Ski Law in Colorado: The Timorous No Longer Stay at Home

by James H. Chalat, Eric Samler, and Chris Koupal

In Colorado, skiing represents the largest component of the tourism industry and is therefore critical to Colorado's economy. This article provides a current overview of ski law as it pertains to legal economics, legislation, and ski accident case law. It also compares ski law in other states and offers the Colorado lawyer some practice tips.

American skiing traces its beginning to the 1932 Lake Placid Winter Games. In 2002, for the first time in its history, the Winter Olympic Games are being held in the Rocky Mountains—the part of America where the ski industry has flourished most. In Colorado, skiing (or snow-riding, as the sport is becoming known in deference to snowboarding's tremendous popularity) is the largest component of the tourism industry.[1] Tourism is a critical component of Colorado's annual gross domestic product.[2]

Although it has maintained its significance to the Colorado economy, skiing's growth in the state has not kept pace with the overall economic growth of Colorado. The Colorado ski industry reported a record 11.5 million skier visits in 1997-98. Even though the past decade saw an economic boom, approximately the same numbers were reported in 2000-2001. Moreover, the events of September 11, 2001, coupled with a weakened economy, are predicted to result in a significant downturn for the 2001-2002 ski season.[3] Over the past decade, the ski business's annual growth rate of only 2 percent evidences a flat skier market,[4] which has led to a period of consolidation and competition among ski areas.

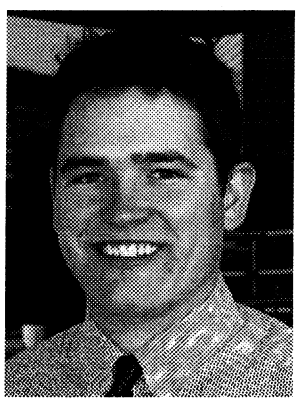
Despite the ups and downs of the economy, skiing will continue to have great economic significance in Colorado; 20 percent of all skier days in the United States take place in Colorado, and skiing has become elemental to this state's culture, ethic, and lifestyle. Once a sport of a few wealthy, risk-taking adventurers, skiing has now become widely practiced across our entire society, including the young, the elderly, the fit, and the handicapped. The timorous no longer stay at home.[5] As a result, any Colorado lawyer whose practice includes the defense or prosecution of personal injury cases (ski accident cases are tort cases) is certain to have a ski case come his or her way.

This article updates *The Colorado Lawyer* article published in 1998,[6] focusing first on the legal economics of ski law, legislative changes, and case law. The article then addresses the types of ski accidents and how Colorado law treats each variant of ski case, noting several out-of-state cases for comparison. Finally, the article provides practice tips for the Colorado lawyer.

LEGAL ECONOMICS OF SKI LAW

Compared with other states, Colorado ski law has had the effect of making skiing comparatively safe. It has achieved





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this by carefully balancing protective concerns for the industry against a thoughtful risk- and responsibility-sharing scheme. Skiers must maintain a lookout, ski within their abilities, avoid collisions with others and objects, exercise common-sense safety practices, and accept the inherent risks of the sport.[7] When on the lifts, skiers have the duties to learn the fundamentals of the use of the lift and to obey written and verbal instructions.[8] Skiers injured by the negligent acts of other skiers do have recourse against those skiers.[9]

Concomitantly, ski areas do not enjoy absolute immunity from tort liability.[10] Ski area operators have statutory duties regarding signage and the operation of equipment on the slopes.[11] Ski lift operators owe the highest duty of care to passengers on the lift.[12] In addition, the composition of the Colorado Passenger Tramway Safety Board, which oversees enforcement of the Colorado Passenger Tramway Safety Act ("Tramway Safety Act"),[13] has changed. Formerly, a representative of the tramway manufacturing and design industry sat on the Board. That representative has now been replaced with a licensed professional engineer not employed by a ski area or other related industry, removing any potential conflict.

Colorado ski law, therefore, has supported the early growth and present stability of the industry.[14] The Colorado Ski Safety and Liability Act ("Ski Act" or "Act") was enacted during the period of "tort reform" legislation of the 1970s and 1980s, purportedly out of concern for the economic health of the industry.[15] In general, Colorado's Ski Act balances the safety responsibilities and risks of the sport between skiers and ski area operators, depending on the specific situation at hand. Central to the Ski Act is the listing of "inherent risks," which arguably can act as a bar to a plaintiff's claim if the injury stems from one of the risks. In 1998, the Colorado Supreme Court bolstered the health and safety of the industry in the case of *Bayer v. Crested Butte Mountain Resort, Inc.*[16] In *Bayer*, the Court reaffirmed that the ski area operator owed passengers the highest duty of care in the operation of its lifts. In doing so, the Court commented on its view of policy—that safe practices are to be reinforced, while unsafe conduct should be deterred:

> Adoption of Crested Butte's argument that the Tramway Act and Ski Safety Act preempt common law liability would entail no responsibility on the part of ski operators to ensure safe design, other than to comply with the Board's regulations. This notion is contrary to the legislature's intent in assigning the primary responsibility for design to the operators, as well as contrary to a *fundamental precept of tort law—that conduct adverse to evolving safety norms should not be rewarded.*[17] (*Emphasis added.*)

Wisely, the industry has recognized that families constitute its key customer base and that family vacation destination choices are often driven by safety considerations, along with other factors. As a result, the industry has responded with strong marketing and training campaigns to emphasize and enhance skier and employee safety.[18] Because Colorado is a relatively safe place to ski, the ski industry is better able to promote and protect itself in a competitive national tourist market, holding itself out as not only having better powder, but safer slopes as well.

However, safety is not certain. Despite advances and improvements in ski equipment and the recent industry emphasis on safety, skiing and snowboarding continue to produce a substantial number of injuries that entail considerable medical cost.[19] Current statistics indicate that the overall injury rate has decreased to 2.3 accidents per 1,000 skier visits.[20] Nevertheless, from the overall injury rate, one study concludes that 66 percent of those individuals involved in accidents require treatment either by a physician or in a hospital.[21] Considering these statistics, and that approximately eleven million skier visits take place in Colorado per year, about 16,500 injuries will occur annually at Colorado ski areas.[22]

COLORADO SKI LAW AND CASES

The Ski Act[23] imposes statutory duties on ski area operators: a ski area operator must mark its trails and boundaries and the difficulty level of its trails and slopes.[24] Moreover, manmade objects not readily visible from 100 feet away under conditions of ordinary visibility must be padded.[25] The Ski Act imposes correlative duties on the skier. These duties include the duty to ski in control; within the skier's ability; to maintain a lookout; and to abide by the signs, warnings, and instructions placed by the ski area operator. The Act places the primary duty on the uphill skier to avoid the downhill skier and places on all skiers the duty to stay clear of snowgrooming equipment, vehicles, lift towers, and signs, as well as other equipment on the slope. Skiers assume the risk of the inherent dangers and risks of skiing.[26]

The Ski Act additionally imposes on skiers certain duties when they are "passengers" of ski lifts.[27] Passengers must have the dexterity, ability and knowledge to negotiate and safely use lifts, and if they do not know, they must ask. Passengers must load and unload only at designated areas (for example, they cannot jump from a lift) and otherwise must refrain from any dangerous activity, such as jumping on closed lifts or dropping anything from lifts. The statute creates a tort remedy for the breach of any duty by imposing a *per se* liability standard on the skier, passenger, or ski area operator for the violation of any requirement of the Act.[28]

The Ski Act also limits damage awards in downhill skiing cases and provides that there is no duty to protect skiers from dangers inherent in the sport.[29] Inherent dangers are generally defined as weather, snow, surface, and subsurface conditions; collisions with natural and man-made objects; skier collisions; and the failure of skiers to ski within their ability.[30] In *Graven v. Vail Associates, Inc.*,[31] the Colorado Supreme Court addressed the issue of what constitutes an inherent danger of the sport. Practitioners should review the case carefully,[32] keeping in mind that a skier assumes only those risks that are inherent to and an integral part of the sport. Applicable parts of other laws relating to specific types of accidents are discussed below. Otherwise, practitioners should keep in mind that traditional principles of tort law apply to ski accident cases, such as negligence, comparative negligence, and assumption of risk. Practitioners also should be familiar with the distinct types of ski accidents and the particular legal doctrines associated with each.

The three basic types of ski accident cases are skier/skier collision, skier/object collision, and lift accidents. Each type of case raises different concerns and considerations that the practitioner must take into account. Practitioners also need to be concerned with the operators' reasonable duty to effect a rescue, the responsibility that may result when those efforts fall below generally accepted standards,[33] and that operators owe reasonable duties of care with regard to the operation of equipment and snowmobiles.[34] An overview of the basic types of ski accident cases follows.

