

SKI LAW IN THE UNITED STATES:
A PRACTICAL GUIDE TO SKI ACCIDENT LITIGATION
3RD ANNUAL CONFERENCE
RECREATION & ADVENTURE PROGRAM LAW & LIABILITY
APRIL 28-29, 2005 * ADAM'S MARK HOTEL * DOWNTOWN DENVER

JAMES H. CHALAT
CHALAT HATTEN LAW OFFICES, P.C.
1900 GRANT, SUITE 1050
DENVER, COLORADO (CO) 80203
PHONE:303-861-1042
FAX:303-861-0506
EMAIL: JCHALAT@CHALATLAW.COM
www.skisafety.com
www.chalatlaw.com

I. SKI LAW IN THE UNITED STATES.¹

A. Presentation Overview.

1. Ski law covers a broad continuum of claims and duties of care. Downhill skiing accidents involve the most restricted duty analysis as claims are limited by assumption of risk/inherent danger rules. Vehicle, snow groomer, and snowmobile cases, along with skier versus skier collisions and other "co-participant cases" are governed by rules of reasonable care owed by all participants. Ski lift/tramway accidents impose the highest duties of care upon the ski area operator.
2. Ski law is local law. It varies from state to state. Each state's statutory, common law, and regulatory schemes apply different treatment to the duties, immunities, and liabilities of ski area operators, lift operators, skiers, snowboarders, and related parties.
 - a. Most states with a ski industry have a specific ski statute, modeled on an operator immunity framework advanced by industry lobbyists. However each statute evolved differently and typically each state has a body of interpretative case law, relating to skiing. Generally, these statutes establish safety requirements for

¹ Prepared for the 3rd Annual Conference Recreation & Adventure Program Law & Liability April 28-29, 2005. Adam's Mark Hotel, Downtown Denver

operating equipment and vehicles, marking, signs and other minimal duties on the operators, otherwise, all risks are purportedly transferred onto the skier. Several states with significant ski economies (e.g., CA) have no statewide statutory scheme, although in CA local ordinances offer legislative authority.

- b. Some states (for example: MI) employ an assumption of risk or inherent risk doctrine to protect the ski areas against claims arising from almost any injury claim, on the premise that any injury while downhill skiing or snowboarding is inherent in the sport.
 - c. Many states (for example: CO) mandate minimal safety standards for the operation of the ski areas, principally with regard to signs, warnings, markings on trails, which if specifically violated, will form the basis for a claim against a ski area operator, for a downhill skiing/snowboarding accident.
 - d. Most states hold skiers & snowboarders financially responsible to other skiers for their negligent skiing which results in a skier/skier collision. Several states have held that skiing is a "limited contact" sport and require proof of recklessness in order to recover from a collision between participants. CA. *Cheong v. Antablin*, 946 P.2d 817 (Calif. Sup. Ct. 1997).
 - e. In most states with a substantial skiing industry, ski area operators must meet higher standards of care in the operation, use and maintenance of lifts, trams and tows.
- B. Perspective: In the highly competitive and refined modern U.S., ski industry resort operators are sophisticated, automated, well-financed, high-tech businesses that exercise the considerable power of capital in the political, transportation, labor, and insurance markets. Once the exclusive pastime of wealthy urban adults, skiing, snowboarding, and other snow-riding activities, have evolved from sports into "recreational activities."
- C. Now, the hot issues in ski law are:
1. Waiver:
 - a. Area operators' use of waivers to gain full immunity for any act of negligence, including for claims arising under statutory duties, to which area operators, and general negligence law would hold the operators responsible.
 - b. Waivers to protect against children's claims, no matter how the child is injured.
 2. Helmets:
 - a. Liability for ski school accidents involving unhelmeted children.

3. International issues: a marked increase in foreign visitors to our ski resorts, and the increased number of foreign employees, means that international law considerations will often pertain to ski cases, for instance:
 - a. Skier collision cases where the hitter or the victim are foreign citizens.
 - b. Foreign employees witness ski accidents or are involved in skiing accidents.
 - c. Foreign manufacturers of ski lifts or other equipment involved in product cases.
4. Criminal liability for reckless skiing .
5. NY & PA - establishing that a skier collision does not require a reckless or wanton standard, that simple negligence is actionable.
6. In CO the effect and enforceability of the extension of ski area immunities under the 2004 statutory amendments.
7. Duty to rescue and reasonable care issues in the rendering of first aid on the slope.
8. Avalanche liability law in the United States.

II. ECONOMICS OF SKIING AND THE STATISTICS OF SKIING INJURIES.

- A. Many different groups of people, including the very young, a disproportionately large cohort of participants over age 60, the handicapped and the disabled enjoy these activities. Approximately 10.4 million Americans either ski or snowboard. During the 2002/2003 season, the U.S. ski industry reported 57.3 million skier visits. Ski Area Management, Aug. 7, 2003. As many participants now snowboarder as ski.
 1. The Canadian Ski Council reported 18.9 million Canadian skier visits for 2002/2003. *Id.*
 2. Snowboarders now account for over 30% of all ski traffic in the United States.
- B. Safety statistics:
 1. Death:
 - a. Studies have determined that the per capita traumatic death rate is 2.67 deaths per million skiing participants, and an overall death rate of 0.55 deaths per million skier visits. Jasper E. Shealy and Thomson Thomas, *Death in Downhill Skiing from 1976 Through 1992 - A Retrospective View*, 10 *Skiing Trauma and Safety*, p. 66 (1993). This rate persists.

