

Law Reform Commission of British Columbia
October 1994

**Report on Recreational Injuries:
Liability and Waivers in Commercial Leisure Activities**

Executive Summary and Recommendations

The Law Reform Commission's Report No. 140, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* is a response to the Attorney General's request that the Commission examine the law relating to the tort liability of commercial recreational operators, especially with regard to conventional recreational skiing. The Report was preceded by a Consultation Paper, which received wide distribution in print and in electronic form and generated much useful comment.

The reference to the Commission arose from two roughly parallel developments. Around the beginning of 1992 several provincial government ministries received complaints about the breadth of some waivers used by recreational operators. At about the same time, the Canada West Ski Areas Association (CWSAA) resumed its efforts on behalf of the skiing industry to secure the enactment of a *Ski Area Safety Act* modelled on American legislation dealing with risk and liability in alpine skiing. The Commission was also asked to review the draft Act proposed by the CWSAA.

The Report reviews the present law governing civil liability and waivers in commercial recreation, and contains a detailed analysis of the CWSAA legislative proposal. The Commission's conclusions are set out in 24 recommendations. The recommendations cover two related issues in addition to matters coming strictly within the Attorney General's terms of reference. These are, firstly, the ability of non-profit recreational organizations to make use of comprehensive waivers and, secondly, decreasing access to land for recreational use resulting from fear of liability on the part of landowners and occupiers.

Occupiers Liability

A catalyst for the renewal of the CWSAA's legislative initiative was *Waldick v. Malcolm*, a 1990 decision of the Supreme Court of Canada in the area of occupier's liability that led to consternation in the general insurance industry. Within the skiing industry, the specific concern surrounding *Waldick v. Malcolm* was that it might prevent a ski area operator from successfully defending a personal injury claim on the basis of the inherent risk involved in the sport, unless the skier had signed an express waiver or release of liability.

The Commission concluded that the common law defence of inherent risk was likely unimpaired, but that any uncertainty about its survival should be removed. The Report accordingly recommends that anyone who voluntarily takes part in a recreational activity be deemed to have willingly accepted the inherent risk associated with the activity for the purpose of the *Occupiers Liability Act*. "Inherent risk" in this context should be understood as being risk incidental to and inseparable from a recreational activity that cannot be removed by the exercise of reasonable care without changing the fundamental nature of the activity. Eliminating the risk of injury from a tackle within the rules of football or the risk of falling while skiing, for example, would result in something other than football or skiing as we know them.

The Report also recommends other changes to the way the *Occupiers Liability Act* applies to private land to which recreationists gain access without charge, and to ski areas. These changes are directed at relaxing the responsibilities of occupiers.

Alpine Skiing

The Report concludes that parts of the draft *Ski Area Safety Act* proposed by the CWSAA should be enacted. These included the *Skier Responsibility Code*, a widely recognized set of principles for safety in skiing,

and the obligations to ski under control and within the limits of one's ability. (These obligations largely codify the present case law in any event.)

The Commission recommends against making a breach of the *Skier Responsibility Code* or other safety obligations of skiers a provincial offence. Instead, the authority of operators to enforce the Code by revocation of a skier's ticket or pass and expulsion from the ski area should be legislatively confirmed. An exception would be the provision requiring a skier involved in a collision to provide his or her name and address to the ski patrol. The purposes of this requirement are to identify persons who may bear responsibility for accidents, and indirectly to minimize any temptation on the part of skiers injured in a collision to sue the operator when the skier at fault cannot be identified. If a failure to provide identification under these circumstances were not subject to prosecution, those purposes would be defeated.

The Commission recommended against enacting some other parts of the CWSAA draft Act that would insulate the operator from liability almost entirely. Those provisions would have accomplished this by effectively precluding courts from examining the circumstances behind skiing accidents in sufficient depth to distinguish between occurrences that are truly fortuitous and those that are not. For example, under the CWSAA's proposed legislation "impacts, collisions, or falls involving snow grooming machinery" would be defined as "inherent risks of skiing" for the purpose of *every* case, regardless of the facts. This would mean that even if an accident was caused primarily because the operator breached a statutory duty, such as by allowing grooming equipment to be operated on a run without a warning light or audible signal, the operator would be still be immune. This goes much further than most of the American legislation and, in the Commission's view, shields the skiing industry from legal responsibility to an excessive degree.

Ski area operators, like operators of other recreational facilities, will be protected from frivolous personal injury claims by the recommendation that voluntary participants in any sport be statutorily deemed to have accepted inherent risk. While recreational skiers obviously must bear the risk that arises from their own lack of skill, the Commission was unconvinced by the CWSAA's position that any legal responsibility of the operator towards the skier should end at the top of the chairlift.

The Report does recommend, however, that the duty of care under section 3(1) of the *Occupiers Liability Act* to make premises "reasonably safe in all the circumstances of the case" should not apply to closed ski runs or out-of-bounds areas. Only a residual obligation not to cause deliberate harm or act with reckless disregard (*e.g.* intentionally discharging an avalanche accumulation when out-of-bounds skiers are known to be present below) should remain in place.

The Commission found the list of ski area operators' duties set out in the CWSAA draft Act to be relatively minimal in comparison to the degree of regulation under which much of the American ski industry operates. The list falls short of many safety measures that can be found at British Columbia ski areas. For example, it fails to mention any duty to maintain a ski patrol or carry out avalanche precautions. The brevity of the CWSAA version of the list of operator's safety obligations makes it unlikely that a court would treat it as definitive with respect to the standard of care in a negligence case. As such, its enactment would bring little benefit to the skiing industry.

The Commission considered that a realistic and definitive list of ski area operators' safety obligations should be developed by an expert advisory body and be implemented by regulation. The Report recommends that the advisory body include representation not only from the skiing industry itself, but also from other elements of the community that surrounds the sport of skiing.

Waivers

The Report comes to grips with the conflicting interests reflected in the controversy over the use of comprehensive waivers: the economic health of the recreational industries on one hand and public safety on the other.

From the industry standpoint, a waiver is essential to prevent unlimited exposure to liability that would cause insurance costs to become unmanageable, or even lead insurers to withdraw coverage altogether. If this happened, recreational operations might be forced to close.

The concern about public safety arises because comprehensive waivers protect operators not only against frivolous claims, but also from legal responsibility for their own negligence and that of their employees. With potential liability greatly reduced or eliminated, an operator may be slower to correct a dangerous situation or make needed safety improvements, particularly if it involves significant cost.

The scope that comprehensive waivers can have is little understood by the public. A belief persists that waivers "are not worth the paper they're written on" or that they "don't hold up in court." Even though this fallacy has been repeatedly contradicted in recent, fairly well-publicized cases in British Columbia, the Commission still received comments in this vein.

The approaches taken to these issues elsewhere were canvassed in the Consultation Paper. In some jurisdictions, it is impossible to contract out of liability for personal injury. In others, waivers and exclusion clauses are subjected to a statutory test of reasonableness or fairness. The Commission did not think these solutions were appropriate, however. Instead, the Report recommends a compromise between the "industry" and "public safety" standpoints that makes only a few sources of risk beyond the reach of waivers. These are sources of risk within the operator's ability to control, but over which users of recreational facilities have little or no ability to influence. Some greater leeway would be allowed for waivers obtained in connection with racing events. This approach continues to allow a wide degree of protection to recreational operators without letting waivers over-reach their legitimate purpose and operate in a manner contrary to the public interest.

Non-profit recreational organizations would continue to be able to obtain fully comprehensive waivers from their own adult members. If they involve the general public in activities that are aimed at generating a profit, their ability to take advantage of a waiver from a non-member in relation to those activities would be equivalent to that of a commercial operator.

The position of minors would remain unchanged from the present: a waiver obtained from a minor would continue to be unenforceable, but in its place an operator could use an acknowledgment of risk form that could serve as evidence that a minor and the minor's parents consciously assumed the inherent risk involved in an activity.

To remove the temptation to include an operator in a lawsuit for "deep pockets" reasons when another person is primarily or exclusively at fault, the Report recommends that when a waiver is in place, an operator could not be called upon to bear any greater portion of the plaintiff's loss than its own share of the fault. In legal terms, the operator's liability should be several only, rather than joint and several, for non-disclaimable sources of risk. For example, if the operator is 10% at fault and a third party 90%, the most the injured person could recover from the operator would be 10% of the damages, whether or not the other person at fault could pay any of the rest.

Gratuitous Use of Land for Recreational Purposes

Fear of liability is causing landowners and Crown tenure holders to restrict access to land and foreshore for recreational uses. The Outdoor Recreation Council has documented this problem and its effects on sports like hiking, climbing, canoeing and kayaking, which are extensively pursued in British Columbia and are important for tourism. In 1990 the Outdoor Recreation Council urged the provincial government to follow Ontario's example by relaxing the obligations of occupiers towards non-paying

recreationists. The Commission decided to deal with this issue even though it is not strictly within the terms of reference for the project, since it is closely related to the questions the Commission was specifically asked to study. The Report recommends that persons entering land without payment for recreational purposes be deemed to do so at their own risk for the purpose of the *Occupiers Liability Act*, unless they are invited onto the land by the occupier. Merely permitting recreationists to enter or cross land would not amount to an invitation.

Overview

In the Commission's view, the concern surrounding civil liability in recreation is rooted less in the law itself than in the pressure on insurance rates stemming from the high cost of litigation. The Report sets out some non-legislative recommendations directed at reducing this pressure in sports-related cases. One recommendation is for the use of early neutral evaluation (a means of alternate dispute resolution or "ADR") in sports-related personal injury cases. Neutral evaluation of injury claims would serve both as a screening mechanism to discourage tenuous claims from proceeding and as a means of inducing early settlement where it is warranted. The Report also urges the development and active promotion of a personal accident insurance programme specifically for skiers.

List of Recommendations

The Recommendations set out in Chapter V of the Report appear below in italics. Explanatory notes appear in parentheses beneath some of the recommendations.

Legislative Recommendations

1.(a) Persons who enter premises to participate in a sport or other recreational activity should be statutorily deemed to have willingly accepted the inherent risks associated with that sport or activity for the purpose of section 3(3) of the Occupiers Liability Act.

(b) "Inherent risk" in paragraph (a) should be given the following definition:

"inherent risk" means the possibility of physical injury to a participant or spectator, incidental to and inseparable from a recreational activity, that cannot be eliminated by the exercise of reasonable care without fundamentally changing the nature of the recreational activity.

(Comment: Section 3(3) of the *Occupiers Liability Act* provides that an occupier owes no duty of care to persons in respects of risks that they "willingly accept" as their own, other than a very minimal obligation of not causing deliberate harm or acting with reckless disregard for their safety. Recommendation 1 would confirm that the *Occupiers Liability Act* does not impose liability for injuries that occur due to the inherent risk of a sport. Deliberate harm or recklessness is not considered inherent risk.)

2. Persons who, for a recreational purpose, gratuitously enter premises that have not been specifically designated for recreational use, other than persons who do so at the invitation of the occupier, should be deemed to willingly accept the risk of the hazards present on the premises for the purpose of section 3(3) of the Occupiers Liability Act. The fact that an occupier does not prevent or actively discourage entry for recreational use should not amount to an implied invitation.

3. Sections 1 and 8 of the draft Ski Area Safety Act proposed by the Canada West Ski Areas Association should not be enacted.

(Comment: Section 1 of the CWSAA's draft *Ski Area Safety Act* contains a lengthy extended definition of "inherent risks of skiing." Section 8 states that a ski area operator is not liable for any injury resulting from the inherent risks of skiing, so defined. The Commission recommended against adopting the CWSAA definition, because under it the mere fact that a skiing injury resulted from a listed hazard would automatically decide the issue of legal responsibility, regardless of the factual background of the accident. The full text of the CWSAA draft *Ski Area Safety Act* appears in Appendix C of the Report.)

4. Sections 3 and 4 of the CWSAA draft Ski Area Safety Act should be enacted, with the addition of a provision indicating that the duties imposed by those sections on a skier do not relieve any other person of liability for that other person's own conduct.

(Comment: Sections 3 and 4 of the CWSAA draft *Ski Area Safety Act* state:

3. Each skier has the sole responsibility for knowing the range of his own ability to negotiate any ski run and to ski within the limits of such ability.

4. Each skier has a duty to ski under control and in such a manner at all times so as to be able to avoid collision with other skiers or objects and so as not to pose a threat or risk to the safety of other skiers.)

5. Sections 5, 6 and 7 of the CWSAA draft Ski Area Safety Act should be enacted, with the following additions:

- (a) Section 5(c) should include a requirement to look uphill and downhill to check for the approach or presence of other skiers prior to entering a run;
- (b) Section 5(d) should include a reference to ski brakes as an alternative to ski retention straps;
- (c) Section 7 should refer to "costs reasonably incurred" instead of "all costs."

(**Comment:** Section 5 of the CWSAA draft Ski Area Safety Act contains the *Skier Responsibility Code*. Sections 5, 6 and 7 are as follows:

5. Each skier shall obey the following responsibility code:

- (a) When skiing downhill or overtaking another skier, a skier shall choose a course and speed which assures the safety of other skiers ahead or below;
- (b) A skier shall not stop in any location which obstructs a ski run or where he is not visible from above;
- (c) When entering a ski run or starting to ski downhill, a skier shall yield to other skiers on the ski run;
- (d) A skier shall wear retention straps or other devices which prevent runaway skis;
- (e) A skier shall keep off closed ski runs and shall observe all posted signs within the ski area;
- (f) A skier shall not ski within any ski area when his ability to do so is impaired by alcohol, drugs, or other substances; and
- (g) A skier involved in a collision with another skier shall as soon as practicable identify himself to the other skier, or to a representative of the ski area operator, and shall render all possible assistance to the other skier, pending the arrival of the ski patrol or emergency first aid personnel.

6. No persons shall use a toboggan, sleigh, tube, or other sliding device other than skis or a snowboard within the ski area except in an area designated by the ski area operator exclusively for that purpose or by authorized personnel for emergency or rescue purposes.

7. A skier who knowingly skis outside of the ski area boundary shall be liable to compensate a ski area operator for all costs it incurs in attempting to rescue such skier.)

6. *A ski area operator should be empowered to enforce the Skier Responsibility Code set out in section 5 of the draft Ski Area Safety Act by revocation of the ski area admission ticket or pass, and by temporary or permanent expulsion from the ski area. A breach of the Skier Responsibility Code or other skiing safety provisions, except the obligation to provide one's name and address if involved in a skiing accident, should not be an offence.*

7. *A person injured in a skiing accident, or those representing him or her, should be able to obtain from the ski area operator the name and address of another person involved in the accident and those of witnesses, if available. The operator should exercise its best efforts to obtain this information, but failure to obtain it should not give the injured person any cause of action against the operator.*

8. (a) *A definitive list of duties of ski area operators in relation to safety should be developed and promulgated by an advisory body having expertise in skiing safety.*

(b) *The skiing industry, recreational skiers, the Canadian Ski Patrol, the Canadian Avalanche Association, insurers engaged in insuring risks associated with skiing, sports medicine, and risk management professionals should be represented in the composition of the advisory body. The recommendations of the advisory body should be implemented by regulation.*

9. *It should be expressly enacted that the common duty of care of a ski area operator under section 3(1) of the Occupiers Liability Act is not owed to persons*

- (a) *on runs marked as closed;*
- (b) *in portions of the ski area which, though situated within its outer boundaries, are designated as out of bounds;*
- (c) *who knowingly ski outside the outer boundaries of the ski area.*

(**Comment:** Section 3(1) of the *Occupiers Liability Act* imposes a duty on occupiers to make their premises "reasonably safe," in light of the circumstances of the case. Recommendation 9 relieves ski area operators of this duty in the case of out of bounds areas and closed runs, because skiers are not supposed to go there. It is also aimed at

preventing any gradual expansion of the obligations a ski area operator has as an occupier to the immediate surroundings of the ski area.)

10. *A ski area operator should owe only the relaxed duty of care specified in section 3(3)(c) and (d) of the Occupiers Liability Act towards persons in areas mentioned in paragraphs (a) and (b) of Recommendation 9.*

(Comment: Section 3(3) of the *Occupiers Liability Act* provides that in certain cases an occupier only has a duty not to:

...

(c) create a danger with intent to do harm to the person [*i.e.* who is on the premises] or damage to his property, or

(d) act with reckless disregard to the safety of the person or the integrity of his property.

An example of "reckless disregard" might be to discharge an avalanche accumulation of snow when persons are known to be present below. It is a much lower standard of care than the duty to make premises reasonably safe in the circumstances of the case.)

11. *A commercial recreational operator should not be able to exclude or limit its liability for personal injury or death arising from the following sources of risk:*

- (a) *malfunction of mechanical equipment and recreational apparatus under the control of or maintained by the operator, including vehicles, other than that resulting from misuse by a user;*
- (b) *unsafe operation of mechanical equipment or recreational apparatus, including vehicles, by the operator or its employees;*
- (c) *unsafe aspects of the structure and condition of an indoor recreational facility that directly affect the safety of users when actually engaged in a recreational activity for which the recreational facility is designed or intended;*
- (d) *failure by the operator of an outdoor recreational facility to maintain commonly accepted conditions or standards of demarcation, signage, lighting, and monitoring of user activity, for outdoor recreational facilities of comparable size and type;*
- (e) *unfitness for normal use, at the time of supply or rental, of equipment or apparatus supplied or rented for use in connection with a recreational activity;*
- (f) *conduct of the operator's employees, acting in the course of their employment, that results in personal injury to or death of a user from the sources of risk referred to in paragraphs (a) to (e);*
- (g) *breach by the operator, or by an employee of the operator, of a specific statutory duty or regulatory requirement relating to safety in a particular recreational activity.*

12. *A recreational operator should remain able to exclude or limit its liability to adult users for personal injury, death, or damage to property, stemming from risks associated with a recreational activity, other than those mentioned in Recommendation 11.*

13. *Despite Recommendation 11, a commercial recreational operator should be able to obtain a waiver excluding its liability for personal injury and death arising from the physical configuration and condition of the facility or site of a race, if the racer certifies that he or she has had an opportunity to examine the same and is willing to participate in the race. The waiver should not have effect if the configuration or conditions are materially altered without the consent or knowledge of the racer.*

14. *An operator should not be able to make participation in a recreational activity conditional on terms that exclude liability for injury or loss arising otherwise than in connection with that recreational activity.*

15. *Any exclusionary terms protecting an operator from claims for injury or loss arising otherwise than in connection with a recreational activity should be the subject of a separate agreement, and not form part of any set of exclusionary terms relating to the recreational activity or be contained in the same document.*

16. *The practice of requiring a minor or the minor's parent or guardian to agree to terms excluding liability for personal injury to the minor as a precondition to the minor's participation in any recreational activity should be prohibited.*

17. *An agreement whereby a parent or guardian of a minor agrees to indemnify a person in respect of any legal action brought on behalf of the minor should be prohibited. Such an agreement, if obtained, should be unenforceable.*

18. *It should be permissible to obtain from a minor, or from the minor's parents or guardians, a signed acknowledgment that a recreational activity involves inherent risks, and that the minor assumes them in order to be permitted to engage in the recreational activity, provided that such an acknowledgment should be inadmissible as evidence of assumption of risk to the extent that it*

- (a) *contains any terms purporting to waive any cause of action of the minor that may arise, or give a release of any liability to the minor, or*
- (b) *contains an extended definition of "inherent risk".*

19. *The liability of an operator towards an adult user in respect of harm arising from the sources of risk specified in paragraphs (a) to (g) of Recommendation 11 should be limited to the percentage share of fault apportioned to the operator, rather than being joint and several, if an enforceable waiver or enforceable set of terms excluding the operator's liability for personal injury or death arising from other sources of risk is in effect and is binding on the adult user.*

20. *A non-profit recreational organization and its members should be expressly permitted to exclude their liability to an adult member or that member's dependents for personal injury or death arising from the adult member's participation in the activities of the organization.*

21. *When a non-profit recreational organization offers a recreational opportunity on a profit-seeking basis to the general public as well as to its own members, its ability to exclude its liability for personal injury and death towards adult non-members should be equivalent to that of a commercial operator under Recommendations 11 and 14.*

Non-legislative Recommendations

22. *In actions arising from recreational injuries, neutral evaluation should be carried out whenever possible at the earliest feasible stage by an independent assessor completely familiar with the recreational activity in question, and who is selected by the parties themselves, in order to provide the parties with a realistic appraisal of the merits of the claim.*

23. *The skiing and insurance industries should be encouraged to explore the possibility of co-operating in the development and marketing of a first-party insurance package directed primarily at skiing injuries.*

24. *Comprehensive standards of good operating practice should be developed and promulgated within all recreational industries, and be subjected to periodic revision.*

How to Obtain the Full Report

Financial constraints prevent wide complementary distribution of the Report in print form. The printed version is available from Crown Publications Ltd. for a nominal fee while supplies last. The full text of the Report is also available for free download in Wordperfect 5.1 format from the Queen's Printer Bulletin Board under the filename LRC140.EXE. This is a self-extracting compressed file.

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REPORT ON

RECREATIONAL INJURIES:

LIABILITY AND WAIVERS IN
COMMERCIAL LEISURE ACTIVITIES

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970. The mandate of the Commission is to:

“take and keep under review all the law of the Province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law...”

Law Reform Commission Act
Statutes of British Columbia 1969

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**TO THE HONOURABLE COLIN GABELMANN
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:**

The Law Reform Commission of British Columbia has the honour to present the following:

**REPORT ON
RECREATIONAL INJURIES:
LIABILITY AND WAIVERS IN COMMERCIAL LEISURE ACTIVITIES**

This Report brings forward recommendations arising out of a project referred to the Law Reform Commission early in 1992. The reference arose out of efforts by the ski industry to secure the passage of special legislation that would regulate aspects of recreational skiing and create a more favourable regime of tort liability. These efforts coincided with concerns expressed by some members of the public that waivers of potential rights of action extracted from users of recreational facilities by their operators were too broadly drawn.

Existing law recognizes that most forms of physical recreation involve some inherent risk, but when an accident occurs it is not always easy to determine whether it is within the domain of risk implicitly assumed by those engaging in a sport. The use of waivers is one response to the unpredictability of personal injury in sport. This Report concludes that comprehensive waivers have legitimate purposes, but occasionally operate in a manner contrary to the public interest. It recommends that some curbs be placed on the scope of comprehensive waivers, in order to prevent them from overreaching their proper functions.

The Report considers difficulties associated with the application of the *Occupiers Liability Act* to premises used for recreational purposes and recommends changes to relax the obligations of some classes of occupiers under that Act, including those of ski area operators. Other recommended changes are intended to remove any doubt that the defence of inherent risk continues to apply to cases governed by the Act. The Report also concludes that it would be desirable to enact into law a restatement of the duties and responsibilities of both skiers and operators.

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A. General

One of the most desirable aspects of life in British Columbia is the phenomenal range of opportunities for recreation that the geographical diversity of the Province makes possible. The recreational potential of the Province is known worldwide. It is the key to growth in tourism.

As enjoyable as vigorous recreational activity may be in these varied natural settings, the possibility of injury is never far removed. Sports injuries are common and have a significant economic impact, though one that is difficult to measure with any precision. According to Statistics Canada's *General Social Survey*, sports accounted for 23 per cent of all accidental injuries in Canada in 1987, the last year for which complete data are available.¹ They accounted for 29 per cent of all accidental injuries to adults, and for a much higher percentage among young people.² Most of these injuries were no doubt minor, but sports-related accidents were found to result in almost as many hospital out-patient visits in 1987 as work-related ones.³ These statistics do not distinguish between competitive and casual sports activities. Since much recreational activity is non-competitive and individual in nature, like hiking, jogging, cycling or skiing, it is reasonable to think that accidents occurring in casual sport are reflected to a significant extent in those findings.

There is no reliable means of determining the total cost to the public of recreational injuries in British Columbia. The circumstantial context in which an injury occurs is not recorded for the purpose of Medical Services Plan payments. It is recorded in connection with hospital in-patient treatment by means of an international system of codes, but recreational injuries cannot be isolated from the total number of accidental injuries treated.⁴ In any event, in-patient treatment probably accounts for a small proportion of the sports injuries requiring treatment that actually occur in the Province each year.

It is a reasonable inference that the number of sports-related injuries increases with the volume of participation. With increased importance being attached to physical fitness in Canadian society, the level of participation has risen not only in sports commonly engaged in, but also in activities that would formerly have been thought of as being suited only to the unusually daring. In the past, long wilderness hiking trips and climbing sports, for example, would have been engaged in only by a small number of enthusiasts. Now, however, "adventure holidays" have become popular and are marketed energetically. Older age groups are more physically active than previously. All of this has been encouraged by governments as a way of improving the general standard of health and reducing the burden that the effects of modern urbanized living place on the health care system.

While a more active and physically fit population is unquestionably a good thing, the heightened level of participation brings questions of risk and legal liability in sport into more prominence. The potential for liability and the cost of insurance in recreation is currently a

1. Statistics Canada, *General Social Survey*, Cat. No. 11-612E, *Accidents in Canada* (1991) 68.

2. *Ibid.*

3. *Ibid.*, p. 70.

4. The E-series codes of the ICD9 coding system promulgated by the World Health Organization is used in hospital records to describe the "external cause," or circumstantial context, of injury. Some codes relate to injuries in specific activities, but the coverage is uneven. For example, there is a code for water skiing and another for a chairlift or cable car accident, but none for skiing itself. The ICD9 system has an identifier for injuries occurring in a "recreational area," but it is not used consistently by B.C. hospitals. Thus, sports injuries are not necessarily distinguishable from similar types of injury occurring in a different context. See World Health Organization, *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death* (9th revision, 1977).

matter of considerable concern. The concern is especially acute in relation to alpine skiing, but is by no means limited to it.

B. About this Project

In 1991 and 1992 several provincial government ministries received complaints about the scope of comprehensive waivers then in use by commercial recreational operators in British Columbia. At approximately the same time, the Canada West Ski Areas Association renewed its efforts to secure the enactment of a *Ski Area Safety Act* inspired by U.S. legislation dealing with risk, liability and safety in alpine skiing. It presented a draft statute for the government's consideration. As a result of these events, the Attorney General requested the Law Reform Commission to examine the law regarding the tort liability of operators of commercial recreational facilities and the use of comprehensive waivers, with specific emphasis on conventional recreational skiing.

In the course of its initial research and consultation, the Commission held meetings with representatives of the Canada West Ski Areas Association, the Athletics and Recreation Committee of the British Columbia Medical Association, and some concerned individuals. Informal consultation took place through extensive contact with numerous provincial and national recreational organizations, regulatory authorities in Canada and the U.S., and the insurance industry.

C. The Consultation Paper

In October 1993 the Commission issued Consultation Paper No. 70: *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*. The Consultation Paper reviewed the present law in detail and identified some areas in which change or greater clarification appeared desirable. It set out tentative proposals and draft legislation to accomplish the legal changes. The tentative proposals dealt principally with the *Occupiers Liability Act*, waivers, the legal position of minors, and the allocation of responsibilities between ski area operators and individual skiers. The *Ski Area Safety Act* proposed by the CWSAA was analyzed section by section. Some portions of it were incorporated into the tentative proposals and the draft legislation accompanying them. A further issue that arose in our research surrounded restrictions being imposed with increasing regularity on access to land for recreational purposes. While this problem is somewhat tangential to our terms of reference, we decided to include a tentative proposal addressing it because it related to recreation and the *Occupiers Liability Act*.

The Consultation Paper and a four-page summary were made available to the public in print form and also in electronic format for free download from the Queen's Printer Bulletin Board. Internet discussion groups surrounding particular sports were alerted. Brochures indicating the availability of the documents were placed in various public libraries and other institutions. Several hundred copies of the Consultation Paper were distributed to commercial operators, insurers, non-profit sports organizations, and individuals. Responses were requested by 31 January 1994.

D. Responses to the Consultation Paper

Numerous responses were received, some being very extensive. Many individuals forwarded comments by E-mail. All the responses were given full consideration by the Commission in formulating the final Report.

Most interesting was a group of letters from trainee wilderness guides, the majority of whom had some practical experience in the field. Their letters illustrated, all the more remarkably because of the writers' connection with industry, the ambiguity that surrounds public attitudes towards issues of risk and liability in recreation. While decrying what one referred to as the "Disneyland theory," i.e. a tendency among the public to be drawn by advertising images towards high-risk sports without giving adequate attention to the dangers involved, most also expressed uneasiness about operators and equipment manufacturers transferring all risk to users by means of comprehensive waivers.

While the Consultation Paper focused on commercial recreational operations, many correspondents voiced concern about the potential for non-profit recreational organizations and their volunteers to become involved in litigation. Given the number of responses in which the matter was raised, we decided to address the situation of non-profit groups in the final Report as another important issue related to the terms of reference, though not strictly within them.

