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ALLOCATION OF THE RISKS OF SKIING: A CALL FOR THE REAPPLICATION OF FUNDAMENTAL COMMON LAW PRINCIPLES

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I. INTRODUCTION

Skiing is a unique and special sport in which an individual skier's abilities are constantly pitted against a changing winter mountain environment, ranging from gentle groomed trails to steep, ungroomed slopes. The essence of skiing is the continual challenge of making successful, individual assessments about one's own abilities in light of the available terrain choices and varying snow conditions.

Fueled by a significant growth in the popularity of the sport as a major recreational activity, ski area operators have invested millions of dollars in technological advances to develop, operate and maintain their areas. Not surprisingly, the ski industry, in general, has become an important factor in the economies of many communities and states. However, individually, many ski areas have become the frequent targets of litigation arising from injuries sustained by skiers.

Application of common law negligence principles by the courts to the sport of skiing has shifted between the inconsistent use of various legal doctrines and has drifted away from an analytical assessment and allocation of the appropriate responsibilities of skiers and ski area operators. In many states, legislation has been enacted in an effort to more clearly define the relative duties and responsibilities. As a result, many courts have struggled to fit novel statutory requirements into the common law frame of analysis.

This article will first outline the development of the common law as applied to the sport of skiing. Second, subsequent codifications affecting the determination of liability will be traced. Finally, this article will argue for a return to the fundamentals of tort law to properly assess and allocate legal responsibility for the risks associated with the sport of skiing. In each individual case, this framework will provide the basis for an analysis of whether there was a legal duty on the ski area operator upon which the injured skier may sustain an action in negligence.

Three recent Colorado Supreme Court cases provide the stepping stones for going back to the basics in the application of tort law to the sport of skiing. These cases suggest how common law principles of negligence may be reconciled with the recent statutory revisions and how a

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common sense approach may be available in the determination of liability for injuries arising from the inherent risks of skiing.

II. The Common Law Development

The evolution of negligence law in the sport of skiing began with the historic case of *Wright v. Mt. Mansfield Lift, Inc.*[1] Since that decision, in 1951, involving the assessment of the responsibilities of a ski area operator and an injured skier, many different aspects of skiing have been litigated including ski school classes[2], skiing competitions[3], ski lift accidents[4], ski lift loading and unloading accidents[5], collisions with ski area

1. 96 F. Supp. 786 (D. Vt. 1951).

2. Ninio v. Hight, 385 F.2d 350 (10th Cir. 1967)("rules of road" applicable in skier-skier collision); Heath v. Aspen Skiing Corp., 325 F. Supp. 223 (D. Colo. 1971)(dismissal of complaint based upon refusal to permit independent ski instructor at ski area); Davis v. Erickson, 53 Cal. 2d 860, 350 P.2d 535, 3 Cal. Rptr. 567 (1960)(proximate cause instruction necessary in a collision between a ski school student-plaintiff and another skier); Summit County Development Corp. v. Bagnoli, 166 Colo. 27, 441 P.2d 658 (1968)(no assumption of risk instruction when ski school student misloaded lift); Seidl v. Trollhaugen, Inc., 305 Minn. 506, 232 N.W.2d 236 (1975)(comparative negligence instruction upheld in collision with ski instructor action); Elliott v. Taos Ski Valley, Inc., 83 N.M. 575, 494 P.2d 1392 (N.M. App. 1972)(application of traditional negligence law to injury of a ski school student when instructor failed to summon assistance), *aff'd*, 83 N.M. 763, 497 P.2d 974.

3. Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972)(release upheld in jumping competition accident); Marietta v. Cliff's Ridge, Inc., 20 Mich. App. 449, 174 N.W.2d 164 (1969)(liability for use of inappropriate slalom poles), *aff'd*, 385 Mich. 364, 189 N.W.2d 208 (1971); Vogel v. West Mountain Corp., 97 A.D.2d 46, 470 N.Y.S.2d 475 (1983)(mere sponsorship of a race did not create a duty to a racer on the part of the sponsor); Douglass v. Skiing Standards, Inc., 142 Vt. 634, 459 A.2d 97 (1983)(release upheld in a skiing competition accident).

4. Trigg v. City and County of Denver, 784 F.2d 1058 (10th Cir. 1986)(negligence per se instruction appropriate in a lift accident but not a res ipsa loquitur instruction under the facts presented); Noto v. Pico Peak Corp., 469 F.2d 358 (2d Cir. 1972)(instructions and warnings regarding maintenance of a lift bullwheel do not cover defective designs); Sabo v. Breckenridge Lands, Inc., 255 F. Supp. 602 (D. Colo. 1966)(contributory negligence not a bar to recovery if ski area is subsequently in a position to avoid the injury and prevent harm), *appeal denied*, 376 F.2d 840 (10th Cir. 1967); Miller v. Arnal Corp., 129 Ariz. 484, 632 P.2d 987 (1981)(no liability for failure to rescue campers stranded in storm); Anderson v. Heron Engineering Co., 40 Colo. App. 191, 575 P.2d 16 (1977)(lift manufacturer held to express warranties regarding safety), *rev'd*, 198 Colo. 391, 604 P.2d 674 (1979); Lewis v. Big Powderhorn Mountain Ski Corp., 69 Mich. App. 437, 245 N.W.2d 81 (1976)(strict liability not applicable in rope tow accident); Pessl v. Bridger Bowl, 164 Mont. 389, 524 P.2d 1101 (1974)(standard of reasonable care applicable in lift operations under Montana Passenger Tramway Act); Cowan v. Tyrolean Ski Area, Inc., 127 N.H. 397, 506 A.2d 690 (1985)(inadequate jury instructions in chair lift incident); Bolduc v. Herbert Schneider Corp., 117 N.H. 566, 374 A.2d 1187 (1977); Ford v. Black Mountain Tramways, Inc., 110 N.H. 20, 259 A.2d 129 (1969)(ski area not a manufacturer or seller of tramway, only an entity providing transportation service and thus no action under strict liability); Allen v. State, 110 N.H. 42, 260 A.2d 454 (1969)(operator of ski lift a common carrier); Lippman v. State, 83 A.D.2d 700, 442 N.Y.S.2d 598 (1981)(res ipsa loquitur applicable in case where chairs with riders fell to ground); Lawrence v. Davos, Inc., 46 A.D.2d 41, 360 N.Y.S.2d 730 (1974)(res ipsa loquitur instruction rejected in lift case where plaintiff failed to use safety chains); Albert v. State, 80 Misc. 2d 105, 362 N.Y.S.2d 341 (1974)(lifts under New York statutory law not common carriers), *aff'd*, 51 A.D.2d 611, 378 N.Y.S.2d 125 (1976); Friedman v. State, 54 Misc. 2d 448, 282 N.Y.S.2d 858 (1967)(operator of a ski lift is a common carrier), *modified*, 31 A.D.2d 992, 297 N.Y.S.2d 850 (1969); Vogel v. State, 204 Misc. 614, 124 N.Y.S.2d 563 (1953)(contributory negligence in not freeing ski poles from chair barred recovery in lift unloading accident); Egede-Nissen v. Crystal Mountain,

equipment[6] and other skiers[7], skier collisions with natural objects and skier falls[8]. Courts have also addressed evidentiary issues[9], applications

Inc., 21 Wash. App. 130, 584 P.2d 432 (1978)(obligations to invitee in lift accident only apply to those parts of property which are in the scope of the invitation), *aff'd*, 93 Wash. 2d 127, 606 P.2d 1214 (1980).

5. Hunt v. Sun Valley Company, Inc., 561 F.2d 744 (9th Cir. 1977)(highest degree of care applied to lift operation, yet strict liability rejected); Riblet Tramway Company v. Monte Verde Corp., 453 F.2d 313 (10th Cir. 1972)(standard of highest degree of care as common carrier for lift operations); Houser v. Floyd, 220 Cal. App. 2d 778, 34 Cal. Rptr. 96 (1963)(res ipsa loquitur not applicable in lift case); Summit County Development Corp. v. Bagnoli, 166 Colo. 27, 441 P.2d 658 (1968); Jordan v. Loveland Skiing Corp., 503 P.2d 1034 (Colo. App. 1972)(res ipsa loquitur instruction rejected in lift unloading case); Arapahoe Basin, Inc. v. Fischer, 28 Colo. App. 580, 475 P.2d 631 (1970)(instructions on contributory negligence sufficient in lift related accident without instruction on assumption of risk); Grauer v. State, 9 A.D.2d 829, 192 N.Y.S.2d 647 (1959)(operator of a ski lift not subject to res ipsa loquitur); Math v. State, 37 Misc. 2d 1023, 237 N.Y.S.2d 478 (1962)(operator of lift has same duty as a common carrier).

6. Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976)(skier collision with unpadded lift tower assumed risks of losing control); Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. App. 1983)(ski area liable in skier collision with sno-cat for failure to warn skier of grooming activities as required by Colorado Ski Safety Act of 1979); Rowett v. Kelly Canyon Ski Hill, Inc., 102 Idaho 708, 639 P.2d 6 (1981)(lighting for night skiing held to be adequate); Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1979)(skier collision with unpadded utility pole; ski area subject to "ordinary" care).

7. Rosen v. LTV Recreational Development, Inc., 569 F.2d 1117 (10th Cir. 1978)(in collision with skier and then a metal pole, assumption of the risk is a species of contributory negligence; reasonable man standard applicable); LaVine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977)(in skier-skier collision, recognition of "rule of road" for downhill skier to yield to skiers below); Ninio v. Hight, 385 F.2d 350 (10th Cir. 1967)("rules of road" applicable in skier-skier collision); McDaniel v. Dowell, 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962)(operation of tow rope not that of a common carrier since it does not physically carry the skier); Seidl v. Trollhaugen, 305 Minn. 506, 232 N.W.2d 236 (1975)(skier-skier collision where secondary assumption of risk did not include the risk of being hit by another skier); Goss v. Allen, 134 N.J. Super. 99, 338 A.2d 820 (1975)(standard of care for minor in skier collision case is that required of a reasonable person of like age, intelligence and experience); Morse vs. State, 262 A.D. 324, 29 N.Y.S.2d 34 (1941)(sledding not an inherent danger to a novice skier in a collision with the sled on a ski slope), *aff'd*, 287 N.Y. 666, 39 N.E.2d 288 (1941).