- b. On average, 34 people die each year in the United States while skiing or snowboarding. Another 39 suffer severe, yet nonfatal, injuries, including paralysis and brain trauma. National Ski Areas Association, *Facts About Skiing/Snowboarding Safety* (Oct. 26, 2000), available at http://www.nsaa.org/nsaa/safety/facts_about_skiing_and_snowboarding.asp; Allan R. Meyers & Bismruta Misra, *Alpine Skiing and Spinal Cord Injuries*, 12 SKIING TRAUMA & SAFETY p.150 (1999).
- c. Who suffers skiing deaths in the U.S.?
- (1) In a study which included back country incidents, males account for 83 percent of skier deaths. Skiers from 20 to 29 years of age made up 44 percent of the deaths. "Striking Object" accounted for 36 percent of deaths and was the leading cause of death. Avalanches caused 35 percent of deaths. Most deaths occurred in the afternoon, during March and within ski area boundaries. *Colorado Snow Skier Deaths*, Health Statistics Section, Colorado Dept. Of Health (1993).
- (2) Who gets hurt skiing?
- (a) According to another well recognized statistical study of ski related injuries, the overall injury rate for downhill skiers is 3.37 injuries per 1000 skier visits. Injury rates for snowboarders are 3.03 injuries per 1000 skier visits. Beginning skiers are much more likely to be injured than experienced skiers. Novice male skiers have an injury rate of 8.38/1000 skier visits ("s/v"). Advanced male skiers have an injury rate of .88/1000 s/v. Novice female skiers have the highest injury rate of 9.48/1000 s/v. Advanced female skiers have an injury rate of .94/1000 s/v. Knees are the most frequently injured body part in skiing: 32.7 percent. Jasper E. Shealy, *Overall Analysis of NSAA/ASTM Data on Skiing Injuries for 1978 through 1981*, 5 SKIING TRAUMA AND SAFETY (1985); Jasper E. Shealy & Sundman, *Snowboarding Injuries on Alpine Slopes*, 7 SKIING TRAUMA AND SAFETY (1989). Applying the overall injury rate, to the frequency of skier visits in the United States, indicates that approximately 193,100 ski related injuries occur annually, in the United States.
- (b) What gets hurt skiing?
- i) Knee injuries are the most frequent skiing related injury. One study indicates that the cost of ski-related knee injuries in the United States exceeds \$250 million annually; more than skiers spend on equipment each year. *Knee-Injury \$\$ May Soon Surpass Ski Spending*, INSIDE TRACKS, Jan. 1, 1998, at 12.

(c) A handy summary:

Skier Injuries in the United States

Total U.S. skier/visits 2002-2003	57,300,000
Average Injury Rate	3.37/1,000 s/v
Predicted Annual number of Total Skier Injuries in the U.S.	193,100
Average Percentage of Total Skier Injuries caused by Collisions	3.5%
Predicted Annual number of Collision Injuries in the U.S.	6,760
Total Colorado skier/visits (s/v) 2002-2003	11,605,000
Predicted Annual # of Total Skier Injuries in Colorado @ 3.37/1000 s/v	39,109
Predicted Annual # of Collision Injuries in Colorado @ 3.5%	1,415
Rate of Skier Deaths in the U.S.	.55/1,000,000
Annual # of Expected Skier Deaths in U.S.	31
Experiential annual rate of Skier Deaths in Colorado (Colo. Dept. of Health).	12

III. HEAD INJURIES CAN BE PREVENTED AND MITIGATED BY HELMET USE.

A. Head Injury is the cause of death in 50-90% of skier/snowboarder fatalities. See, Levy, Hawkes, Rossie, Gorman, "Helmets for Skiers and Snowboarders: an Injury Prevention Program and Analysis of Protective Effect" (publication pending).

1. Helmet use has increased at Colorado ski slopes from 1-5% in the 1997-98 season to 15-35% in the 1999-2000 season. Further increases will likely demonstrate a continued reduction in the incidence and severity of brain injuries.
2. Helmets have been conclusively proven to effectively reduce the incidence and severity of head injuries from skier accidents.
 - a. In children age 11-19 admitted to level I trauma units with traumatic brain injuries, approximately 135 were not wearing helmets as compared to approximately 18 admissions for children who were wearing helmets. In young adults age 20-29 the numbers are ~85 admissions without helmets versus ~18 admissions for helmeted skiers/boarders.

- b. 87.5 percent of skier fatalities result from head injuries. The authoritative study conducted under grants issued and obtained by a leading group of trauma neurosurgeons, Centura Health Systems, and St. Anthony Hospital show that none of the head injury fatalities were wearing helmets.
 3. *Skiing Helmets: An Evaluation to Reduce Head Injury*, United States Consumer Product Safety Commission, Washington D.C. (Jan. 1999). Bluntly recommending the use of helmets, especially for children, while skiing.

