ASSUMING THE RISK: TORT LAW, POLICY, AND POLITICS ON THE SLIPPERY SLOPES[1]

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INTRODUCTION

Since its inception in the mid-nineteenth century, the tort doctrine of assumption of risk has served as legal shorthand for the idea that individuals are responsible for the consequences of their own risk-taking preferences. Indeed, one of the most famous Latin maxims in the common law corpus—*volenti non fit injuria*—indicates that those who freely take chances have only themselves to blame for their harms.[2] Yet this seemingly simple legal concept has been freighted with political and moral tensions for over a century, and it has been attacked as "sinister"[3] and "dangerously misleading."[4] As Justice Felix Frankfurter pointedly wrote,

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> The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal

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[2] *See* Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).

[3] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 413 (1973).

[4] Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 VAL. U. L. REV. 833, 835–36 (1997) (suggesting that "when we are tempted to say 'assumption of risk' we should instead say something else," such as "'no breach,' 'no duty,' 'no cause,' and 'no proximate cause,'" because assumption of risk is an inaccurate and "confusing substitute for each of them").

> formula, undiscriminatingly used to express different and sometimes contradictory ideas.[5]

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This Article uses a case study approach to take a fresh look at the assumption of risk doctrine. Focusing on ski accidents, it argues that although judges and legal scholars have overwhelmingly engaged in the idea of assumed risk as a matter of legal doctrine,[6] the political, economic, and ideological dimensions of the assumption of risk are both more interesting and more important. Doctrinally, conflicts over ski injuries vividly illustrate why assumed risk points in such different directions. From one perspective, skiers are precisely the types of individuals who ought to bear the cost of their injuries. Skiing is a purely recreational activity in which people freely chose to participate. It is clearly dangerous, resulting in injuries that range from minor scrapes to physical impairment and death. Many of the risks it entails are obvious: falls due to conditions such as ice and moguls, and collisions with objects such as trees, ski towers, and snowmaking equipment.[7] However, it is also the case that the owners

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[5] Tiller v. Atl. Coast Line R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

[6] As every torts casebook indicates, the assumption of risk doctrine is not a single doctrine, but rather a set of more-or-less related doctrines. This Article focuses on primary implied assumption of risk, not implied or express assumption of risk, the firefighter's rule, or other legal concepts that have been called "the assumption of risk."

[7] *See infra* Part II.C.

and operators of ski resorts can reduce the overall incidence and cost of accidents by taking reasonable precautions to eliminate unnecessary dangers on the slopes.[8] Determining liability for ski accidents thus requires a complex calculus of risk that accepts the reality that skiing is dangerous and will inevitably lead to some injuries, reflects the individualistic ethos of American legal culture by holding skiers accountable for their actions,[9] and creates incentives both for skiers to exercise care when skiing and for resort owners and operators to offer skiers a reasonably safe skiing environment.[10] In almost every case that we have examined, reasonable minds could and do differ on the question of liability; there is no cookbook-like formula for drawing a line between the risks that are legitimately taken by the skier and those risks that embody the carelessness of defendant ski resort owners and operators.

But there is far more to an understanding of the assumption of risk doctrine than is revealed by a focus on tort law doctrine alone.

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[8] *See infra* text accompanying note 208.

[9] In 1906, Francis Bohlen wrote that assumption of risk was "a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure." Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906).

[10] *See generally* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985) (discussing the high degree to which Americans have developed expectations of recompense for whatever injuries they suffer).

Crucial to the assumed risk debate is the powerful influence of politics and economics on the manner in which courts define and operationalize risks.[11] The ski industry is essential to the economy of some states, and the insurance industry is critical to the successful operation of the ski industry. Together, they have lobbied aggressively for protective state legislation. The result has been the legislative enactment of ski safety statutes that are intended to shield the industry from liability.[12] For several decades, these statutes have structured the legal conflict over ski accidents.[13] Allocating responsibility for accidents on the slopes, therefore, is fraught with economic and political tension, and the seemingly jurisprudential and doctrinal debate over the assumption of risk is, in reality, heavily shaped by the political and cultural climate in which it exists.[14]

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[11] *See infra* Part III.
[12] *Id.*
[13] *Id.*
[14] The question of how to allocate liability in ski accident cases is part of a more general social conversation over risk and responsibility that animates the broader tort reform debate. Almost every important work that has attacked tort litigation in the United States has championed the importance of individual responsibility and bemoaned the perceived tendency of individuals to take risks but avoid responsibility for the harms such risks cause. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED

Our goal in this Article is neither to argue in favor of an existing doctrinal interpretation of assumed risk nor to propose an alternative formulation. Although we are in accord with many of the doctrine's critics and are sympathetic to the view that it is conceptually imperfect, we are more interested in analyzing how the assumption of risk operates in practice than we are in engaging a set of hypotheticals.[15] What one learns from a detailed examination of ski accidents, we argue, is that regardless of the scholarly criticism of the assumption of risk doctrine, the far-ranging material interests implicated by the doctrine guarantee its continued salience. Powerful political and economic actors with links to the ski industry value the idea of assumed risk, and they have worked hard to keep the concept alive in the judicial realm.[16] The financial interests of those actors caused them to promote the view that the cost of accidents suffered by skiers should be borne by the skiers because those who ski are presumed to have knowingly engaged in a risky activity. By pointing

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WHEN AMERICA UNLEASHED THE LAWSUIT (1991); CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER (1992).

[15] Similarly, Peter Schuck argues that the assumption of risk doctrine implicates "evolving social norms concerning fundamental issues of morality: the meaning of fairness, reciprocity in relationships, the extent of free will, individual responsibility for choice, and the like." *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 912 (1993).

[16] *See infra* text accompanying note 110.

to politics and economics as a critical factor in the persistence of the doctrine of assumed risk, we seek to politically and culturally contextualize what has been an unduly narrow legal debate among tort law scholars.

Moreover, by analyzing litigation over ski accidents in three ski-intensive states—Vermont, Colorado, and California—it becomes clear that the outcome of a ski-related conflict that is decided under the rubric of assumed risk is not mechanically determined by the existence of forcefully articulated material interests. In fact, defendants in California have fared far better than those in Vermont and Colorado, even though California is the only one of the three states that has not passed a statute that is designed to shield the ski industry from liability.[17] Vermont, in contrast, was home to the first such legislation, but the courts in that state are as likely to award damages to injured skiers as they are to find for defendants.[18] In short, we argue that politics and financial interest are critical to the "law-in-action" of assumed risk, but we emphasize how diverse and sometimes unexpected judicial outcomes emerge despite the shadow of such influences. [19]

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[17] *See infra* Part V.C.
[18] *See infra* Part V.A.
[19] *See infra* Part V.

In Part II of this Article, we describe the emergence of skiing as a popular sport in the United States, we highlight its economic import in particular states, and we present general data on the risks of skiing through an overview of ski-related accidents and deaths. Part III reviews the historical and conceptual development of the assumption of risk as a tort law doctrine, detailing both the contemporary criticisms leveled against the doctrine and its application to cases that involve injured skiers. In Part IV we turn to the politics of the assumption of risk doctrine and tell the story of how the National Ski Areas Association and the insurance industry lobbied state legislatures in an effort to codify the assumption of risk doctrine in order to protect the industry from potentially expensive personal injury cases. Part V provides a detailed assessment of the case law in three states in which skiing has particular economic importance: Vermont, Colorado, and California. Although there are various types of ski-related claims—including ski resort employees who sue their employers for injuries suffered on the slopes, skiers who sue ski equipment manufacturers, and skiers who sue one another, often "friends," our emphasis is on litigation brought by injured skiers against ski resorts because these cases are the most common, involve the largest sums of money, and most directly implicate the notion of assumed risk. Two of the states we investigate, Vermont and

Colorado, have ski safety statutes meant to shield resort owners and operators from liability, whereas California has not enacted protective legislation. Intriguingly, we find that despite the lack of legislation, defendants fare better in California than elsewhere, while plaintiffs have been particularly successful in Colorado, which is home to an early statute that was later revised and strengthened. Overall, although the data is imperfect, a careful look at judicial opinions from the past several decades reveals that regardless of whether plaintiffs or defendants prevail, the doctrine of assumption of risk remains a critical part of the case law. In the face of persistent academic criticism and predictions by some influential scholars that the assumption of risk doctrine was a relic of the past whose disappearance would usher in an era of plaintiff recovery,[20] the doctrine continues to exert a powerful influence on how disputes over ski-related harms are resolved. In Part V, we conclude by reviewing the central claims of the Article and draw analogies to other areas of the law in which the assumption of risk remains critical.

II. SKIING IN AMERICA

[20] *See* Schuck, *supra* note 15, at 911–12 ("The dominant approach has been to eliminate or narrow the defense, thereby facilitating plaintiffs' recoveries.") (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68, at 493–95 (5th ed. 1984)).

An article discussing legislative efforts in Vermont to impose the burden of ski injuries on injured skiers states, "Give ski areas the courage to reduce the risks they can, skiers the strength to accept those that they cannot, and juries the wisdom to know the difference."[21] The struggle to determine the risks that ski areas have a legal duty to reduce and those that will be borne by skiers has loomed large throughout the history of American skiing.

While the origins of skiing in America can be traced to 1854,[22] the sport did not become popular until the end of World War II, when soldiers returned from Europe and brought ski equipment into the United States.[23] The construction of the Interstate Highway System, authorized by President Dwight Eisenhower through the passage of the 1956 Federal-Aid Highway Act, contributed to the growth of skiing by improving access to ski areas in remote and difficult-to-

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[21] Beth Robinson, *Playing it Safe: Allocating the Risk of Harm on the Slopes*, 25 VT. B.J. & L. DIG., Mar. 1999, at 15, 15.

[22] There are numerous newspaper records of competitive skiing among California mining camp populations. *See* E. JOHN B. ALLEN, FROM SKISPORT TO SKIING: ONE HUNDRED YEARS OF AN AMERICAN SPORT, 1840–1940 21–28 (1993).

[23] *See* Peter Kaineg, Chris Van Valkenburg & Carsten Winsnes, Issues Facing Ski Safety Research 6 (Apr. 26, 2006) (unpublished interactive qualifying project report submitted in partial fulfillment of the requirements for the degree of Bachelor of Science, Worcester Polytechnic Institute) (on file with author) [hereinafter Ski Safety Research].

access places.[24] Over the second half of the twentieth century, the sport quickly evolved into a $10 billion industry.[25] In 2006, there were 485 ski resorts operating in the United States,[26] with an estimated 6.4 million skiers and 5.2 million snowboarders who made 55.1 million visits to the resorts during the 2006–2007 season.[27]

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[24] *See* Federal-Aid Highway Act of 1956, 70 Stat. 374 (1956) (current version at 23 U.S.C § 101 (2006)). The bill, commonly referred to as The National Interstate and Defense Highways Act, appropriated $25 billion for 41,000 miles of interstate highways and was the largest public works project in America at the time. Pub. L. No. 84-627, 70 Stat. 374 (1956)).

[25] NAT'L SKI AREA ASS'N & RCC ASSOCS. (NSAA), 2005/06 SKI RESORT INDUSTRY RESEARCH COMPENDIUM 6, 9 (2006), *available at* http://www.nsaa.org/nsaa/marketing/docs/0506-research-compendium.pdf. This figure was calculated by multiplying the 2005–2006 average gross revenue per ski resort ($21.9 million) by the number of ski resorts in the United States at the time (478 ski resorts).

[26] *See* Press Release, NSAA, 481 Ski Resorts in Operation During 2007–2008 Season (July 20, 2008) http://www.nsaa.org/nsaa/press/operating-ski-areas.asp (outlining the number of ski resorts in America by ski season from 1985 through 2007).

[27] NSAA, Final Report Indicates 55.1 Million Visits in 2006/07," (Aug. 9 2007) http://www.nsaa.org/nsaa/press/0708/kottke-2007.asp ("A skier/snowboarder visit is defined as one person visiting a ski area for all or part of a day or night, and includes full- and half-day, night, complimentary, adult, child, season and other types of tickets."). Over the last ten seasons (1997–1998 through 2006–2007), there has been an average of 55.57 million visits recorded annually. *Id.*; *see also* NSAA, Facts About Skiing/Snowboarding Safety, http://www.nsaa.org/nsaa/press/facts-ski-snbd-safety.asp (last visited Sept. 9, 2007).

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> 13.9 percent of snowboarders also ski, and conversely, 12.8 percent of skiers also snowboard. Therefore, the total on-slope participants were calculated at 9.2 million. (13.9 percent of 5.1 million snowboarders equals 708,900. 5.1 million minus 708,900

Owning a ski resort has always been a profitable endeavor. According to the 2005/06 Ski Resort Industry Research Compendium of the National Ski Areas Association (NSAA),[28] which includes responses from over 200 resorts, accounting for 47.9 million ski visits,[29] the average gross revenue of a resort is $21.9 million, with an average operating profit margin of 24.4% or $5.3 million per ski resort area.[30] The typical price of a weekend lift ticket now exceeds $60.[31] Ski resorts derive 46.3% of their revenues from lift ticket sales, and the NSAA considers the ability to regularly increase the price of lift tickets a critical factor in the overall financial health of the

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equals 4.4 million snowboarders. 12.8 percent of 5.5 million skiers equals 704,000. 5.5 million minus 704,000 equals 4.8 million skiers.)
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Facts About Skiing/Snowboarding Safety, *supra* note 27.

