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NOTES


I. Introduction

Give ski areas the courage to reduce the risks that they can, skiers the strength to accept those that they cannot, and jurors the wisdom to know the difference.¹

As evidenced by the 2004 presidential election campaign, recent talks of tort reform have garnered political support.² Because tort reform has occurred often in the past, the issue in passing tort reform acts is usually not whether there is majoritarian support for the acts. Rather, after the passage of the acts, the issue is whether the judiciary will follow the intent of legislatures by upholding the reform acts, or simply allow a cause of action to proceed despite a legislature’s intent and attempt at reform. Thus far, legislatures have made many attempts at tort reform ranging from veterinary malpractice to sports related injuries, including skiing injuries.³

One particular area of tort reform is the liability that a ski area provider has to its patrons. Since the 1960s, skiing has emerged as a significant sport and a rather large tourist industry for many states in the country.⁴ During the 2003-2004 ski season, there were 57.1 million visits to ski resorts, the third best performance in U.S. ski industry history.⁵ During the same ski season, the

average gross sales per resort totaled $18.77 million.\textsuperscript{6} Considering the amount of money that the ski industry generates for its respective states, the ski industry’s ability to lobby for legislative reform comes as no surprise.

Under the common law theory of \textit{volenti non fit injuria},\textsuperscript{7} a ski area provider owes no duty to protect a patron from injuries resulting from skiing.\textsuperscript{8} \textit{Wright v. Mt. Mansfield Lift, Inc.}\textsuperscript{9} best demonstrates this concept in that the court found that the ski area provider had a duty to warn patrons of dangers that the provider could have reasonably foreseen and corrected but did not have a duty to warn of the dangers inherent in the sport of skiing such as a tree stump covered by snow.\textsuperscript{10}

As the law regarding skiing liability slowly evolved, legislatures placed more duties on the provider, but most state legislatures also passed comparative negligence laws that confused primary and secondary assumption of risk.\textsuperscript{11} This confusion not only made it more difficult to define the provider’s duties, but the confusion also made it more difficult to determine when the law placed no duty whatsoever on the provider, thus preventing recovery.\textsuperscript{12} Also, in \textit{Sunday v. Stratton Corp.},\textsuperscript{13} the court held that because of the ski area provider’s representations concerning the condition of its slopes and the new technology that allowed for better cleaning of the slopes, brush hidden by snow was not an inherent risk in the sport of skiing.\textsuperscript{14} Fearing the

\begin{footnotesize}
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\item \textit{Id.} at 150. Justice Cardozo issued one of the most famous statements on \textit{volenti non fit injuria}:
One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his chance to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.
\item Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (1929) (citations omitted).
\item \textit{Id.} at 791; see also Hansen & Duerr, \textit{supra} note 7, at 154.
\item \textit{See} Hansen & Duerr, \textit{supra} note 7, at 150-51.
\item \textit{Id.}
\item 390 A.2d 398 (Vt. 1978).
\item \textit{Id.} at 401-03; see also Hansen & Duerr, \textit{supra} note 7, at 161.
\end{enumerate}
\end{footnotesize}
end of the inherent risk doctrine in the sport of skiing, the ski industry sought a legislative response, thus most states with a ski industry passed legislative reform.\textsuperscript{15} In particular, Connecticut passed a statute that the legislature designed to codify the inherent risk doctrine in the sport of skiing.\textsuperscript{16} Despite statutory language to the contrary, however, in \textit{Jagger v. Mohawk Mountain Ski Area, Inc.},\textsuperscript{17} the Connecticut Supreme Court held that the plaintiff did not assume the risk of a collision with a ski instructor because the instructor was under the presumed control of the ski area operator at all times.\textsuperscript{18}

This note examines how one state court addressed one example of tort reform, ski tort reform, to determine whether the judiciary might upset the intent of tort reform legislation. This note argues that the Connecticut Supreme Court’s decision in \textit{Jagger} ignored the state legislature’s intent to reform the common law principles of ski tort liability by interpreting statutory tort reform in the ski area industry as merely codifying the preexisting common law principles. Part II of this note analyzes and discusses the judicial decisions and legislative responses to those decisions before the \textit{Jagger} case. Part III gives the facts and procedural history of \textit{Jagger}, and Part IV discusses the majority and dissenting opinions in \textit{Jagger}. Finally, Part V analyzes the strengths and weaknesses of the court’s rationale and makes reforming suggestions for the Connecticut ski industry and other states with such industries.

\textbf{II. Law Leading Up to the Jagger Case}

\textbf{A. Traditional Concept of Ski Tort Liability}

Skiing accidents have resulted in the litigation of many personal injury cases.\textsuperscript{19} Voluntary assumption of risk and contributory negligence dominated personal injury law when skiing was gaining popularity during the 1950s and 60s, giving little recourse to injured skiers.\textsuperscript{20} The difference between primary and secondary assumption of risk was important in the analysis of personal injury cases involving ski tort liability:

The term “assumption of risk,” often misused, actually designates two distinct concepts: primary assumption of risk and

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\item Hansen & Duerr, \textit{supra} note 7, at 150.
\item See generally \textit{CONN. GEN. STAT. §§ 29-211 to -214} (2001).
\item 849 A.2d 813 (Conn. 2004).
\item \textit{Id.} at 828.
\item Until the 1960s, equipment tended to be crude and somewhat dangerous. Frakt & Rankin, \textit{supra} note 4, at 236.
\item \textit{Id.} at 237.
\end{enumerate}
secondary assumption of risk. While both concepts operate to relieve the defendant of liability, primary assumption of risk does so by recognizing the defendant did not owe a duty of reasonable care to the plaintiff. . . . Secondary assumption of risk . . . is a form of contributory negligence. The secondary assumption of risk analysis . . . ask[s] whether a reasonably prudent person in the exercise of due care would have incurred the known risk the plaintiff incurred.\textsuperscript{21}

In other words, under a primary assumption of risk analysis, the court asks whether the defendant owed a duty to the skier. Under a secondary assumption of risk analysis, the court assumes that the defendant had a duty toward the skier, and it assumes that the defendant breached that duty. The court, however, seeks to determine whether the skier, knowing that the defendant breached its duty, chose to confront the known risk. Primary assumption of risk traditionally guided litigation in the ski industry because the issue was whether the ski area provider had a duty to provide reasonable care to an injured skier.\textsuperscript{22} Although secondary assumption of risk, and thus contributory negligence, was a complete defense for a ski area provider, courts recognized the necessity of balancing the interests of ski area providers and the interests of skiers by defining “resort liability in light of the skier’s recognition and voluntary assumption of certain dangers intrinsic in the sport.”\textsuperscript{23} Hence, courts sought to limit the ski area provider’s liability based upon known risks that inhere to the sport of skiing.

