

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALEXANDER MATOLCSY and :
DENISE MATOLCSY :
 :
v. : Civil No. 1:00CV79
 :
KILLINGTON SNOWMOBILE TOURS, INC. :

JURY INSTRUCTIONS

Members of the Jury:

You have heard the evidence in this case. You, the jury, are the judges of the facts. Do not consider any statement that I have made in the course of the trial or make in these instructions of law as an indication that I have any opinion about the facts of this case. It is your duty to follow the law as I give it to you. You will not be faithful to your oath as jurors if you return a verdict that contradicts this law.

You have heard the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence. Their only purpose is to help you understand the evidence and the parties' claims.

You are not to be guided by sympathy, prejudice or public opinion. The parties expect you to reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as a dispute between persons of equal standing in the community. A corporation is entitled to the same fair trial as a private individual.

Soon, I will give you a verdict sheet containing questions you must answer. Answer each question based on the facts as you find them. Do not decide who you think should win the case and then answer the questions accordingly. Your answers and verdict must be unanimous.

Burden of Proof

Since this is a civil case, the plaintiffs must prove their case by a preponderance of the evidence, and the defendant must prove its defense of obvious and necessary danger by a preponderance of the evidence.

A preponderance of evidence means that amount of evidence which persuades you that a fact is more likely true than not true. In determining whether any fact has been proven by a preponderance of evidence, you may consider:

- (1) the testimony of all the witnesses - regardless of which side called them;
- (2) all exhibits received into evidence - regardless of which side presented them; and
- (3) the admissions and stipulations read into the record.

If you are satisfied that the plaintiffs have proven all elements of their claims, then you must find in their favor. On the other hand, if you find the plaintiffs did not prove all elements of their claims, you must find for the defendant.

Credibility of Witnesses

You, as jurors, are the sole judges of the believability of witnesses and the weight to be given to their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Nor do you have to give the same weight to each witness's testimony, since you may accept or reject part or all the testimony of any witness.

In judging the testimony of the witnesses, you should consider:

- (1) their interest, if any, in the outcome of the case;
- (2) their manner of testifying;
- (3) their candor and honesty;
- (4) their bias, if any;
- (5) the extent to which other evidence in the case supports or contradicts their testimony; and
- (6) the reasonableness of their testimony.

You may believe as much or as little of the testimony of each witness as you think proper.

The number of witnesses called by each side is not an important consideration. You may find testimony of a small number of witnesses or a single witness more believable than the different testimony of a large number of witnesses.

Differences or conflicts in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to not believe the witness. Two or more persons may hear or see things differently, or may have different perceptions about their observations.

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 had 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.

Your job is to weigh the effect of any difference in testimony, considering whether the difference is about an important or unimportant detail, and whether the difference is an innocent error or is false. You should also try to resolve any differences in the testimony if you can. However, as the fact finders, you may believe or not believe any part of the testimony of any witness.

Expert Witnesses

Some of the testimony you heard was given by expert witnesses. These witnesses are persons who, by education, training or experience, have developed expertise beyond the level of the average person in some field. They are allowed to state opinions on matters within the area of their expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider each expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. If you decide or conclude:

- (1) the opinion is not based on sufficient education, training and experience;
- (2) the reasons given by an expert in support of his or her opinion are not sound;
- (3) the expert's testimony is outweighed by other evidence;
or
- (4) the expert is biased,

then, you may disregard the opinion entirely or in part.

Use of Deposition Testimony

During this trial, some testimony has been presented to you by videotapes and transcripts. These videos and transcripts contain deposition testimony. A deposition consists of sworn recorded answers to questions asked of the deposed witness, in advance of trial, by one or more of the attorneys from each side. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented by videotape or transcript with the witness under oath. You are to give this deposition testimony the same consideration you would give to the testimony of a witness who takes the witness stand and testifies in your presence.

Respondeat Superior

The defendant in this case is a corporation. A corporation can only act through its officers, employees and agents, and is liable for the acts and omissions of an employee who is acting within the scope of his or her employment. For the purposes of your deliberations, you should consider the act or omission of any employee of the corporation to be the act or omission of the corporation itself.

INSTRUCTIONS OF LAW

Alexander and Denise Matolcsy seeks damages from Killington Snowmobile Tours, Inc. for their claimed injuries. You, the jury, must decide whether Killington Snowmobile Tours is liable for the injuries and losses they have sustained. If you find Killington Snowmobile Tours is liable, you must also decide the amount of damages for which the corporation is responsible, if any.

The plaintiffs' claims for damages are based on a theory of negligence. To prevail, the Matolcsy's must prove to you, by a preponderance of the evidence, each and every element of that theory.

If you find for either Alexander or Denise Matolcsy, you will then be asked to consider and apportion the respective degree(s) of fault, if any, attributable to each party.

Obvious and Necessary Danger

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 snowmobile touring.