[28] NSAA, About the National Ski Areas Association, http://www.nsaa.org/nsaa/home/about.asp. ("The [NSAA] is the trade association for ski area owners and operators. It represents 326 alpine resorts that account for more than 90 percent of the skier/snowboarder visits nationwide. Additionally, it has 400 supplier members who provide equipment, goods and services to the mountain resort industry."). *Id.*
[29] NSAA, *supra* note 25, at 2
[30] *Id.* at 9.
[31] *Id.* at 5, 9.

business because lift tickers are the single largest revenue producer of the industry.[32]

Ski resorts do not simply benefit their individual or corporate owners. The ski industry also plays an enormous role in many state economies. In New Hampshire, for example, the ski industry provides ten percent of all jobs in the winter months,[33] and the California Ski Industry Association reports that "the California winter sports industry generates $500 million annually to the economy, employs 15,000 people, and hosts an average of eight million skiers seasonally."[34] Many "ski safety statutes"[35] candidly describe the important role that skiing plays in the state's economy, thereby alluding to the need for the state legislature to protect the industry

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[32] *Id.* at 9–10.

[33] Keep Winter Cool, Why Should I Care?, http://www.keepwintercool.org/whyshouldicare.html "Keep Winter Cool is a partnership between NRDC (Natural Resources Defense Council) and the National Ski Areas Association (NSAA) to raise visibility and public understanding of global warming and spotlight opportunities that exist right now to start fixing the problem."

[34] California Ski & Snowboard Safety Ass'n, U.S. Ski & Snowboarding General Facts, *available at* http://74.125.93.132/search?q=cache:tOEYlznSv1cJ:www.calskisafety.org/reports/general-facts.html+%22california+ski+industry+association%22+and+%22winter+sports+industry%22+and+%22generates+%24500+million%22&cd=1&hl=en&ct=clnk&gl=us

[35] *See* Charles J. Sanders & Jacqueline Gayner, *The Cold Truth: Have Attorneys Really Chilled the Ski Industry?*, 2 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 125, 131–32 (1991).

from crushing liability. In short, skiing is a major industry that is critical to the economy of some states and offers an attractive recreational opportunity to a large number of people. But it also results in a significant number of serious accidents.

Although everyone involved in skiing agrees that it can be dangerous, it is surprisingly difficult to obtain reliable information about ski-related injuries or deaths.[36] Aside from a series of research projects that examine patterns of ski injury against the backdrop of equipment, environmental conditions, or both,[37] most of the available data regarding actual fatalities and serious injuries comes from the ski industry itself.[38] The NSAA reports that during the past ten years there has been an average of 43.6 serious injuries[39] and 39.8 ski- or snowboard-related deaths per year.[40] During the 2007–2008 season,

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[36] *See, e.g.*, Nicholas Bakalar, *Summer Sports Are Among the Safest*, N.Y. TIMES, July 8, 2008, at F7 (noting that summer sports are relatively safe and that "the most dangerous outdoor recreational activity by a wide margin is snowboarding, followed by sledding," citing a study from the Centers for Disease Control and Prevention).
[37] *See, e.g.*, Jasper Shealy, Carl F. Ettlinger & Robert Johnson, *Signal Detection Theory: A Model for Evaluating Release/Retention Criteria in Alpine Ski-Binding-Book Systems*, *in* 12 SKIING TRAUMA & SAFETY, 120–31 (Robert J. Johnson ed., 1999).
[38] Ski Safety Research, *supra* note 23, at 1 (noting that, with the exception of Sugarbush, "most ski areas are not cooperative in conducting injury studies").
[39] NSAA, Facts About Skiing/Snowboarding, *supra* note 27 (defining "serious injuries" as "paraplegics, serious head and other serious injuries").
[40] *Id.*

60.5 million visits by skiers and snowboarders resulted in 41 serious injuries and 53 fatalities;[41] the vast majority of accident victims are men: 28 men died on the slopes, and 25 suffered serious injury.[42] It is important to note that one's chance of dying or experiencing serious injury when skiing or snowboarding is relatively small. Indeed, in contrast to the 53 fatalities per 60.5 million visits by skiers and snowboarders in 2007–2008, in 2006, there were 3,600 drowning deaths per 58 million swimmers, and 1,100 fatalities per 43.1 million bicyclists.[43] Yet the NSAA's emphasis on death and serious injury, and its seemingly narrow definition of what constitutes a serious injury, may underplay the real risks faced by skiers and snowboarders. Although the NSAA does not provide public data on the full range of injuries that occur on the slopes, Jasper Shealy, a professor of engineering at Rochester Institute of Technology, has studied ski injuries for three decades and offers a dramatically different perspective from that of the NSAA. He reports nearly 15,000 skier and snowboarder injuries annually, many of which could

[41] *Id.* ("The rate of fatality converts to .40 per million skier/snowboarder visits. . . . The rate of serious injury . . . was .73 per million skier/snowboarder visits.").
[42] *Id.*
[43] *Id.*

potentially end up in court.[44] With figures ranging from the NSSA's reported annual average of 43.7 serious injuries to Shealy's claim of almost 15,000 hurt skiers, the lack of fine-grained data on the number and type of ski injuries in the United States makes it difficult to (1) estimate the number of tort claims that could be brought by skiers, and (2) compare it to the number of claims actually filed, the number of cases resolved by judicial opinion, and the number of estimated settlements. But with over 80 deaths or catastrophic injuries occurring on the slopes each year, and thousands—perhaps tens of thousands—of additional personal harms suffered by skiers and snowboarders, the potential for legal conflict over who is responsible for such harms is significant.

III. TORT LAW AND THE ASSUMPTION OF RISK

A. Historical Development

There have always been individuals who are willing to engage in activities that others consider overly dangerous. But it was not until the latter half of the nineteenth century that the common law explicitly addressed the legal consequences of injuries that resulted from risky undertakings. Tort law was becoming an independent area of the law in that era, distinct from contracts, property, and criminal

[44] Sarah Tuff, *Safety on the Slopes: Easy to Say but Harder to Ensure*, N.Y. TIMES, Mar. 2, 2006, at G8 (discussing Shealy's study and noting the anxiety over accidents on the slopes).

law, but in many instances universal notions of duty were overshadowed by an emphasis on status relationships. Francis Hilliard's 1859 book on torts, the first such treatise to appear in the United States, introduced the notion of assumption of risk to American courts. Hilliard's view of assumed risk made clear that the concept of assumed risk was closely tied to the relationship between the parties: "[I]f a defective condition 'was known to the servant . . . and the servant continued in the service he assumed the risk himself.' "[45] Over the next several decades, the idea of assumption of risk was freed from the specific context of the master-servant relationship posited by Hilliard. Francis Wharton's 1878 *Treatise on the Law of Negligence*, for example, described the assumption of risk doctrine as a "general principle that a party cannot recover for injury he incurs in risks, themselves legitimate, to which he intelligently submits himself."[46] In 1895, Charles Warren underscored the rejection of status relationships as the underlying justification for applying the assumption of risk doctrine by presenting assumed risk as a rule of

[45] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 42 (expanded ed. 2003) (quoting F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 467 (3d ed. 1866)).
[46] FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 181 (2d ed. 1878).

law regarding a plaintiff's conduct that is a part of the general law of negligence.[47]

By the first years of the twentieth century, the law of torts became further refined, and the theory of negligence was increasingly used to limit defendants' liability. As a result, the idea of assumption of risk was widely summed up by the Latin phrase *volenti non fit injuria* (to a willing person, no injury is done), with courts generally unsympathetic to injured plaintiffs who made a decision to knowingly engage in certain risks.[48] In *Lamson v. American Axe & Tool Co.*, Oliver Wendell Holmes denied recovery to Lamson, an employee of an axe manufacturer, who was injured when a hatchet fell from a defective rack.[49] Although Lamson had expressed concern about the stability of the rack and the safety of working underneath it, his employer insisted that he would be forced to either accept the condition of the rack or quit his job.[50] In Holmes' view, the employee "appreciated the danger more than any one else. He perfectly understood what was likely to happen. . . . He stayed, and took the

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[47] *See* WHITE, *supra* note 45, at 42–43.
[48] Jane P. North, *Employees Assumption of Risk: Real or Illusory Choice?* 52 TENN. L. REV. 35, 38 (1984).
[49] 58 N.E. 585, 585 (Mass. 1900).
[50] *Id.* at 585 ("The plaintiff complained to the superintendent … [and h]e was answered, in substance, that he would have to use the racks or leave.").

risk."[51] As a result, he was the author of his own fate, and consequently, he must bear the costs of his accident.

Holmes' approach to assumed risk held sway for the first several decades of the twentieth century, and it left plaintiffs with little hope of recovering for injuries that resulted from their own informed choices.[52] Justice Benjamin Cardozo's 1929 opinion in *Murphy v. Steeplechase Amusement Co.*—a colorful case involving a young man injured on a Coney Island amusement ride called "the Flopper"—further solidified the notion that those who take risks must bear the consequences.[53] Justice Cardozo wrote,

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> Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . The plaintiff was not seeking a retreat for meditation. . . . The timorous may stay at home.[54]

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According to Justice Cardozo, the plaintiff's injury was the result of "the very hazard that was invited and foreseen."[55] As such, liability could not be imposed on Steeplechase, which had merely

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[51] *Id.*
[52] *See, e.g.*, Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).
[53] *Id.*
[54] *Id.* (citations omitted).
[55] *Id.*

provided an entertaining diversion for willing participants. Like Lamson's hatchet wound, Murphy's injuries were the result of his decision to knowingly and willingly take a risk, and he alone was responsible for the unfortunate consequence. "There would have been no point to the whole thing, no adventure about it, if the risk had not been there," Cardozo wrote. "The very name, above the gate, 'the Flopper,' was warning to the timid."[56]

The approach to assumed risk that emerged in the nineteenth century and that was hardened by Holmes and Cardozo in the early twentieth century began to erode after World War II, as tort law moved toward a greater emphasis on compensation. The introduction of liability insurance played an important role in that transformation,[57] as did social norms that conceptualized accidental harms as a societal rather than an individual problem. Starting in the late 1940s, and accelerating in the 1960s and 1970s, legal scholars and the courts displayed a growing skepticism of the narrow approach to the assumption of risk doctrine approach—which consistently imposed the cost of accidents on the injured—and embraced a newfound willingness to provide awards to plaintiffs whose claims would have been denied by earlier courts. Doctrinal and legislative innovations,

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[56] *Id.*
[57] *See* WHITE, *supra* note 45, at 149.

like strict liability and worker's compensation, provided avenues to redress that enabled plaintiffs to sidestep the law of negligence and the possibility that their claims would falter on the successful invocation of the assumption of risk doctrine.[58] The result was that injured parties, even those who knowingly had embraced particular risks, were more likely to be compensated for their harms than in any other period in American history.[59]

The expansion of liability that reached a peak in the 1970s would prove to be short lived. In response to the rise in unemployment and high inflation of the 1970s, in the early 1980s, the Reagan administration ushered in an era of conservative retrenchment that emphasized the need to heal the ailing economy and shrink the size of the federal government.[60] Reflecting the tenor of the times, by the mid-1980s, tort law scholars and courts began to move away from their emphasis on compensation, and instead embraced values like deterrence. Theories based on economic concepts such as market efficiency took precedence over social welfare concerns and distributive justice theories, and skepticism about the government's

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[58] *Id.* at 245.

[59] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 521–23 (3d ed., 2005); KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, 171–72 (2008).

[60] *See generally* HALTOM & MCCANN, *supra* note 14.

ability to effectively conceptualize and implement solutions to social problems led to an emphasis on individual responsibility.[61] With its inherently deterrent-based rationale and its focus on individual behavior, the notion of assumption of risk was ready-made for the times. Once again, courts were in the position, in Holmes' famous phrase, to let the "loss from accident lie where it falls."[62]

For over a century, therefore, courts have wrestled with the notion of assumed risk, sometimes emphasizing that individuals who knowingly take chances are liable for the cost of their injuries, and other times displaying an unwillingness to absolve defendants of responsibility for plaintiffs' injuries. During most of that period, defendants could extinguish potential liability by presenting convincing evidence that a plaintiff's careless conduct contributed to the injuries. In the many accidents in which both parties were careless, therefore, the burden was borne exclusively by the injured plaintiff, and the defendant had no liability for the harm. Known as contributory negligence, this doctrine represented a formidable bar to

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[61] *Id.* at 22 ("We refer especially to the specific 'ethic of individualism' that 'emphasizes self-reliance, toughness, and autonomy—qualities that are posed as being central to progress and 'getting along' in a market economy.'").

[62] Oliver Wendell Holmes, Jr., The Common Law 94 (1881). *Cf.* Schuck, *supra* note 15, at 902 ("The doctrine of informed consent in healthcare shared in the more general expansion of American tort liability that proceeded well into the 1980's and that now appears to have stabilized.").

recovery.[63] Since the 1960s, the absolutism of contributory negligence has given way to a system of comparative negligence, which emphasizes the relative degrees of fault borne by each party.[64] Although these rules vary by state, in almost every instance a plaintiff who can establish that she was less at fault than the defendant can recover, with recovery measured by the defendant's degree of fault. For example, a defendant who was 75% responsible for the accident will pay 75% of the damages.

