711 P.2d 671, 55 A.L.R.4th 607, 54 USLW 2326

Supreme Court of Colorado,
En Banc.
Bhrett PIZZA, Plaintiff-Appellant,
v.
WOLF CREEK SKI DEVELOPMENT CORPORATION, a Colorado corporation, Defendant-Appellee.
No. 83SA62.
Dec. 2, 1985.
Rehearing Denied Jan. 21, 1986.

Skier sued ski area operator after sustaining injuries in accident on ski run. The District Court, Mineral County, Robert W. Ogburn, J., entered judgment for operator on a jury verdict finding operator not negligent, and skier appealed. The Supreme Court, Rovira, J., held that: (1) statutory presumption that skier was responsible for accidents unless contrary was shown did not violate due process on theories that it was vague or that it lacked a rational evidentiary basis; (2) presumption did not violate equal protection; (3) various jury instructions regarding duties of operator and skier were erroneous; (4) operator only owed a skier a duty of reasonable care; and (5) exemplary damages were not precluded by statute, but evidence did not warrant jury instruction on such damages.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1021 k. Equal Protection. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4))

Supreme Court endeavors to construe statutory language so as to avoid finding it unconstitutionally vague whenever reasonable and practical. U.S.C.A. Const.Amend. 14.

[2] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TIII Personal Injuries
315TIII(C) Actions
315Tk145 Burden of Proof and Presumptions
315Tk146 k. In General. Most Cited Cases
(Formerly 376k6(22.1), 376k6(22) Theaters and Shows)

"Responsibility" may be equated with concept of negligence for purposes of applying presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved unless contrary is shown by preponderance of evidence.

[3] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk10 k. Personal Injuries. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

"Responsibility" equates with concept of negligence and is thus not unconstitutionally vague as used in presumption contained in C.R.S. 33-44-109(2) that responsibility for certain skiing accidents lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by preponderance of evidence.

[4] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk10 k. Personal Injuries. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

"Natural object" is not unconstitutionally vague as used in presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by preponderance of evidence.

[5] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TIII Personal Injuries
315TIII(C) Actions
315Tk145 Burden of Proof and Presumptions
315Tk146 k. In General. Most Cited Cases
(Formerly 376k6(22.1), 376k6(22) Theaters and Shows)

Slope of mountain, with which skier collided after becoming airborne, was a "natural object" within meaning of presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by preponderance of evidence.

[6] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TIII Personal Injuries
315TIII(C) Actions
315Tk145 Burden of Proof and Presumptions
315Tk146 k. In General. Most Cited Cases
(Formerly 376k6(22.1), 376k6(22) Theaters and Shows)

Presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator "unless shown to the contrary by a preponderance of the evidence" places upon skier the burden of rebutting presumption by presenting evidence of ski area operator's negligence which outweighs presumption of skier's sole negligence.

[7] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk10 k. Personal Injuries. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

Presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator "unless shown to the contrary by a preponderance of the evidence" is not unconstitutionally vague in describing rebuttable burden. U.S.C.A. Const.Amend. 14.

[8] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3999 Evidence and Witnesses
92k4001 k. Presumptions, Inferences, and Burden of Proof. Most Cited Cases
(Formerly 92k311)

315T Public Amusement and Entertainment KeyCite Citing References for this Headnote
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk10 k. Personal Injuries. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

Presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by a preponderance of evidence does not violate due process on theory that no natural and rational relationship exists between collision, as fact to be proved, and responsibility. U.S.C.A. Const.Amend. 14.

[9] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3064 k. In General. Most Cited Cases
(Formerly 92k213.1(1))

92 Constitutional Law KeyCite Citing References for this Headnote
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3070 k. In General. Most Cited Cases
(Formerly 92k213.1(1))

For purposes of determining appropriate standard of review in Fourteenth Amendment equal protection challenge to Ski Safety Act of 1979 [C.R.S. 33-44-101 et seq.], skiers as a group are not a suspect class, and skiing is not a fundamental right. U.S.C.A. Const.Amend. 14.

