MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 19, 1979

The sixty-third meeting of the Senate Judiciary Committee was called to order by Senator Everett R. Lensink, Chairman on the above date in room 331 of the capitol building at 9:35 a.m.

ROLL CALL:

All members were present.

FINAL DISPOSITION OF HOUSE BILL 438:

Joan Mayer from the Legislative Council and attorney for the committee presented the amendments to this bill, and requested the committee to look over this amendment as she had changed the language somewhat. Senator Towe made a motion that we adopt the language as offered by Ms. Mayer. The motion carried unanimously. The bill had previously been voted to be concurred in as amended.

FINAL DISPOSITION OF HOUSE BILL 836:

This bill is an act defining the responsibility and liability of ski area operators and the responsibility and risk borne by skiers. Joan Mayer, attorney for the Legislative Council, stated that she had added an amendment on page 1, lines 24 and 25, where it says, "does not include the use of an aerial passenger tramway", that she changed it to say "a person using" an aerial passenger tramway.

Senator Towe moved that without objection this amendment be adopted. There was no objection.

Joan Mayer also stated that on page 2, line 25, she had reworded the material to read, "However, nothing in this section relieves an operator from the duty of taking whatever other actions are necessary to properly construct, operate, maintain and repair a passenger tramway." Senator Towe moved that this amendment be adopted without objection. There was no objection.

RECONSIDERATION OF ACTION ON HOUSE BILL 787 and HOUSE BILL 788

Joan Mayer from the Legislative Council stated that there were two amendments that were made on House Bill 788 that were not put on House Bill 787 and she wanted to make sure that the committee did not want them. She said that in section 14, did they want this on House Bill 787 also.

Senator Turnage moved that the committee reconsider their action on House Bill 787. He further moved that on House Bill 787 the bill be amended by striking Section 14. The motion carried unanimously.

Senator Turnage also moved that on page 2, line 16, the bill be amended following the "." by inserting the following language, "the department of administration shall assist the department of highways in the issuance and sale of the bonds." The motion carried unanimously.

Senator Turnage moved that House Bill 787 be concurred in as amended. The motion carried unanimously.

RECONSIDERATION OF ACTION TAKEN ON HOUSE BILL 774:

Senator Towe stated that many of the senators have received several phone calls in connection with the vote taken on this bill the previous day and since the bill is still in committee, we should maybe reconsider our action on this bill. He further stated that we have singled out teachers and that he was not sure we could justify doing this as they are not the only ones dealing with young children - there are juvenile probation officers, judges, etc. and he made a motion that we reconsider our action and open this up for further discussion.

Senator Van Valkenburg said that he supported this for one reason and that was that he did not think a great number of people understood the ramifications of what this bill would do. He felt that the matter should be set for a public hearing again and he would support the motion for that reason so that people have a chance to comment on it.

Senator Lensink commented that we have several other bills and they must be acted on first; and Senator Turnage suggested that it might be best to have a conference committee with the House.

Senator Blaylock stated that if the committee would do this, he would appreciate it very much and maybe the teacher organizations could have some brief input for the members of the committee. Senator Lensink stated that certainly the committee members would be happy to talk to anyone and that we will not report it out of committee until they have had a chance to talk about it.

DISPOSITION OF HOUSE BILL 860:

Joan Mayer offered some amendments (See attached) and she went over them. Senator Towe moved adoption of amendments # 1 through 8. The motion carried unanimously.

Senator Towe moved on page 2, line 25, that the bill be amended by striking "or misapprehension". The motion carried unanimously.

Senator Towe moved that the bill be amended on page 3, line 5 by striking "any" and inserting "punitive" and strike all of lines 6, 7, and 8. The motion carried unanimously.

Senator Van Valkenburg moved that the bill be amended on page 1, line 9, by striking "all but actual" and inserting "punitive" and on line 9 and 10, strike "and in determining actual damages." The motion carried unanimously.

Senator Brown stated that he still has problems with this bill to say that a person cannot collect punitive damages when they have been harmed and where someone is really libeled or defamed; and he was not sure he could go along with this.

Senator Towe stated that he believed that if there were an honest mistake, there is no way they can get punitive damage - punitive damages is something done with maliciousness, and with full knowledge that something is going to happen and there must be an evil motivation involved.

Senator Brown told of a story that was printed in the Lee newspapers when he was in the governor's office whereby an investigation was done by a reporter from another newspaper who did not check the facts. He stated that they did print a retraction, but that that is the kind of problem that is going to go on and he felt that the paper should be held responsible because of these types of situations.

Senator Turnage commented that you will still have a constitutional problem with this bill unless the attitude of the supreme court changes, and he did not feel that you can say that everyone is entitled to exemplary damages.

Senator Towe requested that Valencia Lane comment on that case and Ms. Lane, researcher for the committee, stated

that they said the old law was unconstitutional because of the right of access to the courts plus she thinks she could say that in section 7, it says that in libel actions you can go to the court and get defense.

Senator Van Valkenburg stated that the old law says you can not initiate an action and under this law, this says you can initiate an action.

Senator Towe commented that they can't start an action first without an opportunity to retract.

There was considerable discussion of the old law versus the new law.

Senator Towe commented that he liked the part of the statute that deals with retraction and Senator Olson questioned if they give the same space in the retraction as they do when they made the report. Joan Mayer stated that on page 3 it says that there must be a correction timely published or broadcast without comment in a position and type as prominent as the alleged libel or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration.

Senator Towe moved that the bill be concurred in, as amended. The motion carried with Senators Brown and Van Valkenburg voting no.

DISPOSITION OF HOUSE BILL 877:

This bill is an act to abolish the defense of mental disease or defect in criminal actions and this bill was sponsored by Representative Keedy. Senator Towe had sponsored a similar bill, which is Senate Bill 495. Senator Towe explained that his bill, Senate Bill 495, is now in the House, it was placed in a subcommittee, which came back with a do not pass and the subcommittee recommended making a study on the matter but the subcommittee's report has not been adopted by the whole committee.

Senator O'Hara wondered about placing a heavy burden on Warm Springs. Senator Towe stated that these people are going there now. They feel that, they would give an indeterminate sentence and once they are cured, they shouldn't spend any more time at Warm Springs than they do now; and he said that he doesn't know if the present situation works any better than he suggests but he feels that this way gives a far better approach.

He further stated that a person who did something wrong intended to do it, but he may have thought what he did was not criminal; and that they are going to take that into consideration when sentencing.

Senator Turnage questioned about shop lifting and Senator Towe said it would be the same thing if someone is a kleptomaniac, he would be tried for the act, but then this would be taken into consideration at the time of sentencing, and under present law, he doesn't have a trial.

Senator Van Valkenburg stated that he does have a trial, but is found not guilty by reason of mental disease or defect.

Senator Lensink said that being Senator Towe prefers his bill and that this committee passed that bill, that maybe a nice way of handling the matter would be to table this one.

Senator Brown moved that the bill be tabled.

Senator Towe said that the only other alternative that he would suggest would be that we amend this bill to say basically what the other bill says. He stated that he talked to Mr. Keedy and he told him that he would not be able to support his bill unless it had these amendments on it.

Senator Olson questioned if the courts recognize temporary insanity and Senator Turnage replied that it is pretty much abrogated by the new criminal code.

Senator Brown stated that he would renew his motion that this bill be tabled. The motion carried unanimously.

DISPOSITION OF HOUSE BILL 870:

This is an act to provide that the existence of a mental state necessary for commission of a criminal offense may be inferred from the acts of the accused and the facts and circumstances connected with the offense and to provide that defenses relating to a lack of the required mental state must be proved by the defendant by a preponderance of the evidence.

There was some discussion on the merits of this bill. Senator Van Valkenburg moved to amend the bill by striking all the new language on page 3, lines 4 and 5, and to further amend on page 1, line 8, following "and" by striking all the

remaining material on this line and lines 8, 9 and 10 up to word, "amending". The motion carried. Senator O'Hara voted no.

Senator Van Valkenburg moved that the bill be concurred in, as amended. The motion carried.

DISPOSITION OF HOUSE BILL 621:

This is an act to require the Department of Social and Rehabilitation Services, in cooperation with other agencies to gather, maintain and analyze statistics on domestic violence and spouse abuse in the state for a period of 5 years.

Senator Towe moved that on page 2, line 22, that the bill be amended by striking "1984" and inserting in lieu thereof "1983". The motion carried unanimously. Senator Brown moved that the bill be concurred in as amended. The motion carried with Senator Olson voting no.

DISPOSITION OF HOUSE BILL 865:

This is an act to provide for mandatory minimum sentences for crimes involving the molesting or raping of children. Ms. Joan Mayer from the Legislative Council offered some amendments to this bill and went over them.

Senator Brown stated that he was concerned about the conviction for rape and said that the crisis center feels that they do not want these sentences tightened because by keeping these people in prison longer, when they eventually get out, it will be that much worse a problem.

Ms. Mayer explained amendment number 7, which put deviate sexual conduct back into the bill.

Senator Turnage moved the adoption of the amendments as presented. The motion carried unanimously.

Senator Turnage moved the bill be concurred in, as amended.

Senator Van Valkenburg explained that the present law provides for a persistent felony offender to serve from five to one hundred years and stated that if you are a second offender, you can get up to a hundred years and he felt that this kind of legislation was unnecessary.

Senator Towe commented that putting in a limit of forty years would reduce the sentence and Senator Van Valkenburg said it would increase the bottom limit and reduce the top to forty.

Senator Van Valkenburg said another thing the bill does is on page 2, lines 15 and 17, it provides statutory lack of consent for people under the age of 13.

Senator Towe stated that he would support the old statutory rape concept without tinkering with sentencing and further said that he would support the bill which would not change the sentencing in any way but would apply statutory rape. Ms. Joan Mayer from the Legislative Council said that House Bill 652 is also in this committee and that this bill does that. The committee agreed to look at House Bill 652.

DISPOSITION OF HOUSE BILL 652:

This bill is an act to amend section 45-5-501, MCA relating to the definitions of terms used in the sexual crimes statutes, to make the definition of "without consent" applicable to sexual assault.

Ms. Joan Mayer from the Legislative Council stated that the amendment would have this apply if the victim is less than 13 years old and the offender is both three or more years older than the victim and at least 15 years of age.

Senator Towe stated that if this were changed to 5, he thought this is a much better bill and Senator Van Valkenburg agreed that he liked the three instead of five.

Senator Towe moved that we change this to four years on the amendment. The motion failed. (See Roll Call Vote)

Senator Van Valkenburg moved the adoption of the amendments. The motion carried.

Senator Van Valkenburg moved the bill be concurred in as amended. The motion carried unanimously.

DISPOSITION OF HOUSE BILL 865:

Senator Towe moved that House Bill 865 be not concurred in.

Senator Lensink stated that we are going to legislate that there be mandatory sentences rather than give the discretion to the courts and said that the crux of the problem is not whether we should be tougher, but whether we take away the option of the courts.

Senator Towe moved that the bill be concurred in, as amended. He then withdrew his motion.

Senator Towe moved that the bill be amended on page 2, by striking lines 15 through 17 in its entirety. The motion carried unanimously.

Senator Towe then moved that this bill be not concurred in, as amended. The motion carried with Senators O'Hara and Galt voting no.

DISPOSITION OF HOUSE BILL 813:

This is an act to revise and clarify the roles of the department of social and rehabilitation services and the county welfare department in conducting investigations, including the financial investigations, and preparing reports when a minor is placed in a foster home, child care agency, group home, or private treatment facility relating to abused, neglected or dependent children, etc.

Joan Mayer from the Legislative Council offered amendments suggested for this bill. Senator Towe moved adoption of all the amendments. The motion carried unanimously.

Senator Towe moved that the bill be concurred in, as amended. He withdrew that amendment and offered a substitute motion that the bill be further amended on page 12, line 5, prior to amendments just offered and after word "services" insert, "to the extent deemed appropriate under the circumstances". The motion carried unanimously.

Senator Towe moved that the bill be concurred in as amended. The motion carried unanimously.

There being no further business, the meeting adjourned at 11:32 a.m.

Everett R. Lensink

SENATOR EVERETT R. LENSINK, Chairman
Senate Judiciary Committee

Date 3/8/79

ROLL CALL

JUDICIARY COMMITTEE - Work Session

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
Lensink, Everett R., Chr. (R)	✓		
Olson, S. A., V. Chr. (R)	✓		
Turnage, Jean A. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Anderson, Mike (R)	✓		
Galt, Jack E. (R)	✓		
Towe, Thomas E. (D)	✓		
Brown, Steve (D)	✓		
Van Valkenburg, Fred (D)	✓		
Healy, John E. (Jack) (D)	✓		

Each Day Attach to Minutes.

