

## DARKNESS FALLS: SHOULD NIGHT SKIERS BE GIVEN A FREE PASS?

*Thomas Loegering*

Night skiing continues to emerge as an increasingly popular alternative to day skiing among ski enthusiasts. Many resorts offer discounted lift ticket prices for night skiers with the appeal of shorter lift lines, uncommon during the day.<sup>1</sup> Despite the fact night skiing accounts for only 7% of all annual ski visits, the National Ski Area Association (NSAA) reports that nearly 200 NSAA member resorts offer night skiing.<sup>2</sup> With the increasing number of Colorado resorts offering night skiing, the issue of liability pertaining to the “inherent dangers and risks” of night skiing is up for debate.<sup>3</sup> Coincidentally, the question of whether the “inherent dangers and risks” of night skiing should be treated equivalently under the Colorado Ski Safety Act as the dangers inhering in day skiing remains unanswered.

A 1990 amendment to the Colorado Ski Safety Act of 1979 states that “no skier can make any claim or recover against any ski area operator for an injury that was sustained due to the ‘inherent dangers and risks of skiing.’”<sup>4</sup> Ski area operators are not required to post warning signs regarding the inherent dangers and risks of skiing, and in any negligence claim against a ski area operator the essential determination will be whether the injury is based on the inherent dangers and risks of skiing.<sup>5</sup> Inherent risks and dangers of skiing are defined as “dangers and conditions which are an integral part of skiing.”<sup>6</sup> They include: changing weather, snow and

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<sup>1</sup> Mike Doyle, *Night Skiing: Skiing Under the Lights and the Stars*, 2008, available at <http://skiing.about.com/od/downhillskiing/a/nightskiing.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Terminology “inherent dangers and risks” adopted by Colorado Legislature to define dangers or conditions that inhere in sport of skiing. *See*, Ski Safety Act of 1979, C.R.S. § 33-44-103 (2008).

<sup>4</sup> C.R.S. § 33-44-112 (2008).

<sup>5</sup> *Graven v. Vail Assoc., Inc.*, 909 P.2d 514, 518 (Colo. 1995).

<sup>6</sup> *Id.*

surface conditions, collisions with natural and artificial objects and other skiers, variations in steepness and terrain, and failure to ski within one's ability.<sup>7</sup>

A basic reading of the text of the Colorado Ski Safety Act and the subsequent 1990 amendments suggest that injuries resulting from night skiing should qualify as "inherent dangers and risks of skiing." Although night skiing injuries are not specifically mentioned as inherent dangers or risks of skiing in the Colorado Ski Safety Act, common sense and judicial efficiency recommend their inclusion.<sup>8</sup> The Colorado legislature states that the word "include," which is used before a listing of common inherent dangers of skiing, is not mutually exclusive and does not encompass all inherent dangers associated with skiing.<sup>9</sup>

The legislative history relating to the Ski Safety Act evidences the legislature's intent to include night skiing injuries as inherent in skiing. The purpose of the 1990 amendments was to clarify the law regarding duties and responsibilities of skiers and provide greater protection for ski area operators.<sup>10</sup> The public policy concern, addressed by the legislature through the amendments, was the increased operating costs for Colorado resorts due to accident claims and litigation involving snow skiing.<sup>11</sup> The general assembly felt increased costs and litigation were due to confusion about whether or not a skier accepts and assumes the inherent dangers and risks of skiing.<sup>12</sup>

To classify night-skiing injuries as outside the risks and dangers inherent to skiing would complicate the Act and subject resorts to increased claims and litigation, which is precisely the inverse of the legislature's intent. Disqualifying night skiing injuries from coverage under the

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<sup>7</sup> *Id.*

<sup>8</sup> *See* C.R.S. § 33-44-103 (2008) (listing examples considered "inherent risks and dangers of skiing").

<sup>9</sup> *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) (stating "include" is not equivalent to the word "mean" and is ordinarily an extension and enlargement of a particular class or list, not a complete list which cannot be supplemented).

<sup>10</sup> *Gravin*, 909 P.2d at 517.

<sup>11</sup> *Id.* at 518.