[10] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)17 Tort or Financial Liabilities
92k3750 Personal Injuries
92k3751 k. In General. Most Cited Cases
(Formerly 92k249(5))

315T Public Amusement and Entertainment KeyCite Citing References for this Headnote
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk10 k. Personal Injuries. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

Presumption contained in C.R.S. 33-44-109(2) that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by a preponderance of evidence does not violate equal protection clause of Fourteenth Amendment on theory that it arbitrarily and unreasonably treats skiers differently from other individuals such as swimmers or golfers, as presumption has a rational basis in fact and is rationally related to legitimate state interest of preserving skiing as important area of state's economy.

[11] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TIII Personal Injuries
315TIII(C) Actions
315Tk164 k. Instructions. Most Cited Cases
(Formerly 376k6(39) Theaters and Shows)

Including presumption contained in C.R.S. 33-44-109(2), which provides that responsibility for collisions by skiers with any person, natural object or manmade structure marked in accordance with statutory requirements lies solely with skier or skiers involved and not with ski area operator unless contrary is shown by a preponderance of evidence, in negligence per se instruction to jury was error, as resulting instruction wrongly commingled statutory rebuttable presumption with statutory duties of skiers and thereby suggested that presumption was conclusive rather than rebuttable.

[12] KeyCite Citing References for this Headnote

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k229 k. Repetition. Most Cited Cases

Reciting statutory presumption that skier was presumed to be negligent unless contrary was shown by preponderance of evidence in both instruction on presumptions and in instruction on negligence per se was erroneously repetitious, and presumption should have been omitted from negligence per se instruction, where it was inappropriate and confusing in itself.

[13] KeyCite Citing References for this Headnote

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k229 k. Repetition. Most Cited Cases

"Look but not see" jury instruction, stating that to look in such manner as to fail to see what must have been plainly visible was to look without a reasonable degree of care, was not essentially identical to another jury instruction, providing that each skier had duty to maintain proper lookout so as to avoid other skiers and objects, and giving both instructions was thus not unduly repetitive.

[14] KeyCite Citing References for this Headnote

272 Negligence
272XVIII Actions
272XVIII(E) Instructions
272k1721 Presumptions and Burden of Proof
272k1722 k. In General. Most Cited Cases
(Formerly 272k138(3.1), 272k138(3))

272 Negligence KeyCite Citing References for this Headnote
272XVIII Actions
272XVIII(E) Instructions
272k1743 Defenses and Mitigating Circumstances
272k1745 k. Fault of Plaintiff or Third Persons. Most Cited Cases
(Formerly 272k138(4))

A "look but not see" jury instruction should be given when alleged negligence or contributory negligence involved failure to see something which was plainly visible and allegedly negligent actor claimed he did not see it.

[15] KeyCite Citing References for this Headnote

388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k249 Application of Instructions to Case
388k252 Facts and Evidence
388k252(8) k. Personal Injuries in General. Most Cited Cases

"Look but not see" instruction to jury, providing that to look in such a manner as to fail to see what must have been plainly visible is to look without reasonable degree of care, should not have been given in skier's negligence action against ski area operator, where dangerous nature of terrain to be avoided was not obvious or apparent such that skier should have avoided it, and skier never stated that he did not see it.

[16] KeyCite Citing References for this Headnote

315T Public Amusement and Entertainment
315TIII Personal Injuries
315TIII(A) In General
315Tk93 Skiing, Ice Skating and Winter Activities

315Tk95 k. Skiing and Snowboarding. Most Cited Cases
(Formerly 376k6(7.1), 376k6(7) Theaters and Shows)

Skiing is not an "inherently dangerous activity" such that ski area operator owes skiers the highest degree of care; operator only owes skiers a duty of reasonable care.

[17] KeyCite Citing References for this Headnote

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
(Formerly 376k6(1) Theaters and Shows)

115 Damages KeyCite Citing References for this Headnote
115V Exemplary Damages
115k88 Injuries for Which Exemplary Damages May Be Awarded
115k89 In General
115k89(1) k. In General. Most Cited Cases
(Formerly 376k6(1) Theaters and Shows)

Ski Safety Act of 1979 [C.R.S. 33-44-101 et seq.] does not preclude exemplary damages in civil actions arising out of skiing injuries. C.R.S. 13-21-102.

