



## Putting Risk Back on the Downhill Edge: The Case for Meaningful Limitations on Ski Area Liability

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“For me, skiing is a physical necessity. I have a need for risk.”

~Jean-Marie Messier

“I do not participate in any sport with ambulances at the bottom of the hill.”

~Erma Bombeck

### Introduction

Few pastimes capture the rugged, intrepid spirit of American individualism better than alpine skiing. At its core, skiing is a liberating but dangerous sport best suited to risk-taking thrill-seekers such as Jean-Marie Messier. The fact that three skiers were killed on Vermont's slopes this year is a sobering reminder of this reality.<sup>i</sup> The upscale facilities and guest services offered at many major resorts may prompt the Erma Bombecks of the world to take to the hill, but the sport itself remains fraught with risk.

Although Vermont's "sports injury" statute was specifically enacted to insulate ski areas from tort liability for injuries caused by a host of inherent hazards on the slopes, the Vermont Supreme Court has construed the statute's ambiguous language in favor of allowing recovery for injured skiers under traditional tort principles. As a result, the sports injury statute has been rendered a virtual nullity, leaving ski areas exposed to the same kind of liability imposed in the infamous *Sunday v. Stratton*<sup>ii</sup> decision.

This article examines the development of the law in this area, explains why the protections afforded by the sports injury statute are largely illusory, and proposes amendments to the statute that would delineate specific inherent risks of skiing and compel courts to enforce sensible, bright-line limitations on ski area liability.

### The Assumption-of-Risk Doctrine

Before 1978, ski areas found solace in the assumption-of-risk doctrine, a defense often expressed in the Latin phrase *volenti non fit injuria* (to a willing person, no injury is done). Leading jurists during the first half of the twentieth century, most notably Justice Oliver Wendell Holmes and Justice Benjamin Cardozo, unflinchingly applied assumption-of-risk principles to deny recovery to injured plaintiffs.<sup>iii</sup> In a 1929 case brought by a person who had



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been injured as a result of being jostled about on an amusement park ride aptly named “The Flopper,” Justice Cardozo wrote:

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

For Cardozo, the plaintiff’s injury was “the very hazard that was invited and foreseen ... The very name, above the gate, ‘the Flopper,’ was warning to the timid.”<sup>v</sup> Cardozo also added a sentiment to which many skiing enthusiasts subscribe: “There would have been no point to the whole thing, no adventure about it, if the risk had not been there.”<sup>vi</sup>

Initially, Cardozo’s logic was applied to ski accident cases governed by Vermont law. In the 1951 case of *Wright v. Mount Mansfield Lift, Inc.*, a federal judge reasoned that the mechanism of the plaintiff’s injury—a tree stump covered by snow on an intermediate trail—was an inherent risk of skiing that precluded any recovery.<sup>vii</sup>

In the 1976 case of *Leopold v. Okemo Mountain Inc.*, the court denied recovery for a skier who sustained fatal injuries as a result of colliding with an unpadded lift tower on expert terrain.<sup>viii</sup> The fact that the ski area could have padded the tower was irrelevant. The court reasoned that the plaintiff had made a “logical ... choice as to whether he should proceed and assume the consequences of skiing in an area where a plainly apparent and necessary danger exists.”<sup>ix</sup> For Vermont ski areas, however, the halcyon days of *Wright* and *Leopold* were about to come to an abrupt end.

### The Sunday Decision

On a fateful day in February 1974, a novice skier named James Sunday took to the slopes at Stratton. While traversing the outer edge of a novice trail “at a speed equal to a fast walk,” his ski became entangled in a “clump of brush” that was “concealed by loose snow” which caused him to lose control and strike a boulder off the trail.<sup>x</sup> Tragically, Sunday’s injuries resulted in permanent quadriplegia. He sued Stratton, alleging that it had negligently maintained the trail and failed to warn him of hidden surface hazards. The trial judge, who had openly stated that ski areas should no longer be allowed to “hide behind” the philosophy that injuries are an inherent risk of skiing, denied Stratton’s motion for a directed verdict based on assumption-of-risk principles.<sup>xi</sup> A jury ultimately found Stratton to be 100% at fault for the accident and awarded Sunday \$1.5 million in compensatory damages.<sup>xii</sup>

Stratton appealed to the Vermont Supreme Court but the Court, in an opinion authored by Justice Larrow, affirmed the *Sunday* verdict in its entirety. Stratton’s central contention on appeal was that it had no legal duty to clear its trails of natural growth because such hazards were an inherent risk of the sport. It relied principally on *Wright*, which, after all, featured strikingly similar facts, *viz.*, injuries resulting from contact with snow-covered natural growth on non-expert terrain. The Court, however, swept *Wright* aside and declared that “the passage of time has greatly changed the nature of the ski industry” such that tree stumps could no longer be characterized as inherent dangers.<sup>xiii</sup>

The Court seized on evidence that “Stratton had widely advertised its world-wide reputation for trail maintenance, ‘meticulous grooming’ and ‘top quality cover,’” and used “elaborate machines” to remove natural debris from the trails in order “to achieve a ‘complete new surface,’ like a ‘fairway, absolutely flat.’”<sup>xiv</sup> From this Stratton-specific evidence, the Court concluded that *all* ski areas had (or should acquire) the technological sophistication and maintenance capabilities necessary to remove natural growth from the slopes.