Skier/Skier Collisions

Skiing is not a contact sport.[35] Since 1967, Colorado courts have been trying ski-

er versus skier cases, applying general negligence standards, and imposing on each skier the duty to ski with due care, maintain a lookout, and generally yield to the skier below.[36] Arguably, a ski area is not liable for an injury caused by a skier/skier collision in which its employee is at fault.[37] However, it is clear that claims are viable in an action between two skiers (or snowboarders). To recover, the injured skier need prove only negligence, not recklessness. Under the Ski Act, a collision is not an inherent risk, and the defense of assumption of the risk is not available.[38] Section 109 of the Ski Act lists the duties of skiers as follows:

1) The responsibility to ski within his or her ability;
2) The duty to maintain control of his or her speed and course at all times; and
3) The duty to maintain a proper lookout so as to be able to avoid other skiers and objects.

Criminal Liability

One recent seminal Colorado ski case is *People v. Hall*.[39] In 1997, Nathan Hall, a former high school ski racer, was skiing down the Riva Ridge ski run at Vail. The eyewitness testimony from Buck Allen, a municipal judge and long-time skier, was that Hall was skiing at a high speed, sitting back on his skis, skiing directly down the fall line, bouncing off moguls, and appeared to be out of control.[40] As Hall flew over a knoll, other witnesses observed Allen Cobb traversing a catwalk that intersected with the Riva Ridge ski run. Hall went off the knoll and collided into Cobb. Cobb suffered a fractured skull and fatal brain injury.[41] The coroner testified that Cobb's injuries were similar to those he typically found in victims of a high-speed car accident.[42] The People brought felony reckless manslaughter[43] and criminal negligent homicide[44] charges against Hall.

After a preliminary hearing, the Eagle County court dismissed the case, finding that Hall's conduct—which the county court characterized as skiing "too fast for the conditions"—did not involve a substantial and unjustifiable risk of death and "[did] not rise to the level of dangerousness required under the current case law" to sustain a charge of manslaughter.[45] The People appealed to the district court.[46] The district court affirmed the county court, finding that while such conduct may involve a risk of injury, a person of ordinary prudence and caution would not infer that skiing too fast for the conditions creates a probability greater than 50 percent that such conduct would result in the death of another.[47] Thus, the court determined that the prosecution failed to meet its burden and affirmed the county court's finding of no probable cause.[48]

The Colorado Supreme Court took the case on a writ of *certiorari* from the district court's order affirming the county court's dismissal of the case on preliminary hearing.[49] The Court reversed and remanded for trial, holding that reasonable persons could conclude that Hall's conduct grossly deviated from the standard of care that a reasonable, experienced skier would have exercised knowing that other people were below him. The Court held that defendant's excessive speed and lack of control significantly increased both the likelihood that a collision would occur and the seriousness of the injuries that might result from such a collision, including the possibility of death.

> We hold that under the particular circumstances of this case, whether Hall committed the crime of reckless manslaughter must be determined by the trier of fact. Viewed in the light most favorable to the prosecution, Hall's conduct . . . created a substantial and unjustifiable risk of death to another person. A reasonable person could infer that the defendant, a former ski racer trained in skier safety, consciously disregarded that risk. For the limited purposes of a preliminary hearing, the prosecution provided sufficient evidence to show probable cause that the defendant recklessly caused the victim's death.[50]

At trial, the jury found Hall guilty of the lesser charge of criminally negligent homicide, and he was sentenced to ninety days in jail, 240 hours of community service, and three years' probation.[51]

A review of applicable case law would reveal that reckless high-speed skiing may cause the reckless skier's own death.[52] It is equally reasonable to infer that reckless high-speed skiing can result in the injury or death of another skier. The Court's rationale in *Hall* was that if substantial injury is foreseeable from a particular ski accident involving reckless skiing, death also may be a reasonably foreseeable consequence. The Court reasoned:

> Like other activities that generally do not involve a substantial risk of death, such as driving a car or installing a heater, "skiing too fast for the conditions" is not widely considered behavior that constitutes a high degree of risk. However, we hold that the specific facts in this case support a reasonable inference that Hall created a substantial and unjustifiable risk that he would cause another's death.[53]

By finding the existence of probable cause to bring manslaughter charges in an aggravated skier/skier collision case, the Court implicitly upheld the thirty-year-old rule of Colorado ski law that tort liability arises on the basis of negligence in a skier/skier collision case.[54] The *Hall* opinion established that aggravated conduct on the ski slope now may result in criminal sanctions. However, the jury verdict underscored the societal norm that negligent skiers will be held financially responsible for their misconduct, whether the negligence results in the skier's own injuries or injuries to another skier. The decision ensures enforcement of the Ski Act's provisions excluding "assumption of risk" from skier versus skier cases (substitute snowboarder for either or both parties)[55] by reinforcing the conventional wisdom that negligent skiing is a basis for a cause of action in money damages.

Restitution

The *Hall* case further raised the potential of criminal liability for a ski accident. As a result, practitioners should take note of the recent statute concerning restitution in criminal actions.[56] This statute requires that orders of restitution be entered for all convictions, including "felony, misdemeanor, petty or traffic misdemeanor(s)."[57] Criminal restitution is limited to pecuniary (economic) damages, meaning that non-economic damages (for example, damages for pain and suffering and for disability and disfigurement) are still left exclusively to the civil action. Moreover, restitution is not limited to aggravated cases because many misdemeanors and petty offenses impose criminal liability for a breach of due care. Thus, tort claimants will sometimes find themselves also designated "victims" in a criminal case arising from the same facts.[58]

The new restitution provisions are implicated not only when the conduct at issue rises to the level in the *Hall* case, but in other ski-related contexts as well. The Ski Act makes it a Class 2 petty offense to ski while intoxicated, ski on a closed trail, ski off a ski slope and onto closed and posted adjacent private lands, or to leave the scene of an accident.[59]

When a criminal action is pending against a person who is also a defendant in a civil action, the attorneys are faced with both ethical and pragmatic considerations. The Colorado Rules of Professional Conduct prohibit an attorney from threatening to present charges to obtain an advantage in a civil matter.[60] In connection with the related criminal proceedings, plaintiff's counsel should be cautious about participating prior to a conviction in the criminal case. It is the prosecutor—not the plaintiff's attorney—who determines whether a criminal case proceeds against a particular skier who has harmed another on the slopes.

In addition to the ethics questions posed by the new restitution statute, several practical challenges exist for the plaintiff's attorney. An order of restitution in a criminal case may be the basis for an argument of collateral estoppel as to certain civil remedies available to the injured party or may bar the civil defense counsel from asserting either non-liability or lack of proximate cause. Pursuant to the new restitution statute, "Any order for restitution entered pursuant to this section shall be a final civil judgment in favor of the state and any victim."[61] The statute also provides that "[a]ny amount paid to a victim under an order of restitution shall be set off against any amount later received as compensatory damages by such victim in any federal or state civil proceeding."[62]

The new restitution statute should cause practitioners to remain alert to developments in the related criminal proceeding arising out of the same accident. Practitioners need to take into account the relationship between criminal restitution and civil damages to competently advise either party in the civil action or an insurance company responsible for the representation or the indemnification of the skier-defendant who caused the harm. Moreover, questions concerning fees for representation, insurance coverage, and bankruptcy are likely to arise. Attorneys and their clients must decide whether representation in the civil matter will entail representation in the restitution matter in the criminal case. The retainer agreement and arrangements for attorney fees must reflect a clear understanding about the scope of representation.

Questions to be considered whenever the issue of criminal restitution is possible may include the following: What (if any) fee will plaintiff's counsel receive if the injured client is awarded restitution? If the prosecuted skier has insurance coverage, who will pay insurance defense counsel? What will be the relationship between the prosecuted skier's insurance defense counsel and his or her criminal defense counsel? If a prosecuted skier's insurance is available for the civil claim, will insurance pay the victims if the defendant is ordered to pay restitution? Is a plaintiff in a civil action estopped from litigating in the civil case claims for pecuniary loss that the plaintiff/victim either was awarded or failed to pursue in the restitution phase of the criminal proceeding? What if a release from liability was obtained in the civil matter prior to the conclusion of the criminal case? Would the purpose and intent of the statutory scheme for restitution be frustrated if a civil release barred the court from ordering restitution?[63]

Insurance defense counsel may wish to consider whether they want to become involved in the restitution stage. If they determine not to be involved, the restitution award may be a significant obligation that ultimately is claimed to be the insurer's. Thus, insurance counsel may want to become involved in the restitution proceed-

ings early enough to protect the insurer and/or insured.

