Wisconsin Jury Instructions

Civil

2020

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1 RIGHT TO A JURY TRIAL: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The right to a jury trial does not exist in all civil actions. The purpose of this note is to assist trial courts in determining whether a civil litigant has a constitutional right to a jury trial. The note examines common law and statutory claims. Article I, Section 5 of the Wisconsin Constitution governs a civil litigant's right to a jury trial in a Wisconsin court.

That constitutional section states: "the right of trial by jury shall remain inviolate and shall extend to all cases at law." This provision guarantees the right to a civil jury trial as the right existed at the time our state's constitution was adopted in 1848.

RIGHT TO A JURY TRIAL IN EQUITABLE ACTIONS

The right to a trial by jury does not exist in equitable actions. In an equitable action, all the issues, whether legal or equitable, are triable by the court.[1] The merger of law and equity has not abolished the difference between legal and equitable remedies. In an equitable action a litigant has never been held entitled to a jury trial as a matter of right.[2]

The trial court in an action in equity may submit questions of fact to an advisory jury. The trial court is required to find facts necessary for a party to have judgment and is free to disregard the jury's findings. Failure of a trial court to make its own findings is prejudicial error.[3]

The issues triable by the court in an equitable action include counterclaims or other legal responses submitted by the defendant.[4] However, the waiver of jury does not apply to a compulsory legal counterclaim asserted by defendant in an equitable suit.[5] A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject of the action and it is lost if not asserted.

CLASSIFYING CASES AS LEGAL OR EQUITABLE

Classification of cases as legal or equitable is based on two types of criteria. The first criteria is whether the relief is coercive in nature. Examples of coercive remedies include injunction, attachment, receivership, and other remedies which can be both provisional or permanent. These types of remedies are equitable remedies. Equitable remedies of this type

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include a coercive in personam order directing the defendant to act in a certain way and are enforceable by contempt. Dobbs Law of Remedies (2nd edition) §1.4, p. 16.

The second criteria for equitable classification is historical. Under this approach, "a claim could be deemed equitable if the plaintiff sought to enforce a right that was originally created in equity courts, or a right that was traditionally decided according to equitable principles." Dobbs Law of Remedies (2nd edition) §2.6(3) p. 155. Examples of historical equity actions are the law of mortgages, trusts, divorces, fiduciary, and confidential relationships. Other examples are claims for rescission and restitution.[6]

Modern legal pleadings can assert multiple claims which include both legal and equitable claims. The trial court can analyze and manage these claims in the following suggested ways:

1. **Clean up or incidental authority**: A plaintiff who joins both legal or equitable claims or a defendant who files a legal claim in an equity suit waives a right to a jury trial. Under clean up or incidental authority, the trial court determines both the legal and equitable issues. A party who voluntarily submits a claim in equity takes an equity trial even as to legal claims. This approach is efficient as it avoids a multiplicity of suits. Dobbs Law of Remedies (2nd edition) §2.6(4) pp. 169-170.

2. **Primary focus of case**: In this approach, a court examines whether the gist or primary point of the case is equitable. If so, then the whole case including the legal issue is tried to the court. Dobbs, supra, at page 169.

3. **Severance of legal and equitable claims**: The trial court can sever the claims and try them separately. If the court tries the equity claim first, the equity decision will create issue preclusion on any facts the legal and equitable claims have in common. In cases where equitable relief depends on whether a legal right was first established, the cases can be severed and the legal claim can be tried to a jury. Alternatively, the claims can be tried together and the jury's verdict can be accepted as binding on both the legal and equitable issues. Dobbs, supra, at page 170.

STATUTORY CLAIMS

Claims created by statute require an analysis of the constitutional right to a jury trial. If the legislature includes a provision for trial by jury in the statute, litigants are entitled to a jury trial for any claim at law.[7] If the statute is silent with regard to the right to jury trial, no

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jury trial is required unless the right is preserved by Article I, section 5 of the Wisconsin Constitution.[8]

In Village Food & Liquor v. H&S Petroleum, Inc., 254 Wis.2d 478, 484, 647 N.W.2d 177 (2002), the Wisconsin Supreme Court stated:

> …consistent with our prior case law, we conclude that a party has a constitutional right to have a statutory claim tried to a jury when:
>
> (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and
>
> (2) the action was regarded at law in 1848.

The application of part (1) of the test to particular causes of an action has lacked a unanimous consensus.[9]

In Village Food, supra, the supreme court concluded that the plaintiff was entitled to a jury trial for alleged violation of the minimum mark up statute. The majority determined that the mark up laws were "of the same nature" as the common law crimes of forestalling the market, regrating, and engrossing found in Blackstone's Commentaries on the Law of England. The majority rejected a rigid test of requiring statutory causes of action to codify common law causes of action in a form substantially similar. Instead, the majority opted for a broader test requiring that the modern statutory claim be analogous to a common law claim or essentially a counterpart to a known common law claim.

In State v. Schweda, 303 Wis.2d 353, 736 N.W.2d 49 (2007), the supreme court refused to grant a jury trial in a case involving alleged violations of waste disposal regulations. The defendants premised their right to a jury trial on analogous common law nuisance claims. The court concluded that the analogy between nuisance law and modern environmental regulatory law was not precise enough to establish that part (1) of the Village Food test had been met.

In Harvot v. Solo Cup, 320 Wis.2d 1, 768 N.W.2d 176 (2009), a majority of the supreme court refused to permit a jury trial in an action under the Family Medical Leave Act. The statute again was silent on the jury trial issue. The majority opinion concluded that the Family Medical Leave Act was not a counterpart to a cause of action existing in 1848 because there was no common purpose with any common law cause of action. No common law claim existed in 1848 designed to protect employees while on leave to care for their medical needs or those of their families.

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In State of Wisconsin v. Abbott Laboratories, 341 Wis.2d 510, 816 N.W.2d 145 (2012), the State sued various pharmaceutical companies alleging violations of the Deceptive Trade Practices Act (DTPA) and the Medicaid fraud statute. The supreme court affirmed the right to a jury trial under both statutes. Applying the Village Food test, the court's decision concluded that the DTPA claims were an essential counterpart to the common law claim of "cheating." The claim shared a similar purpose of combatting deceptive commercial conduct. As to the Medicaid fraud claim, the court concluded that that statute counterpart was the common law claim of fraud. The similar purpose was to protect the integrity of business relationships and market transactions.

Determining whether the first part of the Village Food & Liquor test has been met for a jury trial on a statutory claim is difficult. The committee believes the following five criteria should be considered to determine if the first part of the test has been met:

- Does the statute codify common law causes of action in a form substantially similar to causes of action that existed in 1848? If so, the first test is met.

- Is the modern day statutory claim sufficiently analogous to a known common law claim? Considerations here include whether the statutory claim is: of the same nature as the common law claim, similar to the common law claim, or essentially a counterpart to a known common law claim.

- The purpose of the statute should be examined. If the purpose of the statute does not share a purpose with an 1848 common law action, then the first test is not met.

- The court should examine the analogy to the common law claim. The analogy must be precise and cannot be vague, general or amorphous.

- Statutes which deal with prohibited deception or fraud are likely to be sufficiently analogous to common law fraud to meet the first test. The purpose of protecting the market place from business misconduct is a common denominator.

The second part of the Village Food & Liquor test is whether the claim was regarded at law in 1848. Equitable claims do not meet the test. The discussion in "**CLASSIFYING CASES AS LEGAL OR EQUITABLE**" section of this Law Note on determining whether a claim is legal or equitable should be consulted for help in resolving this issue.

NOTES:

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1. In Neff v. Barber, 165 Wis. 503, 162 N.W. 667 (1917), a derivative claim was brought by a stockholder and creditor of a company alleging conspiracy and mismanagement. The case was tried to the court who found no conspiracy and no mismanagement. On appeal, the plaintiff claimed the issue of conspiracy was a legal issue entitling him to a jury trial as a matter of right. The supreme court disagreed stating:

> He admits that the action was one in equity, but claims, nevertheless, the absolute right to a jury trial of the issue of law presented by the charge of conspiracy. That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. Harrigan v. Gilchrist, 121 Wis. 127, 281, 282, 99 N.W. 909. In an action in equity all the issues, whether legal or equitable, are triable by the court. In its discretion an advisory verdict upon any or all of the issues may be taken, but neither party is entitled thereto as a matter of right, much less to a verdict having the force of one in an action at law. (emphasis supplied)

2. In Spensley Feeds v. Livingston Feed & Lumber, Inc., 128 Wis.2d 279, 381 N.W.2d 601 (1985), the trial court tried an action to a jury involving the applicability of the statute of frauds to a land transaction. Because this was an equitable action, the court of appeals found error and reversed stating:

> Although the distinctions between actions at law and suits in equity have long been abolished, the differences between legal and equitable remedies continue. Miller v. Joannes, 262 Wis. 425, 428, 55 N.W.2d 375, 376 (1952). The right to trial by jury under Wis. Const. art. 1, sec 5, does not extend to "equity cases, in which the party has never been held entitled to a jury trial as a matter of right." Stilwell v. Kellogg, 14 Wis. 499[461], 503 [464] (1861).
>
> In all equitable actions, the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence. Stahl v. Gotzenberger, 45 Wis. 121, 123 (1878), quoted with approval in Dombrowski v. Tomasino, 27 Wis.2d 378, 385, 134 N.W.2d 420, 424 (1965). The trial court made no findings or conclusion regarding any of the equitable exceptions in sec. 706.04(1)-(3), Stats.
>
> The trial court in an action in equity may, of course, on the motion of a party or its own motion, submit questions of fact to an advisory jury. Jolin v. Oster, 55 Wis.2d 199, 205, 198 N.W.2d 639, 642 (1972); sec. 805.02(1), Stats.
>
> Nothing in the record indicates that the trial court considered the verdict as advisory. Nor did the verdict determine which, if any, of the equitable exceptions in sec. 706.04, Stats., is applicable. For those reasons, the error was prejudicial.

3. Spensley Feeds v. Livingston Feed and Lumber, Inc., Ibid.

4. Mortgage Associates v. Monona Shores, 47 Wis.2d 171, 176-177, 177 N.W.2d 340 (1969); Zabel v. Zabel, 210 Wis.2d 336, 344-345, 565 N.W.2d 240 (1997).

5. Green Spring Farms v. Spring Green Farms, 172 Wis.2d 28, 492 N.W.2d 392 (Ct. App. 1992).

6. Dobbs Law of Remedies (2nd edition) Vol 1, §2.6 (3) pp. 162-163. Zabel v. Zabel, 210 Wis.2d 336, 345, 565 N.W.2d 240 (1997); Zastrow v. Journal Communications, Inc. 291 Wis.2d 426, 442, 718

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N.W.2d 51 (2006).

7. Bekkedal v. City of Viroqua, 183 Wis.2d 176, 192, 197 N.W. 707 (1924); Stillwell v. Kellogg, 14 Wis. 499 (1861); Harvot v. Solo Cup, 320 Wis.2d 1, 20, 768 N.W.2d 176 (2009); Village Food & Liquor, supra, page 486.

8. Harvot, supra, page 20.

9. State v. Schweda, 303 Wis.2d 353, 363, 736 N.W.2d 49 (2007).

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10 SUGGESTED ORDER OF INSTRUCTIONS: NEGLIGENCE CASES

Instruction	Subject
50	Preliminary Instruction: Before Trial [If used (discretionary), they are to be given after jury selection and before opening statements.]
100	Opening
110	Remarks and Arguments of Counsel
115	Objections of Counsel
120	Ignoring Judge's Demeanor
130	Stricken Testimony
215	Credibility of Witnesses; Weight of Evidence
260	Expert Testimony: General
265	Expert Testimony: Hypothetical Questions
145	Special Verdict Questions: Interrelationship
200	Burden of Proof: Ordinary

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Instruction	Subject
1005	Negligence Defined
1500	Read the cause question(s) of the verdict; then read 1500
1580	Comparative Negligence
1700	Damages: General Read the damage questions and instruct after each question is read using the applicable damage instructions (JI-Civil 1705-1897).
180	Five-Sixths Verdict
190 or 191	Closing
195	Supplemental Instruction Where Jury is Unable to Agree (If appropriate)
197	Charge After Verdict is Received

COMMENT

This suggested order of instructions was initially approved by the Committee in 1981 and revised in 1982, 1991, 2000, 2010, and 2018. The comment was revised by the Committee in 1982, 2010, and 2018.

There is no hard and fast rule concerning the order in which instructions are to be given. One order may be more preferable to one judge or to fit a particular case than another. In any event, it is recommended that instructions involving various subjects, such as appropriate witness instructions, should be given at one time during the charge and not piecemeal throughout the charge.

In cases not involving a question of negligence, the order can conform to the above order with modifications to accommodate the nature of the case and burden of proof.

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50 PRELIMINARY INSTRUCTION: BEFORE TRIAL

(NOTE TO THE TRIAL JUDGE: The following is a suggested instruction to be given to the jury before opening statements are made by the lawyers for the parties. While most of this instruction should apply to most cases, some parts of it do not apply to all cases and some parts of it may not apply to the case before you now. Read the instruction before it is given and delete any parts that are not applicable. Also, the language used in this Instruction is "suggested" language. You may have another way of expressing the same ideas in this instruction and may do so, consistent with Wisconsin law.)

MEMBERS OF THE JURY:

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings about race, religion, national origin, sex, or age affect your consideration of the evidence.

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your

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experience as a juror. Once deliberations begin in the jury room you will then be in a position to intelligently and fairly exchange your views with other jurors.

CONDUCT

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone or other electronic device, including personal wearable electronics, applications, or tools with communication capabilities to share any information about this case. For example, do

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not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

PARTIES

A party who brings a lawsuit is called a plaintiff. In this case, the plaintiff[s] [is] [are] _____ [state separately as to each if more than one]. The plaintiff[s] [is] [are] suing to [note: state purposes of the action for each plaintiff, for example, recover damages from a defendant].

[If there are multiple plaintiffs, give the following: You should decide the case of each plaintiff as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of [his] [her] [its] own claim(s). All instructions apply to each plaintiff unless I tell you otherwise.]

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A party against whom a claim is made is called a defendant. In this case, the defendant[s] [is] [are] _____ [state separately to each if more than one].

[If there are multiple defendants, give the following: You should decide the case against each defendant as if it were a separate lawsuit. Each defendant is entitled to separate consideration of [his] [her] [its] own defenses. All instructions apply to each defendant unless I tell you otherwise.]

[If there is a counterclaiming defendant, give the following: The defendant[s] in this case have also filed a claim against the plaintiff[s]. [Identify the party making the counterclaim and the party against whom the counterclaim is made]. The claim of a defendant against a plaintiff is called a counterclaim. The defendant[s] [is] [are] counterclaiming for [note: state purposes of the counterclaim for each defendant, for example, recover damages from a plaintiff.]

[If there are parties with subrogated interests or other parties named in caption and not appearing at trial, give the following: There [is another party] [are other parties] named in this case that will not participate in this trial. Do not speculate on the reasons. Any claims involving them are not to be considered by you in deciding this case.]

[If there are settled, dismissed, or withdrawn parties, give the following: [Former party] is no longer a party in this case. [The claims of that party] [Claims against that party] have been [settled] [dismissed] [withdrawn]. Do not speculate on the reasons.]

EVIDENCE

You are to decide the case solely on the evidence offered and received at trial.

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Evidence is:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence.

Remarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.

ORDER OF PROOF

Normally, a plaintiff will produce all witnesses and exhibits supporting plaintiff's claim against the defendant before the defendant introduces any evidence, although exceptions are sometimes made to that rule to accommodate a witness. After the plaintiff's case is presented, the defendant may present witnesses and exhibits to establish any defenses. There is no requirement that the defendant call any witnesses or present any evidence [unless the defendant is making a claim against the plaintiff]. If the defendant does introduce evidence, the plaintiff is then permitted to offer additional evidence to rebut the defendant's case. Each witness is first examined by the lawyer who called the witness to testify and then the opposing lawyer is permitted to cross-examine.

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OBJECTIONS

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling upon objections will be based solely upon the law and are not matters which should concern you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against either party to this lawsuit.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

[**NOTETAKING NOT ALLOWED**

Do not take notes during the trial. Taking notes will not be permitted in this case because _____.]

[**NOTETAKING PERMITTED**

You are not required to but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

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You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

USE OF DEPOSITIONS

During the trial, the lawyers will often refer to and read from depositions. Depositions are transcripts of testimony taken before the trial. The testimony may be that of a party or anybody who has knowledge of facts relating to the lawsuit. Deposition testimony, just like testimony during the trial, if received into evidence at the trial, may be considered by you along with the other evidence in reaching your verdict in this case.

[**JUROR QUESTIONING OF WITNESSES**

You will be given the opportunity to ask written questions of the witnesses testifying in this case.

After both lawyers have finished questioning a witness, you may raise your hand if you have any questions that have not been addressed by the lawyers. Questions must be in writing and directed to the witness and not to the lawyers or me. If I determine that

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your question may be asked, I will ask it. If I do not ask your question, you should not speculate what the answer to the question is or why I did not ask it.]

CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

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There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

BURDEN OF PROOF

In every trial there is a burden of proof. The phrase "burden of proof" means that when a party comes into a courtroom and makes a claim, as the plaintiff is making here, the law says that claim must be proved. After the trial, I will instruct you on the proper burden of proof to be applied to the questions in the verdict that will be submitted to you.

[**CLOSING ARGUMENTS**

After all of the evidence is introduced and both parties have rested, the lawyers will again have an opportunity to address you in a closing argument. While the closing arguments are very important, they are not evidence and you are not bound by the argument of either lawyer.

After the final arguments are concluded, I will instruct you on the rules of law applicable to the case, and you will then retire for your deliberations. Your function as jurors is to determine what the facts are and to apply the rules of law that I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from exhibits that are submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade your province. I will try to preside impartially during this trial and not to express any opinion concerning the facts. Any views of mine as to what the facts are are totally irrelevant.

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I do caution you, however, that under your oath as jurors, you are duty bound to accept the rules of law that I give you whether you agree with them or not. As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.]

OPENING STATEMENTS

We have now reached that stage of the proceedings where both lawyers have the opportunity to make an opening statement.

The purpose of an opening statement is to outline for you what each side expects to prove so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

After [counsel/the parties] have completed their opening statements, we will begin the trial, by (plaintiff)'s lawyer calling the first witness.

COMMENT

This instruction was approved in 2010, and revised in 2017 to include a "Note to the Trial Judge" at the beginning of the instruction. This revision was approved by the Committee in January 2020; it expanded on the use of social media and other digital tools.

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57 JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

Wis JI-Civil 57 was originally approved in 2001 and revised in 2010 and 2013. The revision in 2013 adopted Wis JI-Criminal 57 and the commentary by the Criminal Jury Instructions Committee.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

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The discussion below was taken from the commentary to Wis JI-Criminal 57. It is a revision of material originally published by the Criminal Jury Instructions Committee in *Wis JI-Criminal* Special Materials 8 (SM-8).

Advantages and Disadvantages of Juror Questioning

a. **Advantages**
   i. Allows jurors to resolve issues that are important to them.
   ii. Brings out relevant material the lawyers missed.
   iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
   iv. Increases juror attentiveness.
   v. Increases juror satisfaction; decreases frustration and discontent.
   vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
   vii. Promotes compliance with the admonition that jurors are not to do research on their own.

b. **Disadvantages**
   i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
   ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
   iii. Makes jurors less impartial and more partisan.
   iv. Questions may be to the disadvantage of clients.
   v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

a. Whether to allow questions lies within the judge's discretion.
b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
e. The judge reviews the questions and any objections.
f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
g. If the judge overrules the objection, the judge asks the question.
h. Lawyers are allowed to follow up on issues raised by juror questions.
i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted.

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60 NOTETAKING NOT ALLOWED

Do not take notes during the trial. You may not take notes because:

_____

_____

_____

COMMENT

This instruction and comment were approved by the Committee in 1984. The instruction was revised in 2010. The comment was reviewed without change in 1989.

If notetaking is not allowed, the court must state the reasons for the determination on the record. See Wis. Stat. § 805.13(2), quoted in full in the Comment, Wis JI-Civil 61.