The doctrines of contributory and comparative negligence are closely related to the assumption of risk doctrine. Under the assumption of risk doctrine, a defendant escaped liability after proving that the plaintiff had assumed the risk of the defendant's negligence. Similarly, under a contributory negligence scheme, a defendant would also escape liability after convincing the court that the plaintiff had acted carelessly. Both contributory negligence and the assumption of risk doctrine, therefore, incorporated the classic all-

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[63] *See* BLACK'S LAW DICTIONARY 353 (8th ed. 2004) (defining contributory negligence as "[t]he principle that completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault" and noting that "[m]ost states have abolished this doctrine and have adopted instead a comparative-negligence scheme").

[64] *Id.* at 300 (defining comparative negligence as "[t]he principle that reduces a plaintiff's recovery proportionally to the plaintiff's degree of fault in causing the damage, rather than barring recovery completely" and noting that "[m]ost states have statutorily adopted the comparative-negligence doctrine").

or-nothing reasoning of the common law. Moreover, as the black-and-white reasoning of contributory negligence has yielded to the more nuanced analysis of comparative fault, states with comparative fault statutes have had to reassess the assumption of risk defense in many types of claims.

B. The Assumption of Risk Docrtine in Contemporary Tort Law

To better understand the link between comparative fault and assumption of risk, it is essential to recognize that courts have identified three types of cases in which risks may be assumed. One involves the express assumption of risk, in which, for example, the skier signs a liability waiver whereby the skier agrees to accept the risks of skiing and releases all possible defendants from liability for her potential injuries.[65] Express assumption of risk cases may also involve the fine print on the back of a stadium ticket, parking ticket, ski lift ticket, or the agreement one signs when joining a health club. The question raised by such cases is whether express agreements should be enforced or whether the unequal bargaining power of the parties negates the plaintiff's consent, regardless of the plaintiff's

[65] *See, e.g.*, Dalury v. S-K-I, Ltd., 670 A.2d 795, 796 (Vt. 1995) (holding that liability waivers that "releas[e] defendants from all liability resulting from negligence, are void as contrary to public policy").

awareness of certain dangers and apparent choice to confront them.[66] Cases involving accidents on the slopes have been treated inconsistently by the courts, with some invalidating express agreements on so-called public policy grounds,[67] and others finding that the agreements are enforceable.[68]

In the second type of assumption of risk case—primary implied assumption of risk—the plaintiff's consent is implied rather than explicit.[69] The implied assumption of risk cases focus on the relationship between the parties and the behavior and knowledge of the plaintiffs. Industrial workers, for example, may have tacitly

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[66] *See* Schuck, *supra* note 15, at 910.
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> Legislatures often prohibit and courts often invalidate [express agreements] as a matter of public policy. Stigmatizing this type of waiver as a contract of adhesion, they emphasize the consumer's lack of bargaining power, alternatives, risk information, and awareness of the waiver—in essence, her lack of informed consent to the risk.

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[67] *See, e.g.*, *Dalury*, 670 A.2d at 796.
[68] *See, e.g.*, Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 817 (Cal. Ct. App. 1996) (affirming summary judgment for the defendant ski area in an action brought by the plaintiff for injuries suffered while in ski school because "in consideration for being allowed to enroll in the ski school, [the plaintiff] specifically agreed to release Snow Summit and its employees from any liability for injuries caused by participating in the ski lesson").
[69] *See, e.g.*, Daniel E. Wanat, *Torts and Sporting Events: Spectator and Participant Injuries—Using Defendant's Duty to Limit Liability As an Alternative to the Defense of Primary Implied Assumption of Risk*, 31 U. MEM. L. REV. 237 (2001).

consented to dangerous working conditions and even to the negligence of their employers, and on that basis their claims for compensation may be denied. Likewise, spectators at sporting events may choose a seat in a part of the stadium that is not protected by screens, thereby exposing themselves to errant balls.[70] These cases generally focus on "defining the contours of the legal duty that a given class of defendants . . . owed to an injured plaintiff."[71] In cases where no duty is owed by the defendant, courts often conclude that the plaintiff assumed the risk.

The third type of assumption of risk case, the secondary implied assumption of risk, involves cases in which the defendant breached a legal duty and the plaintiff knowingly consented to the

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[70] The primary implied assumption of risk doctrine has been the subject of considerable academic commentary. For example, Steven Sugarman argues that it is more doctrinally coherent to treat such cases as involving basic questions of duty and breach than to consider them under the assumed risk rubric. *See* Sugarman, *supra* note 4, at 836 ("Many cases in which the courts talk about 'assumption of risk' are best understood as ones in which there simply has been no negligence, or more precisely, 'no breach' of the duty to exercise due care."). In Sugarman's view, liability in a case involving a sports spectator should hinge on the question of whether the stadium owner had a duty to the spectator, and if so whether the duty was breached. In the absence of a duty or the breach of a duty there is no liability. The result—no liability—is identical to the one that would be reached by concluding that the plaintiff had assumed the risk by selecting an unprotected stadium seat. But the focus of the analysis shifts from the behavior of the plaintiff to the behavior of the defendant, and thus enables courts to avoid the language of assumed risk. *See Sugarman, supra* note 4, at 836–37.

[71] Knight v. Jewett, 834 P.2d 696, 700 (Cal. 1992).

risks created by the defendant's conduct.[72] In the era before the adoption of comparative fault, there was little reason to distinguish between primary and secondary implied assumption of risk because plaintiffs were barred from recovery in both types of cases. But with the advent of comparative fault, cases of so-called secondary implied assumption of risk no longer barred recovery for plaintiffs. Instead, courts began to examine whether plaintiffs voluntarily and reasonably took risks that were created by defendants' lack of due care, and they then apportioned the loss according to what they considered to be the relative responsibility of the parties.

All three types of assumed risk cases—express, primary implied, and secondary implied—are at play in claims that result from skiing accidents. These cases quickly make clear that the categorical divisions are muddier in practice than they may appear when viewed in abstraction.[73] In many respects, express assumption of risk cases are more about contract law than tort law.[74] But in certain

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[72] *See, e.g.*, Davenport v. Cotton Hope Plantation Horizontal Property Regime, 508 S.E.2d 565, 571 (S.C. 1998) ("Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence.").

[73] Judge Richard Cardamone accurately described how courts have struggled with the "vexing phrase 'assumption of the risk,' " calling it a "legal maze." Dillworth v. Gambardella, 970 F.2d 1113, 1114–15 (2d Cir. 1992).

[74] Many state courts disfavor exculpatory agreements. *See, e.g.*, Dalury v. S-K-I, Ltd., 670 A.2d 795, 796 (Vt. 1995) (holding that

circumstances, courts that hear a claim about an expressly assumed skiing risk use the case as an opportunity to explore the idea of the assumption of risk more broadly. It is these cases to which we pay careful attention. Frequently, courts do not precisely distinguish between primary and secondary implied assumption of risk.[75] Both risks are closely tied to what courts and legislatures deem "inherent" risks—the idea that participants in sports consent to the risks inherent in a particular sport, like horseback riders who consent to the possibility of being thrown off their horses, and skiers who consent to the possibility of hitting an icy patch or a mogul. Many courts use the language of inherent risk as a way of discussing and contextualizing the doctrine of assumption of risk. For example, if a plaintiff's injury results from a risk inherent to the sport of skiing, she is said to have assumed the risk. The idea of inherent risks is contested, in part because the concept is not self-defining. In some cases inherent risks

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liability waivers that "releas[e] defendants from all liability from negligence, are void as contrary to public policy"). The Colorado Supreme Court holds that "parental indemnity provisions, liability waivers that parents sign on behalf of their minor children, 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, 1237 (Colo. 2002).

[75] *See, e.g.*, Monk v. V.I.Water & Power Auth., 53 F.3d 1381, 1385 n.6 (3d Cir. 1995) ("Express assumption of risk, as distinguished from implied assumption of risk, has retained its viability as an absolute defense despite the advent of comparative negligence.") (citations omitted).

are defined as those that cannot be removed by due care,[76] whereas in other cases courts imply that even some risks that could be relatively easily remedied are inherent in skiing.[77]

In examining cases from Vermont, Colorado, and California, we will use the phrase "assumption of risk" or "inherent risk" as these phrases are used by attorneys and courts: to capture the idea that liability at least in part, depends upon whether a plaintiff knowingly and voluntarily confronted a risk and upon the nature of the risk that was confronted. Throughout the Article, we invoke the phrases "assumption of risk" and "inherent risk" not because we are unaware of the academic debate about their logical and doctrinal coherence but because we consider those debates to be less important than the political and economic dimensions of conflicts that revolve around actions of risk-bearing individuals. As disputes over ski-related accidents make clear, state courts, judges, juries, state lawmakers, and lobbyists continue to use assumption of risk language to frame the analysis of accidents that result from risky activities in which a plaintiff willingly, perhaps enthusiastically, took part. Doctrinal

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[76] *See* Brett v. Great Am. Recreation, Inc., 677 A.2d 705, 715 (N.J. 1996) ("In the skiing context, an inherent risk is one that cannot be removed through the exercise of due care if the sport is to be enjoyed.").

[77] *See* Souza v. Squaw Valley Ski Corp., 41 Cal. Rptr. 3d 389, 394 (Cal. Ct. App. 2006) (holding that a collision with a plainly visible hydrant was an inherent risk of the sport).

coherence—or lack thereof—has taken a back seat, as parties have engaged in a highly politicized struggle over the apportionment of liability for accidents on the slopes.

C. Assuming the Risk of Injury on the Slopes

The modern era of personal injury litigation entered the world of skiing with a dull thud. Descending a trail in the Green Mountains, a skier hit a snow-covered tree stump and broke her leg.[78] A United States federal district court in the state of Vermont used these quotidian facts as an opportunity to articulate a general standard of liability for ski accidents. In the 1951 case of *Wright v. Mount Mansfield Lift, Inc.*, the court held that a skier accepts those "obvious and necessary" dangers that "inhere" in the sport of skiing, including falling over a natural obstacle that is hidden under the snow.[79] Showing great deference to the *Murphy v. Steeplechase Amusement Co.* opinion,[80] the court wrote,

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> The doctrine of volenti non fit injuria applies. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . ,
> . . . .

[78] Wright v. Mount Mansfield Lift, Inc., 96 F. Supp. 786, 791 (D. Vt. 1951).
[79] *Id.*
[80] *See supra* notes 52–56 and accompanying text.

> Chief Justice Cardozo in the case of [*Murphy*] discusses the law, which I hold to be applicable to ski accident cases . . . .[81]

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Then in 1976, another federal case in Vermont, *Leopold v. Okemo Mountain Inc.*,[82] strengthened the principle that skiers legally assume the risk of being injured on the slopes.[83] In that case, a skier who lost control, crashed into an unpadded lift tower, and suffered fatal injuries was denied recovery.[84] Again, the court relied on the principle of volenti non fit injuria:

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> From his past experience, [the skier] was surely cognizant of the dangers inherent in skiing a trail of this type . . . . If he believed that the trail or the towers presented risks which were too great, he could have chosen not to proceed. Yet, he chose to ski the trail . . . . As he proceeded, [the plaintiff] willingly assumed all the obvious and necessary risks involved in this descent, including the danger that he might collide with a tower if he lost his control or concentration for an instant.[85]

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Although Vermont's 1970 comparative negligence statute enabled the court to apportion responsibility for the accident to both the plaintiff and the defendant, the court instead imposed the full cost of the accident on the plaintiff, emphasizing that the plaintiff must

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[81] *Wright*, 96 F. Supp. at 791. For a discussion of *Murphy*, see *supra* Part II.
[82] 420 F. Supp. 781 (D. Vt. 1976).
[83] *See* Sanders & Gayner, *supra* note 35, at 130.
[84] *See Leopold*, 420 F. Supp. at 788.
[85] *Id.* at 787.

have made a "logical . . . choice as to whether he should proceed and assume the consequences of skiing in an area where a plainly apparent and necessary danger exists."[86] With *Wright* on the books, it appeared that the owners and operators of ski resorts had little to fear from the courts. [87]

Yet, the historical narrative of ski liability had already started to change. On February 10, 1974, a twenty-one-year-old beginner named James Sunday was skiing at a "speed equal to a fast walk" when "his ski became entangled in a small bush . . . . concealed by loose snow."[88] He fell off the edge of the trail, struck a boulder, and was rendered a quadriplegic.[89] A jury awarded $1.5 million in damages to Sunday. In June 1978, the Vermont Supreme Court rejected not only the defendant's appeal, but also the applicability of *Murphy* and *Wright* to the case.[90] "[T]he timorous no longer need stay at home," the judge wrote in an impassioned opinion. [91] To the contrary,

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> There is concerted effort to attract their patronage and to provide novice trails suitable for their use. . . . [N]one of [the evidence] was calculated to show the

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[86] *Id.* at 787 n.2.
[87] *See* Sanders & Gayner, *supra* note 35, at 130.
[88] Sunday v. Stratton Corp., 390 A.2d 398, 401 (Vt. 1978).
[89] *Id.* at 400–01.
[90] *Id.* at 402.
[91] *Id.*

