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RECREATIONAL INJURIES & INHERENT RISKS: WYOMING'S RECREATION SAFETY ACT

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I. INTRODUCTION

Recreational activities, from skiing, white water rafting and mountain climbing to mountain biking or bronc riding, involve inherent risks that provide the challenge and excitement enticing individuals to participate. How should the responsibility for recreational risks be allocated between the participant and the provider? Does the answer change if the recreational activities are important to the economy of the state where an injury occurs? These are some of the questions that have troubled judges, juries and legislatures for many years, especially in the context of downhill skiing injuries.

Under the common law, the *"volenti non fit injuria"*[1] doctrine prescribed that a recreational activity provider owed no duty to protect a participant from injuries resulting from the inherent risks of the particular sport.[2] As the law evolved, however, courts gradually

1. "He who consents cannot receive an injury." BLACK'S LAW DICTIONARY 1746 (4th ed. 1968).

2. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929). Judge Cardozo held:

> *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 antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of like fate, with whatever damage to his body might ensue from such a fall. *The timorous may stay at home.* (Emphasis added).

Id. at 173. Judge Cardozo's opinion is based upon the doctrine of primary assumption of risk and an English case, Cruden v. Fentham, 170 Eng. Rep. 496 (Esp. 1799).

In Wright v. Mt. Mansfield Lift, Inc., this doctrine was applied to the recreation industry in the skiing context. 96 F. Supp. 786 (D. Vt. 1951). *Wright* was the first case to hold that in the recreation industry, a skier could not recover for injuries caused by the "inherent dangers" of the sport. The *Wright* court, applying the doctrine of *volenti non fit injuria, found* Mt. Mansfield had no duty to protect the plaintiff from a snow covered stump, an inherent danger of the sport. *Id.* at 791. The district court directed a verdict for defendants. *Id.* at 792.

See also Arthur B. Ferguson, Jr., *Allocation of the Risks of Skiing. A Call for the Reapplication of Fundamental Common Law Principles,* 67 DENV. U. L. REV. 165, 189 note 142 (1990) [hereinafter Ferguson], for examples of cases utilizing the inherent risk doctrine in the recreational context.

increased the scope of a recreation provider's legal duty.[3] Furthermore, most state legislatures enacted comparative negligence laws.[4] As a result, primary and secondary assumption of risk were often mistakenly lumped together, severely limiting the effective use of a duty analysis to prevent recovery against recreation providers in appropriate circumstances.[5] Instead a legal duty was almost presumed, the inherent risk doctrine was largely ignored, and assumption of risk was simply viewed as a "factor" in a judge or jury's comparative fault determination.[6] The timorous need no longer stay at home.[7]

Fear of rising insurance costs and large jury verdicts forced the nation's ski industry to look aggressively at legislation.[8] Wyoming,

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3. *See infra* notes 43-90 and accompanying text.

4. Wisconsin was the first state to adopt comparative negligence laws in 1963, with other states following closely thereafter. WIS. STAT. ANN. § 895.045 (1983). Wyoming passed its modified comparative negligence scheme in 1973, *see* Wyo. STAT. § 1-1-109 (Supp. 1992). *See* further discussion of the interaction between the doctrine of primary assumption of risk and comparative negligence, *infra* notes 91-96 and accompanying text.

5. Comparative negligence technically should have no impact upon the doctrine of primary assumption of risk. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 496-97 (5th ed. 1984) [hereinafter Keeton et. al.). "[A]ssumption of risk in this [primary] form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff." *Id. See also* notes 91-96 and accompanying text.

Even prior to the advent of comparative negligence laws, the primary assumption of risk doctrine was oftentimes viewed as an assumption of risk defense. Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). Viewed as secondary assumption of risk, or contributory negligence, the plaintiff's conduct is seen as a defense to a given breach of duty by defendant. *Id. See also infra* notes 31-40 and accompanying text.

6. Eg. Mannhard v. Clear Creek Skiing Corporation, 682 P.2d 64 (Colo.Ct.App. 1984) (plaintiff's decedent killed in avalanche triggered by entering out-of-bounds area, with jury finding both skier and operator 50% negligent and awarding damages); Rosen v. LTV Recreational Development, Inc., 569 F.2d. 1117, 1121 (10th Cit. 1978)(plaintiff seriously injured when collision with skier hurled him into metal pole on ski slope, with judge affirming jury finding defendant 100% negligent and awarding plaintiff $200,000). In neither *Mannhard* nor *Rosen* did the court determine, or submit to the jury, the issue of whether or not the risk was inherent. *Id.*

In Sunday v. Stratton, the plaintiff was rendered a quadriplegic when he allegedly tripped over some snow covered brush. 390 A.2d 398 (Vt. 1978). The Supreme Court of Vermont affirmed the superior court's entry of a jury verdict attributing 100% negligence to the ski area and awarding the plaintiff $1,500,000. This case sent a wave of panic through the recreation industry, particularly the ski industry. *See supra* note 2 and *infra* notes 64-73 and accompanying text.

7. While in *Murphy,* Judge Cardozo warned the timorous to stay at home, *(see supra* note 2) the *Sunday* decision sent this new message. 390 A.2d at 398. Ferguson, *supra* note 2 at 171 and Carl H. Lisman, *Ski Injury Liability,* 43 U. Co. L. RV. 307, 315 (1972) [hereinafter Lisman].

8. *Abominable Snow Suits* was the title of a lead article in TIME, January 16, 1978 at 60. In the TIME article, a representative of Kendall Insurance Company decried the possibility of skyrocketing insurance rates or the unavailability of ski area liability insurance sometime in the future if the courts continued to follow the ruling of *Sunday.* The United States ski industry undertook a nationwide effort to reduce exposure to suits arising out of inherent risk injuries. See Michael J. Farrow, *Ski Operators and Skiers-Responsibility and Liability,* 14 NEW ENG. L. REv. 260, 268 & n.68 (1978) [hereinafter Farrow].

along with a cast of other states, moved to enact legislation attempting to redefine and codify the various duties and liabilities of participants and providers involved in recreational activities.[9] The sentiment was strong in many states like Wyoming, where recreation had become an important sector of declining state economies.[10]

The popular sport of skiing has been the focus of most of these types of legislative enactments and has generated a substantial amount of case law.[11] Therefore, this article will focus specifically on the sport of skiing in examining the evolution of the inherent risk doctrine and the circumstances which led to the perceived need for legislation to better define the law.[12]

The insurance crisis did ensue. For analyses of the causes and affects of the insurance crisis, *see generally:* Henry J. Reske, *Was There A Liability Crisis? A.B.A* JRNL., January 1989; Franklin W. Nutter, *The Insurance Wars, The Battle Over McCarran Ferguson,* A.B.A, THE BRIEF, Vol. 18, No. 2 Winter 1989; Kenneth S. Abraham, *The Causes of the Insurance Crisis,* THE ACADEMY OF POLITICAL SCIENCE, NEW DIRECTIONS IN LIABILITY LAW, Vol. 37, No. 1, 1988; 1. William Berry, *The Great Insurance Fallout,* SKI, January, 1989 at 45-51*; Taking a Dip in the Insurance Shark Tank,* SKI AREA MANAGEMENT, Summer, 1988 at 12; George J. Church, *Sorry America Your Insurance Has Been Canceled - Those Dreaded Words Echo With Numbing Frequency In An America Well On Its Way To Insuring Itself Into A Silly, Shuddering Halt,* TIME, March 24, 1986 at 16.

9. Wyoming Recreational Safety Act, Wyo. STAT. §§ 1-1-121 to 123 (Supp. 1991); *See also,* Snow Safety Act, ALASKA STAT. § 09.65.135 (1965 & Supp. 1991); Ski Safety and Liability Act, COLO. REV. STAT. §§ 33-44-101 to 114 (1984 & Supp. 1991); Passenger Tramways, CONN. GEN. STAT. §§ 29-201 to 214 (1991); Responsibilities and Liabilities of Skiers & Ski Area Operators, IDAHO CODE §§ 6-1101 to 1109 (1979 & Supp. 1992); Skiers' and Tramway Passengers' Responsibilities, ME. REV. STAT. ANN. tit. 26, § 488 to 490 (1964); Recreational Tramways (ski operators and skiers responsibilities and liability), MASS. GEN. LAWS ANN. ch. 143, §§ 71H to 71Q (1981 & Supp. 1991); Ski Area Safety Act, MICH. STAT. ANN. §§ 18.483(l) to (21) (1986 & Supp. 1992); Skier's Assumption of Responsibility, MONT. CODE ANN. §§ 232-731 to 737 (1991); Skier Safety Act, NEV. REV. STAT. §§ 455A.010 to .190 (1991); Skiers, Ski Area and Passenger Tramway Safety, N.H. REV. STAT. ANN. §§ 225-A:1 to 26 (1989 & Supp. 1991); Skiing, N.J. STAT. ANN. §§ 5:13-1 to 11 (1982 & Supp. 1992); Ski Safety Act, N.M. STAT. ANN. §§ 24-15-1 to 14 (1978 & Supp. 1991); Safety in Skiing Act, N.Y. LABOR LAw §§ 865-868 (1988); Actions Relating to Skier Safety and Skiing Accidents, N.C. GEN. STAT. §§ 99C-I to 5 (1985); Skiing Responsibility Act, N.D. CENT. CODE §§ 53-09-01 to 11 (1989); Skiing Safety, OHIO REV. CODE ANN. §§ 4169.01 (1989 & Supp. 1991); Skiing Activities, OR. REV. STAT. §§ 30.970 to 990 (1991); Comparative Negligence, PA. CONS. STAT. 42 § 7102 (1982 & Supp. 1992); Responsibility and Liability of Ski Operators and Skiers, R.I. GEN LAWS §§ 41-8-1 to 4 (1990); Ski Area Safety and Liability, TENN. CODE ANN. §§ 68-48-101 to 107 (1987 & Supp. 1991); Passenger Tramways, Inherent Risk of Skiing, UTAH CODE ANN. §§ 7827-51 to 58 (1992); VT. STAT. ANN. tit. 12, § 1037 (1973 & Supp. 1991); Skiing and Commercial Ski Activity, WASH. REV. CODE ANN. §§ 70.117.010 to 117.040 (1992); Ski Responsibility Act, W. VA. CODE §§ 20-3A-1 to 8 (1989 & Supp. 1992); Participation in Recreational Activities, WIS. STAT. ANN. § 895.525 (1991).

10. In the late 1970's, the Arab oil embargo contributed to creating an oil and gas boom in Wyoming. That boom was turning to bust in the mid 1980's. The agricultural and livestock industries also suffered general downturns. Natural beauty, recreation, wildlife and the related travel and tourism industries were perceived as less affected by these cycles and were quickly gaining strength as major economic forces. In 1985, tourism was the second largest revenue source for the state bringing in revenues of about $800 million with agriculture at about $600 million and the assessed value of minerals produced at about $7 billion. In 1989 tourism produced revenues of about $1.5 billion and provided about 30,000 full time jobs. Recreation and tourism is clearly a relatively stable and growing industry. DEPARTMENT OF ADMINISTRATION AND INFORMATION, WYOMING DATA HANDBOOK (1989).

11. *See supra* note 9; *infra* note 12.

12. *See infra* notes 43-90 and accompanying text. The Wyoming Supreme Court has not analyzed

This article will then focus specifically on Wyoming's statutory enactment, the Recreation Safety Act (the "Act").[13] The Wyoming Supreme Court has not yet interpreted this statute.[14] This article will therefore explore the meaning and intended scope of the Act and its necessary interaction with Wyoming statutory and common law.[15]

This article will then focus on the pros and cons of enacting this particular type of legislation versus variations adopted by other states.[16] Finally, the article will propose an analytical framework, incorporating both common law principles and social policy, within which the judiciary can effectively utilize the Act to assist in defining the scope of duties/responsibilities in this increasingly important segment of Wyoming's economy.[17]

11. BACKGROUND

The sport of skiing has generated a large amount of case law in the recreational tort area, and is the focus of the majority of states' "inherent risk" legislation.[18] This case law therefore provides an appropriate focus for examining the history of the inherent risk doctrine and its necessary interaction with premises liability law.

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the primary assumption of risk doctrine in the context of the inherent risks of skiing or any other recreational activity. However, the court has extensively analyzed the primary assumption of risk doctrine in the context of the obvious danger rule. *See,* O'Donnell v. City of Casper, 696 P.2d 1278, 1281-84 (Wyo. 1985). The inherent risk doctrine and obvious danger rule are both primary assumption of risk concepts. The striking similarity between the two doctrines provides a good vantage point from which to view how the Wyoming Supreme Court might have analyzed the inherent risk doctrine prior to legislative enactment. *See infra* notes 97-109 and accompanying text. *But see infra* note 97, (obvious danger rule is a premises liability doctrine and inherent risk doctrine can apply either in or out of the premises liability context).

13. *See infra* note 133. The Act should be distinguished from Wyoming's Recreational Use Statute codified at Wyo. STAT. §§ 34-19-101-06 (1989). Like other states' recreational use statutes, the Wyoming version limits a land possessor's duty to individuals who come upon the land for recreational purposes. *Id. See infra* notes 194-210 and accompanying text for a discussion of the interaction between the Act and the Recreational Use Statute. *See also* Michael K. Davis, *Landowner Liability Under the Wyoming Recreational Use Statute, 15* LAND & WATER L. REV. 649 (1980)[hereinafter Davis], for a thorough discussion of this statute.

14. *But see* Judge Johnson's unpublished opinion in Johnson v. United States, C.A. No. C89-0220J (on appeal, 949 F.2d 332 (10th Cir. 1991)). That case involved a hiker death in Grand Teton National Park, occurring prior to the effective date of the Recreational Safety Act. Judge Johnson granted summary judgment for the United States on other grounds, but noted in dictum that: "Wyoming Law now bars law suits for injuries and death arising from similar incidents occurring after June 1989." The Judge then quoted § 1-1-123(a) of the Act in footnote 2 of his opinion. *Id.*

15. For a discussion of the Act and Wyoming's Comparative Negligence Laws, *see infra* notes 170-179 and accompanying text. For a discussion of the Act's interaction with common law premises liability, the Recreational Use Statute and the Skier Responsibility Statute, *see infra* notes 180-215 and accompanying text.

16. *See infra* notes 235-240 and accompanying text.

17. *See infra* notes 224-234 and accompanying text.

18. *See supra* note 9. Wyoming, Vermont and Wisconsin are the only states which have adopted legislation covering all recreational sports; *see infra* note 121.

A. Premises Liability and Inherent Dangers

Downhill skiing necessarily involves the use of outdoor premises. As a result, ski law has interphased with premises liability law throughout its history. In *Wright v. Mt. Mansfield,* the Vermont Supreme Court was the first court to officially adopt the inherent risk doctrine in ski cases.[19] However, the court adopted the inherent risk doctrine within the context of premises liability law. The court noted that the defendant ski area owed plaintiff invitees a duty to advise them "of any dangers which reasonable prudence would have foreseen and corrected."[20] The court found that, under the doctrine of *volenti non fit injuria,* the defendant's duty did not extend to warning plaintiffs of the dangers inherent in the sport, in this case a snow covered stump:[21]

> The plaintiff, in hitting the snow covered stump as she claims to have hit, was merely accepting a danger that inheres in the sport of skiing. To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these mutations of nature and requires it to warn the public against such.

In essence, the court held that Mt. Mansfield had fulfilled its duty of ordinary care to plaintiff invitee, and that such duty did not extend to protecting plaintiff from the risks inherent in the sport.[22]

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19. 96 F. Supp. 786 (D. Vt. 1951).
20. *Id.* at 791.
21. *Id.*
22. The court described in detail the nature of skiing's inherent risks:

> Skiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn spots and other manner of skier created hazards.

Wright, 96 F. Supp. at 791.

