UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

COPY

DANIEL RICE v. KILLINGTON, LTD.	:	Civil No. 1:94CV367

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

The plaintiff, Daniel Rice, claims he was injured when he struck a snowmaking apparatus while skiing at Killington Ski Area. Mr. Rice contends that the defendant negligently caused his injury by placing a snowmaking apparatus along the side of the trail and by failing to make the apparatus sufficiently visible to downhill skiers and/or by padding the apparatus to prevent injury.

Killington denies Mr. Rice's allegations. It contends it has no duty to warn of or prevent conditions which are obvious and necessary dangers inherent in the sport of skiing, and that it acted at all times with the degree of care ordinarily exercised by owners of premises. Further Killington claims that Mr. Rice's own negligence was a proximate cause of his injuries.

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and the law stated by the Court in these instructions, you are to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Likewise, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Questions Not Evidence

If a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence.

Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense suggest are probably true, based on the facts which have been established by the evidence in the case.

Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any bias or prejudice; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not give you cause to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of

recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Use of Deposition Testimony

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties in the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath, or on a video recording played on a television set. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

As to certain affirmative defenses which I will discuss later in these instructions, however, the burden of establishing the essential facts is on the defendant. If the proof should fail to establish any essential element of a defendant's affirmative defense by a preponderance of the evidence in the case, the jury should find for the plaintiff as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence

means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or affirmative defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Obvious and Necessary Dangers

As a threshold matter, you must determine whether the accident at issue occurred as a result of an obvious and necessary danger inherent in the sport of alpine skiing. The plaintiff must prove by a preponderance of the evidence that the risk involved was not an obvious and necessary risk associated with skiing and that Killington therefore owed a duty to the plaintiff that was breached.

Under Vermont law, a person who takes part in any sport, including alpine skiing, accepts as a matter of law the inherent dangers of the sport, insofar as those dangers are obvious and necessary to the participant. Accordingly, the defendant has no duty to warn of obvious dangers or conditions which are apparent or which should have been known by a skier exercising ordinary care. If you find the plaintiff assumed the risk of suffering the injury at issue, you are necessarily concluding the defendant owed no duty to protect plaintiff from an inherent danger obvious and necessary to the sport of alpine skiing, as represented in this case by the snowmaking apparatus, and therefore the defendant was not negligent.

Thus, you must first determine whether the accident at issue occurred as a result of an obvious and necessary danger of alpine skiing. When making your determination of what constitutes an "obvious or necessary danger," you should consider whether, given contemporary practices and technology, the risk of injury at issue was reasonably avoidable.

A risk or danger which is "inherent" in a sport is one which is a part of the essential character of that sport and intrinsic to it. An "obvious danger" is not necessarily something easily observed; rather it is a risk or hazard which a participant in the sport would know of or appreciate. A "necessary danger" is one that exists even when due care is exercised. A person need accept only those risks that are inherent in the sport, not those increased risks that are caused by another's failure to use due care. Skiers should be deemed to assume only those skiing risks which the skiing industry cannot be reasonably required to prevent.

In sum, ski accidents are not always and inevitably the product of a party's failure to use reasonable care. Some accidents may be the result of the obvious and necessary risks inherent in the sport, and accidents might occur despite the exercise of ordinary and reasonable care and without negligence by either party.

If you find that the accident at issue is an obvious and necessary part of alpine skiing, then your verdict must be for the defendant. However, if you find the accident is not an obvious and necessary part of alpine skiing, then you must consider the whether the defendant, Killington, Ltd., was negligent.

Negligence

Plaintiff Daniel Rice is proceeding against defendant Killington, Ltd. on a theory of negligence. To prevail on his negligence claim, the plaintiff must prove both of the following by a preponderance of the evidence: First, that Killington, Ltd. was negligent; and second, that Killington, Ltd.'s negligence was a proximate or legal cause of the damage he sustained.