In \textit{Wright v. Mt. Mansfield Lift, Inc.}, essentially the first case concerning ski resort liability, the District Court of Vermont stated that if the plaintiff’s injuries were the result of a risk that inhere in the sport of skiing, the ski operator owed no legal duty to skiers and could not be held liable for the plaintiff’s injuries.\textsuperscript{24} The plaintiff in \textit{Wright} skied into a snow-covered stump that the ski operator failed to previously remove.\textsuperscript{25} The court held for the ski operator, stating that the plaintiff had assumed a risk that was an integral part of the sport of skiing.\textsuperscript{26}

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\item \textsuperscript{21} Paige Bigelow, Recent Development, \textit{Ski Resort Liability for Negligence Under Utah’s Inherent Risks of Skiing Statute}, 1992 Utah L. Rev. 311, 313-14 (footnotes omitted).
\item \textsuperscript{22} Wendy Faber, Comment, \textit{Utah’s Inherent Risks of Skiing Act: Avalanche from Capitol Hill}, 1980 Utah L. Rev. 355, 359.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Wright v. Mt. Mansfield Lift, Inc., 96. F. Supp. 786, 791 (D. Vt. 1951); see also Hansen & Duerr, \textit{supra} note 7, at 158.
\item \textsuperscript{25} Wright, 96 F. Supp. at 787.
\item \textsuperscript{26} Id. at 791; see also Frakt & Rankin, \textit{supra} note 4, at 237.
\end{itemize}
Over the next few decades, cases across the country conformed to the ruling in Wright. In Leopold v. Okemo Mountain, the plaintiff, an expert skier, collided with the unpadded concrete base of a ski lift tower while skiing. Although the ski area operator faced no undue burden by padding the base of the lift tower, the court held that the plaintiff was in a better position than the defendant to decide whether to assume the consequences of skiing when those consequences were plain and apparent; accordingly, the court ruled in the defendant’s favor.

Wright’s influence is further exemplified in Kaufman v. State. In Kaufman, the plaintiff fell on a rocky bare spot — a rocky area with very little or no snow — located on a slope at the defendant’s ski area. Even though the court stated that the operator had a duty to warn of “reasonably foreseeable danger involving unreasonable risks, of which the owner has knowledge,” the court cited Wright and found that the proximate cause of the injury was not a breach of the operator’s duty. Falling in this manner was a foreseeable risk, and the plaintiff failed to prove that the operator exercised unreasonable care and “to prove himself [sic] free from contributory negligence causing or proximately contributing to his accident and injuries.”

Juries also tended to agree with the principle that a skier must assume some risks inherent in the sport of skiing. This agreement among juries, consisting of lay citizens, demonstrates the public’s acceptance that some activities, such as skiing, involve certain known risks. In La Vine v. Clear Creek Skiing Corp., an employee of the defendant ski resort collided with the plaintiff. The jury ruled for the ski resort, and the court of appeals upheld the jury verdict, concluding that “the jury in a ski slope case tends to view the entire skiing scene as one involving a high degree of hazard in which the skier assumes a degree of risk by merely taking to the slopes.”

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29. Id. at 782-85; see also Frakt & Rankin, supra note 4, at 237.
31. Id.
33. Id. at 278; see also Hansen & Duerr, supra note 7, at 159.
35. Id.
36. Id. at 285.
37. Frakt & Rankin, supra note 4, at 238.
38. 557 F.2d 730 (10th Cir. 1977).
39. Id. at 732; see also Frakt & Rankin, supra note 4, at 238.
40. La Vine, 557 F.2d at 735.
settled issue regarding the scope of liability of ski area providers, however, was about to change.

B. Sunday v. Stratton Corp.: The “Shot Heard Round the World” of Skiing

In 1978, the Supreme Court of Vermont’s decision in Sunday v. Stratton Corp. changed the way the nation’s skiing industry viewed its potential liability. Most saw Sunday as repudiating the doctrine established in Wright, a doctrine that courts had accepted and followed for decades. The facts in Sunday were similar to those in Wright in that concealed objects on groomed trails injured both plaintiffs. Because of new methods of grooming technology, however, the court in Sunday could not accept that brush concealed by loose snow was an inherent danger of skiing. The court in Sunday attempted to distinguish Wright by stating that brush or a stump covered by snow on a “novice” trail was not a necessary and inherent risk of skiing. This statement, however, further contradicted the Wright decision because the trail in question in Wright was also a novice trail, and the Wright court determined that the stump was an integral risk of skiing on a novice trail.

In addition to potentially repudiating Wright, the Sunday court also distinguished between primary and secondary assumption of risk. The court held that the secondary assumption of risk doctrine was only a phase of contributory negligence, and its application was irrelevant in the analysis because the judge had instructed the jury concerning comparative negligence. According to the court, primary assumption of risk was not applicable because the ski area treated the skier as an invitee. Therefore, the ski area provider had to exercise “reasonable care to keep its premises in a safe and suitable condition. . . . If a hidden danger existed, known to defendant, but unknown and

41. Frakt & Rankin, supra note 4, at 242 (with alterations in capitalization) (quoting BETTY VAN DER SMISSEN, LEGAL LIABILITY AND RISK MANAGEMENT FOR PUBLIC AND PRIVATE ENTITIES § 8.4, at 77 (1990)).
42. 390 A.2d 398 (Vt. 1978).
44. Faber, supra note 22, at 355.
45. Sunday, 390 A.2d at 402; see also Frakt & Rankin, supra note 4, at 243.
46. Sunday, 390 A.2d at 402; see also Frakt & Rankin, supra note 4, at 243. Ironically, the Vermont Supreme Court later repudiated the sharp distinction it made when comparing Sunday and Wright. See generally Frant v. Haystack Group, Inc., 641 A.2d 765 (Vt. 1994).
48. Sunday, 390 A.2d at 403-04.
49. Id.; see also Frakt & Rankin, supra note 4, at 243.
50. Sunday, 390 A.2d at 402-03.
not reasonably apparent to the plaintiff, it was [defendant’s] duty to give warning of it to the latter.”

Accordingly, the court held that the ski area provider failed to exercise reasonable care in keeping the slopes clear of obstructions in light of the new technology available in 1978 — a technology that was not available in 1951 when Wright was decided — and in light of the fact that the ski area provider advertised pristine slopes as one of its characteristics. The world of skiing quickly reacted.

C. Legislative Response to the Sunday Decision

Following the Sunday decision, lobbyists and representatives of ski area operators petitioned for legislative change regarding ski tort liability, and within three years of the decision, the legislatures of almost every state with a skiing industry passed or were considering a “‘ski responsibility act.’” These state statutes basically provide that ski area operators are not liable for an injury that is a foreseeable aspect, or inherent risk, of the sport of skiing. Generally, the states’ statutes list the following inherent risks: variations in weather, terrain, and snow conditions; and collisions with lift towers, other man-made structures, and other skiers. Additionally, these statutes usually state that a ski resort will not be liable for “‘a skier’s failure to ski within the limits of the skier’s ability.’” Courts have tended to interpret these statutes in favor of ski area operators.

