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Torts - Skier Liability - A Skier Who Injures Another May Be Liable in Tort Under the Look But Don't See Rule - Ninio v. Hight, 385 F.2d 350 (10th Cir. 1967)

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tion,"[64] and given the cooperation between the regular agent and the special agent just discussed, the interview "is a coercive examination of a taxpayer at a critical preliminary hearing . . . ."[65] On this point, it was said, "I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call . . . [or] under the guise of an examination for purely civil purposes."[66] Also supportive of this critical observation: "If the revenue agent has done work on the case before the special agent enters the scene, he will make available to the special agent the data he has collected and 'worked-up' . . . ."[67] It should also be emphasized that the lack of advisement deemed violative in *Mathis* was by a regular agent in the course of a civil investigation; albeit, the suspect was in custody.

Still other alternatives may exist. Since the criminal tax case is unique, as we have seen, it may well demand devising an approach novel to contemporary procedural safeguards. It can be safely predicted that the law must move beyond the position of *Mathis*. It must, of necessity, because *Mathis* leaves essentially the entire field of criminal tax prosecutions untouched and much troubled.

Gerald P. McDermott

TORTS — SKIER LIABILITY — A SKIER WHO INJURES ANOTHER MAY BE LIABLE IN TORT UNDER THE "LOOK BUT DON'T SEE" RULE. — *Ninio v. Hight,* 385 F.2d 350 (10th Cir. 1967).

Plaintiff, Ida Ninio, was skiing at Aspen in a beginners' class. Defendant, Donald Hight, skiing from above the group, rammed into Mrs. Ninio, inflicting serious injury. Mrs. Ninio filed suit against Hight for damages caused by his alleged negligence. Testimony at the trial revealed that Hight had finished making a turn to the left and "saw, sort of out of my field, ski pants and boots, and I didn't have time to really look up."[1] On the basis of this evidence, plaintiff argued that Hight was concededly in control; that had he looked to his right he could have seen the group and avoided the collision; and that his failure to see and heed the group's presence was negligence as a matter of law. However, the trial court refused plaintiff's request for special jury instructions and instructed the jury only on

[64] United States v. Carlson, 260 F. Supp. 423, 427 (E.D.N.Y. 1966).

[65] Thomas v. United States, 386 U.S. 975 (1967).

[66] United States v. Guerrina, 112 F. Supp. 126, 129 (E.D. Pa. 1953).

[67] H. BALTER, *supra* note 1, § 3.3-2, at 14-15.

[1] Ninio v. Hight, 385 F.2d 350, 351-52 (10th Cir. 1967).

the issue of negligence in conventional terms of ordinary care. A jury verdict was rendered for defendant. On appeal, *held*, reversed and remanded on the basis of Colorado's long-established "look but don't see" rule.[2]

> [W]hen, in the exercise of ordinary care, one has a duty to look for dangerous conditions, he will be presumed, in case of accident, to have looked where he was supposed to look and to have seen what he could reasonably be expected to see. And, failure to look and to see what reasonably could and should have been seen is negligence.[3]

Ninio v. Hight raises some interesting questions about skier liability. Aside from the rule of negligence cited by the court, there is a logical pattern of evidence upon which negligence could have been predicated: it was a clear day, there was no obstruction blocking defendant's view of the area, and defendant was an otherwise competent skier (a member of the Dartmouth Ski Patrol), shown to be skiing "in control" at the time of the accident. Furthermore, the case raises the issue of the applicability of the doctrine of assumption of risk, although this issue was not discussed by the court. Finally, Mrs. Ninio invoked "the unwritten 'rule of the road' applicable to skiing activities under which an overtaking skier is required to yield to skiers below him that are being overtaken,"[4] thus raising a question concerning the legal efficacy of privately promulgated standards of conduct and care.

This Comment does not contemplate the multitude of ski cases involving suits brought against ski area operators, for these have been discussed elsewhere.[5] Rather, the concern is with the liability of one skier to another, irrespective of the liability of the operator, which will be mentioned only where it relates to the issue under study.

I. ASSUMPTION OF RISK

Equal in significance to the express holding of *Ninio* is a doctrine which the court plainly ignored, but which may nevertheless be applicable to such cases — the doctrine of assumption of risk. This doctrine states, with regard to athletics, that a person who "participates in an athletic event, game, or sport accepts the dangers

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[2] Behr v. McCoy, 138 Colo. 137, 330 P.2d 535 (1958); Clibon v. Wayman, 137 Colo. 495, 327 P.2d 283 (1958); Prentiss v. Johnston, 119 Colo. 370, 203 P.2d 733 (1949); Fabling v. Jones, 108 Colo. 144, 114 P.2d 1100 (1941). This rule, usually applied to traffic accident cases, has been recently expanded to include a landlord-tenant situation where the plaintiff tripped over a metal floormat leaving defendant's apartment house. Folck v. Haser, 432 P.2d 245 (Colo. 1967).

