University of Wyoming

College of Law

LAND AND WATER LAW REVIEW

VOLUME XXXIII 1998 NUMBER 1

RECREATIONAL INJURIES AND INHERENT RISKS: WYOMING'S RECREATIONAL SAFETY ACT – AN UPDATE

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I. INTRODUCTION

In the winter of 1993, the *Land & Water Law Review* published an article entitled: *Recreational Injuries and Inherent Risks: Wyoming's Recreation Safety Act,* (*1993 Article*).[1] That article traced the evolution of the "inherent risk doctrine" vis-a-vis recreational sports and activities.[2] In addition, it provided a detailed analysis of the Wyoming Recreation Safety Act ("Act") and other states' legislation in this area of the law.[3] The article closed with a discussion of how the Wyoming judiciary might interpret the Act when presented with appropriate cases.[4] This follow-up article will highlight recent case law interpreting the Act,[5] successful efforts in amending the Act,[6] and the potential impact these changes will have on the recreation industry and on the judiciary's future interpretation of the Act.

1. Cathy Hansen and Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND AND WATER L. REV. 149 (1993).

2. *See id.* nn.29-42 and accompanying text for further discussion of the meaning, history and evolution of the inherent risk doctrine. *See also infra* Part I.A., for an explanation of the inherent risk doctrine.

3. WYO. STAT. ANN. §§ 1-1-121 to 123 (Michie 1997); Hansen & Duerr, *supra* note 1, at 167-81.

4. Hansen & Duerr, *supra* note 1, at 186-90. For an analysis of how the Act interacts with Wyoming's Comparative Negligence Act, WYO. STAT. ANN. § 1-1-109 (Michie 1997) (now Comparative Fault Act), premises liability law, Recreational Use Statute, *id.* §§ 34-19-101 to -106, and Skier Responsibility Statute, *id.* §§ 6-9-201, 301, see Hansen & Duerr, *supra* note 1, at 179-86. Note that since publication of the *1993 Article*, the Act has been amended twice, in 1993 and 1996, and the Wyoming Supreme Court has abolished the invitee/licensee distinction for purposes of determining the scope of a landowner's duty to property entrants. Property owners now owe a general duty of reasonable care to all property entrants, other than trespassers. *See* Clarke v. Beckwith, 858 P.2d 293, 296 (Wyo. 1993); *see also* discussion *infra* note 52. These factors would need to be reviewed in determining the Act's current interaction with the captioned laws.

5. The only cases in Wyoming interpreting the Act are *Halpern v. Wheeldon*, 890 P.2d 562 (Wyo. 1995) and *Walters v. Grand Teton Crest Outfitters*, 804 F. Supp. 1442 (D. Wyo. 1992).

6. The Wyoming Legislature first passed the Act in 1989. Act of Mar. 7, 1989, ch. 228, 1989 Wyo. Sess. Laws. For a discussion of the Act's amendments see *infra* Parts III & IV. For a history of the Act's initial enactment, see Hansen & Duerr, *supra* note 1, at 170-

A. What is the "Inherent Risk Doctrine?"

In earlier days, the latin term *volenti non fit injuria* – "he who consents cannot receive an injury" – defined the inherent risk doctrine, highlighted in the well known case of *Murphy v. Steeplechase Amusement Co*.[7] This primary assumption of risk doctrine provides generally that individual participants assume the inherent risks of recreational activities and all liability or responsibility for injuries resulting from those risks. Alternatively, providers of recreational activities have no duty to protect participants from the inherent risks and dangers of recreational activities.[8] Inherent risks are now defined by a conglomeration of differing state statutes.[9] Inherent risks fall into two general categories: 1) those risks that are essential characteristics of a recreational activity and those that participants desire to confront: e.g., moguls, steep grades, exciting whitewater; and 2) those undesirable risks which simply exist, e.g., falling rock or sudden, severe weather changes.[10] The Wyoming Act's definition states, "`[I]nherent risk' with regard to any sport or recreational opportunity means those dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity."[11]

The *1993 Article*, coined the term "inherent risk doctrine" to describe this primary assumption of risk legal doctrine. It stated: "the terms `*volenti non fit injuria*,'[12] `primary assumption of risk' and `inherent risk doctrine' are all interrelated concepts. *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."[13]

81.

7. 166 N.E. 173, 174 (N.Y. 1929).

8. *See* Hansen & Duerr, *supra* note 1, nn.29-42 and accompanying text and *infra* notes 18-24, 56-60, and 83-85 for important clarification between the concepts of primary and secondary assumption of risk.

9. *See infra* Appendix A for a comprehensive listing of those statutory enactments. This Appendix updates Appendix A included in the *1993 Article.*

10. Clover v. Snowbird, 808 P.2d 1037, 1047 (Utah 1991); *see also infra* notes 108-09; Hansen & Duerr, *supra* note 1, nn.155-56 and accompanying text.

11. WYO. STAT. ANN. § 1-1-122(a) (Michie 1997).

12. *See supra* note 7 and accompanying text.

13. *See* Hansen & Duerr, *supra* note 1, nn.41-42 and accompanying text. Since publication of the *1993 Article*, the Wyoming Supreme Court (in *Halpern*) has agreed with this proposition, as outlined in the *1993 Article.* Halpern v. Wheeldon, 890 P.2d 562, 565 (Wyo. 1995). *See also* discussion *infra* notes 83-85 and accompanying text.

B. Why a Follow-Up?

In the eight years since its inception, the Act has been amended twice, both in 1993 and in 1996.[14] Although only two cases to date have interpreted the Act,[15] the explosion of recreational activity in Wyoming on private, state and federal lands[16] underlines the importance of understanding the Act and its potential legal impact. Recreational use of land is booming in Wyoming, a state historically tied to the ranching, agricultural and mining industries. Although mining is still the major economic force in Wyoming, tourism and recreation have grown dramatically and continue their upward trend.[17] Wyoming's beautiful and rugged "wide open spaces" beckon a huge variety of folks, eager to engage in everything from dude-ranching, horsepacking and hunting, to skiing, mountain climbing and biking. Increasing activity and the overwhelming availability of recreational opportunities in Wyoming, dictate that the Wyoming Recreation Safety Act is likely to have its *days* in court.

14. Act of Mar. 3, 1993, ch. 162, 1993 Wyo. Sess. Laws; Act of Mar. 19, 1996, ch. 78, 1996 Wyo. Sess. Laws

15. *See supra* note 5.

16. Wyoming has 40,141,128 acres of federal lands within its boundaries. Much of that combination of National Park Service, U.S. Forest Service, U.S. Fish & Wildlife Service and Bureau of Land Management lands is available for recreational use. *See National Land Acreage,* (The Wilderness Society), May 1996. "The West has the greatest wealth of recreation resources, and experiences the largest per capita participation compared to other regions in the United States." KPMG MARWICK LLP, OUTDOOR RECREATION COALITION OF AMERICA (ORCA), SPORTING GOODS MFRS. ASSOC. (SGMA), HUMAN POWERED OUTDOOR RECREATION 1997 STATE OF THE INDUSTRY REPORT 12 (1997). Last year, over 830 million visitors were tallied in the National Forests alone, land initially designated to provide the nation's wood supplies. By the year 2000, forest based recreation is "expected to pump 100 billion dollars into the U.S. economy." John G. Mitchell, *In the Line of Fire, Our National Forests,* NATIONAL GEOGRAPHIC, March 1997 at 66.

17. From 1985-1995, tourism revenue in Wyoming increased by about $100 million dollars. In 1995, nearly three million travelers visited Wyoming, responsible for about $900 million in direct expenditures, 33,500 jobs (approximately 11.4% of Wyoming's total jobs), $50 million in state and local tax revenues, and nearly $646 million in total personal income. *Report on the Economic Impact of the Travel Industry in Wyoming 1995, to the Division of Tourism, Department of Commerce,* (Morey & Associates, Inc.), April 29, 1996. Tourism appears to continue to rank second in state wide revenue, exceeded only by the mining industry. *See* WYOMING STATE ALMANAC (Dept. of Admin. & Info., Div. of Econ. Analysis, 4th ed. 1996). *See also* earlier statistics noted at Hansen & Duerr, *supra* note 1, n.10 and accompanying text.

C. Focus of this Article

In the *1993 Article,* we noted that courts' continued confusion of primary and secondary assumption of risk concepts[18] and rising insurance costs[19] finally catapulted many states into a rush to enact protective legislation, codifying the doctrine.[20] Courts continually muddled the inherent risk doctrine (primary assumption of risk) with secondary assumption of risk principles. In fact, the two legal doctrines require entirely different analyses. As the Vermont Supreme Court stated:

> Where primary assumption of 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 plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence.[21]

Secondary assumption of risk, on the other hand, was historically an absolute defense to an established breach of duty.[22] Now, in many states it is simply a form of contributory negligence and a basis for apportionment of fault under comparative fault laws.[23] Although distinct legal principles, the doctrines were hopelessly confused, prompting widespread legislation.[24] In

18. *See* Hansen & Duerr, *supra* note 1, nn.3-7, 29-42, 110-14 and accompanying text.

19. *Id.* n.8 and accompanying text.

20. *Id.* nn.110-28 and accompanying text.

21. Sunday v. Stratton, 390 A.2d 398, 403 (Vt. 1978). Prosser & Keeton state: [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. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 496 (5th ed. 1984) [hereinafter PROSSER & KEETON].

22. Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). *See also* discussion *infra*, notes 84 and 102 and accompanying text.

23. PROSSER & KEETON, *supra* note 21, at 495-96. *See also,* authorities cited *infra* note 102; Hansen & Duerr, *supra* note 1, n.33 and accompanying text. Wyoming has gone this route. *See* Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979); *see also* discussion *infra* note 55.

24. *See* Hansen & Duerr, *supra* note 1, nn.5-6, 29-42, 91-96 and accompanying text for additional authorities recognizing the confusion around, and distinction between, primary and secondary assumption of risk. Some authorities believe the term "assumption of risk" is so badly misunderstood it should be banished from the legal arena. *See,* PROSSER & KEETON, *supra* note 21, §§ 21.0 at 190, 21.8 at 259-60; Anderson v. Louisiana-Pacific, 859 P.2d 85, 89 (Wyo. 1993) (Macy, R., concurring). *See also* authorities cited in Hansen & Duerr, *supra* note 1, n.40. The confusion around the term "assumption of risk" is precisely the reason for coining the term "inherent risk doctrine" in our *1993 Article. See* Hansen &

1989, Wyoming followed with its own version of the *volenti non fit injuria* principle in recreational activities.[25] Although enactment of the legislation signified an important step for the recreation industry and went a long way to clarify the inherent risk doctrine, arguable confusion remained, evident within the Act's awkward language. The *1993 Article* thus recommended that the Act be amended to clarify its purpose and meaning.[26] Almost simultaneous with the Article's publication, the Wyoming federal district court in *Walters v. Teton Crest Outfitters*, took the first crack at applying the Act within the context of recreational injuries.[27] The Wyoming Supreme Court followed with its own interpretation in *Halpern v. Wheeldon*.[28] These

Duerr, *supra* note 1, at 158, and *supra* p. 251.

