



Defining the Necessary Role and Appropriate Level of Risk in Helicopter-Accessed Wilderness Skiing

Caylin J. Goldey Barter

Winner of the 2013 Lillian S. Fisher Prize in Environmental Law and Public Policy

Udall Center for Studies in Public Policy
The University of Arizona



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by Caylin J. Goldey Barter, J.D.

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A venturesome minority will always be eager to set off on their own, and no obstacles should be placed in their path; let them take risks, for godsake, let them get lost, sunburnt, stranded, drowned, eaten by bears, buried alive under avalanches—that is the right and privilege of any free American.

—Edward Abbey, *Desert Solitaire* (1968)

We can have wilderness without freedom; we can have wilderness without human life at all, but we cannot have freedom without wilderness, we cannot have freedom without leagues of open space beyond the cities, where boys and girls, men and women, can live at least part of their lives under no control but their own desires and abilities, free from any and all direct administration by their fellow men.

—Edward Abbey, *The Monkey Wrench Gang* (1975)

Introduction

On March 13, 2012, a massive avalanche near Haines, Alaska, took the life of Nickolay Dodov, a twenty-six-year-old snowboarder from Lake Tahoe.¹ Rob Liberman, his thirty-five-year-old ski guide employed by Alaska Heliskiing, also perished in the slide. Nickolay had come to Haines to realize a heliskiing dream widely held by residents of Truckee, California, a place I called home for the better part of the last decade. I, too, dream of heliskiing in Alaska someday, though seeing as my earning capacity seems to be inversely correlated with my knee stability, “someday” needs to come soon, if it is going to come at all. Such dreams carry a hefty price tag: a single day of skiing with Alaska Heliskiing costs around a thousand dollars, which is more than the price of a season pass at one of Lake Tahoe’s dozen or so local world-class ski resorts.

Helicopter-assisted skiing and snowboarding (known collectively as “heliskiing”) is a relatively recent phenomenon. Though commercial outfits have provided heliskiing services since the 1960s,² the industry has grown significantly only in the past several years as avalanche survival technology has drastically improved. Now, in addition to the “big three” of avalanche rescue gear carried by every backcountry skier—avalanche transceiver, shovel, and probe—many who venture out-of-bounds from the familiar territory of the ski area also carry an “air bag” and an “avalung” to further boost their chances of survival in the event of an avalanche.³ There have also been significant advancements in avalanche-forecasting science, and avalanche transceiver technology has vastly improved as well; today’s models are nearly idiot-proof, with the capability to distinguish victims in multiple-burial situations and to provide distance and depth information for each one. It is unsurprising, then, that more people than ever before have ventured away from ski resorts and into

¹ Neil Amdur, “Extreme Grief,” *New York Times*, Mar. 5, 2013, at B11, <http://www.nytimes.com/2013/03/06/sports/skiing/grieving-families-of-extreme-sports-enthusiasts-are-left-to-wonder-was-the-thrill-worth-it.html?smid=pl-share> (last visited June 18, 2013).

² See “The CMH Story,” <http://www.canadianmountainholidays.com/about/our-story> (last visited June 25, 2013).

³ An “airbag” is a backpack containing sacs that can be rapidly inflated by pulling a ripcord in the event of an avalanche; the increased drag helps to keep a buried skier nearer the surface of the sliding snow. An “avalung” is a simple hose-valve system that draws fresh air from the snowpack on the inhale, and expels CO₂-laden air away from the face on the exhale; it increases survival times of buried skiers from under fifteen minutes to more than an hour.

the backcountry, enticed by the prospect of fresh snow, solitude, and the excitement that accompanies any trip into the wilderness.⁴

Why start this story with Nickolay? Because he was a lot like me. He hailed from Truckee. He worked odd jobs to finance his ski addiction (the waiver he signed to participate in heliskiing lists his occupation as “handyman”). He was an expert snowboarder with substantial backcountry skiing experience. He loved the mountains.⁵ His parents shared his excitement for high-intensity outdoor pursuits. The parents of his guide, Rob Liberman, were also supportive of their son, but less tolerant of his affection for extreme sports; they could never fully understand why he needed to push the envelope so far, why he needed to assume so much risk. In a *New York Times* interview, Rob’s father reflected, “I think my son really needed to get those rushes in life. They meant a lot to him, and he felt very good about it, but I would tell you I’m sorry I ever showed him a pair of skis.”⁶ If I had to guess, I imagine my own parents lean more toward the Liberman end of the spectrum: happy for my achievements as a skier, mountain biker, and climber, but perhaps happier if I had stuck with tennis and piano lessons.

Yet somewhat surprisingly, it is not Rob Liberman’s parents who are out to settle the score with the industry that took their son. Rather, it is the Dodovs who have made it their lives’ work to dig through the blizzard of paperwork their son’s death triggered, seeking answers to a complicated question: who is to blame for Nickolay’s death, and how should they be punished? This question highlights the double-edged sword of pursuing extreme sports in the backcountry, and it is one that society will likely face more frequently as more people venture out in search of their own transformative experiences. Technology makes it easier for us to get out there and makes it more likely we will survive when Mother Nature is in a foul mood. But if we do not make it back from “out there,” when should we be able to lay blame on those who facilitated our exit? Or does the blame game jeopardize the very “wildness” we went out in search of in the first place?

