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# THE COLD TRUTH: HAVE ATTORNEYS REALLY CHILLED THE SKI INDUSTRY?

Charles J. Sanders and Jacqueline Gayner\*

## INTRODUCTION

Over the past several years, the perception of the legal industry among American alpine skiers had not been, to put it mildly, a flattering one. Blamed for everything from logarithmic jumps in lift ticket prices to trail closures, litigators stand accused of having imposed a severe chilling effect on a sport that boomed in the 1970's but which has since substantially flattened out.<sup>1</sup>

Chief among the proponents of this theory have been members of the ski media, who have regularly cited personal injury lawsuits against ski mountains as the primary gravity dragging the ski industry downhill. That proposition likely received its widest airing in the 1988 extreme skiing film, *The Blizzard of Aahhs*, a genre classic viewed by millions of skiers throughout the world.<sup>2</sup>

In the film's narration, producer Gregg Stump railed that United States ski areas had become so skittish about lawsuits that he was forced to film his most death-defying ski sequences at Chamonix, France, rather than right here at home, despite the willingness of the

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1. The number of Americans who classified themselves as active skiers in 1972 was three million. By the close of the decade, the number had more than quadrupled to 14 million. John E. Fagen, *Ski Area Liability For Downhill Injuries*, 49 *INS. COUNS. J.* 36, 36 n.1 (1982). Between 1980 and 1990, the number of active skiers basically remained static, dropping to 13.8 million in 1987 and leveling off at 15.5 million in 1990. Moreover, United States ski area visits that totaled 50.2 million in 1978-79 dropped to 50 million visits in 1989-90. Ted Farwell, *Measuring Demand*, *SKI AREA MGMT.*, May 19, 1991, at 62. The good news for the ski industry is that between 1980-90, revenue per skier visit rose at an annual compounded growth rate of 8.2 percent, while operating costs increased at the rate of 4.5 percent.

In 1990, however, less than 68 percent of ski areas showed an operating profit (before interest and taxes) and fewer than a third showed a profit after interest payments. This illustrates that while the elite ski areas are doing well, the bottom two-thirds of the industry are in severe economic trouble. C.R. Goeldner, *1989-90 Economic Analysis*, *SKI AREA MGMT.*, Mar. 1991, at 58.

2. *THE BLIZZARD OF AAHHS* (Delamo Films, Ltd./Gregg Stump Productions 1988). This film is available in VHS format through Delamo Films, 386 Fore St., Portland, Maine 04101.

movie's participants to sign full waivers of liability.<sup>3</sup> In fact, the film's star, Scot Schmidt was featured in an on-camera diatribe against the "fat lawyers" denying skiers the right to take responsibility for their own actions on the slopes.<sup>4</sup> Mr. Schmidt concluded with the suggestion—presumably satirical—that "people who sue ski areas should be shot."<sup>5</sup>

Emotions have also run high among skiers who perceive a correlation between North American lift ticket prices and liability insurance rates. The theory here is that the price of lift tickets increases proportionately to the increase in insurance rates, which allegedly have been driven up by personal injury lawsuits filed against ski resorts. One need only spend a few minutes on any chair lift line to gauge the hostility against attorneys by proponents of that plausible theory. At Vail, Colorado, and Mount Snow, Vermont, for example, a small, informal sampling of several dozen skiers last year<sup>6</sup> revealed that nearly all believed frivolous lawsuits against the ski area were a major factor behind the high lift ticket prices—currently averaging \$30 per day and ranging substantially higher at some resorts.<sup>7</sup> Any attempt to refute this "abominable lawyer" hypothesis has been made difficult by the outright refusal of the ski industry to comment specifically on these perceived correlations. Before leaping to the "obvious" conclusion that the Grinch-like reputation of attorneys among the skiing public is well-earned, however, one must consider new statistical data more closely.

