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**MAY 23 2007**

  
CLERK

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION**

CIV. 04-5062-KES

DAVID GAILLARD

Plaintiff,

vs.

JIM'S WATER SERVICE, INC., a  
Wyoming corporation; and HOWARD  
HOYT, an individual,

Defendants.

**FINAL  
INSTRUCTIONS  
TO THE JURY**

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FINAL INSTRUCTION NO. 1 – INTRODUCTION & DEFINITIONS

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – CORPORATION AS A PARTY

The fact that one of the parties to this action is a corporation is immaterial. In the eyes of the law, the corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

### FINAL INSTRUCTION NO. 3 - IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – AGENCY

Defendant Jim's Water Service, Inc., is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his employment is the act or omission of the corporation for which he was then acting.

The defendants are sued as principal and agent. Jim's Water Service, Inc., as Howard Hoyt's employer, is his principal. Howard Hoyt, as an employee of Jim's Water Service, Inc., is its agent. If you find Hoyt is liable, then you must find that Jim's Water Service, Inc. is also liable. However, if you find that Hoyt is not liable, then you must find that Jim's Water Service, Inc. is not liable.

## FINAL INSTRUCTION NO. 5 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this action the plaintiff has the burden of proving the following issues:

1. Hoyt was negligent;
2. Hoyt's negligence was the legal cause of Gaillard's injuries; and
3. The amount, if any, of Gaillard's damages that were legally caused by defendants' conduct.

The defendants have the burden of proving the following issues:

1. Gaillard assumed the risk of injury.
2. Gaillard was contributorily negligent more than slight.
3. Gaillard failed to mitigate his damages.

In determining whether or not an issue has been proved by the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

## FINAL INSTRUCTION NO. 6 – NEGLIGENCE

Plaintiff David Gaillard alleges that defendants Howard Hoyt and Jim's Water Service are liable because Hoyt negligently operated the truck. To show negligence, Gaillard must prove by the greater convincing force of the evidence the following two elements:

### ***First, Hoyt was negligent;***

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide.

It is the duty of a driver of a vehicle using a public highway to exercise ordinary care at all times to avoid placing oneself or others in danger and to exercise ordinary care at all times to avoid a collision.

A person who is exercising ordinary care has a right to assume that others will perform their duty and obey the law. Unless there is reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of the law or duty of care.

A person operating a motor vehicle on a public highway has a duty to exercise reasonable care under the circumstances to keep such lookout for other users of the highway and to maintain control of the motor vehicle so as to be able to stop the motor vehicle or otherwise avoid an accident within that person's range of vision, unless the accident is caused by events which could not have been reasonably anticipated by a person exercising reasonable care under the circumstances.

A driver may be considered negligent in the operation of a motor vehicle even though the driver is driving within the speed limit if the speed was greater than was reasonable and prudent under the conditions.

A statute of this state provides that on a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such a movement can be made with safety. This statute sets the standard of care of a reasonable person. If you find that Hoyt violated it, such violation is negligence unless you find from all the evidence that defendants have proven by the greater weight of the evidence that the violation was legally excused. An emergency not of the driver's own making by reason of which the driver fails to observe the statute is a legal excuse. Under this standard, the defendant must prove:

- (1) that an emergency existed,
- (2) that defendant was not engaged in prior conduct which caused or contributed to the emergency, and
- (3) that defendant was unable to comply with the statute because of the emergency.

The mere fact that an accident happened and a party sustained damages because of the accident does not give rise to any inference that it was caused by the negligence of anyone.

**Second, Hoyt's negligence was a legal cause of an injury to Gaillard.**

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. The defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff's injury.



A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result, nor the last or nearest cause. A legal cause may act in combination with other causes to produce a result.

If you find that Gaillard has not proved both of the above elements by the greater convincing force of evidence, enter your verdict for Hoyt and Jim's Water service on the verdict form. If you find that Gaillard has proved both of the above elements by the greater convincing force of the evidence, proceed to Final Jury Instruction Number 7.

FINAL INSTRUCTION NO. 7 – ASSUMPTION OF RISK

If a person assumes the risk of injury, the person is not entitled to any recovery. Hoyt and Jim's Water Service assert that even if Hoyt was negligent, defendants are not liable for any injury suffered by Gaillard because Gaillard assumed the risk of injury through his conduct. To prove an assumption of risk defense, the defendants must show by the greater convincing force of the evidence the following three elements:

***First, Gaillard had actual or constructive knowledge of the existence of the specific risk involved;***

***Second, Gaillard appreciated the risk's character; and***

***Third, Gaillard voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice.***

If you find that all three of the above elements have been proven by the greater convincing force of the evidence, then enter your verdict for Hoyt and Jim's Water Service on the verdict form. If you find that Hoyt and Jim's Water Service have not proved all three of the above elements by the greater convincing force of the evidence, proceed to Final Jury Instruction Number 8.