Under Vermont law, a person who takes part in any sport, accepts as a matter of law the inherent dangers of the sport, insofar as those dangers are obvious and necessary to the participant. A snowmobile tour operator has no duty to warn of obvious dangers or conditions which are apparent or which should have been known by a snowmobiler on tour exercising reasonable care.

The defendant, Killington Snowmobile Tours, Inc., claims that the plaintiffs were persons who took part in a sport and therefore accepted the dangers that are inherent to that sport insofar as those dangers are obvious and necessary. Therefore, Killington Snowmobile Tours has the burden of proving by a preponderance of the evidence this affirmative defense.

First, you must determine whether the accident at issue occurred as a result of "an obvious and necessary danger" of snowmobile touring. When making this determination, you should consider whether, given contemporary practices and technology, in the snowmobile touring field, the risk of sustaining the injury at issue was reasonably avoidable.

Note that an "obvious danger" is not always one which is 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. Snowmobilers on tour are only required to assume those snowmobile-related risks which the snowmobile tour industry cannot be reasonably required to prevent.

Second, you must determine whether the accident at issue involved a risk or danger "inherent" in the sport of snowmobile touring. A risk or danger which is "inherent" in a sport is one which is part of the essential character of that sport and intrinsic to it.

If you find the plaintiffs assumed the risk of suffering the injuries at issue, you are necessarily concluding Killington Snowmobile Tours owed no duty to protect Alexander and Denise Matolcsy from an inherent danger obvious and necessary to the sport of snowmobile touring and, therefore, was not negligent. However, if you find the Matolcsys' accident did not result from an inherent danger obvious and necessary to the sport of snowmobile touring, then you must consider whether Killington Snowmobile Tours was negligent.

Negligence

The Matolcsys each claim that Killington Snowmobile Tours was negligent, thereby causing them injury, in one or more of the following ways: (1) It failed to advise them of the fact that the tour was not for beginner-level snowmobilers; (2) It failed to properly instruct them on how to cross a bridge on a snowmobile; (3) It failed to adequately instruct them on how to operate a snowmobile with two people on it; (4) It conducted its tour using a bridge with no railings; and (5) It guided their snowmobile across a bridge that, given the conditions on the day of the tour, was unsafe.

Negligence is the failure to use reasonable care under the circumstances of the case. "Reasonable care" is that care which reasonably prudent persons use in conducting their own affairs, to avoid injury to themselves or their property, or the persons or property of others. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. In deciding whether reasonable care was used in a given case, the conduct in question must be looked at by you while considering all of the surrounding circumstances.

The mere fact that an accident happened does not mean that someone was negligent. Rather, to find Killington Snowmobile

Tours was negligent, you must determine from the evidence that it failed to use reasonable care. In deciding this, Killington Snowmobile Tours' conduct should be compared against the standard of conduct for a reasonably prudent snowmobile tour operator under the same or similar circumstances.

To prove Killington Snowmobile Tours was negligent as to either or both plaintiffs, each plaintiff must prove by a preponderance of the evidence all of the following four elements for each claim:

- (1) Killington Snowmobile Tours owed Alexander and Denise Matolcsy a duty to exercise reasonable care;
- (2) Killington Snowmobile Tours breached that duty and, therefore, was negligent;
- (3) Alexander Matolcsy and/or Denise Matolcsy suffered injuries; and
- (4) Killington Snowmobile Tours' negligence was a proximate cause of his or her injuries.

If you find that Killington Snowmobile Tours was not negligent, your verdict on the negligence claims must be in favor of the defendant, Killington Snowmobile Tours.

However, if you find that Killington Snowmobile Tours breached any of its duties to Alexander and Denise Matolcsy to exercise reasonable care to protect them, you must then decide if

one or more breaches was a proximate cause of his or her injuries.

Proximate Cause

Alexander and Denise Matolcsy must prove the defendant's alleged negligence was a proximate cause of his or her injuries. An injury is proximately caused by negligent behavior when it appears from the evidence that the behavior played a substantial part in bringing about or actually causing the injury, and the injury was either a direct result or a reasonably probable consequence of the negligent behavior. Thus, proximate cause is that cause which, in a natural and continuous sequence, unbroken by any interruption, causes the injury and without which the injury would not have occurred.

This does not mean that the law recognizes only one proximate cause or the conduct of only one person. Many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause the injury. In such a case, each factor, thing or person may also be a proximate cause.

Comparative Negligence

As a defense to each plaintiffs' claim, Killington Snowmobile Tours claims either or both Alexander Matolcsy or Denise Matolcsy was comparatively negligent. If you find that a preponderance of the evidence supports one or both of the plaintiffs' claim of negligence, then you must consider the comparative negligence defense raised by Killington Snowmobile Tours.

To prevail on this defense, Killington Snowmobile Tours must prove each of the following elements by a preponderance of the evidence:

- (1) that either Alexander Matolcsy or Denise Matolcsy was negligent in the care of himself or herself; and
- (2) the negligence of plaintiff you are considering was a proximate cause of his or her injuries.

