Terrain Park Liability Continues to Threaten Resorts
COULD LITIGATION SET THE SNOWBOARD INDUSTRY BACK 20 YEARS?  BY BRAD FARMER

ONE DAY A LAWSUIT IS BROUGHT AGAINST A RESORT FOR TERRAIN PARK LIABILITY in a serious personal injury case. After years of trials and appeals, the verdict ultimately goes against the resort. Millions of dollars have to be doled out to the victim, and once payment is made the resort’s insurance company promptly threatens to drop its coverage unless the resort agrees to stop building terrain parks. Due to the new precedent that the verdict set and the flood of additional lawsuits that follow the judgment, the exclusion of terrain parks from coverage ripples throughout the insurance industry. Resorts are forced to send their crews out to plow down their parks and put nice flat groomers where jumps and halfpipes once stood. Can you imagine the impact that would have on the snowboard industry? Resorts, retailers, manufacturers, and everyone involved in the business of snowboarding would immediately have their livelihoods seriously threatened. Does this scenario seem impossible to you? Well, it may have narrowly avoided becoming a reality.

The case quickly turned into a nightmare for the resort industry when Vans and Switch were named in the lawsuit for product liability.
The Trial

In 2002, a negligence lawsuit in *Vine vs. Bear Valley* went to trial after summary judgment was denied. The plaintiff was seeking damages in the neighborhood of $18 million. Charlene Vine suffered a broken back at the T-12 vertebral area, resulting in paraplegia, when she fell while attempting a jump at an employee party hosted by Bear Valley Mountain Resort after the end of the season. A Bear Valley employee had reshaped and groomed the jump specifically for the party.

It’s difficult to put yourself in the place of someone who has become paralyzed in a snowboarding accident. You made the choice that led to your life being tragically altered. Deep down, you may know it was your own fault, but when a personal injury lawyer tells you that you have a case and could collect millions of dollars in damages, what would you do?

Vine’s lawsuit was based on the claim that the jump was dangerous and increased the risks to snowboarders beyond those inherent in the sport. The case quickly turned into a nightmare for the resort industry when Vans and Switch were named in the lawsuit for product liability—with a claim that Vine’s bindings failed to release upon impact. As we all know, bindings are not supposed to release upon impact, but the ridiculous claim helped the plaintiff win a change of venue from Alpine County to San Francisco County. The problem with the change of venue is that San Francisco is known for being very liberal with negligence case awards, and a jury drawn from an urban area would most likely be made up of people unfamiliar with snowboarding and terrain parks. “We suspected that if a plaintiff attorney was ever successful in arguing for a change of venue out of the mountain community, it would not be good for the resort industry,” said John Rice, expert witness for Bear Valley.

According to Peter Koenig, defense attorney for Bear Valley, presiding Judge Paul Alvarado denied all the typical arguments at trial, including:

- Primary and secondary assumption of risk
- The open and obvious condition of terrain
- A release of liability signed by Vine
- The exclusive remedy workers’ compensation

Koenig went on to explain the plaintiff’s attorney Mike Danko took an Occupational Safety and Health Administration (OSHA) standard that states; “a fall from a ladder from eight feet can be dangerous” and applied it to this case. This argument of trying to put scientific standards to features made out of snow seemed ludicrous. However, it was successfully used to prove to the jury that there was negligence on the part of Bear Valley for constructing a jump that could cause someone to impact the ground from an equivalent fall height of 12 feet (the height of the jump in question). In addition to the aforementioned typical defense arguments, and several expert witnesses who testified that the jump was built properly, there was a videotape of 31 snowboarders successfully making it over the same jump that Vine didn’t. The video was deemed admissible in court, but only without the audio.

“Ultimately, half of the defense’s evidence was thrown out by the very liberal judge.”

—John Rice, Expert Witness for Bear Valley
The Verdict

The jury awarded Vine $3,727,000 in special damages and $713,000 in non-economic damages. In what was a small victory for Bear Valley, the jury found Vine to be 54.6 percent at fault reducing the award by that percentage. Vine motioned for a new trial on the non-economic damages. The trial court granted the motion, but ruled the judgment could be affirmed if Bear Valley accepted an additur of nearly $5.3 million. The judge basically tried to add millions in damages over the jury’s award. Bear Valley rejected the additur and appealed the judgment and the order for a new trial.

In 2004, the state appeals court in San Francisco reversed the trial court ruling based primarily on finding that the jurors were not properly instructed on “the assumption of risk doctrine.” The legal concept states: people who engage in dangerous recreational activities can reasonably assume that they could be injured. Two cases in which the assumption of risk protected the resort from liability include Kelly vs. Sierra-At-Tahoe [see exhibit A] which, actually went to trial before the doctrine was found to be an effective defense, and Harshman vs. Jackson Hole Resort [see exhibit A], which ended in summary judgment citing the doctrine. The appeals court also found that all of the initial defenses that were denied in the trial court should have been admissible.

“If you are going to come after the resort industry with litigation, you’d better be prepared.”
—Tim White, Director of Education for the National Ski Areas Association.
The Retrial

"Most of the time you feel about 50-50 going into an appeal, but in this case my confidence was very high," said Koenig. He went on to say that the appeals court did a great job of laying out a roadmap for the new trial by stating precisely where errors were made in the first trial. The defense was also successful in arguing for favorable change of venue to Calaveras Country, sighting reasons of convenience in getting witnesses to court—the location being much closer to a majority of those involved. According to Koenig, this helped the progression of evidence go much smoother as witnesses and experts could be called into court on much shorter notice. The venue change also brought the trial back to the mountain community and a jury pool that would be more familiar with snowboarding.