⁴ See, e.g., Larry Olmsted, “Why You Need to Try Heli-Skiing This Winter,” *Forbes*, Dec. 12, 2012, 7:58 AM, <http://www.forbes.com/sites/larryolmsted/2012/12/20/why-you-need-to-try-heli-skiing-this-winter/> (“So there it is: minimal hassle, long runs, great terrain and tons of powder skiing. It doesn’t get much better.”).

⁵ Some of Nickolay’s artwork can be viewed on the memorial blog his parents started in March 2013: <http://alexnatalianickdodovdotcom.wordpress.com> [hereinafter Dodov Blog].

⁶ Amdur, *supra* note 1.

In this essay I use Nickolay's story as a springboard to explore the idea of wilderness, the reasons for protecting it, and how best to experience it (as a place free from regulation, or as a place for practicing a regulated set of freedoms). Media coverage triggered by the March 2012 fatalities highlights the very different perceptions of what is the proper role of risk in wilderness recreation and how to best mitigate it. I review that coverage and then discuss the current means of mitigating risk—through liability releases (which encourage individuals to exercise care by waiving negligence claims against guide services) and permits (which encourage competing permittees to exercise care to protect permit eligibility and company reputation). To end, I examine the calls for increased regulation made by Nickolay's parents and others, concluding that such regulation would not likely improve the already impressive safety record of heliski operators considering the risks inherent in the activity. Given the important economic role of wilderness heliskiing operations for neighboring communities and the sport's increasing popularity, there are significant incentives in place to keep client safety the top priority, but still to offer these clients the chance to answer the call of these wild mountains despite the substantial risks.

The Idea and Role of Wilderness

The Wilderness Act of 1964 established a framework for preserving areas “untrammelled by man, where man himself is a visitor who does not remain;”⁷ areas so designated are subject to the act's prohibition on motorized vehicles, mechanized transport, roads, commercial enterprises, and structures.⁸ Neither the Takhin Ridge, where Nickolay perished, nor the greater Chilkat Range, is classified as federal wilderness, nor may it be so classified in the future. Formerly managed by the Bureau of Land Management, the region was conveyed eight years ago to the state of Alaska for management by the Borough of Haines. Still, the area's characteristics certainly invoke the *idea* of wilderness. The statutory definition, though not here applicable, provides helpful goalposts for evaluating an area's wilderness character:

⁷ Wilderness Act of 1964, § 2(c), Pub. L. No. 88-577, 78 Stat. 890, 891.

⁸ *Id.* § 4(c), 78 Stat. at 894.

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁹

Had the region been designated as federal wilderness rather than conveyed to the state, heliskiing operations would have been precluded by the 1964 law because of the activity's reliance on noisome helicopters. Even with these aircraft still buzzing around, however, the sheer magnitude of these mountains and the thousands of square miles they span have allowed the region to retain its wilderness flavor.

The local government has other reasons besides the area's inherent wilderness value to ensure that the region keeps this wild character. Adventure tourism provides more jobs than any other sector of the economy for the 2000 residents who call Haines home;¹⁰ in fact, the borough¹¹ bill's itself as "The Adventure Capital of Alaska."¹² With regard to heliskiing in particular, the borough closely regulates the number of guide companies permitted to operate during any given ski season (three), as well as the number of skiers who may take advantage of

⁹ *Id.* § 2(c), 78 Stat. at 891.

¹⁰ Joy Wilkinson et al., Alaska Dep't of Labor & Workforce Development, The Haines Borough, *Alaska Economic Trends*, Sept. 2010, at 19, available at <http://labor.alaska.gov/trends/sep10.pdf>.

¹¹ Alaska is organized into eighteen boroughs, which are the equivalent of counties. The remainder, spanning more than half the total land area of the state, is called the Unorganized Borough. Fewer than 100,000 people live in it. See generally "List of Boroughs and Census Areas in Alaska," Wikipedia, http://en.wikipedia.org/wiki/List_of_boroughs_and_census_areas_in_Alaska (last visited May 3, 2013).

¹² Haines, The Adventure Capital of Alaska, Haines Alaska, <http://www.haines.ak.us/> (last visited May 3, 2013).

those guide services (currently set at 2600 skier days total).¹³ One skier day currently commands around \$1000, and the companies' aggregated requests for skier-day allotments often exceeds allocations. Last year the three companies requested 2850 skier days, and only 2500 were doled out; 100 were held in reserve for allocation later in the season. In this context, the borough has demonstrated a commitment to regulating the area as "unofficial wilderness" rather than letting pure market forces compromise the region's "outstanding opportunities for solitude or a primitive and unconfined type of recreation," as the 1964 act puts it.

