

RULING REGARDING STRICT LIABILITY CONTENTIONS ON
MOTION FOR NON-SUIT (MODIFIED 12/23/85)

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This court has been requested to rule on the applicability of the doctrine of strict liability insofar as it applies to the conduct of the defendants Alpine Meadows Ski Corporation. The questions for ultimate determination are whether the avalanche control procedures or avalanche hazards at Alpine Meadows prior to and during March 31, 1982 constituted ultra-hazardous activities which were the proximate cause of the deaths to David Hahn, Laura Nelson, and Dr. Leroy Nelson.

For the reasons stated herein, defendant's motion for non-suit on strict liability issues is granted.

I. FACTS

Alpine Meadows is a large ski area located in the northern Sierra Nevada on a portion of the Pacific Crest Trail. Alpine Meadows is located in the Bear Valley directly south of Squaw Valley, California, the site of the 1960 Winter Olympic games. In March, 1982, Alpine Meadows consisted of a series of chair and surface lifts, a ski lodge, a multi-purpose outbuilding, commonly referred to as the "summit building", various other outbuildings for maintenance purposes, and a large parking lot directly north of the main lodge facility. The entire area is surrounded on three sides by high, steep mountains which provide for both spectacular skiing and views of the Sierra Nevada and Lake Tahoe. The area also produces snow avalanches.

Interest in Alpine Meadows as a downhill ski area began shortly before the 1960 Winter Olympics at nearby Squaw Valley. The area was toured in both summer and winter conditions by Monty Atwater, the snow ranger assigned to the area by the United States Forestry Service. Atwater was renowned in his pioneering of avalanche forecasting and avalanche control techniques. Atwater, along with representatives

of the first developer of Alpine Meadows inspected the Bear Valley and the mountains which surround it, taking note of identifiable avalanche paths, and evidence of previous avalanche activity. Permit approvals for the construction of the entire facility were obtained through the appropriate agencies, including the United States Forest Service, upon whose land a portion of the ski area was built. As part of the development of the project, a road was built to the Bear Valley area, commencing at Highway 89 and running for approximately three miles in a general south-westerly direction to the lodge. In December, 1961, the area opened for the first time, and was operated each year thereafter.

In March of 1982, the road in question, Alpine Meadows Road, was maintained by the County of Placer up to the land leased by Alpine Meadows which generally was the beginning of the parking area for use by persons going to the ski area. At the terminus of the County Road, the road continued as a private road owned by Alpine Meadows. The road curved to the left in front of the Alpine Meadows Lodge, and thereafter made a complete loop to the left, proceeding back towards Highway 89. The loop connected with Gintzen Road at a ninety degree angle, which then proceeded northwesterly to intersect again with the Alpine Meadows road, near the terminus of the County road itself. The effect was to provide a loop at the end of the County road which brought customers into the lodge and parking area and then provided for egress from the lodge and parking area back out onto Alpine Meadows Road. A parking lot occupied much of the land enclosed by the loop. It is the west portion of this parking lot in which decedents, Dr. Leroy Nelson, his daughter Laura Nelson, and David Hahn, were killed on March 31, 1982, when an avalanche of unexpected proportions descended upon the parking lot, the ski lodge, and the summit building. In addition to plaintiffs decedents herein, four other persons were killed in the avalanche, including Bernie Kingery, himself a noted avalanche forecaster and avalanche control expert.

The avalanche hazards at Alpine Meadows were recognized early in the development of the ski area. The very same factors that made the area desirable for skiing contributed to the avalanche hazard: (1) the "aspect" of the mountains along the Sierra crest ran in a general north-south direction, causing storms which approached from the south-west to deposit

heavy amounts of snow in the lee of the crest into Estelle, Wolverine, and Beaver bowls, which were generally situated on the eastern slope of the crest; (2) the location of the area at the Sierra crest caused storms to hover over the area, allowing for precipitation in greater amounts than in other areas in the northern Sierras; (3) prevailing winds within the valley itself tended to cause snow deposition which was heavy in some areas, but which were believed to "scour" more open and unprotected areas (most importantly those areas immediately above the parking lot in question); (4) most slopes subject to avalanche ran in a general direction toward the base facilities, including the lodge, summit building, and parking lot.