IV. SKI ACCIDENT LIABILITY LAW IN THE UNITED STATES.

- A. American Ski law is tort law. Thus, the basic elements of civil tort law are at issue: Duty, Breach, Causation, and Damages.
- B. Thumbnail sketch of duties of care downhill skiing cases.
 1. Violation of a statutory duty is negligence: “Barring a skier's claim as an inherent danger or risk of skiing before determining whether a ski area operator violated the Ski Safety Act renders a ski area operator's statutory duties meaningless. Thus, the district court erred by not instructing the jury that (1) it must first determine whether there was a statutory violation by Copper Mountain before turning to the question of whether the Doering children's claims were barred because their injuries resulted from an inherent danger or risk of skiing, and (2) a violation of the Ski Safety Act by Copper Mountain causing a skier injury cannot constitute an inherent danger or risk of skiing. Because there was conflicting evidence adduced at trial on the issue of Copper Mountain's alleged statutory violations, the district court's instructional error was prejudicial. Doering ex rel. Barrett v. Copper Mountain, Inc., 259 F.3d 1202, 1213 (10th Circ. 2001).
 2. Downhill skiing case—skier skis into manmade object, or natural object, skier skis off run into dangerous terrain, or finds himself in terrain above his ability.
 3. Comment on 2004 legislation purportedly intended to establish rules for “Extreme terrain,” was actually stealth legislation to reverse long standing rulings enforcing safety standards upon ski area operators in connection with marking danger areas, and operation of snow grooming equipment.

- a. “‘Inherent dangers and risks of skiing’ means those dangers or conditions which are an integral part of the sport of skiing . . . [former C.R.S. 33-44-103(3.5)] Not all dangers that may be encountered on the ski slopes, however, are inherent and integral to the sport, and this determination cannot always be made as a matter of law.” *Graven v. Vail Associates, Inc.*, 909 P.2d 514, 520 (Colo. 1995).
- b. New definition of “Inherent dangers and risks of skiing” from H.B. 04-1393. “Inherent dangers and risks of skiing” means those dangers or conditions that are part of the sport of skiing, C.R.S. § 33-44-103(3.5) as amended 2004. *Laws 2004, Ch. 341, § 3, eff. May 28, 2004.*
- c. Under the Ski Safety Act, a warning sign must be posted when a sno-cat is present on the ski slopes for purposes of grooming and maintaining a ski slope but is not actively “grooming” in that particular location. *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo.App. 1983). Whether ski resort breached its duty to post signs that snow-grooming equipment was present, under Colorado’s Ski Safety Act, was question for jury in children’s negligence action against ski resort arising out of children’s collision with snow-grooming equipment. *Doering ex rel. Barrett v. Copper Mountain, Inc.*, *supra*.
- d. New provision regarding maintenance equipment operation: “Whenever maintenance equipment is being employed to maintain or groom any ski slope or trail while such ski slope or trail is open to the public, the ski area operator shall place or cause to be placed a conspicuous notice to that effect at or near the top of that ski slope or trail. This requirement shall not apply to maintenance equipment transiting to or from a grooming project.” C.R.S. §33-44-108(2). *Laws 2004, Ch. 341, § 3, eff. May 28, 2004.*
- e. Abrogation of previous requirement of “Danger” signs. *Cf. Gifford v. Vail Resorts, Inc.*, 37 Fed.Appx. 486, Slip Copy, 2002 WL 1303222 (10th Circ., Jun 14, 2002) not selected for official publication.
 - (1) C.R.S. § 33-44-107(1) (1995), provided: “Each ski area operator shall maintain a sign and marking system as set forth in this section.... All signs required by this section shall be maintained so as to be readable and recognizable under conditions of ordinary visibility.

- (2) The statute then provided for signs marking "danger areas," as part of the sign and marking system, as follows: "Danger areas, designated by a red exclamation point inside a yellow triangle with a red band around the triangle and the word "Danger" printed beneath the emblem. Danger areas do not include areas presenting inherent dangers and risks of skiing." former § 33-44-107(2)(d)(1995) (emphasis added). Danger areas were not otherwise defined.
- f. Amended by H.B. 04-1393: "The ski area's extreme terrain shall be signed at the commonly used access designated with two black diamonds containing the letters "E" in one and "X" in the other in white and the words "extreme terrain". The ski area's specified freestyle terrain areas shall be designated with an orange oval." C.R.S §33-44-107(2)(d). *Laws 2004, Ch. 341, § 3, eff. May 28, 2004.*
- B. Collision with another skier or snowboarder. Ordinary duties of care apply. Typically, the law holds the uphill skier/overtaking skier responsible. *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir.1995).
1. Colo. Rev. Stat. § 33-44-109(1)Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability. Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. 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. (emphasis supplied).
- C. Lift accidents. American ski area operators have enhanced duties of care in the connection with the design, installation, construction, maintenance, and operation of ski lifts. Skier injured in lift accidents can claim damages if accident is due to faulty design, operation or maintenance (lift failure) thus, the injured skier will prevail. If accident due to negligent operation—failure to stop lift to clear ramp, etc.—skier may prevail. Industry standards are plainly set out in the ANSI B-77 code. *Bayer v. Crested Butte Mountain Resort*, 960 P.2d 70, 74 (Colo. 1998). *Platzer v. Mammoth Mountain Ski Area*, 104 Cal. App. 4th 1253, 128 Cal. Rptr. 2d 885 (3d Dist. 2002).