E. About the Report

The Report concentrates on tort liability for personal injury and death. Property damage is not discussed. This is because liability for property damage was not in the foreground in the controversies that gave rise to the Attorney General's reference, nor did it emerge in our research as being of particular significance in relation to recreation.

In order to reduce the length of this Report, much of the detailed review of the law found in the Consultation Paper has been omitted. For the benefit of interested readers, Appendix A describes how to obtain access to the Consultation Paper.

The draft legislation in Chapter V is included only for illustration, and does not form part of the final recommendations themselves.

F. A Note on Terminology

In this Report, we use the word

"recreation" and "recreational activities" to refer to physical leisure activities, including recognized sports, but not to passive recreation like playing cards or reading;

"operator" to refer to a person or organization

- operating, on a profit-seeking basis, a facility where people pay to engage in some form of recreation, or

- providing a recreational opportunity on a profit-seeking basis;

“spectator” to refer to anyone who pays an operator for the privilege of viewing an event or activity;

“user” to refer to anyone who pays to make use of a recreational facility or an opportunity provided by an operator;

“waiver” in its popular sense to denote an agreement excluding liability, whatever its form. (As used here, it covers releases and indemnity agreements as well as true waivers. The technical differences between these types of agreements are explained in Chapter II of the Consultation Paper);

“occupier” and “entrant” in place of “operator” and “user,” respectively, where it is necessary to refer to the *Occupiers Liability Act* and the classes of persons it affects in a general context without reference to any particular economic activity;

“plaintiff” to refer to someone who sues for damages;

“defendant” to refer to someone who is sued.

A. General

This Chapter contains a very brief summary of the basic legal principles governing civil liability in recreation. Readers may refer to the Consultation Paper for a review in greater depth.

B. First Principles

1. GENERAL

For the most part, recreation is governed by the same general legal rules that apply to other aspects of social conduct. A tort (civil wrong) committed in a sport setting attracts the same consequences as it would elsewhere: the wrongdoer may be held liable to provide compensation (“damages”) for the harm incurred. Tort law consists predominantly of judicial decisions, though legislation governs some of its aspects.

2. NEGLIGENCE

Negligence is the aspect of tort law dealing with unintentional wrongs. It operates on the “neighbour” principle. In most circumstances, negligence law imposes a duty on you to take reasonable care not to harm your neighbour. Your neighbour is someone whom you can reasonably foresee may be harmed if you are careless.¹ If actual harm is caused because this *duty of care* is not fulfilled,² liability will result.³

3. CONTRIBUTORY NEGLIGENCE AND APPORTIONMENT OF BLAME

In addition to the duty owed towards one's neighbour, the law also imposes a duty to look out for one's own safety. When an accident victim's own conduct is one of the contributing causes of the accident, the victim is said to have been *contributorily negligent*.

At one time, contributory negligence in the slightest degree prevented the victim from recovering any compensation from others who might also have been partly responsible. As this resulted in very unfair outcomes and discouraged the correction of dangerous situations, legislation was passed in nearly all parts of the Commonwealth and many U.S. states to allow blame to be apportioned on a percentage basis. Damages are reduced by the extent to which the plaintiff is found to have contributed to the accident. In British Columbia, the legislation allowing for apportionment of fault and reduction of damages to take account of contributory

1. *Donoghue v. Stevenson*, [1932] A.C. 562, 580 (H.L.); *Anns v. Merton London Borough Council*, [1978] A.C. 728, 751-752 (H.L.). The formulation of the two-part test of liability in negligence in *Anns* was approved by the Supreme Court of Canada in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 10 where Wilson J. expressed it thus:

- (i) is there a sufficiently close relationship between the parties...so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
- (ii) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

It was approved again by a majority in *C.N.R. v. Norsk Pacific S.S. Co. Ltd.*, [1992] 1 S.C.R. 1021.

2. The duty of care is breached if the *standard of care* is not met. The standard of care is what a reasonable person would do under the circumstances to avoid harm to a class of persons that may foreseeably be harmed by lack of care.

3. Liability arises only with respect to damage of a generally foreseeable nature: *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. (The Wagon Mound No. 1)*, [1961] A.C. 388 (P.C.) (N.S.W.); *Hughes v. Lord Advocate*, [1963] A.C. 837. Damage of an unforeseeable nature is said to be “remote.”

negligence is found in the *Negligence Act*.⁴ In sports-related cases, it is common for plaintiffs to be found at least partly responsible for the accident, and to be awarded proportionally reduced damages.⁵

4. SHARED LIABILITY

When two or more persons are found at fault for harm done to a plaintiff who is not contributorily negligent,⁶ they are all responsible to the injured plaintiff for the entire extent of the damages the plaintiff is entitled to receive. The plaintiff is entitled to recover the entire amount from any of the persons at fault. The degree to which each is at fault must be determined on a percentage basis, however.⁷ As between themselves, the persons at fault are liable to contribute towards the plaintiff's damages in proportion to their percentage shares of blame, and to indemnify each other for amounts paid in excess of them.

C. Occupier's Liability

1. THE OCCUPIERS LIABILITY ACT

The branch of the law of negligence that deals with the obligations of a person in control of land towards persons who come onto the land is now governed in British Columbia by the *Occupiers Liability Act*.⁸ Similar legislation is in force in several other provinces. The Act imposes a duty on occupiers of premises to take reasonable care that persons coming onto the premises will be reasonably safe in doing so.⁹ The degree of care required is what is reasonable "in all the circumstances of the case."¹⁰ Thus, the level of care required on the part of an occupier varies with the nature of the premises.

As the Act replaced a body of inconsistent case law creating several gradations of duties of care that depended on the relationship between the occupier and the entrant, the statutory duty imposed by the Act is often referred to as the "common" duty of care. It extends to the condition of the premises, the activities on the premises, and to controlling the conduct of third parties on the premises.¹¹ The duty is owed to all but two classes of entrants.¹²

4. R.S.B.C. 1979, c. 298, ss. 1 and 2.

5. *E.g.*, *Gerak v. R.*, (1984) 59 B.C.L.R. 273 (C.A.); *Stynes v. Corporation of the City of Victoria*, (1990) 43 B.C.L.R. (2d) 118 (C.A.); *Wilson v. Garibaldi Lifts Ltd.* (1977) 79 D.L.R. (3d) 495 (S.C.); *Turanec v. Ross*, (1980) 21 B.C.L.R. 198 (S.C.).

6. If the plaintiff is contributorily negligent and thus shares part of the overall blame for the accident, he or she can only recover from each person at fault the share of the damages corresponding to that person's share of the blame. See the Commission's *Report on Shared Liability* (LRC 88, 1986).

7. *Negligence Act*, *supra*, n. 4, s. 4.

8. R.S.B.C. 1979, c. 303. The Act is reproduced in Appendix B.

9. *Ibid.*, s. 3(1).

10. *Ibid.*

11. *Ibid.*, s. 3(2).

12. These are: (a) trespassers on enclosed agricultural land and (b) those who willingly accept risk: s. 3(3). The second exception is relevant to the subject of this Report and is discussed further in Chapter III.

2. WHO IS AN OCCUPIER?

An occupier, for the purposes of the Act, is a person who

- (a) is in physical possession of premises; or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

The law fastens the duty to take reasonable care to make the premises reasonably safe on the person who has actual control over some significant aspect of the management or operation of the premises.¹³ The owner is not necessarily the occupier. The owner may not be in possession of the premises, or have control over their condition or the activities on them. Exclusive possession or control of the premises is not necessary either. There may also be more than one occupier for the purposes of the Act.¹⁴

3. THE OCCUPIERS LIABILITY ACT AND RECREATIONAL PREMISES

The *Occupiers Liability Act* applies to recreational facilities, just as it does to other premises. The fact that the occupier's duty of care extends not only to the physical safety of the premises, but also to activities and the conduct of third parties on the premises, holds special significance for recreational operators. It makes them responsible for supervising the recreational activities that take place at their facilities to ensure that users are not endangered to an unreasonable extent by the behaviour of other users, or, possibly, by carelessness on the part of employees.¹⁵

Not all operators are in the position of an "occupier." Operators conducting activities on wilderness land over which they do not have exclusive rights of possession or effective control are not occupiers and the Act does not govern them, although they are subject to the general law of negligence at all times. Thus, the operator of a conventional ski area with defined boundaries is subject to the Act, while a heli-skiing or river rafting operator is not when conducting a skiing or rafting party on wilderness land. They may be "occupiers" at their lodges or base camps, however.

Contributory negligence has the same effect in cases under the *Occupiers Liability Act* as in others. Blame is apportioned between the plaintiff and any defendants found at fault, and the plaintiff's damages are reduced.

D. Sports and Torts

What distinguishes sport as a setting for the application of the principles of civil liability is that to a great degree it consists of purposive risk-taking for its own sake. The combination of unpredictable individual behaviour and vigorous physical activity leads to a continually

13. *Wheat v. E. Lacon & Co. Ltd.*, [1966] A.C. 552, 578, 589 (H.L.); *Couch v. McCann*, (1977) 77 D.L.R. (3d) 387, 390 (Ont. H.C.); *Lavolette v. Welch*, [1987] B.C.D. Civ. 3651-17 (S.C.).

14. *Supra*, n. 8, s.1.

15. If an operator engages an independent contractor to oversee activities at its recreational facility and uses due care in selecting and supervising the work of the contractor, it may be in a position to avoid liability under s. 5(1) of the Act: see *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33, 58-60 (S.C.); *aff'd* (1987) 49 B.C.L.R. (2d) 99 (C.A.).

unstable situation in which mishap may easily occur. In some outdoor sports, uncontrolled forces of nature add to the risk.

Applying the fundamental tort principles mechanically to all sporting situations would very often result in absurdity. It would not make sense, for example, for boxers to be able to sue each other for the tort of battery because of the punches they exchange. Accordingly, the peculiar characteristics of sport must be accommodated in some manner.

E. Inherent Risk

1. GENERAL

The inevitability of a certain level of danger in sport is recognized in law by means of the concept of *inherent risk*. Its classic expression is this:¹⁶

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.

Inherent risk has also been described by the Supreme Court of Canada as risk that is “incidental to and inseparable from” a sport.¹⁷

The concept has the effect that a participant in a sporting activity is taken to assume the risks that cannot be eliminated from the activity without fundamentally changing its nature.¹⁸ Examples of these are a fracture resulting from a football tackle within the rules, an occasional fall in skiing,¹⁹ or a blow from a ricocheting hockey puck.²⁰ Were these dangers to be completely removed, we would have a different game altogether.

Spectators are also deemed to accept the risk of accidents that may be anticipated to occur to them due to the nature of the sport they are watching.²¹ Since it is a known and obvious risk for a hockey puck or baseball to fly into the stands, the mere fact that this occurs will not give rise to any liability on the part of the player or the operator of the sports facility, as long as reasonable precautions are taken to protect spectators.

2. INHERENT RISK AS A DEFENCE TO A PERSONAL INJURY CLAIM

Failing to remove inherent risk does not constitute negligence. There is no duty of care to do so.²² Since no liability attaches to harm that results purely from hazards that are a

16. *Murphy v. Steeplechase Amusement Co.*, (1929) 166 N.E. 173, 174 per Cardozo. J.

17. *Dixon v. City of Edmonton*, [1924] S.C.R. 640.

18. The *dicta* of Wilson, J. in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 that the appellant's participation in a race was not in itself a waiver of legal rights against the race organizer are directed towards risk creation going beyond the inherent risks of the activity in question, *i.e.*, allowing an intoxicated racer to compete. Wilson J. began the analysis in *Crocker* by stating that the broad issue was whether there was anything in the case to distinguish it from an ordinary sports accident.

19. *Feniuk v. School District No. 54 and Smithers Ski Corporation*, [1991] B.C.D. Civ. 3124-01 (S.C.); *Knowles v. Whistler Mountain Ski Corporation*, [1991] B.C.D. Civ. 3075.2-01 (S.C.).

20. *King v. Redlich*, [1986] 4 W.W.R. 567 (B.C.C.A.), *aff'd* [1984] 6 W.W.R. 705 (B.C.S.C.).

21. *Hall v. Brookland Auto Racing Club*, [1933] 1 K.B. 205, 214; *Elliott v. Amphitheatre Ltd.*, [1934] 3 W.W.R. 225 (Man. K.B.); *White v. Blackmore*, [1972] 2 Q.B. 651 (C.A.).

22. *King v. Redlich*, *supra*, n. 20; *Hagerman v. Niagara Falls*, (1980) 29 O.R. (2d) 609, 114 D.L.R. (3d) 184 (H.C.).

characteristic part of a sport in which a person freely engages, the concept of inherent risk provides a defence to a claim based on an injury attributable to them.²³

3. NEGLIGENCE OR OTHER WRONGDOING GOING BEYOND INHERENT RISK

Participants and spectators are not deemed to assume the risk of wrongdoing that goes beyond the level of risk that is inherent in a sport, in the sense of being a normal and self-evident part of it. Outside the domain of inherent risk, the law of tort applies in the usual way.

The Australian case *Rootes v. Shelton*²⁴ illustrates the difference between inherent risk, to which no liability attaches, and negligence, which does attract liability. A waterskier was engaged in a crossover manoeuvre involving two other skiers. He was momentarily blinded by spray and when the spray cleared he was six feet away from a stationary boat, with which he collided. The pilot of the towing boat had failed to avoid the stationary boat or signal its presence to the skiers he was towing. The pilot was found negligent for steering too close to the stationary boat without giving the skier a chance to avoid collision. By so doing, the pilot had imposed an unnecessary degree of risk on the skier. The Australian court reasoned that while running into a submerged obstruction that the pilot did not see could amount to inherent risk, waterskiers clearly did not expect to be towed directly into collision with a visible one.

Similarly, inadvertent collision with another skier is an inherent risk of alpine skiing, but when the collision occurs because one of the skiers is skiing recklessly out of control or failing to keep a proper lookout, that skier will be found liable.²⁵

A recent, well-publicized British Columbia case concerned an amateur hockey player rendered quadriplegic after a bodycheck from behind propelled him headfirst into the boards. Such a check was against the rules of the hockey association and there was evidence that players were cautioned of its dangers. The injured player's claim was contested on the basis of inherent risk. The player who delivered the illegal bodycheck was held negligent, since the risk it created was outside the normal risks of hockey.²⁶

The line between inherent risk and negligence is sometimes much more difficult to discern than in these examples. A breach of the rules of a game does not automatically amount to negligence, since a certain level of inadvertent rule-breaking can be expected to occur during normal, vigorous play in many sports. But acts and omissions that enlarge the usual risks to an unreasonable degree potentially give rise to liability.

4. RECREATIONAL OPERATORS AND THE DISTINCTION BETWEEN INHERENT RISK AND NEGLIGENCE

Just as one player may increase the likelihood of injury to other players through careless acts, it is possible for an operator to increase the degree of risk beyond what is inherent in a sport through lack of a reasonable level of care. For example, a guide-outfitter who uses an overloaded and poorly maintained aircraft for a fishing trip exposes guests to an

23. The defence of inherent risk must be distinguished from another defence called "voluntary assumption of risk" or *volenti non fit injuria* ("no harm is done to one who consents.") To avoid confusion with the defence of inherent risk, it is referred to as *volenti* in this Report and in the Consultation Paper, where the distinction between the two defences is explained in greater depth.

24. (1967) 116 C.L.R. 383 (H.C. Aus.).

25. *Fink v. Greeniaus*, (1973) 43 D.L.R. (3d) 485 (Ont. H.C.); *Taylor v. R.*, [1981] 2 S.C.R. 2, (*sub nom. Jaegli Enterprises Ltd. v. Ankenman*) 124 D.L.R. (3d) 415; *rev'g* in part (1980) 21 B.C.L.R. 155 (C.A.); *varying* 95 D.L.R. (3d) 82 (B.C.S.C.); *Wolkoski v. Strongman*, [1987] B.C.D. Civ. 3124-01 and 3385-01 (S.C.).

26. *Unrub v. Webber*, (1994) 88 B.C.L.R. (2d) 353 (C.A.).

unnecessary risk of fatal injury.²⁷ Continuing to operate a ski lift when wind conditions are too severe, causing a T-bar cable to derail, is something which goes beyond the usual dangers faced by skiers.²⁸ The user of a fitness centre does not assume the risk of being injured by a defective machine.²⁹

A claim against an operator based on a sports-related injury will succeed if the plaintiff is able to prove on the balance of probabilities (show that it is more probable than not) that:

- the operator's acts or omissions created conditions that were dangerous beyond the extent normally associated with the practice of the sport in question; and
- those conditions caused the injury in the sense that but for them, it would not have occurred.

The defence of inherent risk is open to operators, however, just as it is open to co-participants of the plaintiff. If the operator is able to show that it is more probable than not that the plaintiff's injury resulted from the normal hazards of the activity and not from an act or omission of the operator, the claim will be dismissed.

F. Exclusion of Liability by Contract: Waivers and Ticket Terms

It is generally possible to “contract out” of liability. *Waivers*, i.e. agreements under which a user gives up the right to sue and releases the operator from liability, are very common. So are terms printed on tickets that are aimed at accomplishing the same result. Use of recreational facilities or participation in an activity is often allowed only on the condition that all risk is transferred to the user in this manner.

Courts will confine the effect of waivers and exclusionary wordings on tickets to their precise terms and will not give them any broader interpretation than is necessary. If a user signs a waiver, however, its contents are usually considered binding, whether or not they were read and understood.³⁰ Unsigned terms need not have been read or understood either in order to be effective, as long as the operator has taken reasonable steps to make the user aware, firstly, of their existence and, secondly, that they could affect the user's legal rights.³¹ A recent example in British Columbia is the case of *McQuary v. Big White Ski Resort Limited*,³² in which the terms on a skier's ticket releasing the operator from liability were enforced. *McQuary* had not read the ticket, but admitted knowing of the presence of the terms on it and that such terms are usually worded to protect the operator.

27. *Lake v. Callison Outfitters Ltd.*, (1991) 58 B.C.L.R. (2d) 99 (S.C.).

28. *Lyster v. Fortress Mountain Resorts Ltd.*, (1978) 6 Alta. L.R. (2d) 338 (S.C.).

29. *Robinson v. Madison*, [1987] B.C.D. Civ. 3080-03 (S.C.).

30. *L'Estrange v. F. Graucob Limited*, [1934] 2 K.B. 394. Recently there has been some erosion of this rule in Canada, but a well-drafted document that is clearly marked as a waiver will still be enforced on the strength of a signature in most circumstances. Further details on the enforceability of waivers may be found in the Consultation Paper at pp.41-50.

31. *Parker v. S. Eastern Ry. Co.* (1877) 2 C.P.D. 416, 425-426 (C.A.); *Union SS. Co. v. Barnes*, [1956] S.C.R. 842. The more one-sided the terms, the more closely the courts will scrutinize the efforts made to make the user aware of them. Among the factors the courts will consider are: the size of the print, the location and legibility of signs, the amount of time the user had to become acquainted with the terms, the complexity of the wording, and the user's level of education or familiarity with similar transactions: *Karroll v. Silver Star Mountain Resorts Ltd.*, (1988) 33 B.C.L.R. (2d) 160 (S.C.).

32. [1993] B.C.D. Civ. 3124-02 (S.C.). This case was described as a legal breakthrough in the press, but in fact it merely represents the application of long-standing principles.

The *Occupiers Liability Act* allows an occupier to exclude or restrict the common duty of care imposed by the Act, unless some other law prevents doing so in particular circumstances.³³ The common duty of care may be modified through express contract terms (as in a waiver or ticket) or by a notice.³⁴ The Act stipulates that where this is done, the occupier must take reasonable steps to bring the modification of liability to the entrant's attention.³⁵ Printing the terms on the back of a ticket would likely not suffice, for example.³⁶

33. *Supra*, n. 8, s. 4(1).

34. *Ibid.*

35. *Ibid.*, s. 4(2).

36. *Dixon v. R. in Right of B.C.*, [1980] 6 W.W.R. 406 (B.C.C.A.); *Wilson v. Blue Mountain Resorts Ltd.*, (1974) 49 D.L.R. (3d) 161 (Ont. H.C.).

A. General

The responses to the Consultation Paper evidence a liability chill in the recreational sector. It appears to be widely believed that you only have to get hurt in order to be able to sue, and that waivers are of absolutely no use. The extensive review of Canadian jurisprudence on recreation in the Consultation Paper disclosed that these beliefs are not well-founded: existing law has a mechanism for dealing with the element of risk in sport, courts hold that ordinary recreational accidents do not result in liability unless due to something outside the normal risks of the activity in question, and properly obtained recreational waivers are regularly enforced. A substantial number of our correspondents, however, referred to a litigious tendency replacing individual responsibility in recreation.

The perception that individual responsibility for personal safety in sport has diminished is hard to assess. We found no evidence that the volume of litigation stemming from recreational accidents is increasing at a greater rate than that arising from other causes. We were informed by an insurer specializing in recreational risks that claims activity arising from competitive team sports for which it provides liability coverage is manageable, and that this line of coverage is more profitable than liability insurance underwriting in Canada generally. This coincides with the findings of the Glynn Commission, which concluded in 1986 that Canadian sports organizations were good risks and the huge premium increases they faced at that time were unrelated to their own claims records.¹

The cost of liability insurance may be a more significant issue in particular recreational sectors. For the skiing industry, it has increased each year since 1991, following a decline between 1988-90. Small non-profit recreational organizations that rely heavily on volunteers and are not in a position to insure also voice concern over their potential liability.

Few of the responses to the Consultation Paper referred to specific defects in the law.² Accordingly, this Chapter concentrates on the areas of difficulty identified in the Consultation Paper: the *Occupiers Liability Act* as applied to recreational premises generally and to alpine ski areas in particular, and comprehensive waivers.

1. *Commission on the Insurance Crisis Facing Canada's National Sport and Recreation Associations, Final Report to the Minister of State, the Honourable Otto Jelinek, responsible for Fitness and Amateur Sport* (Ottawa, 1986) 26, 54-55.

2. One response urged that damage awards be limited, together with contingency fees. Contingency fees are already subject to limits under Law Society rules. Personal injury damages for non-pecuniary loss, e.g. pain and suffering, are also subject to an upper limit stemming from the Supreme Court of Canada's decision in *Andrews v. Grand & Toy (Alberta) Ltd.*, [1978] 2 S.C.R. 229, 260-265. The balance of an award of damages for personal injury consists of proven pre-trial losses and an assessment of future loss and future care costs based on careful actuarial calculations. At the present time British Columbia courts do not have the power to award damages to be paid periodically, as in a consensual structured settlement. The impact of a large award could be reduced if the award took this form, since a smaller amount is needed to fund annuity payments received after-tax than must be paid as a lump sum directly to a plaintiff to provide the same level of compensation. Legislation that would have conferred the power to order periodic payments was introduced twice in the Legislative Assembly, but lapsed before passage on each occasion and so far has not been reintroduced: Bill 66, *Structured Compensation Act* (3rd Sess., 34th Parl., 1989); Bill 29 (4th Sess., 34th Parl., 1990). This Report does not consider the assessment of damages in sports injury cases as a separate issue, because the principles are the same as in other personal injury cases.

B. The Occupiers Liability Act, Recreational Premises, and the Controversy over *Waldick v. Malcolm*

1. INHERENT RISK UNDER THE OCCUPIERS LIABILITY ACT BEFORE *WALDICK v. MALCOLM*

(a) *When are Recreational Premises "Reasonably Safe?"*

What effect does the imposition of a statutory duty to make premises reasonably safe have on occupiers of recreational premises, i.e. premises intended for activities having an element of intrinsic danger at all times? One fairly early answer came in a 1969 English case decided under occupier's liability legislation similar to our own *Occupiers Liability Act*. In *Simms v. Leigh Rugby Club*³ it was held that the duty of care under the Act did not require an occupier of a rugby field to eliminate the dangers in playing on a field that met the usual standards. It also held that a rugby player is deemed to accept those dangers for the purposes of the Act. This appeared to firmly establish that the defence of inherent risk applies in recreational accident cases where liability is governed by the *Occupiers Liability Act*.

In British Columbia, as in other Canadian provinces having occupiers liability legislation, subsequent cases have generally been consistent with *Simms v. Leigh Rugby Club*. Adherence to the usual standards for the activity for which the facility is intended usually provides a good defence to a personal injury claim. For example, the absence of seatbelts in go-carts was not found to amount to negligence on the part of the owner of the track, because it was usual not to provide them at similar facilities.⁴ A claim by a user who slipped at a waterslide facility was dismissed because the facility had the standard poolside surfacing used for traction.⁵ Using snow-grooming equipment on ski slopes while skiers are in the immediate area is a normal part of the operation of a ski area, and does not in itself impose an unreasonable risk on skiers.⁶

Among the factors the courts will consider in determining if recreational premises are reasonably safe or whether they expose users to unnecessary risks are:⁷

- the existence of an unusual danger;⁸
- the cost and difficulty of avoiding a specific danger;⁹
- the safety record of the premises;¹⁰
- whether an unusual danger could be satisfactorily reduced or eliminated by adequate warning, and whether an adequate warning was given.¹¹

3. [1969] 2 All E.R. 923.

4. *Krysta v. Funland Enterprises Ltd.*, (1984) 57 B.C.L.R. 32 (S.C.).

5. *Atley v. Popkum Water Slides Inc.*, (1992) 64 B.C.L.R. (2d) 1 (C.A.).

6. *Feniuk v. School District No. 54 and Smithers Ski Corporation*, [1991] B.C.D. Civ. 3124-01 (S.C.).

7. *Stynes v. Corporation of the City of Victoria*, [1988] B.C.D. Civ. 3101-01 (S.C.); *aff'd* (1990) 43 B.C.L.R. (2d) 118 (B.C.C.A.).

8. *Wilson v. Blue Mountain Resorts Ltd.*, (1974) 49 D.L.R. (3d) 161 (Ont H.C.) (unmarked gully on an access trail to a ski run); *Kottke v. Robert L. Sutherland Prof. Corp.*, (1990) 75 Alta. L.R. (2d) 27 (Q.B.) (13 foot high icy mound attracting children); *Simms v. Whistler Mountain Corporation Ltd.*, [1990] B.C.D. Civ. 3124-01 (C.A.) (visually confusing bend in groomed ski run increasing hazard from unmarked drop).

9. *Kottke*, *ibid.*; *Simms*, *ibid.*

10. *Rudko v. The Queen*, (1983) 28 Alta. L.R. (2d) 350 (F.C.).

11. *Simms*, *supra*, n. 8; *Marshall v. R. in Right of B.C.*, (1988) 23 B.C.L.R. (2d) 320 (C.A.).

It is possible for a court to find that the usual conditions are not good enough, and that something more must be done in order to make a facility “reasonably safe.” But such a finding would require evidence that better measures are desirable and could be implemented without inordinate difficulty or cost. It is not necessary to take precautions against every conceivable mishap, without regard to the probability of its occurrence.¹²

If a recreational facility does not meet a reasonable standard of safety, the increased risk this poses will probably be found to be of the kind illustrated by *Rootes v. Shelton*, namely risk that is superimposed on the inherent risks of the activity. The law will not deem users to have assumed it simply because of the fact they voluntarily use the facility.¹³ Some examples of unsafe operation that has given rise to liability on the part of the operator are:

- a failure to install adequate barriers to protect spectators,¹⁴
- conducting exercise classes on an unsuitable floor,¹⁵
- inadequate maintenance of exercise machines,¹⁶
- allowing a rope barrier warning of an artificial embankment to fall and be covered by snow,¹⁷
- failing to repair a rotting wooden platform despite warnings from an employee about its unsafe condition,¹⁸
- allowing overcrowding on a waterslide complex.¹⁹

(b) *Difficulties in Applying the Criterion*

Fine distinctions in law emerge from fine distinctions in fact. Facilities having non-standard features are more exposed to occupier's liability than those which do not. One British Columbia case, *Stynes v. City of Victoria*,²⁰ concerned a tennis court with an unusually short area behind the base line at one end, bordered by a curb. A player who tripped over the curb while trying to return the ball, breaking an ankle, sued the city that owned the tennis court. The majority of the court found the city partially at fault because it would be easy for a player to trip over the curb when concentrating on returning the ball during vigorous play, even though players could see the curb and could tell that there was a smaller than usual space in which to move. The minority would have dismissed the claim because the anomalous features were visible.

12. *Simms v. Leigh Rugby Club*, *supra*, n. 8; *Bolton v. Stone*, [1951] 1 All E.R. 1078 (H.L.); *Johnson v. Goldsmid*, [1988] B.C.D. Civ. 3124-01 (S.C.); *Rudko v. The Queen*, *supra*, n. 10; *cf. Plumb v. Cowichan School District No. 65*, (1993) 83 B.C.L.R. (2d) 161 (C.A.).