The stating of reasons need not be done in the presence of the jury, but it is probably a good practice to tell the jurors why they are not being allowed to take notes.

See supreme court rationale in Fischer v. Fischer, 31 Wis.2d 293, 304, 142 N.W.2d 857 (1965).

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61 NOTETAKING PERMITTED

You may take notes during the trial, except during the opening statements and closing arguments. Court personnel will give you writing materials.

Be careful that notetaking does not distract you from carefully listening to and observing witnesses.

You may rely on your notes during your deliberations. Otherwise, keep them confidential. Court personnel will collect and destroy any notes after the trial.

COMMENT

This instruction and comment were approved in 1984 and revised in 2005 and 2010.

This instruction implements Wis. Stat. § 805.13(2), as amended by Chapter 358, Laws of 1981:

> (2) Preliminary instructions and notetaking.
> (a) After the trial jury is sworn, the court shall determine if the jurors may take notes of the proceedings:
>
> 1. If the court authorizes notetaking, the court shall instruct the jurors that they may make written notes of the proceedings, except the opening statements and closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.
>
> 2. If the court does not authorize notetaking, the court shall state the reasons for the determination on the record.
>
> (b) The court may give additional preliminary instructions to the jury which instructions may again be given in the charge at the close of the evidence.

Under the statute, the court must decide whether the jury should be allowed to take notes. The only Wisconsin decision discussing notetaking preceded the statute by several years, see Fischer v. Fischer, 31 Wis.2d 293, 142 N.W.2d 857 (1965).

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63 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a written transcript of the trial testimony to use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely on your memory of the testimony and evidence when you are deliberating.

COMMENT

This instruction was approved in 2003 and revised in 2010. For suggestions on using this instruction, see the commentary to Wis. JI-Criminal 58.

In some cases, the trial judge may want to add the following: "You may ask to have specific portions of the testimony read to you."

This is not intended to encourage jury requests for the rereading of testimony. However, the jury does have a right to have testimony read. The extent is within the discretion of the trial judge. State v. Cooper, 4 Wis.2d 251, 253-54, 89 N.W.2d 816 (1958).

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). But the Wisconsin Supreme Court has indicated that it may be "the far better practice" to have the testimony read back. Kohloff v. State, 85 Wis.2d 148, 160, 270 N.W.2d 63 (1978). For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57-58, 233 N.W.2d 430 (1975).

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65 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A WITNESS

No matter what language people speak, they have the right to have their testimony heard and understood. During this trial an interpreter will translate for one or more of the witnesses. The interpreter is required to remain neutral. The interpreter is required to translate between English and [insert appropriate other language] accurately.

You must base your decision on the evidence presented in the English translation. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. You must disregard any different meaning of the non-English words.

You must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's translated testimony based on your conclusions, if any, regarding the extent to which that person speaks English.]

COMMENT

This instruction was approved in 2003 and revised in 2010. It is based on Wis. JI-Criminal 60. This committee concludes this instruction covers a party if the party testifies.

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66 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A JUROR

One of the jurors requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the juror can hear the evidence and participate effectively in jury deliberations. An interpreter must interpret truly, accurately, completely, and impartially. An interpreter may not offer any opinion on the proceedings, or ask any questions, or participate in the jury's deliberations. An interpreter may not disclose or comment upon anything that happens in jury deliberations unless ordered to do so by me. During the deliberations, address the juror directly and speak as freely as if an interpreter was not there. Please do not engage the interpreter in conversation, except to speak with the juror.

COMMENT

This instruction was approved in 2003 and revised in 2010. It is based on Wis. JI-Criminal 61.

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80 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

This instruction was approved by the Committee in 2010. It is based on Wis JI-Criminal 158.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, see State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74: the jury should return to the courtroom and the recording should be played for the jury in open court.

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100 OPENING

Members of the jury, (this case) (these cases) will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict. It then becomes my duty to direct judgment according to law and according to the facts as you have found them.

Evidence is defined as follows:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial. You are to be guided by my instructions and your own sound judgment in considering the evidence in (this case) (these cases) and in answering these questions.

You should not concern yourselves about whether your answers will be favorable to one party or to the other nor with what the final result of this lawsuit may be.

COMMENT

This instruction was originally approved in 1960 and revised in 1984, 1986, 1996, and 2000. The comment was revised in 1984, 1986, 1996, 2000, and 2012.

The special verdict is authorized by Wis. Stat. § 805.12; the five-sixths verdict by § 805.09(2).

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The issue of telling the jury the effect of its findings is one that has frequently been discussed by the Wisconsin Supreme Court. Cases on this issue date back to at least 1890. Throughout the years, the court has not deviated from the position that it is improper for a trial judge to tell the jury the effect of its verdict. In Anderson v. Seelow, 224 Wis. 230, 271 N.W. 844 (1937), the court said:

> . . . . The sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose. . . .

Similarly, in Blahnik v. Dax, 22 Wis.2d 67, 125 N.W.2d 364 (1963), the court held that a jury should not be instructed as to the effect of the apportionment of negligence upon the jury award. The court stated:

> We have consistently held that, "'[i]t is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.'" To instruct the jury on the effect of its apportionment of negligence upon the ultimate recovery would be such an error.
>
> Our holding is based on the fundamental separation of the questions in the special verdict on the issues of liability from those of damages. If the trier is persuaded that a preponderance, however narrowly, favors a finding of negligence, he is then to award the full damages proved. The trier of fact is not to discount damages because of his view of the degree of fault in the defendant's conduct. Conversely, he is not to increase damages because the defendant's conduct was especially wanton and irresponsible. Neither is the trier of fact to temper his findings as to negligence by any consideration of the extent of the damages suffered.

In McGowan v. Story, 70 Wis.2d 189, 234 N.W.2d 325 (1975), the court was asked to alter this position in cases involving the comparative negligence law. In its decision, the court recognized that "where multiple parties are involved the effect of a jury's apportionment of negligence and the impact of the comparison of negligence between negligent tortfeasors can be complex indeed." Although it recognized this inherent problem, the court refused to allow the jury to be instructed on the effect of Wis. Stat. § 895.045 on its verdict. It stated:

> Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.
>
> Moreover, under the Wisconsin comparative negligence law, where multiple parties are involved the effect of a jury's apportionment of negligence between negligent tortfeasors can be complex indeed. It is occasionally apparent that these complexities are not understood by lawyers and try the deliberative faculties of judges.

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> While we recognize the validity of the problem posed by the plaintiff, there is no evidence that the remedy of advising a jury of the effect of its answers would not result in jury confusion and create a situation more to be deplored than that which presently exists.
>
> We suggest that the jury should be admonished, and impressed, that its function in a negligence case is fact-finding only and that it is not its role to usurp the legislative function under the comparative negligence law or the judicial function in interpreting the comparative negligence law. It is the role of the judge, acting under the law, and not the jury, to implement the general policies of the comparative negligence statute. We decline to consider the change in the jury function proposed by the plaintiff.

The most recent expression of the court's position on this issue is set forth in Delvaux v. Vanden Langenberg, 130 Wis.2d 464, 387 N.W.2d 430 (1986). On appeal, the plaintiffs argued that failing to inform the jury of the ultimate legal effect of its verdict "blindfolds" the jury. Further, the plaintiffs argued that "it is basically unfair to litigants to have some juries which, by virtue of a knowledgeable juror or jurors, are appraised of the legal effect of the verdict, while other juries, without the benefit of a legally knowledgeable juror, are left to reach a verdict without the knowledge of its ultimate legal effect."

The supreme court rejected these arguments, stating:

> Plaintiffs' arguments overlook the function given to juries in this jurisdiction and ignore case precedent. The members of the jury are not to concern themselves about whether the verdict answers will be favorable to one party or to the other party, nor should a jury be concerned "with what the final result of [the] lawsuit may be." Wis JI-Civil No. 100. Olson v. Williams, 270 Wis. 57, 71, 70 N.W.2d 10 (1955). The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court. Indeed, the law applicable to a given set of facts is irrelevant to the function of finding those facts; to instruct the jury on matters irrelevant to its charge would disserve the jury's proper task and enlarge the scope of the jury's function beyond that of fact finder.
>
> If it is true, as plaintiffs assert, that some juries will be knowledgeable about the ultimate effect of their verdicts while other juries will not be C thereby arguably subjecting a litigant's success or demise to the happenstance constituency of a particular jury C then the solution is to more emphatically instruct the members of a jury that its sole function is strictly that of fact finder. See McGowan v. Story, 70 Wis.2d 189, 198-99, 234 N.W.2d 325 (1975). To inform all juries of the effect of a special verdict in comparative negligence cases solely in the interest of uniformity of knowledge merely substitutes one problem for another. Informing a jury of the verdict's legal effect enlarges the function of the jury well beyond that of fact finder and into the domain of the court. It is the duty of the jury to find the facts and the duty and domain of the court to determine the legal rights of the parties after the return of the verdict. Vanderbloemen v. Suchosky, 7 Wis.2d 367, 374, 97 N.W.2d 183 (1959); see also McGowan, 70 Wis.2d at 199.

For further cases which discuss advising the jury of the effects of its verdict, see Shawver v. Roberts Corp., 90 Wis.2d 672, 280 N.W.2d 226 (1979); McGowan v. Story, supra at 196; Vanderbloemen v.

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Suchosky, 7 Wis.2d 367, 373, 97 N.W.2d 183 (1959); Bailey v. Bach, 257 Wis. 604, 608, 610, 44 N.W.2d 631, 634 (1950); Nelson v. Pauli, 176 Wis. 1, 11, 186 N.W. 217, 221 (1922).

Instructions to the jury can be given by the court either before or after closing arguments of counsel. Wis. Stat. § 805.13(4).

Exhibits. The reference to exhibits in the instruction serves as a cautionary note to jurors so they do not disregard exhibits that were admitted into evidence but were not allowed in the jury room. For an instruction when a summary exhibit has been used, see Wis JI-Civil 103.

Taking care not to comment on the evidence, a judge may choose to inform the jury which exhibits have been admitted and which have not.

The decision on whether to allow exhibits in the jury room has long been recognized as being a matter of trial court discretion. Milwaukee Tank Works v. Metals Coating Co., 196 Wis. 191, 194, N.W. (1928), Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 382, 80 N.W. 467 (1899). But note the language of Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929), the court stated, in part:

> While it is held that the matter of permitting exhibits to be taken to the jury room is a matter resting within the discretion of the trial court (cite omitted), attention should be paid to the nature of the exhibits. Generally there could be no harm in permitting a jury to refresh its memory with reference to the contents of a written instrument by an examination of the instrument. Where, however, the testimony bearing on one side of a controversy is in the form of a deposition or other written statement, and the testimony on the other resting entirely on parole evidence given in court, it is obvious that to permit a jury to take the written portion of the testimony to the jury room, compelling them to rely on their memories for the testimony on the other side, gives one side of the controversy an undue advantage, and it would seem plain that such exhibits should not be permitted to be taken to the jury room. 2 Thompson, Trials (2d ed) § 2578.

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103 SUMMARY EXHIBIT

The court has allowed the use of a chart to organize the evidence and to assist you in understanding it. The chart is a summary of some of the evidence that was presented. However, it is the evidence that controls. You should rely on the chart only to the extent that you believe it accurately and properly summarizes the evidence.

[ADD THE FOLLOWING IF THE SUMMARY WAS NOT ADMITTED INTO EVIDENCE: The chart itself is not evidence.]

COMMENT

This instruction was approved in 2012. See also Wis JI-Criminal 154.

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106 SUBMISSION ON GENERAL VERDICT

Two forms of verdict will be submitted to you. Only one of them will be returned as your verdict. The verdict numbered 1, which reads as follows, will, if returned by you, be a verdict in favor of plaintiff and against the defendant.

[Read Verdict No. 1.]

The verdict numbered 2, which reads as follows, will, if returned by you, be a verdict in favor of the defendant and against the plaintiff.

[Read Verdict No. 2.]

SUGGESTED FORMS OF VERDICTS FOLLOW:

Verdict No. 1

We, the jury, find in favor of the plaintiff, _____, and assess damages at _____.

Dated: _____.

_____
Presiding Juror

Dissenters: _____

_____

Verdict No. 2

We, the jury, find in favor of the defendant, _____.

Dated: _____.

_____
Presiding Juror

Dissenters: _____

_____

COMMENT

This instruction was approved by the Committee in 1962 and reviewed without change in 2010. The comment was revised in 1991 and 2010.

See Wis. Stat. § 805.12(1). The special verdict is the rule and not the exception in Wisconsin practice. Milwaukee & Suburban Transp. Corp. v. Milwaukee County, 82 Wis.2d 420, 263 N.W.2d 503 (1978). A party who desires the general verdict form must request the court to order the use of the general verdict.

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107 SUBMISSION ON ULTIMATE FACT VERDICT

Instruction Withdrawn.

COMMENT

This instruction was approved in 1962 and withdrawn in 2010.

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108 SUBMISSION ON ULTIMATE FACT VERDICT WHEN COURT FINDS ONE OR MORE PARTIES AT FAULT

Instruction withdrawn.

COMMENT

This instruction was withdrawn in 2010.

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110 REMARKS AND ARGUMENTS OF COUNSEL

Remarks of the attorneys are not evidence. If any remarks suggested certain facts not in evidence, disregard the suggestion.

You should consider carefully the closing arguments of the attorneys, but their arguments, conclusions, and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and answer the questions in the verdict according to the evidence and my instructions on the law.

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1980. The instruction was revised in 1985, 1991, and 2010.

Mullen v. Reinig, 72 Wis. 388, 392, 39 N.W. 861, 862-63 (1888); Merco Distrib. Corp. v. O. & R. Engines, Inc., 71 Wis.2d 792, 239 N.W.2d 97 (1976). See also Kenwood Equip., Inc. v. Aetna Ins. Co., 48 Wis.2d 472, 180 N.W.2d 750 (1970).

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115 OBJECTIONS OF COUNSEL

The lawyers for the parties have a duty to object to what they feel are improper questions. Do not draw any conclusion for either side if an objection was made to a question and the witness was not permitted to answer.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1985, 1991, and 2010. The comment was updated in 2015.

Frion v. Craig, 274 Wis. 550, 557, 80 N.W.2d 808, 812 (1957); Johnson v. Cintas Corp. No. 2., Appeal No. 2013AP2323 (Recommended for publication).

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120 IGNORING JUDGE'S DEMEANOR

If any member of the jury has an impression that I have an opinion one way or another in this case, disregard that impression entirely and decide the issues solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

COMMENT

The instruction was originally published in 1960 and revised in 1985, 1991, 2004, and 2010.

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125 COUNSEL'S REFERENCE TO INSURANCE COMPANY

You have heard references to an insurance company. The title to this case includes an insurance company. However, the special verdict does not contain a question about insurance. This is because there is no dispute concerning insurance. Whether (defendant) is liable for damages is the same, whether or not (defendant) is insured. Under your oath as jurors, you are bound to be impartial toward all parties. You should answer the questions in the verdict the way you would if there was no insurance company in the case.

COMMENT

The instruction was originally published in 1960 and revised in 1991, 2005, and 2010. The comment was updated in 1980. The comment was reviewed without change in 1989 and 2005.

Nimmer v. Purtell, 69 Wis.2d 21, 230 N.W.2d 258 (1975).

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130 STRICKEN TESTIMONY

I ordered certain testimony to be stricken during the trial. Disregard all stricken testimony and do not let it affect your answers to the verdict questions.

COMMENT

The instruction was published in 1972 and revised in 2004 and 2010.

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145 SPECIAL VERDICT QUESTIONS: INTERRELATIONSHIP

Some questions in the verdict are to be answered only if you have answered a preceding question in a certain manner. It is important for you to read the introductory portion of each question carefully before you answer it. Do not answer questions you are not required to answer.

COMMENT

This instruction was originally approved by the Committee in 1972 and was revised in 1985, 2004, and 2010. The comment was updated in 1982 and 2016.

Prefatory instructions to a special verdict question which instruct the jury not to answer the question unless it has answered a previous question in a certain manner do not violate the rule against informing the jury of the effect of its answers. Papenfus v. Shell Oil Co., 254 Wis. 233, 238, 35 N.W.2d 920, 923 (1949); John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," 60 Marq. L. Rev. 201 (1977). For medical negligence verdict questions, see Wis JI-Civil 1023 (Comment).

The form of a special verdict is discretionary with the trial court. A reviewing court will not interfere as long as material issues of fact are encompassed within the questions and appropriate instructions are given. Meurer v. ITT General Controls, 90 Wis.2d 438, 280 N.W.2d 156 (1979); Murray v. Holiday Rambler, Inc., 83 Wis.2d 406 265 N.W.2d 513 (1978).

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150 DAMAGE QUESTION ANSWERED BY THE COURT

I have answered several parts of the damage question(s) in the verdict.

These answers are not an admission of liability by any party or a finding of liability by me.

I have answered these questions because the answers to these questions are not in dispute. My answers have no bearing on what your answers should be to the other parts of these questions or to any other question in the verdict.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1985 and 2004.

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152 VIEW OF SCENE

We are visiting (describe where) to help you understand and weigh evidence that will be introduced during the trial. What you will see today is not evidence and should not be considered by you as evidence. During the trip or while we are at the scene, do not discuss this case or what you see with anyone. Only I or someone at my direction may talk to you.

Stay with the other jurors during the trip. Do not conduct an independent investigation of (describe where) today or at any time during the trial.

COMMENT

This instruction and comment were approved in 2000 and revised in 2010.

Wis. Stat. § 805.08(4) forms the statutory basis for this instruction:

> On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. The moving party shall pay the expenses of the view. The expenses shall afterward be taxed like other legal costs if the party who incurred them prevails in the action. (Emphasis supplied.)

Whether or not a view is to be conducted is within the discretion of the trial judge. See American Family Mut. Ins. Co. v. Shannon, 120 Wis.2d 560, 567-569, 356 N.W.2d 175 (1984), where the Wisconsin Supreme Court stated that the court may initiate the view on its own motion in a jury case and may conduct a view in a civil nonjury case, after notice to the parties with opportunity for them to be present at the view. The lawyers, a reporter, and the parties C if their lawyers so request C should be present. In that nonjury case, the trial judge took a view on his own at the close of the evidence without notifying the parties of his intention to do so. The court found his action was error requiring a new trial.

The "view" is for the purpose of enabling the trier of fact to Abetter understand, correctly weigh, and assess the respective credibility of the evidence. American Family Mut. Ins. v. Shannon, supra, at 568. It is not considered as evidence independent of that produced during the trial.

As to the second paragraph, see Sasse v. State, 68 Wis. 530, 537, 32 N.W. 849 (1887).

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155 QUESTION ANSWERED BY THE COURT

I have answered question No.____ because (there is no dispute as to the answer) (the attorneys have agreed to the answer.) My answer does not have any bearing on the answer to any other question on the verdict.

COMMENT

This instruction was approved by the Committee in 1972. The instruction was revised in 1985 and 2010.

The supreme court advises giving this instruction. Reyes v. Lawry, 33 Wis.2d 112, 146 N.W.2d 510 (1966). Failure to give it may not, however, be error. Reyes, supra; Schmit v. Sekach, 29 Wis.2d 281, 291, 139 N.W.2d 88 (1966).

Approved in Crowder v. Milwaukee & Suburban Transp. Corp., 34 Wis.2d 499, 508-09, 159 N.W.2d 723 (1968).

Only affirmative, not negative, answers by the court as to negligence should be included in the special verdict. Neuman v. Evans, 272 Wis. 579, 76 N.W.2d 322 (1956).

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180 FIVE-SIXTHS VERDICT

Agreement by ten (five) or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers (the number of the verdict question(s)) with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1984, 2003, and 2010. The comment was revised in 1984, 1986, 1988, 1991, 2010 and 2017. The language of this instruction is also incorporated in Wis JI-Civil 191.

Wis. Stat. § 805.09(2).

Wis. Stat. § 805.09(2) does not require that five-sixths of the jury agree on all questions in the verdict. Rather, five-sixths must agree on all questions necessary to support a judgment on a particular claim. Therefore, a verdict must be reviewed on a claim-by-claim basis. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 331 N.W.2d 585 (1983).