8. Rimkus v. Northwest Colorado Ski Corp., 706 F.2d 1060 (10th Cir. 1983)(evidence of remedial repairs permitted); Rosen v. LTV Recreational Development, Inc., 569 F.2d 1117 (10th Cir. 1978)(in collision with skier and then a metal pole, assumption of the risk is a species of contributory negligence; reasonable man standard applicable); Mannhard v. Clear Creek Skiing Corp., 682 P.2d 64 (Colo. App. 1983)(standard of reasonable care for operation in case where skier was killed in an out-of-bounds avalanche since activity is not "inherently dangerous"); Murphy v. Chestnut Mountain Lodge, Inc., 124 Ill. App. 3d 508, 464 N.E.2d 818 (1984)(no duty to skier regarding skiing equipment without evidence on the existence of anti-friction devices on the skis); Tarlowe v. Metropolitan Ski Slopes, Inc., 34 A.D.2d 905, 311 N.Y.S.2d 344 (1970)(failure of bindings to release could be attributed to a defect in the equipment), *rev'd*, 28 N.Y.2d 410, 271 N.E.2d 515, 322 N.Y.S.2d 665, *on remand*, 37 A.D.2d 810, 324 N.Y.S.2d 852 (1971); Kaufman v. State, 11 Misc. 2d 56, 172 N.Y.S.2d 276 (1958)(skier accepts risk of collision with rock as inherent in the sport in so far as it was obvious and necessary); Blair v. Mt. Hood Meadows Development Corp., 48 Ore. App. 109, 616 P.2d 535 (1980)(assumption of the risk no longer a separate defense due to statutory language; skier is an invitee), *rev'd*, 291 Or. 293, 630 P.2d 827, *reh'g denied*, 291 Or. 703, 634 P.2d 241 (1981); Zimmer v. Mitchell and Ness, 253 Pa. Super. 474, 385 A.2d 437 (1978)(ski rental release upheld), *aff'd*, 490 Pa. 428, 416 A.2d 1010 (1980); Rubin v. Loon Mountain Recreation Corp., No. 84-6248 (D.C. Penn. Oct. 18, 1985)(1985 WL 101)(ski rental release upheld); Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978)(primary assumption of risk in skiing fall not applicable if a ski area operator duty exists and is breached); Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981)(beginning skier not held to assume risk regarding binding adjustment).

9. Rimkus v. Northwest Colorado Ski Corp., 706 F.2d 1060 (10th Cir. 1983)(evi-

of statutes of limitations[10], standards of care[11] and the constitutionality of statutes governing skiing.[12]

Throughout the development of the case law concerning skiing, courts have wrestled with the analysis of the relative responsibilities of skiers and ski area operators for injuries resulting from the "inherent risks of skiing." There has been a concerted effort to analyze the issue pursuant to one or more of the historically defined traditional tort law doctrines including legal duty, primary assumption of the risk, secondary assumption of the risk, contributory negligence, and comparative

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dence of remedial repairs permitted); Opera v. Hyva, Inc., 86 A.D.2d 373, 450 N.Y.S.2d 615 (1982)(evidence of post-accident modifications to binding manufacturer's manual not admissable to establish negligence; renting defective equipment creates strict liability situation).

10. Schafer v. Aspen Skiing Co., 742 F.2d 580 (10th Cir. 1984) (statute of limitations of Colorado Ski Safety Act barred action); Ritter v. Aspen Skiing Corp., 519 F. Supp. 907 (D. Colo. 1981)(statute of limitations barred wrongful death action); Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D. Vt. 1974)(statute of limitations did not bar action by a military serviceman); Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 545 P.2d 1207 (1976).

11. Trigg v. City and County of Denver, 784 F.2d 1058 (10th Cir. 1986)(negligence per se instruction appropriate in a lift accident but not a res ipsa loquitur instruction under the facts presented); Hunt v. Sun Valley, Inc., 561 F.2d 744 (9th Cir. 1977)(highest degree of care applied to lift operation, yet strict liability rejected); Riblet Tramway Co. v. Monte Verde Corp., 453 F.2d 313 (10th Cir. 1972)(standard of highest degree of care as common carrier for lift operations); Houser v. Floyd, 220 Cal. App. 2d 778, 34 Cal. Rptr. 96 (1963)(res ipsa loquitur not applicable in lift case); McDaniel v. Dowell, 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962)(operation of tow rope not that of a common carrier since it does not physically carry the skier); Mannhard v. Clear Creek Skiing Corp., 682 P.2d 64 (Colo. App. 1983)(standard of reasonable care for operation in case where skier was killed in an out-of-bounds avalanche since activity is not "inherently dangerous"); Jordan v. Loveland Skiing Corp., 503 P.2d 1034 (Colo. App. 1972)(res ipsa loquitur instruction rejected in lift unloading case); Lewis v. Big Powderhorn Mountain Ski Corp., 69 Mich. App. 437, 245 N.W.2d 81 (1976)(strict liability not applicable in rope tow accident); Pessl v. Bridger Bowl, 164 Mont. 389, 524 P.2d 1101 (1974)(standard of reasonable care applicable in lift operations under Montana Passenger Tramway Act); Bolduc v. Herbert Scheider Corp., 117 N.H. 566, 374 A.2d 1187 (1977)(ski lift operators are not common carriers); Opera v. Hyva, Inc., 86 A.D.2d 373, 450 N.Y.S.2d 615 (1982)(evidence of post-accident modifications to binding manufacturer's manual not admissible to establish negligence; renting defective equipment creates strict liability situation); Ford v. Black Mountain Tramways, Inc., 110 N.H. 20, 259 A.2d 129 (1969)(ski area not a manufacturer or seller of tramway, only an entity providing transportation service and thus no action under strict liability); Goss v. Allen, 134 N.J. Super. 99, 338 A.2d 820 (1975)(standard of care for minor in skier collision case is that required of a reasonable person of like age, intelligence and experience); Lippman v. State, 83 A.D.2d 700, 442 N.Y.S.2d 598 (1981)(res ipsa loquitur applicable in case where chairs with riders fell to ground); Albert v. State, 80 Misc. 2d 105, 362 N.Y.S.2d 341 (1974)(lifts under New York statutory law not common carriers), *aff'd*, 51 A.D.2d 611, 378 N.Y.S.2d 125 (1976); Lawrence v. Davos, Inc., 46 A.D.2d 41, 360 N.Y.S.2d 730 (1974)(res ipsa loquitur instruction rejected in lift case where plaintiff failed to use safety chains); Friedman v. State, 54 Misc. 2d 448, 282 N.Y.S.2d 858 (1967)(operator of a ski lift is a common carrier), *modified*, 31 A.D.2d 992, 297 N.Y.S.2d 850 (1967); Coger v. State, 23 A.D.2d 935, 260 N.Y.S.2d 45 (1965)(duty of occupier of land); Math v. State, 37 Misc. 2d 1023, 237 N.Y.S.2d 478 (1962)(operator of lift has same duty as a common carrier); Grauer v. State, 9 A.D.2d 829, 192 N.Y.S.2d 647 (1959)(operator of a ski lift not subject to res ipsa loquitur); Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1979)(skier collision with unpadded utility pole; ski area subject to "ordinary" care).

12. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985); Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653 (1986); Brewer v. Ski Lift, Inc., 762 P.2d 226 (Mont. 1988).

negligence.[13] It is important for courts to avoid the instinctive categorization of these responsibilities under such labels without undertaking a systematic analysis of what results may flow from the application a particular doctrine due to that doctrine's underlying nature or historical treatment.

The tide that led to the sea of litigation in the area of ski law began with the historic case of *Wright v. Mt. Mansfield Lift, Inc.*[14] Wright, an intermediate level skier, was skiing with her husband at the Mt. Mansfield ski resort in Vermont. On her first run down the slope, Wright encountered no difficulties. However, during her second run down the same slope, Wright fell after her ski struck a snow covered stump. As a result of the fall, she suffered a broken leg. Wright sued Mt. Mansfield alleging negligent maintenance of the slope.

The Vermont Federal District Court applied the doctrine of *volenti non fit injuria* and held that recovery was barred.[15] The court reasoned that a skier accepts those dangers that inhere in the sport which are obvious and necessary.[16] Consequently, the risk of injury that results from such conditions is the skier's responsibility.[17]

Relying on traditional premises liability under the common law, the court classified Wright as an invitee of the ski area operator. The court, therefore, concluded that the operator owed Wright a duty to inform her of any dangers which reasonable prudence would have foreseen and corrected.[18] In this analysis, the court found that the defendants could not have foreseen the danger which caused Wright's injury, and, therefore, Mt. Mansfield did not have a legal duty to Wright "that charge[d] it with the knowledge of these mutations of nature and require[d] it to warn the public against such."[19]

The primary assumption of the risk doctrine was the lynch pin of the court's rationale for determining Mt. Mansfield to be without a legal duty to Wright. In its analysis, the court coupled the lack of a legal duty on the part of Mt. Mansfield to the assumption of the inherent risks in

13. A thorough discussion of the defense of assumption of the risk is contained in Roselund & Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F.L. REV. 255 (1986). In Blair v. Mt. Hood Meadows Development Corp., 630 P.2d 827 (Or. 1981), the Supreme Court of Oregon articulated the relationships among the doctrines as follows:

> We used the concept of plaintiff's assumption of the risk in our prior decisions involving risks present in sports activities even when properly conducted as a descriptive phrase for the legal conclusion that defendant had no duty under the circumstances or had breached no duty under the circumstances in failing to take precautions against the risk . . . . Conduct of the plaintiff in voluntarily and unreasonably encountering a risk created by the defendant's conduct, which was sometimes labeled "secondary assumption" of risk but was in reality a form of contributory negligence, may now be compared to negligent conduct of the defendant in allocating relative fault and apportioning damages under the comparative fault scheme in ORS 18.470. *Id.* at 832.