- D. Duty to rescue. Once a rescue is initiated, ordinary care is required in the conduct of the rescue and the provision of care, notwithstanding how the skier first came to need care. *Spence v. Aspen Ski Co.*, 820 F. Supp. 542 (D. Colo. 1993); *Miller v. Arnal Corp.*, 632 P.2d 987 (Ariz. Ct. App. 1981).
- E. Equipment cases. DIN standards purportedly apply; however, waivers are asserted to bar claims. Gross negligence may defeat the waiver. Failure to comply with technical qualifications implied by the contract may defeat the waiver. Signature of a minor may defeat the waiver; a parent's signature on behalf of a minor is usually unenforceable against the minor. Often it is argued that failure to set according to DIN specifications is nonetheless not the cause of the injury. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp.472 (D. Colo. 1992); *Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F. Supp. 789, 24 U.C.C. Rep. Serv. 2d (CBC) 924 (D. Utah 1993).
- F. Criminal cases. Reckless skiing causing severe injury or death may result in a criminal felony prosecution. *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000)
- G. Children's cases. "A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence." C.R.S. §13-22-107. *Added by Laws 2003, Ch. 262, § 1, eff. May 14, 2003.* Reversing *Cooper v. Aspen Skiing Company*, which held that Colorado's public policy affords minors significant protections that preclude parents or guardians from releasing a minor's own prospective claim for negligence, and that parental indemnity provisions violate Colorado's public policy to protect minors and create an unacceptable conflict of interest between a minor and his parent or guardian. *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo. 2002)
- H. Cap on damages for ski area operators' at \$250,000.00 for non-economic loss is unconstitutional for want of an annual adjustment for inflation of the limitation on noneconomic damages contained in C.R.S. §13-64-302(1). By automatically guaranteeing an annual reduction in the real value of damages recoverable by the victim, the Act violates plaintiffs' rights to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

V. HISTORY OF SKI LAW IN THE UNITED STATES.

- A. In the first significant ski case, a skier in Vermont was hurt when her ski caught on a tree stump, below the snow surface, in the middle of an open run. On summary judgment against her, the court held that ski injury cases should be governed by the doctrine of inherent danger: "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary." *Wright v. Mount Mansfield Lift, Inc.*, 96 F. Supp. 786, 791 (D. Vt. 1951). The

Vermont court relied partly on an earlier ruling by the noted New York Court of Appeals Chief Judge Benjamin Cardozo who ruled in an amusement park accident case that “[t]he antics of the clown are not the paces of the cloistered cleric. . . . [The plaintiff] took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.” *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 183 (N.Y. 1929).

1. *Wright*, nevertheless suggested that manmade hazards might lead to actionable claims.

“It isn’t as though a tractor was parked on a ski trail around a corner or bend without warning to skiers coming down. It isn’t as though on a trail that was open work in progress of which the skier was unwarned. It isn’t as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.” *Wright*, 96 F Supp at 791 (emphasis supplied).

- B. 30 years after *Wright*, the Vermont Supreme Court ruled that the inherent danger rule should be limited in its application to ski cases, given the large-scale changes that had taken place within the industry. The plaintiff, in a case remarkably similar to that of the *Wright* case, suffered a paralyzing injury when his ski caught on a bush. He sued, arguing that the ski area should have removed shrub. The jury agreed. On appeal, the Vermont Supreme Court affirmed the verdict. *Sunday v. Stratton Corp.*, 390 A.2d 398 (Vt. 1978).

1. The court refused strict application of the inherent danger rule, as urged by the defendant, holding: “[t]he claim is that the brush was an inherent danger of the sport . . . is the equivalent of, and better put as, a claim that defendant owed plaintiff no duty with respect thereto, sometimes referred to as “primary” assumption of risk.” *Id.* at 402 – 403. The court applied to the ski area operator the same rule of ordinary care that business owners owe to visitors on their premises. Vermont’s high court disposed of the inherent danger rule in ski cases by stating that not every fall is a danger inherent in the sport:

If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one “assumed” by the plaintiff, thus, what the plaintiff “assumes” is not the risk of injury, but the use of reasonable care on the part of the defendant. *Id.* at 403.

