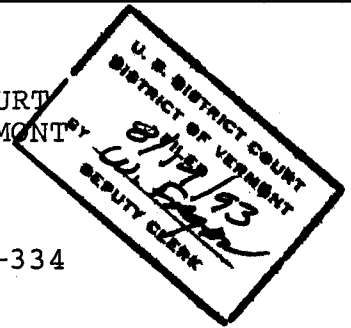


US DISTRICT COURT  
DISTRICT OF VERMONT



VIVIEN NAIM )  
 )  
VS. )  
 )  
MOUNT SNOW, LTD. )  
 )

CIVIL ACTION  
FILE NO. 90-CV-334

FINAL CHARGE TO THE JURY  
INTRODUCTION TO INSTRUCTIONS OF LAW

COPY

APPEARANCES: WILLIAM M MCCARTY  
GWENDOLYN W. HARRIS  
MCCARTY LAW OFFICES  
48 HIGH STREET  
PO 735  
BRATTLEBORO, VERMONT 05302  
Representing the Plaintiff

JOHN J. ZAWISTOSKI  
RYAN, SMITH & CARBINE, LTD.  
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PO 310  
RUTLAND, VERMONT 05702  
Representing the Defendant

DATE: August 10, 1993

TIME: 11:15 a.m.

TRANSCRIBED BY: Kimberly Farhm, CSR

ROONEY & WOOD REPORTERS, INC.  
BRATTLEBORO, VERMONT 05304

1 JUDGE OAKES: Would the clerk,  
2 please, give a copy of the revised final  
3 charge to each of the attorneys, and then  
4 make proclamation.

5 JUDGE OAKES: Ladies and  
6 gentlemen of the jury: The Court appoints  
7 Mr. Donald Morin as your foreperson.

8 This is a civil action brought by  
9 Plaintiff, Vivien Naim, against Defendant,  
10 Mount Snow, Limited. Ms. Naim claims that on  
11 December 17, 1989, Dan Robinson, a ski  
12 instructor and employee of Mount Snow, gave  
13 Plaintiff a skiing lesson, during which Mr.  
14 Robinson negligently, and in disregard of  
15 Plaintiff's inexperience, took Plaintiff to a  
16 trail near the top of the Mountain.

17 Plaintiff also asserts that as she  
18 skied down from that trail near the top of  
19 the mountain she was injured, and that her  
20 injuries occurred as a direct result of the  
21 ski instructor's negligence. Plaintiff  
22 further alleges that Defendant, Mount Snow  
23 was negligent in failing to exercise  
24 reasonable care in hiring, training, and  
25 supervising its employee, Mr. Robinson.

1           Ms. Naim seeks recovery for her  
2           personal injuries, loss of capacity to enjoy  
3           life -- I started to say, there, "loss  
4           earning capacity," but there isn't any  
5           evidence of loss of earning capacity, so, for  
6           her personal injuries -- and, loss of  
7           capacity to enjoy life, and future pain and  
8           suffering. If any.

9           Mount Snow generally denies Ms. Naim's  
10          allegations, and asserts by way of defense  
11          that Ms. Naim, herself, was negligent and  
12          that her negligence was the cause, in whole  
13          or in part, of the accident.

14          Because Defendant, Mount Snow is a  
15          corporation, it must act through its agents  
16          and employees. As a corporation, it is  
17          responsible for the acts and omissions of its  
18          agents and employees acting within the scope  
19          of their employment.

20          Dan Robinson, by agreement of counsel,  
21          and the parties, was such a -- an employee.  
22          Therefore, you will bear in mind that the  
23          acts of Dan Robinson, are the acts of the  
24          Defendant, Mount Snow, and I charge you that  
25          as a matter of law.

1           Now, it is my duty to give you  
2           instructions concerning the law that applies  
3           to this case. It is your duty as jurors to  
4           follow the law as stated in these  
5           instructions. You must then apply these  
6           rules of law to the facts as you, and you  
7           alone, find them from the evidence.

8           It is your sole province to determine  
9           the facts in this case. And, by these  
10          instructions I don't intend to indicate, in  
11          any way, how you should decide any question  
12          of fact.

13          The following are the questions of fact  
14          that you must decide in this case. And,  
15          after stating the questions to you, I shall,  
16          then, discuss them in more detail.

17          First, was Defendant, Mount Snow,  
18          acting through its employee Dan Robinson,  
19          negligent in instucting Plaintiff. And, if  
20          so, was this negligence a proximate, or legal  
21          cause of the accident and injuries suffered  
22          by Plaintiff, Vivien Naim?

23          Second, was Defendant, Mount Snow,  
24          negligent in the hiring, training, and  
25          supervising of its employee, Dan Robinson?

1 And, if so, was this negligence a proximate,  
2 or legal cause of the accident and injuries  
3 suffered by Plaintiff, Vivien Naim?