SENATE

James C. SUNDAY

v.

STRATTON CORPORATION.

No. 241-77.

Supreme Court of Vermont.

June 6, 1978.

Novice skier brought negligence action against ski resort for injuries, which allegedly occurred upon becoming entangled in brush, concealed by loose snow, while skiing on resort's novice trail and which resulted in permanent quadriplegia. The Superior Court, Chittenden County, Wynn Underwood, P. J., entered judgment of $1,500,000 for skier, pursuant to jury's verdict, and resort appealed. The Supreme Court, Larrow, J., held that: (1) resort's motion for directed verdict based upon assumption of risk was properly denied; (2) trial court's charge was adequate on issue of assumption of risk; (3) trial court did not abuse its discretion in denying resort's motion for mistrial because two jurors and alternate read headline of newspaper article on case, one read headline and bottom line, one "skimmed through" article, one read headline and two paragraphs and one read phrase stating that presiding judge had stated "frankly" that he did not think ski area should be allowed to operate any longer "hiding behind" philosophy that ski accidents are risk skiers assume; (4) no error occurred in denying resort's motion for new trial on ground that verdict was against weight of evidence, since skier's version of accident was neither incredible nor impossible, and (5) award of $1,500,000 was not excessive.

Affirmed.

1. Negligence ⇐105

A person who takes part in any sport accepts as a matter of law dangers that inhere therein insofar as they are obvious and necessary.

2. Theaters and Shows ⇐6(26)

In negligence action brought by novice skier against ski resort for injuries, which allegedly occurred upon becoming entangled in brush, concealed by loose snow, while skiing on resort's novice trail and which resulted in permanent quadriplegia, no error occurred in denying resort's motion for directed verdict based upon resort's claim that recovery was precluded by skier's assuming risk of brush, alleged inherent danger of sport, for, resort's arguing to jury that its excellent grooming practices, so perfected as to render skier's claim of brush in trail impossible, did not sustain its burden of proving skier's assumption of risk. 12 V.S.A. § 1036; V.R.C.P. 8(c).

3. Negligence ⇐97, 105

Any chance of conflict between comparative negligence statute and defense of primary assumption of risk as an absolute bar to recovery is not existent; where primary assumption of risk exists, there is no liability to plaintiff, because there is no negligence on part of defendant to begin with; danger to plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence. 12 V.S.A. § 1036; V.R.C.P. 8(c).

4. Theaters and Shows ⇐6(19)

While skiers fall, as matter of common knowledge, that does not make every fall a danger incident in sport; if fall is due to no breach of duty on part of ski resort, its risk is assumed in primary sense and there can be no recovery; but where evidence indicates existence or assumption of duty and its breach, that risk is not one "assumed" by skier; what he then "assumes" is not risk of injury, but use of reasonable care on part of ski resort. 12 V.S.A. § 1036; V.R.C.P. 8(c).

5. Theaters and Shows ⇐6(39)

In negligence action brought by novice skier against ski resort for injuries, which allegedly occurred upon becoming entangled in brush, concealed by loose snow, while skiing on resort's novice trail and which resulted in permanent quadriplegia, instruction, which stressed acceptance by

skier of dangers inherent in sport, insofar as obvious and necessary, which informed jury that negligence in trail maintenance or in warning of dangers was a prerequisite to recovery and which expressly excluded liability based upon any "guarantee" of safety, adequately instructed on issue of primary assumption of risk.

6. Negligence ⇐105

In order for "secondary" assumption of risk to exist there must be knowledge of existence of risk, appreciation of extent of danger and consent to assume it.

7. Negligence ⇐138(3)

Assumption of risk need not be charged at all where evidence does not establish any case for its application.

8. Theaters and Shows ⇐6(39)

In negligence action brought by novice skier against ski resort for injuries, which allegedly occurred upon becoming entangled in brush, concealed by loose snow, while skiing on resort's novice trail and which resulted in permanent quadriplegia, resort, which contended that instruction was not adequate to apprise jury on elements of secondary assumption of risk, received more charge concerning assumption of risk than it was entitled to, since, although resort had burden of proof on assumption of risk, there was no evidence that skier knew of existence of brush before running his skis into it. V.R.C.P. 8(c).

9. Trial ⇐178

In negligence action brought by novice skier against ski resort for injuries sustained while skiing on resort's novice trail, trial court did not abuse its discretion by, after dismissing jury, hearing and ruling upon resort's motion for directed verdict in open court rather than in chambers, since trial court was not required to have anticipated that presence of press would lead to production of prejudicial article, that it would be read by jury despite constant admonitions on subject and that such would possibly influence jury decision despite clear instructions on what they could consider.

10. Trial ⇐20

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning competence and impartiality of judges; free and robust reporting, criticism and debate can contribute to public understanding of rule of law and to comprehension of functioning of entire justice system as well as improve quality of that system by subjecting it to cleansing effects of exposure and public accountability.

11. Trial ⇐20

General rule is that trial should be public, with chamber proceedings exception rather than rule.

12. Trial ⇐304

In negligence action brought by novice skier against ski resort for injuries sustained while skiing on resort's novice trail, presiding judge did not abuse his discretion by denying resort's motion for mistrial because two jurors and alternate read headline of newspaper article on case, one read headline and bottom line, one "skimmed through" article, one read headline and two paragraphs, and one read phrase stating that presiding justice had stated "frankly" that he did not think ski area should be allowed to operate any longer "hiding behind" philosophy that ski accidents are risk skiers assume, since no prejudice appeared.

13. Appeal and Error ⇐979(1)

In reviewing trial court's denial of a defendant's posttrial motion to set aside verdict as against weight of evidence, question for review is whether trial court has abused its discretion to extent that injustice would result from sustaining ruling; discretion of Supreme Court is not involved, and that of trial court should not be exercised, where different minds can reasonably come to different conclusions on evidence. V.R.C.P. 59.

14. New Trial ⇐72(9)

In negligence action brought by novice skier against ski resort for injuries which allegedly occurred upon becoming entangled in brush, concealed by loose snow,

while skiing on resort's novice trail, and which resulted in permanent quadriplegia, no error occurred in denying resort's motion for new trial on ground that jury's verdict for skier was against weight of evidence, since, in spite of testimony of resort's witnesses that they either did not see any bush at scene of accident or that it was physically impossible for such growth to exist given resort's careful grooming of trail, skier's version of happening was neither incredible nor impossible. V.R.C.P. 59.

15. New Trial ⇨76(1)

In review of a trial court's denial of a defendant's motion for new trial because damages awarded were excessive, verdict must stand unless grossly excessive, or "entirely" excessive, where action does not permit exact computation.

16. Damages ⇨132(3)

Award of $1,500,000 to 21-year-old plaintiff, whose injuries resulted in permanent quadriplegia, who was predicted to require 60 days per year of hospitalization during his remaining 50 years of life expectancy, whose efforts to complete his education were fraught with incredible difficulties, who could neither work nor father children, whose costs for required daily care by visiting and registered nurses projected to $875,000, whose future hospitalization was $1,500,000, whose loss of future earnings was $300,000, whose cost for required daytime attendant, projected to $500,000, and whose medical bill to date was $70,000, was not excessive.

Sylvester & Maley and J. William O'Brien, Burlington, for plaintiff.

Paul D. Sheehey, Burlington, and David L. Cleary, of Richard E. Davis, Associates, Inc., Barre, for amicus curiae Vermont Ski Areas Ass'n, Inc.

Dick, Hackel & Hull, Rutland, and Paul, Frank & Collins, Inc., Burlington, for defendant.

Before BARNEY, C. J., and DALEY, LARROW, BILLINGS and HILL, JJ.

LARROW, Justice.

On February 19, 1974, plaintiff, then just under 21, was injured while skiing as a paying patron on the premises of the defendant's ski resort in Stratton, Vermont. His injuries resulted in permanent quadriplegia. In the instant suit, he alleges in substance that defendant negligently maintained its ski trails and failed to give notice of hidden dangers. Trial by jury, demanded by both parties, resulted in a plaintiff's verdict for $1,500,000 and judgment for that amount plus costs. The verdict was based upon a finding that defendant's negligence was 100% the cause of plaintiff's injuries. Defendant, by its appeal, seeks in the alternative: (I) reversal of the trial court's adverse ruling on its motion for directed verdict based upon assumption of risk, and entry of judgment in its favor here, (II) reversal and remand because of claimed trial errors, including denial of a motion for mistrial and errors in the court's charge, (III) setting aside the verdict as against the weight of the evidence, and (IV) remand for new trial because of error in denying its motion to set aside the verdict as excessive. Some of its claims overlap each other, while others involve more than one asserted error. We will address the several points in the order outlined.

(I) *Motion for Directed Verdict*

Defendant moved for directed verdict at the end of plaintiff's case and renewed the motion at the close of all the evidence. In substance, the motion was based upon its claim that recovery was precluded by the doctrine of assumption of risk, asserted to have survived adoption of the comparative negligence statute (12 V.S.A. § 1036) and to operate as an absolute bar in the instant case.

Important to any consideration of this claim is the provision of V.R.C.P. 8(c), embodying the substance of what was formerly 12 V.S.A. § 1024. Under that provision, assumption of risk is an affirmative defense, which the asserting party has the burden to "affirmatively set forth and establish." We note this burden because, in

our view, the evidence adduced by the parties does not support application of the doctrine as a bar to recovery in the present case.

Viewing the evidence in the light most favorable to plaintiff, he was a novice skier, skiing on a novice trail owned and maintained by the defendant. While traversing the trail at a speed equal to a fast walk, his ski became entangled in a small bush, or clump of brush, about 8" by 20", some 3-4 feet in from the side limits of the travelled portion of the trail. The brush was concealed by loose snow. Unseen by him before the accident, it was seen shortly after by himself and his skiing companion.

A novice is a beginner, the lowest classification of skier, and novice trails are designed to be easy and are more carefully maintained to compensate for the lesser skills of the users. At Stratton the trail here in question (the Interstate) is the best maintained of the many trails on the mountain. Defendant uses highly sophisticated equipment and machines for this purpose. Witness after witness, employed by and testifying for the defendant, described the procedures employed, all aimed at establishing, not that the clump of brush was an inherent danger of the sport as defendant now asserts, but that it simply was not there, as the plaintiff testified. Each witness testified that no such growth had ever been observed on the Interstate.

In laying out the trail, every effort was made to achieve a "perfect surface for skiing." After cutting of trees, elaborate machines moved everything, stumps and brush included, from the trail to achieve a "complete new surface," like a "fairway, absolutely flat." The surface was then raked and fertilized, and all stones over 3" were removed by hand labor. Seeding was then done with a "carpetlike" grass cover to kill other growth. Any other growth was cut by hand or mower, even tall grass, because such growth is considered a danger to the novice skier. As a last step the slope was rolled "as smooth as it can be." Single stones, as they may occur, were regularly checked and cut, and regular rolling was carried out. The Interstate, in particular, was maintained with the best base of all trails, because it was regularly used as a road by all the company equipment, which is radio controlled. Trail cutting went to within one foot of the tree line, and the packed area was about 16' wide where the plaintiff was injured. One expert witness called by the defendant testified that any brush or shrub in the skiable portion of the Interstate should have been eliminated.

At the time of the accident some 52 ski patrolmen were on duty, plus a trail crew charged with checking for hazards. At least 17 pieces of heavy equipment were available for use, plus other transportation. Prior to 1974, Stratton had widely advertised its world-wide reputation for trail maintenance, "meticulous grooming" and "top quality cover."

The foregoing facts are emphasized because defendant argues that, in some manner, this case is controlled by *Wright v. Mt. Mansfield Lift, Inc.*, 96 F.Supp. 785 (D.Vt. 1951). In that case the Federal District Court, construing Vermont law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), but relying almost entirely on cases from other jurisdictions, held that a tree stump, from cutting, covered by snow on an intermediate trail, was a part of the inherent risk of the sport of skiing, assumed by the injured plaintiff and therefore barring her recovery. The accident in *Wright* occurred in 1949.