## FINAL INSTRUCTION NO. 8 – CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence on the part of the plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in the bringing about of the injury to the plaintiff. Hoyt and Jim's Water Service assert that even if Hoyt was negligent, defendants are not liable for any injury suffered by Gaillard because Gaillard was contributorily negligent. A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the defendant. To prove a contributory negligence defense, the defendants must show by the greater convincing force of the evidence the following three elements:

### ***First, Gaillard was negligent;***

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by the evidence. That is for you to decide.

A statute of this State provides that whenever a vehicle is parked or stopped upon a highway, whether attended or unattended, during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle and projecting red light visible under like conditions from a distance of five hundred feet to the rear. This statute sets the standard of care of a reasonable person. If you find that Gaillard violated this statute, such violation is contributory negligence.

A vehicle is defined as a device in, upon, or by which any person or property is or may be transported or drawn upon a public highway. You are instructed that Gaillard's motorcycle is a vehicle for purposes of this instruction.

You are further instructed that the term highway includes the shoulder of Interstate 90.

The Court takes judicial notice of the fact that on August 9, 2002, sunset occurred at 8:08 p.m.

**Second, Gaillard's negligence was a legal cause of his injury; and**

The term "legal cause" was explained in issue two of Final Instruction Number 6.

**Third, Gaillard's negligence was more than "slight."**

The term "slight" means small when compared with the negligence of the defendant.

In determining whether Gaillard's negligence was more than "slight" you must make a direct comparison between the conduct of Gaillard and Hoyt.

If you find that Gaillard was contributorily negligent, but that Gaillard's contributory negligence was slight, or less than slight, when compared with the negligence of Hoyt, then you must reduce Gaillard's damages in proportion with the amount of his contributory negligence.

If you find that all three of the above elements have been proven by the greater convincing force of the evidence, then enter your verdict for Hoyt and Jim's Water Service on the verdict form. If you find that Hoyt and Jim's Water Service have not proved all three of the above elements by the greater convincing force of the evidence, enter a verdict in favor of Gaillard on the verdict form. If you enter a verdict in favor of Gaillard you must determine the amount of damages to which he is entitled, if any, as instructed in Final Instruction Number 10.

## FINAL INSTRUCTION NO. 9 – DEFENSES COMPARED

While the same conduct on the part of the plaintiff may amount to both assumption of risk and contributory negligence, the two defenses are distinct. Assumption of risk involves a voluntary or deliberate decision to encounter a known peril whereas contributory negligence frequently involves the inadvertent failure to notice danger. In addition, contributory negligence must be a legal cause of the injury in order to be a defense, while assumption of the risk need not cause the injury in order to bar recovery.

## FINAL INSTRUCTION NO. 10 – DAMAGES

If you decide for plaintiff on the question of liability you must then fix the amount of money which will reasonably and fairly compensate Gaillard for any of the following elements of loss or harm proved by the evidence to have been legally caused by defendants' conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. Disability and disfigurement;
2. The pain and suffering, mental anguish and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury;
3. The reasonable value of necessary medical care, treatment, and services received and the reasonable value of the necessary expense of medical care, treatment and services reasonably certain to be received in the future;
4. The earnings the plaintiff has lost, if any, from any source from the date of the injury until the date of trial;
5. Such sum as will reasonably compensate plaintiff for whatever loss of earning capacity you find that the plaintiff has suffered as a result of the injury.

The factors to be considered in determining the measure of damages for loss of earning capacity include what the plaintiff earned before the injury and what the plaintiff is capable of earning after the injury, the prior ability of the plaintiff and the extent to which the injuries affect power to earn, age, life expectancy, physical condition, occupation, skill and habits of industry.

Whether any of these elements or damages have been proved by the

evidence is for you to determine. Your verdict must be based on the evidence and not upon speculation, guesswork, or conjecture.

In determining the amount of money which will reasonably compensate Gaillard, you are instructed that a person who suffers personal injury must exercise reasonable care to minimize the existing injury and prevent further injury and damages. Gaillard cannot recover money for damages which could have been avoided by such exercise of reasonable care.

If you find that Gaillard was contributorily negligent as discussed in Final Instruction Number 8, and that Gaillard's contributory negligence was slight, or less than slight, when compared with the negligence of Hoyt, then you must reduce Gaillard's damages in proportion with the amount of his contributory negligence.