*Sunday* empowered judges and juries to decide, on a case-by-case basis, whether a particular risk of skiing was “inherent” based on whether the danger could have been removed or prevented through the use of available technology. Vermont’s highest court even twisted Cardozo’s assumed-risk rhetoric into a pro-plaintiff battle-cry, declaring that “the timorous no longer need stay at home.”<sup>xv</sup>

Not surprisingly, ski areas from Maine to California reacted to *Sunday* with “unmitigated panic.”<sup>xvi</sup> Due to the drastic increase in liability exposure, insurance premiums for many ski areas across the country doubled or tripled on the heels of the decision.<sup>xvii</sup> Jack Murphy, the general manager of Sugarbush at the time, reported that the mountain’s liability premiums had “just about doubled.”<sup>xviii</sup> As a result, “the price of lift tickets skyrocketed,”<sup>xix</sup> at least four small Vermont ski areas shut down completely, and “the two primary ski area insurers threatened to withdraw from Vermont during 1978, effectively putting in jeopardy one of the state’s major industries.”<sup>xx</sup>

### Judicial Nullification of the Sports Injury Statute

Even before the Vermont Supreme Court’s ruling, the legislature responded swiftly to the disastrous ripple effects of the *Sunday* verdict by enacting the “sports injury” statute (12 V.S.A. §1037). The statute, which was the first of its kind in the nation, reads in full:

Notwithstanding the provisions of [Vermont’s comparative negligence statute], a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.<sup>xxi</sup>

The legislative history of the sports injury statute reveals a very clear purpose: to consign *Sunday* to the ash heap of bad law and reinstate the assumption-of-risk principles applied in *Wright*.<sup>xxii</sup> The statute itself, however, is terse, generic and textually incapable of serving the objectives articulated in the legislative history. It fails to mention skiing by name and, instead, applies to “any sport.” While the statute reaffirms the basic tenet that a person assumes the inherent (“obvious and necessary”) risks of any sport, it does not actually delineate any specific risks that skiers assume as a matter of law.

Because the sports injury statute was enacted before the *Sunday* appeal was decided, it was a preemptive reprisal that did not adequately account for the Supreme Court’s nuanced holding. The statute codified the assumption-of-risk doctrine by invoking the “obvious and necessary” catchphrase from *Wright*, but the Court in *Sunday* did not reject the legal standard enunciated in *Wright*—it rejected *application* of the *Wright* standard to a particular skiing risk (*viz.*, natural growth on novice terrain). In essence, the sports injury statute resurrected a common-law creature that had never passed away in the first place. *Sunday* actually reaffirmed the primary assumption-of-risk doctrine in recognizing that certain risks are so obvious and necessary that ski areas do not owe a duty to warn of such risks or take any action to eradicate them. The problematic dimension of *Sunday* was the Court’s finding that latent natural hazards on novice terrain should no longer be counted among such risks. Thus, while *Sunday* did not quibble with the *Wright* standard, it rejected the idea that skiers invariably assume specific risks that are “inherent” to skiing despite the passage of time.

In the end, Stratton’s litigation strategy in *Sunday* made it easy prey for the Court. At trial, it touted its thorough trail maintenance and grooming practices in an attempt to prove that the brush could not have existed on the trail at all.<sup>xxiii</sup> One of Stratton’s experts had even testified at trial that any natural growth on the skiable portion of the trail should have been eliminated.<sup>xxiv</sup> On appeal, Stratton resorted to the incongruous argument that brush-and-bramble entanglements were among the inherent risks of skiing the trail.<sup>xxv</sup> Stratton also conceded in its appellate brief that the snow-covered tree stump in *Wright* “may well be the

basis for negligence today in view of improved grooming techniques.”<sup>xxvi</sup> This fateful concession is the doctrinal hook on which *Sunday* hangs. Unfortunately, the sports injury statute, enacted before the *Sunday* appeal was decided, simply failed to address the Court’s *evolutionary* approach to ski area liability.

