Skiing accidents

Paul Crabb, Canberra

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Between 1990 and 1994 an average of 1,035,000 ski lift tickets (skier days) were bought at New South Wales ski resorts. This increased to 1,134,000 skier days in 1996 - an increase of 9.95%. With an overall injury rate of 3.37 injuries[1] for every 1000 skier days, a typical season in New South Wales will result in 4,000 injuries. (NSW National Parks & Wildlife Service, Snowy Mountain Region, Resorts section).

Introduction

There have been many changes in the sport of skiing, not least of which has been its transformation into a recreational industry. Today, skiers of varying ability and experience can ski the same slopes accessed by ski lifts from the New South Wales ski resorts. The public perception of skiing has also changed. Ski resorts are seen as part of a large profitable industry. As such, the ski operator's responsibilities towards its customers are in general the same as that of any other business. Ski operators have also developed the technology and financial resources to refine the sport so that many risks and dangers formerly thought to be "inherent" could be eliminated or reduced with the exercise of reasonable care.

The object of this paper is to raise some grounds of action in skiing accidents that may not have been considered before. This paper will not revisit the law of product liability.

Duty of care

In New South Wales the Kosciuszko National Park, and therefore its popular ski fields, are administered by the Minister for the Environment under the *National Parks and Wildlife Act* 1974 (NSW) ("the Act"). Under section 151 of this Act, the Minister is empowered to grant leases of land within a national park for the purpose of the erection of "accommodation hotels or ... houses", or "facilities and amenities for tourists and visitors". Terms of these leases include obligations on the lessee to act to avoid "improper", "illegal" or "unlawful conduct": To "maintain, replace, repair, rebuild and keep" its equipment and property in "good and substantial repair, order and condition". Another important obligation on the lessee is to maintain its ski slopes:

"12.6 ... groom smooth and keep tidy all slopes, trails and tracks and remove, mark or protect the public from all hazards whether caused by topography, climatic change or otherwise ..."(Deed of Lease for Ski Lifts and Associated Premises, Smiggin Holes, June 1985)

The Act is the starting point for an examination of the duty of care owed by the ski operator to skiers.

Hidden dangers

A skier unfortunate enough to collide with a natural object or object placed by the ski operator must establish in fact that the hazard was not "inherent" to skiing or that the skier had no antecedent knowledge of the hazard. In *Rootes v Shelton* (1967) 116 CLR 383 the plaintiff was water skiing; being towed by a boat driven by the defendant. The plaintiff collided with a stationary boat. The plaintiff's action in negligence was partly based on the defendant's failure to adequately warn the plaintiff of the danger. The defence alleged that the plaintiff recognised and knew the risks of colliding with obstacles on the water, and had accepted them. The matter was decided for the plaintiff, as the defendant had failed to warn of the unusual obstacle, even though the plaintiff had clearly assumed some risks of injury.

Rootes' case can be applied to ski runs on the slopes of ski resorts. A ski operator would be negligent by not adequately warning the skier of or mitigating any danger. Evidence should be led of any deviation from the standard of care by the ski operator in failing to provide adequate warning or preventing the injury with barriers etc.

Too crowded slopes

There are many potentially dangerous situations created by requiring skiers of differing experience and standards of competence to ski together. Such a situation arises at the end of a ski run or leading up to and from ski lifts. In *Trevali Pty Ltd (trading as Campbell Roller Rink) v Haddad* (1989) ATR 80-286, an inexperienced roller skater was ejected from the beginners' enclosure into the area for skilled skaters. The skater was pushed to the ground and was injured. The Appeal Court found that by its actions, the appellant company had "brought into being a situation having in it potential danger" (per Mahoney J at 69,032) and thereby owed the inexperienced skater a duty of care. The company failed to take reasonable care by not adequately supervising the actions of skaters skating in the area for skilled skaters.