Recognizing that the avalanche hazard existed, Alpine Meadows began a program of avalanche forecasting and control. The forecasting of avalanches is a combination of both science and art. It employs the collection of certain scientific data, including weather forecasting, analysis of current and previous weather conditions, and the gathering of data concerning the snow pack itself. Coupled with the scientific analysis is the experience of the avalanche forecasting personnel, knowledge of the idiosyncrasies of the area in question, knowledge of past avalanche activity at the area, and ultimately, analysis of the scientific results in light of experience, practice, and the current state of development of the art of avalanche forecasting.

Avalanche forecasting is a de jeune discipline. Dr. Edward LaChapelle, one of plaintiffs' experts and a noted avalanche forecast and control expert, related the development of avalanche forecasting to that of weather forecasting. LaChapelle believes that the state of the art in avalanche forecasting is approximately forty years behind that of the state of the art in weather forecasting. LaChapelle is the author of the first handbook of avalanche forecasting and control procedures, published by the United States Forest Service in 1961. That handbook was superseded by a second avalanche handbook published by the United States Department of Agriculture in 1976. Although the handbook is authoritative by itself, the body of scientific literature concerning the subject of avalanche forecasting techniques and control techniques is substantial.

Avalanche forecasting techniques used by Alpine Meadows in March of 1982, included the identification of those areas of the mountain in which a hazard of avalanche existed, including areas within the ski hill, over the parking lot, and over Alpine Meadows Road. In connection with the forecasting was an avalanche control program which utilized methods of ski checking, explosive control, hill compaction and occasionally closure.

The ultimate purpose of avalanche forecasting and the use of avalanche control is

of course, the protection of life and property. Avalanche control was accomplished by Alpine Meadows through a combination of ski checking, explosive control, and compaction. By and large, however, the most reliance on the control program was placed on the use of explosive.

Over the years of experience at Alpine Meadows, the avalanche forecasting and control staff developed an avalanche atlas which defined the starting zones and runout areas of the various avalanche paths at Alpine Meadows. Through the use of photographs and previously identified starting zones, artillery shots and hand charges were directed at the starting zones. Various avalanche control routes were identified for the members of the ski patrol who were responsible for throwing hand charges on routes which were impractical to reach by artillery.

The artillery pieces used by Alpine Meadows were a 75 mm Howitzer and a 75 mm recoilless rifle. Due to Federal restrictions on the private use of artillery, personnel of the United States Forest Service were required to maintain and operate the artillery pieces in cooperation with avalanche control personnel at Alpine Meadows. There was, however, no Federal restriction on the use of hand thrown charges. Alpine Meadows professional ski patrolmen were dispatched in teams to perform avalanche control work along various routes throughout the ski area, and over the Alpine Meadows road. Access to these routes was generally accomplished by chairlift to the tops of the various mountains, and by either hiking upwards along the routes, or skiing down along the routes. Several areas of frequent avalanche hazard along the Alpine Meadows road were accessible only by teams of patrolmen taking the Squaw Valley chairlift to the top of KT22.

The purpose of explosive control is both to test the slopes for stability, and to cause the artificial release of avalanches. As a general rule, a slope which has been forecasted as having a high hazard of avalanche is classified as stable if the explosive testing does not cause a release. The general rule does not apply, however, when slopes with similar aspects, or contiguous slopes or slopes in the same general area are found to be running when explosive control is performed. In such an event, additional explosive controls are generally called for until the slope in question releases. In some areas, the use of explosives is used to cause the frequent release of smaller avalanches so that the build-up of snow will not allow for a larger and unexpected avalanche.

Alpine Meadows utilized a system of closure during the actual performance of avalanche control on the ski hill, over the parking lot, and on Alpine Meadows road. The purpose of this closure was to keep persons from wandering into potential avalanche paths

during the performance of the control work. This was accomplished by posting guards at the entrance to the control area, and at the end of the control area, and maintaining communication with those guards by two-way radio.

The foregoing techniques of avalanche forecasting and control as utilized by Alpine Meadows in 1982, can be generally stated as being common to ski areas throughout the United States which face dangers similar to those present at Alpine Meadows. Explosive control is common to any ski area which must face avalanche hazard.