"Negligence" is the breach of a legal duty to exercise ordinary or due care which a prudent person would exercise under the same or similar circumstances. Negligence may consist of omitting to do something a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

In general, a "duty" in negligence cases may be defined as an obligation to conform to a particular standard of conduct toward another. Here, the defendant is a corporation which, of course, can only act through its agents and employees. Nevertheless, acting through those agents and employees, the defendant had a duty to conform to a standard of conduct of a reasonable entity of like experience and knowledge of the situation and its dangers. In light of this standard of conduct, the general legal duty that Killington, Ltd. owed to the plaintiff was the duty to use reasonable care to keep its premises in a reasonably safe and suitable condition so that a

skier would not be unreasonably or unnecessarily exposed to injury.

If you find that Killington, Ltd. did not breach its duty to the plaintiff and therefore was not negligent, that ends your deliberations, and you must enter a verdict in the defendant's favor. If, on the other hand, you decide that Killington, Ltd. was negligent, then you must determine whether its negligence was a proximate, or legal, cause of the plaintiff's injuries.

Proximate Cause

You may not award damages for any injury from which plaintiff Daniel Rice may have suffered or may now be suffering unless he has established by a preponderance of the evidence in the case that such injury was proximately caused by the accident in question.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. If you find that any injury sustained by Daniel Rice was proximately caused by some individual or entity other than Killington, Ltd., then you should return a verdict in favor of the defendant.

This does not mean, however, that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person or entity. On the contrary, many factors or things, or the conduct of two or more persons, may operate either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

Comparative Negligence

As an affirmative defense, defendant Killington, Ltd. claims plaintiff Daniel Rice was comparatively negligent. If a preponderance of the evidence does not support the plaintiff's claim that the defendant was negligent, then your verdict should be for the defendant. However, if a preponderance of the evidence does support the plaintiff's claim, then you must consider the comparative negligence defense raised by defendant Killington, Ltd.

To prevail on this defense, Killington, Ltd. must prove each of the following elements by a preponderance of the evidence: First, the plaintiff was also negligent; and second, the plaintiff's negligence was the proximate or legal cause of his injury.

As you can see, these elements mirror those which you have already considered when determining whether Killington, Ltd. was negligent. Accordingly, in making your determination on the issue of comparative negligence, you should refer to the definitions of "negligence," "duty," and "proximate cause" which I have already given you. In this regard, the plaintiff had a duty to conform to a standard of conduct of a reasonable person of like age, intelligence, experience, as well as like knowledge of the situation and its dangers. The plaintiff, as any alpine skier, is under a duty to exercise reasonable care for his own safety while participating in the sport of alpine skiing and to

exercise reasonable prudence for his own safety in descending the trail.

If you find that Killington, Ltd.'s negligence caused or contributed to Daniel Rice's injury, then you must assess a percentage of fault to the defendant. You will do that by indicating, on the special verdict form, what percentage of fault of the plaintiff's injury is attributable to the defendant.

Moreover, if you also find Daniel Rice's own negligence cause or contributed to his own injury, then you must also assess a percentage of fault to the plaintiff. You will do this by indicating the percentage of plaintiff's negligence, if any, on the special verdict form. Note that the total of all such fault or negligence must be one hundred percent.

If you find that the plaintiff's comparative negligence is greater than 50%, then the plaintiff cannot recover anything, and you must enter a verdict for the defendant. In other words, if you determine that Daniel Rice was more than 50% comparatively negligent, then he will recover nothing and your verdict is for the defendant, Killington, Ltd.

However, if the plaintiff's negligence is 50% or less, then the plaintiff is entitled to recover from the defendant.

