ASSUMPTION OF RISK AFTER *SUNDAY v. STRATTON CORPORATION:* THE VERMONT SPORTS INJURY LIABILITY STATUTE AND INJURED SKIERS

INTRODUCTION

The cause of action in the case of *Sunday v. Stratton Corp.*[1] arose when James Sunday, then a twenty-one year old student, was injured on February 7, 1975, while skiing at Stratton Mountain in Vermont. Sunday fell when his ski caught a piece of brush three to five feet from the edge of the trail. His head struck a rock, resulting in quadraplegic paralysis. Sunday brought suit, alleging that his injury resulted from Stratton Corporation's negligent failure to properly maintain its trails. The jury determined that Stratton Corporation had been negligent and returned a verdict in favor of plaintiff Sunday.

Prior to the *Sunday* verdict, the defense of assumption of risk had been available to bar recovery by a skier injured as a result of a downhill skiing accident.[2] In *Sunday,* however, the trial court refused to give a requested charge to the jury on the issue of assumption of risk. The court ruled that under Vermont's recently enacted comparative negligence statute,[3] the defense of assumption of risk was no longer available, and that on the facts in *Sunday,* only con-

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1. Sunday v. Stratton Corp., No. C83-75 CnC (Vt. Super. Ct. May 31, 1977), *aff'd,* No. 241-77 (Vt. Sup. Ct. June 6, 1978). For a discussion of the supreme court opinion released as this note went to press, see note 76 *infra.*

2. *See* Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781, 787 (D. Vt. 1976); Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 791 (D. Vt. 1951).

3. VT. STAT. ANN. tit. 12, § 1036 (1973). There are three basic types of comparative negligence statutes: "pure," "modified," and "slight/gross." Under the "pure" formula, no amount of contributory negligence will be a total bar to the plaintiff's action. This formula has been criticized because recovery may be had against a defendant who was only slightly negligent in comparison to the negligence of the plaintiff. Under the "modified" formula, there are two subdivisions. Under one, the plaintiff may not recover if his negligence is equal to or greater than that of defendant; the other subdivision allows recovery where the negligence of the plaintiff is equal to or less than that of the defendant. Vermont is in this latter group, sometimes referred to as the "fifty-one percent bar rule." In the "slight/gross" formula, the plaintiff may recover only if his negligence was slight and the defendant's gross by comparison. *See* Note, *Comparative Negligence in Vermont: A Solution or a Problem,* 40 ALB. L. REV. 777 (1976); Note, *Colorado Comparative Negligence and Assumption of Risk,* 46 U. COLO. L. REV. 509, 514-15 & nn. 19-22 (1975).

tributory negligence could be offered as a defense.[4] The jury, required by the Vermont comparative negligence statute to apportion any finding of negligence between the parties, found the area operator 100% negligent for allowing a piece of brush to be in the trail and awarded damages to plaintiff Sunday in the amount of 1.5 million dollars.[5]

In the wake of the verdict in the *Sunday* case, much attention has been focused on the issue of ski injury liability in Vermont.[6] The two remaining insurers of Vermont's ski areas threatened to withdraw coverage, fearing a succession of large damage awards unless *Sunday* could be limited by either the courts or the legislature.[7] The ski area owners and operators claimed that such action by the insurers would force them to shut down, and skiers became alarmed that there would be fewer facilities and a large increase in daily lift ticket prices.[8]

In order to avoid these consequences, the Vermont General Assembly enacted legislation to clarify the law governing the liability of ski area operators. According to its legislative history,[9] the pur-

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4. Some comparative negligence jurisdictions have expressly abolished assumption of risk by statute. *See, e.g.*, MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Co-op 1974); OR. REV. STAT. § 18.475(2) (1977); UTAH CODE ANN. § 78-27-37 (1977); *see also* Note, *Comparative Negligence in Vermont: A Solution or a Problem*, 40 ALB. L. REV. 777, 802 n.141 (1976). Other jurisdictions have specifically retained it, usually by decisional law. *See, e.g.*, Bugh v. Webb, 328 S.W.2d 379, 381 (Ark. 1959); Henry Grady Hotel Corp. v. Watts, 167 S.E.2d 205, 209-10 (Ga. App. 1969); Herod v. Grant, 262 So.2d 781 (Miss. 1972); *cf.* Farley v. M & M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (assumption of risk abolished in negligence cases, and retained in strict liability cases and situations where there is express consent to assumption of risk). *See* Anderson, *The Defense of Assumption of Risk Under Comparative Negligence*, 5 ST. MARY'S L.J. 678 (1974); Note, *Colorado Comparative Negligence and Assumption of Risk*, 46 U. COLO. L. REV. 509, 518 (1975).

5. Sunday originally sought damages in the amount of 1.25 million dollars, but was awarded 1.5 million dollars by the jury.