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3. *Id.*

4. *Id.*

5. *Id.*

6. The informal survey was undertaken by the authors during the 1990-91 ski season. Twenty-four lift ticket buyers at Vail, Colorado, and an equal number at Mount Snow, Vermont, were asked to list orally the factors which they believed contributed to rising lift ticket costs in order of significance. Seventy-nine percent cited litigation against the mountain (yielding awards plus insurance premium hikes) as either the most or second most important reason for increases, and ninety-eight percent listed it as a top-five reason.

A majority of those listing litigation as either the first or second important reason for increases modified the word "lawsuits" with "frivolous," "bogus" or synonymous adjectives. Other reasons listed with frequency included "fewer skier visits," "poor snow conditions/investments in snowmaking," "facility improvements," "inflation," and "price gouging by the mountain." The last response was listed as a top-two reason by 12.5 percent of the respondents, most of whom expressed a belief that lift ticket price increases far surpass the rising costs of ski area operations. See Goeldner, *supra* note 1, at 58. Fewer than 10 percent of the respondents cited "unjustified insurance hikes" as a top-five reason for price increases.

7. For a comparative analysis of lift-ticket price increases and the United States consumer price index 1984-90, see John Henry Auran, *Skiflation*, *SKIING MAG.*, Nov. 1991, at 30. See also, Janet Nelson, *Finding Bargains and Discounts on Ski Lift Tickets*, *N.Y. TIMES*, Nov. 24, 1991, § 5, at 3, wherein the author notes that undiscounted prices of daily lift tickets at Mount Snow, Vail, Okemo, Deer Valley and other major United States ski resorts have risen above \$40 for the 1991-92 season.

Statistics indicate that between 1982 and 1989, plaintiffs in United States ski injury suits prevailed in less than one of four cases decided by a jury.<sup>8</sup> That figure is in stark contrast to a recovery rate for plaintiffs of about fifty percent in the late 1970's and early 1980's. It also illustrates a definitive, legislatively induced trend away from ski area liability in cases involving injuries incurred while skiing.<sup>9</sup> Skiers now have the lowest rate of recovery among all personal injury sports litigants who go to trial.<sup>10</sup> In turn, the amounts received by these plaintiffs in pre-trial settlements have relatively diminished.<sup>11</sup>

There is no empirical data available from any ski industry source concerning trends in the number of ski injury lawsuits filed per year over the past decade, anecdotal information gathered from individual ski areas indicates that there has been a noticeable decline in these filings.<sup>12</sup> This decline may be a reflection of the substantial drop in the annual number of ski injuries incurred since 1980, rather than the downward trend in ski area liability.<sup>13</sup> Regardless of the reasons, the estimated 1,900 ski injury claims per year filed against ski areas in the late 1980's represents a diminished number

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8. Robert I. Rubin, *Ski Liability Law Cuts New Trails*, TRIAL, Oct. 1990, at 108, 112.

9. *Id.* at 112.

10. *Id.*

11. *Id.*

12. Not one of the six major ski area legal representatives who confirmed such "noticeable declines" in the number of lawsuits would speak on the record. Counsel to one of the largest ski insurers in the United States also refused to be quoted, but confirmed that his company's statistical records indicated a "modest" decline in the number of claims litigated as the 1980's progressed and more states adopted ski safety laws. That person also confirmed that the only published estimate of ski accident claims, about 1,875 claims in 1988, as calculated by Irving Naylor of the National Ski Areas Association ("NSAA"), was "in the ballpark." See *Taking A Dip In The Insurance Shark Tank*, SKI AREA MGMT., Sept. 1988, at 13 (quoting Irving Naylor). It is not difficult to surmise the reasons why no one in the ski industry is willing to go on record regarding lawsuits. First, there is enormous fear that anything uttered by a ski area representative regarding legalities will turn up later as evidence in a suit, to the great embarrassment of the speaker. Second, the industry believes that it stands to be damaged by a broader public perception that chair-lift price hikes are outstripping ski area cost increases. An admission that lawsuits are less of a threat today than in 1980 could bring about such a shift in public opinion.

