inherent."[119]

Statutes Barring Claims as Primary Assumption of Risk

Departing from its historical acceptance of the role of reasonable care in ski cases,[120] the state of Michigan has broadly construed the inherent danger rule barring practically all claims arising from skiing, and is a good example of what happens when cases are filed based on very tenuous theories of liability.[121] In *Barr v. Mt. Brighton*, the plaintiff skied through a grove of trees into a closed area that was not roped off or marked as closed. The plaintiff struck what he referred to as a "uniquely shaped" tree, and was paralyzed by the collison. The court held that the ***14** collision was a risk assumed by the skier, notwithstanding statutory requirements that the ski area mark its slopes or trails and post as "closed" the portion of the trail onto which he skied.[122]

Idaho also has been intolerant of plaintiffs' claims arising from ski accidents. The Idaho Ski Act immunizes ski areas from liability for dangers "inherent" in the sport.[123] The Ninth Circuit turned down the claim of a recreational racer who had been paralyzed after crashing into an inadequately padded lift tower.[124] However, in a recent case, the Idaho Supreme Court turned away from the statutory immunity, and refused to impose a common law standard of inherent danger (*e.g.*, primary assumption of risk) in a case against a race course setter.[125] The court held in this case that the Idaho Ski Act's immunity provisions did not extend to persons other than the ski area operator. Absent a statutory protection, no doctrine of primary assumption of risk would protect the defendant automatically. A duty of due care was owed by the course setter to the ski racer. The court further held that the Idaho jury was to consider secondary assumption of risk as an element of comparative negligence.[126]

These cases represent different approaches to the inherent danger rule. However, it is clear that the national trend, to narrowly construe the inherent danger rule, is consistent with the Colorado Supreme Court's ruling in *Graven*.

Waivers and Releases

In March 1993, eleven-year-old Tara Yauger collided into the unpadded, concrete base of a chair lift tower at Hidden Valley Ski Area, located north of Manitowoc, Wisconsin. The Wisconsin Court of Appeals held that the claims of Tara's parents were barred by a hold harmless clause printed in the application for the Yauger family's season ski pass. The application read:

> There are certain inherent risks in skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises Inc. harmless on account of any injury incurred by me or my Family member on the Hidden Valley Ski Area premises.

The court sustained the validity of the hold harmless language, finding that the use of the words "inherent risks of skiing" plainly and simply described the risk of colliding with a fixed object while skiing. The Wisconsin Supreme Court disagreed and held that the clause was not conspicuous, and did not alert the Yaugers to the nature and significance of what they were

signing. Moreover, the exculpatory clause did not explicitly release the ski area from its own negligence, and did not define the inherent risks of skiing.[127]

In Colorado, a minor's release was held to be a voidable contract. Heather Del Bosco was fourteen years old when she signed a release in favor of the United States Ski Association, which then sponsored a Trophy Series Race in which she was injured. A minor has the right to avoid a contract, as a matter of public policy. A party who contracts with a minor does so at his or her own risk. The fact that a minor has received the benefits of the contract does not prohibit the minor from later disaffirming the release. The court voided the release.[128] The result was similar in the case of *Scott v. Pacific West Mountain Resort*.[129] Courts have uniformly held that children cannot be held to a waiver or a release.

However, with adults, the courts generally hold such waivers to be enforceable when the waiver is on their own behalf and when the circumstances reflect a ski activity of heightened risk, such as racing. Specifically, Colorado courts follow a national trend to enforce waivers executed in connection with racing, which is generally considered under primary assumption of risk principles. In *Potter v. National Handicapped Sports*, an experienced handicapped ski racer fell because a race official was standing on the finish line.[130] The trial court found for the defendant on the basis of the waiver of liability signed by the plaintiff.

Equipment cases also present an opportunity for the rental shop to obtain a waiver or release of liability. The waiver bars a claim for damages resulting from a binding allegedly failing to release. One Colorado court addressed a ski rental waiver and found that it was conscionable, since the skier could have enjoyed the ambience of Aspen without having to ski.[131]