6. *See, e.g.*, New York Times, Feb. 21, 1978, at 43, col. 1. The ski industry provides an important source of revenue for the State of Vermont, amounting to approximately 150 million dollars annually. *Id.*

7. *Id.*

8. *Id.*

9. Act of Feb. 7, 1978, H. 417 §1 (legislative intent). Section one reads as follows:

> Since 1941, the law relating to liability of operators of ski areas in connection with downhill skiing injuries has been perceived to be governed by the doctrine of *volenti non fit injuria* as set forth in the case of Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, decided by the United States District Court for Vermont. In 1976, in the case of Leopold v. Okemo Mountain, Inc.,

pose of the statute is to reaffirm the availability of the defense of assumption of risk in cases involving sports injuries.[10] The operative section of the measure provides: "Notwithstanding the provisions of [the Vermont comparative negligence statute], a person who takes part in a sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."[11]

The new statute specifically mandates a return to the law as declared by Judge Gibson in the 1951 federal district court decision, *Wright v. Mt. Mansfield Lift, Inc.*[12] In that case, Ms. Florine Wright broke her leg when she fell after her ski struck a stump that was concealed under four to five inches of snow. The court held that Ms. Wright's injury resulted from a danger inherent in the sport of skiing, and that she had assumed the risk of such a danger when she chose to ski.

In the few subsequently reported cases involving downhill ski injuries, *Wright* has been closely followed.[13] It was most recently

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420 F. Supp. 781, decided also by the United States District Court for Vermont, the doctrine of assumption of risk was held to be applicable in a downhill skiing injury case, despite the adoption of a comparative negligence statute by the Vermont General Assembly in 1970. In 1977, in the case of Sunday v. Stratton Corporation, the Superior Court for Chittenden County of the state of Vermont ruled that the defense of assumption of risk was inappropriate in a comparative negligence case involving a downhill skiing injury.

It is a purpose of this act to state the policy of this state which governs the liability of operators of ski areas with respect to skiing injury cases, including those resulting from both alpine and nordic skiing, by affirming the principles of law set forth in Wright v. Mt. Mansfield Lift, Inc., and Leopold v. Okemo Mountain, Inc., which established that there are inherent dangers to be accepted by skiers as a matter of law.

10. Act of Feb. 7, 1978, H. 417 § 2 (to be codified in VT. STAT. ANN. tit. 12, § 1037).

11. *Id.* The question remains whether the availability of the defense of assumption of risk is specifically limited to those cases involving inherently dangerous sporting activity, or whether it will continue to be available as a defense in other tort actions. *See* Frost v. Tisbert, ___ Vt. ___, 376 A.2d 748, 749 (1977) (the court, in dictum, stated that assumption of risk was still an affirmative defense to be established by the defendant in a negligence action). In considering the sports injury liability statute, the Vermont General Assembly had an opportunity to re-establish the defense more broadly than it did, but omitted to do so. The General Assembly made no mention of the status of the defense of assumption of risk when the comparative negligence statute was being considered, thus no guidance may be found in the legislative history. *See* Minutes of Vt. House of Rep. Comm. on the Judiciary, Mar. 18, 1970.

12. 96 F. Supp. 786 (D. Vt. 1951). *See* note 9 *supra.*

13. *See,* e.g., Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781, 786-87 (D. Vt. 1976); McDaniel v. Dowell, 210 Cal. App. 2d 26, 31, 26 Cal. Rptr. 140, 143 (1962); Kaufman v. State,

affirmed in the 1976 federal district court decision, *Leopold v. Okemo Mountain, Inc.*[14] In *Leopold,* a skier struck an unpadded chair lift tower located in the trail, resulting in his death. Recovery was denied on an assumption of risk theory as articulated in *Wright.* In contrast to the *Sunday* decision, this result was reached despite the fact that the Vermont comparative negligence statute was in effect at the time of the injury.[15]

In enacting the new statute, the Vermont General Assembly has affirmed and adopted the principles of law expressed in *Wright.*[16] Thus, the importance of the language and logic of *Wright* and *Leopold* has been recognized and it is inevitable that the *Wright* opinion will continue to be used as a touchstone in the resolution of litigation that arises under the new statute.

The language of the statute does not include the so-called "laundry list" of specific risks to be assumed by a skier which was desired by the insurance carriers for Vermont ski areas.[17] By opting for less definite language, the General Assembly left certain questions partially unanswered. What dangers, for example, "inhere" in the sport of skiing, and which of these are "obvious and necessary"? What is the effect of declaring that the skier accepts dangers inherent in the sport "as a matter of law"? And what procedural effect, if any, will the new statute have on future sports injury litigation? The court's analysis in the *Wright* decision may prove helpful in the resolution of these inquiries, but it cannot be expected to answer all questions. A case-by-case resolution will be the only available method of decision, and in ski injury cases, an understanding of the

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11 Misc. 2d 56, 63, 172 N.Y.S.2d 276, 283 (1958). *See generally* Lisman, *Ski Injury Liability,* 43 U. COLO. L. REV. 307 (1972); Annot., 94 A.L.R.2d 1431, 1435, 1437, 1446 (1964).

14. 420 F. Supp. 781, 786-87 (D. Vt. 1976). Although there were no witnesses to the accident, evidence was presented to support the inference that the skier, conceded to be an expert, was looking back over his shoulder when the accident occurred. *Id.* at 784.

15. VT. STAT. ANN. tit. 12, § 1036 (1973).

16. *See* note 9 *supra.*

17. The Vermont Ski Area Association argued for the inclusion of explicit language that would have enumerated certain risks to be assumed by skiers, presumably to make the outcome of ski injury litigation more predictable. The Barre-Montpelier Times Argus, Jan. 25, 1978, at 1, col. 1. *See also,* Rutland Herald, Dec. 14, 1977, at 1, col. 1, for a critique of an early draft of a ski injury liability bill. The list of duties and risks proposed was similar to that found in a recently enacted statute in the State of Washington. 1977 Wash. Legis. Serv., 432-35.

duties and responsibilities of both area operator and skier is the only sound foundation on which to base such decisions.