In addition, a 2012 ordinance now requires each helicopter to maintain a continuous GPS location record so that the Borough may penalize operators who stray outside of designated heliskiing areas.¹⁴ In this fashion, sensitive resources (such as mountain goats¹⁵) may be insulated from the potential negative impacts of heliskiing, while preserving the income-generating potential the activity provides for the region. The Alaska Department of Labor and Workforce Development shared its optimism in a recent article on Haines's economy: "With the Alaska Highway to the north, the Alaska Marine Highway to the south, and thousands of acres of wilderness in all directions, Haines is likely to remain an attractive destination for many years to come."¹⁶

Wilderness and wildness serve much more than just an economic purpose for neighboring settlements; they also serve an important symbolic role to society in general. "In Wildness is the preservation of the world," goes the oft-misquoted line from Henry David Thoreau's essay, "Walking," published posthumously in *Atlantic Monthly* in 1862. John Muir had the following to say about such areas' intrinsic value: "Thousands of tired, nerve-shaken, over-civilized people are beginning to find out that going to the mountains is going home; that wildness is a necessity; and that mountain parks and reservations are useful not only as fountains of timber and irrigating rivers, but as fountains of life."¹⁷ Haines has so

¹³ Haines Borough Code 5.18.080.

¹⁴ Haines Borough Code 5.18.080(f)(4) (adopted Feb. 28, 2012).

¹⁵ Much of the Haines Borough is off-limits to heliskiing due to the presence of mountain goats. See Current Heliskiing Map, Adopted 11-27-12, Haines Borough Alaska, http://www.hainesalaska.gov/sites/default/files/fileattachments/administration/current_heli_map_adopted_11-27-12_0.pdf (last visited May 3, 2013).

¹⁶ Wilkinson, *supra* note 10, at 20.

¹⁷ John Muir, *Our National Parks* 1 (1901).

far demonstrated its recognition that those thousands of nervy civilized folks cannot all visit the wilderness together, lest they destroy it in their clamor for the life fountains; to maintain the wild character of these mountain parks, the number of visitors and the activities they may pursue have been restricted to some degree so that these wild areas retain their idyllic and idealized untrammelled state.

Edward Abbey echoes his predecessors on the need to preserve wilderness for its spiritual value: “Wilderness is not a luxury but a necessity of the human spirit, and as vital to our lives as water and good bread.”¹⁸ He also recognized the value of just knowing that wild areas exist: “A man could be a lover and defender of the wilderness without ever in his lifetime leaving the boundaries of asphalt, power lines, and right-angled surfaces. . . . I may never in my life go to Alaska, for example, but I am grateful that it is there.”¹⁹ And on the proper way to experience it, Abbey would have us park our vehicles where the pavement ends, lest we miss the whole point of going out there in the first place. While he directs his comments toward national parks, the sentiment extends to the broader concept of how “best” to experience wilderness:

Industrial tourism is a threat to the national parks. But the chief victims of the system are the motorized tourists. They are being robbed and robbing themselves. . . . [T]hey will not discover the treasures of the national parks and will never escape the stress and turmoil of the urban-suburban complexes which they had hoped, presumably, to leave behind for a while.²⁰

On the improper role of engine-powered recreation in wilderness, Abbey’s predecessor, Aldo Leopold, also touched on the inherent tension between access to, and experience of, wild areas:

Recreation is valuable in proportion to the intensity of the experiences, and to the degree to which it differs from and contrasts with workaday life. By these criteria, mechanized outings are at best a milk-and-water affair. Mechanized recreation already has seized

¹⁸ Edward Abbey, *Desert Solitaire* 211 (1968).

¹⁹ *Id.* at 162.

²⁰ *Id.* at 49.

nine-tenths of the woods and mountains; a decent respect for minorities should dedicate the other tenth to wilderness.²¹

While I agree with the sentiment in general, here I will pick a bone with Leopold and Abbey and the others in this minority case of heliskiing in Alaska (I'll not make a similar argument in favor of dirtbikes in wilderness areas in California, for instance). It is difficult to argue straight-faced that skiing thousands of vertical feet of weightless powder, surrounded by the breathtaking beauty of the Chilkat Range, and exposed to its unforgiving elements, is anything akin to "the stress and turmoil of the urban-suburban complexes," even if one uses a helicopter to get to the top.

As the state's department of labor points out, remote, thinly settled areas of Alaska such as Haines Borough are awash with wilderness—wilderness that is functionally inaccessible because the region's towering peaks, deep snow, and yawning crevasses make surface travel exceedingly dangerous and difficult. Indeed, for all but the most intrepid mountaineers, helicopter travel offers the only viable means to experience how these mountains differ from and contrast with that workaday life. Thus, to allow for the enjoyment of this wild area (and more visceral enjoyment than that gained by just knowing that it is there), it seems that the intrusion of a few helicopters into a few designated areas during a few months of the year is an acceptable "evil" that contributes little to diminishment of the region's wild character.

Much debate surrounding the appropriate management of wilderness areas arises from whether such wilderness is framed in terms of negative freedom or positive freedom.²² To some (including Abbey), wilderness is a place where one is free from society's constraints, and similarly free from its safety net. This "negative freedom" highlights the allure of wilderness as a place to test our skills and abilities, knowing full well that the penalties for failing the test are likely to be severe. Others view wilderness through a lens of "positive freedom"—as a place where one may go to experience nature "untrammelled by man," though

²¹ Aldo Leopold, *A Sand County Almanac with Essays on Conservation from Round River: Wilderness for Recreation* 272 (1966) (emphasis in original).