Skier/Object Collisions

Skier/object collision cases typically involve a ski area operator as the defendant[64] and also implicate the "inherent danger" rule. The Ski Act states that "no skier may make any claim against or recover from any ski area operator for any of the inherent danger and risks of skiing."[65] Inherent dangers are defined in the Ski Act as including weather, snow, surface and subsurface conditions, collisions with natural and man-made objects, skier collisions, and the failure of skiers to ski within their ability. The doctrine establishes a non-duty rule but is derived from the doctrine of *volenti non fit injuria* ("a person is not wronged by that to which he or she consents")[66] or as aptly put by Chief Judge Cardozo, "The timorous may stay at home."[67]

In *Graven v. Vail*, the Colorado Supreme Court held that "inherent dangers and risks" will be narrowly construed.[68] In reaching this conclusion, the Court relied on both the detailed listing of risks contained in the Ski Act[69] and the prefatory language in the statute that inherent dangers and risks are those dangers and risks that are an integral part of the sport.[70] The Court was also following the lead of other states such as Vermont, which, in recognizing the changing nature of the ski industry, held that "the timorous no longer need stay at home."[71]

In *Rowan v. Vail Holdings Inc.*,[72] the U.S. District Court for the District of Colorado addressed the issue of what constitutes an inherent danger of the sport. Rowan was glide-testing downhill skis on a race course at Beaver Creek Ski Resort. Bleachers were at the bottom of the course. While skiing down the course, Rowan lost control, crashed into the bleachers, and was killed. His family brought a wrongful death action against the ski area operator, alleging first a negligence *per se* claim that the bleachers should have been padded, and second, that the unpadded bleachers were not a risk inherent in the sport under *Graven*.[73]

The ski area filed a motion for summary judgment, contending, among other things, that the injuries sustained by Rowan were a result of the inherent dangers and risk involved in skiing. The court granted in part, and denied in part, the motion for summary judgment. The court concluded as a matter of law that the ski area operator is required to pad only man-made structures not readily visible from a distance of at least 100 feet.[74] The bleachers were visible from more than 100 feet. Thus, the negligence *per se* claims were dismissed. However, the court concluded that there were disputed issues of fact as to whether the crash was an inherent risk of skiing and that question was one for the jury.[75]

At the jury trial, the court had to parse out the Colorado Supreme Court's reasoning in *Graven* and develop a set of instructions from which the jury could make a factual finding. The court concluded that there must be a twofold inquiry: (1) Could the sport be undertaken without confronting the risk? and (2) Was there an unnecessary hazard that could not have been eliminated by the exercise of reasonable care on the part of the defendant?[76]

The *Rowan* case provides some initial guidelines for submitting to the jury the question of deciding whether a particular hazard was inherent to the sport. The court ultimately instructed the jury that it must

find as a preliminary matter whether an accident was a result of the inherent dangers of skiing. To some extent, it relied on the language of *Clover v. Snowbird Ski Resort*,[77] which defined the inherent risks of skiing as "those dangers that skiers wish to confront as essential characteristics of the sport of skiing . . . or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator."[78] The court instructed the jury that if they found that the accident fell within the inherent risks of skiing, it must find for the defendant, and the jury did so find.

Skiing, by its very nature, can be a dangerous sport.[79] However, a skier assumes only those risks that are inherent to and an integral part of the sport.[80] If the danger and risk are neither inherent to nor an integral part of the sport, arguably, plaintiffs neither voluntarily expose themselves to the risk nor know of or appreciate the risk. On the other hand, if the dangers and risks are inherent to and an integral part of the sport, and the proximate cause of a plaintiff's injuries, a plaintiff's claim would be barred. Under the *Rowan* approach, the jury must determine whether the accident was caused by a risk inherent to the sport and whether that risk was the sole proximate cause of a plaintiff's injuries.

For the practitioner, this means that in theory an injury caused by a collision with an object, man-made or natural, will not necessarily be considered an inherent risk of the sport. If the danger or risk was not integral to the sport or if the hazard could have been eliminated by reasonable care, arguably, the skier is entitled to recovery. However, from a pragmatic standpoint, the skier must have a compelling case, such as that stated by the Court in *Graven*:

> In the present case, the plaintiff describes the terrain that precipitated his injuries as a steep ravine or precipice immediately next to the ski run. This description conjures up an image of a *highly dangerous situation* created by locating a ski run at the very edge of a steep drop off. If such a hazardous situation presents an inherent risk of skiing that need not be marked as a danger area, the ski area operator's duty to warn under [CRS] section 33-44-107 (2)(d) is essentially meaningless. Therefore, we do not construe [CRS] section 33-44-103(3.5) to include such a situation within the inherent dangers and risks of skiing as a matter of law.[81] (*Emphasis added.*)

A thorough investigation must be made into the design, signs, warnings, and markings of the ski run and the precise cause of the injuries to determine whether a plaintiff's injuries were the result of the inherent risks and dangers of the sport. The jury looks to the negligence and duty of care instructions for guidance because it also must determine if the risk or hazard could have been eliminated by the exercise of reasonable care. However, unless the facts show that the skier was unfairly surprised by the risk, and that the ski area knew or should have known of the existence of the risk, a jury will likely hold for the ski area.

In *Doering v. Copper Mountain*,[82] two young children were injured while sledding on the lower slopes of Copper Mountain when they collided into the blade of a snow-grooming machine. They alleged claims under *Graven* and negligence *per se* under the Ski Act.[83] A jury returned a verdict for the defendant, specifically finding the injuries to have been proximately caused by an inherent risk of skiing. On appeal, the U.S. Court of Appeals for the Tenth Circuit approved the general conceptual approach of allowing the jury to determine, as its first task in its deliberations, whether a particular hazard was "inherent," as laid out in *Rowan*. However, in the *Doering* case, the plaintiffs had made out a negligence *per se* case. They claimed that the "sno-cat" did not have an adequate visible light, as required by the statute, and that proper warnings of snow-grooming operations had not been posted.[84] The court held:

> The jury was obligated to determine whether Copper Mountain violated the statutory provisions and, if there was a violation, whether the violation was a cause of the Doering children's injuries. Only after Copper Mountain is found not to have violated the Ski Act can the jury turn to the question of whether an inherent danger or risk of skiing barred the Doering children's claims. If, on the other hand, a jury were to find that Copper Mountain violated the Ski Safety Act and these violations contributed to the injuries, the children's claims cannot be barred as an inherent danger or risk of skiing.[85]

Thus, the jury could not make the inherent risk inquiry laid out in *Rowan* until it first determined that the ski area was not in violation of the Ski Act. An inquiry into a negligence *per se* claim must be made prior to any determination of common law negligence.

Lift Accidents

The third type of ski accident involves injuries resulting from ski lift/chair mishaps. Most ski lift injuries occur when loading or dismounting from the lift. When a skier does not properly load onto a high-speed lift and the lift continues to move, the possibility of severe injury is significantly greater because the distance between the chair and the ground increases at that high rate of speed. In addition, the new generation of chair lifts tends to be more mechanically complex and requires workers who are technically sophisticated. For economic and other reasons, such workers are not always readily available, and this could cause problems for ski area operators in light of the standard of care owed to those riding the lifts.[86]

In *Bayer*,[87] the plaintiff boarded a double-chair, center-pole chairlift that was not equipped with restraining devices. Pursuant to regulations adopted by the Passenger Tramway Safety Board, restraining devices were required during summer operation of the lifts but not during winter operation.[88] The plaintiff rode the lift for approximately 100 yards before losing consciousness, falling to the ground below, and suffering serious and permanent head injuries.

On certification from the Tenth Circuit Court, the Colorado Supreme Court held that neither the Tramway Safety Act[89] nor the Ski Act[90] preempt or otherwise supersede the pre-existing Colorado common law standard requiring a ski lift operator to exercise the highest degree of care commensurate with the practical operation of the ski lift. The *Bayer* court based its holding in part on the longstanding rule that the greater the risk, the greater the amount of care required.[91] In ordinary negligence cases, an actor is required to conform his or her conduct to a standard of objective behavior measured by what a reasonable person of ordinary prudence would do under the same or similar circumstances.[92] In cases where the risk of harm is greater, a corresponding greater degree of care is required to avoid injury to others.[93]

For example, operators engaged in an inherently dangerous activity such as the transmission of electricity "must exercise the highest possible degree of skill, care, caution, diligence and foresight with regard to that activity, according to the best technical, mechanical, and scientific knowledge and methods which are practical and available at the time of the claimed con-

duct which caused the claimed injury."[94] Operators also must provide qualified mechanics and lifts that are capable of being immediately stopped when there is a loading mishap. Operators must ensure that those operating the lifts are properly trained to run those lifts.