Ski liability cases in the post-*Sunday* era indicate that ski areas have not derived any appreciable benefits from the sports injury statute. Even where the results have been favorable, they have flowed directly from the primary assumption-of-risk principles that *Sunday* left intact, and not from any special protections afforded by the statute. *Nelson v. Snowridge Inc.*, for example, involved an expert skier who sustained injuries after falling on an icy swath of Sugarbush’s famed “Upper F.I.S.,” a steep double black diamond run.<sup>xxvii</sup> The skier filed suit against Sugarbush, alleging that it had been negligent in failing to properly maintain the trail and in failing to warn her of the trail’s icy conditions. Although the Court in *Nelson* ultimately dismissed the claims against Sugarbush, it scrutinized the hazard through *Sunday*’s lens of technological sophistication and feasibility:

No improvements in grooming technique have been able to eliminate ice from the New England ski slopes ... often described as ‘frozen granular’ and ‘eastern hardpack.’ Ice is both an obvious feature of skiing and a necessary one; despite exhaustive grooming efforts, ice still remains evident on at least some portion of most ski slopes in the East. If a ski area were required to close a trail every time there was ice present, it would surely be forced to curtail its operations for a good part of the ski season ... Ice, being an obvious and necessary danger in the sport of skiing, Sugarbush had no duty to warn [plaintiff-skier] and its other patrons of the icy conditions of the trail, or take any steps to attempt to eliminate the ice.<sup>xxviii</sup>

The sports injury statute had nothing to do with the favorable result in *Nelson*. Sugarbush obtained a pre-trial dismissal of the claim because it satisfied the court that ice was an “obvious and necessary” danger under *Sunday*. And at bottom, *Nelson* was an easy case to decide. Ice is a nearly ubiquitous and indelible characteristic of eastern skiing, and many advanced skiers and competitive racers crave the opportunity for unparalleled speed and technical swashbuckling that only “eastern hardpack” makes possible.

Though the result in *Nelson* may have lulled ski areas into a false sense of security, the Vermont Supreme Court’s decision in *Frant v. Haystack Group, Inc.* sent a clear message that *Sunday* remained the law of the land. In *Frant*, an intermediate-to-advanced skier was injured at Haystack when he skied into an unpadded wooden post in a corral system designed to direct and funnel skiers into a lift line at the base of the mountain.<sup>xxix</sup> The skier had seen the corral post on earlier runs and admitted that he was skiing “pretty fast” at the time of the accident.<sup>xxx</sup>

The trial court in *Frant* dismissed the claim on the ground that Haystack’s use of the corral posts posed an “obvious and necessary” risk of injury. The Supreme Court, however, reversed the trial court’s ruling and held that the plaintiff was entitled to a jury trial on the issue of whether the unpadded wooden post construction of the corral system was “necessary” within the meaning of the sports injury statute.<sup>xxxi</sup> The plaintiff’s ski-area safety expert had opined that there was a “safer way” of corralling skiers, namely by using more forgiving, plastic posts.<sup>xxxii</sup> Consistent with *Sunday*, the Court held that Haystack could be held liable if the plaintiff’s expert succeeded in convincing a jury that Frant’s injury was foreseeable and avoidable based on the availability of safer, alternative methods.<sup>xxxiii</sup>

The Court in *Frant* declared that “the only difference between *Wright* and *Sunday* is in their results, not in the principles of controlling law.”<sup>xxxiv</sup> It then deduced, rather remarkably, that in reaffirming the *Wright* standard in abstract form without delineating any concrete skier

risks such as tree stumps, the sports injury statute had implicitly condoned the *Sunday-Frant* approach:

In drafting [the sports injury statute], the legislature avoided cataloguing fact-specific examples of ‘obvious and necessary’ risks inhering in sports such as skiing. The legislature thereby recognized, as *Wright* demonstrates, that yesterday’s necessary skiing risks tend to become, with the passage of time and advancement of technology, reasonably avoidable ... The language of [the statute] is broad enough to account for safety improvements in the skiing industry. We do not think the legislature’s purpose in reasonably protecting the skiing industry is compromised by asking a jury to supply a contemporary sense of what constitutes an obvious and necessary risk. Skiers should be deemed to assume only those skiing risks that the skiing industry is not reasonably required to prevent.<sup>xxxv</sup>

*Frant* officially reduced the sports injury statute to nothing more than a paper tiger. As one commentator observed, the Court in *Frant* “deftly sidestepped the legislation, and reasserted the authority of Vermont’s courts to determine liability for the harms resulting from skiing.”<sup>xxxvi</sup> Despite the fact that the sports injury statute was clearly intended to limit the liability of ski area operators, *Frant* made abundantly clear that *Sunday* was alive and well. And if ski areas thought they could circumvent *Sunday* by having recreational skiers and amateur racers sign liability releases, they were sorely mistaken. Shortly after *Frant* was decided, the Court declared general ski liability releases void on “public policy” grounds.<sup>xxxvii</sup>