[18] KeyCite Citing References for this Headnote

115 Damages
115X Proceedings for Assessment
115k209 Instructions
115k215 Exemplary Damages
115k215(2) k. Sufficiency of Pleading and Proof. Most Cited Cases
(Formerly 376k6(39) Theaters and Shows)

Evidence was insufficient to justify instruction on exemplary damages in skier's negligence action against ski area operator; totality of evidence did not indicate that operator knew, or should have known, that serious injury would probably occur due to condition of ski run at lower headwall.

***674** Williams, Trine, Greenstein & Griffith, P.C., William A. Trine, Boulder, Lee J. Shapiro, Littleton, for plaintiff-appellant.

White & Steele, Stephen K. Gerdes, John M. Lebsack, Denver, for defendant-appellee.

ROVIRA, Justice.

The plaintiff-appellant, Bhrett Pizza, appeals a judgment of the district court based on a jury verdict finding the defendant, Wolf Creek Ski Development Corporation (Wolf Creek), not negligent. He challenges the judgment on two grounds: that the Ski Safety Act of 1979, section 33-44-109(2), 14 C.R.S. (1984), is unconstitutional; [FN1] and that the trial court erred in giving certain jury instructions and not giving others. We uphold the constitutionality of the challenged statute but agree that certain of the instructions given were erroneous. Accordingly, we reverse the judgment and remand for a new trial.

FN1. This appeal was filed directly with this court pursuant to section 13-4-102(1)(b), 6 C.R.S. (1973) (constitutionality of a statute in question).

I.

On December 5, 1980, Pizza suffered severe injuries while skiing down "Thumper," a slope marked "more difficult" at Wolf Creek ski area. The injury occurred on his first run of the day. At trial, Pizza testified that while skiing down Thumper he unexpectedly became airborne due to a variation in terrain. After traveling through the air for an unknown distance, he landed in such a manner as to severely damage his spine.

A key issue at trial centered on the condition and nature of Thumper at the point where the accident occurred. The terrain of Thumper consists of a series of plateaus and drop-offs which extend from the top of the run to the bottom. The accident occurred near the "lower headwall" on Thumper. The lower headwall consists of a drop-off to a snow-covered service road which traverses the lower portion of the run. The downhill edge of the service road is followed by another drop-off. The road is used during the summer for logging purposes and to reach the ski lifts and runs for maintenance.

Shortly after the accident, Pizza's eyeglasses and ski poles were found approximately 20 to 25 feet from the downhill side of the service road; and he was found lying approximately 60 to 75 feet below the service road. No one witnessed the accident.

Pizza brought an action against Wolf Creek, the operator of the area, alleging negligent failure to warn of Thumper's dangerous condition, and negligent failure to eliminate the condition. The jury returned a verdict for the defendant.

II.

The appellant contends that the evidentiary presumption contained in section 33-44-109(2), 14 C.R.S. (1984), is unconstitutional as violative of the fourteenth amendment of the United States Constitution.[FN2] That section states:

> FN2. The fourteenth amendment provides in pertinent part: "No state shall ... deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

***675** (2) Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him. It is presumed, unless shown to the contrary by a preponderance of the evidence, that the responsibility for collisions by skiers with any person, natural object, or man-made structure marked in accordance with section 33-44-107(7) is solely that of the skier or skiers involved and not that of the ski area operator.

He challenges the constitutionality of the presumption on the grounds that it is vague, not founded on a rational evidentiary basis, and violates his right to equal protection under the law. In addressing these contentions we are mindful of the well-settled principle that statutes are presumed to be constitutional, and the challenger bears the burden of proving unconstitutionality beyond a reasonable doubt. Section 2-4-201, 1B C.R.S. (1980); *High Gear and Toke Shop v. Beacom*, 689 P.2d 624, 630 (Colo.1984); *People v. Smith*, 620 P.2d 232 (Colo.1980).