²² See Randy J. Tanner, *Wilderness and the Paradox of Individual Freedom*, USDA Forest Serv. Proc. RMRS-P-49, at 205, 207 (2007) ("[M]any (if not most) conflicts concerning wilderness are rooted in divergent views of individual freedom.").

that experience must conform to norms defined by society as consistent with the wilderness experience. As one author writes,

[W]ilderness enthusiasts who enjoy wilderness—whether designated or de facto—for its freedom-based values are left with a sense of confusion. On one hand, wilderness is to be the embodiment of a landscape set apart from human hands, but on the other, societies have adopted legal frameworks and an ethic that confines the wilderness experience.²³

The Wilderness Act’s prohibition on motorized travel is a means to preserve a wilderness experience characterized by solitude, quietude, and opportunities for contemplation; for those who share this concept of an ideal wilderness, the means are completely consistent with the ends. For heliskiers, however, such a ban would preclude their desired wilderness experience—one that falls closer to the negative end of the freedom spectrum than the positive end, based on the chance it provides to test one’s abilities against the forces of nature.

In Haines, motorized wilderness recreation is a means to an end: it is a way to get visitors “out there” so that they may drink deeply from Muir’s fountains of life, and in the process, the local economy draws deeply from those visitors’ pockets. But forming the contractual relationships necessary to access and enjoy these wild areas starts to blur more than just the line between wilderness and civilization. It also raises the question of the proper balance between a person’s freedom to assume the risks inherent in backcountry recreation, and a client’s trust in the expertise of a guide hired to facilitate that freedom.

“Extreme Grief” v. “In Defense of Taking Risks”

Since the deaths of Nickolay and Rob last year, many have weighed in on how best to allocate responsibility for the tragedy. In March 2013, *The New York Times* published an article by Neil Amdur, titled “Extreme Grief,” which pieced together recent interviews with the parents of the victims along with anecdotes from other families impacted by accidents involving extreme winter sports. The

²³ *Id.* at 205.

article quoted a line from a January 2013 letter sent by the Dodovs to both U.S. Senators from California, Barbara Boxer and Diane Feinstein: “We know that our son Nick’s death could have been prevented had there been stricter guidelines imposed.”²⁴ Amdur also highlighted the difficult road faced by another father, one coping with the traumatic brain injury his son sustained while snowboarding; the struggles faced by father and son alike were the focus of a recent documentary that “explored the divide between risk-driven, free-spirited young athletes and their supportive, but tortured, families,” as Amdur put it. The author also expressed hope that this documentary and others like it would refocus public concern about “increased risk-taking and lack of regulation in extreme winter sports.” Finally, Amdur quoted Liberman’s father, a nonskier, as “describ[ing] the world of extreme skiing as a kind of Russian roulette. ‘I don’t think it’s worth it,’ he said.”

On the other side of the spectrum, a widely circulated article written by Steve Casimiro in *Adventure Journal* criticized the *New York Times* article and requested a different interpretation of the 2012 Haines heliskiing tragedy.²⁵ Casimiro chastised Amdur for fueling a “reactionary, emotional response” in cobbling together several high-profile accidents and injuries as proof that the risks inherent in adventure sports outweigh the benefits to be gained from their pursuit. For instance, the *New York Times* article recalled the recent untimely deaths of snowmobiler Caleb Moore and skier Sarah Burke, and the traumatic brain injury of snowboarder Kevin Pearce—all professional winter-sports athletes who were harmed doing what they loved most and did best. Yet the only connection between Moore, Burke, and Pearce was that there was snow involved. Amdur failed to remind readers that Burke and Pearce hurt themselves while practicing in carefully manicured halfpipe features at ski resorts, or that Moore died from injuries sustained during the 2013 Winter X Games snowmobile competition when he under-rotated on an attempted backflip.²⁶ Casimiro’s displeasure with Amdur is best captured in this excerpt:

²⁴ Amdur, *supra* note 1.

²⁵ Steve Casimiro, “In Defense of Taking Risks,” *Adventure Journal*, Mar. 6, 2013, <http://www.adventure-journal.com/2013/03/in-defense-of-taking-risks/>.

²⁶ Notably, there has been only one fatality during X Games competition in the event’s eighteen-year history: Caleb Moore, on January 31, 2013.

The problem with this story is that by casting vague concerns and institutional handwringing toward a disparate group of incidents, with no real understanding of the fundamental equation of risk, sport, and adventure, it suggests that pursuits like backcountry skiing simply aren't worth the danger. It's an unpacked snowball thrown in a random direction, but it calls into question the very essence of an adventurous life. That's cowardly. And coming from a publication as big as the New York Times, it's dangerous.²⁷

Why "dangerous"? Because it gives legitimacy and momentum to reactionary efforts to constrain the freedom we have as consenting adults to pursue extreme sports in the backcountry—risky activities that might not make sense to others, but that bring us some of our greatest fulfillment in life.

