Vermont Pattern Jury Instructions for Personal Injury Cases

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FORWARD

The Vermont bar has long been in need of pattern jury instructions for personal injury cases. This volume is an attempt to compile the more popular jury instructions that have been used throughout the State of Vermont by various Superior Court judges. Nearly every jury instruction in this volume has been used by Superior Court judges in numerous cases over the years.

Pattern jury instructions not only make the lives of the court and lawyers easier but also provide predictability as to what instructions will be read. This is especially true with personal injury cases where the subject matter is generally predictable and the jury instructions are subject to uniformity.

Each section of the Vermont Pattern Jury Instructions for Personal Injury Cases has been broken down in an attempt to allow a complete set of instructions to be compiled as applicable. Some sections will be applicable in every case (General Information and Closing Instructions, for example) while others will be unique to each case (Medical Negligence and Products Liability, for example).

The Vermont Trial Lawyers Association hopes that this collection of jury instructions will assist the courts and the general bar in providing ease and uniformity in the preparation of personal injury cases for trial.

Montpelier, Vermont

May 19, 1995

D. PATRICK WINBURN

President
Vermont Trial Lawyers Association

TABLE OF CONTENTS

I

GENERAL INFORMATION

1.1

INTRODUCTORY REMARKS

Ladies and gentleman of the jury, now that you have heard all of the evidence and the argument of counsel, it is my responsibility to inform you of the law which governs this case.

The Plaintiff alleges that [*insert brief statement of the Plaintiff's claim*]

The Defendant(s) deny the allegations; they claim that [*insert brief statement of the Defendant's defenses/claims*]

The testimony of the witnesses and the exhibits which you will have in the jury room are all that you can consider in arriving at your verdict. You may not speculate or guess about whether or not there is any other evidence or that other witnesses should have testified. You may think that there is more evidence which you should consider or that additional witnesses should have testified. However, you may not speculate about such evidence or about witnesses and what they have said.

You may not take into consideration or use in any way in arriving at your verdict any knowledge or information you may have had prior to the case or which you may have acquired during the case, except the evidence--the testimony and exhibits--admitted during the trial.

Sympathy for, or prejudice against, anyone is not a proper basis for, or be a factor in your verdict. I remind you that your oath as jurors requires you to set aside all sympathy and prejudice and reach your verdict objectively on the facts as you find them and the law as given to you by me now.

During the trial, I made various rulings on questions asked and on motions made. I made those rulings as a matter of law, and by making them I did not intend to indicate to you how you should decide any disputed question of fact or give the opinion of the Court as to how questions

of fact should be decided. You, the jury, are the triers of the facts, and it is your decision, and yours alone, as to how disputed questions of fact are to be decided.

During the course of the trial some questions asked have been stricken by me. They have been excluded. Some answers given have been ordered stricken from the record. Those questions and answers are not evidence. They are not for your consideration, and they should be completely disregarded by you in arriving at your verdict.

You should bear in mind that your decisions should be reached upon the evidence presented before you here in open court. The comments of counsel in their opening and closing arguments, while they may be helpful to you in weighing evidence, are not in themselves evidence and are not to be treated as such.

The various exhibits which have been introduced are evidence to be considered by you and may and should be taken by you to the jury room to assist you in your deliberation. They will be given to the Court Officer who will bring them to the jury room and give them to you. When you reach a verdict, they should be returned to the Court Officer.

1.2

CREDIBILITY OF WITNESSES

The credibility of the witnesses and the weight to be given their testimony are questions entirely for your consideration and determination.

You are not bound to give the same weight or credit to the testimony of each witness. You should give their testimony just such weight, or just such credit, and have just such faith in it, as you think it is fairly entitled to receive.

You may consider the witnesses' appearance on the stand, their candor or lack of candor, their openness or evasiveness, their feelings or bias, if any, their interest in the result of the trial, if any, their opportunities for observation, and their means of information. You may consider the reasonableness of the testimony they give, whether it is probable or unlikely in your experience and judgment. Believe as much or as little of the testimony of each witness as you think you ought to.

Where the testimony of two or more witnesses appears to be conflicting, try to reconcile this testimony, if you can, on the theory that all of these witnesses have sworn to tell the truth. But if you cannot do so, you are to determine all the evidence before you and decide which of the witnesses

is entitled to the greater credit. Sometimes two or more witnesses to a certain occurrence will differ in their narratives of what occurred, and that difference is not necessarily the result of any untruthfulness, but may come from the fact that they either saw or heard it from a different standpoint, or that they remember it differently. In fact, because of human limitations, this is often true where there are numerous details that are, or may be, observed.

The weight of the evidence presented by each side does not necessarily depend upon the number of witnesses testifying on one side or another. You must consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater weight than that of a larger number on the other.

In the final analysis, it is for you to find the facts from the evidence as you believe them to

be. You and you alone are the sole judge of the facts and the weight to be given to the testimony of the witnesses.

1.3

PRIOR INCONSISTENT STATEMENTS

If you find that any witness testified inconsistently with statements made [*under oath at deposition*][*prior to trial*], you may find that such inconsistencies impeach his or her testimony given during the trial. Impeachment of a witness means impairing, discrediting, weakening or rendering questionable his or her testimony. Where such a witness has given prior inconsistent testimony under oath, you may consider which version, if either, is true. In your judgment, you may disregard the entire testimony of the witness if you find it not worthy of belief, or you may believe such portions as you find credible, including the prior statement. This is all a question for your sound discretion.

COMMENTS

See generally 12 V.S.A. §1611 (written statements taken without the consent of a physician or parent), 12 V.S.A. §1642 (impeachment of own witness) and V.R.E. 613 (Prior Statements of Witnesses).

1.4

DEPOSITIONS: USE AS EVIDENCE

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 witnesses in advance of the trial by one or more of the attorneys for the parties of 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. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand.

COMMENTS

See generally V.R.E. 804 regarding testimony of unavailable witnesses.

1.5

EXPERT WITNESSES

Some of the testimony introduced in this case has been what we call expert testimony. The following people gave opinion testimony as experts:

[*List expert witnesses*]

The rules of evidence ordinarily do not permit a witness to testify as to his or her opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education or experience has become expert in any art, science, profession or calling, may be permitted to state his or her opinion as to a matter in which he or she is versed and which is material to the case, and he or she may also state the reasons for such opinions.

As with ordinary witnesses, you should determine their credibility from their demeanor, candor, and possible interest in the outcome of the trial, and then give their testimony the weight you think it deserves. You may reject an opinion entirely if you conclude the reasons given in support of it are unsound or insufficient. You may accept an opinion in whole or in part, to the extent you find it worthy of weight and belief. The weight to be given expert testimony is solely a matter for your determination.

COMMENTS

See 12 V.S.A. §1643, V.R.E. 702, V.R.E. 703 and V.R.E. 704 generally for parameters of expert testimony.

II

ISSUES

2.1

RECITATION OF ISSUES: ALL NEGLIGENCE ISSUES STILL PART OF THE CASE

The issues for your determination on the claim of the Plaintiff, against the Defendant, are whether the Defendant was negligent and, if so, whether such negligence was a proximate cause of loss, injury or damage sustained by the Plaintiff.

These terms will be discussed more fully later in this charge.

If the evidence does not support the claim of the Plaintiff, then your verdict should be for the Defendant.

If however, the evidence does support the claim of the Plaintiff, then you shall consider the defense(s) raised by the Defendant.

On the defense, the issues for your determination are whether the Plaintiff was negligent and, if so, whether such negligence was a proximate cause of the damage complained of.

If the evidence does not support the defense and the evidence does support the claims of the Plaintiff, then your verdict should be for the Plaintiff in the total amount of [*his*][*her*] damages.

However, if the evidence shows that the Plaintiff was negligent and that the negligence of each contributed as a legal cause of the damage sustained by the Plaintiff, you should determine what percentage of the negligence of all parties, the Plaintiff and the Defendant, is chargeable to each. This will be more fully explained later in this charge.

2.2

PREEMPTIVE CHARGE: NEGLIGENCE NOT AN ISSUE

The Court has determined and now instructs you, as a matter of law, that the Defendant was negligent. The issue for your determination on the claim of the Plaintiff is whether such negligence was a legal cause of loss, injury, or damage sustained by the Plaintiff.

2.3

PREEMPTIVE CHARGE: RESPONDEAT SUPERIOR NOT AN ISSUE

A corporation such as [*insert corporation*] can act only through its officers, employees and agents. The Court finds, and instructs you, that [*insert corporation*] is responsible and liable for any acts or omissions caused by its [*employees*][*agents*][*officers*]. For purposes of your deliberations, you should consider any act or omission of [*insert name of employee, agent, officer*] to be the act and omission of [*insert corporation*].

COMMENTS

See generally Paris v. St. Johnsbury Trucking Co., 395 F.2d 543 (2d Cir. 1968) and Ploof v. Putnam, 83 Vt. 252, 75 A.277 (1910).