Multiple Claims. When instructing the jury in cases involving multiple claims, see In Interest of C.E.W., 124 Wis.2d 47, 368 N.W.2d 47 (1985). In that decision, the court said it was error to give this instruction in a case involving six verdict forms because the instruction's language that "at least the same ten jurors should concur in all the answers made" gives the jury the belief that the same jurors must make the same decision on all verdicts. The court said that the six verdicts were independent, and, therefore, there was no reason for the trial court to impose the requirement of unanimity across verdicts.

Other cases dealing with five-sixths rule: Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 189 (1948); Vogt v. Chicago, M., St. P. & P. R.R., 35 Wis.2d 716, 151 N.W.2d 713 (1967); Krueger v. Winters, 37 Wis.2d 204, 155 N.W.2d 1 (1967); Lorbecki v. King, 49 Wis.2d 463, 182 N.W.2d 226 (1971).

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The practice of providing a place at the end of the verdict for dissenting jurors to sign their names and indicate the numbers of the questions to which the dissents relate was approved in Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 403, 88 N.W.2d 747, 754-55 (1958); in this case, only two signature lines were provided, but there was space below the lines for additional signatures. It is error for counsel in closing argument to "lure jurors into the belief that a verdict agreed to by less than five-sixths of their number is one that can be received by the court." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990). Thus, the trial counsel in Lievrouw was not permitted to argue that although only two spaces were designated in the verdict for dissenting jurors that did "not mean that only two of you (jurors) can dissent" and that "[if] six of you feel one way and six of you feel the other way – ." Lievrouw, supra at 360.

The supplemental instruction to be used after the jury has reported its inability to agree is Wis JI-Civil 195.

If the jury returns a verdict which is defective because there are too many dissenters, the judge may direct the jury to return to the jury room with appropriate instructions and to reconsider their answers. Bensend v. Harper, 2 Wis.2d 474, 478, 87 N.W.2d 258 (1958); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937); Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 263 N.W. 641 (1935).

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190 CLOSING: SHORT FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

When you retire to the jury room, your first duty will be to elect a juror, who will preside over your deliberations and write in the answers you have agreed upon. The vote of the presiding juror, however, is entitled to no greater weight than the vote of any other juror. When your deliberations are concluded, and your answers inserted in the verdict, the presiding juror will sign and date the verdict, and all of you will return with the verdict into the court.

The clerk may now swear the bailiffs.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1985 and 1991. A longer alternative to this instruction, Wis JI-Civil 191, was approved in 2010.

See Dick v. Heisler, 184 Wis. 77, 83-87, 198 N.W. 734, 736-38 (1924).

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191 CLOSING: LONG FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You are free to deliberate in any way you wish consistent with your oath as jurors, but these suggestions may help you proceed in a smooth and timely way.

I would remind you to follow the instructions about the law. Respect each other's opinions and value the different viewpoints you each bring to the case. Listen to one another and be respectful of each other's opinions. Do not be afraid to change your opinion if you are convinced by the reasoning of your fellow jurors. Be thoughtful and do not rush. The parties to this case deserve your complete attention and consideration.

Selecting the Presiding Juror

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror. The presiding juror should:

- Encourage discussions that include all jurors.
- Keep the deliberations focused on the evidence and the law.
- Let the court know when there are any questions or problems.
- Tell the court when a verdict has been reached.

Discussing the Evidence and the Law

I will send written copies of the instructions to the jury room for you to refer to during deliberations. It is a violation of the juror's oath not to follow the instructions, to refuse to deliberate, or to rely on any information outside of the evidence.

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I remind you that you may not bring into the jury room any research materials or additional information; this includes dictionaries, computers, electronic communication devices, or other reference materials. You may not communicate in any way with anyone other than jurors until you have reached your verdict.

Getting Assistance from the Court

You will not have a copy of a written transcript of the trial testimony available for use during your deliberations. You must rely primarily on your memory of the evidence and testimony introduced during the trial. You may ask to have specific portions of the testimony read to you, but you may not receive everything you ask for or you may receive more than you ask for.

[If you wish to see an exhibit, you may ask for it. I will respond by either sending the exhibit to you or by sending back a note that I cannot send you that particular exhibit. If I do not send you the exhibit, do not concern yourselves about the reason why I have not done so.]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you not communicate with me except by a written note.

If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the issues in this case unless I ask you to do so.

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Reaching a Verdict

Agreement by ten (five) or more jurors is sufficient to become the verdict of the jury. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

After you have reached a verdict, the following steps will be followed:

- The presiding juror tells the bailiff that a verdict has been reached.
- The judge calls everyone, including you, back into the courtroom.
- The verdict is read into the record in open court.
- I may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" to the question.

Members of the jury, you will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

The clerk may now swear the bailiffs.

COMMENT

The instruction was approved in 2010 and revised in 2011 and 2016. It is an alternative to Wis JI-Civil 190. The comment was revised in 2017.

See Wis JI-Civil 180.

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Wis. Stat. § 805.09(2) does not require that five-sixths of the jury agree on all questions in the verdict. Rather, five-sixths must agree on all questions necessary to support a judgment on a particular claim. Therefore, a verdict must be reviewed on a claim-by-claim basis. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 331 N.W.2d 585 (1983).

Multiple Claims. When instructing the jury in cases involving multiple claims, see In Interest of C.E.W., 124 Wis.2d 47, 368 N.W.2d 47 (1985). In that decision, the court said it was error to give this instruction in a case involving six verdict forms because the instruction's language that "at least the same ten jurors should concur in all the answers made" gives the jury the belief that the same jurors must make the same decision on all verdicts. The court said that the six verdicts were independent, and, therefore, there was no reason for the trial court to impose the requirement of unanimity across verdicts.

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195 SUPPLEMENTAL INSTRUCTION WHERE THE JURY IS UNABLE TO AGREE

The court has been informed that the jury is unable to agree on a verdict. You are not going to be kept here until you do agree, but you jurors are as competent to agree on a verdict as the next jury that may be called to hear the same evidence and arguments that you have heard.

You do not have to violate your individual judgment and conscience. However, you do have the duty to be open-minded to discuss the evidence freely and fairly, to listen to the arguments of your fellow jurors, and to examine your own position and to make a conscientious effort to agree on a verdict.

Remember, agreement by ten (five) or more jurors is sufficient to become the verdict of the jury. [If you can do so consistently with your duty as a juror, at least the same ten (five) should agree in all the answers (as to a particular claim).] If possible, I ask you to be unanimous.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their name or names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

The instruction was originally published in 1972 and revised in 1991 and 2002. The comment was updated in 1980 and was reviewed in 2002 without change.

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Wis. Stat. § 805.13(5).

Kelley v. State, 51 Wis.2d 641, 645, 187 N.W.2d 810 (1971). See also Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 282, 276 N.W.2d 284 (1979).

It is not error to permit a civil jury to separate at night and return the next morning to continue deliberations. Annot., 77 A.L.R.2d 1086 (1961).

For reinstruction of the jury, see Hareng v. Blanke, 90 Wis.2d 158, 279 N.W.2d 437 (1979).

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197 INSTRUCTION AFTER VERDICT IS RECEIVED

Your service in this case is completed. Many jurors ask if they are allowed to discuss the case with others after receipt of the verdict. Because your role in the case is over, you are not prohibited from discussing the case with anyone. However, you should know that you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court. This includes the parties, lawyers, the media, or anyone else.

If you do decide to discuss the case with anyone, I would suggest you treat any discussion with a degree of solemnity such that whatever you do say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of the parties. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticism of any person. Please respect the privacy of the views of your fellow jurors.

Finally, should any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room. You may confer with me at any time before answering any questions asked by anyone.

COMMENT

The instruction and comment were originally approved in 1972. The instruction was revised in 1995 and 2010.

The instruction is strongly recommended, but its use is not mandatory. It may be appropriate in cases where the jury might find it helpful to be advised by the court that it is solely their decision whether to discuss their jury service with others.

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200 BURDEN OF PROOF: ORDINARY

Certain questions in the verdict ask that you answer the questions "yes" or "no". The party who wants you to answer the questions "yes" has the burden of proof as to those questions. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer to the verdict questions.

The greater weight of the credible evidence means that the evidence in favor of a "yes" answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

COMMENT

This instruction was approved in 1972 and revised in 1989, 1991, 2000, and 2002. The instruction was reviewed without change in 2003. The comment was updated in 1982, 1985, 1986, 1988, 1989, 1991, 2000, 2001, and 2002.

In 2002, the Committee reviewed the standard civil burden of proof instructions following the decision of the supreme court in Nommensen v. American Continental Insurance Co., 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301. The Committee is mindful of a number of suggestions made by the supreme court in Nommensen. From that case, we glean the following:

(1) The two element approach (the greater weight standard and the reasonable certainty standard) should not be abandoned. ¶4.

(2) The term, "the greater weight of the credible evidence," is understandable by the average juror. ¶16.

(3) The term, "reasonable certainty" has been firmly established in our case law. ¶26.

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(4) Substituting "reasonable probability" for "reasonable certainty" would be inconsistent with precedent and is not the solution here. ¶56.

(5) A jury should first consider the greater weight standard, then apply the reasonable certainty standard. ¶27.

(6) The revision should separate the two elements. ¶57.

Our revision in 2002 endeavors to satisfy the guidelines set out in Nommensen.

Nommensen was a medical malpractice action. When the plaintiff filed proposed jury instructions, he asked the trial judge to replace the word "certainty" with the word "probability" in Wis JI-Civil 200, Burden of Proof: Ordinary. The trial judge declined to do so and charged the jury with Wis JI-Civil 200 without modification.

On appeal, the plaintiff, who had failed to establish causation, argued that the trial judge erroneously instructed the jury when it gave the standard jury instruction although he concluded the instruction correctly sets out current Wisconsin authority. The court of appeals affirmed the use of the instruction without modification, but said it was bound by precedent. A concurring opinion criticized the current instruction and urged the supreme court to reevaluate the use of the phrase "reasonable certainty."

The supreme court affirmed the trial judge's use of Wis JI-Civil 200. Its opinion contains the following passages:

- We think the Wisconsin Civil Jury Instructions Committee was standing on solid ground when it commented that "The Committee believes the term 'reasonable certainty' has been firmly established in our case law and accurately reflects the degree of certitude jurors must reach in answering verdict questions." Wis JI-Civil 200 cmt . . .

- We disagree with the criticism that "reasonable certainty" is not firmly established in our case law, or that it is not well supported by the cases that adopted it. Reasonable certainty is one of the two essential elements of the ordinary burden of proof in this state . . .

- Another of Nommensen's proposals—to eliminate discussion of the degree of certitude altogetherBruns contrary to well-established case law . . . This idea of Nommensen's does not square with this state's long-standing two-element approach to the burden of proof. The Wisconsin Civil Jury Instructions Committee also has expressly rejected this proposal. Accordingly, we decline to rewrite instruction 200 in the manner proposed by Nommensen . . .

- We have carefully considered petitioner's argument that there is potential for juror confusion in Wis JI-Civil 200, with respect to the elements of degree of certitude and quantum of evidence. With this in mind, we respectfully request the Wisconsin Civil Jury Instructions Committee to revisit the instruction for a thorough review . . .

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- Changing "reasonable certainty" to "reasonable probability" in the instruction is not the proper tonic for potential juror confusion and would be inconsistent with precedent. However, we concur with Nommensen that instruction 200 as written is deserving of a thorough review. Such a review should consider all legitimate reformulations of the current instruction, so long as the instruction maintains the two-element approach to the burden of proof . . .

- In examining instruction 200, the committee should make every effort to remedy one of the most troubling aspects of the instruction: the juxtaposition of the two elements of the burden of proof . . .

General Verdict. If a general verdict is used, the first paragraph should read:

> The verdict form requires you to state whether you find for the plaintiff or the defendant. The burden, called the burden of proof, is on the plaintiff to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that you should find for the plaintiff. If you are not so satisfied, you must find for the defendant.

Guessing and Speculation. This instruction was revised in 1989 to incorporate concepts relating to speculation and guessing that were previously contained in Wis JI-Civil 220. As a result of this revision, the Committee believes a separate general instruction on speculation is not necessary and, therefore, Wis JI-Civil 220 was withdrawn.

Case Law. Wisconsin law recognizes and requires differing degrees of persuasion for different types of cases. Thus, separate and distinct burdens exist for: (1) criminal cases (beyond a reasonable doubt); (2) civil cases with penal aspects or involving criminal type behavior (higher civil standard: to a reasonable certainty by evidence that is clear, satisfactory, and convincing); and (3) ordinary civil actions (ordinary civil standard to a reasonable certainty by the greater weight of the credible evidence).

Each of these three burdens of proof has a mental element. This mental component is identical for the two civil standards (i.e., "satisfaction to a reasonable certainty"). Criminal cases call for a higher mental element: "beyond a reasonable doubt." In addition to the mental component, the two civil standards include a requirement as to the kind of evidence needed to carry a burden, i.e., "clear, satisfactory, and convincing evidence" for the middle civil burden and "greater weight of the credible evidence" for the ordinary civil burden.

Chief Justice Hallows in 1972 discussed the two components of the civil burdens in writing for the court in State ex rel. Brajdic v. Seber, 53 Wis.2d 446, 448, 193 N.W.2d 43 (1972):

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> Every standard of burden of proof, other than the standard applied to criminal cases, is composed of two elements: (1) The degree of certitude required of the trier of the fact, i.e., reasonable certainty, and (2) either the quantity of the evidence, i.e., the greater weight or convincing power, or the quality of the evidence, i.e., clear, satisfactory, and convincing.

Along these same lines, the court, in Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960), said the "complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence."

Some have suggested, pointing to decisions predating 1920, that the dual component civil burdens can be abbreviated by simply dropping the mental element. See Sullivan v. Minneapolis, St. Paul & S.S.M.R. Co., 167 Wis. 518, 167 N.W. 311 (1918). The Committee disagrees with such proposals and follows the rationale expressed by the Wisconsin Supreme Court in Kuehn v. Kuehn, supra, in which Chief Justice Hallows said:

> The statement of the complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence. It is possible the contestant having the burden of proof may have the preponderance of the evidence fair, clear, or otherwise in his favor and still fall short of convincing the jury to a reasonable certainty of the existence of the facts for which he is contending. 11 Wis.2d at 28

Based on the Committee's review of the case law, the Committee concluded in 1989 that this instruction, as well as the instruction on the middle burden (JI-Civil 205), correctly instruct juries on the burdens of proof in civil actions.

Suggestions have also been made to the Committee and to trial judges during instruction conferences that the certainty element ("to a reasonable certainty") should be replaced with the term "reasonable probability." Apparently, this suggestion is prompted by the fact that most expert witnesses, at least in medical malpractice cases, are asked to give opinions "to a reasonable probability." In Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 356-57 234 N.W.2d 332 (1975), the trial judge used the word "probability" in place of "certainty" in Wis JI-Civil 200. The remainder of the instruction defining "greater weight" and "credible evidence" was given. The court said using the term "reasonable probability" was error, although not reversible error. The court also said the "use of probability rather than certainty was not to be encouraged."

The Committee feels that "greater weight" is an exact synonym for "fair preponderance" and much more understandable by the average juror. This expression of the ordinary burden was cited approvingly by the supreme court in Wangen v. Ford Motor Co., 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980).

Adverse Possession. This instruction should be used in adverse possession cases. Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987). In Kruse, the court expressly rejected the argument that the middle burden of proof applies to the jury's determination of whether adverse possession has occurred. In some older adverse possession cases, the term "clear and positive" evidence appears regarding evidence of possession. In Kruse, the title holder of the property argued that this term, "clear and positive," means that the middle burden of proof applies to the jury's determination. The court disagreed, concluding that the term is not to be used for the overall burden of proof.

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Instead, this term refers only to the quality of evidence which may even be considered. To avoid confusion in future cases, the court expressly instructed trial judges to delete this term from their instructions to juries on adverse possession.

Comparative Negligence. For the burden of proof in connection with the comparison of negligence question, see Wis JI-Civil 1580, Comparative Negligence: Basis of Comparison.

Presumptions. Special attention is needed when instructing the jury on the burden of proof in cases involving statutory or common law presumptions. See Wis JI-Civil 1600, for an example of a situation where the burden rests upon the party contending the answer to a special verdict question should be "no."

Damages. See Wis JI-Civil 202 and 1700 for the burden of proof on damages.

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202 BURDEN OF PROOF: ORDINARY: COMPENSATORY DAMAGES

In considering the amount to be inserted by you in answer to each damage question, the burden rests upon each person claiming damages to convince you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages (with respect to the element or elements mentioned in the question) and the amount of the damages.

The amount you insert should reasonably compensate the person named in the question for the damages from the (accident) (occurrence.)

COMMENT

The instruction was approved in 2000. An editorial correction was made in 2004.

Ellsworth v. Schelbrock, 2000 WI 63, ¶17, 235 Wis.2d 678, 689, 611 N.W.2d 764. See also Sufferling v. Heyl & Patterson, 139 Wis. 510, 517-18, 121 N.W. 251 (1909). See also Smee v. Checker Cab Co., 1 Wis.2d 202, 83 N.W.2d 492 (1957), and Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 179, 191, 70 N.W.2d 577, 583 (1955).

See also Wis JI-Civil 1700, Damages: General.

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205 BURDEN OF PROOF: MIDDLE

The burden of proof on question(s) _____ rests upon the party contending that the answer to the question should be "yes." The burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be the answer to (that) (those) question(s).

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

[This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, but may be less than beyond a reasonable doubt.]

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1989, 1997, 2004, and 2010. A comma was added to the last sentence in 2011. The comment was updated in 1981, 1986, 1988, 1989, 1995, 2001, 2004, 2010, 2011, and 2016.

The Committee revised this instruction in 1997 because it concluded that the prior version of the instruction did not adequately explain to a jury what the middle burden of proof is. Under this former version, the jury was instructed as follows:

> The burden of proof as to each question in the verdict is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes. "
>
> If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party having the burden of proof as to that question has not met the required burden. Wis JI-Civil 205 (1989).

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Some have suggested that explaining the differences between the two civil burdens is merely an academic/legalistic exercise because juries cannot realistically tell the difference between the "ordinary" and "middle" burden of proof. See Judge Cane's concurrence, joined by Judge Fine, in Carlson & Erickson v. Lampert Yards, 183 Wis.2d 220, 515 N.W.2d 305 (Ct. App. 1993). Others have argued that the "greater weight of the evidence" component of the ordinary burden actually sounds like a more rigorous or higher standard than "clear, satisfactory, and convincing" in our currently established middle burden. Although the Committee is aware of this criticism, it believes that (1) the supreme court has consistently required two civil burdens, and (2) the current version of this instruction conforms to the expressions of the court that the middle burden be expressed in terms of clear, satisfactory, and convincing evidence.

Weight; Degree of Certitude. Wisconsin case law provides little instruction on the middle burden. As to quantity, the middle burden is said to mean the clear preponderance which has been translated to mean "clear weight of the evidence" or "clearly more probable than not. " Klipstein v. Raschein, 117 Wis. 248, 94 N.W. 63 (1903). As to quality, the supreme court has said that clear, satisfactory, and convincing evidence refers to the quality or convincing power of the evidence necessary to produce the greater certainty a degree of reasonable certitude required. Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960).

The middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. Kruse v. Horlamus Indus., 130 Wis.2d 357, 363, 387 N.W.2d 64 (1986).

Types of Cases. The middle burden of proof is required in certain civil actions which involve such matters as fraud, undue influence, punitive damages, and acts which would be considered criminal. Kruse v. Horlamus Indus., supra; Layton School of Art & Design v. WERC, 82 Wis.2d 324, 362-63, 262 N.W.2d 218 (1978); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); Kuehn v. Kuehn, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960); Macherey v. Home Ins. Co., 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994). Both the decisions in Kuehn and Wangen list the types of cases in which the middle burden is required. In addition, the middle burden applies in an action for reformation of a contract. Bailey v. Hovde, 61 Wis.2d 504, 213 N.W.2d 609 (1973). In adverse possession cases, the lower burden of proof (Wis JI-Civil 200) should be submitted, not the middle burden of proof. Kruse v. Horlamus Indus., supra at 367; Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987).