On March 27, 1982, a major Sierra storm struck northern California. The storm raged for five days, depositing almost eight feet of snow prior to the avalanche.

On the morning of March 31, 1982, the Alpine Meadows avalanche forecaster rated the avalanche hazard over the parking lot at "high". The decision to close the ski area was made at 7:00 a.m. because of high winds, excessive snow, and extreme avalanche danger. Avalanche control by artillery was scheduled and began at 9:10 a.m. over the parking lot and road. Shots were placed in normally identified starting zones as well as extra shots in the staunchwalls. Firing on the Pond and Buttress slopes was completed at 9:50 a.m., with no visible results. After completing the firing mission, the avalanche danger in the parking lot was reduced to nil by the forecaster.

At 3:45 p.m. the Poma Rocks, Pond, and Buttress paths avalanched together. The avalanche fracture line (or crown) was estimated to be as deep as 15 feet in some places.

The parking lot was buried to depths of as much as 20 feet. Plaintiffs' decedents were all killed in this portion of the slide. The summit building to the south of the main lodge was totally destroyed, including within it Base 4, the heart of the avalanche forecasting and control operation. The main lodge itself received major damage. The loss of life totaled 7, the worst ski area avalanche in United States history.

II. CONTENTIONS OF THE PARTIES

Plaintiffs contend that the avalanche control procedures utilized by Alpine Meadows were ultra-hazardous in that they consisted of activities which relied primarily upon blasting by use of hand thrown explosive charges, the use of a 75 mm recoilless rifle, and a 75 mm Howitzer. Plaintiffs rely primarily on those cases which define the use of explosives as a hazardous activity. Plaintiffs alternately alleged that defendants Alpine Meadows marketed a dangerous product, that is, skiing facilities in an avalanche-prone area, and as such should be held under strict liability principles. Thirdly, plaintiffs allege the existence of latent defects in the premises and seek to

impose strict liability on the theory set forth in Becker v. IRM Corp. (1985) 38 Cal. 3d 454. Defense alleges that the avalanche control procedures as practiced by them are not ultra-hazardous activities and that there is no strict liability for merely operating a ski area in an avalanche-prone locale.

III. DISCUSSION

There are no reported cases in California dealing with the applicability of strict liability rules to avalanche hazard and avalanche control activities at ski areas. For this reason, a review of the development of the doctrine of strict liability is appropriate.

Absolute liability for the carrying on of ultra-hazardous activities was first established at common law in Rylands v. Fletcher (1866) L.R.1 exp. 265, affirmed (1868) L.R.3 H.L. 330. Rylands dealt with the absolute liability for damage occasioned by water escaping from the defendant's reservoir which flooded plaintiff's land.

Many early cases dealt with blasting activities and the use of explosives. In Colten v. Onderdonk (1886) 69 Cal. 155, one property owner in a large city used explosives to blast out rocks which caused subsequent damage on an adjoining neighbor's property. The court found that there was no practical difference between damage resulting proximately from an act of blasting by the defendant where the damage was caused either by projectiles or by concussion. Nor was the fact of reasonable care sufficient to overcome the imposition of liability when dealing with an ultra-hazardous activity. See also Munro v. Pacific Coast (1890) 83 Cal. 515.

Early reliance upon the Restatement of Torts was made in Green v. General Petroleum Corp. (1928) 205 Cal. 328. Green dealt with drilling for oil in urban areas and held that such activity was subject to strict liability. The court found that it was a matter of common knowledge that the inner earth contains powerful gaseous forces, frequently near oil deposits. It was known that there was a tremendous pressure of gas in the area of the drilling, and that the defendant proceeded with that knowledge. The court went on to make reference to Restatement of Torts section 519, rendering a preliminary opinion on the ultra-hazardous nature of an activity as being within the prerogative of the trial judge. The court went on to state that:

"Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done,

the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done."

Green v. General Petroleum Corp., supra, p 334.