14. 96 F. Supp. 786 (D. Vt. 1951).
15. *Id.* at 791.
16. *Id.*
17. *Id.*
18. *Id.* at 790.
19. *Id.* at 791.

the sport by skiers. Future courts carefully considered this linkage to separate the assumption of the "inherent risks of skiing" doctrine in their determination of whether a legal duty existed on the part of the ski area operator. The focus became whether the specific injury producing risk had been "assumed" by skiers, and, if not, the ski area operator necessarily owed a legal duty to the injured skier.

The decision in *Wright* was narrowed by *Marietta v. Cliff's Ridge, Inc.*[20] Marietta was running through the latter portion of a slalom race course when he struck a sapling pole used as a gate marker. He seriously injured his groin and abdomen area. Marietta proved that this type of accident was common among slalom racers, and that it was an industry standard to use more flexible materials for the gate markers.

The Supreme Court of Michigan deviated from the precedent set in *Wright*. The court placed greater emphasis upon a ski area operator's duties to its skiing patrons than on the knowledge, assumption or acceptance of risks by the skier. Marietta provided the court with sufficient evidence to prove that the use of sapling poles created a foreseeable risk of harm and that Marietta's injuries were, therefore, reasonably foreseeable.

Specifically, the court held that ski area operators have a duty to warn skiers of or prevent those conditions that present a reasonably foreseeable risk of injury or harm.[21] The ski area operator was found to have breached its duty to Marietta and was, therefore, found to be liable for his injuries.[22] The court added that the proper standard of care for ski area operators in the discharge of their legal duties was that of a reasonable man.[23]

The dissent in *Marietta* argued that the "inherent risks of skiing" doctrine should have been applied to bar the plaintiff's claim.[24] Through application of this theory, the court could have found that Marietta assumed the risk of injury, and, therefore, that the ski area operator should have been relieved of liability. To the contrary, the majority felt that a strict application of this doctrine would have unfairly and improperly placed all of the risks of injury upon the skier.

Without citing the *Marietta* decision, the Supreme Court of Vermont changed the tide in the sea of ski law with the landmark decision of *Sunday v. Stratton*.[25] Sunday, a novice skier, was skiing on "The Interstate," a trail maintained by the ski area operator for beginners, when his skis became entangled in snow-covered brush. As a result of the accident, he was rendered quadriplegic. Sunday alleged that the defendant negligently maintained the ski trails and failed to give notice of hidden dan-

20. 20 Mich. App. 449, 174 N.W.2d 164 (1969), *aff'd*, 385 Mich. 364, 189 N.W.2d 208 (1971).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 212 (Black, J., Dissenting).

25. 136 Vt. 293, 390 A.2d 398 (1978).

gers. The court restructured and applied the assumption of inherent risks doctrine.

Specifically, the court reasoned that primary assumption of the risk imparts no liability on a ski area operator because the ski area operator does not have a duty to the skier with respect to the risk that led to injury.[26] However, the court concluded that, in this case, the defendant did owe Sunday a duty as a matter of law.[27]

The court dismissed the doctrine of "primary assumption of the risk" by drawing a distinction between assuming a risk inherent in a sport and a risk created by the condition of the "playing field" that is provided for the sport to take place.[28] The court reasoned that although skiers often fall, every fall is not necessarily due to an inherent danger in the sport.[29] If the fall is not due to a breach of duty by the defendant, then the risk is assumed and recovery is barred. Conversely, when the evidence indicates the existence of a duty, then the assumption is not of the risk, "but the use of reasonable care on the part of the defendant"[30] in the discharge of the duty.

The court affirmed the jury's determination that the defendant failed to meet its duty to Sunday, an invitee, and was therefore liable for negligence.[31] The court also upheld the trial court's charge to the jury concerning contributory negligence and found that the doctrine of "secondary assumption of risk" is merely a phase of contributory negligence.[32]

The court emphasized the changes in grooming techniques since the *Wright* decision and stated that, "[i]t is clear from the evidence that the passage of time has greatly changed the nature of the ski industry . . . . [T]he stump that injured the plaintiff in *Wright* may well be the basis for negligence today in view of improved grooming techniques."[33]

This decision was the height of the tide that shifted the focus from a skier's assumption of risks to a ski area operator's duty of care. The *Sunday* court sent a new message: the timorous need no longer stay at home. The message was clearly contrary to Cardozo's advice which was

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26. 390 A.2d at 403. The Court stated the doctrine as follows:

> Where primary assumption of risk exists, there is no liability to the plaintiff, because there is no negligence on the part of the defendant to begin with; the danger to plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence.

Id. The Court's analysis focused on whether the risk was "inherent" and therefore subject to the primary assumption of the risk doctrine since no legal duty would extend to Sunday if the risk was found to be inherent.

27. The Court approached the issue by analyzing the existence of a legal duty and concluded that "where the evidence indicates existence or assumption of a 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." *Id.*

28. *Id.* at 402.

29. *Id.* at 403.

30. *Id.*

31. *Id.*

32. *Id.* at 404.

33. *Id.* at 402.

applied in *Wright*.[34]

In *Smith v. Seven Springs Farm, Inc.*,[35] the Third Circuit applied the primary assumption of the risk doctrine after concluding that the doctrine survived the enactment of a comparative negligence statute that included a specific provision relating to downhill skiing.[36] The plaintiff sued Seven Springs as a result of an accident in which he fell and slid into a large pole and two snowmaking pipes. The court concluded as follows:

> [A]ssumption of risk in its primary sense is a defense that negates the defendant's duty of care. Here, plaintiff seeks to construct a prima facie case of duty owed to him by the defendant. Prosser, Law of Torts § 68, at 455 (4th ed. 1971). Defendant then has the burden of demonstrating that no duty was owed plaintiff. Restatement (Second) of Torts § 496G (1965). Defendant can sustain its burden by proving that plaintiff knew of the risk, appreciated its character, and voluntarily chose to accept it. *Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 88, 394 A.2d 546, 552-53 (1978). The standard to determine whether assumption of the risk existed is essentially subjective. *Weaver v. Clabaugh*, 255 Pa. Super. 532, 536, 388 A.2d 1094, 1096 (1978).[37]

Primary assumption of the risk served as the basis for absolving any legal duty on the part of the defendant to warn or protect the plaintiff. In *Schmitz v. Cannonsburg Skiing Corp.*,[38] the ski area operator was sued following the death of a skier who collided with a tree. The Court, relying on *Grieb v. Alpine Valley Ski Area*,[39] applied the assumption of the inherent risks doctrine codified in the Michigan Ski Area Safety Act,[40] and concluded that the skier had accepted the risk of colliding with a tree. The Court noted:

> [i]t is clear from the plain and unambiguous wording of § 22(2) that the legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators. Significantly, the list of 'obvious and necessary' risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equip-

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34. The Court in *Wright* quoted from Cardozo's opinion in Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929).

> The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

96 F. Supp. at 791.

35. 716 F.2d 1002 (3d Cir. 1983).

36. *Id.* at 1007 (citing 42 PA. CONS. STAT. ANN. § 7102 (Purdon Supp. 1982)).

37. *Smith*, 716 F.2d at 1008-9.

38. 428 N.W. 2d 742 (Mich. 1988).

39. 155 Mich. App. 484, 400 N.W. 2d 653 (1986).

40. MICH. STAT. ANN. § 18.483 (22) (2) (Callaghen 1980).

> ment that are inherent parts of a ski area, such as lift towers and other such structures of snow-making or grooming equipment when properly marked. These are all conditions that are inherent to the sport of skiing . . . . The skier must accept these dangers as a matter of law.[41]

In California, the court of appeals took a different approach from the *Schmitz* court in reviewing the legal duties of a ski area operator rather than the acceptance of the inherent risks by the skier. The California court of appeals analyzed the existence of a legal duty in *Danieley v. Goldmine Ski Associates*,[42] in which the plaintiff lost control of her skis during a turn and collided with a large tree just beyond the groomed edge of the run, sustaining serious injuries. The trial court granted the motion from summary judgment filed by the defendant. The primary issue concerned whether the defendant owed a legal duty to the plaintiff to remove the tree that was struck by the plaintiff.

The court did rely on the analysis of the Michigan Supreme Court in *Schmitz* upholding the determination by the trial court that the ski area operator owed no legal duty to the skier to remove the tree she collided with. The court found: "To impose a duty of the kind urged by plaintiffs would, in our view, have the effect of making Goldmine an insurer of plaintiff wife's safety, as well as an insurer of the safety of every other skier on the mountain."[43] The court added that a large tree growing at the side of a run is an obvious danger and served as its own warning. It concluded that if a duty existed to remove trees along the edges of runs, all trees on the mountain should be cut down, which would be an inappropriate result.[44]

In the event the risk does not appear to be obvious and necessary, a ski area operator may be found to owe a duty of care to skiers. For example, in *Rosen v. LTV Recreational Development, Inc.*,[45] a collision between the skier and a steel signpost embedded in concrete was not determined to be an obvious danger. Consequently, the court concluded that the skier could not have assumed the risk of his accident.[46] Even though the skier in *Rosen* collided with another skier before striking the concrete wall, the court allowed proof that the prior collision was not an intervening legal cause.[47] The court also rejected application of the assumption of the risk as a bar to Rosen's recovery.[48]

Courts began to apply the primary assumption of the risk doctrine based upon whether the risk was inherent in the sport. In *Marietta*, the court held that the resort's use of maple sapling poles as slalom markers was not an inherent risk, particularly since the ski area operator knew of

41. 400 N.W.2d at 744.
42. No. E005891 (Cal. Ct. App. Feb. 22, 1990).
43. *Id.* at 13-14.
44. *Id.* at 15.
45. 569 F.2d 1117 (10th Cir. 1978).
46. *Id.* at 1121.
47. *Id.* at 1119-20.
48. *Id.* at 1121.

more appropriate slalom pole materials. The failure to use those materials constituted negligence. As part of the determination of whether the risk of collision with a man-made object was an inherent risk, the court assessed the obvious and necessary nature of the object. In this case, the court deemed the object was not an obvious and necessary danger inherent in the sport of skiing, and, therefore, the skier was not found to have assumed the risk of injury.