Such Colorado rulings regarding the language of waivers are contradicted by the Vermont Supreme Court in *Spencer v. Killington*.[132] In that case, the plaintiff signed a waiver printed on his season pass and then signed a waiver on his entry form for a race series. He was injured when he struck an unpadded wooden post marking the finish line. The court held that the waiver was void as against public policy. There was no tortured language about ambiguity, clarity, conspicuous print, or large type. Here, the court went directly to the heart of the matter, stating, "Such exculpatory agreements are void, whether the ski area uses them to avert suits by recreational skiers testing themselves on the ski area's public race course, or, as here, by recreational skiers participating in an amateur race controlled by and held at the ski area." The court noted that it was merely allowing a plaintiff his or her day in court, since the Vermont Ski Act would still protect the ski area operator from claims arising from the dangers that "inhere therein insofar as they are obvious and necessary....Assumption of risk remains as a defense."[133] However, it must be remembered that Colorado has held that the ski area operator cannot obtain, with a waiver, a higher degree of protection than that provided by the Ski Act.[134]

Finally, in California, one court has held that, absent recklessness, a release signed as a condition of enrolling in ski school bars a claim for negligent instruction.[135]

PRACTICAL TIPS

When handling a ski case, certain practical tips should be followed, whether the case arises from a collision, downhill skiing accident, an accident concerning a child, or a lift-related accident. There are certain practical pointers concerning professional responsibility, evaluation, venue selection, disclosure and discovery, and settlement evaluation that can make the job easier and more effective for both the lawyer and client.

Professional Responsibility Regarding Ski Cases

Over 63 percent of Colorado's 11 million or so SVs are from out-of-state residents taking a Colorado ski vacation. Since these visitors purchase lift tickets without the benefit of many of the in-state discounts, as well as lodging and food, the daily cost of their visit is higher than that of an in-state resident. Adjusted for inflation, the average in-state resident spends about $60 per

day, per skier visit, while an out-of-state resident spends about $225 per day per skier visit (exclusive of airfare).[136] Therefore, the majority of out-of-state skiers are of relatively high economic means and, when injured, often first contact an attorney in their home state whom they have previously used for other legal matters.

An out-of-state attorney can help the Colorado lawyer with document disclosure, coordination with medical providers, preparation of the clients for depositions and trial, and providing a base of operations in the locale where the plaintiff ***15** lives. It is important that local counsel and the out-of-state attorney work together pursuant to Colorado Rules of Professional Conduct ("CRPC") Rules 1.5(c) and 1.5(d) to create a fair agreement for the division of fees that has been approved by the client. Referral fees are strictly prohibited in Colorado, pursuant to CRPC Rule 1.5(e).

The underlying contingent fee agreement must comply with the Colorado court rules.[137] If the out-of-state attorney's fee agreement does not meet Colorado's stringent requirements for a contingent fee agreement with an accompanying disclosure certificate, it is best to supercede the out-of-state's attorney's agreement with one of counsel's own. Note that if the client is a minor child, Colorado, as well as most other states, requires that the probate court approve any settlement in the state in which the minor resides.[138]

Venue, Discovery, And Disclosure

Venue

The first question a Colorado lawyer needs to answer before filing a ski accident case is the matter of where the case will be filed. In the past, the conventional wisdom has been to avoid state district court in the county in which the accident occurred. Juries were considered to be biased in favor of the ski area operator because they were (1) economically dependent on the ski area and (2) often knew the owners and management.

Now, however, ski town populations are more circumspect about ski cases. A higher degree of skepticism is inherent in a population that cannot afford to live where it works and where owners and management are wealthy businesses from out of state. Therefore, it is suggested that counsel reconsider filing in the county in which the accident occurred. However, in a case involving diversity and damages in excess of $75,000, the U.S. district courts will provide a more neutral forum.

Discovery and Disclosure

Proper strategy in a ski case often requires counsel to prove the standard of care exercised by the ski area operator with respect to the operation of its lifts and tows, and the maintenance, marking, padding, and grooming of its trails, runs, and slopes. Notwithstanding the advantage ski area operators have in the "battle of the experts," the standard of care for safety, hazard markings, and lift operations in the operation of ski areas often can be established with statutory guidelines in combination with internal documents, which are subject to discovery and disclosure. Most Colorado ski areas are located on federal land and operated under a federal ski area permit.[139] These permits and attachments are available by making a proper request under the Freedom of Information Act.[140]

In a skier/skier collision case, the deposition of the parties is critical. Additionally, line of sight, slope gradient, trail markings, clothing, and eyewitnesses are of extreme importance. The precise geography of the area of the accident can be determined by reference to topographic maps and surveys that are typically on file with the ski area operator and the U.S. Forest Service.