> brush to be a danger inherent in the use of a novice slope as laid out and maintained by the defendant.[92]

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According to the court, because the defendant ski area was aware of the underbrush, it "had an absolute duty to properly maintain its novice slopes free of known hidden dangers."[93]

Insurers and ski mountain owners and operators reacted to the *Sunday* decision with "unmitigated panic," predicting that "an avalanche of undefendable lawsuits" would quickly follow.[94] One commentator hyperbolically declared that "[i]n some jurisdictions, it appears that ski accident plaintiffs have an almost automatic right of recovery," and warned that "[t]he few who assume the risk of [skiing] without seeking redress in the law have vanished like the Pteranodon."[95] Insurance rates dramatically increased, sometimes three-fold, throughout the United States, and the price of lift tickets skyrocketed.[96] Leonard H. Collier, then-vice president of American International Group, Inc., whose American Home Assurance Company subsidiary was one of the two major ski-area liability

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[92] *Id*.
[93] Sanders & Gayner, *supra* note 35, at 131 (citing *Sunday*, 390 A.2d at 402).
[94] *Id.* (citing Clarence E. Hagglund, *Ski Liability*, 32 FED'N INS. COUNS. Q. 223 (1982)).
[95] Hagglund, *supra* note 94, at 223. "Pteranodon" is part of the Pterosaurial order of extinct reptiles.
[96] *See* John E. Fagan, *Ski Area Liability for Downhill Injuries*, 49 INS. COUNS. J., Jan. 1982, at 36, 42 (1982).

insurers,[97] predicted to *The Wall Street Journal* that the *Sunday* decision "could be catastrophic for the ski industry."[98] The insurance industry's acute reaction to the *Sunday* decision was due to several factors: (1) irritation regarding the questionable facts of the *Sunday* case, namely, that the plaintiff was drunk and had lied about the circumstances of the accident,[99] (2) disappointment at the size of the award, which was $250,000 more than the plaintiff had asked for, and (3) the belief that the Vermont Supreme Court had turned its back on earlier assumed risk holdings that had been advantageous for industry for over a quarter of a century.[100]

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[97] Neil Ulman, *Shaken U.S. Ski Industry Awaits Verdict on Responsibility for Downhill Accidents*, WALL ST. J., Dec. 9, 1977, at 20. The other major ski area liability insurer was Lloyds, the London insurance exchange. *Id.*

[98] *Id.*

[99] "According to one report, shortly after the lower court rendered its decision, a physician claimed that Sunday had been intoxicated at the time of the accident and had admitted he did not encounter any bush on the trail." *See* Wendy A. Farber, Comment, *Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill*, 1980 UTAH L. REV. 355, 360 n.33.

[100] The belief that the *Sunday* court had rejected *Wright* is misguided, as the court in *Sunday* distinguished *Wright* from the case at hand. "[T]he only difference between *Wright* and *Sunday* is in their results, not in the principles of controlling law. In *Wright*, the defendant did not breach any duty it owed to plaintiff; in *Sunday*, it did." *See* Estate of Frant v. Haystack Group, Inc., 641 A.2d 765, 769 (Vt. 1994) (quoting Dillworth v. Gambardella, 970 F.2d 1113, 1119 (2d Cir. 1992)).

Whatever the underlying cause of the industry's reaction,[101] the consequences were immediately clear: with only two major insurers willing to provide coverage to the industry,[102] ski mountain owners and operators were stuck with higher premiums, the cost of which they passed on to visiting skiers and snowboarders. As skiing became more expensive, ski industry analysts estimated that business would decrease by as much as twenty-five percent, forcing many small resorts to close.[103] In a state like Vermont, that could mean losing as much as $150 million annually.[104] In fact, after Sunday's victory in trial court, four small Vermont ski areas closed, allegedly because of the "insurance squeeze."[105] One of them, Little Underhill Ski Bowl, shut down mid-season when its insurance premiums rose from $1,000 to $3,500.[106] Jack Murphy, then-general manager of Sugarbush Mountain, explained that while his mountain remained open for the time being, his liability premiums had "just about doubled."[107] Similarly, Joseph Kohler, then-president of Bristol Mountain in Rochester, New York, lamented that " '[e]leven cents out

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[101] Of course, it is also possible that the nature of the insurance business leads insurers to overemphasize certain liability risks in an effort to justify significant rate increases.
[102] *See* Ulman, *supra* note 97.
[103] Fagan, *supra* note 96, at 42.
[104] *Id.*
[105] Ulman, *supra* note 97.
[106] *Id.*
[107] *Id.*

of every ticket dollar we took in last year went across the ocean to Lloyds' for liability insurance . . . . That compares with about two cents 'a couple of years ago.'"[108] When the co-owner of Little Underhill Ski Bowl was asked by *The Wall Street Journal* if she planned to reopen the following ski season, she responded, "It all depends . . . on how the Vermont legislature resolves a major question that has focused the attention of ski-area operators from Maine to California on the Green Mountain state: Who is responsible for downhill skiing accidents?"[109]

IV. LEGISLATING THE ASSUMPTION OF RISK: THE NSAA, THE INSURANCE INDUSTRY, AND THE STATES

Ski area operators, insurance providers, and state tourism bureaus, each feeling newly vulnerable to tort claims brought by injured skiers, turned to legislatures to clarify the legally assumed risk of skiing. On June 30, 1977, just three weeks after the lower court decision in *Sunday*, the NSAA "circulated a model Ski Area Safety and Liability Act to aid state associations in drafting proposed legislation for their areas."[110] According to one NSAA executive, the goal of the act was to place "specific prohibitions on passengers and skiers [that would] go a long way towards alleviating the strict

[108] *Id.*
[109] *Id.* (internal quotation marks omitted).
[110] Farber, *supra* note 99, at 355 n.3.

liability interpretation that is increasingly being adopted by the Courts."[111] Just before the Vermont Supreme Court's ruling in *Sunday*, the Vermont legislature passed a ski safety statute, the first in the United States. It states that "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[112] The supreme court's ruling in the plaintiff's favor sent ski area operators and associations across the country back to the drawing board. They took the NSAA draft legislation to their state legislatures in an effort to "nullify *Sunday*'s precedent and re-establish[] the inherent danger law in skiing."[113] Within a few years, most ski states had passed legislation that imposed liability on skiers for the assumed risk of skiing, and by 1990 twenty-four ski states had passed "assumption of risk" ski safety statutes, all of which remain in force.[114] Today, "all but three states with any significant ski industry have adopted a form of ski safety

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[111] *Id.*
[112] VT. STAT. ANN. tit. 12, § 1037 (2002).
[113] JAMES H. CHALAT, Ski Law in the United States: A Practical Guide to Ski Accident Litigation (Apr. 2, 2005) (unpublished manuscript prepared for 3rd Annual Conference Recreation & Adventure Program Law & Liability, on file with DePaul Law Review) 11 (citing Farber, *supra* note 99, at 355 n.3 (1980)).
[114] Sanders & Gayner, *supra* note 35, at 131–32.

legislation that in some way limits the liability of ski area operators in ski cases."[115]

Although the statutes have a common goal, they take somewhat different forms.[116] Some seek to reaffirm the pre-*Sunday* standard by mandating that skiers assume all obvious and necessary risks inherent in the sport. Vermont's ski safety law, for example, reads, "Notwithstanding the provisions of [Vermont's comparative negligence statute], a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[117] Lest there be any ambiguity about the statute's intent, the legislative history makes clear that its goal is to limit ski area liability in order to keep the industry afloat:

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> Since 1951, the law relating to liability of operators of ski areas in connection with downhill skiing injuries has been perceived to be governed by the doctrine of volenti non fit injuria as set forth in the case of Wright v. Mt. Mansfield Lift, Inc. . . . . In 1977, in the case of *Sunday v. Stratton Corporation*, the Superior Court of Chittenden County . . . ruled that the defense of assumption of risk was inappropriate . . . .
> . . . . It is the purpose of this act . . . to state the policy of the state which governs the liability of operators of ski areas . . . by affirming the principles of law set forth in Wright v. Mt. Mansfield Lift, Inc. . . . which

[115] CHALAT, *supra* note 113, at 11.
[116] Much of this classification is taken from an incisive discussion of ski safety statutes by Sanders & Gayner, *supra* note 35, at 132.
[117] VT. STAT. ANN. tit. 12 § 1037 (2002).

> established that there are inherent dangers to be accepted by skiers as a matter of law.[118]

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Other states have gone a step further than Vermont by specifically articulating the inherent risks of skiing and barring recovery for injuries resulting from such risks. Utah's statute, for example, defines the inherent risks of skiing to include changing weather conditions, snowy or icy conditions, surface or subsurface conditions, variations or steepness in terrain, impact with lift towers, collisions with other skiers, participation in competitions or special events, and the failure of a skier to ski within the skier's own ability.[119] It goes on to state that "no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing."[120] Like Vermont's law, Utah's statute is accompanied by a statement of legislative intent that discusses the critical role that skiing has played in Utah's economy, notes the need to maintain reasonable insurance rates, and highlights the need to limit ski area operators' liability:

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> The Legislature finds that the sport of skiing . . . significantly contribut[es] to the economy of this state. It further finds that few insurance companies are willing to provide liability insurance protection to ski

[118] *Id.* (quoting 1977, No. 119 (Adj. Sess., § 2).
[119] UTAH CODE ANN. § 78B-4-402 (2008).
[120] *Id.* § 78B-4-403.

> area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, . . . to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.[121]

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A third approach to legislating the assumption of risk, exemplified by New York[122] and Colorado,[123] identifies both the duties of ski area operators and the duties of skiers. For example, Colorado's ski safety statute requires ski area operators to post a series of signs and notices with "concise, simple, and pertinent information," including the degree of difficulty of a certain trail, warnings of extreme or dangerous terrain, and notices of any man made structures that are not clearly visible to skiers.[124] Likewise, the Colorado law states that "[e]ach 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."[125]

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[121] *Id.* § 78B-4-401.
[122] *See* N.Y. LAB. LAW §§ 865–68 (McKinney 2002).
[123] COLO. REV. STAT. §§ 33-44-101 to 33-44-114 (2008).
[124] *Id.* §§ 33-44-106, 107.
[125] *Id.* § 33-44-109.

Although almost every ski state has a ski safety statute, California, despite its substantial ski industry, never adopted a ski safety statute. Instead, with the help of an aggressive litigation strategy by plaintiff lawyers and defense attorneys, California courts have crafted an approach to the assumption of risk doctrine that is based solely on the common law.[126] Yet, like in other states with ski safety statutes, the California courts have also been influenced by elected officials. Judges in California have also looked to the legislative codification of assumed risk in other jurisdictions, particularly Michigan, when deciding cases involving injuries on the slopes.[127]

V. FROM SERVICE ROADS TO BURIED ROCKS: SKI ACCIDENT LITIGATION IN COLORADO, VERMONT, AND CALIFORNIA

In the aftermath of the *Sunday* decision and the ensuing codification of assumed risk, disgruntled plaintiffs' lawyers attacked the ski safety statutes as nothing more than "non-duty, special interest, immunity legislation."[128] Ski industry representatives countered, describing the statutes as simply "codifying the share[d] responsibilities of the ski area and the skier" that had always existed

[126] Interview with John Fagan, June 6, 2008.
[127] *See infra* Part IV.C.
[128] CHALAT, *supra* note 113, at 11.

in the common law.[129] The industry maintained that by more clearly defining the duties of skiers, the statutes provide incentives to be more safety-conscious, thereby benefiting all parties. "For a long time, we tried to play down the risks because we thought we were discouraging entry into the sport," explained Joseph Kohler, president of Bristol Mountain, "[b]ut now the [NSAA] has created a skiers' responsibility code [along with its ski safety statute]."[130] The owner of Copper Mountain in Colorado made a similar claim: with the ski safety statutes reminding them that they cannot bring suit for inherent dangers, skiers will realize that "it pays to be in good condition and to ski carefully."[131]

Although lawyers for both plaintiffs and defendants vehemently disagreed on the merits of ski safety statutes, they shared a fundamental assumption: the statutes had successfully codified the assumption of risk, marking the end of an era of awards like those in *Sunday*. Like the lawmakers who had crafted the statutes, attorneys—as well as resort owners and operators—expected the ski statutes to enable defendants to prevail in trial court, either through motions for summary judgment or motions to dismiss. In fact, so-called ski safety legislation appeared to have so fundamentally altered the liability

[129] Fagan, *supra* note 96, at 42.
[130] Ulman, *supra* note 97. (internal quotations omitted).
[131] *Id.*

landscape that injured skiers had little motivation to sue, and tort lawyers who use contingency fee agreements lack a compelling financial incentive to come to their aid. In the months following the passage of the statutes, ebullient insurers and ski area operators seemed justifiably confident that the new statutes would keep them out of court.[132]

Perhaps not surprisingly, the operationalization of the assumption of risk statutes became considerably more complex than the parties predicted. Most importantly, expectations of protection for the industry[133] have proven to be unfounded. With each new case brought against a ski area, judges and juries engaged in a spirited debate about the facts of each particular accident to determine whether the risk was assumed by the individual skier.[134] At the same time, courts criticized legislative efforts to immunize ski areas, with judges clearly voicing their resentment against legislation that ignored the distinctive facts of individual lawsuits in order to provide immunity for ski areas.[135] The result is a rich, passionate, and highly

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[132] Conversation with John Fagan, May 5, 2008.
[133] Sanders & Gayner, *supra* note 35, at 134–35 (describing how the ski industry believes it has been "able to protect itself with a successful effort, led by its own attorneys, to have equitably protective legislation enacted throughout the country").
[134] *See infra* Part IV.D.
[135] *See, e.g.*, Estate of Frant v. Haystack Group Inc., 641 A.2d 765, 771 (Vt. 1994) (discussing how, despite assumption of risk legislation

varied collection of conflicts in which parties—who debate the appropriate allocation of responsibility for injuries suffered by skiers—clash over competing conceptions of assumed risk.[136] Critically, as the following case analysis reveals, there are clear differences between the approaches of the courts in Vermont, Colorado, and California. In Vermont, which denied recovery to skiers for decades and then changed course in *Sunday*, the courts occupy a middle ground, frequently imposing liability on plaintiffs but on occasion allowing them to recover.[137] Courts in Colorado have moved from a posture that initially appeared to greatly favor plaintiffs to one that is generally favorable to defendants. California, which lacks a codified assumption of risk ski statue, has been decidedly hostile to plaintiffs, embracing a liability regime that most closely approximates the type sought by defendant-friendly parties who aggressively and successfully influenced legislation elsewhere.