13. "With improvements in equipment and skier education, the rate for most typical ski injuries has declined dramatically over the past two decades." Josh Lehrman, *Ski With Care*, SKI MAG., Dec. 1991, at 20. In 1972, there were 105,000 ski accidents/injuries, about six per every 1,000 skier visits. By 1980, the number of accidents doubled, but skier visits tripled, dropping the ratio to 4.2 injuries per 1,000 skier visits. In 1987, with skier visits remaining constant from 1980, the number of injuries dropped to 150,000, or three per 1,000 skier visits. See Fagen, *supra* note 1, at 36 n.2; *Taking A Dip In The Insurance Shark Tank*, *supra* note 12, at 13.

from previous years.<sup>14</sup> Curiously, however, during the same period ski area liability insurance rates inexplicably skyrocketed in double and triple annual percentage figures<sup>15</sup> and lift ticket prices rose at more than double the rate of inflation. For that and other reasons, the sport's economic expansion ceased.<sup>16</sup>

Unfortunately for attorneys, the press and public paid far more attention to the sheer number of ski injury lawsuits filed as a primary reason for the industry's slump than to either the actual decline in ski area liability or the unjustifiably staggering rises in insurance rates.<sup>17</sup> The ski industry reacted to the defensive finger pointing between attorneys and insurers over fault for the sport's woes with the attitude "a plague on both your houses."<sup>18</sup>

## I. BRIGHTER FORECAST

Fortunately for skiers, the bickering over blame for this decade-long, winter festival of greed is made less relevant by the good news currently ringing from every ski mountain between Sugarloaf, Maine, and Mammoth, California. Over the past three years, insurance rates for ski mountains have declined, on average, about eight percent annually.<sup>19</sup> That trend probably will not result in a deep drop in lift ticket prices. It may mean, however, that future price hikes will be less formidable.

Even better news for expert skiers is the recent expansion of serviceable "extreme" terrain at many mountains.<sup>20</sup> "Three or four years ago," writes industry commentator Chris Noble, "[t]he U.S. ski industry was in the midst of a liability crisis . . . . Trails were groomed like golf courses . . . . Skiing, which had always been exciting, sexy and maybe a little dangerous; became stagnant, a victim of overzealous risk managers . . . ." <sup>21</sup>

The recent decline in liability exposure and insurance rates has permitted ski areas to begin injecting some of the "on the edge"

14. *Id.*

15. See Goeldner, *supra* note 1, at 64.

16. See Farwell, *supra* note 1, at 62. See Auran, *supra* note 7 (regarding lift-ticket prices).

17. According to NSAA spokesman Irving Naylor, sixty-two percent of the \$52 million in liability insurance premiums paid by ski areas for the 1987-88 season (\$33.75 million), represented profit to the insurance industry. Dick Williams of the Western Ski Areas Insurance Plan answered Naylor's assertions by claiming that the ski industry had also been the beneficiary of artificially low premiums in the early 1980's due to fierce competition among insurance companies for investment capital, and that such undercutting led to a substantial 1984 gross deficit for ski area insurers. See *Taking A Dip In The Insurance Shark Tank*, *supra* note 12.

18. See, e.g., THE BLIZZARD OF AAHHS, *supra* note 2.

19. Goeldner, *supra* note 1, at 58.

20. Bob Gillen, *Extremel*, SKI AREA MGMT., July 1991, at 42.

21. *Id.* at 43.

qualities back into skiing and snowboarding—a desperately needed step toward attracting a new generation of skiers to a flat-growth sport.<sup>22</sup> Several ski areas are once again touting their double black diamond and extreme terrain as principal attractions, including Jackson Hole in Wyoming, Crested Butte in Colorado and Squaw Valley in California.