[1, 2] Of course, *Wright* is not a binding decision on this Court. Nor do we regard it as completely significant that since its rendition it has been cited in our decisions only twice, neither time with anything like general adoption. *Stearns v. Sugarbush Valley Corp.*, 130 Vt. 472, 474, 296 A.2d 229, 232 (1972); *Marshall v. Town of Brattleboro*, 121 Vt. 417, 420, 160 A.2d 762, 765 (1960). The simple fact of the matter is that the general rule which it lays down has wide acceptance, even by the plaintiff here. But its application to particular facts is not as simple. The general principle of *Wright* is that a person who takes part in any sport accepts as a matter of law the dangers that

inhere therein insofar as they are obvious and necessary. We are not called upon here to pass upon what dangers are inherent in an intermediate trail, as in *Wright*, but we could not subscribe to the theory that a stump created by the defendant in a novice trail would be such a danger. We cannot agree that such a stump would be, in the language of *Wright*, a "mutation of nature." Nor do we subscribe to the theory that the brush here in question is such an inherent danger, given defendant's unchallenged testimony, the basis for its whole defense, that its modern methods of care have made such a growth, within the travelled trail, impossible. Arguing to the jury its excellent grooming practices, so perfected as to render plaintiff's claim of brush in the trail impossible, may indeed present an issue as to its alleged negligence, but it does not sustain the burden of proving an assumption of risk by the plaintiff. It is clear from the evidence that the passage of time has greatly changed the nature of the ski industry. Unlike those participants eloquently described by Chief Judge Cardozo in *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929), heavily relied upon in *Wright*, the timorous no longer need stay at home. There is concerted effort to attract their patronage and to provide novice trails suitable for their use. This is the state of the evidence in the case tried below; none of it was calculated to show the brush to be a danger inherent in the use of a novice slope as laid out and maintained by the defendant. Like many other fields, the "art" has changed vastly. Defendant admits as much by conceding in its brief that "the stump that injured the plaintiff in *Wright* may well be the basis for negligence today in view of improved grooming techniques." And, unlike 1949, the maintenance here is performed by the defendant itself, rather than by the communal efforts of individuals, corporations, innkeepers and the like.

Many of our cases contain language that is difficult to reconcile, in discussing the fine distinctions between assumption of risk and contributory negligence. Early cases, of course, deal with the master-servant relationship, in which field development was curtailed by the adoption of laws relating to workmen's compensation and abolishing the defense. And fine distinction between assumption of risk and contributory negligence was not important when either was an absolute bar to recovery. We will not attempt an analysis of all cases on this point, because it would serve, we feel, no useful purpose. We have stated the rule applicable to business visitors on premises, which plaintiff here admittedly was, in *Garafano v. Neshobe Beach Club, Inc.*, 126 Vt. 566, 572, 238 A.2d 70, 75 (1967):

> In the discharge of its duty, [defendant] was bound to use reasonable care to keep its premises in a safe and suitable condition so that plaintiff would not be unnecessarily or unreasonably exposed to danger. If a hidden danger existed, known to the defendant, but unknown and not reasonably apparent to the plaintiff, it was [defendant's] duty to give warning of it to the latter. In those circumstances he had a right to assume that the premises, aside from obvious dangers, were reasonably safe for the purpose for which he was upon them, and that proper precaution had been taken to make them so.

Plaintiff Garafano was a softball player, injured when he stepped in a hole on the diamond leased for amusement purposes by the defendant. Accord, *Benoit v. Marvin*, 120 Vt. 201, 138 A.2d 312 (1958). And we have held that a ski area's responsibility towards its customers is in general the same as that of any business. *Stearns v. Sugarbush Valley Corp., supra*, 130 Vt. at 474, 296 A.2d at 222.

[3] There is no claim advanced here, nor could there be, that plaintiff expressly assumed any risk. The claim is that the brush was an inherent danger of the sport. This is the equivalent of, and better put as, a claim that defendant owed plaintiff no duty with respect thereto, sometimes referred to as "primary" assumption of risk. "In case of injury resulting from such a risk, the servant is denied a recovery, not because he has assumed the risk, but because the master has not been guilty of a

breach of duty." *Carleton v. E. & T. Fairbanks & Co.*, 88 Vt. 537, 549, 93 A. 462, 467 (1915); *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 48-50, 155 A.2d 90, 93 (1959). See also Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 Cal. L.Rev. 239 (1976). Cast in this terminology, any chance of conflict between a comparative negligence statute and the defense of primary assumption of risk as an absolute bar to recovery becomes nonexistent. Where primary assumption of risk exists, there is no liability to the plaintiff, because there is no negligence on the part of the defendant to begin with; the danger to plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence.

Defendant's claim here with respect to primary assumption of risk is laid to rest by two terse sentences of Mr. Justice Keyser in *Garafano, supra*, 126 Vt. at 574, 238 A.2d at 76.

> By also urging that the plaintiff assumed the risks inherent with the sport, the defendant has mistakenly associated the injury with the playing of the sport itself whereas it is not. Rather, it is the condition of the recreation field provided for the game that was the cause of the injury.

[4] While skiers fall, as a matter of common knowledge, that does not make every fall a danger inherent in the sport. If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one "assumed" by the plaintiff. What he then "assumes" is not the risk of injury, but the use of reasonable care on the part of the defendant. The motion for directed verdict was correctly denied. So also was the post-trial motion for judgment n. o. v., which involved the same questions and was not separately briefed for presentation here.

(II) *Claims of Trial Error*

(a) *The Charge.*

[5] Defendant argues first, with respect to the court's charge, that it failed to delineate adequately the issue of primary assumption of risk as one that must be considered separate and apart from contributory negligence. We are cited to no authority whatever for this claim, and could well disregard it as inadequately briefed. But we have examined the charge in whole and at length and perceive no basis for the contention. As we have previously noted, primary assumption of risk is really a doctrine absolving a defendant from liability because of the absence of a duty on its part. That precept is made clear and evident from the court's charge viewed as a whole. The jury was instructed that liability had to be based upon fault, the reasonableness of protective measures taken or the lack of them, and the need for determining what precautions were commensurate with the duty of due care. Acceptance by a skier of dangers inherent in the sport, insofar as obvious and necessary, was stressed a number of times, and the jury was clearly instructed that negligence in trail maintenance or in warning of dangers was a prerequisite to recovery. The clear purport of the charge, read as a whole, required the jury to find, as a basis for any plaintiff's verdict, a duty on the part of the defendant and a breach of that duty. Liability based upon any "guarantee" of safety was expressly excluded.

Reading the charge as a whole, the claimed error is not sustained. *Paton v. Sawyer*, 134 Vt. 598, 600, 370 A.2d 215, 216 (1976); *State v. Arbeitman*, 131 Vt. 596, 602, 313 A.2d 17, 20 (1973).

The second claimed error in the charge is not clearly delineated in its scope, either in the briefs as filed by defendant or in the exception taken below. At the close of the charge, defendant excepted, *inter alia*:

> Secondly, if assumption of risk is a form of contributory negligence, the Defendant excepts to the failure of the court to so charge.

Here, it argues that:

> Even assuming that the Trial Court was not required to charge the jury as to

assumption of the risk *per se*, the Court's charge was not adequate to apprise the jury of the elements of secondary assumption of the risk so that the jury could adequately evaluate secondary assumption of risk as an aspect of the plaintiff's negligence.

Notably absent from the objection as taken is any reference to the distinction between primary and secondary assumption of risk. We could well consider that the claim here urged was not adequately called to the attention of the trial court under V.R.C.P. 51. Because of the importance of this case, we elect not to do so.

[6] Our cases have several times outlined the elements of "secondary" assumption of risk. There must be knowledge of the existence of the risk, appreciation of the extent of the danger, and consent to assume it. *Garafano v. Neshobe Beach Club, Inc., supra*, 126 Vt. at 574, 238 A.2d at 76; *Killary v. Burlington-Lake Champlin Chamber of Commerce, Inc.*, 123 Vt. 256, 262, 186 A.2d 170, 174 (1962). 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. *Bulatao v. Kauai Motors, Ltd.*, 49 Hawaii 1, 406 P.2d 887 (1965); *Wilson v. Gordon*, 354 A.2d 398 (Me.1976); *Bolduc v. Crain*, 104 N.H. 163, 181 A.2d 641 (1962); *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963); *Meistrich v. Casino Arena Attractions, Inc., supra; Gilson v. Drees Brothers*, 19 Wis.2d 252, 120 N.W.2d 63 (1963). See also James, *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185 (1968).

[7, 8] All the elements of contributory negligence were properly charged by the trial court, without objection thereto. The general content of the court's charge must not be viewed piecemeal, and as a whole it fairly outlines the issues bearing on liability. *Forcier v. Grand Union Stores, Inc.*, 128 Vt. 389, 396, 264 A.2d 796, 801 (1970). Beyond this, a careful search of the record reveals absolutely no evidence that the plaintiff here knew of the existence of the undergrowth before running his skis into it, and a consistent claim by defendant's witnesses that such existence was, in fact, impossible. Assumption of risk need not be charged at all where the evidence does not establish any case for its application. *Mulford v. Rossi Construction Co.*, 131 Vt. 219, 225, 303 A.2d 146, 149 (1973). With the burden of proof on assumption of risk and contributory negligence resting on the defendant under V.R.C.P. 8(c), defendant may well have received more charge than it was entitled to.

We inject one further comment, because of various references by the defendant to a claimed "prejudicial overall impact" of the charge, and to several isolated words employed by the trial court in its rulings. We have reviewed with care the 1,094 pages of transcript in this case, mindful that circumstances invoking sympathy sometimes, perhaps unconsciously, inject an element of prejudice into a trial. Certainly the physical condition of the plaintiff could well cause, if not justify, such a reaction. We found, however, a trial court scrupulous in its rulings, carefully considerate of all legal issues presented, patient and courteous to the parties. Any claim of lack of impartiality is not sustained by the record.

(b) *The Motion for Mistrial.*

[9] At the close of plaintiff's case, defendant moved for a directed verdict in its favor and asked that the motion be heard in chambers. Although dismissing the jury, the presiding judge declined to exclude the public or to consider the motion in chambers. After hearing, the motion was denied, with the presiding judge stating the reasons for denial at some length. A resulting front page article appeared in the Burlington Free Press, headlined "Ruling May Broaden Liability of Ski Resorts." Two jurors and an alternate read only the headline, one read the headline and bottom line, one "skimmed through" the article, one read the headline and two paragraphs. In the middle of the article, seen by only

one juror, was a phrase to which defendant particularly objects. That phrase stated that the presiding judge had stated "frankly" that he did not think ski areas should be allowed to operate any longer "hiding behind" the philosophy that ski accidents are a risk people assume when they go skiing.

Defendant claims an abuse of discretion in not hearing and ruling upon its motion in chambers, in the first instance, and in denying its motion for a mistrial in the second instance. We find no reversible error in either respect.

Defendant's argument on its first contention might well be termed an exercise in hindsight, imposing upon the trial court a duty to anticipate that the presence of the press will lead to the production of a prejudicial article, that it will be read by the jury despite constant admonitions on the subject (given here at each recess), and that it will influence the jury decision, despite clear instructions on what they may consider. It strains the fine line of logic when defendant argues that it need not, itself, anticipate such an "untoward development" and ask for sequestration, but that the court must foresee it and retire to chambers.

[10] In general, we agree with the statement of Mr. Justice Brennan in his opinion concurring in the judgment in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 587, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), applicable to civil cases as well as to the criminal case there involved:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

[11] We agree with the trial court that the general rule is that trials should be public, with chamber proceedings the exception rather than the rule. Vermont statutes favor public availability of court records, so that the filing of a written ruling rather than an oral one could have produced the same article. 4 V.S.A. §§ 652(4), 693. And the trial court was entitled to assume that the jurors would not disregard its repeated instructions relative to publicity of proceedings. *Mainieri v. McLellan*, 125 Vt. 157, 211 A.2d 239 (1965). The claimed abuse of discretion in hearing the motion and ruling upon it in open court does not appear.

[12] The denial of defendant's motion for a mistrial is equally supportable as a sound exercise of discretion. Abuse of discretion must appear to justify reversal. *Marshall v. United States*, 360 U.S. 310, 311–12, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Woodhouse v. Woodhouse*, 99 Vt. 91, 153, 130 A. 758, 787 (1925); *Fraser v. Blanchard*, 83 Vt. 136, 145–46, 73 A. 995, 999, 75 A. 797 (1909); *Town of Peacham v. Carter*, 21 Vt. 515, 518–19 (1849). Since discretion involves latitude, each case must turn on its special facts, with careful notation of what action the trial court took. For this reason, defendant's reliance upon *Bellows Falls Village Corp. v. State Highway Board*, 123 Vt. 408, 190 A.2d 695 (1963), is misplaced. There a news article referring to the "State's welshing on its given word" was read or discussed by eight jurors, and a private view was taken by one juror. The verdict was set aside by the trial court, and its action was affirmed. In our view the decisions in *Fraser, supra* and *Town of Peacham, supra*, are more in point. In *Fraser*, we sustained a refusal to set aside a verdict where two jurymen had read an improper article, but it did not appear they had formulated an opinion. And in *Town of Peacham*, we refused to reverse a denial of new trial where a letter, not in evidence, had gone to the jury with the exhibits, no prejudice being shown because the substance of the letter had been brought out at trial. No prejudice was made to appear in the instant case; and defendant was not, contrary to its assertion, precluded from showing such prejudice. Advised by the court that it would "do whatever counsel

for the defense prefers in that area . . . will do whatever they want," defendant elected to confine itself to a single inquiry about how many jurors had looked at the front page of the Free Press. This clear election, coupled with repeated cautions and admonitions to the jury by the trial court, negates any possible resultant prejudice.