Note that "express" and "implied" assumption of risk are yet other labels to contend with in this arena. Express assumption of risk is generally that assumption of risk wherein the plaintiff expressly agrees, in writing or otherwise, to *relieve* defendant of any duty owed. RESTATEMENT (SECOND) OF TORTS § 496A-B (1965) [hereinafter RESTATEMENT]. Implied assumption of risk operates similarly: plaintiff's conduct or actions *relieves* defendant of his duty of care. *Id.* § 496A & C (emphasis added). Both express and implied assumption of risk have traditionally been linked to *secondary* assumption of risk, with the elements of knowledge, consent and appreciation required to be *subjectively* proven in each instance, in order to successfully assert the defense. *Id.* § 496A, cmt. c, d & e (emphasis added). In each case, the defendant is relieved of a duty of care.

Prior to the advent of comparative negligence laws, (secondary) assumption of risk was an absolute defense to an action in negligence. Following enactment of comparative negligence laws, (secondary) assumption of risk is generally viewed as a form of contributory negligence. *See* authorities cited, *supra* notes 22-23 and *infra* notes 55, 84 and 102. In many cases now, plaintiff's subjective consent, knowledge and appreciation (e.g., what he actually knows and appreciates) is mixed in with an objective standard of reasonable care (e.g., what a reasonable man would understand and appreciate) in determining plaintiff's potential contributory fault. RESTATEMENT, *§* 496A, cmts. c and d; *see* discussion and cites *infra* notes 55 and 102.

Contrast primary assumption of risk, where the defendant simply owes no duty to the plaintiff under the circumstances. *See supra* notes 8 and 21 and *infra* notes 56-59, 83 and accompanying text. The RESTATEMENT does not utilize the terms "primary" and "secondary" assumption of risk, but does allude to the distinction in section 496G: "There are, however, situations in which elements similar to those of assumption of risk are present, but the development of the law has taken the form of a limitation upon the defendant's initial duty." RESTATEMENT, § 496G. One can conclude that authors of the RESTATEMENT were referring to the primary assumption of risk legal doctrine.

Note that practically speaking, both the inherent risk doctrine (primary assumption of risk) and secondary assumption of risk may be embodied in a written document or agreement utilized between a recreational provider and participant. *See* discussion *infra* note 126.

25. *See* Hansen & Duerr, *supra* note 1, nn.129-39 and accompanying text.

26. *Id.* at 176-80.

27. 804 F. Supp. 1442 (D. Wyo. 1992).

28. 890 P.2d 562 (Wyo. 1995)

two opinions were instrumental in driving passage of the 1996 amendments to the Act.

Closely following publication of our *1993 Article*, the equine industry united to lobby for amendments to the Act. The legislature responded by passing several amendments which became effective in July, 1993 (*Equine Amendments*).[29] These amendments clarified the definition of "equine activities," but added some troublesome confusion to the definition of "inherent risks."[30] The *Walters* case, the *Equine Amendments*, and finally, the court's holding in *Halpern,* tipped the scales. Change was clearly needed to resolve the confusion. A collection of forces joined in Spring 1996 to obtain successful passage of further amendments to the Act, consistent with the recommendations contained in the *1993 Article.*

This article will discuss the *Walters* and *Halpern* courts' interpretation of the Act, the 1993 *Equine Amendments*, and the part those elements played in fueling passage of the 1996 amendments to the Act. This article will also discuss the content, meaning and potential legal affect of amendments to the Act.

II. BRIEF BACKGROUND

In 1989, the Wyoming Legislature passed the Recreation Safety Act, backed by ski industry efforts.[31] The Act applies to *all* recreational sports and activities, unlike many other states which have enacted legislation covering only one particular sport.[32] The structure of the Wyoming Act, like similar acts in Vermont and Pennsylvania, does not provide a "list" of inherent risks, or a "list" of provider/participant duties.[33] The *1993 Article* termed this a "judicial approach." Under this judicial approach, the judge determines whether the risk causing injury is inherent and hence, whether the provider owes a legal duty.[34] Although this structure singularly codifies application of the inherent risk doctrine to all recreational activities, it leaves more work for the judiciary.

29. Act of Mar. 3, 1989, ch. 162, 1993 Wyo. Sess. Laws. Note changes in WYO. STAT. ANN. §§ 1-1-122(a)(iii)-(v) (Michie 1991 & Supp. 1993).

30. WYO. STAT. ANN. § 1-1-122(iii) defines "sport or recreational opportunity." The 1993 amendments added "and any other equine activity" after "horseback riding" in that section. Section (iv) added a lengthy definition for "equine activity." Lastly, section (v) added an entirely new definition of "inherent risks" "with regard to equine activities." For text of *Equine Amendments,* see *infra* note 67.

31. *See* Hansen & Duerr, *supra* note 1, nn.129-30 and accompanying text.

32. Vermont and Wisconsin are the only other states whose statutory enactments apply to all recreational activities (vs. one particular activity). *See* VT. STAT. ANN. tit. 12, § 1037 (1996); WIS. STAT. ANN.

Statutes like the "Colorado Ski Safety Act," provide a comprehensive list of the inherent risks of skiing, and, the specific duties of both provider and participant. The *1993 Article* termed this the "legislative approach," in that the scope of legal duties and/or activity specific inherent risks are listed in the statute.[35] In any particular case, the judiciary is basically allowed to conduct a "paint by numbers" analysis: the court looks at the incident, locates an applicable inherent risk on the list, notes that the provider has no duty regarding inherent risks, and summarily dismisses the case.

Wyoming has taken the judicial approach. The Wyoming Act codifies that providers have no duty or corresponding liability to participants for injuries resulting from inherent risks, but the judiciary must define whether a risk causing injury is inherent[36] – there is no list of risks for the courts to turn to.

Although the Act's sheer breadth of coverage gives it power and flexibility, it does require a strong and committed judiciary to apply it properly, within the context of appropriate cases. The original purpose of the Act was to codify that, as a matter of law, providers of recreational activities have no duty to protect participants from injuries resulting from the inherent risks of those activities.[37] Presumably, defendant providers could bring motions to dismiss, or for summary judgment, arguing that the injury resulted

§ 895.525(2) (West 1996). Note, however, in 1995 Vermont added an "equine" inherent risk statute. VT. STAT. ANN. tit. 12, § 1039 (1997). The equine statute does not explain how it interacts with VT. STAT. ANN. tit. 12, § 1037 ("a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."). Wisconsin takes a unique approach. Under that statute, a provider's duty is always presumed. If an inherent risk results in injury, it is simply viewed as a factor in determining the plaintiff's contributory negligence. *See* WIS. STAT. ANN. § 895.525(2); *see also* Hansen & Duerr, *supra* note 1, n.121.

33. VT. STAT. ANN. tit. 12, § 1037; 42 PA. CONS. STAT. ANN. § 7102 (West 1996).

34. *See* Hansen & Duerr, *supra* note 1, at 168 and n.118 and accompanying text.

35. *Id.* at 168.

36. In 1996, the definition of "inherent risks" was changed from "inherent risk means any risk that is . . ." to "inherent risk with regard to any sport or recreational opportunity means those dangers or conditions which are . . . ." This latter language was also included in the 1993 *Equine Amendments* which added a separate definition for "inherent risks with regard to equine activities and horseback riding." The 1996 amendments eliminated the equine definition and merged the two definitions of "inherent risk" back into one definition of inherent risks for all sport and recreational opportunities. *Compare* WYO. STAT. ANN. § 1-1-122(a)(i) (Michie Supp. 1989), *with* WYO. STAT. ANN. § 1-1-122(a)(v) (Michie Supp. 1993), *and* WYO. STAT. ANN. § 1-1-122(a)(i) (Michie 1997.) The change does not appear significant from a comparison of the plain and ordinary meanings of those words. *See infra* notes 105-06 and accompanying text.

37. This result would accord with the common law *volenti non fit injuria* inherent risk doctrine intended to be codified in the Act, as evidenced by the original purpose clause, dropped prior to final passage of the Act. *See* Hansen & Duerr, *supra* note 1, n.131 and accompanying text

from an inherent risk, the provider owed no duty, and thus, the case should be dismissed.[38]

The *1993 Article* proposed this judicial application of the Act.[39] However, awkward statutory language posed potential challenges for the judiciary, and for those urging application of the Act in the manner contemplated. Namely, the Act defined an "inherent risk" as "any risk that is characteristic of or intrinsic to any sport or recreational opportunity *and which cannot reasonably be eliminated, altered or controlled.*"[40] The Act went on to state that providers were "*not required* to eliminate, alter or control the inherent risks within the particular sport or recreational opportunity."[41] This second piece was accurate: inherent risks, *by definition*, cannot be altered or controlled. That is why the common law dictates that providers have no duty to protect participants in regard to those risks. However, the "reasonably altered" language arguably injected a factual analysis into the equation, tempting a court to perceive a factual issue in *any* case involving inherent risks.[42]

The *1993 Article* proposed an amendment to the inherent risk definition more in accord with the common law doctrine, to eliminate this factual inquiry: "[i]nherent risk means any risk that is *characteristic of, intrinsic to, or an integral part of* any sport or recreational opportunity."[43] The *1993 Article* also proposed amending the language in other provisions of the Act to clarify its intent and meaning.[44] It became immediately clear that the legislature would have to take action on these suggested changes in order to preserve the intent of this important Act.

38. *See* Hansen & Duerr, *supra* note 1, n.216 and accompanying text, urging this approach, pursuant to WYO. R. CIV. P. 12 and 56 (Michie 1997).

39. *Id.*

40. WYO. STAT. ANN. § 1-1-122(a)(i) (Michie 1989 & Supp. 1991) (emphasis added).

41. *Id.* § 1-1-123(b) (emphasis added).

42. *See* Hansen & Duerr, *supra* note 1, nn.151-54 and accompanying text. In Wyoming, the determination of the existence and scope of a duty are questions of law for the court to decide. Roybal v. Bell, 778 P.2d 108, 111 (Wyo. 1989).

43. Hansen & Duerr, *supra* note 1, at 176 (emphasis added).

44. *Id.* at 177-80.