13. *Gillmore v. London County Council*, [1938] 4 All E.R. 331 (K.B.).

14. *Keough v. Henderson Highway Branch No. 15*, [1978] 6 W.W.R. 335 (Man. C.A.); *Swanson v. Henkel Enterprises Ltd.*, [1972] 3 W.W.R. 241 (Man. Q.B.).

15. *Gillmore v. London County Council*, *supra*, n. 13, (decided on common law occupier's liability principles.)

16. *Robinson v. Madison*, [1987] B.C.D. Civ. 3080-03 (S.C.).

17. *Wilson v. Garibaldi Lifts Ltd.*, (1977) 79 D.L.R. (3d) 495 (S.C.).

18. *Landrey v. North Vancouver*, (1993) 37 A.C.W.S. (3d) 962 (B.C.S.C.).

19. *Golos v. Trans-Canada Waterslides Limited Partnership*, [1989] B.C.D. Civ. 3390-04 (S.C.). This was a case of vicarious liability. The overcrowding occurred due to an employee's negligence in departing from the operator's safety policy.

20. *Stynes v. City of Victoria*, [1988] B.C.D. Civ. 3101-01 (S.C.); *aff'd* (1990) 43 B.C.L.R. (2d) 118 (B.C.C.A.).

Cases like *Stynes* illustrate the difficulty in applying the *Occupiers Liability Act* to recreational premises, where intense and vigorous activity can be anticipated by both the operator and the user. Users clearly have a responsibility for their own safety. Yet it is the operator who invites the public to make use of the facility. When the case is not one of obvious neglect by the operator or foolhardiness on the part of the user, and the specific cause of an injury is some feature of the facility itself, what should tip the balance: the individual user's responsibility to be vigilant for his or her own safety, or rational expectations that arise from the operator's invitation?

For the moment, however, questions like that posed by *Stynes* as to when a facility is “reasonably safe” have been overshadowed by the controversy over the interpretation of section 3(3) of the Act in *Waldick v. Malcolm*.²¹

2. SECTION 3(3) OF THE OCCUPIERS LIABILITY ACT

Section 3(3) reads:

- (3) Notwithstanding subsection (1), an occupier has no duty of care to a person
- (a) in respect of risks willingly accepted by that person as his own risks,
 - ...
 - other than a duty not to
 - (c) create a danger with intent to do harm to the person or damage to his property, or
 - (d) act with reckless disregard to the safety of the person or the integrity of his property.

Similar provisions are found in the occupier's liability legislation of other provinces and Commonwealth countries.

Section 3(3) gives a complete defence to the occupier to a claim for injury suffered on the premises by those who willingly accept the risk giving rise to the injury, provided that the occupier does not deliberately or recklessly endanger them.²² Under what circumstances does an entrant “willingly accept” a risk?

Prior to 1991, there were two lines of authority on the effect of s. 3(3) and its counterparts in other jurisdictions. The first line was that such provisions preserve a common law defence sometimes called “voluntary assumption of risk” or *volenti non fit injuria* (“no harm is done to one who consents”). In other words, to make out a defence under s. 3(3)(a) an occupier would have to establish that an entrant fully appreciated the nature of the risk and expressly or impliedly agreed not to hold the occupier liable for it. There was a sizeable body of case law supporting this view of provisions like s. 3(3)(a).²³

21. [1991] 2 S.C.R. 456, 83 D.L.R. (4th) 114.

22. The lesser duty of care under s. 3(3) corresponds to the common law duty of care owed to trespassers, as expressed in *Grand Trunk Railway Company of Canada v. Barnett*, [1911] A.C. 361 (P.C.) (Ont.) and *Addie & Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358 (H.L.). In *Veinot v. Kerr-Addison Mines Ltd.*, [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533 the Supreme Court of Canada moved towards a duty of “common humanity” towards trespassers, favouring the House of Lords decision in *Herrington v. British Railways Board*, [1972] A.C. 877. Since the *Occupiers Liability Act* has incorporated the wording corresponding to the older formulation of the occupier's duty of care towards trespassers, however, the pre-*Veinot* case law may still be relevant to the meaning of “creating a danger with intent to do harm” and “reckless disregard” in s. 3(3). In order to act with reckless disregard for an entrant's safety, the occupier must be aware of the entrant's presence: *Commissioner for Railways v. Quinlan*, [1964] A.C. 1054, 1072. Recklessness implies an indifference towards the entrant's safety and imports a moral element going beyond mere carelessness: *Stanton v. Taylor*, (1965) 56 D.L.R. (2d) 240, 244 (B.C.C.A.); *aff'd* [1966] S.C.R. 641. Failing to lock a gate or post a warning is not reckless disregard: *Haynes v. C.P.R.*, (1972) 31 D.L.R. (3d) 62 (B.C.C.A.).

23. *Beatty v. Brad-Lee Meadows*, (1986) 39 A.C.W.S. (2d) 334 (Ont. H.C.); *Bunker v. Charles Brand & Son Ltd.*, [1969] 2 Q.B. 480; *White v. Blackmore*, [1972] 2 Q.B. 651, 661 and 674 (C.A.); *McGinlay v. British Railways Board*, [1983] 1 W.L.R. 1427, 1434 (H.L.); *Woelburn v. Liberty Leasing of Canada No. 3 Ltd.*, (1978) 8 B.C.L.R. 352 (S.C.); *Brautigam v. Orderly Investments Ltd.*, (1985) 58 A.R. 140 (Q.B.); *Preston v. Canadian Legion, Kingsway Branch No. 175*, (1981) 123 D.L.R. (3d) 645 (Alta. C.A.); *Sandberg v. Steer Holdings Ltd.*, [1987] 3 W.W.R. 732 (Man. Q.B.); *Burroughs v. Town of Kapuskasing*, (1987) 60 O.R. (2d) 727, 732 (Dist. Ct.). See also the remarks tending to support this view of s. 3(3) in *Gerak v. R.*, (1984) 59 B.C.L.R. 273, 297 (C.A.).

The second line of cases held that s. 3(3) and its counterparts set up a less onerous requirement. All that was required to excuse the occupier was to show that the entrant had sufficient knowledge of the danger as to be able to recognize and appreciate the nature of the risk. There was no need to show an express or implied agreement to release the occupier of legal responsibility for the risk in question. This view was also supported by numerous judicial decisions.²⁴ The British Columbia Court of Appeal ultimately accepted this interpretation of s. 3(3) in *Samis v. City of Vancouver*,²⁵ though an earlier decision of that court seemed to support the other view.²⁶

3. *WALDICK v. MALCOLM*

The conflicting views were resolved in 1991 by the decision of the Supreme Court of Canada in *Waldick v. Malcolm*,²⁷ a case that arose from a fall in an icy parking area adjacent to a dwelling. The Supreme Court held that “willing acceptance” of risk under section 4(1) of the Ontario *Occupiers' Liability Act*²⁸ incorporated the common law defence of *volenti*, rather than requiring only mere appreciation of the risk. Thus, a defence based on “willing acceptance” of risk is not available unless the occupier is able to establish the entrant expressly or impliedly agreed that the occupier will not be liable in respect of the risk. It is insufficient for an entrant merely to appreciate its existence.

As section 4(1) of the Ontario statute is very similar to section 3(3) of the British Columbia *Occupiers Liability Act*, *Waldick v. Malcolm* effectively overruled *Samis v. City of Vancouver* and now represents the authoritative interpretation of section 3(3).²⁹

4. WHAT DOES *WALDICK v. MALCOLM* MEAN?

Waldick v. Malcolm caused considerable apprehension in the general insurance industry, where the case is viewed as encouraging frivolous claims against property owners. It has also sparked concern in the recreational sector, where large increases in the cost of liability insurance are anticipated. In submissions made to the provincial government, the Canada West Ski Areas Association (CWSAA) maintained that *Waldick* threatened the viability of the skiing industry. The CWSAA argued that *Waldick* has the effect of making it impossible to defend a personal injury claim by a skier on the basis of inherent risk unless the skier has actually signed an express waiver.³⁰ If these fears are justified, the skiing industry would be in an untenable position.

The Consultation Paper indicated we did not think *Waldick v. Malcolm* removed the defence of inherent risk under the *Occupiers Liability Act*. We continue to hold that view for these reasons:

24. *Samis v. City of Vancouver*, [1989] B.C.D. Civ. 3108-04 (C.A.); leave to appeal refused (1992) 102 N.R. 400n (S.C.C.); *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33 (S.C.); *aff'd* (1987) 49 B.C.L.R. (2d) 99 (C.A.); *Fraser v. McGee*, (1985) 29 A.C.W.S. (2d) 480 (Ont. Dist. Ct.); *Christie v. Toronto*, (1983) 20 M.P.L.R. 145 (Ont. Co. Ct.). While *Epp v. Ridgetop Builders Ltd.*, (1978) 94 D.L.R. (3d) 505 (Alta. S.C.) was cited in the trial judgment in *Milina* as supporting this view of s. 3(3), there was no ruling in *Epp* with respect to the meaning of the equivalent Alberta provision. *Epp* was actually decided on the ground of contributory negligence and the fact that the absence of a warning was not causally linked with the accident. A warning by the occupier would not have told the plaintiff anything more than he already knew or have prevented the accident. The court noted its agreement at p. 510 with the argument that the provision preserved the *volenti* defence, however.

25. *Supra*, n. 24. Since the court concluded *Samis* had not fully appreciated the risk created by an unprotected abutment due to his lack of familiarity with the site and the nighttime conditions when his fall occurred, the interpretation of s. 3(3) of the *Occupiers Liability Act* was technically non-binding on future decisions.

26. *Gerak*, *supra*, n. 23.

27. *Supra*, n. 21.

28. R.S.O. 1980, c. 322 (now *see* R.S.O. 1990, c. O.2).

29. *Bains v. Hill*, (1992) 68 B.C.L.R. (2d) 193 (C.A.).

30. Letter by J. Spencer, president of the CWSAA to the Minister of Tourism, 25 January 1992, p. 6.

- the case did not arise in a sport setting, so the context in which the defence is applicable was absent and the Supreme Court did not need to deal with it.
- *volenti* and inherent risk are separate, though related, defences.³¹ The Supreme Court said in *Waldick* that provisions like section 3(3) were not intended to create a “wholesale displacement” of common law defences. While said in relation to *volenti*, this also implies the common law defence of inherent risk is not displaced either.
- an operator's duty of care is only to make premises *reasonably* safe, not absolutely risk-free. The question whether recreational premises are reasonably safe cannot be divorced from the purpose for which they are intended.³²
- the Supreme Court acknowledged the concept of inherent risk in cases decided in the 1980s,³³ and in any event has held that even the defence of *volenti* can be based on an implicit release of liability that is inferred from the plaintiff's conduct rather than an express agreement.³⁴
- decisions espousing the same interpretation given to provisions like section 3(3) of the *Occupiers Liability Act* in *Waldick* were abundant before the Supreme Court decided that case,³⁵ and the defence of inherent risk was still routinely applied.

There is a tendency, however, for the defences of inherent risk, *volenti*, and reasonable care to become blurred in case law. When the inherent risk defence is applied, language more appropriate to *volenti* is often used to explain the basis for dismissing the claim. As the *Occupiers Liability Act* is treated as a code, some may argue that section 3(3) is the only means by which inherent risk can be set up as a defence in a claim against an occupier and the more stringent requirements of *volenti* must therefore be met, though this argument ignores the content of the duty imposed by section 3(1).³⁶ Some of the cases stemming from recreational accidents also indicate a tendency to consider the plaintiff's awareness and acceptance of risk in terms of specific hazards in a particular location, rather than in terms of a general knowledge of the usual hazards of an activity.³⁷

While we remain confident the defence of inherent risk is still available after *Waldick v. Malcolm*, doubt will persist until a conclusive ruling is obtained. When insurers are uneasy about their position, premiums increase substantially and sometimes coverage becomes

31. The distinction is that inherent risk is based on an absence of negligence: there is no duty of care to eliminate inherent risk, so failure to do so is not a breach of a duty of care: *King v. Redlich*, [1984] 6 W.W.R. 705 (B.C.S.C.); *aff'd* [1986] 4 W.W.R. 567 (B.C.C.A.). *Volenti*, on the other hand, relieves a defendant of liability for breach of a duty of care the law would otherwise impose. Linden, *Canadian Tort Law* (3rd ed., 1982) 491; Kennedy, “Assumption of Risk, Inherent Risk Acceptance and Release of Liability,” *Sports and the Law* (Continuing Legal Education, 1989) 1.1.05. Linden says at p. 494 that the defence of *volenti* is misused when it is invoked in sports cases. Instead, the defence should proceed on the basis of an absence of negligence.

32. If the premises are reasonably safe, there is no breach of the common duty of care under the *Occupiers Liability Act* and therefore the operator does not need to look to provisions like s. 3(3) to be absolved of liability: see *Abbott v. Silver Star Sports Ltd.* (1986) 6 B.C.L.R. (2d) 83 (S.C.); *Vannan v. City of Kamloops*, (1991) 63 B.C.L.R. (2d) 307 (S.C.).

33. *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589, 593; 18 D.L.R. (4th) 635, 637; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 1192. In *Crocker* the operator was unable to rely on inherent risk because it had materially increased the risk in a tubing competition by not disqualifying a visibly drunken competitor from the race. This result in no way diminishes the force of Wilson, J.'s acknowledgment at the outset of the judgment that the inherent risks of a sport do not give rise to liability.

34. *Dubé v. Labar*, [1986] 1 S.C.R. 649, 658.

35. *Supra*, n. 23.

36. See the cases mentioned in n. 32, *supra*.

37. In the recent case of *Tutinka v. Mainland Sand & Gravel Inc.* (B.C.C.A., Van. No. CA015838, 20 December 1993; leave to appeal refused 2 February 1994 (S.C.C.)) a sand and gravel pit operator who had partly excavated a portion of a trail that was used frequently by trespassing motorcyclists, thereby creating a cliff, was held liable to a dirt-biker who inadvertently rode over the edge of the cliff. The application of *Waldick v. Malcolm* by both the trial and appeal courts revolved around the extent of the plaintiff's lack of knowledge of the specific hazard the operator had created by the excavation. The defence of inherent risk is not discussed as such in either the trial or appellate judgments, but *Tutinka* has more of the elements of an ordinary case involving injury to a trespasser than one relating to an injury sustained during participation in a sport. The analysis can be contrasted with that in *McErlean v. Sarel*, (1987) 42 D.L.R. (4th) 577 (Ont. C.A.), which involved a trail-bike race.

difficult or impossible to obtain. This would have a severe adverse impact on our recreational industries. Some measure is warranted to remove the doubt that now surrounds the survival of the defence of inherent risk.

C. A Related Problem: Restrictions on Gratuitous Use of Land for Recreational Purposes

In the course of our work on this project we became aware of recreationists' concern that fear of liability was causing private landowners and Crown tenure holders to deny access to land and foreshore for recreational uses. The problem of restricted access was particularly acute for overland sports like hiking, mountaineering, orienteering and rock climbing, and for marine sports requiring access to foreshore and riverbank for beaching canoes, kayaks and other craft. This concern was detailed in a submission made to the provincial government by the Outdoor Recreation Council of British Columbia in 1990.³⁸ The submission urged that British Columbia follow Ontario's example and relax the duty of care owed by an occupier towards persons allowed free access to land for their own purposes.

D. The *Occupiers Liability Act* and the Skiing Industry

1. GENERAL

Alpine skiing has the unusual character of being a wilderness sport with mass appeal. This makes all the more acute the questions of risk and responsibility that are always present in sport.

As the 58 ski areas of the Province have defined boundaries, and their operators have authority to control entry, the *Occupiers Liability Act* applies to them and to the legal relationship between the operator of a ski area and skiers. The common duty under the Act "to take that care that in all the circumstances of the case is reasonable"³⁹ to see that persons using the premises are "reasonably safe" presents complications when applied to a mountain. Removing all natural hazards would not only be impossible, but would destroy the appeal of the sport. It would be equally impractical to expect a ski area operator to warn of every possible danger on a mountain slope. When a person is moving downhill on skis, virtually every feature of the landscape is a potential hazard.

Existing case law, however, does not require operators to warn of every possible danger, nor does it require them to eliminate natural hazards. Courts have repeatedly held skiers to a duty to ski under control at all times, so as to be able to stop or take avoiding action within their lines of vision.⁴⁰ There is no obligation on an operator to warn of the obvious, and the required standard of care can be met by using caution signs or hazard markers at locations calling for greater than normal vigilance on the part of skiers.⁴¹ In dismissing an injury claim by a minor skier, a British Columbia court noted that ski areas cannot be held to the same

38. Outdoor Recreation Council of B.C., "Recommendations for Law Reform to Enhance Public Access to Outdoor Recreation" (October 1990). The Outdoor Recreation Council of B.C. is a non-profit society representing a wide cross-section of outdoor recreational interests. It comprises 31 member groups and a number of other associated recreational and environmental organizations. These groups have a collective membership of approximately 120,000 persons.

39. *Occupiers Liability Act*, s. 3(1).

40. *Abbott v. Silver Star Sports Ltd.*, *supra*, n. 32.

41. *Ibid.*

standard of care as shopkeepers and motorists.⁴² In other words, a mountain is a mountain, whether or not there are a few ski runs on it.

In a few decisions since the 1970's, ski areas have been held liable in Canada under common law occupier's liability principles, as well as under occupier's liability legislation, for failing to give adequate warning of hazards that are not readily apparent or are visually deceiving, like ledges, blind zones, and semi-concealed gullies.⁴³ Usually the lack of warning, where warning is required, is found to be only a contributing cause of a skiing accident.

Whenever some degree of liability has been imposed on the operator, the skier has generally been found to be partly at fault also and blame has been apportioned. Despite this, the industry's reaction to these decisions can be described as one of profound dissatisfaction.⁴⁴ Ski area operators see the *Occupiers Liability Act* as forcing them into a maze of double binds. The demand for more challenging skiing cannot be satisfied without exposing skiers to more danger. The more hazard markers and signs that are installed, the less vigilant skiers have to be for their own safety. Padding lulls skiers into a false sense of security and encourages them to ski closer to lift towers and other structures than is safe for their level of ability. Grooming lessens the hazard from moguls, but it also allows people to ski faster and slide further when they fall.

Deciding where to use warning signs and hazard markers is an exercise of judgment. After an accident, it is always easy to say with the benefit of hindsight that more or different warning should have been given to a skier. The definition of "hazard" in skiing is itself very elusive. A mountain in winter is not a static environment. A rock or stump clearly visible under good weather conditions may become lethal in a localized fog or whiteout. While, in principle, errors of judgment that a reasonable operator could make in assessing the need for safety measures do not amount to negligence, the vagaries of litigation make the distinction one of cold comfort.

While nothing to demonstrate a flood of frivolous claims stemming from skiing injuries has come to light, and very few cases go against the operator even to the extent of partial liability, the cost of defending the claims that do arise is high in relation to the premium base (total of premiums collected) for ski areas in western Canada. This presents a further problem besides one of profitability for insurers: there is a potential for massive claims in the event of a serious chairlift accident. It is in the interest of the skiing public to prevent erosion of the premium base through litigation-related costs.

2. SKIING LEGISLATION

42. *Feniuk, supra*, n. 6.

43. *E.g. Wilson v. Blue Mountain Resorts Ltd.*, *supra*, n. 8 (failure to warn of a semi-concealed gully on an access to a run); *Marshall v. R.*, (1988) 23 B.C.L.R. (2d) 320 (C.A.) (failure to warn of a gully near the exit of a run); *Simms v. Whistler Mountain Ski Corporation Inc.*, [1990] B.C.D. Civ. 3124-01 (C.A.) (failure to place hazard marker at a visually confusing point on a groomed intermediate run). In Québec, a ski area has been found liable to the extent of 50% under the Civil Code because its ski patrollers took a break at the same time and left the runs unmonitored for more than an hour, allowing a reckless "downhillier" to make six or seven descents at up to 60 miles per hour before he ran into the plaintiff at the bottom of the run: *L'Ecuyer v. Quail*, (1991) 38 Q.A.C. 90. Some decisions in which the operator was found to have met the required standard of care are: *Abbott v. Silver Star Sports Ltd.*, *supra*, n. 32 (posted warning sign sufficient notice of a transition zone); *Warren v. Dupras*, (1989) 13 A.C.W.S. (3d) 1362 (Que. C.A.) (fall on icy, rutted cross-country trail an inherent risk accepted by skier); *Norak v. TIV Industries Ltd.*, (1986) 42 Alta L.R. (2d) 370 (Q.B.) (5-8% grade between waiting and loading points for chairlift held a reasonable industry standard); *Worobetz v. Panorama Resort (Title Holding) Corp.*, (1993) 9 Alta. L.R. (3d) 38 (Q.B.) (metal sign of type commonly used in skiing industry; operator not liable when sign came loose and slid, knocking down plaintiff).

44. In an article by John Threndyle in the February 1993 issue of *Ski Canada* entitled "Ski the Fault Line," R.B. Kennedy, counsel for the CWSAA, is quoted as describing the decision of the British Columbia Court of Appeal in *Simms, supra*, n. 42 as "basically unacceptable to Western Canadian ski areas."

The skiing industry sees an answer to its problems with the *Occupiers Liability Act* and insurance costs in legislation dealing specifically with risk and liability in skiing. It points to the fact that some 26 American states have enacted statutes of this kind.

Typically, these statutes entrench the “Skier's Responsibility Code,” a set of safety rules developed for skiers. They also impose specific duties on the operator of a ski area. Another element of most of the American skiing statutes is a declaration that ski area operators are not liable for injuries resulting from the inherent risks of the sport. “Inherent risk” is usually given a detailed definition listing most of the physical hazards encountered in skiing.

The American statutes originated with a prototype prepared by the National Ski Areas Association a few weeks after the 1978 decision of the Vermont Supreme Court in *Sunday v. Stratton Corporation*.⁴⁵ Until that time, the leading case in the U.S. on liability for skiing injuries had been *Wright v. Mt. Mansfield Lift Inc.*⁴⁶ *Wright* had held that a collision with a snow-covered stump on a ski trail gave rise to no liability on the part of the operator. In *Sunday* a 21-year-old intermediate skier became quadriplegic after an accident in which one of his skis became entangled in brush concealed by loose snow on a novice trail. At trial the operator did not raise the defence that such obstacles were an inherent risk of skiing, but instead presented evidence that its novice trails were meticulously groomed smooth surfaces (as advertised), so that the accident could not have happened the way the plaintiff and his companion said it did. The jury, however, accepted the plaintiff's version.

On appeal, the operator raised the defence of inherent risk for the first time. The appeal court, bound by the trial record, held that the evidence introduced at the trial stage could not support this defence. In fact, the defence brief stated, “...the stump that injured the plaintiff in *Wright* may well be the basis for negligence today in view of improved grooming techniques...” Saying that “it is clear from the evidence that the passage of time has greatly changed the nature of the ski industry,” the Vermont Supreme Court concluded that the presence of concealed brush on a novice trail could not, on the evidence presented at trial, be found an inherent risk at the stage of development the skiing industry had reached.

The U.S. skiing industry saw adverse and far-reaching implications in the *Sunday* case. Its legislative initiative was launched immediately and found rapid acceptance in many states. The legislation that resulted is far from uniform, however, and tends to be weighted more heavily towards protection of the industry in states where skiing is a more significant part of the local economy.⁴⁷

At the present time, Quebec is the only Canadian province to have legislation dealing specifically with skiing safety. It is part of that province's *Safety in Sports Act*.⁴⁸ It is purely regulatory legislation imposing various safety requirements, and does not address issues of civil liability.

3. THE CWSAA DRAFT *SKI AREA SAFETY ACT*

45. (1978) 390 A. 2d 398. See Feuerhelm, “From *Wright* to *Sunday* and Beyond: Is the Law Keeping up with the Skiers,” (1985) 3-4 Utah L.R. 885, 891.

46. (1951) 96 F. Supp. 786.

47. With the exception of California, which has no skiing statute. California does have a provision absolving public entities of liability towards persons engaging in a “hazardous recreational activity,” which is defined to include downhill and cross-country skiing. The immunity does not apply if the public entity was grossly negligent or in breach of a specifically enumerated duty towards such persons, or if a fee is paid in order to engage in the activity: Cal. Government Code, s. 831.7 (Cal. Stats. 1983, c. 863, s. 1).

48. *Safety in Sports Act*, R.S.Q. 1977, c. S-3.1 (S.Q. 1979, c. 86), ss. 46.3-55.2, as amended. See also *Regulation respecting safety in alpine ski centres*, O.C. 1788-88, Gaz. Off. du Que. Pt. 2, vol. 120, no. 51, p.3952, as am. by O.C. 935-91, vol. 123, no. 31, p. 2871.

(a) *General*

In 1992 the Canada West Ski Areas Association presented a draft *Ski Area Safety Act* to the provincial government and recommended it be enacted quickly. It had sought the enactment of similar legislation unsuccessfully during the 1980's. In a brief accompanying the draft statute, the CWSAA maintained that as a result of *Waldick v. Malcolm*, the Canadian skiing industry was exposed to a flood of spurious litigation.⁴⁹ It also asserted that without the legislation, the skiing industry in western Canada was at a competitive disadvantage vis-à-vis its American competition.⁵⁰

The CWSAA's draft Act appears in its entirety in Appendix C. It bears a close resemblance to Colorado's statute as amended in 1990, particularly in its definition of "inherent risks of skiing."⁵¹ It is broadly similar to many of the U.S. skiing statutes in setting out specific duties for ski area operators and skiers, and absolving operators of liability for personal injury and property damage resulting from the inherent risks of skiing, as defined.

An analysis of the draft Act appears below. The sections are considered in an order that yields a better overview of the content rather than in numerical order.

49. [1991] 2 S.C.R. 456, (*sub nom. Malcolm v. Waldick*) 83 D.L.R. (4th) 114, 8 C.C.L.T. (2d) 1.

50. Canada West Ski Areas Association, "British Columbia Ski Area Safety Act" (March, 1992).

51. The 1990 amendments to Colorado's *Ski Safety Act* of 1979 made by Colo. L. 90, pp. 1540-1543 introduced a legislative definition of "inherent risks of skiing," a shorter limitation period for actions by skiers against ski area operators, and limits on damage awards. It also absolved operators expressly from liability for injuries resulting from any hazard within the statutory definition of inherent risks, and barred actions in respect of them. The amendments were introduced as a response to decisions of the Colorado courts under the 1979 legislation which were perceived as unduly favourable to plaintiffs in skiing injury cases.

(b) *Skier's Duties: Sections 3-7*

(i) *Section 5: The Skier Responsibility Code*

Like its American counterparts, the CWSAA draft Act enacts one of several versions of the *Skier Responsibility Code* into law:

5. Each skier shall obey the following responsibility code:
 - (a) When skiing downhill or overtaking another skier, a skier shall choose a course and speed which assures the safety of other skiers ahead or below;
 - (b) A skier shall not stop in any location which obstructs a ski run or where he is not visible from above;
 - (c) When entering a ski run or starting to ski downhill, a skier shall yield to other skiers on the ski run;
 - (d) A skier shall wear retention straps or other devices which prevent runaway skis;
 - (e) A skier shall keep off closed ski runs and shall observe all posted signs within the ski area;
 - (f) A skier shall not ski within any ski area when his ability to do so is impaired by alcohol, drugs, or other substances; and
 - (g) A skier involved in a collision with another skier shall as soon as practicable identify himself to the other skier, or to a representative of the ski area operator, and shall render all possible assistance to the other skier, pending the arrival of the ski patrol or emergency first aid personnel.

Some of the rules in the Code already form part of the law of British Columbia, having been accepted by the courts as establishing the standard of care of a reasonable skier in particular cases.⁵² Undoubtedly, universal observance of the Skier Responsibility Code would go a very long way in preventing skiing accidents. A number of decisions arising from skier-skier collisions yield graphic evidence of the devastating injuries that can result from reckless and overly aggressive skiing.⁵³ Enactment of the Code would provide the ski patrol with greater authority to curb dangerous behaviour on the slopes.

One consequence of making provisions of the Code statutory duties, however, is to make their breach a provincial offence.⁵⁴ This would mean that skiers violating the Code could be issued tickets or appearance notices and prosecuted in Provincial Court. They would be subject to the general penalty in section 4 of the *Offence Act*,⁵⁵ Ski patrollers could be designated as enforcement officers under s. 121.1 of the *Offence Act*. This would significantly alter the commercial relationship that now exists between skiers and the operator of the ski area.

(ii) *Section 4*

Section 4 of the CWSAA draft states:

4. Each skier has a duty to ski under control and in such a manner at all times so as to be able to avoid collision with other skiers or objects and so as not to pose a threat or risk to the safety of other skiers.