The traditional classifications for those using another's land are that of invitee, licensee or trespasser.[23] A possessor of land[24] must exercise reasonable care with respect to an invitee.[25] The possessor has a duty to make the land safe for entry, including the duty to inspect the land, and make any repairs or warnings reasonably prudent under the circumstances.[26] Having paid a fee for use of the ski area, the participant is most often classified as an invitee.[27] Following the Wright case, many courts continued to invoke the inherent risk doctrine within the parameters of the ski operator's duty to an invitee.[28]

B. Primary vs. Secondary Assumption of Risk

Beginning with *Wright and Murphy,* courts have associated the inherent risk doctrine with "assumption of risk." The *Wright* court held: "[V]olenti 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."[29] The court employed the primary assumption of risk doctrine to find that, as a matter of law, Mt. Mansfield owed no

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23. RESTATEMENT (SECOND) OF TORTS §§ 329 to 331 (1965). An invitee can be either a public invitee or a business visitor. In either case, the invitee has an express invitation to remain on the premises. A licensee is one only entitled to remain on the premises because of the possessor's consent. A trespasser is one who enters upon the premises without the possessor's consent. *Id. See also,* Yalowizer v. Husky Oil Co., 629 P.2d 465, 467 (Wyo. 1981). Many states, such as California, have overruled these traditional classifications and adopted a reasonable man standard; the landowner has a duty of reasonable care to all who enter upon his property. See, Rowland v. Christian, 443 P.2d 561 (Cal. 1968). In *Rowland,* the court noted that the party's status might have some bearing on liability, but would not be determinative. *Id.* at 568. Wyoming has retained the traditional classifications. *See, Yalowizer,* wherein the Wyoming Supreme Court discusses the *Rowland* rule and refuses to adopt a reasonable man standard. *Yalowizer,* 629 P.2d at 465.

24. Possessor of land is defined to include a person who is or has been in possession of the land with "intent to control it." RESTATEMENT (SECOND) OF TORTS § 328E (1965).

25. *Id.* § 343 and cmt. b.

26. *Id.* § 343 and cmt. b. Wyoming generally follows the Restatement position regarding duties owed to invitees. See, Radosevich v. Board of County Commissioners, 776 P.2d 747, 749 (Wyo. 1989); McKee v. Pacific Power & Light, 417 P.2d 426, 429 (Wyo. 1966). However, the Wyoming Supreme Court has rejected the Restatement position regarding duties owed to licensees. Under Wyoming law, a possessor owes a licensee and a trespasser a duty only to refrain from willful or wanton injury. See, Holland v. Weyher/Livsey Constructors, Inc., 651 F. Supp. 409, 415-16 (D. Wyo. 1987); Yalowizer, 629 P.2d at 466, 469-70; Maher v. City of Casper, 219 P.2d 125, 127 (Wyo. 1950). *Compare* RESTATEMENT (SECOND) OF TORTS § 342 (1965) (additional duty of possessor of land to exercise reasonable care to licensee to warn of or make safe any known or reasonably discoverable dangers). *See infra* notes 183-93 and accompanying text for a discussion of the Act's interaction with Wyoming premises liability law.

27. *See, e.g.,* Codd v. Stevens Pass, Inc., 725 P.2d 1008, 1010 (Wash. 1986) and cases *cited infra* notes 43-90 and accompanying text.

28. *See, e.g.,* Sunday v. Stratton, 390 A.2d 398, 402 (Vt. 1978) (Duty to invitee to give warning of reasonably discoverable hidden danger); Burke v. Ski America, Inc., 940 F.2d 95, 97 (4th Cir. 1991) (Duty to invitee only if no inherent danger and danger of premises not obvious); Daniely v. Goldmine Ski Associates, Inc., 266 Cal. Rptr. 749 (1990) (Duty to invitee does not extend to obvious dangers); and cases cited *infra* notes 43-90 and accompanying text.

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

legal duty to plaintiff for injuries which resulted from risks inherent in the sport.[30]

Following *Wright,* the term "assumption of risk" has repeatedly been used in reference to the inherent risk doctrine. This usage has resulted in a varied and inconsistent application of the doctrine. Therefore it is important to identify the relationship between these concepts and how they have been applied in the context of skiing litigation.

Assumption of risk is most often referred to as a "defense" to an action for negligence. A plaintiff presents a prima facie case of negligence[31], and defendant responds with the affirmative defense that plaintiff assumed the risk of injury. Defendant then has the burden of proving the elements of the assumption of risk defense.[32] This "secondary assumption of risk" is a form of contributory negligence and a defense to an established breach of duty.[33] The determination of the presence or absence of assumption of risk/contributory negligence is a *question of fact* for the trier of fact.[34]

Primary assumption of risk, although called "assumption of risk," has historically not been a defense,[35]

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30. *Id.* Although this was not clearly expressed in the opinion, a commentator notes that this was precisely the basis of the court's decision:

> The court in *Wright* did not find the area operator negligent. Since assumption of risk in its secondary sense is an affirmative defense invoked only after the negligence of defendant has been established, the court could not have applied the doctrine of secondary assumption of risk.

Id. Robert C. Manby, *Assumption of Risk after Sunday v. Stratton Corporation: The Vermont Sports Injury Liability Statute and Injured Skiers,* 3 VT. L. REV. 139. (1978). One commentator noted that "[a] careful reading of the court's authority, *Murphy v. Steeplechase Amusement Co.* . . . suggests that it is the negation of any duty rather than the assumption of risk which is conclusive." Lisman, *supra,* note 7 at 316.

31. The elements of a cause of action in negligence are: (1) a legal duty, (2) breach of the legal duty, (3) proximate cause and 4) damages. Pine Creek Canal No. I v. Stadler, 685 P.2d 13, 16 (Wyo. 1984). Plaintiff has the burden of proving the elements of his prima facie case. *Id. See also,* RESTATEMENT (SECOND) OF TORTS § 328A (1965).

32. The elements of the classic defense are that plaintiff voluntarily encountered the risk with knowledge and appreciation of the danger. Prosser, *supra note* 5, § 68 at 486-87.

33. Meistrich v. Casino Area Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). Prior to the advent of comparative negligence laws the successful application of the defense of assumption of risk completely barred plaintiff's ability to recover. Following the enactment of comparative negligence laws, the assumption of risk defense was merged into contributory negligence, allowing a comparison of fault. Keeton et. al., *supra note* 5 at 496; *infra notes* 91-96. (Express assumption of risk, wherein the plaintiff agrees in writing or otherwise to relieve defendant of any duty owed is excluded from this discussion. See RESTATEMENT (SECOND) OF TORTS § 496B (1965), for an explanation of that doctrine.

34. Keeton et. al., *supra note* 5 at 455. Wyoming follows this rule: "contributory negligence and assumption of risk can become questions of law in only the clearest of cases and are usually jury questions." Anderson v. Schulz, 527 P.2d 151, 152-53 (Wyo. 1974).

35. Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence,* 8 HARV. L. REV. 457, 458-59 (1895). Warren notes that the maxim "Volenti non fit injuria" is "strictly not a defence, but a rule of law regarding a plaintiff's conduct which forms a bar to a suit brought by him ... [it] is really proof of no basis to a right of action." *Accord:* FOWLER F. HARPER ET AL., THE LAW OF TORTS § 21.0 at 189 & note 2, Vol. 4 (1986).

> In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering it. *Volenti non fit injuria.*[36]

In *Meistrich v. Casino Arena Attractions, Inc.*, the New Jersey Supreme Court succinctly outlined the confusion which has surrounded the assumption of risk doctrine:[37]

> In one sense (sometimes called its "primary" sense) it is an alternate expression for the proposition that *defendant was not negligent, i.e. either owed no duty or did not breach the duty owed.* In its other sense (sometimes called "secondary"), assumption of risk is an affirmative defense to an established breach of duty.[38]

Unlike the defense of secondary assumption of risk, the determination of the presence or absence of a duty (primary assumption of risk) is a *question of law* for the court.[39] Two different legal concepts but born of the same label-hence the hopeless confusion.[40]

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36. James Fleming, Jr., *Assumption of Risk,* 61 YALE L.J. 141 (1952) (emphasis added).

37. 155 A.2d at 93 (N.J. 1959).

38. *Id.* (emphasis added). These distinctions developed in the law of master and servant.

The master was not liable to the servant in negligence for damages resulting from inherent risks. Therefore, the servant must prove, as part of his prima facie case, the duty owed; or, that damages resulted from something other than an inherent risk. In this form, it was not a defense. However, if the servant proved his prima facie case, the master could then assert assumption of risk as a defense, urging that the servant assumed the risk despite the master's negligence. The burden of proof was then upon the master to prove the elements of this defense. *Id.* at 93. *See also Barnette v. Doyle,* for a discussion of *volenti non fit injuria* in the master/servant context. 622 P.2d 1349, 1356-59 (Wyo. 1981).

39. Although plaintiff must present facts giving rise to the existence of a legal duty, it is the court's function to determine, as a matter of law, whether those facts ultimately give rise to a legal duty. RESTATEMENT (SECOND) OF TORTS § 328 A-B (1965). Wyoming adheres to these principles. *See, eg.,* MacKrell v. Bell H2S Safety, 795 P.2d 776, 779 (Wyo. 1990); Maxted v. Pacific Car & Foundry Co., 527 P.2d 832, 835 (Wyo. 1974).

40. In *Meistrich,* the court noted that in its primary sense, assumption of risk is a duty analysis with the burden on plaintiff to demonstrate the existence of a legal duty. Historically, however, if plaintiff proved his prima facie case, defendant would assert assumption of risk as an affirmative defense. "Thus two utterly distinct thoughts bore the same label with inevitable confusion." Meistrich v. Casino Arena Attractions Inc., 155 A.2d 90, 93 (N.J. 1959), *citing* Martin v. Des Moines Edison Light Co., 106 N.W. 359, 363 (1906). The *Meistrich* court concluded that the burden of proof under the primary assumption of risk doctrine should remain with the plaintiff to demonstrate the existence of a legal duty. The court held that the defense of assumption of risk is merely a phase of contributory negligence and hence, the burden of proof as to this defense should rest with defendant. *Id.*

Modern text writers agree; *See* FOWLER F. HARPER ET AL., THE LAW OF TORTS, § 21.1 (1956); RESTATEMENT (SECOND) OF TORTS § 496G cmt. b & c (1965); Manby, *supra* note 30 at 138. Some have suggested that the term "assumption of risk" simply be abandoned, leaving the court with the concepts of negligence and contributory negligence: "[e]xperience ... indicates the term "assumption of risk" is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it."

Because of the confusion surrounding "primary assumption of risk", the authors will try to avoid, where possible, any reference to "assumption of risk" when discussing the inherent risk doctrine. Furthermore, the terms *"volenti non fit injuria,"* " primary assumption of risk," and "inherent risk doctrine" are all interrelated concepts.[41] Volenti non fit injuria is a primary assumption of risk doctrine that employs inherent risk analysis to determine the presence or absence of a legal duty.[42] Therefore, to avoid further confusion, this concept will be referred to throughout this article as the "inherent risk doctrine."

C. Post Wright Case Law

Against this muddled backdrop the *Wright*[43] court had applied the inherent risk doctrine to downhill skiing. If plaintiff's injuries were a result of an inherent risk of the sport, the ski operator owed plaintiff no legal duty, and thus could not be found negligent.[44] The Wright court connected the absence of a legal duty directly to the presence of inherent risks resulting in injury. As skiing liability law evolved however, some courts strayed from this analysis. Courts began examining the operator's duty separately from the presence or absence of

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McGrath v. American Cyanamid Co., 196 A.2d 238 (1963); *see also* James Fleming, Jr., *Assumption of Risk: Unhappy Reincarnation,* 78 YALE L.J. 185, 186-187 and n.11 (1968-69); Keeton, et al., *supra note* 5, § 68 at 493 and note 36.

See also, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68 (1943). Justice Frankfurter noted in a concurring opinion that:

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

Id.

See also Manby, supra note 30 at 128, 136.

41. *See supra* notes 2; 31-40 and accompanying text.

42. *Id. See also supra* note 12; *infra* notes 97-109 and accompanying text for a discussion of the obvious danger rule, another primary assumption of risk doctrine.

43. 96 F. Supp. 7.86, 791 (D. Vt. 1951).

44. Paige Bigelow, *Ski Resort Liability for Negligence Under Utah's Inherent Risks of Skiing Statute, UTAH* E. REV, Vol. I of 1992, 311, 314 (1992); K. Feuerhelm et al., *From Wright to Sunday and Beyond. Is the Law Keeping up with the Skiers?,* UTAH L. REV, Vol. 1985, 885, 886 (1985); Wendy A. Faber, *Utah's Inherent Risks of Skiing Act. Avalanche from Capitol Hill,* UTAH L. REV, Vol. 1980, 355, 358 & note 24 (1980); Manby states it another way,

> [w]hen a court bars recovery by an injured skier, declaring that the injured person "assumed the risk," what is really stated is that the defendant area operator fulfilled the required duty of ordinary care. This is to be distinguished from saying that the injured skier assumed the risk of the operator's negligence, for the injured skier has never consented to relieve the operator of his legal duty of ordinary care. It is simply that the proximate cause of the injury was not a breach of any duty owed by the defendant, but rather a danger inherent in the sport, not within the ambit of the operator's reasonable control.

Manby, *supra* note 30 at 139.

inherent risks or confusing the application of the doctrines of primary and secondary assumption of risk.[45]

In Kaufman v. State, the New York Court of Claims granted defendant operator summary judgment, aligning its holding with *Wright.*[46] In *Kaufman,* plaintiff, an expert skier, was injured when he fell on a rocky bare spot at defendant's ski area.[47] The court recognized the operator's duty to exercise reasonable care for its invitee and to warn him of "reasonably unforeseeable danger involving unreasonable risks, of which the owner has knowledge."[48] The court cited both *Wright and Murphy* for their espousal of the inherent risk doctrine and found that the proximate cause of the injury was not a breach of the operator's duty.[49]

In *Marietta v. Cliff's Ridge, Inc.,*[50] the Michigan Supreme Court affirmed the court of appeals' decision for re-entry of a jury verdict in plaintiff's favor. In *Marietta,* plaintiff ski racer was severely injured when he struck a sapling pole gate marker.[51] The court, emphasizing an operator's duty to his invitee, held that there was sufficient evidence before the jury to find that the duty extended to the use of the safest material available to construct the marker.[52] However, the majority did not apply the inherent risk doctrine.[53]

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45. *See* cases cited *infra,* notes 46-90 and accompanying text.

In a negligence action, it is the plaintiff's initial burden to present evidence of a duty owed: i.e. that his injury was not caused by an inherent risk. Therefore, the elements of the classic *defense* of assumption of risk (consent, knowledge and appreciation) should not be at issue. (*See supra* notes 31-40 and accompanying text). In fact, such concepts are largely implied because of plaintiff's consent to take part in the sport. *See, Wright v. Mt. Mansfield Lift, Inc.,* 96 F. Supp. 786, 791 (D.Vt. 1951); Sunday v. Stratton, 390 A.2d 398, 403-04 (Vt. 1978); RESTATEMENT (SECOND) OF TORTS § 496G crnts. b & c (1965); Bigelow, *supra* note 44 at 315; Betty van der Smissen, *Legal Liability and Risk Management for Public and Private Entities* Vol. I at 237, 243 (1990).

The Wright court did not contemplate that plaintiff had actual knowledge or appreciated the dangers of that specific snow covered stump. However, because defendant has the burden to prove the presence of these three elements under the defense of assumption of risk (Keeton, et W., *supra note* 5 at 484 & 486) and the doctrines of primary and secondary assumption of risk have been so confused, some courts and commentators suggest that such elements must be proven present at the inherent risk duty analysis stage. See Abigail Holman Harkins, A *Guide to Judicial Interpretation of Maine's Ski Liability Statute: 26 M.R.S.A. 488,* ME. BAR J., Nov. 1991 344, 350; Rosen v. LTV Recreational Development, 569 F.2d 1117, 1121 (10th Cir. 1978); Smith v. Seven Springs Farm, Inc., 716 F.2d 1002, 1009 (Ct. Ap. Pa. 1983).