The likelihood that the danger of a collision with a natural object will be seen as an obvious and necessary risk inherent in the sport was lessened as a result of *Sunday*. The court failed to find that the existence of such a natural obstruction presents a danger which is inherent in the sport. Such a case-by-case review of whether a particular risk is inherent in the sport of skiing became the preferred approach in assessing whether the ski area operator owed a duty to the skier.[49]

In *Blair v. Mt. Hood Meadows Development Corp.*,[50] the defendant was found not liable after Blair skied into a ravine. Blair took an unfamiliar route, missed a curve in the trail and skied into a ravine which separated the ski area from the lodge. He sustained injuries to his arm and shoulder. Blair claimed that the defendant was negligent in failing to warn of the ravine by flag, warning signs or complete closure of the run. The defendant used the affirmative defense of contributory negligence by asserting that the plaintiff failed to keep a proper look out and failed to maintain control of his speed and course.

The court reviewed the appropriateness of the following jury instruction: "Sports activities involve some risks. Every person who takes part in a sport accepts and submits himself to the dangers that are inherent in or a reasonable part of that sport."[51] The court balanced the doctrines of primary assumption of the risk and existence of a legal duty in light of an Oregon statute abolishing "implied assumption of the risk" and concluded that the instruction "should not have been given by the trial judge because it focuse[d] upon the plaintiff's implied assumption of risk. It is not couched in the terms of defendant's duty."[52] This represented another shift away from an assumption of the risk assessment to a duty analysis.

In cases dealing with collisions between skiers, the courts have looked to traditional "rules of the road" in skiing in placing the burden of accident avoidance on the person skiing downhill or "overtaking" others on the slope. In *Ninio v. Hight*,[53] the plaintiff, Ninio, was participating in a beginners skiing class and was hit by a skier while the class was stationary on the mountain. The Tenth Circuit applied the "rule of the road" theory. Under Colorado law, when one has a duty to look for dangerous conditions he will be presumed, in an accident scenario, to

49. Indeed, the assessment of the nature of the risk was the only criterion considered by many courts in determining the existence of a legal duty on the ski area operator.

50. 291 Or. 293, 630 P.2d 827 (1981), *reh'g denied*, 291 Or. 703, 634 P.2d 241.

51. *Id.* at 296, 630 P.2d at 829.

52. *Id.* at 301, 630 P.2d at 833.

53. 385 F.2d 350 (10th Cir. 1967).

have looked where he was supposed to look and to have seen what reasonably could and should have been seen.[54] Failure on the part of a skier to comply with this duty was seen as negligence.[55] The court did not take the next step and consider whether collisions between skiers constitute one of the inherent risks of the sport.

III. THE IMPACT OF STATE LEGISLATION

A. *The Codification of Laws Relating Directly to Skiing*

Responding to the shift in the case law away from application of the primary assumption of inherent risks doctrine, legislatures of most of the skiing states enacted statutes which specifically addressed the responsibilities of skiers and ski area operators.[56] Like the development of the case law, the various statutes focused on enumerating the respective duties of skiers and ski area operators, the assumption of the inherent risks by skiers or some combination of both.[57]

For example, Utah's legislature followed the assumption of the risk

54. *Id.* at 352. This instruction is traditionally used in auto accident cases.

55. This rule was applied again in LaVine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977). *LaVine* involved injuries to an expert skier who was hit from behind by a certified ski instructor. The court applied the "rule of the road" theory.

56. ALASKA STAT. § 09.65.135 (1983); CAL. PENAL CODE §§ 602(q) & 653(i) (West Supp. 1989); COLO. REV. STAT. §§ 33-44-101 to -111 (1984); CONN. GEN. STAT. ANN. §§ 29-201 to -214 (West Supp. 1989); IDAHO CODE §§ 6-1101 to -1109 (Supp. 1989); ME. REV. STAT. ANN. tit. 26, §§ 488 & 489 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 143, §§ 71 I to S (West Supp. 1989); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 1985); MONT. CODE ANN. §§ 23-2-731 to -737 (1983); NEV. REV. STAT. ANN. §§ 455A.010 to .190 (Michie 1987); N.H. REV. STAT. ANN. §§ 225-A:1 to :26 (1989); N.J. STAT. ANN. §§ 34.4A-1 to -15 (West 1989); N.M. STAT. ANN. §§ 24-15-1 to -14 (1986); N.Y. LAB. LAW §§ 865 to 868 (McKinney Supp. 1989); N.C. GEN. STAT. §§ 99C-1 to -5 (1985); N.D. CENT. CODE §§ 53-09-01 to -11 (Supp. 1989); OHIO REV. CODE ANN. §§ 4169.01 to .99 (Anderson Supp. 1988); OR. REV. STAT. §§ 30.970 to .990 (1988); PA. STAT. ANN. tit. 42, § 7102(c) (Purdon Supp. 1989); R. I. GEN. LAWS §§ 41-8-1 to -4 (1984); TENN. CODE ANN. §§ 68-48-101 to -107 (1987); UTAH CODE ANN. §§ 78-27-51 to -54 (1987); VT. STAT. ANN. tit. 12, § 1037 (Supp. 1989); WASH. REV. CODE ANN. §§ 70.117.010 to .040 (West Supp. 1989); W. VA. CODE §§ 20-3A-1 to -8 (1989); WYOMING STAT. §§ 6-9-201 & -301 (1989).

57. State statutes that adopted a primary assumption of inherent risks approach include the following: ALASKA STAT. § 09.65.135 (1983); IDAHO CODE §§ 6-1101 to -1109 (Supp. 1989); ME. REV. STAT. ANN. tit. 26, §§ 488-489 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 143, §§ 71 I to S (West Supp. 1989); 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. §§ 34.4A-1 to -15 (West 1989); N.M. STAT. ANN. §§ 24-15-1 to -14 (1986); OHIO REV. CODE ANN. §§ 4169.01 to .99 (Anderson Supp. 1988); OR. REV. STAT. §§ 30.970 to .990 (1988); TENN. CODE ANN. §§ 68-48-101 to -107 (1987); UTAH CODE ANN. §§ 78-27-51 to -54 (1987); VT. STAT. ANN. tit. 12, § 1037 (Supp. 1989); W.VA. CODE §§ 20-3A-1 to -8 (1989).

At the time of the writing of this article, the Colorado General Assembly was considering a significant amendment to the Ski Safety Act in Senate Bill 80. The Colorado Senate and House of Representatives passed the bill and the House version was being reviewed by the Senate before being sent to the Governor for review and signatures. The bill adopts the primary assumption of inherent risk doctrine and sets forth those risks in a similar fashion to the Utah statute. In addition, the proposed statute contains a cap of $1,000,000 on the damages that may be awarded to skiers injured as a result of a ski area operator's negligence in those cases not involving a lift. The cap may be lifted in limited circumstances by the trial court judge. If passed in substantially its proposed form, it will result in statutorily combining the legal duty and primary assumption of the inherent risks doctrines in Colorado.

approach by enumerating specific inherent risks which preclude recovery.[58] Ski area operators are required to post signs advising skiers of the inherent risks of skiing and the limitations on liability of ski area operators.[59]

The Colorado General Assembly enacted the Colorado Ski Safety Act ("Act")[60] in 1979 "to define the rights and liabilities existing between the skier and the ski area operator."[61] The Act begins with a declaration that "dangers . . . inhere in the sport of skiing, regardless of any and all reasonable safety measures which can be employed."[62] The Act then articulates the responsibilities of skiers and ski area operators, but, contrary to the Utah approach, does not clearly address the assumption of inherent risks doctrine.[63] On the other hand, the Colorado General Assembly did not impose any duties upon ski area operators to reduce or eliminate those dangers that "inhere in the sport of skiing."

The Colorado Ski Safety Act carefully defines the duties imposed upon ski area operators.[64] Ski area operators are required to comply with a comprehensive sign system on each of its ski lifts and on its ski trails. These signs provide information advising skiers about the relative difficulty of the ski slope, closed areas and danger areas.[65] Operators are also required to inform skiers of any grooming vehicles which will be present on the slopes.[66] Each of the duties is discrete and clearly defined.

The Act also addresses the responsibilities of tramway passengers.[67] Each passenger of a tramway is expected to have sufficient physical dexterity, ability and knowledge to negotiate or use a tramway safely. If the passenger does not possess such knowledge, he is required to seek out such information sufficient to enable him to use the tramway safely.[68]

The statute also codifies the duties of skiers.[69] Each skier has the duty to be aware of his abilities and to ski within those abilities. Skiers

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

59. *See* Feuerhelm, Lund, Chalat & Kunz, *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers*, 1985 UTAH L. REV. 885; Comment, *Utah's Inherent Risks of Skiing Act: Avalanche From Capitol Hill*, 1980 UTAH L. REV. 355.

60. COLO. REV. STAT. § 33-44-105 (1984).

61. COLO. REV. STAT. § 33-44-102 (1984); *see* Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671, 675 n.4 (Colo. 1985).

62. COLO. REV. STAT. § 33-44-102 (1984).

63. While the legislative declaration does acknowledge that there are some dangers which inhere in the sport, the statute does not define those dangers, and, instead, merely creates a presumption concerning a skier's responsibility for collisions with objects or other skiers. COLO. REV. STAT. §§ 33-44-102 & -109(2) (1984); *see* Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985); *compare* MASS. GEN. LAWS ANN. ch. 143, § 71 O (West Supp. 1989); N.H. REV. STAT. ANN. § 225-A:24 IV (1989); N.D. CENT. CODE § 53-09-06 (Supp. 1989); TENN. CODE ANN. § 68-48-103 (1987). *See supra* note 57 and accompanying text (regarding pending legislation in Colorado).