With the snow tide having turned back to a time in United States ski history when every fall was not a potential multimillion-dollar lawsuit and each jaunt into the glades was not an invitation to having one's lift ticket pulled, this seems like a good time to reflect on the litigation and legislation that led the industry to the edge of the crevasse and back again. Perhaps by studying the pitfalls of this nearly lethal trip down the mountain, the next run will not be quite so dangerous for the ski industry—or quite so embarrassing to a legal community that has suffered nearly all of the slings and arrows of disgruntled skiers for more than a decade.

## II. SKI LITIGATION GENESIS

The deep base upon which the first United States ski injury cases rested was a decision by the great jurist Benjamin Cardozo which arose not on the slopes of Lake Placid, but near the beaches of Brooklyn. In the 1929 Steeplechase Amusement Park case,<sup>23</sup> Judge Cardozo denied recovery to a man hurt on a Coney Island funhouse ride because the plaintiff had assumed a foreseeable risk of injury inherent in the amusement activity he had voluntarily undertaken.<sup>24</sup> "Visitors were tumbling about the belt to the merriment of onlookers when [the plaintiff] made his choice to join them . . ."<sup>25</sup> "He took the chance of a like fate, with whatever damage to his body might ensue from such a fall."<sup>26</sup> Summing up, Judge Cardozo suggested with simple eloquence that "[t]he timorous may stay at home."<sup>27</sup>

Not until 1951 did an injured skier bring a notable personal injury lawsuit against a ski mountain, with predictably hostile results for the plaintiff. In that case, *Wright v. Mt. Mansfield Lift, Inc.*,<sup>28</sup> a woman who suffered a broken leg when her ski struck a snow-covered tree stump on a run at Stowe was denied recovery. Basing its deci-

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22. "The USIA end-of-season business survey conducted by Dr. Marvin Kottke produces what has been characterized as the 'flat' growth curve, varying from 50.2 million skier visits in 1978-79 to 50.0 million in 1989-90. Preliminary guesstimates for the current [1991] season do not anticipate growth." Farwell, *supra* note 1, at 62.

23. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929).

24. *Id.*

25. *Id.* at 174.

26. *Id.*

27. *Id.*

28. 96 F. Supp. 786 (D. Vt. 1951).

sion on the *Steeplechase* opinion, the court reasoned that a skier accepts those obvious and necessary dangers that inhere in the sport—such as falling over a hidden natural obstacle.<sup>29</sup>

The decisions in ski injury lawsuits over the next twenty-five years varied somewhat in their outcome, but the principle that a skier legally assumes the risks of the sport generally was accepted overwhelmingly by courts throughout the country.<sup>30</sup> The general trend was highlighted by a 1976 decision in which a Vermont federal district court barred recovery from Okemo Mountain for fatal injuries sustained by a skier who lost control and crashed into an unpadded lift tower.<sup>31</sup> The tower was found to be an obvious danger inherent to the sport.<sup>32</sup>

Naturally, plaintiffs have fared better in ski lawsuits involving injuries sustained in chairlift accidents and other mishaps not directly involved in the act of skiing, whereby the duty owed by the mountain or the equipment manufacturer to the skier appears more obvious.<sup>33</sup> Overall, however, ski mountains had relatively few reasons to view litigation with more than the usual trepidation prior to February 10, 1974, the day on which James Sunday decided to try skiing at Stratton Mountain, Vermont.

### *Never on Sunday*

Mr. Sunday, a 21-year-old novice skier traversing Stratton's groomed bunny hill at the speed of a "fast walk," fell near the edge of the wide slope and tragically struck a boulder off the trail.<sup>34</sup> The fall, which rendered him quadriplegic, was alleged to have been caused by a piece of underbrush that had been covered by loose snow.<sup>35</sup> He was awarded \$1.5 million in damages at trial, a decision appealed by Stratton to the Supreme Court of Vermont.<sup>36</sup>

In June 1978, the verdict was affirmed.<sup>37</sup> The court rejected Stratton's arguments that Mr. Sunday had assumed the risk of just

29. *Id.* at 791.