46. 172 N.Y.S.2d 276 (Ct.Cl.N.Y. 1958).

47. *Id.* at 278.

48. *Id.* at 282.

49. *Id.* at 285. The court noted that if the operator had made specific representations about the snow conditions on the run, it might have been found to have breached its duty. *Id.* at 282. The court fell short of holding that the bare spot was an inherent risk of skiing or that the proximate cause of the injury was an inherent risk; however, this can be inferred from a reading of the opinion.

50. 174 N.W.2d 164 (1969), *affd,* 189 N.W.2d 208 (1971).

5 1. Id. at 209.

52. Id. at 210.

53. Id. at 210-11.

Justice Black argued in his dissent that the lower court missed one major step when it failed to identify whether the operator owed a legal duty through the application of the inherent risk doctrine before submitting the case to a jury:

> As for the defendant's pleaded affirmative defenses, it may and should be said that the evidence gave rise to no question of contributory negligence, and no question of assumption of risk. *Each of these defenses is available-if at all-when and only when a submissible case of actionable negligence has been made out.* No such case was made out here. The action instead is controlled by an old legal maxim, *"volenti non fit injuria"* (he who consents cannot receive an injury).[54]

Justice Black cited the Kaufman court's decision to dismiss plaintiff's claim based upon the inherent risk doctrine as applied by the courts *in Murphy and Wright.*[55] Black reasoned plaintiff's injuries were a result of an inherent risk of the sport, and that plaintiff had therefore failed to establish the existence of a legal duty.[56]

In Leopold v. Okemo Mountain,[57] plaintiff's decedent was killed when he hit an unpadded lift tower on the slope. The Vermont Federal Court affirmed its holding in *Wright*, granting judgment for the defendant.[58] The court held that the tower was obvious and necessary and an inherent risk of the sport.[59]

However, the court strayed from *Wright* when it injected an analysis of the elements of the defense of secondary assumption of risk into the inherent risk doctrine.[60] The court took the "obvious and necessary" language of *Wright* and emphasized plaintiff's actual knowledge and appreciation of the dangers of the unpadded lift towers, and his decision to proceed voluntarily, despite the danger.[61] The factors the court examined were in fact the *elements* of the defense of secondary assumption of risk.[62] Had the court truly dovetailed with *Wright,* plaintiff's *actual* knowledge would not have mattered.[63]

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54. *Id.* at 218 (emphasis added.)
55. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929); *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786 (D. Vt. 1951).
56. Kaufman v. State, 172 N.Y.S.2d 276 (1958).
57. 420 F. Supp. 781 (D.Vt. 1976).
58. *Id.* at 788.
59. *Id.* at 787.
60. *Id.* at 786-87.
61. *Id.* at 786-787.
62. *Id.* at 786-88; *see also supra* notes 32 and 45.

In the landmark case of *Sunday v. Stratton Corp.*,[64] the Vermont Supreme Court affirmed a jury verdict awarding $1,500,000 to plaintiff for serious injuries received when he fell on a groomed cat track.[65] The court acknowledged the inherent risk doctrine as articulated in *Murphy/Wright,* noting that it involves an analysis of the scope of the operator's duty in the first instance.[66] The court articulated that a defendant is not liable for injuries resulting from inherent risks because the injuries result from something the defendant had no duty to "extinguish or warn about."[67] However, the court refused to hold that the snow covered brush before it could be considered an inherent risk.[68] The court held that Stratton's express representations[69] about the condition of its slopes expanded its duty to invitees to an obligation to protect plaintiff from the covered brush:

> While skiers fall, as a matter of common knowledge, that does not make every fall a danger inherent in the sport. If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. *But where the evidence indicates existence or assumption of duty and its breach, that risk is not one "assumed" by the plaintiff . . . .*[70]

Essentially, the court would not allow Stratton to argue that the presence of brush was an inherent risk where it had expressly assumed a duty to keep the trails free from brush.[71]

The Sunday decision was viewed by many as the death knell to the inherent risk doctrine. This view was buttressed by the court's

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63. In *Wright,* the snow covered stump was a latent danger. It was irrelevant that plaintiff had no actual knowledge of the stump. The stump was objectively "obvious" to anyone who chose to participate in the sport, and therefore qualified as an obvious and necessary inherent danger. Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 791 (D.Vt. 1951). *Accord, Dill*worth v. Gambardella, 776 F. Supp. 170 (D. Vt. 1991).

64. 390 A.2d 398 (Vt. 1978).

65. *Id.* at 400.

66. *Id.* at 401-02.

67. *Id*. at 403.

68. *Id.* at 402. The court stated:

> Nor do we subscribe to the theory that the brush here in question is such an inherent danger, given defendant's unchallenged testimony, the basis for its whole defense, that its modern methods of care have made such a growth, within the travelled trail, impossible.

Id.

69. *Id.* at 401-403. The court noted that:

> At the time of the accident some 52 ski patrolmen were on duty, plus a trail crew charged with checking for hazards. At least 17 pieces of heavy equipment were available for use, plus other transportation. Prior to 1974, Stratton had widely advertised its world-wide reputation for trail maintenance, "meticulous grooming" and "top quality cover."

Id.

70. *Id.* at 403.

71. *Id.* at 401-03.

announcement that "the timorous need no longer stay at home."[72] Operators were gravely concerned that post-*Sunday,* they would be viewed as insurers of safety, thus threatening their continued existence.[73]

The court's holding in *Blair v. Mt. Hood*[74] further illustrates the continued confusion surrounding the term assumption of risk when used in connection with the inherent risk doctrine. In *Blair,* plaintiff was injured in a fall while skiing.[75] The Oregon Supreme Court struggled with the interpretation of a statute whereby the legislature had abolished the doctrine of implied assumption of risk.[76] The Court agreed that an instruction on assumption of risk was improper, but reaffirmed the jury verdict for the operator because of plaintiff's failure to timely object to the instruction.[77] The court noted that the legislature had abolished assumption of risk, thereby precluding the use of the doctrine, either in connection with primary or secondary assumption of risk.[78] However, the court noted that the *concept of* primary assumption of risk (inherent risk doctrine) was still completely viable if it were couched in terms of the legal duty owed.[79] In other words, if plaintiff failed to prove a legal duty owed, there could be no negligence, and defendant would be relieved of liability.[80]

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72. *Id.* at 402. To the contrary, the court acknowledged the validity of the inherent risk doctrine as espoused in *Wright,* but simply believed that the snow covered brush before it could not be viewed as an inherent risk. The court thus went on to affirm the jury verdict, finding that Stratton had breached its duty to invitees by failing to warn about or remove the brush, which breach was the proximate cause of the injuries. *Id.* at 401-03. Probably because of the severity of the injuries (quadriplegia) and the large damage award, many misunderstood the court's decision as rejecting the *Wright* inherent risk doctrine. See *Farrow, supra* note 8 at 270, n.76, *infra* note 110. *See supra* note 8 for reaction to *Sunday.*

73. *See supra* note 8.

74. 630 P.2d 827 (Or. 1981); reh. den., *modified,* 634 P.2d 241 (Or. 1981).

75. Plaintiff fell when he chose to return to the base lodge by way of a run he had never skied. He failed to see a sharp curve in the run and skied directly into a creek ravine. *Id.* at 828.

76. OR. REV. STAT. § 18-475 (2) provided: "The doctrine of implied assumption of risk is abolished." Blair, 630 P.2d at 829.

77. *Id.* at 833. The jury had returned a verdict for operator and the court of appeals had reversed based on jury instruction error. *Id.* at 829.

78. The court stated:

> We conclude that in flatly abolishing the "doctrine of implied assumption of risk" the legislature intended to abolish all use of the concept of plaintiff's assumption of risk in, negligence cases (other than in its "express" sense) whether as a defense to defendant's prior "tortious" conduct or as a shorthand phrase for defendant's lack of duty under the circumstances or breach of duty.

Id. at 831.

79. *Id.* at 832.

80. Probably because of this incredible confusion, the Oregon legislature later enacted a ski statute which expressly recognized the inherent risk doctrine. OR. REV. STAT. § 30.970 to 990 (1991). OR. REV. STAT. § 30.975 provides:

> In accordance with ORS 18.470 [regarding contributory negligence] and notwithstanding ORS 18.475(2) [abolishing the doctrine of implied assumption of risk], an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing insofar as they are reasonably obvious, expected or necessary.

Id.

Later, in *Smith v. Seven Springs,*[81] the third circuit affirmed a summary judgment for the ski area operator.[82] In Smith, plaintiff was injured when he fell on an icy slope.[83] The court was asked to determine whether the comparative fault statute (which abolished the defense of assumption of risk) contemplated the continued viability of the primary assumption of risk (inherent risk) doctrine[84] in downhill skiing cases.[85] The court determined that the statute was meant to preserve the inherent risk doctrine, but throughout the opinion, referred to the doctrine as a "defense," even though the court identified that the "defense" involved a duty analysis.[86]

The court identified that the operator owed certain duties to his invitees, but stopped there with its duty analysis.[87] The court then analyzed the inherent risk doctrine like a defense, determining not whether the pole condition constituted an inherent risk, but whether plaintiff had known and appreciated the danger, and voluntarily consented to it.[88] The court then held that plaintiff's assumption of risk relieved the operator of any duty of care (even had the operator been negligent).[89] Although the court called it a primary assumption of risk analysis, the court had in fact applied secondary assumption of risk analysis.[90]

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81. 716 F.2d 1002 (3d Cir. 1983).

82. *Id.* at 1009.

83. After failing on the slope, the plaintiff collided with a telephone like pole and some snow-mak ing pipes. *Id.* at 1005.

84. In *Smith,* the court referred to the "inherent risk doctrine" as the "primary assumption of risk" doctrine. As stated *supra,* the authors have avoided using the term "assumption of risk," where appropriate, to avoid confusion.

85. *Id.* at 1006. Pennsylvania's comparative negligence statute contained (and still contains) a section which preserves the primary assumption of risk doctrine in downhill skiing cases:

(c) Downhill Skiing.-

(1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by subsections (a) and (b).

PA. CONS. STAT. ANN. 42 § 7102(c) (1982).

86. *Smith,* 716 F.2d at 1005-09.

87. *Id.* at 1009.

88. *Id. at* 1005, 1007-09.

89. *Id.* at 1009.

90. The court should have determined, as a matter of law, whether the injuries resulted from an inherent risk. If so, the operator had no duty to plaintiff, and plaintiff's cause of action must fail. If not, the court could determine if the operator had breached its duty and correspondingly, if plaintiff had assumed the risk in a secondary sense. At that point, defendant would have the burden to prove plaintiff's contributory negligence, e.g., his knowledge, appreciation and consent. If he succeeded, the court could have then utilized the comparative fault statute to compare the fault of the parties accordingly.

D. Enactment of Comparative Negligence Laws

Comparative negligence laws contributed to the continued confusion between the inherent risk doctrine and secondary assumption of risk.[91] In most states, following enactment of comparative negligence laws, assumption of risk was merged into contributory negligence. Neither defense continued as an absolute bar to a negligence cause of action.[92] If the plaintiff proved his prima facie case, the defenses were only available to assign plaintiff with a share of the fault and so reduce his ultimate recovery.[93]

It became critical to distinguish between the inherent risk "duty" analysis, and the defense of secondary assumption of risk (contributory negligence). Despite the distinction, some courts ruled that the doctrine of assumption of risk, whether primary (inherent risk) or secondary, had no place in the law with the advent of comparative negligence principles.[94] This was done despite the fact that inherent risk duty analysis precedes the application of comparative negligence principles; if an injury is the result of an inherent risk, defendant owes no legal duty and cannot be found negligent, hence, there is no negligence to compare.[95] It was abundantly clear that the inaccurate use of the term "assumption of risk" to describe the inherent risk doctrine had launched the doctrine into even more troubled waters.[96]

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91. *See supra note* 5 and accompanying text.

92. Keeton et al., *supra note* 5, § 68 at 496. *See also supra* note 33 and accompanying text.

93. *Id.*

94. Keeton et al., *supra note* 5. *See, e.g.* Rosen v. LTV Recreation Development, Inc., 569 F.2d 1117, 1121 (10th Cir. 1978) (Tenth Circuit held that because the Supreme Court of Colorado had merged assumption of risk into contributory negligence following adoption of comparative negligence laws, primary assumption of risk (inherent risk) doctrine could not be used to absolve operator of liability. The court failed to identify the inherent risk doctrine as a duty analysis and simply held that the elements of an assumption of risk defense-knowledge and consent-would be weighed in determining plaintiff's potential comparative fault.) In essence, the court skipped over the inherent risk duty analysis and presumed a duty on the part of the operator.

95. Keeton et al., *supra note* 5. *In Dillworth,* the Vermont Federal Court, citing *Sunday* held:

> ... any chance of conflict between a comparative negligence statute and the defense of primary assumption of the risk as an absolute bar to recovery becomes nonexistent. When a primary assumption of the risk exists there is no liability to the plaintiff because there is no negligence on the part of the defendant to begin with; the danger to the plaintiff is not one which the defendant is required to extinguish or warn about. Having no duty to begin with, there is no breach of duty to constitute negligence.

Dillworth v. Gambardella, 776 F. Supp. 170, 173 (D. Vt. 1991). *Accord,* Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1046 (Utah 1991); Smith v. Seven Springs Farm, Inc., 716 F.2d, 1002, 1008 (3d. Cir. 1983).

96. *See,* Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). *See also, Smissen, supra* note 45, § 5.22 at 235-36.

E. Wyoming Example

The Wyoming Supreme Court has never had an opportunity to analyze the inherent risk doctrine. However, the court has had ample opportunity to rule upon the scope of the obvious danger rule, a primary assumption of risk doctrine quite similar to the inherent risk doctrine.[97]

The court's varied and inconsistent analysis of the obvious danger rule sheds light on the equal historical confusion in Wyoming surrounding primary assumption of risk concepts.[98]

Historically in Wyoming, a possessor of land had no duty to his invitee to protect him from reasonably known, discoverable or obvious dangers on the premises.[99] If plaintiff's injuries were caused by such dangers, the defendant owed no duty, and was therefore absolved of liability.[100] However, throughout the years, the Wyoming Supreme Court has analyzed the obvious danger rule inconsistentlyboth as a duty limitation [primary assumption of risk] and as a form of contributory negligence [secondary assumption of risk.][101]

In Sherman v. Platte County,[102] the Wyoming Supreme Court held that because the obvious danger rule operated to limit a possessor's

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97. *See* cases cited in: Lisa A. Yerkovich, *Torts-The Obvious Danger Rule-A Qualified Adoption of Secondary Assumption of Risk Analysis. O'Donnell v. City of Casper,* 696 P.2d 1278 (Wyo. 1985), 21 LAND & WATERL. REV. 251 (1985) [hereinafter Yerkovich]; Barbara L. *Lauer, Torts-Assumption of Risk and the Obvious Danger Rule. Primary or Secondary Assumption of Risk? Sherman v. Platte County,* 642 P.2d 787 (Wyo. 1982), 18 LAND & WATER L. REV. 373 (1982) [hereinafter Lauer].

Note that the obvious danger rule only operates to limit a possessor's duty in the premises liability context. Cervelli v. Graves, 661 P.2d 1032, 1039 (Wyo. 1983). In contrast, the inherent risk doctrine can apply outside the premises liability context in cases involving activities such as climbing and rafting (recreational provider not "possessor" of land). *See also infra note* 144. For a discussion of the Act's interaction with Wyoming premises liability law and the Wyoming Recreational Use Statute, *see infra* notes 183-210 and accompanying text.

98. *See also* O'Donnell v. City of Casper, 696 P.2d 1278, 1288 (Wyo. 1985). Authors Lauer and Yerkovich advocate the complete abrogation of the obvious danger "duty" limitation in favor of a fault comparison in all cases. See Lauer and Yerkovich, *supra* note 97.

99. Sherman v. Platte County, 642 P.2d 787, 790 (Wyo. 1982). *See also supra* note 26 for a discussion of the duties owed to licensees and trespassers.