2.4

RESPONDEAT SUPERIOR LIABILITY: MASTER-SERVANT

The law in Vermont is that an employer is responsible for the negligent acts of [*his*][*her*][*its*] employees so long as the duties carried out were within the scope of the employee's employment. (See Ploof v. Putnam, 83 Vt. 252, 75 A. 277 (1910); Anderson v. Toombs, 119 Vt. 40, 117 A.2d 250 (1955) and Paris v. St. Johnsbury Trucking Co., 393 F.2d 543 (1968)).

The test is whether the employee is acting for the employer in doing what [*he*][*she*] is doing with the knowledge of the employer, with [*his*][*her*][*its*] assent and by [*his*][*her*][*its*] direction, either expressed or implied. (See Ballou v. Stebbins, et al., 124 Vt. 417, 419, 207 A.2d 134 (1965). To constitute the relation of employer and employee, it is not necessary that there is a written agreement between them and the relationship can be implied based on the circumstances. (See Ballou at p. 419).

COMMENTS

See Ploof v. Putnam, 83 Vt. 252, 75 A. 277 (1910); Anderson v. Toombs, 119 Vt. 40, 117 A.2d 250 (1955); Paris v. St. Johnsbury Trucking Co., 393 F.2d 543 (1968); Ballou v. Stebbins, et al., 124 Vt. 417, 419, 207 A.2d 134 (1965) and Young v. Lamson, 121 Vt. 474, 160 A.2d 873 (1960).

2.5

RESPONDEAT SUPERIOR LIABILITY: AGENCY

An agent is a person who is employed to act for another, and whose actions are controlled by his or her employer or are subject to the employer's right of control. An employer is responsible for the negligence of his or her agent if such negligence occurs while the agent is performing services which they were employed to perform or while the agent is acting at least in part because of a desire to serve their employer and is doing something that is reasonably incidental to the employment.

The existence of an agency relationship does not depend on the label parties give it and may be demonstrated from circumstances of particular situations or conduct of the parties. Formality is not essential to the creation of the relationship which can arise by verbal agreement or be implied from circumstances and can arise from a single transaction.

COMMENTS

See generally Bills v. Wardsboro School District, 150 Vt. 541, 554 A.2d 673 (1988) and cases cited therein.

2.6

PARTNERSHIP LIABILITY

The Defendants [*insert name*] and [*insert name*] were partners with respect to the ownership of [*insert*]. As partners, each is individually liable for any loss or injury to the plaintiff caused by the wrongful act or omission of any partner acting in the ordinary course of the business of the partnership. In other words, if a partner injures someone carrying out work on behalf of the partnership, all partners are liable for the damage which has occurred.

COMMENTS

See generally 11 V.S.A. §1207 and Concra Corporation, et al v. Andrus, 141 Vt. 169, 446 A.2d 363 (1982).

2.7

BURDEN OF PROOF AND PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on a particular issue that means that, considering all of evidence in the case, their contention on that issue must be established by a "preponderance of the evidence".

A "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so. A "preponderance of the evidence" does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, the weight and the effect that it has on your mind.

The burden of proof in this civil case is less than the standard of proof "beyond reasonable doubt" required in criminal cases. In this case a party may prevail on an issue where that party has the burden of proof even if you have reasonable doubts, provided that you find that the evidence supporting their claim exceeds the evidence on the other side.

2.8(a)

COMPARATIVE NEGLIGENCE: ONE DEFENDANT

The Defendant in this case claims that the Plaintiff was comparatively negligent. Therefore, the burden of proof is on the Defendant to prove each and every element of this claim.

The defendant must prove each and every one of the following elements by a preponderance of the evidence:

(1) First, the Defendant must prove that the Plaintiff had a duty to act with reasonable, ordinary care under substantially similar circumstances.

(2) Second, the Defendant must prove that the Plaintiff failed to act with reasonable, ordinary care under substantially similar circumstances, that is, the Plaintiff failed to use ordinary care. (a) Ordinary care is defined as that care which a reasonable, prudent person would exercise under substantially similar circumstances in order to avoid injury to themselves or to the person or property of others; and,

(3) Third, the Defendant must prove that the Plaintiff's failure to use ordinary care was the proximate cause of the harm. If you find that the Plaintiff failed to use ordinary care then you must decide if that failure was a proximate cause of the harm.

(a) A person's failure to use ordinary care is a proximate cause if that failure was a substantial factor in bringing about the harm. However, there may be more than one proximate cause of the harm including the Defendant's proximate cause of Plaintiff's harm.

If you find that the Plaintiff did use ordinary care under the circumstances, then the Plaintiff is not comparatively negligent.

If you find that the Plaintiff did not use ordinary care under the circumstances but the failure to use ordinary care was not a proximate cause of the harm, then the Plaintiff is not comparatively negligent.

If you find that the Plaintiff was comparatively negligent and that Plaintiff's negligence was a proximate cause of the harm, then you must compare the negligence of the Plaintiff with the negligence of the Defendant.

Consider the entire negligence in the case that was the proximate cause of the harm. The negligence of the Plaintiff and the negligence of the Defendant must total 100%.

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.

If the Plaintiff's negligence is 50% or less, then the Plaintiff is entitled to recover from the Defendant. Once you have made this determination, then you must determine the total amount of damages incurred by the Plaintiff.

If you find that the Plaintiff is 50% or less comparatively negligent, then apply that percentage attributable to the Defendant's negligence to the total amount of Plaintiff's damages. That is, multiply the percentage of the Defendant's negligence to the total amount of the Plaintiff's damages and the result is the amount of damages you should award to the Plaintiff.

COMMENTS

See 12. V.S.A. §1036:

"Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." Amended 1979.

2.8(b)

COMPARATIVE NEGLIGENCE: MULTIPLE DEFENDANTS

The Defendants in this case claim that the Plaintiff was comparatively negligent. Therefore, the burden of proof rests with the Defendants to prove each and every element of this claim.

The Defendants must prove each and every one of the following elements by a preponderance of the evidence:

(1) First, the Defendants must prove that the Plaintiff had a duty to act with reasonable, ordinary care under substantially similar circumstances.

(2) Second, the Defendants must prove that the Plaintiff failed to act with reasonable, ordinary care under substantially similar circumstances, that is, the Plaintiff failed to use ordinary care.

(a) Ordinary care is defined as that care which a reasonable, prudent person would exercise under substantially similar circumstances in order to avoid injury to themselves or the person or property of others; and,

(3) Third, the Defendants must prove that the Plaintiff's failure to use ordinary care was the proximate cause of the harm. If you find that the Plaintiff failed to use ordinary care, then you must decide if that failure was a proximate cause of the harm.

(a) A person's failure to use ordinary care is a proximate cause if that failure was a substantial factor in bringing about the harm. However, there may be more than one proximate cause of the harm including the Defendant's proximate cause of the Plaintiff's harm.

If you find that the Plaintiff did use ordinary care under the circumstances, then the Plaintiff is not comparatively negligent.

If you find that the Plaintiff did not use ordinary care under the circumstances but the failure to use ordinary care was not a proximate cause of the harm, then the Plaintiff is not comparatively negligent.

If you find that the Plaintiff was comparatively negligent and the Plaintiff's negligence was a

proximate cause of the harm, then you must compare the negligence of the Plaintiff with the total combined negligence of all of the individual Defendants.

Consider the entire negligence in the case that was the proximate cause of the harm. The negligence of the Plaintiff and the combined negligence of the individual Defendants must total 100%.

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 Defendants.

If the Plaintiff's negligence is 50% or less than the total combined negligence of all of the Defendants, then the Plaintiff is entitled to a recovery in this action. Once you have made this determination then you must determine the total amount of damages incurred by the Plaintiff.

If you find that the Plaintiff is 50% or less comparatively negligent, then apply the percentage of negligence attributable to each individual Defendant to the total amount of the Plaintiff's damages. That is, multiply the percentage of each individual Defendant's negligence to the total amount of the Plaintiff's damages and the result is the amount of damages each individual Defendant is responsible for and the amounts you should award to the Plaintiff.

COMMENTS

See 12. V.S.A. §1036:

"Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." Amended 1979.

As stated in Howard v. Spafford 132 Vt. 434, 437, 321 A.2d 74 (1974):

"[12 V.S.A. §1036] does away with joint and several liability among joint tortfeasors held liable in a judgment. They are liable only severally, not jointly; their liability is only in the proportion that their negligence bears to the causal negligence of the sued defendants held liable." But see Plante v. Johnson, 152 Vt. 270, 565 A.2d 1346 (1989) which, in dicta, states that liability is joint and several as to multiple defendants when the plaintiff is not negligent.

2.8(c)

ASSUMPTION OF RISK: COMMON LAW

It is recommended that no charge be given.

COMMENTS

"While we have not expressly so held, in this aspect it seems now well accepted that the doctrine is logically only a phase of contributory negligence and that use of assumption of risk language is irrelevant and confusing in a jury instruction on comparative negligence." Sunday v. Stratton Corporation, 136 Vt. 293, 304, 390 A.2d 398 (1978). See also Perkins v. Windsor Hospital Corp., 142 Vt. 305, 310, 455 A.2d 810 (1982); and Favreau v. Miller, 156 Vt. 222, 231, 591 A. 2d 68 (1991).