Ski lift injuries

Skiers who have been transported up a ski slope by a ski lift find that at the end of the ride they must move quickly away from the ever moving lift. There are many dangers associated with this activity. The skier may fall from the ski lift, their equipment or clothes may be caught on the lift or the skier may leave the lift too early or too late. All of these events can cause injury. In *Connors v The Western Australian Government Railways Commission* (1992) ATR 81-187, the plaintiff alighted from a train, crossing railway lines to leave the station. The plaintiff was struck by a moving train. The Court found that the carrier had a general duty: "a carrier of passengers comes under the ... duty or liability ... that he is bound to carry according to his profession": *Clarke v West Ham Corporation*

(1909) 2 KB 858 at 876 (per Falwell LJ). The duty to take due care to carry a passenger safety extends to providing safe access to and from the transport (*Longmore v The Great Western Railway Company 144 ER 757 and Craft v Metropolitan Railway Co* 1 LR-CP 300). The Court found that the defendant had breached its duty to a passenger by failing to adequately warn against common dangers, having regard to mistakes that passengers might make (per Pidgeon J at 61,653). Another useful authority is *Ratcliffe v Jackson* (1994) ATR 81-284, where the plaintiff alighted from a car when her cardigan caught in its door. The defendant drove the car away, causing the plaintiff to suffer injury. The Court applied the general principles of *Wyong Shire Council v Shirt* (1979-80) 146 CLR 40, finding that the defendant had breached his duty of care by not delaying "his departure until he had observed the (plaintiff) to be out of close proximity to the car or at least until there had been time for the (plaintiff) to move well clear, or, to attract his attention to her predicament ..." (per Car J at 61,481).

The principles of negligence specifically relating to the duty of care owed to skiers is still substantially untested in New South Wales. As the ski industry grows, attracting more skiers to its slopes, the plaintiff solicitor should be aware of these possible areas of claim. ■

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Note:

[1] Jim Chalat's "Ski Safety News" (http://www.skisafety.com)

Volenti on high? Voluntary assumption of risk in high risk adventure sports

Terry Stern, Sydney

Introduction

Hanging from a belay on the second pitch of a face climb at Mt Boyce I quietly contemplated whether the old Latin saying "Volenti non fit injuria" continued to have relevance.

I had taken a course of climbing instruction with a guide and had signed the usual risk release (or, at least, what I assumed was usual):

"In consideration of the instructors accepting my application for, and being permitted to go on the adventure trip/course/instruction, I, for myself my heirs, executors, and administrators agree to this release of claims, waiver of liability and assumption of risk (collectively this agreement). I waive any and all claims I may now and in the future have against, and release from liability and agree not to sue the instructors, agents or representatives (collectively, its staff) or any Licensor for any personal injury, death, property damage, or loss sustained by me as a result of my participation in an adventure trip with the instructors, due to any cause whatsoever, including without limitation, negligence on the part of the instructors, or its Staff, I confirm that I am at an age of legal consent (18 years or older) and that I have read and understand this Agreement prior to signing it. This waiver will operate for....., its principals, its instructors and agents.

Signature.....Date.....

(Parent or legal guardian if under the age of 18)"

After a short course on abseiling, basic knots and rope ascending (on prussicks) here I was on my first multi-pitch climb contemplating the legal consequences of a variety of possible disasters which I imagined could happen at any time.

The thought of the article I would write "Volenti on High" amused me and I relaxed.

Well, what would have happened if...

Volenti non fit injuria

Don't you know, when in Rome do as the Romans do? It's Australia isn't it? So what do we mean by Voluntary Assumption of Risk and does it continue to have much relevance in the modern law of Tort? Specifically, how does it apply in the context of high risk adventure sports? And does it matter any way?

Does it matter any way?

I was at a climbing gym in Sydney one afternoon. The walls were crowded with kids hanging off ropes, - the latest craze, a climbing party. Youngsters 11, maybe 12, belaying each other. No idea, no concept of danger, of risk. Presumably, the birthday boy's parent had signed them all in and signed some "communal risk release" for whatever worth or effect it had.

It occurred to me that, sooner or later, there'd be a nasty accident or two, or three, in rock climbing gyms.

Sure enough, in the Winter '97 edition of the climbing magazine, *Rock*, p. 11, a corespondent related that he was:

"...aware of several law suits against climbing gyms around Australia which involved customer accident arising from climbers becoming detached from their ropes purely because the karabiner becomes detached from the rope."

He was referring to accidents resulting because the "fail-safe" locking karabiner had unlocked from the climber's harness detaching the climber from the end of the rope.

You see it at some climbing gyms. ▶