This section seems to make perfect common sense, and the rule has been adopted in case law as an expression of the standard of care every skier is required to exercise.⁵⁶ Yet the consequences of making the obligation to ski under control a statutory duty need to be examined closely. Is inadvertent loss of control to be a provincial offence? Beginners often

52. *Wolkoski v. Strongman*, [1987] B.C.D. Civ. 3124-01 and 3385-01 (S.C.); *Sheppard v. Jones*, [1986] B.C.D. Civ. 3124-02 and 3388-20 (S.C.).

53. *E.g., Wolkoski v. Strongman, ibid.; Taylor v. R.*, [1981] 2 S.C.R. 2; *R. v. Wilcox*, (B.C. Prov. Ct., 1986, unreported).

54. The *Offence Act*, R.S.B.C. 1979, c. 305, s. 5 makes a breach of a provincial enactment an offence.

55. *Ibid.*, s. 4. The general penalty is a fine of not more than \$2,000, imprisonment for not more than six months, or both.

56. Notably in *Wolkoski v. Strongman, supra*, n. 52 and *Abbott v. Silver Star Sports Ltd., supra*, n. 32.

lose control. Even very good skiers can lose control if, for example, they hit an icy spot or if they are knocked off balance by a reckless skier rushing past. Presumably, section 4 is not meant to subject purely accidental loss of control on the part of those skiing responsibly to penal consequences. The probable intent of section 4 would be clearer if the section were accompanied by a further provision declaring that it could not be interpreted in this manner.

(iii) Section 3

Section 3 states:

3. Each skier has the sole responsibility for knowing the range of his own ability to negotiate any ski run and to ski within the limits of such ability.

On the surface, this seems quite sensible. When a skier runs into difficulty purely because of over-estimating his or her skiing ability, no one else can, in fairness, be blamed for the mishap that may result. But would section 3 have the effect of legally attributing any harm that may befall the skier to the skier's lack of ability, regardless of other influences?⁵⁷ Consider this example:

A number of intermediate runs begin from the same general area as a much more difficult expert run. The sign indicating the difficulty of the expert run has fallen and is covered with snow. This situation has been uncorrected for several days. An intermediate skier who has experienced no difficulty on the marked intermediate runs assumes the remaining run is of the same degree of difficulty and starts down it. Unable to handle the difficult terrain, the skier goes over an unmarked ledge.

Read literally, section 3 could mean that the skier was solely at fault for skiing beyond ability, even though there was never any intention to ski on an expert run and the operator had left the run unmarked for several days.

(c) Operator's Duties

(i) Section 2

Section 2 of the CWSAA draft Act sets out a list of operator's duties:

2. A ski area operator shall take reasonable care to:
 - (a) Mark with a sign, in accordance with current ski industry practice, the degree of difficulty of ski runs within the ski area;
 - (b) Mark with a sign, in accordance with current ski industry practice, any closed ski run within the ski area;
 - (c) Equip each snow grooming machine, maintenance vehicle, and snow mobile operating within the ski area with a flashing or rotating light, which shall be operating whenever the vehicle is on a ski run;
 - (d) Equip each snowmobile used within the ski area with a fluorescent flag of not less than thirty centimetres along each dimension and mounted at least two metres above the bottom of the tracks of the snowmobile;
 - (e) Post a warning to skiers at the beginning of any ski run open to skiers on which snow making or snow grooming operations are being carried out; and
 - (f) Designate in accordance with current ski industry practice the boundaries of the ski area.

(ii) Ski Patrol and First Aid

57. Two U.S. writers think the equivalent of s. 3 in U.S. skiing statutes may provide a universal defence to the operator, though the provision does not seem to have played a major part in skiing jurisprudence to date: Frakt and Rankin, "Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability," (1991-92) 28 Idaho L.R. 227, 250.

The CWSAA's list contains no duty to provide a ski patrol with first aid capability, although a ski patrol is a familiar sight at ski areas. Ski patrols are specifically required by the *New York Safety in Skiing Code*,⁵⁸ by the New Mexico skiing legislation,⁵⁹ and by the *Québec Safety in Sports Act*.⁶⁰

(iii) Duty to Warn of Hazards

Operators do mark some hazards with signs or in the traditional manner with bamboo poles. Lift towers and other fixed structures are often padded nowadays, and fixed snowmaking hydrants are often surrounded by a fence or netting. The section makes no mention of these precautions. Their absence from the list of operator's duties is conspicuous.

The skiing industry is likely to continue marking some hazards whether or not it is under a statutory duty to do so. But the complete absence of any mention of a duty to warn of hazards in the statutory list of operator's duties could raise an inference that the list is exclusive and there is no legal duty to warn of hazards under any circumstances. This would be at variance with the case law as it exists now in British Columbia and other Canadian provinces.

Imposing a statutory duty to warn of hazards would nevertheless present a great many problems. How much padding and how many bamboo poles can an operator be expected to install?

If the duty is restricted to "obvious" hazards, it is self-defeating. Confining it to "concealed," "unusual," or "unexpected" hazards, on the other hand, might require near-perfect foresight to detect anything that could harm a skier in what could be a large area of very rugged terrain. What amounts to a "hazard" is often dependent on variable snow and weather conditions. A rock that is clearly visible and easily avoidable can become a concealed hazard after a snowfall. No ski patroller can remember the precise location of every sizeable rock. A slope that is easily negotiable with good snow cover can become dangerous when ice forms on it, melts and re-forms with changing amounts of light and fluctuations in temperature. Marking some hazards and not others can produce a false sense of security that may lull skiers into a lack of vigilance for their own safety. In light of these difficulties, the industry's position of "ski at your own risk" has considerable justification.

The North Carolina skiing statute imposes a duty to post signs giving reasonable notice of unusual conditions and to mark clearly *any* hidden rock, hidden stump or *any* other hidden hazard which the operator knows to exist.⁶¹ This kind of provision may be possible to fulfil to an extent on the more benign slopes of some smaller eastern ski areas, but its feasibility in terrain of the nature and scale seen at Whistler-Blackcomb, for example, is highly doubtful.

Despite the great difficulty of determining the extent of hazard warning that is appropriate, it should be kept in mind that the average downhill skier on a British Columbia

58. *General Obligations Law*, art. 18, s. 18-103(14).

59. *N.M. Health and Safety Code*, s. 24-15-7G.

60. R.S.Q. 1977, c. S-3.1, s. 46.7, added by S.Q. 1988, c. 26, s. 18.

61. N. Carolina Gen. Stats., s. 99C-2(b),(c).

slope is not likely to be a true alpine adventurer.⁶² The skiing industry has encouraged the wide appeal the sport now enjoys. In rejecting any obligation to warn, the skiing industry, while deploring those who venture out-of-bounds, seems to be taking the position that all recreational skiers should be expected to have the attitudes and skills of the backcountry or heli-skier. We believe that recreational skiing in western Canada has evolved to a point at which the public expects to be warned of extraordinary hazards.

Any statutory duty to warn against hazards should in no way lessen the obligation the general law imposes on skiers to take reasonable care for their own safety, or prevent them from being held contributorily negligent when they do not. It should not downplay the inherent dangers of skiing, which cannot be eliminated. It should not detract from the challenge of the sport either.

The Ski Safety Subcommittee of the British Columbia Medical Association has suggested that signs be posted warning of:

- points where trails merge or cross;
- blind corners or blind crests that may not be obvious to the skier under conditions of ordinary visibility;
- artificial structures like snowmaking hydrants and water pipes that are not visible to skiers under conditions of ordinary visibility from a distance of at least 100 feet;
- the outside boundaries of the ski area;
- points of avalanche danger;
- cliffs and crevasses.

(iv) Avalanche Control

Section 2 of the CWSAA draft does not mention standard avalanche precautions as being an operator responsibility. Avalanche is not a significant problem on most ski runs, but it can be at higher levels and on some expert runs, which form a substantial percentage of the skiable terrain at larger resorts. While avalanche accumulations are notoriously unstable, it is feasible for ski area operators who have posted runs in avalanche-prone terrain to attempt to reduce the danger by carrying out standard precautions using personnel trained in techniques approved by the Canadian Avalanche Association. This is being done now at major ski areas in any case.

(v) General

The duties imposed on the operator by s. 2 of the CWSAA's draft Act are relatively minimal, considering the range of safety measures usually undertaken by commercially operated ski areas throughout North America. It is also minimal in comparison to the degree of regulation under which much of the U.S. skiing industry operates. Some examples of the

62. A study of the skiing population completed for the Ministry of Tourism indicates that the average skier resident in British Columbia is a married professional, manager or proprietor between 25 and 44.

types of statutory duties that have been imposed on ski area operators in the U.S. appear in Appendix E. The portion of Québec's *Safety in Sports Act*⁶³ dealing with alpine skiing appears in its entirety in Appendix D.

(d) *Sections 1 and 8: Definition of Inherent Risk and Non-Liability of Operators*

Section 1 contains an extensive definition of “inherent risks of skiing:”

1. In this Act

“Inherent risks of skiing” includes any risk, danger, hazard or condition, whether or not such risk, danger, hazard or condition is obvious, expected or necessary, which is associated with the sport of skiing, including but not limited to the following: changing weather conditions; variation or steepness in terrain; creeks; gullies; cliffs; crevasses and other glacier hazards; avalanches; rocks; earth; ice; trees and tree wells, tree stumps or other natural growth, whether above or beneath the skiing surface; the condition of ice or snow on or beneath the skiing surface; changes or variations in the skiing surface or sub-surface; impacts, collisions, or falls involving snow grooming machinery, snow making machinery, ski lift towers, utility poles, roadways, fences, buildings or other structures and their components ordinarily used in the operation of a ski area; impact or collision with or falls resulting from other skiers; a skier's failure to ski within his own ability or in a manner so as not to pose a threat or risk to the safety of other skiers; and a skier's failure to meet any duty owed to other skiers;

This impressive definition is worthy of careful analysis. Compare the wording at the beginning of the definition,

“Inherent risks of skiing” includes any risk, danger, hazard or condition, *whether or not* such risk, danger, hazard or condition is *obvious, expected or necessary*,

with the classic expression of the common law doctrine of inherent risk in *Murphy v. Steeplechase Amusement Co.*⁶⁴, mentioned in Chapter II:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are *obvious* and *necessary*...

and with the wording of section 30.975 of the Oregon skiing legislation:

In accordance with ORS 18.470 and notwithstanding ORS 18.475(2), an individual who engages in the sport of skiing, alpine or nordic, accepts and assumes the inherent risks of skiing *in so far as they are reasonably obvious, expected or necessary*.

In imposing risk on the skier *whether or not* it is “necessary,” the definition in the CWSAA draft goes beyond the common law concept of inherent risk. It mixes fortuitous with non-fortuitous risk.

Another way in which the definition departs from the common law concept of inherent risk is by speaking of numerous hazards as *being* inherent risks. Undoubtedly, most of the hazards mentioned in the definition are commonly encountered by skiers. But not every encounter with them is a result of inherent risk. A skier may misjudge a turn and hit a rock because of the imperfections of human senses. That is inherent risk. But if a skier who is skiing responsibly hits a rock when desperately trying to avoid someone who is skiing recklessly, that is attributable to the other skier's recklessness, not to inherent risk as it is known apart from the statutory definition proposed.

63. R.S.Q. 1977, c. S-3.1, as amended.

64. (1929) 166 N.E. 173 *per* Cardozo J.

A wrongful act going beyond the nature of the sport itself is not excused under existing law merely because it occurs in the context of sport. In *Rootes v. Shelton*,⁶⁵ the water skier did not collide fortuitously with a stationary boat, or because of his own lack of skill or vigilance. He collided with it because the pilot of the boat that was pulling him carelessly steered into it.

Section 8 states, however:

8. No ski area operator shall be liable to a skier for injury arising or resulting from an inherent risk of skiing and no cause of action in respect of such injury shall lie against the ski area operator.

The combined effect of section 8 and the definition of “inherent risk” in section 1 is to extinguish a cause of action against the operator for injury physically produced by a hazard mentioned in the definition in all circumstances, whether or not the conduct of an operator or an employee of the operator contributed to the accident.

Most of the increased risk that would flow in whole or in part from breach of the operator's statutory duties under the CWSAA's draft Act would be swept into the definition of inherent risk. For example:

An operator decides to close a run because of dangerously icy conditions on a portion of its length, but its employees neglect to post a sign marking it as closed as required by section 2 [of the CWSAA draft Act.] The ice is not visible at the top of the run. A skier assumes the run is in a skiable condition and starts down it, hits the ice and is injured. The operator and the employees would be absolved of any liability, because “ice,” and “the condition of ice or snow on or beneath the skiing surface” are defined as inherent risks.

The driver of a snow-groomer fails to turn on the machine's revolving light and audible signal. No sign warning of grooming operations has been posted. The machine is slowly approaching a bend in a run. As the groomer reaches the bend, a skier approaching from the opposite direction sees the machine a short distance away and desperately attempts to turn out of its way. Though skiing under control, the skier catches an edge on the turn, falls, and slides into the caterpillar treads of the groomer. The driver's breach of the statutory duty under section 2(c) to turn on the revolving light and audible signal so as to give warning of the machine's approach, and the failure to post the warning signs required by section 2(e), are factors contributing to this mishap. So was the accidental fall, which is clearly an inherent risk. There can be no apportionment of liability, however, because “impacts,” “collisions,” or “falls” involving “snow grooming machinery” are defined as inherent risks of skiing.

An operator does not mark the difficulty of a particular run having steep slopes and jagged rocks with a black diamond, denoting “difficult” or “experts skiers only.” The stretches where these hazards are located are not obvious at the top of the run. Other runs commencing at about the same altitude are marked green, for “easiest” or “suitable for novices.” A novice skier who has already negotiated the green ones with ease assumes the unmarked one is similar and starts down it, soon running into major difficulty. Unable to maintain control on the steep grade, the novice smashes into a rock outcropping, incurring serious injuries.

Section 8 appears to preclude any liability on the part of the operator where a breach of the operator's statutory duty under section 2 is causally related to the harm. By contrast, some of the American statutes preserve the ability to recover damages from the operator where the operator's breach of various duties similar to those in s. 2 causes the damage.⁶⁶

65. (1967) 116 C.L.R. 383 (Aus. H.C.). See Chapter II under the heading “3. Negligence or Other Wrongdoing Going Beyond Inherent Risk.”

66. E.g., Idaho, c. 11, s. 6-1107; New Mexico, art. 24-15-11. These provisions appear to prevent apportionment of any liability to the operator if the skier is also contributorily negligent. Sometimes the attempts by American state legislatures to achieve even-handedness between the two objectives of protecting the ski industry and maintaining fairness to skiers has resulted in much confusion. The Washington statute provides that no action is maintainable against the operator by reason of the condition of the track, trail or run unless it results from the operator's negligence: Wash., s. 70.117.020(4). This seems virtually redundant. In *Codd v. Stevens Pass Inc.*, (1986) 725 P. 2d 1008, the Washington Court of Appeals held that an operator had a duty under this statute to warn skiers of dangers on trails, whether they were obvious or not. Contributory negligence of the skier did not relieve the operator of a duty to warn of latent danger. The Maine statute is hopelessly confused. It states the skier assumes legal responsibility for any injury to person or property unless it was actually caused by the negligent operation or maintenance of the ski area. It goes on to undercut that proposition by declaring that the responsibility for collision with a person or object is solely that of the skiers involved: Maine, c. 26, s. 488.

Colorado's legislation excepts breach of a statutory duty by the operator from its definition of "inherent risks of skiing," which in other respects is similar to the definition in section 1 of the CWSAA draft.⁶⁷

Section 1 mingles inherent risk with artificially created risk and calls them both inherent. Section 8 gives a blanket absolution.

In effect, the draft CWSAA *Ski Area Safety Act* would have the same scope as the comprehensive waivers now in use, but its enactment would strengthen the operator's position in two additional ways. The first is that holders of day tickets, who do not receive the benefit of a discounted price, would unequivocally be subject to the same risk and liability regime as those holding season's passes. Evidentiary problems faced by the operator in establishing that the ticket holder was alerted to the presence of the exclusionary terms would be overcome.

The second change stems from the fact that the CWSAA's draft Act would apply to minors as well as adult skiers. While minors are deemed under existing law to assume inherent risks (according to the common law understanding of them) when they engage in sports,⁶⁸ they are not bound by a waiver extending to the risk of another's negligence. As proposed by the CWSAA, the Act would apply to minors in the same way as it would to adult skiers, however.

(e) *Section 1: The Definition of "Skier"*

"Skier" is defined in section 1 as:

"skier" means a person authorized by a ski area operator to use the facilities of a ski area for skiing, snowboarding, tobogganing, sleighing, tubing, hiking, sightseeing, or any other such activity;

People do enter ski areas for purposes other than skiing. Depending on the nature of their activities, they may be subject to some of the same natural dangers as skiers. If the reason for a non-skier's admission is unrelated to some form of outdoor sport, however, there is little reason for the legal relationship between the operator and the non-skier to be governed by special legislation.

(f) *Section 6: Tobogganing, Tubing, Etc.*

This section states:

6. No persons shall use a toboggan, sleigh, tube, or other sliding device other than skis or a snowboard within the ski area except in an area designated by the ski area operator exclusively for that purpose or by authorized personnel for emergency or rescue purposes.

Tobogganing, tubing and similar activities within the boundaries of ski areas have caused serious accidents in the past.⁶⁹ These activities should only take place with the operator's permission, and in a suitable area.

67. *Ski Safety Act of 1979*, art. 33-44-103(8), as am. by L. 90, p. 1540, s. 2. The Colorado definition also omits the language found at the beginning of the definition in the CWSAA draft, *i.e.* "whether or not such risk...is obvious, expected or necessary..." It refers instead to "those dangers or conditions which are an integral part of the sport of skiing" and then proceeds to catalogue specific hazards.

68. *Murray v. Haringay Arena*, [1951] 2 K.B. 529; *Feniuk v. School District No. 54 and Smithers Ski Corporation*, [1991] B.C.D. Civ. 3124-01 (S.C.).

69. *Wilson v. Garibaldi Lifts Ltd.*, (1977) 79 D.L.R. (3d) 495 (S.C.).

Concerns have been raised in the news media and also in the course of consultation about snowboarding in close proximity to conventional skiing. In the Consultation Paper we invited comment as to whether snowboarding should be confined to a segregated area, and whether any rules were needed specifically for it. Comment was varied, but the preponderant view was that snowboarding did not need to be segregated from conventional skiing. A need was cited for the message to be brought home to snowboard riders that the same basic rules that apply to skiers also apply to them, however.

*(g) Section 7: Reimbursement of Rescue Costs
by Out-of-Bounds Skiers*

Section 7 of the CWSAA draft Act states:

7. A skier who knowingly skis outside of the ski area boundary shall be liable to compensate a ski area operator for all costs it incurs in attempting to rescue such skier.

In the Consultation Paper, we noted that the matter of recovery of search and rescue costs was under consideration by other bodies. We accordingly refrained from expressing a view on this section beyond stating that we did not object to it in principle and suggesting that recoverable costs should be limited to those “reasonably incurred” in rescue attempts. At the present time the matter is still under debate and no general legislation appears imminent.

4. GENERAL

In Chapter IV, recommendations are made with respect to occupier's liability as it affects sport in general, and skiing in particular.

C. Waivers

1. GENERAL

Agreements allocating legal risk to the user, commonly called *waivers*, are common in the recreational sector. So are exclusionary terms printed on admission tickets. The reason for their prevalence is obvious: the risk of injury in sports is greatly dependent on individual behaviour in an atmosphere of vigorous exertion and competition. It is unpredictable, even under the best conditions. This makes risk management more difficult than in some other fields.

Sometimes the operator's liability insurance policy requires that waivers be obtained. There are no established guidelines within the insurance industry as to when the use of waivers will be required. Insurers will insist waivers be used when they associate an activity with an unusually high degree of risk. Bungee jumping is one such activity. In other cases, the use of waivers is left to the operator's discretion, but using them may reduce the cost of the insurance.

The advantage a waiver holds for recreational operators is that it provides a contractual defence that is much more reliable than the fact-dependent tort defences: exercise of reasonable care, contributory negligence, inherent risk, and *volenti*. Where there is an enforceable contract excluding or limiting the operator's liability, it is decisive insofar as its terms extend. If the terms cover the accident in question and there is nothing in law to detract from their enforceability, a court will not look into the facts behind it to determine if liability should be imposed.

2. SPECIFIC AND COMPREHENSIVE WAIVERS

A waiver may be specific to certain risks and certain sources of liability, but waivers designed to prevent a claim against the operator for any reason are much more common. The effect of a properly drafted comprehensive waiver is that the operator has no duty of care towards the user and therefore no obligation to compensate the user for any mishap.

3. RECREATIONAL WAIVERS

A comprehensive waiver used in the recreational sector typically contains a recitation that the participant recognizes the existence of inherent risks and dangers in the sport in question. It also states the user assumes all risks arising from participation in the sport and releases the operator from all claims of every kind, including those based on the operator's own negligence,⁷⁰ breach of contract, and sometimes breach of statutory duty. Wording like this, drawn from an actual example, may be used:

I, for myself, my heirs, executors, administrators, or anyone else who may claim on my behalf, covenant not to sue, and waive, release, and discharge [operator, its employees, etc.] or anyone acting for or on their behalf, for any and all claims or liability for personal injury, death, damage to property or loss of whatsoever nature or kind and howsoever caused, whether arising by reason of the negligence of [operator, its employees, etc.] or otherwise.

⁷⁰ In order for the waiver to cover the operator's own negligence, it is practically essential for it to say so expressly: *Canadian S.S. Lines v. R.*, [1951] A.C. 192 (P.C.); *Smith v. Horizon Aero Sports Ltd.*, (1981) 19 C.C.L.T. 89 (B.C.S.C.); *Lyster v. Fortress Mountain Resorts Ltd.*, (1978) 6 Alta. L.R. (2d) 338 (S.C.).

Indemnity clauses are common in agreements for rental of sports equipment. Under these, the user agrees to reimburse the operator for any damages the operator might become liable to pay to a third party because of the renter's use of the equipment, regardless of its condition at the time of rental.

4. SKIING WAIVERS

(a) *Conventional Skiing*

The most sophisticated waivers are used by the skiing industry. Identical wordings appear on lift tickets and season's pass applications, but lift ticket purchasers do not sign a document containing the waiver. The form of waiver widely used by British Columbia ski areas applies to any accident (other than lift malfunction) that happens within the boundaries of the ski area, whether due to skiing or not. It contains an extensive definition of "inherent risks of skiing" which includes negligence of the ski area or its staff and, before the 1992/93 season, also included chairlift malfunction.⁷¹ A notice in large type at the top of the document indicates that by signing it, the user waives the right to sue. The reference to the operator's own negligence in the general release clause is also printed in enlarged type to attract the user's attention. The standard waiver form has proven quite effective. Several claims against British Columbia ski areas have been dismissed on the basis of signed waivers and ticket conditions in the standard form now in use.

(b) *Heli-skiing*

A special form of waiver, developed with the approval of provincial authorities, is used by heli-skiing operations. It came into use because of the difficulties experienced by heli-skiing operators in the mid-1980's in obtaining liability insurance needed to meet the requirements of their Crown land use permits. Since most heli-skiing activity takes place on wilderness land, the release it contains is worded to operate in favour of the Province as well as the operator.

5. WAIVERS BY AND ON BEHALF OF MINORS

While contracts made by minors are unenforceable,⁷² it is a common practice to have minors sign a waiver before they are allowed to participate in certain athletic activities. The waiver form invariably contains a space for an additional signature by a parent. Sometimes it takes the form of a waiver by the parent on behalf of the minor. This does not make it enforceable.⁷³

One device sometimes used in an attempt to indirectly enforce a waiver by a minor is to insert a term whereby the parent agrees to indemnify the operator for any liability the operator may have towards the minor. If the parent sues on behalf of the minor and the operator is

71. In British Columbia, the operation of chairlifts is governed by regulations under the provincial *Railway Act*, R.S.B.C. 1979 c. 354. S. 241 of the *Railway Act*, which is made applicable to the chairlift operation permits of all but one ski area in B.C., makes terms excluding liability for lift malfunctions unenforceable unless the wording has been approved by the Minister of Transport. No approvals have been given. Reference to "failure of ski lifts" as being one of the "inherent risks" of skiing, for which the skier gave a general release of liability, was deleted from the standard skiing industry form of waiver and standard lift ticket conditions at the Attorney General's request.

72. *Infants Act*, R.S.B.C. 1979, c. 196, s. 16.2. There is provision in ss. 16.4 and 16.5 of the Act for the court or the Public Trustee to grant capacity to minors to enter into binding contracts, but only in respect of contracts that are clearly for their benefit. Contracts made by minors were also unenforceable at common law, except in a few exceptional cases. See *Report on Minors' Contracts* (LRC 26, 1976).

73. S. 31(1) of the *Infants Act*, *ibid.*, allows a guardian (which, under s. 27 of the *Family Relations Act*, R.S.B.C. 1979, c. 121, includes a parent) to make a binding agreement for a minor only with the approval of the court. The Public Trustee may approve the agreement if the consideration is \$10,000 or less.

compelled to pay damages, the parent would theoretically be bound contractually to reimburse the operator. In this way, the parent is discouraged from suing on behalf of the minor. This type of indemnity clause is contained in waivers used for some sports instruction programs for children in British Columbia. Its enforceability is uncertain. In Ontario an indemnity of this type has been held unenforceable.⁷⁴

Commercial recreational operators and amateur sports associations obtain waivers from minors and their parents despite the fact they are unenforceable, because they serve to draw both the minor's and the parent's attention to the possibility of injury, and afford some evidence that both are aware of and assume inherent risk.⁷⁵

The practice of taking legally unenforceable waivers from minors and their parents has nevertheless generated some objection. Despite the fact that a large portion of the general public seems to be aware that minors cannot make binding contracts, it is still possible that a parent may be deceived into thinking that a valid claim of a seriously injured minor cannot be pursued because of a waiver signed in connection with the minor's participation in some activity.⁷⁶

The uncertain status of parents' indemnity agreements is a further complication. Faced with a possibly enforceable obligation to indemnify the operator if a child's lawsuit succeeds, a parent of average means might well be dissuaded from suing.

74. *Stevens v. Howitt*, [1969] 1 O.R. 761 (H.C.). The ground cited for refusing to enforce the parent's indemnity agreement was that it discouraged a parent from pursuing a minor's legal rights, and this was inconsistent with public policy. An analogy could be drawn to the unenforceability of indemnity terms in a separation agreement which operate to the disadvantage of the children of the marriage: *Cutler v. Cutler*, [1991] B.C.D. Civ. 1604-06 (S.C.).

75. The principle that no liability arises from inherent risks of a sport applies to minors as well as to adult participants: *McErlean v. Sarel*, (1987) 42 D.L.R. (4th) 577 (Ont. C.A.); leave to appeal refused 46 D.L.R. (4th) vi (S.C.C.); *Murray v. Haringay Arena*, [1951] 2 K.B. 529 (C.A.).

76. Insistence on a waiver by or on behalf of a minor might arguably be a "deceptive practice" under s. 3(3)(m) of the *Trade Practice Act*, R.S.B.C. 1979, c. 406:

3(3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice:

... (m) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if the representation is deceptive or misleading;

"Representation" is defined in s. 1 to include a term of a document relied on by a supplier. Thus, a document with exclusionary terms that is used in connection with a minor's participation may amount to a misleading representation regarding the legal incidents of that participation. The definition of "consumer transaction" appears to be restricted to transactions involving personal property, services, or a business opportunity, however. Most transactions between operators and users would not come within the definition. One kind of transaction that would fit within the definition of "consumer transaction" would be the supply or rental of sports equipment. S. 3(3)(m) may therefore cover waivers associated with the leasing of sports equipment to minors. This would have little practical effect. While the Act makes a supplier liable to a consumer for loss caused by a deceptive practice, the waiver could not bar an action in negligence on behalf of a minor.

6. ENFORCEABILITY OF RECREATIONAL WAIVERS

Canadian courts will subject waivers relating to sports activities to the usual tests regarding adequate notice and will confine them to their precise terms.⁷⁷ If they meet these hurdles, they will be readily enforced, however. Recreational waivers have not, by and large, been subjected to the same searching scrutiny on the grounds of reasonableness or unconscionability as exclusionary language in other consumer transactions. The leading Canadian case on sports waivers, *Dyck v. Manitoba Snowmobile Association*,⁷⁸ and a number of British Columbia decisions,⁷⁹ hold that waivers protecting a recreational operator against claims based on its own negligence are in keeping with standards of commercial morality and reasonable in light of the purpose for which they are obtained, namely to allow participation in activities carrying obvious risks. The British Columbia cases concern comprehensive waivers used for white water rafting,⁸⁰ ski racing,⁸¹ recreational skiing,⁸² and rental of skiing equipment.⁸³

The overriding consideration for the courts is the voluntary nature of participation in recreational activities, and the indisputable fact that danger and physical challenge are basic to the attraction of many sports. After all, no one is compelled to ski an “experts only” slope, go down the Fraser River on a raft, play rugby, or jump off a platform while attached to a bungee cord. The possibility that operator negligence might materially increase the chances of injury in ways the user would not anticipate has not appreciably influenced the law relating to the enforcement of waivers.⁸⁴

7. WHY THE CONTROVERSY?

It is nothing new for users to be required to sign a comprehensive waiver to obtain membership in a sports organization, as part of an application for a pass enabling regular use of a recreational facility or an entry form for competitions, nor is it unusual to encounter waiver terms on admission tickets. The breadth of some waivers now in use is nevertheless controversial.