<sup>12</sup> *Id.*

Ski Safety Act counteracts the Act's purpose.<sup>13</sup> Permitting someone who chooses night skiing, rather than day skiing, recovery from the same resort for the same injury resulting from the same inherent dangers and risks of the sport is patently unfair. The aim of the Ski Safety Act and the 1990 Amendments were to ensure that no one injured due to the inherent risks and dangers of skiing would be able to recover from ski area operators - regardless of whether the accident occurred during the day or night.<sup>14</sup>

Night skiing involves the same inherent risks and dangers as day skiing; however, the possibility of these risks and dangers increase as visibility diminishes. Many obstacles and hazards that are readily visible during the day may become difficult to see at night. This idea is neither unforeseeable nor beyond the knowledge of a reasonable person. Such an elementary concept should be borne by skiers and should not subject ski area operators to increased liability. The fundamental notion of darkness and its attendant circumstances is widely understood, and heightened use of caution should be charged to night skiers who undertake the inherent risks and dangers of skiing at night. Reduced visibility is inherent in night skiing and can be qualified as a "condition" which is referenced in the Colorado Ski Safety Act's definition of "inherent dangers and risks of skiing."<sup>15</sup>

Weather conditions at ski resorts frequently change throughout the day causing similar changes in visibility as well. A common visibility condition is known as "flat" light<sup>16</sup> which usually occurs on overcast days and creates a lack of contrast making it difficult to see the snow surface clearly. A ski area is not expected to mark all areas and obstacles that suddenly become

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<sup>13</sup> See, *Supra*, 10 (stating the purpose of the 1990 amendments were to provide greater protection for ski area operators).

<sup>14</sup> C.R.S. § 33-44-112 (2008).

<sup>15</sup> C.R.S. § 33-44-103 (2008) (defining "inherent risks and dangers of skiing" as dangers or *conditions* that are part of skiing).

<sup>16</sup> Stu Campbell, *Skiing in Flat Light*, 2008, available at <http://www.skinet.com/article.jsp?ID=1000038427>

hazardous upon the occurrence of shifting visibility conditions.<sup>17</sup> Likewise, there should be no greater responsibility owed by ski area operators to skiers at night than there is during the day when visibility conditions are poor. Traditionally, it is the responsibility of the skier to know the range of his own abilities, ski within his control and be aware of his surroundings at all times.<sup>18</sup> Under conditions of decreased visibility, it is the skier's duty to locate and ascertain all posted signs and warnings.<sup>19</sup> Based on this assertion, a skier should also be aware of hazards and obstacles that may be hidden or difficult to see due to decreased visibility associated with night skiing. Just as a reasonable skier would proceed with caution and slow down in order to remain under control in flat-light conditions, the skier should be held to the same standard when night skiing. Night skiers should not receive a free pass to ski irresponsibly and be afforded a remedy for their failure to recognize and adhere to changing visibility conditions inherent in night skiing. The remedy and expense for the careless disregard of these inherent conditions will fall on the ski area operator, and ultimately, other responsible ski area patrons. If injuries while night skiing are not considered as inherent risks of skiing, night skiers effectively get a waiver for reckless behavior. This opens the door for countless lawsuits. This scenario, however, is avoided by treating the inherent dangers and risk of night skiing as identical to those of day skiing.

The inherent risks of skiing are dangers that skiers choose to confront. They are essential characteristics of the sport and are hazards that cannot be eliminated by the use of ordinary care by the ski area operator.<sup>20</sup> The Utah legislature reinforces the idea that it is impracticable for ski area operators to try to undertake the elimination of all potential hazards and dangerous

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<sup>17</sup> Arthur N. Frakt & Janna S. Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 Idaho L. Rev. 227.

<sup>18</sup> See generally C.R.S. § 33-44-109 (2008) (addressing duties and responsibilities of all skiers).

<sup>19</sup> *Id.*

<sup>20</sup> *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1046-47 (Utah 1991)

conditions that inhere in skiing.<sup>21</sup> Included in those hazards and dangerous conditions are changes in visibility, an essential element of night skiing. The Utah legislature recognizes the universal idea that hazards may exist in locations where they are not easily discoverable, and changes in weather and snow conditions can create decreased visibility and new hazards where none had previously existed.<sup>22</sup> Additionally, it is foreseeable that as a result of such conditions a skier may lose control or fall unexpectedly and that there is no way for ski area operators to alleviate these risks.<sup>23</sup> Therefore, ski area operators should not be responsible for injuries caused by such visibly foreseeable risks.

