

AVALANCHE LITIGATION:
TECHNOLOGY AND LIABILITY¹

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Abstract.--Anticipating hazards and allocating costs, avalanche litigation plays a positive role in avalanche protection. By deciding cases, courts provide an assessment of avalanche technology. By offering evidence, attorneys present both the avalanche accident event and the avalanche control problem. The interplay between technology and liability, as demonstrated by litigated cases, improves avalanche technology and enhances avalanche protection.

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INTRODUCTION

The purpose of this paper is not to predict whether any particular parties will be liable in any particular situations. Nor is the purpose to promote the commencement of litigation when litigation can be avoided. Litigation is a systematic process for evaluating facts and for applying law to facts. Litigation is both a dispute resolution device and a technology assessment process. The purpose of the paper is to propose that, because of litigation's formalized approach and authoritative effect, when litigation must occur, the results of litigation can be used. The proposition of the paper with respect to avalanche studies is that, because the judicial process applies analysis and evaluation to anticipate hazards and to allocate costs, avalanche litigation plays a positive role in avalanche protection.

The paper considers five aspects of avalanche litigation:

- (1) the determination of LIABILITY,
- (2) the assessment of TECHNOLOGY,
- (3) using the court by conducting LITIGATION,
- (4) making the record by presenting EVIDENCE, and
- (5) the generation of useful INFORMATION.

LIABILITY

Determination of Liability

Liability is determined by courts. Liability is an application of law to particular facts. Liability is determined when one party is held by a court to be legally responsible for a real or threatened injury to another. Arising neither from criminal statutes nor from contractual agreements, liability distinctively involves the breach of a duty imposed by law that one shall refrain from harming another. By deciding litigated cases involving avalanche phenomena, courts determine avalanche liability.

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Anticipating Hazards (Injunction)

Anticipating hazards before an avalanche accident occurs, a court may enjoin dangerous activities of a defendant whose conduct poses a threat. For example, a case commenced by plaintiff who owns land adjacent to a ski area might ask the court to enjoin further development of the ski area in a way which threatens to create or increase an avalanche hazard affecting his land. A decree granting an injunction will specify particular conduct and prohibit the defendant from engaging in such conduct. If the defendant does not refrain from the conduct, he may be jailed or fined for contempt of court.

Allocating Costs (Damages)

Allocating costs after an avalanche accident occurs, a court may award monetary damages against a defendant whose conduct causes an injury. For example, a case commenced by a plaintiff who gains access to a ski area while avalanche control work is in progress might ask the court to award monetary damages compensating him for injuries sustained in an avalanche which is triggered by control personnel. A judgment awarding monetary damages will specify a compensatory amount and require the defendant to pay such amount. If the defendant does not pay the damages, his property may be sold to satisfy the judgment.

TECHNOLOGY

Assessment of Technology

Technology is assessed by many institutions, including courts. (Katz 1969) Technology is the application of science to particular uses. Technology is assessed when businesses consider investments, when governments establish programs, and when courts determine liability. However achieved, technology assessment generates useful results, including the identification of adverse side effects and the identification of technological alternatives. Before or after avalanche accidents occur, avalanche litigation provides objective assessments of avalanche technology.

Instruction of Personnel (Effects)

Assessments of avalanche technology serve to instruct avalanche personnel, particularly through the identification of adverse side effects of current and proposed avalanche technology.

Improvement of Technology (Alternatives)

Assessments of avalanche technology also serve to improve avalanche technology, particularly through the identification of technological alternatives to current and proposed avalanche technology.

LITIGATION ("USING THE COURT")

Plaintiffs and Defendants

Litigation is commenced by the parties, not by

the courts. Litigation is prospective or retrospective with respect to the facts. The decision to commence litigation by a plaintiff against a defendant involves many factors, including a rational preference for avoiding litigation. Assessments of technology are also factors in the decision. Such assessments assist in avoiding litigation where possible or defending litigation when necessary. By filing cases involving avalanche phenomena, plaintiffs commence avalanche litigation.

Prospective (Find an Alternative)

When directed toward a defendant whose conduct poses a threat, prospective litigation calls upon the court to anticipate a hazard by granting an injunction. The plaintiff's proof must present both the source and the expected results of the threat. The losing defendant, who must refrain from conduct, is compelled to find an alternative. The result in the case may influence others similarly situated to seek alternatives as well.

Retrospective (Bear a Cost)

When directed toward a defendant whose conduct causes an injury, retrospective litigation calls upon the court to allocate a cost by awarding monetary damages. The plaintiff's proof must present both the cause and the actual effects of the injury. The losing defendant, who must pay the judgment, is compelled to bear a cost. The result in the case may influence others similarly situated to bear costs as well, a process which economists refer to as the internalization of costs.