Although *Bayer* upheld a high duty of care for lift operators, ski lift operators are not considered common carriers and are not insurers of their passengers' safety.[95] Once ski lift passengers have boarded the lift, however, they are helpless to prevent accidents, and the operator has exclusive control of the ski lift. Therefore, the court in *Bayer* held:

> [T]he standard of care applicable to ski lift operators in Colorado for the design, construction, maintenance, operation, and inspection of a ski lift, is the highest degree of care commensurate with the practical operation of the lift. Neither the Tramway Act nor the Ski Safety Act preempt or otherwise supersede this standard of care, whatever the season of operation.[96]

The Ski Act also imposes a few specific duties on passengers: they are required to have sufficient physical dexterity, ability, and knowledge to board, ride, and alight from the lift, and must follow any written or oral instructions that are given to them regarding the use of the passenger tramway.[97]

Due to the high duty of care owed, ski lift cases are the most likely type of ski case to result in a recovery for the skier. The likelihood of recovery is even greater if the Tramway Board's rules and regulations are incorporated into the jury instructions as *per se* standards of care.[98] However, ski lifts generally are mechanically safe. Lift-related accidents usually occur in connection with loading and unloading, precisely the points at which the skier does have some control over his or her fate and the fate of others. Therefore, in most lift cases, the court and jury need to weigh the facts in light of the countervailing duties imposed on both the skier and ski lift operator.[99]

WAIVERS AND RELEASES

In *Cooper v. Aspen Skiing Co. et al.*,[100] the Court of Appeals held that a pre-injury release of liability signed by the minor and the parent barred not only the parent's claim, but also the minor's claim. The court based its decision on what it perceived as the fundamental liberty interest of parents in rearing their children and thus making decisions on their behalf.

In *Cooper*, the facts of the case are as follows. David Cooper was 17 years old when, as part of his enrollment with the Aspen Valley Ski Club, he and his mother signed a contract, entitled "Aspen Valley Ski Club, Inc. Acknowledgment and Assumption of Risk and Release." The release stated that the Club and the coach are relieved from:

> . . . any liability whether known or unknown, *even though that liability may arise out of negligence or carelessness on the part of the entities mentioned above.* The undersigned Participant and Parent or Guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known. . . . (*Emphasis added.*)

A few months later, the boy was blinded when he lost control and crashed into a tree while training on a ski race course set by his coach. David (still 17 years old) and his parents filed suit against the Aspen Valley Ski Club and his coach, alleging negligence and other claims. The Pitkin County District Court granted summary judgment in favor of all the defendants on all claims. At the core of the proceedings was the trial court's summary judgment in favor of the Club and the coach.[101]

The trial court found that the mother's signature on the pre-accident release of liability bound David to the terms of the release and, therefore, his claims were barred against the club and his coach. The Court of Appeals affirmed, holding that "modern realities" coupled with the parental interest in decision-making on behalf of their children, empower parents to sign an enforceable exculpatory agreement waiving a child's potential claim for negligence against a third party.[102] The Court of Appeals found the post-accident release provided in exchange for a settlement to be distinguishable from the pre-accident release signed by the Coopers.[103] The court considered the importance of the parents' interest in the care, custody, and management of their children and found that the parents' interests in making decisions for the family outweighed any interest of the State in interfering with the parent-child relationship. The court relied on the U.S. Supreme Court opinion in *Troxel v. Granville*, which established the principle "that parents have a fundamental right under the Due Process Clause to make decisions concerning the care, custody, and control of their children."[104]

The Colorado Supreme Court granted *certiorari* on October 1, 2001, on the specific issue of whether the public policy of Colorado allows a parent to release the claims of a minor child for possible future injuries from a recreational ski activity. The majority of state appellate courts that have addressed this issue have held that a parent may not release his or her child's prospective tort claim.[105]

Most recently, on October 30, 2001, the Utah Supreme Court held that a parent's release of a child's claims and an associated indemnity agreement were invalid.[106] The Court relied on the public policy exception specifically relating to the release of a minor's claims. "A clear majority of courts treating the issue . . . have held that a parent may not release a minor's prospective claim for negligence."[107] The Utah Court paid particular attention to the rationale employed by the Washington Supreme Court in *Scott v. Pacific West Mountain Resort* that because in a post-injury setting, a parent's signature on a release "is ineffective to bar a minor's claims against a negligent party . . . it makes little, if any, sense to conclude a parent has authority to release a child's cause of action prior to an injury."[108]

Utah's economy, as Colorado's, is heavily reliant on tourism and the recreational industry. The Utah recreational industry competes with Colorado for international and national tourism business.[109] Utah's population is youthful and family-oriented. Youth soccer, midget football, student sports, and recreation activities are as popular there as they are in Colorado. Thus, the same considerations adopted by the Utah Supreme Court may be given deference by the Colorado Supreme Court.

However the Colorado Supreme Court ultimately decides this issue, the Tenth Circuit decision in *Doering*[110] will impact whether a child will be able to recover for his or her injuries. In *Doering*, the Tenth Circuit held that the Ski Act abrogated the common law rule that children under the age of seven cannot be negligent, but left unanswered the question of whether a child's negligence should be tempered by his or her age. Thus, even if the Court holds that a parent may not release his or her child's potential claims for future injuries, jurors and the courts might well be faced with the situation where they will need to weigh the "negligence" of a five-year-old against that of, for example, his or her ski instructor, or the conduct of a snowmobile driver, lift attendant, or another adult under a duty to act with due care.[111]

Colorado's federal courts have upheld waivers in other recreational cases involv-

ing ski rentals[112] and snowmobile rentals,[113] but have narrowly construed a waiver in the *Rowan* case.[114] However, the Colorado Court of Appeals rejected, many years ago, the purported effect of exculpatory language embossed on a lift ticket, to the extent that it intended to immunize the ski area beyond the protections afforded by the Ski Act.[115] The *Cooper* case, therefore, will have a significant effect on the extent and sharing of responsibility and liability for the costs of injuries and damages. The decision should have significant precedential value across the nation.

DAMAGE CAPS AND RECENT CASE LAW

Another current area of interest to practitioners involves caps on damages. CRS § 33-44-113 of the Ski Act limits the amount of damages an injured skier may recover in a downhill ski accident case from a ski area operator.[116] Pursuant to that provision, total damages shall not exceed $1 million and "any claim attributable to non-economic loss or injury, as defined in [CRS § 13-21-102.5(2)], whether past damages, future damages or a combination of both, ... shall not exceed two hundred fifty thousand dollars."[117] This provision is similar to the limitation on damages recoverable against health care professionals in the Health Care Availability Act ("HCAA").[118] Because the damages cap provisions in the Ski Act are so similar to those found in the HCAA, practitioners should be aware of a significant new Colorado Supreme Court case about the damage caps in the HCAA.

In *Preston v. Dupont*,[119] the Colorado Supreme Court interpreted the damages cap provision of HCAA and, in particular, the $250,000 cap for non-economic damages. The Court held that the cap for non-economic damages does not limit damages for physical impairment or disfigurement. The rationale of the Court may apply with equal force to an interpretation of the limitation of damages provision of the Ski Act.[120] In *Preston*, the Court held that the limitations under the HCAA as to non-economic loss did not cap disfigurement and physical impairment within the $250,000 limitation on "non-economic loss."[121]

Thus, in any case where there is significant physical impairment, disability, or disfigurement, as well as pain and suffering, the practitioner must make certain that the verdict form accurately reflects the distinct categories of damages and that evidence is presented about the distinct nature and extent of each category of damages. Moreover, the plaintiff's attorney must be prepared to argue the applicability of the *Preston* decision in the event that damages for physical impairment and disfigurement, when combined with the pain and suffering award, exceed $250,000.

COMPARATIVE SKI LAW

Colorado lawyers who specialize in ski law are often called on to answer questions about how Colorado law and practice compares to that of other states. Also, many people from other states who are injured on the Colorado slopes may ask Colorado lawyers about ski law in their home states. Knowledge of other states' laws, therefore, may be helpful in distinguishing improper application of assumption of risk rules, especially in cases involving co-participant liability (such as where one lift passenger misloads or is unable to unload safely).

Most states with a significant ski industry have statutes or case law, or a combination of both, that state that skiing carries inherent risks for which damages cannot be recovered. States with ski laws that include some form of an inherent danger scheme wherein the skier (by virtue of his or her participation in the sport) has assumed those risks inherent or integral to the sport include: Alaska, Arizona, California, Idaho, Maine, Massachusetts, New Hampshire, Oregon, Pennsylvania, Vermont, Utah, and Wyoming.