4 Third, was Plaintiff, herself,  
5 negligent. And, if so, was her negligence a  
6 proximate, or legal cause of the accident and  
7 injuries suffered?

8 Fourth, if you find that Defendant and  
9 Plaintiff were both negligent, and that the  
10 negligence of each was a proximate, or legal,  
11 cause of the accident and Plaintiff's  
12 injuries, then you must compare Defendant's  
13 causal negligence, to Plaintiff's causal  
14 negligence.

15 If Plaintiff's negligence is greater  
16 than Defendant's negligence, then you must  
17 find for the Defendant. Conversely, if  
18 Plaintiff's negligence is equal to, or less  
19 than, Defendant's negligence, then you must  
20 find for the Plaintiff.

21 Fifth, and finally, if you find  
22 Defendant negligent, and that its negligence  
23 was the proximate, or legal, cause of the  
24 accident and Plaintiff's injuries, then you  
25 must determine what injuries Plaintiff

1       sustained, and what damages she is entitled  
2       to recover.

3               All of these questions will be given to  
4       you in the form of written interrogatories,  
5       and questions. I shall discuss each of these  
6       questions in more detail, later, as I explain  
7       the law to apply for each negligence claim.  
8       But first, I again, would like to summarize  
9       for you the general rules applicable in all  
10      civil cases, which I described to you at the  
11      beginning of the case, and by which you are  
12      to assess all the evidence you have seen and  
13      heard in the courtroom, in answering the above  
14      questions.

15             First, burden of proof. The party who  
16      has the burden of proof must establish its  
17      claim on a particular question or issue, by a  
18      preponderance of the evidence.

19             Preponderance of the evidence means  
20      that the evidence presented on one side of a  
21      question, or issue, convinces you that the  
22      matter sought to be proven is more likely  
23      true, than not true. It is a matter of  
24      quality, not quantity, and means that the  
25      evidence on one side has greater persuasive

1 value.

2 If the evidence on any disputed issue  
3 is evenly balanced, then the party with the  
4 burden of proof has not prevailed on the  
5 issue.

6 In this case the Plaintiff, Vivien  
7 Naim, has the burden of establishing the  
8 negligence of the Defendant, Mount Snow by  
9 the -- a preponderance of the evidence.  
10 Mount Snow, however, has the burden of  
11 establishing the negligence of Vivien Naim by  
12 such a preponderance.

13 The party having the burden of proof,  
14 is required to meet that burden by  
15 establishing his or her claim, relative to  
16 the particular question or issue involved, by  
17 a preponderance of the evidence.

18 With regard to each fact or issue to be  
19 proven, it must be directly supported by  
20 evidence. A burden which is not overcome by  
21 the introduction of facts which generate only  
22 conjecture, surmise or suspicion. Proof of  
23 possibility alone is not enough.

24 Second, credibility of witnesses. The  
25 credibility, or believability, of the

1 witnesses, and the weight to be given their  
2 testimony, are questions entirely for your  
3 determination.

4 The law states that you are not bound  
5 to give the same weight, the same credit, or  
6 have the same faith in the testimony of each  
7 witness. But, you should give their  
8 testimony just such weight, just such credit,  
9 and have just such faith in it that you think  
10 it is fairly entitled to receive.

11 Third rule: Reconciliation of  
12 Testimony. This rule concerns the  
13 reconciliation of testimony. In the event  
14 that different witnesses give conflicting  
15 testimony, you should try to reconcile their  
16 testimony on the theory that all witnesses  
17 have sworn to tell the truth. If, however,  
18 you can not reconcile all the testimony, you  
19 must decide which testimony is entitled to the  
20 greater weight.

21 Expert witnesses. There has been  
22 testimony introduced in this case which we  
23 call expert testimony. In this regard, I  
24 refer particularly to the testimony of:  
25 Gregory Loucony, Dr. Thomas Wickiewicz, James

1 Isham, and Shawn Smith.

2 An expert is a person who, by reason of  
3 special study, training, and experience as to  
4 a given subject, has knowledge concerning  
5 that subject superior to other people in  
6 general. Expert testimony is to be weighed  
7 by you with all other testimony in the case,  
8 and the weight of all the expert testimony in  
9 this case is for you, and you alone, to  
10 decide.

11 Next: Testimony, and Arguments  
12 Excluded. Any testimony or exhibit which has  
13 been excluded, or which has been stricken  
14 from the record, is not evidence in the case.  
15 And, you will entirely disregard it in  
16 arriving at your verdict.

17 Likewise, the arguments of the  
18 attorneys, and any statements which they made  
19 in their arguments, are not evidence, and  
20 will not be considered as evidence by you.  
21 You will render your verdict from the facts  
22 as you find them from the exhibits, the  
23 testimony of the witnesses, and any  
24 stipulations regarding the evidence entered  
25 by counsel for the parties.