Increased explicitness in the wording and format of more sophisticated waivers, together with a higher rate of participation in sports that were formerly engaged in only by the more adventurous, is partly responsible for the controversy. A few recent decisions upholding recreational waivers have attracted a degree of publicity, bringing public misconceptions about them into collision with the legal reality.

77. E.g. *Robinson v. Madison*, [1987] B.C.D. Civ. 3080-03 (S.C.); *Moodie v. Perfect Images, Inc.*, (B.C.S.C. 1993, Kelowna No. 4352, unreported).

78. *Supra*, n. 33. In *Dyck*, the Supreme Court of Canada remarked that the operator was a voluntary association, but later decisions of other courts have applied *Dyck* to waivers obtained by commercial recreational operators, without treating this as a ground of distinction.

79. *Delaney v. Cascade River Holdings Ltd.*, (1985) 44 B.C.L.R. 24 (C.A.); *Karroll v. Silver Star Mountain Resorts Ltd.*, (1988) 33 B.C.L.R. (2d) 160 (S.C.).

80. *Delaney*, *ibid.*

81. *Karroll*, *supra*, n. 79.

82. *Blomberg v. Blackcomb Skiing Enterprises Ltd.*, (1992) 64 B.C.L.R. (2d) 51 (S.C.); *Oesko v. Cypress Bowl Recreations Ltd.*, (1992) 95 D.L.R. (4th) 701 (B.C.C.A.).

83. *Knowles v. Whistler Mountain Ski Corporation*, [1991] B.C.D. Civ. 3075.2-01 (S.C.).

84. In *Dyck v. Manitoba Snowmobile Association*, *supra*, n. 33, an accident occurred at the end of a snowmobile race because a race official, acting according to instructions from the association, moved as close as he could to the snowmobiles at the finish line in order to enhance the entertainment value of the race for the spectators. *Dyck*, a 19-year-old driver, swerved to avoid him, struck a barrier and was severely injured. The Supreme Court of Canada did not regard the role played by the race official in causing the accident as something that took the facts of the case outside the logical relationship between the nature of the activity and the reasonableness of the waiver. In *Crocker v. Sundance Northwest Resorts*, *supra*, n. 33, the Supreme Court noted that the operator had materially enhanced the risk to the plaintiff by allowing him to compete when obviously intoxicated, but the waiver defence was not rejected on this basis. The ground for rejecting it was that the waiver in the race entry form was not adequately drawn to the plaintiff's attention.

A misconception that emerged repeatedly in the responses to the Consultation Paper, as well as in informal consultation, is that waivers are “not worth the paper they are printed on.” This mistaken belief is held not only by members of the general public, but even among some commercial operators and recreational organizations. It probably stems from a misunderstanding of “ticket cases” in which unsigned exclusionary terms were not enforced because the consumer’s attention was not adequately drawn to them. It was common in the past to print exclusionary terms on the back of tickets in virtually unreadable print, and examples of this practice are still found.⁸⁵

Similarly, it is often thought that waivers are intended to protect the operator and its employees only against liability for fortuitous accidents, not against their own negligence. The reference to the operator’s own negligence is sometimes buried in the middle of a lengthy paragraph, for obviously disingenuous reasons.

Another misconception is that waivers cannot afford protection in the event of “gross negligence,” which is true in some jurisdictions but not in British Columbia, apart from instances where liability is governed by specific legislative provisions that distinguish between degrees of negligence.

Without waivers, operators and their insurers believe they lose control over their exposure to liability. Negligence law is based on judicial decisions that are highly dependent on individual fact patterns. They do not provide operators with a coherent body of practical rules that, if followed, will avoid entanglement in personal injury litigation. The cost of defending all personal injury claims, even those that are dismissed, consumes premium revenue and impairs the ability of insurers to create reserves to meet real liabilities.

Despite the importance attached by industry to waivers, and the increased use of explicit language, it is still easy to find waivers and ticket terms in use that are written in complex, legalistic “boilerplate” that most users will not read or take the time to try to understand, although their lives may be drastically affected by it.

85. E.g., *Dixon v. R. in Right of B.C.*, [1980] 6 W.W.R. 406 (B.C.C.A.); *Wilson v. Blue Mountain Resorts Ltd.*, *supra*, n. 8.

A. Alternatives to Tort

A threshold question in considering how to resolve dilemmas of risk and liability in recreation is whether it is necessary to continue to rely upon tort at all, especially as legal fault is not present in any event in most incidents of personal injury related to recreation. The liability spectre haunting the recreational sector could certainly be exorcised by a universal scheme of accident and disability compensation, for example. Wholesale replacement of tort as a means of securing compensation for negligently inflicted personal injury does not seem to be a realistic possibility in the short term, however, given the present fiscal plight of governments and popular resistance to further taxation in any form. Even though work-related accidents have long been removed from the tort realm and complete no-fault schemes for motor vehicle accident cases have been or are being established in other provinces, little interest is being shown at official levels in Canada for a comprehensive no-fault accident compensation scheme like that of New Zealand.¹ Indeed, increased attention is being given here to recovery of public funds expended for the care of injured persons from third parties who are at fault.

Can private accident insurance provide the solution? The answer is a qualified yes, with respect to less serious injuries. The success of the All Sport insurance program in containing the overall cost of insurance for many British Columbia amateur sports organizations may be partly due to the fact that under it participants can obtain individual accident coverage at reasonable cost. Despite the fact that income loss is not covered, the availability of periodic disability benefits discourages litigation over less serious injuries at least. Private accident and disability policies which do cover some extent of income loss are more expensive, but can still exert a dampening effect on tort claims.

Recently, however, there have been reports of an increase in subrogated claims brought by accident and disability insurers against third parties allegedly at fault for their insureds' losses. In the past, such claims were apparently infrequent. If it is indeed the case that they are being brought more often, the dampening effect of accident and disability coverage on personal injury litigation would be less pronounced.²

Catastrophic injury stands in a different category with respect to insurability. It is not possible for individual users to insure themselves and their families adequately against the full cost of total permanent disability. Accident and disability policies typically provide benefits limited both in amount and duration. Few, if any, private plans will meet all the needs of a quadriplegia victim over a remaining lifespan of several decades, for example. In order to do so, premiums would have to be set prohibitively high. It is commonly thought that long-term care is available as of right under the public health care scheme, but this is a fallacy. Provincial long-term care program services are not provided when the victim is entitled to

1. In New Zealand a public injury compensation scheme was introduced in 1974. It abolished the right to sue for personal injury in tort with the right to claim benefits under the scheme without a determination of fault. It also supplanted earlier separate schemes for workers' compensation, motor vehicle accidents, and criminal injuries compensation. The scheme is funded through employer and employee contributions, a tax on the earned income of the self-employed, by a motor vehicle licence levy, and from general revenues. See *Accident Rehabilitation and Compensation Insurance Act 1992*, S.N.Z. 1992, no. 13.

2. The reputed proliferation of subrogated claims by first-party insurers and benefit payers may be in reaction to *Ratych v. Bloomer*, [1990] 1 S.C.R. 940. In that decision the Supreme Court of Canada appeared to affirm the ability of a benefit payer to recover benefits paid to a recipient from a third party responsible for the loss if a valid right to subrogation can be made out on any recognized basis, including a contractual one. A subsequent decision (*Cunningham v. Wheeler*, (1994) 88 B.C.L.R. (2d) 273 (S.C.C.)) preserving the "collateral benefits rule," which prevents benefits in the nature of insurance from being deducted in computing personal injury damages, may also encourage disability benefit payers to pursue claims in the name of the recipient.

compensation from a third party.³ If third party liability is thought to be present, patients are encouraged to sue for the compensation to which they may be entitled at law, so that the need for public expense is minimized.

Is a sectoral scheme like worker compensation feasible as a means of dealing with recreational injuries? The risk pool (*i.e.*, anyone taking part in physical recreational activity in British Columbia) might be large enough to provide a financial base, but there would be huge difficulties in the assessment of activities and individuals, and in collecting contributions. While some recreation is highly organized, much is individual in nature or organized very informally. Individual risk perception is rarely accurate enough for self-assessment by recreationists. Many recreational organizations are very informal, unincorporated voluntary associations. The more highly organized ones already participate in insurance programs. Those with excellent claims experience would probably not look upon a scheme in which they might have to participate with groups having less desirable claims experience as an improvement over the present situation. Considerations like these led the New Zealand Law Commission to reject a proposal to supplement the funding of that country's universal accident compensation scheme by separate assessments on participation in sports and informal recreational activities.⁴

Granting legislative immunity from liability to industries perceived to be more exposed to litigation is not an answer either, since it will constantly engender demands for protection from other interests. Rafting outfitters and riding stables, for example, can make virtually as strong a case as the skiing industry that much of the risk in their sports is beyond their control.

Although very few recreational injuries result in litigation, a residual role for tort will likely be preserved for the time being by the inability of personal accident and disability insurance to meet the full needs of the minority who suffer catastrophic harm, the drive to contain public expenditure on long-term care, and the new interest shown by disability insurers in subrogated recovery. Ways need to be found, therefore, to deal with the problems identified in Chapter III within the fault-based system.

B. The *Occupiers Liability Act* - Inherent Risk and Gratuitous Entry

1. *WALDICK v. MALCOLM* AND THE INHERENT RISK DEFENCE

There is no dispute that the concept of inherent risk is equally as important in the area of occupier's liability as in general negligence law. In the Consultation Paper we tentatively proposed that the uncertainty surrounding the continued applicability of inherent risk under the *Occupiers Liability Act*⁵ after *Waldick v. Malcolm*⁶ be removed by enacting that anyone entering premises to take part voluntarily in a recreational activity be deemed to "willingly accept" the inherent risks of the activity.⁷ By virtue of section 3(3) of the Act, the occupier would then be relieved of a duty of care towards the entrant to make the premises reasonably safe in respect of those risks. Only the basic and self-evident obligation not to cause wilful

3. The provincial policy has been summarized thus: "Long-term care program services are not provided where third party liability is established."

4. New Zealand Law Commission, *Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (NZLC 4, 1988) 73-74.

5. R.S.B.C. 1979, c. 303.

6. [1991] 2 S.C.R. 456.

7. See Law Reform Commission of British Columbia, *Consultation Paper No. 70: Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (1993) 56.

harm or act with reckless disregard for the entrant's safety would remain. This proposal received approval from most correspondents.

As the term “inherent risk” has a well-developed meaning at common law, the tentative proposal contained no definition. Some correspondents urged that one be included, however. Having had the benefit of their commentary, we agree that the common law meaning of “inherent risk” should be codified in the provision.

The Commission recommends:

1. (a) *Persons who enter premises to participate in a sport or other recreational activity should be statutorily deemed to have willingly accepted the inherent risks associated with that sport or activity for the purpose of section 3(3) of the Occupiers Liability Act.*

(b) *“Inherent risk” in paragraph (a) should be given the following definition:*

“inherent risk” means the possibility of physical injury to a participant or spectator, incidental to and inseparable from a recreational activity, that cannot be eliminated by the exercise of reasonable care without fundamentally changing the nature of the recreational activity.

2. GRATUITOUS USE OF LAND FOR RECREATIONAL PURPOSES

It is understandable why private landowners and Crown tenure holders may fear that they will be exposed to unknown liabilities if they allow unrestricted entry to recreationists.⁸ It is unrealistic to expect an occupier who is unaware of the location or even of the presence of recreationists to protect them from hazards related to activities such as logging and mining. While section 4(1) of the *Occupiers Liability Act* allows the occupier to post warnings that entry is at the recreationists' own risk, signs cannot be posted on wilderness lands in enough places.

to ensure adequate warning to all entrants.

Encouraging outdoor recreation and development of the Province's recreational potential are central elements of public policy in British Columbia, pursued by successive governments. Through their umbrella organization, outdoor recreationists have expressed a willingness to assume the risk of hazards on the lands and waters they cross in return for being allowed greater access. While legislators should be careful to avoid reviving the unwieldy distinctions between categories of entrants that were a feature of the former law of occupier's liability, relaxing the occupier's duty of care towards gratuitous recreational entrants will probably receive wide acceptance in British Columbia as a means of encouraging more private and public occupiers to grant access. It has been done in Ontario,⁹ in England,¹⁰ and in many American states.¹¹

Such a change would fit easily into the scheme of the *Occupiers Liability Act*. The Act already provides in section 3(3) that occupiers have no duty of care towards trespassers on

8. The recent decision of *Tutinka v. Mainland Sand & Gravel Ltd.* (B.C.C.A., Van. No. CA015838, 20 December 1993) lends considerable credence to the fears of landowners and tenure holders regarding the possible extent of their liability towards trespassers: *see* Chapter III, n. 37.

9. *Occupiers Liability Act*, R.S.O. 1990, c. 2, ss. 4(1),(3),(4).

10. *Occupiers Liability Act 1984*, c. 3.

11. *E.g.* Washington RCW 4.24.200, 210; Wisconsin s. 895.52; N. Dakota, s. 53-08-01; S. Dakota, ss. 20-9-13; 20-9-16.

enclosed agricultural land to make the land reasonably safe for them, but only to refrain from doing them wilful harm or act with reckless disregard for their safety. In the Consultation Paper, we tentatively proposed that this relaxed duty of care, rather than the common duty of care to make the premises reasonably safe, should apply to gratuitous recreational entrants on land not specifically designated by the occupier for recreational use. Invited guests would not fall into this category, but merely permitting recreationists to use the premises or failing to prevent entry by recreationists would not amount to an invitation. This proposal received almost universal approval by those who responded to the Consultation Paper. Accordingly, we restate it here as a recommendation.¹²

The Commission recommends:

2. Persons who, for a recreational purpose, gratuitously enter premises that have not been specifically designated for recreational use, other than persons who do so at the invitation of the occupier, should be deemed to willingly accept the risk of the hazards present on the premises for the purpose of section 3(3) of the Occupiers Liability Act. The fact that an occupier does not prevent or actively discourage entry for recreational use should not amount to an implied invitation.

C. Alpine Skiing

1. STATUTORY IMMUNITY FROM CIVIL LIABILITY FOR SKI AREA OPERATORS?

Alpine skiing is the most important recreational industry in the Province, accounting for a large volume of tourism. It is highly dependent on weather, which means that its profitability varies greatly from one season to the next. Maintaining insurance costs at a tolerable level, along with other operating expenses, is essential to the health of the industry. Despite this, the industry's argument that it stands in a unique position in relation to risk and liability issues must be approached with caution.

The skiing industry's stated position is that inherent risk in skiing is of an entirely different nature than, for example, the chance of being hit with the puck in hockey.¹³ It seeks a special legal framework for skiing characterized by what amounts to a restoration of the "voluntary assumption of risk" (*volenti*) defence in its nineteenth century form, before apportionment of fault for contributory negligence was adopted.

The interaction of sections 1 and 8 of the CWSAA draft *Ski Area Safety Act* would largely accomplish this because it prevents any consideration of the circumstances surrounding the kinds of mishaps listed in section 1. The CWSAA draft statute would confer a much wider degree of immunity than any of the American legislation. It would, for example, exclude liability even where a breach by the operator of a statutory duty caused a skiing mishap.

We doubt that every recreational skier has the same expectations as someone prepared to ski in the backcountry. The sport is aggressively marketed. People of all ages and capabilities are encouraged to ski, but only a very small minority of those on the slopes of

12. It may be noted that implementation of this recommendation would reverse the result of *Tutinka v. Mainland Sand & Gravel Ltd.*, *supra*, n. 8 (and see Chapter III, n. 37.) That case illustrates why it may be necessary, after twenty years of experience with the *Occupiers Liability Act*, to examine how well it has functioned in application and, in particular, whether it forces the net of liability to be cast too widely.

13. An assertion made in the CWSAA response to the Consultation Paper (pp. 10-11).

British Columbia ski areas would ever contemplate downhill skiing in the backcountry, where there are no hazard markers, no lifts, no lights, and no ski patrol. All these features were introduced to induce a wider portion of the public to ski. Without them, skiing would not have attained its present popularity and the skiing industry would not have grown to its present extent. It would still consist today of small, guiding-type operations like those seen in heli-skiing.

Despite the difficulties of applying negligence principles to an alpine environment, and the laudable efforts of the industry to encourage proper ski training, some weight has to be given to the representation that designated areas on a mountain are *suitable* for skiing. This cannot mean those areas are “safe” in the same sense as a basketball court, or that anyone should expect a mountainside to be as even and unobstructed as a roadway, but careful, vigilant recreational skiers exercising proper consideration for their own and others' safety on designated runs do not expect to be entrapped by unusual hazards which the operator knows of and can warn against, but which the skier otherwise has no chance of avoiding.¹⁴ The rarity of such an occurrence does not justify removing any possibility of redress when it does occur. We are not prepared to conclude that the character of skiing demands that operators be granted a degree of immunity from legal responsibility that no other form of commercial enterprise enjoys.

Introducing a special regime of civil liability for one recreational industry would inevitably lead to demands for similar concessions from others. Other jurisdictions in which skiing plays a prominent economic role, such as Switzerland, have not found a need to give the skiing industry a blanket exemption from the responsibilities of occupiers of land.¹⁵ The skiing industry, like other recreational operators, will obtain protection by the deemed acceptance of inherent risk under the *Occupiers Liability Act*.¹⁶ This is not to say that the current application of the *Occupiers Liability Act* to ski areas should not be modified to better reflect the realities of their semi-wilderness setting. This is the subject of recommendations made later in this Chapter.

The Commission recommends that:

3. Sections 1 and 8 of the draft Ski Area Safety Act proposed by the Canada West Ski Areas Association should not be enacted.

14. An Austrian court defined what it considered would amount to an unusual hazard on a ski run in this fashion in 1983:

[Translation:]

A hazard is to be understood as atypical when, having regard to the appearance and posted degree of difficulty of the run, it would be unexpected and difficult to avoid even for a responsible skier.

(Landesgericht Innsbruck, 9 May 1983.)

15. The Consultation Paper noted (p. 65, n. 31) that the Commission had been told Swiss skiing operators are exempt from any civil liability for skiing mishaps. Subsequent communication with the Swiss Ministry of Justice indicated this is not the case, and that they are subject to obligations common to those in a position to exercise control over land.

16. See Recommendation 1, *supra*.

2. THE SKIER RESPONSIBILITY CODE AND RELATED PROVISIONS

Some portions of the CWSAA's *Ski Area Safety Act* commend themselves as worthwhile safety measures. Enactment of the *Skier Responsibility Code* would emphasize the public importance of responsible conduct in a sport having great potential for serious or fatal injury. Sections 3 and 4 of the CWSAA draft statute are largely reflective of the existing common law in British Columbia, but enacting them would highlight the importance of the principle of individual accountability in skiing. For the sake of clarification, however, they should be accompanied by a provision affirming that the duties they impose to ski under control and within the limits of one's own ability do not excuse other persons from their own share of legal responsibility for a mishap.

Whether violation of the Code should be a provincial offence is another question. The Canada West Ski Areas Association has taken the position that a breach of the Code should be an offence. The RCMP, however, are not prepared to allocate policing resources to enforce a skiing safety code.¹⁷ If ski patrollers were designated as enforcement officers, the discretion to take an educative rather than a punitive approach to violators in individual cases would be greatly diminished. The patrollers would have no choice but to follow the procedures under the *Offence Act*, issuing violation tickets or appearance notices when violations were detected. Some skiers might welcome this heightened enforcement role. Others who ski equally responsibly would not think the image of patrollers issuing speeding tickets and making random checks for ski brakes would enhance their enjoyment of the sport. In the Consultation Paper, comment was invited with respect to the means of enforcing the *Skier Responsibility Code*. The responses received convince us that opinion is greatly divided as to whether it is appropriate to bring the quasi-criminal machinery of the *Offence Act* to bear on the problem of irresponsible skiing.

Our conclusion is that it is undesirable to make breach of most provisions of the *Skier Responsibility Code* an offence. Instead, the ski area operator should be given statutory authority to enforce the Code by revoking the offending skier's ticket or pass and refusing re-admittance to the ski area, either on a temporary or permanent basis, at its discretion. This would not prevent an operator from enlisting the aid of the police to deal with misconduct of such an extreme nature as to amount to a Criminal Code violation.¹⁸

The obligation to identify oneself and provide an address when involved in a collision under s. 5(g) stands in a different light, however. It is comparable to the requirement under section 62(1) of the *Motor Vehicle Act* to provide name and address to an investigating peace officer when involved in an accident. Since the information may obviously be used against the interests of the person providing it in court proceedings, the obligation to provide it is not capable of being effectively enforced without some penal sanction. Failure to provide it should be an offence, attracting the sanctions of the *Offence Act*.¹⁹

Part of the value of requiring skiers involved in collisions to identify themselves lies in reducing the temptation to claim against a ski area when a skier allegedly at fault for an

17. Letter from Chief Supt. M.J. Johnston, Officer in Charge of Contract Policing, E Division, to Law Reform Commission Chair A.L. Close, Q.C., 14 February 1994.

18. There has been one conviction in British Columbia for criminal negligence arising from a skier-skier collision: *R. v. Wilcox*, (B.C. Co. Ct., 1986, Vancouver Registry No. CC860401).

19. Section 4 of the *Offence Act*, R.S.B.C. 1979, c. 305, states that conviction for a provincial offence for which no specific penalty is imposed carries a fine of not more than \$2000, imprisonment for not more than six months, or both.

accident cannot be identified. For this reason, an injured skier, or his or her representative, should be entitled to obtain from the operator the names and addresses of other persons involved in the accident, together with those of witnesses, when this information is available.²⁰ The ski patrol should be encouraged to obtain the information, but first aid to the victim may have to take priority. The accident may not have been witnessed. The guilty party may abscond. Failing to identify persons involved in the accident or witnesses should not give grounds for any claim against the operator.

We would make two additions to the *Skier Responsibility Code*. The first addition would be to add to paragraph 5(c) a clarification that, before entering a run or beginning to ski downhill, a skier is under a duty to look uphill and downhill to check for skiers approaching from above or who are present below. This was mentioned during consultation as a measure that would prevent many skiing accidents.

The second addition would be to add a reference to ski brakes to paragraph 5(d). Ski brakes are generally considered to be superior to ski retention straps.

The Consultation Paper invited comment on the question whether snowboarding needed to be physically segregated from conventional downhill skiing. The consensus appears to be that physical segregation of the two activities is not necessary, but that common snowboard manoeuvres can be hazardous in close proximity to skiers because of the different kinesthetics. This can be overcome by exercising caution and consideration for the safety of others in the area.

The Commission recommends:

4. Sections 3 and 4 of the CWSAA draft Ski Area Safety Act should be enacted, with the addition of a provision indicating that the duties imposed by those sections on a skier do not relieve any other person of liability for that other person's own conduct.

5. Sections 5, 6 and 7 of the CWSAA draft Ski Area Safety Act should be enacted, with the following additions:

(a) Section 5(c) should include a requirement to look uphill and downhill to check for the approach or presence of other skiers prior to entering a run;

(b) Section 5(d) should include a reference to ski brakes as an alternative to ski retention straps;

(c) Section 7 should refer to "costs reasonably incurred" instead of "all costs."

6. A ski area operator should be empowered to enforce the Skier Responsibility Code set out in section 5 of the draft Ski Area Safety Act by revocation of the ski area admission ticket or pass, and by temporary or permanent expulsion from the ski area. A breach of the Skier Responsibility Code or other skiing safety provisions, except the obligation to provide one's name and address if involved in a skiing accident, should not be an offence.

20. This addition would correspond to s. 61(1)(7) of the *Motor Vehicle Act*.

7. A person injured in a skiing accident, or those representing him or her, should be able to obtain from the ski area operator the name and address of another person involved in the accident and those of witnesses, if available. The operator should exercise its best efforts to obtain this information, but failure to obtain it should not give the injured person any cause of action against the operator.

3. STATUTORY DUTIES OF SKI AREA OPERATORS

In Chapter III we noted that section 2 of the CWSAA draft *Ski Area Safety Act* would impose a minimal list of requirements on operators in comparison to American and Québec skiing legislation. A definitive list is desirable not only from a safety standpoint, but also as a means of setting the standard of care to be applied when questions of liability arise. In our view, the uncertainty created by the lack of an objective criterion against which to measure an operator's discharge of the occupier's common duty of care can only be removed by the existence of an authoritative statement of good operating practice. It is not essential that such a statement be incorporated into legislation in order to be useful in any future litigation,²¹ but enacting it would increase the likelihood of it being treated as defining the standard of care.

In the Consultation Paper, no specific proposal was made with respect to operator duties and comment was invited on the matter. For the sake only of illustration, alternative lists largely drawn from legislation existing elsewhere were set out in a comparative table. One list also incorporated some long-standing suggestions of the Ski Safety Subcommittee of the British Columbia Medical Association. This approach was taken because the Law Reform Commission has no special expertise in skiing safety. Comment was also invited on whether a body to provide advice on skiing safety matters should be established, and the form and mandate such a body should have.

None of the responses advocated retention of section 2 of the CWSAA draft Act in its original form. Some correspondents would be satisfied with the single addition of a requirement to maintain a ski patrol with first aid capability. Others suggested more extensive requirements. The CWSAA now opposes legislation on operating practices, favouring standardization within the industry instead.²² The CWSAA opposed the establishment of an advisory body, but the concept received some support from elsewhere within the skiing community.

Examples of what might be included in a statutory list of operator duties are found in Appendices D and E, but none are the subject of a formal recommendation in this Report. A model of what can feasibly be expected of ski area operators should be developed by a different body having expertise in ski area management and safety. This body should comprise representation from the skiing industry, the Canadian Ski Patrol, the Canadian Avalanche Association, sports medicine, the insurance industry, risk management professionals, and recreational skiers. With this composition, a balanced, realistic, and credible set of standards is likely to emerge.

21. *Waldick v. Malcolm*, *supra*, n. 6, holds that custom must be proved by evidence and is not in itself decisive with regard to the standard of care under the *Occupiers Liability Act*, particularly if it is not reasonable in light of the occupier's positive statutory duty, but the case is in no way an authority that proven trade custom is irrelevant to the issue. There are numerous authorities in which customs or norms within a recreational industry have been accepted as the standard of care: e.g., *Kryta v. Funland Enterprises Ltd.*, (1984) 57 B.C.L.R. 32 (S.C.); *Norak v. TIW Industries Ltd. and Doyle*, (1986) 42 Alta. L.R. (2d) 370 (Q.B.); *MacLeod v. Roe*, [1947] S.C.R. 420, [1947] 3 D.L.R. 241.

22. CWSAA Response to the Consultation Paper, p. 44.

Once formed, such a committee should have a continuing existence, whether or not it has a formal legal structure. In this way, operating practices could be periodically re-evaluated as the sport continues to develop. We believe that it is in the best interests of both the skiing industry and the skiing public that the recommendations of this advisory body should be given legislative force in the form of a regulation. This would add to their authority, and tend to eliminate the uncertainty now surrounding the standard of care applicable to an operator of a ski area.

The Commission recommends:²³

8. (a) A definitive list of duties of ski area operators in relation to safety should be developed and promulgated by an advisory body having expertise in skiing safety.

(b) The skiing industry, recreational skiers, the Canadian Ski Patrol, the Canadian Avalanche Association, insurers engaged in insuring risks associated with skiing, sports medicine, and risk management professionals should be represented in the composition of the advisory body. The recommendations of the advisory body should be implemented by regulation.

4. MODIFICATION OF THE OCCUPIER'S DUTY OF CARE IN RELATION TO SKI AREAS

As it now stands, the common duty of care under section 3(1) of the *Occupiers Liability Act* to make premises reasonably safe applies throughout the entirety of a ski area, though large portions of it may be closed or designated out of bounds. While it is unlikely that a court would ever hold that the same standard of care applies to these zones as to designated runs and public access areas, the matter should not be left open to argument.²⁴ Anyone who ignores a run closure or who deliberately skis in areas between designated runs presumably realizes that the operator does not represent them as being suitable for skiing, that they are not patrolled, and that dangerous conditions may be present. Operators should not be under an obligation to make areas reasonably safe for skiing, or any other purpose, if they are not intended to be travelled at all.