### The Need for Ski Area Liability Reform in Vermont

In its current form, Vermont’s sports injury statute is an empty legislative platitude incapable of insulating ski area operators from *Sunday*-style liability. Although the legislature has since enacted a separate statute (12 V.S.A. § 1038) that categorically immunizes ski areas from all liability for injuries sustained on “terrain *outside* open and designated ski trails” (i.e., closed trails or backcountry terrain), the *Sunday-Frant* paradigm governs all negligence claims arising out of injuries sustained on open and designated trails. For all of these claims, the question boils down to whether a given hazard—even if patently obvious—is “necessary” in light of technological or safety advancements in the industry.

Taken to its logical terminus, the *Sunday-Frant* necessity test could result in ski area liability in a wide range of circumstances. While trees are certainly an essential feature of any glade run, a lone tree (or a few sparsely scattered trees) in the middle of an otherwise fast, open slope is probably not “necessary” under *Frant*. It is also arguably unnecessary for ski resorts to cut serpentine-like trails over quirky double fall-lines or crests that result in “blind jumps” when such characteristics increase the risk of injury and could be eliminated through alternative trail designs or earth-moving equipment. Even such commonplace features as moguls and terrain-parks cannot be said to be strictly “necessary.” Groomers can easily transform mogul fields into carpet-like corduroy overnight, and terrain parks are purely artificial structures created by ski areas themselves. A seemingly endless parade of potential liability risks flow from *Sunday* and *Frant*. If ski areas must continually ensure that open, designated trails are free of such “unnecessary” risks, the entire sport would be fundamentally changed.

Courts in other states have recognized that “skiing is a quasi-dangerous, thrill-seeking sport, and if certain ‘dangers’ are removed, the interest in skiing would be greatly diminished.”<sup>xxxviii</sup> Justice Cardozo made this observation over eighty years ago when he remarked that there would be “no point” and “no adventure” in a sport that has been stripped of the very risks that define and animate it.<sup>xxxix</sup> The Vermont Supreme Court has never

acknowledged the legitimacy of this philosophy. Instead, it seems committed to the goal of offering placid environs for “the timorous”<sup>xli</sup> and bountiful harvests for personal injury lawyers. If the last thirty years of ski liability jurisprudence is any indication, the Court prefers a system in which ski areas are forced “to insure against the risks and spread the increased cost of insurance among ... all skiing customers.”<sup>xlii</sup>

*Sunday* is not responsible for all of the ski industry’s woes, but it has undoubtedly contributed to escalating operating expenses for an industry that has not traditionally boasted wide profit margins to begin with. Ski areas face a great deal of financial uncertainty by virtue of their weather-dependency alone, and the tell-tale signs of climate change—shrinking snowpack, volatile and shifting weather patterns, rapidly receding glaciers, and truncated seasons—pose a threat to their very existence. Vermont’s resorts sustained massive revenue losses during the 2011-12 season due to the snow drought and record high temperatures. In some seasons, northeastern ski areas have experienced significant declines in gross revenue even when weather conditions have been favorable and the industry as a whole has achieved marked growth.<sup>xliii</sup>

In addition to the unpredictable forces of nature, Vermont’s ski areas must contend with the unduly burdensome insurance and litigation costs that go hand-in-hand with an expansive liability system. In the aggregate, Vermont ski areas pay an estimated \$20 million in annual insurance premiums, and most policies come with high deductibles or self-insured retentions (SIRs) that require the ski area to foot the bill for sizable litigation costs (i.e., attorney fees, settlements, and judgments) before coverage is even triggered. These insurance and litigation expenses—coupled with jaw-dropping labor, energy and regulatory-compliance costs incurred to keep the lights on and the lifts spinning—also translate into higher prices at the ticket window. Higher lift ticket prices have not yet led to a decline in the number of annual skier visits (Vermont has averaged about four million skier visits annually over the last decade) because the throngs of non-residents who visit our slopes each year occupy more affluent strata than most Vermonters. But even the high-end ski market has a finite tolerance for price hikes, and a confluence of external factors (travel expenses, poor weather or lackluster surface conditions) often render the purchase of a lift ticket cost-prohibitive. Sadly, ordinary Vermonters—the kind of people who established and populated the many family-owned “rope tow” ski areas that once existed throughout the state—have already been priced out of active participation in the sport.