Next: Inferences and Circumstantial Evidence. 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 testimony, such as the testimony of a -- an eye witness. The other is indirect, or circumstantial evidence; the proof of the chain of circumstances pointing to the existence, or non-existence, of certain facts.

As a general rule, the law makes no distinctions between direct, and 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. However, you are to consider only the evidence in the case.

Nevertheless, you are not limited, solely, to the exhibits and what you saw and heard. Rather, 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.

Now, keeping in your mind those general

1 rules by which you are to evaluate the  
2 evidence in this case, I shall now discuss  
3 with you the factual questions which you must  
4 decide, and the law by which you are to reach  
5 your decision.

6 At this time, I'll ask the clerk, Mr.  
7 Fagan, to hand you copies of the written  
8 interrogatories. These interrogatories are  
9 intended to help guide your decision-making,  
10 and I will be referring to them a bit later.

11 Negligent Instruction: The first  
12 question you must resolve is, whether Dan  
13 Robinson was negligent in instructing Miss  
14 Naim, and if so whether this negligence was a  
15 proximate, or legal cause of the injuries  
16 suffered by Plaintiff, Vivien Naim.

17 Negligence is the breach, or omission  
18 through neglect, or carelessness, of a legal  
19 duty owed to the Plaintiff. A professional  
20 ski instructor, such as Mr. Robinson, who  
21 undertakes to render services in the practice  
22 of a profession, owes a duty to his students,  
23 such as Ms. Naim, to exercise the skill, or  
24 knowledge, normally possessed by members of  
25 the profession in good standing, in similar

1 communities.

2 The skill that Mr. Robinson was  
3 required to exercise is an issue for you to  
4 decide, in light of all the evidence as you  
5 find it. Skill is something more than the  
6 mere minimum competence required of any  
7 person who does an act. Rather, it is the  
8 result of acquired learning, and aptitude,  
9 developed by special training, and  
10 experience. The extent of his training as an  
11 instructor, and his instructional experience,  
12 are factors you may take into account.

13 The standard of skill and knowledge  
14 required of the actor who practices a  
15 profession or trade, is that which is  
16 commonly possessed by members of that  
17 profession, or trade, in good standing. It  
18 is not that of the most highly skilled, nor  
19 is it that of the average member of the  
20 profession or trade, because those who have  
21 less than average skill may still be  
22 competent and qualified.

23 On the other hand, the standard is not  
24 that of the unqualified, or incompetent  
25 individual. It is that skill common to those

1       who are recognized in the profession, or  
2       trade.

3               Again, I instruct you that the standard  
4       of skill and knowledge, required of Mr.  
5       Robinson, is a matter for you to decide,  
6       based upon the evidence as you find it.

7               Once you have determined what duties --  
8       Mr. Robinson's duties -- or the standard of  
9       skill Mr. Robinson owed to Plaintiff, under  
10      the circumstances of this case, you must  
11      determine whether those duties were breached  
12      through negligence.

13              Under this theory the test for  
14      negligence is what a careful, and prudent ski  
15      instructor would have done under like  
16      circumstances, acting upon his or her  
17      judgement at the time of the incident, and  
18      not upon the instructor's judgment based on  
19      subsequent reflection.

20              In determining whether Dan Robinson was  
21      negligent in this case, you should consider  
22      whether a professional ski instructor in Mr.  
23      Robinson's position, would have foreseen that  
24      injuries to Plaintiff would be likely to  
25      result from taking her from one of the

1 learning areas, to a mountain trail, on her  
2 second day, or third hour or so, of skiing.

3 Second, you should consider what  
4 precautions a reasonably prudent ski  
5 instructor would have taken in view of the  
6 reasonably foreseeable risks, or likelihood of  
7 harm. An error in judgment does not make for  
8 liability, unless it is inconsistent with due  
9 care.

10 There was expert evidence from Mr.  
11 Loucony, that in taking Ms. Naim up the  
12 mountain -- considering her level of ability,  
13 experience, and training, to ski on a trail  
14 with terrain and differing fall lines, and  
15 weather, and trail conditions, that existed  
16 at a time of day where light was flat -- Mr.  
17 Robinson was negligent.

18 That evidence was disputed by Mount  
19 Snow's Expert witnesses, Mr. Smith, and Mr.  
20 Isham, who testified that Long John Trail  
21 where Ms. Naim fell was generally similar in  
22 character and condition to the learning area  
23 where she had been taught. It will be for  
24 you to determine to which expert evidence you  
25 will give the greater weight.

1           In evaluating the testimony of an  
2           expert witness, you should consider not only  
3           his or her qualifications, but also his or  
4           her honesty and ability, the facts that he or  
5           she used to form the opinion, and his or her  
6           evaluation of the facts he or she relied  
7           upon.