100. *Id.* (Compare the inherent risk doctrine: if plaintiff's injuries are the result of an inherent risk of the sport, the defendant owes no duty, is not negligent, and is therefore absolved of liability.) In *Sherman,* the Wyoming Supreme Court cited two rules: the no duty/obvious danger rule and the no duty/natural accumulations of ice and snow rule. The court held that the latter rule expanded the scope of protection given the occupier under the former rule. *Id.* at 789.

RESTATEMENT (SECOND) OF TORTS § 343A, cmt. c (1965) discusses "inherent" dangers: § 343A. Known or Obvious Dangers.

The possessor's activities may involve a risk which is known or obvious to those who enter his land, either because the risk is inherent in the nature of the activity itself, or because they are aware that it is carried on in a manner which involves risks that are not necessarily inherent in such activities.

101. *O'Donnell,* 696 P.2d at 1281-82.

102. 642 P.2d 787 (Wyo. 1982).

duty [primary assumption of risk analysis], it remained unaffected by Wyoming's comparative negligence act.[103] However, in *O'Donnell v. City of Casper,* the court held that the duty limitation of the obvious danger rule was not consistent with comparative negligence principles.[104] The court proceeded to narrow the obvious danger rule to limit the possessor's duty only in cases involving natural conditions.[105] The court thus expanded the scope of a possessor's duty, holding that the obviousness of the danger arising from an artificial or man-made condition must only be viewed as a factor in assessing the plaintiff's potential contributory fault.[106]

In a strong dissent, Justice Rooney urged that the majority:

> [w]ould dissect negligence by removing one of its essential elements and then treat the remaining elements as a viable whole in comparing them with the dissected element. Negligence consists of a duty, a violation of the duty, proximately causing the injury. (Cites omitted). The majority opinion sets "duty" off from "negligence" and then discusses the presence, or absence, of "negligence" without one of its component parts.[107]

Justice Rooney noted the majority opinion incorrectly confused the application of contributory negligence which "necessarily presupposes" the presence of defendant's negligence, with the application of

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103. *Id.* at 790. The court held:

> Comparative negligence only abrogated absolute defenses involving the *plaintiffs own* negligence in bringing about his or her injuries. See Brittain v. Booth, 601 P.2d 532 (Wyo. 1979). However, it did not impose any new duties of care on prospective *defendants.* Since the law of this state is to the effect that there is no duty to remove or warn of an obvious danger or one that is known to plaintiff, no change was accomplished in that law by the adoption of comparative negligence. (emphasis added).

104. 696 P.2d 1278, 1281-83 (Wyo. 1985). The court failed to distinguish the obvious danger rule as a primary assumption of risk "duty" analysis and instead lumped it with secondary assumption of risk. Primary assumption of risk is not inconsistent with comparative fault principles (*supra* note 95 and accompanying text). Precisely because the *defense* of [secondary] assumption of risk is inconsistent with comparative fault principles, it has been merged into contributory negligence for purposes of comparing fault under the Comparative Negligence Act. Neither doctrine survives as a complete defense to a negligence action. *Brittain,* 601 P.2d at 534. Indeed, Wyoming recommends no jury instruction on the defense of assumption of risk. Wyo. Pattern Jury Instructions, § 3.07 (September 1981).

105. *O'Donnell,* 696 P . 2d at 1283. The holding in *O'Donnell* has been affirmed; *see e.g.,* Stephenson v. Pacific Power & Light Co., 779 P.2d 1169, 1179 (Wyo. 1989); Radosevich v. Board of County Commissioners, 776 P.2d 747, 749 (Wyo. 1989). Although the court's holdings *in Stephenson and Radosevich* refer only to invitees, it appears that the obvious danger rule also applies to licensees. See Allen v. Slim Pickens Enterprises, 777 P.2d 79, 82 (Wyo. 1989).

106. *O'Donnell,* 696 P.2d at 1281-82. Note that a different body of law applies to "attractive nuisances," a doctrine which delineates a possessor's duty to children in the context of artificial conditions. See Thomas v. South Cheyenne Water and Sewer District, 702 P.2d 1303, 1305 (Wyo. 1985), citing with approval RESTATEMENT (SECOND) OF TORTS § 339 (1965).

107. *O'Donnell,* 696 P.2d at 1288.

the obvious danger rule, which is focused on defendant's lack of a legal duty.[108] Justice Rooney concluded that the application of the obvious danger rule or, the analysis of whether a legal duty exists, is a question of law for the court. He noted that the majority largely ignored this issue in its opinion.[109]

The Wyoming Supreme Court's ruling in *O'Donnell,* holding intact only a portion of the obvious danger rule, certainly left the viability of other primary assumption of risk doctrines, like the inherent risk doctrine, very unclear.

F. Call for Protective Legislation

The *Sunday* decision sent a shock wave through the entire ski industry. It appeared that the inherent risk doctrine was in tatters,[110] leaving the ski industry reeling over the thought of skyrocketing insurance rates, potential uninsurability and ever increasing liability.[111] In Wyoming and other western states, the concern was multiplied, because recreation was quickly becoming a critical segment of economies suffering from downturns in the energy and ranching industries.[112]

Unfortunately, many misinterpreted the Sunday decision as limiting or killing the inherent risk doctrine as framed in *Wright and Murphy.*[113] Surely contributing to this misunderstanding was the historical confusion and resulting misapplication of the inherent risk doctrine by courts throughout the country. In any event, the ski industry and state legislatures reacted quickly to this perceived 180 degree change in the courts' analysis, scrambling to adopt protective legislation which would preserve the inherent risk doctrine as enunciated in *Wright.*[114]

G. Legislative Enactments

Legislatures across the country enacted a variety of legislation in an attempt to allocate the responsibilities between recreational pro-

108. *Id.* at 1290.
109. *Id.* at 1289-90.
110. In reality, *Sunday* acknowledged the viability of the inherent risk doctrine, but simply chose not to apply it to the facts of the case. Sunday v. Stratton Corp., 390 A.2d 398 (Vt. 1978). *See supra* note 72.
111. Reasons for the premium increases, coverage decreases and unavailability of insurance include: (1) investment decisions by insurance companies during the double digit interest periods of the late 1970's; (2) lack of competition; and (3) the cost of frivolous suits. *See eg. supra,* note 8.
112. *See supra* note 10.
113. *See supra* note 72.
114. *See supra* note 9.

viders and participants. Twenty-six jurisdictions currently have this type of legislation in place.[115] Many states' legislation also contain abbreviated notice of claim and statute of limitations provisions.[116] Colorado's statute appears unique in providing for a cap on plaintiff's recoverable damages.[117]

Two different approaches have been taken. Under the first approach, the legislature defines the legal duty and the scope of inherent risks, or both, and the trier of fact decides factual issues. This will be referred to as the "legislative approach." Under the second approach, the judge determines the legal duty and scope of inherent risks and the trier of fact decides factual issues. This will be referred to as the "judicial approach."

Only the Wyoming, Vermont and Pennsylvania statutes follow a true judicial approach.[118] The remaining twenty-three states in some way attempt to define the respective duties of operator or participant, the scope of inherent risks, or all three.[119] The Maine, Massachusetts and Washington statutes, though defining operator/participant duties to some degree, do not define inherent risks.[120] Wyoming, Vermont and Wisconsin are the only jurisdictions whose acts cover all recreational sports.[121]

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115. *Id.* See Arthur N. Frakr and Janna S. Raukin, *Surveying the Slippery Slope. The Questionable Value of Legislation to Limit Ski Area Liability,* 28 IDAHO L. REV. 227 (199192), for a discussion of inherent risk legislation in the ski context. Authors Frakr and Raukin take a dim view of the efficacy of this type of legislation.

116. *See supra* note 9. Colorado: 2-year statute of limitations, § 33-44-111; Maine: 2-year statute of limitations, 14 § 75213; Massachusetts: 90 day notice of claim with limited grace period, 1-year statute of limitations, § 71P; New Hampshire: 90-day notice of claim, 2-year statute of limitations, § A25; Oregon: 180-day notice of claim with limited grace period, 2year statute of limitations, § 30.980(1) & (3); Tennessee: 90-day notice of claim, 1-year statute of limitations, § 68-48-107(c).

117. COLO. REV. STAT. ANN. § 33-44-113 (Supp. 1991) provides as follows:

> The total amount of damages which may be recovered from a ski area operator by a skier who uses a ski area for the purpose of skiing or for the purpose of sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, a snow board, or any other device and who is injured, excluding those associated with an injury occurring to a passenger while riding on a passenger tramway, shall not exceed one million dollars, present value, including any derivative claim by any other claimant, which shall not exceed two hundred fifty thousand dollars, present value, and including any claim attributable to non-economic loss or injury, as defined in sections 13-21-102.5 (2) (a) and (2) (b), C.R.S., whether past damages, future damages, or a combination of both, which shall not exceed two hundred fifty thousand dollars. The statute goes on to provide an exception, allowing damages in excess of the cap in limited circumstances.

118. WYO. STAT. §§ 1-1-121, -123 (Supp. 1992); VT. STAT. ANN. tit. 12, § 1037 (1973 & SUPP. 1991); PA. CONS. STAT. ANN. 42 § 7102 (1982 & Supp. 1992).

119. *See supra* note 9; *See infra* appendix A.

120. See supra note 9. ME. REV. STAT. ANN. tit. 26 § 488; MASS. ANN. LAWS ch. 143 § 7IN; WASH. REV. CODE ANN. § 70.117.024(6). The statutes of Nevada, North Carolina, Rhode Island and Tennessee, although skier safety acts, do not mention the term "inherent risk." *Id.* at note 119.

121. See supra note 9. WYO. STAT. § 1-1-122(a)(iii); VT. STAT. ANN. LAWS. tit. 12 § 1037; WIS. STAT. § 895.525(2). Wisconsin, the first state to enact comparative negligence laws, takes a quite unique

Following this wave of legislative activity, constitutional attacks were launched on some state statutes. In *Brewer v. Ski Lift, Inc.*,[122] the Montana Supreme Court reversed a summary judgment for the ski area operator when it struck down portions of the Montana skier responsibility statute on equal protection grounds. Although the court appreciated the economic interest in limiting liability for Montana's ski industry, it could find no rational basis for broad statutory language which 1) essentially eliminated actions against the operator for operator negligence,[123] and, 2) singled out skiers for exemption from the comparative negligence act, even in cases of potential operator negligence.[124]

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approach: a participant's assumption of inherent risks goes directly to his contributory fault for comparative fault purposes. Thus, the provider's duty re: inherent risks is entirely presumed. Wis. STAT. § 895.525(3).

In addition to equal protection concerns, the obvious preference for a recreation act versus a skiing act is quite apparent from the patchwork approach taken by many state legislatures. *See, e.g.* Maine hang gliding "inherent risk" statute, ME. REV. STAT. ANN. tit. 26, § 489-A; Idaho outfitters and guides "inherent risk" statute, IDAHO CODE § 6-1201. Opposition is stiff to attempted introduction of a bill in the Colorado legislature providing similar protection to the river rafting industry; see *Tort Reform Test,* WALL ST. JRNL., March 1992.

Of course, the judicial approach taken in Wyoming and Vermont is, for all practical purposes, imperative, because those statutes cover an undefinable group of recreational activities. It would be impossible to thoroughly list out inherent risks and duties for the non-exclusive group of recreational activities covered by those statutes. Wyo. STAT. § 1-1-122(a)(iii) (Supp. 1992); VT. STAT. ANN. tit. 12 § 1037. *See infra* note 240 and accompanying text.

122. 762 P.2d 226 (Mont. 1988).

123. MONT. CODE ANN. § 23-2-736 (1991) states "a skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participating in the sport of skiing *by virtue of his participation."* (Emphasis added.) The court also struck down the following provision on similar grounds: "the responsibility for collisions with a person or object while skiing is the responsibility of the person or persons and not the responsibility of the ski area operator." The court held that these sections essentially eliminated any proximate cause requirement, thereby precluding recovery against an operator for injuries caused by operator negligence. *Brewer,* 762 P.2d at 230. The latter section has now been deleted from the act, and the former section revised to require proximate cause and to clearly delineate an operator's duties.

Note: both Tennessee and Idaho currently include broad "participation" language in their statutes and may therefore be subject to constitutional attack on grounds similar to those stated *in Brewer. See,* IDAHO CODE § 6-1106 (1992); TENN. CODE ANN. § 68-48-103 (1992); however, similar statutory language withstood an equal protection challenge in *Lewis v. Canaan Valley Resorts, Inc.* 408 S.E.2d 634 (W.Va. 1991). In that case, the West Virginia Supreme Court found that, unlike the Montana statute cited in *Brewer,* the West Virginia statute delineated certain operator duties, and thereby did not eliminate actions against the operator for operator negligence. *Id.* at 642-43.

124. MONT. CODE ANN. § 23-2-737 (1991) provided that: "Notwithstanding any comparative negligence law in this state, a person is barred from recovery from a ski area operator for loss or damage resulting from any risk inherent in the sport of skiing . . . ." The court held that the statute singled out skiers, to the exclusion of other inherent risk sports, for exemption from application of the comparative negligence laws. *Brewer,* 762 P.2d at 731.

If the entire act had been more carefully drafted to preserve actions against operators for operator negligence, this section should have appropriately triggered the notion that comparative negligence laws do not conflict with the inherent risk doctrine; if an inherent risk caused the injury, there is no operator duty and no negligence to compare. *See supra note* 5. However, because other sections of the act eliminated actions for operator negligence, this section had a different effect. On the other hand, the court, like the court in *Rosen,* may have misinterpreted the inherent risk doctrine as being a secondary, rather than a primary

On the other hand, courts have generally upheld a legislative decision to single out skiers, to the exclusion of all inherent risk sports, for statutory coverage.[125] Indeed, the majority of states' inherent risk legislation covers only skiing.[126] In *Pizza v. Wolf Creek Ski Development Corp.*,[127] the Colorado Supreme Court noted the well established rule that classes may be treated differently, provided there is a reasonable basis for the differing treatment. The court held that the ski industry, as an important segment of the state's economy, provided that reasonable basis.[128]

III. THE WYOMING ACT

A. Legislative History

In 1989, the Wyoming legislature passed Wyoming's Recreational Safety Act (the "Act"). The engine driving passage of the Act was the Wyoming ski industry, represented by its statewide association, Ski Wyoming, Inc.[129] The Act altered versions unsuccessfully presented in the two previous legislative sessions.[130] The impetus behind the revised Act was an attempt to introduce principles perceived as benefi-

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asumption of risk concept. *See supra note* 5.

125. *See infra* note 127 and accompanying text.

126. *See supra* note 9.

127. 711 P.2d 671 (Colo. 1985).

128. *Id.* at 679; *see also* Northcutt v. Sun Valley Co., 787 P.2d 1159, 1165-66 (Idaho 1990); Lewis v. Canaan Valley Resorts, 408 SE.2d 634, 643 (W.Va. 1991) ("ski" statutes upheld on same grounds).

129. Ski Wyoming was organized in 1989. Ten ski areas were, and currently are, members: Antelope Butte - Dayton; Eagle Rock - Evanston; Grand Targhee - Alta; High Park - Worland; Hogadon - Casper; Jackson Hole Ski Resort - Teton Village; Pine Creek - Cokeville; Sleeping Giant - Cody; Snow King - Jackson and Snowy Range - Laramie.

130. In 1987 the "Skier Assumption of Risk" bill passed the Wyoming Senate and failed to get out of committee in the House (SF 0280-1987). In 1988 the "Wyoming Ski Safety Act" failed to get the necessary two thirds vote of the legislative members to gain introduction to the semiannual budgeting session (SF14, 1988). Each bill was based on a Montana model and proposed to create Wyoming Statute §§ 1-43-101 through 107. The bills were specific to the ski industry and would have defined the responsibilities of skiers and ski area operators, barred recovery by a skier against a ski area operator where the skier is deemed to assume defined risks, limited damages, and reduced the statute of limitations to two years. These bills followed the Colorado type legislation, specifically defining duty. The Wyoming legislature avoided the pitfalls of the Montana statute and did not adopt the bill based on the Montana model. *See supra* notes 122-24 and accompanying text (portions of Montana model held unconstitutional). In 1989 the legislation was renamed "The Recreation Safety Act," broadening the act to cover the entire recreation and tourism industry, including affected branches of the government.