III. WRITING ON THE WALL

A. Walters v. Teton Crest Outfitters

Just prior to publication of the *1993 Article*, the Wyoming federal court published its holding in *Walters*.[45] In that case, plaintiff guest claimed he was thrown while mounting "Katie" the mule at defendant's guest ranch.[46] Plaintiff suffered injuries and filed suit against Teton Crest, asserting claims of negligence, strict liability and breach of warranty.[47] Teton Crest filed a motion to dismiss, and in the alternative, a motion for summary judgment on all claims, asserting that plaintiff's injuries resulted from an inherent risk of riding (mounting), and that plaintiff's claims should therefore be dismissed.[48] Judge Brimmer first dealt with the negligence claim, and proceeded to discuss the Recreation Safety Act within the context of the doctrine of assumption of risk. The court stated:

> In Wyoming, assumption of risk used to be an absolute defense to a negligence action (cite omitted). That is no longer true. Under Wyoming's comparative negligence statute, Wyo. Stat. 1-1-109 (1988), assumption of risk has been held to be a form of contributory negligence (cite omitted). Assumption of risk is now a basis for apportioning fault. *Id.* For these reasons, the [C]ourt rejects the defendant's argument that assumption of risk would be a bar to recovery.[49]

The court went on to state that the Wyoming Recreation Safety Act should be considered a "statutory exception to these assumption of risk principles."[50] The court then refused to grant defendant's motion, and held that questions of fact remained regarding whether plaintiff's injuries were caused by an inherent risk or by defendant's negligence.[51]

The opinion was discouraging. Just like many courts across the

45. 804 F. Supp. 1442, 1445 (D. Wyo. 1992).

46. *Id.* at 1443.

47. *Id.* at 1444.

48. *Id.*

49. *Id.* at 1445.

50. *Id.*

51. *Id.* The court also denied defendant's motion on the strict liability claim, ruling that questions of fact remained regarding whether defendant knew or had reason to know whether Katie had any "dangerous propensities," in line with that cause of action. The court granted the defendant's motion to dismiss the express and implied warranty claims, ruling that recreational use of an animal is not a "sale of goods" within Article 2 of the Uniform Commercial Code. *Id.* at 1446-47.

country,[52] the Wyoming federal court had confused the doctrines of primary

52. *See* Hansen & Duerr, *supra* note 1, nn.43-96 for examples of case law confusing the two assumption of risk doctrines. *See also id.* nn.97-109 and accompanying text for a discussion of the Wyoming Supreme Court's confusion over primary and secondary assumption of risk principles within the context of another primary assumption of risk doctrine: the "obvious danger" rule. Wyoming continues to uphold this primary assumption of risk "no duty" rule, although its application has narrowed in recent years. In *O'Donnell v. City of Casper*, 696 P.2d 1278, 1282 (Wyo. 1985), the Wyoming Supreme Court restricted the "no duty" obvious danger rule to those cases involving natural causes or accumulations (e.g., ice and snow). *See* Hansen & Duerr, *supra* note 1, nn.104-09 and accompanying text. In *Eiselein v. K-Mart, Inc.*, 868 P.2d 893, 895 (Wyo. 1994), the Wyoming Supreme Court reiterated the *O'Donnell* rule and discussed that rule's interaction with Wyoming's comparative negligence (now comparative "fault") laws. The court accurately noted that Wyoming's comparative negligence law did not abrogate or affect the "no duty" obvious danger/natural accumulations rule. The court reasoned that the comparative negligence laws did not create any new duties, but were enacted to eliminate the harsh effects of the old absolute contributory negligence bar. *Id.*

Interestingly, the *Eiselein* court did not refer to the distinction between primary and secondary assumption of risk. As outlined in the *1993 Article*, the obvious danger/natural accumulations rule (as narrowed by the *O'Donnell* court) is a primary assumption of risk "duty" limitation. Such a duty analysis naturally precedes application of the comparative negligence laws. *See supra* notes 18-24 and *infra* notes 56-60, 83-85 and accompanying text.

Justice Macy specially concurred in *Eiselein* (with the court's decision to reverse and remand the case). However, Justice Macy disagreed with the majority's conclusions and urged that the obvious danger/natural accumulations rule should not be a duty limitation, but simply a factor in determining the parties' comparative fault. Justice Macy argued that the no duty/natural accumulations rule was incompatible with Wyoming's comparative negligence laws. *Id.* at 897-98. Justice Macy took a different view in *Halpern*, when ruling on the inherent risk doctrine, a primary assumption of risk "duty" limitation quite similar to the obvious danger/natural accumulation rule. There, Justice Macy (like Justice Golden in *Eiselein*), held that the inherent risk duty limitation did not conflict with Wyoming's comparative negligence laws, and articulately distinguished between primary and secondary assumption of risk concepts vis-a-vis the comparative negligence laws. Halpern v. Wheeldon, 890 P.2d 562, 565 (Wyo. 1995); *see* discussion *infra* Part III.C. In *Halpern*, Justice Macy does not distinguish the rationale for his differing views on these two primary assumption of risk "duty" limitations. It appears that Justice Macy may believe that the "no duty" obvious danger/natural accumulations rule simply conflicts with a premises owner's duty to exercise care for those entering his property. *See Eiselein*, 868 P.2d at 899-900.

Note that Wyoming has now abolished the rule that property owners owe different duties to invitees vs. licensee entering upon property. In *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993), the Wyoming Supreme Court ruled, consistent with many jurisdictions, that a property owner owes a general duty of reasonable care to all property entrants other than trespassers. *Id.* at 296. The rule applies prospectively. *Id. See* Matthew F. McLean, Note, *Duties of Owners and Occupiers of Land: The Impact of the Wyoming Supreme Court's Decision to Abolish a Portion of the Common Law Status of Classifications*, 29 LAND AND WATER L. REV. 299 (1994), for a thorough discussion of these premises liability concepts. *See* also Hansen & Duerr, *supra* note 1, nn.23-26 and accompanying text for a discussion of

and secondary assumption of risk.[53] The court correctly noted that, following adoption of Wyoming's Comparative Negligence Act,[54] *secondary* assumption of risk no longer qualifies as a complete defense to a cause of action in negligence. It is viewed simply as a form of contributory negligence, and is a defense to an established breach of duty.[55] The court was right on that score.

However, application of a *primary* assumption of risk doctrine, like the inherent risk doctrine, is quite different. Determination of the application of primary assumption of risk is a "duty" analysis which precedes the negligence inquiry.[56] A participant assumes the inherent risks of a recreational activity by agreeing to voluntarily participate in that activity.[57] A recreation

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Wyoming's pre-*Clarke* premises liability rules.

53. *See supra* notes 21-23 and accompanying text and *infra* notes 56-61, 83-84 and accompanying text; *see also* Hansen & Duerr, *supra* note 1, at 155-66 for further discussion of these assumption of risk principles.

54. WYO. STAT. ANN. § 1-1-109 (Michie 1997). The Act is now termed the Comparative Fault Act. *Id.*

55. *Walters*, 804 F. Supp. at 1445 (citing Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979)). In *Brittain,* the court clarified that assumption of risk, as a form of contributory negligence, was no longer a complete defense to an action in negligence, but simply a basis for apportionment of fault. *Brittain,* 601 P.2d at 534. As a result, W.C.P.J.I. 3.07 (1994), does not recommend a separate jury instruction on assumption of risk. The *Halpern* court confirmed that it is secondary and not primary assumption of risk which merged with contributory negligence for comparative fault purposes. *See infra* pp. 264-65. The classic elements of the old (secondary) assumption of risk defense – consent, knowledge and appreciation of the risk – appear to be factors a court or jury may review in determining overall contributory negligence. *See O'Donnell,* 696 P.2d at 1284. *See also infra* note 102; Hansen & Duerr, *supra* note 1, nn.31-34, 179, 217 and accompanying text for further discussion of the distinction between primary and secondary assumption of risk and the application of secondary assumption of risk principles following the advent of comparative negligence laws.

56. Hansen & Duerr, *supra* note 1, nn.35-40 and accompanying text. In *Halpern,* the Wyoming Supreme Court accurately outlined this concept. *See* discussion *infra* notes 83-84 and accompanying text.

57. Plaintiff need not have actual knowledge and appreciation of the risks for a court to apply the inherent risk doctrine to deny recovery; his voluntary consent to participate implies knowledge and appreciation. *In re* Frant v. Haystack Group, Inc., 641 A.2d 765, 767 & 770. (Vt. 1994). *See* discussion *infra* notes 102 and 113. Some commentators disagree. *See* Hansen & Duerr, *supra* note 1, n.45 and accompanying text.

In *Frant,* the Vermont Supreme Court aggressively straightened out the confusion in that state around the inherent risk rule, created following the Vermont federal court's ruling in *Leopold v. Okemo Mountain,* 420 F. Supp. 781 (D. Vt. 1976). In *Frant,* the court was faced with construing Vermont's inherent risk statute, VT. STAT. ANN. tit. 12, § 1037 (1996) ("a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary"). Plaintiff suffered injuries when he hit a wooden corral post on the ski hill. *Frant,* 641 A.2d at 765. The supreme court reversed a lower court ruling granting summary judgment to plaintiff. *Id.* at 766. The lower court had held that the Vermont statute barred recovery as a matter of law because plaintiff

provider has no duty to protect the participant from these risks, and ultimately, has no liability to the participant for injuries resulting from those risks.[58] As the New Jersey court stated in *Meistrich v. Casino Arena Attractions, Inc.*,:

> It [primary assumption of risk] 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.[59]

Importantly, in codifying the inherent (primary assumption of risk) doctrine, the Act does not resurrect assumption of risk as a complete *defense* to a negligence action. Rather, the application of the Act requires a duty analysis: if the injury results from an inherent risk, the provider owes no legal duty, plaintiff's cause of action must fail, and the Comparative Fault Act is unaffected.[60] If the injury does not result from an inherent risk, plaintiff may

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had actual knowledge and appreciation of the risk, and proceeded to ski anyway. *Id.* at 765. The court noted the seminal ruling in *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786 (Vt. 1951), applying *volenti non fit injuria* principles to the inherent risks of skiing. (*See* discussion of *Wright* case in Hansen & Duerr, *supra* note 1, nn.19-22, 29-30 and accompanying text). The court noted these same principles were applied in *Sunday v. Stratton*, 390 A.2d 398 (Vt. 1978). *Frant*, 641 A.2d at 768-69. The court clarified that both *Wright* and *Sunday* followed the primary assumption of risk rule that the ski area did not owe a duty to the participant for injuries resulting from inherent risks. *Id.* The *Frant* court then noted that the *Leopold* court had confused the doctrines of primary and secondary assumption of risk in its holding when it required that plaintiff have actual knowledge and appreciation of the risk in order to apply the inherent risk rule to bar recovery. The *Frant* court noted that the *Leopold* court had actually applied secondary assumption of risk concepts in its ruling. *Id.* at 769-70. The court clarified that under the inherent risk (primary) rule, knowledge is presumed, and that this primary assumption of risk "duty" limitation is the doctrine incorporated into Vermont's Safety Act. *Id.* at 766-68. The court then ruled that the case must return to the lower court for a determination of whether the wooden corral post was an inherent risk. If so, the provider would have no duty to plaintiff, and the case should be dismissed. The court noted the inaccurate characterization of the law articulated in the Preamble to the Vermont inherent risk statute. *Id.* at 768. Interestingly, the court's explanation, clarifying the inherent risk rule as a primary assumption of risk "duty" limitation, and noting the inaccuracies in the *Leopold* ruling is quite similar to the discussion and analysis of these principles in the *1993 Article. Compare* discussion of *Leopold* & *Sunday*, Hansen & Duerr, *supra* note 1, nn.57-71 and accompanying text, *with Frant*, 641 A.2d at 766-77. *See also infra* note 139.