Although the statutes of several ski states, such as Utah, Colorado, and New Mexico, follow the common trend stated above, some state statutes provide exceptions to these general guidelines. For example, Maine helps ski area operators only by shortening the statute of limitations. This shortening of the statute of limitations helps ski operators by limiting the amount of time an injured patron would have to bring suit. In another example of a deviation from the common trend, the Supreme Court of Montana found the first draft of the Montana statute unconstitutional under the Equal Protection Clause of the

51. Id. at 402 (second alteration in original); see also Frakt & Rankin, supra note 4, at 243.
52. Sunday, 390 A.2d at 401.
53. Frakt & Rankin, supra note 4, at 248.
54. Id. at 249.
55. Id. at 249-50.
56. Id. at 250 (quoting ALASKA STAT. § 09.65.135 (repealed 1994)).
57. Id. at 252-57.
60. See generally N.M. STAT. ANN. §§ 24-15-1 to -14 (LexisNexis 2004).
61. ME. REV. STAT. ANN.tit. 32, § 15,217 (2003); see also Frakt & Rankin, supra note 4, at 251.
Montana State Constitution. The Supreme Court of Montana determined that despite a legitimate state interest in protecting the ski industry, the Equal Protection Clause forbid the legislature from singling out skiers by prohibiting them from obtaining legal recourse if the ski area operator proximately caused the skier’s injury. This unequal protection was especially apparent given that the Montana legislature did not create a similar statute that applied to other participants in inherently dangerous activities, such as mountain climbing and bicycling. Essentially, the court decided that the passage of the Montana ski statute was “an attempt to go back to the old law of negligence which provided in Montana that a person who was in any way contributorily [sic] negligent was barred from recovery.”

Like other states, the Connecticut legislature’s response to Sunday was swift. Four statutes comprise Connecticut’s ski tort reform. Section 29-211 of the Connecticut General Statutes lists the responsibilities of the ski area operator: Under this section, ski area operators must mark all areas of possible danger to its patrons (including the location of maintenance vehicles and the intersection

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63. Frakt & Rankin, supra note 4, at 250-51 (discussing Brewer v. Skilift, Inc., 762 P.2d 226, 230 (Mont. 1988)).
65. Id. at 230.
66. Id.
68. CONN. GEN. STAT. § 29-211 (2001). The statute reads:
   In the operation of a passenger tramway or ski area, each operator shall have the obligation to perform certain duties including, but not limited to: (1) Conspicuously marking all trail maintenance vehicles and furnishing the vehicles with flashing or rotating lights which shall be operated whenever the vehicles are working or moving within the skiing area; (2) conspicuously marking the location of any hydrant or similar device used in snow-making operations and placed on a trail or slope; (3) conspicuously marking the entrance to each trail or slope with a symbol, adopted or approved by the National Ski Areas Association, which identifies the relative degree of difficulty of such trail or slope or warns that such trail or slope is closed; (4) conspicuously marking all lift towers within the confines of any trail or slope; (5) maintaining one or more trail boards at prominent locations within the ski area displaying such area’s network of ski trails and slopes, designating each trail or slope in the same manner as in subdivision (3) and notifying each skier that the wearing of ski retention straps or other devices used to prevent runaway skis is required by this section, section 29-201 and sections 29-212 to 29-214, inclusive; (6) in the event maintenance men or equipment are being employed on any trail or slope during the hours at which such trail or slope is open to the public, conspicuously posting notice thereof at the entrance to such trail or slope; and (7) conspicuously marking trail or slope intersections.

Id.
of trails), visibly mark and label the degree of difficulty of each trail, and notify skiers of devices that aid in preventing runaway skis that could hurt other skiers.\footnote{69} Section 29-212 explains the assumption of risk on the part of the skier.\footnote{70} This section states that skiers assume the risk of injuries caused by the following: variations in the terrain of the ski slope, bare spots on the slopes, conspicuously marked lift towers, objects outside the slope, boarding a tramway\footnote{71} without informing oneself of how to load and unload from a tramway, and collisions “with any other person by any skier while skiing.”\footnote{72} The assumption of the risk of injury under this section, however, would not apply when the negligent operation of the ski area caused the injury.\footnote{73} Section 29-213 lists prohibited conduct that the legislature applied to skiers, such as intentionally throwing something from the tramway.\footnote{74} Finally, section 29-214 provides

\begin{itemize}
\item \footnote{69} Id.
\item \footnote{70} Id. \S\ 29-212. The statute reads:
\begin{quote}
Each skier shall assume the risk of and legal responsibility for any injury to his person or property arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees. Such hazards include, but are not limited to: (1) Variations in the terrain of the trail or slope which is marked in accordance with subdivision (3) of section 29-211 or variations in surface or subsurface snow or ice conditions, except that no skier assumes the risk of variations which are caused by the operator unless such variations are caused by snow making, snow grooming or rescue operations; (2) bare spots which do not require the closing of the trail or slope; (3) conspicuously marked lift towers; (4) trees or other objects not within the confines of the trail or slope; (5) boarding a passenger tramway without prior knowledge of proper loading and unloading procedures or without reading instructions concerning loading and unloading posted at the base of such passenger tramway or without asking for such instructions; and (6) collisions with any other person by any skier while skiing.
\end{quote}
\item \footnote{71} A tramway is the carrier that travels on the overhead cable and transports the patrons up and down the ski slopes. MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.m-w.com/dictionary/tram (last visited Mar. 31, 2006).
\item \footnote{72} CONN. GEN. STAT. \S\ 29-212.
\item \footnote{73} Id.
\item \footnote{74} Id. \S\ 29-213. The statute reads:
\begin{quote}
No skier shall: (1) Intentionally drop, throw or expel any object from a passenger tramway; (2) do any act which shall interfere with the running or operation of a passenger tramway; (3) use a passenger tramway without the permission of the operator; (4) place any object in the skiing area or on the uphill track of a passenger tramway which may cause a skier to fall; (5) cross the track of a J bar lift, T bar lift, platter pull or similar device or a rope tow, except at a designated location; (6) depart from the scene of a skiing accident when involved in the accident without leaving personal identification, including name and address, or before notifying the proper authorities and obtaining assistance when such skier
\end{quote}
\end{itemize}
special defenses for ski area operators against certain claims of civil liability brought by a skier. One such defense, for example, is against skiers who did not ski within the limits of their own abilities.\textsuperscript{75} Thus, with the passage of these statutes, the Connecticut legislature seemingly sought to protect its ski industry. As the rest of this note demonstrates, however, the Connecticut Supreme Court removed some of the protection the legislature had given to ski area providers.

### III. Statement of the Case: Jagger v. Mohawk Mountain Ski Area, Inc.

In December 1999, plaintiff Mary Ann Jagger suffered a broken leg while skiing at the Mohawk Mountain Ski Area (Mohawk Mountain).\textsuperscript{76} Allegedly, James Courtot, an employee of Mohawk Mountain, injured her when he collided with her from behind.\textsuperscript{77} On the day of the collision, Courtot was participating in Mohawk Mountain’s onsite preseason clinic, designed to train ski instructors.\textsuperscript{78} Courtot was not providing ski instruction to Jagger or interacting with her in any way when the collision occurred.\textsuperscript{79} As a result of the collision, Jagger sustained personal injuries, which she claimed both Courtot and Mohawk Mountain negligently caused.\textsuperscript{80}

Jagger sued both Courtot and Mohawk Mountain in a diversity suit in the U.S. District Court for the District of Connecticut,\textsuperscript{81} alleging two claims. First,

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\textsuperscript{75} Id. § 29-214. The statute reads:

It shall be a special defense to any civil action against an operator by a skier that such skier: (1) Did not know the range of his own ability to negotiate any trail or slope marked in accordance with subdivision (3) of section 29-211; (2) did not ski within the limits of his own ability; (3) did not maintain reasonable control of speed and course at all times while skiing; (4) did not heed all posted warnings; (5) did not ski on a skiing area designated by the operator; or (6) did not embark on or disembark from a passenger tramway at a designated area. In such civil actions the law of comparative negligence shall apply.