[3] 385 F.2d at 352.

[4] *Id.* at 351.

[5] *See* Annot., 94 A.L.R.2d 1431 (1964); Wells, *Liability of Ski Area Operators*, 41 DENVER L.C.J. 1 (1964).

inherent in the activity as far as they are obvious and necessary."[6] Further, in Colorado, the doctrine "applies to the relationship between an owner of premises and a licensee. In this respect the licensee ordinarily assumes the risks incident to the conditions of the property upon which he ventures."[7] The courts will generally find a defendant ski area operator liable when he has failed to operate properly his tow facilities, but will rarely find him liable for rocks or stumps on the ski run which the skier failed to see or negotiate.[8] The skier assumes the risk of what he might reasonably expect to encounter during the course of his activity. The question then becomes, Does a skier assume the risk of hazardous encounters with other people on the slope, and if so, to what extent?

There are two cases which have considered the question: *Morse v. State*[9] and *McDaniel v. Dowell*.[10] In *Morse,* a New York case, the plaintiff was struck from behind by a person riding a sled on the ski slope. The court held that plaintiff

> might properly believe that she would be safe there and that she might practice skiing without being subjected to additional hazards. There was a certain amount of danger in the sport in which she was indulging, but the risk of being struck by a speeding sled was not part of it. That danger came from the state's failure to keep the sports separate.[11]

The state was held to a degree of care requiring it to take steps to prevent what may have been reasonably forseeable. The sledder who hit plaintiff was not sued. However, the real importance of the case was that plaintiff did not assume the risk that the sledder would strike her. The question remains whether a court would draw this parallel as to the negligence of another skier.

In *McDaniel,* a California case, the plaintiff was struck by a skier out of control as she was waiting in line to ride the rope tow. The court was unsympathetic: "[I]t was clear from the evidence that one of the risks normally incident to the use of the skiing facilities was the danger arising from the movements of a *skier who has lost control* of his bodily actions."[12] It may be implicit in the *McDaniel* holding that a skier who has lost control creates a danger inherent in the sport, and that another skier who is injured thereby is deemed to have assumed the risk of such a danger. However, the *Ninio* case may be easily distinguished inasmuch as Hight testified that he was

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[6] 65A C.J.S. *Negligence* § 174(6) (1966).

[7] Mathias v. Denver Union Terminal Ry., 137 Colo. 224, 229, 323 P.2d 624, 627 (1958).

[8] *See* authorities cited note 5 *supra.*

[9] 262 App. Div. 324, 29 N.Y.S.2d 34 (1941).

[10] 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962).

[11] 262 App. Div. at 326, 29 N.Y.S.2d at 37.

[12] 210 Cal. App. 2d at 32, 26 Cal. Rptr. at 146 (emphasis added).

in control at the time of the accident. A skier should not be deemed to have assumed a risk which another skier, in control of his movements, could have reduced by observing a standard of due care.

Although a skier may assume the risk of dangers inherent in the sport, the argument can be made that he does not assume the risk of another person's negligence. In *Hawayek v. Simmons,*[13] the plaintiff and the defendant were fishing together. Defendant negligently swung his fishing lure in such a way that it caught the plaintiff in the eye. The court held: "While one who becomes part of a fishing venture might be said to assume all ordinary and normal hazards incident to the sport, the law does not require him to assume all risks of negligence of those other persons in the fishing party."[14] There is certainly no difference between a fishing accident of the type witnessed in *Hawayek* and a skiing accident as in *Ninio.*

To make the ski area operator responsible for the acts of all the skiers on its slopes would be impractical. The serious problem with the *Morse* case is that it may require the operator to patrol his slopes to discover every careless skier, just to protect potential plaintiffs. A better theory would be to hold the careless skier personally liable, as in *Ninio.* Tow tickets, purchased by the skier as an admission to the lift devices, usually carry disclaimers: "User hereof agrees: To observe all rules of safe, sportsmanlike skiing; upon request of management in event of violation of such rules, to surrender this tag; and for himself, his heirs, executors, assigns and his or their attorneys or agents, not to prosecute any claims for any cause, for injury, death or loss incurred while using this tag against LOVELAND SKI TOW CO., its officers, agents or employees."[15] However, skiers rarely read the tow ticket so its effectiveness is questionable.

Whether a plaintiff assumes the risk of another skier's negligence has yet to be determined in Colorado. Since the ski industry in this state is productive for the economy, it seems unlikely that the courts will impose too great a duty on the operator, but will instead charge the careless skier. This is where the duty should justifiably fall.