58. *See* Hansen & Duerr, *supra* note 1, at 155-58.

59. 155 A.2d 90, 93 (N.J. 1959). *See* Hansen & Duerr, *supra* note 1, n.38 and accompanying text.

60. *See* Hansen & Duerr, *supra* note 1, nn.5, 91-97, 171-79 and accompanying text for further discussion of these principles. *See also* the ruling in *Halpern v. Wheeldon*,

go on to prove that the provider's negligence caused his injuries. Provider may then assert that plaintiff's contributory negligence (secondary assumption of risk) caused or contributed to the injury.[61] The *Walters* court missed this important distinction in its analysis.

The *Walters* court went on to find a question of fact existed regarding whether the risk resulting in injury was an inherent risk, or, whether Teton Crest was somehow negligent in its conduct regarding the mule. Although unclear from the opinion, it appears that the court was influenced by the wording of the Act's "inherent risk" definition, and plaintiff's urging that the risk causing injury could have been "reasonably altered, eliminated or controlled." Judge Brimmer therefore denied defendant's motion to dismiss the negligence claim.[62]

Strike one for the Act.

890 P.2d 562 (Wyo. 1995), *infra* note 84 and accompanying text.

61. *See* Hansen & Duerr, *supra* note 1, nn.5, 91-97, 171-79. *See also id.* n.178 (discussing jurisdictions which have found injuries resulting from a combination of inherent risks and negligence and thus applied comparative negligence statutes accordingly).

62. Walters v. Grand Teton Crest Outfitters, 804 F. Supp. 1442, 1445 (D. Wyo. 1992).

B. The Equine Amendments

Immediately following publication of the *1993 Article*, representatives from the equine industry[63] came forward during the 1993 legislative session, proposing to amend the Act. Representatives Clarene Law (R-Teton) and Robert "Budd" Betts (R-Fremont/Sublette/Teton), among others, sponsored House Bill 0159. Equine representatives, discouraged by perceived inadequacies in the Act, sought to carve out a separate definition for inherent risks regarding equine activities, within the context of the existing Act.[64] In addition, despite the fact that no "lists" existed for any other recreational activities covered under the Act, the bill outlined a list of equine provider "duties" and a list of selected "inherent risks" of equine activities.[65] Equine representatives felt that the size and impact of their industry in Wyoming justified separate coverage under the Act. In effect, the proposed legislation was like an act within an act.[66]

After a variety of committee and floor amendments, the legislature passed a version of these changes, effective July 1993.[67] The final bill was

63. Representatives from the equine industry were headed largely by the Wyoming Outfitters Association.

64. *See* H.R. 0159, 52nd Leg. (Wyo. 1993). The bill was modeled after the Colorado Equestrian Statute, 6A COLO. REV. STAT. § 13-21-119 (Supp. 1992). The Colorado statute is a separate piece of legislation, addressing only inherent risks in horseback riding and other equestrian activities. It is similar to the Colorado Ski Act in its scope and design. *See* 14 COLO. REV. STAT. § 33-44-101 (1996).

65. H.R. 0159, 52nd Leg. (Wyo. 1993).

66. Author Catherine Hansen-Stamp assisted the Wyoming Outfitters Association in lobbying for these changes, and in testifying before the House and Senate committees. Comments come from discussions with various sponsoring legislators and individuals connected with the equine industry.

67. Act of March 3, 1993, ch. 162, 1993 Wyo. Sess. Laws (codified as amended at WYO. STAT. ANN. §§ 1-1-121 to -123 (Supp. 1993)). H.R. 0159, Enrolled Act No. 107, ch. 162, signed into law on March 3, 1993, read in part:

1-1-122. Definitions.

(a) As used in this act:

(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, hunting, fishing, backcountry trips, horseback riding AND ANY OTHER EQUINE ACTIVITY, snowmobiling and similar recreational opportunities;

(iv) Equine activity means:

(A) Equine shows, fairs, competitions, performances or parades that involve any or all breeds of equines;

(B) Any of the equine disciplines;

(C) Equine training or teaching activities, or both;

significantly smaller than that originally proposed. Various amendments had eliminated the proposed separate lists of equine provider duties and equine inherent risks.[68] However, the final bill did provide a new and separate definition of "inherent risks with regard to equine activities or horseback riding."[69] In addition, the legislation expanded the definition of equine activities.[70]

The *Equine Amendments* clarified the scope and definition of equine activities covered under the Act.[71] In addition, the new definition of "inherent risks" for equine activities and horseback riding was more concise than the general definition of inherent risks contained in the Act. "Inherent risks" with regard to equine activities and horseback riding were now "those dangers and conditions which are an integral part of equine activities or horseback riding."[72]

Unfortunately, the Act now contained two definitions of inherent risks: one for equine activities and horseback riding, and one for all other sport and recreational activities. The equine industry had succeeded in eliminating the troublesome "cannot reasonably be altered, eliminated and controlled" language contained in the Act's inherent risk definition, but had done so for only one group of recreational providers. Any other recreation provider was still governed by the Act's original definition. The Act now cried out for amendments.

Strike two for the Act.

In the fall of 1995, members of the Wyoming Bar tried to garner

(D) Boarding equines;

(E) Riding, inspecting or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchase of the equine to ride, inspect or evaluate the equine;

(F) Rides, trips, hunts or other equine activities of any type however informal or impromptu;

(G) Day use rental riding, riding associated with a dude ranch or riding associated with outfitted pack trips; and

(H) placing or replacing horseshoes on an equine.

(v) "Inherent risks" with regard to equine activities and horseback riding means those dangers or conditions which are an integral part of equine activities or horseback riding[.]

Section 2. This act applies only to claims based upon acts or omission occurring on or after July 1, 1993.

68. *Id*.

69. *Id*. § 1-1-122(a)(v).

70. *Id*. § 1-1-122(a)(iv).

71. *See supra* note 67.

72. 1993 Wyo. Sess. Laws ch. 162, § 1-1-122(a)(v).

support for amendments which would merge these two distinct definitions and clarify the Act for all recreation providers.[73] Wyoming legislators were busy with other issues, and equine supporters appeared nervous that any tinkering with the Act might result in elimination of the amendments obtained in 1993. Without broad-based support, no bill could even be introduced.

C. Halpern v. Wheeldon

In 1995, the Wyoming Supreme Court had its first opportunity to analyze the Act within the context of a recreational injury. In *Halpern v. Wheeldon*,[74] plaintiff, a guest of the Mill Iron Ranch (Ranch), sued the Ranch for injuries he sustained when the horse he was attempting to mount bucked and threw him to the ground.[75] Plaintiff claimed that the Ranch was negligent in 1) selecting a horse that was not safe or appropriate; 2) failing to secure the horse while he was mounting it; 3) failing to assist him while he was mounting the horse; and 4) failing to warn him about the horse's erratic behavior. The Ranch moved for summary judgment, claiming the injury resulted from an inherent risk of riding, and that therefore, the case should be dismissed.[76] The district court applied the Act and found that, as a matter of law, getting thrown off a horse was an inherent risk of horseback riding.[77] The court therefore granted the Ranch's motion and dismissed the case.

The Wyoming Supreme Court reversed, finding that a question of fact existed as to whether the risks encountered by plaintiff were "intrinsic to the sport of horseback riding" and whether the Ranch could have "reasonably altered, eliminated, or controlled those risks."[78] (The court noted the passage of the *Equine Amendments*, effective July 1993, but found those amendments inapplicable as plaintiff's injury had occurred prior to the amendments' effective date.[79]) Despite its ruling, the court noted that in appropriate cases

73. Attorneys Catherine Hansen-Stamp and Steve Duerr and the Wyoming Defense Lawyers Association worked together in an attempt to garner support for amendments to the legislation.

74. 890 P.2d 562 (Wyo. 1995).

75. *Id.* at 564.

76. *Id.*

77. *Id.* The district court specifically held: "Getting thrown off a horse or falling from a horse is an inherent risk in riding any horse. The risk is therefore intrinsic to the sport and one which cannot be reasonably altered, eliminated or controlled." *Id.*

78. *Id.* at 565. Using the rules of statutory construction, the supreme court did find that the statute was clear and unambiguous in its message. Citing WYO. STAT. ANN. § 1-1-123(a) and (b), the court found that the plain and ordinary meaning of the Act included: "a provider has no duty to eliminate, alter, or control the inherent risks of an activity, and any person who chooses to take part in a sport or recreational opportunity assumes all inherent risks which are associated with that opportunity." *Id.*

79. *Id.* at 564, n.1.

(pursuant to the Act), courts may use the Act to determine, as a matter of law, that a provider does *not* owe a duty to a participant.[80]

Strike three for the Act.

However, *Halpern* was important in two major respects. First, despite the court's negative ruling, its holding highlighted the problem with the Act's "inherent risk" definition. The court correctly noted that in Wyoming, the duty determination is generally one for the court to decide.[81] However, the court found that the "reasonably altered" language would require a factual analysis in most cases.[82]

Second, in its opinion, the Wyoming Supreme Court lucidly and correctly identified the distinction between primary and secondary assumption of risk, noting the ongoing confusion between the two doctrines. Citing the *1993 Article* and other authority, the court found that "[u]nder the clear and unambiguous language of the Act, the assumption-of-risk terminology is intended to limit the duty which a provider owes to the participant. This type of assumption of risk is known as primary assumption of risk."[83]

The court noted that primary assumption of risk must be distinguished from secondary assumption of risk:

> Secondary assumption of risk is generally considered to be an affirmative defense which a defendant may raise after the plaintiff has met his burden of proving that the defendant breached a legal duty which he owed to the plaintiff. *See* Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk,* 16 A.L.R. 4th 700 (1982). In other words, secondary assumption of

80. *Id.* at 566 (emphasis added).