8           But, in making the determination  
9           whether Mr. Robinson was negligent, you are  
10          not just limited to the expert testimony; you  
11          should way it with all the testimony in the  
12          case. You may use common sense in the light  
13          of all the evidence, and you may want to  
14          consider whether Mr. Robinson did preceed  
15          her, or should have preceeded her, down the  
16          slope, should have taken her up the mountain,  
17          at all, or should have been more familiar  
18          with the conditions, and Mount Snow's trail  
19          structure and complex, or any other factors  
20          in evidence.

21          If you decide that Mr. Robinson was  
22          negligent under this theory, then you must go  
23          on to determine, before you answer the first  
24          question, whether this negligence was a  
25          proximate cause of Ms. Naim's injuries.

1           Negligence is of no legal significance  
2 unless it is a proximate cause of injury.  
3 The proximate cause of an injury is defined  
4 as that cause which, in natural and  
5 continuing sequence, unbroken by any  
6 efficient intervening cause, plays a  
7 substantial part in producing the injury, and  
8 without which the result would not have  
9 occurred.

10           Efficient intervening cause is defined  
11 as a new, and independent force, which breaks  
12 a causal connection between the original  
13 wrong, and the injury.

14           This does not mean that the law  
15 recognizes only one proximate cause of an  
16 injury, or damage, consisting of only one  
17 factor or theory, or the conduct of only one  
18 person. On the contrary, many factors or  
19 things, or the conduct of two or more  
20 persons, may operate at the same time, either  
21 independently or together, to cause injury or  
22 damage. In such a case, each may be a  
23 proximate cause.

24           If you find that Dan Robinson was  
25 negligent under this theory, and that his

1 negligence was a proximate cause of Ms.  
2 Naim's injuries, then you can skip Question  
3 -- then you should skip Question 2, and go on  
4 to consider Question 3 of the  
5 interrogatories, to determine whether Ms.  
6 Naim was also negligent.

7 If, for any reason you do not find  
8 Mount Snow is liable under this theory, then  
9 you should proceed to Question 2 of the  
10 interrogatories, to determine whether Mount  
11 Snow was negligent in permitting Mr. Robinson  
12 to instruct, at his stage of training and  
13 skill as an instructor, and, whether this  
14 negligence was a proximate cause of Ms.  
15 Naim's injuries.

16 Under the Plaintiff's second legal  
17 theory, you must determine whether Defendant,  
18 Mount Snow was negligent in the training of  
19 its employee, Dan Robinson or permitting him  
20 to instruct at his level of training and  
21 skill, and if so, whether this negligence was  
22 a proximate, or legal, cause of the injuries  
23 suffered by Plaintiff, Vivien Naim. Unlike  
24 the last question which focused on the acts  
25 of Dan Robinson, this question requires you

1 to focus on the acts of Defendant, Mount Snow  
2 in the training and supervision of Dan  
3 Robinson.

4 An employer, such as Defendant, Mount  
5 Snow, owes a duty to ski school students such  
6 as Ms. Naim, to employ reasonable care in  
7 hiring, training, and supervising its  
8 employees, so that an unreasonable risk of  
9 harm is not presented to its ski school  
10 students.

11 An employer, such as Mount Snow, which  
12 conducts activities through its employees, is  
13 liable for any harm resulting from its  
14 conduct, if it is negligent in the hiring,  
15 training, or supervision of its employees. As  
16 stated above, "negligence," means the failure  
17 to exercise that care which is reasonably  
18 required by the circumstances. That holds  
19 true throughout the case.

20 An employer may be considered negligent  
21 because it had reason to know that the  
22 servant, or other agent, because of his  
23 qualities, is likely to harm others in view  
24 of the work entrusted to him.

25 The dangerous quality in the employee

1        may consist of his or her incompetence, or  
2        unskillfulness, due to his or her lack of  
3        experience, considered in relation to the  
4        act, or acts, to be performed by the  
5        employee.

6                You may not find Mount Snow liable  
7        under this theory simply by finding that the  
8        Mount Snow employee was careless, or  
9        incompetent. Rather, Mount Snow is liable  
10       under this theory only if you find that,  
11       under the circumstances, it did not take the  
12       care a reasonable person would have taken in  
13       hiring the employee for the business at hand.

14               What precautions must be taken by Mount  
15        Snow in hiring, training, and supervising its  
16        ski instructors, and in particular, Dan  
17        Robinson, is a matter for you to decide,  
18        based upon the evidence as you find it.

19               One can normally assume that another  
20        who offers to perform simple work is  
21        competent. If, however, the work is likely  
22        to subject third persons to serious risk of  
23        great harm, there is a duty of care and  
24        supervision. If you find that Mount Snow  
25        either knew, or should have known, that

1        permitting Mr. Robinson to instruct would  
2        present an unreasonable risk of harm to ski  
3        students, such as Ms. Naim, then you should  
4        find that Mount Snow was negligent in hiring,  
5        training, and supervising Mr. Robinson

6                If you decide that Mount Snow was  
7        negligent under this theory, then you must go  
8        on to determine whether this negligence was a  
9        proximate cause of Ms. Naim's injuries. I  
10       explained proximate cause earlier in my  
11       instructions, and you should determine  
12       whether such negligence was a proximate cause  
13       of the accident in accordance with those  
14       instructions. That is, whether the acts or  
15       omissions of Mt. Snow played a substantial  
16       part in actually causing Ms. Naim's injury or  
17       damage, and that the injury or damage was the  
18       result of the act, or omission, in a natural  
19       sequence, unbroken by any other intervening  
20       cause.