The question of whether the middle burden of proof applies to a given claim, defense, or limitation on liability was generally left to Wisconsin case law and the common law. That has changed significantly over the last 25 years as the Wisconsin Legislature has entered this area. The Wisconsin Legislature has now dictated that the clear and convincing evidence standard applies to many disparate areas of Wisconsin law. There are now over 100 Wisconsin statutes which contain the phrase "clear and convincing evidence." Numerous Wisconsin statutes now use these, or similar, phrases: "willfully, wantonly, or recklessly"; "reckless, wanton or intentional misconduct"; and "gross negligence. " It is the Committee's opinion that, when Wisconsin statutes use those phrases and similar phrases, the middle burden of proof is required.

Variations of Middle Burden at Common Law. The Committee recognizes that variations of this middle burden are found throughout earlier Wisconsin case law. For example, in release cases, the court in 1949 held that to impeach a written release on the ground of fraud or mistake, the proof must be "clear and convincing beyond reasonable controversy." Jandrt v. Milwaukee Auto Ins. Co., 255 Wis. 618, 39 N.W.2d 698 (1949). Similarly, the court said in 1981that use of excessive force in a battery action must be proved by a "clear and satisfactory preponderance of the evidence." Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Further variations of this middle burden are presented in Kuehn, supra. Despite these variations, the supreme court has expressly stated that the "preferential way" of stating the middle standard of proof is in terms of "clear, satisfactory, and convincing." Madison v. Geier, 27 Wis.2d 687, 135 N.W.2d 761 (1965). See also Wangen, supra at 299. In the interests of achieving uniformity in the expression of the middle standard, the Committee strongly recommends that whenever the trial court determines that the middle burden is required, the above instruction should be used even though a variation of the standard may exist in case law.

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210 BURDEN OF PROOF WHERE VERDICT CONTAINS A MIDDLE STANDARD QUESTION

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1997 because JI-Civil 205 was revised. The new version of JI-Civil 205 explains to jurors that the middle burden applies to certain questions and eliminates the need for JI-Civil 210.

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215 CREDIBILITY OF WITNESSES; WEIGHT OF EVIDENCE

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

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The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1984 and 2010. The comment was revised in 1984, 1991, and 2010.

Jury's Duty: Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1966). See also Shawver v. Roberts Corp., 90 Wis.2d 672, 280 N.W.2d 226 (1979); American Family Mut. Ins. Co. v. Dobrzynski, 88 Wis.2d 617, 277 N.W.2d 749 (1979).

Weight of Evidence: O'Brien v. Chicago & N.W. Ry., 92 Wis. 340, 343, 66 N.W. 363, 364 (1896).

Juror's Knowledge: Solberg v. Robbins Lumber Co., 147 Wis. 259, 266-70, 133 N.W. 28, 30-32 (1911), laid down the rule held that a juror may use individual knowledge, observation, and experience. See also Coenen v. Van Handel, 269 Wis. 6, 10, 68 N.W.2d 435, 437 (1955); McCarty v. Weber, 265 Wis. 70, 72, 60 N.W.2d 716, 718 (1953); and De Keuster v. Green Bay & W. R.R., 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953).

Although a jury may, if it so desires, place less credence in the testimony of a witness whose evidence is inconsistent, the inconsistency does not render that testimony incredible as a matter of law. It is the function of the jury to determine where in the discrepant testimony and contradiction of the witness the truth really is. Millonig v. Bakken, 112 Wis.2d 445, 453-54, 334 N.W.2d 80 (1983).

For the credibility of a child witness, see Wis JI-Criminal 340.

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220 JURY NOT TO SPECULATE

This instruction was withdrawn by the Committee in 1990. See Comment to Wis JI-Civil 200.

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230 CIRCUMSTANTIAL EVIDENCE

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

COMMENT

This instruction was initially approved in 1972 and revised in 1991 and 2010. This instruction is based on Wis JI-Criminal 170.

See Krause v. Milwaukee Mut. Ins. Co., 44 Wis.2d 590, 172 N.W.2d 181 (1969); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1950); Truelsch v. Miller, 186 Wis. 239, 202 N.W. 352 (1925); Guillaume v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 636, 155 N.W. 143 (1915); 29 Am. Jur.2d Evidence '' 264-65 (1967); Reicher v. Rex Accessories Co., 228 Wis. 425, 436, 279 N.W. 645 (1938); Cooper v. Chicago & N.W. Ry., 155 Wis. 614, 619, 145 N.W. 203 (1914); 30 Am. Jur.2d Evidence § 1091 (1967); Rumary v. Livestock Mortgage Credit Corp., 234 Wis. 145, 147, 290 N.W. 611 (1940); Hyer v. Janesville, 101 Wis. 371, 77 N.W. 729 (1898).

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255 DRIVER'S MANUAL: USE BY JURY

Instruction withdrawn.

COMMENT

This instruction was withdrawn in 2010.

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260 EXPERT TESTIMONY

Usually, witnesses can testify only to facts they know.

But, a witness with expertise in a calling (specialty) may give an opinion in that calling (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. You are not bound by any expert's opinion.

(In resolving conflicts in expert testimony, weigh the different expert opinions against each other and consider the qualifications and credibility of the experts and the reasons and facts supporting their opinions.)

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2011. The comment was updated in 1982, 1986, 1988, 1991, 2011, 2012, and 2017.

Wis. Stat. §§ 907.02 and 907.03; Black v. General Elec. Co., 89 Wis.2d 195, 212-13, 278 N.W.2d 224 (1979); Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

In Wisconsin, the general rule is that a nonexpert owner of property may testify concerning the property's value. Perpignani v. Vonasek, 139 Wis.2d 695, 408 N.W.2d 1 (1987).

For Expert Testimony: Hypothetical, see Wis JI-Civil 265.

For expert testimony in a medical malpractice trial, see Wis JI-Civil 1023; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191 and Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

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261 MEDICAL OR SCIENTIFIC TREATISE IN EVIDENCE

During the trial, the court received portions of a published treatise in evidence written by _____. This evidence was not received to establish that the views expressed by the author are undisputed truths or absolute standards. The author's views should be considered as any other expert witness' opinion.

You are not bound by the opinions expressed by the author any more than you are bound by the opinion of any other expert witness.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986. The comment was updated in 1982 and 1986 and reviewed without change in 1989.

Wis. Stat. § 908.03(18); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis.2d 69, 146 N.W.2d 505 (1966).

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265 EXPERT TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, an expert witness was told to assume certain facts and asked for an opinion based upon the assumed facts. This is called a hypothetical question. Consider the opinion in answer to the question only if you believe the assumed facts upon which it is based. If you find that the assumed facts in the hypothetical question have not been proved, do not give any weight to the opinion.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2010. The comment was updated in 1982 and 1986. The comment was reviewed without change in 1989.

Wis. Stat. § 907.03; a hypothetical question during the trial may be based on facts not yet in evidence. Novitzke v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979). See also Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 652, 260 N.W.2d 783 (1978), and Rabata v. Dohner, 45 Wis.2d 111, 126, 172 N.W.2d 409 (1969).

Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 866, 203 N.W.2d 135 (1973).

McGaw v. Wassman, 263 Wis. 486, 492, 57 N.W.2d 920, 922 (1953).

For Expert Testimony: General, see Wis JI-Civil 260.

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268 OPINION OF A NONEXPERT WITNESS

Ordinarily, a witness may testify only about facts. However, in this case (name of witness) was allowed to give an opinion as to (identify the subject on which an opinion was given) .

In determining the weight you give to this opinion, you should consider the witness' opportunity to observe what happened and the extent to which the opinion is based on that observation.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by the opinion of any witness.

COMMENT

This instruction and comment were approved in 2012.

This instruction is for the situation where a nonexpert witness is allowed to testify in the form of an opinion. § 907.01.

Section 907.01 was amended by 2011 Wisconsin Act 2 to read as follows:

> 907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Subsections (1) and (2) were part of the prior statute; subsection (3) was created by Act 2.

For discussion on the opinion of a nonexpert witness, see Wis JI-Criminal 201.

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305 MEASUREMENTS

There is testimony with reference to both observations and measurements of distances. Testimony based on casual observation or estimate must yield to that based on measurements by disinterested, unimpeached witnesses.

COMMENT

This instruction was approved by the Committee in 1960 and revised in 1986. The comment was updated in 1982 and 1986. The comment was reviewed without change in 1989.

Consolidated Papers, Inc. v. ILHR Dep't, 76 Wis.2d 210, 221, 251 N.W.2d 69 (1977); Capital Sand & Gravel Co. v. Waffen Schmidt, 71 Wis.2d 227, 234, 237 N.W.2d 745 (1976); Scalzo v. Marsh, 13 Wis.2d 126, 150, 108 N.W.2d 163 (1961).

The phrase "disinterested and unimpeached" is proper. Jacobson v. Milwaukee, 262 Wis. 256, 260, 55 N.W.2d 1, 3 (1952), citing Wanta v. Milwaukee Elec. Ry. & Light Co., 148 Wis. 295, 298, 134 N.W. 133, 135 (1912); Serkowski v. Wolf, 251 Wis. 595, 601, 30 N.W.2d 223, 226 (1947).

In Milwaukee Trust Co. v. Milwaukee, 151 Wis. 224, 230, 138 N.W. 707, 710 (1912), the word "witnesses" was not qualified.

In Capital Sand & Gravel Co., supra, the court recognized that "in the area of measurement testimony, not only must testimony based on memory or casual observation yield to that which is based on actual measurement but, in addition, it is not to be rejected in the absence of opposing proof." (Citing Serkowski, supra.)

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315 NEGATIVE TESTIMONY

Positive testimony of credible witnesses regarding an event is entitled to greater weight than negative testimony of equally credible witnesses as to the same event.

Testimony of a witness that the witness (heard the bell) is positive testimony.

Testimony of a witness (that the witness did not hear the bell) under circumstances that the witness (could have heard the bell) if it had actually (rung) may be positive or negative testimony.

If the witness' sense (of hearing) was directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is positive testimony.

If the witness' sense (of hearing) was not directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is negative testimony.

The strength or weakness of negative testimony depends upon all the circumstances and the weight you give to this testimony is for you to decide.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986 and 1991. The comment was updated in 1982, 1986, and 2016.

The general rule is that the weight to be accorded negative evidence is a matter for the jury to determine. Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, (1956); Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236, 244 (1971). This instruction provides for an exception to the general rule when certain criteria are met. Care should be used before giving the instruction. Not all testimony that might appear negative constitutes "negative testimony" warranting the instruction e.g. testimony of absence of entry in records is not negative testimony, Resseguie, supra; testimony that a party did not speak the words charged found not to be negative testimony, Suick v. Krom, 171 Wis. 254, 177 N.W. 20, 21 (1920). The court in Suick ruled that "Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence, testified by some other witnesses to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witnesses to have happened, that he did not hear or recollect it. Id. In addition to the requirement of negative testimony, the rule requires the element of equal credibility of the witnesses. Id. at 20-21.

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Sometimes, testimony which appears positive can be sufficiently negative in effect to warrant the instruction. In explaining why an instruction similar to Wis JI-Civil 315 was warranted, the court ruled: "Although Mustas testified he did not go into the construction office or speak with anyone there, he also stated that he could not recall whether he went there or spoke with anyone. Under these circumstances, his testimony although positive in form is negative in effect." Mustas v. Inland Construction, Inc., 19 Wis.2d 194, 120 N.W.2d 95, 99 (1963).

Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, 562 (1956); Rambow v. Wilkins, 264 Wis. 76, 78, 58 N.W.2d 517, 518 (1953); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126-29, 262 N.W. 581, 582-84 (1935).

Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236 (1971); Becker v. Barnes, 50 Wis.2d 343, 184 N.W.2d 97 (1971).

A jury may not disregard positive, uncontradicted testimony as to the existence of some fact, or the happening of some event, in the absence of something in the case which discredits the existence of the fact or renders it against responsible probabilities. Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 650, 260 N.W.2d 783 (1978).

This instruction needs to be tailored to the particular facts and witnesses in the case.

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325 PHYSICAL FACTS

If you find a witness' testimony conflicts with physical facts established by evidence and that the testimony cannot be reconciled with the physical facts, then disregard the conflicting testimony. But, the testimony of a witness is overcome by physical facts only if such facts establish a conclusion contradicting such testimony beyond any reasonable ground for doubt.

COMMENT

This instruction was approved by the Committee in 1960. The instruction and comment were updated in 1986. The comment was reviewed without change in 1989.

Pappas v. Jack O. A. Nelson Agency, Inc., 81 Wis.2d 863, 369, 260 N.W.2d 721 (1978); Chart v. General Motors Corp., 80 Wis.2d 91, 111-12, 258 N.W.2d 680 (1977); Corning v. Dec Aviation Corp., 50 Wis.2d 441, 184 N.W.2d 152 (1971); New Amsterdam Casualty Co. v. Farmers Mut. Auto Ins. Co., 5 Wis.2d 646, 649, 94 N.W.2d 175, 177 (1959); Kleckner v. Great Am. Indem. Co., 257 Wis. 574, 577, 44 N.W.2d 560, 562 (1950); Schoenberg v. Berger, 257 Wis. 100, 106, 42 N.W.2d 466, 469 (1950); Strnad v. Coop. Ins. Mut., 256 Wis. 261, 271, 40 N.W.2d 552, 559 (1949); McCarthy v. Thompson, 256 Wis. 113, 116, 40 N.W.2d 560, 562 (1949).

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LAW NOTE FOR TRIAL JUDGES

349 PRESUMPTIONS AND PERMISSIVE INFERENCES

The 1974 Rules of Evidence made substantial changes in the theory of presumptions:

1) All presumptions are now treated the same, whether previously characterized as common law, statutory, policy, of fact, or of law;

2) Presumptions do not "disappear, " "burst, " or drop out when evidence to the contrary of the presumed fact is introduced;

3) A presumption when established shifts the burden of persuasion (proof) as well as the burden of proceeding to the party against whom the presumption is directed.

The instructions (Wis JI-Civil 350-356) which follow illustrate the common situations which arise. Not all instructions on presumptions are collected here; others will be found located with topics to which they are related.

To understand the words used in the models which follow, it is necessary to keep in mind the meaning of "basic fact" and "presumed fact." A presumption is a device to simplify proof; it does so by letting a fact easy to establish – the basic fact – stand for the fact difficult to establish – the presumed fact. So ownership of a car may stand for (or prove) the proposition that the driver of the car was the agent of the owner.

The instructions which follow illustrate the common proof situations in which a presumption may be involved: 1) conflict as to existence of the basic fact and also evidence from which nonexistence of the presumed fact may be inferred; 2) no conflict as to the basic fact, but evidence from which nonexistence of the presumed fact may be inferred; 3) conflict as to the existence of the basic fact but no evidence from which the nonexistence of the presumed fact may be inferred. The situation in which there is no conflict as to either the

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basic fact or the presumed fact is covered in the second paragraph of the comment to Wis JI-Civil 354.

The process of drawing inferences is logical. It is fundamental to litigation. From the standpoint of the judge, it is legal-scientific-common-sense. The judge says: I will let the jury find that the act of the defendant railroad company caused the fire because (for example) trains do emit sparks and the fire in the field was noticed shortly after the passage of the train, and no other cause of the fire was produced. This inference is legally permissible because it is logical and does not offend science or common sense. This is the "reasonable inference."

A presumption is an inference required by law. It may be logical or illogical. The illogical presumptions as, for example, the presumption that a deceased person was not negligent are not logically related to the basic fact (death) and are established, for policy reasons, to facilitate the bringing of a case, by shifting the burden of proof to the opponent who may be better able to produce evidence on the matter (the negligence of the deceased).

Between the reasonable inference and the presumption is the permissive inference; res ipsa is an example; see Wis JI-Civil 356. This is also an inference required by law; it differs from a presumption in that its impact on the jury, through the instruction given, is less. In the presumption instruction, the jury is told "you must give effect to the presumption unless you find the contrary of the presumed fact more probable"; in the permissive instruction, the instruction is "you may find."

COMMENT

This note was originally published in 1977. An editorial correction was made in 2015 to remove the term, "guilty of negligence." The comment was updated in 2017.

See Wisconsin Judicial Council Notes at 59 Wis.2d R41-R56. See also Blinka, Daniel, Wisconsin Evidence, 3rd (Volume 7, Wisconsin Practice Series), Chapter 903 Presumptions § 301.2 - 301.4.

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350 PRESUMPTIONS: CONFLICT AS TO EXISTENCE OF BASIC FACT; EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT MAY BE INFERRED

There is a conflict in the evidence as to (here state basic fact). There is evidence from which you may conclude that (state the basic fact) exists; on the other hand, there is evidence from which you may conclude that (state the basic fact) does not exist. You must resolve this conflict.

If you find the existence of (state the basic fact) more probable than not, then, by law, a presumption arises that (state the presumed fact). But there is also evidence from which you can conclude that (state the presumed fact) does not exist. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (state the presumed fact) does not exist, you must find that (state the presumed fact) exists.

COMMENT

This instruction was approved by the Committee in 1977. The comment was updated in 1984 and revised in 1991, 2010, and 2012. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

For the treatment of presumptions in civil cases, see Wis. Stat. § 903.01. See also Wisconsin Rules of Evidence, 59 Wis.2d R50-51; Westfall v. Kottke, 110 Wis.2d 86, 113, 328 N.W.2d 481 (1983).

For the use of this instruction in a trial involving a claim of self-defense under Wis. Stat. § 895.62, see Wis JI-Civil 2006.2.

Retrograde amnesia may be used as an illustration of the use of this instruction in the situation where it is claimed that the amnesia was caused by the accident involved in the litigation. This is an example of an illogical, or contrary to fact, presumption.

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Example of Use of Wis JI-Civil 350

> The law provides that if a person has retrograde amnesia as a result of an accident, there is a presumption that the person was not negligent at the time of the accident. There is a conflict in the evidence as to whether or not __(name)__ has retrograde amnesia. There is evidence from which you may conclude that __(name)__ has retrograde amnesia; on the other hand, there is evidence from which you may conclude that __(name)__ does not have retrograde amnesia. You must resolve this conflict. If you find it more probable than not that __(name)__ has retrograde amnesia, then, by law, a presumption arises that __(name)__ was not negligent. But there is also evidence from which you can find that __(name)__ was not negligent. You must resolve this conflict. Unless you are satisfied, by the greater weight of the credible evidence to a reasonable certainty, that __(name)__ was negligent, you must find that, at the time of the accident, __(name)__ was not negligent.

Retrograde Amnesia. To prove the basic fact of retrograde amnesia, expert medical testimony is necessary. Ernst v. Greenwald, 35 Wis.2d 763, 151 N.W.2d 706 (1967); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1967); Mallare, Wisconsin Civil Trial Evidence, 1969 Supp., at 284.

While the point has not been decided, it may be possible to give the instruction where retrograde amnesia has been proved even though it was not caused by the accident.

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352 PRESUMPTIONS: EXISTENCE OF BASIC FACT UNCONTRADICTED; EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT MAY BE INFERRED

There is no dispute that (state the basic fact). From these facts, a presumption arises that (state the presumed fact). But there is evidence in the case which may be believed by you that (state the negative of the presumed fact). You must resolve the conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable (state the negative of presumed fact), you must find that (state the presumed fact).

COMMENT

This instruction was approved by the Committee in 1977. The comment was updated in 1989, 2010, and 2012. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is designed for the case where there is no conflict in the basic facts, but there is evidence from which the contrary of the presumed fact may be inferred.

For the use of this instruction in a trial involving a claim of self-defense under Wis. Stat. § 895.62, see Wis JI-Civil 2006.2.

This form is proper, for example, to state the presumption that a letter, properly addressed, stamped, and mailed with sender's return address thereon, is received by the addressee in the case where there is also evidence that the letter was not received. For other examples, see Wis JI-Civil 1600, Agency: Driver of Automobile; Wis JI-Civil 1026.5, Bailment: Negligence of Carrier Presumed.

For the presumption of due care by a deceased person, see Wis JI-Civil 353.

For the presumptions to be given to billing statements and invoices for health care services in Wis. Stat. § 908.03(6m)(bm), see Wis JI-Civil 1756 and 1757.