In a ski lift case, whether the manufacturer is a named party or not, numerous records pertinent to the equipment's design, construction, modification, and permitting process are typically available at the Passenger Tramway Safety Board offices. In a case involving a snowmobile accident, attention needs to be paid to the documents required to be filed pursuant to the Colorado Snowmobile Act.[141]

Settlement Evaluation

From the plaintiff attorney's perspective, the objective of any tort case is to redress damages incurred by the plaintiff, and to do so promptly and fully. Trial and appellate dockets have the effect of discouraging trials of civil cases, and thus settlement always deserves some consideration.

To assist in determining proper damages, historic values and amounts achieved in settlements are often available through public data bases, such as the *Colorado Jury Verdict Reporter* or the Association of Trial Lawyers of America.[142]

The value of a plaintiff's injuries, however, is only one element in evaluating the settlement value of a ski accident case. Although conventional wisdom holds that ski area operators are typically either well insured or have plenty of liquidity, the fact is that the industry is so highly competitive that several marginal resorts may reduce coverage or, in the event of a major lift failure, have insufficient capital resources to cover a catastrophic event.

It is more common to find that either the plaintiff or a defendant in a ski collision accident has no insurance. If the plaintiff has no medical insurance, and is thus rendered destitute by a catastrophic injury, settlement may be impossible because any compromise offer is simply insufficient to meet his or her needs. Alternatively, the plaintiff might be vulnerable to a lower offer due to the ever-present risk of getting nothing in a trial. Moreover, statutory offers of settlement may have the effect of burdening an unsuccessful plaintiff with defense costs. All of this can create terrible imbalances in the economic analysis of settlement: an individual plaintiff is rarely in the position to pay a $50,000 bill of costs, yet an insurance company can bear such a risk over a number of cases.

In actuality, the evaluation of liability in a ski accident case is quite straightforward, as it is based on the continuum of legal standards of care, such as: (1) the primary assumption of risk standard generally accepted in downhill skiing cases in which the accident was not caused by a hazard the ski area operator could have reasonably mitigated (*Graven*); (2) the secondary assumption of risk standard (inherent danger/integral to the slope analysis) under the *Graven* and *Dovey* cases; and (3) the range of ordinary care and highest duty of care applicable in lift and collision cases. The higher the defendant's duty of care, the greater percentage of a claimant's full damages are collectible.

CONCLUSION

Under the *Graven* Rule, actions may be brought dealing with accidents arguably caused by the ski area's conduct in creating or failing to warn adequately of an unreasonable hazard. Moreover, the specific provisions of the Ski Act set out duties and liabilities for the skier and ski area operator. The law is becoming somewhat more complex due to the fact that each type of accident may generate a different spin on the questions of duty and responsibility. However, the economic impact of the ski industry in this state makes it an important area of law. Practitioners need to stay current on the case law and be familiar with the statutory scheme. Because case law developments in other states may have an effect on Colorado law, it is necessary to follow these trends as well.

Liability breeds responsibility among both skiers and ski area operators. It is hoped that the recent rash of ski-related deaths will result in encouraging safer skiing practices. Making skiing safer will benefit all concerned and possibly reduce the number of ski-related court cases.

***16** Both ski area operators and skiers/snowboarders are taking positive steps toward improving safety, with helmets, safety programs, and a heightened awareness of the need for caution. Colorado has a natural opportunity to lead on these issues. Colorado lawyers and judges, many of them skiers/snowboarders themselves, will be at the forefront of ski law.

Footnotes

a1 Note 1. *James H. Chalat, Denver, is with Chalat • Justino, P.C. His practice emphasizes ski accident, professional negligence, and personal injury cases*.

1 "The Contribution of Skiing to the Colorado Economy," *Colorado Ski Country USA* (March 1992) at 2.

2 Goeldner, "1993-1994 Economic Analysis," *Ski Area Management* (Nov. 1995).

3 Chalat, "The Development of the Standard of Care in Colorado Ski Cases," 15 *The Colorado Lawyer* 373 (March 1986).

4 Chalat, "Colorado Ski Act Update," 10 *The Colorado Lawyer* 161 (July 1981); Chalat, "Ski Tips for Attorneys," 9 *The Colorado Lawyer* 452 (March 1980).

5 CRS §§ 33-44-103(3.5) and 112.

6 711 P.2d 671 (Colo. 1985).

7 804 P.2d 166 (Colo. 1991).