Liability Releases for Extreme Sports

"The very essence of an adventurous life." Through the years, I have signed countless liability waivers in pursuit of this essence. I have at various times been an avid rock climber, backcountry skier, freeskiier, and mountain biker; I have tried my hand at whitewater kayaking, rafting, surfing, sailboarding, paragliding, snowboarding, and ice climbing; and I have scars and surgeries as proof of some of the risks inherent in each activity. Only in recent years have I begun to appreciate the scope of impacts that could result if my risk-taking incurs the ultimate price; embracing those grownup "M" words of "matrimony" and "mortgage" seem to have infused my adventure pursuits with a slightly more contemplative and conservative character. And only in recent years have I begun to appreciate the scope of the waivers I signed as a condition of participating in these various activities and associated competitive events.

All along, however, I understood that two factors would define my success in any extreme sport—the same two factors that define success in any sport, or, even more broadly, in any activity that requires a modicum of skill to stay alive: the extent of my abilities, and the extent of my ability to discern and react appropriately to the inherent risks of the activity. Even now, with my relative

²⁷ *Id.*

“wisdom” acquired through the school of law and the school of hard knocks, I bristle at suggestions that we as a society should use extensive regulation to constrain opportunities to participate in these “risky” activities, lest the mitigation of risk lead to the demise of the thrill we sought in the first place. It seems to me that the alternatives—including “outlaw” operations, obesity-related illnesses, and further crumbling of our tech-fueled society’s already-eroded connection with nature—are riskier still. It also seems to me that the judicial system already affords an adequate solution through the adversary process. And it seems to me that such regulation will only deepen the divide between those who view wilderness as a place to exercise “negative” freedom and those who wish to constrain wilderness activities to those that conform with their perceptions of “positive” freedom.

On the website they created to document their investigation into their son’s death, Nickolay’s parents recently posted the liability release he signed in exchange for the opportunity to use Alaska Heliskiing’s services. It is unlike any release I have ever read. That statement merits additional explanation to properly convey this particular waiver’s distinctiveness. The first time I read a liability release was at my first real paid job, working as an instructor at the local climbing wall during high school. I can remember being amazed at its complexity and relative impenetrability, but also at the low level of liability our organization would assume under typical circumstances; even if I messed up and was negligent in my instruction, my student would not likely prevail in a lawsuit. Later, as a climbing instructor with my college’s outdoor education program, I went along with the first-day-of-class tradition of reading the waiver out loud to every new group. For most of our participants, this was either the first waiver they had ever read or the first into which they had ever put any thought as to the repercussions of signing it. And later still, as a ski rental tech in Truckee, California, I pointed out the key sections of that organization’s waiver to each of our customers as I adjusted their ski bindings based on their body weight, boot-sole length, and skiing ability.

The waiver Nickolay signed was perhaps the most honest I have ever encountered, and captures the essential aspects of backcountry winter recreation that make it both compelling and unpredictable:

Helicopter skiing is usually accompanied by beautiful mountain scenery. Those same beautiful mountains pose a risk of avalanches. Avalanches may be caused by natural forces including steepness of slopes, snow depth, instability of snow pack or changing weather conditions. Alaska Heliskiing, LLC or its staff may misjudge whether the terrain is safe for skiing or where or when an avalanche may occur. The natural beauty of the mountainous area used for heliskiing sometimes hides dangerous obstacles. Those obstacles may be hidden by snow and include, but are not limited to crevasses, ice and snow cornices, tree wells, tree stumps, creeks, rocks and boulders, a forest deadfall, holes and depressions below the snow surface, and varying and difficult snow conditions. . . . Furthermore, Alaska Heliskiing, LLC guides have difficult jobs to perform. They seek safety, but are not infallible. They might be ignorant of a participant's fitness or abilities. They might misjudge weather, the elements or terrain. They may give inadequate warnings or instructions, and the equipment being used may malfunction.²⁸

Portions of the release appear in a mock waiver prepared as part of a 2011 story in *Outside Magazine* about the importance and enforceability of liability waivers in adventure sports.²⁹ Tracy Knutson is quoted in the article as an expert on the topic; as general counsel to Alaska Heliskiing, she will serve a key role in their defense should the Dodovs make good on their threat to sue.³⁰

Even with the experience I had gained from signing hundreds of extreme-sports waivers and reviewing thousands of them with paying clients, it was not until 1L Torts and Contracts that I began to comprehend the finer points of the terms I had seen and said so many times before: negligence, assumption of risk, duty of care, waiver of claims, indemnify and hold harmless, release of liability. . . . And until that point, it also had not occurred to me that tort law and contract law vary widely depending on the state in which one finds oneself when seeking to enforce or avoid the terms of such a waiver. In Arizona, for instance, our state constitution requires that the affirmative defense of “contractual assumption of

²⁸ Incident Report at 17 (Participant Agreement, Release, and Acknowledgement of Risks), available at <http://alexnatalianickdodovdotcom.files.wordpress.com/2013/04/dodov-reports.pdf>.