The extent of an operator's obligations toward those skiing off designated runs should be fixed no higher than the minimal level specified in sections 4(c) and (d) of the Act: the duty not to cause intentional harm or act with reckless disregard for their safety. Case law antedating the Act indicates that a trespasser's presence must be known to the occupier in order for the occupier to be found to act with reckless disregard for the trespasser's safety.²⁵

Expansion of occupier's liability to the immediate environs of a ski area should also be foreclosed. Apart from indicating the location of the outer boundaries adequately, a ski area operator should have no legal responsibility whatsoever as an occupier towards those who venture beyond them.

The Commission recommends:

23. Section 2(b) of the *Law Reform Commission Act*, R.S.B.C. 1979, c. 225, empowers the Commission to recommend that an agency or committee other than the Commission itself examine a particular branch of law.

24. In *Simms v. Whistler Mountain Ski Corporation* (B.C.S.C. 1988, Van. No. A960937); *aff'd* [1990] B.C.D. Civ. 3124-01 (C.A.) the trial court stated that the defendant ski area operator could expect skiers to go off the groomed portion of runs to some extent, as the ski area catered to all levels of skiing expertise. Extending this reasoning to off-piste skiing in general would present alarming possibilities.

25. See Chapter III, n. 22. An example of reckless disregard for the safety of off-piste skiers might be to deliberately discharge an avalanche accumulation of snow into an area where they were known to be present.

9. It should be expressly enacted that the common duty of care of a ski area operator under section 3(1) of the Occupiers Liability Act is not owed to persons

(a) on runs marked as closed;

(b) in portions of the ski area which, though situated within its outer boundaries, are designated as out of bounds;

(c) who knowingly ski outside the outer boundaries of the ski area.

10. A ski area operator should owe only the relaxed duty of care specified in section 3(3)(c) and (d) of the Occupiers Liability Act towards persons in areas mentioned in paragraphs (a) and (b) of Recommendation 9.

D. Waivers in Recreation

1. GENERAL

Little objection can be raised against an operator having an additional contractual defence where the injury complained of is attributable wholly to the victim's own lack of care or to the risk inherent in a sport. Most of the recreational waivers we have examined, however, go well beyond this. They are intended to protect operators from the consequences of acts and omissions that would be characterized as negligent, and if properly obtained they are effective in doing so. For insurers, the obvious value of waivers is their ability to discourage claims.

Cogent arguments can be mounted both for and against comprehensive waivers. Some are briefly canvassed here. A lengthier discussion is found in the Consultation Paper.²⁶

2. OPPOSING VIEWS

(a) Health of Recreational Industries

Recreational operators and their insurers maintain the contractual defence provided by a comprehensive waiver is vital to avoid being caught in a constant upward spiral of cost and potential liability. Improvements in equipment and industry practices that increase user safety may, paradoxically, bring about a greater chance of litigation. This is because they raise users' expectations of safety and reduce their awareness of risk. As a consequence, users take less care for their own safety.²⁷ The practice of having users assume the risk of "the operator's own negligence" loses some of its repugnance when it is remembered that courts invariably act with the benefit of hindsight in deciding whether harm should have been foreseen and precautions taken. The unpredictability of outcomes when day-to-day decisions are called into question in litigation forces operators and insurers to anticipate judicial opinion.

26. Pp. 69-74.

27. For an industry source expressing this viewpoint, see Segal, "The Dilemmas of Risk Management," *Ski Area Management* (Nov. 1989) 63, 64.

Comprehensive waivers are a pragmatic response to the uncertain extent of potential liability. They keep insurance affordable, and sometimes keep it available.²⁸ Any interference with the ability to insist that users waive all rights of action will certainly cause insurers now covering sports-related risks to “reassess their position.” Without the control over exposure to liability that they provide, premiums cannot be set with confidence. If coverage is withdrawn, recreational operations may close and the tourism potential of the Province could be damaged.

(b) Protection of the Public

Users patronizing a recreational facility or participating in a commercially organized activity expect to encounter an environment or to be supplied equipment that, while clearly not risk-free, is at least suitable for the activity in question. A fitness centre with unsafe apparatus, a marina renting craft that are unseaworthy,²⁹ or a rafting outfitter supplying sub-standard lifejackets, acts contrary to that expectation. Users may understand a waiver to mean that if they injure themselves by misusing the apparatus, steering a rented boat into a rock, or falling out of the raft, they have no claim against the operator. They can readily understand this. But they would likely be surprised to learn that the form they have signed or the ticket they are given will release the operator from any liability to compensate their dependents if they drown because they have been supplied with an inadequate lifejacket or an unsteerable and leaking boat. If made aware of the actual danger in which the operator places them in such a case, few would be foolhardy enough to proceed.

Clearly, the legal system should not protect unrealistic safety expectations. But an expectation on the part of the consuming public that an operator will not expose them to danger that is excessive, given the essential characteristics of the particular activity in question, does not fall into this category. When a comprehensive waiver is in place, there is no legal duty on the operator to meet that basic level of care.

Advertising by recreational industries is characterized by powerful images emphasizing adventure and enjoyment. Not surprisingly, we have come across none that places an equal emphasis on danger. One response by a skiing operator to the Consultation Paper in fact stated:

The ski industry, and [operator] in particular, spends a great deal of money, time and effort to maximize participation in the sport. Much of the promotion focuses on the appeal of the sport - including its challenges, alternatives (such as snowboarding), the healthy outdoor experience, and the social aspects. *The real possibility of serious injury is not exactly in keeping with this marketing effort.* [Italics added.]

The response went on to say that waivers serve to bring home the possibility of injury.

The messages of health, adventure, and enjoyment these images and words convey to prospective users cannot be ignored in any fair discussion of comprehensive waivers, however. If users are presented with a waiver at precisely the point when their attention is most focused on the anticipated recreational value of the experience offered, the subtleties of a legal document in the guise of an application form or an admission ticket will not be

28. An obvious question is why operators insure at all when they are protected by a comprehensive waiver. The answer is equally obvious: liability coverage is maintained in order to meet cases in which, for one reason or another, the waiver cannot be enforced.

29. See “Chartering boat can land you in hot water, coast guard warns” *Vancouver Sun*, 9 May 1994 pp. B1-B2.

grasped. The argument that waivers are a counterbalance to marketing strategy is self-serving.

The effect of comprehensive waivers in recreation reaches beyond that of a risk-allocating arrangement under a private business transaction. Where an injury is negligently inflicted, the effect of a comprehensive waiver is to transfer the associated costs to society. In the case of serious or catastrophic injury, the cost of initial treatment, rehabilitation, continuing care, and temporary or permanent loss of the victim's productive capacity, is a significant burden. The present value of the cost of lifetime care for a quadriplegic, for example, generally exceeds \$1,000,000. When liability is present, the loss is likely to be met from insurance funded from the operator's gross revenues, and therefore ultimately by users. In this way, the risk is spread across the user population, but not across society at large.

The skiing industry's response to this observation in the Consultation Paper was to point to the rarity of instances in which tort recovery is possible and to suggest that a better way to relieve the social burden would be to increase the health care premiums of those taking part in hazardous sports.³⁰ Differential premiums may indeed be justified, but this argument does not come to grips with the fact that users ultimately fund both the health care scheme and the operator's liability coverage. The waiver bars access to insurance funded from admission revenue, which operators carry precisely in order to meet instances in which the harm is not fortuitous but is found to have been negligently caused.

3. A COMPROMISE BETWEEN THE OPPOSING VIEWS

In the Consultation Paper we discussed several alternative approaches to the matter of recreational waivers and described the limits that some other jurisdictions and legal systems place on the ability to contract out of liability for personal injury and death.³¹ That lengthy discussion is not repeated here. What is repeated here is the attempt to chart a course between the two diverging, but equally well-founded, views of comprehensive waivers.

The Consultation Paper explained why we rejected the complete prohibition on contractual exclusion of liability for bodily harm that is a feature of a number of other legal systems, and why we rejected a prohibition on contracting out of liability for negligence as being impractical.³² We also rejected the approach of the English *Unfair Contract Terms Act 1977*,³³ which subjects exclusionary terms to a test of reasonableness, on the ground that it would encourage speculative challenges and make contractual relations far too uncertain.

Our tentative conclusion in the Consultation Paper was that the ability to contract out of liability should be restricted only in relation to risk that could be classified as exclusively operator-controlled.

Our reasoning was, firstly, that where one party has the ability to control a risk and another has none, it is unfair to impose the risk on the party who has no influence over it. Preventing operators from contracting out of liability for the narrow domain of risk within their

30. CWSAA response to the Consultation Paper, pp. 14-15.

31. Pp. 63-68.

32. *See* Consultation Paper No. 70, pp. 63-68, 74-78.

33. 1977, c. 50.

exclusive control satisfies a need for a minimum level of public protection without exposing operators to unlimited potential for liability.

Secondly, an operator should not be forced to contest claims for injuries sustained due to fortuitous risk stemming from the nature of the activities in question (inherent risk).

Thirdly, individual user behaviour is unpredictable, especially during intense physical activity. Many eventualities that may take place are simply unforeseeable. Others may be foreseeable, but the chance of their occurrence may be slight. The domain of risk that is influenced by the judgment of both the user and operator is very wide. Under the general law of negligence, liability may or may not be present when accidents arise from a cause within this grey area, but finding out through litigation is costly to all concerned. In this domain of risk a legitimate trade-off exists between retention of full legal rights on the one hand, and lower prices and preservation of recreational opportunity on the other. It should therefore be open to contractual allocation between the operator and the user.

We tentatively concluded that sources of risk that were outside the ability of the user to influence, but within that of the operator, should be set out in legislation so that they would not have to be identified gradually through litigation. Seven categories were listed in the Consultation Paper as being operator-controlled and therefore non-disclaimable.

The broad outlines of this approach met with approval from correspondents from within the legal community. Industry and insurance correspondents urged that the ability to contract out of liability remain entirely unrestricted. Responses from individuals were varied, with a majority expressing approval in principle. (Few individuals commented on details of the wording of the tentative proposal.) One important sports association, a frequent renter of recreational facilities, urged that the tentative proposal be extended to all public and private facilities.

We remain of the view that the policy of restricting the ability to contract out of liability only to the minimum extent necessary to protect the public interest is sound. Accordingly, the recommendation set out below follows the approach taken in the Consultation Paper, though details have been revised in light of comments received. The examples given in non-italicized print are for explanation only and are not part of the recommendation.

The Commission recommends:

11. A commercial recreational operator should not be able to exclude or limit its liability for personal injury or death arising from the following sources of risk:

(a) malfunction of mechanical equipment and recreational apparatus under the control of or maintained by the operator, including vehicles, other than malfunction resulting from misuse by a user;

(Example No. 1: A user of a fitness centre is injured by faultily maintained apparatus. The apparatus is handled by users when they are actually engaging in a workout, but users are not allowed to alter the machines in any way, except to adjust the weight or tension on the machines for the purpose of their workouts. Maintenance of the apparatus is carried out by the fitness centre, and it alone decides when the machines need to be overhauled. In response to the user's claim for compensation, the fitness centre points to a posted notice and a clause in its membership agreement that says it is not responsible for any injury to users. The notice and the clause in the signed agreement would be invalid to the extent that it applied to equipment malfunction. The risk is in the non-disclaimable category.

Example No. 2: A chairlift malfunction immobilizes the chairs for several hours. A number of skiers riding the lift at the time of the malfunction suffer frostbite. Since the chairlift is an item of mechanical equipment that users are not authorized to operate themselves, the ski area cannot rely on a notice or term in a signed waiver excluding its liability for this accident. This does not mean that the ski area operator will necessarily have to pay any damages, because it may not have been negligent. The malfunction may have occurred despite all proper maintenance and safety precautions. It only means the frostbitten skiers are not automatically barred from attempting to prove that chairlift maintenance was carried out negligently.³⁴

(b) unsafe operation of mechanical equipment or recreational apparatus, including vehicles, by the operator or its employees;

(Example: A ski area employee operates a snowmobile recklessly at a high speed. A skier, who has not been keeping a sufficient lookout and is moving too fast, cannot get out of the way in time and is run over. The negligence of both the employee and the skier have contributed to the accident. The skier sues, and the ski area operator attempts to have the claim dismissed on the strength of a condition printed on a lift ticket that it is not responsible for injuries resulting from “the inherent risks of skiing,” defined to include its negligence and that of its employees. The operator cannot rely on the printed condition, and the claim proceeds. Liability is apportioned 50-50. The skier recovers half the damages that would have been awarded but for the contributory negligence.)

(c) unsafe aspects of the structure and condition of an indoor recreational facility that directly affect the safety of users when actually engaged in a recreational activity for which the recreational facility is designed or intended;

(Example: During an aerobics class in a fitness centre, someone trips on a loose floorboard and falls, suffering a broken wrist. A claim by the injured person would not be barred by a term printed on the registration form stating that users waive all claims and release the operator from all liability for anything that may happen to them while on the premises.)

(d) failure by the operator of an outdoor recreational facility to maintain commonly accepted conditions or standards of demarcation, signage, lighting, and monitoring of user activity, for outdoor recreational facilities of comparable size and type;

(An operator of a facility for outdoor recreation may not have the same degree of control over conditions in it as the operator of an indoor facility. It is possible to meet commonly acceptable standards, however.)

Example No. 1: A golf course does not post any signs indicating the location of its driving range, which is some distance away from the golf course itself. It is usual for golf courses to post such signs. The golf course could not rely on a notice posted at the entrance, stating that it assumes no liability for any accident on the premises, to bar a claim by someone who is hit after accidentally wandering onto the far end of the range.)

Example No. 2: A ski area, like all others, maintains runs on which some hazards are marked, but many are not. Signs are posted at the entrance to the ski area, warning that many obstacles on the mountain are unmarked and the ski area assumes no liability for them. Such notices are commonly, if not universally, found at ski areas. A skier on a mogulled run loses her balance, falls, and sustains a fractured tibia. If the skier sues the ski area, the ski area would be able to rely on the exclusion of liability for unmarked obstacles, since all ski areas have them, it would be impracticable to remove or warn against all of them, and they are commonly accepted as a part of skiing.)

(e) unfitness for normal use, at the time of supply or rental, of equipment or apparatus supplied or rented for use in connection with a recreational activity;

(Members of the public renting sports equipment should be entitled to expect the equipment will be serviceable for normal use.)

34. At the present time, s. 241 of the *Railway Act*, R.S.B.C. 1979, c. 354 would invalidate the exclusionary wording, unless it had been approved by the Minister of Transport or unless s. 241 was not made applicable to the lift permit. Recommendation 11, however, would have the effect that contractual exclusion of liability for mechanical failure should not be possible in any event except to the extent that it is due to misuse by the user. Recommendation 11 and s. 241 of the *Railway Act* can stand together, except that the Minister's power to approve exclusionary wording could no longer be exercised in relation to aerial tramways associated with a recreational enterprise.

Example: A novice skydiver rents a parachute for a practice dive. The parachute has been overused and disintegrates. The novice is killed. The skydiving school would not be able to rely on a form the novice signed releasing it from claims based on its own negligence in order to bar a claim under the *Family Compensation Act*.³⁵

(f) conduct of the operator's employees, acting in the course of their employment, that results in personal injury to or death of a user from the sources of risk referred to in paragraphs (a) to (e);

(Existing law makes an employer liable to a person who suffers injury or loss because of the negligence of an employee acting in the course of employment. Operators should not be able to avoid vicarious liability for their employees' acts or omissions if they affect a risk that is within the category that cannot be imposed on the user. Otherwise, the purpose of categorizing recreational risks would be defeated.)

(g) breach by the operator, or by an employee of the operator, of a specific statutory duty or regulatory requirement relating to safety in a particular recreational activity.

(If operators are allowed to contract out of specific statutory obligations imposed in the public interest, their purpose will be all too easily defeated. Breach of a statute or regulation by the operator or the operator's employees does not of itself entitle the user to sue when injury or loss results.³⁶ But the court may find that the duty or requirement under the statute or regulation represented the standard of care under the circumstances, so that failure to abide by it amounts to negligence if it leads to injury.)

12. A recreational operator should remain able to exclude or limit its liability to adult users for personal injury, death, or damage to property, stemming from risks associated with a recreational activity, other than those mentioned in Recommendation 11.

It should be noted that preventing an operator from excluding liability by contract does not mean the operator automatically becomes liable. It simply means that the claim is not automatically barred by virtue of a waiver or exclusionary term. The operator is free to show it was not at fault.

Apportionment of fault is not ruled out by this approach either. The emergence of an operator-controlled risk may not be the sole cause of an accident. The operator remains free to raise the user's contributory negligence as a defence.

4. COMPREHENSIVE WAIVERS AND RACING

Racing presents some special considerations. Speed and intense concentration make the risk of injury less controllable in racing than in the purely recreational practice of a sport. Sometimes the enhanced danger is the very attraction of a race. Waivers are almost universally required for entry in races, even if they are not insisted upon in connection with non-competitive activity in the same sport. It is safe to say that without the ability to obtain a truly comprehensive waiver, many fewer races would take place. This would be undesirable. The recreational industries would suffer the loss of the promotional value of these events, and the economic benefits associated with them would be lost to communities.

There are always some tacit parameters for a race, however. Racers are not bent on suicide, nor do they set out to cause themselves irreparable harm even when they recognize there is some possibility of it. It is arguable that the operator of the facility where a race

35. R.S.B.C. 1979, c. 120. The *Family Compensation Act* allows a spouse, parent or child of a person who is killed in an accident to recover the resulting financial loss from a person responsible for the death. See Law Reform Commission of British Columbia, *Report on Pecuniary Loss and the Family Compensation Act* (LRC 139, 1994).

36. *The Queen in Right of Canada v. Sask. Wheat Pool*, [1983] S.C.R. 205, 143 D.L.R. (3d) 9.

occurs, or the race organizer, should exercise greater than usual care in preparing for a race to prevent the tacit parameters of tolerable risk from being exceeded.

Some relaxation of Recommendation 11 is nevertheless justified to accommodate the unpredictability of racing. If a competitor has an opportunity to examine the site or facility where the race will take place and agrees to participate under the conditions apparently existing there, it is not unfair to insist that the competitor waive claims based on allegations that those physical conditions are inadequate. A waiver by such a competitor with respect to those conditions can justifiably be given effect, provided that the physical conditions under which the competition is to be run, which we will call the “static conditions,” are not materially altered without the competitor’s knowledge, so as to change the nature of the risk which the competitor agrees to run.

Example No. 1: A cross-country trail bike race is to take place over an extremely challenging course. A racer receives a map of the course several weeks before the race and, on the day of the race, signs a comprehensive waiver when registering. The racer is injured going over a jump on the course. The comprehensive waiver will have the effect of barring any claim against the race organizer, a company expecting to make a profit from the gate receipts and sponsoring the race as part of its promotional efforts.

Example No. 2: The same facts as in Example No. 1, but shortly before the race takes place the organizer decides to move some of the flags marking the course in order to build in another jump to make the course more exciting for competitors and spectators. Competitors are not told of the change. The competitor is injured on the added jump. Under these circumstances, the waiver will not be effective to bar a claim by the injured racer, since the static conditions of the race were altered without giving the racer an opportunity to freely consent to them.

The Commission recommends:

13. Despite Recommendation 11, a commercial recreational operator should be able to obtain a waiver excluding its liability for personal injury or death arising from the physical configuration and condition of the facility or site of a race, if the racer certifies that he or she has had an opportunity to examine the same and is willing to participate in the race. The waiver should not have effect if the configuration or conditions are materially altered without the consent or knowledge of the racer.

5. RISK UNCONNECTED WITH A RECREATIONAL ACTIVITY

The wording of comprehensive waivers used by some recreational complexes or operations extends to any mishap that occurs in the complex or during the commercial relationship between the operator and user, even if it is entirely unrelated to a recreational activity. It may refer, for example, to “any claim of whatsoever nature arising from the use of the facilities of the sports centre.” “Facilities” may be defined so as to cover any of the amenities of the complex, in addition to the sports facilities. A waiver signed in order to obtain a pass enabling regular use of a sports complex might cover a case of food poisoning in the cafeteria, for example. It might also apply to a collision in the parking lot with a vehicle driven by an employee. Users would be surprised to learn this. Their natural assumption would be that the waiver was referable only to sports activities.

In the Consultation Paper we tentatively proposed that operators should have to obtain a separate waiver, on a separate document, if they wanted to exclude their liability for risks that were unconnected with recreation. We also proposed, however, that participation in the recreational activity itself should not be made conditional on signing an extraneous waiver of this kind or acceptance of a similar term. The example given was that of a rafting outfitter

using a waiver that covered not only the rafting trip itself, but also transportation in a van to the embarkation point.

It would be counter-productive for an ordinary restaurant to require all its customers to waive any claim against the restaurant before being allowed to purchase a meal, even though it could do so in theory. The acquiescence shown by users of recreational facilities to exclusionary terms enables their operators to avoid liability in situations where it would not be feasible for other businesses to do so, without the users being aware they are giving a release for liability for injury or loss that has nothing to do with participating in any sport or with being a spectator. If recreational operators wish to exclude liability for claims unconnected with recreational activities, they should do so openly as other businesses must.

The Commission recommends that:

14. An operator should not be able to make participation in a recreational activity conditional on terms that exclude liability for injury or loss arising otherwise than in connection with that recreational activity.

15. Any exclusionary terms protecting an operator from claims for injury or loss arising otherwise than in connection with a recreational activity should be the subject of a separate agreement, and not form part of any set of exclusionary terms relating to the recreational activity or be contained in the same document.

6. MINORS AND THE WAIVER ISSUE

The widespread practice of taking signed waivers in connection with minors' participation in various sports activities raises a number of questions. Is it to act as a deterrent, and so aid in controlling the cost of insurance? Since they are unenforceable under the *Infant Act*,³⁷ they could do so only by deceiving parents into thinking they are barred from bringing an action on behalf of a negligently injured child.

Minors should not be prejudiced by their own or their parents' naiveté. This is the historic policy of the law, and it is still sound. Modern legislation in the *Infant Act*³⁸ provides for minors to be granted capacity to enter into an enforceable agreement where it is clearly in their interests. The traditional protection should remain available where it is not.

If the real purpose is to obtain evidence of the acceptance of inherent risk by minors and their legal guardians, this can be done without the stratagem of an unenforceable waiver. It can be accomplished by taking a signed acknowledgment by the minor and the parents that they recognize the existence of inherent risks in the activity and agree to assume them. Such an acknowledgment is unobjectionable, as long as it contains no waiver or release language and no expanded, self-serving definition of inherent risk. Expanding on the common law notion of inherent risk in an acknowledgment-of-risk form for minors would impose on them the burden of others' wrongful acts and omissions. Any terms in an acknowledgment form which do so should have no legal effect.

37. R.S.B.C. 1979, c. 196, s. 16.2.

38. *Ibid.*, s. 16.4. See Law Reform Commission of British Columbia, *Report on Minors' Contracts* (LRC 26, 1976).

The practice of extracting agreements from parents to indemnify operators in respect of legal actions on behalf of their children also contravenes the public policy of protecting minors' interests. They are clearly intended to discourage a parent from pursuing a child's rights. If there is doubt about the unenforceability of such indemnities, it should be removed.

Arguments for giving binding effect to waivers by minors or their parents based on the fact that the *volenti* defence can be raised against a minor are unconvincing. That defence usually succeeds today only where the plaintiff's conduct is imbued with illegality or is unusually foolhardy. Treating a minor who engages in obviously dangerous conduct as being conscious of the natural consequences of his or her acts is not analogous to holding the minor to the terms of a binding legal document, the contents of which may be deceptive even to adults.

The Commission recommends that:

16. *The practice of requiring a minor or the minor's parent or guardian to agree to terms excluding liability for personal injury to the minor as a precondition to the minor's participation in any recreational activity should be prohibited.*

17. *An agreement whereby a parent or guardian of a minor agrees to indemnify a person in respect of any legal action brought on behalf of the minor should be prohibited. Such an agreement, if obtained, should be unenforceable.*

18. *It should be permissible to obtain from a minor, or from the minor's parents or guardians, a signed acknowledgment that a recreational activity involves inherent risks, and that the minor assumes them in order to be permitted to engage in the recreational activity, provided that such an acknowledgment should be inadmissible as evidence of assumption of risk to the extent that it*

(a) *contains any terms purporting to waive any cause of action of the minor that may arise, or give a release of any liability towards the minor, or*

(b) *contains an extended definition of "inherent risk."*

7. WAIVERS AND MULTIPLE DEFENDANTS

The general rule that tort liability is joint and several could occasionally result in an operator who is at fault only to a limited extent in relation to one of the non-disclaimable sources of risk specified in Recommendation 11 having to meet the entirety of the plaintiff's loss.³⁹ For example:

An oily substance is spilled onto a velodrome track and the operator of the facility, though aware of the hazard, procrastinates unreasonably in cleaning it up. A court finds that the spill is a partial cause of an accident in which a cyclist received a closed head injury incapacitating her for life, but also finds that another cyclist was 90% responsible. Under Recommendation 11, the waiver obtained from the plaintiff would not absolve the operator because allowing an oily substance to remain on the track makes the facility unsafe for the activity for which it is intended. The cyclist who is 90% responsible is uninsured and has no means of satisfying the judgment. Despite the fact that the operator is no more than 10% to blame, the plaintiff is entitled, as the law now stands, to recover the entire amount of the award

39. This would not happen if the plaintiff were contributorily negligent to any extent. See the heading "4. Shared Liability" in Chapter II.

from the operator. The operator does have a right to claim 90% contribution from the negligent cyclist,⁴⁰ but this is beside the point because the negligent cyclist has no resources in any event.

The rationale for the general rule that results in negligent co-defendants occasionally having to meet the full extent of the plaintiff's loss regardless of their respective degrees of fault is that a plaintiff who is not also at fault should not be denied full recovery because some of the defendants are unable to satisfy their respective shares of liability. In this example, however, application of the general rule defeats the policy of Recommendation 11. That policy is to allow risk to be allocated by contract, except where the risk is under the exclusive control of the operator. The result that should flow from Recommendation 11 is that the operator bear responsibility only for the portion of the total loss referable to the operator-controlled source of risk.

A way to achieve a result consistent with the policy of Recommendation 11 would be to treat the contractual relationship between the plaintiff and the operator as making the liability of the operator several only. In other words, an operator would be liable only for its own share of the blame and no question of contribution between the operator and other defendants would arise.⁴¹ If this rule were applied in the example above, the most that the plaintiff could recover from the operator would be 10% of the total judgment.⁴²

40. *Negligence Act*, R.S.B.C. 1979, c. 298, s. 4. See also Law Reform Commission of British Columbia, *Report on Shared Liability* (LRC 88, 1986).

41. Under present law, a right of contribution can exist between two or more negligent defendants only if each could have been found liable to the plaintiff. If liability on the part of one is blocked by a special defence, such as a waiver given prior to the harm occurring, the other defendants cannot claim contribution from the defendant enjoying the special defence: *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346.

42. This situation is equivalent to that arising when a plaintiff is contributorily negligent: *Leisbner v. West Kootenay Power and Light Co. Ltd.* (1986) 70 B.C.L.R. 145 (B.C.C.A.); *varying* (1983) 45 B.C.L.R. 204 (S.C.).

The Commission recommends:

19. *The liability of an operator towards an adult user in respect of harm arising from the sources of risk specified in paragraphs (a) to (g) of Recommendation 11 should be limited to the percentage share of fault apportioned to the operator, rather than being joint and several, if an enforceable waiver or enforceable set of terms excluding the operator's liability for personal injury or death arising from other sources of risk is in effect and is binding on the adult user.*

8. NON-PROFIT RECREATIONAL ORGANIZATIONS

Most organized recreational activities in the Province take place under the auspices of non-profit organizations. They range from large and sophisticated societies to informal groups of only a few persons. While non-profit recreational groups are outside the terms of reference for this Report, a few responded to the Consultation Paper. The message they conveyed was that non-profit groups do not have the resources to insure against liability and therefore cannot survive without the protection of comprehensive waivers. Concern was expressed that legislative provisions applying to commercial operators should expressly exempt non-profit organizations and their volunteers.

It was not our intention to extend the scope of any recommendations concerning waivers to non-profit organizations, given the fact that the reference to the Commission related only to commercial operators. We recognize nevertheless that non-profit recreational groups occupy a distinct position. They rely almost exclusively on the services of volunteers to carry out programs and oversee events. Only larger sports organizations have paid staff, and even they rely heavily on volunteers. Volunteers would be reluctant to serve if exposed to personal liability. Small groups cannot afford liability insurance. Much recreational opportunity would be lost if liability concerns prevented these smaller groups to function.