8 CRS §§ 33-44-103(10), -107(7), -107(8), -112.

9 CRS § 33-44-112.

10 CRS § 33-44-103(3.5).

11 CRS § 33-44-107(1) and (2).

12 CRS § 33-44-107(7).

13 CRS § 33-44-113.

14 *Id*.

15 CRS § 33-44-103(3.5).

16 *Graven v. Vail Associates, Inc.*, 909 P.2d 514 (Colo. 1995).

17 *Dovey v. Victoria Breckenridge*, Denver Dist. Ct., No. 95-CV-1153 (Jan. 1996). The author was plaintiff's counsel

18 *Supra*, note 16.

19 "Inherent Dangers and Risks of Skiing," CRS § 33-44-103(3.5).

20 CRS § 33-44-112.

21 888 P.2d 310 (Colo.App. 1994).

22 *Supra*, note 16 at 520.

23 CRS § 33-44-107(2)(d).

24 *Graven, supra*, note 16 at 519, n. 5.

25 *Id*. at 520.

26 *Supra*, notes 5, 6 and 7.

27 *Graven, supra*, note 16 at 520.

28 *Id*. at 521. Justice Erickson wrote the dissent and was joined by Justices Vollack and Kourlis. The dissent reasoned that the intent of the General Assembly was to include accidents such as Graven's within the ambit of inherent dangers.

29 *Graven*, supra, note 16. *Accord: Dovey, supra*, note 17; *Clover v. Snowbird Resort*, 808 P.2d 1044-1047 (Utah 1991) at 1037, interpreting Utah's Inherent Risks of Skiing Act. Utah Code Ann. 78-27-51 to 54.

30 *See* Appendix-Comparative Ski Liability Legislation.

31 *Compare*, CRS § 33-44-107(7) and § 33-44-103(3.5), 103(10).

32 569 F.2d 1117 (10th Cir. 1978).

33 961 F.2d 220 (10th Cir. 1992)(unpublished disposition).

34 *Dovey, supra*, note 17; CRS § 33-44-107(7).

35 *Supra*, note 7.

36 *Supra*, note 6.

37 *Graven, supra*, note 16 at 523.

38 CRS § 33-44-107(2)(d).

39 CRS § 33-44-112.

40 CRS § 33-44-109(2).

41 *Ulissey v. Shvarstman*, 61 F.3d 805 (10th Cir. 1995); *Gray v. Houlton*, 671 P.2d 443 (Colo. App. 1983). The author was plaintiff's counsel in both cases.

42 CRS § 13-21-102.5.

43 CRS § 13-21-102.5(5).

44 *See e.g, Philippi v. Sipapu*, 961 F.2d 1492 (10th Cir. 1992); *Geibink v. Fischer* 709 F.Supp. 1012 (D.Colo. 1989). The ski student is burdened with a correlative duty to exercise due care and understand the inherent risks of skiing. *Miller v. Aspen Skiing Co.*, 92-F-303 (D.Colo. 1992); Chalat, "Instructions for the Ski Instruction Case," 35 *Trial Talk* 118 (Colo. Trial Law.Assn., April 1986).

45 *See Bradford v. Vail*, 84CV 8458 (Den. Dist. Ct., 1986). Surveyed in Chalat, *supra*, note 44.

46 820 F.Supp. 542 (D.Colo. 1993). *See also, Miller v. Arnal*, 632 P.2d 987 (Ariz. App. 1991). Reasonable care was defined in *Spence, id*. at 544, as follows:

> Persons providing medical treatment-whether they be hospitals, doctors, nurses, or EMT's-should expect to treat not only patients who fall ill or are injured through no fault of their own, but also those whose own neglect or intentional conduct has placed them in the precarious position of requiring medical treatment. All patients, regardless of how they sustain an illness or injury, may reasonably expect competent treatment from those into whose hands they have placed themselves.

47 *Twohig v. USA*, 711 F.Supp. 560 (D. Mont. 1989); *Holland v. U.S. Forest Service and Ralston-Purina*, 95-S-346 (D.Colo. 5/10/96). *See also, Mannhard v. Clear Creek Skiing Corp.*, 682 P.2d 64 (Colo.App. 1984); Fagan, "Avalanche Control: Negligence Over Strict Liability," 20 *U. San Francisco L. R*. 719 (1986).

48 *See Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472 (D.Colo. 1992), which held that a release contained within rental agreement was enforceable.

49 *Potter v. Handicapped Sports*, 849 F.Supp. 1407 (D.Colo. 1994) held that a release, contained within a racing application, was enforceable.