Theories of Liability

Accidents (Negligence)

Avalanche litigation involving an accidental avalanche phenomenon may be decided by reference to theories of negligence. The duty imposed upon a defendant in such cases is the duty of the hypothetical reasonable man to use reasonable care in avoiding injury to another. Negligence is the failure to fulfil that duty.

Defects (Products Liability)

Avalanche litigation may also involve a defective product or process. Such cases may be decided by reference to theories of products liability. Courts increasingly tend to hold products liability defendants strictly liable when the product or process fails to fulfil the purpose for which it was manufactured or marketed.

Mistakes (Professional Liability)

Avalanche litigation may finally involve an error of judgment. If the mistake is made by one holding himself out to the public as having special expertise in an activity or service, the case may be decided by reference to theories of professional liability. The standard to which the defendant in such cases may be held is that of the professionals who are engaged in similar activities or services, not that of the hypothetical reasonable man.

EVIDENCE ("MAKING THE RECORD")

Trials and Appeals

Litigation is conducted in courts. Courts include both trial courts and appellate courts. The trial court considers evidence which is admissible, determines issues which are relevant, and enters a judgment or a decree. The judgment or the decree, if reviewed on appeal, is affirmed, modified, or reversed by the appellate court. The formal relationship between trial courts and appellate courts is the source of the authority of appellate opinions as binding precedent and the basis for the importance of making an evidentiary record.

Observations (Lay Testimony)

Avalanche litigants must prove the particular event of an avalanche accident. Events are presented through the testimony of lay witnesses, who testify to their personal observations. Because the court acts only upon an evidentiary record, recording actions and reporting accidents in a comprehensive, consistent manner facilitates presenting the particular event of an avalanche accident.

Opinions (Expert Testimony)

Avalanche litigants must also present the general problem of avalanche control. Problems are presented through the testimony of expert witnesses, who testify to their expert opinions. Because the court accepts opinion testimony only from an expert witness, qualifying avalanche experts and offering scientific testimony in a clear, cogent manner facilitates presenting the general problem of avalanche control.

Theories of Evidence

Demonstrations

Demonstrative evidence may include illustrations, graphics, photographs, films, physical objects, or actual reenactments of events. Demonstrative evidence, if feasible for presentation in the courtroom, is usually admissible if it can be shown as relevant to and representative of the event or the site. Avalanche litigation may present special problems with respect to demonstrative evidence.

Documents

Documentary evidence may include business records, personnel records, public records, accident reports, or computerized data. Documentary evidence, if shown to be relevant to the event, is admissible if it is authenticated as to when, how, by whom, and for what purpose it was made or recorded. Avalanche litigation may require extensive use of documentary evidence.

Testimony

The oral testimony of lay or expert witnesses

serves two functions. One is to support demonstrative evidence or to authenticate documentary evidence. Another is to serve independently as evidence of the observation of a lay witness or the opinion of an expert witness. Oral testimony is given great weight in part because the witness who gives it in court is fully subject to cross-examination. However, its weight can often be enhanced in avalanche litigation by the effective use of demonstrations and documents.

INFORMATION

Appellate Opinions

Avalanche personnel generally lack useful data regarding avalanche litigation. One source of such data is the published appellate opinions of the state and federal courts. These opinions are available in the law libraries maintained by many counties, every state, and every law school. At this time, however, the avalanche cases which have been appealed are believed to be very few.

Litigated Cases

Even lawyers generally lack useful data about particular litigated cases, unless such cases have been appealed. In the absence of an appeal, there is rarely any source of data other than the case files in the courthouse where the case was commenced and may have been tried or in the offices of the particular lawyers who conducted the case. No regular publication of these proceedings or their results is undertaken. In any event, at this time, the avalanche cases which have been litigated are believed to be few.

Supplementing Scientific Investigation

Because avalanche litigation provides an assessment of avalanche technology, the systematic compilation of data regarding litigated cases supplements scientific investigation.

Enhancing Avalanche Protection

Because avalanche litigation provides an assessment of avalanche technology, the regular publication of data regarding litigated cases enhances avalanche protection.

CONCLUSION

The systematic compilation and regular publication of avalanche litigation data is a goal worthy of further consideration and effort by the avalanche studies community.

LITERATURE CITED

Katz, Milton. 1969. The Function of Tort Liability in Technology Assessment. University of Cincinnati Law Review 38:587.