Perhaps the most tragic of all the *Sunday* effects was the virtual extinction of Vermont’s small ski area operators who simply could not afford the “highly sophisticated equipment and machines” Stratton had touted in *Sunday*.<sup>xliiii</sup> It is hardly surprising that these relatively low-tech, shoestring operations imploded under the weight of *Sunday*’s purchase-or-perish mandate. For example, Hogback, a once popular family-oriented ski area founded in the mid-40s, was forced to shut down in 1986 when its insurance rates exceeded its gross income.<sup>xliiv</sup>

The Mad River Glen Cooperative is among the few no-frills ski areas still in existence and its profit margins are razor-thin. Mad River generally eschews grooming and snowmaking, and its daredevil terrain is reminiscent of the narrow, steep, rough-hewn trails the Civilian Conservation Corps blazed up and down Mount Mansfield in the 1930s. Mad River’s purist philosophy is admirable, but it could cost it dearly in the courts. One would think its cautionary slogan, “Ski It If You Can!,” would discharge any duty owed to the timorous, but *Sunday* and *Frant* hold otherwise. In the eyes of the Vermont judiciary, Mad River and Stratton are fungible entities. Both are equally duty-bound to purchase and employ state-of-

the-art technology, eliminate all “unnecessary” surface hazards, and cultivate kinder, gentler alpine fairways for the faint-hearted.

### **A Model for Change: Michigan’s Ski Area Safety Act**

Today, almost every ski industry state in the country has legislation that allocates risk in a way that limits the liability of ski areas for skiing-related injuries. Vermont’s sports injury statute was the first of these statutes, but it is also “one of the briefest, least-detailed statutes.”<sup>xlv</sup> The statute’s extreme generality is its Achilles’ heel. Many other states have enacted more detailed statutes that impose an absolute bar to recovery for injuries arising out of a litany of specifically defined risks. Michigan’s Ski Area Safety Act (SASA), for example, enumerates a non-exclusive list of skiing risks that are, by definition, “obvious and necessary” as a matter of law. The SASA provides in pertinent part:

Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.<sup>xlvi</sup>

The SASA is generally well-crafted and has been interpreted expansively in favor of protecting Michigan’s ski areas from the kind of liability exposure their Vermont counterparts must contend with under *Sunday* and *Frant*.

*Schmitz v. Cannonsburg Skiing Corporation*, for example, involved a skier who died from injuries sustained when he struck a lone tree growing on an open slope.<sup>xlvii</sup> Despite the gravity of the injury and the relative ease with which the tree could have been removed, a Michigan appellate court held that the SASA barred any recovery because it specifically listed “trees” among the inherent risks of skiing. Looking to the statutory language as a whole, the court declared:

[I]t is clear from the plain and unambiguous wording of [the statute] that the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators. Significantly, the list of ‘obvious and necessary’ risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski area, such as lift towers and other such structures or snow-making or grooming equipment when properly marked. These are all conditions that are inherent to the sport of skiing. It is safe to say that, generally, if the ‘dangers’ listed in the statute do not exist, there is no skiing.<sup>xlviii</sup>

In *Kidwell v. Wakefield Properties Inc.*, another case governed by Michigan’s SASA, the Sixth Circuit affirmed a summary judgment ruling in favor of a ski area in a negligence action brought by skiers who had collided with one of two permanently fixed poles equipped with a timing device that demarcated the finish line of a race course.<sup>xlix</sup> Although the poles were not among the inherent risks specifically listed in the statute, the court noted that the non-exclusive statutory language (“including, but not limited to”) was broad enough to encompass race course poles because they were analogous to the enumerated man-made dangers.<sup>l</sup> Like the plaintiff in *Frant*, the plaintiffs in *Kidwell* conceded that the poles were obvious but argued that they were unnecessary because “other means of marking the finish could have been used.”<sup>li</sup> The court rejected the plaintiffs’ argument and concluded that the

statute's clear grant of absolute immunity rendered the availability or feasibility of safer alternatives irrelevant:

The Act was designed to reduce the liability of ski area operators by making skiers liable for obvious risks of harm from skiing and to encourage skiers to accept responsibility for their safety. We do not think that the statute intended to place responsibility on the ski area operators to determine which ski equipment is the least risky and to only use that equipment. Such a responsibility would have been parallel to requiring the defendant in *Schmitz* to have removed the tree from the slope. It would be difficult to argue that a tree in the skier's path was 'necessary' for skiing on the slope. This is clearly not the intention of the statute. It was intended to limit the liability of ski resort operators. If a structure serves some purpose or function with respect to skiing and is similar to those listed, it meets the 'necessary' requirement.<sup>lii</sup>