21                Returning to the interrogatories,  
22       Question 2 asks whether Mount Snow was  
23       negligent in the training, and supervision,  
24       of Dan Robinson, and whether such negligence  
25       was the proximate cause of Ms. Naim's

1 injuries. If you answer this question, "no,"  
2 then you need answer no further questions.  
3 In that case, you should enter a verdict for  
4 Mount Snow on the "General Verdict Form," and  
5 the foreperson should sign the verdict.

6 On the other hand, if you find that  
7 Defendant, Mount Snow, is negligent under  
8 this theory; that is, if you answer Question  
9 2, "yes," you must then go on to determine  
10 whether Ms. Naim was negligent, and whether  
11 her negligence was a proximate cause of her  
12 injuries.

13 In other words, if you answer either  
14 Question 1, or Question 2, "yes," you then go  
15 to Question 3. If you answer them both,  
16 "no," you sign the verdict for Mount Snow.

17 Now, we talk about, "comparitive  
18 negligence." The question of negligence on  
19 the part of Ms. Naim involves the same  
20 general principles of negligence I discused  
21 previously. Plaintiff was under a duty to  
22 exercise the same degree of care as you find  
23 that an ordinary, reasonable, and prudent  
24 skier of her age, experience, and ability  
25 would exercise under the conditions, and

1        circumstances, as they existed at the time  
2        of, and immediately preceding, the accident.

3                When evaluating this question, you may  
4        consider that skiing is a sport which  
5        requires an ability on the part of the skier  
6        to handle himself, or herself, under various  
7        circumstances of grade, boundary,  
8        obstructions, corners, and widely varied snow  
9        conditions.

10               A beginning skier is obviously less  
11        able, than a more experienced skier, to  
12        handle more difficult terrain or conditions.  
13        But, the standard of care is as I have above  
14        stated.

15               She was bound to look, and look  
16        effectively, for hazards which might affect  
17        her safety while skiing. It will not avail a  
18        person to say that he or she looked, but did  
19        not see what was there to be seen, had he or  
20        she looked effectively. Thus, if she ran  
21        into a visible obstruction, that might be  
22        evidence of negligence. Here, there was  
23        evidence that there may have been an icy  
24        patch, or frozen crust on the trail where she  
25        went out of control. If there was such, and

1 if, before she started across it was plainly  
2 visible to her, at the time of day and place  
3 where she was, that might be evidence of  
4 negligence on her part, if she was situated  
5 to avoid it, and capable of avoiding it.

6 Now if, however, Plaintiff was  
7 confronted with a sudden peril, through no  
8 fault of her own, she is not held to the  
9 exercise of the same degree of care that she  
10 would be had there been time for reflection.

11 The law recognizes that a prudent  
12 person brought face-to-face with an  
13 unexpected danger may fail to use the best  
14 judgment, may omit some precaution she could  
15 have taken, or may not choose the best  
16 available method for meeting the dangers of  
17 the situation. This rule does not alter  
18 Plaintiff's duty to keep an effective lookout  
19 and otherwise exercise reasonable care; it  
20 simply recognizes that despite having  
21 proceeded in a reasonable manner, a person  
22 confronting sudden danger may not always be  
23 capable of using the best judgment.

24 If you find that Ms. Naim was  
25 negligent, you must go on to consider whether

1 her negligence was a proximate cause of her  
2 accident. In this connection, the same  
3 general comments I made earlier, with respect  
4 to proximate cause, apply. And, I will not  
5 repeat them here.

6 Now, Assumption of Risk. Assumption of  
7 risk has to do with both the defendant's duty  
8 of care to the plaintiff, and the plaintiff's  
9 own conduct.

10 Now, there has been some mention of  
11 assumption of risk. That is a technical  
12 term, but it refers to an every-day concept,  
13 and it has a bearing on what is reasonable,  
14 and prudent, or what is negligent. All of  
15 life has risks. You walk across the street  
16 and there's a risk that a speeding car will  
17 hit you. You drive on a snowy Vermont road,  
18 and there is a risk you will skid. You walk  
19 down a flight of stairs, and there is a risk  
20 you will trip, and fall.

21 The same is true of sports, whether you  
22 engage in them or are a mere spectator. In a  
23 baseball park the batter may be hit by a wild  
24 pitch, the pitcher may be hit by a hard hit  
25 ball, a spectator may be hit by a foul ball

1           and so on. In golf a player or a spectator  
2           may be hit by a stray shot; I think it was  
3           President Gerald Ford who was known for  
4           beating spectators. In ocean swimming there  
5           may be risks from crashing surf, or  
6           undertows, or currents.