Alaska imposes statutory duties and obligations on both ski area operators and skiers.[122] A skier cannot recover for injuries sustained as a result of inherent risks of skiing, which include weather, steepness, snow, surface or subsurface conditions, and collisions with other skiers or with man-made objects. The risk of a skier/skier collision is not a risk assumed in an action against another skier.[123] If an injury is caused by a combination of inherent danger and skier negligence, comparative negligence principles apply.[124]

Arizona has enacted statutes that, for the most part, grant immunity to ski area operators. Ski area operators are required to post various passenger and ski information signs within the ski area.[125] If a ski area proves that the skier signed a valid release, the terms of the release govern.[126] Arizona takes a minority position that skier/skier collisions are considered inherent risks of the sport.[127]

Although California does not have a state ski safety act, five California counties have "inherent danger" ordinances.[128] The California courts have held that striking a lift tower is an inherent risk of skiing, as is colliding with a tree or falling into a ravine.[129] The California Court of Appeals, in *Mastro v. Petrick*,[130] has recently held that individual skiers or snowboarders do not owe a duty of care to others who might also be skiing or snowboarding on the same ski hill. Thus, if the skier's or snowboarder's conduct is not "so reckless as to be totally outside the range of ordinary activity found in the sport," no liability would lie.[131] This is in conflict with prior California Court of Appeals' decisions.[132] Until the California Supreme Court takes up the issue, California law in this area will remain unsettled. Regarding waivers, California courts have enforced waivers obtained at the time of the rental, purchasing, or servicing of ski bindings.[133]

The Idaho statute immunizes ski areas from liability for dangers inherent in the sport.[134] The duties of ski area operators are strictly limited to those established by statute.[135] Maine statutes exemplify the inherent risk approach. Inherent risks are those that are an integral part of the sport, such as changing weather; bare spots; and collisions with lift towers, lights, and other skiers.[136] Moreover, claims may be brought for negligent operation and maintenance.[137] Massachusetts law is a mixture of negligence and inherent danger. Ski areas must maintain and operate ski areas in a reasonably safe condition and manner, yet ski areas are not liable for inherent risks.[138]

New Hampshire bars most claims against ski area operators because, according to statute, skiing involves risks and hazards that must be assumed by the skier regardless of the safety measures taken by the operator.[139] Oregon has a modified inherent danger scheme whereby skiers assume the inherent risks of skiing insofar as they are reasonably obvious, expected, and necessary.[140] Utah's statute imposes on skiers the inherent risks of the sport, but leaves it on a case-by-case basis to determine what is inherent.[141] Vermont statutes provide that a skier assumes those inherent dangers that are obvious and necessary.[142] In Wyoming, inherent dangers are those that are inherent, obvious, or necessary to its participation, a question that ordinarily must be resolved by the jury.[143] Wyoming also provides that it is a misdemeanor for a person to ski while impaired by alcohol or drugs or to ski in reckless disregard of the skier's own or another's safety.[144]

Connecticut has adopted a mixed approach of both statutory duties and negligence. Skiers accept the risks inherent in the sport, including variations in the slope

and trail (except when caused by snowmaking, grooming, or rescue operations), trees, or other objects not within the confines of the slope, bare spots, and collisions with others.[145] In interpreting Montana's Skier Responsibility Ski Act,[146] Montana courts have held that ski area operator's duties are not limited to those set out in its ski act.[147]

Nevada, New Mexico, New York, North Carolina, and Washington follow a negligence standard. Nevada's standard is statutory.[148] In New Mexico, skiers accept the inherent risks of skiing, and actions are barred for skiing injuries except when it is shown that the injuries arose from a breach of the duties identified in its ski act, including the duty "to warn or correct particular hazards or dangers known to the operator where feasible to do so."[149] This quoted language appears to establish a negligence standard. New York places specific duties on ski area operators, including the duty to inspect the condition on each run twice a day, pad lift towers and man-made objects, and post signs and notices. The New York code also specifically states that the duties of skiers and ski area operators are governed by common law.[150] In North Carolina, ski areas cannot engage in conduct that willfully or negligently contributes to injury.[151] Finally, the Washington state courts have interpreted the Washington Ski Safety Act[152] as not relieving ski areas of liability for their own negligence.[153]

This brief survey reveals a variety of differing approaches to the issues. The fact that the ski industry might be important to the overall economic well-being of the state does not in itself mean that the ski industry will be provided absolute immunity. However, the various approaches can help to guide Colorado practitioners in determining what constitutes an inherent risk and, in particular, what is and what is not integral to the sport. For example, the requirement of the New York statute regarding inspection of runs and padding of man-made objects is instructive. Unlike Colorado, New York ski area operators are required to inspect their slopes twice each day for hazards and to log the inspections.[154] Wyoming's decision to criminalize skiing while impaired and for reckless skiing also is instructive of what can be done to provide a safer skiing environment while maintaining the exciting nature of the sport.

As noted above, although Colorado law controls as to Colorado ski accidents, the significant number of out-of-state skiers, combined with the media scrutiny the subject has received, may foster preconceived notions for clients about what responsibilities other skiers or ski areas may have. Therefore, it is helpful for the practitioner to be conversant with the rudimentary aspects of alternative and out-of-state ski law, as well as to be able to compare how Colorado ski law works when advising, for instance, a New York or California client on the particulars of his or her accident case.

PRACTICE TIPS

Practitioners should be aware of certain practice tips to represent efficiently and effectively either the injured skier or defendant in a ski accident case. These suggestions concern venue issues, skier/skier collisions, use of preservation depositions and experts, the Snowmobile Act and Ski Act, forest service filings and public documents, and personal injury cases generally.

Venue Issues

Because many skiers come to Colorado from out of state, lawyers need to determine if a case should be filed in state or federal court. Prior to *Hall*, the conventional wisdom was that local ski-town juries would be less likely in any event to find for a plaintiff. Given the changing demographics of those counties that are heavily reliant on skier business, some consideration now should be given to the advantage of having a jury familiar with the ski area and the local concerns for ski safety.

However, the U.S. District Court for the District of Colorado, pursuant to the diversity jurisdiction of the federal district courts,[155] is still the venue of choice for many ski cases, especially if the injured party received extensive medical care and hospitalization in Denver following the accident. Moreover, the increased number of foreign nationals skiing in Colorado makes federal court the only proper court of jurisdiction with the power under the Hague Convention to obtain *in personam* jurisdiction if the foreign national has left Colorado prior to initiation of suit.[156]

Skier/Skier Collisions

Typically, the defendant's homeowner's liability carrier will provide coverage and indemnification, making the skier collision case similar to any general tort case. Ski patrol reports are crucial to locating the accident site, circumstances, and terrain. However, independent witnesses should be interviewed promptly.

Use of Preservation Depositions and Experts

Improvements in technology and worldwide telephone service lend themselves to video and digital Internet conferencing for the taking of preservation depositions. Experts are less critical to skier cases than other matters because the issues are so fundamentally based on common-sense notions of right of way, safety, and visibility. Nonetheless, experts can make the issues easier for a jury. Experts can create and explain maps, photos, and models of the scene of the accident, thus demonstrating lines of sight, topographic features, and paths of travel, as well as which skier was uphill. Experts also can provide useful interpretations of the biomechanics of an accident so that the facts of the accident are explained by the injuries sustained by the parties. In lift cases, an expert can determine the mechanics of an accident, the physical movement of the lift, and critical time frames.

The Snowmobile Act And Ski Act

The Colorado Snowmobile Act contains important provisions that impose duties of care on snowmobile operators.[157] Snowmobile usage is significant at ski areas. As a result, skiers and snowmobiles collide, and, in these accidents, skiers can be seriously injured. In trials involving snowmobiles and skier injuries, ski area operators are held to the duties of care established in the Snowmobile Act. Moreover, juries are usually instructed on the Act's standards as *per se* duties of care.