64. COLO. REV. STAT. §§ 33-44-106, -107 & -108 (1984).

65. COLO. REV. STAT. § 33-44-107 (1984).

66. COLO. REV. STAT. § 33-44-108 (1984).

67. COLO. REV. STAT. § 33-44-105 (1984).

68. COLO. REV. STAT. § 33-44-105(1) (1984).

69. COLO. REV. STAT. § 33-44-109 (1984).

are further required to maintain control of their speed and course at all times and to maintain a proper look-out to avoid collisions with skiers and objects.[70] In addition, each skier specifically has the duty "to refrain from acting in a manner which may cause or contribute to the injury of the skier or others."[71] While these duties relate to the skier's conduct and apparently involve the inherent risks of the sport, not all of the rules of the road were included[72] and skiers are not specifically obligated to accept responsibility for injuries resulting from the inherent risks of the sport. Furthermore, most of the statutory duties of skiers relating to their skiing conduct can be difficult to apply to any given fact situation.[73] A person skiing downhill also has the "primary duty . . . to avoid collision with any person or object below him."[74]

Rather than incorporating the primary assumption of inherent risks doctrine, the statute provides a presumption that the responsibility for a collision by a skier with a person, natural object or man-made structure is "solely that of the skier or skiers involved and not that of the ski area operator."[75] This rebuttable presumption has been upheld as constitutional in Colorado state case law.[76] The Act also includes criminal provisions. Violation of several of the duties assigned to skiers could result in criminal liability.[77]

Colorado's rebuttable presumption provision is significantly different from Utah's codification of the assumption of inherent risks doctrine as the priniple focus in the assessment of liability when the injuries sustained relate to an inherent risk of the sport. While the latter entirely absolves the ski area operator, the former leaves the operator subject to potential liability for some inherent risks. Consequently, since Colorado has adopted the doctrine of comparative negligence,[78] secondary assumption of the risk and contributory negligence by the skier have become critical issues in the ski area operator's defense. However,

70. COLO. REV. STAT. §§ 33-44-109(1) & (2) (1984).

71. COLO. REV. STAT. § 33-44-109(5) (1984).

72. For example, several of the responsibilities contained in the Skier's Responsibility Code are not described specifically. The Skier's Responsibility Code is an informal list of common sense "rules of the road" endorsed by the National Ski Areas Association. They including the following responsibilities:

> (1) Ski under control and in such a manner so you can stop or avoid other skiers or objects; (2) When skiing downhill or overtaking another skier, you must avoid the skier below you; (3) You must not stop where you obstruct a trail or are not visible from above; (4) When entering a trail or starting downhill, yield to other skiers; (5) All skiers shall use devices to help prevent runaway skis; and (6) You shall keep off closed trails and observe all posted signs.

73. While this is true concerning the requirement "to maintain control of course and speed," there are other provisions that establish clear and discrete duties. For example, in the case of a collision between two skiers which results in injury, neither is to leave the scene without first providing a ski area operator employee with his name and address; in the event such a skier leaves the vicinity for the purpose of securing aid for the injured party, the skier is not thereby relieved of the obligation to provide his name and address to the ski area operator. COLO. REV. STAT. § 33-44-109(10) (1984).

74. COLO. REV. STAT. § 33-44-109(2) (1984).

75. *Id.*

76. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985).

77. COLO. REV. STAT. § 33-44-109(12)(1984).

78. COLO. REV. STAT. § 13-21-111 (1987).

application of these issues does not provide any assistance whatsoever in determining whether the ski area operator had common law duties to the skier in the first instance.[79]

B. *The Struggle to Fit Statutory Law with Common Law*

Colorado case law is illustrative of the questions that remained after codification. For example, particular problems arose in the application of common law principles of premises liability. In the ten years since its enactment, Colorado courts have had an opportunity to interpret the Act and integrate its application with the common law.

C. *The Colorado Example*

In *Pizza v. Wolf Creek Ski Development Corp.*,[80] the Colorado Supreme Court held that the statement of ski area operator duties in the Act is not an exclusive list and that additional duties may exist pursuant to common law.[81] The common law duties that have been applied to ski area operators since passage of the Act are based on the doctrines of premises liability.[82]

Until 1971, Colorado law governing a landowner's liability followed the traditional scheme of classifying the injured party into one of three categories — invitee, licensee or trespasser.[83] The nature of the duty of the landowner, and, therefore, the landowner's liability for an injury to a person on his land, was directly linked to the status of the injured party. There are no reported decisions in Colorado involving an action by a skier against a ski area operator that applied the traditional premises liability approach.[84] However, application of the traditional analysis was

79. Therefore, a summary judgment motion which would likely be granted in a jurisdiction with a statute similar to Utah's, depending upon whether an inherent risk is involved, will not be routinely successful under statutes similar to Colorado's.

80. 711 P.2d 671 (Colo. 1985).

81. *Id.* at 678. This ruling apparently resolves the issue of whether the Act extinguished all common law duties of ski area operators, even though the Act expressly provides that its purposes is "to define the rights and liabilities existing between the skier and the ski area operator." COLO. REV. STAT. § 33-44-102 (1984). At least one article has observed, after listening to the recorded testimony preceding enactment of the Act, that the Act was intended to "set forth a definitive list of operators' obligations and that, if complied with, would absolve the operators from further liability or responsibility for injury." Chalat & Kroll, *The Development of the Standard of Care in Colorado Ski Cases*, 15 COLO. LAW. 373, 374 (1986).

82. In Clark v. Breckenridge Ski Corp., No. 84-M-506, slip op. (D. Colo. June 24, 1986), without reference to the Act, the court stated:

> It must be remembered that the Breckenridge Ski Area encompasses many acres and many variations in terrain and snow conditions. While a ski area operator shares responsibility with other landowners for avoiding unreasonable risks of harm because of hazards, the existence of a small dome of ice on a ski trail is not analogous to ice cubes on a store floor.

Id. at 5.

83. Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971)(the obligations of a "landowner" extend to any party responsible for the premises including possessors).

84. Under *Wright*, skiers were classified as "invitees." In the classification scheme, if a person was determined to be an invitee, a higher standard of care was imposed upon the landowner than if the person was deemed to be "licensee" or "trespasser." In the case of

overruled by *Mile High Fence Co. v. Radovich*.[85]

The plaintiff in *Mile High Fence* was an on-duty police officer who broke his leg when he stepped into a post hole located on private property. The hole was approximately seven inches from the paved portion of a public alley.

The court rejected the traditional analysis and adopted a novel basis for assessing the responsibilities of landowners:

> What we are holding is that *status* or *classification* of one who is upon the property of another is not to be determinative of the occupant's responsibility or the degree of care which he owes to that person. Rather, the occupant, in the management of his property, should act as a reasonable man in view of the probability or foreseeability of injury to others. A person's status as a *trespasser*, *licensee* or *invitee* may, of course, in the light of the facts giving rise to such status, have some bearing on the question of liability, but it is only a factor — not conclusive. (citation omitted).
>
> This traditional tort concept, that is, the probability of injury as foreseen by a reasonable man, was properly applied by the trial court in the instant case. It was, therefore, within the province of the trial court to find and conclude that the Company, in leaving the post hole adjacent to a public way unprotected, could foresee or, by the exercise of reasonable care, should have foreseen, the probability that someone using the alley might inadvertently deviate from the alley, step into the post hole and injure himself. Under these circumstances, the law imposes a duty upon the possessor of land to warn or protect those using the public way from the dangerous condition. Failing to take such action, the possessor becomes liable for the harm caused by its breach of duty.[86]

The focus of the determination of the existence and scope of a legal duty was shifted from the status of the injured person to the reasonableness of the landowner's action. The court reasoned that the status of one who is upon the land of another should not be the pivotal issue in the determination of the existence of a legal duty. The question then becomes whether the owner, in the exercise of his legal duty, acted as a reasonable man in view of the probability of injury to others.[87]

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an invitee, the landowner had a duty to have the land in a reasonably safe condition and to warn of dangers which were not readily visible. If the person was a licensee, a lesser degree of care applied. In that case, the landowner had a duty to refrain from causing willful or wanton injury. In the case of a trespasser, no duty was imposed upon the landowner. *See* Gallegos v. Phipps, 779 P.2d 856, 860 (Colo. 1989).

85. 175 Colo. 537, 489 P.2d 308 (1971).

86. *Id.* at 548, P.2d at 314-15 (emphasis added).

87. In 1987, The Colorado General Assembly enacted a new premises liability statute. COLO. REV. STAT. § 13-21-115 (1987). The statute closely resembled the traditional classification scheme (i.e., invitee, licensee and trespasser) which was used before *Mile High Fence* by placing the focus of a landowner's liability upon the status of the injured person. The General Assembly determined that the classification scheme was necessary due to the unpredictability created by *Mile High Fence*. Gallegos v. Phipps, 779 P.2d 856, 861 (Colo. 1989). Reinstatement of the classification scheme was intended to increase the protection of landowners. However, the constitutionality of this statute was successfully challenged

In *Mannhard v. Clear Creek Skiing Corp.*,[88] the Colorado court of appeals held that the standard of care applicable to a ski area operator vis-a-vis a skier who was killed in an avalanche which was triggered by the skier in an out-of-bounds area, was that of reasonable care rather than the highest degree of care. In its analysis, the court stated:

> [T]he testimony, including that of the skier's companions, indicated that avalanche danger is a phenomenon of which the public is generally aware, and that conditions under which avalanches are likely to occur are easily recognized by most skiers so they can be avoided. These factors were fully known and appreciated by the skier himself.[89]

While this comment touches on aspects of the primary assumption of inherent risks doctrine,[90] the court did not specifically address the doctrine.

