

1045 DRIVER'S DUTY WHEN CHILDREN ARE PRESENT

Drivers of motor vehicles are chargeable with the knowledge that children of tender years do not possess the traits of mature deliberation, care, and caution of adults. The driver must increase vigilance if the driver knows, or in the exercise of ordinary care should know, that children are in, or are likely to come into, the driver's course of travel.

COMMENT

This instruction was approved by the Committee in 1963. The comment was updated in 1982 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is based on Hartzheim v. Smith, 238 Wis. 55, 59-60, 298 N.W. 196, 197 (1941); Hanes v. Hermsen, 205 Wis. 16, 17-19, 236 N.W. 646, 647-48 (1931); Ruka v. Zierer, 195 Wis. 285, 290-92, 218 N.W. 358, 360-61 (1928).

This instruction was quoted with approval in Holzem v. Mueller, 54 Wis.2d 388, 395, 195 N.W.2d 635 (1972), and Mack v. Decker, 24 Wis.2d 219, 230, 128 N.W.2d 455 (1964).

In Binsfeld v. Curran, 22 Wis.2d 610, 612, 126 N.W.2d 509 (1964), the court quoted Wis JI-Civil 1045 in full and made the following interpretation:

This does not mean a driver of a motor vehicle is under a higher standard or degree of care approaching absolute liability but rather, when children are present or likely to come into his course of travel, he must exert greater effort in respect to lookout, speed, and management and control of his car to fulfil the duty of exercising ordinary care under such circumstances. As in any other case of negligence, the question is for the jury unless the facts are such as to compel a determination as a matter of law.

See also Burant v. Ortloff, 50 Wis.2d 223, 227, 184 N.W.2d 84 (1971).

Wis. Stat. § 891.44 creates a conclusive presumption that a child under seven cannot be contributorily negligent.

This instruction should not be given in the following situation: (1) Where the driver had no actual notice of the presence of children, and (2) Where there were no special situations, such as a school zone, park, or playground, etc., which should have alerted the driver to the possibility of the presence of children. Lisowski v. Milwaukee Auto Mut. Ins. Co., 17 Wis.2d 499, 502-03, 117 N.W.2d 666 (1962).