VI. LEGISLATIVE RESPONSE SPONSORED BY INDUSTRY.

- A. In response to *Sunday v. Stratton Corp.*, ski area operators went to state legislatures with the express purpose to nullify *Sunday's* precedent and re-establishing the inherent danger law in skiing. Wendy A. Faber, Note, *Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill*, 1980 UTAH L. REV. 355 n.3 (1980).
1. State legislatures, sensitive to the economic influence of a billion-dollar business, were receptive to claims by ski area operators that the Vermont ruling could result in an "avalanche of litigation." Since 1978, all but three states with any significant ski industry have adopted a form of ski safety legislation that in some way limits the liability of ski area operators in ski cases. Orwellian titles to the statutes, often called "ski safety" legislation, disguise what in truth, are non-duty, special interest, immunity legislation.
 2. Predictably, ski statutes vary, and states treat identical accidents differently due to variations in the laws. An injured plaintiff may be able to recover damages under the ski laws of one state, while another claimant, injured under identical circumstances but in another state, may have no claim.
 3. At the core of the statutes is an assumption of risk rule imposed by statute. David K. DeWolf & Deborah G. Hander, *Assumption of Risk and Abnormally Dangerous Activities: A Proposal*, 51 MONT. L. REV. 161, 166-168 (1990). Under primary assumption of risk, no duty is owed to the participant. The rule, as applied to a ski case, dictates that the ski area operator has "no duty" to mitigate the so-called "inherent" dangers or risks of the activity. "Under 'primary assumption of the risk,' the defendant owes no duty to protect the plaintiff from risks of injury which are 'inherent' in the sport. Defendants still owe a duty, however, not to increase the risks of injury beyond those that are inherent in the sport." The law often equates the doctrine of primary assumption of risk to the "inherent danger rule," without regard to the balancing tests of determining if the risk is "inherent" or if the risks were increased by the ski area's conduct.
- B. Seven states have laws that generally preserve the doctrine of ordinary care. CONN. GEN. STAT. §§29-214 (2000); NEV. REV. STAT. 455A.010 to .190 (2001); N.J. STAT. ANN. § 5:13-1 to -11 (West 2001); N.M. STAT. ANN. §§ 24-15-1 to -14 (Michie 1991); N.Y. GEN. OBLIG. LAW §§18-101 to -108 (McKinney 2001); N.C. GEN. STAT. §§ 99 C-1 to -5 (2001); WASH. REV. CODE ANN. §§ 79.45.010 to .060 (West 2001).
- C. Seventeen states have statutes that include some form of the inherent danger doctrine. ALASKA STAT. §§ 05.45.010 to .020 (Michie 2000); COLO. REV. STAT. ANN. §§ 33-44-101 to -114 (West 2000); IDAHO CODE §§ 6-1101 to -1109 (Michie 2000); ME. REV. STAT. ANN. tit. 32 §§ 15202-227 (West 2000); MASS. GEN. LAWS

ANN. ch. 143 §§ 71H to 71S (West 2001); MICH. COMP. LAWS ANN. §§ 408.321 to .344 (West 2001); MONT. CODE ANN. §§ 23-2-733 to -736 (2001); N.H. REV. STAT. ANN. §§ 225-A: 1 to: 26 (2001); N.D. CENT. CODE §§ 53-09-01 to -11 (1999); OHIO REV. CODE ANN. §§ 4169.01 to .99 (West 2001); ORE. REV. STAT. §§ 30.970 to .990 (1999); 42 PA. CONS. STAT. ANN. § 7102 (West 2001); R.I. GEN. LAWS §§ 41-8-1 to -4 (2000); TENN. CODE ANN. §§ 68-48-101 to -107 (2000); UTAH CODE ANN. §§ 78-27-51 to -54 (2000); VT. STAT. ANN. tit. 12, §§ 1037-38 (2000); W. VA. CODE §§ 20-3A-1 to -8 (2000).

- D. Ordinances in five California counties have been held to establish an inherent danger standard. Alpine County, Cal., Ordinance 562-94 (2001); AMADOR COUNTY, CAL., CODE § 12.48.101 (2001); EL DORADO COUNTY, CAL., CODE §§ 9.20.010 to .070 (2001); NEV. COUNTY, CAL., CODE § G-IV, ART. 19-19.9 (2001); PLACER COUNTY, CAL., CODE §§ 9.28.10 to .90 (2001). CAL. PENAL CODE § 602(q) (West 2001), provides that it is a misdemeanor to ski on a closed ski trail, and §§653(I) makes leaving the scene of a skiing accident punishable by a fine of up to \$1,000.
- E. In Wisconsin, inherent dangers reduce recovery in any recreational accident case, as a component of contributory negligence. WIS. STAT. ANN. § 895.525 (West 2001).
- F. In Wyoming, the Recreation Safety Act sets out various standards of conduct and assumption-of-risk rules that cut across a broad range of recreational activities. WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie 2000).
- G. Neither Arizona nor Virginia has statutes explicitly referring to ski liability, although both states have ski areas within their jurisdictions. Ironically, the only reported Arizona ski injury case, *Miller v. Arnal Corp.*, is the leading case on the duty to rescue, and in Virginia, a jury has entered the largest verdicts ever awarded in a downhill ski injury case. *Hoar v. Great E. Resort Mgmt.*, 506 S.E.2d 777 (Va. 1998) Ski area opened a new run without the slope designer's intended high visibility barricade at the steep drop-off to skier's left. *Hoar v. Great Eastern Resort Mgmt.*, 506 S.E.2d 777 (Va. 1998).
- H. Generally, proof of a breach of a statutory standard meets the requirement for showing negligence.
 - 1. "The Ski Safety Act sets forth safety standards for the operation of ski areas and for the skiers using them." *Doering ex rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202, 1212 (10th Cir. 2001). See also, COLO. REV. STAT. § 33-44-102 (2003). "A violation of any provision of the Act applicable to skiers constitutes negligence on the part of the skier. *Barrett*, 259 F.3d at 1212. See also COLO. REV. STAT. § 33-44-104 (2003).