II. SKIING RULES OF THE ROAD

The court in *Ninio* was influenced by plaintiff's invocation of the skiing "rule of the road," whereby an overtaking uphill skier is required to yield to the skier being overtaken.[16] This "rule of the

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[13] 91 So. 2d 49 (La. App. 1956).

[14] *Id.* at 54-55.

[15] This statement was taken from a tow ticket sold by the Loveland Ski Area in 1968. Other ski areas sell tickets with similar wording.

[16] 385 F.2d at 351.

road" is part of the National Skier's Courtesy Code which represents the collective thinking of the U. S. Ski Association, the National Ski Patrol System, Inc., the National Ski Areas Association, and the Professional Ski Instructors of America.[17] The nine rules constituting the Code are as follows:

1 — All skiers shall ski under control. Control shall mean in such a manner that a skier can avoid other skiers or objects.
2 — When skiing downhill and overtaking another skier, the overtaking skier shall avoid the skier below him.
3 — Skiers approaching each other on opposite traverses pass to the right.
4 — Skiers shall not stop in a location which will obstruct a trail, or stop where they are not visible from above, or impede the normal passage of other skiers when loading or unloading.
5 — A skier entering a trail or slope from a side or intersecting trail shall first check for approaching downhill skiers.
6 — A standing skier shall check for approaching downhill skiers before starting.
7 — When walking or climbing in a ski area, skis should be worn and the climber or walker shall keep to the side of the trail or slope.
8 — All skiers shall wear safety straps or other devices to prevent runaway skis.
9 — Skiers shall keep off closed trails and posted areas and shall observe all traffic signs and other regulations as prescribed by the ski area.[18]

These rules, for the most part, are not complicated but are simple, commonsense guides for anyone who has skied more than once or twice. Of course, they have no effect as law but may well set forth the standards of care and prescribe the acceptable methods of conduct on the ski slopes. The skier who violates a rule may be considered to have acted in such a way as to make him negligent and consequently liable for injuries he has caused by such violation.

CONCLUSION

As our ski slopes become more crowded, there will be more accidents similar to that in *Ninio v. Hight.* Courts and juries will be faced with questions of skier negligence and liability plus the related element of the standard of care imposed upon skiers. As this area of tort law develops, perhaps the best solution is to look to the National Skier's Courtesy Code as a starting point. Of course, the ultimate determination of negligence will continue to rest with the jury, and jury decisions will vary with the circumstances in each case, notwithstanding the Code. The problems of collisions between

[17] Denver Post, Nov. 12, 1967, (Empire Magazine, Spec. Supp. *Ski Colorado*), at 47.
[18] *Id.*

skiers are still relatively new in the law. We may, however, expect to see more litigation in this field commensurate with the growing popularity of the sport, especially in Colorado where skiing is a major tourist attraction.

Richard M. Kennedy

TORTS — WORKMEN'S COMPENSATION — INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. — *Finn v. Industrial Commission of Colorado,* 437 P.2d 542 (Colo. 1968).

The claimant, John B. Finn, was seen by his supervisor shortly after reporting to work at his place of employment, the Adolph Coors Company. Minutes later he was found lying on the floor nearby in a semiconscious and contorted condition. Cursory examination revealed that blood was running from his ears, his eyes were blackened, he had facial abrasions, and his forearms were badly bruised. It developed that the claimant had also sustained a skull fracture. Finn's work clothes were torn and showed evidence of an external force, and he later surmised that he had been struck by a forklift truck. However, he was unable to produce any witnesses to the purported accident or any direct evidence as to the exact nature of the event which caused his injuries. The referee determined that, although Finn had been injured while at work, he had failed to prove that his injury arose out of his employment. At the Industrial Commission hearing, evidence of the claimant's perfect health prior to the injury was excluded. Expert medical testimony tended to eliminate the possibilities of latent disease, seizure, or heart attack, and there was no clinical or observable evidence of any such endogenous condition. The Industrial Commission concurred in and adopted the referee's findings and denied the claimant compensation based on the belief that "this otherwise healthy man may have contorted himself into these injuries from some innerbody malfunction."[1] The district court upheld the ruling, and on appeal, the Colorado Supreme Court, *held,* affirmed. There is no rebuttable presumption in Colorado in favor of an injured employee to the effect that, in the absence of any proof of the event causing his injury, the accident will be held to have arisen in the course of his employment and thus compensable under the Colorado Workmen's Compensation Act. Furthermore, the res ipsa loquitur doctrine or some variation thereof does not apply to such an unwitnessed accident.[2]

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[1] *Hearing of Finn v. Adolph Coors Co. & Liberty Mut. Ins. Co. before the Industrial Comm'n of Colo.,* #1-803-503 (1964).

[2] Finn v. Industrial Comm'n, 437 P.2d 542 (Colo. 1968).