²⁹ Michael Behar, “Just Waive Goodbye,” *Outside Magazine*, Mar. 8, 2011, <http://www.outsideonline.com/adventure-travel/Just-Waive-Goodbye.html>.

³⁰ See Dodov Blog, *supra* note 5.

the risk,” as evidenced by the plaintiff’s signing of a liability waiver, is a question of fact that cannot be resolved by the judge at the summary judgment phase.³¹ The Dodovs have expressed their intent to sue Alaska Heliskiing for gross negligence,³² a tort claim that would be decided under the law of Alaska. Alaska has a ski area statute that prevents ski area operators from obtaining exculpatory releases from customers while at the same time protecting these operators from suits arising from risks inherent to the sport.³³ However, that statute would not apply to heliskiing because the activity does not occur within the borders of a ski resort. Instead, an Alaskan court would be guided by a 2001 decision of the Alaska supreme court, *Moore v. Hartley Motors, Inc.*³⁴

In *Moore*, the plaintiff appealed the trial court’s award of summary judgment to the defendant operator of an ATV safety course based on her signing of a liability release. In vacating the trial court’s decision, the Alaska supreme court held that the case could not be resolved at the summary judgment phase because genuine issues of material fact remained as to whether the plaintiff’s injuries had arisen from dangers inherent in the activity. It was unclear from the facts alleged whether the operator may have improperly laid out the training course in such a way that the dangers arising from the plaintiff’s use of the course were greater than those that would have arisen had the operator used ordinary care. The *Moore* court quoted from an earlier skiing case to illustrate the intended scope of a release of liability: “‘If a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger’ and is therefore not an inherent risk of the sport.”³⁵ The court continued, “We have described an ‘unreasonable risk’ as one for which ‘the likelihood and gravity of the harm threatened outweighed the utility of the conduct and the burden on the defendant for removing the danger.’”³⁶ The court remanded the case for a determination of whether the operator’s layout of the course was reasonable (particularly in light of the plaintiff’s novice status and the program’s billing as

³¹ *Phelps v. Firebird Raceway Inc.*, 210 Ariz. 403, 410, 111 P.3d 1003, 1010 (2005).

³² See Tom Morphet, *Avalanche Victim’s Family to Borough: Revoke Heli Permit*, Chilkat Valley News, Sept. 13, 2012, at 1.

³³ Alaska Rev. Stat. §§ 05.45.010, .080.

³⁴ *Moore v. Hartley Motors, Inc.*, 36 P.3d 628 (Alaska 2001). This case was included in our Torts textbook to illustrate the complexities of enforcing liability releases.

³⁵ *Id.* at 633 (quoting *Hiibschman ex rel. Welch v. City of Valdez*, 821 P.2d 1354, 1360 n.12 (Alaska 1991)).

³⁶ *Id.* (internal punctuation omitted).

an ATV safety course), since “holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver.”³⁷

If the threatened suit does go forward, the parties will dispute what risks are inherent to heliskiing; whether another reasonable guide would have chosen to take clients down the slope Rob selected; whether Nickolay’s own negligence contributed to his demise; and the duty of care owed by a guide to an expert-level snowboarder with years of backcountry experience. This careful weighing is exactly the sort of analysis required in the context of highly uncertain and variable conditions like those encountered in Alaskan heliskiing; in light of such unpredictability, basic negligence would be difficult to prove, much less gross negligence, the claim that provides the only grounds for recovery in this hypothetical case. Considering no suit has yet been filed and the Dodovs have instead chosen to publish the results of their own investigation on a blog they started in March 2013, it seems more probable that they recognize the limitations of their case and the low likelihood of success, particularly with an Alaskan jury at least marginally familiar with the terrain where the accident occurred and with the guide service Nickolay hired to take him there. Instead, the Dodovs appear to be aggressively pursuing a guilty verdict from the court of public opinion, and they are now lobbying for civil penalties against Alaska Heliskiing and regulatory changes to the entire heliskiing industry.

The Role of Regulations in Mitigating Heliskiing Risks

Alaska Heliskiing has the largest allocation of skier days among the three heliskiing companies regulated by Haines Borough. Rob and Nickolay were the first and second fatalities to occur in the company’s twenty-year history and in the entire state’s history of commercial heliskiing.³⁸ Perhaps it was only a matter of time. By the numbers, heliskiing is one of the most dangerous of the so-called extreme sports.³⁹ Canadian Mountain Holidays, the company that pioneered the

³⁷ *Id.* at 633-34.

³⁸ Nick Barlow, “Summer Reflections of a Season in Haines,” *Backcountry Access*, June 12, 2012, <http://www.backcountryaccess.com/2012/06/12/summer-reflections-of-a-season-in-haines/>.