As you can see, these elements mirror those which you have already considered when determining whether Killington Snowmobile Tours was negligent. Therefore, in making your determination on the issue of comparative negligence, you should refer to the definitions of negligence and proximate cause which I have already given you. With respect to the definition of duty, I instruct you that each plaintiff had a duty to exercise reasonable care for his or her own safety while participating in

snowmobile touring and to exercise prudence for his or her own safety.

If you find that either Alexander Matolcsy or Denise Matolcsy was negligent and that his or her negligence was a proximate cause of his or her injuries, then you must assess the percentage by which his or her negligence contributed to his or her injuries. You should indicate this percentage in the appropriate place on the Special Verdict Form, which I will provide you. In other words, if you find that one or both of the plaintiff's injuries was due partly to his or her own negligence, then you would fill in the percentage as your finding on the special verdict form.

Damages

The fact that I will instruct you about the proper measure of damages is no indication of my view of the case. Rather, I give you these instructions for guidance if you find in favor of either plaintiff from a preponderance of the evidence presented in the case and according to the other instructions I have given you.

If you find either Alexander or Denise Matolcsy is entitled to recover, then the law provides that he or is to be fully and fairly compensated for all the injuries and losses he or she has suffered. This means you may award the amount of money you determine to be full, fair and reasonable compensation for all his or her injuries and losses.

A person suffering from a disease or peculiar physical condition, and who is injured by reason of the negligence of another, is entitled to recover for all damages proximately resulting from the negligent act. This includes the right to recover for any aggravation any pre-existing condition.

Where such a pre-existing condition is shown, the rule is that the defendant is subject to liability for harm to the plaintiff, although the underlying physical condition of the plaintiff is not known to the defendant and the accident makes the injury greater than that which the defendant as a reasonable

person should have foreseen as a probable result of his or her conduct. The defendant is not responsible for those injuries which would have happened purely from the original condition. However, if you find that a plaintiff's pre-existing condition was made worse, then that plaintiff is entitled to receive such sums as will adequately and fully compensate him or her for the enhancement and aggravation of the pre-existing condition.

This will be each plaintiff's only opportunity to recover damages from Killington Snowmobile Tours.

In determining the damages suffered by either or both Alexander Matolcsy and Denise Matolcsy, if any, as a result of his or her injuries, you should consider the following items:

- (a) medical expenses - you may award a sum reimbursing the plaintiffs for all past medical expenses he or she has incurred;
- (b) lost earnings and benefits -- you may award any earnings and benefits plaintiff Alexander Matolcsy has lost up to the date of this trial; and
- (c) pain and suffering -- you may award the plaintiffs a sum you deem appropriate to compensate him or her for the pain and suffering he or she has endured as a result of his injuries, including any
 - (i) disability, (ii) disfigurement, (iii) physical impairment, and (iv) emotional distress. You may also

include an amount to compensate him or her for any future pain and suffering which you find he or she is reasonably likely to experience.

(d) loss of enjoyment of life - you may award plaintiff Denise Matolcsy damages for pain and suffering and for mental or emotional distress resulting from the diminished quality of the marital relationship.

The plaintiff has produced evidence that Alexander Matolcsy's life expectancy is 21 years.

Whatever each plaintiff is entitled to recover in the future on account of his or her injuries must be included in the amount he or she recovers now. Even if you find either or both plaintiff's were partially at fault, you must still determine the total amount of his or her damages and place this amount on the Special Verdict Form. Do not reduce the damages by any percentage of fault you assign to either plaintiff. I will do that reduction calculation, if necessary.

Damages Calculations

To the extent that you award any future damages, including future pain and suffering, you should determine what amounts will be needed in the future for reasonable compensation. Then, you need to determine what present sum, if prudently invested, will produce or match those future compensation needs as they arise.

You may also include in your award for future damages an amount to compensate for inflation.

If you should award damages for medical expenses or pain and suffering to either plaintiff, you should know that there will not be any state or federal taxes due to the government. Therefore, you should not include any amount in your damages figure to compensate for taxes.

Damages Not to be Punitive

If you find either or both plaintiffs is entitled to damages, you are not to include or add any sum meant to punish Killington Snowmobile Tours or meant to serve as an example or warning to other snowmobile tour operators. Likewise, you may not include any sum to compensate the plaintiffs for court costs or attorneys' fees.

Conclusion

Your verdict must represent the considered judgment of each of you. Also, your verdict must be unanimous.

In reaching your verdict, 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 surrendering your individual judgments. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous, or that another point of view is sounder. However, do not surrender your honest convictions solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

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

A Special Verdict Form has been prepared for your convenience. You will take this form to the jury room. The answer to each question on the form must be the unanimous answer of the jury. The foreperson will write the unanimous answer of the jury in the space provided opposite each question. Upon

completion, the foreperson will date and sign the Special Verdict form.

If, during your deliberations, you should desire to communicate with the Court, please put your message or question in writing, signed and dated by the foreperson, and pass the note to the court security officer. He will then bring the note to my attention. I will 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 that you should never indicate where you are in your deliberations or your numerical division, if any, at the time.