50 *Id*.

51 668 P.2d 982 (Colo.App. 1983).

52 CRS § 33-44-103 (3.5).

53 Shealy and Thomas, "Death in Downhill Skiing from 1976 Through 1992-A Retrospective View," *Skiing Trauma and Safety*, 10th International Symp. (ASTM 1993 STP 1266) (*hereafter, Shealy, 1976-1992*); Johnson, Ettinger, and Shealy, "Skier Injury Trends," *Skiing Trauma and Safety*, Seventh International Symp. (ASTM 1989 STP 1022) (*hereafter, Johnson et al*.); "Recreational

Fatalities in Colorado, 1993-1995," Health Statistics and Vital Records Div., Colo. Dept. of Health (Oct. 1996); Shealy and Sundman, "Snowboarding Injuries on Alpine Slopes," *Skiing Trauma and Safety: Seventh International Symposium* (ATSM 1989 STP 1022).

54 *Johnson et al., supra*, note 53.

55 *Id. See also Colorado Snow Skier Deaths* (Health Statistics Section, Colo. Dept. of Health, 1993).

56 *Shealy, 1976-1992, supra*, note 53.

57 *Colorado Snow Skier Deaths, supra*, note 55.

58 *Johnson et al., supra*, note 53; Shealy and Sundman, *supra*, note 53.

59 (1.1 x 107) x (3.37 x 10-3) = 3.74 x 104 = 37,400.

60 *Quoting*, Etlinger, "Knee Injury § May Soon Surpass Ski Spending," Vermont Safety Research; *Inside Tracks* (Belvoir Pubs., 1/1/98) at 12.

61 *See, eg., Peck v. Vail Associates, Inc.*, 46 F.3d 1151 (10th Cir. 1995) (unpublished disposition).

62 *Summit Cty. Develoment Corp. v. Bagnoli*, 441 P.2d 658 (Colo. 1968).

63 *Sabo v. Breckenridge Lands, Inc.*, 255 F.Supp. 602 (D.Colo. 1966).

64 For example, in *Sabo, supra*, note 63, the plaintiff misloaded, and was carried 275 feet up the line while dangling from the chair before she fell.

65 Kunczynski, "Lift Accidents, Vail Aerial Tramway and Ski Safety Seminar," *Ski Area Management* (Jan. 1983).

66 *See*, "The Rise, Fall and Return of a Ski-Lift Entrepreneur," *Wall Street Journal* (1/16/97) at B1, describing the history of fatalities associated with lifts manufactured by Lift Engineering & Construction, Co.

67 CRS § 33-44-109(1), (2), (4), (8), (10).

68 "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 skeir in an action by one skier against another." CRS § 33-44-109(1).

69 *Ulissey, supra*, note 41.

70 CRS §§ 3-44-106 and -108.

71 CRS § 33-44-109.

72 CRS § 33-44-104(2).

73 CRS § 33-44-105.

74 *Graven, supra*, note 16 at 520.

75 DeWolf and Hander, "Assumption of Risk and Abnormally Dangerous Activities: A Proposal," 51 *Mont. L.Rev*. 161, 166-168 (1990).

76 *See* Frakt and Rankin, "Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability," 28 *Idaho L.Rev*. 227-250 (1992); Ferguson, "Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles," 67 *DU L.Rev*. 165 (1990); Bernstein, "Note, The Snowballing Cost of Skiing: Who Should Bear the Risk?," 7 *Cardozo L.Rev*. 153 (1988); Fleming, "Assumption of Risk: Unhappy Reincarnation," 33 *Am. Trial Lawyers J*. 101 (1968).

77 *Id.*; Lisman, "Ski Injury Liability," 43 *U. Colo. L.Rev*. 262 (1972). *See also* Eichstadt, "Release Me Not: Products Liability and Ski Bindings Injuries-A Source for Model Sports Principles," 19 *T. Marshall L.Rev*. 551 (Thurgood Marshall Law Rev., Symp.: "Current Trends in U.S. Sporting Arena," 1994).

78 *See e.g., Yauger v. Skiing Enterprises, Inc.*, 539 N.W.2d 834, *rev'd*, 557 N.W.2d 60 (Wis. 1996); *Brett v. Great American Recreation, Inc.*, 677 A.2d 705, 715 (N.J. 1996); *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 800 (Vt. 1995); *Mead v. M.S.B.*, 872 P.2d 782 (Mont. 1994); *Frant v. Haystack Group, Inc.*, 641 A.2d 765 (Vt. 1994).