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353 PRESUMPTIONS: DECEASED PERSON WAS NOT NEGLIGENT

Because (decedent) has died and cannot testify, you must presume that (decedent) was not negligent at and before the time of the occurrence, unless you find the presumption is overcome by other evidence.

In deciding whether (decedent) was negligent, you must weigh the presumption with all the other evidence. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more likely that (decedent) was negligent, you must find that (decedent) was not negligent.

COMMENT

The instruction and comment were approved in 1989. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

See Seligman v. Hammond, 205 Wis. 199, 236 N.W. 115 (1931); Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). Theisen applied the "bursting bubble" theory to the presumption, i.e., the presumption of due care is eliminated and drops out of the case entirely once the defense presents evidence showing conduct contrary to the presumption. As explained in Law Note, Wis JI-Civil 349, the 1974 rules of evidence made substantial changes in the theory of presumptions. Presumptions do not disappear or burst when evidence contrary to the presumed fact is presented. Instead, a presumption when established shifts the burdens of persuasion and proceeding. See Law Note, Wis JI-Civil 349, p. 2, for the policy reasons for the presumption of due care.

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354 PRESUMPTIONS: CONFLICT AS TO EXISTENCE OF BASIC FACT; NO EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF PRESUMED FACT COULD BE INFERRED

The law provides (state the presumption).

There is a conflict in the evidence as to whether or not (state the basic fact). There is evidence from which you may conclude that (state the basic fact); on the other hand, there is evidence from which you may conclude (state the contrary of the basic fact). You must resolve this conflict.

If you find that (state the basic fact), you must find that (state the presumed fact).

COMMENT

This instruction was approved by the Committee in 1977. The comment was revised in 1991.

This instruction is designed for the case in which there is conflict as to the existence of the basic fact, and no evidence to the contrary of the presumed fact; in this situation, the jury must determine whether the basic fact exists.

If the evidence of the basic fact is uncontradicted and there is no evidence to the contrary of the presumed fact, the judge will find the presumed fact or instruct the jury to find the presumed fact.

There is no need for this instruction in the situation where the presumed fact is not in issue. For example, in a negligence action, where plaintiff represents a deceased driver, if the defendant has put in no evidence of deceased driver's contributory negligence, there is no need for the plaintiff to prove that the deceased driver was not negligent, and hence no need for the presumption which leads to deceased driver's nonnegligence. (If death, then deceased not negligent.) Conversely, if the plaintiff must prove an element of the case, such as receipt of a letter by the defendant, the instruction on the presumption is necessary, even if the defendant has put in no proof of nonreceipt of the letter, because the plaintiff must establish some way, for the record, the fact of receipt of the letter.

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356 PERMISSIVE INFERENCES; e.g., RES IPSA LOQUITUR

NOTE: Wis. Stat. § 903.01 does not apply to permissive inferences. Wisconsin Rules of Evidence, 59 Wis.2d R45.

Res Ipsa is the only common permissive inference in Wisconsin; Wis JI-Civil 1145 may be used as a model for any other permissive inference.

COMMENT

This note was approved by the Committee in 1977 and was reviewed without change in 1982 and 1989.

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400 SPOLIATION: INFERENCE

[Describe the conduct the court has found to constitute spoliation of evidence.]

You may, but are not required to, infer that (plaintiff) (defendant) (describe spoliation) because producing that evidence would have been unfavorable to (plaintiff)'s (defendant)'s interest.

(For example: The defendant destroyed all of his medical records for patient care provided prior to 2005. You may, but are not required to, infer that the defendant destroyed his medical records from prior to 2005 because producing that evidence would have been unfavorable to defendant's interest.)

COMMENT

This instruction and comment were approved in 2010.

Prior to giving this instruction, the court must first determine if spoliation occurred. If the court finds spoliation has occurred, the court must then determine if the proper sanction for the spoliation of evidence is to instruct the jury on the spoliation inference.

Spoliation Defined. Omnia Praesumuntur Contra Spoliatorem: "All things are presumed against a despoiler or wrongdoer." Black's Law Dictionary 1086 (Sixth Edition 1990).

Spoliation is defined as the destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App. 61, 242 Wis.2d 205, 245, 626 N.W.2d 821.

The duty to preserve evidence exists whether litigation is pending or not. In evaluating an allegation of document destruction a court should examine whether the party knew or should have known at the time it caused the destruction of the documents that litigation against (the opposing parties) was a distinct possibility. Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999), citing Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis. 2d 523, 532, 502 N.W.2d 881 Ct. App. 1993; S.C. Johnson & Son, Inc. v. Morris, 2010 WI App. 6, 322 Wis.2d 766, 779 N.W.2d 19.

When a party deliberately destroys documents, the court may find spoliation by applying a two-part analysis. First, the court should consider "whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility." Second,

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the court should consider "whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation." "The purposes of the spoliation doctrine are served only if the offending party has notice that the evidence is or is likely to be relevant to pending or foreseeable litigation and proceeds to destroy the evidence anyway." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App 15, ¶¶15 and 16, 269 Wis.2d 286, 294, 674 N.W.2d 886, 890.

There is a five step process for evaluating the destruction of evidence and whether it constitutes spoliation.

(1.) Identification, with as much specificity as possible, of the evidence destroyed;

(2.) The relationship of that evidence to the issues in the action;

(3.) The extent to which such evidence can now be obtained from other sources;

(4.) Whether the party responsible for the evidence destruction knew or should have known at the time it caused the destruction of the evidence that litigation against the opposing parties was a distinct possibility; and

(5.) Whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon the party responsible for the evidence destruction and if so, what those sanctions should be.

Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis.2d 523, 532, 502 N.W.2d 881 Ct. App. 1993 citing Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 756 (D.N.J. 1981).

Burden of Proof. The party seeking the evidence must prove by clear, satisfactory, and convincing evidence that relevant evidence was intentionally withheld or destroyed. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶¶82 and 83, 242 Wis. 2d 205, 246, 626 N.W.2d 821 citing Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973).

Sanctions. The decision whether to impose a sanction for the spoliation of evidence is committed to the trial court's discretion. City of Stoughton v. Thomasson Lumber Co., 2004 WI App. 6, & 38, 269 Wis.2d 339, 675 N.W.2d 487 citing Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d at 717.

The primary purpose behind the doctrine of spoliation is two fold: (1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence. A remedy for spoliation should "advance truth by assuming that the destroyed evidence would have hurt the party responsible for the destruction of evidence and act as deterrent by eliminating the benefits of destroying the evidence." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App. 15, ¶16, 269 Wis.2d 286, 295, 674 N.W.2d 886, 891 (Ct. App. 2003).

Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are:

(1) Pretrial discovery sanctions;

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(2) The spoliation inference; and
(3) The recognition of independent tort actions for the intentional and negligent spoliation of evidence. Estate of Neumann v. Neumann, 2001 WI App. 61, & 80, 242 Wis.2d 205, 626 N.W.2d 821.

See also Wis. Stat. ' 804.12 for sanctions for a failure to make discovery.

Spoliation Inference. Where the spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶81, 242 Wis.2d 205, 246, 626 N.W.2d 821 citing Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829, 832 (Conn. 1996). The spoliation inference is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional. In Wisconsin, the operation of the *Maxim Omnia Praesumuntur Contra Spoliatorem* is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973). See also S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19.

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405 FALSUS IN UNO

If you are satisfied from the evidence that a witness has willfully testified falsely to a material fact, you may, in your discretion, disregard all the testimony of the witness which is not supported by other credible evidence in the case.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 2010 and 2018.

Use of this instruction is not favored. It should not be given routinely although the Committee believes its discretionary use is appropriate in some circumstances. See, however, the caveat in Ollman v. Wisconsin Health Care Liab. Ins. Plan, 178 Wis.2d 648, 505 N.W.2d 399 (Ct. App. 1993). To warrant giving this instruction, the trial court must be satisfied that there is sufficient evidentiary basis to show there was willful false swearing to a material fact. Pumorlo v. Merrill, 125 Wis. 102, 103 N.W. 64 (1905); 50 Marq. L. Rev. 507 (1967). See also State v. Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

Omission of "credible" is error. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 386, 117 N.W. 852, 854 (1908).

To warrant giving this instruction, there must be some basis in evidence to show false swearing. Pumorlo, supra at 110-12. In Estate of Neumann v. Neumann, 2001 WI 61, 242 Wis.2d 205, 626 N.W.2d 821, the court noted that the numerous inconsistencies and contradictions in the defendant's deposition and trial testimony provided an evidentiary basis to show there was willful false swearing by the defendant to material facts. The court noted the instruction is not proper where there are mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake. It also agreed with the language in the instruction suggesting that even if the falsus in uno instruction is given, the jury is not required to find the witness willfully testified falsely.

In State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), the refusal to give the falsus in uno instruction in a criminal case was upheld where the witness maintained that her prior testimony was inconsistent because she was confused. The court noted that "[t]he falsus in uno instruction is not favored in the law," citing: Annot., 4 A.L.R.2d 1077 (1949), and emphasized the evidentiary basis required for giving the instruction:

> In order for the falsus in uno instruction to be appropriate, the false testimony must be on a material point and must be willful and intentional. Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are not basis for rejecting a witness's testimony entirely. 84 Wis.2d 370, 394.

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410 WITNESS: ABSENCE

If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

COMMENT

The instruction and comment were originally published in 1967. The instruction was revised in 1985. The comment was updated in 1997, 2012, 2013, 2014, and 2015.

Kochanski v. Speedway SuperAmerica LLC, 2014 WI 72, 356 Wis.2d 1, 850 N.W.2d 160; State ex rel. Park Plaza Shopping Center, Inc. v. O'Malley, 59 Wis.2d 217, 207 N.W.2d 622 (1973); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis.2d 231, 237, 201 N.W.2d 745 (1972); Carr v. Amusement, Inc., 47 Wis.2d 368, 177 N.W.2d 388 (1970); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1966); Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966); Kink v. Combs, 28 Wis.2d 65, 74, 135 N.W.2d 789 (1965); Dodge v. Dobson, 21 Wis.2d 200, 205, 124 N.W.2d 97 (1963); Lubner v. Peerless Ins. Co., 19 Wis.2d 364, 371, 120 N.W.2d 54 (1963); Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191 (1932); Bowen v. Industrial Comm'n, 239 Wis. 306, 1 N.W.2d 77 (1941). See also Lobermeier v. General Tel. Co. of Wis., 119 Wis.2d 129, 349 N.W.2d 466 (1984); D.L. by Friederichs v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983); Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975); Coney v. Milwaukee & Suburban Transp. Corp., 8 Wis.2d 520, 99 N.W.2d 713 (1959).

The Wisconsin Supreme Court has stated that a party to a lawsuit does not have the burden, at his or her peril, of calling every possible witness to a fact, lest the failure to do so will result in an inference against him or her. The requirements of the absent material witness instruction should be narrowly construed to be applicable only to those to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth. Ballard, supra at 615-16. Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). See also Featherly v. Continental Ins. Co., 73 Wis.2d 273, 282, 243 N.W.2d 806 (1976); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 355, 234 N.W.2d 332 (1975); City of Milwaukee v. Allied Smelt Corp., 117 Wis.2d 377, 344 N.W.2d 523 (Ct. App. 1983).

Trial Court Discretion. There is an area of trial court discretion as to whether the "missing witness" instruction should be given to the jury. Roeske v. Diefenbach, 75 Wis.2d 253, 249 N.W.2d 555 (1977); for example, the age of the witness is a "material consideration" in the trial court's decision not to give the instruction. Dawson v. Jost, 35 Wis.2d 644, 151 N.W.2d 717 (1967). Where the testimony of the witness will be cumulative, the court is proper in refusing to give the instruction. Ballard v. Lumbermen's Mut. Casualty Co., supra.

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In Kochanski, supra, the Wisconsin Supreme Court ruled the trial judge erred by giving this instruction where there was no evidence that the absent witnesses were: material, within the control of the defendant, or that it was more natural for the defendant to call them.

Refusal to give the instruction was not error where plaintiff did not put his dentist on the stand, but the dentist's bill was in record. Lundquist v. Western Casualty & Surety Co., 30 Wis.2d 159, 167, 140 N.W.2d 241 (1966).

Inference. The absent witness instruction does not create a presumption. Instead, it describes a permissible inference. Kochanski, supra. A court may give the instruction only if there are facts in the record that would allow the jury to reasonably draw a negative inference from the absence of a particular material witness. Kochanski, supra; Thoreson, supra. The inference is persuasive rather than probative and, standing alone, would not support plaintiff's case or defendant's defense. Carr v. Amusement, Inc., supra at 376.

Alternative Access to the Testimony. In a bad faith by insurer action, the trial judge gave the jury an absent witness instruction after the insurer failed to call one of its field agents who had investigated the plaintiff's claim. On appeal, the insurer complained that the trial court should not have given the instruction because the investigator's potential testimony was available to the plaintiff because the plaintiff had deposed the investigator during discovery. The insurer argued that the plaintiff could have read to the jury whatever information he wanted from the deposition transcripts. The insurer also contended that an earlier supreme court case, Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975), established a bright-line rule against giving the absent witness instruction whenever the requesting party had alternative access to the missing witness' testimony. The court of appeals disagreed that a bright-line rule had been previously established. It held that while, the party requesting the instruction in Bode had deposed the missing witness, the requesting party's earlier access to the missing witness' testimony was not the basis for the conclusion that the instruction was not warranted. Instead, it said, in Bode, the court held that the instruction was not appropriate because the party who should have called the absent witness did not have a "special relationship" with the witness. DeChant v. Monarch Life Ins. Co., 204 Wis.2d 137, 554 N.W.2d 225 (Ct. App. 1996).

Availability of a Witness. The test of availability of the witness involves the question of whether it is more natural for one party to call the witness than the other party. Thoreson, supra, p. 238. The Wisconsin Supreme Court has held that it is improper to give the absent-witness instruction when the witness is equally available to both parties. Capello v. Janeczko, 47 Wis.2d 76, 176 N.W.2d 395 (1970); Thoreson, supra.

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415 WITNESS: PRIOR CONVICTION

Evidence was received that a witness has been convicted of a criminal offense. You may consider this evidence in weighing the testimony of that witness and in determining the witness' credibility, but it may not be used for any other purpose.

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1991 and 2010.

Wis. Stat. § 906.09(2) provides that evidence of crime should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Moore v. State, 83 Wis.2d 285, 265 N.W.2d 540 (1978); Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967); State v. Hutnik, 39 Wis.2d 754, 159 N.W.2d 733 (1968). See also Fahrenberg v. Tengel, 96 Wis.2d 211, 291 N.W.2d 516 (1980); Voith v. Buser, 83 Wis.2d 540, 266 N.W.2d 304 (1978).

In construing a similar earlier statute, the court said in Underwood v. Strasser, 48 Wis.2d 568, 180 N.W.2d 631 (1970): "This statutory provision applies to civil actions as well as to criminal cases. No distinction between the two categories of cases is made in the statute."

In Fehrman v. Smirl, 25 Wis.2d 645, 131 N.W.2d 314 (1964), also construing the earlier statute, the court instructed jurors that in considering the testimony of S, they were entitled to take into consideration the fact that S had admitted prior conviction of a misdemeanor but that this fact did not disqualify S as a witness; the supreme court held that if the misdemeanor had been one such as a driving offense which did not affect credibility, the instruction would not have been proper.

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420 IMPEACHMENT OF WITNESSES: PRIOR INCONSISTENT OR CONTRADICTORY STATEMENTS

COMMENT

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. The statement in question is inconsistent with the declarant's testimony at trial, and

2. The declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

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> 908.01 Definitions. The following definitions apply under this chapter:
> . . . .
>
> (4) Statements which are not hearsay. A statement is not hearsay if:
> (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> 1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.

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425 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate (the witness) (him) (her). You may find by this refusal to answer that the answer(s) would have been against the interest of (the witness) (him) (her).

COMMENT

This instruction was approved in 2010.

Wisconsin has long recognized that a person may invoke the Fifth Amendment privilege against self-incrimination as protection from the adverse use of such evidence in a subsequent criminal action. Grognet v. Fox Valley Trucking Serv., 45 Wis.2d 235, 239, 172 N.W.2d 812 (1969); S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19. However, in a civil case as distinguished from a criminal case, an inference of guilt or against the interest of the witness may be drawn from the witness invoking the Fifth Amendment. For comparison, see Wis JI-Criminal 317.

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950 REASONABLE DILIGENCE IN DISCOVERY OF INJURY (STATUTE OF LIMITATIONS)

Question _____ asks whether (plaintiff) knew, or should (he) (she) with the exercise of reasonable diligence have known, on or before (date on which statute of limitations would have run) that _____ was a cause of (damage) (injury) to _____.

To answer this question "yes," you must be satisfied that, prior to (date), (plaintiff) knew or with the exercise of reasonable diligence should have known the following:

First, that (he) (she) (suffered damages) (was injured).

Second, that (his) (her) (damages) (injuries) were probably caused by (defendant)'s conduct.

"Reasonable diligence" means the diligence the great majority of persons would use in the same or similar circumstances to discover the cause of the (damages) (injuries).

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2016.

Gumz v. Northern States Power Company, 2007 WI 135, 305 Wis.2d 263, 742 N.W.2d 271; Schmidt v. Northern States Power Co., 2007 WI 136, 305 Wis.2d 538, 742 N.W.2d 294. Kolpin v. Pioneer Power & Light, 162 Wis.2d 1, 469 N.W.2d 595 (1991); Allen v. Wisconsin Public Service Corp., 2005 WI App 40, 279 Wis.2d 488, 694 N.W.2d 420; Spitler v. Dean, 148 Wis.2d 630, 436 N.W.2d 308 (1989); Christ v. Exxon Mobil Corp., 2015 WI 58, 362 Wis.2d 668, 866 N.W.2d 602.

A cause of action accrues for purposes of determining the statute of limitations when the plaintiff discovers, or with reasonable diligence should have discovered, the injury and that the defendant's conduct probably caused that injury. Borello v. United States Oil Co., 130 Wis.2d 397, 411 (1986); Schmidt v. Northern States Power Company, 2007 WI 136. Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to his or her injury and its cause. Claypool v. Levin, 209 Wis. 2d 284 (1997); Schmidt v. Northern States Power, supra.

In Gumz v. Northern States Power Company, supra, the supreme court noted that "(S)tatute of limitations defenses based on failure to exercise reasonable diligence will often present questions of fact appropriate for a jury. When they do, courts should provide separate questions for negligence and reasonable diligence in discovery." (para. 49).

The last paragraph is taken from Allen v. Wisconsin Public Service Corp., 2005 WI App 40, 279 Wis.2d 488, 694 N.W.2d 420.

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1000 UNAVOIDABLE ACCIDENT

COMMENT

The Committee believes that no instruction is needed on this subject since, in most cases, there is some evidence of negligence as to a party, or else it is clear that the party is not negligent.

This comment was approved by the Committee in 1960 and updated in 1984. The comment was reviewed without change in 1989.

It is error to give an unavoidable accident instruction where there is no evidence that the accident resulted other than from negligence. Calhoun v. Lasinski, 255 Wis. 189, 191, 39 N.W.2d 353, 354 (1949); 65 A.L.R. 2d 33 (1949). In Calhoun, the Wisconsin Supreme Court said:

> Defendant admitted applying his brakes hard enough to kill his engine. In view of these facts we can see no justification for submitting an instruction as to "unavoidable accident."

In Mittelstadt v. Hartford Accident & Indem. Co., 2 Wis.2d 78, 86-88, 85 N.W.2d 793, 797-98 (1957), the supreme court held that under the circumstances of this particular case, it is erroneous and prejudicial for the trial court to give an instruction on unavoidable accident.

Skidding does not necessarily warrant the giving of an unavoidable accident instruction. Paul v. Hodd, 271 Wis. 278, 282-84, 73 N.W.2d 412, 415-16 (1955); Abbott v. Truck Ins. Exch. Co., 33 Wis.2d 671, 148 N.W.2d 116 (1967).

When the instruction has been given, it has been held properly given in connection with the cause question, Murray v. Yellow Cab Co., 180 Wis. 314, 318-19, 192 N.W. 1021, 1023 (1923), but improperly in connection with the negligence questions, Mittelstadt, supra at 88.