81. *Id.* at 565 (citing Roybal v. Bell, 778 P.2d 108, 111 (Wyo. 1989)).

82. *Id.* at 566. The court noted that the Wyoming Act's "concise" format, unlike other similar state legislation, did not provide a "list" of inherent risks for the judiciary. The court suggested that such a list would allow greater opportunities for judges to determine, as a matter of law, whether an injury resulted from an inherent risk. (*But see infra* Part VI, discussing the difficulty in formulating an inherent risk "list" for Wyoming's comprehensive Act.) The court discussed the holding in *Dillworth v. Gambardella,* 970 F.2d 1113 (2d Cir. 1992). In that case, the Second Circuit held that under Vermont law, in absence of an inherent risk "list," whether or not a risk is inherent is properly a question of fact for the jury to decide. *See also* discussion in Hansen & Duerr, *supra* note 1, n.149 and accompanying text.

Wyoming need not look to the Vermont courts as persuasive authority for the construction and interpretation of Wyoming's Act, and the division between legal/factual determinations. Although drafters of Wyoming's Act initially looked to Vermont, they did not adopt that model. The two statutes have unique wording. *See infra* note 139.

83. *Halpern,* 890 P.2d at 565 (citing PROSSER & KEETON, *supra* note 21, § 68).

> risk is a type of contributory negligence. Cathy Hansen & Steve Duerr, *Recreational Injuries and Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND AND WATER L. REV. 149, 156 (1993). In Wyoming, the absolute defense of secondary assumption of risk (contributory negligence) was abolished when the Legislature adopted the comparative negligence statute. WYO. STAT. 1-1-109 (1988) (amended 1994). Secondary assumption of risk is a basis for apportionment of fault under the comparative negligence scheme. *Brittain*, 601 P.2d at 534. *Since the Act is intended to limit the duty which a provider owes to a participant, our analysis in this case is not affected by the adoption of the comparative negligence statute.*[84]

The *Halpern* court's clear ruling – viewing the Act as a codification of common law primary assumption of risk principles – did preserve the spirit of the Act.[85] However, *Halpern* highlighted the problem with a statutory inherent risk definition which appeared to beg a factual question, steering judges away from a legal duty determination.[86] The opinion, coming on the heels of the 1995 legislative session, solidified the recreation industry's desire to effect a change. It was indeed the straw that appeared to break the camel's back. Interest for suggested amendments sparked, and in 1996 people were ready to take action.

84. *Id.* at 565 (emphasis added). Justice Macy wrote the majority opinion, but did not distinguish the rationale for his differing views in *Eiselein*, around another primary assumption of risk doctrine – the obvious danger/natural accumulations rule. *See* Eiselein v. K-Mart, 868 P.2d 893, 897-901 (Wyo. 1994) (Macy, R., specially concurring); *see also* discussion *supra* note 52.

85. This will hopefully assure that the inherent risk doctrine and other primary assumption of risk doctrines, like the "obvious danger" rule, have earned their place and will no longer be confused with secondary assumption of risk principles. *See supra* note 52; Hansen & Duerr, *supra* note 1, nn.29-40, 97-109 and accompanying text.

86. In Wyoming, the existence and scope of a duty are questions of law for the court to decide. Roybal v. Bell, 778 P.2d 108, 111 (Wyo. 1989); Ely v. Kirk, 707 P.2d 706, 709 (Wyo. 1985).

IV. CALL FOR AMENDMENTS

A. 1996 Amendments: The Process

The courts' decisions in both *Walters* and *Halpern*, as well as the 1993 *Equine Amendments*, put the effectiveness of the Act in question.[87] In late fall of 1996, Senator Larson chose to go forward in sponsoring proposed amendments to the Act. Representatives Betts and Law joined as co-sponsors. This time, the recreation industry united to support the amendments.[88] In February 1996, SF 00065, "Recreation Safety Act-amends.," was introduced into the Senate.[89] The purpose of the amendments was threefold: 1) to combine the Act's two different definitions of inherent risks[90] into one concise definition;[91] 2) to more clearly define the inherent risk doctrine in other portions of the Act;[92] and 3) to clarify language in the Act expressly preserving other causes of action against a provider where injuries do not result from inherent risks.[93] The proposed amendments were almost identical to those suggested in the *1993 Article*.[94] Supporters hoped the amendments would allow judges to more effectively use the Act as a tool to dismiss appropriate cases where injuries resulted from an inherent risk of a recreational activity.

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87. *See supra* Part III.

88. Author Catherine Hansen-Stamp drafted the proposed amendments and lobbied for the Jackson Hole Ski Corporation. The author worked in conjunction with attorneys Steve Duerr and Marilyn Kite. The Wyoming Outfitters Association, through Representative Betts, supported the amendments. Recent case law had enlightened the equine industry. The industry understood that it was in their best interest to clean up the legislation, and that the proposed 1996 amendments would not hurt the equine cause, but instead would benefit the entire recreation industry. Discussion with representatives Budd Betts (R-Fremont/Sublette/Teton) and Grant Larson (R-Teton) in Cheyenne, Wyoming (February 1996).

89. S. 00065, 54th Leg. (Wyo. 1996). The bill read in part:

Section 1. W.S. 1-1-122(a)(i) and 1-1-123(a) and (c) are amended to read:

1-1-122. Definitions.

(a) As used in this act:

(i) "Inherent Risk" means any risk that is characteristic of, intrinsic to, or *an integral part of* any sport or recreational opportunity;

1-1-123. Assumption of risk.

(a) Any person who takes part in any sport or recreational opportunity assumes the inherent *risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible* for *any and all* damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.

(c) Actions *against* the provider *wherein the damage, injury or death is not the result*

The bill passed through the Senate Travel, Recreation and Wildlife Committee without opposition, and went back to the Senate floor. The bill passed through the Senate unscathed, despite an attempt to reinsert the "reasonably altered" language back into the inherent risk definition.[95]

Just prior to the bill's House introduction, legislators and lobbyists agreed to a minor amendment to the inherent risk definition proposed in the bill. The amendment changed the language from "`inherent risk' means any risk that is . . ." to "`inherent risk' . . . means those dangers or conditions

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of an inherent risk of the sport or recreational opportunity shall be preserved pursuant to W.S. 1-1-109.

Section 2. W.S. 1-1-122(a)(v) is repealed.

See also repealed portions of the Act *supra* note 67.

Note the language in section 1-1-123(a): "legally responsible for any and all damage, injury or death to himself or other persons . . . that results from the inherent risks in that sport. . . . " The version given to Senator Larson to introduce, recommended deleting the reference to "other persons." Under the common law, those injured by an inherent risk are only responsible for injury to themselves or their property, absent application of some other theory of liability, e.g., negligence. *See* Hansen & Duerr, *supra* note 1, n.2 and accompanying text. Senator Larson chose not to correct this oversight in the hearing before the Senate Committee on Travel and Recreation. The wording continues in the final version of the Act, passed in March 1996.

Interpreting the language literally, an individual injured by an inherent risk would be responsible for his own injuries as well as those of any third parties injured at the same time (should that somehow occur). This interpretation would potentially create a cause of action by a third party against one injured by an inherent risk; obviously an absurd construction of the Act. Wyoming courts will apply rules of statutory construction to ascertain legislative intent if a statute is subject to different interpretations. Attletweedt v. State, 684 P.2d 812, 814 (Wyo. 1984). Using the rule that laws will not be construed to dictate absurd results, the statute should not be interpreted in this manner. Stauffer Chemical Co. v. Curry, 778 P.2d 1083, 1093 (Wyo. 1989). In addition, if the Act were interpreted to somehow create a third party cause of action, it would alter the common law. If so intended, the statute should do so in clear and unequivocal terms; not the case in the instance of this language. State v. Stovall, 648 P.2d 543, 547-48 (Wyo. 1982).

90. The 1993 *Equine Amendments* had created a separate definition of inherent risks "with regard to equine activities or horseback riding." *See supra* note 67. One central goal was to eliminate the "reasonably altered, eliminated and controlled" language from any new, combined definition of inherent risks.

91. *See supra* note 89; S. 00065, 54th Leg., § 1-1-122(a)(i).

92. *Id.* § 1-1-123(a).

93. *Id.* § 1-1-123(c).

94. *See* Hansen & Duerr, *supra* note 1, at 176-79.

95. Senator Gregory Phillips (D-Uinta) attempted to seek support on the floor to alter the proposed amended definition of inherent risks. Senator Phillips introduced an amendment to reinsert "and which cannot reasonably be altered, eliminated or controlled" back into the combined definition of inherent risks contained in the bill. Senator Phillips' amendment won little support and the bill passed through into the House. Catherine Hansen-Stamp, Author/lobbyist (March 1996).

which are . . . ."[96] Bill supporters thought the language strengthened the definition and readily agreed to support the amendment.[97] The House Travel, Recreation and Wildlife Committee approved the language and the bill proceeded to the House floor.[98]

On first reading, Representative Ross (R-Laramie) introduced an amendment to reinsert "based upon negligence" back into section 1-1-123(c), to clarify that actions against negligent providers were preserved. Ironically, the amendment[99] was intended to clarify that where an injury was *not* caused by an inherent risk, *any* actions against a provider, whether grounded in negligence or otherwise, were preserved. Those actions could obviously include actions grounded in negligence, strict liability or any other form of fault. Despite attempts by legislators to explain this to Senator Ross, he persisted in wanting to see the word "negligence" preserved in the Act. To avoid conflict on the House floor, bill supporters agreed to reinsert the language.[100]

B. Successful Passage!

On March 19, 1996, the Governor signed original SB 00065, Enrolled Act No. 37, chapter 78 into law. The final bill read in part:

> AN ACT relating to the Recreation Safety Act; modifying the definition of "inherent risk" and repealing an inconsistent definition; clarifying the risk assumed by participants in specified sport and recreational activities; clarifying the duty owed by providers of sport and recreational activities; and providing for an effective date. . . .

96. Wyoming Trial Lawyers Association (WTLA) representatives proposed the change. The WTLA generally supported the Act's purpose in allowing for summary disposal of those cases where injuries result from inherent risks. Discussion with Steve Karpe, lobbyist, WTLA (March 1996).

97. The proposed change actually came form wording in the existing inherent risk definition for "equine activities"; language added with the 1993 amendments to the Act. *See supra* note 67 and accompanying text.

98. Clarene Law, co-sponsor of the bill, chaired the committee.

99. *See supra* note 89; S. 00065 54th, Leg., § 1-1-123(C) (Wyo. 1996).