Forest Service Filings and Public Documents

The general rule of lawyering is that lawyers can never have enough paper. Its cousin is that the more often a story is told, the more likely there will be contradictions in each successive version. These rules hold true as well in ski cases. Ski areas generate accident reports. In skier versus skier accidents involving serious injury or death, the local sheriff also may generate a report. Ski areas in Colorado exist principally on U.S. Forest Service ("USFS") land; thus, in death cases, reports are also filed with the USFS. Documents on file with the USFS may include maps, permits, tree-cutting requests, and safety-related

filings. The USFS typically will furnish copies of these documents following a Freedom of Information Act request.[158]

In a case in which a ski area employee is involved in the accident, counsel should determine if a workers' compensation claim was filed. If so, it is incumbent on the plaintiff's attorney to obtain the report filed in the workers' compensation matter because it might have more details than a sanitized accident report. Moreover, Colorado law requires the operator of a snowmobile to file a report within forty-eight hours of the accident, along with notice to a local law enforcement agency.[159]

Jury Instructions

In a case where the elemental claims against either another skier or a ski area operator are based on statutory duties of care, the jury must be instructed on the statutory provisions of the Ski Act as a *per se* duty of care. Where there is sufficient evidence to demonstrate a breach of a statutory provision, counsel should submit a C.J.I.-Civ.3d: 9:14 instruction embedded with the appropriate statutory language.[160] The more contentious issue then arises of whether a defendant is also entitled to a jury instruction on assumption of risk, arguing that skiing is dangerous and any accident, no matter how it occurs, is an assumed risk. Generally, the defendant does not get to make such an argument, as the breach of a duty of care is not a risk assumed by another person. As the Colorado Supreme Court held in *Summit County Development Corp. v. Bagnoli*, the first Colorado ski lift accident case in which a similar contention was made: ". . . there is no basis for charging the plaintiff with knowledge that the defendants would fail to exercise due care for her safety."[161]

Personal Injury Cases Generally

Walter L. Gerash,[162] one of the mentors of the Colorado personal injury bar, has consistently asserted that a trial is a "morality play." These words also ring true in ski cases. The central character of the "play" is the plaintiff, and the plaintiff's character, motives, intentions, credibility, background, and appearance all weigh in to be considered by the jury, whether consciously or subconsciously. Likewise, the cast of other characters fill other roles, some as villains, victims, and unimpeachable observers. All of these elements must be taken into consideration when deciding which cases to try and which to close. Practitioners also need to take into account how a jury will respond to the plaintiff.

CONCLUSION

Ski law is a challenging and rapidly developing area of the law. As the Colorado ski industry and tourism continue to grow, it becomes increasingly important for Colorado practitioners to stay abreast of developments not only in Colorado, but also on a national level. The Colorado Supreme Court, in *Cooper*, may soon give practitioners guidance on whether a ski area operator may rely on a parent's signature to waive or release the claim of an injured minor. Undoubtedly, other issues will be left for future resolution in the courts.

NOTES

1. "Colorado boasts more than 35 winter recreation areas, offering such activities as snow shoeing, snowmobiling, snowcat tours, sleigh rides, ice skating, cross-country skiing, and, of course, the largest recreational attraction in Colorado: downhill skiing and snowboarding. With 26 ski resorts to choose from, all types of terrain are offered to suit all tastes and abilities, from 'crash the bumps' thrills to easier, gentler runs for the family. Of the $524 million spent on recreation each year in Colorado, 60 percent is spent on ski related recreation. With over 11 million skier visits annually, Colorado leads the nation and accounts for nearly 20 percent of all ski trips nationwide." *See Colorado Data Book 2001-Recreation and Tourism (hereafter, "Colorado Data Book")* (Colo. Office of Economic Development, Aug. 2001). This information can be accessed online at: www.state.co.us/oed/bus_fin/Databook2001/recreation.pdf.

2. Colorado currently ranks seventeenth in the nation for total tourism spending and fifth on a per capita basis. *See Colorado Data Book, supra*, note 1 at www.state.co.us/oed/bus_fin/Databook2001/ecbase.pdf. Tourism employed 212,222 Coloradans in 1999, comprising 8 percent of total Colorado employment. *See* Center for Business and Economic Forecasting, Inc., *Tourism Jobs Gain Ground in Colorado: 1999 Estimates of State and County Tourism Jobs*, prepared for the Colo. Dept. of Local Affairs (April 2001) at 2. This information can be accessed online at: www.dola.state.co.us/demog/cbef/tourism99.pdf. Employment related to ski areas generated 14 percent of these jobs. *Id.* at 8.

3. Chalat, "Colorado Ski Law," 27 *The Colorado Lawyer* 5 (Feb. 1998). *See also Focus Colorado: Economic & Revenue Forecast, 2001-2007, State of Colorado* (Colo. Legis. Council Staff Rep., Sept. 2001). Bookings for ski resorts are down an average of 28 percent. *Colorado Economic Chronicle* (Colo. Leg. Council, Nov. 9, 2001).

4. Blevins, "Vail Resorts Gets a Big Lift for Season: 4.9 Million Skier Visits a Record; Flagship Hill is No. 1 in the U.S.," *The Denver Post* (June 7, 2001) at C-01.

5. *Infra*, note 67.

6. Chalat, *supra*, note 3. *See also* Chalat, "The Development of the Standard of Care in Colorado Ski Cases," 15 *The Colorado Lawyer* 373 (March 1986); Chalat, "Colorado Ski Act Update," 10 *The Colorado Lawyer* 1611 (July 1981); Chalat, "Ski Tips for Attorneys," 9 *The Colorado Lawyer* 452 (March 1980).

7. CRS §§ 33-44-109 and -112.

8. CRS § 33-44-105.

9. CRS § 33-44-109(1).

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

11. CRS §§ 33-44-106 and -108.

12. *Bayer v. Crested Butte*, 960 P.2d 70 (Colo. 1998).

13. CRS §§ 25-5-701 *et seq.* The Tramway Safety Act provides both procedural and administrative provisions concerning the licensing, construction, and maintenance of all passenger tramways in Colorado. The Tramway Act also creates a board that oversees the execution of the Act's provisions, including granting licenses, assuring proper compliance by operators, and carrying out necessary disciplinary proceedings. In addition, the Act lays out the duties and responsibilities of tramway operators.

14. *Id.*

15. CRS §§ 33-44-101 *et seq*. *See* Frakt and Rankin, "Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability," 28 *Idaho L.Rev*. 227-250 (1992); Ferguson, "Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles," 67 *DU L.Rev*. 165 (1990); Bernstein, "Note, The Snowballing Cost of Skiing: Who Should Bear the Risk," 7 *Cardozo L.Rev.* 153 (1988); Fleming, "Assumption of Risk: Unhappy Reincarnation," 33 *Am. Trial Lawyers J*. 101 (1968).

16. 960 P.2d 70 (Colo. 1998).

17. *Id.* at 80.

18. National Ski Areas Assoc., Safety Initiative. Access this online at: http://www.nsaa.org/safety/index.asp.

19. On average, 34 people die each year in the United States while skiing or snowboarding. An additional 39 suffer severe, yet nonfatal injuries, including paralysis and brain trauma. Also, 165,000 skiers/snowboarders sustain less serious injuries such as broken bones, knee injuries, and ruptured ligaments. *See* National Ski Area Assoc., *Facts About Skiing/Snowboarding Safety* (Oct. 26, 2000), available at: www.nsaa.org/safety/facts_about.asp (last visited Nov. 15, 2001).

20. Johnson *et al.*, "Injury Trends in Alpine Skiing, Skiing Injuries," Johnson, Zucco, and Shealy, eds., Vol. 13, *Skiing Trauma and Safety* (American Society for Testing and Materials, 2000). These materials are available at www.astm.org.

21. Ekeland and Rodven, *Skiing Trauma and Safety*, *supra*, note 20.

22. *Id.* In 1999-2000, the U.S. ski industry reported 52 million skier visits. For that same

time frame, the Colorado ski industry reported over 11 million skier visits.

23. CRS §§ 33-44-100 *et seq.*

24. CRS § 33-44-107(1) and (2).

25. CRS § 33-44-107(7).

26. CRS § 33-44-109.

27. CRS § 33-44-105.

28. CRS § 33-44-104.

29. CRS § 33-44-112 ("[N]o skier may make any claim against or recover from any ski area operator for injury *resulting from* any of the inherent dangers and risks of skiing."). (*Emphasis added.*)

30. CRS § 33-44-103.5.

31. 909 P.2d 514 (Colo. 1995). The *Graven* decision is discussed in depth in Chalat, *supra*, note 3.

32. A review of the *Graven* decision will help determine if there is a possible claim against the ski area. *See also Rowan v. Vail Holdings, Inc.*, 31 F.Supp.2d 889 (D.Colo. 1998), discussed below.

33. *Restatement (Second) of Torts* § 314A(b). *Spence v. Aspen Skiing Co.*, 820 F.Supp. 542, 544 (D.Colo. 1993); *Miller v. Arnal Corp.*, 632 P.2d 987 (Ariz.App. 1981).