Thereafter in McKenna v. Pacific Electric Railway Co. (1930) 104 Cal. App. 538, the court found that there was no reason to differentiate between the responsibility for damage done on account of projectiles and responsibility for damage done by vibration or concussion. Commentators discussed the McKenna case in light of Green v. General Petroleum Corp., supra, and theorized that strict liability cases could result from two types of actual negligent activities which gave rise to strict liability: (1) the manner of conducting the blasting operations, and (2) attempting to blast at all at the particular time and location which was inappropriate for such activity. "Most courts recognize only the first type of negligence as such, and often when a court says that the plaintiff may recover without a showing of negligence, it really means without proving negligence of the first kind - undoubtedly because the plaintiff has already proved negligence of the second description. 3 Southern California Law Review 447, Comment, (1930), see also 19 Cal. Law Review 94, Comment, (1930).

In 1948 the California Supreme Court in Luthringer v. Moore (1948) 31 Cal.2d 489, quoted extensively from the Restatement of Torts and endorsed the Restatement rule requiring the judge, not the jury, to determine whether an activity is ultra-hazardous. Luthringer involved fumigation with hydrocyanic acid and upheld the lower court's determination that its use involved the serious risk of harm which was unavoidable and relied heavily upon expert testimony as to the penetrating power and lethal nature of the gas. The court in Luthringer strictly construed the term "common usage" by stating that the gas may be commonly used by fumigators, but such fumigators are relatively few in number and engaged in a specialized activity. The practice of using the gas was not carried on by the public, nor was it a common everyday practice. Relying upon Green, the court stated that "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." Luthringer v. Moore, supra, 31 Cal. 2d 489, 500.

After Luthringer, courts have sought to define the grounds for the imposition of strict liability, however no court has specifically adopted the terms of the Restatement as the California rule. It seems to this court, however, after an analysis of the California cases on the subject, that California in fact has adopted the Restatement rule.

Especially in blasting cases, courts seem to have focused upon the appropriateness of the area in which the blasting is carried on. In Alonso v. Hills (1950) 95 Cal. App. 2d 778, the court held that blasting in populated surrounding, in the vicinity of dwelling places or places of business is considered an ultra-hazardous activity for the miscarriage of which the actor is held strictly liable in damages regardless of the degree of care with which the blasting is performed. All of the blasting cases in which there was no negligence in the manner of blasting, rest their decision upon whether the blasting is in a populated area versus an isolated area, the latter not being an ultra-hazardous activity. (See comments to Section 52), 3 Restatement of Torts 2d.) In Smith v. Lockheed (1967) 247 Cal. App. 3d 774, the court dealt with a testing and firing of a large solid fuel rocket motor. The court classified an ultra-hazardous activity as one which necessarily involves the risk of serious harm to the person, land, or chattels of others that cannot be eliminated by the exercise of the utmost care and which is not a matter of common usage. The court, in imposing strict liability, stated that if classification of an activity is ultra-hazardous, it does not automatically subject one engaged in it to strict liability without regard to place or circumstances.

A. Avalanche Forecasting and Avalanche Control Procedures.

Plaintiffs allege that the practice of avalanche forecasting and avalanche control procedures either lumped together, or taken separately, give rise to the imposition of liability for damages caused by avalanche. Their hypothesis is that the use of explosives, in and of itself, is inherently dangerous, the results of which are unpredictable. Secondly, it is alleged that reliance upon avalanche forecasting and control gives a false sense of security, which procedures can never be one hundred percent successful.

The use of explosives themselves in the instant case terminated before 10:00 a.m. Some five hours and forty-five minutes later the avalanche occurred. The causal connection between the use of explosives and the subsequent avalanche is one which plaintiffs have not proven. Some attempt was made to show that the use of explosives can cause what is termed a "hang-fire" or "post-control release" avalanche.

The theory of the "hang-fire" avalanche was not proven at trial. Of the experts who testified on the subject, none were willing to admit that there was any support within the scientific community for the "hang-fire" principle. A "hang-fire" avalanche is described as one which results from explosive testing which does not release at the time that the explosion is detonated, but rather at an unspecified time thereafter. The theory is that the use of explosives actually weakens the snow

and causes it to avalanche unpredictably some time later.