A. Vermont

Even before the Supreme Court of Vermont issued its opinion in *Sunday*, the legislature passed the first ski safety statute in the

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in Vermont, "[s]kiers should be deemed to assume only those skiing risks that the skiing industry is not reasonably required to prevent").

[136] *Id.*

[137] *See infra* Part IV.A.

United States.[138] Vermont's Sports Injury Statute, which came into effect in 1978, is short and straightforward, stating simply that "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[139] In the wake of the trial court's decision in *Sunday*, legislators had expressed concern that the only two ski area insurers that operated in the state might leave the market, which could cause the collapse of Vermont's ski industry.[140] The new law, they hoped, would protect ski area owners and operators from being sued, and it would enable them to win cases quickly through directed verdicts.[141] During the three decades since the passage of Vermont's Sports Injury Statute, however, the case law has been inconsistent.[142] While the courts in many instances have shielded defendants from liability, plaintiffs have recovered in some notable cases. In many of these

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[138] For a discussion of *Sunday*, see *supra* notes 88–109 and accompanying text.
[139] VT. STAT. ANN. tit. 12, § 1037 (2002).
[140] *See* Dillworth v. Gambardella, 970 F.2d 1113, 1117 (2d Cir. 1992) ("Following [*Sunday*], the two primary ski area insurers threatened to withdraw from Vermont. . . . [and a] groundswell built-up to restore the law protecting ski area operators to that which existed prior to the holding in *Sunday*.").
[141] *Id*. at 1118-19.
[142] *Compare* Green v. Sherburne Corp., 403 A.2d 278, 279–80 (Vt. 1979) (finding an unpadded utility pole to be an inherent risk of skiing) *with* Estate of Frant v. Haystack Group, Inc., 641 A.2d 765, 766 (finding that an unpadded wooden ski lift post was not an inherent risk of skiing and thus allowing for the possibility of recovery).

cases, courts have questioned the importance of the *Sunday* decision and the legislation that it inspired. [143]

Decided just before the Sports Injury Statute came into effect, *Green v. Sherburne Corp.* gave the Supreme Court of Vermont an opportunity to contain the furor unleashed by *Sunday*. The case was brought on behalf of nine-year-old Brett Green, who skied into an unpadded utility pole.[144] In its judgment for the defendant, the supreme court emphasized that *Sunday* did not impose on ski area owners or operators a "duty to warn concerning dangers inhering in the sport of skiing," nor did it impose a "duty to extinguish such dangers."[145] Seemingly backtracking from its earlier opinion in *Sunday*, the court rehabilitated the views expressed three decades earlier in *Wright*: skiers assume the obvious and necessary risks of skiing.

There are no published opinions involving ski accidents in Vermont during the 1980s, which may indicate that *Green*, along with the ski safety statute, suppressed potential claims against the ski industry. It is also possible that conflicting interpretations of the *Sunday* decision and the legislative response to that decision created a

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[143] *See* Nelson v. Snowbridge, 818 F. Supp. 80, 83 (D. Vt. 1993) ("Although the *Sunday* case appears at first glance to depart from the rules of *Wright* and *Mt. Mansfield*, in fact they differ only in result.").
[144] *See Green*, 403 A.2d at 279.
[145] *Id.*

climate of uncertainty for all parties and led them to settle rather than rely on the courts.[146] After thirteen arid years, a collision between two skiers at Stratton in 1992 brought attention once again to the allocation of responsibility for ski-related harm in Vermont.[147] And, as in earlier opinions, assumption of risk was at the core of the conflict.

Although *Dillworth v. Gambardella* involved a lawsuit brought by an expert skier whose leg was broken in a collision with another skier, the court's ruling once again discussed the nature of the risks inherent in skiing.[148] At the outset of its opinion, the court expressed ambivalence about the idea of assumed risk, noting its "obscure and complicated" nature, the "distinctly different legal theories to which it simultaneously refers," and the way in which it "bedevils the law because it is often used to express different and contradictory notions."[149] It then made two observations that have influenced subsequent litigation in Vermont. First, the court asserted that the Vermont Sports Injury Statute does not shield the ski industry from liability for personal injuries because saying that skiers assume the inherent risks of skiing "as a matter of law" leaves the question of

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[146] Unfortunately, we have been unable to obtain settlement data that would allow us to explore this possibility.
[147] Dillworth v. Gambardella, 970 F.2d 1113, 1113 (2d Cir. 1992).
[148] *Id.* at 1114–23
[149] *Id.* at 1115, 1118.

what counts as an inherent risk in the hands of the jury.[150] By failing to define inherent risks in the statute, it appears that the legislature made it extremely difficult for courts to direct verdicts for defendants. Second, the court argued that the violent reaction to *Sunday* was misplaced because "the only difference between *Wright* and *Sunday* is in their results, not in the principles of controlling law."[151] In other words, according to the court, the law of skiing in Vermont remains as stated in *Wright*—volenti non fit injuria—and neither the *Sunday* holding nor the Vermont legislature significantly altered its approach to assumed risk.[152]

Just one year later, *Nelson v. Snowbridge, Inc.* underscored the approach of *Dillworth*. Joanne Nelson, an expert skier, brought suit against Sugarbush Resort after she fell on a patch of ice, hit a tree, and sustained multiple injuries including a broken collarbone and clavicle, a fractured skull, crushed vertebra, and fractured ribs.[153]

Citing the legislative history that accompanied the Sports Injury Statute, the court emphasized that Vermont's legislation affirmed "the principles of law set forth in *Wright v. Mt. Mansfield Lift, Inc.* and *Leopold v. Okemo Mountain, Inc.* which established that

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[150] *Id*. at 1119–20.
[151] *Id.* at 1119.
[152] *Id.* at 1116.
[153] Nelson v. Snowbridge, 818 F. Supp. 80, 81 (D. Vt. 1993).

there are inherent dangers to be accepted by skiers as a matter of law."[154] Likewise, the court emphasized that *Sunday* did not establish a new rule of law, but instead differed from cases like *Wright* only in result.[155] Focusing on Nelson's accident, the court found the dangers she encountered both obvious and necessary.[156] In the words of the court, "Ice is both an obvious feature of skiing and a necessary one; despite exhaustive grooming efforts, ice still remains evident on at least some portion of most ski slopes in the East. . . . On a double black diamond trail, ice presents special difficulties, of which Nelson was also aware."[157] Unlike the *Sunday* court, which highlighted what ski area operators could do to eliminate risks and dangers to skiers, the *Nelson* court asked whether the danger that the plaintiff encountered was obvious and necessary, answered affirmatively, concluded that the plaintiff had thus assumed the risk, and found for the defendant.[158]

The Supreme Court of Vermont offered a more detailed analysis of the Sports Injury Statute in *Estate of Frant v. Haystack Group, Inc.*, which involved a ten-year-old boy, Martin Frant, who was injured when he skied into an unpadded wooden post that

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[154] *Id.* at 82. (quoting VT. STAT. ANN. tit. 12, § 1037 (2002)).
[155] *Id.* at 83.
[156] *Id.*
[157] *Id.*
[158] *Id.* at 83–84.

channeled skiers into lift lines.[159] The trial court reasoned that Vermont's ski legislation prevented recovery "as a matter of law because Frant accepted the 'obvious and necessary' risk posed by the corral post."[160] The Supreme Court of Vermont disagreed and held that the question of whether any given risk is obvious and necessary is a question of fact for a jury, not a question of law for a judge.[161] The fact that the legislature did not provide examples of "obvious and necessary" risks inherent in skiing when it drafted the Sports Injury Statute, according to the court, indicates the legislature's acknowledgment of the fluid nature of risks.[162] When *Wright* was decided, the court explained, skiers assumed the risk of colliding with snow-covered tree stumps because grooming techniques in 1949 did not enable resort operators to detect, remove, or warn skiers about such hazards. [163] By the time of Frant's accident, that was no longer the case. Summarizing its view, the court stated

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[159] 641 A.2d 765, 766 (Vt. 1994).
[160] *Id.*
[161] *Id.* (stating that what constitutes an "obvious and necessary" risk is "a threshold question of fact decided by the jury").
[162] *Id.* at 770 ("In drafting [the ski safety statute], the legislature avoided cataloguing fact-specific examples of 'obvious and necessary' risks . . . . [and] thereby recognized . . . that yesterday's necessary skiing risks tend to become, with the passage of time and advancement of technology, reasonably avoidable.").
[163] *Id.*

> We do not think the legislature's purpose in reasonably protecting the skiing industry is compromised by asking a jury to supply a contemporary sense of what constitutes an obvious or necessary risk. Skiers should be deemed to assume only those skiing risks that the skiing industry is not reasonably required to prevent.[164]

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In essence, the court deftly sidestepped the legislation, and reasserted the authority of Vermont's courts to determine liability for the harms resulting from skiing. Thanks to the vague language of the statute, two decades after its influential decision in *Sunday*, and in the shadow of state legislation that was clearly meant to limit the liability of ski area owners and operators, the Supreme Court of Vermont has made it clear that it will continue to balance the risk-taking behavior of skiers with the precautions taken by ski areas when apportioning liability for ski accidents. In doing so, it pushed back against the shield of liability that the ski industry believed it had obtained through the political process, and it revitalized the possibility of recovery, at least for some injured skiers.[165]

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[164] *Id.* at 771.

[165] In addition to the implied assumption of risk cases in Vermont, one case that highlights the continuing importance of assumption of risk in the context of skiing and other dangerous activities is *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995). This case involved a skilled skier who purchased a season pass to the Killington Ski Area and signed a form stating that he agreed to

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> freely accept and voluntarily assume the risks of injury or property damage and release Killington Ltd., its

> employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, actions or omissions of employees or agents of the ski area or from my participation in skiing at the area, accepting myself the full responsibility for any and all such damage or injury of any kind which may result.

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Id. at 796. To determine the effect of this waiver, the court looked to the leading case of Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445–46 (1963). According to *Tunkl*,

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> An agreement is invalid if it exhibits some or all of the following characteristics: [1.] It concerns a business of a type generally thought suitable for public regulation. [2.] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3.] The party holds [it]self out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4.] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [the party's] services. [5.] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6.] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents.

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Dalury, 670 A.2d at 796 (citing to *Tunkl*, 838 P.2d at 445–46). The Vermont Supreme Court concluded that it is contrary to public policy to enforce a liability waiver that prevents skiers from bringing claims against ski area owners and operators. In the court's words,

B. Colorado

Colorado judges and the Colorado state legislature have been sparring for three decades over the text of the Colorado Ski Safety Act of 1979. When setting forth the duties of skiers, the Colorado Act originally stated that "[e]ach skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects."[166] After the Act was passed, Colorado judges issued a number of pro-plaintiff decisions that were perceived by backers of the legislation as being directly at odds with the dictate of the statute.[167] In response, the legislature and the ski industry reconvened in 1990 to redraft and strengthen the assumption of risk language in the statute.[168] The post-amendment cases demonstrate how the courts have responded to the legislature's effort to more explicitly address assumption of risk.

"If defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries." *Id.* at 799. In the court's view, although the statute imposes the inherent risks of skiing on skiers, ski areas continue to have a duty to "warn of or correct dangers which in the exercise of reasonable prudence in the circumstances could have been foreseen and corrected." *Id.* at 800 (quoting *Frant*, 641 A.2d at 769(NEED PAGE #).

[166] COLO. REV. STAT. § 33-44-109(2) (2008).

[167] *See, e.g.*, Phillips v. Monarch Recreation Corp., 668 P.2d 982, 984–86 (Colo. Ct. App. 1983) (finding, despite the passage of the Ski Safety Act, that the ski area should have warned the plaintiff of the risk of his injury).

[168] 1990 Colo. Sess. Laws 1540.