I. Duty of the Ski Area Operator

In Vermont, the legal relationship existing between the ski area operator and the patron skier generally is that of invitor and invitee.[18] This means that the operator has a legal duty to use ordinary care to protect the skier from such hazards as may be reasonably discoverable and preventable by the operator.[19] With respect to lift operations, however, the courts have held the ski lift operator to the more demanding standard of "common carrier," which requires that the utmost care be exercised by the carrier for the safety of the passenger.[20] In contrast, downhill ski situations are governed not by the common carrier standard, but by the less demanding standard, of ordinary care.[21]

Although there is no case law which clearly defines the duties to be fulfilled by the area operator, standard practice in the industry[22] dictates that the operator's summer maintenance program be

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18. Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 790 (D. Vt. 1951). The invitor-invitee relationship is but one of the varying standards of care that could be required by law. For example, the licensor-licensee relationship contemplates a standard that is considerably less demanding. The licensee is required to take the premises as he finds them. W. Prosser, Law of Torts § 60 at 376 (4th ed. 1971) [hereinafter cited as Prosser]. *See also,* Gaines, *Liability of Ski Area Operators,* 20th Annual Convention, ATLA, 674, 678-93 (1966).

19. Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 790 (D. Vt. 1951).

20. In litigation against ski area operators, there is a distinction between the cases in which the skier is injured while skiing down the hill and the cases in which the skier is injured while being conveyed up the hill. Although an in-depth discussion of the latter class of cases is beyond the scope of this note, it is significant that in Vermont, the duty of the lift operator has been held to be that of a common carrier, with the highest degree of care owed to passegers on a chair lift (though perhaps not a rope tow, where the skier retains more control over his movement). Fisher v. Mt. Mansfield Lift, Inc., 283 F.2d 533 (2d Cir. 1960). In Grauer v. State, 15 Misc. 2d 471, 476, 181 N.Y.S.2d 994, 999 (Ct. Cl.), *aff'd,* 9 App. Div. 2d 829, 192 N.Y.S.2d 647 (1959), the lift operator was required to use the "utmost foresight as to possible dangers, and the utmost prudence in guarding against them." *See also,* Lisman, *Ski Injury Liability,* 43 U. Colo. L. Rev. 307, 307-12 (1972); Annot., 94 A.L.R.2d 1431, 1438-40 (1964).

The trend is toward the abolition of the trespasser, licensee, and invitee categories and to the imposition of a general standard of ordinary care on owners and occupiers of land. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Prosser, *supra* note 18, at § 62.

21. *See* note 20 *supra.*

22. The fact that a practice is normally followed will not, of course, establish that an

designed to remove as many potentially dangerous obstacles as is reasonably possible.[23] Once the ski season has opened, various pieces of slope-grooming equipment, and increasingly, snow-making machinery, are used to improve the condition of the trails and add to the snow cover.[24] In conforming to standard practices, the operator marks the various trails with ability designations so that skiers may choose the trails where they will ski based on their own assessment of their ability.[25] In addition, it is universal practice to employ ski patrol personnel. These specially trained expert skiers inspect the trails during the day in an effort to detect hazards as they develop, and they assist in the care and removal of skiers who may be injured on the slopes.

If the maintenance standards of the industry fulfill the legal standard of ordinary care,[26] and if the area operator has adhered to this standard, it has done all that is required. If, however, the area operator unreasonably fails to take any precautions, such as hiring ski patrol personnel, actively maintaining the premises on and off season, or marking trails with skiing conditions and ability designations;[27] or if the operator affirmatively creates a danger, such as

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adequate standard of care has been observed, for that would allow ski area operators to establish their own standard. As the Supreme Court of Michigan observed in Marietta v. Cliffs Ridge, Inc., 385 Mich. 364, 369-70, 189 N.W.2d 208, 209 (1971):

> The standard by which the negligent or non-negligent character of the defendant's conduct is to be determined is that of a reasonably prudent man under the same or similar circumstances. . . . The customary usage and practice of the industry is relevant evidence to be used in determining whether or not this standard has been met. Such usage cannot, however, be determinative of the standard.

In *Marietta*, a skier was injured when he struck a slalom pole while participating in a race. The operator was found negligent for allowing maple saplings to be used as slalom poles instead of the more common, and safer, bamboo poles. *Id.* at 369-74, 189 N.W.2d at 209-11.

23. Interview with Donald deJ. Cutter, Sr., in Hanover, N.H. (Nov. 26, 1977). Mr. Cutter, a ski area consultant, has had extensive experience in all aspects of the sport of skiing, including ski area design, construction, maintenance, and operation.

24. *Id.*

25. The duty to assess a skier's ability is generally not that of the operator, but of the skier himself. *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786, 790 (D. Vt. 1951); *Vogel v. State*, 204 Misc. 614, 621, 124 N.Y.S.2d 563, 570 (Ct. Cl. 1953), *appeal dismissed by default*, 284 App. Div. 993, 136 N.Y.S.2d 376 (1954).