It appears Colorado's legislature shared Utah's legislative intent when it drafted the Colorado Ski Safety Act and the 1990 Amendments. Colorado and Utah are both extremely popular ski destinations for skiers all over the world.<sup>24</sup> They offer numerous world class resorts and boast some of the best snow conditions and terrain available anywhere.<sup>25</sup> Both legislatures list public policy and the fact that the ski industry contributes significantly to the state's economy and is practiced by a large number of its state's residents as reasons to include an "inherent dangers and risks of skiing" provision in each respective state's ski safety act.<sup>26</sup>

Colorado, like Utah, is concerned about protecting ski areas from frivolous lawsuits concerning accidents that are common to the sport of skiing.<sup>27</sup> Many ski areas contend that the only way to guard against being subject to unreasonable and unwarranted liability is through legislative protection.<sup>28</sup> The Colorado legislature has tried to alleviate these concerns through

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

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See generally*, <http://www.utah.com/ski/>; <http://www.skicolorado.com/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Clover*, 808 P.2d at 1046-47; *Graven*, 909 P.2d at 518.

<sup>27</sup> C.R.S. § 33-44-102 (2008) (legislative declaration explaining Colorado has legitimate state interest in economic viability of ski industry).

<sup>28</sup> *Frakt & Rankin*, *supra* note 12 at 263.

the enactment of the Colorado Ski Safety Act and the subsequent 1990 amendments.

Disqualifying night skiing injuries as not “inherent” within the risks of skiing completely undermines this effort. Conversely, it subjects ski area operators to the very same unreasonable and unwarranted liability and augmented insurance costs from which they seek protection.

Case law on this particular subject is rare, but a pair of New York cases reinforce the idea that injuries resulting from night skiing qualify as inherent dangers and risks of skiing.<sup>29</sup> In *Ruepp*, the court held on appeal that the defendant ski area’s motion for summary judgment should have been granted because no factual issues existed as to plaintiff’s injury which occurred during night skiing.<sup>30</sup> The court concluded that “...the forest environment where the sport of skiing takes place and the time of day chosen by plaintiff in which to ski, the possibility of encountering shadows in an irregular topography was an obvious and inherent risk of night skiing.”<sup>31</sup> The court stated that because the plaintiff acknowledged skiing involves risk, and he voluntarily chose to ski at night, he effectively “assumed the risk of encountering inevitable shadows which might conceal depressions in the terrain.”<sup>32</sup>

In *Sontag*, the court repeated the idea that night skiing injuries are part of the inherent dangers of skiing.<sup>33</sup> The court held that inherent risks of skiing included the risk of injury caused by terrain variations regardless of whether or not they could be seen.<sup>34</sup> Additionally, the court stated that the plaintiffs failed to submit sufficient evidence showing that defendant ski area had created a dangerous condition above that of the inherent dangers of skiing.<sup>35</sup> The court

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<sup>29</sup> See generally, *Ruepp v. West Experience*, 272 A.D.2d 673 (N.Y. App. Div. 2000); *Sontag v. Holiday Valley*, 38 A.D.3d 1350 (N.Y. App. Div. 2007).

<sup>30</sup> *Ruepp*, 272 A.D.2d at 674.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Sontag*, 38 A.D.3d at 1351.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

concluded poor lighting conditions giving way to unseen dangers are open, obvious, and inherent dangers of skiing.<sup>36</sup>

These cases hold that night skiing injuries are included in the inherent risks and dangers of skiing because they are foreseeable and obvious risks that are assumed by skiers choosing to ski at night. The dangers accompanying decreased visibility and hidden obstacles associated with night skiing are comprehensible by those who chose to participate. To hold night skiers to a lower standard than day skiers will hurt the entire sport of skiing and jeopardize the availability of night skiing as a viable option. Skiers should be held accountable, both day and night, and a particular group cannot be allowed to drive up costs for all skiers through needless and easily preventable litigation. Following the intent of Colorado's legislature, as well as case-law and common sense, night skiing injuries should be included as inherent dangers and risks of skiing under Colorado's Ski Safety Act to ensure the Colorado ski industry continues to thrive.

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<sup>36</sup> *Id.*