The form of the instruction frequently approved is in the Murray and Mittelstadt cases. But note that in Linden v. Miller, 172 Wis. 20, 24, 177 N.W. 909, 910 (1920), the first paragraph of this instruction is criticized.

The common law does not impose upon anyone an absolute duty to avoid an accident, and it does not contemplate that all accidents or mishaps must arise as a consequence of fault. Millonig v. Bakken, 112 Wis. 445, 452, 334 N.W.2d 80 (1983).

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1001 NEGLIGENCE: FAULT: ULTIMATE FACT VERDICT

[NOTE: The instruction which follows is for use with a verdict which inquires about the ultimate fact of fault in regard to each party rather than asking about negligence and causation. This form of verdict may be used only if the parties stipulate to its use. Baierl v. Hinshaw, 32 Wis.2d 593, 601, 146 N.W.2d 433 (1966).]

Questions 1 and 2 of the verdict inquire whether the parties to the collision were at fault. "Fault," as used here, involves two elements – negligence and cause. To establish legal fault, the conduct under consideration must be negligent, and it must be a cause of the injury and damages.

(Wis. JI-Civil 1005 Negligence).

In addition to this general definition of negligence, there are rules of law, as well as statutes enacted by the legislature, for the safe operation of motor vehicles, violation of which establishes negligence.

(Here add appropriate instructions on specific kinds of negligence.)

In considering "cause" as an element of fault, you will consider it from the standpoint of relationship of cause and effect between the negligence of either or both parties, if found by you, and the collision and the resulting injuries and damages.

[Give Wis. JI-Civil 1500 Cause]

Before you can find either party at fault, you must be satisfied first, that the party was negligent, as that term has been defined for you, and, second, that such negligence was a substantial factor in producing the collision and the natural results thereof. If you can be so satisfied that either or both parties were at fault, then you will so find – otherwise not.

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After determining whether these parties were or were not at fault, under the instructions I have given you, you will consider and determine what percentage of the fault of each, if found, contributed to the collision and the natural results thereof. Total fault is based on 100%. If you find only one party at fault, then of course, that person's contribution to the collision and the results would be 100%. If you find both parties at fault, then you will consider the fault of each party, weigh its contribution in producing the collision and the results, and fix it in such percentage of the total fault which is proved to be attributable to the person named in the question.

Questions 1 and 2 are to be answered in terms of percentages if the party inquired about is found to be at fault, as that term has been defined to you.

The burden of proof on either question is upon the party who claims another is at fault.

[Wis JI-Civil 200 Burden of Proof]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and 2003. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The Committee recommends that this instruction be given only if all parties to the action consent to its use.

In Wisconsin, negligence and causation are separate inquiries. Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 226, 270 N.W.2d 205 (1978); Grunwald v. Halron, 33 Wis.2d 433, 147 N.W.2d 543 (1966); Baierl, supra.

In 1976, Wis. Stat. § 805.12 was adopted as part of the major revision to the civil procedure rules. This new legislation has raised some question as to whether it altered the rule announced in Baierl that it was error to submit a special verdict question combining negligence and causation into a single question. The court in Baierl relied upon the following statutory language from Wis. Stat. § 270.27 to justify its conclusion that negligence and causation could not be combined: "[The] court may submit separate questions as to the negligence of each party, and whether such negligence was a cause. . . ." (Emphasis added.)

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The 1976 revision created Wis. Stat. § 805.12 which, according to the Judicial Council Committee note, was "generally based" on Wis. Stat. § 270.27. However, the above-quoted statutory language of § 270.27 which was cited in Baierl was deleted in the 1976 legislation. This deletion gave rise to speculation that the "net effect of redrafting section 805.12(1) appears to be a reversal of Baierl and a restoration of Wisconsin Jury Instruction-Civil Number 1001 as a proper method of submission, irrespective of consent of the parties." John A. Decker & John R. Decker, "Special Verdict Formulation," 60 Marq. L. Rev. 201, 213-14 (1977).

Subsequent to publication of that article, the state supreme court in 1978 adhered to its earlier holdings that "negligence and causation are separate inquiries." Fondell, supra at 226. In a footnote supporting this proposition, the court in Fondell cited the following passage from Grunwald, supra:

> An important aspect of the instructions in a negligence case is the matter of proximate cause, for though there be negligence, liability may extend only for such damages that are proximately caused by the negligence. In a very recent case we held that it was error to submit a negligence case without a separate causation question. Baierl v. Hinshaw (1966), 32 Wis.2d 593, 146 N.W.2d 433. (Emphasis supplied.)

Later in its decision, the court in Fondell, supra at 228, stated that: "Cause and negligence are separable legal concepts predicated on distinct legal tests." The court in Fondell, however, did not engage in the same statutory analysis of § 805.12 and its predecessor § 270.27, as did the commentators in the 1976 article. In addition, the issue in Fondell did not specifically relate to the propriety of Wis JI-Civil 1001. Nevertheless, it can conservatively be stated that the court's preference for separate inquiries on negligence and causation is obvious.

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1002 GAS COMPANY, DUTY TO CUSTOMER

The defendant gas company at the time and place in question had a duty to exercise ordinary care in the manner in which it [inspected (gas pipes) (gas appliances)] [acted after inspecting plaintiff's (gas pipes) (gas appliances)] [repaired plaintiff's (gas pipes) (gas appliances)].

To conform to this standard, the care used must be commensurate with the dangerous consequences which would be reasonably expected from a course of action or inaction. It is common knowledge that natural gas, if not properly contained, is highly explosive and, if permitted to escape, is highly dangerous. Therefore, greater caution and vigilance are required in dealing with this commodity than are required in dealing with ordinary affairs of life and business.

[Select the appropriate following paragraph.]

[If a gas company, such as the defendant, is notified by a customer of a claimed defect in the customer's gas appliance, or in gas pipes leading from the company's meter, and the company knows or should know that if such defect exists it would create a dangerous condition, it is the duty of the gas company to make an inspection of the claimed defect within a reasonable time after notification under all the circumstances then existing. If the company fails to make a proper inspection within a reasonable time, it is negligent.]

[If, on inspection, a defect is found, and the company knows or should know that such defect creates a dangerous situation, it is the duty of the company either to undertake repair of the defect or to shut off the gas supply to enable the owner to have the (gas pipes) (gas appliance) repaired. If the company fails to shut off the gas or to undertake repair of the defective (gas pipes) (gas appliance), it is negligent.]

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[If the company undertakes repair of the defective (gas pipes) (gas appliance), it must conduct such repair operations in a careful, workmanlike manner and within a reasonable time; failure to so repair is negligence.]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and was reviewed without change in 1989.

Depending on the issues under the evidence, the question will ask about inspection, action after inspection, or repair; the proper paragraph will be used in connection with the question asked.

If there is an issue as to the giving of notice to the gas company, an additional preliminary question is needed.

If the gas pipes or appliances are owned by the customer and are under his control, the gas company cannot be found liable unless it knows or should know that a dangerous condition exists. Weber v. Interstate Light & Power Co., 268 Wis. 479, 482, 68 N.W.2d 39 (1955); Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 167, 72 N.W.2d 771 (1955); Shaw v. Wisconsin Power & Light Co., 256 Wis. 176, 179, 44 N.W.2d 98 (1949).

As to the duty of the gas company to inspect and repair or to shut off the gas supply once it has received notice of a dangerous defect, see Weber v. Interstate Light & Power Co., supra at 481.

Gas is a dangerous agent, and it is the duty of the gas company to take a high degree of care to avoid injury and damage resulting from its escape. Brown v. Wisconsin Natural Gas Co., 59 Wis.2d 334, 341, 208 N.W.2d 769 (1973). Webb v. Wisconsin S. Gas Co., 27 Wis.2d 343, 350, 137 N.W.2d 407 (1965); Weber v. Interstate Light & Power Co., supra at 481.

When a defect is found, the gas company is not required as a matter of law to shut off the gas supply but may permit a customer to operate the gas appliance manually. Webb v. Wisconsin S. Gas Co., supra at 349.

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1003 NEGLIGENCE, GAS COMPANY, DUTY IN INSTALLING ITS PIPES, MAINS, AND METERS

The defendant gas company at the time and place in question had a duty to exercise ordinary care in the manner in which it (laid its mains) (installed pipes and fittings) (inspected its mains) (repaired its mains).

To conform to this standard, the care used must be commensurate with the dangerous consequences which would be reasonably expected from a course of action or inaction. It is common knowledge that natural gas, if not properly contained, is highly explosive and, if permitted to escape, is highly dangerous. Therefore, greater caution and vigilance are required in dealing with this commodity than are required in dealing with the ordinary affairs of life and business.

[Select the appropriate following paragraph.]

[To comply with this duty, the gas company must install pipes and fittings of good material and workmanship, and it must lay its mains and install its pipes and fittings with reasonable skill and care, having in mind the conditions and circumstances then existing. If the defendant gas company fails to construct good quality pipes and fittings or to install them in a reasonable manner, it is negligent.]

[To comply with this duty, the gas company must make such reasonable inspections as will enable it to discover with reasonable promptness any leaks in its pipes and mains. If the defendant gas company fails to make such reasonable inspections, it is negligent.]

[If the gas company or any of its employees (knows or should know of the existence of a leak in its pipes) (has notice of a possible leak in its pipes), it must, in order to comply with the required standard of care, use reasonable care and diligence (to locate and repair) (in repairing) such defect within a time which is reasonable under all of the circumstances then

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existing. If the defendant gas company fails to reasonably (locate and repair) (repair) such defect within a reasonable time, it is negligent.]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and 1989.

Wis. Stat. §§ 66.047, 196.745; Wis. Adm. Code Chap. PSC 135; 96 A.L.R.2d 1007 (1964).

See E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N.W. 861 (1933), concerning the negligent construction of gas mains.

See Larsen v. Wisconsin Power & Light Co., 120 Wis.2d 508, 355 N.W.2d 557 (Ct. App. 1984), for utility's duty to inspect gas appliances.

A gas utility may also be negligent if it fails to use ordinary care to supervise or inspect the work of others digging near its pipes. Brown v. Wisconsin Natural Gas Co., 59 Wis.2d 334, 208 N.W.2d 769 (1973).

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1004 NEGLIGENT VERSUS INTENTIONAL CONDUCT

See JI-Civil 2001.

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1005 NEGLIGENCE: DEFINED

A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

(For the violation of a safety statute, see Wis JI-Civil 1009.)

COMMENT

This instruction and comment were approved in 1993 and revised in 1999 and 2009. The comment was updated in 2005, 2009, 2012, 2015, and 2016.

Ordinary Care. The Committee believes this instruction is true to the supreme court's concept of negligent behavior expressed in the leading case, Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931). The Wisconsin Supreme Court discussed Osborne v. Montgomery in a 2015 decision, Dakter v. Cavallino, 2015 WI 67, 363 Wis.2d 738, 866 N.W.2d 656. In Dakter v. Cavallino, supra, the court reviewed a jury instruction in a case involving a collision between a passenger car and a semi-trailer truck. The negligence instruction given by the trial judge provided:

> . . . It was Defendant's duty to use the degree of care, skill, and judgment which a reasonable semi-truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi-truck drivers holding commercial drivers licenses. A semi-truck driver who fails to conform to this standard is negligent.

The Wisconsin Supreme Court concluded that this jury instruction did not "misstate" the law, but reaffirmed that the standard of care remains "ordinary care" as set forth in Osborne.

The Committee believes that Dakter does not require that a trial judge give a jury instruction on special knowledge or skill. Instead, use of such an instruction is discretionary. It may be given, but Dakter does not mandate its use. The standard of care in Wisconsin negligence cases remains the same, i.e. ordinary care.

Duty. Wisconsin follows the minority opinion in Palsgraf v. Long Island Railroad Co., 162 N.E. 99, (N.Y., 1928) (Andrews, J., dissenting). This view holds that "(e)very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Palsgraf, p. 103; see also Hornback v. Archdiocese of Milwaukee, 2008 WI 98, 313 Wis.2d 294, 752 N.W.2d 862.

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This duty has also been described as an "obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act." A.E. Investment Corp. v. Link Builders, Inc., 62 Wis.2d 479, 483, 214 N.W.2d 764 (1974).

The duty of care "is established under Wisconsin law whenever it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person." Gritzner v. Michael R., 2000 WI 68, 235 Wis.2d 781, par. 20, 611 N.W.2d 906. See also Alvarado v. Sersch, 2003 WI 55, 262 Wis.2d 74, 662 N.W.2d 350; Dakter v. Cavallino, supra at ¶46.

Violation of Safety Statute. The trial judge must decide whether a safety law applies to the claimed negligent act. If so, then see Wis JI-Civil 1009. A safety law applies if the court determines: 1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. Tatur v. Solsrud, 174 Wis.2d 735, 743, 498 N.W.2d 232 (1993); Antwaun A. v. Heritage Mut. Ins. Co., 228 Wis.2d 44, 64-65, 596 N.W.2d 456 (1999). See also, Grube v. Daun, 210 Wis.2d 681, 563 N.W.2d 523; Burke v. Milwaukee & Suburban Transp. Co., 39 Wis. 2d 682, 690, 159 N.W.2d 700 (1968); McNeil v. Jacobson, 55 Wis.2d 254, 259, 198 N.W.2d 611 (1972); Betchkal v. Willis, 127 Wis.2d 177, 378 N.W.2d 684 (1985); Walker v. Bignell, 100 Wis.2d 256, 301 N.W.2d 447 (1981).

The Wisconsin Supreme Court in Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 391-393 recognized that a violation of a safety statute may be excused by the emergency doctrine, citing Restatement (Second) of Torts § 288A. (The emergency doctrine may apply in traffic cases where management and control is at issue. See Wis JI-Civil 1105A.)

§ 288A provides as follows:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

- (a) the violation is reasonable because of the actor's incapacity;
- (b) he neither knows nor should know of the occasion for compliance;
- (c) he is unable after reasonable diligence or care to comply;
- (d) he is confronted by an emergency not due to his own misconduct;
- (e) compliance would involve a greater risk of harm to the actor or to others.

The court discussed §§ (1) and (2)(d) and their commentary in reaching the conclusion that the emergency doctrine may excuse a violation of a safety statute. Interpretation of a safety statute or regulation as it relates to the emergency doctrine is a question of law for the court. Totsky, par. 21. If the court determines that the emergency doctrine applies, the jury decides whether the doctrine excuses the conduct. See Wis JI-Civil 1105A.

While § 288A was quoted at length, the court did not discuss §§ (2)(a), (b), (c) or (e). The committee believes that these sections were not "germane to the controversy" in Totsky and were not adopted by the court. See State ex rel. Schultz v. Bruendl, 168 Wis.2d 101, 111-112 (Ct. App., 1992); State v. Holt, 128 Wis.2d 110, 123 (Ct. App., 1985).

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Ski Area Operators and Participants in Snow Sports. For the duties of ski area operators and participants in snow sports, see Wis. Stat. § 895.525 (2011 Wisconsin Act 199). The law sets forth the responsibilities of ski area operators and participants, but also establishes restrictions on civil liability.

Corporate Officer; Business Judgment Rule. A corporate officer may be liable in some situations for non-intentional torts committed in the scope of his or her employment. Casper v. American International South Ins. Co., 2011 WI 81, 336 Wis.2d 267, 800 N.W.2d 880. The court, in Casper, noted that the "business judgment rule" expressed in Einhorn v. Culea, 2000 WI 65, 235 Wis.2d 646, 612 N.W.2d 78, and in Wis. Stat. § 180.0826 defines a corporate officer's duties to shareholders, not to third parties. Thus, it held the rule does not necessarily immunize a corporate executive from liability for negligence. Nevertheless, the court noted that the existence of the rule reflects public policy that corporate officers are allowed some latitude to make wrong decisions without subjecting themselves to personal liability.

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1006 GROSS NEGLIGENCE: DEFINED

Gross negligence is conduct involved in (the operation of an automobile) which shows either a willful intent to injure or reckless and wanton disregard of the rights, safety, or property of another person.

You may consider the defendant's conduct in any of its aspects (such as the speed at which (defendant) was driving) to determine whether it was wanton or reckless conduct (whether it showed willful intent to injure).

[Wis JI-Civil 205 Burden of Proof: Middle.]

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2002 to correct the reference to the burden of proof and update the comment. The instruction and comment were revised in 2015 to replace the terms, "guilty of" and "guilt." The instruction and comment were revised in 2016.

Gross negligence is no longer a part of Wisconsin common law. Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962). It remains a part of Wisconsin statutory law. Wis JI-Civil 1006 is retained for whatever use may be made of it in the trial of cases in which foreign law on gross negligence is to be applied. See Brunke v. Popp, 21 Wis.2d 458, 124 N.W.2d 642 (1963), and Parchia v. Parchia, 24 Wis.2d 659, 130 N.W.2d 205 (1964).

In addition, the Wisconsin Legislature has brought the concept of gross negligence back into Wisconsin law over the last twenty years. See, as examples, Wis. Stat. § 895.4802 (civil liability for discharge of hazardous materials), Wis. Stat. § 118.2925 (civil liability for school officials regarding the use of epinephrine auto-injectors), and Wis. Stat. § 118.293 (concerning civil liability for school officials regarding an athlete who has a concussion). While none of those statutes define "gross negligence," it is the Committee's opinion that it is reasonable to assume the Legislature intended the term to have the meaning previously stated in case law.

This instruction may also be of use in cases arising under Wisconsin statutes which impose civil liability for conduct which is akin to or the equivalent of gross negligence. See, for example, uses of the phrase "willful or wanton," and similar phrases, in Chapter 895 of the Wisconsin Statutes.

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1007 CONTRIBUTORY NEGLIGENCE: DEFINED

Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself.

ADDITIONAL OR OPTIONAL PARAGRAPHS

(A person must exercise ordinary care to employ (his) (her) senses of sight and hearing so as to become aware of the existence of danger to (him) (her). A failure to do so is negligence.)

(It is the duty of every person to exercise ordinary care to recognize and appreciate all dangers that are open and obvious to (him) (her) or which should have been recognized and appreciated by a reasonably prudent person under the same or similar circumstances. That the warning of the existence of danger was not seen or was not heard does not free one from negligence. In addition, one who looks and fails to see, or listens and fails to hear, a warning of danger which under like or similar circumstances would have been seen or heard by a reasonably prudent person is as negligent as one who did not look or listen at all.)

(However, a person is not bound to see every hazard or danger in his or her pathway even though they should be plainly observable nor to remember the existence of every condition of which the person has had knowledge. A person is only required to act as a reasonably prudent person would act under the same or similar circumstances.)

(To be free of negligence, a person must exercise ordinary care in choosing his or her course of conduct and in the pursuit of that choice. A person is not negligent in making a choice of conduct if the person has no knowledge that one course of conduct carries a greater

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hazard than another, provided that the lack of knowledge is not the result of the person's failure to exercise ordinary care.)

(Insert Wis JI-Civil 1015, Negligence in an Emergency, if applicable.)

COMMENT

This instruction and comment were approved in 1974. The Committee revised this instruction in 2014 to replace the term, "guilty of negligence. " The comment was updated in 1989, 2000, 2003, 2004, and 2012.

A party has a right to an instruction relating to the contributory negligence of an opponent, even though an instruction on negligence generally (Wis JI-Civil 1005) is given. Raszeja v. Brozek Heating & Sheet Metal Corp., 25 Wis.2d 337, 343, 130 N.W.2d 855 (1964).

Note that some of the above optional paragraphs are framed in general terms while others are pointed at particular fact situations. Some other contributory negligence issues are dealt with specifically elsewhere in Wisconsin Jury Instructions-Civil (e.g., Wis JI-Civil 1046, Contributory Negligence of Passenger: Placing Self in Position of Danger; and Wis JI-Civil 1047, Contributory Negligence of Guest: Riding with Host; Wis JI-Civil 1047.1, Contributory Negligence of Guest: Active; Wis JI-Civil 1048, Contributory Negligence: Highway Defect; Wis JI-Civil 1049, Contributory Negligence: Sidewalk Defect; Wis JI-Civil 1902, Safe Place Statute: Negligence of Plaintiff Frequenter).

Passive and Active Negligence. In Johnson v. Cintas Corp. No. 2., Appeal No. 2013AP2323 (Recommended for publication), the court of appeals said that asking the jury to separately consider the plaintiff's "passive" and "active" negligence "could have been more confusing than helpful."