100. Discussion with Rep. Budd Betts in Cheyenne, Wyoming (March 1996). An express statement is not necessary to preserve actions against providers for provider negligence. By definition, both pursuant to common law and the Act, a provider has no duty to protect participants from the inherent risks of recreational activities. The Act does not in any way impinge upon a participant's ability to bring a cause of action in negligence if a provider has breached a duty of reasonable care. The provision simply clarifies that a plaintiff may pursue a negligence claim against a provider if the injury did not result from an inherent risk. *See* Hansen & Duerr, *sup*ra note 1, nn.5, 91-96, 170-79 and accompanying text. *See also supra* notes 21-24, 59-61, 84 and accompanying text (discussing these principles).

1-1-122. Definitions.
(a) As used in this act:
(i) "Inherent risk" with regard to any sport or recreational opportunity means those dangers and conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity;
1-1-123. Assumption of risk.
(a) Any person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.
(c) Actions based upon negligence of the provider wherein the damage, injury or death is not the result of an inherent risk of the sport or recreational opportunity shall be preserved pursuant to W.S. 1-1-109.
Section 2. W.S. 1-1-122(a)(v) is repealed.
Section 3. This act is effective July 1, 1996.[101]

The legislation was successful in achieving the goals those pushing for the amendments had targeted, namely: 1) striking the "reasonably altered, eliminated or controlled" language from the definition of inherent risk; 2) combining the two definitions of inherent risk – one for equine activities and the other for other recreational activities – into one, more concise definition of inherent risks for *all* sport or recreational opportunities; 3) more clearly defining a participant's assumption of risk, responsibility and liability for injuries resulting from inherent risks;[102] and 4) clarifying that actions against

101. 1996 Wyo. Sess. Laws, ch. 78 (codified as amended at WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie 1997)). Note that the *Equine Amendments*, passed in 1993, provided in section 2: "[T]his act applies only to claims based upon acts or omissions occurring on or after July 1, 1993." *See supra* note 67. The 1996 amendments only supply an effective date. However, Wyoming law is well settled that, unless expressly provided in the legislation, statutes and any subsequent amendments are only applicable to claims based upon acts or omissions occurring *after* the effective date of the legislation. Independent Producers Mktg. Corp. v. Cobb, 721 P.2d 1106, 1109 (Wyo. 1986).

102. Note what the amendment adds to section 1-1-123(a). WYO. STAT. ANN. § 1-1-123(a) (Michie 1997). The amendment makes clear that persons participating in any sport or recreational opportunities assume the inherent risks of those activities, "whether those risks are known or unknown," and all legal responsibility for damage or injury resulting from those inherent risks. *Id*. This revised language codifies the common law proposition that *actual* knowledge and appreciation of the risk is not necessary in order to apply the inherent risk *primary* assumption of risk doctrine. One's voluntary consent to participate brings with it an assumption of those inherent risks in the activity, whether one has actual knowledge or not.

providers for provider negligence are preserved, in cases where injuries do not result from inherent risks.

Following the *1993 Article* suggesting amendments, troubling case law and a series of equine amendments, differing forces had successfully negotiated a change. Recreation providers, the plaintiffs' and defense bars and the legislators, had united to pass amendments which strengthen the integrity of the Act, and will hopefully allow it to be used effectively to dismiss those cases where recreational injuries result from inherent risks.

Under the classic secondary assumption of risk defense, defendant was required to prove plaintiff voluntarily assumed a risk with actual knowledge and appreciation of the risk, in order to bar plaintiff's recovery. RESTATEMENT, *supra* note 24, §§ 496A, D, E; Sunday v. Stratton, 390 A.2d 398, 404 (Vt. 1978); PROSSER & KEETON, *supra* note 21, § 68 at 486-87. Of course, with the advent of comparative fault legislation, assumption of risk is usually considered just one form of contributory negligence, with these elements viewed along with other factors in determining plaintiff's comparative fault. RESTATEMENT, *supra* note 24, § 496A (*see* cmt. d & e); Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979); Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 94-96 (N.J. 1959). *See* related discussion *supra* notes 24, 55 and 57. *See also* Hansen & Duerr, *supra* note 1, nn.29-42 and accompanying text.

V. WHAT NOW? JUDICIAL APPLICATION OF THE ACT

A. Amended Act: The Changes

Reviewing the three basic amendments illustrates the effect those changes will have on judicial application of the Act.[103]

1. Definition of "inherent risk"[104]

The two inconsistent definitions of inherent risk were merged, taking out the "reasonably altered, eliminated and controlled" language. Now the judiciary will not need to undertake an analysis of whether an inherent risk can be reasonably altered, eliminated or controlled. Under the plain and ordinary language of the amended Act, a risk must now only satisfy one requirement to be classified as an inherent risk, namely: it must be one of "those dangers or conditions which are characteristic of, intrinsic to or an integral part of . . ." a sport or recreational opportunity.[105] "Dangers or conditions" replace "risk" in the beginning of the sentence. "Risk" is defined as a "danger," and "danger" is defined as "a source or instance of risk or peril." "Conditions" are defined as "existing circumstances."[106] Thus, these introductory words do not change the essence of the definition.

What is an inherent risk? In other words, what is a condition "characteristic of, intrinsic to or an integral part of" a recreational opportunity? Literally, "characteristic of" means a distinctive feature of something; "intrinsic to" and "an integral part of" both mean an essential part of something. Inherent is defined as "an essential constituent or characteristic."[107]

The court in *Clover v. Snowbird Ski Resort*, aptly clarified the meaning of inherent risks, and thus the rationale for the "no duty" rule, within the

103. *See supra* note 4 for a discussion of the Act's potential interaction with other relevant Wyoming statutes and legal doctrines.

104. WYO. STAT. ANN. § 1-1-122(a)(i) (Michie 1997); *see supra* text p. 268.

105. The *Halpern* court found: "[U]nder the plain and ordinary language of the statute, a risk must satisfy two requirements in order to be classified as being an inherent risk. The risk must be characteristic of or intrinsic to the sport or recreational opportunity, and it must be one which cannot be reasonably eliminated, altered or controlled." Halpern v. Wheeldon, 890 P.2d 562, 565 (Wyo. 1995).

106. AMERICAN HERITAGE DICTIONARY (Microsoft Bookshelf 1992).

107. *Id.*

context of skiing.[108] The court reasoned that there are really two types of inherent risks: 1) those risks which are essential characteristics of a sport and those which participants desire to confront, e.g., moguls, steep grades, and fresh powder; and 2) those undesirable risks which simply exist, e.g., falling rock, severe and sudden weather changes, and icy slopes.[109] These same principles can be applied to determine the nature of inherent risks in other recreational opportunities.[110]

2. Assumption of Risk[111]

The amendments clarify that participants "assume the inherent risks" in a sport or recreational opportunity "whether those risks are known or unknown," and are legally responsible for "damage, injury or death" resulting from the inherent risks. Despite the Act's original (different) wording (a participant "assumes the inherent risk of injury . . .") the *Halpern* court found that the language clearly and unambiguously limits the duty that a provider owes a participant. The court held: "[a] provider has no duty to eliminate, alter or control the inherent risks of an activity, and any person who chooses to take part in a sport . . . assumes all inherent risks which are associated with that opportunity."[112]

Therefore, the amended language buttresses what the court already determined was clear from a reading of the Act. However, importantly, the added language "whether those risks are known or unknown" codifies a principle element of the inherent risk doctrine: a participant's knowledge and appreciation of the danger is not necessary for application of the doctrine. A participant's consent to participate brings with it an agreement to assume all inherent risks, known or unknown.[113]

108. 808 P.2d 1037, 1047 (Utah 1991).

109. *Id. See also supra* note 10 and accompanying text; Hansen & Duerr, *supra* note 1, n.155 and accompanying text.

110. *See infra* note 126 and accompanying text for further discussion of these principles.

111. WYO. STAT. ANN. § 1-1-123(a) (Michie 1997); *see supra* text pp. 268-69.

112. *Halpern*, 890 P.2d 562, 565 (Wyo. 1995). Whether or not a statute is ambiguous is a question of law for the court. Allied-Signal, Inc. v. State Bd. of Equalization, 813 P.2d 214, 220 (Wyo. 1991). The *Halpern* court's conclusion that the Act's language is clear and unambiguous, should continue to apply following the amendments (the amendments clarify the court's statement on the Act). As such, legislative intent should be gleaned solely from the plain and ordinary meaning of the statutory language. *Id.* at 219.

113. In *In re Frant v. Haystack Group, Inc.*, 641 A.2d 765, 766, 770 (Vt. 1994), the Vermont Supreme Court noted this distinction. Citing the seminal cases of *Wright* and *Sunday* (applying the "inherent risk" rule to downhill skiing), the court noted that plaintiff's actual knowledge and appreciation of a risk is not necessary to apply the "no duty" inherent

3. Preservation of Negligence Claims[114]

The amendment clarifies that actions based upon negligence of the provider are preserved. The amendments cleaned up the language stating "negligence of the provider not caused by an inherent risk." The *1993 Article* noted that this language might be misconstrued to somehow limit negligence claims unless those claims were "caused by" inherent risks.[115] The statutory provision now says what it means to say: this Act does not limit or affect an individual's ability to bring a cause of action in negligence. If the judge determines that the injury results from an inherent risk, the provider owes no legal duty, and the claim for negligence must be dismissed. If the judge determines otherwise, plaintiff may go on and attempt to prove that provider's negligence (breach of duty) caused or contributed to his injury. The legal duty determination required by the Act is applied separately from, and prior to, a factual determination regarding potential negligence.[116]

B. Amended Act: Judicial Application

The *1993 Article* highlighted a proposed judicial framework for the Act under its earlier form.[117] The Act can be applied within the identical framework. Now, however, the amended language will strengthen the Act's utility as a vehicle to summarily dismiss appropriate cases. Judges will have a much clearer path to determine, as a matter of law, those cases where injuries result from inherent risks.[118]

Defense attorneys will use the Act in support of pre-trial motions to dismiss or for summary judgment.[119] The Act should be pled under the defense of failure to state a claim for which relief can be granted.[120] The Act

risk rule. *Id*. *See also supra* notes 57 and 102 for related discussion; *see supra* notes 21-24, 59-61, 84 and accompanying text for further explanation and discussion of the distinction between primary (duty analysis) and secondary (contributory fault) assumption of risk.

114. WYO. STAT. ANN. § 1-1-123(c); *see supra* text p. 269.

115. *See* Hansen & Duerr, *supra* note 1, at 179.

116. *Id.*

117. *Id.* at nn.216-31 and accompanying text.