In the instant case, the period between the explosive control and the avalanche was some five hours and forty-five minutes later. The situation was best described by Dr. LaChapelle, who indicated that throughout the period of time between the conclusion of explosive control and the occurrence of the avalanche, snow was falling at an average rate of 1.3 inches per hour, a critical rate for purpose of avalanche forecasting. The buildup of snow between the conclusion of control and the time of the avalanche, was sufficient to bring the weight of the snow pack, combined with other possible meteorological explanations, to a critical release level. As such, the "hang-fire" theory for imposing strict liability for damages due to an avalanche which was attempted to be controlled by explosives is simply unfounded. The theory is at best controversial in the scientific community, and at worst an unsupported, unproven hypothesis.

The plaintiffs would also have this court impose strict liability upon the defendants for the use of avalanche forecasting and avalanche control procedures which plaintiffs allege, in and of themselves, cause a false sense of security when the result of forecasting and control can never be one hundred percent effective. What seem to differentiate the instant case from others imposing strict liability, is the fact that where forces of nature themselves gather to produce the hazard, ameliorating attempts by man for the purpose of generating safety to the public should not be held against him by the imposition of absolute liability. In Sutliff v. Sweetwater Water Co. (1920) 182 Cal. 24, the Supreme Court declined to impose strict liability for damages for injury to property from the breaking out of the flood waters from an extraordinary or unprecedented flood. Although the fact situation seems to be close to that of Rylands v. Fletcher, *supra*, the court in Sutliff found that the proximate and immediate cause of the flooding of the plaintiff's land and its consequent injury was not the existence of the defendant's reservoir or the manner of its maintenance and use, which were wholly lawful and innocuous, but the overwhelming of the reservoir by an agency beyond the defendant's control, in fact, in that case, beyond human control. To this day Sutliff has not been overruled. The soundness of its ruling, however, must be viewed in light of the more liberal construction of abnormally dangerous activities after Luthringer. One case which appears to consider the nature of avalanche danger versus the liability of a ski area owner, is Mannhard v. Clear Creek Skiing Corp. (colo. app. 1983) 682 p. 2d 64. Mannhard was also a wrongful death action brought by the widow of a skier who was killed as a result of an avalanche triggered by him and two companions skiing in an out-of-bounds area. In seeking to establish a higher standard of care than "reasonable care"

the court considered whether the operation of a ski area near an avalanche zone was one which was an "inherently dangerous activity". In finding that an avalanche area adjacent to a ski area did not impose a higher standard of liability, the court stated that

"...[T]he phrase "inherently dangerous activity" implies some sort of action of affirmative act which would create a dangerous situation for others, such as transmission of electricity...or delivery of liquefied propane gas ...In other words, the phrase applies to activities which by their very nature create a danger to the public that otherwise would not exist. The snow conditions which constituted the avalanche danger were a natural occurrence and were not caused by, nor did they result from, operator's activities. And, there was no evidence that the danger was increased by anything done or not done by the operator.

We have not been referred to, and we have not found, any Colorado case law in which the 'inherently dangerous' classification has been applied to passive activities or inaction pertaining to already existing dangerous natural conditions. We see no need so to extend the concept." Mannhard v. Clear Creek Skiing Corp., *supra* 682 P2d 64, 66 (Emphasis in original)

Recognizing that section 522 of the Restatement of Torts 2d imposes liability for an abnormally dangerous activity even though it is caused by the unexpected, such as action of an animal, or by an operation of force of nature, the fact remains that man's intervention did not cause the dangerous situation in the instant case. The actual avalanche forecasting and control procedures sought only to reduce the hazard to life and property, and there is no evidence to suggest that such procedures themselves increased the risk of harm to the decedents in this case.