We have, in addition, compared the newspaper article with the instructions delivered by the court to the jury some days later. We perceive no inconsistency between the two. Apart from the use of the rather strong term "hide behind" the reported remarks of the trial judge bear remarkable similarity to the charge subsequently delivered. Given this consistency, and the approval we have hereinabove expressed of the charge itself, we think the trial court was quite correct in its considered judgment that prejudice was not made to appear and that the verdict was not suspect.

(III) *The Motion to Set Aside the Verdict*

[13] As with many of the issues involved, which the parties have carefully and skillfully briefed, there is no substantial disagreement as to the principles of law governing review of defendant's post-trial motion to set aside the verdict as against the weight of the evidence. V.R.C.P. 59 preserves the former practice. The question for review here is whether the trial court has abused its discretion to an extent that injustice would result from sustaining the ruling. The discretion of this Court is not involved, and that of the trial court should not be exercised, where different minds can reasonably come to different conclusions on the evidence. *O'Brien v. Dewey*, 120 Vt. 340, 348, 143 A.2d 130, 134-35 (1958); *Russell v. Pilger*, 113 Vt. 537, 559-52, 37 A.2d 403, 411-12 (1944).

[14] Appellant argues eloquently about the need, in our consideration, to "discount the manifestly incredible or physically impossible." The principle is a sound one, but we cannot accept its application. Against two reasonably consistent versions of the accident, from plaintiff and his companion, defendant marshalled a number of witnesses who testified, in general, that they either did not see any brush at the scene of the accident, or that it was physically impossible for such growth to exist given defendant's careful grooming of the Interstate trail.

Quite apart from the usual opportunity given the trial court to observe a witness's candor and reaction, numerous other matters, apparent from the record, preclude adopting defendant's version of the accident in this Court as a matter of law. Its principal expert witness purported to qualify in so many differing fields of expertise that some of his testimony could well have been excluded. Some of his conclusions were badly shaken by cross-examination. Seven members of the ski patrol, defendant's employees, gave remarkably similar versions of the physical setting, but actual measurements were lacking, and the terrain of the whole accident scene was acknowledged by defendant to have been changed the following summer, with the involved boulder vanishing, never to be identified again. The ski patrol testimony was also badly damaged by rejection of their own entries on accident reports, denial of a transcribed statement, nonproduction of reports they claimed to have filed in the regular course of business, and admission of a group "pow-wow" to prepare their testimony just before trial with all present.

We have already reviewed at length the testimony presented by the plaintiff, and its repetition would serve no useful purpose. His story is not, in our view, anything approaching a physical impossibility, and we can easily understand the reluctance of the jury to accept the type of opinion evidence presented to discredit it. Noteworthy is the testimony of a photographic expert that infra-red photographs proved conclusively the absence of any growth under the snow, but his admission on cross-examination that they also showed no growth below the snow where two trees and a rock projected above it.

The evidence did not convince the jury that plaintiff's version of the happenings was either incredible or impossible. Even

absent the opportunity to observe the witnesses involved, a review of that evidence falls far short of convincing us to that effect. No error appears in the trial court's denial of defendant's motion for a new trial on the ground that the verdict was against the weight of the evidence.

(IV) *Damages*

[15, 16] Remaining for our determination is the only other issue raised by defendant on appeal, the denial of its motion for new trial because the damages awarded were excessive. Again there is little dispute about the applicable rule of law; the verdict must stand unless grossly excessive, or "entirely" excessive, where the action does not permit exact computation. *Serizzi v. Baraw*, 127 Vt. 315, 322, 248 A.2d 725, 730 (1968); *Wilford v. Salvucci*, 117 Vt. 495, 500, 95 A.2d 37, 40 (1953). Although defendant, in the pejorative, leaves this matter to the "sound instincts" of the Court, it does not seriously contend that this is the real test. And apart from the fact that it is simply not true, its statement that our appellate review has not encompassed verdicts in excess of $65,000 has no logical conclusion. This Court does not operate in a vacuum and is fully aware that most major cases are settled rather than litigated, either because of perceptive realization of the hazard involved or limitations upon insurance coverage and other assets available to meet a claim.

Without belaboring the point, this case is one involving almost incredible damage. Ignoring any compensation whatever for pain and suffering, the amounts involved are far in excess of the verdict returned. We do not propose to evaluate a course of treatment involving eight operations, coma, intensive care, and severe drug reaction. The degree of physical care involved, by others, takes 3½ hours each morning. There are problems of urinary and blood-stream infection, and spasmodic pain. There is a propensity to bladder stones, and a need for all kinds of special equipment to perform the few limited bodily functions remaining to plaintiff in his quadriplegia. A film of his typical day was shown the jury without objection. Some 69 days per year of hospitalization are predicted during his remaining 50 years of life expectancy. His efforts to complete his education are fraught with incredible difficulties; he can neither work nor father children, and he has recurring fits of depression. Without financial loss, the verdict would be supportable.

But the financial losses involved are also of staggering magnitude. In round figures, required daily care by visiting and registered nurses projects to more than $875,000. Future hospitalization, even at present rates, approximates $1,500,000. Loss of future earnings is more than $200,000. One medication alone has a projected cost of $94,500. A required daytime attendant, at $3.00 per hour, comes to over $500,000. Medical bills to date approximate $70,000. Defendant did not even attempt to controvert any of these estimates or the medical evidence. Without any projected inflation, arguably offsetting reduction to present worth, financial loss to the plaintiff, standing alone, is almost twice the verdict returned.

The argument that the original ad damnum was only $1,250,000, and that this fact should influence the court's judgment, has little weight. Amendment, as done, was permissible. *Dupont v. Benny*, 130 Vt. 281, 283-84, 291 A.2d 404, 406 (1972). Apart from the manifest unfairness of permitting a party to be bound by the judgment of his counsel, we are mindful of the one year statute of limitations here involved, a special treatment accorded the ski industry. 12 V.S.A. § 513. In cases like this one, any accurate determination of prospective damage during that short period may well be impossible.

The verdict below, and the resulting judgment, cannot be said to be excessive as a matter of law.

Since no error has been made to appear, the entry must be:

Judgment affirmed.

weeks after breeding. It was the practice of the plaintiff during those years to allow the pigs to run with the sows for about two months after birth and then sell such sows as packers. Sows selling as packers usually sell for about $2.00 less per hundred than prime hogs, but they usually weigh considerably more than prime hogs.

5. During the year of 1945 the plaintiff sold 34 sows for the net sale price of $2,051.83. At the time of sale the said sows were apparently 1½ years old. The said 34 sows were used and handled as, and for, breeding sows in accordance with the practice of the plaintiff heretofore described. The plaintiff in his income tax return for 1945 treated the said sows as constituting capital assets within the provisions of Section 117(j) of the Internal Revenue Code, 26 U.S.C.A. § 117(j). The Collector of Internal Revenue for the District of Iowa claimed that the said breeding sows did not constitute capital assets within the provisions of said Section. In response to said claim, the plaintiff paid to the said Collector additional income tax for the year of 1945 in the sum of $175.00, together with penalty thereon in the sum of $8.75. The plaintiff made due, timely and proper claim for refund for the sum of $175.00 and $8.75, or $183.75, which claim was disallowed on May 12th, 1950.

6. During the year 1947 the plaintiff sold 40 sows for the net sale price of $3,522.04. At the time of the sale the said sows were approximately 1½ years old. The said 40 sows were used and handled as, and for, breeding sows in accordance with the practice of the plaintiff heretofore described. The plaintiff in his income tax return for 1947 treated the said sows as capital assets within the provisions of Section 117(j). The Collector of Internal Revenue for the District of Iowa claimed that the said sows did not constitute capital assets within the provisions of said Section. In response to said claim, the plaintiff paid to said Collector additional tax for the year 1947 in the sum of $444.19, together with penalty thereon in the sum of $22.21. The plaintiff made due, timely and proper claim for refund for the said sum of $444.19, plus $22.21, or $466.40, which claim was disallowed on May [illegible] 1950.

7. The said 34 sows, the sale of [illegible] was reported by the plaintiff in his [illegible] income tax return, did constitute [illegible] assets within the provisions of Section [illegible] (j) of the Internal Revenue Code.

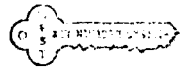
8. The said 40 sows, the sale of [illegible] was reported by the plaintiff in his [illegible] income tax return, did constitute [illegible] assets within the provisions of Section [illegible] (j) of the Internal Revenue Code.

Conclusions of Law

1. That this Court has jurisdiction [illegible] the subject matter of this action and [illegible] parties thereto under the provisions [illegible] Section 1346 of the Revised Judicial [illegible] 28 U.S.C.A. § 1346.

2. That the said sum of $175.00 [illegible] tional tax, the penalty in the sum [illegible] and interest in the sum of $[illegible] sum of $207.59, was illegally and [illegible] ously collected from the plaintiff.

3. That the said sum of $444.19 [illegible] ditional tax, the penalty in the sum [illegible] 21, and interest in the sum of $35.[illegible] total sum of $501.39, was illegally and [illegible] roneously collected from the plaintiff.



WRIGHT et al. v. MT. MANSFIELD LIFT, Inc., et al.

Civ. A. No. 1101.

United States District Court
D. Vermont.
April 16, 1951.

Action by Florine Wright and [illegible] against Mt. Mansfield Lift, Inc., Mt. [illegible] field Hotel, Inc., and Stowe-Mansfield [illegible] ciation, Inc., for injuries sustained by [illegible] plaintiff as result of a skiing accident. [illegible] the conclusion of the plaintiff's case, [illegible] the three defendants filed a motion [illegible] rected verdict. The District Court, [illegible] J., held that in absence of evidence [illegible] dangers existing on ski trail which [illegible]

...prudence on part of defendants would ... foreseen and corrected, plaintiff, in hitting snow-covered stump was merely accepting a danger that inhered in sport of skiing. ...dgment for defendants.

Negligence ⇐32(2.4)

Whenever one makes such use of another's premises as the owner intends he ..., or such as he is reasonably justified understanding that owner intended, that ... implied invitation to enter on the ... of another.

Theaters and shows ⇐6(3)

Where hotel company and ski lift company cleared and maintained ski trails open ... use by general public, and for their ...cial gain, plaintiff and her husband ...invitees of lift and hotel companies at ... plaintiff and husband were skiing on ... and plaintiff fractured a leg as result ...colliding with snow-covered tree stump ...ail.

Theaters and shows ⇐6(8)

Where defendant ski lift company invited plaintiffs to top of lift and maintained ... premises a record as to which ski ... were open and had signs on its prop... for purpose of giving plaintiff a choice ...ails, and once on trail leading down ...ains plaintiffs were invited onto trail, ... of which was on land of defendant ... company, which trail hotel company ...maintained for years, and reason for ... trails being open was to financially ...fit both lift company and hotel com... duty owed plaintiffs, invitees, by each ... defendants was to advise them of ... changes in trails which reasonable ... person would have foreseen and ...ected.

Negligence ⇐105

One who takes part in sport of skiing ...es dangers which inhere in it so far ...y are obvious and necessary.

Theaters and shows ⇐6(19)

Where plaintiff, an invitee, ascended to ... mountain by the use of ski lift operated by defendant lift company and while ... on trail located on land owned by ... hotel company, collided with ...ered tree stump and fractured her leg, in absence of evidence of any danger existing which reasonable prudence on part of defendants would have foreseen and corrected, plaintiff, in hitting snow-covered stump, was merely accepting a danger that inhered in sport of skiing and defendants were not liable for her injuries.

Justin G. Cavanaugh and William H. Cooney, Springfield, Mass., for plaintiffs Florine Wright and Robert B. Wright, Jr.

McNamara & Larrow, Burlington, Vt., Frank G. Sterritte, New York City, for defendants Mt. Mansfield Lift, Inc. and Mt. Mansfield Hotel, Inc.

Clifton G. Parker, Morrisville, Vt., for defendant Stowe-Mansfield Assn, Inc.

GIBSON, District Judge.