Despite the 1990 statute's explicit language that skiers assume the risks inherent in skiing, Colorado's courts have remained surprisingly sympathetic to those who have suffered ski injuries. While the number of published ski injury cases is modest, they illustrate a pattern: courts often deny defendants' motions for summary judgment, even when doing so appears to contravene the language of the statute and the intent of the legislature. In sixteen out of twenty-eight cases, plaintiffs have either recovered damages or at least defeated summary judgment motions, even in cases involving injuries that resulted from risks that were likely considered "assumed" at the time the statute was enacted. In reaching those results, judges focused on whether particular risks are "inherent" to skiing or whether ski areas could eliminate them.[169] Frequently, they concluded that the risk could have been minimized or eliminated by the ski area.[170] Yet the statute retains some vitality: when courts find that a skier's injury resulted from an inherent risk, the defendant's summary judgment motion prevails.[171]

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[169] Courts also use terms such as "obvious" and "necessary" to describe a risk or danger as being "inherent" to the sport of skiing. *See, e.g.*, Rimkus v. Nw. Colo. Ski. Corp., 706 F.2d 1060, 1063 (10th Cir. 1983) (describing hazards that were "obvious" to the skier).
[170] *See, e.g.*, Phillips v. Monarch Recreation Corp., 668 P.2d 982, 984 (Colo. Ct. App. 1983).
[171] *See, e.g.*, Peck v. Vail Assocs, Inc. No. 94-1015, 1995 WL 18278, at *1 (10th Cir. Jan. 18, 1995).

In a case decided shortly after the passage of the 1979 Ski Safety Act, a skier sued for injuries that he sustained after he collided with a trail grooming machine ("sno-cat").[172] The Act states that "whenever maintenance equipment is being employed to maintain or groom any ski slope or trail while such trail is open to the public, a conspicuous notice to that effect shall be placed at or near the top of that slope or trail."[173] To determine whether the defendant was negligent in failing to post signs that warned skiers about the sno-cat, the court asked whether the risk posed by the sno-cat was inherent to the sport of skiing, or whether the ski area could have minimized or eliminated the injury.[174] It concluded that ski areas can—and should—warn "skiers that their path may be obstructed by heavy machinery."[175]

In another case decided the same year, a United States court of appeals sitting in Colorado struggled to identify the types of risks to be borne by skiers. After a jury returned a verdict for a skier who was injured when he hit a rock on a ski slope,[176] the defendant appealed, arguing that, while the Ski Safety Act requires ski areas "to mark

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[172] Phillips v. Monarch Recreation Corp., 668 P.2d 982, 984 (Colo. Ct. App. 1983).
[173] *Id.* (quoting COLO. REV. STAT. § 33-44-108 (1973 & Supp. 1982)).
[174] *Id.* at 985.
[175] *Id.*
[176] *Rimkus*, 706 F.2d at1061.

man-made obstacles on slopes that are not clearly visible in conditions of ordinary visibility,"[177] it does not require ski areas to mark non-man-made or natural objects, such as rocks.[178] Despite the statute's explicit language, the court held that in addition to warning skiers of man-made obstacles, ski areas should be required "to mark man-made obstacles . . . that are not clearly visible in conditions of ordinary visibility." The court thus confirmed the district court's verdict in favor of the plaintiff.[179] Once again, the court creatively interpreted the Ski Act in an effort to balance a skier's responsibility and a ski area's duty to eliminate unsafe conditions. In doing so, it concluded that even certain natural objects could be eliminated with due care and were thus not risks inherent to skiing.[180]

As the years passed, courts continued to engage in detailed analyses of inherent risks, and those who thought the Ski Safety Act insulated the industry from liability began to vocalize their disappointment.[181] Colorado Ski Country USA (CSC), the central lobbying organization for Colorado ski areas, criticized the courts for

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[177] *Id.* at 1067 (quoting COLO. REV. STAT. § 33-44-107(7) (1979)).
[178] *See Rimkus*, 706 F.2d at 1067.
[179] *Id.*
[180] *Id.*
[181] *See, e.g.*, Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 683 (Colo. 1985) (discussing the situations in which "a skier can ordinarily (use "ordinarily" otherwise ellipses)—use word ordinarily guard against potentially dangerous variations in terrain" and situations in which skiers are unable to do so.).

failing to understand that the Ski Safety Act granted blanket immunity to ski areas.[182] To remedy the situation, CSC presented the Colorado state legislature with a new bill and aggressively argued for its passage by noting that despite the 1979 statute, "multimillion-dollar judgments against ski resorts [continue to present] an economic burden for the industry."[183] In 1990, the Colorado legislature amended the Ski Safety Act.[184] The most significant alteration of the statute was an unequivocal "legislative declaration" about the assumption of risk:

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> The general assembly . . . finds that, despite the passage of the "Ski Safety Act of 1979," ski area operators of this state continue to be subjected to claims and litigation involving accidents which occur during the course of skiing, which claims and litigation and threat thereof unnecessarily increase Colorado ski area operators' costs. . . . [S]uch increased costs are due, in part, to confusion under the "Ski Safety Act of 1979" as to whether a skier accepts and assumes the dangers and risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the dangers and risks inherent in that sport, to establish as a matter of law that certain dangers and risks are inherent in that sport, and to provide that, as a matter of public policy, no

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[182] Jeffery A. Roberts, *Colo. Ski Industry Wins First Legal-Liability Battle First*, DENVER POST, Jan. 31, 1990; *see also* John Accola, *Ski Resort Liability*, ROCKY MOUNTAIN NEWS, Jan. 25, 1990

[183] Roberts, *supra* note 182; *see also* Accola, *supra* note 182("A 1982 ski accident in Aspen that resulted in a $7 million jury award is being used by Colorado ski resort operators to draw support for a new bill exempting them from liability for certain ski accidents.").

[184] 1990 Colo. Sess. Laws1540

> person engaged in that sport shall recover from a ski area operator for injuries resulting from those inherent dangers and risks.[185]

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With the amended statute, the Colorado legislature and the ski industry sent an unambiguous message: courts should carefully consider the consequences of imposing liability on ski area operators in cases involving injured skiers. And just in case a plaintiff managed to successfully navigate the barriers to recovery, the new Act includes a $1 million cap on damages for skiers.[186]

Colorado's amended Ski Safety Act caused considerable controversy and debate. Representative Scott McInnis, a Republican cosponsor of the bill, defended the legislation to *The Denver Post*: "The search for the deep pockets will come to an end with this bill . . . . This is a sport that sometimes has injuries associated with it . . . [skiers] should be careful."[187] In response, Representative Steve Ruddick, a Democrat who tried unsuccessfully to remove the damages cap and to add a provision that exempted people under eighteen years of age from the law,[188] warned that "if injured skiers are barred from suing to recover damages, they could become

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[185] *Id.*
[186] *Id.* at 1543.
[187] Jeffery A. Roberts, *House Supports Measure Barring Skiing Lawsuits*, DENVER POST, Mar. 22, 1990.
[188] *Id.*

dependent on government for medical care or other assistance," and questioned why "[w]e've decided that one industry needs charity from taxpayers."[189] *The Rocky Mountain News* also weighed in, publishing a powerful editorial in support of the bill: "Skiing is dangerous . . . dangerous enough to demand special care from those who venture onto the slopes. For most of us, of course, the pleasure of skiing easily outranks the risk. But it would be hypocrisy to pretend, should our luck run out, that we don't know the score."[190]

The conflict over the Ski Safety Act demonstrates how powerful actors have strategically mobilized around the assumption of risk doctrine to further their material interests. Unconcerned with the conceptual failings of the doctrine, they exploit its inherent ambiguities in an effort to structure judicial outcomes.[191] But the

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[189] *Id.*

[190] Editorial, *Skiers Should Assume the Sport's Inherent Risks*, ROCKY MOUNTAIN NEWS, Feb. 1, 1990, at 58; *accord* Joe Garner, *Lowered Liability Fails to Freeze Ski-Lift Prices*, ROCKY MOUNTAIN NEWS, July 20, 1990, at 10 (discussing the lack of a corresponding decline in the price of lift-tickets); Editorial, *Suing for Fun and Profit: Risky Business in Ski Country*, ROCKY MOUNTAIN NEWS, May 4, 1990, at 78 (arguing that the ski liability bill represents a stand against frivolous lawsuits).

[191] Parties on all sides of the issue undertook strategic mobilization in an effort to secure a favorable legal doctrine. John Sanki & John Accola, *Ski At Own Risk, Say Lawmakers; Measure Would Limit Liability of Resorts*, ROCKY MOUNTAIN NEWS, Jan. 31, 1990; John Accola, *Responsibility for Safety Debated: Skier vs. Ski Area*, ROCKY MOUNTAIN NEWS, Feb. 13, 1990. Had the plaintiffs' bar been better

Colorado courts have not been easily contained. Since the 1990 amendments, courts have continued to engage in a dialogue about the assumption of risk and the meaning of "inherent risks." More than half of the fifteen published post-amendment cases have been favorable to plaintiffs.[192]

The impact of the amended Ski Safety Act on the liability of ski resort owners and operators is illustrated by cases such as *Peck v. Vail Associates*, a 1995 case in which the plaintiff alleged that she suffered serious injuries because of the defendant's negligent placement of safety cones along the chairlift's exit ramp.[193] In keeping with the amended statute's emphasis on barring claims brought by plaintiffs who assume the inherent risks of skiing, the court focused its analysis on whether the risk that led to Peck's injury was "inherent," as defined in the Act.[194] Doing so led the court to conclude that despite the fact that she was hurt at the exit of the chair lift, the risk which led to her injury was "inherent," and thus, no recovery was forthcoming.

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positioned politically in Colorado, it may have been more successful in battling the ski industry.

[192] Of fifteen published cases since the Act was amended, eight were decided in favor of plaintiffs, and seven in favor of defendants. (Please INSERT citation, at least an "*e.g.*" cite).

[193] Peck v. Vail Assocs, Inc., No. 94-1015, 1995 WL 18278, at *1 (10th Cir. Jan. 18, 1995).

[194] *Id.*

But interpretation of the statue has also gone in the opposite direction. In *Graven v. Vail Associates*, an experienced skier fell on slushy snow and plunged forty to fifty feet into a steep unmarked ravine that ran adjacent to the run.[195] Graven claimed that his injuries were caused by the defendant's failure to warn him about the ravine.[196] The Colorado Supreme Court used the legislative history of the 1990 amendments to justify a narrow construction of the phrase "inherent dangers and risks of skiing."[197] It noted that the scope of the phrase "variations in steepness or terrain" was addressed during hearings before the House State Affairs Committee when a ski lobby representative stated, "[S]kiers encounter terrain changes, a trail turning to the right or left, or a trail dipping, and a skier going too fast out of control will fall, and instead of looking to himself will sue the ski areas."[198] The court distinguished the conditions encountered by the plaintiff from those considered by the legislature:

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> Skiing is a dangerous sport. Ordinary understanding tells us so, and the legislature has recognized that dangers inhere in the sport. Not all dangers that may be encountered on the ski slopes, however, are inherent and integral to the sport, and this determination cannot

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[195] 909 P.2d 514, 515 (Colo. 1995).
[196] *Id.*
[197] *Id.* at 519.
[198] *Id.* at 519 (citing *Hearings on S.B. 80 Before the H. State Affairs Comm.*, 57th Gen. Assembly, 2d Reg. Sess., (Mar. 13, 1990) Audio Tape No. 90-18.)).

> always be made as a matter of law. 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 . . . is essentially meaningless. Therefore, we do not construe [the Act] to include such a situation within the inherent dangers and risks of skiing as a matter of law.[199]

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In distinguishing the facts of *Graven* from the statute's explication of "inherent dangers," the court engaged in the type of analysis that legislators had hoped to rein in with their 1990 amendments. Jim Chalat, a prominent plaintiff's attorney in Colorado, describes *Graven* as significant because it enables some skiers to sue operators for injuries that result "not only from a ski area operator's breach of a specific duty set out in the Ski Act, but also from a danger or risk which is found to be not 'integral' to the sport" even though the risk appears to be defined as an "inherent" risk by the statute.[200] Because *Graven* held that the determination of inherent risks is not always a matter of law as determined by the Ski Act, but is

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[199] *Id.* at 520 (citations omitted).
[200] Chalat Hatten Law Offices, P.C., Ski Areas are Shaken by Ruling That Unnecessary Hazards Are Not Inherent Dangers, http://www.skilaw.com/jimcases-graven.html.

sometimes a matter of fact,[201] it gave attorneys like Chalat hope that they might be able to get their claims in front of juries even under the amended Act.[202]

Graven's approach to the assumed risk of skiing was strengthened three years later in *Rowan v. Vail Holdings, Inc.* In *Rowan*, the survivors of a skier who died after striking a picnic deck brought a wrongful death suit against the ski resort.[203] The court recognized that the Ski Act bars "any claim against any ski area operator for injury resulting from any of the inherent dangers and risks of skiing, and that the statute defines 'inherent risks and dangers of skiing to include impact with . . . man-made structures and their components."[204] But the *Graven* precedent, the court explained, meant that "the court must consider whether dangers and risks 'are an integral part of the sport of skiing.'"[205] The critical question, according to the court, is "whether a picnic deck . . . is an integral part of skiing, *i.e.*, whether the sport could not be undertaken without

[201] Graven, 909 P.2d at 520 ("[W]e do not construe section 33-44-103(3.5) to include such a situation within the inherent dangers and risks of skiing as a matter of law.").
[202] Chalat, *supra* note 200.
[203] 31 F. Supp. 2d 889, 892 (D. Colo. 1998).
[204] *Id.* at 902 (emphasis omitted) (quoting COLO. REV. STAT. §§ 33-44-112, 103(3.5)) (internal quotation marks omitted).
[205] *Rowan*, 31 F. Supp. 2d at 902 (citation omitted).

confronting that risk."[206] The court compared the picnic table to hydrants, signs, and the other objects that are listed as inherent risks in the Ski Act, and it found that the picnic table, in contrast to those other objects, is not essential to the operation of a ski area.[207] Further, the hazard of the picnic deck could have been easily eliminated with padding.[208] Following that reasoning, the court denied the defendant's motion for summary judgment.[209] Other cases in Colorado have continued to demonstrate the willingness of courts to allow plaintiffs to recover for their ski injuries.[210]

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[206] *Id.* at 903.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *See*, *e.g.*, Doering v. Copper Mountain, Inc., 259 F.3d 1202, 1213 (10th Cir. 2001) (finding that even plaintiffs harmed by inherent dangers may be able to recover). In what is now referred to as the "Doering Rule," the court stated that the jury must first inquire as to whether the ski area breached a statutory duty before looking into whether an inherent danger was implicated in the plaintiff's injury because if

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> a jury were to find that Copper Mountain violated [the Act] and these violations contributed to the injuries, the children's claims cannot be barred as an inherent danger or risk of skiing.
> . . . . Barring a skier's claim as an inherent danger . . . before determining whether a ski area operator violated [the Act] renders a ski area operator's statutory duties meaningless.