The new trial set at the historic courthouse in San Andreas, California, began in February of 2006. After two months of heated testimony, the jury returned a verdict after just two days deliberation. The jury found in favor of Bear Valley by a margin of 10-2. "We were pleased with the verdict of the retrial and felt somewhat vindicated. We also feel that as an industry, we proved we have the resolve to stick it out. If you are going to come after the resort industry with litigation you’d better be prepared," said Tim White, director of education for the National Ski Areas Association.

"After all the money that went into presenting expert witnesses and trying to prove scientific standards, what it really came down to was a jury watching the videotape. They were able to sit down together outside the courtroom without lawyers and view it frame-by-frame. Despite the emotion of the case they were able to draw conclusions based on what they saw. Thirty minutes later, the jury came back with their decision," said Koenig.

"If we are ever forced to regulate the building of snow features with scientific standards we might as well scrap the whole idea."
—Pete Koenig, Defense Attorney for Bear Valley

Exhibit A

OTHER SIGNIFICANT TERRAIN PARK LIABILITY CASES

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Year</th>
<th>Summary</th>
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<tbody>
<tr>
<td>Kelly vs. Sierra At Tahoe</td>
<td>1994</td>
<td>This was the first terrain park liability case to go to trial. The court found in favor of Sierra-At-Tahoe, citing the inherent risks of snowboarding.</td>
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<tr>
<td>Shukowski vs. Indianhead Resort</td>
<td>1996</td>
<td>The court determined a jump clearly marked as expert slope led to an assumption of risk, and the case was denied in summary judgment.</td>
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<td>Randall vs. Mammoth Mountain Resort</td>
<td>1997</td>
<td>The court determined when a resort fabricates non-obvious, atypical hazards on its runs, it has artificially increased the risks to snowboarders over and above those inherent to the sport.</td>
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<tr>
<td>Solis vs. Kirkwood Resort</td>
<td>2001</td>
<td>The court found ambiguity in a liability release, which made the legality of the form questionable.</td>
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<tr>
<td>Harshman vs. Jackson Hole Resort</td>
<td>2002</td>
<td>The court determined snowboard jumping was an inherent risk of the sport, and the case was denied in summary judgment.</td>
</tr>
<tr>
<td>Lane vs. Homewood Resort</td>
<td>2002</td>
<td>The court found that there could be recovery of workers’ compensation where an employer had encouraged an employee to participate in a company-sponsored event.</td>
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What Does It All Mean?
Bear Valley wins the case and everything is just fine now, right? Well, not necessarily. What we now have is a new battle of science versus art. The plaintiff’s attorneys were successful in questioning the design of a jump constructed out of snow with use of science. “If we are ever forced to regulate the building of snow features with scientific standards we might as well scrap the whole idea,” said Koenig. Let’s face it; building terrain parks is more of an art form than architecture, as snow is a malleable substance that will never be consistent in shape. According to Koenig, despite the victory for Bear Valley, the science argument is out there now and could someday prove damaging. There is always the risk that someone will have a serious or fatal accident on a terrain feature and there is nothing perfect about the resort industry. Despite the growing experience and expertise there are likely still resorts out there putting forth meager efforts in their terrain park design and maintenance.

“There has been a general maturing of people who are building terrain parks,” said White. The larger resorts seem to have it together now, but it is difficult to keep track of what is happening at the hundreds of small resorts across the country. Perhaps in the next terrain park liability case, science will prove negligence in design. “The important issue right now is that, thus far, a resort has not been found liable,” said Rice.

How the Resort Industry is Protecting Itself
“The Vine case raised awareness in ski resort and recreation community as a whole,” stated Koenig. Somewhere around the year 2000, the resort industry accepted the fact that snowboarders were here to stay and quality terrain parks were actually something their customers now demanded, and, if done right, could lead to increases in visitors and dollars. They also recognized the importance of protecting their new interests. “We put forth some serious efforts to limit future terrain park liability,” stated White.

The National Ski Areas Association took it upon themselves to bring industry leaders together in an effort to make improvements in three main areas:

ASSUMPTION OF RISK:
The legal concept states people who engage in dangerous recreational activities can reasonably assume that they could be injured.
EDUCATION: Development of consistent messages and warnings to guests about terrain parks, which led to the creation of Burton’s Smart Style. (SEE EXHIBIT C)

OPERATIONAL: General improvement in the consistency and quality of terrain parks across the nation, which lead to a more open sharing of information.

LEGISLATIVE: A handful of states were successful in updating laws and statutes pertaining to Ski Safety Acts to include terrain parks making it more difficult to sue resorts. (SEE EXHIBIT B)

Another way resorts are working to protect themselves is with the use of liability releases signed by guests. Most resorts now require them from season pass holders and individuals participating in events. The new Echo Mountain resort located in Colorado is primarily a terrain park and now requires all visitors to sign releases. Snow Summit, located in Southern California, recently instituted the CORE program where they offer a one time $10 discount to guests who will sign a release. There has even been talk within the resort industry of attempting to create a universal database of waivers. “Liability releases are the last bastion of legal support for resorts,” said Rice. Event releases seem to hold up in court as seen in the recent Summary Judgment in Shepperd vs. Bear Valley (SEE EXHIBIT A). The ambiguity of a release was brought into question in Salis vs. Kirkwood (SEE EXHIBIT A). “The effectiveness in court comes down to the clarity of the release,” said Koenig.

Exhibit B
States that have updated statutes:

- Colorado
- Connecticut
- Minnesota (working on it)
- New Hampshire
- Utah
- West Virginia

Exhibit C
Burton’s Smart Style

#01 Look Before You Leap
Scope around the jumps first, not over them. Know your landings are clear and clear yourself out of the landing area.

#02 Easy Style It
Start small and work your way up.

#03 Respect Gets Respect
From the lift line through the park.