A. *Vagueness*

The appellant argues that the word "responsibility," and the phrases "natural object" and "unless shown to the contrary by a preponderance of the evidence" are unconstitutionally vague under the due process clause of the fourteenth amendment. We disagree.

[1] This court has always endeavored to construe statutory language in such a manner as to avoid finding it unconstitutional on the basis of vagueness whenever reasonable and practicable. *Mr. Lucky's, Inc. v. Dolan,* 197 Colo. 195, 199, 591 P.2d 1021, 1023 (1979). Because we have not adopted a standard concerning the requisite degree of certainty for determining the constitutionality of a purely civil statute,[FN3] we derive guidance from standards applied in the criminal context. In *High Gear,* we reviewed the constitutionality of the "Control of Drug Paraphernalia Act," sections 12-22-501 to 506, 5 C.R.S. (1983 Supp.), which imposes penalties for the possession, manufacture, sale, or delivery of drug paraphernalia. There, we stated that the "level of scrutiny which the court uses in reviewing a vagueness challenge will depend in part on the nature of the enactment." 698 P.2d at 631, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). We then listed four factors to consider when determining the level of scrutiny to apply when reviewing a statute challenged on vagueness grounds: "The strictness of the vagueness test depends upon whether the enactment: (1) is an economic regulation; (2) imposes civil or criminal penalties; (3) contains a scienter requirement; and (4) threatens to inhibit the exercise of constitutionally protected rights." *High Gear,* 689 P.2d at 631, citing *Flipside,* 455 U.S. at 498, 102 S.Ct. at 1193.

> FN3. The court has, however, answered vagueness challenges where the statute in question imposed quasi-criminal sanctions. *See LDS, Inc. v. Healy,* 197 Colo. 19, 589 P.2d 490 (1979); *Weissman v. Board of Educ. of Jefferson County School Dist. No. R-1,* 190 Colo. 414, 547 P.2d 1267 (1976); *Trail Ridge Ford Inc. v. Colorado Dealer Licensing Board,* 190 Colo. 82, 543 P.2d 1245 (1975). Quasi-criminal statutes generally impose money penalties, forfeitures of property, or punitive disabilities such as the loss of a professional license or public employment. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis,* 60 *Minn.L.Rev.* 379, 381 (1976).

In the instant case, the statutory presumption does not involve civil or criminal penalties and does not threaten to inhibit the exercise of constitutionally protected rights. At most, the presumption may be considered an economic regulation,[FN4] designed***676** to limit the liability of ski area operators.[FN5] It is well established that economic regulations are subject to a less exacting vagueness standard than penal statutes or laws regulating first amendment rights. *Flipside,* 455 U.S. at 498, 102 S.Ct. 1193, citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Nor does the absence of a scienter requirement here raise the level of scrutiny. In short, we are dealing with a civil statute which regulates constitutionally unprotected conduct and which has no effect on speech or expression.

> FN4. The legislative history of the Ski Safety Act indicates that its drafters were motivated, in part, by a strong desire to shelter ski area operators from the rapidly escalating costs of liability insurance. *See infra* note 10.

> FN5. Section 33-44-103(7), 14 C.R.S. (1984), provides: " 'Ski area operator' means 'operator' as defined in section 25-5-702(3), C.R.S., and any person, partnership, corporation, or other commercial entity having operational responsibility for any ski areas, including an agency of this state or a political subdivision thereof."

The guidelines adopted in *People v. Blue,* 190 Colo. 95, 544 P.2d 385 (1975), are also helpful in evaluating appellant's vagueness challenges. In *Blue,* the defendants contended that a criminal statute was void for vagueness because its crucial terms were so vague that a person of ordinary intelligence would have to speculate as to their meaning. In rejecting defendants' challenge, the court stated that there are limits to the degree of exactitude required of any statute:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of government

inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.