Finally, if you assess a percentage of fault to the defendant then, disregarding any fault on the part of the plaintiff, you must determine the total amount of plaintiff's

damages. I will provide you with instructions relating to the proper measure of damages, if any, that you may award.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to the plaintiff. The Court will compute the plaintiff's final recovery, if any, on the basis of the percentages of fault that you assess.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Damages

If you should find for the plaintiff and against the defendant as to any of plaintiff's claims, then you must consider the issue of damages.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate a plaintiff fully and adequately for all injuries and losses caused by a defendant's negligence. In other words, the purpose of awarding damages is to place the injured person in the position he or she occupied immediately before the injury occurred, as nearly as can be done with an award of money damages.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which he is entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

It is part of counsel's function as an advocate to persuade the jury. Formulas used in closing argument are just that, argument, and no more. They are not evidence. You the jury need not be governed by the formula or method suggested by counsel of breaking the damages into units of time. The jury's ultimate obligation is to arrive at an amount which, in your view, is supported by the evidence and is fair and just to both the plaintiff and the defendant.

In this case, Daniel Rice seeks to recover past damages for lost wages and medical expenses and future compensatory damages for his injury, pain and suffering, disfigurement, disability, physical impairment, mental anguish and emotional damages.

You also may include in your verdict a sum that will justly, fully and adequately compensate the plaintiff for permanent injury or disability, if any, that you may find. In evaluating such permanent injury or disability, you should take into consideration the age of the plaintiff, which the parties have stipulated is 31 years today, and his ability to lead a normal life, and his life expectancy, which the parties have stipulated is 44.1 years as of today.

Medical Damages

With regard to medical expenses, if you find for the plaintiff, then he is entitled to recover his past medical expenses, which the parties have stipulated are $ 60,085.

Reduction of Future Damages to Present Value

In the event you award future damages, any such award necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date. Insofar as your award is for future damages, you should adjust to present worth such sum as you find is to be needed in the future so that the portion of the award for future damages, when prudently invested and saved, will match the compensation needs as they arise in the future.

If you make any award for future pain and suffering, or future mental anguish, then you should adjust or discount the award to present value in the same manner.

Damages Not Punitive

If you should find the plaintiff is entitled to a verdict, in fixing the amount of your award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing any defendant, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney's fees.

Effect of Taxes

If you award any damages to plaintiff, you should know those damages are not subject to income tax and therefore you should not include in your verdict any amount to compensate for taxes.

Election of Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict read.]

You will note that each of these interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the Marshal. He will then bring the message to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

COPY

DANIEL RICE	:	
v.	:	CIVIL NO. 1:94CV367
KILLINGTON, LTD.	:	

VERDICT FORM

1. Did the plaintiff, Daniel Rice, assume the risk of suffering the injuries at issue by participating in the sport of alpine skiing?

_____ yes _____ no

If your answer to question 1 is "yes," then your verdict is for the defendant, Killington, Ltd., and your deliberations are completed. You should have the foreperson sign and date the verdict form.

If your answer to question 1 is "no," then proceed to question 2.

2. Was there negligence on the part of the defendant, Killington, Ltd., which was a legal cause of loss or damage to the plaintiff, Daniel Rice?

_____ yes _____ no

If your answer to question 2 is "no," then your verdict is for the defendant, Killington, Ltd., and your deliberations are completed. You should have the foreperson sign and date the verdict form.

If your answer to question 2 is "yes," then proceed to question 3.

3. Was there negligence on the part of the plaintiff, Daniel Rice, which was a legal cause of the plaintiff's loss or damage?

_____ yes _____ no

If your answer to question 2 is "yes," and your answer to question 3 is "no," then proceed to question 5. If your answer to question 2 is "yes," and your answer to question 3 is "yes," then proceed to question 4.

4. State the percentages of comparative negligence that you find. Note that these percentages must equal 100%.

Plaintiff Daniel Rice	_____%
Defendant Killington,Ltd.	_____%
Total	100 %

If you have found plaintiff Daniel Rice more than 50% negligent, then your verdict is for the defendant, and you have completed your deliberations. You should have the foreperson sign and date this verdict form.

If you have found Killington, Ltd. at least 50% negligent, then proceed to question 5.

5. State the total damages to which you find plaintiff Daniel Rice is entitled.

$_____

Note: Do not reduce your damages award if you have found plaintiff Daniel Rice comparatively negligent in question 5. The Court will do the calculations.

_____
Foreperson

_____
Date