This is an action for damages resulting from a skiing accident brought by Florine and Robert B. Wright, Jr., husband and wife, of Springfield, Mass., against the Mt. Mansfield Lift, Inc., Mt. Mansfield Hotel, Inc., and the Stowe Mansfield Association, Inc. The case was heard on its merits at the February term, 1951, U. S. District Court, District of Vermont. At the conclusion of the plaintiff's case, each of the three defendants filed a motion for a directed verdict. The motion, in each instance, is hereby granted.

The plaintiff, Mrs. Florine Wright, in her complaint, alleged that on January 23, 1949, she was skiing at the Mt. Mansfield ski area in Stowe, Vermont; that she had paid the required fee to one of the defendants, Mt. Mansfield Lift, Inc., hereinafter called Lift; had been transported to the top of Mt. Mansfield by this chair lift and having reached the top, started to ski down a marked trail; that on her way down the mountain, at a certain point on a ski trail, she ran against or collided with a snow-covered stump of a tree and thereby caused a serious fracture of her left leg.

The evidence viewed in the light most favorable to the plaintiff revealed the following situation. Stowe, Vermont, has become one of the largest winter sports areas of the eastern United States. The area of

Mt. Mansfield is a snow bowl. In fact, the slogan of the area is "There is always snow in Stowe, you know".

Lift, Inc. was a Vermont corporation which owned or controlled land running up Mt. Mansfield on which it had erected a modern chair lift for skiers, the lift itself being better than a mile long.

In January, 1949, those who desired to ski down the trails of Mt. Mansfield in this area purchased a ticket at the bottom of the mountain where the lift commenced, the ticket costing 75¢ for a single ride up the mountain. After purchasing the ticket, the prospective skier stood in line and as the skier's turn came, sat in the ski chair, generally with skis on. The skier was then hoisted better than 2,000 feet above the elevation of the bottom of the ski lift and deposited at the top of the ski lift at the top of Mt. Mansfield. At the top of the ski lift, there was what is known as the Octagon House, made of stone, in which was served refreshments and also in which was a blackboard or chart on which were listed the particular trails which were open for skiing. There were also located in this general area at the top of the lift signs pointing to the starting points of various trails down the mountain, each trail bearing a different name, such as Nosedive, Skimeister, Toll Road, etc. Most of these trails started on land that was owned or controlled by Lift, Inc. As these trails wended their way down Mt. Mansfield, they twisted their way, on occasion, onto lands owned or controlled by others. Defendant Mt. Mansfield Hotel, Inc., hereinafter called Hotel, Inc., at the time of the accident, owned and operated a hotel which at that time cared for approximately 20 guests. Most of these guests were ski enthusiasts. The Skimeister trail, as it came down Mt. Mansfield, came onto land of the Hotel, Inc. The Skimeister trail had been in operation for many years before this accident with the full knowledge and approval of Hotel, Inc. The trails were areas cleared down the rough mountain side of Mt. Mansfield by cutting trees, by bulldozing and by other methods. The trails are of varying width, some trails being much more crooked than others.

The maintenance of the trails in summertime consisted of mowing and cutting the brush and trees and of widening existing trails. Various residents, interested innkeepers in and about Stowe, assisted from the Forestry Department of the State of Vermont and workers provided by Lift, Inc., Hotel, Inc., and other organizations interested in skiing, did the summer maintenance work on these trails.

Generally speaking, there were three classes of trails on Mt. Mansfield which those who used the ski lift might ski on. There was one class of trails known as expert trails. To maneuver these trails required a high degree of skiing ability. The second class of trails were known as the intermediate trails. These trails were less hazardous and less difficult than the expert trails, but one to negotiate safely needed to be a fairly good skier. The third class of trails were known as the novice trails. These trails were for those who had skied but little.

During the winter of 1948-1949, the skiing of the trails was done by an organization known as the Mt. Mansfield Ski Patrol. This ski patrol consisted of five or six good skiers who were paid by the Mt. Mansfield Ski Club. This club, in turn, raised its funds by contributions from individuals, corporations, innkeepers and the like. Its total budget for the winter season of 1948-1949 was in the vicinity of $3,000. Of this, about $1,600 was contributed by the Hotel, Inc. and another substantial sum by the Lift, Inc.

The duties of this Ski Patrol were many. It was the Patrol's duty each day to ski each trail to determine which trails were suitable for skiing and which were not. Having done this, the patrol would see to it that the blackboard in the Octagon House which listed the trails open for skiing would properly list those that were open for skiing on this particular day. The patrol would also see to it that such trails as were adjudged by it as unsafe for skiing were closed off by chain or rope and that warning signs were put up at the start of the trail and at other places warning that the particular trail was not open. In addition, members of the patrol skied down the trails

kept their eyes open for any unsafe
ditions that appeared on open trails. If
e were any, patrol members took steps
put up proper warning flags or proper
guards or notified officials of the lift
there was a dangerous spot at a cer-
n place on a certain trail so that steps
ld be taken immediately either to erect
er warning notices or to close off the
l.

The main purpose of the members of the
patrol was to be available in case of
injury to any skier. Ski patrol mem-
s were trained in first aid and had
ment staged at various places on Mt.
sfield for the purpose of removing in-
skiers safely and expeditiously to
ottom of the mountain and if necessary
hospital.

n January 23, 1949, Mr. and Mrs.
ght, accompanied by Mr. Abrams, went
Bayston, Vermont, where the Wrights
both working at this time, to Stowe,
ont, for skiing purposes. Mr. Wright
an expert skier, having been certified
uch, and was engaged as a ski in-
or at the Mad River Valley ski
ct. Mrs. Wright had been skiing for
years and had taken lessons from her
nd and others. She was not what
own as an expert skier, but was in
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feet or so to within sight of the head of the T-bar lift, and also within sight of the hut called the Christienda hut, which is located near the top of the T-bar lift. He stopped and turned around and watched his wife come along. As Mrs. Wright began to approach him, she went into what is known as a snow-plow. This is a procedure used by skiers for stopping. It consists of turning the toes in to about an angle of 30° each and putting more pressure on the inside runner of each ski. As she was snow-plowing to a stop, she suddenly fell and began to cry out in pain for help. Mr. Abrams, in the meantime, was standing at the spot they had last stopped. He then skied to the spot where Mrs. Wright had fallen. Mr. Wright rushed up from a spot 15-20 feet away. Shortly a member of the ski patrol arrived with a toboggan. Mrs. Wright was in pain and was loaded onto the toboggan, tied onto the toboggan and thus taken down to the foot of the mountain and thence by automobile to the Morrisville Hospital.

The trail at the point of the accident was of good width and was more or less level land. It wasn't hazardous or steep in any way at this spot. No stump showed above the snow. There was a smooth snow surface. Indeed the Skimeister trail had ample snow. The witness Abrams testified that at the point of the plaintiff's fall, he got down and brushed the snow aside with his hand. He then found a stump 4-5 inches high from the ground—definitely a cut tree—no jagged edges. From the evidence one could infer that it was this obstacle that caused Mrs. Wright to fall and break her left leg.

From this recitation of the facts, as viewed in the light most favorable to the plaintiffs, it is apparent that there is no evidence of any nature that connects the defendant, Stowe-Mansfield Association, Inc., with this case. Stowe-Mansfield Association, Inc. neither owned or controlled any of the land on which this accident happened. It was merely a promotional enterprise for the Stowe-Mansfield area. Indeed, the plaintiffs make no claim, that as the evidence stands, there is liability upon Stowe-Mansfield Associati[on]. Therefore, a directed verdict on t[his] fendant's part is granted.

The situation is different, however, with regard to the Lift Company and the Hotel Company.

[1, 2] In the eyes of the law, the plaintiffs were invitees of the Lift and Hotel Companies. Whenever one makes use of another's premises as the owner invites he shall, or such as he is reasonably justified in understanding that the owner invites, this is an implied invitation to enter upon the land of another. Wool v. [illegible], 118 Vt. 431, 435, 26 A.2d 89.

The Lift Company invited the plaintiffs to the top of the lift. It maintained on its premises a record as to which trails were open and had signs on its property for the purpose of leading the plaintiffs to make a choice of trail, in this case the Toll House Trail. Once on the trail and headed down the mountain, the plaintiffs were led off onto the Skimeister Trail, part of which was on land of the Hotel Company. The Skimeister trail the Hotel Company had sanctioned for years. Indeed, the reason for each of the trails mentioned being open was to financially benefit both the Lift Company and the Hotel Company.

[3] The duty owed the plaintiffs, as invitees, by each of these two defendants was to advise them of any dangers which reasonable prudence would have foreseen and corrected. Slattery v. Mecra Inc., 2 Cir., 186 F.2d 134, 136.

Skiing is a sport; a sport that engages thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, trail construction, corners and varied conditions of the snow. Secondly, it requires a judgment on the part of the skier in recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Hard crust may be encountered where soft snow is expected. Roots and rocks may be

under a thin cover. A single thin ...gle of cut brush can trip a skier in ...middle of a turn. Sticky snow may ...w a fast running surface without warn... Skiing conditions may change quick... What was, a short time before, a ...fect surface with a soft cover on all ...ps may fairly rapidly become filled ... ruts, worn spots and other manner ...ier created hazards.

[4] The doctrine of volenti non fit in... applies. One who takes part in such ...port accepts the dangers that inhere in ...o far as they are obvious and necessary. ...s one who goes ice skating on a rink ...mes the ordinary risks of the sport ...ch includes inequalities of surface. Ob... v. Pennsylvania Sports and Enter... 358 Pa. 62, 55 A.2d 766, 769; ...ds v. Van-Kelton Amusement Corp., ...N.Y. 396, 127 N.E. 261; McCullough ...maha Coliseum Corp., 141 Neb. ..., 12 ...2d 639, 643. One who goes to a ...ching beach as an invitee accepts the ...ers that inhere in it so far as they are ...ous and necessary. McGraw v. Dis... of Columbia, 3 App.D.C. 405, 25 L.R.A. ..., 692 693. A passenger who rides on ...emic railway and falls off, through no ...ual action of the railway, may not ...ver. The passenger has placed him... in a position of obvious danger for the ...pose of receiving the sensation caused ...the sudden and violent motion of the ... He assumed the risk. Lumsden v. ...A. Thompson Scenic Railway Company, ... App.Div. 209, 114 N.Y.S. 421, 423. ...e who had participated in bobsledding ...had followed that sport for some years ...mes the risk attendant upon participa... of that sport. The bobsled enthusiast ...w that bobsled racing was a dangerous ...t and could not recover for injuries re...ved. Clark v. State, 195 Misc. 581, 89 ...Y.S.2d 132, 139.

...n this skiing case, there is no evidence ...any dangers existing which reasonable ...ence on the parts of the defendants ...ld have foreseen and corrected. It ...s as though a tractor was parked on ...ski trail around a corner or bend without ...ing to skiers coming down. It isn't ...ough on a trail that was open work ...was in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.

[5] The trail at the point of the accident was smooth and covered with snow. There were no unexpected obstructions showing. The plaintiff, in hitting the snow-covered stump as she claims to have hit, was merely accepting a danger that inheres in the sport of skiing. To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constitutly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these natural features of nature and requires it to warn the public against such. Chief Justice Cardozo in the case of Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, 166 N.E. 173, 174, discusses the law, which I hold to be applicable to ski accident cases and I quote:

"Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. * * * The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

"A different case would be here if the dangers inherent in the sport were obscure or unobserved. * * * Nothing happened to the plaintiff except what common

experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe."

The verdict is therefore directed for each defendant.

UNITED STATES v. E. F. METZNER CO. Inc. et al.

Civ. A. 1877.

District Court of United States
W. D. Kentucky.

March 22, 1951.

The Office of the Housing Expediter, in the name of United States, brought action against E. F. Metzner Company, Inc., and John Payne, to recover $307.50 for benefit of tenants from whom excessive rent had allegedly been collected and an additional amount of $615, twice the amount of the alleged overcharge, in favor of the United States. The District Court, Shallenberger, J., held that company acting as agent for landlord in collection of rent was jointly liable with landlord for the overcharge.

Judgment for plaintiffs in accordance with opinion.