\textsuperscript{76} Id. v. Mohawk Mountain Ski Area, Inc., No. 3:01CV2163, 2002 WL 31433376, at *1-2 (D. Conn. Sept. 24, 2002). Because the unpublished opinion more explicitly states the facts, this citation will be used for a recitation of the facts only. The published opinion will be used for all other parts of the paper.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} James Courtot was a resident of the state of Connecticut, Mohawk Mountain was a Connecticut corporation with its principal place of business in Connecticut, and Mary Jagger
she sought damages based on “vicarious liability for Courtot’s conduct and [Mohawk Mountain’s] own negligence in failing to properly train and supervise him.”

Second, she sought damages because the collision “was caused by Courtot’s negligence in that he was skiing at an unreasonable speed and failed to keep a lookout, slow down, turn, or stop, although he reasonably could have done so.”

In other words, she sued Mohawk Mountain for vicarious liability and James Courtot for negligently performing his duties.

Mohawk Mountain moved to dismiss, stating that the claim against it was barred under section 29-212 of the Connecticut General Statutes:

> which provides that skiers “assume the risk of and legal responsibility for any injury . . . arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees” including the hazard of “collisions with any other person by any skier while skiing.”

Additionally, Courtot contended that the Connecticut Supreme Court’s ruling in *Jaworski v. Kiernan* barred any claim against him because the *Jaworski* court held that a plaintiff must prove recklessness to create liability for injuries that occurred from the participation in contact sports; consequently, the court could not hold him liable upon proof of mere negligence.

The district court reserved judgment, finding that the negligence of ski area operators was a public concern and that the *Jagger* case presented circumstances which were likely to happen again. Consequently, the district court sought certification of the following question directly to the Connecticut Supreme Court:

> Pursuant to [section 29-212 of the Connecticut General Statutes], does a skier assume the risk of, and legal responsibility for, an injury arising out of a collision with a ski instructor, acting in the...
course of his employment with the ski area operator, when the collision is caused by the instructor’s negligence.\textsuperscript{89}

The Connecticut Supreme Court answered this question in the negative and allowed Jagger’s cause of action.\textsuperscript{90}

\section*{IV. Discussion of the Case}

\subsection*{A. The Majority’s Opinion}

The plaintiff made three main contentions in presenting her argument to the Connecticut Supreme Court.\textsuperscript{91} First, under section 29-212 of the Connecticut General Statutes, the phrase “negligent operation of a ski area” applied to all services offered by the ski operator, including the type of clinic conducted by Courtot, and should not be limited to those services specifically enumerated in section 29-211 of the Connecticut General Statutes.\textsuperscript{92} Second, the plain language of the statute and its legislative history illustrated that skiers assumed only the risks inherent in skiing and did not assume any risks arising from a ski operator’s negligence.\textsuperscript{93} Finally, even though this was a case of first impression for the Connecticut Supreme Court, other jurisdictions with similar statutes concerning ski liability had created a distinction between a collision “not caused in some manner by a ski area operator or its employees . . . and collisions somehow caused by the negligence of a[n] operator or its employees.”\textsuperscript{94}

The defense responded with four contentions of its own.\textsuperscript{95} First, ski instruction and preseason clinics were not enumerated in the statutes, and

\begin{footnotes}
\item[89] Jagger, 2002 WL 3143376, at *1.
\item[90] Jagger v. Mohawk Mountain Ski Area, Inc., 849 A.2d 813, 815 n.2 (Conn. 2004). This note focuses only on one of the certified questions presented to the court. The other question was “Does the fellow participant immunity against liability for sports injuries caused by negligence recognized in Jaworski apply to collisions between a skier and a ski instructor caused by the instructor’s negligence?” \textit{Id.} (citation omitted). Concerning the second certified question, the Connecticut Supreme Court held that the rule in Jaworski did not apply. \textit{Id.} at 831. Jaworski stated that in contact sports the plaintiff must prove recklessness, rather than mere negligence in order to recover damages. \textit{Id.} The Connecticut Supreme Court for several reasons held that skiing is not a “contact sport,” and therefore, the plaintiff need only prove negligence. \textit{Id.} at 832. \textit{See generally} Jaworski v. Kiernan 696 A.2d 332 (Conn. 1997), for a more detailed explanation of how Connecticut has ruled on negligence which occurs as part of a contact sport.
\item[91] Jagger, 849 A.2d at 817.
\item[92] \textit{Id.; see also} CONN. GEN. STAT. §§ 29-211 to -212 (2003).
\item[93] Jagger, 849 A.2d at 817.
\item[94] \textit{Id.} at 817-18.
\item[95] \textit{Id.} at 818.
\end{footnotes}
therefore, were excluded from the meaning of “operation of a ski area.”

Second, the statute plainly stated that a ski participant assumed the risk of a collision with another skier when skiing. Third, the legislative history showed that the legislature intended to place the risks of inherent dangers, including a collision with another skier, on the participant while confining the liability of ski operators to negligent operation of the ski area. Finally, the defendant claimed that the decisions of lower Connecticut courts and courts from other jurisdictions provided persuasive support for the above contentions.

The Connecticut Supreme Court began its analysis by stating how courts in its jurisdiction should interpret statutes. According to the court, a court should determine the meaning of the statute as applied to the factual situation of the case currently before the court. In so doing, the court may look “to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.”

Both the plaintiff and the defendant argued that the statute was unambiguous; therefore, the court needed to follow precedent holding that, in the case of an unambiguous statute, a court should first use the plain language of the text to determine the meaning. The court disagreed, concluding that the statute was ambiguous because the statute never defined the phrase “operation of the ski area’ or its operative terms.” Consequently, the court used extra-textual evidence, such as the legislative history and the circumstances surrounding the statute’s enactment, to help it understand and determine the statute’s meaning. The court approached the ultimate issue by answering two subissues and concluded that (1) ski instruction falls within the meaning of the phrase “operation of a ski area,” and (2) a skier did not assume the risk of a collision with a ski instructor who was under the presumed control of the ski area operator at all times.

96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
103. Id. at 819.
104. Id.
105. Id.
106. Id. at 828.
I. “Whether Ski Instruction Is an Activity Falling Within the Operation of a Ski Area by a Ski Area Operator”

The plaintiff claimed that the term “operation” encompassed all services offered by the ski operator. The defendant ski operator argued that because section 29-212 did not define the phrase “operation of a ski area,” the Connecticut Supreme Court should look to the duties listed in section 29-211 as a guide to decide what falls under “operation.” All of the duties listed in section 29-211 essentially relate to marking equipment and trails to provide skiers with notice of the location of and potential hazards associated with equipment and trails. Consequently, the defense wanted the phrase “operation of a ski area” limited to those types of warning activities. The ski operator argued that ski instruction was dissimilar to the duties listed in section 29-211, and therefore, should not be considered part of the “operation of a ski area.”