Recreational Participants. In April 1988, the Wisconsin Legislature enacted legislation which affects the civil liability of owners of recreational property. 1987 Wisconsin Act 377. The act imposes standards of conduct on persons who participate in indoor and outdoor recreational activities with respect to the legal responsibility for injuries that are incurred while engaging in these activities. According to the act, "recreational activity" means any activity undertaken for the purpose of exercise, relaxation, or pleasure, including practice or instruction in any activity. The act includes a long list of activities included within the definition of "recreational activity." The act codifies an "appreciation of risk" doctrine which arguably already exists in common law as contributory negligence. Under the act, a participant in a recreational activity must:

1. act within the limits of his or her ability;
2. heed all warnings
3. maintain control of his or her person and the equipment, devices, or animals used while participating in the activity; and

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4. refrain from acting in a manner that may cause or contribute to injury to himself or herself or other persons while participating in the recreational activity.

A violation of these responsibilities constitutes negligence and is subject to the comparative negligence statute.

Participants in Snow Sports. For the duties of ski area operators and participants in snow sports, see Wis. Stat. § 895.525 (2011 Wisconsin Act 199). The law sets forth the responsibilities of ski area operators and participants, but also establishes restrictions on civil liability.

Mentally Disabled Persons. For the contributory negligence of a mentally disabled person under care and custody, see Wis JI-Civil 1021 and Hofflander v. St. Catherine's Hospital, 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545. In Hofflander, the supreme court recognized the concept of "subjective" contributory negligence. The Civil Jury Instructions Committee will be reviewing the Hofflander decision in 2004 to develop an instruction consistent with the decision.

Medical Informed Consent. See Wis JI-Civil 1023.4 for a comment on the issue of contributory negligence by a plaintiff in a duty to inform a patient case.

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1007.5 CONTRIBUTORY NEGLIGENCE: RESCUE RULE

[Give Wis JI-Civil 1005 & 1007.]

A person is not negligent in attempting to make a rescue if the following circumstances are found to exist:

1. That the person to be rescued was actually in imminent danger of death or injury or it appeared to the plaintiff, in the exercise of ordinary care, that the person was in imminent danger; and
2. That in deciding whether to attempt to make the rescue, the plaintiff acted as a reasonably prudent person even though there was no certainty of success in accomplishing the rescue; and
3. That in carrying out the rescue attempt, the person used ordinary care with respect to the means and manner of making the rescue.

In determining whether the plaintiff used ordinary care, you should consider the alarm, excitement, and confusion, if any, the uncertainty of the means to be employed in the rescue, and the apparent necessity for immediate action, together with all other surrounding circumstances that bear upon the reasonableness of the rescue attempt.

COMMENT

This instruction and comment were approved by the Committee in 1981. The comment was updated in 2016.

Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 672 (1977); 65A C.J.S. Negligence ' 124 (1966). The "rescue doctrine" is separate from the "emergency doctrine." Cords, supra at 246. The rescue doctrine is applicable even though the action of the rescuer is deliberate and taken after some planning and consideration.

For the relationship between the rescue rule and emergency doctrine, see Kelly v. Berg, 2015 WI App 69, 365 Wis.2d 83, 870 N.W.2d 481; Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 672 (1977).

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1008 INTOXICATION: CHEMICAL TEST RESULTS [REFLECTS CHANGES IN 2003 WISCONSIN ACT 30]

The results of a chemical test for intoxication have been received in evidence.

(NOTE: USE THE APPROPRIATE PARAGRAPH):

[If you find there was an alcohol concentration of more than 0.04 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question, but it is not by itself a sufficient basis for a finding that the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question.]

[If you find there was an alcohol concentration of 0.8 or more at the time of the test, you should find from that fact alone that the person was under the influence of an intoxicant at the time in question, unless you are satisfied to the contrary from other evidence.]

[If you find there was an alcohol concentration of more than 0.00 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question, but it is not by itself a sufficient basis for a finding that the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question.]

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COMMENT

[REPORTER'S NOTE: This instruction reflects the changes to alcohol concentration in 2003 Wis. Act 30. This act took effect on September 30, 2003. For a case in which the prior law applies, change "0.08" to "0.1."]

This instruction and comment were originally published in 1961. They were revised in 1974, 1983, 1989, 1994, 1996, 2000, and 2003.

Evidence of chemical tests for intoxication is generally admissible if intoxication is at issue. Wis. Stat. § 885.235(1g). But if the sample (blood, breath, or urine) was taken more than three hours after the event, the analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if established by expert testimony. Wis. Stat.§ 885.235(3).

With regard to the operation of a commercial motor vehicle, Wis. Stat. § 885.235(1g)(d) indicates that an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

"The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant. . . ." Wis. Stat. § 885.235(4).

See also Wis JI-Criminal 230, 232, 234, 235, 237, 1185, 1185A, 1186 1186A, 1188, 1190, and 1191 for jury instructions dealing with chemical test results.

Prima Facie Evidence. In drafting this instruction, the question arose whether Aprima facie evidence@ was the same as presumption. Wis. Stat. § 903.01 makes clear that it is. The statute reads:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. (Emphasis added.)

Wis Stat. § 885.235(1g)(c) is a statutory provision that makes a chemical test showing an alcohol concentration of 0.1 or more (the basic facts) "prima facie evidence" of being under the influence of an intoxicant (the other fact). Wis. Stat. § 903.01 makes this statutory provision a presumption. Wis. Stat. § 903.01 makes clear, also, that the introduction of the basic fact establishes the presumed fact for the jury and shifts the burden to the opposing party to overcome or rebut the presumption.

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In terms of meeting the presumption, Chief Justice Heffernan's words in Kruse v. Horlamus Indus., Inc., 130 Wis.2d 357, 365-66, 387 N.W.2d 64 (1986) are instructive"

> Under Wisconsin law, presumptions do not "disappear" or "burst" when evidence to the contrary of the presumed fact is introduced. This means that, even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight.

This language supports the use of "should" in the civil instruction ("you should find from that fact alone that the person was under the influence of an intoxicant") rather than the permissive "may" used in the criminal instruction; it also supports the language "unless you are satisfied from other evidence to the contrary" because the presumption shifts the burden of production.

Civil/Criminal Distinction. In drafting this instruction, the Committee recognized that there is a distinction between Wis JI-Criminal 230 and Wis JI-Civil 1008. The Committee believes that Wis. Stat. § 903.01 supports the slightly different treatment in the civil instruction. Wis. Stat. § 903.03(3) supports the criminal instruction and indicates why the criminal instruction is worded as it is. The statute provides in the most relevant section:

> (3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt. (Emphasis added.)

The criminal instruction must use the permissive "may" and the cautionary adjunct because of the higher burden of proof. The instruction also must instruct that the jury can only rely on the presumed fact if all the evidence proves the presumed fact beyond a reasonable doubt. The instruction may not suggest that the burden shifts to the defendant to overcome or rebut the presumption.

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1009 NEGLIGENCE: VIOLATION OF SAFETY STATUTE

Violation of a safety (statute) (regulation) (ordinance) is negligence as that term is used in the verdict questions and my instructions. (Plaintiff) claims that (defendant) violated a safety (statute) (regulation) (ordinance) that provides:

> [Read appropriate motor vehicle jury instruction applicable to the facts or summarize or read statute, administrative rule, or ordinance at issue]

If you determine that (defendant) violated this safety (statute) (regulation) (ordinance), the violation is negligence.

COMMENT

The instruction and comment were approved in 2009. Conduct is negligent either because it will foreseeably cause harm, or because it violates a safety statute where the statutory purpose is to avoid or diminish the likelihood of harm that resulted. Koback v. Crook, 123 Wis.2d 259, 276, 366 N.W.2d 857, 865 (1985).

Before giving this instruction, the trial judge must decide whether the safety law applies to the claimed negligent act. A safety law applies if the court determines: 1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. Tatur v. Solsrud, 174 Wis.2d 735, 743, 498 N.W.2d 232 (1993); Antwaun A. v. Heritage Mut. Ins. Co., 228 Wis.2d 44, 64-65, 596 N.W.2d 456 (1999). See also, Grube v. Daun, 210 Wis.2d 681, 563 N.W.2d 523; Burke v. Milwaukee & Suburban Transp. Co., 39 Wis. 2d 682, 690, 159 N.W.2d 700 (1968); McNeil v. Jacobson, 55 Wis.2d 254, 259, 198 N.W.2d 611 (1972); Betchkal v. Willis, 127 Wis.2d 177, 378 N.W.2d 684 (1985); Walker v. Bignell, 100 Wis.2d 256, 301 N.W.2d 447 (1981).

Excused Violation of Safety Statute. The Wisconsin Supreme Court in Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 391-393 recognized that a violation of a safety statute may be excused by the emergency doctrine, citing Restatement (Second) of Torts § 288A. (The emergency doctrine may apply in traffic cases where management and control is at issue. See Wis JI-Civil 1105A.)

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§ 288A provides as follows:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

The court discussed §§ (1) and (2)(d) and their commentary in reaching the conclusion that the emergency doctrine may excuse a violation of a safety statute. Interpretation of a safety statute or regulation as it relates to the emergency doctrine is a question of law for the court. Totsky, par. 21. If the court determines that the emergency doctrine applies, the jury decides whether the doctrine excuses the conduct. See Wis JI-Civil 1105A.

While § 288A was quoted at length, the court did not discuss §§ (2)(a), (b), (c) or (e). The committee believes that these sections were not "germane to the controversy" in Totsky and were not adopted by the court. See State ex rel. Schultz v. Bruendl, 168 Wis.2d 101, 111-112 (Ct. App., 1992); State v. Holt, 128 Wis.2d 110, 123 (Ct. App., 1985).

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1010 NEGLIGENCE OF CHILDREN

As a child, (_____), was required to use the degree of care which is ordinarily exercised by a child of the same age, intelligence, discretion, knowledge, and experience under the same or similar circumstances.

In determining whether (child) exercised this degree of care, you should consider the child's instincts and impulses with respect to dangerous acts, since a child may not have the prudence, discretion, or thoughtfulness of an adult.

COMMENT

This instruction was approved in 1974. It was revised in 1986. The comment was revised in 1988, 1994, and 1995. A citation was corrected in 2014.

This instruction is taken substantially from Brice v. Milwaukee Auto Ins. Co., 272 Wis. 520, 76 N.W.2d 337 (1956). See also Goldberg v. Berkowitz, 173 Wis. 608, 181 N.W. 216 (1921). The second paragraph, in substance, was approved in Rasmussen v. Garthus, 12 Wis.2d 203, 206, 107 N.W.2d 264 (1961).

The use of a child's instincts and impulses was approved in Statz v. Pohl, 266 Wis. 23, 31, 62 N.W.2d 556 (1954), although the issue in that case was not contributory negligence of the child but rather that of the parent.

This rule applies to defendants as well as to plaintiffs. Huchting v. Engel, 17 Wis. 237 (1863); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891); Heath v. Madsen, 273 Wis. 628, 79 N.W.2d 73 (1956); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Wisconsin Loan & Fin. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930); Restatement, Second, Torts §§ 283 and 464 (1934, Supp. 1948); 173 A.L.R. 883 (1948).

A reading of Wis. Stat. § 891.44, Presumption of lack of contributory negligence for infant minor (under 7), should not be included if this instruction is given. Gremban v. Burke, 33 Wis.2d 1, 8, 146 N.W.2d 453 (1966).

Under Wis. Stat. § 891.44, a child under seven is presumed to be incapable of negligence. A child over seven is capable of negligence, although by a lesser standard of care than an adult. Rossow v. Lathrop, 20 Wis.2d 658, 663, 123 N.W.2d 523 (1963); Gonzalez v. City of Franklin, 128 Wis.2d 485, 383 N.W.2d 907 (Ct. App. 1986). Between the age of seven and the age of majority, neither common law nor statutory law creates any further age classifications regarding the acts of minors. Therefore, the care of a minor over seven

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years is measured against the degree of care which children of the same age ordinarily exercise, under the same circumstances, taking into account the experience, capacity, and understanding of the child.

The only exception to this rule arises where the child engaged in an activity which is typically engaged in only by adults and for which adult qualification or a license is required. Restatement, Second, Torts § 283A, p. 16, note b (1965). In such a situation, the child will be held to the standard of adult skill, knowledge, and competence, and no allowance will be made for the child's immaturity. Strait v. Crary, 173 Wis.2d 377, 496 N.W.2d 634 (Ct. App. 1992); Hoff v. Wedin, 170 Wis.2d 443, 489 N.W.2d 646 (Ct. App. 1992).

In cases where a safety statute has been violated, the issue also arises whether a child can be held negligent as a matter of law (negligence per se) regardless of age. Restatement of Torts states that where an actor does not have the capacity, because of immaturity, to comply with safety legislation, the child's violation of the safety legislation will ordinarily be excused. Section 288A, Note e, p. 35 (1965). However, in Shaw v. Wuttke, 28 Wis.2d 448, 460, 137 N.W.2d 649 (1965), the court held that "the legal effect of a violation of a safety statute is visited upon adults and minors alike and there is no limiting or conditional application to a child of seven and one-half years." Citing Miller v. Keller, 263 Wis. 509, 57 N.W.2d 711 (1953). In Gonzalez v. City of Franklin, 137 Wis.2d 109, 403 N.W.2d 747 (1987), the supreme court held that a Wisconsin safety statute regulating the sale and use of fireworks excludes from its coverage the detonation by a seven-year-old boy of a firework which he believes to be a smoke bomb and which he discovered only through the negligence of the party claiming the benefit of the statute.

For apportioning negligence between an adult and a child, see Wis JI-Civil 1582, Comparative Negligence: Adult and Child.

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1011 ATTRACTIVE NUISANCE: ULTIMATE FACT QUESTION

This instruction was revised and renumbered in 2012 following the enactment of Wis. Stat. ' 895.529 (2011 Wisconsin Act 93). A claim based on attractive nuisance is covered in Wis JI-Civil 8025. Previously, Wis JI-Civil 1011 was based on common law established in Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981).

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1012 PARENTS' DUTY TO PROTECT MINOR CHILD

Parents must use ordinary care to protect their children from dangers which are known or should have been known or anticipated by the parents. Although parents are not required to do the impossible in keeping their children safe, they must use ordinary care to see that their children are given reasonable protection from hazards and dangers, and their duty increases where special circumstances exist.

In determining whether (a parent) (parents) used ordinary care to protect (his) (her) (their) child(ren), you may consider the age of the child(ren) and the traits and disposition of children of that age. You should also consider that parents are expected to know the traits and dispositions of their children.

COMMENT

This instruction was approved in 1974 and revised in 1985. The comment was reviewed without change in 1989.

Reber v. Hanson, 260 Wis. 632, 635, 51 N.W.2d 505, 507 (1952); Hansberry v. Dunn, 230 Wis. 626, 284 N.W. 556 (1939); Matson v. Dane County, 177 Wis. 649, 189 N.W. 154 (1922); Monrean v. Eastern Wis. Ry. & Light Co., 152 Wis. 618, 623, 140 N.W. 309-10 (1913); Ewen v. Chicago & N.W. Ry., 38 Wis. 613, 628 (1875).

The duty of the parents is ordinarily joint, as where both had a duty to be aware of the whereabouts of a child playing in the yard; in such a case, the negligence in the comparison question is not divisible but must be assessed as a unit. Reber, supra. If one parent clearly is not negligent, as in the case of a father who is not present while the child is riding with its mother, the negligence of the mother will not be imputed to the father. Hansberry, supra.

While the court, in Bell v. Duesing, 275 Wis. 47, 80 N.W.2d 821 (1957), intimates that it is improper to inquire about the negligence of a parent who is not a party to the action, the better rule would seem to be contra under the general theory that the negligence of a nonparty may be inquired into.

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1013 PARENT'S DUTY TO CONTROL MINOR CHILD

A parent must use ordinary care to control (his) (her) minor child so as to prevent the child from intentionally harming others or from conducting (himself) (herself) so as to create an unreasonable risk or bodily harm to others, if the parent knows or should know:

(1) that (he) (she) has the ability to control the child;

(2) that there is a necessity for exercising such control; and

(3) that there is an opportunity to do it.

A parent is not required to anticipate and guard against every logically possible instance of a child's misconduct. The parent must know, or should have known, that the child had a habit of engaging in the particular act or course of conduct which led to the plaintiff's injury.

COMMENT

This instruction and comment were initially published in 1974 and revised in 1984 and 2005. The comment was updated in 2002 and 2005.

This instruction is to be used in cases involving a claim of negligent failure to control a child. It is not to be used in a "negligent entrustment" type case.

This instruction is taken substantially from Restatement, Second, Torts § 316 (1965) as a correct statement of the law in Gerlat v. Christianson, 13 Wis.2d 31, 35, 108 N.W.2d 194 (1961); Statz v. Pohl, 266 Wis. 23, 31, 62 N.W.2d 556 (1954); and Siebert v. Morris, 252 Wis. 460, 463, 32 N.W.2d 239 (1948). See also Pawlack v. Mayer, 266 Wis. 55, 62 N.W.2d 572 (1954); Bruttig v. Olsen, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989). Gritzner v. Michael R. 235 Wis.2d 781, 611 N.W.2d 906, 2000 WI 68; Nielsen v. Spencer, 2005 WI App 207.

The duty extends to either parent who has an ability to control the child. Restatement, Second, Torts § 316 (1965); Siebert v. Morris, supra at 463.

In cases involving failure to control, as in negligent entrustment cases, the parent who has failed to exercise proper control is treated as a joint tortfeasor, whose separate act of negligence, for the imposition of liability, only becomes relevant upon the negligent act and injury by the child who should have been controlled. Bankert v. Threshermen's Mut. Ins. Co., 110 Wis.2d 469, 329 N.W.2d 150 (1983).

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The tort differs from that of negligent entrustment, however. Although both the tort of negligent entrustment and of failure to control a child generally involve children improperly using an instrumentality which can be dangerous, entrustment requires that the instrumentality be "entrusted" to the entrustee. Negligent control may be the failure to exercise ordinary care in allowing the instrumentality to be in the hands of a child, or it may be a failure in other respects, e.g., failure to properly instruct in use or a failure to warn of hazards.

The four general situations resulting in parental liability at common law are: (1) Where the parent negligently entrusts the child with an instrumentality which may become a source of danger to others; (2) where the child is acting as the parent's agent; (3) where the parent knows of the child's wrongdoing and consents to it or directs or sanctions it; and (4) where the parent who has the ability to control the child fails to exercise control over the child, although the parent knows, or should know, that injury to another is a probable consequence.

In Nielsen, supra, the court noted that the parent=s duty under Restatement (Second) of Torts § 316 (1965) has been interpreted narrowly in Wisconsin and elsewhere. Mere knowledge by the parent of a child's mischievous and reckless, heedless, or vicious disposition is not of itself sufficient to impose liability with respect to torts of the child. Consequently, the court in Nielsen agreed that "no parental liability exists without notice of a specific type of harmful conduct and an opportunity to interfere with it." Nielsen, supra, ¶14.

Loco Parentis. A claim for negligent failure to control a minor child also may be based on the doctrine of loco parentis. Gritzner, 2000 WI 68, ¶48. In Gritzner, the court found that a friend of the mother of a minor who committed sexual abuse had assumed parental responsibility.

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1014 NEGLIGENT ENTRUSTMENT

To find (defendant) negligent in permitting _____ to use (the object), you must find that:

1. (defendant) was initially in control of (the object);
2. (defendant) permitted _____ to use (the object); and
3. (defendant) either knew or in the exercise of ordinary care should have known that _____ intended or was likely to use (the object) in a way that would create an unreasonable risk or harm to others.

COMMENT

This instruction was approved in 1985. The comment was updated in 1995, 1998, 2002, and 2017.

Bankert v. Threshermen's Mut. Ins. Co., 110 Wis.2d 469, 329 N.W.2d 150 (1983); Restatement, Second, Torts ' 308 (1965). See also Kempf v. Boehring, 95 Wis.2d 435, 290 N.W.2d 562 (Ct. App. 1980); Bruttig v. Olsen, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989); Erickson v. Prudential Ins. Co., 166 Wis.2d 82, 479 N.W.2d 552 (Ct. App. 1991); Johnson v. Cintas Corp. No. 2, 2015 WI App 14, 360 Wis.2d 350, 860 N.W.2d 515.