30. *See, e.g.,* Arthur B. Ferguson, Jr., *Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles*, 67 *DENV. U. L. REV.* 165 (1990).

31. *Leopold v. Okemo Mountain Inc.*, 420 F. Supp. 781 (D. Vt. 1976).

32. *Id.* at 786-87.

33. It is beyond the scope of this article to deal with matters outside the main issue of ski area liability for injuries incurred in the act of skiing. For an expanded view of other liability issues concerning the sport, such as the duties of skiers to other skiers (collisions, etc.), the duties of equipment manufacturers and renters to skiers, and the duties of ski lift operators. *See, e.g.,* Ferguson, *supra* note 30; Rubin, *supra* note 8.

34. *Sunday v. Stratton, Corp.*, 390 A.2d 398, 401 (Vt. 1978).

35. *Id.* at 400-01.

36. *Id.* at 400.

37. *Id.* at 407.

such an injury, and that Stratton had fulfilled any duty it may have had to the skier by exercising due care in constantly grooming the novice slope on which he was injured.<sup>38</sup> The court ruled that Stratton had breached its duty to Mr. Sunday by not *successfully* clearing the underbrush.<sup>39</sup>

"[T]he timorous no longer need stay at home," wrote Justice Larrow in sarcastically denying the application of the *Steeplechase* and *Mount Mansfield* holdings to the Sunday case.<sup>40</sup> "[Today,] [t]here is [a] concerted effort to attract their patronage and to provide novice trails suitable for their use."<sup>41</sup> Thus, Stratton had an absolute duty to properly maintain its novice slopes free of known hidden dangers.<sup>42</sup> Its failure to do so constituted negligence for which it was liable.<sup>43</sup>

Ski mountain operators and their insurers reacted to the *Sunday* decision with unmitigated panic.<sup>44</sup> This was exacerbated by insurance industry commentators who predicted an avalanche of undefendable lawsuits. "The few who assume the risk of [skiing] without seeking redress in the law have vanished like the Pteranodon," wrote one.<sup>45</sup> "In some jurisdictions, it appears that ski accident plaintiffs have an almost automatic right of recovery."<sup>46</sup>

As a result of this alleged explosion in liability exposure, insurance rates doubled and tripled for ski mountains throughout America.<sup>47</sup> At some mountains, the percentage of lift ticket prices allocated to insurance costs increased by a factor of five, launching consumer prices skyward.<sup>48</sup> According to the insurance industry, the limited number of insureds (about 400 American ski areas) made spreading the risk difficult and smaller rate jumps impossible.<sup>49</sup>

### III. THE LEGISLATIVE ERA

Ironically, the blizzard of legal activity spawned by *Sunday* turned out in large part to be legislative, not litigious. Through the successful lobbying efforts of the ski industry, at least twenty-four states had enacted statutes which enumerated the respective duties

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38. *Id.* at 403.

39. *Id.*

40. *Id.* at 402.

41. *Id.*

42. *Id.*

43. *Id.* at 403.

44. Clarence E. Hagglund, *Ski Liability*, 32 *FED'N INS. COUNS. Q.* 223 (1982).

45. *Id.* at 223. "Pteranodon" refers to a member of the Pterosaurial order of extinct flying reptiles.

46. *Id.*

47. Fagen, *supra* note 1, at 42.

48. *Id.*

49. *Id.*

and risks of skiers and ski area operators by the end of the 1980's.<sup>50</sup> The enactment of these laws was premised on two basic public policy goals: To ensure a high degree of safety for citizens engaging in the sport; and to protect the local ski industry economy. Four general categories of legislation have developed among the twenty-four state statutes currently in force.<sup>51</sup>

The first type of statute is the "general assumption of the risk" variety, typified by the law enacted by Vermont following the *Sunday* decision.<sup>52</sup> It mandates that skiers accept as a matter of law the obvious and necessary dangers of the sport, but does not specifically list skier risks and ski area duties.<sup>53</sup> The legislative record of the Vermont Legislature specifically rejects the *Sunday* decision in favor of the broad assumption of risk principles set forth in *Mt. Mansfield*.<sup>54</sup>

A second type of law is the "delineated skier risk" statute such as the one enacted in Utah<sup>55</sup> which specifically defines those risks that are inherent in skiing and bars recovery for injuries resulting from those risks. Juries balance liability between the skier and ski area as to injuries resulting from undelineated risks and activities.