7                     Now, the law -- the law of Vermont --  
8           says that there are some risks that are  
9           inherent and obvious in a sport, and that the  
10          participant assumes them. In skiing, a ski  
11          area operator need not warn of, or eliminate  
12          risks that are obvious to, and inherent in,  
13          or necessary to the sport of skiing.

14                    An, "obvious danger," is one which  
15          would have been recognized by a reasonable  
16          person of plaintiff's age, skill, and  
17          experience, under similar circumstances.

18                    An "inherent," or "necessary" danger is  
19          one which, keeping in mind the nature of the  
20          sport of skiing, could not be eliminated or  
21          lessened, through the operator's exercise of  
22          reasonable care.

23                    A risk or danger which inheres in a  
24          sport, such as skiing, is one which is a part  
25          of the essential character of the sport and

1       intrinsic to it. Such risks or dangers are  
2       inherent because, in essence, they are the  
3       sport, the challenges without which the  
4       activity would not be sport at all, and the  
5       risks that the participants would not  
6       dispense with, even if they could.

7               For, example, if you are skiing down a  
8       mountain, and you see a lift tower standing  
9       there, it is obvious. And, the ski area has  
10      no duty to warn you of that danger, or take  
11      steps to eliminate it. That is to say, you  
12      assume the risk of that necessary danger  
13      which is inherent in the sport, and inherent  
14      to it, because lifts are required to carry  
15      people up the mountain.

16             Similarly, on a ski slope there are  
17      other skiers, and some of them may ski out of  
18      control. If one collides with you, the ski  
19      area is not automatically responsible.  
20      Inherent dangers that are obvious, and  
21      necessary to participation in a sport are, at  
22      least where a participant knows, or should  
23      know of, appreciates and voluntarily accepts  
24      them, do not make the sport operator, the  
25      baseball team, or the ski hill owner liable

1 to the participant. By inherent, I thus  
2 mean existing as an essential constituent, or  
3 characteristic of a sport.

4 Carrying this one step further, I  
5 charge you that ice on a New England ski  
6 slope, whether you call it "frozen granular"  
7 or "eastern hardpack" as an expert might do,  
8 is an obvious, and necessary hazard in the  
9 sport of skiing and you cannot hold Mount  
10 Snow responsible to Ms. Naim, merely because  
11 she lost control on that kind of ski surface,  
12 nor, I should add, does she make the claim  
13 that you should so hold.

14 On the other hand, there are risks that  
15 are latent, hidden, or concealed, such that  
16 a sports participant plainly does not assume.  
17 In the case of a skier, say, a speeding,  
18 unlit snowmobile coming up the mountain  
19 around a blind curve. Or, perhaps a piece of  
20 equipment negligently left just under the lip  
21 of a hill. A person cannot be held to assume  
22 a hidden risk. Thus, in our ski tower  
23 example, if the trails were so laid out, or  
24 so designed, as to lead skiers of limited  
25 ability to ski in their immediate vicinity

1           there might be negligence on the operator's  
2           part.

3                 Similarly, when a participant entrusts  
4           himself, or herself, to an instructor, at  
5           least where the instructor is a professional  
6           -- that is to say, where money is charged for  
7           the instruction -- one does not assume the  
8           risk of negligent instruction.

9                 What one pays for, and is entitled to  
10          is careful, and prudent instruction -- which  
11          the evidence in this case indicated involves  
12          -- in the case of skiing -- at least two  
13          elements, safety and teaching. The teaching,  
14          involving, perhaps, some measure of  
15          challenge, but not exposure to undue risk.

16                One thing you will have to decide in  
17          this case, is whether Mr. Robinson  
18          negligently, or carelessly, took Ms. Naim to  
19          ski on a slope under conditions beyond her  
20          capabilities and skills, as she, and her  
21          expert witness claims. Or, whether he simply  
22          was giving her the next stage of instruction,  
23          in a careful, and prudent manner as Mount  
24          Snow, and its expert witnesses, claim.

25                Considerations bearing on this, you may

1 find, will include Mr. Robinson's own level  
2 of teaching skill, his knowledge of the  
3 mountain, and the trail, or trails, to which  
4 they were going, and the conditions thereof,  
5 and the extent to which, if any, he apprised  
6 Ms. Naim of what she was going to encounter.

7 One does assume in skiing, then, that  
8 there will be falls, and perhaps injuries.  
9 And, these may occur in the course of a  
10 lesson. So, that a ski school or operator is  
11 not an insurer for all such accidents.

12 One, does not assume, however that a  
13 professional teacher will negligently -- that  
14 is to say, "carelessly," or "imprudently" --  
15 lead you prematurely beyond your capacities,  
16 and skills, to ski on a trail. Or, under  
17 conditions that are therefore especially  
18 hazardous to you.