2.8(d)

ASSUMPTION OF RISK: SPORTS PARTICIPATION STATUTE

The Defendant claims that the Plaintiff was a person 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. (12 V.S.A. §1037). Therefore, the Defendant has the burden of proving by a preponderance of the evidence this affirmative defense.

In advancing this affirmative defense, the Defendant alleges that there are certain dangers which are inherent to, and form a necessary part of, the very sport in which the Plaintiff was engaged. The Defendant claims that the Plaintiff accepted these dangers by merely engaging in the sport of [*insert sport*]. The Defendant must prove that there are dangers inherent in the specific sport in which the Plaintiff was participating and that these dangers were both "obvious and necessary".

"Obvious" has a particular definition when used here. "Obvious" does not mean something that is easily observed. Rather, an obvious risk is one that is inherent in the very nature of the sport itself. The Defendant must prove that the danger was obvious. If you find that the danger was not obvious, then the Defendant cannot succeed with this defense.

A "necessary risk" is one where the danger exists because the effort required to remove the danger would place an unreasonable burden upon the Defendant. In other words, the Defendant claims there simply was no obligation toward the Plaintiff because it would place an unreasonable burden on the Defendant to discover or learn of the danger; to warn the Plaintiff about the danger; or, to prevent or extinguish the danger. If you find, based on a preponderance of the evidence, that it would have taken unreasonable effort on the part of the Defendant to discover or learn of the danger, to warn about the danger, or to prevent or extinguish the danger, then the danger was a necessary risk of the sport in which the Plaintiff was engaged. The Defendant must prove that the danger was "necessary".

If you find that the Defendant had an obligation to discover or learn of the danger; to warn the Plaintiff about the danger; or to prevent or extinguish the danger, then the danger was not a

"necessary risk" and the Defendant cannot succeed with this defense. Whether the danger causing the Plaintiff's harm was both an "obvious" and "necessary" risk is a question for you to decide. The burden of proof rests with the Defendant to establish that the risk was both "obvious" and "necessary".

COMMENTS

See 12 V.S.A. §1037. (Acceptance of inherent risks). "Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein so far as they are obvious and necessary."

Primary assumption of risk is incorporated into 12 V.S.A. §1037. See Frant v. Haystack Group, Inc., 5 Vt.L.W. 140 (1994), 641 A.2d 765 (Vt. 1994).

2.8(e)

SEAT BELT DEFENSE

(This request is sought only if seat belt evidence is kept in the case.)

The burden is on the Defendant to prove that there was a seat belt in the vehicle that the Plaintiff was driving, and that the seat belt was fully functional, that the non-use of that fully functional seat belt constituted negligence under the circumstances, that the use of the seat belt would have prevented all or some of [*his*][*her*] injuries, and the extent to which the use of the seat belt would have prevented or reduced [*his*][*her*] injuries. If the Defendant does not prove all of these elements, you must disregard the question of seat belt usage completely in deciding what damages to award the Plaintiff. The only reduction in damages for comparative negligence that you can apply in this case is for non-use of a fully functional seat belt. Therefore, if the Defendant has failed to prove each of the elements that I have just gone over with you by a preponderance of the evidence, then this defense is not available to the Defendant and should not be considered by you further.

If the Defendant proves by a preponderance of the evidence each of the elements which I set out above with respect to seat belts, you may reduce the damages to which [*he*][*she*] otherwise is entitled by that percentage as you find constituted negligence on [*his*][*her*] part under the circumstances.

In considering whether it was negligence for the Plaintiff not to use a seat belt, you should consider [*his*][*her*] familiarity with the particular car that [*he*][*she*] was [*driving*][*travelling in*], the distance [*he*][*she*] had to travel and any other factors which you believe have any bearing upon whether a reasonably prudent driver would have used a seat belt under the circumstances and therefore whether the Plaintiff's non-use of a seat belt at the time of this accident was negligence. In examining this defense and in deciding whether the Defendant has met [*his*][*her*] burden of proof as to seat belt usage, you should consider the fact that at the time of this accident there was no law in the State of Vermont that required a person to wear a seat belt or to anticipate

the happening of an accident or to anticipate that another person will cause an accident.

COMMENTS

For accidents occurring after January 1, 1994, the seat belt defense is no longer valid in Vermont. See 23 V.S.A. §1259.

Smith v. The Goodyear Tire & Rubber Co., 600 F. Supp. 1561 (D.Vt. 1985) holds the defense to be valid for pre-1994 accidents. But see Lahouillier v. Jamel, S210-86LC, November 9, 1988, Lamoille County Superior Court in which Judge Kilburn rejected the defense. Given the expression of Vermont's public policy by enacting 23 V.S.A. §1259, Goodyear may no longer be controlling even for pre-1994 accidents.

2.8(f)

MITIGATION OF DAMAGES

The Plaintiff has a duty to mitigate [*his*][*her*] damages. Mitigation relates to protective or preventative measures to be taken after the operation of the original causative factor, with a view to reducing the harm or preventing its increase. Thus, if you find that Plaintiff is entitled to recover damages, and that some or all of the Plaintiff's injuries were exacerbated or increased as a result of a failure by the Plaintiff to so some act which would have avoided that harm, then you must reduce the Plaintiff's damages in proportion to the amount of injury attributable to that failure to exercise reasonable diligence to prevent an increase of the injuries.

COMMENTS

See generally Carton v. Continental Homes of New Hampshire, 134 Vt. 362, 360 A.2d 96 (1976) and Sheldon v. Northeast Developers Inc., 127 Vt. 15, 238 A.2d 775 (1968).

III

NEGLIGENCE

3.1

NEGLIGENCE DEFINED

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. 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.

COMMENTS

See Sorrell v. White, 103 Vt. 277, 282, 153 A.359 (1931). See also, Thurber v. Russ Smith, Inc., 128 Vt. 216, 219, 260 A.2d 390 (1969). (Negligence has been defined as the absence or want of care required by the circumstances; and failure to exercise care which the circumstances reasonably require or justly demand.)

3.2

NEGLIGENCE OF A CHILD

Since [*Plaintiff*][*Defendant*] is a minor and not an adult, you should consider [*his*][*her*] age, intelligence and experience, as well as [*his*][*her*] knowledge of the situation and its dangers in determining [*his*][*her*] negligence.

COMMENTS

See Beaucage v. Russell, 127 Vt. 58, 64, 238 A.2d 631 (1968) ("when the question of a child's contributory negligence arises, his age, intelligence and experience are to be considered as well as his knowledge of the situation and its dangers"); Bottum's Admr. v. Hawks, 84 Vt. 370, 385, 79 A. 858 (1911) (a child's age, intelligence and want of experience is considered respecting the question of his contributory negligence). Cf., Johnson's Admr. v. Rutland Railroad Co., 93 Vt. 132, 140, 106 A. 682 (1919) (contributory negligence will not be imparted to child of tender years, unless the child has reached the stage of development and is of such intelligence that he is capable of caring for his own safety).

3.3

NEGLIGENCE OF A COMMON CARRIER

In operating the [*chairlift*][*bus*][*train*][*airplane*] involved in this case, the Defendant acts as a common carrier. Under the law, a common carrier is a person or company which provides transportation to the general public in return for compensation. In addition to [*Defendant*], other examples of common carriers include [*chairlifts*][*buslines*][*railroads*][*taxis*] and [*airlines*].

As a common carrier, the Defendant is required to exercise the highest degree of care commensurate with the circumstances involved. If you determine in this case that the operation of the [*chairlift*][*bus*][*train*][*taxi*][*airplane*] was in some respect dangerous, the law requires the Defendant, as a common carrier, to take all reasonable steps to remedy the danger and to give the public fair warning of any remaining danger.

If you find that the Defendant failed to take steps necessary to remove any danger or failed to warn the Plaintiff of any remaining danger present before [*he*][*she*] boarded the [*chairlift*][*bus*][*train*][*taxi*][*airplane*], you may find that the Defendant is liable to the Plaintiff for all injuries caused by such defect, danger or failure to warn.

COMMENTS

See Fisher v. Mount Mansfield Co., 283 F.2d 533, 534 (2d Cir. 1960); Ploesser v. Burlington Rapid Transit Co., 121 Vt. 133, 149 A.2d 728 (1959); Grauer v. State, 15 Misc. 2d 471, 476, 187 N.Y.S. 2d 994, 999) aff'd, 9 App. Div. 2d 829, 192 N.Y.S.2d 647 (1959) and Lisman, "Ski Injury Liability," 43 U. Colo. L. Rev. 307, 307-12 (1972).

3.4

NEGLIGENCE BY VIOLATION OF STATUTE OR ORDINANCE

The following law is known as a safety [*statute*][*ordinance*] and is to be considered by you in your determination of whether the [*Plaintiff*][*Defendant*] was negligent:

[*insert statute or ordinance*]

You may consider whether the [*Plaintiff*][*Defendant*] failed to conform [*his*][*her*] conduct to this [*statute*][*ordinance*] in determining whether the [*Plaintiff*][*Defendant*] was negligent under the circumstances.