34. *Lee v. Aspen Ski Co.*, No. 98S1235 (D.Colo. Sept. 27, 1995); Colorado Snowmobile Act, CRS §§ 33-14-101 *et seq.*

35. *Novak v. Virene*, 586 N.E.2d 578 (Ill.App. 1992).

36. *Ninio v. Hight*, 385 F.2d 350 (10th Cir. 1967).

37. *Glover v. Vail Corp.*, 137 F.3d 1444 (10th Cir. 1998). This proposition has not yet been tested in a Colorado state court.

38. CRS § 33-44-109(1).

39. 999 P.2d 207 (Colo. 2000).

40. *Id.* at 212.

41. *Id.* at 210.

42. *Id.* at 212-13.

43. CRS § 18-3-104(1)(a) ("A person commits the crime of manslaughter if such person recklessly causes the death of another person."). Colorado's criminal code defines recklessness as follows: "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." CRS § 18-1-501(8).

44. CRS § 18-1-501(3); *see also People v. Jones*, 565 P.2d 1333, 1335 (1977).

45. *Hall, supra*, note 39 at 213.

46. C.R.Crim.P. 5(a)(4)(IV).

47. The district court erroneously relied on the 50 percent figure as a basis for defining what constituted a "substantial and unjustifiable risk." The Supreme Court acknowledged this, and held that: "The district court construed some of our earlier cases as requiring that the risk of death be 'at least more likely than not' to constitute a substantial and unjustifiable risk of death. In interpreting our cases, the court relied on an erroneous definition of a 'substantial and unjustifiable' risk. Whether a risk is substantial must be determined by assessing both the likelihood that harm will occur and the magnitude of the harm should it occur. We hold that whether a risk is unjustifiable must be determined by assessing the nature and purpose of the actor's conduct relative to how substantial the risk is. Finally, in order for conduct to be reckless, the risk must be of such a nature that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise." *Hall, supra*, note 39 at 217.

48. *Hall, supra*, note 39 at 214.

49. C.A.R. 49.

50. *Hall, supra*, note 39 at 211.

51. Frazier,"Hall Guilty in Skier's Death: Jurors Opt for Lesser Charge in '97 Collision," *Rocky Mtn. News* (Nov. 17, 2000); Frazier, "Man Gets 90 Days for Vail Skiing Death: Victim's Family Appalled When Man Admits Guilt, But Announces Appeal," *Rocky Mtn. News* (Feb. 1, 2001).

52. Examples of high-speed death cases in which a skier strikes an object are: *Rowan, supra*, note 32 (D.Colo. 1998) (crash into viewing stand); *Martin v. Spirit Mountain Recreation Area Auth.*, 566 N.W.2d 719 (Minn. 1997) (tree); *Yauger v. Skiing Enterprises, Inc., d/b/a Hidden Valley Ski Area*, 206 Wis.2d 76, 557 N.W.2d 60 (Wis. 1996) (child killed in collision with unpadded concrete lift-tower foundation); *Brouchard v. Johnson, d/b/a Frost Fire Mtn. Resort*, 555 N.W.2d 81 (N.D. 1996) (tree); *Schmitz v. Cannonsburg*, 428 N.W.2d 742 (Mich.1988) (tree).

53. *Hall, supra*, note 39 at 222.

54. *Ninio, supra*, note 36; *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977); *Ulissey v. Shvartsman*, 61 F.3d 805 (10th Cir. 1995); *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991) (severe head injury); *Giebink v. Fischer*, 709 F.Supp. 1012 (D.Colo. 1989) (reduced a young man to lifelong coma).

55. "Notwithstanding any provision of law or statute to the contrary, the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another." CRS § 33-44-109(1).

56. CRS §§ 16-18.5-101 *et seq. See generally* Dieter, "Restitution in Criminal Cases," 30 *The Colorado Lawyer* 125 (Oct. 2001).

57. CRS §§ 16-18.5-101 *et seq.*

58. Chalat and Chalat, "Restitution in Criminal Ski Actions: Considerations for Civil Trial Lawyers," Vol. 50, No. 6, *Trial Talk* (Oct./Nov. 2001).

59. CRS § 33-44-109(112).

60. Colo.RPC 4.5 holds: "(a) A lawyer shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter; (b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes."

61. CRS § 16-18.5-103(4)(a).

62. CRS § 16-18.5-103(6).

63. *See People v. Maxich*, 971 P.2d 268 (Colo. App. 1998).

64. However, skier versus private car collisions in ski area parking lots implicate the personal injury provisions of the auto owners' no-fault insurance. CRS § 10-4-707(1)(a).

65. CRS § 33-44-112.

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

67. *Murphy v. Steeplechase Amusement Co., Inc.*, 166 N.E. 173, 174 (Ct.App.NY 1929).

68. *Graven, supra*, note 10 at 519.

69. CRS § 33-44-103(3.5).

70. *Id. See also* CRS § 33-44-103(3.5).

71. *Sunday v. Stratton Corp.*, 390 A.2d 398, 402 (Vt. 1978).

72. 31 F.Supp.2d 889 (D.Colo. 1998).

73. *Id.*

74. *Id.* at 901.

75. *Rowan, supra*, note 32 at 903.

76. *Id.*

77. 808 P.2d 1037 (Utah 1991). This case was relied on by the Colorado Supreme Court in *Graven, supra*, note 10.

78. *Rowan, supra*, note 32, *quoting Clover, supra*, note 54 at 1046-47.

79. *See Graven, supra*, note 10 at 520.

80. *See* C.J.I.-Civ.3d: 9:4: "A person assumes the risk of injury or damage if the person voluntarily or unreasonably exposes him or herself to such injury or damage with knowledge or appreciation of the danger and risk involved."

81. *Graven, supra*, note 10 at 520.

82. 259 F.3d 1202 (10th Cir. 2001).

83. CRS § 33-44-108(1).

84. *Supra*, note 82.

85. *Id.* at 1212-13.

86. *See generally Bayer, supra*, note 12 (ski lift operators owe the highest duty of care in operation of ski lifts).

87. *Id.*

88. *See* http://www.dora.state.co.us/tramway/tramwayrules.htm.

89. CRS §§ 24-34-101 *et seq.*

90. CRS § 33-44-113.

91. *Bayer, supra*, note 12 at 72.

92. *Id.; United Blood Services v. Quintana*, 827 P.2d 509, 519 (Colo. 1992).

93. *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 587 (Colo. 1984).

94. *City of Fountain v. Gast*, 904 P.2d 478, 480-81 (Colo. 1995); C.J.I.-Civ.3d: 9:5.4.

95. Skiers, snowboarders, and trail bike riders are considered to be passengers under the Ski Act and Tramway Act. *See* CRS §§ 33-44-103(4) and 25-5-701 and -721, respectively.

96. *Bayer, supra*, note 12 at 75 and 80.

97. CRS § 33-44-105.

98. The regulations cover general requirements and engineering specifications with regard to the design, construction, and operation of aerial trams; fixed grip and detachable lifts; tows, funiculars, and conveyors; and the handling of fuel, accident reporting, and inspections. CRS § 25-5-704.

99. *Trigg v. City and County of Denver*, 784 F.2d 1058 (10th Cir. 1986).

100. 32 P.3d 502 (Colo.App. 2000).

101. Perry McBride was the Aspen Valley Ski Club coach who allegedly set the gates on the training course with the trees directly in

the fall zone at a turn where David fell and lost control.

102. *Cooper, supra*, note 100 at 506.

103. *Id.*

104. 530 U.S. 57 (2000).

105. *See Scott v. Pacific West Mountain Resort*, 834 P.2d 6, 11 (1992); *Munoz v. II Jaz, Inc.*, 863 S.W.2d 207 (Tex.App. 1993); *Kaufman v. American Youth Hostels, Inc.*, 174 N.Y.S.2d 580 (S.Ct. N.Y. 1957); *Alexander v. Kendall School Dist.*, 634 N.Y.S.2d 318 (S.Ct. A.D. 1995); *Santangelo v. City of New York*, 66 A.D.2d 880, 881, 411 N.Y.S.2d 666 (N.Y. A.D. 1978)); *Shields v. Gross*, 448 N.E.2d 108 (Ct.App. N.Y. 1983); *Kotary v. Spencer Speedway*, 47 A.D.2d 127, 365 N.Y.S.2d 87 (N.Y.A.D. 1975); *Fedor v. Mauwehu Council, Boy Scouts of America, Inc.*, 143 A.2d 466 (Super.Ct. Conn. 1958); *Childress v. Madison Cty.*, 777 S.W.2d 1 (Ct.App. Tenn. 1989); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Ct.App. Tenn. 1990); *Doyle v. Bowdin College*, 403 A.2d 1206 (Me. 1979); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557 (N.J. 1970); *Hawkins v. Navajo Trails*, No. 20000562, 2001 UT 94, 433 Utah Adv.Rep. 19 (Oct. 30, 2001); *Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411 (App.Ct. Ill. 1994); *Simmons by Grenell v. Parkette Nat. Gymnastic Training Center*, 670 F.Supp. 140 (E.D.Pa. 1987). *But see Zivich v. Mentor Soccer Club*, 696 N.E. 2d 201 (Ohio 1998); *Hohe v. San Diego Unified School District*, 274 Cal.Rptr. 647 (Cal.App.3d 1990).