The Jagger court stated that because section 29-212 did not define “operation of a ski area” and because the legislature presumably created a consistent body of law, the court may look to other statutes involving similar matters. The court decided section 29-211 uses the word “duties” to describe “the operation of a ski area” when it states that “[i]n the operation of a . . . ski area, each operator shall have the obligation to perform certain duties . . . .” The court found that the duties listed in this statute were simply a subset of the more general operations involved in the “operation of a ski area” mentioned in section 29-212, so consequently, the section 29-211 duties did not define or provide an exhaustive list of the operations within the phrase “operation of a ski area.” Thus, the court determined that the legislature did not provide a statutory definition for the phrase. Lacking sufficient statutory guidance, the court decided to consult the dictionary, which “define[d] the word ‘operation,’ . . . as the whole process of planning for and operating a business or other organized unit, and as a phase of a business or of business activity.” Accordingly, the court held for the plaintiff, stating that

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107. Id. at 818.
108. Id. at 819.
109. Id.; see also CONN. GEN. STAT. §§ 29-211 to -212 (2003).
110. Jagger, 849 A.2d at 819.
111. Id.
112. Id.
113. Id. (quoting CONN. GEN. STAT. § 29-211).
114. Id.
115. Id.
116. Id. at 820 (internal quotations omitted) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1976 ed.)).
ski instruction fell under the definition of the statutory phrase “operation of a ski area.”

Continuing its use of extra-textual evidence to determine statutory meaning, the court further stated that the legislative history and purpose behind the passage of the statute supported the plaintiff’s claim. The primary purpose of the legislation was to outline responsibilities of both ski area operators and skiers. According to the Court, the legislature intended for skiers to assume certain risks inherent in skiing and outside the control of the ski area operator and for the ski area operators to reduce risks within their control. Thus, because Courtot’s activities were within the ski operator’s control, the court determined that ski instruction and preseason clinics should be included under the definition of the phrase “operation of a ski area.”

2. “Whether a Skier Assumes the Risk of a Collision With a Ski Instructor”

Section 29-212 of the Connecticut General Statutes states that “[e]ach skier shall assume the risk of and legal responsibility for any injury to his person . . . arising out of the hazards inherent in the sport of skiing. . . . Such hazards include, but are not limited to . . . collisions with any other person by any skier while skiing.” The court understood assumption of risk to act either: (1) primarily as a defense to a negligence claim because the defendant owed no duty of care to the plaintiff, or (2) secondarily, as a defense to a negligence claim because even though the defendant owed and breached a duty of care to the plaintiff, the defendant was not liable if the plaintiff was aware of the negligence and the risk involved and chose to face such risk despite this awareness.

According to the court, the Connecticut statute fit neither of these definitions. With regard to primary assumption of risk, the statute states that a skier assumes the risks inherent in the sport of skiing but does not assume the risks caused by the operator’s negligence; therefore, because the defendant still owed the plaintiff a duty of care, the statute did not conform to the definition of primary assumption of risk. In other words, because primary assumption

117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
123. Jagger, 849 A.2d at 822.
124. Id.
125. Id.
of risk applies only when the defendant does not owe a duty and because the statute requires a duty of care on the part of the ski area operator, primary assumption of risk would be inapplicable. Additionally, the court stated that the statute did not coincide with secondary assumption of risks, because the statute “presume[d] negligence on the part of the defendant, but nevertheless disallow[ed] recovery because the plaintiff voluntarily chose to encounter the known risk,” regardless of whether the plaintiff was aware of the defendant’s negligence.\textsuperscript{126} For secondary assumption of risk to apply, the plaintiff must be aware of the defendant’s breach of duty, so section 29-212 would not apply in a secondary assumption of risk scenario.

To reconcile contradictions between the doctrine of assumption of risk and the Connecticut General Statutes, the \textit{Jagger} court determined that a skier only assumes the inherent risks of skiing over which a ski area operator has no control or cannot reasonably act to limit such inherent risk.\textsuperscript{127} Even then, the court stated that a skier only assumes the risk in the primary sense, thus only when the ski area provider does not owe a duty — such as when an injury results from a terrain variation — will the court deem that the skier has assumed the risks associated with skiing.\textsuperscript{128} The court explained further:

\begin{quote}
[C]loser analysis of the statute reveals that § 29-212 provides that a skier assumes the risk of those hazards over which an operator has no control or over which an operator cannot reasonably act so as to ameliorate the potentiality of harm — for such hazards a skier has assumed the risk in the primary sense and an operator has no duty to protect skiers with regard to such hazards. . . . Over those risks which an operator has control, or over which an operator can act reasonably so as to minimize the existence or level of risk, however, an operator owes skiers a duty of care and breach of that duty subjects the operator to liability in negligence under our settled principles of comparative negligence.\textsuperscript{129}
\end{quote}

According to the \textit{Jagger} court, this interpretation fit within the legislative history of the statute, which essentially was a response to the differing results between \textit{Wright} and \textit{Sunday}.\textsuperscript{130} The \textit{Jagger} court interpreted \textit{Wright} to state that a ski area provider did not have a duty to warn skiers of inherent risks, such as a snow-covered stump, that were out of operator’s control, but the provider, however, had a duty to warn skiers of risks that were within the ski

\begin{thebibliography}{130}
\bibitem{126} \textit{Id.} at 823.
\bibitem{127} \textit{Id.}
\bibitem{128} \textit{Id.}
\bibitem{129} \textit{Id.}
\bibitem{130} \textit{Id.} at 825.
\end{thebibliography}
area operator’s control, such as leaving a tractor on a ski trail. 131 The Jagger court applied this interpretation to state that, similar to leaving a tractor on a ski trail, the ski area provider had presumptive control over its employees; therefore, the court did not consider an employee running into a patron an inherent risk. 132 The Sunday court concluded that modern grooming techniques should have uncovered the snow-covered brush; therefore, the concealed brush was not an inherent danger assumed by the skier when participating in skiing. 133 The Connecticut Supreme Court in Jagger reconciled Sunday and Wright by noting that Sunday did not overrule Wright; rather, Sunday merely reclassified what risks were within the control of the ski area provider, considering the advent of new technology. 134 Because new technology allowed the complete removal of brush that existed on a novice ski trail, a skier was no longer deemed to assume that risk. 135

Furthermore, the court found that the intent behind the ski tort reform legislation passed after the Sunday decision complied with its explanation of what was within the control of ski area providers. After the Sunday decision, ski area operators, including those in Connecticut, became concerned with their new potential liability and sought redress from the state legislatures throughout the country. 136 By looking at the legislative history of the Connecticut ski tort reform statutes, the court in Jagger concluded that Connecticut had passed a statute that was in complete harmony with Sunday. 137 Additionally, the court found that the statute distinguishes between a risk over which the operator has no realistic control, such as terrain variations, and a risk over which the operator has control, such as marking a lift tower so a skier may know the tower’s location on the course and have the ability to avoid it. 138