131. *Id.* The legislative intent is clearly set forth in the purpose clause contained in the original draft of the 1989 law. This clause stated:

1-1-121(b) Legislative Purpose: The legislature finds that sport and recreation opportunities, activities, or services are participated in by a large number of residents of Wyoming and attract a large number of nonresidents, significantly contributing to tourism and the economy of this State. It further finds that few insurance carriers are willing to provide liability insurance protection to many providers of sport and recreational opportunities, activities, and services and that the premiums charged by those carriers have risen

cial to the growing Wyoming recreation industry while avoiding potential constitutional conflict.[131] Wyoming legislators hoped that the Act would, in time, increase the availability of insurance to recreation providers, thereby enhancing the recreational opportunities for tourists in Wyoming.[132]

B. General Scope of Act

The Act provides as follows:

1-1-121 RECREATION SAFETY ACT; short title.

1-1-122 Definitions.

(a) As used in this act:

(i) "Inherent risk" means any risk that is characteristic of or intrinsic to any sport or recreational opportunity and which cannot reasonably be eliminated, altered, or controlled;

(ii) "Provider" means any person or governmental entity which for profit or otherwise, offers or conducts a sport or recreational opportunity. This act does not apply to a cause of action based upon the design or manufacture of sport or recreational equipment or products or safety equipment used incidental to or required by the sport or recreational opportunity;

(iii) "Sport or recreational opportunity" means commonly understood sporting activities including baseball, softball, football, soccer, basketball, swimming, hockey, dude ranching, nordic or alpine skiing, mountain climbing, river floating,

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sharply in recent years due to litigation and to confusion as to whether participants are responsible for the risks inherent in the sport or recreational opportunities, activities, and services. *Therefore, it is the purpose of this act, to clarify the law in relation to sport and recreational injuries and the risks inherent in these sport and recreational opportunities, activities, and services, to establish as a matter of law that certain risks are inherent in such sport and recreational opportunities, activities, and services and to provide that, as a matter ofpublic policy, no person engaged in that sport or recreational opportunity, activity, or service shall recover from the owner, operator, or provider of such sport or recreational opportunity, activities or services for injuries, damages or death resulting from those inherent risks.* (Emphasis added).

The House Travel and Recreation Committee failed to pass that version of the bill out of committee by a vote of 1 to 8. On introduction to the Senate Recreation Committee the purpose clause was dropped for simplification and brevity. With other changes, the bill passed the Senate Committee 5-0 and the full Senate 27-2. On return to the House Recreation Committee the bill passed 7 to 1 and went on to passage by the full House and was signed by the Governor.

132. *See supra* note 8.

hunting, fishing, backcountry strips, horseback riding, snowmobiling and similar recreational opportunities;

(iv) "This act" means W.S. 1-1-121 through 1-1-123. (Laws 1989), (ch. 228, 1.)

1-1-123 ASSUMPTION OF RISK

(a) Any person who takes part in any sport or recreational opportunity assumes the inherent risk of injury and all legal responsibility for damage, injury, or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.

(b) A provider of any sport or recreational opportunity is not required to eliminate, alter or control the inherent risks within the particular sport or recreational opportunity.

(c) Actions based upon negligence of the provider not caused by an inherent risk of the sport or recreational opportunity shall be preserved pursuant to W.S. 1-1-109. (Laws 1989, ch. 228, 1) (13)[133]

The entire Act consists of only seven paragraphs and includes the definition of only three terms: provider, sport or recreational activity and inherent risk. It thus stands in stark contrast to other states' lengthy definitions of duties and inherent risks.[134] Instead the Act places the responsibility on the judiciary to determine the existence of a legal duty owed by the operator to the participant.[135] The Act, along with the statutes of Vermont and Wisconsin, is in a minority in applying to all recreational sports.[136]

The key to the Act is that it codifies[137] the common law principles set out in *Wright and Murphy.* The court is forced to undertake

133. WYO. STAT. 1-1-121, -123 (Supp. 1991).

134. *See supra* note 119; *See infra* note 240 and accompanying text. (discussing why the judicial approach taken in the Wyoming Act is necessary in light of its coverage of all rec- reational activities.)

135. Wyoming used the statutes of Vermont and Utah as models for this approach. Utah has since expanded its skiing statute to include certain defined operator duties, leaning now towards the legislative approach. UTAH CoDE ANN. §§ 78-27-51,-54 (1992).

136. *See supra* note 121. Applying the inherent risk doctrine to all recreational sports is consistent with the common law as espoused in Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929) and Wright v. Mt. Mansfield Lift, Inc. 96 F.Supp. 786 (D.Vt. 1951). *See supra* note 2.

137. In precisely codifying the inherent risk doctrine, the Act does not resurrect assumption of risk as a complete *defense* to a negligence action. *See supra* note 2 and notes 31-40 and accompanying text. The constitutionality of the Act should therefore not be thrown into question by the Wyoming Supreme Court's

the duty analysis required by the inherent risk doctrine, rather than confusing the doctrine with secondary assumption of risk or contributory negligence.[138] Furthermore, by placing the duty analysis in the hands of the judiciary, the Act differs markedly from the legislative approach taken in other states, like Colorado, wherein legislatures have exclusively defined an operator's duties and the scope of inherent risks.[139]

IV. ANALYSIS OF ACT, PRACTICAL USE AND PROPOSED ANALYTICAL FRAMEWORK

A. Analysis of Act

The original purpose clause states that the Act was intended to eliminate "confusion...... clarify the law" in relation to the inherent risk doctrine, and codify that *"as a matter of law* ... certain risks are inherent in recreational activities."[140] The Act does just this in allowing the court to determine, as a matter of law, if the provider owes a duty.[141] This duty determination is a two step analysis: was the injury

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recent decision in *Mills v. Niggemyer.* 837 P.2d 48 (Wyo. 1992). In that case, a plurality of Justices held that a provision of the Worker's Compensation Act granting full immunity from liability to co-employees was unconstitutional under the equal protection provisions of the Wyoming Constitution. Justices Macy & Urbigkit held that Wyo. STAT.. § 27-14-104 (1992) affected a fundamental right-the employees' right of access to the courts under Wyo. CONST. ART. 1, § 8-and therefore was subject to a strict scrutiny analysis. Applying that analysis, the court could find no compelling reason for a provision which granted co-employees, to the exclusion of other classes, complete immunity from suit, thus impinging upon an injured parties' right of meaningful access to the courts. Justice Cardine specially concurred, but argued on other grounds that the provision was unconstitutional in that it limited the amount of a party's recoverable damages. WYO. CONST. ART. X, § 4). Cardine reasoned that legislation eliminating a tort cause of action against coemployees essentially eliminated the right to recover damages, and thus violated Wyo. CONST. art. X, § 4's plain terms.

In any event, Wyoming's Recreation Safety Act should survive constitutional attack on either ground. Because the Act is a codification of the inherent risk doctrine set forth in Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929); and Wright v. Mt. Mansfield Lift, 96 F.Supp. 786 (D.W. 1951), it does not single out a group for special protection (thus restricting a right of access to the courts), nor does it eliminate a previously existing cause of action.

138. The Act preserves the inherent risk doctrine as a primary assumption of risk concept: a limitation on the scope of the operator's duty. In this way, the inherent risk doctrine will avoid the inconsistent judicial treatment accorded to a similar primary assumption of risk doctrine: the obvious danger rule. Without the statute, the inherent risk doctrine might suffer the same fate as the obvious danger rule, being gradually pared down as a duty limitation. *See also, supra,* notes 97-109 and accompanying text.

139. COLO. REV. STAT. §§ 33-44-101,414 (Supp. 1991). The Colorado statute contains thirteen sections (approximately twelve pages including latest supplement) covering the respective duties, a cap on recoverable damages, and abbreviated notice of claim and statute of limitations provisions. For a recent analysis of the Colorado statutory framework, see *Ferguson, supra* note 2 at 175-83. *Compare* Wyoming's one page Act, *supra* note 133 and accompanying text.

140. *See* original purpose clause, *supra* note 131.

the result of a risk which is 1) intrinsic to the sport, *and* 2) one which cannot be reasonably altered, eliminated or controlled.[142] If the answer is yes, the risk is inherent. The provider therefore owes no legal duty and plaintiff cannot maintain a cause of action sounding in negligence.[143] If the answer is no, the risk is not inherent and plaintiff may go on to prove that the provider's breach of a legal duty[144] caused or contributed to his injury.[145]

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141. What would be the affect of an exculpatory clause, post-Act? In *Milligan v. Big Valley Corp.,* the Wyoming Supreme Court upheld the validity of a release, signed by plaintiff's decedent. 754 P.2d 1063 (Wyo. 1988). Plaintiff's decedent was killed in an amateur ski race called the "Ironman Decathlon" at Grand Targhee Ski Resort in Alta, Wyoming. Plaintiff's decedent had signed a broad release in favor of defendant, releasing defendant from all liability, including, the court determined, injuries resulting from defendant's own negligence. The court held that the release did not violate public policy nor did it find the presence of willful and wanton misconduct to warrant voiding the release. *Id.* at 1065-68. *Accord,* Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986). Both of these cases were decided prior to the enactment of Wyoming's Act.

Courts interpreting exculpatory clauses in light of existing legislation have come to varying conclusions. In *Phillips v. Monarch Recreation Corp.,* plaintiff skier was injured when he collided with trail grooming equipment at defendant's ski area. 668 P.2d 982 (Colo. App. 1983) The Colorado Court of Appeals affirmed the lower court's decision not to enforce release language on the back of defendant's lift ticket, as such language was contrary to the provisions of Colorado's Ski Safety Act. The court held:

> Statutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute. (cites omitted). The statutes at issue here allocate the parties' respective duties with regard to the safety of those around them, and the trial court correctly excluded a purported agreement intended to alter those duties.

Id. at 987.

However, in Fullick v. Breckenridge Ski Corporation, No. 90-1377, 1992 WL 95421 (10th Cit. Colo. April 29, 1992) (unpublished disposition), plaintiff skier was injured in a speed skiing competition at defendant's ski area. The Tenth Circuit affirmed the lower court's grant of summary judgment in favor of defendant on the basis of a release signed by plaintiff prior to the race. Although the exculpatory language released Breckenridge from injuries resulting from its own negligence, the court held that the release was val*Id.* The court noted *Phillips,* but held that the release did not "[a]void nor modif[y] any statutory duty found in the Ski Safety Act. If one could never release liability to a greater degree than a release provided in a statute, then one would never need to draft a release, in any context." *668 P.2d at 987.*

See also, Kotovsky v. Ski Liberty Operating Corporation, 603 A.2d 663, 665 (Pa. 1992) (Superior Court of Pennsylvania upheld lower court's entry of judgment for defendant on basis of release; court held that release entered into between private parties (ski racer and ski area) did not violate public policy as expressed in Pennsylvania ski statute); Collins v. Schweitzer, Inc., 774 F. Supp. 1253, 1262 (D.Idaho. 1991) (Idaho District Court granted judgment for defendant ski area based partially on the ski statute and partially on a release signed by plaintiff ski racer; release only invalid if it purports to absolve ski area of one of its "public duties" as outlined in statute.)

142. *See supra* note 133 and accompanying text. WYO. STAT. § 1-1-122(a)(i) (Supp. 1992).

143. *See supra* note 133 and accompanying text.. Wyo. STAT. § 1-1-123(b) (Supp. 1992). Plaintiff has the burden of proving the elements of his prima facie case: duty, breach of duty, proximate cause and damages. McLaughlin v. Michelin Tire Corp., 778 P.2d 59, 63 (Wyo. 1989). If he fails to establish the existence of a duty, he is missing one of the elements of his prima facie case. *See also supra* note 31 and accompanying text.

144. WYO. STAT. § 1-1-122(a)(i), may be construed to require the provider to reasonably alter, eliminate or control non-inherent risks. Wyo. STAT. § 1-1-122(a)(i) (Supp. 1992). If so, this implied duty could be viewed in tandem with a provider's other potential legal duties. If the provider is a possessor of land, he will owe the participant certain duties pursuant to Wyoming premises liability law and the Wyo

At this juncture, a closer look at the language of the statute will shed light on its meaning. The language of the Act is generally clear and unambiguous.[146] However, the rules of statutory construction will be applied to the Act's provisions to analyze any potential ambiguities.[147]

1. Inherent Risk

In Wyoming, the determination of the existence and scope of a duty are questions of law for the court.[148] The statute employs a judicial duty analysis consistent with Wyoming law, and the inherent risk doctrine as espoused in *Wright.*[149]

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ming Recreational Use Statute. *See* Wyo. STAT. § 34-19-101,406 (1990). For a discussion of the Act's interaction with premises liability law and the Recreational Use Statute, *see infra* notes 183-210 and accompanying text. Of course, whether to impose a duty in any given case is a question of law for the court. Ely, 707 P.2d at 709. In any event, the Act contemplates the preservation of negligence claims against the provider as stated in Wyo. STAT. §1-1-123(c), -[a]ctions based upon negligence of the provider ... shall be preserved pursuant to [the comparative negligence act." Wyo. STAT. §1-1-123(c) (Supp. 1991).

145. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-122(a)(i)(Supp. 1991). A possessor-provider may still owe no legal duty even absent an inherent risk. Recall the evolution of the obvious danger rule as a "duty" limitation. *Supra* notes 97-109 and accompanying text. Under current Wyoming law a possessor owes no duty to his invitee for injuries resulting from naturally existing conditions (i.e. accumulations of ice and snow) which are known, obvious or reasonably apparent. Sherman v. Platte County, 642 P.2d 787, 789 (Wyo. 1982); Radosevich v. Board of County Commissioners, 776 P.2d 747, 749 n. I (Wyo. 1989); *and supra* note 99 and accompanying text. Presumably this rule would still apply in the recreational context.

146. The primary goal in construing a statute is to ascertain legislative intent. If the words of the statute are clear and unambiguous, legislative intent should be gleaned solely by analysis of the plain and ordinary meaning of the statutory language. Allied-Signal v. Board of Equalization, 813 P.2d 214, 219 (Wyo. 1991). *See also* WYO. STAT. § 8-1-101(a)(i) (1989).

147. Whether or not a statute is ambiguous is a question of law for the court. A statute will be construed as ambiguous if it is vague, uncertain or subject to varying interpretations. *Allied-Signal,* 813 P.2d at 219-20. As the Wyoming Supreme Court stated in State ex. rel. Motor Vehicle Division v. Holtz, 674 P.2d 732, 736 (WYO. 1983):

> When the language is not clear or is ambiguous, the court must look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of law, and other prior and contemporaneous facts and circumstances, making use of the accepted rules of construction to ascertain a legislative intent that is reasonable and consistent.

Id.

148. Ely v. Kirk, 707 P.2d 706, 709 (Wyo. 1985).

149. *See supra* notes 2, 19-21; 29-30 and accompanying text. Other courts that have judicially determined under ski statutes whether or not the risk is inherent, and hence, whether or not the operator owes a duty, include the following: Berniger v. Meadow Green-Wildcat Corp., 945 F.2d 4, 8 (1st Cir. 1991); Williams v. Heavenly Valley, 946 F.2d 899 (9th Cir. 1992). Schmitz v. Cannonsburg Skiing Corp., 428 N.W.2d 742 (Mich. App. 1988).