2. Any violation of the statute's provisions applicable to skiers constitutes negligence on their part. Violations by a ski area operator of the Ski Safety Act or the Tramway Act constitute negligence as to the acts. *See*, COLO. REV. STAT. § 33-44-104 (1997). The effect of these statutory provisions is to make violations of the Ski Safety Act and/or Tramway Act negligence per se. *Bayer v. Crested Butte Mountain Resort*, 960 P.2d 70, 74 (Colo. 1998).

VII. SKIER COLLISIONS.

- A. Comprise 3.5% of skier injuries, but a higher proportion severe injuries and death, especially among children.
- B. There are four basic categories of skier collisions.
 1. High traffic areas, such as near the lodge, or lift loading and unloading areas. In *Rosen v. LTV Recreational Development, Inc.*, 569 F.2d 1117 (10th Cir. 1978), the accident occurred in the lift unloading area of a lift, which terminated part way up the mountain at a busy ski run. *See also*, *Dillworth v. Gambardella*, 970 F.2d 1113 (2d Cir. 1992).
 2. High speed collision between two moving skiers; usually a skier moving at a speed above his ability bears down on a slow skier whose turns are wide and whose progress is slow. *Ulissey v. Shvartsman*, 61 F. 3d 805 (10th Circ. 1995). *See*, Martin Burtscher & Michael Philadelphia, *Skiing Collision Accidents: Frequency and Types of Injuries*, 10 SKIING TRAUMA & SAFETY 73-76 (1996).
 3. Collisions between a moving skier who is descending a slope and a skier who is either in a blind spot, such as below a knoll, or makes a jump only to find another skier in the landing zone. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989). Another variant is the "sudden move" case in which a downhill skier turns directly into the path of the overtaking skier. In one case, the elements of both these patterns were combined where it was established that the defendant jumped over a knoll on the slope and ran into the plaintiff, while the defendant testified the plaintiff made a sudden move into the defendant's path. *Gray v. Houlton*, 671 P.2d 443 (Colo. Ct. App. 1983).
 4. Fourth, are cases involving a collision between a ski area employee and a member of the public. For example, a ski instructor skiing into the plaintiff. *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977). A restaurant employee was involved in the collision in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991). In *Nolan v. Mt Bachelor, Inc.*, 856 P.2d 305 (Or. 1993), a ski patroller crashed into a guest. *See also*, *Kaufman v. Hunter Mountain Ski Bowl, Inc.*, 657 N.Y.S.2d 773 (N.Y. App. Div. 1997).

- C. Studies suggest that over thirty per cent of skier collisions result in head injuries. The same study indicated that children were especially vulnerable to head injuries due to skier collisions, and recommended that youngsters wear helmets. The Burtscher Study was conducted in Austria between 1986 through 1991. It was generally consistent with Ekeland study of children's ski injuries, which was conducted in Norway from 1982 through 1986. Both of these European studies indicated that skier collisions consist of about 5% of the overall skiing injury picture. Both studies underscored that the most frequent cause of fatality in skiing was impacting a fixed object, usually a tree, but that skier collisions cause more severe injuries than ordinary falls on the slope.
1. Burtscher & Philadelphia, *Skiing Collision Accidents: Frequency and Types of Injuries*, 10 SKIING TRAUMA AND SAFETY 73-76 (1996); Arne Ekeland et al., *Alpine Skiing Injuries in Children*, SKIING TRAUMA & SAFETY p. 43 (1993). See also, Jenkins et al., *Collision Injuries in Downhill Skiing*, 5 SKIING TRAUMA & SAFETY 358-66 (1985).
- D. According to the studies, children are at much greater risk for severe injuries, especially head injury, in skier collisions. The Norwegian study bluntly recommended "children and adolescents ought to wear protective helmets while skiing." See also, Harald Lystad, *Collision Injuries in Alpine Skiing*, 7 SKIING TRAUMA AND SAFETY 69, 72-73 (1989).