131. Id. at 824.
132. Id.
133. Id.
134. Id.
135. Id. The court in Sunday explained:
   While skiers fall, as a matter of common knowledge, that does not make every fall a danger inherent in the sport. If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one “assumed” by the plaintiff. What he then “assumes” is not the risk of injury, but the use of reasonable care on the part of the defendant.
137. Id. at 825.
138. Id. at 827.
Thus, the Connecticut Supreme Court opined the basis of liability revolves around a ski operator’s control of certain risks.\textsuperscript{139} The court relied on the Utah case of \textit{Clover v. Snowbird Ski Resort}\textsuperscript{140} to support its position concerning what risks were within control of the ski area providers.\textsuperscript{141} Because Utah’s skiing statute is very similar to Connecticut’s statute, the court found the decision highly persuasive.\textsuperscript{142} In \textit{Clover}, the plaintiff brought a negligent design action against the defendant ski resort.\textsuperscript{143} The plaintiff alleged that because of the negligent design of the resort, a ski employee, acting in the course of his employment, collided with the plaintiff.\textsuperscript{144} The negligent design involved a “blind jump,” which allows a skier to jump off a ski run and land below without the ability to see if anyone is positioned in the landing area. The trial court granted summary judgment in favor of the defendant ski operator, stating that the plaintiff was injured as a result of an inherent risk of the sport — running into another skier; therefore, the claim was statutorily barred because the Utah statute, like its Connecticut counterpart, stated that running into another skier was an inherent risk of skiing.\textsuperscript{145} The Utah Supreme Court, however, reversed and held in favor of the plaintiff, stating, “[T]he inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator.”\textsuperscript{146} The Utah Supreme Court found that a blind jump negligently located was not an essential characteristic that a skier wished to confront while skiing, and furthermore, the blind jump’s location was within the control of the ski area provider.\textsuperscript{147}

Influenced, at least partially by \textit{Clover}, the Connecticut Supreme Court held that because ski instruction falls within the “operation of a ski area” and because the skier did not assume the risk of a collision with a ski instructor

\begin{itemize}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} 808 P.2d 1037 (Utah 1991).
\item \textsuperscript{141} \textit{Jagger}, 849 A.2d at 828.
\item \textsuperscript{142} \textit{See Utah Code Ann. §§ 78-27-52 to -54 (2004).}
\item \textsuperscript{143} \textit{Jagger}, 849 A.2d at 828.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.} (quoting \textit{Clover v. Snowbird Ski Resort}, 808 P.2d 1037, 1046-47 (Utah 1991)).
\item \textsuperscript{147} \textit{Clover}, 808 P.2d at 1045-47. The \textit{Jagger} court elaborated:
\begin{quote}
Thus, for inherent hazards, ski area operators owe skiers no duty of care and skiers assume the risk of those hazards in the primary sense. For those hazards which are not an innate part of the sport of skiing, or over which an operator can act reasonably to eliminate or minimize the potential for harm, operators owe skiers a duty of reasonable care.
\end{quote}
\textit{Jagger}, 849 A.2d at 828.
\end{itemize}
who was under the presumed control of the ski area operator at all times, Mohawk Mountain could be liable to the plaintiff.\footnote{148} Therefore, the court held that a jury should hear the case and decide if Mohawk Mountain was liable.\footnote{149}

\textbf{B. The Dissenting Opinion}

The dissenting opinion began by agreeing with the majority opinion on three points: (1) the claim against Mohawk Mountain was based on vicarious liability; (2) the statutes were ambiguous; and (3) Connecticut’s conflicting statutes need “something more” for them to make sense.\footnote{150} The dissent, however, criticized the majority’s position that Mohawk Mountain had presumed control over Courtot’s skiing. The dissent “fail[ed] to see how such conduct reasonably can be considered within the control of Mohawk [Mountain].”\footnote{151} The dissenting opinion stated that an employee’s loss of control was simply beyond the control of the ski resort; therefore, skiers assume that risk.\footnote{152} Furthermore, the dissent stated that the plain language of the statute applied to this case, so the majority’s interpretation removing assumption of risk from the statute was incorrect.\footnote{153} The dissent concluded by proposing another interpretation that allowed assumption of risk to remain in the statute while still protecting the ski industry.\footnote{154} Part V of this note clarifies and builds on these points made by the dissent by including them in part of the analysis.

\textbf{V. Analysis}

\textbf{A. Examination of the Majority Opinion}

This analysis argues four main points. First, the majority opinion correctly decided that holding a preseason clinic is part of the operation of a ski area. Second, even though the majority correctly decided the first issue, it erred by recognizing an incorrect purpose of the ski tort reform statute in Connecticut. Third, the court erred by placing too much faith in the \textit{Clover} decision, and

\begin{itemize}
\item \footnote{148}{\textit{Jagger}, 849 A.2d at 828-29.}
\item \footnote{149}{\textit{Id.}}
\item \footnote{150}{\textit{Id.} at 833-35 (Borden, J., dissenting in part). The dissenting opinion also agreed with the majority’s position on the second certified question concerning whether skiing was a contact sport, and if so, whether recklessness was required to prove negligence. \textit{Id.} at 834; see supra note 90.}
\item \footnote{151}{\textit{Jagger}, 849 A.2d at 836 (Borden, J., dissenting in part).}
\item \footnote{152}{\textit{Id.}}
\item \footnote{153}{\textit{Id.} at 836-37.}
\item \footnote{154}{\textit{Id.} at 838-39.}
\end{itemize}
finally, the court erred by not basing its decision on the plain language of the ski tort statute.

The court correctly found that a preseason clinic is part of the operation of a ski area. Because the Connecticut legislature did not provide a statutory definition of the phrase “operation of a ski area,” the Jagger court correctly used outside sources to determine what “operation of a ski area” entails.\textsuperscript{155} The defendant ski operator wanted the court to determine that the preseason clinic was outside the definition of “operation of a ski area” because the legislature did not specifically enumerate a preseason clinic in the statute as it did with other operations.\textsuperscript{156} Such an argument was not correct because the Connecticut legislature could not possibly list every action that could be considered part of the “operation of a ski area” in its statute. In fact, the statute itself generally reflects such an idea by stating, “In the operation of a passenger tramway or ski area, each operator shall have the obligation to perform certain duties including, but not limited to . . . .”\textsuperscript{157} Consequently, the court could look to the dictionary definition “[t]o ascertain the commonly approved usage of the word” and find that “‘operation’ [includes] ‘the whole process of . . . operating a business.’”\textsuperscript{158} Therefore, the majority’s opinion correctly included the preseason clinic as part of the “operation of a ski area.”