There is also a significant difference between the imposition of exclusionary terms by a commercial operation on the general public and by a non-profit recreational organization on its own members. In the case of a commercial operation, the terms are essentially unilaterally imposed. There is no opportunity to negotiate them. The public normally must deal with the operator on a "take it or leave it" basis. On the other hand, the members of a recreational organization are able to decide among themselves the terms on which they will participate in the organization's activities. They are free to agree not to hold one another liable for injuries that take place as a result of those activities. When exclusions of liability are imposed by the members on themselves as a group, they lose the self-serving character they have in other situations.

Some non-profit sports organizations have programs with a commercial flavour, however.⁴³ Competitions staged on a profit-seeking basis, in which non-members may take part, are quite common. We were urged to exempt such activities from limits on the scope of comprehensive waivers also, but where the general public is involved rather than only adult members of the sponsoring organization, similar considerations arise as with commercial operations. In these situations, waivers obtained from members of the sponsoring organization should take effect according to their terms, but the organization should be treated as a commercial operator as far as non-member participants are

43. While the *Society Act*, R.S.B.C. 1979, c. 390, s. 2(1) prohibits the formation of a society for the purpose of carrying on a business, s. 2(2) allows a society to carry on a business as an incident to its authorized purposes.

concerned.⁴⁴ In other words, if a non-member is asked to give a waiver, the limits set out in Recommendations 11 and 14 should apply.

20. A non-profit recreational organization and its members should be expressly permitted to exclude their liability to an adult member or that member's dependents for personal injury or death arising from the adult member's participation in the activities of the organization.

21. When a non-profit recreational organization offers a recreational opportunity on a profit-seeking basis to the general public as well as to its own members, its ability to exclude its liability for personal injury and death towards adult non-members should be equivalent to that of a commercial operator under Recommendations 11 and 14.

E. Means of Controlling the Cost and Volume of Claims

1. GENERAL

The chief difficulty in the area of recreational liability is not that the law is slanted in favour of plaintiffs or that sports-related injury claims are being brought in disproportionate numbers. It is the high costs associated with adjusting and defending any claim, regardless of its size. While the problem of cost within the civil justice system needs to be addressed on a very broad front, there are ways to alleviate the cost problem in recreational injury claims that do not require legislation and can be invoked privately.

2. EARLY NEUTRAL EVALUATION OF CLAIMS

One way to contain cost is to make use of alternate dispute resolution (ADR) mechanisms, where appropriate, to keep cases out of court altogether. At the time of writing, initiatives are in progress to make ADR available to parties in all civil proceedings as an adjunct to the formal court process, though the exact form these initiatives will take is not yet clear.

As liability is often contested strongly in sports-related cases, the usual ADR techniques of arbitration and mediation have a limited role to play. But another technique, neutral evaluation, may serve to screen out tenuous claims at a fairly early stage at minimal cost, or lead to settlements when warranted. Neutral evaluation involves a review of the facts of the claim and each party's position by a knowledgeable independent assessor chosen by the parties. The review can be structured in any way the parties desire. The purpose is not to arrive at a resolution or compromise as in other ADR processes, but to enable both sides to receive an objective, non-binding opinion on the validity of the claim before the action reaches an advanced stage. This helps the parties to gain a better impression of the probable outcome if the action proceeds.

Neutral evaluation may be particularly well-adapted to sports-related personal injury litigation, since it allows for a disinterested review of the claim by an assessor familiar with the dynamics of the sport in question.

⁴⁴ In order to prevent circumvention of the minimum protection that the limits in Recommendation 11 would afford to the general public, a non-profit organization would only be able to obtain the benefit of the exemption from Recommendation 11 if the user was a member prior to giving the waiver.

The Commission recommends:

22. In actions arising from recreational injuries, neutral evaluation should be carried out whenever possible at the earliest feasible stage by an independent assessor completely familiar with the recreational activity in question, and who is selected by the parties themselves, in order to provide the parties with a realistic appraisal of the merits of the claim.

3. PROMOTING PERSONAL ACCIDENT AND DISABILITY INSURANCE

Raising participants' awareness of the need for personal accident and disability coverage when engaging in hazardous sports could pay dividends. In Sweden, for example, the skiing industry and the Folksam insurance group acted in concert to market a policy directed at skiers. The coverage could be bought at the same time as a lift ticket, similar to the sale of flight insurance at airports. There may be room for similar initiatives in Canada. Co-operation between the Canadian skiing and insurance industries in developing and marketing a viable personal accident (first party) insurance program directed specifically at skiers may discourage litigation, at least in non-catastrophic cases.

The Commission recommends:

23. The skiing and insurance industries should be encouraged to explore the possibility of co-operating in the development and marketing of a first-party insurance package directed primarily at skiing injuries.

4. OPERATING STANDARDS

Our review of jurisprudence on recreational accidents has led us to conclude that where comprehensive standards of good operating practice exist, they are powerfully persuasive on the question of the legal standard of care. They need not be legislative in character in order to have this effect. Provided they are rationally justifiable and not merely self-serving, standards generated within an industry are equally capable of serving as an objective reference point for courts against which to measure the degree of care shown in individual cases. All recreational industries should be encouraged to establish such standards where they do not already exist, and maintain the credibility of the standards by periodic revision.

The Commission recommends:

24. Comprehensive standards of good operating practice should be developed and promulgated within all recreational industries, and be subjected to periodic revision.

F. Some Concluding Observations

The scheme of reform set out in this Chapter is predicated on the assumption that a fault-based system of compensation for personal injury will remain in place for the time being. This assumption is made because a general accident compensation scheme based on a different principle appears unlikely to be implemented in the foreseeable future.

The common law doctrine of inherent risk, which evolved within the fault-based tort system to take account of the voluntary risk-taking characteristic of sport, is fundamentally

sound and continues to be applied in British Columbia. The commercial necessity of managing the unpredictable nature of risk in sport requires, nevertheless, that there be room for allocation of risk by agreement. Intervention is justified only to the extent necessary to require operators to bear responsibility for the risks that are within their control, thereby ensuring minimum requirements of public safety and preventing the purpose of regulatory standards from being defeated.

Throughout work on this reference, we have been aware that imposing any limits whatsoever on the scope of comprehensive waivers in the public interest might cause insurers to cease offering liability coverage to recreational industries, and to the skiing industry in particular. While we came upon no conclusive evidence that the viability of the skiing industry or its ability to insure is threatened by the existing level of litigation, and none was offered, the possibility that insurers could leave the field cannot be discounted entirely. Claims experience and the relative attractiveness of a line of coverage to insurers have never dictated substantive rules of civil responsibility, however. If they did, we would not have a principled legal system, but one based instead on the ebb and flow of the insurance cycle.

We have made a careful attempt to arrive at a balanced legislative scheme in which two vital interests, the health of recreational industries and the safety of the public, are given equal weight. Any other approach would have involved an assessment of the greater public good based on different considerations than those governing this Report, and one that can properly be made only by elected legislators.

A. List of Recommendations**1. GENERAL**

The list of recommendations that appears below is divided into two categories. The first can be implemented by legislative action. The second category contains recommendations for non-legislative courses of action that would help to reduce the frequency and cost of litigation. Some matters of detail covered in the draft legislation set out later in this Chapter are not expressly mentioned in the Recommendations.

2. LEGISLATIVE RECOMMENDATIONS

1. (a) *Persons who enter premises to participate in a sport or other recreational activity should be statutorily deemed to have willingly accepted the inherent risks associated with that sport or activity for the purpose of section 3(3) of the Occupiers Liability Act.*

(b) *“Inherent risk” in paragraph (a) should be given the following definition:*

“inherent risk” means the possibility of physical injury to a participant or spectator, incidental to and inseparable from a recreational activity, that cannot be eliminated by the exercise of reasonable care without fundamentally changing the nature of the recreational activity. [page 37]

2. *Persons who, for a recreational purpose, gratuitously enter premises that have not been specifically designated for recreational use, other than persons who do so at the invitation of the occupier, should be deemed to willingly accept the risk of the hazards present on the premises for the purpose of section 3(3) of the Occupiers Liability Act. The fact that an occupier does not prevent or actively discourage entry for recreational use should not amount to an implied invitation. [page 38]*

3. *Sections 1 and 8 of the draft Ski Area Safety Act proposed by the Canada West Ski Areas Association should not be enacted. [page 39]*

4. *Sections 3 and 4 of the CWSAA draft Ski Area Safety Act should be enacted, with the addition of a provision indicating that the duties imposed by those sections on a skier do not relieve any other person of liability for that other person's own conduct. [page 41]*

5. *Sections 5, 6 and 7 of the CWSAA draft Ski Area Safety Act should be enacted, with the following additions:*

(a) *Section 5(c) should include a requirement to look uphill and downhill to check for the approach or presence of other skiers prior to entering a run;*

(b) *Section 5(d) should include a reference to ski brakes as an alternative to ski retention straps;*

(c) *Section 7 should refer to “costs reasonably incurred” instead of “all costs.” [page 41]*

6. A ski area operator should be empowered to enforce the Skier Responsibility Code set out in section 5 of the draft Ski Area Safety Act by revocation of the ski area admission ticket or pass, and by temporary or permanent expulsion from the ski area. A breach of the Skier Responsibility Code or other skiing safety provisions, except the obligation to provide one's name and address if involved in a skiing accident, should not be an offence. [pages 41 - 42]

7. A person injured in a skiing accident, or those representing him or her, should be able to obtain from the ski area operator the name and address of another person involved in the accident and those of witnesses, if available. The operator should exercise its best efforts to obtain this information, but failure to obtain it should not give the injured person any cause of action against the operator. [page 42]

8. (a) A definitive list of duties of ski area operators in relation to safety should be developed and promulgated by an advisory body having expertise in skiing safety.

(b) The skiing industry, recreational skiers, the Canadian Ski Patrol, the Canadian Avalanche Association, insurers engaged in insuring risks associated with skiing, sports medicine, and risk management professionals should be represented in the composition of the advisory body. The recommendations of the advisory body should be implemented by regulation. [page 43]

9. It should be expressly enacted that the common duty of care of a ski area operator under section 3(1) of the Occupiers Liability Act is not owed to persons

(a) on runs marked as closed;

(b) in portions of the ski area which, though situated within its outer boundaries, are designated as out of bounds;

(c) who knowingly ski outside the outer boundaries of the ski area. [page 44]

10. A ski area operator should owe only the relaxed duty of care specified in section 3(3)(c) and (d) of the Occupiers Liability Act towards persons in areas mentioned in paragraphs (a) and (b) of Recommendation 9. [page 44]

11. A commercial recreational operator should not be able to exclude or limit its liability for personal injury or death arising from the following sources of risk:

(a) malfunction of mechanical equipment and recreational apparatus under the control of or maintained by the operator, including vehicles, other than that resulting from misuse by a user;

(b) unsafe operation of mechanical equipment or recreational apparatus, including vehicles, by the operator or its employees;

(c) unsafe aspects of the structure and condition of an indoor recreational facility that directly affect the safety of users when actually engaged in a recreational activity for which the recreational facility is designed or intended;

- (d) failure by the operator of an outdoor recreational facility to maintain commonly accepted conditions or standards of demarcation, signage, lighting, and monitoring of user activity, for outdoor recreational facilities of comparable size and type;**
- (e) unfitness for normal use, at the time of supply or rental, of equipment or apparatus supplied or rented for use in connection with a recreational activity;**
- (f) conduct of the operator's employees, acting in the course of their employment, that results in personal injury to or death of a user from the sources of risk referred to in paragraphs (a) to (e);**
- (g) breach by the operator, or by an employee of the operator, of a specific statutory duty or regulatory requirement relating to safety in a particular recreational activity. [pages 47 - 49]**

12. A recreational operator should remain able to exclude or limit its liability to adult users for personal injury, death, or damage to property, stemming from risks associated with a recreational activity, other than those mentioned in Recommendation 11. [page 49]

13. Despite Recommendation 11, a commercial recreational operator should be able to obtain a waiver excluding its liability for personal injury and death arising from the physical configuration and condition of the facility or site of a race, if the racer certifies that he or she has had an opportunity to examine the same and is willing to participate in the race. The waiver should not have effect if the configuration or conditions are materially altered without the consent or knowledge of the racer. [pages 50 - 51]

14. An operator should not be able to make participation in a recreational activity conditional on terms that exclude liability for injury or loss arising otherwise than in connection with that recreational activity. [page 51]

15. Any exclusionary terms protecting an operator from claims for injury or loss arising otherwise than in connection with a recreational activity should be the subject of a separate agreement, and not form part of any set of exclusionary terms relating to the recreational activity or be contained in the same document. [page 51]

16. The practice of requiring a minor or the minor's parent or guardian to agree to terms excluding liability for personal injury to the minor as a precondition to the minor's participation in any recreational activity should be prohibited. [page 52]

17. An agreement whereby a parent or guardian of a minor agrees to indemnify a person in respect of any legal action brought on behalf of the minor should be prohibited. Such an agreement, if obtained, should be unenforceable. [page 52]

18. It should be permissible to obtain from a minor, or from the minor's parents or guardians, a signed acknowledgment that a recreational activity involves inherent risks, and that the minor assumes them in order to be permitted to engage in the recreational activity, provided that such an acknowledgment should be inadmissible as evidence of assumption of risk to the extent that it

- (a) contains any terms purporting to waive any cause of action of the minor that may arise, or give a release of any liability to the minor, or**

(b) contains an extended definition of “inherent risk.” [pages 52 - 53]

19. The liability of an operator towards an adult user in respect of harm arising from the sources of risk specified in paragraphs (a) to (g) of Recommendation 11 should be limited to the percentage share of fault apportioned to the operator, rather than being joint and several, if an enforceable waiver or enforceable set of terms excluding the operator's liability for personal injury or death arising from other sources of risk is in effect and is binding on the adult user. [page 54]

20. A non-profit recreational organization and its members should be expressly permitted to exclude their liability to an adult member or that member's dependents for personal injury or death arising from the adult member's participation in the activities of the organization. [page 55]

21. When a non-profit recreational organization offers a recreational opportunity on a profit-seeking basis to the general public as well as to its own members, its ability to exclude its liability for personal injury and death towards adult non-members should be equivalent to that of a commercial operator under Recommendations 11 and 14. [page 55]

3. NON-LEGISLATIVE RECOMMENDATIONS

22. In actions arising from recreational injuries, neutral evaluation should be carried out whenever possible at the earliest feasible stage by an independent assessor completely familiar with the recreational activity in question, and who is selected by the parties themselves, in order to provide the parties with a realistic appraisal of the merits of the claim. [page 56]

23. The skiing and insurance industries should be encouraged to explore the possibility of co-operating in the development and marketing of a first-party insurance package directed primarily at skiing injuries. [page 56]

24. Comprehensive standards of good operating practice should be developed and promulgated within all recreational industries, and be subjected to periodic revision. [page 56]

B. Draft Legislation

The draft legislation that appears below is intended only to illustrate the manner in which the recommendations under heading A could be implemented. It does not form part of the recommendations themselves.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Recreational Liability and Safety Act

PART 1 - GENERAL

Definitions

1. In this Act,

“inherent risk” means the possibility of physical injury to a user, spectator, or other person, incidental to and inseparable from a recreational activity, that cannot be eliminated by the exercise of reasonable care without fundamentally changing the nature of the recreational activity;

Comment: This definition of “inherent risk” is based on the meaning of that term at common law.

“operator” means anyone who, for the purpose of profit,

- (a) operates a recreational facility open to the public, or
- (b) provides a recreational opportunity to the public, whether or not on a continual or regular basis,

Comment: The definition of “operator” primarily refers to someone who operates a commercial recreational enterprise. It extends to organizations that call themselves “clubs” and charge a user fee that may be called a “membership fee,” but which are actually commercial operations rather than voluntary non-profit bodies. The definition does not extend to non-profit bodies in respect to non-profit activities. It does apply to them when they organize events or programs on a profit-seeking basis and make these available to the general public, not merely to their own members.

“premises” has the same meaning as in the *Occupiers Liability Act*,

Comment: “Premises” is defined in the Occupiers Liability Act as including

- (a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c);
- (b) ships and vessels;
- (c) trailers and portable structures designed or used for a residence, business or shelter; and
- (d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

“recreation” means any sport, or any activity involving physical exertion, engaged in for the purpose of enjoyment or leisure, and includes

- (a) practice, instruction, leadership or guiding services by a person engaged to perform those services in relation to the sport or activity, whether or not that person is paid to do so,

but does not include

- (b) practice, instruction, training or research in safety, first aid, emergency response, avalanche control, risk prevention and management, or search and rescue techniques,

Comment: The definition of “recreation” covers sports and other physical activities. It includes the participation of a paid instructor or guide. For example, canoeists may engage the services of a guide. The definition does not cover passive leisure activities not involving physical exertion, nor does it cover emergency response training or risk prevention activities, e.g. first aid, search and rescue, and avalanche control.

“recreational” means anything relating to recreation,

“recreational facility” means a place within delineated boundaries, designated or equipped for use in connection with one or more recreational activities;

“ski area” means the area within the boundaries designated by a ski area operator;

“ski area operator” means a person operating a ski area using aerial or surface cable lifts to transport skiers within a ski area,

Comment: This definition is drawn primarily from the draft CWSAA Ski Area Safety Act. (See Appendix C, s. 1.) The reference to specific licensing authorities in the CWSAA version has been deleted, because ministerial responsibilities can vary over time. The reference to a partnership or corporation is also deleted because the definition of “person” in the Interpretation Act covers these. The reference to employees, volunteer ski patrollers and other representatives of the operator has also been deleted because it is not intended to impose all the duties of an operator on individual personnel. The reference to ski area personnel has been transferred to s. 14 in connection with enforcement powers.

“skier” includes snowboard rider,

“ski” and “skiing” include the use of a snowboard,

“user” means a person who uses an operator's recreational facility or makes use of a recreational opportunity provided by an operator, and includes a person who has paid for the privilege of being a spectator.

Inherent Risk

2.(1) A person who voluntarily participates in or is a spectator of a recreational activity is deemed to willingly accept, for the purpose of section 3(3) of the *Occupiers Liability Act*, the inherent risks associated with participating in or viewing that recreational activity .

*Comment: No liability flows from an injury or loss due to the risks inherent in an activity, and voluntary participation traditionally denoted assumption of them. This has come into some question in relation to situations governed by the Occupiers Liability Act because of a Supreme Court of Canada decision: *Waldick v. Malcolm*. Section 2(1) is aimed at removing these doubts. It preserves the doctrine of inherent risk in sport in situations to which the Occupiers Liability Act applies. Subsection (1) refers to a person participating voluntarily in a recreational activity rather than employing the term “user” because the subsection is meant to apply whenever recreational activities are engaged in. It is not limited to recreation provided by a commercial operator.*

(2) Subsection (1) does not restrict the circumstances in which a person is deemed to accept the inherent risks of a recreational activity.

Comment: Subs. (2) clarifies that s. 2(1) is not to be interpreted as preventing the defence of inherent risk from being raised when a case must be decided otherwise than under the Occupiers Liability Act. For example, in an action between two hockey players for an injury suffered during a game, the issue of liability must be decided on common law principles.

Gratuitous Recreational Entry

3.(1) A person who, for a recreational purpose, enters premises not specifically designated by the occupier for recreational use without paying a fee or other consideration for the privilege of entering, is deemed to willingly accept the risks present on the premises for the purpose of section 3(3) of the *Occupiers Liability Act*.

Comment: Fear of liability is causing occupiers of land to restrict access for recreational use. Recreationists have urged that occupiers be relieved of liability towards persons venturing onto the land for recreational purposes, in order to encourage them to make more land and foreshore available for a wide variety of outdoor sports. Section 3(1) implements this policy by bringing gratuitous recreational entrants into the class of persons under section 3(3) of the Occupiers Liability Act to whom the occupier owes only a duty not to cause deliberate harm or act in reckless disregard of their safety.

(2) Subsection (1) does not apply to a person who enters the premises at the invitation of the occupier.

Comment: The effect of subs. (2) is that the occupier continues to owe to persons invited to the premises the duty to ensure they will be reasonably safe while on the premises. The occupier's guests fall into a different category than persons who merely desire access to the premises for their own purposes.

(3) The occupier's consent to or acquiescence in an entry by a person referred to in subsection (1) does not amount to an invitation to enter the premises.

Comment: Mere consent by an occupier to a gratuitous entry by recreationists or acquiescence in the use of the premises by them should not amount to an invitation to enter, depriving an occupier of the relief from liability given by s. 3(1).

Exclusion of Liability by Operator

4.(1) An agreement between an operator and a user, or a term on which an operator allows use of a recreational facility or a recreational opportunity, is unenforceable to the extent that it purports to exclude or limit liability on the part of an operator in respect of personal injury or death arising from the following sources of risk:

- (a) malfunction of mechanical equipment or recreational apparatus under the control of or maintained by the operator, other than that resulting from misuse by a user,
- (b) unsafe operation by the operator of mechanical equipment or recreational apparatus, including vehicles,
- (c) unsafe aspects of the structure or condition of an indoor recreational facility that directly affect the safety of users while engaged in a recreational activity permitted by the operator,
- (d) failure by an operator of an outdoor recreational facility to maintain commonly accepted conditions or standards of demarcation, signage, lighting, and monitoring of user activity, for outdoor recreational facilities of comparable size and type,
- (e) unfitness for normal use, at the time of supply or rental, of equipment or apparatus supplied or let by the operator for use in a recreational facility or in connection with recreation,
- (f) conduct of an employee of the operator, when acting in the course of employment, that is a cause of injury or death from the sources of risk mentioned in paragraphs (a) to (e),

CHAPTER V: RECOMMENDATIONS AND DRAFT LEGISLATION

- (g) breach of a requirement of a statute or regulation specifically concerning safety in similar recreational facilities or in the form of recreation to which the recreational opportunity provided by the operator relates.

Comment: Agreements commonly called "waivers," under which users agree to give up any right to take legal action against an operator and release the operator from all liability for injury and loss, are used frequently by commercial recreational enterprises. Terms stating that the operator assumes no liability and that users assume all risk are often printed on tickets or posted on notices at recreational facilities. Operators use these techniques to exclude their liability because most sports and recreational activities involve some risk and accidents cannot be completely prevented. They may operate unfairly with respect to sources of risk that are within the operator's sole control, however. S.4(1) provides that an exclusionary agreement or term is unenforceable to the extent that it excludes or limits an operator's liability for personal injury or death arising from sources of risk that are under the operator's control.

(2) A term stipulated by the operator that excludes or limits liability on the part of the operator in respect of personal injury or death arising from a source of risk that is not directly associated with participating in, or viewing as a spectator, a recreational activity

- (a) for which the operator's recreational facility is intended, or
- (b) to which a recreational opportunity provided by the operator relates,

is not enforceable if

- (c) the operator makes the user's participation in, or viewing of, the recreational activity conditional on acceptance of the term, or
- (d) the term is contained in or forms part of the same document or set of terms as an agreement or term that excludes or limits liability on the part of the operator in respect of that recreational activity.

Comment: Subs. (2) is intended to prevent a waiver taken with respect to a user's participation in a particular recreational activity from applying to exclude liability for harm that is completely unrelated to that activity. For example, it may be reasonable for a rafting outfitter to require users to sign a waiver regarding the risks associated with white water rafting, but the user probably would not contemplate that the waiver might extend to a motor vehicle accident while being transported to the point of embarkation. A comprehensive waiver containing a general release of liability might have that effect, however. The effect of subs. (2) is to require a waiver of liability for risks unconnected with participation in the recreational activity itself to be the subject of a separate express agreement.

(3) Subsection (1) does not apply to a term of an agreement between a society or voluntary association that is ordinarily non-profit-seeking and a user who is its member, or to a term of an agreement between its members.

Comment: Non-profit recreational organizations sometimes organize events open to the public with the intention of making a profit as means of fundraising. When they do so, they fall within the definition of "operator." Subs. (3) allows non-profit organizations to obtain fully comprehensive waivers from their own members despite subs. (1) in respect of their usual non-profit activities as well as occasional profit-seeking events.

(4) Despite subsection (3), a term of an agreement between a user and a society or voluntary association that is ordinarily non-profit-seeking, or between the members of such a society or voluntary association, is subject to subsection (1)

- (a) if the society or voluntary association pays any proceeds of an activity to, or shares them with, an operator, unless
 - (i) the society or voluntary association deals with the operator at arm's length, and

- (ii) the payment or sharing of proceeds results from an obligation to compensate the operator for out-of-pocket expenses, actual provision of goods or services, or use of a facility,

or

- (b) insofar as the term purports to affect a user who
 - (i) was not a member immediately before agreeing to the term and
 - (ii) is required to become a member or to agree to the term in order to take advantage of a recreational opportunity ostensibly extended to the public.

Comment: Subs. (4) preserves the minimum protection subs. (1) would accord to the general public by providing that a commercial operator cannot evade subs. (1) by interposing a non-profit organization between itself and the public, and that users must already have joined the non-profit organization before giving a waiver that is exempt from the limits that subs. (1) imposes.

(5) Despite section 4 of the *Negligence Act*, if a term purporting to exclude the liability of an operator towards a user for personal injury or death would be fully enforceable but for subsection (1), the liability of the operator in respect of harm to the user arising from the sources of risk referred to in paragraphs (a) to (g) of subsection (1) is not joint and several, but is limited to that portion of the user's loss corresponding to the percentage share of fault apportioned to the operator by the court, and no other person liable to the user may recover contribution from the operator in any greater amount.

Comment: Liability in tort is normally joint and several. This sometimes means that a defendant who is only partly liable may have to pay the entire amount of a judgment if other defendants cannot pay their shares of the damages. The policy behind subs. (1), however, is to limit the operator's liability to the specified non-disclaimable sources of risk when a comprehensive waiver is in place. Subs. (5) is intended to accomplish that result.

Racing

5. Despite section 4(1), a term that excludes liability on the part of the operator for personal injury to or death of a participant in a race due to a source of risk related to the physical configuration or condition of the facility or site where the race takes place is enforceable if

- (a) the participant certifies that he or she has had an opportunity to examine the facility or site, and
- (b) the physical configuration or condition of the facility or site is not materially altered between the time the participant accepts the term and the time the race is held without the consent or knowledge of the participant.

Comment: Some relaxation of section 4(1) is warranted in relation to racing, because of the racer's conscious acceptance of a heightened level of danger. Section 5 allows a waiver to take effect with respect to the static conditions of a race site, even though they may be within the operator's control, as long as the racer has had an opportunity to inspect them beforehand.

Minors

6.(1) An operator must not require a minor or a minor's parent or guardian to agree to a term excluding the operator's liability for personal injury to or death of the minor.

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Comment: Waivers are frequently obtained from minors or their parents, though these are generally unenforceable under present law. Subs. 6(1) prohibits this practice because it may deceive parents and guardians into thinking that a minor's legal rights have been effectively waived.

(2) An operator must not require a parent or guardian of a minor to agree to indemnify the operator in respect of any damages or other amount to which a minor may become entitled or an expense associated with a legal action on behalf of the minor.

Comment: Some waivers contain a term requiring a parent or guardian to indemnify the operator if the parent or guardian brings a successful legal action on the minor's behalf. These indemnity agreements are probably unenforceable under present law as being against the public policy that a minor's legal rights are to be protected. Nevertheless, they discourage a parent or guardian from pursuing a minor's rights. Subs. (2) prohibits them.

(3) Subsection (2) does not prevent an operator from recovering costs in an action brought on behalf of a minor.

Comment: When a legal action fails, the defendant is usually entitled to recover costs. Subs. (3) indicates that subsection (2) does not prevent an operator from recovering costs in the normal manner if an action brought against the operator on behalf of a minor is unsuccessful.

(4) An operator may obtain from a minor, or from the parent or guardian of a minor, a signed acknowledgment that a particular recreational activity involves inherent risks and that the minor assumes them, if the acknowledgment

- (a) does not contain any term purporting to waive any cause of action of the minor that may arise, or give a release of any liability towards the minor, and
- (b) contains no definition of "inherent risk" that extends to any fault on the part of the operator.

Comment: Minors are deemed to accept the inherent risks of sports they engage in. It should be permissible for an operator to have evidence that a minor was aware that an activity involved inherent risks prior to engaging in the activity. Subs. (4) clarifies that the rest of s. 6 does not prevent this.

(5) A term of an agreement or an acknowledgment is unenforceable and inadmissible as evidence of assumption of risk, to the extent that it violates subsections (1) or (2), or paragraphs (a) or (b) of subsection (4).

Comment: Subs. (5) confirms that a waiver given by a minor or on a minor's behalf is unenforceable. It also puts beyond doubt the unenforceability of a parent's or guardian's agreement to indemnify the operator against an action on the minor's behalf.