In *Rosen v. LTV Recreational Development, Inc.*,[91] the Tenth Circuit held that a separate instruction on secondary assumption of the risk was not appropriate in light of Colorado's codification of comparative negligence. The court determined that assumption of the risk should no longer be considered as a complete defense.[92] Rather, it should be treated as reducing recovery in the same fashion as contributory negligence. Furthermore, the court, citing Prosser, noted that a ski area operator was obligated to act as a "prudent person in maintaining the premises in a reasonably safe condition considering the probability or foreseeability, if any, of injury to others."[93] Finally, the court added that contributory negligence, as a defense, could minimize or negate the ski area operator's liability.[94]

In *Rosen*, the plaintiff was hurled into a steel pole after a collision with another skier. The ski area operator argued that the injuries sustained were the proximate result of the prior collision and not the negligence of the ski area. The ski area operator also argued that the possibility of a skier colliding with another skier and then crashing into a pole is so remote as to be unforeseeable by the defendant. Furthermore, the operator argued, the first collision should be considered an intervening and superseding legal cause. The defendant challenged the court's application of the doctrine of contributory negligence and the

in *Gallegos*. Gallegos was injured after he fell down a flight of stairs while intoxicated in the defendant's restaurant. The crux of the claim was that the owner of the restaurant was liable to Gallegos as an invitee and that the statute offered him less protection as an invitee than he would have received as a licensee which was contrary to the common law classification scheme. The court agreed and found the statute in violation of the equal protection clause of the fourteenth amendment. The court concluded that no governmental interest could be rationally related to giving an invitee less protection than a licensee. *Id.* at 862. Since the court found no justification for this "inverted hierarchy" of duties, historically or logically, it held the statute to be unconstitutional. *Id.*

88. 682 P.2d 64 (Colo. App. 1983).
89. *Id.* at 66.
90. *See supra* note 13.
91. 569 F.2d 1117 (10th Cir. 1978).
92. *Id.*
93. *Id.* at 1120.
94. *Id.* at 1121.

failure to give an instruction on assumption of the risk. However, the court rejected each of the defendant's arguments and upheld the verdict for the plaintiff.

Phillips v. Monarch Recreation Corp.,[95] was the first reported case to apply the Act. The plaintiff, Phillips, brought an action against the defendant, Monarch ski area, for injuries sustained in a collision on an open run with a sno-cat which had just groomed a neighboring slope. There were no signs posted to warn skiers of the possible presence of sno-cat's in the area. The plaintiff argued that the Act required the posting of a sign to warn skiers that equipment was being used to groom or maintain the slope.[96]

The defendant argued that the Act required notice only when a sno-cat was "grooming" a slope and that the sno-cat involved in the accident with the plaintiff was not "grooming" at the time, but was traversing the slope after grooming another slope.[97]

The court ignored this argument and held that the Act was designed to further public policy and such a strict construction would violate that public policy. "Although the act only requires a sign when equipment is 'grooming and maintaining' a ski slope, we hold that a warning sign must also be posted when a sno-cat is present on the ski slopes but is not actually 'grooming' in that particular location."[98]

The trial court instructed the jury concerning the provisions of the Act and the duties of skiers and ski area operators. The trial court did not offer a common law negligence instruction relating to a ski area operator's duties, but relied solely on the Act to instruct the jury in that regard.[99] The trial court went on to state that the language of the Act was clear and that its terms could not be modified through application of the principles of contract based upon the purchase of a lift ticket which stated that a skier assumes the risk of skiing. The court of appeals, in affirming the trial court's judgment, noted that the Act allocated the parties' respective duties with regard to the safety of those around them, and upheld the exclusion of the purported agreement on the lift ticket which was an attempt to modify those duties.[100]

The Tenth Circuit addressed the Act in *Rimkus v. Northwest Colorado Ski Corporation*.[101] Rimkus, the plaintiff, sustained injuries after he hit a rock outcropping not marked by the ski area operator.

The defendant appealed the judgment for Rimkus on the basis that the Act required it to mark only man-made, rather than natural, objects which are not readily visible in conditions of ordinary visibility.[102] It further argued that the "look but not see" instruction approved in *Ninio*

95. 668 P.2d 982 (Colo. App. 1983).
96. *Id.* at 985 (citing COLO. REV. STAT. § 33-44-108(2) (1984)).
97. *Id.*
98. *Id.* at 986.
99. *Id.* at 984-85.
100. *Id.* at 985.
101. 706 F.2d 1060 (10th Cir. 1983).
102. *Id.* at 1064 (citing COLO. REV. STAT. § 33-44-101 to -111 (1984)). A critical evi-

should have been given.[103] Affirming the judgment below, the court held that *Ninio* was inapplicable since there was a dispute as to whether a reasonable man could have seen the rock outcropping and since the specific duties of skiers under the Act were included in the trial court's instructions.[104]

With respect to the evidentiary issue, the court noted that the evidence of curative measures after the accident (i.e., the marking of the rock outcropping) was admissible for the purpose of showing that Rimkus had not committed contributory negligence since the evidence went to the issue of the feasibility of marking the area.[105] The court did not address the issues of duty or primary assumption of the risk in its opinion. Again, the appellate review of a skiing accident was restricted to evidentiary and instruction issues.

The Colorado Supreme Court took a thorough look at the Act in *Pizza v. Wolf Creek Ski Development Corp.*[106] Pizza, the plaintiff, was skiing down a slope known as "Thumper" when he became airborne due to a variation in the terrain created by a snow covered service road. Upon landing, he suffered severe and permanent damage to his spinal column. Pizza brought an action against the owners of the Wolf Creek Ski Area alleging the operation of a ski area constituted an inherently dangerous activity which compelled application of the highest degree of care and further alleging that the "look but not see" instruction should not have been given. In addition, Pizza challenged the constitutionality of Section 33-44-109(2) of the Act, which created a presumption that the sole responsibility for collisions with any person, natural object, or properly marked man-made structure rests with the skier.[107] He claimed that the presumption violated the fourteenth amendment on vagueness and equal protection grounds and that it was not founded on a rational evidentiary basis.[108]

The court upheld the constitutionality of the statute. The presumption was considered by the court to be "at most . . . an economic regula-

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dentiary issue arose concerning the admissibility of evidence that defendant marked the rock outcropping after the accident.

103. *Id.*

104. *Id.* at 1067. The court also held that the trial court was under no obligation to instruct the jury that the law did not require the marking of natural conditions on the slope.

105. *Id.* at 1065.

106. 711 P.2d 671 (Colo. 1985).

107. The section states:

> 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-made structure marked in accordance with section 33-44-107(7) is solely that of the skiers involved and not that of the ski area operator.

COLO. REV. STAT. § 33-44-109(2) (1984).

108. The remaining provisions of the Act were not included in the constitutional challenge.

tion, designed to limit the liability of ski area operators,"[109] and, consequently, the appropriate vagueness standard is less exacting than that for review of criminal laws or the first amendment.[110] The court held:

> [W]e construe the presumption as consistently as possible with common law principles of negligence. We therefore hold that, while the evidentiary presumption is not unconstitutionally vague, the skier has the burden of rebutting the presumption by presenting evidence of the ski area operator's negligence which outweighs the presumption of the skier's sole negligence. . . . Accordingly, a plaintiff in a ski accident case already bears the burden of proving negligence and causation by a preponderance of the evidence. It follows, therefore, that the presumption is rebutted whenever a plaintiff establishes by a preponderance of the evidence that the defendant's negligence caused the collision in which the plaintiff was injured. We must conclude that if the legislature intended anything greater than such a showing by the plaintiff, it would have specifically so provided.[111]

The court found that there was a rational basis for the presumption, and, therefore, that the statute was constitutional.[112]

The court also confirmed that the standard of care applicable to the discharge of a ski area operator's legal duty is one of reasonable care rather than the highest degree of care when the injury related to a variation in terrain. The court's analysis was focused upon the relative duties of the parties in the context of the Act. *Pizza* did not address the fundamental issue of how to determine the existence and scope of common law duties and how such duties are altered or displaced by those set forth in the Act.[113] Consequently, the Colorado Supreme Court has yet to address that central issue. The duty issue has been the subject of a Colorado court of appeals opinion that was not selected for publication in *Peer v. Aspen Skiing Company*.[114] Peer, an expert skier, was skiing on the Aspen Mountain Ski Area on opening day of the 1982-83 ski season.

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109. *Pizza*, 711 P.2d at 675-76.

110. *Id.* at 676.

111. *Id.* at 677-78.

112. The court also stated:

> However, where a skier's injury is unrelated to an operator's breach of a specific duty, as in this case where the injury involved a variation in terrain, the legislature has chosen to create a rebuttable presumption that the skier is solely responsible for the collision. Given that the legislature has imposed duties on the operator, that the skier is under a duty to maintain control and keep a proper lookout, and, most important, that the sport is inherently risky, we conclude that there is a rational and natural relation here between the fact proved and the fact presumed.

Id. at 678-79.

113. The court did not address the issue of the duties of a ski area operator except to the extent that they are set forth in the Act. While the court did not comment on the doctrine of primary assumption of the risk, it did note the declaration of the legislature as follows: "Realizing that there are risks and dangers which will always inhere in the sport, the legislature has attempted to identify those dangers which can reasonably be eliminated or controlled by the ski area operator." *Id.* at 678.

114. No. 88CA0190 (Colo. App. Aug. 10, 1989), *cert. granted*, No. 89SC548 (Colo. Feb. 20, 1990).

Peer testified that on his first run of the day down Ruthie's Run he struck a snow covered service road, fell and was rendered a quadriplegic. His speed was estimated to be between 35 and 50 miles per hour. Peer also testified that if he had been skiing significantly slower, he could have successfully negotiated the transition between the slope and the road. The Aspen Skiing Company ("Aspen") was found to be 100% negligent and Peer was awarded $5,000,000.00 in damages. Aspen appealed the judgment to the Colorado court of appeals. The two primary issues on appeal were whether a duty was owed to Peer as an expert skier to warn him of the transition or to groom the slope to accommodate his chosen speed and whether the trial court improperly denied a motion for a new trial based upon Aspen's discovery of evidence after the trial that Peer had skied Ruthies's Run at least two times prior to that run on which the accident occurred. The court of appeals upheld the decisions of the trial court and affirmed the judgment. With respect to the duty issue, the court distinguished *Smith* by stating that a road across a ski run was not a natural condition and further distinguished *Whitlock* by finding that Aspen had groomed the slope which was an affirmative act by the defendant.[115] It did not apply the analytical framework set forth in those cases; it merely concluded as follows: "Consequently, because Aspen had undertaken the task of grooming the slopes, the trial court correctly concluded that it incurred the concomitant duty of doing so reasonably.[116] The court did not discuss this duty in relation to the duties of skiers as articulated in the Colorado Ski Safety Act. Accordingly, it gave no guidance with regard to the scope of the duty. Certiorari was granted by the Colorado Supreme Court with respect to the issue of the denial of a new trial only. Application of the *Smith* and *Whitlock* analysis would force the courts to consider the role of the skier and the skier's responsibilities in assessing the existence and scope of the ski area operator's duty.