19 Comparative negligence. If you find  
20 that both Mount Snow, and Ms. Naim, were  
21 negligent, and that the negligence of each  
22 was a proximate cause of the accident, and  
23 her resulting injuries; that is if you  
24 answered either Questions 1 or 2 and Question  
25 3, "yes," you should then proceed to the 4th

1 question.

2 Question 4, requires you to compare the  
3 degree to which Ms. Naim's negligence caused  
4 her injuries, with the degree to which  
5 Defendant, Mount Snow's negligence caused Ms.  
6 Naim's injuries. Ms. Naim can recover only  
7 if her negligence was equal to, or less than,  
8 that of Defendant, Mount Snow. If you find  
9 in making this comparison that Ms. Naim's  
10 causal negligence was greater in degree than  
11 the negligence of Defendant Mount Snow you  
12 must return a verdict for Defendant, Mount  
13 Snow. If you find that Ms. Naim was  
14 negligent in a degree less than, or equal to,  
15 that of Defendant, Mount Snow, you must  
16 return a verdict for Ms. Naim.

17 Thus, Question 4, of the  
18 interrogatories, asks you to determine, in  
19 terms of percentages, the degree of Ms.  
20 Naim's negligence, if any, and the degree of  
21 Mount Snow's negligence, if any.

22 On Question 4A, you should enter the  
23 degree to which you determine that Ms.  
24 Naim's negligence proximately caused her own  
25 injuries.

1           On Question 4B, you should enter the  
2           degree to which you determine that Defendant  
3           Mount Snow's negligence proximately caused  
4           Ms. Naim's injuries.

5           If you determine that Ms. Naim's,  
6           negligence, was greater than Mt. Snow's,  
7           negligence -- that is greater than 50% -- you  
8           should enter a verdict for Defendant, Mount  
9           Snow, on the "General Verdict Form."

10          If, however, you find Ms. Naim's  
11          negligence to be equal to, or less than, that  
12          of Mount Snow's, then you must go onto  
13          Question 5, which deals with the issue of  
14          damages.

15          I now charge you on the issue of  
16          damages. What amount Plaintiff shall  
17          recover, if anything, is solely a question  
18          for you to decide. The basic principle of  
19          damages, is that an injured person may  
20          recover full, just, and adequate compensation  
21          for all injuries and losses caused by the  
22          fault of the Defendant.

23          The purpose of an award of damages is  
24          to place an injured person in the position  
25          he, or she, occupied immediately before the

1 injury, as nearly as can be done, by an award  
2 of money damages.

3 To award damages, you must find that  
4 Plaintiff has proven, by a preponderance of  
5 the evidence, that each injury or item of  
6 damage occurred as a direct result or  
7 reasonably probable consequence of the  
8 negligent acts of Defendant. You may not  
9 award speculative damages.

10 Plaintiff, in this case, seeks to  
11 recover damages for medical expenses, pain  
12 and suffering, permanent injury, and loss of  
13 enjoyment of life.

14 With regard to medical expenses,  
15 Plaintiff is entitled to recover the  
16 reasonable value, not exceeding the cost to  
17 her, of any expenses incurred for medical  
18 treatment made necessary by the negligence of  
19 the Defendant. These costs cover all  
20 expenses from the date of the accident, to  
21 the present time. This includes the  
22 expenses which were reasonable and necessary,  
23 even if they might have been paid by someone  
24 other than the Plaintiff.

25 The parties have agreed that the

1 medical bills submitted by Plaintiff are  
2 reasonable, as to the amount charged for the  
3 services rendered in the community where Ms.  
4 Naim lives, and was surgically, and medically  
5 treated.

6 Pain and suffering. With regard to  
7 pain and suffering, Plaintiff may recover  
8 full, just, and adequate compensation for all  
9 pain, suffering, and discomfort caused by the  
10 injuries resulting from this accident.

11 This award should compensate Plaintiff  
12 for all pain, suffering, and discomfort, from  
13 the time of the accident to the present, and  
14 should include compensation for physical, and  
15 mental pain and suffering that you may find  
16 from the evidence.

17 In addition, you may award Plaintiff a  
18 sum of money to compensate her for all pain,  
19 suffering, and discomfort, from the time of  
20 the accident, to the present. And, should  
21 include compensation for physical and mental  
22 pain and suffering that you may find from the  
23 evidence.

24 In addition, you may award Plaintiff a  
25 sum of money to compensate her for all pain,

1 suffering, and discomfort, that she may  
2 suffer in the future -- with her life  
3 expectancy of 44. 7 years -- as a result of  
4 the accident.

5 You may -- now, permanent injury. You  
6 may also include in you verdict a sum that  
7 will justly, fully, and adequately compensate  
8 Plaintiff for the effects of any permanent  
9 injury or disability that you find, from the  
10 evidence, that she may have received.