³⁹ See, e.g., “The World’s Most Dangerous Sports,” *Term Life Insurance*, <http://www.term-life-insurance.org/dangerous-sports/> (last visited May 1, 2013).

sport in the 1960s and which is now the largest heliskiing outfit in the world, reports thirty-six fatalities in their five decades of operation, with twenty-six of those caused by avalanches.⁴⁰

Earlier this year, another Haines guide who worked for a competitor of Alaska Heliskiing was killed and two clients were seriously injured in a cornice collapse; like Liberman, the deceased guide also held a level III certification from the American Avalanche Institute and presumably was quite familiar with the methods used to analyze the snowpack and detect the warning signs it emits.⁴¹ The incident report prepared after the first two fatalities notes that Alaska Heliskiing requires all guides to complete a level I avalanche certification as well as other relevant coursework. In addition to holding an advanced avalanche certificate, Liberman was a senior guide with the company and was described by several of his colleagues as the best skier of all of the guides at Alaska Heliskiing.⁴² He even gave the avalanche forecast on the morning of the accident.⁴³

It is difficult to see how better guide training could have prevented these tragedies, as both men had spent decades guiding clients in the winter mountain environment and were intimately acquainted with the various moods of Mother Nature. Still, both ended up leading clients into situations that resulted in the realization of these risks. Even the most experienced guide will tell you that sometimes there is no discernible warning before tragedy strikes, and simply by virtue of being in the wrong place at the wrong time, a dream trip can turn instantly into a nightmare. Other times there is a judgment call to make, and in retrospect, the call turns out to be the wrong one. While Monday-morning quarterbacking is helpful in understanding the causes of mistakes so they may be avoided in the future, the best solution is rarely one that involves kicking the team out of the league and changing the rules of play for the entire sport. But these are exactly the remedies the Dodovs have sought.

⁴⁰ Safety, CMH Heli-Skiing, <http://www.canadianmountainholidays.com/heli-skiing/safety> (last visited May 4, 2013).

⁴¹ Margaret Friedenauer, "Deadly Backcountry Accident Likely Caused by Cornice Failure," Alaska Public Media, Mar. 5, 2012, 3:02 PM, <http://www.alaskapublic.org/2013/03/05/deadly-backcountry-accident-likely-caused-by-cornice-failure/>.

⁴² See Incident Report, *supra* note 35.

⁴³ Amdur, *supra* note 1.

In February, Haines Borough released its allocation of skier days for the 2013 ski season.⁴⁴ Alaska Heliskiing had requested 1400 days (down from 1450 days requested last year) of the 2600 maximum available; SEABA requested 1000 days (same as last year), and Alaska Mountain Guides requested 450 days (up from 200 last year). Because demand exceeded supply, the borough manager proceeded to the next step under the heliskiing ordinance and considered eight factors in deciding how to allocate skier days between the permittees, including each permittee's safety record and compliance with ordinances, the borough's interest in promoting tourism, and the permittee's historic use of its allotted ski days. Based on the following findings, the manager reduced Alaska Heliskiing's allocation by 25 percent:

Alaska Heliskiing failed to obtain a permit for use of state lands over multiple years of operation, failed to follow operating and safety plan accident reporting, failed to submit a mutual aid agreement, failed to file a report of employee death with the State of Alaska, twice flew out of bounds and posted inaccurate and misleading information on its website relating to guide certification and company safety standards.⁴⁵

The borough manager also held 100 days in reserve, for which the permittees could apply until the end of the season. Interestingly, the borough manager did not state his findings as to the required consideration of the permittee's past safety record; presumably this factor did not bear heavily either way on his decision. This modest reduction was far from the result hoped for by the Dodovs, who had lodged twelve complaints alleging various faults in the company's operations related to Nickolay's death in hopes of a complete revocation. An Anchorage newspaper article reported that Nickolay's mother said she was left "speechless and disturbed" by the borough's decision to renew the company's tour permit for the upcoming ski season, and that she thought the officials were "playing her family for fools."⁴⁶

⁴⁴ Mark Earnest, Haines Borough Admin., Manager's Report - Heliskiing Allocations Update 2013, Haines Borough Alaska, Feb. 12, 2013, http://www.hainesalaska.gov/sites/default/files/fileattachments/administration/2013_heliskiing_skier_day_allocations.pdf.

⁴⁵ *Id.* at 2.

⁴⁶ Karen Garcia, "Haines Borough Renews Heliski Permit for Company That Broke Law," *Anchorage Daily News*, Feb. 11, 2013, <http://www.adn.com/2013/02/11/2785332/haines-borough-renews-heliski.html>.

For me, of all of the reasons provided in the Anchorage article supporting reduction rather than revocation, the borough manager's summary rang truest: "decisions regarding permit renewal and skier day allocation need to be based on objective facts, not gut reactions to tragic accidents."⁴⁷ Revoking Alaska Heliskiing's ski tour permit would in all likelihood drive the company straight out of business—a company that has been part of the community for more than two decades—for alleged violations only tangentially related to the core issue of client safety. As Haines's borough clerk was quoted, "it's not against the law to have an avalanche on your watch." However, the company has been placed on notice that continued violations could result in a less-favorable renewal decision in the future.