In *Anderson v. Pine Knob Ski Resort, Inc.*, the Michigan Supreme Court denied recovery to a skier who collided into a shack that housed race timing equipment.<sup>liii</sup> The Court concluded that, while the race shack was not specifically listed among the SASA's "obvious and necessary" dangers, it was of the same class, character or nature as the enumerated man-made hazards because its existence and location on the trail fulfilled a sport-related purpose (*viz.*, timing of ski races).<sup>liv</sup> The plaintiff in *Anderson* argued that the shack was not a "necessary" danger because it "was larger and more unforgiving than other imaginable, alternative timing-equipment protection might have been."<sup>lv</sup> The Court, however, held that the availability of safer housing could not form the basis for liability under the statute:

To adopt the standard plaintiff urges would deprive the statute of the certainty the Legislature wished to create concerning liability risks. Under plaintiff's standard, after any accident, rather than immunity should suit be brought, the ski-area operator would be engaged in the same inquiry that would have been undertaken if there had been no statute ever enacted. This would mean that, in a given case, decisions regarding the reasonableness of the placement of lift towers or snow groomers, for example, would be placed before a jury or judicial fact-finder. Yet it is just this process that the grant of immunity was designed to obviate. In short, the Legislature has indicated that matters of this sort are to be removed from the common-law arena, and it simply falls to us to enforce the statute as written.<sup>lvi</sup>

In *Jakubovsky v. Blackjack Ski Corporation*, a skier brought suit against a ski area for injuries she received as a result of colliding into a wooden fence along the side of a trail to prevent skiers from falling over a steep embankment.<sup>lvii</sup> Consistent with *Kidwell* and *Anderson*, the Court reasoned that safety fences, though not specifically included in the SASA, were similar to snow-making equipment and lift tower components in that they serve a functional purpose relating to the maintenance and operation of the ski area. The fact that the fence was made of wood, as opposed to a safer material such as netting, was immaterial. The Court explained: "Having found that the fence was a necessary and obvious hazard, I may not consider whether it could have been less rigid and more forgiving. Nothing in the language of the statute allows consideration of factors of this sort."<sup>lviii</sup>

Notably, California is one of the few ski states that do not have a ski liability statute. California courts, however, have repeatedly looked to Michigan's SASA as "persuasive authority" in determining what skiing risks are "obvious and necessary" under the common law of California.<sup>lix</sup> Relying on Michigan's codified catalogue of inherent risks, California courts have denied recovery to injured skiers in cases involving collisions with trees,<sup>lx</sup> inadequately padded lift towers,<sup>lxi</sup> and unpadded snowmaking equipment.<sup>lxii</sup> All of these risks

would likely give rise to liability—or at least significant litigation costs—for ski areas under current Vermont law.

### **A Proposal to Amend Vermont’s Statute Based on the Michigan Model**

In *Sunday*, Stratton’s voluntary business decision to convert some of its natural terrain into hazard-free fairways became the springboard for a broad-sweeping, judge-made rule that every ski area from Jay Peak to Mount Snow should be *required* to do the same. A statutory scheme based on the Michigan model would extinguish the *Sunday-Frant* regime and provide clear, predictable, and substantial liability protections for Vermont ski areas. The following proposed amendments to the sports injury statute incorporate and expand on the Michigan model:

*(1) It is the purpose of this Act to eliminate litigation and litigation-related costs for ski area owners and operators with respect to claims and actions for injuries arising out of certain inherent dangers of skiing, and to facilitate the stabilization of an industry which contributes substantially to Vermont’s economy. This Act sets forth the policy of the State with respect to the liability of ski area owners and operators by affirming the principles of law set forth in Wright v. Mt. Mansfield Lift, Inc., and by establishing certain inherent dangers of the sport of skiing as “obvious and necessary” as a matter of law. In Frant v. Haystack Group Inc., the Vermont Supreme Court observed that, “[i]n drafting 12 V.S.A. § 1037, the legislature avoided cataloguing fact-specific examples of ‘obvious and necessary’ risks inhering in sports such as skiing.” The purpose of this Act is to catalogue fact-specific dangers or risks inherent in the sport of skiing to which the doctrine of primary assumption of the risk shall apply as a matter of law.*

*(2) Each person who participates in the sport of skiing or snowboarding accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries or death resulting from:*

- (a) variations in weather, contours or steepness in terrain, trail mergers or trail design;*
- (b) surface or subsurface snow or ice conditions;*
- (c) bare spots, holes, ruts, rocks, cliffs, trees, roots, stumps, and other forms of natural growth or debris;*
- (d) man-made jumps, half-pipes, terrain parks or other artificial skiing or snowboarding structures or surfaces.*
- (e) collisions with other skiers or snowboarders;*
- (f) collisions with ski lift towers or their components;*
- (g) collisions with snow-making equipment, systems or their components;*
- (h) collisions with plainly visible snow-grooming equipment;*
- (i) collisions with plainly visible trail ropes, trail markers, hazard stakes, trail or traffic signage, snow fencing, safety fencing, or lift-line corral systems;*
- (j) collisions with any other artificial or man-made objects, structures or equipment located on, or in the vicinity of, any open and designated trails so long as said dangers are (i) plainly visible to skiers or snowboarders and (ii) serve some purpose or function related to the sport of skiing or snowboarding, ski or snowboard racing, or the maintenance or operation of any designated trails, open or closed.*