D. *Outside Colorado*

In *Grieb v. Alpine Valley Ski Area, Inc.*,[117] the Michigan court of appeals analyzed the constitutionality of a Michigan statute that provided that skiers accept the dangers in the sport in so far as they were obvious and necessary.[118] The case involved a collision between skiers at the defendant's ski area. In a short opinion, the court analyzed the constitu-

115. *See infra* notes 130-36 and accompanying text.
116. No. 88CA0190 at 3 (Colo. App. Aug. 10, 1989).
117. 155 Mich. App. 484, 400 N.W.2d 653 (1986).
118. The statute reads as follows:

> Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snowmaking or snow-grooming equipment.

MICH. COMP. LAWS ANN. § 408.342(2) (West 1985); MICH. STAT. ANN. § 18.483(22)(2) (Callaghen 1980).

tional challenge based upon the equal protection and due process clauses. The court concluded that the statute passed the constitutional test:

> The purposes of the legislation include safety, reduction in litigation and economic stabilization of an industry which substantially contributes to Michigan's economy. The delineation of ski operators' and skiers' duties and responsibilities, along with skiers' assumption of certain expressed inherent dangers, are reasonably related to obtaining these legitimate state objectives. The safety and economic rationales under the amended act are legitimate state objectives which are accomplished through a reasonable scheme rationally related to the stated legislative purpose. As such, the legislation does not violate the equal protection or due process guarantees of the constitution."[119]

The opinion clearly supports a legislative approach to articulating the relative rights and responsibilities of the parties including an acceptance of the inherent risks by skiers.[120] As noted above, the Colorado General Assembly has not taken the second step in its legislation and the Colorado courts have not yet done so either.[121]

A successful constitutional attack upon portions of a ski statute occurred in Montana. In *Brewer v. Ski Lift, Inc.*,[122] the plaintiff argued that the statute denied his fundamental right to equal protection of the laws without the justification of a compelling state interest. The Montana statute went beyond codifying the primary assumption of inherent risks doctrine and specifically imposed responsibility for *all* risks of injury that resulted from participation in the sport upon the skier. The court determined that the language of the statute totally absolved ski area operators from liability, even if an accident was the direct result of the operator's negligence. It construed the applicable provision as follows:

> A skier assumes the risk and all legal responsibility for injury to himself that results from *participating* in skiing; and that the responsibility for collisions with an object is the responsibility of the skier and not the responsibility of the ski area operator; and finally notwithstanding the comparative negligence law of Montana, a skier is barred from recovery from a ski area operator for loss from any risk inherent in the sport of skiing, thereby eliminating the theory of comparative negligence.[123]

A rational relationship could not be found by the court between the state interest of protecting the economic vitality of the ski industry and extinguishing all legal claims of an injured skier against the ski area operator. The court, therefore, found those provisions of the Act to be

119. *Grieb*, 155 Mich. App. at 488, 400 N.W.2d at 656.

120. The court subsequently applied the statute in Schmitz v. Cannonsburg Skiing Corp., 428 N.W. 2d 742 (Mich. 1988). *See supra* note 37 and accompanying text.

121. *See supra* note 57 and accompanying text (regarding pending legislation in Colorado).

122. 762 P.2d 226 (Mont. 1988)(concerning MONT. CODE ANN. §§ 23-2-731 to 737 (1983)).

123. *Id.* at 230 (emphasis added).

unconstitutional.[124]

Although the ruling by the Montana court is the only rejection of fundamental portions of a ski statute, the constitutionality of similar statutes may, in view of *Brewer*, be subject to close judicial scrutiny.[125] The focus will be upon how the statutes allocate responsibilities between skiers and ski area operators and whether skiers are totally precluded from stating their claim. As in Montana, if an injured skier is forced to bear all of the responsibility for all accidents of any kind whatsoever that result from the participation of skiers in the sport, the statute may not withstand a rational relationship test.

IV. ANALYSIS

A. *The Existence and Scope of the Relative Duties*

As illustrated in the various statutory approaches, a tension continues to exist in the relationship between the primary assumption of inherent risks doctrine and the determination of whether a particular risk should be classified as "inherent." While many statutes have addressed this issue, the relationship of statutory and common law principles of negligence in this area continues to evolve. A return to the fundamental precepts of tort law, as recently articulated by the Colorado Supreme Court, will provide the proper and necessary focus in the evolution of these relationships in the future.

The first and most critical element of the tort of negligence is "the existence of a duty owed by the defendant to the plaintiff."[126] Under Colorado law, the issue of "whether a defendant owes a plaintiff a duty to act to avoid injury[,] is a question of law to be determined by the court."[127] Only if the court has answered this threshold question in the affirmative, may the trier of fact then consider whether the defendant acted reasonably in the discharge of the duty. In the absence of a legal duty, there can be no breach of duty, and, therefore, no negligence.[128]

The existence of a legal duty is entirely distinct from the determination of what standard of care is applicable to the discharge of that duty. If a legal duty exists, then, in most instances, the actor must exercise reasonable care in the discharge of that duty.[129] As noted above, under Colorado law, the standard of reasonable care applies to ski area operators once a legal duty has been found to exist.[130]

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124. *Id.* at 230.

125. *See* Morrison & Morrison, *Constitutional Challenges to Tort Reform: Equal Protection and State Constitutions*, 64 DEN. U. L. REV. 719 (1988).

126. Leake v. Cain, 720 P.2d 152, 155 (Colo. 1986).

127. Smith v. City and County of Denver, 726 P.2d 1125, 1127 (Colo. 1986); *accord* Metropolitan Gas Repair Service v. Kulik, 621 P.2d 313 (Colo. 1980); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 37 (5th ed. 1984).

128. *Smith*, 726 P.2d at 1128.

129. *See supra* note 11.

130. Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671, 683 (Colo. 1985)(rejecting contention that standard of highest degree of care applies to ski area operators); Mannhard v. Clear Creek Skiing Corp., 682 P.2d 64, 65 (Colo. App. 1983).

Under the common law, there is no legal duty to protect sports participants from the inherent risks of the sports in which they choose to engage. Since 1986, the Colorado Supreme Court has considered the criteria governing the imposition of common-law duties within the context of recreational activities on two separate occasions.

In *Smith v. City and County of Denver*,[131] and in *University of Denver v. Whitlock*,[132] the court addressed the existence and scope of a landowner's duty to protect a recreational user of his property from injury. *Smith* and *Whitlock* each involved recreational activities with inherent risks: river diving in *Smith* and trampoline acrobatics in *Whitlock*. The plaintiffs in both cases were rendered quadriplegic as a result of their accidents. In each case, the court affirmed the dismissal of the plaintiffs' complaints, holding that the defendants had no legal duty to protect the plaintiffs from their accidents and injuries.

In *Smith*, the court framed the common-law duty analysis as follows:

> Whether the law should impose a duty requires consideration of many factors including, for example, the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor.[133]

After applying these criteria, the court concluded that the duties alleged by the plaintiff did not exist as a matter of law:

> [The defendant] did not have a duty to warn the petitioner of the inherent dangers involved in the activity in which he chose to engage because the potential for danger was readily apparent. Moreover, because the alleged hazard existed as a result of the natural condition of the terrain and river at The Chutes, the [defendant] had no duty to make the area safer.[134]

Although a risk of injury to the plaintiff was "foreseeable" in a general sense, knowledge of and control over the specific factors contributing to the nature and level of that risk were exclusively within the plaintiff's ken. Accordingly, the court refused to impose on the defendant a duty to protect the plaintiff from the consequences of his personal recreational choice.

As in *Smith*, the Supreme Court's decision in *Whitlock* rested entirely upon the question of duty. After reviewing the *Smith* criteria, the court stated:

> [The *Smith*] list [of factors] was not intended to be exhaustive and does not exclude the consideration of other factors that may become relevant based on the competing individual, public and social interests implicated in the facts of each case. A

131. 726 P.2d 1125 (Colo. 1986).
132. 744 P.2d 54 (Colo. 1986).
133. *Smith*, 726 P.2d at 1127.
134. *Id.* at 1128. In Bittle v. Brunetti, 750 P.2d 49 (Colo. 1988), the Colorado Supreme Court relied in part on *Smith* to conclude that a property owner owes no duty to pedestrians to keep abutting sidewalks clear of snow and ice. "[W]e generally have been unwilling to impose liability for injuries caused by natural obstacles or conditions." *Id.* at 53.

> court's conclusion that a duty does or does not exist is an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is (or is not) entitled to protection. No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards — whether reasonable persons would recognize a duty and agree that it exists.[135]

Applying the *Smith* criteria, the court then rejected the plaintiff's claim that the defendant had "a duty . . . to protect [him] . . . because of the foreseeability of the injury, the extent of the risks involved in trampoline use, the seriousness of potential injuries, and the [defendant's purported] superior knowledge concerning these matters."[136] The court also held that "the fact that [the defendant] is charged with negligent failure to act rather than negligent affirmative action is a critical factor that strongly militates against the imposition of a duty . . . ."[137]

In the Colorado Supreme Court's most recent consideration of the duty issue, *Observatory Corp. v. Daly*,[138] the court stated that a lower "court must exercise a prudential judgment" based on the factors stated in *Smith* and *Whitlock*, and that those cases are not to be limited only to those recreational activities involved in each case.[139] The court also noted that resolution of the duty issue in every case rests upon fundamental considerations of policy. Furthermore, the court held that the analysis of the asserted duty in each case should be one which is "mindful of the magnitude of the burden that [is] implicated by imposing [a] legal duty" and the practical consequences of such a finding.[140]

To review the existence and scope of a legal duty and the attendant issue of primary assumption of inherent risks, in an appropriate and comprehensive manner, it is critical that an inquiry be made into the analytical bases that fundamentally underlie the labels of these doctrines. Application of the criteria set forth in *Smith* and *Whitlock* will give proper focus to the determination of whether a legal duty exists on the ski area operator in a particular case or whether the injured skier must accept and assume responsibility for the risk that caused the injury.