In contrast, the Vermont courts have submitted the inherent risk issue to the jury. Dillworth v. Gambardella, 776 F. Supp. 170, 172 (D.Vt. 1991). Under the Vermont statute, a model for the Wyoming Act, skiers accept as a matter of law the inherent risks of skiing "insofar as they are obvious and necessary." This language should leave the duty analysis to the judiciary. However, in *Dillworth,* the Vermont Federal Court denied plaintiff's motion for new trial following a jury verdict for defendant operator. Plaintiff suffered

"Inherent risk" is defined and, as stated, is central to the duty analysis.[150] The judge must first determine whether the risk is "characteristic of or intrinsic" to the particular sport and second, whether the risk can be "reasonably altered, eliminated or controlled."[151] If the risk is determined intrinsic to the sport, and, one which *cannot* be reasonably altered, eliminated or controlled, it is an inherent risk.[152] The Act states that a provider has no duty to alter, eliminate or control the inherent risks within a particular sport.[153]

A fundamental problem with the language of Section 1-1-121(a)(i) is that a judge may perceive that a question of fact exists as to what is "reasonable." This would allow the jury to inappropriately engage in the duty analysis. An amendment which would simplify the court's inherent risk analysis would be the following: "Inherent risk means any risk that is *characteristic of, intrinsic to, or an integral part of* any sport or recreational opportunity." The court could then use the *"Gates"* factors in tandem with the statute to determine whether the risk was inherent, and hence whether the provider owed a legal duty.[154]

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severe injuries when he collided with another skier on the slope. The court implicitly accepted the lower court's decision to let the jury decide whether the risk was inherent, and hence whether the operator owed a duty. The lower court had instructed the jury on Vermont's ski statute, informing them that if they found that "plaintiff assumed the risk of the collision because such collisions are an obvious and necessary part of the sport of skiing, you must return a verdict for the defendant." Note how the court phrases the inherent risk doctrine in assumption of risk versus duty language. *Id.* at 172-73.

150. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-122(a)(i) (Supp. 1992).

151. *Id.*

152. *Id.* This interpretation is clear from a careful reading of Wyo. STAT. § 1-1-122(i) (Supp. 1992). An amendment which would clarify this reading would be the following: "inherent risk means any risk that is 1) characteristic of or intrinsic to any sport or recreational opportunity and *2) that which* cannot reasonably be altered, eliminated or controlled."

153. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-123(b) (Supp. 1992). What if a provider attempts to alter, eliminate or control what is later determined to be an inherent risk? Must he do so commensurate with any standard of care? The Idaho ski statute contains a provision which, like Wyoming, states that the operator has no duty to "alter, control or lessen" the inherent risks of skiing. However, the statute lists certain operator's duties which have been interpreted to be duties regarding inherent risks (i.e. posting signs). IDAHO CODE § 6-1103-04 (Supp. 1992). The statute goes further in saying that if the operator does make an attempt to alter, control or lessen the inherent risks, such attempt need not be accomplished "to any standard of care." *Id.* at § 6-1103(10). In Collins v. Schweitzer, Inc., 774 F. Supp. 1253, 1262 (D. *Id.* 1991), the Idaho Federal Court construed this section to mean that any attempt by the operator to accomplish the duties re: inherent risks as set out in the statute could not constitute negligence.

Under the Wyoming Act, the nature of effort undertaken to alter or control a risk would probably shed ultimate light on whether or not the risk should be viewed as inherent.

154. See discussion of proposed analytical framework, *infra* notes 224-234 and accompanying text. The statutory language "cannot reasonably be altered, eliminated or controlled" unnecessarily complicates pure common law inherent risk analysis as espoused in Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929); and Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (D. Vt. 1951). *See supra* notes 21-22 and accompanying text and *infra note* 155 and accompanying text.

What is an inherent risk? Courts and commentators disagree. In *Clover v. Snowbird,* the Utah Supreme Court recently summarized the scope of inherent risks as follows:

> the term "inherent" refers to those risks that are essential characteristics of skiing - risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks. Generally, these risks can be divided into two categories. The first category of risks consists of those risks, such as steep grades, powder, and mogul runs, which skiers wish to confront as an essential characteristic of skiing...The second category of risks consists of those hazards which no one wishes to confront but [sic] cannot be alleviated by the use of reasonable care on the part of a ski resort. It is without question that skiing is a dangerous activity. Hazards may exist in locations where they are not readily discoverable. Weather and snow conditions can suddenly change and, without warning, create new hazards where no hazard previously existed. Hence, it is clearly foreseeable that a skier, without skiing recklessly, may momentarily lose control or fall in an unexpected manner.[155]

This expansive definition takes in much of the *Wright* court's general theory on inherent risks.[156] However, a reading of this language and that presented in *Wright* solidifies why the determination of what is an inherent risk must be an integral part of the duty analysis. The court must be able to incorporate common law principles and changes in technology to determine whether a particular risk should be classified as inherent, and thus, whether the operator owes a duty.[157]

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155. 808 P.2d 1037, 1047 (Utah 1991).

156. *See supra* notes 20-21 and accompanying text. Note that the *Wright* court limited inherent risks to those which were "obvious and necessary." The snow covered stump in *Wright* was a latent danger, but one which the court nonetheless considered "obvious and necessary" to the reasonable person who participates in the sport. Later courts used these terms to conclude that the "obvious" element of "obvious and necessary" must mean open, plainly visible, or something of which the plaintiff had actual knowledge. *See supra* notes 57-61 and accompanying text. The drafters of the Wyoming Act avoided use of this language while still adhering to the principles advanced in *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786 (D. Vt. 1951).

157. In judicially determining whether a risk is inherent under the Wyoming Act, it may be worthwhile for the court to view other state statutes which list out specific inherent risks. *But see contra Harkins, supra* note 45 at 153. Of course, a consideration of these other statutes would not be determinative, because the court will use the *"Gates"* factors to ultimately determine whether the risk is inherent. See discussion of proposed analytical framework, *infra* notes 224-234 and accompanying text.

2. Assumption of Inherent Risks

The Act goes on to provide that persons who participate in the particular sport "assume the inherent risk of injury and all legal responsibility for damage, injury or death . . . that results from the ,inherent risks in that sport . . . . "[158] This is simply the codification of the common law principle[159] that the provider's duty does not extend to protecting the participant from the inherent risks of the sport.[160] Again, the Act is not resurrecting secondary assumption of risk as a complete defense to a cause of action in negligence.[161] The " assumption of risk" provision contained in 123(a) is simply the flipside of the "no duty" provision contained in 123(b). Full effect can only be given to Wyo. Stat. §§ 1-1-123(a) and (b), by reaching this conclusion.[162] This construction is consistent with the language of *Wright.*[163]

Because Wyo. Stat. § 1-1-123(a) is a restatement of the "noduty" provision contained in Wyo. Stat. § 1-1-123(b), and the "assumption of risk" terminology has so confused the inherent risk analysis, an appropriate amendment to that section would be the following: "Any person who takes part in any sport or recreational opportunity *is legally responsible for* damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity." The proposed amendment cuts out any unneeded reference to assumption of risk, thereby eliminating the possibility that Wyoming courts might confuse the inherent risk doctrine with secondary assumption of risk.

3. Provider of Sport or Recreational Opportunity

These two terms have no common law legal significance, but are

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158. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-123(a) (Supp. 1992).

159. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-123(b) (Supp. 1992).

160. *See supra* notes 2 and 19-21 and accompanying text.

161. *See supra* notes 35-40 and accompanying text. Because assumption of risk is referred to in its primary sense as a duty analysis, the elements of the *classic defense* of assumption of risk: knowledge, appreciation and voluntary consent are not at issue. As explained in *Wright,* plaintiff's mere participation in the sport implies knowledge of those risks deemed inherent. Some writers disagree. See *Harkins, supra* note 45 at 350; Smissen, *supra* note 45 § 5.22 at 241-48. In any event, to the extent that those elements have any bearing on common law primary assumption of risk, the Wyoming statute does not require their presence. WYO. STAT. § 1-1-123(a) (Supp. 1992).

162. A resort to rules of statutory construction reveals that a court must avoid absurd results in legislation, must harmonize every section of a statute, and must not construe a portion of a statute so as to render other portions meaningless. Stauffer Chemical Co. v. Curry, 778 P.2d 1083, 1093 (Wyo. 1989); Reliance v. Chevron, 713 P.2d 766, 770 (Wyo. 1986).

163. *See supra* notes 2 and 19-21 and accompanying text.

164. *See supra* note 133 and accompanying text. WYO. STAT. §§ 1-1-122(a)(ii),(iii) (Supp. 1992).

165. Otherwise is defined as "in another way; differently." THE AMERICAN HERITAGE DICTIONARY 931 (Ed. 1981). This language therefore appears to make the Act applicable, whether or not a fee is charged to the participant. DiVenere v. University of Wyoming, 811 P.2d 273, 275 (Wyo. 1991) (if statute is

both defined in the Act.[164] "Provider" is defined as one who "for profit or otherwise[165], offers or conducts a sport or recreational opportunity."[166] This section gives a scope to those persons or entities, private or public, governed by the Act. Provider includes profit, non profit, private and governmental entities. This necessarily includes the federal government, the state of Wyoming and Wyoming municipalities.[167] This section specifically exempts any product liability based cause of action premised on design or manufacture of recreational equipment.[168] Sport or recreational activity is defined to include a non-exclusive list of a variety of activities.[169]

4. Interaction with Comparative Negligence Act

The Act expressly preserves actions against the provider for the provider's negligence.[170] However, the language of Wyo. Stat. § 1-1123(c) as drafted, may be viewed as ambiguous. The provision reads: "Actions based upon *negligence of the provider not caused by an inherent risk of the sport* or recreational opportunity shall be preserved pursuant to W.S. 1-1-109."[171] This provision might be interpreted to mean that an action for negligence can only be maintained against a provider where the *negligence is not caused by* an inherent risk of the sport.

Reading the statute as a whole, an amendment which would harmonize this provision with §§ 1-1-123(a) and (b) (the provider has no duty regarding inherent risks) would be the following:[172]

> Actions based upon negligence of the provider *wherein the injury was not the result* of an inherent risk of the sport or recreational opportunity shall be preserved pursuant to W.S. 1-1-109.

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unambiguous, words of statute are interpreted by reference to their plain and ordinary meaning). For a discussion of the Act's potential interaction with Wyoming's Recreational Use Statute in these "no-fee" situations, *see infra* notes 194-210 and accompanying text.

166. WYO. STAT. § 1-1-122(a)(ii) (Supp. 1992). A provider may or may not be a possessor of land. For a discussion of the Act's interaction with Wyoming premises liability law, *see infra* notes 183-193 and accompanying text.

167. *Id.* The federal government is covered by the Act to the extent that no other federal acts preempt state legislation in this area. Furthermore, it is important to note the interplay which must exist between the application of the Act and the Federal and Wyoming Tort Claims Acts. 28 U.S.C.A. § 1346 (West Supp. 1992); WYO. STAT. § 1-39-106 (Supp. 1991). Those acts provide exceptions to government immunity in certain circumstances. *Id.* A plaintiff suing the state or federal government would need to comply with the notice of claim provisions and other requirements contained in those acts prior to any application of the Recreation Safety Act. *Id.*

168. *See supra* note 13 3 and accompanying text. Wyo. STAT. § 1-1-122(a)(ii) (Supp. 1992).

169. *See supra* note 133 and accompanying text. Wyo. STAT. § 1-1-122(a)(iii) (Supp. 1992).

170. WYO. STAT. § 1-1-123(c)(1977).

171. This statutory reference is to Wyoming's Comparative Negligence Act.

172. *See supra* note 162.

This amended language is consistent with the Act's intent to prevent plaintiff's recovery where the injury results from an inherent risk. Alternatively, the amended language clarifies that plaintiff may pursue a negligence claim against the provider if the injury is not the result of an inherent risk.[173]

Wyo. Stat. § 1-1-123(c)'s language preserving provider negligence claims makes a direct reference to Wyoming's Comparative Negligence Act.[174] However, the Comparative Negligence Act would only come into play following the court's application of the inherent risk doctrine, as codified in the Act.

If the court determines that the injury results from an inherent risk, the provider owes no legal duty, plaintiff's cause of action must fail, and the Comparative Negligence Act is unaffected.[175] If the injury does not result from an inherent risk, plaintiff may go on to prove that the provider's negligence caused his injuries.[176] Provider may then assert that plaintiff's contributory negligence caused or contributed to the injury.[177] The Comparative Negligence Act would then be applied by the trier of fact to compare the fault of the parties accordingly.[178]

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173. The Utah Supreme Court's holding in *Clover v. Snowbird Ski Resort,* illustrates the importance of including this "preservation of operator negligence claims" provision in a statute. 808 P.2d 1037, 1046 (Utah 1991). In that case, the court was interpreting Utah's Inherent Risk of Skiing Statute, which does not include a provision expressly preserving operator negligence claims. Plaintiff was injured when he collided with another skier, following the latter skier's jump off a steep incline. The Utah statute provides that:

> an "inherent risk of skiing" means those dangers or conditions which are an integral part of the sport of skiing, including, but not limited to: ". . . variations in steepness or terrain" and "collisions with other skiers" and further provides that "no person engaged in [skiing] shall recover from a ski operator for injuries *resulting from those* inherent risks." (Emphasis added).

The Utah Supreme Court, constructing a very convoluted interpretation of the statute, reversed the lower court's grant of summary judgment for Snowbird. The court held that, pursuant to the statutory language, an inherent risk can only bar recovery if, under the facts of each case, the risk is an "integral aspect of the sport of skiing." The court then held that the existence of a "blind jump" with a landing area located on a high traffic slope is not an "essential characteristic of an intermediate run." The court then reversed, holding that a genuine issue of fact existed as to whether Snowbird exercised reasonable care. *Id.* at 1044-48.

The court should have focused on a basic question: was the injury the result of an inherent risk or the result of a breach of duty by Snowbird? The statute already provides that recovery is barred only for injuries "resulting from" inherent risks. It is certainly implied that if the injury does not result from an inherent risk, a plaintiff can proceed to prove provider negligence.

174. Wyo. STAT. § 1-1-109 (1988).

175. *See supra* notes 141-143 and accompanying text.

176. *See supra* notes 31, 144-145 and accompanying text. The term "negligence" is oftentimes used to describe defendant's breach of a legal duty. ABC Builders v. Phillips, 632 P.2d 925, 930 (Wyo. 1981). *See supra* note 144, for a discussion of a provider's potential legal duties to a participant.

177. *See supra* notes 32-34.

178. WYO. STAT. § 1-1-109 (1988). Is it possible for the injury to be caused partially by negligence of the provider and partially by an inherent risk? The Oregon Court of Appeals said yes in *Jessup v. Mt. Bachelor, Inc.,* a decision affirming summary judgment for the ski operator. 792 P.2d 1232 (Or. App. 1990). The operator had raised the statutorily defined inherent risk doctrine as an affirmative

The inherent risk doctrine, as codified in the Act, works as a "duty analysis" and does not impinge upon the Comparative Negligence Act. The Act simply clarifies what should happen anyway under the common law inherent risk doctrine as originally espoused *in Wright.* The Act does not revive secondary assumption of risk as a complete defense to a cause of action.[179]

5. Interaction with Wyoming Premises Liability Law, Recreational Use Statute[180] and Skier Responsibility Statute[181]

Although the Act does not include an express reference to other related Wyoming statutes or to common law premises liability, it is

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defense to plaintiff's claim of injuries resulting from a skier collision. The jury was instructed that an operator has no duty for injuries resulting from the inherent risks of the sport. The jury instruction left to the jury the question of whether a collision was an inherent risk. In response to an alternate argument posed by plaintiff, the court held that the Oregon statute allows for the application of comparative negligence in cases where injury results from a combination of both an inherent risk and operator negligence. *Id.* at 1233. *Accord,* Hiibschman v. City of Valdez, 821 P.2d 1354, 1363 (Alaska 1991).