COMMENTS

See Favreau v. Miller, 156 Vt. 222, 233, 591 A.2d 68 (1991) and compare, Burns V. Bombard, 128 Vt. 178, 181, 260 A.2d 219 (1969) ("duties of the parties and effect of safety statutes are all merged in the establishment of the standard of conduct of prudent persons in the same circumstances.") c.f., Duncan v. Wescott, 142 Vt. 471, 474, 457 A.2d 277 (1983) (breach of safety statute establishes rebuttable presumption of negligence); Zaleskie v. Joyce, 133 Vt. 150, 153, 333 A.2d 110 (1975) (same); Campbell v. Beede, 124 Vt. 434, 436, 207 A.2d 236 (1965) (same); Smith v. Blow & Cote, Inc., 124 Vt. 64, 67, 196 A.2d 489 (1963) (same); Smith v. Grove, 119 Vt. 106, 111-112, 119 A.2d 880 (1956) (violation of a safety statute "makes a prima facie case of negligence. It gives rise to a rebuttable rather than a conclusive presumption of negligence. The presumption, of itself, alone, contributes no evidence and has no probative value. It takes the place of evidence temporarily. Its function is to shift the burden of going forward with evidence on the presumed fact to the party against whom the presumption operates. When such a party produces evidence fairly and reasonably tending to show that the fact is not as presumed the presumption disappears. It is for the court to consider in ruling as to whether there has been sufficient evidence so introduced to make it proper to submit the issue to the jury. If so the fact in issue is to be established by the evidence without aid from the presumption. It is not for consideration by the jury, for they are concerned only with the evidence presented to them."(citing cases)).

3.5

NEGLIGENCE OF A LANDLORD

Landlords, just like other people, must exercise reasonable care. A landlord may be found liable for injury to any person caused by the landlord's negligence in caring for the property.

Where a landlord had notice, or with due diligence should have known of a condition dangerous to the safety of tenants, [*he*][*she*][*it*] is required to use ordinary care to make the property safe. That is, [*he*][*she*][*it*] must take such reasonable steps as are necessary to take care of the problem within a reasonable time.

Some conditions are so serious that prompt measures are required to be taken. Others are not so serious and can await a convenient moment to get to them. What is reasonable will depend upon the circumstances of the particular case.

Therefore, the Plaintiff must prove each of the following essential elements of [*his*][*her*] case by a preponderance of the evidence:

a. That the condition of [*insert condition*] under consideration was unreasonably dangerous;

b. That the landlord knew, or with the exercise of reasonable care should have known, that there was a dangerous condition.

c. That the landlord failed to take reasonable steps within a reasonable time to make [*insert the area of the premises complained of*] appropriately safe for the tenants;

d. That the unreasonable condition was the proximate cause of injuries to the Plaintiff.

It might be well to define what we mean by the term "unreasonably dangerous." Something is unreasonably dangerous when it has a tendency to cause injury beyond the degree ordinarily to be expected by a reasonably prudent and knowledgeable user. A [*stairway, walkway, etc.*] is unreasonably dangerous when its likelihood of causing injury is beyond that ordinarily expected and which should not be expected to be safely negotiated by the use of ordinary care.

COMMENTS

This is, in the most part, the charge given in Favreau v. Miller, 156 Vt. 222, 591 A.2d 68 (1991). In this decision the Supreme Court approved the language of the charge. The only qualification the Court mentioned was a problem with "assumption of risk" language that the lower court had also included. In addition, the Court overturned the so-called "control test" set forth in Smith v. Monmaney, 127 Vt. 585, 255 A.2d 674 (1969).

See also Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973) cited with approval in Favreau.

3.6

MEDICAL NEGLIGENCE

This is a medical malpractice action against the defendant, Dr. [*name*]. Under our law, medical malpractice simply means negligence by a health care provider. It is your duty to determine whether the defendant, Dr. [*name*] was negligent in connection with [*his*][*her*] care and treatment of the Plaintiff.

In determining whether the Defendant Dr. [*name*] was negligent, there are certain principles of law that you are to follow. The Plaintiff has the burden of proving by a preponderance of the evidence the elements of medical negligence. The three elements of medical negligence that the Plaintiff has the burden of proving are as follows:

1. The degree of knowledge or skill possessed or care ordinarily exercised by a reasonably skillful, careful and prudent health care professional engaged in a similar practice under the same or similar circumstances whether or not within the State of Vermont. This is also known as the standard of care.

2. That the defendant, Dr. [*name*], either lacked this degree of knowledge or skill or failed to exercise this degree of care. This is known as a deviation from the standard of care.

3. That as a result of this lack of knowledge or skill or the failure to exercise this degree of care, the Plaintiff suffered injuries that would not have otherwise been incurred.

(See 12 V.S.A. §1908and Deyo v. Kinley, 152 Vt. 196, 205, 565 A.2d 1286 (1989))

Put more simply, the Plaintiff must prove:

One, the applicable standard of care;

Two, that the Defendant lacked knowledge of or failed to exercise the applicable degree of care or the Defendant failed to apply the standard of care; and,

Three, as a proximate result of the defendant's failure, the Plaintiff suffered damages.

(See Phinney v. Vinson, 158 Vt. 646, 605 A.2d 850 (1992))

When determining the standard of care that Dr. [*name*] owed to the Plaintiff, you should understand that the duty imposed by law on every person providing medical care is to exercise

that degree of care which would ordinarily be expected of a reasonably skillful, careful and prudent health care provider under the same or similar circumstances.

(See 12 V.S.A. §1908(1))

Expert witnesses have testified regarding the standard of care to be exercised in this case. This testimony will provide you with guidance in your determination of the standard of care to be applied in this case.

Once you have determined that standard of care, you must then decide whether Dr. [*name*] deviated from that standard of care, that is, whether Dr. [*name*]'s actions met or fell below the standard of care to be used in this case. In determining whether Dr. [*name*] deviated from the standard of care, you should consider the following:

[*insert one or more of the following paragraphs as applicable*]

a) The law imposes on the physician, who undertakes the care of a patient, the obligation of due care to exercise an amount of skill common to his or her profession, without which he or she should not have taken on the treatment of the patient. (See Douthwaite, Jury Instructions on Medical Issues section 3-12 (4th Ed. 1992))

b) A physician is obliged to give [*his*][*her*] patients as careful and thorough an examination as the circumstances require, using such care, skill and prudence, and such method of diagnosis for discovering the nature of the ailments as are required by the rules of reasonable medical practice.

c) Dr. [*name*] is charged with the knowledge which [*he*][*she*] would have and could have acquired had [*he*][*she*] performed as careful and thorough an examination as the circumstances required, using such methods of diagnosis as are required by the rules of good medical practice.

d) Dr. [*name*] holds [*himself*][*herself*] out as a specialist in [*insert specialty*]. Dr. [*name*] is board certified in [*insert speciality*]. As such, Dr. [*name*] must use [*his*][*her*] skill and knowledge as a specialist in a manner consistent with the special degree of skill and knowledge ordinarily possessed by other board certified [*insert speciality*], who have devoted

special study and attention to that expertise. (See Rann v. Twitchell, 82 Vt. 79, 83, 71 A. 1045 (1909); Short v. Kinkade, 684 p.2d 210, 211 (Colo. 1983); and Restatement (Second) of Torts §299A, comment D.)

e) In evaluating the conduct of Dr. [*name*], the test is whether [*he*][*she*], in the performance of [*his*][*her*] services, either did something that board certified [*insert specialty*] of ordinary skill, care and diligence would not have done or that [*he*][*she*] failed or omitted to do some particular thing which board certified [*insert specialty*] would have done under the same or similar circumstances.

f) By treating the Plaintiff, Dr. [*name*] represented that [*he*][*she*] possessed the appropriate level of knowledge, training and skill possessed by physicians practicing the same speciality of [*insert specialty*] and that [*he*][*she*] would employ such knowledge, training, care and skill in [*his*][*her*] treatment of Plaintiff. Lack of skill or a failure to apply that skill, if it is possessed, are two grounds of liability for medical negligence. The Plaintiff may prevail by showing either that Dr. [*name*] lacked this skill and knowledge or that [*he*][*she*] failed to apply [*his*][*her*] skill and knowledge.

g) If you find that Dr. [*name*] knew or should have known that [*he*][*she*] did not have the requisite skill, knowledge or facilities to treat the Plaintiff's illness properly, and that a more favorable result would likely be obtained by another specialist; and you further find that specialist was available but that Dr. [*name*] did not transfer the Plaintiff to that specialist and that this failure to transfer [*him*][*her*] resulted in an injury to the Plaintiff, then you may find Dr. [*name*] liable. (See Douthwaite, Jury Instructions on Medical Issues, section 3-40 (4th ed. 1992); see also Faulkner v. Pezeshki, 337 N.E. 2d 158, 164 (Ohio 1975)). A physician may also be held liable for [*his*][*her*] negligent failure to use or obtain and heed the results of standard diagnostic tests or procedures such as [*insert tests*] to identify the patient's problem. Dr. [*name*] may also be held liable for any delay in using or obtaining the results of any such tests or procedures. (See Forestal v. Magendantz, 848 F.2d 303 (1st Cir. 1988) and Douthwaite, Jury Instructions on Medical Issues, section 3-36).

h) Please keep in mind that a physician is not required to possess or to exercise the highest possible degree of knowledge, skill or care. Rather Dr. [*name*] should be judged only

in a comparison to that degree of knowledge, skill or care ordinarily possessed or exercised by a reasonably skillful, careful and prudent board certified [*insert speciality*] under the same or similar circumstances. (See 12 V.S.A. §1908).