26. *See* note 22 *supra.*

27. New Hampshire requires ski areas to use a uniform system of trail markings that designates the degree of difficulty of the trail. N. H. REV. STAT. ANN. § 225-A:24 (Supp. 1975). The State of Washington has adopted a similar requirement in its new statute, 1977 Wash. Legis. Serv. 433, and it is likely that this type of measure will be more common in the future.

leaving equipment in the trails at dangerous locations, this would be a clear breach of its duty of ordinary care.[28] All these situations are within the reasonable control of the operator, and requiring the operator to take these safety measures is consistent with its duty to protect patron skiers from reasonably discoverable and preventable dangers.[29]

In cases where a skier has been injured because of the negligence of the area operator, subsequent recovery by the injured skier may result. The amount recovered would be determined with regard to the provisions of Vermont's comparative negligence statute.[30] Under the modified version of comparative negligence which exists in Vermont,[31] an injured skier could recover against a negligent area operator unless the skier's negligence exceeded that of the area operator.[32]

It must be recognized, however, that even when the operator is conscientious in fulfilling its required duty of ordinary care, considerable danger of injury still remains.[33] These dangers are inherent in the sport of skiing, and under the new statute in Vermont, the skier voluntarily consents to assume the risk of these dangers when the choice is made to participate in the sport.[34] Inherent dangers are

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28. *See* text accompanying note 72 *infra*.

29. Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 790 (D. Vt. 1951).

30. VT. STAT. ANN. tit. 12, § 1036 (1973).

31. *See* note 3 *supra*.

32. *See* note 3 *supra*.

33. Arguably, there is no other "consumer" sport where so many expose themselves to hazardous conditions as diverse and as likely to produce injury as in downhill skiing. A favorable comparison may be drawn to horseback riding, where the risk of injury has been held to inhere in the sport even when the owner of a riding stable has fulfilled his duty of care to the rider-bailee. *See* Baar v. Hoder, 482 P.2d 386 (Colo. App. 1971) (citing Troop A Riding Academy v. Miller, 127 Ohio St. 545, 189 N.E. 647 (1934)).

34. Act of Feb. 7, 1978, H. 417 § 2 (to be codified in VT. STAT. ANN. tit. 12, § 1037). Section One of the new statute speaks of "the doctrine of *volenti non fit injuria* as set forth in the case of Wright v. Mt. Mansfield Lift, Inc. . . ." In Vermont, the *volenti* phrase was originally used to express a contractual relation such as that between master and servant. *See* Gover v. Vermont Central Ry., 96 Vt. 208, 212-16, 118 A. 874, 876-78 (1922); Carbine's Adm'r v. Bennington & Rutland R.R., 61 Vt. 348, 351-53, 17 A. 491, 492 (1889). The Vermont Supreme Court has recognized the equivalency of the *volenti* doctrine with what is more commonly called assumption of risk. *See* Roberts v. Gray, 119 Vt. 153, 157, 122 A.2d 855, 858 (1956) (quoting Watterlund v. Billings, 112 Vt. 256, 261, 23 A.2d 540, 543 (1942)); Bouchard v. Sicard, 113 Vt. 429, 431, 35 A.2d 439, 440 (1944). Prosser also observes that there is no substantive distinction between the *volenti* doctrine and assumption of risk. PROSSER, *supra* note 18, § 68 at 439-40 & nn. 12 & 13.

by definition those which are beyond the reasonable control of the area operator, they are an intrinsic part of the sport itself.[35]

Although the court in *Wright v. Mt. Mansfield Lift, Inc.*[36] did not attempt to specifically define the area operator's duties, the opinion did offer an analysis of the duties which can *not* be required of the area operator:

> To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. *It cannot be that there is any duty imposed* on the owner and operator of a ski slope that charges it with the knowledge of these mutations of nature and requires it to warn the public against such.[37]

By adopting *Wright* as the foundation of the new sports injury statute,[38] the Vermont General Assembly has recognized that retention of the assumption of risk defense is appropriate when applied to sporting activities such as skiing in which a certain measure of danger is inherent.

II. Assumption of Risk by the Skier: Obvious and Necessary Dangers

A. *Assumption of Risk*

Few tort doctrines have suffered from such imprecise definition as assumption of risk.[39] It has been suggested that assumption of

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35. *See* text accompanying note 65 *infra*. *See also*, Lisman, *Ski Injury Liability*, 43 U. Colo. L. Rev. 307, 315-16 (1972).

36. 96 F. Supp. 786 (D. Vt. 1951).

37. *Id.* at 791 (emphasis added).

38. *See* note 9 *supra*.

39. The concurring opinion of Mr. Justice Frankfurter in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), comments succinctly:

> The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

Id. at 68 (Frankfurter, J., concurring).

risk is an eclectic doctrine with no legally unique feature, and that cases where it has been applied could have been decided as easily through the use of other tort concepts, such as no-duty analyses, express exculpation agreements, and contributory negligence.[40]

The most common and useful model for analyzing assumption of risk categorizes the defense as either "primary" or "secondary."[41] The distinction between these two categories of assumption of risk was clearly drawn by the New Jersey Supreme Court in *Meistrich v. Casino Arena Attractions, Inc.*:[42]

> In one sense (sometimes called its "primary" sense), it is an alternate expression for the proposition that defendant was not negligent, *i.e.*, either owed no duty or did not breach the duty owed. In its other sense (sometimes called "secondary"), assumption of risk is an affirmative defense to an established breach of duty.[43]

Traditionally,[44] the burden of asserting and proving the affirmative defense of assumption of risk has been on the defendant.[45] In this situation, known as secondary assumption of risk, the defense is advanced to bar recovery even though there has been a demonstrated breach of duty by the defendant—that is, he has already been found negligent.[46] Here, it has been argued that "assumption