B. *The Nature of the Risk Involved*

An evaluation of the risks of skiing begins with the fact that the sport necessarily involves inherent risks of injury. The essential nature of the sport requires that it be practiced in a rugged winter environment. The court in *Wright* articulated the basic attributes of the sport which involve inherent risks of injury:

Skiing is a sport; a sport that entices thousands of people; a

135. *Whitlock*, 744 P.2d at 57.
136. *Id.* at 61.
137. *Id.* at 57.
138. 780 P.2d 462 (Colo. 1989).
139. *Id.* at 466.
140. *Id.* at 469.

> sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstruction, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn spots, and other manner of skier-created hazards. . . .
>
> To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these mutations of nature and requires it to warn the public against such.[141]

These observations on the nature of the risk in the sport remain true today.[142] Consistent with the approach that numerous courts have

141. *Wright v. Mt. Mansfield Lift, Inc.* 96 F. Supp. 786, 791 (D. Vt. 1951).

142. In *Wright*, the court applied the common-law doctrine of *volenti non fit injuria* ("he who consents to an act is not wronged by it"). The modern application of this doctrine traces its roots to Cardozo's landmark opinion in Murphy v. Steeplechase Amusement Co., 250 N.Y. 472, 166 N.E. 173 (1929). In *Murphy*, the plaintiff had been injured when she chose to partake in a carnival "fun house" activity, which presented an obvious risk of injury. In explaining why there could be no recovery in this circumstance, Cardozo stated the rule succinctly: "one who takes part in such sports accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." *Id.* 250 N.Y. at 474, 166 N.E. at 174. Since *Wright*, several courts have applied the doctrine to a variety of sports activities to hold that no legal duty is owed to the participants therein. *See, e.g.*, Ordway v. Superior Court, 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988)(no legal duty to protect jockey bumped by another jockey in violation of safety rule); Neinstein v. Los Angeles Dodgers, Inc., 185 Cal. App. 3d 176, 229 Cal. Reptr. 612 (1986)(no legal duty to protect baseball spectators from "natural hazards of foul balls"); Ridge v. Kladnick, 42 Wash. App. 785, 713 P.2d 1131 (1986)(no legal duty to protect skater from "clear and obvious" risks of hazardous skating game). Several courts also considered the inherent risks of skiing. *See, e.g.*, Smith v. Seven Springs Farm, Inc., 716 F.2d 1002 (3d Cir. 1982)(skier's loss of control and slide into unpadded snowmaking apparatus); Nielsen v. Jack Frost Mountain Co., No. 87-0532 (E.D. Pa. May 23, 1988)(skier's fall caused by large visible chunks of ice on snow surface), *aff'd*, No. 88-1496 (3d Cir. Nov. 1, 1988); Leopald v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976)(skier's uncontrolled slide and ensuing collision with unpadded lift tower); McDaniel v. Dowell, 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962)(skier's loss of control and collision with another skier); Blair v. Mt. Hood Meadows Development Corp., 291 Or. 293, 630 P.2d 927 (1981)(skier's loss of control and fall into ravine).

taken in the past,[143] an important consideration, but not the only consideration, is that the elements creating the risk of injury are inherent in the essential nature of the sport.

C. *The Likelihood of Injury Versus Social Utility*

Although injuries resulting from inherent risks are generally foreseeable, the "likelihood of injury" is necessarily dependent upon the skier's own judgment and conduct while actively engaged in the sport. While such injuries are often foreseeable in a general sense, and while hindsight always provides marvelous clarity, numerous factors must be considered in each case to determine whether the particular injury was specifically likely and foreseeable. The location of the accident, the time of the accident, the snow conditions, the weather conditions, the injured skier's ability level, the nature of the accident, the skier's conduct and knowledge, and a myriad of additional relevant factors must be reviewed in the assessment of whether the particular injury and its cause were foreseeable or likely. Skier falls and loss of control are random events that can lead to injury at any time and at any location within a ski area; these considerations must be weighed against the benefits of the sport in general.

D. *The Burden of Guarding Against the Risk*

The magnitude of the burden of guarding against the risk of injury to skiers is wide-ranging. Obviously, no ski area operator can know the specific skills and abilities of the millions of skiers who venture onto the slopes. Nor can any ski area operator control individual skiers' decisions regarding their speed, course and other behavior while skiing under the varying conditions which exist at any given time on any given ski mountain or ski slope. Since a skier's loss of control can be an entirely random event, serious consideration must be given to the feasibility and practicality of requiring ski area operators to anticipate such events and protect skiers from them. While ski area operators cannot expect to be totally absolved from any responsibility,[144] it is virtually impossible to protect all skiers from the inherent risks in the sport or to eliminate such risks in an effort to make the mountain "crashproof."[145]

For example, the Colorado Ski Safety Act requires the posting of signs at specific locations throughout the ski area. While the cost of developing and maintaining a sign system may be an acceptable burden, a significant expansion of this obligation may not result in an increased benefit to the skier and could jeopardize the economics of a number of ski areas. Again, this specific requirement calls for a thorough and detached balancing of interests. Such an analysis should be applied to

143. *See, e.g.*, Blair v. Mt. Hood Meadows Development Corp., 291 Or. 293, 630 P.2d 927 (1981).

144. *See, e.g.*, Brewer v Ski-Lift, Inc., 762 P.2d 226 (Mont. 1988).

145. *See, e.g.*, COLO. REV. STAT. §§ 33-44-101 to -111 (1984) (the Colorado Ski Safety Act); *see* Danieley v. Goldmine Ski Assoc., No. E00589 (Cal. Ct. App. Feb. 22, 1990).

each duty assessment. This process should also facilitate the integration of statutory duties with the applicable common law.

E. *The Consequences of Placing the Burden Upon the Actor*

The consequences of placing the burden of accepting responsibility for inherent risks upon the actor (i.e., the individual skier in most ski cases) can be minimal. Each individual skier is in the best position to assess his or her own subjective abilities in light of the availaible objective information such as the relative difficulty of the terrain and prevailing weather and snow surface conditions. Such an analysis incorporates the elements of the primary assumption of inherent risks doctrine as discussed above. As the court in *Leopold v. Okemo Mountain, Inc.*[146] found:

> The skier, not the ski area operator, is the logical one to make the choice as to whether he should proceed and assume the consequences of skiing in an area where a plainly apparent and necessary danger exists. Were it otherwise, ski trails, among the most enjoyable places to ski, might well have to be eliminated because of the obvious hazards of trees, rocks and adverse terrain which border every trail and which every skier faces with some degree of peril when he makes his decision to venture forth thereon.[147]

The Colorado court of appeals likewise recognized the role of personal choice in the apportionment of responsibilities between the skier and the ski area operator. In *Mannhard*, the court held that an avalanche was a snow condition which the *skier* had the duty to avoid. "[A] skier has little or no control over his movements while riding a chairlift or gondola and must necessarily depend on the operator for his safe passage. Conversely, while on the slopes, as here, the skier has complete freedom of movement and choice."[148]

The inquiry to be made should include a consideration of the factors which underlie the primary assumption of inherent risks doctrine. Obviously, this also entails regard for the nature of the individual risk. In addition, the statutory duties of skiers must be carefully reviewed and integrated into the balancing of interests.

F. *Public and Social Interests*

In general, expanding the availability of skiing is in the "public and social interest." Many of the legislative declarations to the statutes governing skiing refer to the need to maintain the sport in view of the industry's economic contribution to the state as well as the need to properly allocate responsibilities among skiers and ski area operators.[149] The determination of the existence and scope of a specific legal duty on the

146. 420 F. Supp. 781 (D. Vt. 1976).

147. *Id.* at 787 n.2. *See also* Nielson v. Jack Frost Mountain Co., No. 87-0532 (E.D. Pa. May 23, 1988), *aff'd*, No. 88-1496 (3d Cir. Nov. 1, 1988).

148. 682 P.2d 64, 66 (Colo. App. 1983).

149. *See, e.g.*, COLO. REV. STAT. § 33-44-102 (1984); UTAH CODE ANN. § 78-27-51 (1987).

part of ski area operators necessarily involves consideration of social policy in assessing responsibility for injuries to skiers, and, consequently, in choosing who is to bear the risk of loss. In making policy assessments, it is important to balance the essence of the sport of skiing, the freedom of movement and choice in a mountain environment, against pressures to protect skiers from themselves. Reference to the legislative declarations of many ski statutes can provide direction in balancing the various policy issues. Reduced to its essence, the determination of the existence and scope of a legal duty is one based upon public policy considerations.

V. CONCLUSION

Since the decision in the historical case of *Wright v. Mt. Mansfield Lift, Inc.*,[150] the area of ski law has been through numerous ebbs and flows. After the *Wright* decision, the primary assumption of inherent risks doctrine prevailed. However, the focus shifted away from the existence of a duty upon the skier to a novel focus upon ski area operators. The expansion of litigation caused many state legislatures to create ski statutes assigning the duties of ski area operators, lift operators, and skiers. The law remains in a state of flux as it evolves.[151]

Although the sport of skiing will probably never return to the days of *Wright*, when the timorous were advised to remain at home, a return to the basic tenets of tort law will provide analytical tools and a framework for appropriately assessing the numerous risks in the sport and allocating the responsibility for injuries that are incurred by skiers. As a result, the law affecting the sport of skiing will provide a comprehensive approach to determine the existence and scope of the relative legal duties and the nature and extent of a skier's responsibility for those risks that inhere in the sport.

150. 96 F. Supp. 786 (D. Vt. 1951).

151. *See* Feuerhelm, Lund, Chalat & Kunz, *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers*, 1985 UTAH L. REV. 885, 918.