1. Landlord and tenant ⇐200(1½)
War and national defense ⇐210

Under Housing and Rent Act, an agent who demanded and received more than maximum rental was liable for the accepted overcharge and statutory damages. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

2. Landlord and tenant ⇐200(1¼)
War and national defense ⇐200, 210

Where landlord rents new housing accommodations but disobeys regulatory scheme and failed to file a registration statement, if he chooses to collect rent that he himself has fixed, he can do so only contingently and Administrator may fix what was the proper amount from the beginning, and excess is illegal and must be refunded. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

3. Landlord and tenant ⇐200(1½)
War and national defense ⇐210

The maximum rental of dwelling established by the Controlled Housing Rent regulations, cannot be changed by action of landlord in filing new registration statements. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

4. Landlord and tenant ⇐200(1½)
War and national defense ⇐210

A landlord's registration of dwelling unit under Controlled Housing and Rent regulation is not binding on the Housing Expediter, and does not entitle landlord to charge rental higher than the original rental fixed at freeze time. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

5. Landlord and tenant ⇐200(1½)
War and national defense ⇐210

Where total of $307.50 rental overcharge for apartments was collected, which amount $252.50 was collected by landlord's agent, landlord was liable for total amount of overcharge and agent was jointly and severally liable to the extent of amount collected by it. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

6. Landlord and tenant ⇐200(1½)
War and national defense ⇐210, 242

Evidence indicated good faith on part of landlord and its agent in collecting rent overcharges for apartment and their actions were neither willful nor result of failure to exercise practical precaution against violations of Housing and Rent Act, so that they would be absolved from the penalty of paying double the amount of the overcharge. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

Dominic J. Cimino, Enforcement Atty., Office of Housing Expediter, Cleveland, Ohio, for plaintiff.

weeks after breeding. It was the practice of the plaintiff during those years to allow the pigs to run with the sows for about two months after birth and then sell such sows as packers. Sows selling as packers usually sell for about $2.00 less per hundred then prime hogs, but they usually weigh considerably more than prime hogs.

5. During the year of 1946 the plaintiff sold 34 sows for the net sale price of $2,051.83. At the time of sale the said sows were apparently 1½ years old. The said 34 sows were used and handled as, and for, breeding sows in accordance with the practice of the plaintiff heretofore described. The plaintiff in his income tax return for 1946 treated the said sows as constituting capital assets within the provisions of Section 117(j) of the Internal Revenue Code, 26 U.S.C.A. § 117(j). The Collector of Internal Revenue for the District of Iowa claimed that the said breeding sows did not constitute capital assets within the provisions of said Section. In response to said claim, the plaintiff paid to the said Collector additional income tax for the year of 1946 in the sum of $175.00, together with penalty thereon in the sum of $8.75. The plaintiff made due, timely and proper claim for refund for the sum of $175.00 and $8.75, or $183.75, which claim was disallowed on May 12th, 1950.

6. During the year 1947 the plaintiff sold 40 sows for the net sale price of $3,522.04. At the time of the sale the said sows were approximately 1½ years old. The said 40 sows were used and handled as, and for, breeding sows in accordance with the practice of the plaintiff heretofore described. The plaintiff in his income tax return for 1947 treated the said sows as capital assets within the provisions of Section 117(j). The Collector of Internal Revenue for the District of Iowa claimed that the said sows did not constitute capital assets within the provisions of said Section. In response to said claim, the plaintiff paid to said Collector additional tax for the year 1947 in the sum of $444.19, together with penalty thereon in the sum of $22.21. The plaintiff made due, timely and proper claim for refund for the said sum of $444.19, plus $22.21, or $466.40, which claim was disallowed on May [illegible] 1950.

7. The said 34 sows, the sale of [illegible] was reported by the plaintiff in his income tax return, did constitute [illegible] assets within the provisions of Section [illegible] (j) of the Internal Revenue Code.

8. The said 40 sows, the sale of [illegible] was reported by the plaintiff in his income tax return, did constitute [illegible] assets within the provisions of Section [illegible] (j) of the Internal Revenue Code.

Conclusions of Law

1. That this Court has jurisdiction [illegible] the subject matter of this action and [illegible] parties thereto under the provisions [illegible] Section 1346 of the Revised Judicial Code, 28 U.S.C.A. § 1346.

2. That the said sum of $175.00 additional tax, the penalty in the sum of [illegible] and interest in the sum of $23.84, or a sum of $209.59, was illegally and erroneously collected from the plaintiff.

3. That the said sum of $444.19 additional tax, the penalty in the sum of [illegible] 21, and interest in the sum of 34.09, total sum of $501.39, was illegally and erroneously collected from the plaintiff.

WRIGHT et al. v. MT. MANSFIELD LIFT, Inc., et al.

Civ. A. No. 1101.

United States District Court D. Vermont.

April 16, 1951.

Action by Florine Wright and [illegible] against Mt. Mansfield Lift, Inc., Mt. Mansfield Hotel, Inc., and Stowe-Mansfield Association, Inc., for injuries sustained by the plaintiff as result of a skiing accident. At the conclusion of the plaintiff's case, each of the three defendants filed a motion for directed verdict. The District Court, [illegible] J., held that in absence of evidence [illegible] dangers existing on ski trail which [illegible]

prudence on part of defendants would foreseen and corrected, plaintiff, in hitting snow-covered stump was merely accepting danger that inhered in sport of skiing. judgment for defendants.

Negligence ⇐32(2.4)

Whenever one makes such use of another's premises as the owner intends he or such as he is reasonably justified understanding that owner intended, that an implied invitation to enter on the of another.

Theaters and shows ⇐6(4)

Where hotel company and ski lift company cleared and maintained ski trails open use by general public, and for their mercial gain, plaintiff and her husband invitees of lift and hotel companies at plaintiff and husband were skiing on and plaintiff fractured a leg as result colliding with snow-covered tree stump trail.

Theaters and shows ⇐6(8)

Where defendant ski lift company inplaintiffs to top of lift and maintained its premises a record as to which ski were open and had signs on its prop- for purpose of giving plaintiff a choice trails, and once on trail heading down claims plaintiffs were invited onto trail, of which was on land of defendant company, which trail hotel company maintained for years, and reason for trails being open was to financially both lift company and hotel com- duty owed plaintiffs, invitees, by each the defendants was to advise them of changes in trails which reasonable person would have foreseen and rected.

Negligence ⇐105

One who takes part in sport of skiing dangers which inhere in it so far they are obvious and necessary.

Theaters and shows ⇐6(19)

Where plaintiff, an invitee, ascended to mountain by the use of ski lift operby defendant lift company and while on trail located on land owned by hotel company, collided with covered tree stump and fractured her leg, in absence of evidence of any danger existing which reasonable prudence on part of defendants would have foreseen and corrected, plaintiff, in hitting snow-covered stump, was merely accepting a danger that inhered in sport of skiing and defendants were not liable for her injuries.

Justin G. Cavanaugh and William H. Cooney, Springfield, Mass., for plaintiffs Florine Wright and Robert B. Wright, Jr.

McNamara & Larrow, Burlington, Vt., Frank G. Sterritte, New York City, for defendants Mt. Mansfield Lift, Inc. and Mt. Mansfield Hotel, Inc.

Clifton G. Parker, Morrisville, Vt., for defendant Stowe-Mansfield Assn, Inc.

GIBSON, District Judge.

This is an action for damages resulting from a skiing accident brought by Florine and Robert B. Wright, Jr., husband and wife, of Springfield, Mass., against the Mt. Mansfield Lift, Inc., Mt. Mansfield Hotel, Inc., and the Stowe-Mansfield Association, Inc. The case was heard on its merits at the February term, 1951, U. S. District Court, District of Vermont. At the conclusion of the plaintiff's case, each of the three defendants filed a motion for a directed verdict. The motion, in each instance, is hereby granted.

The plaintiff, Mrs. Florine Wright, in her complaint, alleged that on January 23, 1949, she was skiing at the Mt. Mansfield ski area in Stowe, Vermont; that she had paid the required fee to one of the defendants, Mt. Mansfield Lift, Inc., hereinafter called Lift; had been transported to the top of Mt. Mansfield by this chair lift and having reached the top, started to ski down a marked trail; that on her way down the mountain, at a certain point on a ski trail, she ran against or collided with a snow-covered stump of a tree and thereby caused a serious fracture of her left leg.

The evidence viewed in the light most favorable to the plaintiff revealed the following situation. Stowe, Vermont, has become one of the largest winter sports areas of the eastern United States. The area of

Mt. Mansfield is a snow bowl. In fact, the slogan of the area is "There is always snow in Stowe, you know".

Lift, Inc. was a Vermont corporation which owned or controlled land running up Mt. Mansfield on which it had erected a modern chair lift for skiers, the lift itself being better than a mile long.

In January, 1949, those who desired to ski down the trails of Mt. Mansfield in this area purchased a ticket at the bottom of the mountain where the lift commenced, the ticket costing 75¢ for a single ride up the mountain. After purchasing the ticket, the prospective skier stood in line and as the skier's turn came, sat in the ski chair, generally with skis on. The skier was then hoisted better than 2,000 feet above the elevation of the bottom of the ski lift and deposited at the top of the ski lift at the top of Mt. Mansfield. At the top of the ski lift, there was what is known as the Octagon House, made of stone, in which was served refreshments and also in which was a blackboard or chart on which were listed the particular trails which were open for skiing. There were also located in this general area at the top of the lift signs pointing to the starting points of various trails down the mountain, each trail bearing a different name, such as Nosedive, Skimeister, Toll Road, etc. Most of these trails started on land that was owned or controlled by Lift, Inc. As these trails wended their way down Mt. Mansfield, they twisted their way, on occasion, onto lands owned or controlled by others. Defendant Mt. Mansfield Hotel, Inc., hereinafter called Hotel, Inc., at the time of the accident, owned and operated a hotel which at that time cared for approximately 20 guests. Most of these guests were ski enthusiasts. The Skimeister trail, as it came down Mt. Mansfield, came onto land of the Hotel, Inc. The Skimeister trail had been in operation for many years before this accident with the full knowledge and approval of Hotel, Inc. The trails were areas cleared down the rough mountain side of Mt. Mansfield by cutting trees, by bulldozing and by other methods. The trails are of varying width, some trails being much more crooked than others.

The maintenance of the trails in summertime consisted of mowing and cutting the brush and trees and of widening existing trails. Various residents, interested innkeepers in and about Stowe, aided from the Forestry Department of the State of Vermont and workers provided by Lift, Inc., Hotel, Inc., and other organizations interested in skiing, did the summer maintenance work on these trails.

Generally speaking, there were three classes of trails on Mt. Mansfield which those who used the ski lift might ski. There was one class of trails known as expert trails. To maneuver these trails required a high degree of skiing ability. The second class of trails were known as the intermediate trails. These trails were less hazardous and less difficult than the expert trails, but one to negotiate safely needed to be a fairly good skier. The third class of trails were known as the novice trails. These trails were for those who had skied but little.

During the winter of 1948-1949, the skiing of the trails was done by an organization known as the Mt. Mansfield Ski Patrol. This ski patrol consisted of five or six good skiers who were paid by the Mt. Mansfield Ski Club. This club, in turn, raised its funds by contributions from individuals, corporations, innkeepers and the like. Its total budget for the winter season of 1948-1949 was in the vicinity of $3,000. Of this, about $1,000 was contributed by the Hotel, Inc. and another substantial sum by the Lift, Inc.

The duties of this Ski Patrol were many. It was the Patrol's duty each day to inspect each trail to determine which trails were suitable for skiing and which were not. Having done this, the patrol would see to it that the blackboard in the Octagon House which listed the trails open for skiing would properly list those that were open for skiing on this particular day. The patrol would also see to it that such trails as were adjudged by it as unsafe for skiing were closed off by chain or rope and that warning signs were put up at the start of the trail and at other places warning that a particular trail was not open. In addition, members of the patrol skied down the trails

kept their eyes open for any unsafe conditions that appeared on open trails. If there were any, patrol members took steps to put up proper warning flags or proper safeguards or notified officials of the lift that there was a dangerous spot at a certain place on a certain trail so that steps could be taken immediately either to erect proper warning notices or to close off the trail.

The main purpose of the members of the ski patrol was to be available in case of injury to any skier. Ski patrol members were trained in first aid and had equipment staged at various places on Mt. Mansfield for the purpose of removing injured skiers safely and expeditiously to the bottom of the mountain and if necessary to the hospital.

On January 23, 1949, Mr. and Mrs. Wright, accompanied by Mr. Abrams, went to Fayston, Vermont, where the Wrights were both working at this time, to Stowe, Vermont, for skiing purposes. Mr. Wright was an expert skier, having been certified as such, and was engaged as a ski instructor at the Mad River Valley ski school. Mrs. Wright had been skiing for several years and had taken lessons from her husband and others. She was not what is known as an expert skier, but was in what is generally termed as the intermediate class. Mr. Abrams was not as good a skier as Mr. and Mrs. Wright, but was generally able to negotiate intermediate trails.