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The first "modern" case to explain assumption of risk was Cruden v. Fentham, 2 Esp. 685, 170 Eng. Rep. 496 (1799). PROSSER, *supra* note 18, § 68 at 439 n.9. For a history of the defense, see Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 324-30 (1943). Assumption of risk has been divided into as few as two components, "primary" and "secondary." 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.1 (1956) [hereinafter cited as HARPER & JAMES]; James, *Assumption of Risk*, 61 YALE L.J. 141, 141 (1952); Note, *Comparative Negligence in Vermont: A Solution or a Problem*, 40 ALB. L. REV. 777, 800 (1976). In contrast, assumption of risk has been asserted to have as many as six components. *See* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 123-28 (1961). For other categorical breakdowns of the defense, see RESTATEMENT (SECOND) OF TORTS § 496A, comment c at 561-62 (1965); Note, *Torts: Comparative Negligence + Implied Assumption of Risk = Injustice*, 27 OKLA. L. REV. 549, 549-50 (1974).

40. *See, e.g.*, Meistrich v. Casino Arena Attractions, Inc. 31 N.J. 44, 48, 155 A.2d 90, 93 (1959); 2 HARPER & JAMES, *supra* note 39, § 21.1 at 1162-63.

41. *See* note 39 *supra*.

42. 31 N.J. 44, 155 A.2d 90 (1959).

43. *Id.* at 49, 155 A.2d at 93.

44. For a discussion of the applications of the phrase "assumption of risk" in Vermont, see Hoar v. Sherburne Corp., 327 F. Supp. 570, 572-78 (D. Vt. 1971).

45. VT. R. CIV. P. 8(c) (Cum. Supp. 1977).

46. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 49-54, 155 A.2d 90, 93-

of risk" is a misnomer and that the concept of contributory negligence is the more appropriate legal theory.[47] Once the negligence of defendant is established, the question becomes whether plaintiff was acting reasonably in encountering a known risk, and if so, whether under all the circumstances (including defendant's negligence), the reasonable person would have acted as plaintiff did.[48] If the reasonable person would have so acted, then plaintiff is guilty of no negligence himself and there can be no assumption of risk in the secondary sense.[49] If on the other hand, the reasonable person in plaintiff's circumstances would not have acted as plaintiff did, then assumption of risk in its secondary sense may bar recovery.[50] Thus use of the phrase "assumption of risk" is a confusing shorthand for the underlying truth that plaintiff has been contributorily negligent, for he has failed to exercise reasonable care for his own safety.[51]

Primary assumption of risk, on the other hand, is unrelated to the issue of plaintiff's contributory negligence; it relates to the issue of defendant's negligence.[52] Thus, when a court bars recovery under primary assumption of risk, it has in fact concluded that defendant either owed no duty to plaintiff, or if the defendant did owe plaintiff a duty, it had been fulfilled.[53] Since defendant's negligence is the real question addressed, it is arguable that the burden of proof of primary assumption of risk should be shifted to plaintiff.[54]

It has been suggested that consent by plaintiff to assume the risk of injury is tantamount to relieving the defendant of the obligation to exercise care for the plaintiff's safety.[55] Thus, no duty re-

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96 (1959); 2 HARPER & JAMES, *supra* note 39, § 21.1 at 1162 (1956); James, *Assumption of Risk*, 61 YALE L.J. 141, 167, 169 (1952).

47. *See* note 46 *supra*.

48. *See* note 46 *supra*.

49. *See* note 46 *supra*.

50. *See* note 46 *supra*.

51. *See* Bouchard v. Sicard, 113 Vt. 429, 431, 35 A.2d 439, 440 (1944). In *Bouchard* the Vermont Supreme Court recognized the virtual equivalence of contributory negligence and assumption of risk in what is now termed its secondary sense.

52. *See* 2 HARPER & JAMES, *supra* note 39, § 21.1; James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

53. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 49, 155 A.2d 90, 93 (1959).

54. *Id.*; James, *Assumption of Risk*, 61 YALE L.J. 141, 168-69 (1952). *But see* note 76 *infra*.

55. *See* PROSSER, *supra* note 18, § 68 at 440, 442; Keeton, *Assumption of Risk in Products*

mains for defendant to breach, and no basis exists for recovery by plaintiff. A corollary of the "no duty" or "no breach of duty" analysis is appropriately applied to some sporting activities which are hazardous and present a risk of injury even where there has been no breach of duty by anyone. For example, when a court bars recovery by an injured skier, declaring that the injured person "assumed the risk," what is really stated is that the defendant area operator fulfilled the required duty of ordinary care.[56] This is to be distinguished from saying that the injured skier assumed the risk of the operator's negligence, for the injured skier has never consented to relieve the operator of his legal duty of ordinary care. It is simply that the proximate cause of the injury was not a breach of any duty owed by the defendant,[57] but rather a danger inherent in the sport, not within the ambit of the operators reasonable control. The area operator is not and can not be a guarantor of the skier's safety due to the existence of dangers inherent in the sport.