## FINAL INSTRUCTION NO. 11 – FUTURE DAMAGES

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The law simply requires that facts exist which establish a basis for measuring any claimed future damages with reasonable certainty. The requirement of reasonable certainty applies only to whether future damages exist; once such detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, uncertainty as to the measure or extent of damages or the fact that they cannot be measured with exactness does not bar their recovery. On the other hand, conjecture, speculation, or the mere possibility of future damages does not warrant such an award.



## FINAL INSTRUCTION NO. 12 – PRESENT VALUE

If you should find that Gaillard is entitled to a verdict, and further find that the evidence in the case establishes either:

1. a reasonable likelihood of future medical expense; or
2. a reasonable likelihood of loss of future earnings

then it becomes your duty to ascertain the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date

Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which the plaintiff would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use of money representing a lump-sum payment of anticipated future loss, the law requires that you discount, or reduce to its present value, the amount of the anticipated future loss, by taking (1) the interest rate or return which plaintiff could reasonably be expected to receive on an investment of the lump-sum payment together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of future loss that amount which would be reasonably certain to earn or return, if invested at such rate of interest over such period of time; and

include in the verdict an award for only the present worth—the reduced amount—on anticipated future loss.

This computation is made by using the so-called "present-value" table which is attached to this instruction for your use.

Bear in mind that your duty to discount to present value applies only to loss of future earnings and future medical expenses. Damages for future pain and suffering, future mental anguish, disability, and disfigurement are not subject to any reduction for the present use of such money.

There has been evidence presented to you concerning the claim for future medical expenses and future earnings in the form of expert testimony. However, it is your duty to determine whether the expert's adjustment for present value was reasonable, and if not, you should make your own adjustment for present value of any such award you determine the plaintiff is entitled for the above losses, if any.

Finally, in determining the present value of future damages, loss of past or future earnings, you may also take into consideration the effect of inflation or deflation on the future damages.

The fact that I have given you instructions on damages should not be taken by you as any intimation by the Court or an any admission by the defendants of the defendants' liability for the alleged injuries to the plaintiff.

## FINAL INSTRUCTION NO. 12A – PRESENT VALUE TABLE

The attached tables may be used to calculate the present value of future expenses. This calculation requires that you make three determinations.

First, determine the number of years that the future expenses will be incurred. That number is designated as “n” in the attached tables.

Then, determine the net discount rate. The net discount rate is the interest rate which Mr. Gaillard could reasonably be expected to receive on an investment of the lump-sum payment minus the inflation rate.

Finally, determine the annual amount of the future expenses to be incurred, without consideration of inflation.

Using the number of years (n value) and the net discount rate, ascertain the factor from the table. Multiply the annual amount of the future expenses by the appropriate factor from the table to calculate the present value of those future expenses.

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**PRESENT VALUE TABLE**

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**PRESENT VALUE CALCULATIONS**  
**PRESENT VALUE OF 1 PER PERIOD RECEIVED FOR n PERIODS**  
**(Uniform Series)**

n	1%	2%	3%	4%	5%	6%	7%	8%
1	0.9901	0.9804	0.9709	0.9615	0.9524	0.9434	0.9346	0.9259
2	1.9704	1.9416	1.9135	1.8861	1.8594	1.8334	1.8080	1.7833
3	2.9410	2.8839	2.8286	2.7751	2.7232	2.6730	2.6243	2.5771
4	3.9020	3.8077	3.7171	3.6299	3.5460	3.4651	3.3872	3.3121
5	4.8534	4.7135	4.5797	4.4518	4.3295	4.2124	4.1002	3.9927
6	5.7955	5.6014	5.4172	5.2421	5.0757	4.9173	4.7665	4.6229
7	6.7282	6.4720	6.2303	6.0021	5.7864	5.5824	5.3893	5.2064
8	7.6517	7.3255	7.0197	6.7327	6.4632	6.2098	5.9713	5.7466
9	8.5660	8.1622	7.7861	7.4353	7.1078	6.8017	6.5152	6.2469
10	9.4713	8.9826	8.5302	8.1109	7.7217	7.3601	7.0236	6.7101
11	10.3676	9.7868	9.2526	8.7605	8.3064	7.8869	7.4987	7.1390
12	11.2551	10.5753	9.9540	9.3851	8.8633	8.3838	7.9427	7.5361
13	12.1337	11.3484	10.6350	9.9856	9.3936	8.8527	8.3577	7.9038
14	13.0037	12.1062	11.2961	10.5631	9.8986	9.2950	8.7455	8.2442
15	13.8651	12.8493	11.9379	11.1184	10.3797	9.7122	9.1079	8.5595
16	14.7179	13.5777	12.5611	11.6523	10.8378	10.1059	9.4466	8.8514
17	15.5623	14.2919	13.1661	12.1657	11.2741	10.4773	9.7632	9.1216
18	16.3983	14.9920	13.7535	12.6593	11.6896	10.8276	10.0591	9.3719
19	17.2260	15.6785	14.3238	13.1339	12.0853	11.1581	10.3356	9.6036
20	18.0456	16.3514	14.8775	13.5903	12.4622	11.4699	10.5940	9.8181
21	18.8570	17.0112	15.4150	14.0292	12.8212	11.7641	10.8355	10.0168
22	19.6604	17.6580	15.9369	14.4511	13.1630	12.0416	11.0612	10.2007
23	20.4558	18.2922	16.4436	14.8568	13.4886	12.3034	11.2722	10.3711