118. Recall, this amended language will only apply to those incidents occurring on or after the effective date of the amendments, or July 1, 1996. *See* Independent Producers Mktg. Corp. v. Cobb, 721 P.2d 1106, 1109 (Wyo. 1986) ("[a] provision will operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect") (quoting Mestas v. Diamond Coal & Coke Co., 76 P.2d 567, 569 (Wyo. 1904)); *see also supra* note 101.

119. WYO. R. CIV. P. 12 and 56; *see Hansen & Duerr, supra* note 1, n.216 and accompanying text.

120. Hansen & Duerr, *supra* note 1, n.217 and accompanying text.

embodies a primary assumption of risk legal doctrine: the scope of defendant's legal duty to plaintiff. The presence of a duty is an essential element of a cause of action in negligence.[121]

Plaintiff must present evidence of the elements of a cause of action in negligence.[122] Plaintiff must establish that the provider breached a legal duty and that the breach was a proximate cause of plaintiff's injuries.[123] Plaintiffs' counsel will argue that the injury did not result from an inherent risk, but from the defendant's failure to exercise care.

Once defendant brings his motion to dismiss or for summary judgment, the court will apply the Act within the context of the pre-trial motions.[124] The court must determine whether the condition causing the injury was an inherent risk. If the court determines an inherent risk caused the injury, defendant owes no duty to plaintiff, plaintiff cannot state a cause of action in negligence, and the claim must be dismissed.[125]

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121. Plaintiff has the burden of presenting and proving a prima facie case of negligence: duty, breach of duty, proximate cause and damages. Pine Creek Canal No. 1 v. Stadler, 685 P.2d 13, 16 (Wyo. 1984). Because the inherent risk doctrine requires a duty analysis, the burden should remain with the plaintiff to plead and prove defendant breached a legal duty (the injury did not result from an inherent risk). *See* RESTATEMENT, *supra* note 21, § 496G, cmts. b & c; FOWLER F. HARPER ET. AL, THE LAW OF TORTS, § 21.7 at 256-258 (1986); Sklar v. Okemo Mt., Inc., 877 F. Supp. 85, 88 (D. Conn. 1995); Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). Practically speaking though, defendant will want to come forward with some evidence indicating that the injury resulted from an inherent risk; particularly on a motion to dismiss or for summary judgment. *Meistrich*, 155 A.2d at 97. Note that although plaintiff must present (as part of his prima facie case) facts giving rise to the breach of a legal duty, the court must determine, *as a matter of law*, the existence and scope of a duty in each particular case. RESTATEMENT, *supra* note 21, § 328A-B; MacKrell v. Bell H2S Safety, 795 P.2d 776, 770 (Wyo. 1990) (emphasis added).

If plaintiff successfully proves his prima facie case, the defendant then has the burden of proving any affirmative defenses, including secondary assumption of risk, or contributory negligence. *See* W.C.P.J.I. No. 10.01 (1994). The existence and extent of contributory negligence or secondary assumption of risk is normally a *question of fact* for jury determination. Anderson v. Schulz, 527 P.2d 151, 152-53 (Wyo. 1974) (emphasis added). *See also* Hansen & Duerr, *sup*ra note 1, nn.31, 34, 39, 40, 217 and accompanying text for related discussion.

122. *Pine Creek*, 685 P.2d at 16. *See also* Hansen & Duerr, *supra* note 1, nn.31, 218 and accompanying text.

123. *Pine Creek*, 685 P.2d at 16.

124. *See* Hansen & Duerr, *supra* note 1, at 186-87.

125. *See supra* note 121. As the court stated in Daily v. Bone, 1039, 1043 (Wyo. 1995), "Without duty, negligence is not actionable. *MacKrell*, 795 P.2d at 770. The existence of duty is a question of law, making an absence of duty the surest route to summary judgment in negligence actions." (citing Tidwell v. HOM, Inc., 896 P.2d 1322, 1325 (Wyo. 1995)).

See also Hansen & Duerr, *supra* note 1, n.217 and accompanying text for an expla-

How have the 1996 amendments changed the court's approach to this duty determination? Principally, the court need only make one legal determination to utilize the Act to dismiss appropriate cases.[126] Instead of

nation of why the Act should not be used as a basis for affirmative defenses of assumption of risk/contributory negligence. The Act embodies a primary assumption of risk doctrine. Pleading as an affirmative defense that plaintiff assumed the risk (was contributorily negligent) embodies secondary assumption of risk principles and is a defense to a stated cause of action in negligence.

Of course, this defense can be alternatively pled. If the court determines the injury did not result from an inherent risk, defendant can urge that despite his negligence, plaintiff's contributory negligence/secondary assumption of risk caused or contributed to the injury. *See* discussion of Brittain v. Booth, 601 P.2d 532 (Wyo 1979), *supra* notes 23, 55 and 102; *see also* Hansen & Duerr, *supra* note 1, n.104. (Following the enactment of Wyoming's comparative negligence laws, (secondary) assumption of risk was merged into contributory fault and did not survive as a complete defense to a negligence action. However, *Brittain* does not foreclose the possibility that a plaintiff could be assigned with 100% of the comparative fault.)

Note plaintiff may bring alternative causes of action, e.g., a claim for strict liability. *See supra* note 51 for a discussion of strict liability as raised in the *Walters* case. If the court determined, as a matter of law, that an inherent risk caused the injury, plaintiff's negligence claim and all alternative claims would need to be dismissed. *But see* Hansen & Duerr, *supra* note 1, n.178 (discussing courts which have found injuries resulting from a combination of an inherent risk and provider negligence).

126. If provider and participant have entered into a written assumption of risk or release type agreement, the court will have more to review on a motion for summary judgment. Providers often incorporate into a written agreement a list of common inherent and other risks of the particular recreational activity engaged in, participant's agreement to assume the risks, and a release of liability for provider's negligent conduct. An agreement like this is typically reviewed on a motion for summary judgment.

A written release agreement, standing alone, can justify summary dismissal in appropriate cases. *See* Mulligan v. Big Valley Corp, 754 P.2d 1063 (Wyo. 1988); Schutowski v. Carey, 725 P.2d 1057 (Wyo. 1986) (where the Wyoming Supreme Court has upheld the use of release agreements in the recreational context). Releases of liability, releasing a provider from liability for his or his employees' negligent conduct are strictly construed by a court against the drafter. Factors the court will consider include: (1) whether the activity requires a special duty to the public; (2) whether the release was fairly entered into; and (3) whether the intent to absolve the provider from liability is clear and unambiguous. (*But see* Dalury v. Killington, Ltd., 670 A.2d 795, 799-800 (Vt. 1995) *and* Murphy v. North American River Runners, 412 S.E.2d 504, 509 (Ct. App. W. Va. 1991), wherein courts have found recreational releases unenforceable on various public policy grounds.) Under Wyoming law, a release cannot absolve the provider from liability for gross negligence or reckless misconduct. *Mulligan*, 754 P.2d at 1066-67. This appears to be the majority view. *See* Doyice J. Cotton, *Analysis of State Laws Governing the Validity of Sport-Related Exculpatory Agreements*, J. OF LEGAL ASPECTS OF SPORTS, Fall 1993, at 50-63.

A judge can also review a written agreement in conjunction with the Act to determine as a matter of law whether the case should be dismissed. The written agreement may contain a provider's list of some of the more common inherent risks present in its

analyzing whether a risk can be reasonably altered, eliminated or controlled, the court need only determine if a condition causing injury was "characteristic of, intrinsic to, or an integral part of" a recreational activity.[127] The Act codifies that, by definition, providers have no duty to alter, eliminate or control inherent risks. The court can incorporate general duty principles in its legal analysis of whether the condition causing injury is an inherent risk.[128]

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offered recreational activities, assisting the judge in determining whether the case should be dismissed.

Note that the National Park Service and some regions of the Forest Service currently require provider concessioners or permittees (those operating recreational businesses on federal land pursuant to a permit or concession) to utilize a Visitor's Acknowledgment of Risk (VAR) form with participants, if they choose to use any written agreement at all. The VAR form is not a release of liability for negligent conduct under any state law. However, it does constitute a participant's express written acknowledgement and assumption of inherent risks, and should have value alone or in conjunction with the Act, in justifying summary dismissal of cases where injuries result from inherent risks.

[For a comprehensive discussion of both state and federal legal issues surrounding the use of these types of documents, and common elements of such documents, see CATHERINE HANSEN-STAMP ET. AL., OUTDOOR RECREATION COALITION OF AMERICA (ORCA), DEVELOPING RELEASES AND RELATED DOCUMENTS: GUIDELINES FOR RECREATION PROVIDERS, OUTDOOR PROGRAMS, OUTFITTERS & GUIDES (1997)].

If the court finds a particular written agreement does not constitute grounds to dismiss the case, the agreement can be used as evidence to show the participant's understanding and assumption of risks, and thus assist in determining the participant's potential comparative negligence under the comparative fault laws. Note that in most cases, several legal doctrines come into play. The Wyoming Act codifies the inherent risk (primary assumption of risk) doctrine. The written agreement may refer to the Act, describe the law surrounding inherent risks, and describe some of the inherent risks of the activity (e.g., a VAR form). In this case, the Act would apply, and the document would constitute an express written agreement of understanding around that doctrine. The written agreement may go on to describe additional risks, and may include an express assumption of all risks and dangers, including plaintiff's agreement to release defendant from liability for his negligent conduct. This written agreement will then include not only an express agreement regarding the inherent risk doctrine (primary assumption of risk), but an agreement to relieve the defendant of any duty of care (secondary assumption of risk), and release him from all liability. A written agreement may contain many other provisions. *See ORCA document, id.*, for elements ordinarily considered for inclusion in these types of agreements. Standard contract law, including the law regarding the enforceability of exculpatory provisions would also come into play. *See also supra* note 24 (discussing express assumption of risk).

127. WYO STAT. ANN. § 1-1-122(a)(i) (Michie 1997). In addition, the court does not need to grapple with two separate definitions of inherent risks. The separate equine activities definition is eliminated for incidents occurring after July 1, 1996, leaving only the amended, integrated definition covering inherent risks for all recreational activities. *See supra* notes 101, 118 and text p. 269.

128. *See* Hansen & Duerr, *supra* note 1, nn.224-32 and accompanying text for a related discussion in the *1993 Article; see also infra* note 130 and accompanying text.

However, the Act already defines the scope of a provider's legal duty regarding inherent risks: there is none. Therefore, use of the factors identified in *Gates v. Richardson*,[129] or Judge Hand's formula, should be used in a general way to assist in identifying whether the risk is inherent.[130]

Importantly, the court can look to other states' case law or statutory "lists" of risks,[131] or agreements between provider and participant identifying examples of inherent risks,[132] to understand the nature of inherent risks in a particular activity and to assist in determining whether a risk is inherent.[133]

Should the inherent risk question ever go to the jury? The author advocates that a court can and should make this determination in each case. In Wyoming, the court conducts the duty determination as a matter of law.