79 *Rosen, supra*, note 32.

80 *But see* Judge Babcock's ruling in *Glover, infra*, note 88 (where it was held that a ski area operator was immune from liability for the negligence of its own employee involved in a skier collision). One would believe that such an active role in an accident would not be "inherent."

81 Chalat, "Key Issues in the *Graven* Case," CLE International, Ski Liability Conference, Vail, Colorado (10/31/96).

82 *Dovey, supra*, note 17.

83 *Supra*, note 41.

84 *See Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848 (10th Cir. N.M. 1996); *Philippi, supra*, note 44; *Fullick v. Breckenridge Ski Corp.*, 962 F.2d 17 (10th Cir. 1992) (unpublished disposition).

85 CRS § 33-44-109(1), (2), (5).

86 As noted in *Ulissey, supra*, note 41 at 809.

87 *Compare: Cheong v. Antablin*, 946 P.2d 817 (Cal. 1997). There, the California Supreme Court held that a county ordinance requiring another skier to avoid the downhill skier did not establish a duty of care owed to the downhill skier, but that the careless skiing of others is at times an inherent risk of skiing.

88 955 F.Supp. 105 (D.Colo. 1997), *appeal pending*.

89 *Id*. 110.

90 *Id*. at 109-10; CRS § 33-44-112.

91 CRS § 33-44-103(10).

92 *See e.g., Nolan v. Mt. Bachelor, Inc.*, 856 P.2d 305 (Or. 1993); *Tilley v. Brodie Mtn. Ski Area, Inc.*, 591 N.E.2d 202 (Mass. 1992); *Clover, supra*, note 29.

93 *Nolan, supra*, note 92.

94 *Glover, supra*, note 88; *Graven, supra*, note 16 at 520.

95 *E.g., LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977), where the court allowed a claim to proceed against the area operator for its employee's collision.

96 *See, e.g., Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Colo. 1992) (negligent hiring); *McDonald v. Lakewood Country Club*, 461 P.2d 437 (Colo. 1969) (*respondeat superior*).

97 *Ulissey, supra*, note 41.

98 CRS § 33-44-109.

99 *See, e.g., Nolan, supra*, note 92*; Tilley, supra*, note 92*; Clover, supra*, note 29 at 1037. *But compare*: *Kaufman v. Hunter Mtn. Ski Bowl, Inc.*, 657 N.Y.S.2d 773 (N.Y.App. 1997) in which the court held that a ski patroller's collision into a guest was a risk that the participant assumed in the sport as "perfectly obvious."

100 784 F.2d 1058 (10th Cir. 1986). For an example of a similar fact situation, which resulted in litigation between joint tortfeasors, *see Copper Mtn. v. Poma of America, Inc.*, 890 P.2d 100 (Colo. 1995).

101 Under C.J.I. Civ.2d 9:14; *Trigg, supra*, note 100 at 1059.

102 C.J.I. Civ.2d 12:13.

103 *Supra*, note 61.

104 *Summit County Develop. Corp. v. Bagnoli*, 441 P.2d 658 (Colo. 1968); *Accord, Arapahoe Basin Inc., v. Fisher*, 475 P.2d 631 (Colo. App. 1970).

105 94M1958 (D.Colo. 1995), *appeal pending*, 96-1269 (10th Cir. 1996), *cert. granted*, 97SA145.

106 CRS § 25-5-701 *et seq*.

107 *Bayer, supra*, note 105.

108 *Teller Lift Cases v. City and County of Denver*, 85CV16271-18. The Teller lift suffered a catastrophic failure at the upper bullwheel. The bullwheel fell, and the cable lost tension. The failure caused almost forty people to be thrown from the lift, causing one death.

109 C.J.I. Civ.2d (now C.J.I. Civ.3d) 12:13.

110 N.D.C.C § 53-09-01 *et seq*.

111 *See Bouchard v. Johnson d/b/a Frost Fire Mtn.*, 555 N.W.2d 81 (N.D. 1996).

112 *Clover, supra*, note 29 at 1037.

113 Utah Code Ann. §§ 78-27-51 to -54 (1992, 1994 Supp.).

114 § 78-27-52(1).