*(3) For the purpose of this section, a “plainly visible” danger shall be defined as a danger that any attentive skier or snowboarder of normal visual acuity would observe*

*from a distance of fifty (50) feet in clear weather conditions. The presence of fog or other inclement weather affecting general visibility shall not be considered in determining whether a particular danger is plainly visible within the meaning of this section.*

*(4) All of the aforesaid dangers shall be deemed obvious and necessary notwithstanding improvements or advancements in technology, or the availability or feasibility of alternative technology, equipment, placement, structures, measures, methods or designs.*

*(5) In all civil actions brought against ski area owners or operators arising out of skiing or snowboarding-related injuries, the plaintiff shall have the burden of proving that the causal mechanism of injury or death is not among the aforesaid obvious and necessary dangers which all skiers and snowboarders assume as a matter of law.*

*(6) In construing the provisions of this Act, the rule of law that statutes in derogation of the common law are to be strictly construed shall not be applied. The provisions of this Act shall be so interpreted and construed as to effectuate its stated purpose.*

An amended “delineated risk” statute along these lines would allocate skiing risks in a fair, reasonable, and administrable manner. Skiers would assume those risks that most detached observers would recognize as inherent to the sport. These risks include injuries resulting from natural hazards, skier-to-skier collisions, and all artificial hazards that (1) serve a skiing-related function and (2) are plainly visible to skiers. For their part, ski areas would owe a common-law duty of reasonable care to keep the slopes free of artificial hazards that are either not plainly visible to skiers or serve no skiing-related purpose. And, of course, ski resorts would continue to face traditional tort liability for a host of other losses, including injuries caused by negligent installation, operation or maintenance of ski lifts,<sup>lxiii</sup> negligent construction or maintenance of the facilities themselves, negligent provision and adjustment of rental equipment, negligent instruction or supervision of ski school attendees, and the like.

### **Conclusion**

A carefully crafted ski liability statute based on the Michigan model would return the sport of skiing to its proper place where adventure, risk, and personal responsibility converge. It would also serve to drastically reduce liability insurance premiums and uninsured litigation costs for an industry that is critical to the state’s economic vitality and is perennially beset by oppressive operating expenses.

Although *Sunday* still reigns supreme, Vermont ski areas have renewed reason to believe the legislative solicitude that inspired the sports injury statute has not waned over the last thirty years. Toward the end of the dispiriting 2011-12 ski season, the legislature designated skiing and snowboarding as the official winter sports of Vermont. The act references Vermont’s ranking as the “the third largest ski and snowboard state,” and recognizes that “both sports are a critical part of our state’s economy, heritage, and way of life.”<sup>lxiv</sup> It chronicles many “historical Vermont firsts in the ski industry,” beginning with the country’s first lift-served ski area on Clinton Gilbert’s Woodstock farm in 1934, and it rattles off several impressive historical accolades that firmly establish Vermont as the birthplace and enduring icon of American skiing and snowboarding.<sup>lxv</sup>

The legislature’s declaration of skiing and snowboarding as Vermont’s official winter sports is a laudable gesture, but symbolic legislation of this sort only goes so far. America’s

original ski state can do more to better serve the eighteen ski areas that comprise an indispensable part of its economy. Three decades under *Sunday's* thumb is enough. The time has come to put the inherent risks of skiing back on the downhill edge and give ski areas the financial breathing space they need to brave the daunting environmental challenges that lie ahead.

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<sup>i</sup> <http://www.wcax.com/story/16963056/making-sense-of-this-years-tragic-skiing-deaths> (last visited April 15, 2012)

<sup>ii</sup> 136 Vt. 293 (1978).

<sup>iii</sup> See, e.g., *Lamson v. American Axe & Tool Co.*, 58 N.E. 585 (Mass.1900); *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y.1929).

<sup>iv</sup> *Murphy*, 166 N.E. at 174.

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> 96 F.Supp. 786 (D.Vt.1951).

<sup>viii</sup> 420 F.Supp.781 (D.Vt.1976).

<sup>ix</sup> *Id.* at 787, n. 2

<sup>x</sup> *Sunday*, 136 Vt. at 297-98.

<sup>xi</sup> *Id.* at 297-305.

<sup>xii</sup> *Id.* at 297.

<sup>xiii</sup> *Id.* at 299-300.

<sup>xiv</sup> *Id.* at 298-299.