This was precisely the analysis of the court in *Wright,* although the relationship between the duty of the area operator and assumption of risk in its primary sense was not clearly expressed.[58] The court in *Wright* did not find the area operator negligent. Since assumption of risk in its secondary sense is an affirmative defense invoked only after the negligence of defendant has been established, the court could not have applied the doctrine of secondary assumption of risk. In reaffirming the principles of *Wright,* therefore, the General Assembly has established primary assumption of risk as controlling law in sports injury cases. Accordingly, under the new statute, it can be argued that the burden is on the plaintiff[59] to prove that the injury was caused not by dangers of which he assumed the risk, but by defendant area operator's breach of duty.[60]

Liability Cases, 22 LA. L. REV. 122, 122-24 (1961). Strictly speaking, this situation involves an express consent by the injured plaintiff, and is arguably more akin to exculpation agreements in contract than to tort law.

56. *See* Lisman, *Ski Injury Liability,* 43 U. COLO. L. REV. 307, 307 (1972).

57. *See* 2 HARPER & JAMES, *supra* note 39, § 20.6 at 1155-56.

58. 96 F. Supp. 786, 790-91 (D. Vt. 1951).

59. *But see* note 76 *infra.*

60. Other jurisdictions have also enacted statutes that address the problem of liability for ski injuries. Among these are New Hampshire, where the supreme court has interpreted the relevant statute to mean that "the entire responsibility for downhill accidents [is] on the skier." Adie v. Temple Mt. Ski Area, Inc., 108 N.H. 480, 482-83, 238 A.2d 738, 740 (1968)

B. *Inherent, Obvious and Necessary Dangers*

Under the new statute, it will have to be established that the plaintiff's injury was caused by a danger neither "inherent" in the sport of skiing, nor "obvious and necessary" before liability is imposed on an area operator.[61] Although these terms have been given partial definition in the past, their meaning remains in large part to be determined by the courts and juries.

Skiing injuries are common; the statistical evidence demonstrates the hazardous nature of this sport. Approximately one in thirty-five skiers will be injured in a given year; more than 100,000 injuries occur each season.[62] The circumstances surrounding these injuries are diverse, but in the process of determining which injuries result from dangers inherent in the sport, the courts will not be without guidance. The language of the new statute, which declares that a participant in a sport "accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary,"[63] is virtually a direct quote from the opinion in *Wright*[64] where the court acknowledged the full extent of the dangers that inhere in the sport of skiing:

> Skiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to

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(construing N.H. REV. STAT. ANN. § 225.A:25 (Supp. 1975)). In New Mexico, "the primary responsibility for the safety of . . . [the] skier . . . rests with the skier himself." N.M. STAT. ANN. § 12-28-2 (1976). Utah has relieved the area operator of the responsibility for protecting the skier from "hazards inherent" in skiing. UTAH CODE ANN. § 63-11-37 (Supp. 1977). Montana has a similarly worded statute. MONT. REV. CODES ANN. § 69.6601 (Supp. 1977). The new statute in the State of Washington is the most comprehensive, giving relatively thorough descriptions of the duties of both skiers and area operators. 1977 Wash. Legis. Serv. 432-35.

61. *See* text accompanying notes 9-11 *supra*. The "obvious and necessary" language in the new statute used by Judge Gibson in *Wright* did not originate with him. He acknowledges Mr. Chief Justice Cardozo, in Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 482, 116 N.E. 173, 174 (1929), as the source of the phrase, and in large measure, the logic of the opinion in *Wright*. Wright v. Mt. Mansfield Lift, Inc., 96 F Supp. 786, 791-92 (D. Vt. 1951).

62. TIME, Feb. 8, 1971, at 58. The figures released by the National Ski Patrol are much more conservative, showing an injury rate of 3.5 per thousand. This is to be expected, for these figures reflect only those accidents that require their attention on the premises of the ski area, and this is not a large percentage of all injuries attributable to skiing. It is estimated that there are nine million skiers in the United States today. Telephone interview with Jack Soper, United States Eastern Amateur Ski Ass'n (Jan. 23, 1978).

63. Act of Feb. 7, 1978, H. 417, § 2 (to be codified in VT. STAT. ANN. tit. 12, § 1037).

64. Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 790 (D. Vt. 1951).

> handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. . . . [I]t requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn spots and other manner of skier created hazards.[65]

Twenty-five years later, notwithstanding advances in the technology of ski area maintenance, the court in *Leopold v. Okemo Mountain, Inc.*[66] recognized that this analysis was still valid and adopted the position of the court in *Wright* that there are certain dangers inherent in the sport of skiing.[67] Precisely what dangers inhere in other sports depends, of course, on the sport in question. Considered in the abstract, the word "inhere" refers to those dangers that *are* the sport, the challenges without which the activity would not be sport at all, the intrinsic risks that the participants would not dispense with even if they could.

Once it has been determined which dangers are inherent in a sporting activity, it must then be determined whether such dangers are both obvious and necessary.[68] The question of whether a risk is necessary relates to the issue of the operator's duty; this is con-

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65. *Id.* at 790-91.

66. 420 F. Supp. 781 (D. Vt. 1976).

67. The court in *Leopold* made the following comment about skiing and its dangers:

> The skier, not the ski area operator, is the logical one to make the choice as to whether he should proceed and assume the consequences of skiing in an area where a plainly apparent and necessary danger exists. Were it otherwise, ski trails, among the most enjoyable places to ski, might well have to be eliminated because of the obvious hazards of trees, rocks and adverse terrain which border every trail and which every skier faces with some degree of peril when he makes his decison to venture forth thereon.