11 Loss of enjoyment of life. You may  
12 also include in your verdict a sum that will  
13 justly, fully, and adequately compensate  
14 Plaintiff for the loss of capacity for the  
15 enjoyment of life, such as athletics, or  
16 other recreation, but also day-to-day living,  
17 that you find from the evidence that she may  
18 have received.

19 Now, in evaluating future pain and  
20 suffering, permanent injury, and loss of  
21 capacity for the enjoyment of life, you  
22 should take into consideration Plaintiff's  
23 age, her physical condition before, and  
24 after, the accident, her physical condition  
25 as it appears to be likely in the future, and

1       also her life expectancy, which is 44.7  
2       years.

3               Obviously, it is difficult to fix a  
4       monetary measure for pain and suffering,  
5       permanent injury, and loss of capacity for  
6       the enjoyment of life. But, if you find that  
7       these exist, it is your duty to award  
8       Plaintiff the amount that will, in your  
9       judgment, fully, fairly, reasonably, and  
10      adequately compensate her therefor.

11              To the extent that your award is for  
12      future damages, you should determine what  
13      sums will be needed in the future, and then  
14      determine what present sum, if prudently  
15      invested, will match future compensation  
16      needs as they arise.

17              If you should award any damages to  
18      Plaintiff, you should know that there will be  
19      no state, or federal, income taxes on the  
20      sum. You should not include these in your  
21      verdict; any amount to compensate for taxes.

22              If you will refer to the interrogatory  
23      form, again, Question 5 asks you to determine  
24      the total amount of damages to which the  
25      Plaintiff is entitled. In answering this

1 question, you do not weigh the degree of any  
2 party's negligence. You simply determine  
3 the total amount of damages as though the  
4 Defendant was a hundred percent at fault, and  
5 the Plaintiff was not at fault, at all.

6 If you find that Mount Snow was  
7 negligent, and that this negligence was a  
8 proximate cause of Plaintiff's injuries; that  
9 is if you answered either Question 1 or 2  
10 "yes," and you found that the degree of the  
11 Defendant's negligence to be 50% or greater,  
12 then you should go onto Question 6. In  
13 Question 6, you are simply required to reduce  
14 the amount of the damages by the percentage  
15 of Ms. Naim's negligence.

16 I will give you an example. This is  
17 merely to demonstrate the manner in which the  
18 total damages are derived. I do not intend  
19 to suggest that any figure which I give you  
20 has any bearing on the damages in this case.  
21 And, you should disregard the actual figure I  
22 use. It is merely intended to provide you  
23 with an example from a mathematical point of  
24 view.

25 Let us say, that you found that the

1 Defendant, Mount Snow was 80% at fault,  
2 Plaintiff, Ms. Naim, was 20% at fault, and  
3 the damages to the Plaintiff were \$1,000.  
4 Your answer to Question 6 would be \$800, or  
5 80% of \$1,000. Similarly, 60% would be \$600.

6 I want to remind you that the findings  
7 of fact in this case are entirely for you.  
8 The law is for the Court to determine, and  
9 whatever reference the Court has made to the  
10 evidence -- either in this charge or  
11 otherwise, or the claims of the parties -- is  
12 only for the purpose of applying the  
13 principles of law to the issues in this case,  
14 and without any purpose of indicating in the  
15 least degree how the Court may think that the  
16 case ought to be decided on the facts. That  
17 is for you, and you, alone, to determine.  
18 You should decide the case impartially,  
19 without sympathy, bias, or prejudice for  
20 either party, and reach a just verdict on the  
21 facts as you find them to be.

22 The exhibits which have been admitted  
23 into evidence during the trial are for your  
24 consideration in your deliberations.

25 Your answers to the Interrogatories,

1           and the general Verdict must be unanimous,  
2           and in writing, and signed by your  
3           foreperson. Your foreperson will return the  
4           signed and completed forms to the Court.

5                   Now, arrangements have been made, I  
6           understand, by the Marshall to take the Jury  
7           to lunch, and you, probably, shouldn't talk  
8           about the case until you get back to the jury  
9           room, and have all of the exhibits in front  
10          of you.

11                   And, we appreciate your care, and  
12          attention. Hope you enjoy your lunch.

13                               (Recess)

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1 I Kimberly A. Farhm, a CSR stenographic  
2 reporter within and for the States of Vermont  
3 and New Hampshire, duly authorized to  
4 practice Shorthand Court Reporting in the  
5 States of Vermont and New Hampshire, hereby  
6 certify that the foregoing Final Charge to  
7 the Jury in the Case of Vivien Naim vs. Mount  
8 Snow, Ltd., was taken by me in shorthand and  
9 thereafter reduced to typewriting by me, and  
10 the foregoing pages 2 through 38, inclusive,  
11 comprise a full, true, and correct  
12 transcription of my verbatim stenographic  
13 notes of Judge Oake's Final Charge to the  
14 Jury. I further certify that I am not  
15 interested in the event of this action.

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