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Id.

Eleven years after the Colorado state legislature and ski industry lobby collaborated to pass a strengthened liability shielding statute, Colorado's courts have continued to engage in a dialogue about the assumption of risk doctrine, finding it questionable whether plaintiff skiers assumed certain risks even when the risks are defined as "inherent" under the Ski Safety Act. After the 1990 amendments made it clear that the Colorado Ski Safety Act was intended to codify the assumption of risk doctrine in order to protect the financial interests of the ski industry, courts have persisted in construing the statute in a manner that allows courts to engage in a detailed analysis of the assumption of risk when allocating liability for accidental harms on the slopes.

C. California

Unlike Vermont and Colorado, California does not have a ski safety statute. As a result, California's common law of torts has shaped the outcome of litigation over accidents on the slopes. Perhaps surprisingly, in the absence of the codification of assumed risk and without a clear statement from the legislature about the importance of shielding the ski industry from liability, California courts have been more vigorous in shielding the ski industry from liability than those in either Vermont or Colorado.

In 1990, for example, an intermediate skier lost control on a slope in the San Bernadino Mountains, collided with a tree, and sustained permanent brain damage.[211] According to the defendant, the skier, Vicki Danieley, had assumed "any and all" risks of skiing, including the "inherent, obvious and unavoidable risks of participating in the sport."[212] The challenge, as the court recognized, was to determine whether the risk was "inherent" or whether the defendant had a duty to warn skiers about the tree or remove the tree.[213]

The only relevant California precedent was a 1962 case, the first published California opinion about a ski accident.[214] The court deemed that the facts from that case were significantly different, and it therefore looked beyond California to see how other states handled cases involving accidents on the slopes.[215] Coincidentally, a 1988 Michigan case had facts paralleling those of *Danieley*—there too a skier was badly injured after colliding with a tree—and was resolved

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[211] *See* Danieley v. Goldmine Ski Assocs., 266 Cal. Rptr. 749, 750–51 (Cal. Ct. App. 1990).
[212] *Id.* at 751, 755.
[213] *Id.* at 753.
[214] *See* McDaniel v. Dowell, 26 Cal. Rptr. 140, 142 (Cal. Ct. App. 1962). The plaintiff was knocked down by another skier while waiting for the towrope to take her to the top of the mountain, and she brought a claim against both the skier and the towrope operator. *Id.*
[215] *Danieley*, 266 Cal. Rptr. at 756 ("Michigan is one such state. . . .").

with reference to Michigan's Ski Area Safety Act.[216] According to the California court, Michigan's law "purports to reflect the pre-existing common law, [so] we regard its statutory pronouncements as persuasive authority for what the common law in this subject-matter area should be in California."[217] Central among those pronouncements was the Michigan Act's enumeration of the inherent risks of skiing: "injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment."[218] Interestingly, the *Danieley* court was untroubled by the state-by-state nature of the common law of torts. Opining that the Michigan statute clearly stated that the risk of colliding with a tree was inherent to the sport and was thus assumed by the plaintiff, the *Danieley* court upheld summary judgment for the defendant.[219] Since the *Danieley* holding in 1990, California courts have regularly

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[216] *See* Schmitz v. Cannonsburg Skiing Corp., 428 N.W.2d 742, 743–44 (Mich. Ct. App. 1988) (citing MICH COMP. Laws § 408.342(2)).
[217] *Danieley*, 266 Cal. Rptr. at 756.
[218] MICH. COMP. LAWS § 408.342(2) (1962).
[219] *Danieley*, 266 Cal. Rptr. at 756–60.

referenced the Michigan legislature's codified definition of inherent risks when deciding the merits of claims brought by injured skiers.[220]

California's most important case on skiing and the assumption of risk doctrine—*Knight v. Jewett*—involved touch football.[221] In that case a young woman was injured in a collision with another player who, she claimed, ignored her request to play less aggressively.[222] Noting that "the assumption of risk doctrine has long caused confusion both in definition and application," the court turned to skiing in an effort to clarify the doctrine's meaning.[223] In his plurality opinion, Justice Ronald George stated that although a slope with moguls is more dangerous than one without moguls, "the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them."[224] But he made clear that not every risk is inherent by stating that ski resort owners and operators

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> have a duty to use due care not to increase the risks to a participant over and above those inherent in the

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[220] Handelman v. Mammoth Mtn, 19 Cal.Rptr.2d 126, 131 (1993); Wattenbarger v. Cincinnati Reds, Inc., 28 Cal. App. 4th 746, 752 (1994) (does not involve skiing, but cites to Michigan statute); Van Dyke v. S.K.I. Ltd, 67 Cal.App.4th 1310, 1316 (1998); Souza v. Squaw Valley, 138 Cal.App.4th 262, 267 (2006).
[221] *See* Knight v. Jewett, 834 P.2d 696, 697 (Cal. 1992).
[222] *Id.*
[223] *Id.* at 699, 705.
[224] *Id.* at 708.

> sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.[225]

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Not all of the justices concurred with Justice George's view. Justice Stanley Mosk, for example, declared that "[t]he time has come to eliminate implied assumption of risk."[226] But in cases involving injured skiers, California's courts have continued to use the lens of assumed risk, and they have regularly invoked the *Knight* court's language for the principle that there is a duty to not increase the risks of skiing beyond those that are inherent.[227] Just two years after *Knight*, a skier was severely injured after he skied into a ravine that was filled with boulders, and he brought a cause of action alleging that the resort negligently maintained and operated its facilities.[228] Relying on *Knight* for the proposition that "there is no duty of care to

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[225] *Id.*

[226] *Id.* at 712 (Mosk, J., concurring in part and dissenting in part). Justice Mosk later reiterated the plea he made in his *Knight* concurrence in *Cheong v. Antablin*, 946 P.2d 817, 823 (Cal. 1997) (Mosk, J., concurring) ("I would discard the confusing, and unnecessary, terminology of 'primary assumption of risk' and analyze the issue as a question of 'duty.'").

[227] Solis v. Kirkwood Resort Co. 94 Cal.App.4th 354 (2001); Vine v. Bear Valley Ski Co., 118 Cal.App.4th 577 (2004).

[228] *See* O'Donoghue v. Bear Mountain Ski Resort, 35 Cal. Rptr. 2d 467, 468 (Cal. Ct. App. 1994).

protect a sports participant against risks of injury that are inherent in the sport itself," the court held that "hazardous natural forest obstacles" are inherent risks of skiing, and affirmed summary judgment in favor of the defendant.[229]

In the following year, 1995, a skier who collided with a ski lift tower and sustained multiple fractures and partial paralysis claimed that the metal tower was inadequately padded.[230] Relying on *Knight*'s approach to assumed risk and the list of inherent risks described in *Danieley* and the Michigan Ski Act,[231] the court in *Connelly v. Mammoth Mountain Ski Area*, found that "collisions with ski lift towers and their components" constitute an inherent risk, and it concluded that the defendant, Mammoth Mountain, had no duty to protect the plaintiff from such an accident.[232] The court was unmoved by the plaintiff's claim that the defendant's failure to adequately pad the lift tower increased the inherent risks of skiing, declaring that it knew of "no relevant legal authority in California . . . requiring a ski area operator to pad its ski lift towers."[233]

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[229] *Id.* at 468–69 (emphasis omitted).
[230] *See* Connelly v. Mammoth Mountain Ski Area, 45 Cal. Rptr. 2d 855, 857 (Cal. Ct. App. 1995).
[231] For a discussion of *Danieley*, see *supra* notes 211–218 and accompanying text.
[232] *Connelly*, 45 Cal. Rptr. 2d at 857–58 (emphasis omitted).
[233] *Connelly*, 45 Cal. Rptr. 2d at 858.

Similarly, in *Souza v. Squaw Valley Ski Corp*., an eight-year-old intermediate skier suffered facial lacerations, shattered teeth, and a fractured palate after she lost her balance and skied into the unpadded nozzle of a snowmaking hydrant.[234] Once again, the court invoked *Knight* to justify analyzing the case under the primary assumption of risk doctrine, and it referenced the catalogue of inherent risks spelled out in Michigan's ski safety statute. Rejecting the claim that Squaw Valley had acted carelessly by not padding the hydrant's nozzle, the court held that it was "not aware of any relevant legal authority, and [had] not been directed to any, requiring a ski area operator to pad its plainly visible snowmaking equipment."[235]

Even in California, however, courts have imposed some limits on the risks assumed by skiers. In *Van Dyke v. S.K.I. Ltd.*, a case involving a plaintiff who fractured his spine and was rendered paraplegic after he collided with a directional signpost (which ironically said "be aware—ski with care") on a slope at Bear Valley, the trial court granted the defendant summary judgment because "the risk of hitting something like this, whether it's a signpost or a pole supporting a ski lift or snow making equipment or trees, is a risk of

[234] Duane Morris, LLP., Sample List of Trials & Summary Judgment.
[235] *Id.* at 393.

injury that's inherent in the sport."[236] However, the appellate court distinguished cases that involved ski towers from those that involve other objects, noting that the signpost in this case was difficult for the plaintiff and other skiers to see.[237] The owners and operators of ski areas, the court concluded, have a duty to ensure that signs on the slopes are plainly visible to all skiers.[238] On remand, however, the paraplegic plaintiff, who was an attorney, was also unable to prevail.[239] After the plaintiff refused a settlement offer of $500,000 and insisted on a payment of over $3 million, the case was retried, resulting in a verdict for the defense.[240]

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D. Comparing Liability for Ski Accidents in Vermont, Colorado, and California

In each of the three states in which we have examined legal conflicts over ski accidents, disputes are adjudicated by using the language of assumed and inherent risk. The ski industry has an important economic presence in all of the states because they employ

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[236] Van Dyke v. S.K.I. Ltd., 79 Cal. Rptr. 2d 775, 777 & n.5 (Cal. Ct. App. 1998).
[237] *Id.* at 777, 779 ("Van Dyke could not see the face of the sign because he approached it at about a 90 degree angle. None of Van Dyke's ski companions saw the sign. Indeed, two of them missed the crossover trail.").
[238] *Id.* at 779.
[239] Duane Morris, LLP., Sample List of Trials & Summary Judgments.
[240] *Premises Liability: Accident at Ski Area Defense Verdict: Parapalegia*, PERSONAL INJURY VERDICT REVIEWS, Oct. 25, 2000.

large numbers of people, attract tourists, and generate significant tax revenue. Through a successful lobbying effort that aimed to minimize if not eliminate resort liability for the injuries suffered by skiers, the ski industry secured legislation in Vermont and Colorado that codified the assumption of risk doctrine. Why no such legislation exists in California is unclear. Some attorneys have suggested that the industry was concerned about a backlash from the courts if it pressed for legislation, and others have speculated that the California legislature was less receptive to ski safety legislation than were those in Vermont and Colorado.[241]

Even in the two states with protective legislation—Colorado and Vermont—the approaches of the state legislatures diverge. In Vermont, the legislature passed an extremely general law stating that "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[242] Lawmakers in Colorado tried a similar approach in 1979, but dissatisfaction with the results of cases reaching the courts caused the ski industry to pressure legislators for a far more specific law, which resulted in a series of amendments in 1990.[243] The amended law is prefaced by a statement of concern about litigation

[241] Interview with John Fagan, June 6, 2008.
[242] VT. STAT. ANN. tit. 12, § 1037 (2002).
[243] *See supra* text accompanying notes 166–169.

that "unnecessarily increase[s] Colorado ski area operators' costs,"[244] and it goes on to catalogue the inherent dangers of skiing, including the following:

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> changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, and machine-made snow; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, extreme terrain, and trees, or other natural objects, and collisions with such natural objects; impact with lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components; variations in steepness or terrain, whether natural or as a result of slope design, snowmaking or grooming operations, including but not limited to roads, freestyle terrain, jumps, and catwalks or other terrain modifications; collisions with other skiers; and the failure of skiers to ski within their own abilities.[245]

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Consequently, Vermont, Colorado, and California share the common law doctrine of assumed risk, and in each there is an economically important and politically powerful industry seeking to avoid liability for ski accidents. Yet industry presence has not had a uniform impact. Instead, legislatures have taken different approaches in Vermont and Colorado, and they have remained on the sidelines in California. Case outcomes have been similarly varied. Defendants have fared reasonably well in Vermont, but recent cases that

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[244] 1990 Colo. Sess. Laws 1540.
[245] COLO. REV. STAT. § 33-44-103(3.5) (2006).

underscore ski industry duties raise the possibility that courts will begin apportioning liability in ski cases, in conformance with the state's comparative fault statute. Colorado's courts, despite the legislature's two efforts to limit the liability of ski resorts, have continued to play the role of the spoiler by engaging in detailed textual analysis of the meaning of "inherent risks" and reaching results that are surprisingly favorable to plaintiffs. California is perhaps the biggest anomaly: even in the absence of legislation that codifies the assumption of risk and shields the ski industry from liability, the courts have regularly sided with the industry at the expense of injured skiers.