115 *White v. Deseelhort*, 879 P.2d 1371 (Utah 1994); *See* Bigelow, "Ski Resort Liability for Negligence Under Utah's Inherent Risks of Skiing Statute," *Utah L.Rev*. 311-20 (Winter 1992), in which the author notes that the Utah legislative history indicates that the bill in no way "restricts the right to bring suit in legitimate negligence cases."

116 V.S.A. § 1037.

117 *See Frant, supra*, note 78, in which the court found that a fence post supporting a rope lift maze was not a danger inherent in the sport and that the jury should have been permitted to hear evidence of safer alternatives to the fence post, such as "forgiving" plastic or padded posts to reduce the hazard.

118 *See, e.g., Bouchard, supra*, note 111; *Clover, supra*, note 29 at 1037; *accord, White, supra*, note 115; *Mead, supra*, note 78*; Frant, supra*, note 117; *Brett, supra*, note 78; *Sytner v. State*, 223 A.D. 140, 645 N.Y.S.2d 654 (N.Y.A.D. 1996).

119 *E.g., Bouchard, supra*, note 101; *White, supra*, note 111; *Clover, supra*, note 29 at 1037; *Pizza, supra*, note 6*; Graven, supra*, note 16 *; Mead, supra*, note 78*; Frant, supra*, note 78*; Brett, supra*, note 78; *Sytner, supra*, note 118; *Hibschman v. City of Valdez*, 821 P.2d 1354 (Alaska 1991) (question for jury whether manmade jump dangerous artificial condition or inherent danger; court reversed summary judgment and held when injury caused by skier negligence and inherent danger, comparative negligence applies and inherent danger reduces, rather than bars, recovery). In *University of Alaska v. Shanti*, 835 P.2d 1225 (Alaska 1992), sledders were entitled to a jury trial as to whether the university had a duty to warn that the hill's terrain would propel sledders into trees.

120 *Marietta v. Cliffs Ridge*, 20 Mich.App. 449, 174 N.W.2d 164, *affirmed*, 385 Mich. 364, 189 N.W.2d 208 (1971).

121 MCLA §§ 408.321 to 408.344. Michigan has the nation's oldest ski safety act. It was amended in 1981 to add an "inherent danger" provision. Each person accepts the dangers that inhere in the sport insofar as the dangers are "obvious and necessary."

122 546 N.W.2d 273 (Mich.App. 1996). *See also, Grieb v. Alpine Valley Ski Area*, 155 Mich. App. 484, 400 N.W.2d 653 (1986); *Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich.App. 692, 428 N.W.2d 742 (1988).

123 *Northcutt v. Sun Valley Co.*, 787 P.2d 1159 (Idaho 1990). Idaho Code §§ 6-1101 to - 1109. *See also Rowett v. Kelly Canyon Ski Hill, Inc.*, 639 P.2d 6 (Idaho 1981) (only duties owed by ski area operator are those specifically imposed by Act); *Long v. Bogus Basin*, 869 P.2d 230 (Idaho 1994). *See*, Frakt and Rankin, *supra*, note 76.

124 *Collins v. Schweitzer*, 774 F.Supp., *aff'd*, 21 F.3d 1491, *cert. denied*, 115 S.Ct. 422 (1994).

125 *Davis v. Sun Valley Ski Education Found., Inc.*, 941 P.2d 1301 (Idaho 1997).

126 *Id*.

127 *Yauger, supra*, note 71.

128 *Del Bosco v. U.S. Ski Assoc.*, 839 F.Supp. 1470 (D.Colo. 1993).

129 834 P.2d 6 (Wash. 1992).

130 849 F.Supp. 1407 (D.Colo. 1994).

131 *Bauer, supra*, note 48. *Compare, Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F.Supp. 789 (C.D. Utah 1993). *See also Anderson v. Eby*, 998 F.2d 858 (10th Cir. 1993), in which a release entered into at the time of a snowmobile rental was enforced, notwithstanding an express Forest Service regulation requiring the permittee snow mobile tour operator to exercise due care.

132 702 A.2d 35 (Vt. 1997).

133 Id.; *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 800 (Vt. 1995).

134 *Phillips, supra*, note 51.

135 *Allan v. Snow Summit, Inc.*, 51 Cal. App.4th 1358 (1996).

136 "Contribution of Skiing," *supra*, note 1.

137 C.R.C.P. Chapter 23.3, Rules Governing Contingent Fees.

138 McPherson, "Personal Injury Settlements with Minors," 21 *The Colorado Lawyer* 1167 (June 1992).

139 16 U.S.C. § 497b.