VIII. LIFT ACCIDENTS.

- A. In contrast to the doctrine of assumption of risk and any variant of the inherent danger rule, a ski area operator typically has a high duty of care concerning the construction, operation and maintenance of its lifts. In Colorado, and elsewhere, the courts held that a ski area operator had a duty to exercise its lifts with the enhanced duties of care. Thus in Colorado, the court held that the ski area operator owes the "highest degree of care commensurate with its practical operation." *Summit County Dev. Corp. v. Bagnoli*, 441 P.2d 658 (Colo. 1968) (citing *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933 (Colo. 1964)). The court reaffirmed this doctrine of highest duty of care in *Bayer v. Crested Butte*, 960 P. 2d 70 (Colo. 1998).
1. See also, *Fisher v Mt. Mansfield Co.* 283 F2d 533 (2nd Circ. 1960) (applying Vermont law); *Hunt v Sun Valley Co.* 561 F2d 744 (9th Circ. 1970) (applying Idaho law) both holding that the owner and operator of a ski lift operates as a common carrier.
 2. In California, chairlift operators at ski areas are "common carriers," for purposes of determining negligence liability. *Platzer v. Mammoth Mountain Ski Area*, 104 Cal. App. 4th 1253, 128 Cal. Rptr. 2d 885 (3d Dist. 2002).

- B. The majority of all lift accidents occur while loading and unloading. A lift attendant has the duty to stop the lift in the event that a situation develops which would endanger a passenger.
- C. The American National Standards Institute ("ANSI") has adopted the universally regarded authoritative code for the operation of lifts and it provides that lift attendants are to "maintain orderly passenger traffic conditions." ANSI also sets out the duty of the operator/attendant to "stop the aerial lift immediately ... if a condition develops in which the continued operation of the lift might endanger a passenger." ANSI B-77 § 4.3.2.3.3 (1999).
- D. Thus, the United States District Court for the District of Colorado held an operator liable for the injuries to a skier who mis-loaded and was carried 275 feet up the line before the lift was stopped. *Sabo v. Breckenridge Lands, Inc.*, 255 F. Supp. 602 (D. Colo. 1966). In a similar case, the plaintiff was carried 195 feet beyond the loading ramp, before operators stopped the lift and instructed her to "point her skis downhill and drop" from about 25 feet above the snow. *Trigg v. City and County of Denver*, 784 F.2d 1058, 1059 (10th Cir. 1986).
1. Unloading cases typically involve maintenance of the unloading ramp, or the fall of a skier who then blocks the unloading ramp. If the operator fails to stop the lift, then either the fallen skier or the next passengers on the ski lift are at risk for injury, as a pileup quickly develops on the unloading ramp.
 2. Young children, who enrolled in ski school and then boarded onto a chair lift without adequate ski instructor supervision, or safety bars, have fallen from the lift. *MacKinnon v. Waterville Co.*, 1994 WL 369550 (D. N.H. 1994). Risk of injury inherent in entering, riding and exiting from chairlift at ski resort is not of such magnitude as to eliminate all duty of care and thereby insulate resort owner from claims of negligent supervision and training of lift operator or negligent maintenance and operation of lift itself, since such negligence may unduly enhance level of risk assumed.
- E. Catastrophic lift failures. There are no reported decisions involving catastrophic lift failure cases because the cases typically settle before trial. A number of serious ski lift accidents have occurred in the past, involving: (1) the failure of bullwheel welds, causing a partial deropement, injuring 40 and killing one passenger at Keystone, Colorado; (2) the failure of a cable on a gondola at Vail, Colorado, causing numerous fatalities; (3) Failures of Yan manufactured chair lift hangars which hold chairs to the cable. As a general principle, such cases are advanced under principles of negligent maintenance by the ski area and, to the extent that the ski area operator may be deemed a manufacturer, the ski area may be liable under principles of strict liability in tort. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Claims of strict

liability, negligence and breach of warranty are advanced against the ski lift manufacturer. Other negligence or products liability claims may be brought against any person(s) who may have had inspection responsibility or who modified the ski lift.

- F. A primary concern in lift cases is the interplay between the pertinent statutory scheme and any common law claims for negligence. Generally, the governing principle is that a defendant's compliance with a safety statute or regulation is a circumstance courts weigh against other factors; it is not, by itself, conclusive on the issue of due care or negligence. *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481 (10th Cir. 1987); *United Blood Servs v. Quintana*, 827 P.2d 509, 520 (Colo. 1992); RESTATEMENT (SECOND) OF TORTS § 288(C) (1965).

IX. DUTY TO RESCUE, DUTY TO RENDER REASONABLE FIRST AID.

- A. Historical background of Duty to Rescue. The question of whether there arises a duty to rescue, and thus a concomitant liability for the failure to attempt or achieve a rescue, dates back to the earliest laws of the sea. Generally, under maritime law, "a master who abandons a missing seaman while there is yet a reasonable opportunity to save him, acts at his own risk." *Gardner v. National Bulk Carriers*, 310 F.2d 284 (4th Cir. 1962).
- B. The RESTATEMENT OF TORTS (SECOND) § 314 (1965) provides that there is no duty to take action to rescue or aid a person, except when a special relationship arises which gives rise to a legal duty to take action and aid a person. One such relationship is the relationship between a possessor of land and its invitees. The Restatement thus holds that a possessor of land, owes to its invitees the duty: "to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." RESTATEMENT TORTS (SECOND) § 314A(b) (1965). Comments to this section make clear that the duty owed is to "exercise reasonable care under the circumstances." RESTATEMENT TORTS (SECOND) § 314A(b) Comment e (1965).
1. Ski area operators are possessors of land, and skiers are invitees of ski area operators. Thus, ski area operators have, apart from the long standing custom and practice of providing a ski patrol, a duty to rescue injured or ill skiers while they are guests of the ski area operator.
 2. There is no requirement that one risk one's own life or limb. Heroics are strictly voluntary in this society. RESTATEMENT OF TORTS (SECOND) § 323 Comment c (1965).