Why have the California courts, in the absence of a statute that codifyies the assumption or risk doctrine, embraced a common law approach to assumed risk that is more favorable to defendants than the most narrowly tailored legislation? And why have courts in states with legislation intended to shield the ski industry from liability thwarted the intent of the legislature and continued to award damages to at least some injured skiers? There are of course many differences between the states, and thus many possible comparative explanations.

The general political profile of each state, for example, might affect the apportionment of tort liability in ski-related claims. Although Vermont, Colorado, and California are all "blue" states,

California is the most liberal, and Colorado is the most conservative of the three.[246] To the extent that liberal values are equated with pro-plaintiff outcomes, therefore, generalized political ideology does little to explain the outcome of the ski cases discussed herein. Perhaps a more fine-grained examination of state politics would reveal that ski claims are more often brought to California courts that are located in the state's most conservative areas, while claims in Vermont and Colorado are more often heard by those states' most liberal locales.[247] Our data are not sufficiently specific to enable such an analysis, but we are skeptical of the possibility of explaining the different outcomes of assumed risk cases with such crude political measures.

In addition to the political configuration of the states, various other factors are worth examining to determine whether they have an impact on the outcome of ski-related assumed risk cases. For example, the relative size and power of the ski industry, and its willingness to expend resources in an effort to influence the legal process by, for example, making contributions to judicial election campaigns, could alter the outcomes of ski cases. So too could the

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[246] *See Statistical Modeling, Causal Inference, and Social Science: Ranking States by the Liberalism/Conservatism of Their Voters*, http://www.stat.columbia.edu/~cook/movabletype/archives/2008/06/ranking_states.html (June 30, 2008, 24:53 EST).

[247] Possible to show that cases are, in fact, heard in CA's more conservative pockets and VT and CO's more liberal pockets?

structure of the state court system; for example, because Vermont has no intermediate appellate courts, the supreme court hears final appeals from all cases originating in trial courts, whereas both California and Colorado have intermediate appellate courts that insulate the supreme courts from a wide range of appeals. Different approaches to the apportionment of liability may also come into play. In Vermont, plaintiffs can recover even if they are no more than fifty percent at fault, while in Colorado only plaintiffs who are less at fault than defendants can recover.[248] California has a pure comparative fault rule which enables plaintiffs to recover even if they are more than fifty percent at fault.[249] Yet none of these factors appears to explain the pattern of liability that we have observed.

One explanation that finds some support in our research is that legislative involvement appears to be counterproductive. That is, when the legislature stays out of the way, the courts are inclined to treat skiers as having assumed the risk of injury on the slopes.[250] But when the legislature codifies assumed risk in an effort to shape

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[248] Mathisen, Wickert & Lehrer, S.C., Contributory Negligence/Comparative Fault Laws, http://www.mwl-law.com/PracticeAreas/Contributory-Neglegence.asp (listing states with contributory and comparative negligence laws).

[249] Li v. Yellow Cab Co., 13 Cal.3d 804, 808-09 (1975).

[250] *See, e.g.* Souza v. Squaw Valley Ski Corp., 41 Cal. Rptr. 3d 389, 391–92 (Cal. Ct. App. 2006).

judicial rulings about ski accident cases, the courts are not easily contained.[251] Judges on the California bench, for example, do not need to push back against the action of the legislature because the latter has not sought to legislate the outcomes of ski accident claims. By contrast, the existence of ski safety legislation may serve as an invitation for courts in Colorado to grapple with the imperfect efforts of legislatures to codify the assumption of risk doctrine, and in doing so they find gaps in the laws that enable plaintiff recovery. This tendency may be exacerbated by judges who consider legislative involvement with the assumption of risk doctrine an inappropriate political intrusion into the common law and who want to reestablish what they believe to be the court's legitimate province. In short, without legislative codification of assumed risk shadowing and shaping their decisions, judges in California have not felt the need to 'fight' the legislation in their opinions. Ironically, the result is that the California courts are approaching the assumption of risk in ski cases just as the ski safety statutes in other states envision judicial action and outcomes.

Yet, the apparent lack of legislation in California is compromised by two factors. First, California's courts have regularly looked to

[251] *See, e.g.*, Rimkus v. Nw. Colo. Ski Corp., 706 F.2d 1060, 1061 (10th Cir. 1983).

Michigan's Ski Area Safety Act for guidance on the assumed risk of skiing. In doing so, the courts have benefited from legislation that details the risks of skiing and the duties of skiers and ski resorts without feeling constrained by local elected officials. Second, although the California state legislature has not enacted a ski safety statute, local government has, at times, stepped in to fill at least some of the gap. The most significant example is in Placer County, located in and around the Sierra Nevada Mountains, which is perhaps the most economically important ski region in the state. Sugar Bowl, the first ski area in the county, opened in 1939, followed by Squaw Valley, Alpine Meadows, Homewood Mountain Resort, Royal Gorge, and Northstar-at-Tahoe.[252] Together, these six resorts have close to one hundred ski lifts and have hosted prestigious international ski events like the 1960 Winter Olympics.[253] In 1984, the Placer County Board of Supervisors enacted a Skier Responsibility Code that echoes state ski safety statutes by providing that "[a]ny individual or group of individuals who engage in the sport of skiing of any type . . . shall assume and accept the inherent risks of such activities insofar as the risks are reasonably obvious, foreseeable or necessary to the

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[252] SACRAMENTO REG'L RESEARCH INST., PLACER COUNTY ECONOMIC AND DEMOGRAPHIC PROFILE 2008, at 112 fig. 79 (Feb. 2008), *available at* http://www.placer.ca.gov/News/2008/March/DemoProfile.aspx.
[253] *Id.* at 112 & fig. 79.

activities."[254] The Code goes on to specify the inherent risks of skiing, as well as to spell out certain duties of skiers.[255] Whatever the legal effect of Placer County's ordinance—the California Supreme Court has not resolved either the question of whether Placer County's Skier Responsibility Code establishes a local duty that gives rise to tort liability or whether the creation of local duties means that similar acts of plaintiffs in different parts of the state would lead to different results in tort claims—it is clear that politics is as much a part of assumed risk in California as elsewhere.[256]

VI. CONCLUSION

There is a powerful intuitive appeal to the idea that individuals who engage in risky activities should bear the costs of their accidents, and tort law has long captured that idea in the doctrine of assumption of risk. One need look no further than the legal conflict over smoking for an example of how the American public has internalized the view that risk-takers are responsible for the consequences of their actions. Smokers suffering from lung cancer and other diseases began to sue tobacco companies in the 1950s, relying heavily on a series of epidemiological studies that demonstrated a link between smoking

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[254] Placer County Code §§ 9.28.010, 9.28.030 (2009).
[255] *Id.* §§ 9.28.040 to 9.28.060.
[256] See Cheong v. Antablin, 946 P.2d 817, 824–26, 828 (Cal. 1997), in which the justices staked out a range of differing positions on the impact of a local ordinance on California's common law of torts.

and various health problems.[257] As evidence of a causal relationship between smoking and cancer became increasingly indisputable, sick smokers continued to bring claims of both negligence and strict liability against the tobacco industry.[258] Even more smokers filed cases with the courts after internal company documents, which indicated that the industry had intentionally misled the public about the dangers of smoking, were made public.[259] Yet, for over forty years after the first cases were filed, plaintiffs failed to recover, and their success was only marginally improved when the scientific basis of their claims was strengthened and the malfeasance of the industry came to light.[260] Although there are a number of reasons for the failure of smokers' tort claims, among the most important is that juries consistently found that smokers made an informed decision to smoke, and as a result, they were responsible for the consequences of their decision. Having "assumed the risk" of smoking, in other words, smokers gave up the opportunity of recovering for their injuries.

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[257] *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856–57 (1992).
[258] *Id.*
[259] *See* Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176, 185 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).
[260] *Id.* at 176, 185.

Although juries have consistently found arguments based on the idea of the assumed risk of smoking to be compelling, many tort law scholars and a number of influential judges have been sharply critical of the doctrine of assumption of risk.[261] Like Justice Felix Frankfurter more than a half-century ago, leading contemporary tort law thinkers continue to write lengthy, doctrinally sophisticated pieces that pick apart the idea of assumed risk and advocate that it be eliminated from the lexicon of tort law. The result is a curious misfit between the "common sense" of the public, as expressed by juries, and the views of learned experts like scholars and judges.

In this Article, we have stepped back from the polarized doctrinal debate over the assumption of risk doctrine and focused on the sociology and politics of assumed risk. Skiing is an ideal window through which to examine the assumption of risk doctrine because determining liability for ski accidents requires a complex balancing of three key factors: the knowledge that skiing is dangerous and will inevitably cause some injuries; the deeply ingrained individualism of American legal culture that calls for skiers to be accountable for their own actions; and the tort goals of deterrence and risk-spreading, which counsel that resort owners and operators should have an

[261] *See supra* notes 45–109 and accompanying text.

incentive to offer skiers a reasonably safe skiing environment.[262] Litigation over ski accidents in Vermont, Colorado, and California illustrates how the language of assumed risk is used as shorthand to discuss the clash between individual freedom to engage in risky activities and the general duty of care that requires people to act reasonably so as to reduce accidental harm to others. The wide-ranging and contradictory case holdings in the three states make clear that there is no recipe for how that balance should be struck. Regardless of its flaws, the language of assumed risk captures the tension between individual freedom, personal responsibility, and the prevention of unexpected risk, and neither scholars nor courts have found an alternative formulation that has wide appeal. In sum, the doctrine of assumed risk has withstood decades of criticism because of its resonance with society—as seen in jury decisions—and of its utility to courts and lawyers. Despite compelling and consistent academic critique, the assumption of risk doctrine remains firmly embedded in tort law, and there is no sign that it is likely to disappear.

The interaction of tort doctrine with social values and beliefs, however, is only part of the reason why the assumption of risk doctrine has remained a critical part of tort law. Equally important,

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[262] *See generally* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985) (discussing the high degree to which Americans have developed expectations of recompense for whatever injuries they suffer).

we argue, is the impact of political and economic interests on the determination of the types of risks that are assumed and the allocation of accident costs when such risks lead to injuries. The ski industry and the insurance industry remain critically interested in how the cost of ski accidents is apportioned, and together they have lobbied aggressively for state ski safety statutes that shield the industry from liability.[263] From one perspective, they have been extremely successful: every major ski state except California has passed some form of legislation that protects ski resort owners and operators from personal injury liability. Yet, as we demonstrated in our discussion of ski accident cases in Vermont, Colorado, and California, courts have varied widely in their interpretation of the statutes. And despite the absence of protective legislation, the California courts have been the least accommodating to plaintiffs. In short, what may appear to be a jurisprudential and doctrinal debate over the assumption of risk is in fact powerfully shaped by the political, economic, and cultural climate in which the debate has taken place.

It should not be surprising that legal doctrines—in this case, the assumption of risk doctrine—are a product not simply of jurisprudential considerations but also of economics, politics, and social values. Generations of legal sociologists have made that point

[263] *See supra* notes 122–256 and accompanying text.

with great success in the legal academy.[264] When it comes to the assumption of risk doctrine, however, it seems that their message has been forgotten. With almost no exceptions, the literature on assumed risk is doctrinal, and even scholars who often highlight the political or sociological dimensions of tort doctrine have been drawn into a more conventional, technical debate. In this Article, we have argued that it is more useful to analyze how the assumption of risk doctrine operates in practice than to parse hypotheticals. The scholarly community may distain the phrase "assumption of risk," but it needs to examine carefully how and when attorneys for defendants and plaintiffs invoke the assumed risk doctrine, the ways in which judges and juries use the concept to justify their rulings, and the reasons why politicians codify the assumption of risk doctrine in legislation. Not doing so threatens to make tort scholars secondary players in an important and ongoing conversation about the allocation of the cost of accidents in a wide range of so-called risky activities.

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[264] *See, e.g.*, LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., 1995).