COMMENTS

Jury instructions to the effect that physicians cannot be held liable for "errors in judgment" as well as "no guarantee" and "bad results" charges are disfavored in Vermont. See Deyo v. Kinley, 152 Vt 196, 206-208, 565 A.2d 1286 (1989).

Some medical negligence cases do not require an expert. "When a physician's lack of care has been such to require only common knowledge and experience to understand and judge it, expert testimony is not required to establish that care." Largess v. Tatem, 130 Vt. 271, 278-79, 291 A.2d 398 (1972).

For proximate cause standards required in medical negligence cases see Charter v. Central Vermont Hospital, 155 Vt. 230, 235, 583 A.2d 889 (1990).

Also see generally Senesac v. Associates in Obstetrics and Gynecology 141 Vt. 310, 449 A.2d 900 (1982).

3.6(a)

LACK OF INFORMED CONSENT

It is the duty of a physician to give to a patient, whose situation permits, all information material to the patient's decision of whether to undergo the proposed treatment. Lack of informed consent means the failure of the physician providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

A physician has obtained the informed consent of his patient for treatment where, 1) the physician is aware of the risks involved in the proposed treatment, 2) [*he*][*she*] has informed the patient about them, and 3) before the proposed treatment is administered, [*he*][*she*] has obtained the patient's consent to such treatment.

If the Plaintiff is to prevail in [*his*][*her*] claim against Dr. [*name*] on the basis of lack of informed consent, [*he*][*she*] must show by a preponderance of the evidence that the Defendant failed to disclose to [*him*][*her*] such alternatives to treatment, and the reasonably foreseeable risks and benefits involved, as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting [*him*][*her*] to make a knowledgeable evaluation. Furthermore, [*he*][*she*] must show that if [*he*][*she*] had been given the required information [*he*][*she*] would not have proceeded.

It is a defense to the claim of lack of informed consent that the risk not disclosed is too commonly known to require disclosure and that the risk is not substantial. It is also a defense to the claim of lack of informed consent, that a reasonably prudent person in the patient's position would have undergone the treatment if [*he*][*she*] had been fully informed. On these defenses, the physician has the burden of proof.

COMMENTS

See 12 V.S.A. §1909.

3.7

LEGAL NEGLIGENCE

The appropriate standard of care to which a lawyer is held in the performance of professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction. The relevant geographic area to be considered by you is not the community in which the attorney's office is located or the nation as a whole, but the jurisdiction in which the attorney is licensed to practice.

COMMENTS

See Russo v. Griffin, 147 Vt. 20, 510 A.2d 436 (1986).

3.8

DRAM SHOP LIABILITY

Vermont law allows a person who has been injured in person, property, or means of support by an intoxicated person, or because of an intoxicated person, to bring an action against any person or persons who in whole or in part caused such intoxication by selling or furnishing that person with intoxicating liquor. (7 V.S.A. §501.)

In order to hold the Defendant liable in this case, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That the Plaintiff was injured in [*his*][*her*] person and/or property by the Defendant;
2. That the Defendant was intoxicated at the time of the accident;
3. That the Plaintiff's injuries were a result of the Defendant's intoxicated state; and,
4. That the [*alcohol serving establishment*] caused or contributed to the Defendant's intoxicated state by serving liquor to [*him*][*her*] at a time when [*he*][*she*] was apparently under the influence of intoxicating liquor.

The phrase "apparently under the influence of intoxicating liquor" means a state of intoxication accompanied by a perceptible act or series of actions which present signs of intoxication. (7 V.S.A. §501 (h)).

The prohibition of sales to a person "apparently" under the influence of liquor requires that the purchaser's intoxication be observable. Moreover, the observation must be made by the one selling the liquor. It is not enough that the purchaser's intoxication was apparent to someone else. The seller, of course, is not permitted to close his eyes to that which is apparent. The seller has a duty to observe that which is observable to a reasonable person. (See Clymer v. Webster, 156 Vt. 614, 596 A.2d 905 (1991) and In re Tweer, 146 Vt. 36, 28, 498 A.2d 499 (1985)).

The Plaintiff may show by circumstantial evidence that the Defendant was intoxicated that is, if you find that the Defendant was apparently under the influence of intoxicating liquor either before or after [*he*][*she*] was served by [*the liquor serving establishment*], and that the

timing was such that the intoxicated condition could be supposed to be continuous, you may find that the Defendant was apparently intoxicated at the time [*he*][*she*] was served. There does not have to be any direct evidence that the Defendant was apparently under the influence of intoxicating liquor at the precise moment a drink was served to [*him*][*her*].

If you find that the Plaintiff has established these elements by a preponderance of the evidence, then you shall proceed to consider what, if any, damages the Plaintiff has suffered. If, however, you find that the Plaintiff has failed to prove any one of the elements by a preponderance of the evidence, then you must return a verdict for [*the liquor serving establishment*] on this issue.

COMMENTS

See 7 V.S.A. §501; Clymer v. Webster, 156 Vt. 614, 596 A.2d 905 (1991); In re Tweer, 146 Vt. 36, 38, 498 A.2d 499 (1985); and In re Capital Investment, 150 Vt. 478, 481, 554 A.2d 662 (1988).

3.9

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In this case the Plaintiff alleges that the Defendant is liable for the negligent infliction of emotional distress upon [*him*][*her*]. Before you find the Defendant liable on this claim, the Plaintiff must prove by a preponderance of the evidence the following essential elements:

1. That the Defendant's conduct was negligent;

2. That the Plaintiff suffered from a reasonable fear of immediate personal injury resulting in substantial bodily injury or sickness; and,

3. That the Defendant's conduct caused the Plaintiff to suffer severe emotional distress.

In order to assist you with your deliberations, I will now define some of these terms for you. Any terms which I do not define for you carry their usual and ordinary meaning.

With respect to the first element,

[*Read definition of negligence - see section 3.1*]

With respect to the second element, the Plaintiff must prove that [*he*][*she*] feared for [*his*][*her*] own personal safety or for the safety of a loved one who is also present. That is, the Plaintiff must show that [*he*][*she*] was within the zone of danger created by the Defendant's conduct.

Next you must determine whether the Plaintiff suffered emotional distress. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock and the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. In this regard, the Plaintiff is additionally required to show that [*he*][*she*] suffered substantial physical injury or sickness in order to recover for negligent infliction of emotional distress.

COMMENTS

See Vaillancourt v. Medical Center Hospital of Vt., 139 Vt. 138, 425 A.2d 92 (1980) and Savard v. Cody Chevrolet Inc., 126 Vt. 405, 234 A.2d 656 (1967).

3.10

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In this case the Plaintiff alleges that the Defendant is liable for the intentional infliction of emotional distress upon [*him*][*her*]. Before you find the Defendant liable on this claim, the Plaintiff must prove by a preponderance of the evidence the following essential elements:

1. That the Defendant's conduct was extreme and outrageous;

2. That the Defendant's conduct was done intentionally or with reckless disregard of the probability of causing emotional distress; and,

3. That the Defendant's conduct caused the Plaintiff to suffer severe emotional distress.

In order to assist you with your deliberations, I will now define some of these terms for you. Any terms which I do not define for you carry their usual and ordinary meaning.

With respect to the first element, "extreme and outrageous" conduct, as it is used in this case, is conduct that is so offensive in character and so extreme in degree as to go beyond all possible bounds of decency. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse resentment against the person who did it.

The extreme and outrageous character of the conduct may arise from an abuse of a position or relationship which gives the actor authority over someone or the power to affect that person's interests. In other words, one can behave outrageously by an extreme abuse of one's position.

Furthermore, the extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is particularly susceptible to emotional distress by reasons of some physical or mental condition or by being in a position of particular helplessness. What may be reasonably endured by one person may be intolerable for another by reason of his or her particular situation. That does not mean that liability extends to mere insults, indignities, threats, annoyances, petty oppression or other trivialities. The Plaintiff has no claim if you find that the Defendant's conduct was simply inconsiderate or unkind.

The outrageous conduct, of course, must have been directed at the intended victim. That

is, the person harmed usually must either be present and must be the object of the outrageous conduct or be positioned in such a way that extreme emotional distress was highly probable.