Although the Connecticut Supreme Court was correct concerning a preseason clinic’s inclusion as part of the operation of a ski area, the court erred regarding the purpose of the Connecticut ski statutes because its analysis does not conform with the true purpose behind the passage of the statutes. After the \textit{Sunday} decision, the ski area industry felt that \textit{Sunday} constituted a possible threat of financial ruin because of a higher level of liability and rising insurance premiums.\textsuperscript{159} Consequently, the representatives of the ski industry petitioned legislatures for a shield against this increased liability posturing that skiers should assume the risks of certain types of dangers inherent in the sport of skiing.\textsuperscript{160} The Jagger court, by stating that the ski statutes were in perfect harmony with both the \textit{Wright} and \textit{Sunday} cases, negated the entire purpose of the lobbyists who petitioned for legislative change on behalf of the ski industry. The court’s analysis seems particularly suspect considering that within three years of the \textit{Sunday} decision, almost every state with a major ski

\textsuperscript{155} See supra notes 107-20 and accompanying text.
\textsuperscript{156} Jagger, 849 A.2d at 820 (majority opinion).
\textsuperscript{157} CONN. GEN. STAT. § 29-211 (2001) (emphasis added).
\textsuperscript{158} Jagger, 849 A.2d at 820 (quoting Gartrell v. Dep’t of Corr., 787 A.2d 541 (2002)).
\textsuperscript{160} Jagger, 849 A.2d at 835.
industry, as a response to the *Sunday* decision, passed or considered passing legislation protecting each state’s respective ski industry.\(^{161}\) The lobbyists for the ski industry and the legislature must have desired something more than a mere codification of the already existing common law resulting from the *Sunday* case.\(^{162}\) Otherwise, going to the legislature for a protective statute was an exercise in futility because it was the common law that the ski industry desired to change.

Despite the intent of the legislature, skiers injured by the negligence of ski operators were not to be left without recourse. The legislature’s purpose in passing the Connecticut ski statutes was to continue allowing recovery when the negligence of ski area operators caused injuries to skiers, but not when the injury was caused by an inherent risk of skiing.\(^ {163}\) As stated earlier in this note, the common law version of assumption of risk frustrates both of these purposes — (1) protecting the ski industry by changing the previous common law doctrine and (2) allowing recovery for the plaintiff when the ski provider is negligent.\(^ {164}\) The majority tried to reconcile the apparent disparity between the common law assumption of risk and the ski statutes by stating that ski resort liability should turn on whether the cause of injury was within the control of the ski area provider.\(^ {165}\)

The court’s focus on “control” was misguided, however, because even the most advanced skier may “catch an edge” and lose control, regardless of training, experience, and supervision.\(^ {166}\) Common knowledge demonstrates that even experienced athletes, such as Olympians, fall often during competition. With regard to an employee performing certain duties on skis, it is impossible to say that the employee is under the control of the ski area operator at all times because even the most experienced and well-trained skiers may lose control. The majority’s reliance on “control” is flawed in this instance because even the skier, the person supposedly in control of the skis at all times, does not have absolute control when “catching an edge.”

Although the court correctly attempted to reconcile the disparity in the statute

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162. *See supra* note 67.
164. As mentioned earlier the defendant still owed a duty under the statute, so it was not primary assumption of the risk. Also, the statute was not secondary assumption of the risk because it did not require that the plaintiff be aware of the defendant’s negligence before the plaintiff chose to confront the known risk. *See supra* notes 122-29 and accompanying text.
165. *Jagger*, 849 A.2d at 835 (Borden, J., dissenting in part).
regarding assumption of risk, its reliance on Mohawk Mountain’s presumed
control over Courtot at all times is not realistic.

The majority also erred by placing too much faith in the Utah Supreme
Court’s Clover decision. In Clover, the plaintiff contended, among other
things, that because the ski resort contained a “blind jump,” the negligent
design and maintenance of the ski resort caused the collision between the ski
resort’s employee and herself.167 The Clover plaintiff’s claim was not based
on an instantaneous loss of control on the part of a ski resort employee as
occurred in Jagger. The Clover allegation fits under the Jagger majority’s
control analysis because the design of a ski resort is definitely within the
control of a ski area provider. As discussed previously, however, the majority
in Jagger claimed that Courtot was under the presumed control of Mohawk
Mountain even though a ski area provider could not prevent an employee from
losing control on skis.168 This presumption, combined with the facts of the
Clover case, adds little to the majority’s argument because of the substantially
higher level of control ski resorts have over the design of their slopes
compared with the control they have over their employees while skiing down
those slopes. Therefore, the Clover decision does not further the majority’s
argument.

Further cutting against the majority’s reasoning is the plain language of the
statute. The statute plainly states that a skier assumes the risk of “collisions
with any other person by any skier while skiing . . . .”169 Such a scenario
applied directly to the incident which occurred between Jagger and Courtot.170
Simply put, Jagger collided with another skier while skiing, and the majority
should have used this fact and the language of the statute to bar recovery by
ruling in favor of Mohawk Mountain.

Additionally, as the dissenting opinion in Jagger stated:

[The] language must apply to this case, where the “other person”
is employed by the ski area, because if the other skier were not an
agent or employee of the ski area, the ski area operator would have
no legal responsibility for his negligence in the first place and,
hence, no need to be shielded from liability by the doctrine of
assumption of risk.171

167. Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1039 (Utah 1991); see also Bigelow,
supra note 21, at 312.
168. See supra notes 165-66 and accompanying text.
170. Id.
171. Jagger, 849 A.2d at 837 (Borden, J., dissenting in part).
For example, in a similar hypothetical collision between Jagger and another patron, the negligence cause of action would not involve an analysis of Mohawk Mountain’s legal responsibility because there is no employer-employee relationship. The real problem with the majority’s analysis, which the dissent identifies, is that it interprets assumption of risk out of the statute. Under the majority’s analysis, assumption of risk will essentially never apply under a vicarious liability scenario because all negligence claims will be the result of the actions of an employee or agent. In other words, all vicarious-liability negligence claims would arise as a result of the acts of an employee or agent of the ski operator.

As a result of its analysis, the majority’s decision completely thwarts the legislature’s intent, which was to statutorily provide at least some relief to the Connecticut ski industry. By preventing any negligence caused by an employee or agent to be an assumed risk, ski area operators are now without the use of assumption of risk as a defense to vicarious liability — a result hardly intended by the passage the Connecticut ski act.