140 5 U.S. § 552.

141 CRS §§ 33-14-101 to -120. A collision with a moving snowmobile is not a danger inherent to skiing. Under the Ski Act, and pursuant to the Colorado Snowmobile Act, a snowmobile must be operated with due regard for all "attendant circumstances," CRS § 33-14-116(1), and a special report must be filed with the local sheriff, state patrol, or law enforcement agency, as well as with with the Division of Wildlife and Parks and Outdoor Recreation. CRS § 33-14-115.

142 For a summary of some ski case settlements, *see:* http:// www.skilaw.com.

APPENDIX

Comparative Ski Liability Legislation

Eight states (CT, ME, NV, NJ, NM, NY, NC, WA) have enacted ski law statutes that generally preserve the doctrine of ordinary care: Conn. Gen. Stat. §§ 29-201 to -214 (1985); Me. Rev.Stat.Ann. Title 26, §§ 488-490 (1984); Nev.Rev.Stat. §§ 455A.060 to -.190; N.J. Stat.Ann. §§ 5:13-1 to -11 (West 1989); N.M. Stat.Ann. §§ 24-15-1 to -14 (Michie 1991); N.C. Gen. Stat. §§ 99C-1 to -5 (Supp. 1985); N.Y. GEN. OBLIG. §§ 18-101 to -108; Wash. Rev. Code Ann. §§ 70.117.010 to -.040 (West Supp. 1992).

Reference to the inherent dangers of skiing tempers ordinary care in several of these states. However, these states abstain from the strict adaptation of the primary assumption of risk rule. Although certain of these state statutes include "inherent danger" language, on balance, these states' laws, taken as a whole, preserve the rule of *Sunday*'s case [*Sunday v. Stratton Corp.*, 390 A.2d 398 (Vt. 1978)] that skiers and ski area operators must exercise reasonable care.

Sixteen states (AK, CO, ID, MA, MI, MT, ND, NH, OH, OR, PA, RI, TN, UT, VT, WV) have adopted various forms of "inherent danger" statutes: Alaska Stat. § 09.65.135 (1983); CRS §§ 33-44-101 to -114 (West 1996); Idaho Code §§ 6-1101 to -1109; Mass. Gen. Laws Ann. Ch. 143 § 71 H-71S (West 1991); Mich. Comp. Laws Ann. § 408.321 to 408.344 (West 1985); Mont. Code Ann. §§ 23-2-732 to -736 (1991); N.H. Rev.Stat.Ann. 225-A:1 to A:26 (1989); N.D. Stat. §§ 53-09-01 to -10; Ohio Rev. Code Ann. §§ 4169.01 to -4169.99 (Baldwin 1990); Ore. Rev. Stat. §§ 30.970 to .990; 42 Pa. Cons. Stat. Ann. § 7102(c)(1988); R.I. Gen. Laws §§ 41-8-2 to -3 (1990); Tenn. Code Ann. §§ 68-48-101 to -107 (1987); Utah Code Ann. §§ 78-27-51 to -54 (1992 & Supp. 1994); 12 Vt. Stat. Ann. § 1037 (1991); W.Va. Code §§ 20-3A-1 to 20-3A-8 (1984).

The scope and effect of these statutes range across a broad spectrum. At one end are states that adopt a strict primary assumption of the risk rule, holding that skiers are solely responsible for injury while skiing, irrespective of how they are injured (*see, e.g.*, Tenn. Code Ann. § 68-114-102). Other states set out strict guidelines as to what risks are inherent so that any defined inherent danger is a risk primarily assumed by the skier [*e.g.*, Idaho Code § 6-1103(10)].

Some states narrowly interpret inherent dangers, and thus allocate responsibility between skiers and ski area operator (*e.g.*, CRS §§ 33-44-105 to -109). Three states with significant skiing facilities (CA, WY, WI) have not adopted ski safety statutes, but have an applicable legislative scheme. Ordinances in five California counties have been held to establish an inherent danger scheme (Alpine Co. Ord. No. 562-94; Amador Co. Code, § 12.48.101 *et seq.*; El Dorado Co. Code, § 9.20.010; Nevada Co. Code, § G-IV, Art. 19; Placer County Code § 12.130 *et seq.*). Cal. Penal Code § 602(q) provides that it is a misdemeanor to ski on a closed ski trail; § 653(I) makes leaving the scene of a skiing accident punishable by up to a $1,000 fine).