179. The Wyoming Supreme Court held in *Brittain v. Booth,* that "assumption of risk, as a form of contributory negligence is not an absolute defense to a negligence action, but is a basis for apportionment of fault." 601 P.2d 532, 534 (Wyo. 1979). Based upon this pronouncement, Wyoming Civil Pattern Jury Instruction § 3.07 does not recommend an instruction on assumption of risk. This makes sense because secondary assumption of risk is simply a form or phase of contributory negligence. *Id.* The defense of contributory negligence "necessarily presupposes negligence for which the defendant is liable, which would be actionable but for the concurrence of the contributory negligence." Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1297, 1301 (Wyo. 1936). As clearly identified in *Meistrich,* the term "assumption of risk" used in its primary sense is simply a misnomer. The primary assumption of risk doctrine undertakes a duty analysis *to determine if there is a legal duty in the first instance.* If there is not, there can be no negligence. *See supra* notes 35-39 and accompanying text. Therefore, the Wyoming Supreme Court's pronouncement in *Brittain,* must have contemplated the merger only of assumption of risk in its secondary sense into contributory negligence. 601 P.2d at 534.In any event the Act forces this result in the inherent risk context.

180. Wyo. STAT. §§ 34-19-101, -106 (1977). This statute is entitled "Liability of Owners of Land Used for Recreation Purposes" but has been cited by Davis, *supra* note 13 as the "Recreational Use Statute." The statute provides:

§ *34-19-101. Definitions.*

(a) As used in this act:

(i) "Land" means land, including state land, roads, water, water-courses, private ways and buildings, structures, and machinery or equipment when attached to the realty;

(ii) "Owner" means the possessor of a fee interest, a tenant, lessee, including a lessee of state lands, occupant or person in control of the premises;

(iii) "Recreational purpose" includes, but is not limited to, any one (1) or more of the following: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports and viewing or enjoying historical, archaeological, scenic or scientific sites;

(iv) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land;

(v) "This act" means W.S. 34-19-101 through 34-19-106. (Laws 1965, ch. 9, § 1; W.S. 1957, § 34-389.1; Laws 1989, ch. 27, § 2.)

§ *34-19-102. Landowner's duty of care or duty to give warnings.*

Except as specifically recognized by or provided in W.S. 34-19-105, an owner of land owes no

important to highlight the interrelationship between these laws, thus clarifying the scope and breadth of the Act.[182]

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duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on such premises to persons entering for recreational purposes. (Laws 1965, ch. 9, § 2; W.S. 1957, § 34-389.2; Laws 1989, ch. 27, § 2.) § *34-19-103. Limitations on landowner's liability.* (a) Except as specifically recognized by or provided in W.S. 34-19-15, an owner of land who either directly or indirectly invites or permits without charge any person to use the land for recreational purposes or a lessee of state lands does not thereby:

(i) Extend any assurance that the premises are safe for any purpose;

(ii) Confer upon the person using the land the legal status of an invitee or licensee to whom a duty of care is owed;

(iii) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of the person using the land. (Laws 1965, ch. 9, § 3; W.S. 1957, § 34-389.3; Laws 1989, ch. 27, § 2.)

§ *34-19-104. Application to land leased to state or political subdivision thereof.*

Unless otherwise agreed in writing W.S. 34-19-102 and 34-19-103 shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision of this state for recreational purposes. (Laws 1965, ch. 9, § 4; W.S. 1957,

§ 34-389.4; Laws 1989, ch. 27, § 2.)leb § *34-19-105. When landowner's liability not limited.*

(a) Nothing in this act limits in any way any liability which otherwise exists:

(i) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity;

(ii) For injury suffered in any case where the owner of land charges the persons who enter or go on the land for recreational purposes, except that in the case of land leased to the state or a subdivision of this state, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section. (Laws 1965, ch. 9, § 5; W.S. 1957, § 34-389.5; Laws 1989, ch. 27, § 2.)

§ *34-19-106. Duty of care, not created; duty of care of persons using land.*

(a) Nothing in this act shall be construed to:

(i) Create a duty of care or ground of liability for injury to persons or property;

(ii) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise care in his use of the land and in his activities on the land, or from the legal consequences of failure to employ such care. (Laws 1965, ch. 9, § 6; W.S. 1957, § 324-389.6; Laws 1989, ch. 27, § 2.)

181. Wyo. STAT. § 6-9-201 and § 6-9-301 (Supp. 1992)

§ *6-9-201. Trespass on closed or unsafe areas within ski areas,- penalty; exceptions.*

(a) A person is guilty of a misdemeanor punishable by a fine of not more than one hundred dollars ($100.00) if he:

(i) Skis on a slope or trail that has been posted as "closed;"

(ii) Knowingly enters upon public or private lands from an adjoining ski area when the lands have been closed by the owner and posted as closed by the owner or by the ski area operator; or

(iii) Intentionally enters state or federal land leased and in use as a ski -area, knowing:

(A) The lessee of the premises has designated the land as an unsafe area; or

(B) The land has been posted with warning signs, prohibiting entry, which are reasonably likely to come to the attention of the public. (b) This section does not apply to peace officers, national park or forest service officers, or persons authorized by the lessee of the premises. (Laws 1982, ch. 75, § 3; 1989, ch. 202, § 1.)

§ *6-9-301. Skier safety; skiing while impaired; unsafe skiing; collisions; penalties.*

(a) No person shall move uphill on any passenger tramway or use any ski slope or trail while such person's ability to do so is impaired by the consumption of alcohol or by the use of any illicit controlled substance or other drug as defined by W.S. 35-7-1002.

(b) No person shall ski in reckless disregard of his safety or the safety of others.

(c) No skier involved in a collision with another person in which an injury results shall leave the vicinity of the collision before giving his name and current address to an employee of the ski area operator or a member of the ski patrol except for the purpose of securing aid for a person injured in the collision, in which event the person leaving the scene of the collision shall give his name and current address as required by this subsection within twenty-four (24) hours after

a. Premises Liability Law. As already demonstrated, premises liability law has interacted with the inherent risk doctrine throughout its history.[183] In Wyoming, a land possessor's legal duties are still governed by whether the entrant is an invitee, licensee or trespasser.[184] A possessor owes an invitee affirmative duties to inspect the land, and warn of or make safe any dangerous conditions.[185] A possessor's duty to a licensee or trespasser is the same: not to willfully or wantonly injure him.[186] The Act does not express any intended abrogation of common law.[187] Therefore, premises liability law should continue to interphase with the inherent risk doctrine as codified in the Act.

Because the Act covers a variety of recreational opportunities, premises law may or may not be involved. A provider could either be a possessor (e.g. ski area) or a non-possessor (e.g. climbing or rafting company).[188]

If the provider is a possessor, the participant would either be an invitee or licensee.[189] The possessor-provider would owe no legal duty to the participant for injuries determined to result from an inherent risk.[190] Alternatively, if the participant's injuries were determined not

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securing aid. (d) Any person violating this section is guilty of a misdemeanor punishable by imprisonment for not more than twenty (20) days, a fine of not more than two hundred dollars ($200.00), or both. (Laws 1989, ch. 202, § 2.)

182. The Wyoming Supreme Court has held:

All statutes are presumed to be enacted by the legislature with full knowledge of the existing state of law with reference thereto and statutes are therefore to be construed in harmony with the existing law, and as a part of an overall and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to the decisions of the courts. Matter of Adoption of Voss, 550 P.2d 481, 486 (Wyo. 1976).

183. *See supra* notes 19-28 and accompanying text.

184. Yalowizer v. Husky Oil Co., 629 P.2d 465, 466 (Wyo. 1981); *see also supra* note 23. Note that the Recreational Use Statute, *supra* note 180, is an exception to this rule.

185. Radosevich v. Board of County Commissioners, 776 P.2d 747, 749 (Wyo. 1989); *See also supra* note 25.

186. *Yalowizer,* 629 P.2d at 466; *see also supra* note 26.

187. State v. Stovall, 648 P.2d 543, 546-47 (Wyo. 1982)."[T]he presumption is that no change is intended [in the common law] unless the statute is explicit." *Id.*

188. *See supra* notes 97; 144; 166.

189. If the possessor-provider obtains any real or potential economic benefit from the participant, the participant will be considered an invitee. Sinclair Refining Company v. Redding, 439 P.2d 20, 23 (Wyo. 1968). Note that if participant pays no fee and provider is considered to fall within the scope of the Recreational Use Statute, the premises classifications are eliminated. Wyo. STAT. § 34-19-102,-03 (1977). *See infra* notes 194-210 and accompanying text for a discussion of the Act's interaction with the Recreational Use Statute.

190. Wyo. STAT. § 1-1-123 (Supp. 1992).

to result from an inherent risk, the court should consider whether a possessor-provider owes a legal duty under premises liability law.[191]

A non-possessor provider would also owe the participant no legal duty if the injuries were determined to result from an inherent risk.[192] However, in contrast, if the participant's injuries were determined not to result from an inherent risk, the court should consider whether a non-possessor provider owes a legal duty under another legal principle.[193]

b. Recreational Use Statute. Unlike the Act, the Recreationa Use Statute only encompasses cases involving premises liability and cases where no fee is paid for the use of the land.[194] Furthermore, the statute applies to a "recreational purpose."[195] The definition of "recreational purpose" includes a broader variety of activities than the inherent risk "sport or recreational opportunit[ies]"[196] defined in the Act.[197]

The statute works to limit the liability of a land possessor[198] who "directly or indirectly invites or permits *without charge* any person to use the land for recreational purposes."[199] The statute eliminates the distinction between "invitees...... licensees" and "trespassers" and provides that a possessor's only duty of care to persons using the land for recreational purposes is to refrain from willfully or maliciously failing to "guard or warn against a dangerous condition."[200] This type of legislation was apparently enacted to encourage land possessors to make

191. *See supra* notes 184-86 and accompanying text and note 188. Note that the court could view a possessor's duties under premises liability law in tandem with any duty implied in Wyo. STAT. § 1-1-122(a)(i) (*supra* note 133 and accompanying text) to reasonably alter, eliminate or control non-inherent risks. *See supra* note 144.

192. WYO. STAT. § 1-1-123 (Supp. 1992).

193. WYO. STAT. § 1-1-122(a)(i) (Supp. 1992). Note that this issue could be influenced by any duty implied in Wyo. STAT. § 1-1-122(a)(i), to reasonably alter, eliminate or control noninherent risks. See supra note 144.

194. WYO. STAT. § 34-19-102-03; § 34-19-105 (1977). Note that this is in contrast to the Act, which applies in cases where a "provider" "offers or conducts" a "recreational opportunity" "for profit or otherwise." Wyo. STAT. § 1-1-122(a)(ii) (Supp. 1992). *See supra* notes 164-65 and accompanying text. *See Davis, supra* note 13, for a detailed discussion and analysis of the Wyoming Recreational Use Statute.

195. WYO. STAT. § 34-19-101(a)(iii) (1990).

196. Wyo. STAT. § 1-1-122(a)(iii) (Supp. 1992).

197. Recreational purpose is defined to include: "picnicking ... pleasure driving, nature study, viewing or enjoying historical, archaeological, scenic or scientific sites." WYO. STAT. § 34-19-101(a)(iii) (1990).

198. The statute defines an "owner" of land to include those with less than a fee interest, e.g. lessees and those persons "in control of the premises." Wyo. STAT. § 34-19-101(a)(ii) (1990). Therefore, for clarity, the term "possessor" is used.

199. *Id.* (emphasis added). The statute also applies to limit the duties and liability of an owner of lands leased to the state. WYO. STAT. § 34-19-104 (1990).

200. WYO. STAT. § 34-19-105 (1990). Note that, under Wyoming premises law, a possessor's duty to licensees and trespassers is the same: to refrain from willful or wanton injury. Yalowizer v. Husky Oil Co., 629 P.2d 465, 466 (Wyo. 1981); *see supra* notes 26 and 186 and accompanying text. Therefore, the statute only effectively alters a possessor's common law duties to invitees. *See Davis, supra* note 13 at 656.

their land available to the public for recreational use.[201]

Because the Recreational Use Statute only encompasses premises cases where no fee is paid by the entrant, its potential interaction[202] with the Act appears limited to the following type scenario: Possessor has set up cross-country ski trails on his property for use by him and his friends. Possessor invites Party A to use his land, without charge, for cross-country skiing.[203] If Party A is injured in connection with a condition of the premises, Possessor may be liable under the Recreational Use Statute only for willful or malicious failure to protect against or warn of the condition.[204]

Could Possessor also be considered a "provider," thus triggering application of the Act?[205] A provider includes one who "for profit or otherwise, *offers or conducts* a sport or recreational opportunity."[206] If Possessor's invitation to ski is considered an "offered"[207] recreational opportunity, he would also be covered by the Act.[208] Under the Act, if the injury is determined to result from an inherent risk, Possessor would owe no legal duty to Party A.[209] If the injury is determined not to result from an inherent risk, Possessor may be liable under the Recreational Use Statute only for willful or malicious failure to protect against or warn of a dangerous condition.[210]

c. Skier Responsibility Statute. Under the Skier Responsibility Statute a skier is subject to criminal liability for engaging in certain types of prohibited conduct while participating in the sport of skiing.[211] This statute should only interphase with the Act in a limited way,[212] illustrated by the following example: Plaintiff is injured in a fall on

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201. *Davis, supra* note 13, at 650.

202. The Wyoming Supreme Court has held that it will interpret statutes related to the same subject matter in harmony with one another, whenever possible. Stauffer Chemical Co. v. Curry, 778 P.2d 1083, 1093 (Wyo. 1989). *See also supra,* note 182.

203. WYO. STAT. § 34-19-101(a)(iii) (1990) defines "recreational purpose" to include "winter sports.

204. WYO. STAT. § 34-19-105 (1990).

205. WYO. STAT. § 1-1-122(a)(ii) (Supp. 1992).

206. *Id.*

207. Offer means to propose or provide. THE AMERICAN HERITAGE DICTIONARY 931 (1981). DiVenere v. University of Wyoming, 811 P.2d 273, 275 (Wyo. 1991) (words of an unambiguous statute are given their plain and ordinary meaning). It appears that provider's invitation could be considered an "offer."

208. In many cases, a "provider" under the Act will charge a fee to participants (i.e. downhill skiing, float trips, dude trail rides). If a fee is charged, the Recreational Use Statute would not apply (and thus not interact with the Act) in a subsequent action against the provider. WYO. STAT. § 34-19-105(a)(ii) (1977).

209. WYO. STAT § 1-1-123 (Supp. 1992).

210. WYO. STAT. § 34-19-105(a)(i) (1990). Note that if Wyo. STAT. § 1-1-122(a)(i) is construed to require the provider to reasonably alter, eliminate or control non-inherent risks, there is a potential conflict with a possessor's limited duties under the Recreation Use Statute. See *supra* note 144.

211. Wyo. STAT. §§ 6-9-201 to -301 (Supp. 1992). *See* text of statute, *supra* note 181 and accompanying text.

provider's ski slope. A subsequent blood alcohol test proves him legally drunk at the time of the fall. He is criminally convicted under the statute and pays the required fine.[213]

Plaintiff later files a cause of action sounding in negligence against the provider to recover damages for injuries incurred in the fall. If plaintiff's injuries are determined to result from an inherent risk, provider owes no legal duty to plaintiff, and plaintiff's cause of action must fail.[214] Therefore, plaintiff's conviction would be irrelevant to the inquiry. If, however, his injuries were determined not to result from an inherent risk, the violation of the statute could be evidence weighed by the trier of fact in assessing plaintiff's potential contributory negligence under the Comparative Negligence Act.[215]

B. *Proposed Analytical Framework For the Judiciary*

How will the Act be interpreted and applied? Defense attorneys will use the Act in support of pre-trial motions to dismiss or for summary judgment.[216] The Act should be pled under the defense of failure to state a claim for which relief can be granted.[217]

Alternatively, plaintiffs bear the burden of presenting evidence of the elements of a cause of action in negligence.[218] Plaintiff must present evidence that the provider breached a legal duty, and that that breach was a proximate cause of plaintiff's injuries.[219] Plaintiffs' attorneys will therefore incorporate the Act into their initial complaint, urging that the injury resulted from a non-inherent risk and that the

212. And, of course, only in the skiing context. *Id.*

213. The statute provides that "[n]o person shall ... use any ski slope or trail while such person's ability to do so is impaired by the consumption of alcohol." WYO. STAT. § 6-9-301(a) (Supp. 1992). Violation of this section amounts to a misdemeanor and can result in a fine, imprisonment, or both. Wyo. STAT. § 6-9-301(d) (Supp. 1992).