106. *Hawkins, supra*, note 105.

107. *Id.*

108. *Scott, supra*, note 105 at 11-12.

109. Utah skier visits in 2000 numbered 3.4 million, up 12.5 percent and showing an annual average growth of 2.5 percent per year. Tourism is Utah's fifth largest employment sector in the state. Tourism spending in Utah is $4.25 billion per year. *See Tourism-Related Economic and Tax Impacts on Utah Counties* (Salt Lake City, UT: Univ. of Utah, Bur. of Bus. and Econ. Research, 2001).

110. *Supra*, note 82.

111. *Zimmer v. Celebrities, Inc.*, 615 P.2d 76 (Colo.App. 1980) (holding that degree of care required of a child is measured by childhood, and that one who deals with children is bound to exercise greater caution than dealing with an adult); C.J.I.-Civ.3d: 9:4: standard of care of a child is that which can reasonably be expected of a child of that age. Arguably, these instructions could be given in combination with the Ski Act duty instructions as *per se* standards of care. C.J.I.-Civ.3d: 9:14.

112. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472 (D.Colo. 1992).

113. *Brooks v. Timberline Tours*, 127 F.3d 1273 (10th Cir. 1997).

114. *Rowan, supra*, note 32.

115. *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo.App. 1983).

116. The only caps applicable in a ski lift or skier versus skier case are the conventional tort caps on pain and suffering damages. (*See* CRS § 33-44-113, which provides that the section only applies to cases involving ski area operators.) CRS § 13-21-102.5(3)(a) provides that the cap on pain and suffering in an injury case is capped at $366,350 (adjusted), except when the court confirms that by clear and convincing evidence a greater award is appropriate, but in no case greater than $732,500 (adjusted). *See also Ulissey v. Shvartsman*, 61 F.3d 805 (10th Cir. 1995).

117. CRS § 33-44-113.

118. Pursuant to the HCAA, CRS § 13-64-302(5), damages in tort against a health care professional or institution is limited to $1 million per patient "of which no more than two hundred fifty thousand dollars . . . shall be attributable to noneconomic loss or injury as defined in [CRS § 13-21-102.5(2)], whether past damages, future damages or a combination of both."

119. 31 Colo.Law. 251 (Jan. 2002) (S.Ct. 00SC492, *annc'd* 11/13/01).

120. CRS § 33-44-113.

121. CRS § 13-21-102.5(2).

122. Alaska Stats. §§ 05.45.010 *et seq.*

123. Alaska Stats. § 05.45.100(a).

124. *See Hirschbaum v. City of Valdez*, 821 P.2d 1354 (Alaska 1991).

125. A.R.S. §§ 5-702, 5-703, and 5-704.

126. A.R.S. § 5-706.

127. A.R.S. § 5-701(5)(f).

128. Alpine Co. Ord. No. 562-94; Amador Co. Code §§ 12.48.101 *et seq.*; El Dorado Co. Code § 9.20.010; Nevada Co. Code § G-IV, art 19; Placer Co. Code §§ 12.130 *et seq.*

129. *Connelly v. Mammoth Mountain Ski Area*, 45 Cal.Rptr.2d 855 (Cal.App.3d Dist. 1995); *Daniely v. Goldmine Ski Assocs.*, 266 Cal.Rtpr. 749 (Ct.App. 1990); *O'Donoghue v. Bear Mountain*, 35 Cal.Rptr.2d 467 (Cal.Ct. App.4th Dist. 1994); *Van Dyke v. S.K.I. Ltd.*, 79 Cal.Rptr. 2d 775 (Cal.Ct. App.4th Dist. 1998).

130. 112 Cal.Rptr.2d. 185 (Ct.App.5th Dist. 2001).

131. *Id.* at 192.

132. *Zubrick v. Ford*, 56 Cal.Rptr.2d 494 (Cal. Ct.App.3rd Dist. 1996) holds that a skier does not assume the risk of another skier's negligence. *Cf. Freeman v. Hale*, 36 Cal.Rptr.2d 418 (Cal.Ct.App.4th Dist. 1994), where a skier was injured by another skier who had been drinking. The court held that the consumption of alcoholic beverages is not within the range of activities involved in downhill snow skiing and, thus, to the extent the consumption of alcohol increased the likelihood of a collision between the drinking skier and other skiers, that increased risk is not inherent in the sport.

133. *Olsen v. Breeze*, 48 Cal.App.4th 608 (Cal. Ct.App.3d Dist. 1996); *Cf. Westyle v. Look Sports, Inc.*, 17 Cal.App.4th 1715 (Cal.App. 1993), which held that a waiver did bar an action against a ski rental shop, but on its express terms, did not bar a claim for strict products liability in tort.

134. Idaho Code § 6-1101-1109.

135. Idaho Code § 6-1103(1)-(10); *see also Davis v. Sun Valley Ski Education Foundation, Inc.*, 941 P.2d 1301 (1997); *Long v. Bogus Basin Recreational Ass'n Inc.*, 869 P.2d 230, 232 (1994).

136. 32 M.R.S. § 15217(1).

137. *Sanchez v. Sunday River Skiway Corp.*, 802 F.Supp. 539 (D.Maine 1992).

138. Mass.Gen.L. ch. 143 § 71N (Supp. 2001).

139. N.H.R.S.A. § 225.A:1 to A:25.

140. O.R.S. §§ 30.970 to 30.990.

141. UT.C.A.S. §§ 7827-51 through -54; *Clover, supra*, note 54.

142. 12 V.S.A. § 1037; *see also Estate of Frant v. Haystack Group, Inc.*, 641 A.2d 765 (1994).

143. *See Recreation Safety Act*, Wyo. Stat. §§ 1-1-121 through -123.

144. Wyo. Stat. § 6-301(a) and (b).

145. C.G.S.A. § 29-212(1) through (6).

146. M.C.A. 23-2-731 to -736.

147. *Mead v. M.S.B.*, 872 P.2d 782 (Mont. 1994) (jury question whether skier on a narrow trail assumed risk of striking a shale outcropping; unconstitutional to place the entire risk of injury on skiers).

148. N.R.S. § 455A.100-190: "A skiing operator shall take reasonable steps to minimize dangers and conditions within his control." Skiers, likewise, have a duty to ski "in a manner to avoid injury, maintain a lookout, ski in control, avoid skiers already in motion and heed warnings and signs."

149. NMSA § 24-15-7(I).

150. NY Gen. Oblig. 18-101-108, "Safety in Skiing Code."

151. N.C. St. §§ 99-c-1 to -5.

152. R.C.W. §§ 79A.45.010 to 79A.45.060.

153. *Nissen v. Crystal Mtn., Inc.*, 606 P.2d 1214 (Wash. 1980); *Codd v. Steven Pass, Inc.*, 725 P.2d 1008 (Wash.App. 1986).

154. NY Gen. Oblig. 18-103(6) provides that ski area operators have a statutory duty to inspect each open slope or trail that is open to the public within the ski area at least twice a day, and enter the results of such inspection in a log that shall note: (1) the snow and slope conditions; (2) the time of inspection and the name of the inspector; and (3) the existence of any obstacles or hazards other than those that may arise from skier use, weather variations, or mechanical failure of snow grooming or emergency equipment that may position such equipment within the borders of a slope or trail.

155. 28 U.S.C. § 1332(a)(1) or (2).

156. Article 5, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at The Hague, Nov. 15, 1965.

157. *E.g.*, CRS §§ 33-14-101 and -116. "No person shall operate a snowmobile in a careless or imprudent manner without due regard for width, grade, corners, curves, or traffic of trails, the requirements of section 33-14-110(3), and all other attendant circumstances."

158. 5 U.S.C. § 552.

159. CRS § 33-14-115.

160. *Trigg, supra*, note 99 at 1059-60.

161. 441 P.2d 658, 662 (Colo. 1968).

162. *See* Mott, "An Oral History: Walter Gerash: Six of the Greatest, 27 *The Colorado Lawyer* 33 (Feb. 1998). ■