The second element is whether the conduct was intentional, or at least done with reckless disregard of causing emotional distress. I need not define the word intentional. It is plain enough. However, conduct which does not rise to the level of being intentional may be the basis for liability if it is done with reckless disregard of the consequences of one's actions. Under such a scenario, you do not need to find that the Defendant intended to harm the Plaintiff directly, but that [*he*][*she*] did consciously consider the probable outcome of [*his*][*her*] actions.

Next you must determine whether the Plaintiff suffered emotional distress. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock and the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. The Plaintiff is not required to show that [*he*][*she*] suffered any physical injury in order to recover for intentional infliction of emotional distress.

The critical issue concerning this element is whether the distress suffered by the Plaintiff was great or extreme. There can be no liability if you do not find it to be extreme. The test is an objective one. It is whether a reasonable person, in the Plaintiff's position, would be expected to endure the conduct without extreme emotional distress. To the extent that you find that the Defendant was aware of the Plaintiff's circumstances, you may take into account any particular susceptibility to distress that [*he*][*she*] may have.

Finally, the last element is whether the extreme emotional distress was proximately caused by the Defendant's conduct. Extreme emotional distress was caused by the act of another whenever it appears, by a preponderance of the evidence, that the act played a substantial part in bringing about or actually causing the harm. Therefore, proximate cause is shown if you find by a preponderance of the evidence that the Plaintiff's extreme emotional distress was either a direct result or a reasonably probable consequence of the Defendant's conduct.

To sum up, it is for you to determine, based on the law as I have given it to you and the evidence that you find credible, whether the Plaintiff has proven each element necessary to

impose liability for intentional infliction of emotional distress. If the Plaintiff has proved by a preponderance of the evidence each of the essential elements, you may find the Defendant liable. If not, you must enter a verdict in favor of the Defendant on this issue.

COMMENTS

See Thayer v. Herdt, 155 Vt. 448, 455, 586 A.2d 1122 (1990); Jobin v. Mcquillen, 158 Vt. 322, 609 A.2d 990 (1992) and Crump v. P&C Food Markets, Inc., 154 Vt. 284, 296, 576 A.2d 441 (1990)).

3.11

RES IPSA LOQUITUR

Res ipsa loquitur is a doctrine in the law which literally means "the thing speaks for itself". When established, the doctrine of res ipsa loquitur is circumstantial proof of the Defendant's negligence and the doctrine permits you to infer negligence on the part of the Defendant. If the Plaintiff has introduced evidence that reasonably supports the following elements, then you are permitted to infer negligence attributable to the Defendant. The elements of res ipsa loquitur are:

1. A legal duty owing from the Defendant to exercise a certain degree of care in connection with a particular instrumentality to prevent the very occurrence that has happened;

2. The subject instrumentality at the time of the occurrence must have been under the Defendant's control and management in such a way as there can be no serious question concerning the defendant's responsibility for the misadventure of the instrument;

3. The instrument for which the Defendant was responsible must be the producing cause of the plaintiff's injury; and,

4. The event which brought on the Plaintiff's harm is such that would not ordinarily occur except for the want of requisite care on the part of the Defendant as the person responsible for the injuring agency.

The possibility that the injury was caused by something other than Defendant's negligence need not be completely eliminated; the evidence need only permit a reasonable factfinder to conclude that the event would not have occurred if defendant has used requisite care.

If you find that the Plaintiff has presented evidence reasonably supporting the elements of res ipsa loquitur, then you may infer negligence on the part of the Defendant.

COMMENTS

As to "control", see Gentles v. Lancotot, 145 Vt. 396, 399, 491 A.2d 336 (1985).
The Vermont Supreme Court affirmed the four elements of the doctrine of res ipsa

loquitur; discussed the element of "control" and stated that the doctrine, if established, allows a permissive inference of negligence and held that Vermont's comparative negligence statute does not bar use of res ipsa loquitur in Cyr v. Green Mountain Power Corporation, 145 Vt. 231, 485 A.2d 1265 (1984).

For a detailed discussion regarding the applicability of the doctrine of res ipsa loquitur to a medical malpractice case, with or without expert testimony, see Connors v. University Associates, 769 F. Supp. 578, (D. Vt. 1991)

IV

PRODUCTS LIABILITY

4.1

STRICT LIABILITY

In Vermont the doctrine of strict liability is as follows:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if:

a. The seller is engaged in the business of selling such a product and

b. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2. The rule stated in subsection (1) applies although:

a. The seller has exercised all possible care in the preparation and sale of his product, and,

b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(See Restatement (Second) of Torts §402 (A))

This rule applies to manufactures, wholesalers, retailers, distributors and processors who sell defective products. (See Restatement (Second) of Torts §402A, comments f and p.)

Comparative negligence is not a defense available to the Defendant for the strict liability claim. If you find that the [*product*] was in a defective and unreasonably dangerous condition at the time of its sale you must find the Defendant liable even if you find the Plaintiff to have been comparatively negligent. (See Restatement (Second) of Torts §402, comment a.) Under the strict liability theory, the Plaintiff need not prove negligence or breach of an implied warranty to establish liability. Liability for the sale of a defective and unreasonably dangerous product does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller, nor any representation or undertaking on the part of the seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption or use of the product. (See Restatement (Second) of Torts, §402A, comment m.)

a. *Defective condition - duty to warn (if applicable)*

Under the doctrine of strict liability, the seller of a product may be required to give warnings or directions to prevent the product from being unreasonably dangerous. (See Restatement (Second) of Torts, §402A, comment j.) This means if a seller has reason to anticipate that danger may result from a certain use of a product and fails to warn of that danger, the product is said to be sold in a defective condition. (See 63 Am Jur §545.) There has been testimony that no warning was placed on the [product]. You may consider this as evidence that the [*product*] was defective when sold.

COMMENTS

See Restatement (Second) of Torts, §402 A; Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 91 (1979); Menard v. Newhall, 135 Vt. 53, 373 A.2d 505 (1977) and Ostrowski v. Hydra-Tool Corp., 144 Vt. 305, 479 A.2d 126 (1984).

4.2

BREACH OF EXPRESS WARRANTY

Whether the Defendant made express warranties to the Plaintiff regarding the [product] in question is governed by the following principles of law:

1. Any affirmation of fact or promise, made by a seller to a buyer and relating to the product sold, which becomes part of the basis of the bargain, created an express warranty that the product will conform to such affirmation or promise.

2. Any description of the product, which is made a part of the basis of the bargain between the buyer and seller, creates an express warranty that the product will conform to that description. Such descriptions include various forms of advertisement disseminated to the public at large and/or to the Plaintiff [*himself*][*herself*].

3. Any sample or model of the product, which is made a part of the basis of any bargain between the buyer and seller at the time of the sale of the product, creates an express warranty that the whole of the product will conform to the sample or model.

4. It is not necessary for the seller to use formal words such as "warrant" or "guarantee" to create an express warranty respecting a product sold to the buyer. Nor is it necessary for the seller to have a specific intent to make a warranty.

COMMENTS

See 9A V.S.A. §2-313 and Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970).

4.3

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

The next theory by which the Plaintiff seeks to hold the Defendant[*s*] liable is called a breach of the implied warranty of merchantability. The implied warranty of merchantability is one imposed by law on sellers of goods, meaning that when goods are sold, they must be of merchantable quality, that is, of fair quality and reasonably safe for the normal use for which the product is made and sold.

The ultimate user of the product must use ordinary care, but is not obliged to observe latent defects.

The warranty is intended to protect the immediate buyer and also any ultimate user of the goods who is likely to be injured by use of the product. In this case, the Plaintiff was the ultimate user of the [*product*] which was [*manufactured*], [*sold*] and [*designed*] by the Defendant [*and co-Defendant, if applicable*].

If you find that the Defendant[*s*] did not breach their implied warranty of merchantability, then you must find for the Defendant[*s*] on this matter.

COMMENTS

See 9A V.S.A. §2-314

4.4

BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

The next claim of the Plaintiff is that the Defendant is liable for damages for a breach of the implied warranty of fitness for a particular purpose. In order to prove breach of implied warranty of fitness for a particular purpose, the Plaintiff must prove by a preponderance of the evidence that (1) when the Defendant sold the [*product*], [*he*][*she*] had reason to know of a particular purpose for which the [*product*] was required; and, (2) the Plaintiff relied on the Defendant's skill or judgement to select or furnish a suitable [*product*]; and,(3) the [*product*] was not fit for that particular purpose.

COMMENTS

See 9A V.S.A. §2-315 and Deveney v. Rheem Manufacturing Co., 319 F.2d 124 (2d Cir. 1963).

4.5

NEGLIGENCE

The Plaintiff alleges that the Defendant was negligent in designing the [*product*] and in placing the [*product*] in the market in a defective condition. The issue for your determination on the negligence claim of the Plaintiff against the Defendant is, whether the Defendant was negligent in designing the [*product*][*or in failing to adequately warn or instruct the Plaintiff*].