The third kind of statute is the "enumerated ski area duty" type, such as the one enacted in New Mexico,<sup>56</sup> which sets forth the duties of a ski area operator and requires that in order for a plaintiff to recover, the jury must find the injury to have resulted from the breach of such duties.

The fourth variety is that of "enumerated risk and duties balancing test," the approach adopted by Colorado<sup>57</sup> and New York.<sup>58</sup> This type of statute broadly sets forth the responsibilities of each

50. Ferguson, *supra* note 30, at 175 n.56.

51. The statutory analysis provided herein is cursory. For a more complete overview of skiing legislation and its relationship to other tort and negligence doctrines within the same jurisdiction (i.e., comparative negligence principles), see, e.g., Fagen, *supra* note 1; Rubin, *supra* note 8; Ferguson, *supra* note 30; Diane Bernstein, Note, *The Snowballing Cost of Skiing: Who Should Bear The Risk?*, 7 CARDOZO ARTS & ENT. J. 153 (1988).

52. VT. STAT. ANN. tit. 12 § 1037 (Supp. 1991).

53. *Id.*

54. VT. STAT. ANN. tit. 12 § 1037 note (Supp. 1991) (Legislative Intent).

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

56. N.M. STAT. ANN. §§ 24-15-1 to -14 (Michie 1991).

57. COLO. REV. STAT. §§ 33-44-101 to -111 (1984 & Supp. 1991).

58. N.Y. LAB. LAW §§ 865-868 (McKinney 1988). The New York law, for example, requires ski area operators to patrol all open trails at least twice each day, to log data regarding surface terrain and snow conditions, and to inform skiers of obstacles or hazards other than those that arise from weather variations. Skiers are required to follow a "safety in skiing code," which includes the duties not to ski on closed slopes; to use equipment such as ankle straps or ski brakes to prevent "run-away" skis from hurtling down the mountain, and generally to ski with regard to the safety of the other skiers.

party, and permits jury discretion in assessing liability based on the facts of each case.

### *Post Legislative Decisions*

While many cases which followed the *Sunday* decision resulted in ski area liability for injuries incurred while skiing, the statistical slide away from liability accelerated with the enactment of each new state law.<sup>59</sup> In 1988, for instance, a Michigan court denied recovery to the estate of a skier fatally injured in a collision with a tree.<sup>60</sup> The court reasoned that the Michigan "delineated risk" statute includes within its risk parameters collisions with natural objects such as trees.<sup>61</sup> Similarly, a skier seriously injured in a collision with a tree at California's Goldmine Ski Area was denied recovery in 1990 because California's "enumerated duty" statute did not extend the obligation of ski areas to clear natural objects from the mountain.<sup>62</sup> In 1989, a New York court overturned a verdict in favor of an injured skier who had been hurt when she crashed into wooden poles holding a snow fence in place far off the trail.<sup>63</sup> The court found that the ski area had no duty to pad the poles, and that the skier recklessly disregarded her duty to ski at a rate of speed that would have allowed her to stop within a reasonable time and distance.<sup>64</sup>

Only one recent case, *Peer v. Aspen Skiing Co.*,<sup>65</sup> has sent a genuinely cold shiver through the ski industry. Mr. Leslie Peer, an expert skier, was crippled in a fall on Ruthie's Run at Aspen on the opening day of the 1982-83 ski season.<sup>66</sup> On what he claimed was his first run on the slope that season, Mr. Peer allegedly attempted to