On the day in question, this party arrived at the foot of Mt. Mansfield around noon. Mr. Wright and Mr. Abrams purchased a ticket for 75¢ apiece to ride to the top of Mt. Mansfield on the ski lift. Mr. Wright as a professional was not required to buy a ticket. This was a courtesy extended by the lift to professional skiers. In due time, the party arrived at the top of Mt. Mansfield via the lift. Mr. Wright decided to see what trails were open and accordingly then went to the start of the Toll Road trail. The Toll Road trail down Mt. Mansfield is a gravelled road used by automobiles during the summertime. It is about four miles in length and one who goes down the Toll Road all the way, comes out at a point about two miles from the bottom of the lift and to get back to the lift, has to either walk or go by taxi. This Toll Road is classified as a novice trail. The party skied down the Toll Road until they came to a cut-off from the Toll Road, known as the 5th Avenue Cut-off. The party then turned onto this cut-off and skied down the cut-off until they arrived at the Skimeister trail. They then swung down the Skimeister trail until they came to the head of an open slope known as the T-bar slope, thence down that slope to the foot of the mountain. In coming down the mountain, Mr. Wright would lead the way, followed by Mrs. Wright and then followed in turn by Mr. Abrams. They would ski a distance of 200-300 feet, more or less, then stop and visit and then after resting a little, Mr. Wright would start off again followed in due time by Mrs. Wright and Mr. Abrams. Mr. Wright would ski as far as he thought wise on a given lap, stop and Mrs. Wright would come up behind him, stop, and Mr. Abrams the same. The first trip down these trails on Mt. Mansfield was uneventful. The party then got back onto the lift, again Mrs. Wright and Mr. Abrams purchasing tickets for 75¢ and were conveyed to the top of Mt. Mansfield once more. The three of them started once again down the identical route they had taken on the first descent; down the Toll Road to the 5th Avenue Cut-off, down the 5th Avenue Cut-off to the Skimeister trail, down the Skimeister trail to the top of the T-bar and the open slopes. The 5th Avenue Cut-off is just what the name implies, a cut-off from the Toll Road trail to another trail. It was an easy trail, a novice trail. The Skimeister trail, on the other hand, was an intermediate trail. The second trip down the mountain by this party was uneventful until the party came onto the Skimeister trail. There, a couple of hundred feet from where the Skimeister trail ran into the open slope and the T-bar lift, the party stopped for a rest and visit. Then Mr. Wright, as was the procedure on this particular day, skied down about 120

feet or so to within sight of the head of the T-bar lift, and also within sight of the hut called the Christiania hut, which is located near the top of the T-bar lift. He stopped and turned around and watched his wife come along. As Mrs. Wright began to approach him, she went into what is known as a snow-plow. This is a procedure used by skiers for stopping. It consists of turning the toes in to about an angle of 30° each and putting more pressure on the inside runner of each ski. As she was snow-plowing to a stop, she suddenly fell and began to cry out in pain for help. Mr. Abrams, in the meantime, was standing at the spot they had last stopped. He then skied to the spot where Mrs. Wright had fallen. Mr. Wright rushed up from a spot 15-20 feet away. Shortly a member of the ski patrol arrived with a toboggan. Mrs. Wright was in pain and was loaded onto the toboggan, tied onto the toboggan and thus taken down to the foot of the mountain and thence by automobile to the Morrisville Hospital.

The trail at the point of the accident was of good width and was more or less level land. It wasn't hazardous or steep in any way at this spot. No stump showed above the snow. There was a smooth snow surface. Indeed the Skimeister trail had ample snow. The witness Abrams testified that at the point of the plaintiff's fall, he got down and brushed the snow aside with his hand. He then found a stump 4-5 inches high from the ground—definitely a cut tree—no jagged edges. From the evidence one could infer that it was this obstacle that caused Mrs. Wright to fall and break her left leg.

From this recitation of the facts, as viewed in the light most favorable to the plaintiffs, it is apparent that there is no evidence of any nature that connects the defendant, Stowe-Mansfield Association, Inc., with this case. Stowe-Mansfield Association, Inc. neither owned or controlled any of the land on which this accident happened. It was merely a promotional enterprise for the Stowe Mansfield area. Indeed, the plaintiffs make no claim, that as the evidence stands, there is liability upon Stowe Mansfield Association, Inc. Therefore, a directed verdict on this defendant's part is granted.

The situation is different, however, with regard to the Lift Company and the Hotel Company.

[1, 2] In the eyes of the law, the plaintiffs were invitees of the Lift and Hotel Companies. Whenever one makes use of another's premises as the owner invites he shall, or such as he is reasonably justified in understanding that the owner invites, this is an implied invitation to enter upon the land of another. Wool v. Lacroix, 126 Vt. 431, 436, 26 A.2d 89.

The Lift Company invited the plaintiffs to the top of the lift. It maintained on its premises a record as to which trails were open and had signs on its property for the purpose of leading the plaintiffs to a free choice of trail, in this case the Toll House Trail. Once on the trail and heading down the mountain, the plaintiffs were invited onto the Skimeister Trail, part of which was on land of the Hotel Company. The trail the Hotel Company had owned for years. Indeed, the reason for each of the trails mentioned being open was to financially benefit both the Lift Company and the Hotel Company.

[3] The duty owed the plaintiffs as invitees, by each of these two defendants, was to advise them of any dangers which reasonable prudence would have foreseen and corrected. Slattery v. Mwera Realty, 2 Cir., 186 F.2d 134, 136.

Skiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier in the recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain phase of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be

under a thin cover. A single thin ...ple of cut brush can trip a skier in ...middle of a turn. Sticky snow may ...a fast running surface without warn... Skiing conditions may change quick... What was, a short time before, a ...ect surface with a soft cover on all ...s may fairly rapidly become filled ...ruts, worn spots and other manner ...ther created hazards.

[4] The doctrine of volenti non fit in... applies. One who takes part in such ...ort accepts the dangers that inhere in ...far as they are obvious and necessary. ...one who goes ice skating on a rink ...mes the ordinary risks of the sport ...h includes inequalities of surface. Ob... v. Pennsylvania Sports and Enter... 358 Pa. 62, 55 A.2d 766, 769; ...s v. Van-Kelton Amusement Corp., ...N.Y. 396, 127 N.E. 261; McCullough ...Omaha Coliseum Corp., 144 Neb. 33, 12 ...2d 639, 643. One who goes to a ...ching beach as an invitee accepts the ...ers that inhere in it so far as they are ...ous and necessary. McGraw v. Dis... of Columbia, 3 App.D.C. 405, 25 L.R.A. ...692 693. A passenger who rides on ...le's railway and falls off, through no ...ul action of the railway, may not ...ver. The passenger has placed him... in a position of obvious danger for the ...ose of receiving the sensation caused ...the sudden and violent motion of the ... He assumed the risk. Lumsden v. ...A. Thompson Scenic Railway Company, ...App.Div. 209, 114 N.Y.S. 421, 423. ...who had participated in bobsledding ...had followed that sport for some years ...mes the risk attendant upon participa... of that sport. The bobsled enthusiast ...w that bobsled racing was a dangerous ...t and could not recover for injuries re... ...ed. Clark v. State, 195 Misc. 581, 89 ...S.2d 132, 139.

...this skiing case, there is no evidence ...any dangers existing which reasonable ...ence on the parts of the defendants ...ld have foreseen and corrected. It ...as though a tractor was parked on ...trail around a corner or bend without ...ing to skiers coming down. It isn't ...ough on a trail that was open work ...was in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.

[5] The trail at the point of the accident was smooth and covered with snow. There were no unexpected obstructions showing. The plaintiff, in hitting the snow-covered stump as she claims to have hit, was merely accepting a danger that inheres in the sport of skiing. To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these variations of nature and requires it to warn the public against such. Chief Justice Cardozo in the case of Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, 166 N.E. 173, 174, discusses the law, which I hold to be applicable to ski slope cases and I quote:

"Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. * * * The antics of the clown are not the jokes of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

"A different case would be here if the dangers inherent in the sport were obscure or unobserved. * * * Nothing happened to the plaintiff except what common

experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe."

The verdict is therefore directed for each defendant.

UNITED STATES v. E. F. HUTZLER CO. Inc. et al.

Civ. A. 1877.

District Court of United States W. D. Kentucky.

March 22, 1951.

The Office of the Housing Expediter, in the name of United States, brought action against E. F. Hutzler Company, Inc., and John Payne, to recover $307.50 for benefit of tenants from whom excessive rent had allegedly been collected and an additional amount of $616, twice the amount of the alleged overcharge, in favor of the United States. The District Court, Shallenberger, J., held that company acting as agent for landlord in collection of rent was jointly liable with landlord for the overcharge.

Judgment for plaintiffs in accordance with opinion.

1. Landlord and tenant ⇐209(1½)
War and national defense ⇐216

Under Housing and Rent Act, an agent who demanded and received more than maximum rental was liable for the accepted overcharge and statutory damages. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

2. Landlord and tenant ⇐209(1½)
War and national defense ⇐209, 216

Where landlord rents new housing accommodations but disobeys regulatory scheme and failed to file a registration statement, if he chooses to collect rent that he himself has fixed, he can do so only contingently and Administrator may fix what was the proper amount from the beginning, and excess is illegal and must be refunded. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

3. Landlord and tenant ⇐209(1½)
War and national defense ⇐216

The maximum rental of dwelling established by the Controlled Housing Rent regulations, cannot be changed by action of landlord in filing new registration statements. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

4. Landlord and tenant ⇐209(1½)
War and national defense ⇐216

A landlord's registration of dwelling unit under Controlled Housing and Rent regulation is not binding on the Housing Expediter, and does not entitle landlord to charge rental higher than the original rental fixed at freeze time. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

5. Landlord and tenant ⇐209(1½)
War and national defense ⇐216

Where total of $307.50 rental overcharge for apartments was collected, which amount $252.50 was collected by landlord's agent, landlord was liable for total amount of overcharge and agent was jointly and severally liable to the extent of amount collected by it. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

6. Landlord and tenant ⇐209(1½)
War and national defense ⇐216, 218

Evidence indicated good faith on part of landlord and its agent in collecting overcharges for apartment and their actions were neither willful nor result of failure to exercise practical precaution against violations of Housing and Rent Act, so that they would be absolved from the penalty of paying double the amount of the overcharge. Housing and Rent Act of 1947, §§ 1 et seq., 205, as amended, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

Dominic J. Cimino, Enforcement Attorney, Office of Housing Expediter, Cleveland, Ohio, for plaintiff.

HB 788

Amend Third Reading copy, as amended by the Senate Committee on Highways and Transportation

1. Senate Committee Amendment #7.
Amend to read:
"Page 2, line 18.
Following: line 17
Strike: "bureau"
Insert: "department acquired a field in connection with rolling stock projects"

HB 870

1. Title, lines 8 through 10.
Following: "OFFENSE" on line 8
Strike: remainder of line 8 through "EVIDENCE" on line 1

2. Page 3, lines 4 and 5.
Following: "defense" on line 4
Strike: remainder of line 4 through "evidence" on line 5

H 63

HB 652

1. Title, lines 4 through 7.
Following: "AMEND" on line 4 "APPLICABLE"
Strike: remainder of line 4 through ~~"WHEN"~~ on line 7
Insert: "THE LAW RELATING"

2. Title, line 7.
Following: "ASSAULT"
Insert: "BY PROVIDING THAT CONSENT IS INEFFECTIVE IN CERTAIN CIRCUMSTANCES; AMENDING SECTION 45-5-502, MCA"

3. Page 1, lines 10 through 19.
Strike: section 1 in its entirety
Insert: "Section 1. Section 45-5-502, MCA, is amended to read

"45-5-502. Sexual assault. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 13 years old and the offender is both 3 or more years older than the victim and at least 15 years old."

HB 865

1. Title, line 11.
Following: "45-5-502,"
Strike: "AND"
Insert: ","
Following: "45-5-503,"
Insert: "AND 45-5-505,"

2. Page 2, line 3.
Following: "is"
Insert: "both"
Following: "victim"
Insert: "and at least 15 years old"

3. Page 2, line 9
Following: "OFFE SE
Insert: "under this subsection"

4. Page 2, line 11.
Following: "40"
Insert: "except as provided in 46-18-222"

5. Page 3, line 10.
Following: "is"
Insert: "both"
Following: "victim"
Insert: "and at least 15 years old"

6. Page 11.
Following: line 19
Insert: "Section 3. Section 45-5-505, MCA, is amended to read

"45-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years.

(4) If the victim is a human being less than 13 years old and the offender is both 5 or more years older than the victim and at least 15 years old ~~at the time of the offense~~ or if the victim is a human being less than 13 years old and the offender inflicts bodily injury upon the victim in the course of committing such deviate sexual conduct, the offender shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 46-18-222. On a second or subsequent offense under this subsection, the offender shall be imprisoned in the state prison for a term of not less than 10 years or more than 40 years, except as provided in 46-18-222.