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129. 719 P.2d 193, 196-97 (Wyo. 1986). *See* Hansen & Duerr, *supra* note 1, nn. 224-32 and accompanying text for an extensive discussion of how these factors work within the scope of a proposed analytical framework for use by the judiciary in interpreting the Act. *See also infra* note 130.

130. In *United States v. Carroll Towing Co.,* 159 F.2d 169, 173 (2d Cir. 1947), Judge Learned Hand defined the duty analysis as a function of the probability of the risk to cause injury, the potential gravity of the harm, and the burden on the defendant of taking adequate precautions. If the burden on the defendant was less than the probability of injury multiplied by the gravity of the harm, or B (burden)<P(probability)L(gravity of harm), then a duty should extend to the defendant. *Id.*

In *Gates,* the Wyoming Supreme Court reviewed eight factors in conducting its duty analysis: 1) the foreseeability of harm; 2) the closeness of the connection between the defendant's conduct and the injury; 3) the degree of certainty that the plaintiff suffered injury; 4) the moral blame attached to 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 of cost and prevalence of insurance for the risk involved. *Gates,* 719 P.2d at 196-97.

Note how Judge Hand's formula fits neatly into the *Gates* factors. If viewed closely, factors 6 and 8 go to the B variable, factors 1, 2 and 5 go to the P variable, and factors 3, 4 and 7 go to the L factor. *See* Hansen & Duerr, *supra* note 1, nn.229 & 231 for a related discussion.

131. *See* Hansen & Duerr, *supra* note 1, n.149 for examples of courts that have judicially determined the "inherent risk" question. *See also* Swenson v. Sunday River Skiway Corp., 79 F.3d 204, 207 (1st Cir. 1996) (affirming summary judgment for defendant ski area, ruling that moguls were an inherent risk of skiing). Maine's then applicable "inherent risk" ski statute did not contain an inherent risk "list." 26 M.R.S.A. 488 (West 1988). *See infra* Appendix A for a comprehensive list of state legislation in this area. For example, the Colorado Ski Safety Act, 14 COLO. REV. STAT. § 33-44-101 (1996), and the equestrian statute, 6A COLO REV. STAT. § 13-21-119 (1996), each contain non-exclusive lists of those activities' inherent risks.

132. *See supra* note 126 for a discussion of written agreements.

133. *See supra* notes 108-110 and accompanying text noting a discussion of inherent risks in the ski context.

Such a determination is outside the province of the jury.[134] The Act states that a provider has *no duty* to participants for injuries resulting from inherent risks.[135] The inherent risk determination is thus a duty determination.

In *Halpern*, the court disagreed, holding (under the Act's pre-1996 wording) that the question of whether or not a risk is inherent is properly one for the jury in appropriate cases.[136] The court noted the Vermont courts' rulings in *Dillworth v. Gambardella*[137] and *Frant v. Haystack Group, Inc.*,[138] holding that under the Vermont inherent risk statute, the question of whether a risk is inherent is generally a factual inquiry for the jury to decide. The *Halpern* court noted that without a list of inherent risks, Wyoming's Act, like Vermont's statute, would frequently require submitting the inherent risk question to the jury.[139] However, the *Halpern* court did note that the inherent risk question could also be decided by the court, as a matter of law, in appropriate cases.[140]

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

135. The Wyoming Supreme Court confirmed this reading of the Act. Halpern v. Wheeldon, 890 P.2d 562, 565 (Wyo. 1995).

136. *Id.* at 566.

137. 970 F.2d 1113, 1120 (2d Cir. 1992).

138. 641 A.2d 765, 770 (Vt. 1994).

139. *Halpern*, 890 P.2d at 566. Wyoming need not look to the Vermont courts as persuasive authority for the construction and interpretation of Wyoming's Act, and the division between legal/factual determinations. Although drafters of the Wyoming Act initially looked to Vermont in drafting legislation that covers all recreational activities, the Wyoming legislature did not adopt the Vermont model. *See* B&W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809, 814 (Wyo. 1992) (uniform laws adopted in Wyoming (Uniform Commercial Code) make it relevant and persuasive to look to precedent of another jurisdiction with identical laws); *In re* Zelikovitz, 923 P.2d 740, 744 (Wyo. 1996) (if statute in another jurisdiction has different wording, Wyoming need not consider that jurisdiction's case law persuasive in interpreting similar Wyoming legislation). The two statutes use distinct language in defining and circumscribing the inherent risk rule. *Compare* 12 VT. STAT. ANN. tit. 12, § 1037 (1996), *with* WYO. STAT. ANN. §§ 1-1-121 to -123 (Michie 1997). *See supra* note 82; Hansen & Duerr, *supra* note 1, n.135.

Although the Vermont Supreme Court would readily submit the inherent risk question to the jury, that court does have a grasp of the distinction between primary and secondary assumption of risk, following the "muddling" of that state's inherent risk case law in *Leopold v. Okemo Mountain, Inc.*, 420 F. Supp. 781 (D. Vt. 1976). *See* discussion *supra* note 57.

140. The *Halpern* court went on to state: "[H]owever, in many cases, the costs of litigation will not be reduced because the losing party will appeal from the district court's legal determination in an attempt to persuade this Court that a particular risk is . . . inherent." *Halpern*, 890 P.2d at 566. This reasoning applies across the board, whenever a court makes a duty determination. However, the possibility of appeal should never deter a court from deciding legal matters properly within its charge. *See supra* note 131 for examples of courts that have judicially determined the "inherent risk" question.

The 1996 amendments to the Act's inherent risk definition should increase the likelihood that Wyoming courts will decide this critical question as a matter of law. The judiciary's decision to aggressively make this legal duty determination, where possible, will effectively minimize frivolous claims. If Wyoming courts do send this question on to the jury, the Act will still have power to mandate dismissal of appropriate cases, albeit following the jury determination.[141] The disadvantage is that significant time and money will be expended in trying cases which could have gone the route of summary dismissal.

VI. CONCLUSION

Four years after the 1993 *Article, is Wyo*ming's judicial approach better than the comprehensive legislative approach taken in other jurisdictions? There is little case law, making a "paint by the numbers" approach tempting, but ultimately of little use when a "list" is outdated, leaving the court empty-handed.[142] Nothing short of legislative clairvoyance would allow for the creation of a list which could withstand the test of time.[143] Practically speaking, separate acts providing comprehensive lists for each different recreational activity would be impossible to legislate for the myriad of recreational activities engaged in in Wyoming.[144] Alternatively, taking the Colorado "piecemeal" approach, which provides comprehensive legislation for the ski and equine industries, but nothing for other recreational providers, leaves many providers out of the loop. Wyoming residents and visitors engage in a broad spectrum of diverse recreational activities. The "judicial" approach taken in Wyoming is the only practical way to codify the inherent risk doctrine in recreational activities. The 1996 amendments to the Act assist Wyoming courts in taking the bold step to use the Act to dismiss appropriate cases where injuries result from inherent risks.

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141. *Id.* If the jury determines that the injury resulted from an inherent risk, provider has no duty or corresponding liability to the plaintiff (under the Act and the common law inherent risk doctrine), and plaintiff's (negligence) claim must be dismissed. *See supra* notes 124-25 and accompanying text. *See also* Hansen & Duerr, *supr*a note 1, n.178 (discussing the possible effect of plaintiff's pleading alternative causes of action).

142. *See* Hansen & Duerr, *supra* note 1, nn.235-40 and accompanying text for a discussion of the pros and cons of these two approaches.

143. BETTY VAN DER SMISSEN, LEGAL LIABILITY AND RISK MANAGEMENT FOR PUBLIC AND PRIVATE ENTITIES, Vol. 1, § 8.41, p. 80 (1990) (noting that advances in technology may likely make an inherent risk list outdated). *See also* Hansen & Duerr, *supra* note 1, n.238 and accompanying text; Frant v. Haystack Group, Inc., 641 A.2d 765, 770 (Vt. 1994).

144. *See* WYO. STAT. ANN. § 1-1-122(a)(iii) (Michie 1997), for a non-exclusive list of recreational activities covered under the Act.

VII. APPENDIX

SKIING

State	Inherent Risks	Operator Duties	Skier Duties
Alaska	09.65.135(c)(1) 05.45.101 05.45.200(3)	05.45.040 05.45.050 05.45.060 05.45.070	05.45.100
Colorado	33-44-103(10)	33-44-106 33-44-107 33-44-108	33-44-109
Connecticut	29-212 (Ch. 538a)	29-211	29-213 29-214
Idaho	6-1106 (Ch.11)	6-1103	6-1106
Maine	32 § 15217(1)(A) 32 § 15217(2)	32 § 15217(3)	32 § 15217(4) 32 § 15217(7) 32 § 15218
Massachusetts		Ch. 143 § 71N	Ch. 143 § 710
Michigan	18.483(22)(2)	18.483(6a)	18.483(21) 18.483(22)(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	24-15-10B	24-15-7 24-15-8	24-15-10
New York	26 § 867 18 § 106	18 § 103 18 § 106	18 § 104 18 § 105 18 § 106
North 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	41-8-1
Tennessee	68-114-103	68-114-105 68-114-106	68-114-103
Utah	78-27-52(1)	78-27-54	
Washington		70.117.010	70.117.020
West Virginia	§ 20-3A-5	§ 20-3A-3	§ 20-3A-5
Wisconsin (general recreation participant duties)			895.525(4)

EQUINE ACTIVITIES

State	Inherent Risks	Operator Duties	Participant Duties
Alabama	§ 6-5-337(b)(6)	§ 6-5-337(d)	
Arizona		§ 12-553(3), (4)	
Colorado	13-21-119	13-21-119(4)	
Illinois	745 ILCS 47/10(f)	745 ILCS 47/15	745 ILCS 47/20(b) 745 ILCS 47/25
Maine	Ch. 743 § 4104-A	Ch. 743 § 4104-A	
Massachusetts	Ch. 128 – 2D(b)	Ch. 128 2D(c)1-4	
North Dakota (general equine statute)	53-10-101 53-10-102		
North Carolina	Ch. 99E-2(a)	Ch. 99E-2(b)	
Ohio	2305.321(A)(7)	2305.321(B)(2)(a) and (b)	
Oregon	30.689(2)		
Vermont	12 § 1039(b)	12 § 1039(b)(1), (2), (3)	
Washington		4.24.540(b)(I)(A), (B)	
Wisconsin	895.481(1)(e)	895.481(3), (4), (5)	