PART 2 - ALPINE SKIING

Duties of Skiers

7. Each skier shall obey the following Skier Responsibility Code:

- (a) When skiing downhill or overtaking another skier, a skier shall choose a course and speed which assures the safety of other skiers ahead or below,
- (b) A skier shall not stop in any location which obstructs a ski run or where he or she is not visible from above,

- (c) When entering a ski run or starting to ski downhill, a skier shall visually check up and down hill for the presence or approach of other skiers and yield to other skiers on the ski run;
- (d) A skier shall use retention straps, ski brakes or other devices which prevent runaway skis;
- (e) A skier shall keep off closed ski runs and shall observe all posted signs within the ski area;
- (f) A skier shall not ski within any ski area when his or her ability to do so is impaired by alcohol, drugs, or other substances; and
- (g) A skier involved in a collision with another skier shall as soon as practicable provide identification to the other skier, or to a representative of the ski area operator, and shall render all possible assistance to the other skier, pending the arrival of the ski patrol or emergency first aid personnel.

Comment: This section enacts into law the Skier Responsibility Code, a recognized set of principles for skiing safety.

8. A skier must ski under control at all times so as to be able to avoid collision with other skiers or objects and so as not to pose a threat or risk to the safety of other skiers.

9. A skier must know the extent of his or her own ability to negotiate any ski run and ski within the limits of that ability.

10. (1) A person must not use a toboggan, sled, tube, or other sliding device other than skis or a snowboard within the ski area except in an area designated by the ski area operator exclusively for that purpose.

(2) Subsection (1) does not apply to authorized emergency personnel employing a sliding device for an emergency or rescue purpose.

Liability of Out-of-Bounds skier

11. A skier who knowingly skis outside the ski area boundaries is liable to compensate the ski area operator for the reasonable costs it incurs in attempting to rescue him or her.

Duties of Ski Area Operators

12. An operator of a ski area must perform the safety duties required by regulation.

[Refer to Appendices D and E for examples of statutory duties imposed on ski area operators in other jurisdictions.]

Comment: Examples of statutory requirements imposed on ski area operators in Québec and the U.S. appear in Appendices D and E. No formal recommendation is made by the Law Reform Commission with regard to specific safety obligations of ski area operators. The degree of statutory regulation appropriate for B.C. should be determined by an advisory body with expertise in ski area operation and representation from the various elements of the skiing community. See Recommendation 8.

13. (1) A ski area operator must provide, on the request of a skier injured in an accident or that skier's personal representative, the name and address of another skier involved in the accident and that of any witness, if the name and address is known to the ski area operator.

CHAPTER V: RECOMMENDATIONS AND DRAFT LEGISLATION

Comment: The purpose of subs. (1) is to discourage claims brought against ski area operators because the identity of a skier who may have been at fault is unknown to the injured party.

(2) Failure by a ski area operator to obtain the name and address of a skier involved in an accident or that of a witness does not give rise to any cause of action against the ski area operator.

Comment: It will not be possible for a ski area to obtain the identities of skiers involved in accidents and witnesses in every case. First aid to injured skiers must take priority. Operators should not be visited with liability because of a skier's failure to comply with s. 7(g).

Enforcement

14. A ski area operator, or an officer, employee, volunteer ski patroller or other representative of a ski area operator, may enforce sections 7 to 10 by

- (a) warning, or
- (b) revocation of a skier's ticket, pass or other authorization to remain in the ski area and temporary or permanent expulsion from the ski area.

Ski Area Operator's Duty of Care Reduced Or Eliminated In Certain Cases

15. A person who, having entered a ski area, knowingly:

- (a) enters a ski run clearly marked at its top as closed,
- (b) enters portions of the ski area clearly marked either on site or on a prominently posted map of the ski area as being out of bounds, though situated within the outer boundaries of the ski area,

is deemed to willingly accept the risks present in the areas mentioned in paragraphs (a) and (b) for the purpose of section 3(3) of the Occupiers Liability Act.

Comment: A ski area operator should not be under an obligation to make out of bounds areas reasonably safe for off-piste skiers. Such skiers may be presumed to fully assume the risk of any hazards present. The effect of s. 15 is to require the operator only to refrain from causing them wilful harm or acting with reckless disregard for them, e.g. by discharging an avalanche accumulation of snow onto off-piste skiers known to be present below.

Out of Bounds Skiers

16. A person who knowingly and voluntarily proceeds beyond the outer boundary of a ski area has no cause of action against the ski area operator by reason of the existence of a risk present outside the boundary or any failure to warn of such a risk.

Comment: The purpose of s. 16 is to clarify that a ski area operator is not liable for harm suffered by anyone consciously venturing outside the outer boundary of the ski area.

PART 3 - INTERPRETATION AND REGULATIONS

Interpretation

17. (1) Breach of sections 6 to 10, except section 7(g), is not an offence.

Comment: Under s. 5 of the Offence Act, breach of a provincial enactment is an offence unless the enactment specifies otherwise. S. 17(1) confines the effect of a breach of ss. 6-10, except s. 7(g), to the sanctions specified in this draft legislation, namely unenforceability of terms for breach of s. 6 and loss of skiing privileges for breach of ss. 7-10. Breach of the obligation to provide one's name and address when involved in a skiing accident, however, is comparable to the duty to identify oneself to an investigating peace officer when involved in a motor vehicle mishap.

(2) The duties imposed on a skier by sections 7, 8 and 9 do not relieve any other person from liability for that other person's own conduct.

Comment: Subs. (2) clarifies the operation of ss. 7-9. The fact that a skier may be partly at fault for an accident by failing to abide by those sections does not relieve anyone else who may be partly at fault of that other person's own share of legal responsibility.

Regulations

18. (1) The Lieutenant Governor in Council may make regulations as authorized by section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations prescribing the safety duties of ski area operators under section 12.

APPENDIX A

HOW TO OBTAIN ACCESS TO THE CONSULTATION PAPER AND THE ELECTRONIC VERSION OF THIS REPORT

Consultation Paper No. 70, *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, contained a more comprehensive review of the law of tort as it affects recreation than the one that appears in this Report. It remains accessible to readers in both printed and electronic form.

How to Get Access to the Consultation Paper

1. Request a copy from the Law Reform Commission

The Law Reform Commission still has a number of copies of the Consultation Paper and is happy to distribute them on request so long as the supplies last. Write, phone or fax:

203 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3

phone: (604) 660-2366
fax: (604) 660-2378

2. Electronic Access

The full text of the Consultation Paper has been posted to the Queen's Printer Bulletin Board System (QPBBBS) where it is available for downloading in Wordperfect 5.1 format under the filename CP70.EXE. This is a self-extracting compressed file.

The QPBBS can be accessed in two different ways:

(a) Telephone/modem connection

To access the QPBBS by telephone the numbers are:

(604) 356-0045 (Victoria area)
(604) 660-1264 (Vancouver area)

The QPBBS supports a toll free call back within the province.

Once connection is made, go to the "files" area where a section is reserved for Law Reform Commission documents.

(b) Internet

If you have access to the Internet it is also possible to transfer the document via FTP. The address is:

BBS.QP.GOV.BC.CA.

Log in as ANONYMOUS and use your E-mail address as the password. Once you have connected look for Law Reform Commission files in the following path: /GOVTINFO/LRC.

3. Consult a copy at a Law Library

Most libraries maintained by the British Columbia Courthouse Library Society will have a copy of the Consultation Paper. Copies are also available at some municipal and regional public libraries.

How to Get Access to the Electronic Version of this Report

The full text of this report will be posted to the Queen's Printer Bulletin Board for downloading and FTP transfer under the filename LRC140.EXE. Follow the same procedures as outlined above for obtaining electronic access to Consultation Paper No. 70.

APPENDIX B

OCCUPIERS LIABILITY ACT

R.S.B.C. 1979, c. 303

Interpretation

1. In this Act

“occupier” means a person who

- (a) is in physical possession of premises; or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

“premises” includes

- (a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c);
- (b) ships and vessels;
- (c) trailers and portable structures designed or used for a residence, business or shelter; and
- (d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

“tenancy” includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and “landlord” shall be construed accordingly.

Application of Act

2. Subject to section 3(4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is by law responsible.

Occupiers' duty of care

3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

- (a) condition of the premises;
- (b) activities on the premises; or
- (c) conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person

- (a) in respect of risks willingly accepted by that person as his own risks, or
- (b) who enters premises that the occupier uses primarily for agricultural purposes and who would be a trespasser under the *Trespass Act*,

other than a duty not to

- (c) create a danger with intent to do harm to the person or damage to his property, or
- (d) act with reckless disregard to the safety of the person or the integrity of his property.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

Contracting out

4. (1) Subject to subsections (2), (3) and (4), where an occupier is permitted by law to extend, restrict, modify or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

(2) An occupier shall not restrict, modify or exclude his duty of care under subsection (1) with respect to a person who is

(a) not privy to the express agreement; or

(b) empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to those persons shall, notwithstanding anything to the contrary in that contract, not be restricted, modified or excluded by it.

(4) This section applies to all express contracts.

Independent contractors

5. (1) Notwithstanding section 3 (1), where damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

Tenancy relationship

(6) (1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on his part in carrying out his responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using them.

(2) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) In this section

(a) a landlord is not in default of his duty under subsection (1) unless his default would be actionable at the suit of the occupier;

(b) nothing relieves a landlord of a duty he may have apart from this section; and

(c) obligations imposed by an enactment in respect of a tenancy are deemed imposed by the tenancy.

(4) This section applies to all tenancies.

Negligence Act

7. The *Negligence Act* applies to this Act.

Crown bound

8. (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.

(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road or a road under the *Forest Act* or the *Private Roads Act, 1963*, or to an industrial road as defined in the *Highway (Industrial) Act*.

Not to affect certain relationships

9. This Act does not apply to or affect the liability of

(a) an employer in respect of his duties to his employee;

(b) a person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, aircraft or other means of transport;

(c) a person under the *Hotel Keepers Act*; or

APPENDIX B: OCCUPIERS LIABILITY ACT

- (d) a person by virtue of a contract of bailment.

APPENDIX C

DRAFT SKI AREA SAFETY ACT

(As Proposed by the Canada West Ski Areas Association)

Interpretation

1. In this Act

“Inherent risks of skiing” includes any risk, danger, hazard or condition, whether or not such risk, danger, hazard or condition is obvious, expected or necessary, which is associated with the sport of skiing, including but not limited to the following: changing weather conditions; variation or steepness in terrain; creeks; gullies; cliffs; crevasses and other glacier hazards; avalanches; rocks; earth; ice; trees and tree wells, tree stumps or other natural growth, whether above or beneath the skiing surface; the condition of ice or snow on or beneath the skiing surface; changes or variations in the skiing surface or sub-surface; impacts, collisions, or falls involving snow grooming machinery, snow making machinery, ski lift towers, utility poles, roadways, fences, buildings or other structures and their components ordinarily used in the operation of a ski area; impact or collision with or falls resulting from other skiers; a skier's failure to ski within his own ability or in a manner so as not to pose a threat or risk to the safety of other skiers; and a skier's failure to meet any duty owed to other skiers;

“injury” means any personal injury, death, property damage or loss;

“skier” means a person authorized by a ski area operator to use the facilities of a ski area for skiing, snowboarding, tobogganing, sleighing, tubing, hiking, sightseeing, or any other such activity;

“ski area” means the area within the boundary designated by a ski area operator;

“ski area operator” means any person, partnership or corporation operating a ski area utilizing aerial or surface cable lifts to transport skiers within the ski area with the authority of or licence from the Ministry of Forests and Lands or the Minister of Transportation and Highways, including any agent, director, officer, employee, volunteer ski patroller, or representative of the ski area operator;

“ski run” means those slopes, trails, and runs within a ski area which are designated by the ski area operator to be used by skiers;

Duties of Ski Area Operators

2. A ski area operator shall take reasonable care to:

- (a) Mark with a sign, in accordance with current ski industry practice, the degree of difficulty of ski runs within the ski area;
- (b) Mark with a sign, in accordance with current ski industry practice, any closed ski run within the ski area;
- (c) Equip each snow grooming machine, maintenance vehicle, and snow mobile operating within the ski area with a flashing or rotating light, which shall be operating whenever the vehicle is on a ski run;
- (d) Equip each snowmobile used within the ski area with a fluorescent flag of not less than thirty centimetres along each dimension and mounted at least two metres above the bottom of the tracks of the snowmobile;
- (e) Post a warning to skiers at the beginning of any ski run open to skiers on which snow making or snow grooming operations are being carried out; and
- (f) Designate in accordance with current ski industry practice the boundaries of the ski area.

Duties of Skiers

3. Each skier has the sole responsibility for knowing the range of his own ability to negotiate any ski run and to ski within the limits of such ability.

4. Each skier has a duty to ski under control and in such a manner at all times so as to be able to avoid collision with other skiers or objects and so as not to pose a threat or risk to the safety of other skiers.

5. Each skier shall obey the following responsibility code:

- (a) When skiing downhill or overtaking another skier, a skier shall choose a course and speed which assures the safety of other skiers ahead or below;

APPENDIX C: CWSAA DRAFT SKI AREA SAFETY ACT

- (b) A skier shall not stop in any location which obstructs a ski run or where he is not visible from above;
- (c) When entering a ski run or starting to ski downhill, a skier shall yield to other skiers on the ski run;
- (d) A skier shall wear retention straps or other devices which prevent runaway skis;
- (e) A skier shall keep off closed ski runs and shall observe all posted signs within the ski area;
- (f) A skier shall not ski within any ski area when his ability to do so is impaired by alcohol, drugs, or other substances; and
- (g) A skier involved in a collision with another skier shall as soon as practicable identify himself to the other skier, or to a representative of the ski area operator, and shall render all possible assistance to the other skier, pending the arrival of the ski patrol or emergency first aid personnel.

6. No persons shall use a toboggan, sleigh, tube, or other sliding device other than skis or a snowboard within the ski area except in an area designated by the ski area operator exclusively for that purpose or by authorized personnel for emergency or rescue purposes.

7. A skier who knowingly skis outside of the ski area boundary shall be liable to compensate a ski area operator for all costs it incurs in attempting to rescue such skier.

Liability of Operators

8. No ski area operator shall be liable to a skier for injury arising or resulting from an inherent risk of skiing and no cause of action in respect of such injury shall lie against the ski area operator.

APPENDIX D

SELECTED PROVISIONS OF QUEBEC SAFETY IN SPORTS ACT RELATING TO ALPINE SKIING

S.Q. 1979, c. 86, AS AMENDED

Chapter V.1
Alpine Skiing

“Alpine Skier”

46.3 The term “Alpine skier” includes any person who practises a sport, other than Alpine skiing, that is intended to be practised on ski slopes.

Code of conduct

46.4 The operator of an Alpine ski centre must post on the premises, at the places determined by regulation of the board,

(1) the Alpine skiers' code of conduct established by regulation of the board which shall deal, in particular, with the obligations of every person who practises Alpine skiing or any other sport intended to be practised on ski slopes and with prohibited behaviour in the practice of those sports;

(2) any other rules of conduct that may be imposed on Alpine skiers by the operator of the centre;

(3) the sanctions he intends to impose on Alpine skiers who violate the said code and rules and, where applicable, the duration of such sanctions.

Obligation of skiers

46.5 The operator must indicate on all tickets giving access to ski slopes that the use of a ticket entails the obligation for the Alpine skier to comply with the Alpine skiers' code of conduct and with any other rules of conduct that he may impose on skiers.

Liability insurance

46.6 The operator must be the holder of a liability insurance policy of the type and in the amount prescribed by regulation of the board.

First-aiders

46.7 The operator must ensure that first-aiders who meet the standards prescribed by regulation of the board are present at the ski centre during the hours the ski slopes are open and maintain on the premises a first-aid service consisting of a room equipped with such first-aid kits, toboggans, other first-aid equipment and means of communication as may be required by the standards prescribed by regulation of the board.

Accident procedure

46.8 The operator must

(1) promptly provide first aid to any injured Alpine skier and, on the recommendation of a first-aider referred to in section 46.7, transport the injured skier, at the expense of that skier, to a facility maintained by an institution operating a hospital centre or a local community service centre within the meaning of the Act respecting health services and social services and amending various legislation (1991, chapter 42) or within the meaning of the Act respecting health services and social services for Cree and Inuit Native persons (R.S.Q., chapter M-9);

(2) prepare an accident report, and submit it to the board at its request, on the form prescribed by regulation of the board in all cases where a first-aider referred to in section 46.7 intervenes following an accident which has occurred on a ski slope.

Required signs

46.9 The operator must identify the level of difficulty of each ski slope, by means of the designation prescribed by regulation of the board.

Duties of operator

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46.10 The operator must

- (1) inspect every ski slope, before it is opened, to ascertain that it can be used;
- (2) patrol all slopes to which Alpine skiers have access at all times when they are open;
- (3) inspect every ski slope as soon as it is closed to ascertain that there are no Alpine skiers on the slope.

Diagrams

46.11 The operator must see to it that a pocket-size diagram of the ski slopes and ski lifts is available at the ticket office to those Alpine skiers who wish to have one. The content of the diagram shall be prescribed by regulation of the board.

Enforcement of skiers' code

46.12 The operator must take reasonable measures to ensure that the Alpine skiers' code of conduct is observed.

Compliance with standards

He is responsible for seeing to it that the standards prescribed by regulation of the board to ensure the safety of Alpine skiers are complied with.

Emergencies

46.13 In emergency situations, the board may issue an order enjoining the operator to take such appropriate measure as it may indicate to ensure the safety of Alpine skiers on the premises of the ski centre he operates.

Safety standards

55.1 The board may, by regulation, prescribe standards to ensure the safety of Alpine skiers. For that purpose, it may

- (1) establish the Alpine skiers' code of conduct which shall deal, in particular, with the obligations of every person who practises Alpine skiing or any other sport intended to be practised on ski slopes and with prohibited behaviour in the practice of those sports, and determine the places where the code, the rules of conduct and the sanctions must be posted;
- (2) determine the type and minimum amount of the liability insurance policy that the operator of an Alpine ski centre must hold;
- (3) determine the size of and layout standards for the first-aid room and the equipment it must contain;
- (4) determine the number of first-aid kits that must be kept at the disposal of the first-aid service, the places where they must be kept and the items they must contain;
- (5) determine the number and size of emergency toboggans that must be kept at the disposal of the first-aid service, the places where they must be kept and the items they must contain;
- (6) determine the first-aid equipment and means of communication with which a first-aid service must be equipped, the places where they must be located, their number and, in the case of items of equipment, their content;
- (7) determine the designation of levels of difficulty by means of which ski slopes must be identified;
- (8) determine the posters, signs, pictographs and charts which must be displayed on the premises of an Alpine ski centre and prescribe their content, form, colour, size and location and the size of the characters;
- (9) prescribe the content of the diagram of the ski slopes and ski lifts;
- (10) determine what constitutes an obstacle on a ski slope for the purpose of prescribing proper warning signs or signals;
- (11) prescribe standards relating to the use of vehicles on a ski slope while it is open to skiers and limit or, where advisable, prohibit the use of vehicles on slopes;
- (12) prescribe standards relating to the practice of a sport, other than Alpine skiing, that is intended to be practised on ski slopes and prohibit or limit the practice of a sport, other than Alpine skiing, that is intended to be practised on ski slopes;

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(13) prescribe standards as to the minimum age and the qualifications and training of first-aiders and of persons providing instruction in Alpine skiing or in any other sport intended to be practised on ski slopes;

(14) prescribe the form and content of the form provided for in section 46.8;

(15) prescribe any other safety standard relating to the practice of Alpine skiing or of any other sport intended to be practised on ski slopes, such as standards for the layout, lighting, maintenance and signalization of ski slopes.

Adopted regulations

55.2 The provisions that the Board may adopt by regulation under sections 55 and 55.1 may vary according to the categories or classes of sports, of sports events, of sports centres, of equipment, of persons and of Alpine ski centres determined by the regulation.

APPENDIX E

EXAMPLES OF SKI AREA OPERATORS' STATUTORY DUTIES UNDER U.S. LEGISLATION

Colorado

33-44-104. Negligence - civil actions. (1) A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement.

(2) A violation by a ski area operator of any requirement of this article or any rule or regulation promulgated by the passenger tramway safety board pursuant to section 35-5-710(1)(a), C.R.S., shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of such operator.

33-44-107, as amended by L. 90, p. 1540, s. 2:

Duties of ski area operators - signs required for skiers' information

(1) Each ski area operator shall maintain a sign and marking system as set forth in this section in addition to that required by section 33-44-105. All signs required by this section shall be maintained so as to be readable and recognizable under conditions of ordinary visibility.

(2) A sign shall be placed in such a position as to be recognizable as a sign to skiers proceeding to the uphill loading point of each base area lift depicting and explaining signs and symbols which the skier may encounter at the ski area as follows:

(e) Danger areas, designated by a red exclamation point inside a yellow triangle with a red band around the triangle and the word "danger" printed beneath the emblem. Danger areas do not include areas presenting inherent dangers and risks of skiing.

(4) If a particular trail or slope or portion of a trail or slope is closed to the public by a ski area operator, such operator shall place a sign notifying the public of that fact at each identified entrance of each portion of the trail or slope involved. Alternatively, such a trail or slope or portion thereof may be closed with ropes or fences.

(6) The ski area operator shall mark its ski area boundaries in a fashion readily visible to skiers under conditions of ordinary visibility...

(7) The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall adequately and appropriately cover such obstructions with a shock-absorbent material that will lessen injuries. Any type of marker shall be sufficient, including but not limited to wooden poles, flags, or signs, if the marker is visible from a distance of one hundred feet and the marker itself does not constitute a serious hazard to skiers. Variations in steepness or terrain, whether natural or as a result of slope design or snowmaking or grooming operations, including but not limited to roads and catwalks or other terrain modifications, are not man-made structures, as that term is used in this article.

New Mexico

24-15-7. Duties of ski area operators with respect to skiing areas.

Every ski area operator shall have the following duties with respect to the operation of a skiing area:

C. to mark conspicuously the top or entrance to each slope, trail or area with the appropriate symbol for its relative degree of difficulty; and those slopes, trails or areas which are closed, or portions of which present an unusual obstacle or hazard, shall be marked at the top or entrance with the appropriate symbols as are established or approved by the national ski areas association as of the effective date of the ski Safety Act and as shall be modified by the association from time to time;

G. to provide ski patrol personnel trained in first aid, which training meets the requirements of the American Red Cross advanced first aid course, and also trained in winter rescue and toboggan handling to serve the anticipated number of injured skiers and to provide personnel trained for the evacuation of passengers from stalled aerial ski lifts. A first aid room or building shall be provided with adequate first aid supplies, and properly equipped rescue toboggans shall be made available at all reasonable times at the top of ski slopes and trails to transport injured skiers from the ski slopes and trails to the first aid room;

I. to warn of or correct particular hazards or dangers known to the operator where feasible to do so.

Idaho

APPENDIX E: STATUTORY REGULATION OF SKI AREAS IN U.S.

6-1103. Duties of ski area operators with respect to ski areas.–

Every ski area operator shall have the following duties with respect to their operation of a skiing area:

- (2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails;
- (8) To provide a ski patrol with qualifications meeting the standards of the national ski patrol system.

Nevada

455A.140 Ski slopes, runs or trails: System of signs required; vehicles used by skiing operator to be equipped with light.

1. A skiing operator shall post and maintain a system of signs:

(c) To warn of each area within the boundary of the ski area where there is a danger of avalanche by posting signs stating “Warning: Avalanche Danger Area.”

455A.150 Illumination of signs at night. A sign required to be posted pursuant to NRS 455A.130 and 455A.140 must be adequately illuminated at night, if the ski area is open to the public at night, and be readable and recognizable under ordinary conditions of visibility.

New York

18-103. Duties of ski area operators

Every ski area operator shall have the following duties:

4. To conspicuously mark with such implements as may be specified by the commissioner of labor pursuant to section eight hundred sixty-seven of the labor law, the location of such man-made obstructions as, but not limited to, snow-making equipment, electrical outlets, timing equipment, stanchions, pipes, or storage areas that are within the borders of the designated slope or trail, when the top of such obstruction is less than six feet above snow level.

6. To inspect each open slope or trail that is open to the public within the ski area at least twice a day, and enter the results of such inspection in a log which shall be available for examination by the commissioner of labor. The log shall note:

- a. the general surface conditions of such trail at the time of inspection (powder, packed powder, frozen granular, icy patches or icy surface, bare spots or other surface conditions);
- b. the time of inspection and the name of the inspector;
- c. the existence of any obstacles or hazards other than those which may arise from:
 - (i) skier use;
 - (ii) weather variations including freezing and thawing; or
 - (iii) mechanical failure of snow grooming or emergency equipment which may position such equipment within the borders of a slope or trail.

12. To ensure that lift towers located within the boundaries of any ski slope or trail are padded or otherwise protected and that no protruding metal or wood objects, such as ladders or steps, shall be installed on the uphill or side portion of lift towers within the borders of a ski slope or trail, unless such objects are below the snow line, at least six feet above it, or padded or otherwise protected with such devices as, but not limited to, the following:

- a. commercially available tower padding;
- b. air or foam filled bags;
- c. hay bales encased in a water-proof cover; or
- d. soft rope nets properly spaced from the tower.

13. To, within a reasonable amount of time after the inspection required by subdivision six of this section, conspicuously mark with such implements as may be specified by the commissioner of labor pursuant to section eight hundred sixty-seven of the

APPENDIX E: STATUTORY REGULATION OF SKI AREAS IN U.S.

labor law and to provide sufficient warning to skiers by such marking or remove such obstacles or hazards which are located within the boundaries of any ski slope or trail and were noted pursuant to paragraph c of subdivision six of this section; and to also conspicuously mark with such implements and provide such warning or remove such obstacles or hazards within a reasonable amount of time after receipt of notice by the ski area operator from any skier as to the presence of such obstacles or hazards when notice is given at sites designated by the ski area operator for such receipt and the locations of which are made known to skiers pursuant to paragraph c of subdivision five of this section.

Washington

70.117.010. Ski area sign requirements

(1) The operator of any ski area shall maintain a sign system based on international or national standards and as may be required by the state parks and recreation commission.

All signs for instruction of the public shall be bold in design with wording short, simple, and to the point. All such signs shall be prominently placed.

Entrances to all machinery, operators', and attendants' rooms shall be posted to the effect that unauthorized persons are not permitted therein.

The sign "Working on Lift" or a similar warning sign shall be hung on the main disconnect switch and at control points for starting the auxiliary or prime mover when a person is working on the passenger tramway.

(2) All signs required for normal daytime operation shall be in place, and those pertaining to the tramway, lift, or tow operations shall be adequately lighted for night skiing.

(3) If a particular trail or run has been closed to the public by an operator, the operator shall place a notice thereof at the top of the trail or run involved, and no person shall ski on a run or trail which has been designated "Closed."

(4) An operator shall place a notice at the embarking terminal or terminals of a lift or tow which has been closed that the lift or tow has been closed and that a person embarking on such a lift or tow shall be considered to be a trespasser.

(5) Any snow making machines or equipment shall be clearly visible and clearly marked. Snow grooming equipment or any other vehicles shall be equipped with a yellow flashing light at any time the vehicle is moving on or in the vicinity of a ski run; however, low profile vehicles, such as snowmobiles, may be identified in the alternative with a flag on a mast of not less than six feet in height.

(6) The operator of any ski area shall maintain a readily visible sign on each rope tow, wire rope tow, j-bar, t-bar, ski lift, or other similar device, advising the users of the device that:

(a) Any person not familiar with the operation of the lift shall ask the operator thereof for assistance and/or instruction; and

(b) The skiing-ability level recommended for users of the lift and the runs served by the device shall be classified "easiest," "more difficult," and "most difficult."

70.117.015. "Trails" or "runs" defined

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

"Trails" or "runs" means those trails or runs that have been marked, signed, or designated by the ski area operator as ski trails or ski runs within the ski area boundary.

70.117.020. Standard of conduct - Prohibited acts - Responsibility

(4) A person shall be the sole judge of his or her ability to negotiate any trail, run, or uphill track and no action shall be maintained against any operator by reason of the condition of the track, trail, or run unless the condition results from the negligence of the operator.

(5) Any person who boards a rope tow, wire rope tow, j-bar, t-bar, ski lift, or other similar device shall be presumed to have sufficient abilities to use the device. No liability shall attach to any operator or attendant for failure to instruct the person on the use of the device, but a person shall follow any written or verbal instructions that are given regarding the use.

West Virginia

20-3A-3. Duties of ski area operators with respect to ski areas.

Every ski area operator shall:

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(2) mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails.

(8) Maintain the ski areas in a reasonably safe condition, except that such operator shall not be responsible for any injury, loss or damage caused by the following: Variations in terrain; surface or subsurface snow or ice conditions, bare spots, rocks, trees, other forms of forest growth or debris; collisions with pole lines, lift towers or any component thereof; or, collisions with snowmaking equipment which is marked by a visible sign or other warning implement in compliance with subdivision two of this section.