(5) If the offense is deviate sexual conduct involving sexual intercourse with a human being who is less than 13 years old and either the offender is both 5 or more years older than the victim and at least 15 years old or the offender inflicts bodily injury on the victim in the course of committing such deviate conduct, the

offender shall be imprisoned in the state prison for a term of not less than 10 years or more than 40 years, except as provided in 46-18-222.

(6) Insert "in the course of committing such deviate sexual conduct" includes an attempt to commit the offense or flight after the attempt or commission."

HB 813 (2) (41, ss 25 (20" 12" 2" 11")

1. Title, line 15.
Following: line 14
Strike: "GUARDIAN"
Insert: "GUARDIANSHIP ASSETS"

2. Page 2, line 2.
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

3. Page 2, line 4.
Following: "the"
Strike:
Insert: "parent or"
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

5. ~~4~~. Page 2, lines 17 through 19. wording of S.B-301
Following: "(1)" on line 17
Strike: remainder of line 17 through "the" on line 19
Insert: "Upon receipt of a report as required by 41-3-201 that a"

4. Page 2, line 10.
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

6. Page 8, line 1.
Following: "or"
Strike: "guardian"
Insert: "the extent of guardianship assets"

7. Page 8, line 9.
Following: "or"
Strike: "guardian"
Insert: "the adequacy of the guardianship assets"

8. Page 11, line 19.
Strike: "or guardian"

9. Page 11, line 20.
Following: "youth"
Insert: "or the adequacy of the guardianship assets to provide a contribution"

10. Page 12, lines 1 and 2.
Strike: "or guardian is"
Insert: "or"

11. Page 12, line 2.
Following: "youth"
Insert: "or that the guardianship assets are adequate to provide a contribution"

12. Page 12, line 5.
Following: "service."

available from guardianship assets."

13. Page 15, line 6.
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

14. Page 15, line 13.
Following: "or"
Strike: "guardian"
Insert: "the adequacy of the guardianship assets"

15. Page 16, line 1.
Strike: "or guardian"

16. Page 16, line 2.
Following: "youth"
Insert: "or the adequacy of the guardianship assets to provide a contribution"

17. Page 16, line 7.
Strike: "or guardian"

18. Page 16, line 8.
Following: "youth"
Insert: "or the adequacy of the guardianship assets to provide a contribution"

19. Page 16, lines 14 and 15.
Strike: "or guardian's ies"
Insert: "ore"

Following: "parent" - line 14

20. Page 16, line 15.
Following: "youth"
Insert: "or that the guardianship assets are adequate to provide a contribution"

21. Page 16, line 18.
Following: "services."
Insert: "Payments required of a guardian may not exceed the funds available from guardianship assets."

HB 860

1. Title, line 5.
Following: "LIBEL"
Insert: "OR SLANDER"

2. Page 1, line 15.
Strike: "libelous or"

3. Page 1, line 18.
Following: "the"
Strike: "libeled"
Insert: "defamed"

4. Page 1, lines 20 and 21.
Strike: "libelous or"

5. Page 2, line 17.
Following: "broadcast of the"
Strike: "libeled"
Insert: "defamed"

6. Page 2, line 18.
Following: "not"
Strike: "libelous"
Insert: "defamatory"

7. Page 2, line 22.
Following: "through"
Strike: "3"
Insert: "4"

8. Page 2, line 25.
Following: "broadcast"
Insert: "complained of"

HB 621

1. Title, line 8.
Following: "OF"
Strike: "S"
Insert: "4"

2. Page 2, line 22.
Following: "July 1, "
Strike: "1984"
Insert: "1983

SENATE COMMITTEE JUDICIARY

Date _____ Bill No. SB 5 Time 11:16

NAME	YES	NO
Lensink, Everett R., Chr. (R)	✓	
Olson, S. A., V. Chr. (R)	✓	
Turnage, Jean A. (R)	✓	
O'Hara, Jesse A. (R)		✓
Anderson, Mike (R)		
Galt, Jack E. (R)		✓
Towe, Thomas E. (D)	✓	
Brown, Steve (D)	✓	
Van Valkenburg, Fred (D)	✓	
Healy, John E. (Jack) (D)	✓	
	7	3

Secretary _____ Chairman _____

Motion: Be not concurred in as amended

(include enough information on motion--put with yellow copy of committee report.)

SENATE COMMITTEE JUDICIARY

Date _____ _____ Bill No. 652 Time _____

NAME	YES	NO
Lensink, Everett R., Chr. (R)		✓
Olson, S. A., V. Chr. (R)	✓	
Turnage, Jean A. (R)		✓
O'Hara, Jesse A. (R)	✓	
Anderson, Mike (R)		
Galt, Jack E. (R)		✓
Towe, Thomas E. (D)	✓	
Brown, Steve (D)	✓	✓
Van Valkenburg, Fred (D)		✓
Healy, John E. (Jack) (D)	✓	
		6

Secretary _____ Chairman _____

Motion: Adopt 4 of 4 - amendments 7

(include enough information on motion--put with yellow copy of committee report.)

STANDING COMMITTEE REPORT

March 20, 1979

MR. President:

We, your committee on Judiciary

having had under consideration House Bill No. 360

Scully (Towe)

Respectfully report as follows: That House Bill No. 360,
third reading bill, be amended as follows:

1. Title, line 5.
Following: "LIBEL"
Insert: "OR SLANDER"

2. Title, line 9.
Following: "AGAINST"
Strike: "ALL BUT ACTUAL"
Insert: "PUNITIVE"

3. Title, lines 9 and 10.
Strike: "AND IN DETERMINING ACTUAL DAMAGES"

4. Page 1, line 15.
Strike: "libelous or"

5. Page 1, line 18.
Following: "the"
Strike: "libeled"
Insert: "defamed"

XDO PASSX

(continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

1 4 6

6. Page 1, lines 20 and 21.
Strike: "libelous or"

7. Page 2, line 17.
Following: "broadcast of the"
Strike: "libeled"
Insert: "defamed"

8. Page 2, line 18.
Following: "not"
Strike: "libelous"
Insert: "defamatory"

9. Page 2, line 22.
Following: "through"
Strike: "3"
Insert: "4"

10. Page 2, line 25.
Following: "broadcast"
Insert: "complained of"
Following: "mistake"
Strike: "or misapprehension"

11. Page 3, line 5.
Following: "of"
Strike: "any"
Insert: "punitive"

12. Page 3, lines 6 through 8.
Following: line 5
Strike: lines 6 through 8 in their entirety
Insert: "."

And, as so amended,
BE CONCURRED IN

EVERETT R. LENSINK,
Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 29 19 79

MR. President

We, your committee on Judiciary

having had under consideration House Bill No. 870

Keedy (Van Valkenburg)

Respectfully report as follows: That House Bill No. 870,
third reading bill, be amended as follows:

1. Title, lines 8 through 10.
Following: "OFFENSE" on line 8
Strike: remainder of line 8 through "EVIDENCE" on line 10

2. Page 3, lines 4 and 5.
Following: "defense" on line 4
Strike: remainder of line 4 through "evidence" on line 5

And, as so amended,
DE CONCURRED IN

~~BE~~

STATE PUB. CO.
Helena, Mont.

Everett R. Lensink, Chairman.

STANDING COMMITTEE REPORT

March 20 19 79

MR. President

We, your committee on Judiciary

having had under consideration House Bill No. 621

Waldron (Brown)

Respectfully report as follows: That House Bill No. 621,
third reading bill, be amended as follows:

1. Title, line 8.
Following: "OF"
Strike: "5"
Insert: "4"

2. Page 2, line 22.
Following: "July 1,"
Strike: "1984"
Insert: "1983"

And, as so amended,
BE CONCURRED IN

~~DO PASS~~

Everett R. Lensink, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 19, 19 79

MR. President:

We, your committee on Judiciary

having had under consideration House Bill No. 652

Harper (Van Valkenburg)

Respectfully report as follows: That House Bill No. 652,
third reading bill, be amended as follows:

1. Title, lines 4 through 7.
Following: "AMEND" on line 4
Strike: remainder of line 4 through "APPLICABLE" on line 7
Insert: "THE LAW RELATING"

2. Title, line 7.
Following: "ASSAULT"
Insert: "BY PROVIDING THAT CONSENT IS INEFFECTIVE IN CERTAIN CIRCUMSTANCES; AMENDING SECTION 45-5-502, MCA"

3. Page 1, lines 10 through 19.
Strike: section 1 in its entirety
Insert: "Section 1. Section 45-5-502, MCA, is amended to read:
"45-5-502. Sexual assault. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.
(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months.
(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily

(continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

(3)

injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years.
(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.
(5) Consent is ineffective under this section if the victim is less than 13 years old and the offender is both 3 or more years older than the victim and at least 15 years old.""

And, as so amended,
BE CONCURRED IN

EVERETT R. LENSINK,
Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 20, 19 79

MR. President:

We, your committee on Judiciary

having had under consideration House Bill No. 865

Respectfully report as follows: That House Bill No. 865, third reading bill, be amended as follows:

1. Title, line 11.
Following: "45-5-502,"
Strike: "AND"
Insert: ","
Following: "45-5-503,"
Insert: "AND 45-5-505,"

2. Page 2, line 3.
Following: "is"
Insert: "both"
Following: "victim"
Insert: "and at least 15 years old"

3. Page 2, line 9.
Following: "OFFENSE"
Insert: "under this subsection"

DO PASS:

(continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

4. Page 2, line 11.
Following: "40"
Insert: "years, except as provided in 46-18-222"

5. Page 2, lines 15 through 17.
Strike: subsection (6) in its entirety

6. Page 3, line 10.
Following: "is"
Insert: "both"
Following: "victim"
Insert: "and at least 15 years old"

7. Page 11.
Following: line 19
Insert: "Section 3. Section 45-5-505, MCA, is amended to read:
"45-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.
(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years.
(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years.
(4) If the victim is a human being less than 13 years old and the offender is both 5 or more years older than the victim and at least 15 years old or if the victim is a human being less than 13 years old and the offender inflicts bodily injury upon the victim in the course of committing such deviate sexual conduct, the offender shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 46-18-222. On a second or subsequent offense under this subsection, the offender shall be imprisoned in the state prison for a term of not less than 10 years or more than 40 years, except as provided in 46-18-222.
(5) If the offense is deviate sexual conduct involving sexual intercourse with a human being who is less than 13 years old and either the offender is both 5 or more years older than the victim and at least 15 years old or the offender inflicts bodily injury on the victim in the course of committing such deviate conduct, the offender shall be imprisoned in the state prison for a term of not less than 10 years or more than 40 years, except as provided in 46-18-222.
(6) An act "in the course of committing such deviate sexual conduct" includes an attempt to commit the offense or flight after the attempt or commission.""

And, as so amended,
BE NOT CONCURRED IN

Everett R. Lensink, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 20 19 79

MR. President

We, your committee on Judiciary

having had under consideration House Bill No. 813

Scully (Turnage)

Respectfully report as follows: That House Bill No. 813,

third reading bill, be amended as follows:

1. Title, line 15.
Following: line 14
Strike: "GUARDIAN"
Insert: "THE ADEQUACY OF GUARDIANSHIP ASSETS"

2. Page 1, line 25.
Following: "section"
Strike: "12"
Insert: "11"

3. Page 2, line 2.
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

EXPANS

(Continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

March 20 19 79

14. Page 15, line 6.
Following: "or"
Strike: "guardian"
Insert: "guardianship assets"

15. Page 15, line 13.
Following: "or"
Strike: "guardian"
Insert: "the adequacy of the guardianship assets"

16. Page 16, line 1.
Strike: "or guardian"

17. Page 16, line 2.
Following: "youth"
Insert: "or the adequacy of the guardianship assets to provide a contribution"

18. Page 16, line 7.
Strike: "or guardian"

19. Page 16, line 8.
Following: "youth"
Insert: "or the adequacy of the guardianship assets to provide a contribution"

20. Page 16, lines 14 and 15.
Following: "parents" on line 14
Strike: "or guardian is"
Insert: "are"

21. Page 16, line 15.
Following: "youth"
Insert: "or that the guardianship assets are adequate to provide a contribution"

22. Page 16, line 18.
Following: "services"
Insert: "to the extent considered appropriate under the circumstances"
Following: "."
Insert: "Payments required of a guardian may not exceed the funds available from guardianship assets."

And, as so amended,
SE CONCURRED IN

Everett R. Lensink, Chairman.

STATE PUB. CO.
Helena, Mont.