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59. See e.g., Ferguson, *supra* note 30. At least one commentator points out that declining rates of success for non-catastrophically injured ski plaintiffs may also be the product of evolving jury prejudices. Non-skiing jurors seem increasingly inclined to view skiing as a high risk activity undertaken at the skier's own peril, while skiing jurors tend, as safety equipment advances, to view skiing as a safe sport dangerous only to those who act unreasonably or carelessly. Most significant, however, is the sympathy for the defendant often aroused in jurors who live in venues dependent upon the ski mountain to support their local economy (not including Aspen)—a phenomenon that has grown with the sport's increasing concentration of "destination resort" ski areas. See Rubin, *supra* note 8, at 112.

60. Schmitz v. Cannonsburg Skiing Corp., 428 N.W.2d 742 (Mich. Ct. App. 1988).

61. *Id.* at 743-44 (citing Michigan Ski Area Safety Act, MICH. COMP. LAWS § 408.342(2) (1988) (MICH. STAT. ANN. § 18.483(22)(2) (Callaghan 1984))).

62. Daniely v. Goldmine Ski Assocs., No. E005891 (Cal. Ct. App. Feb. 22, 1990).

63. Nagawiecki v. State, 150 A.D.2d 147 (N.Y. App. Div. 1989).

64. *Id.* at 147.

65. No. 88CA0190 (Colo. App. Aug. 10, 1989), cert. granted, No. 89SC548 (Colo. Feb. 20, 1990), *aff'd*, 804 P.2d 166 (Colo. 1991).

66. *Peer v. Aspen Skiing Co.*, 804 P.2d 166, 168 (Colo. 1991).

negotiate it at a speed estimated by a witness to be thirty-five to fifty miles per hour and fell when the trail crossed an unmarked snow-covered service road.<sup>67</sup> He testified that the accident probably would not have occurred had he been skiing significantly slower.<sup>68</sup> Despite that admission, a jury sympathetic to the severity of his injuries awarded Mr. Peer \$5 million.<sup>69</sup> Aspen was found to have been 100 percent negligent for failing to post a sign warning of the sharp and sudden transition in a groomed run, and for permitting the dangerous condition to exist on the run.<sup>70</sup>

The court of appeals refused to grant Aspen's motion for a new trial based on the affidavits of witnesses who came forward after the verdict to testify that Mr. Peer had skied Ruthie's Run without incident many times, including twice on the day of the accident.<sup>71</sup> The court ruled that Aspen had failed to exercise reasonable diligence in discovering this information prior to trial.<sup>72</sup> The Supreme Court of Colorado affirmed the decision of the court of appeals.<sup>73</sup>

The decision in *Peer* has created measured apprehension throughout the ski industry, especially in Colorado. That anxiety arises not only because Mr. Peer's acts of contributory negligence were ignored in assessing the existence and scope of Aspen's duties, but because it also represents a plaintiff victory in a case factually identical to those of a prior landmark pro-ski area decision in Colorado.

In *Pizza v. Wolf Creek*,<sup>74</sup> a skier seriously injured in a fall at Wolf Creek Ski Area on a slope that intersected with a snow-covered service road was denied recovery. This decision seems to indicate that under Colorado state ski law, a skier has the heavy burden of proving that: 1) The ski area had a duty that it reasonably failed to fulfill; 2) the injury was proximately caused by the area's negligence; and 3) the skier did not assume the risk of such an injury (such as by skiing at an excessive rate of speed).

Whether *Peer* represents an aberrational catastrophic injury verdict or the start of a pro-plaintiff trend in Colorado away from the *Wolf Creek* principles remains to be seen. If need be, says a ski industry spokesperson, the *Peer* precedent may be "legislatively corrected."<sup>75</sup>

67. *Id.* at 170.

68. *Id.* at 171.

69. *Id.*

70. *Id.*

71. *Peer*, 804 P.2d at 172.

72. *Id.*

73. *Id.* at 175.

74. *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671 (Colo. 1985).