In addition to seeking specific redress against Alaska Heliskiing through the permit process, the Dodovs want to see industry-wide regulations instituted to govern the operations of heliskiing guide services.⁴⁸ They have expressed dissatisfaction with the borough being the entity in charge of making permit renewal decisions and skier day allocations (given their interest in the revenues from this activities), and with the lack of clear requirements identifying minimum standards for the operating and safety plans each company must submit as a part of their permit application. Indeed, the Alaska Office of Occupational Safety and Health noted that the applicable federal workplace safety standards for avalanches are a part of the section governing construction sites in avalanche zones, rather than recreational use of such areas.⁴⁹ Similarly, the Haines Borough memorandum prepared to support the borough's decision to reduce Alaska Heliskiing's skier day allocation contained the caveat that, while the borough could consider an applicant's compliance with its own safety plan when making allocation decisions, noncompliance was not actually a violation of the local ordinance and there was no requirement for the Borough to review the safety plan for sufficiency.⁵⁰

⁴⁷ *Id.*

⁴⁸ See Amdur, *supra* note 1.

⁴⁹ See Tom Morphet, "Coordinates Put Avalanche Inside Heli-Ski Zone," *Chilkat Valley News*, Mar. 29, 2012, at 1.

⁵⁰ Memorandum from Julie Cozzi, Haines Borough Clerk, to Alaska Heliskiing LLC, 2013 Commercial Ski Tour Permit Renewal (Feb. 1, 2013), available at http://www.hainesalaska.gov/sites/default/files/fileattachments/administration/2-1-13_memo_to_ah_re_permit_with_corrected_numbering_page_15.pdf.

Perhaps avalanche fatalities would be reduced if commercial heliskiing companies had to meet certain industry-wide standards when developing and implementing their safety plans. Or perhaps not. Setting a floor for the due care required for a given activity may provide uniformity, but it can also lead to a race to the bottom. Companies may feel less incentive to develop rigorous and detailed safety plans for fear that, in event of the injury or fatality of a client, their failure to strictly comply could be grounds for permit revocation.⁵¹ In addition, such regulations would be out-of-date from the moment of their passage. The substantial advancements in avalanche-survival technology over the last several years will undoubtedly continue, such that any regulatory mandate specifying best practices would need to be constantly updated to stay relevant. Enforcement costs would be borne by the regulated community, driving ever upward the costs associated with heliskiing.

While any loss of life is tragic, Nickolay Dodov's life was the first lost in Alaska's entire history of commercial heliskiing. His guide service, Alaska Heliskiing, had never had a single complaint lodged against it in the eight years the borough had managed its permitting process. Given the inherent dangers of this activity, and given the typical population that chooses to pursue it—primarily expert skiers with a lot of experience in the mountains—additional regulation would be met with significant resistance. We go skiing to feel free, and we go to the mountains to feel free, and while our top priority is coming back home alive, we will only tolerate modest restrictions on that freedom. There is a thin line between safety and efficiency; we want to get the most runs possible in a day in the mountains. Snow conditions can change rapidly depending on aspect, wind, sun, air temperature, and humidity; the presence of skiers and snowboarders further changes the snowpack's structure. Even a second descent of the same slope on the same morning might pose drastically different risks than were encountered on the first trip down. The Dodovs have castigated Liberman for his decision not to dig a test pit⁵² prior to skiing the slope where the accident occurred, yet what would they have a guide do instead? Dig a time-consuming test pit before each run? Clients would not stand for the corresponding reduction in the number of

⁵¹ *Id.* at 12.

⁵² A test pit is dug to evaluate the various layers of the snowpack to gauge the likelihood of avalanche. It can take a few minutes to a few hours to dig a test pit sufficient for such analysis, depending on the weight and depth of the snow.

runs possible in a day, and many would turn instead to wildcat operations to get their fix, rather than the safety-conscious group of operators already maintaining an exemplary safety record without stringent regulations.

Conclusion

Heliskiing does not fit nicely within the typical set of wilderness recreation pursuits because of its reliance on helicopters and its high level of risk compared to other traditional wilderness activities like backpacking or fly fishing. But in spite of the risks inherent to the activity and the lack of uniform regulations of the industry, there was not a single fatality in the several decades of commercial heliskiing in the state of Alaska until a fateful day in the spring of 2012. There will no doubt be more fatalities in future years. The very nature of the activity—in remote areas, in snowy mountains, with helicopters, at speed, and with cliffs, rocks, and trees—carries substantial risk: risk that has been mitigated to a degree that is reasonable to the thousands of people who partake in the activity each winter. Whether this level of risk is acceptable to the families they might leave behind should their risk-taking result in injury or death is another story, but their families are not the ones who weigh the risks against the benefits. Erecting taller barriers to participation will not in fact reduce the risks we feel compelled to take; it will just push us to other suppliers outside the borders of today's lightly regulated market.

Fortunately, the courts already provide an adequate forum for resolving questions of whether a particular heliski operator erred on the side of efficiency or short-term client satisfaction over safety and long-term survival. The existing permit process also helps to ensure that wilderness areas stay wild, and that guide services maintain safe and transparent operations. And market forces fueled by competition between operators are strong incentives for these operators to protect their reputations for bringing clients back to base. The benefits we stand to gain from experiencing wilderness in this fashion—be they personal gains in health and spirit, regional gains in employment and income, or national gains in just knowing that these wild areas are there—outweigh the losses that may occur when the risks that make the activity so tantalizing are in fact realized.