214. WYO. STAT. § 1-1-123 (Supp. 1992).

215. WYO. STAT. § 1-1-109 (1986). A party's violation of a statute may be considered as evidence of negligence. Short v. Spring Creek Ranch, 731 P.2d 1195, 1198-99 (Wyo. 1987). *See also supra* notes 170-79 and accompanying text for a discussion of the Act's interaction with the Comparative Negligence Act.

216. W.R.C.P, 12 and 56.

217. The Act should not be used as a basis for the affirmative defense of assumption of risk. This will only result in confusion with secondary assumption of risk or contributory negligence. If it appears to defense counsel that contributory negligence is a viable affirmative defense, it should by all means be pled. Then, if defendant fails in his pre-trial motions, he can assert the affirmative defense and urge that despite defendant's alleged negligence, plaintiff was contributorily negligent. Defendant then has the burden of proving the presence of contributory negligence, or plaintiff's failure to use Ordinary care under the circumstances. See Wyo. Civ. Pattern Jury Instructions, No. 10.01 (September 1981) (contributory negligence defined as a "failure to use ordinary care"). Plaintiff's actual knowledge and appreciation of the risk would then be viewed by the court or jury in assessing plaintiff's share of contributory fault. O'Donnell v. City of Casper, 696 P.2d 1278, 1284 (Wyo. 1985).

218. Pine Creek Canal No. I v. Stadler, 685 P.2d 13, 16 (Wyo. 1984); *see also supra note* 31 and accompanying text.

219. *Id.*

cause of the injury was provider negligence.[220]

The court must then determine the existence of a legal duty.[221] This will generally be done within the context of pre-trial motions to dismiss or for summary judgment.[222] In applying the Act, the court must analyze whether or not the injury resulted from an inherent risk, and hence, whether or not the provider owed a legal duty.[223]

The court's duty determination is fundamental. The court can implement the analytical framework it has previously used in *Gates v. Richardson*[224] to conduct this duty analysis. This framework utilizes common law principles to determine whether or not a provider owes a duty, and hence whether or not recovery is barred.[225]

In United States v. Carroll Towing, Judge Learned Hand defined the duty analysis as a function of three broad variables: 1) "P" is the probability of the risk to cause injury; 2) "L" is the potential gravity of the resulting injury; and, 3) "B" is the burden upon the defendant of taking adequate precautions. Hand summarized that if the burden on defendant was less than the probability of injury multiplied by the gravity of resulting injury, or, $B<PL$, then a duty should extend to defendant.[226]

Like Judge Hand, the Wyoming Supreme Court has recognized that the question of whether to impose a duty in any given case is dependent on various factors:

> ***The judge's function in a duty determination involves complex considerations of legal and social policies which will directly affect the essential determination of the limits to government protection. Consequently,***the imposition and scope of a legal duty is dependent not only on the factor of foreseeability [citations omitted] but involves other consid erations, including the

220. WYO. STAT. § 1-1-123 (Supp. 1992).

221. In Wyoming, the existence and scope of a legal duty are questions of law for the court to decide. Ely v. Kirk, 707 P.2d 706, 709 (Wyo. 1985). However, some commentators believe that the trier of fact should decide whether the injury results from an inherent risk, and thus, whether the provider owes a legal duty. *See* Dillworth v. Gambardella, 776 F. Supp. 170, 173 (D. Vt. 1991); Harkins, supra note 45 at 351. *See supra* note 178 (discussing the possibility of injuries resulting from a combination of both provider negligence and an inherent risk).

222. W.R.C.P., 12 and 56.

223. WYO. STAT. § 1-1-122(a)(i) (Supp. 1992). *See also supra* notes 141-43 and accompanying text and notes 151-153 and accompanying text.

224. 719 P.2d 193 (Wyo. 1986).

225. The judge may decide to submit the "inherent risk" question to the jury. However, this would necessarily and inappropriately involve the jury in the duty determination, usually a question of law for the court. *See supra* note 148 and *infra* note 227 and accompanying text.

226. 159 F.2d 169, 173 (2nd Cir. 1947).

> magnitude of the risk involved in defendant's conduct, the burden of requiring defendant to guard against that risk, and the consequences of placing that burden upon the defendant... ***Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which leads the law to say that the plaintiff is entitled to protection.[227]

The Wyoming Supreme Court has looked to eight specific factors (the "Gates" factors) in conducting its duty analysis. These factors include:

1) [t]he foresecability of harm to the plaintiff;
2) the closeness of the connection between the defendant's conduct and the injury suffered;
3) the degree of certainty that the plaintiff suffered injury;
4) the moral blame attached to the defendant's conduct;
5) the policy of preventing future harm;
6) the extent of the burden upon the defendant;
7) the consequences to the community and the court system, and;
8) the availability, cost and prevalence of insurance for the risk involved.[228]

These factors provide the court with a framework for determining the existence of a legal duty in a negligence case.[229] However, the Wyoming Supreme Court has noted that there is no "scientific formula" for determining whether a duty exists.[230] Therefore, these factors should be used in conjunction with broad policy notions to allow the court to determine in any given case whether a risk is inherent, and hence, whether a legal duty exists.[231] The following scenario illustrates how the framework might be employed.[232]

Scenario: A privately owned ski area ("provider") uses net-like

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227. Mostert v. CBL & Associates, 741 P.2d 1090, 1093 (Wyo. 1987) *(Citations omitted)*.

228. *Mostert,* 741 P.2d at 1094. These eight factors cited in *Gates* were taken from Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976). *See also* Pickle v. Board of County Com'rs, 764 P.2d 262, 265 (Wyo. 1988).

229. If viewed closely, these eight factors implicitly fit within the Hand B<PL variables. Factors 6 and 8 going to the "B" variable, factors 1, 2 and 5 going to the "P" variable and factors 3, 4 and 7 going to the "L" factor.

230. *Pickle,* 764 P.2d at 265.

231. The Wyoming Supreme Court has noted that the first two *"Gates"* factors are somewhat useless in the duty analysis. *Pickle,* 764 P . 2d at 269; *Gates,* 719 P.2d at 196. Further, the court has found that the *"Gates"* factors need not be weighed equally nor should any one factor necessarily be dispositive in the duty analysis. *Id.* The "Gates" factors implicitly fit within the "Hand" balancing test. *See supra* note 229. Therefore it might be simpler for the court to employe the "Hand" test in conducting its duty analysis. *See supra* note 226 and accompanying text.

fences for traffic control purposes. Plaintiff skier turns, hits the net and then takes a fall, suffering injuries. Plaintiff sues provider for negligence in creating the hazardous condition. Following discovery, defendant moves for summary judgment, urging that the net[233] was an inherent risk of skiing, and that plaintiff's claim should be dismissed.[234] How should the judge analyze whether a legal duty exists under the Act?

Are nets of this kind characteristic of or intrinsic to the sport of skiing? The evidence shows that 95% of all ski areas across the country use this type of netting on their mountains for similar purposes. It appears it is characteristic of the sport.

Can the net be reasonably altered, eliminated or controlled? The evidence shows there has been no injury resulting from the use of these nets over the past 15 years. Correspondingly, the evidence shows that over the past 15 years, the nets have controlled skier traffic and reduced the number of reckless and out-of-control skiers. The evidence also shows that a flexible versus rigid net is the most practical traffic control device in that it protects skiers from injuries resulting from impact with the net.

Use of the "Hand" test would presumably incorporate may of the factors discussed by the Colorado Courts in Smith v. City and County of Denver, 726 P.2d 1125 (Colo. 1986) and University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1986). Factors analyzed by the court include: the likelihood of the injury versus social utility, the burden of guarding against the risk, the consequences of placing the burden upon the actor, and public and social interests. For a discussion of how this duty analysis can be employed in the skiing context, *see* Ferguson, *supra* note 2, at 186-92. The Wyoming Supreme Court has already recognized the value of considering the factors highlighted in *Smith and Whitlock*. *See Mostert,* 741 P.2d at 1093.

232. This scenario highlights only selected hypothetical facts and is presented for illustrative purposes only. The scenario is not intended to encompass an analysis of every legal or factual issue that might be raised in a case involving these types of nets, eg. a cause of action based upon defective design or manufacture. See Wyo. STAT. § 1-1-122(a)(iii) (Supp. 1992). Furthermore, the scenario is not intended to illustrate the only method for interpreting or applying the Act.

233. The net is made of a flexible plastic type material.

234. These facts were altered, but extracted from *Berniger v. Meadow Green Mountain.* 945 F.2d 4 (1st Cir. 1991). The court of appeals affirmed the lower court's motion to dismiss, ruling as a matter of law that the net which caused plaintiff's injuries was an inherent risk within the scope of New Hampshire's statutorily defined inherent risks. *Id.* at 8 *(quoting N.H.* REV. STAT. § 225-A:4).

See also Burke v. Ski America, Inc., in which the circuit court affirmed a directed verdict for defendant. 940 F.2d 95 (4th Cir. 1991). In that case, plaintiff, an expert skier, slid on an icy slope, falling underneath a section of border safety netting, ultimately suffering injuries from collisions with stones and trees. Plaintiff alleged that she assumed the plastic netting existed to protect her from the hazards existing along the edge of the slope. The court employed a two pronged test to determine duty: plaintiff must establish that the injury was not caused by an inherent risk of skiing, and was not caused by an obvious condition of the premises. The court muddled its analysis of the two prongs and did not specifically address proximate cause, but did affirm that collectively, the rocks and trees were inherent risks of the sport, and that no evidence existed to show that the ice, slope design and/or netting used, deviated from ordinary custom. *Id.* at 97.

Review of the "Gates" factors indicates the following:

1) it was foreseeable that a plaintiff might run into the net;
2) the connection between defendant's conduct and the injury suffered was not remote, but insignificant in that defendant's purpose in using the net was to control traffic and to have skiers ski in control;
3) it is sufficiently certain that plaintiff suffered injuries, but this is a neutral factor;
4) there is no moral blame associated with the defendant's conduct;
5) provider's purpose in erecting the net was to slow skiers at critical points to minimize future harm; the evidence shows that the absence of the net would increase the potential for injuries;
6) current technology will not allow for the net to be reasonably altered, therefore, to require elimination of the net will place a burden on the ski area: a) the liability risk and attendant cost of defending against increased claims arising from reckless skiing incidents, and; b) the need to find an alternative method to control skier traffic;
7) if the nets are eliminated, the court and community will suffer because of the increased risk of skier injuries and attendant increase in lawsuits;
8) if the nets are eliminated, provider's insurance rates may increase, because of its perceived failure to implement practical measures to reduce the number of reckless and outof-control skiers.

Considering all of the above factors it is evident that the net is characteristic of skiing and that it cannot reasonably be altered or eliminated and still effectively perform a traffic control function. The provider therefore owes plaintiff no legal duty for injuries resulting from collision with the net (an inherent risk of the sport) and the motion for summary judgement should be granted.

V. LEGISLATIVE VERSUS JUDICIAL APPROACH

Is Wyoming's judicial approach better than the comprehensive legislative approach taken in Colorado? Some commentators say no.[235]

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235. Farrow, *supra* note 8, at 284 (The writer urges specific legislation rather than judicial discretion: "Only the proper combination of (specific) safety requirements and (specific) limitation on an operator's liability will equitably serve the interest of both legislators and skiers.")

Certainly, a statute defining duties of operator and participant, and spelling out the scope of inherent risks, informs the respective parties of their future obligations. In a sparsely populated state like Wyoming, where little, if any, interpretive case law trickles down from the Wyoming Supreme Court, this approach appears attractive at first blush.[236] However, an operator gains no real predictability if a statutory list of inherent risks is non-exclusive (e.g. the court or jury must still decide if a particular risk falls within the statutory definition).[237] Furthermore, advances in technology may make an inherent risk "list" outdated.[238] Lastly, the statutory language may be so complicated and confusing that it defies practical application.[239] The truly meritorious claim may fall through the cracks.[240]

In any event, the group of recreational activities currently covered by Wyoming's Act would have to be limited in order for the Wyoming legislature to even consider a "legislative approach." Unlike the Colorado Act which applies only to skiing, the Wyoming Act covers a non-exclusive list of recreational sports. It would be impossible to effectively list out inherent risks and duties for the nonexclusive group of activities currently included within the Act's coverage. In passing the Act, Wyoming legislators made a conscious tradeoff, but one which should prove worthwhile if the Act is effectively interpreted by the judiciary.

VI. CONCLUSION

Enactment of the Recreation Safety Act in Wyoming is a positive step. The Act codifies the inherent risk doctrine's role as a parameter for defining the scope of a provider's duty. The framework for applying the Act, as proposed in this article, utilizes Wyoming common law

236. Should the Wyoming Supreme Court interpret the Act and judicially determine a particular risk "inherent," such determination would only partially inform providers of legal duties owed to participants. Farrow, *supra* note 8, at 85.

237. Of the fourteen state statutes which include a definition and corresponding "list" of inherent risks, Montana is the only state which includes an exclusive list of inherent risks. *See infra* Appendix A. One commentator suggests either leaving the question of which risks are inherent entirely to the courts, or, in the alternative, including within the statute an all inclusive list of inherent risks. Faber, *supra* note 44, at 367.

238. Smissen, *supra note* 45 § 8.41 at p. 80. Such a list must summon legislative clairvoyance to withstand the test of time.

239. See Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985), wherein the Supreme Court of Colorado undertakes an exhaustive study of the myriad of jury instructions submitted by the lower court on Colorado's comprehensive Skier Safety Act. *Id.* Pretrial summary disposition seems highly unlikely under the Colorado formula.

240. *Tort Reform Test, supra* note 121. One lawyer interviewed in regard to Colorado's comprehensive legislation noted that as a result, many cases have become more expensive to pursue and more difficult to prove, and commented, "[t]hat in and of itself is going to result in some cases that have some merit not being pursued." *Id.*

principles to aid in determining the nature of the risk and thus, the scope of a provider's duty. This framework should allow the judiciary to effectively utilize common law principles to more precisely define the scope of these duties/responsibilities. Wyoming's judicial approach to this legislation allows the flexible use of such an analytical framework incorporating common law duty and risk analysis. However, this approach does not provide the type of certainty present in an alternative legislative approach. Following judicial interpretation, the legislature may need to revisit the Act and re-examine the balance between constitutional restrictions, deference to the judiciary, and the need for certainty in this increasingly important segment of Wyoming's economy.

APPENDIX

STATE	INHERENT RISKS	OPERATOR DUTIES	SKIER DUTIES
Alaska	09.65.135(c)(1)		
Colorado	33-44-103(10)	33-44-106 33-44-107 33-44-108	33-44-109
Connecticut	29-212 (Ch. 538a)	29-211 29-214	29-213
Idaho	6-1106 (Ch. 11)	6-1103	6-1106
Maine			26 § 488 26 § 489
Massachusetts		Ch. 143 § 7 IN	Ch. 143 § 710
Michigan	§ 18.48322(2)	§ 18.483(6a)	§ 18.48322(1)
Montana	23-2-736(4)	23-2-733	23-2-736
Nevada		455A. 130	455A.110
New Hampshire	225-A:241	225-A:23	225-A:24
New Jersey	5:13-5	5:13-3	5:13-4
New Mexico	24-15-IOB	24-15-7	24-15-10
New York	26 § 867		
N. Carolina		§ 99C-2(a), (c)	§ 99C-2(b)
North Dakota	53-09-06	53-09-03	53-09-06
Ohio	4169.08(A)	4169.08(B)	4169.08(C)
Oregon	30.970(1)	30.990	30.985
Rhode Island		41-8-1	41-8-2
Tennessee		68-48-106	68-48-103
Utah	78-27-52(l)	78-27-54	
Washington		70.117.010	70.117.020
West Virginia	§ 20-3A-5	§ 20-3A-3	§ 20-3A-5
Wisconsin—Recreational Participant Duties:			895.525(4)

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