[*insert definition of negligence - see Jury Instruction 3.1*]

a. *Negligent Warning (if applicable)*

With regard to the duty to warn or instruct, the duty of care owed to the Plaintiff under the circumstances is proportionate to the dangers involved. If you find from the evidence that the Defendant's [*product*] posed hazards because of its dangerous nature or design or because it lacked reasonably adequate warnings or instructions, then the Defendant owed a duty to exercise that degree of care which is commensurate with the danger involved.

In determining the extent of the Defendant's duty to warn or instruct the Plaintiff and in determining whether they used due care in carrying out that duty, you may consider the severity and magnitude of the risk of harm posed by the [*product*] and the ease with which that risk of harm could have been avoided or reduced by furnishing the Plaintiff with adequate warnings of the dangers in its [*advertisements*][*instruction booklet*][*labels*].

COMMENTS

See generally Garafano v. Neshobe Beach Club, 126 Vt. 566, 238 A.2d 70 (1967).

V

CAUSATION

5.1

PROXIMATE CAUSE

When this Court speaks of the proximate cause of an injury, it means that cause, which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred.

An injury or damage is proximately caused by an act, or 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.

This does not mean that the act or omission must be the only cause. On the contrary, many factors or things, or the conduct or two or more persons, may operate at the same time, either independently or together, to cause injury or damage and in such a case each may be a proximate cause.

COMMENTS

See Restatement (Second) of Torts, §431-432; Tufts v. Wyand, 148 Vt. 528, 536 A.2d 541 (1987) and Rivers v. State, 133 Vt. 11, 328 A.2d 398 (1974).

5.2

INTERVENING CAUSE

It has been alleged by the Defendant that [*he*][*she*][*it*] is not liable because of the act of others or other events, acts which are they claim are intervening causes.

"One shown to have been negligent is liable for all the injurious consequences that flow from his negligence until diverted by the intervention of some efficient cause that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice." (See Thompson v. Green Mountain Power Corp., 120 Vt. 478, 486, 144 A.2d 786 (1958)).

"...[A]n efficient, intervening cause, in order to stand as the responsible cause of the ultimate result, must be a new and independent force or agency breaking the chain of causal connection between the original wrong and that result." (See Beatty v. Dunn, 103 Vt. 340, 343 (1931)) Whether or not the negligence of a third person may or may not amount to such an intervening cause turns on the issue of whether or not such negligent act or intervention was something the original actor had a duty to anticipate. If he was bound to see such intervention as a consequence of his own negligence, he cannot take refuge behind the doctrine of intervening cause. (See Paton v. Sawyer, 134 Vt. 598, 600, 370 A.2d 215 (1977)).

The intervening cause concept is applicable where, notwithstanding an original negligent act, a new act occurs which becomes the proximate cause of the injury. Thus, even if there was some negligence on the part of the Defendant, if you find the Plaintiff's injuries resulted from an intervening cause for which the Defendant is not responsible, you must return a verdict for the Defendant. (See Killary v. Chamber of Commerce, 123 Vt. 256, 186 A.2d 170 (1962)).

COMMENTS

See Thompson v. Green Mountain Power Corp., 120 Vt. 478, 486, 144 A.2d 786 (1958); Beatty v. Dunn, 103 Vt. 340, 343, 154 A. 770 (1931); Paton v. Sawyer, 134 Vt. 598, 600, 370 A.2d 215 (1977) and Killary v. Chamber of Commerce, 123 Vt. 256, 186 A.2d 170 (1962).

VI

DAMAGES

6.1

PERSONAL INJURY DAMAGES

If your verdict is for the Defendant, you will not consider the matter of damages. But, if your verdict is for the Plaintiff you shall consider the following elements of damage as to the Plaintiff [*insert name of Plaintiff*]:

[*insert one or more of the following paragraphs as applicable*]

a. *General personal injury damages*:

Any bodily injury sustained by the Plaintiff and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, loss of ability to engage in recreational activities and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence.

b. *Medical expenses*:

The reasonable value or expense of hospitalization and medical and nursing care and treatment necessarily or reasonably obtained by the Plaintiff in the past or to be obtained in the future.

c. *Lost earnings, lost time, lost earning capacity*:

Any earnings lost in the past and any loss of ability to earn money in the future.

d. *Property Damage*:

Any damage to the Plaintiff's [*reference automobile or other personal property*]. You should also take into consideration any loss the Plaintiff sustained for towing or storage charges and by being deprived of the use of [*his*][*her*] [*reference property*] during the period reasonably required for its [*replacement*][*repair*].

COMMENTS

See generally Melford v. S.V. Rossi Construction Co., 131 Vt. 219, 303 A.2d 146 (1973)

and Kramer v. Chabot, 152 Vt. 53, 564 A.2d 292 (1989).

6.2

AGGRAVATION OF PRE-EXISTING CONDITION

In an action for damages for personal injuries caused by negligence, the injured person such as the Plaintiff is entitled to recover full compensation for all damage proximately resulting from the Defendant's act, even though [*his*][*her*] injuries may have been aggravated by reason of [*his*][*her*] pre-existing physical condition, or have become more serious, than they would have had the Plaintiff been in robust health. The Defendant cannot invoke the previous condition of the Plaintiff for the purpose of escaping the consequences of [*his*][*her*] own negligence or reducing the damages for which [*he*][*she*] is liable. When one violates the duty, imposed by law, of exercising due care not to injure others, [*he*][*she*] may be compelled to respond in damages for all the injuries which [*he*][*she*] inflicts by reason of the violation of such duty, even if a particular injury may have been aggravated by or might not have happened at all except for the peculiar physical condition of the person injured. The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act, includes the right to recover for any aggravation of that 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*][*her*] conduct. Under this rule, which has sometimes been referred to as the "thin skull" doctrine, the tortfeasor takes his victim as he finds him. (See Noll v. City of Bozeman, 172 Mont 447, 564 P.2d 1296 (1977))

So, if you find that any underlying condition of the Plaintiff was made worse, the Plaintiff is entitled to receive such sums as will adequately and fully compensate [*him*][*her*] for the enhancement and aggravation of the pre-existing condition. The Defendant is not responsible

for those injuries which would have happened purely from the original condition. However, the Defendant must pay in damages for such part of the condition as his negligence caused, and if there can be no apportionment, or it cannot be said with certainty that the condition would have existed apart from the injury, then the Defendant is responsible for all the damages sustained. In other words, where the Plaintiff's injuries and damages cannot be apportioned or divided from any injuries related solely to the underlying, pre-existing condition, then the Defendant is deemed to be responsible for all such injuries and damages that you find the Plaintiff has suffered. (See McNabb v. Green Real Estate Co., 62 Mich App 500 233 NW 2d 811 (1975)).

COMMENTS

See Noll v. City of Bozeman, 172 Mont 447, 564 P.2d 1296 (1977); McNabb v. Green Real Estate Co., 62 Mich. App. 500 233 N.W.2d 811 (1975) and Briths v. Freeman, 34 Colo. App. 348, 527 P.2d 1175 (1974).

6.3

LOSS OF CONSORTIUM

If you should find that the Plaintiff is entitled to a verdict, you must also consider the damages sustained by [*his wife*][*her husband*]. As Plaintiff's spouse [*he*][*she*] is entitled to recover for the loss of companionship and services [*he*][*she*] has suffered due to the injuries sustained by [*his wife*][*her husband*]. In computing this amount, if any, you should consider the impact of the injury on all aspects of the Plaintiff's marital relationship, including any loss of [*his*][*her*] services, comfort, society and attentions in the past [*and in the future*].

COMMENTS

See Hay v. Medical Center Hospital of Vermont, 145 Vt. 533, 496 A.2d 939 (1985) and Whitney v. Fisher, 138 Vt. 468, 417 A.2d 934 (1980).

6.4

PUNITIVE DAMAGES: INDIVIDUAL

If you find that the Plaintiff has proved that [*he*][*she*] is entitled to compensatory damages, only then may you consider whether [*he*][*she*] is entitled to punitive damages. It is within your discretion to determine whether or not to award punitive damages and the amount of any punitive damages.

The purpose of punitive damages is to punish conduct that is morally culpable and to deter a wrongdoer from repetitions of the same or similar actions.

Before you may award punitive damages, the Plaintiff must show that the Defendant acted with actual malice toward [*him*][*her*]. Actual malice is defined as conduct manifesting personal ill will, or carried out under circumstances evidencing insult or oppression, or conduct showing a reckless or wanton disregard of the Plaintiff's rights.

In determining the amount of punitive damages, you should consider the character and standing of the Defendants, their financial status and the degree of malice or wantonness in their acts.

COMMENTS

See generally Clymer v. Webster, 156 Vt. 614, 96 A.2d 905 (1991); Glidden v. Skinner, 142 Vt 644, 458 A.2d 1142 (1983); Shortle v. Central Vermont Public Service Corporation, 137 Vt. 32, 399 A.2d 517 (1979); Sparrow v. Vermont Savings Bank, 95 Vt. 29, 112 A.205 (1921) and Parker v. Hoefer, 118 Vt. 1, 100 A.2d 434 (1953).