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24	21.2434	18.9139	16.9355	15.2470	13.7986	12.5504	11.4693	10.5288
25	22.0232	19.5235	17.4131	15.6221	14.0939	12.7834	11.6536	10.6748
26	22.7952	20.1210	17.8768	15.9828	14.3752	13.0032	11.8258	10.8100
27	23.5596	20.7069	18.3270	16.3296	14.6430	13.2105	11.9867	10.9352
28	24.3164	21.2813	18.7641	16.6631	14.8981	13.4062	12.1371	11.0511
29	25.0658	21.8444	19.1885	16.9837	15.1411	13.5907	12.2777	11.1584
30	25.8077	22.3965	19.6004	17.2920	15.3725	13.7648	12.4090	11.2578
31	26.5423	22.9377	20.0004	17.5885	15.5928	13.9291	12.5318	11.3498
32	27.2696	23.4683	20.3888	17.8736	15.8027	14.0840	12.6466	11.4350
33	27.9897	23.9886	20.7658	18.1476	16.0025	14.2302	12.7538	11.5139
34	28.7027	24.4986	21.1318	18.4112	16.1929	14.3681	12.8540	11.5869
35	29.4086	24.9986	21.4872	18.6646	16.3742	14.4982	12.9477	11.6546
36	30.1075	25.4888	21.8323	18.9083	16.5469	14.6210	13.0352	11.7172
37	30.7995	25.9695	22.1672	19.1426	16.7113	14.7368	13.1170	11.7752
38	31.4847	26.4406	22.4925	19.3679	16.8679	14.8460	13.1935	11.8289
39	32.1630	26.9026	22.8082	19.5845	17.0170	14.9491	13.2649	11.8786
40	32.8347	27.3555	23.1148	19.7928	17.1591	15.0463	13.3317	11.9246
41	33.4997	27.7995	23.4124	19.9931	17.2944	15.1380	13.3941	11.9672
42	34.1581	28.2348	23.7014	20.1856	17.4232	15.2245	13.4524	12.0067
43	34.8100	28.6616	23.9819	20.3708	17.5459	15.3062	13.5070	12.0432
44	35.4555	29.0800	24.2543	20.5488	17.6628	15.3832	13.5579	12.0771
45	36.0945	29.4902	24.5187	20.7200	17.7741	15.4558	13.6055	12.1084
46	36.7272	29.8923	24.7754	20.8847	17.8801	15.5244	13.6500	12.1374
47	37.3537	30.2866	25.0247	21.0429	17.9810	15.5890	13.6916	12.1643
48	37.9740	30.6731	25.2667	21.1951	18.0772	15.6500	13.7305	12.1891
49	38.5881	31.0521	25.5017	21.3415	18.1687	15.7076	13.7668	12.2122
50	39.1961	31.4236	25.7298	21.4822	18.2559	15.7619	13.8007	12.2335

## FINAL INSTRUCTION NO. 13 – MORTALITY TABLE

According to the mortality table, the life expectancy of a 47.3-year-old person is 75.2 years of age.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience. Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age. Therefore, in connection with mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits and activities of the person whose life expectancy is in question.

## FINAL INSTRUCTION NO. 14 – DUTIES DURING DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

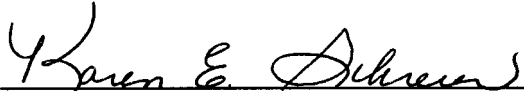
*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer signed by one or more jurors. I will respond as soon as possible either in writing or

orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated May 22, 2007.

  
\_\_\_\_\_  
KAREN E. SCHREIER  
CHIEF JUDGE