3. The exercise of reasonable care by the paid professional patroller. *Spence v. Aspen Skiing Co.*, 820 F. Supp. 542 (D. Colo. 1993). A skier is not contributorily negligent for the consequences of poor first aid care, simply because the skier contributed to her own injury or illness which necessitated treatment.
- C. The maintenance of a ski patrol, at the ready to assist injured guests and customers is absolutely the standard at every ski area in the United States. *See generally*, NATIONAL SKI PATROL SYSTEM, THE SKI PATROLLER'S MANUAL OF THE NATIONAL SKI PATROL SYSTEM, INC. (1982 Ed., Rev. 11th Ed. 1982).
- D. The ski area operator and the ski patrol are obligated to exercise the reasonable standard of care in the industry. That standard is set out in the standards underlying certification for Winter Emergency Training, or Outdoor Emergency Training. *See*, Warren D. Bowman, *Need-Oriented Emergency Care: The Development of Emergency Care Training in the National Ski Patrol System*, 10 SKIING TRAINING AND SAFETY 9-14 (1996).

X. AVALANCHE LIABILITY IN NORTH AMERICA.

- A. Most U.S. avalanche deaths occur in the back country, on public land—state, or federal: National Forest, or Bureau of Land Management. Absent highly unusual circumstances, such as gross negligence, the land owner is typically immune, and if a guide or helicopter service is involved, it is typically shielded from liability by the doctrine of either assumption of risk or waiver under the customary release signed by the participant.
- B. Exceptions:
 1. In-flight accident.
 2. The waiver can be defeated by:
 - a. Gross negligence; either:
 - (1) In the first instance of gross negligence in guiding; and,
 - (2) In rescue efforts. *See e.g.*, *Miller v. Arnal Corp.*, 632 P.2d 987 (Ariz. Ct. App. 1981).
- C. The law has moved from ordinary care toward immunity:
 1. In 1980, the Colorado Court of Appeals held that a ski area operator owed a duty of reasonable care to protect skiers from avalanches. The court indicated ski area operators should furnish trail maps warning of the danger,

post warning signs, install fence or rope barriers, and patrol, inspect, and maintain the signs and barriers to confirm they are in a good state of repair and visibility. *Mannhard v. Clear Creek Skiing Corporation*, 682 P.2d 64 (Colo. Ct. App. 1983).

2. An avalanche is within the inherent risks of skiing, however, a plaintiff can maintain a claim of ski area operator negligence if the plaintiff proves that the area negligently opened without reasonable safety precautions in areas known to be avalanche prone. *Kelleher v. Big Sky of Montana*, 642 F. Supp. 1128 (D. Mont. 1986).
 3. In a claim against the United States Forest Service, the Colorado federal district court held that it could not hold the United States responsible for an avalanche death, absent willful or malicious failure to guard or warn against a known dangerous condition. *Marquez v. United States of America*, No. CIV.A.95-S-346, 1996 WL 588918 (D. Colo. 1996). Compare *Twohig v. United States of America*, 711 F. Supp. 560 (D. Mont. 1989) (holding the state "recreational use" statute did not bar the claim).
 4. In Canada: *Ochoa v. Canadian Mountain Holidays, Inc.*, 1996 WL 1777049 (B.C.S.C. 1996); [1996] CarwellBC 2034, decedent, a paid customer of a back country helicopter skiing service, was one of nine killed, March 12, 1991, in an avalanche in the Bugaboo Mountains. His widow sued seeking wrongful death damages. Decedent Ochoa had signed a waiver and release. The court held the waiver was enforceable, and conscionable in barring a simple claim of negligence. The court held that the widow could recover only if she proved the defendant committed "criminal negligence," the essential elements of which are defined as "carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so." *Id.* at para. 19 -22.
- D. Jurisdiction of American courts for foreign actions is usually sought on behalf of American visitors to foreign countries. See, *Aigner v. Bell Helicopters, Inc.*, 86 F.R.D. 532 (N.D. Ill. 1980). This case did not involve an avalanche, but rather the crash of the helicopter operated by the Canadian heli-skiing guide service. The court held that the Canadian corporation would be subject to United States jurisdiction because its representative made solicitations, maintained regular mail contact with its former customers in the U.S., solicited travel agencies to book tours, and solicited its former customers to purchase equipment. Further, the court reasoned that if it did not exercise jurisdiction, the plaintiff, would probably be unable to obtain relief anywhere else in the United States.

XI. FOREIGN NATIONALS INVOLVED IN SKI ACCIDENTS IN THE UNITED STATES.

A. Hague Convention.

1. The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.
2. The United States is a signatory to the Hague Convention for Service on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.