B. Suggestions for Reform

The attempt at reform in Connecticut took a legislative form, which enjoys certain advantages. For instance, “a statute defining duties of operator and participant, and spelling out the scope of inherent risks, informs the respective parties of their future obligations.” On the other hand, legislative reform presents several problems. The first was demonstrated in Jagger. If the statute includes a non-exclusive list of what risks skiers assume, which most statutes do because of the numerous possibilities of injury that may occur, then neither side can realistically predict the outcome of a case because the trier of fact must decide if a particular set of facts falls within the assumption of risk named in the statute. Second, a statutory list of assumed risks may not take into account the advances in technology that lower the risk associated with the sport of skiing. For example, the Wright court held that an object concealed

172. Id.
173. Id.
174. Id.
175. See supra notes 67-75 and accompanying text.
176. Hansen & Duerr, supra note 7, at 191.
177. Id.
178. Id.
by snow was an inherent risk while the Sunday court held that it was not inherent.\textsuperscript{179} The distinction that the Sunday court made concerning Wright relates to the disadvantage of a static statute and its inability to account for possible changes in skiing technology. The Sunday court stated that new technology allowed for better grooming techniques, and thus, concealed brush was not something that a skier assumed as a risk.\textsuperscript{180} Finally, the legislature may draft a poorly written statute, which could make the application of the statute impractical because the judiciary would have difficulty understanding the intent of the legislature.\textsuperscript{181}

Because of these problems, Connecticut might want to consider a different type of reform. Wyoming has taken a judicial approach, rather than a legislative approach, to tort reform of inherently dangerous activities such as skiing.\textsuperscript{182} A judicial-approach statute does not list duties and risks like the Connecticut legislative-approach statute; instead, the statute allows the judiciary to determine if the operator owes a legal duty.\textsuperscript{183} This approach uses common law principles to determine the nature of the risk and the ski area provider’s duty.\textsuperscript{184} For example, the Wyoming state courts use the following eight factors to determine if a ski area provider has a legal duty: (1) the foreseeability of harm to the plaintiff; (2) the closeness of the connection between the defendant’s conduct and the injury suffered; (3) the degree of certainty that the plaintiff suffered injury; (4) the moral blame attached to the defendant’s conduct; (5) the policy of preventing future harm; (6) the extent of the burden upon the defendant; (7) the consequences to the community and the court system; and (8) the availability, cost, and prevalence of insurance for the risk involved.\textsuperscript{185} In other words, Wyoming state courts use a common law balancing test to determine if a legal duty exists.

Applying these eight factors to the facts of Jagger yields the result that the Connecticut ski industry desired from the legislative process.\textsuperscript{186} First, Jagger could foresee the possibility that she might run into another skier while skiing, even a skier who is an employee of the ski resort. Second, a close connection existed between the defendant’s conduct and the injuries suffered, but the defendant’s purpose in instructing its employees was to provide better service

\begin{itemize}
\item \textsuperscript{179} See supra Part II.A-B.
\item \textsuperscript{180} Sunday v. Stratton Corp., 390 A.2d 398, 402 (Vt. 1978); see also Frakt & Rankin, supra note 4, at 243.
\item \textsuperscript{181} Hansen & Duerr, supra note 7, at 191.
\item \textsuperscript{182} Id. at 173-90.
\item \textsuperscript{183} Id. at 172.
\item \textsuperscript{184} Id. at 191-92.
\item \textsuperscript{185} Id. at 190.
\item \textsuperscript{186} Id. at 189-90.
\end{itemize}
and a safer skiing environment. This proper purpose, therefore, outweighs the close connection of the injury. Third, the plaintiff obviously suffered injuries. Fourth, Courtot’s loss of control while skiing downhill probably is not morally blameworthy — unless he intentionally ran into Jagger. Jagger, however, never alleged that Courtot’s conduct was intentional. Fifth, having a well-trained staff prevents future harm by allowing the staff members to help patrons as they navigate the slopes. For example, Courtot, as a well-trained staff member, would be better able to respond to an injured skier or direct the ski traffic on the slopes so that patrons enjoyed a safer ski environment. Sixth, if the ski resort did not hold preseason clinics to train its staff members, it might suffer a huge financial burden because of the loss of business coupled with increased insurance costs which are both associated with undertrained staff members. Well-trained staff members perform two functions that promote economic gain: (1) they serve the patrons, and good service ensures that the patrons return; and (2) they help those who become injured, and even prevent injuries which reduces insurance costs. Seventh, without a well-trained staff, the community would suffer for the reasons previously listed. Finally, a poorly-trained staff might actually increase insurance premiums because a poorly-trained staff might create situations that impose increased risk on the ski area providers. In conclusion, running into another skier was foreseeable and because training employees is essential to the running of a ski resort, ski resorts like Mohawk Mountain should not be liable when one of its employees happens to lose control while performing onsite training.

A judicial approach to tort reform, however, may not be more desirable than a legislative one. Because of the natural inconsistency by courts in applying these common-law factors, a judicial approach may not decrease the uncertainty of outcomes in cases like Jagger. Uncertainty was one of the issues the ski area providers sought a resolution to when they approached the Connecticut legislature concerning ski tort reform. Perhaps a solution would be for the legislature to simply draft a new statute that precisely protects the ski resort under the facts presented by the Jagger case, but such legislation sets a cumbersome precedent that requires the legislature to pass a new law anytime a particular factual situation caused a problem of interpretation. After all, how many different ways may an individual be hurt while skiing?

Because of the difficulties of both a legislative and a judicial approach to tort reform, perhaps the dissent’s position is an appropriate compromise. The dissent’s interpretation allows for liability based on the negligence of the ski area provider and states that the assumption of risk doctrine should still apply when the skier assumes risks inherent in the sport of skiing. The dissent’s

interpretation rests on the idea that a claim of negligence must, by its nature, be related to something intrinsically a part of the operation of a ski area, such as conducting a preseason clinic. \textsuperscript{188} Therefore, while a preseason clinic is part of operating a ski area, “an instantaneous loss of control by a ski instructor on the slopes does not fall within the type of conduct that is covered” by the statute. \textsuperscript{189} For example, if Jagger’s claim had been that the preseason clinic was negligently placed in an area of the slope where a skier was likely to run into those participating in the ski instruction, then the claim should stand. An employee’s loss of control through no fault of the ski resort, however, is not related to the ski area provider’s duties listed in the Connecticut statutes, and therefore, the Connecticut Supreme Court should have dismissed the case. Thus, the dissent is advocating a pragmatic position that removes some of the inconsistency of applying the common law in a judicial approach to tort reform while still allowing latitude from the strictures of statutory language associated with a legislative approach.

\textbf{VI. Conclusion}

The ski area providers’ purpose in seeking legislation was to protect themselves from the apparent new liability created by the decision of the Sunday case. The providers wanted to change the common law. The court in Jagger implicitly stated that changing the common law was not the purpose behind the passage of the statute when the court announced that the legislation merely codified the existing common law. Additionally, its interpretation of the statute removed assumption of risk from the analysis. Connecticut and other states with similar statutes, whose judiciaries may follow a similar interpretation of Jagger, have a choice to make: (1) they can either create a judicial approach to assumption of risk in the skiing context; (2) they can draft a new statute that would more precisely answer the issue presented by Jagger; or (3) they can encourage their judiciary to interpret the statute to allow for claims of negligent operation, but still retain the concept of assumption of risk. Each scenario has positive and negative aspects, but one thing is for certain: with the amount of money that is generated by the ski industry for its respective states, the legislatures will more than likely be willing to help anytime a perceived threat of higher liability exists. At least in the state of Connecticut, increased liability now exists because of Jagger, and if history holds true to the lobbying actions that occurred as result of Sunday, then the Connecticut ski industry will react. The question remains, however, will the

\textsuperscript{188} Id. at 839.
\textsuperscript{189} Id. (emphasis added).
judiciary allow tort-reform legislation to change the common law or will it simply interpret the new statute as a codification of common law? In the case of Connecticut’s ski industry, past history points to the latter.

Joel Bulleigh