Turning to the factors outlines in 3 Restatement of Torts 2d Section 520, this court accepts as a given the fact that there is a high degree of risk of some harm to the person, land or chattels of another in an area which is prone to avalanche hazards. Similarly, avalanches can produce results which in all likelihood would be great harm. The third criteria, that of the inability to eliminate the risk by exercise of reasonable care, appears to be the crux of this discussion. While the evidence is in somewhat of a state of conflict, the weight of the evidence and that which is more credible, is that avalanche forecasting and control procedures themselves can be carried on to such

a degree as to eliminate the risk of avalanche by the exercise of reasonable care. Arthur Mears and Dr. Edward LaChapelle testified in response to questions by the court outside the presence of the jury. Mears was of the opinion that the high degree of risk could simply not be eliminated by the state of the art avalanche forecasting and control procedures. LaChapelle, a pioneer and innovator in the area, testified that avalanche forecasting and control was in such a state that the high degree of risk of avalanche could be virtually eliminated. In the throes of a monstrous storm, such as that which produced the avalanche in this case, avalanche forecasting and control appears to have been utilized by Alpine Meadows to a high degree of sophistication. The fact that there was continuing storm activity after avalanche control seems to produce the continuing danger of weighting forces and other meteorological changes which would impose the risk of avalanche. Even if forecasting and control procedures themselves could not alleviate the risk of avalanche, closure of the area would accomplish such a result. Since closure is a tool which avalanche forecasters and control experts can use to eliminate the danger to persons venturing into the danger areas, the risk to them can be reduced to nil.

The fact of avalanche forecasting and control being used throughout the United States and Europe is a matter which is not subject to great dispute. Avalanche control procedures as utilized by Alpine Meadows are common throughout skiing and winter areas throughout the United States.

The use of the explosives and other control measures as well as an attempt to forecast the hazards involved in areas subject to avalanche, are certainly appropriate to areas in which avalanches actually occur. These are usually sparsely populated areas, and in the instant case, sufficiently sparsely inhabited so as to eliminate the real danger of risk of harm because of projectiles from actual explosions or concussion damage.

The utility of avalanche forecasting and control procedures is apparent to the community. The forecasting and control are done for the purposes of increasing safety.

In summary, the practice of forecasting or controlling avalanches is not an ultra-hazardous activity for the reasons stated. Avalanches are a natural force of nature which the procedures and controls seek to deal with and make more safe. The fact that they are used in an area which is subject to avalanche may give some sense of security which to a degree may be false. Where an area is built in the path or potential path of an avalanche, there are certain risks inherent to the area. To subject the property owner to strict liability for an avalanche, no matter where it occurs or how it occurs, is beyond the current pale of California law of strict liability. Liability upon the

property owner, if any, must be established by negligence standards.

B. Ski Services as Being a "Dangerous Product"

Plaintiffs seek to impose strict liability on another theory as stated in Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57. California Law has not yet extended itself to services which are of the type provided by a ski area have been marketed to the public. Ownership and operation of a ski area is not a "product" which would guarantee the safety of all persons using the facilities. For this reason, strict liability would not apply to this case on the theory presented. Pierce v. Pacific Gas & Electric Co. (1985) 166 Cal. App. 3d 68. See Lewis v. Big Powder Horn Mountain Ski Corp. (1976) 69 Mich App. 437, 245 N.W. 2d 81, Bolduc v. Herbert Snyder Corp. (1977 NH) 374 A2d 1187 and Hart v. Sun Valley Company, 561 F2d 744 (9th Cir., 1977).

C. Strict Premises Liability

Plaintiffs attempt to assert strict liability to the ski area for a latent defect in the premises as set forth in Becker v. IRM Corp. (1985) 38 Cal. 3d 454. The court in Becker extended strict liability in tort to a landlord whose premises contained shower door which were not made of tempered glass. Placing upon the landlord the duty to inspect and determine latent defects, the court found that the existence of such defects were more within the knowledge of the landlord than the tenant. The court thus imposed strict liability for damages occasioned by such a defect.

Becker v. IRM Corp. is a landlord-tenant case, not one in which a premises liability cause of action was involved. The defendants in this case are land owners and their liability must be that as established by case law applicable to their legal status as such. Liability for injury on a landowner's premises is subject to the traditional rules of negligence and causation. While the rules on premises liability do not have to be stated herein, it is sufficient to state that their extension to impose strict liability upon the defendants in this case is both contrary to existing California law and simply unwarranted.

IV. CONCLUSION

For the foregoing reasons, the court hereby grants defendants' motion for non-suit on the allegations of strict liability contained in plaintiffs' complaints and hereby orders the same accordingly dismissed as to such theories.

DATED: December 23, 1985

/s/
James D. Garbolino
JUDGE OF THE SUPERIOR COURT