<sup>xv</sup> *Id.* at 300.

<sup>xvi</sup> Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 275 (2010).

<sup>xvii</sup> John E. Fagen, *Ski Area Liability For Downhill Injuries*, 49 INS. COUNS.J. 36, 42 (1982).

<sup>xviii</sup> Feldman & Stein, *supra* note 16, at 277.

<sup>xix</sup> *Id.* at 276.

<sup>xx</sup> *Dillworth v. Gambardella*, 970 F.2d 1113, 1117 (D.Vt.1992).

<sup>xxi</sup> 12 V.S.A. §1037.

<sup>xxii</sup> *Id.* (Legislative Intent) (quoting 1977, No. 119, Adj. Sess., § 2).

<sup>xxiii</sup> *Sunday*, 136 Vt. at 298.

<sup>xxiv</sup> *Id.*

<sup>xxv</sup> *Id.* at 299.

<sup>xxvi</sup> *Id.* at 300.

<sup>xxvii</sup> 818 F.Supp. 80 (D.Vt.1993).

<sup>xxviii</sup> *Id.* at 83.

<sup>xxix</sup> *Frant v. Haystack Group, Inc.*, 162 Vt. 11 (1994).

<sup>xxx</sup> *Id.* at 13.

<sup>xxxi</sup> *Id.* at 20-21.

<sup>xxxii</sup> *Id.* at 13.

<sup>xxxiii</sup> *Id.* at 21.

<sup>xxxiv</sup> *Id.* at 18 (quoting *Dillworth*, 970 F.2d at 1119).

<sup>xxxv</sup> *Id.* at 20-21.

<sup>xxxvi</sup> Feldman & Stein, *supra* note 16, at 285.

<sup>xxxvii</sup> *Dalury v. S-K-I, Ltd.*, 164 Vt. 329 (1995) (invalidating liability release signed by recreational skier); *Spencer v. Killington, Ltd.*, 167 Vt. 137 (1997) (invalidating release signed by amateur ski racer).

<sup>xxxviii</sup> *Bouchard v. Johnson*, 555 N.W.2d 81, 85 (N.D.1996).

<sup>xxxix</sup> *Murphy*, 166 N.E. at 174.

<sup>xl</sup> *Sunday*, 136 Vt. at 300.

<sup>xli</sup> *Spencer*, 167 Vt. at 142.

<sup>xlii</sup> NSAA 2005/06 Ski Resort Industry Research Compendium, at 9 (reporting that Northeastern ski areas experienced a 4.0 % decline in gross revenue during the 2005/06 season whereas the industry as a whole experienced a 5.7 % increase in average gross revenue).

<sup>xliii</sup> *Sunday*, 136 Vt. at 298.

<sup>xliv</sup> JEREMY K. DAVIS, LOST SKI AREAS OF SOUTHERN VERMONT 100 (2010).

<sup>xlv</sup> Arthur N. Frakt & Janna S. Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 IDAHO L. REV. 227, 249 (1992).

<sup>xlvi</sup> Mich. Comp. Laws § 408.342(2).

<sup>xlvii</sup> 428 N.W.2d 742 (Mich.App.1988).

<sup>xlviii</sup> *Id.* at 744.

<sup>xlix</sup> 946 F.2d 895 (6<sup>th</sup> Cir.1991).

<sup>l</sup> *Id.*

<sup>li</sup> *Id.*

<sup>lii</sup> *Id.*

<sup>liii</sup> 664 N.W.2d 756 (Mich.2003).

<sup>liv</sup> *Id.* at 760.

<sup>lv</sup> *Id.*

<sup>lvi</sup> *Id.*

<sup>lvii</sup> 2009 WL 5215758 (E.D.Wis.2009).

<sup>lviii</sup> *Id.*

<sup>lix</sup> *Danieley v. Goldmine Ski Assocs.*, 266 Cal.Rptr. 749, 756 (Cal.Ct.App.1990).

<sup>lx</sup> *Id.*

<sup>lxi</sup> *Connelly v. Mammoth Mountain Ski Area*, 45 Cal.Rptr.2d 855, 857-58 (Cal.Ct.App.1995).

<sup>lxii</sup> *Feldman & Stein*, *supra* note 16, at 295-96.

<sup>lxiii</sup> No skier assumes the risk of being injured or killed by derailed lifts. The Ski Tramways Act, enacted in 1961, requires the Passenger Tramway Division of the Department of Labor to conduct annual inspections of every operating ski lift within the state. 31 V.S.A. §§ 701-712. The inspection program is funded directly by ski areas and fees are determined by the lineal footage of lifts at each area.

<sup>lxiv</sup> 2012 Vt. Pub.L.No. 77 (H.365).

<sup>lxv</sup> *Id.*