75. Telephone interview with Irving Naylor of NSAA (Nov. 1991).

## CONCLUSIONS

Although the propensity of Americans for filing lawsuits dealt the ski industry a real scare during the late 1970's and early 1980's, the sport appears to have emerged from the litigation mogul field with plenty of life left in its knees. Today, the industry looks forward to holding the line on lift ticket prices, opening new extreme terrain to the public, and attracting a whole new generation of adventurers to what may qualify as the world's most exciting outdoor sport. Whether the industry meets those goals remains to be seen, but the opportunity to do so has been established.

The issue remains, however, as to the culpability of litigators as prime instigators of skiing's dark decade. Simply put, personal injury lawyers did what they could to exploit the ski industry as a steady source of injured plaintiffs. Absent legislative intervention, litigators and their clients likely would have sued the ski industry back into the Stone Age—with unscrupulous practitioners using the usual amount of fraudulent claims to accomplish the devastation.

Fortunately, the ski industry was able to protect itself with a successful effort, led by its own attorneys, to have equitably protective legislation enacted throughout the country. In fact, ski litigation indirectly produced some positive results for both skiers and ski areas. For instance, the adversarial system led to enactment of laws under which ski areas receive strong protections, but only if they exercise due care in the performance of their duties. Thus these laws provide ski areas with powerful incentives to ensure the safety of skiers.

Litigation and legislation have likewise led to development and circulation of a skiers' code of conduct and responsibility. This list of rules concerning skiing safety and courtesy is posted conspicuously at nearly all ski areas in North America. It educates new skiers and reminds experienced ones that it is their responsibility to ski with care.<sup>76</sup> That code of responsibility has been augmented, on rare occasions, in Colorado since 1989 by criminal prosecutions of *grossly* reckless skiers who cause grave injuries to their fellow

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76. The Skiers Responsibility Code is an informal list of common sense "rules of the road" endorsed by the National Ski Areas Association. They include the following responsibilities: (1) Ski under control and in such a manner so you can stop or avoid other skiers or objects; (2) when skiing downhill or overtaking another skier, you must avoid the skier below you; (3) you must not stop where you obstruct a trail or are not visible from above; (4) when entering a trail or starting downhill, yield to other skiers; (5) all skiers shall use devices to help prevent runaway skis; and (6) you shall keep off closed trails and observe all posted signs. It should be noted that many ski areas have also begun placing blunt statements of risk that skiing is a dangerous activity that can result in catastrophic injury or death conspicuously at lift ticket purchase points, on lift tickets themselves, and even in ski resort brochures. This has a dual purpose; to both shock the skier into realizing the necessity for utmost care, and to bolster the ski area's chances for prevailing in lawsuits in which "assumption of risk" is often a key issue.

sportsmen.<sup>77</sup>

In the final analysis, the public relations "face plant"<sup>78</sup> in the snow that attorneys have taken over their alleged role in causing damage to the ski industry has been—for the most part—undeserved. Surely insurance companies must absorb a substantial portion of blame for having caused the upheaval. What is more, the positive outcome of the entire era serves to mitigate remaining guilt that might have collectively accrued to the bar.

In light of the tenuous nature of the above conclusion, however, the following quotes are provided as food for thought for all attorneys (especially those that ski):

Said Abraham Lincoln, Springfield lawyer: "Never stir up litigation. A worse man can scarcely be found than one who does this."

Said Glen Plake, Mohawked extreme skier extraordinaire: "Ski fast, don't fall." (Words to live-by, if performed with requisite care).

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77. See Rubin, *supra* note 8.

78. A "face plant" in skiing parlance is a fall resulting in the skier's head or face being the first part of the body thrust into the snow, with varying degrees of injury and humiliation arising therefrom. For a complete explanation of skiing slang and humor, see *A SKIER'S DICTIONARY* (1989), wherein the sport is succinctly described as "the art of catching cold and going broke while rapidly heading nowhere at great personal risk."