6.5

PUNITIVE DAMAGES: CORPORATION

The Plaintiff has asked for punitive damages in this case. Under the laws of Vermont, punitive damages are allowed when based on the bad spirit and wrong intention of the person against whom such damages are sought.

Where the Defendant is a corporation, such as is the case here, in order to find the corporation answerable for punitive damages, you must find that the willful, reckless or fraudulent acts of its agents were corporate acts. Generally, where responsible management of the corporation has knowledge of a wrongdoing on the part of lower-level employees or was involved in the acts itself, the corporation will be determined to have permitted the act.

Corporate participation in acts of its agents sufficient to find against it for punitive damages may be expressed or implied, that is, the corporation need not specifically authorize or ratify the acts of its agents which lead to an award of punitive damages, so long as the acts of the agents can reasonably and fairly be said to have been that of the corporation.

If you find on the facts of this case that the Defendant committed a breach of such a nature that you would characterize it as willful, wanton or reckless conduct then you may award the Plaintiff amounts which, in your discretion, will sufficiently serve to punish the Defendant for its actions.

To help you in deciding whether to award punitive damages in this case, you should know that it is not enough for the acts of the Defendant to have been simply wrong or unlawful. They must be taken in a manner which is largely based on malice. The malice contemplated in this situation does not necessarily involve spite, hatred, or a corrupt design. It is sufficiently established by showing that the Defendant acted with an improper or wrongful motive, or engaged in conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or by conduct showing reckless or wanton disregard of the Plaintiff's rights.

There is no requirement that an award of punitive damages bear any relation to the size of the award for compensatory damages, but you may consider the Defendant's ability to pay, and

the degree of malice in determining the amount of punitive damages to award, if you award any.

COMMENTS

See generally Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 399 A.2d 517 (1979), Allard v. Ford Motor Credit Co., 139 Vt. 162, 422 A.2d 940 (1980) and cases cited in section 6.4.

6.6

WRONGFUL DEATH DAMAGES

Under Vermont law, when the death of a person is caused by a wrongful act or negligence of a person, that person is liable for damages to the decedent's next of kin. In this case, the decedents next of kin are [*list survivors*].

In determining damages recoverable by the decedent's next of kin, you shall consider the following elements:

[*insert any of the following paragraphs that are applicable*]

a. *Medical or funeral expenses*:

Medical or funeral expenses due to the decedent's injury or death which [*have become a charge against the decedent's estate*][*were paid on behalf of the decedent by (survivor)*].

b. *Lost support and services (economic)*:

The survivors' loss, by reason of decedent's injury and death, of the decedent's support and services. In determining the duration of any future loss, you may consider the joint life expectancy of the survivor and the decedent.

c. *Non-economic damages*:

In making your determination of what amount of damages is just, you should keep in mind that the recovery of damages for wrongful death is not limited to pecuniary losses - that is, out of pocket expenses of the decedent's next of kin. The decedent's next of kin are entitled to damages for loss of love and companionship, their loss of intellectual, moral, and physical training, the loss of care, nurture, and protection, grief and mental anguish, and the loss of the comfort and companionship of the decedent.

These latter items of damage are admittedly difficult to calculate precisely, but that does not prevent you from compensating the decedent's next of kin for their loss. Among types of evidence you may consider in reaching your decision are the physical, emotional and psychological relationship between the decedent and [*his*][*her*] next of kin, the living arrangements of the family, the harmony of family relations and their commonality of interests

and activities.

d. *Non-economic damages (loss of a child)*:

In making your determination of what amount of damages is just, you should keep in mind that the recovery of damages for wrongful death is not limited to pecuniary losses, that is, out of pocket expenses of decedents next of kin. The decedent's [*mother*][*and*][*father*] [*is*][*are*] entitled to an award of damages for the loss of love and companionship of the child and for the destruction of the parent-child relationship in such amount as under all the circumstances of the case may be just.

COMMENTS

See Wrongful Death statutes 14 V.S.A. §149 and 14 V.S.A. §1492; Clymer v. Webster, 156 Vt. 614, 596 A.2d 905 (1991) and Mobbs v. Central Vt. Railway, 150 Vt. 311, 553 A.2d 1092 (1988).

6.7

PER DIEM CALCULATIONS

Although the arguments of the attorneys are not evidence, you may determine the Plaintiff's damages in terms of daily pain and suffering, and then determine what amount of damages would be appropriate compensation for each day of pain and suffering. A per diem, or daily, calculation argument is a tool of persuasion of counsel to suggest a method of how to quantify damages based on the evidence of pain and suffering presented.

COMMENTS

See Debus v. Grand Union Stores, 159 Vt. 537, 621 A.2d 1288 (1993).

6.8

DAMAGES IN LIEU OF INTEREST

If you award damages to the Plaintiff in compensation for the injury [*he*][*she*] sustained, you may also award damages to the Plaintiff in lieu of interest for the money [*he*][*she*] otherwise would have been able to earn if the money had been paid to [*him*][*her*] timely. The amount awarded in lieu of interest shall not exceed 12% per year, the legal rate of interest in Vermont. This amount should be calculated from [*insert date of the accident*] through the date of your award.

COMMENTS

See generally d'Arc Turcotte v. Estate of LaRosie, 153 Vt. 196, 569 A.2d 1086 (1989); Quinlan v. Hamel, 143 Vt. 147, 465 A.2d 232 (1983); Hall v. Miller, 143 Vt. 135, 465 A.2d 222 (1983); Wells v. Village of Orleans, Inc., 132 Vt. 216, 315 A.2d 463 (1974) and 9 V.S.A. §41(a).

6.9

COLLATERAL SOURCE RULE

You are not to concern yourself with any benefits or payments which you may think the Plaintiff has received as a result of [*his*][*her*] injuries. It is not of any consequence or relevance to the case before you whether [*his*][*her*] medical bills have been paid or by whom. You may not consider whether any damages you may award will go to the Plaintiff or to reimburse others.

COMMENTS

See D'Archangelo v. Loyer, 125 Vt. 325, 215 A.2d 520 (1965) and Coty v. Ramsey Associates, Inc., 149 Vt. 451, 546 A.2d 196 (1988).

VII

CLOSING INSTRUCTIONS

7.1

PLAINTIFF'S ONLY OPPORTUNITY TO RECOVER

The Plaintiff has only one day in court to recover damages for [*his*][*her*] injuries. [*He*][*she*] cannot institute another action at a later date against this Defendant to recover for damages that might accrue at some future time.

The Plaintiff has only one action for [*his*][*her*] injury, therefore it follows that whatever [*he*][*she*] is entitled to recover in the future on account of [*his*][*her*] injuries must be included in the amount [*he*][*she*] recovers now.

COMMENTS

See Verchereau v. Jameson, 122 Vt. 189, 195-96, 167 A.2d 521 (1961) and Martin v. City of New Orleans, 678 F.2d. 1321, 1327 (5th Cir. 1982).

7.2

MORTALITY TABLES

If a preponderance of the evidence shows that the Plaintiff has been permanently injured, you may consider [*his*][*her*] life expectancy. The mortality tables received in evidence may be considered in determining how long the Plaintiff may be expected to live. Such tables are not binding on you but may be considered together with the other evidence in the case bearing on the Plaintiff's age, health, occupation and physical condition, before and after the injury, in determining the probable length of [*his*][*her*] life.

The Court instructs you that the life expectancy of [*Plaintiff*] has been proved to be [number] years.

7.3

TAXES AND INTEREST

If you award damages to the Plaintiff, that sum will not be subject to federal and state taxation. You should not add any sum to your verdict as compensation for income taxes.

You should also not add any sum for interest. The Court will compute the interest on any amount you may award.

COMMENTS

See Stowell v. Simpson, 143 Vt. 625, 470 A.2d 1176 (1983).

7.4

FINAL INSTRUCTIONS

It is now time for you to retire to the jury room and begin your deliberations. Your foreperson will preside over the deliberations and speak for you here in court. Your verdict must be unanimous.

Remember that each of you must decide the case for yourself. But you should only do so after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. You should not hesitate to reconsider your views and change them if you are persuaded that this is appropriate. However, do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Let me also now state that nothing said in the course of these instructions, or during trial, or while making any ruling, should suggest to you what I may think of the evidence, or what your verdict should be. It is my job to apply the law to any situation which arises. It is your duty to judge the facts, apply the law here stated, and reach a just verdict.

The court appoints [*insert juror's name*] as foreperson of the jury. The foreperson will preside over your deliberations, and will be your spokesperson here in court.

After you reach a unanimous agreement on a verdict, your foreperson will fill in a form that will be given to you. The foreperson should sign it and date it and advise the Court Officer that you are ready to return to the courtroom.

You will receive an interrogatory verdict which sets out the issues that I have described. [*Explain interrogatory verdict*].

If it becomes necessary during your deliberations to communicate with me, you should send a note through the Court Officer, signed by your foreperson. Remember that you are not to tell anyone how the jury stands numerically or otherwise until after you have reached a unanimous verdict and have been discharged.

Thank you Ladies and Gentlemen for your patient and full consideration. Good luck with your deliberations.