420 F. Supp. at 787 n.2.

68. Act of Feb. 7, 1978, H. 417, § 2 (to be codified in VT. STAT. ANN. tit. 12, § 1037).

sistent with the application of assumption of risk in its primary sense. If a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger. Necessary dangers, therefore, must be those which can not *reasonably* be eliminated by the area operator.

The application of these statutory terms may be most clearly demonstrated by an example. The challenge presented by a closely spaced mogul field is a facet of the sport that skiers would not choose to eliminate. This inherent danger might cause a skier to lose balance, fall, and be injured. While it could be argued that this danger is not strictly necessary, because the area operator could remove the hazard by flattening the bumps, it would not be reasonable to require this of the operator because to do so would diminish the attraction of the sport itself. Since the mogul field is an inherent part of the sport that may not reasonably be removed, it is a necessary danger. On the other hand, the fact that ski trails are cut down the face of forested mountains may make the danger of assorted exposed brush and sticks inherent, but depending on how long the operator allows a dangerous condition to exist without either giving warning of its existence, mitigating, or removing it, the danger might not be necessary.[69]

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69. The facts in Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D. Vt. 1976), may provide an illustration of the application of the "inherent," "obvious" and "necessary" criteria. In that case an expert skier was killed when he struck an unpadded tower supporting a ski lift. The judge ruled as a matter of law that the lift tower was an inherent danger that was both obvious and necessary to the sport of skiing. The court reasoned that lift towers were an indispensible accessory that the operator could not remove and the skier could not do without, therefore the danger they posed was inherent. The court further found that the bright blue towers, eighteen inches in diameter, were clearly obvious, and that they were necessary because skiers had to get up the hill. This analysis does not do justice to the "necessary" element of the above criteria. Plaintiff claimed that the availability of two inch thick foam padding to guard the tower made the danger unnecessary, since this would have been an utterly reasonable safety measure to require of the area operator. The court concluded on the basis of expert testimony that the padding available to guard against injuries would not have prevented the death in that case. The real question should have been whether the operator could have mitigated the seriousness of the potential danger in the exercise of his duty of ordinary care. Padding devices were available but were not used; there was no showing that they were prohibitively expensive, nor that their installation would have in any way compromised the appeal of skiing. Lift towers *per se* may have been obvious and necessary, but an unpadded tower located in a trail, when padding was available, though obvious, was arguably unnecessary, and could have been found to be negligence by the operator.

In *Leopold*, however, the result would have been the same even if the operator's negli-

The process of determining which of the necessary risks are also obvious may prove more troublesome. Although it might be argued that the term "obvious" suggests a subjective standard—whether the particular danger was recognized by the particular injured skier—this is not the case. The defense of assumption of risk is applied with reference to an objective standard in both its primary and secondary senses,[70] that is, the question of whether the danger is "obvious" must be determined according to the reasonable person standard.

Furthermore, an objective standard obtains because the language of the statute declares that inherent, obvious and necessary dangers are accepted by the skier "as a matter of law." Although there is no clear indication of the reason for the inclusion of the phrase "as a matter of law" in the new statute, at least two interpretations may be suggested. On the one hand, it may be that the General Assembly intended to make it clear that the defendant in a sports injury case is entitled to a jury instruction on assumption of risk as a matter of law. Such an instruction would require that the jury find for the defendant if it were determined that the plaintiff's injury resulted from an inherent danger that was both obvious and necessary. Alternatively, the General Assembly may have intended to manifest its belief that in some sports injury cases, the issue of whether the plaintiff accepted inherent, obvious and necessary dangers in the sport should be determined by the court as a matter of law, rather than by the jury.[71] The General Assembly might have reasoned that if the court could not nonsuit a plaintiff, ski area operators might be forced to a succession of expensive, and

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gence had been proven. There was evidence to support the inference that the skier was not watching where he was going, and that his contributory negligence was the real cause of the accident. In that case, it could have been found that his contributory negligence of inattention surpassed defendant's negligence of leaving the exposed tower unpadded, and Vermont's comparative negligence statute, VT. STAT. ANN. tit. 12, § 1036 (1973), would have barred recovery.

70. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 50-53, 155 A.2d 90, 94-95 (1959); Roberts v. Gray, 119 Vt. 153, 157, 122 A.2d 855, 858 (1956); Note, *Comparative Negligence in Vermont: A Solution or a Problem*, 40 ALB. L. REV. 777, 803 (1976).

71. To determine factual questions as a matter of law, the facts must be such that they do not invite disagreement among reasonable persons. *See* Marietta v. Cliffs Ridge, Inc., 385 Mich. 364, 370-71, 189 N.W.2d 208, 210 (1971) (citing Ackerberg v. Muskegon Osteopathic Hosp., 366 Mich. 596, 600, 115 N.W.2d 290, 292 (1962) (quoting Grand Trunk Ry. v. Ives, 144 U.S. 408, 417 (1892)).

sometimes unwarranted, settlements because of their fear of sympathetic juries. This is a problem that the statute seeks to remedy, and the remedy would be hollow protection if no case could be disposed of on the pleadings as a matter of law. Supporting this latter interpretation is the fact that the *Wright* decision, the keystone of the new statute, involved a directed verdict for defendant Mt. Mansfield Lift, Inc.