Blue, 190 Colo. at 99, 544 P.2d at 388, quoting *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952); *see also People v. Cardwell,* 181 Colo. 421, 510 P.2d 317 (1973). Moreover, we have never mandated that every word or phrase be specifically defined. To the contrary, we have stated that "the legislature is not constitutionally required to specifically define the readily comprehensible and every-day terms it uses in statutes." *Blue,* 190 Colo. at 101, 544 P.2d at 389, citing *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The words challenged in this case involve such readily comprehensible terms.

[2] [3] We turn now to the specific challenges raised by the appellant. First, he asserts that the word "responsibility" is unconstitutionally vague. While the word does not fit nicely into the phraseology used in negligence cases, it is nevertheless common and readily understood. The probable legislative intent in using such a word may be determined by resorting to a standard dictionary. *Blue,* 190 Colo. at 100, 544 P.2d at 388. *Webster's Third New International Dictionary* 1935 (1961) defines "responsibility" as "moral, legal, or mental accountability." Further, *Black's Law Dictionary* 1476 (4th ed. 1951) defines the root term "responsible" as "liable, legally accountable or answerable." Some courts, moreover, have stated that the term "responsibility" is synonymous with "liability." *See, e.g., Rochester Machine Corp. v. Mulach Steel Corp.,* 449 A.2d 1366, 1369, 498 Pa. 545 (1982); *Thorgaard Plumbing & Heating Co. v. County of King,* 426 P.2d 828, 835 (Wash.1967). More specifically, we think that the term "responsibility" as used in section 33-44-109(2) encompasses the legal concept of "fault." Legal scholars have long recognized that the concept of liability is closely related to that of fault.[FN6] In effect, the statute creates a rebuttable presumption that the skier is at fault whenever he collides with an object listed in section 33-44-109(2). And "fault" may be defined as the equivalent of negligence. *Continental Insurance Co. v. Sabine Towing Co.,* 117 F.2d 694, 697 (5th Cir.), *cert. denied,* 313 U.S. 588, 61 S.Ct. 1111, 85 L.Ed. 1543.[FN7] ***677** Given this connection between "responsibility" and "negligence," we conclude that the legislature intended, in the context of a skiing accident case, that the term "responsibility" be equated with the concept of "negligence" for purposes of applying the presumption contained within section 33-44-109 (2).

FN6. *See generally* Isaacs, *Fault and Liability,* 31 *Harv.L.Rev.* 954 (1918).

FN7. *See also Garcia v. Rosewell,* 43 Ill.App.3d 512, 357 N.E.2d 559, 562, 2 Ill.Dec. 392, 395 (1976) ("fault" is susceptible to various interpretations; it may be defined as the equivalent of negligence); *Bixenman v. Hall,* 251 Ind. 527, 242 N.E.2d 837, 839 (1968) (the factor of "fault"-lack of reasonable care-is the factor upon which the presence or absence of negligence depends).

[4] [5] The phrase "natural object" is also not unconstitutionally vague. Section 33-44-109 (2) uses three general categories of objects to include every type of object with which a skier could collide. The same section creates a presumption whereby the skier is presumed responsible/negligent for any collision in which the skier collides with any "person, natural object, or man-made structure marked in accordance with section 33-44-107(7)." [FN8] Here, it is uncontested that Pizza's injuries occurred upon colliding with the slope after he became airborne. Because the mountain must be classified as a "natural object," the presumption of negligence arose.[FN9]

FN8. Section 33-44-107(7), 14 C.R.S. (1984), provides:

> The ski area operator shall mark hydrants, water pipes, and all other man-made structures on slopes and trails which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet and shall cover such

obstructions with a shock-absorbent material that will lessen injuries. Any type of marker shall be sufficient, including but not limited to wooden poles, flags, or signs, if the marker is visible from a distance of one hundred feet and if the marker itself does not constitute a serious hazard to skiers.

FN9. We also disagree with appellant's assertion that the phrase "natural object" arguably includes man-made structures not marked in accord with section 33-44-107(7). In a case where a skier collides with an unmarked man-made structure which is not plainly visible from a distance of 100 feet, the presumption of the skier being solely responsib