To credit the breadth of the analysis by the court in *Wright* it should be noted that the court identified several types of negligent conduct by the area operator that would constitute dangers *not* inherent, obvious and necessary in the sport of skiing; assumption of risk would not shield the area operator in these situations:

> In this skiing case, there is no evidence of any dangers existing which reasonable prudence on the parts of the defendants would have foreseen and corrected. It isn't as though a tractor was parked on a ski trail around a corner or bend without warning to skiers coming down. It isn't as though on a trail that was open work was in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.[72]

This language lends further support to the primary assumption of risk construction of the *Wright* analysis and the Vermont sports injury liability statute since it is clear that the skier is not required to assume the risk of the area operator's negligence under *Wright*. Once a breach of the duty of ordinary care owed by the operator is found, recovery by an injured skier is possible. The new statute does not refute this by the reaffirmation of assumption of risk in the primary sense as expressed in *Wright*. Although all parties have fulfilled the duty of care imposed by law, inherent dangers and the risk of injury will still exist in skiing and some other sports. It is this reasoning, also recognized in other jurisdictions, which compels the retention of primary assumption of risk. For instance, the Supreme Court of Oregon observed: "[I]t is only when the risk exists in spite of due care . . . that it is assumed by the person injured."[73] The

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

73. Hunt v. Portland Baseball Club, 207 Or. 337, 347, 296 P.2d 495, 499 (1956) (quoting 65 C.J.S. *Negligence* § 174 (1950), now appearing as 65A C.J.S. *Negligence* § 174 (1966)).

Minnesota Supreme Court reached a similar conclusion that the special status attached to plaintiff as a participant in an inherently dangerous sporting activity ought to bar his recovery.[74]

Conceptually, the framework of the new statute is sound. It has the support of statutory and case law in other jurisdictions, and insofar as it applies to skiing, it adopts an analysis that is not only well reasoned, but consistent with the approach taken by the courts of Vermont.

CONCLUSION

The status of the defense of assumption of risk in a comparative negligence jurisdiction is a recurring problem.[75] In Vermont, the verdict in the *Sunday* case sharply focused attention on the issue, prompting the legislature specifically to ensure the availability of the defense in its primary sense. The primary assumption of risk construction of the new Vermont sports injury liability statute has two virtues. It fairly represents the allocation of risks in inherently dangerous sporting activity, and it can co-exist with the Vermont comparative negligence statute without conflicting with it in any way. But only by specific recognition of the "primary" and "secondary" senses in which assumption of risk has been used can the courts of the state give content to the new sports liability measure.

Despite the fact that the *Sunday* verdict was seen as a departure from precedent, arguably, this was not the case. Insofar as the judge in *Sunday* believed that assumption of risk in its secondary sense was identical to contributory negligence, he was correct in refusing to instruct the jury separately on assumption of risk.[76] The area operator in *Sunday* was found to be 100% negligent and the opinion in *Wright*, which the new Vermont statute adopts as

74. Springrose v. Wellmore, 292 Minn. 23, 24, 192 N.W.2d 826 (1971).

75. For commentaries on this problem in other jurisdictions, see Anderson, *The Defense of Assumption of Risk Under Comparative Negligence*, 5 ST. MARY'S L.J. 678 (1974); Comment, *Voluntary Assumption of Risk and the Texas Comparative Negligence Statute*, 26 BAYLOR L. REV. 543 (1974); Note, *Contributory Negligence and Assumption of Risk—The Case for Their Merger*, 56 MINN. L. REV. 47 (1971); Note, *Colorado Comparative Negligence and Assumption of Risk*, 46 U. COLO. L. REV. 509 (1975).

76. The *Sunday* decision was recently affirmed by the Vermont Supreme Court. Sunday

controlling law, does not hold that a skier assumes the risk of encountering the operator's negligence. The area operator, under *Wright*, has a duty to use ordinary care to protect its patron skiers from such hazards as may be reasonably discoverable and preventable. The claim of an injured skier against an operator who has breached this duty of care is in no way compromised. Under Vermont law, this person may recover as long as his own contributory negligence, if any, was not greater than the negligence of the area operator.[77] When the operator has been found negligent, the new statute will offer no refuge, for negligence is not inherent, can not be necessary and is seldom obvious.

C. Robert Manby

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v. Stratton Corp., No. 241-77 (Vt. Sup. Ct. June 6, 1978). A unanimous court found no error in the trial court's refusal to give the jury a separate charge on assumption of risk, and acknowledged the distinction between primary and secondary assumption of risk. *Id.* at 6-9. The court held that, since assumption of risk is an affirmative defense under Rule 8 (c) of the Vermont Rules of Civil Procedure, the burden of proof is on the defendant to show that the plaintiff assumed the risk of injury, and the defendant failed to meet that burden. *Id.* at 2. Although the court refused to consider the *Wright* case as binding, *Id.* at 3, it adopted the "general principle" of *Wright* that a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are "obvious and necessary." *Id.* at 4. Applying that principle to the facts in *Sunday*, the court found that "the brush" which had caused the plaintiff's injury was not such an inherent danger. *Id.* In arriving at its holding, the supreme court stressed the fact that both the ski industry and trail grooming technology had advanced greatly since the *Wright* case was decided in 1941. *Id.* at 4-5.

Since the *Sunday* case was not decided under Vermont's new sports injury liability statute, the holding does not represent an interpretation of that statute. Nevertheless, the court's application of assumption of risk in its primary sense is indicative of the approach that it will take to assumption of risk under the new statute.

77. VT. STAT. ANN. tit. 12, § 1036 (1973).