This instruction applies only to situations when the person who is negligently entrusted with an item or activity injures someone else. Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Johnson v. Cintas Corp. No. 2, supra. It does not apply to self-inflicted injuries.

This type of claim is not limited to parental liability. Bankert, supra at 475-76.

For liability to result, the negligence of the entruster and the entrustee must result in the injury. Bankert, supra.

For a discussion of the difference between a claim based on negligent entrustment and a claim based on failure to control, see Comment to Wis JI-Civil 1013.

Failure to Supervise or Properly Instruct a Juvenile in Hunting Procedures. In Kramschuster v. Shawn E., 211 Wis.2d 697, 565 N.W.2d 581 (Ct. App. 1997), the plaintiff based its tort claim on the defendant's failure to supervise or properly instruct a juvenile in regard to safe hunting procedures. The court said that because under the circumstances of the case no duty to supervise or instruct the juvenile was created between the parties or assumed by the defendant and no such duty was imposed by law, the court of appeals concluded that there was no duty for the defendant to supervise or instruct the juvenile in regard to the deer hunt. The court said the failure to reiterate basic hunting rules to an independent member of the hunting party does not create a foreseeable unreasonable risk of injury to another person under the facts of the case. The

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court of appeals, however, said that while the law may imply a duty of supervision when the experience, age, or other factors of a child's engaging in a hunt may suggest such supervision is necessary, those were not the facts of the case before it in Kramschuster v. Shawn E. The court concluded that the defendant had no special duties of supervision, control, or responsibility over the juvenile hunter because of the juvenile's experience in certification as a hunter authorized by law to engage in the hunting of deer. 211 Wis.2d 697, at 706.

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1014.5 NEGLIGENT ENTRUSTMENT TO AN INCOMPETENT PERSON

To find (defendant) negligent in supplying (object) to (plaintiff), you must find that:

1. the (object) was under the control of (defendant);
2. (defendant) supplied (object) to (plaintiff) directly or through a third person; and
3. at the time the (object) was supplied to (plaintiff) (defendant) knew, or in the exercise of reasonable care should have known (plaintiff) was likely, because of (lack of capacity) (youth) (inexperience) (or otherwise) to use the (object) in a way that would create an unreasonable risk of harm to (himself/herself), others, or their property.

COMMENT

This instruction and comment were approved in 2004. The comment was revised in 2016.

This instruction is based on Restatement (Second) of Torts, § 390. See Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Erickson v. Prudential Ins. Co., 166 Wis.2d 82, 479 N.W.2d 552 (Ct. App. 1991).

Restatement (Second) of Torts, § 390 reads:

> § 390. Chattel for Use by Person Known to be Incompetent
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely [because of his youth, inexperience, or otherwise,] to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 is a special application of the rule stated in § 308. Section 308 applies when the person who is negligently entrusted with an object or activity injures another person. Section 390, on which this instruction is based, deals with the supplying of a chattel to a person incompetent to use it safely who subsequently injures himself or herself or another person or property. See Restatement (Second) of Torts § 390, comment b, and Stehlik v. Rhoads, 2002 WI 73, ¶22, 253 Wis.2d 477, 645 N.W.2d 889.

The court in Stehlik explained the difference between a claim based on § 308 and a claim under § 390:

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¶23. A § 308 claim is a bit broader, and can be asserted any time the circumstances are such that the defendant knew or should have known that the person to whom he is entrusting an item is likely to use it in a way that creates an unreasonable risk of harm to others. But ' 308 has never been extended to cases such as this one involving self-inflicted harm by the one to whom an item is allegedly negligently entrusted.

For contributory negligence, see Wis. JI-Civil 1008.

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1015 NEGLIGENCE IN AN EMERGENCY

Instruction renumbered JI-Civil 1105A.

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1019 NEGLIGENCE: EVIDENCE OF CUSTOM AND USAGE

Evidence has been received as to the (practice in the community) (custom in the trade or work operation) (practice in the industry) with respect to (e.g., the use of 2 x 4's for rafters) (installations of 3/8" plywood for subflooring) (standing on running board to guide truck backing into shale pit). You should consider this evidence in determining whether (defendant) acted with ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has a good safety record under similar conditions could aid you in determining whether (defendant) was negligent.

COMMENT

This instruction was originally approved in 1974 and revised in 1985. The instruction and comment were updated in 1995.

Raim v. Ventura, 16 Wis.2d 67, 113 N.W.2d 827 (1962); Kalkopf v. Donald Sales & Mfg. Co., 33 Wis.2d 247, 147 N.W.2d 277 (1967).

This instruction was approved as a correct statement of the law in Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 351, 234 N.W.2d 332 (1975). See also D.L. v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983). In D.L. v. Huebner, supra, the court recommended that where there is evidence of a difference in pre- and post-manufacture industry custom, the instruction can be revised to state how the jury should consider the evidence.

See also Kolpin v. Pioneer Power & Light, 162 Wis.2d 1, 469 N.W.2d 595 (1991), in which the court affirmed the trial court's use of this instruction to explain the standard of care required in furnishing electricity to customers. The text of an instruction, proposed by the utility company and not given by the trial court, is set forth in a footnote. Kolpin, supra, at 31, n.6. Kolpin also discusses whether an instruction on the state-of-the-art of electricity should have been given. Kolpin, supra, at 31-35.

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1020 NEGLIGENCE: UNDER SPECIAL CIRCUMSTANCES

[Withdrawn]

COMMENT

This instruction was approved by the Committee in 1960. It was withdrawn in 2011.

At the time the instruction was withdrawn, it read:

> [While the rule never changes that a (person) (motor vehicle driver) (pedestrian) must exercise ordinary care, the degree of care or diligence which a person must exercise to come up to the standard of ordinary care varies with the circumstances naturally calculated to affect or increase the hazard of collision or injury. The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]
>
> [Alternative: The ordinary care which the law requires varies with the circumstances naturally calculated to affect or increase the hazard of injury or collision. (Under some circumstances, ordinary care may be a high degree of caution; whereas, under other circumstances, a slight degree of caution may be ordinary care.) The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

Wisconsin Jury Instruction-Civil 1005 defines the standard of care of a negligent person. The instruction provides as follows:

> A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

Wisconsin has been committed to the ordinary care standard formulation in negligence cases. Justice Heffernan summarized the formulation of negligence in Smith v. Milwaukee County, 162 Wis.2d 340, pp 355-360 (1990). While Justice Heffernan's summary is found in a dissent, the court's differences were not based on the negligence formulation, but were instead based on the belief that the majority was mistaken in ruling that there were no disputed issues of fact which would permit a finding of negligence.

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Professor Richard Campbell was critical of formulations which deviate from the ordinary care standard because of special circumstance. In his article entitled "Law Governing Automobile Accidents" found in the 1962 Wis Law Rev 240, 250, Professor Campbell asserts:

> *b. The "Emergency" Rule.* The loose nature of what we commonly call the "emergency doctrine" was fully presented in this *Law Review* in 1950.[105] The author concluded that we are not really administering a separate doctrine, but that the emergency rule is ". . . only one facet of ordinary care."[106] Cases since 1950 fully support his conclusion. The heart of the rule as stated in the 1960 recommended jury instructions is as follows:
>
> > ". . . .[Drivers] are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might make, if placed in the same position, even through it should afterwards appear not to have been the best or safest course. . . ."[107]
>
> It will be noticed that this is exactly the way all negligence is tested. The standard of the reasonably prudent man is the guide. The issue is determined by the situation at the time of action; not by the armchair deductions of the Monday morning quarterback.

The withdrawn instruction proposed to elevate the standard of care under "circumstances naturally calculated to affect or increase the hazard of collision or injury." In the second paragraph, the instruction minimized the care required, stating "under other circumstances, a slight degree of caution may be ordinary care." These standards deviated from the general standard of care found in JI-1005 in which a jury measures negligence by "the care a reasonable person would use under similar circumstances."

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1021 NEGLIGENCE OF MENTALLY DISABLED

Evidence has been received (it appears without dispute) that the defendant at the time of (collision, accident, fire, or other alleged tort) was mentally disabled. A person who is mentally disabled is held to the same standard of care as one who has normal mentality, and in your determination of the question of negligence, you will give no consideration to the defendant's mental condition.

COMMENT

This instruction and comment were originally published in 1971. The comment was revised in 1994, 1996, 1998, 1999, 2000, 2003, 2004, and 2005.

Hofflander v. St. Catherine=s Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545; Jankee v. Clark County, 2000 WI 64, 235 Wis.2d 700, 612 N.W.2d 297; Gould v. American Family Mut. Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996); Burch v. American Family Mut. Ins. Co., 198 Wis.2d 465, 543 N.W.2d 277 (1996); Breunig v. American Family Ins. Co., 45 Wis.2d 536, 542, 173 N.W.2d 619 (1970); Guardianship of Meyer, 218 Wis. 381, 261 N.W. 211 (1935); Restatement, Second, Torts § 283B and appendix (1966); 57 Am. Jur.2d Negligence § 82 (1971); 1955 Wis. L. Rev. 12; Prosser, Law of Torts (4th) § 135 at 1000 (1971).

This instruction holds mentally disabled defendants to the reasonable person standard of care.

In Jankee, the court noted that the policy rationales for the rule embodied in this instruction trace their origins to the 1930s, when the court observed that imposing liability on the mentally disabled: (1) better apportions loss between two innocent persons to the one who caused the loss, (2) encourages restraint of the disabled, and (3) prevents tortfeasors from feigning incapacity to avoid liability. The court went on to recognize "more contemporary justifications" for the general rule. It said the reasonable person standard of care obligates mentally disabled persons to conform their behavior to the expectations of the communities in which they live. The court also recognized a more practical rationale. It said the reasonable person standard of care allows courts and juries to bypass the imprecise task of distinguishing among variations in character, emotional equilibrium, and intellect. Jankee, supra, at 734.

The supreme court has fashioned limited defenses for mentally disabled individuals on two occasions. In Breunig, the court said a defendant cannot be found negligent when he or she is suddenly overcome without forewarning by a mental disability or disorder that makes it impossible for the defendant to appreciate the duty to exercise ordinary care. A second exception to liability was created in Gould for persons in institutionalized settings who do not have the capacity to control or appreciate their conduct when they cause injury to caretakers employed for financial compensation. The court said that the expansion of the narrow Gould

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exception to other circumstances based on a party's capacity to control or appreciate conduct would eviscerate the common law rule. Jankee, supra, at 738.

Mentally Disabled Person Under Custody and Control: Contributory Negligence. See Wis. JI-Civil 1385.5.

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1021.2 ILLNESS WITHOUT FOREWARNING

(Defendant) has denied that (he) (she) was negligent in the operation of the automobile on the ground that, without prior warning, (he) (she) was subjected to an illness that affected (his) (her) ability (to understand and appreciate the duty to exercise ordinary care in driving the car) (to control the car in an ordinarily prudent manner).

The law of Wisconsin is that where a driver, through sudden illness or loss of consciousness, commits an act or omits a precaution which would otherwise constitute negligence, such act or omission is not negligence if the occurrence of such illness or loss of consciousness was not preceded by sufficient warning that a person of ordinary intelligence and prudence ought reasonably to foresee that he or she, by driving a car would, subject the person or property of another or of himself or herself to an unreasonable risk of injury or damage.

However, when the occurrence of the illness or loss of consciousness should have been reasonably foreseen, then the person so disabled may be found negligent. The negligence is not in the manner of driving but rather in driving at all, if the person should reasonably have foreseen that the illness or lack of consciousness might occur and affect the person's manner of driving.

COMMENT

The instruction and comment were approved by the Committee in 1971. The comment was reviewed without change in 1980 and 1989. The comment was updated in 2001.

Breunig v. American Family Ins. Co., 45 Wis.2d 536, 173 N.W.2d 619 (1970).

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The party asserting the defense of illness without forewarning has the burden of proof to establish it. 28 A.L.R.2d 16, 38 (1953). See Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

A sleeping driver is negligent as a matter of law. Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). In Theisen, supra, the court noted that certain illnesses while driving would not be negligence as a matter of law:

> We exclude from this holding those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force or fainting or heart attack, epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile and when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen. When, however, such occurrence should have been reasonably foreseen, we have held the driver of a motor vehicle negligent as a matter of law, as in the sleep cases. Eleason v. Western Casualty & Surety Co., (1948), 254 Wis. 134, 35 N.W.2d 301 (epilepsy); Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co., supra; Theisen v. Milwaukee Automobile Mut. Ins. Co., supra at 99.

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1022.2 NEGLIGENCE OF GENERAL CONTRACTOR: INCREASING RISK OF INJURY TO EMPLOYEE OF SUBCONTRACTOR

A general contractor who sublets all or a part of a contract to a subcontractor has a duty not to commit an affirmative act which would increase the risk of injury to an employee of the subcontractor.

An affirmative act is an act of commission – that is, something that one does – as opposed to an act of omission, which is something one fails to do.

COMMENT

This instruction was approved in 1973. The comment was updated in 1989, 2010, and 2020. The 2020 revision updated case law citations.

This instruction deals with the "retained-control" exception to the general immunity of one who hires an independent contractor.

Barth v. Downey Co., 71 Wis.2d 775, 239 N.W.2d 92 (1976); Lemacher v. Circle Constr. Co., 72 Wis.2d 245, 240 N.W.2d 179 (1976).

Failure to check the credentials of an independent contractor or make other inquiries is not "active misconduct constituting an affirmative act." Wagner v. Continental Casualty Co., 143 Wis.2d 379, 390, 421 N.W.2d 835 (1988). Negligent hiring does not by itself constitute an affirmative act of negligence upon which the liability of a principal employer can be based. Wagner, supra at 390.

Negligence of General Contractor: Increasing Risk of Injury to Employee of Subcontractor. A general contractor who fails to warn a subcontractor about the dangers of asbestos, fails to investigate or test for the health effects of asbestos, and who fails to instruct a subcontractor on precautionary measures when dealing with asbestos has committed an omission, not an affirmative act of negligence. Tatera v. FMC Corp., 2010 WI 90, ¶29, 328 Wis.2d 320, 786 N.W.2d 810. Additionally, supplying an unsafe asbestos-containing product is not an affirmative act of negligence because the failure to warn of danger is an omission. Id., ¶30.

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1022.4 NEGLIGENCE: BUILDING CONTRACTOR

A building contractor has a duty to exercise ordinary care in the construction or remodeling of a building. This duty requires such contractor to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by contractors of reasonable prudence, skill, and judgment in similar construction.

COMMENT

The instruction and comment were originally published in 1974. The comment was updated in 1989 and 2016.

A building contractor is liable for injury or damage caused by his or her negligence either to the owner or to third person after completion and acceptance of the work where the defect is concealed or latent in character and is held to the same rules of liability as a manufacturer or vendor. A. E. Inv. Corp. v. Link Builders, Inc., 62 Wis.2d 479, 214 N.W.2d 764 (1974).

An owner is held to a waiver if he or she knowingly accepts a defective performance. Fisher v. Simon, 15 Wis.2d 207, 112 N.W.2d 705 (1961); Restatement, Second, Torts § 385 (1934).

A building contractor may be negligent in using materials which a contractor of reasonable prudence, skill, and judgment would know were defective. Colton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1950); see also 25 A.L.R.3d 403 (1969); 61 A.L.R.3d 792 (1975).

Architects and Engineers. Architects and engineers have an analogous duty. See Barnes v. Lozoff, 20 Wis.2d 644, 650, 123 N.W.2d 543 (1963). A. E. Inv. Corp. v. Link Builders, Inc., supra at 489:

> An architect has the duty of using the standard of care ordinarily exercised by the members of that profession.

Construction by Private Homeowner. The court of appeals has held that alleged negligence by a private homeowner occurring in a private home building project should not be judged by the standard of a commercial builder B vendor. Bagnowski v. Preway Inc., 138 Wis.2d 241, 405 N.W.2d 746 (Ct. App. 1987). A "builder B vendor" is defined as "one in the business of building homes upon land owned by him, and who then sells the houses together with the land to the public." Bagnowski v. Preway, Inc., supra. In Bagnowski, the trial court instructed the jury that the private homeowner who had installed a woodburning stove was responsible only for defects that he knew, or reasonably should have known, existed when he sold his home.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1022.6 LIABILITY OF ONE EMPLOYING INDEPENDENT CONTRACTOR

Generally, an (owner) (principal contractor) is not responsible to a third person for the negligence of an independent contractor. However, an (owner) (a principal contractor) must exercise ordinary care to prevent injury to third persons or damage to their property if: [the work to be done is inherently dangerous] [a contract between the (owner) (principal contractor) and the third person requires that the (owner) (principal contractor) will take ordinary care to (prevent injury to the third person) (prevent damage to the property of the third person) (secure the proper performance of the work)].

Ordinary care is that degree of care which you would expect a reasonable person to use under the same or similar circumstances.

[Inherently dangerous work is work from which one can naturally expect harm to arise unless something is done to avoid that harm.]

[Note: Insert appropriate instructions on contract law, if applicable.]

SUGGESTED VERDICT FORMS

FORM 1 (Inherently dangerous activity):

1. Was the work performed by the (owner) (principal contractor) inherently dangerous?

Answer:_____
Yes or No

[Note: There are times when the above question will not be necessary. In Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988), cited in the comment, the Wisconsin Supreme Court said that AA person engaged in an activity . . . that is inherently dangerous without special

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precautions, can take steps to minimize the risk of injury. Examples include general construction, demolition, and excavation.@ The case appears to say that those three types of activity are inherently dangerous by their nature. Note also that the Wagner court differentiates between activity that is "inherently dangerous" and activity that is "extrahazardous or abnormally dangerous." Examples of extrahazardous activity ". . . include transporting nuclear waste or working with toxic gases."]

2. If you answered question 1 "yes," then answer this question: Did (owner) fail to use ordinary care in (describe the work done)?

Answer:_____
Yes or No

3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to (third person)'s property)?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 2 (Contract to prevent injury or damage):

1. Did the contract between (third person) and the (owner/principal contractor) require that (he) (she) (it) would use ordinary care to prevent (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

2. If you answered question 1 "yes," then answer this question: Did the (owner/principal contractor) fail to use ordinary care to protect the (third person) (or (his) (her) property) from (injury) (harm)?

Answer:_____
Yes or No

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3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 3 (Contract to secure proper performance):

1. Did the contract between (third person) and (owner/principal contractor) require that (he) (she) (it) would use ordinary care to secure the proper performance of the work?

Answer:_____
Yes or No

[Follow the format of questions in Form 2 for questions 2 and 3 and then follow with the appropriate damage question.]

COMMENT

The instruction was approved by the Committee in 1974 and revised in 1999. Editorial changes were made in 2004. The comment was updated in 1989, 1997, 1999, 2001, 2014, and 2015.

Liability of One Employing an Independent Contractor. The general rule, stated in the first sentence of the instruction, is found in numerous cases. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395; Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988); Snider v. Northern States Power Co., 81 Wis.2d 224, 260 N.W.2d 260 (1977); Weber v. Hurley, 13 Wis. 2d 560, 109 N.W.2d 65 (1961). See also 41 Am. Jur.2d Independent Contractors, " 32 & 33 (1968).

A contractor qualifies as an independent contractor when the principal (hiring) contractor does not control the details of the hired contractor's work. See Wis JI-Civil 4060.

Inherently Dangerous Exception. The general rule, though long recognized in Wisconsin, has been sidestepped in many cases where the appellate courts have found that the risk of injury or damage (the inherently dangerous exception) from the work was so great that the owner or principal contractor should have

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taken reasonable steps to avoid it. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395. For example, the court, in Wertheimer v. Saunders, 95 Wis. 573, 70 N.W. 824 (1897), ruled that a landlord owed a duty of reasonable care to protect a tenant's property from damage while having a roof replaced. Also, in Majestic Realty Corp. v. Brant, 198 Wis. 527, 224 N.W. 743 (1929), the court stated there was an exception as to work inherently dangerous to users of the highway. The case involved a fatal injury to a pedestrian caused by falling terra cotta. The terra cotta was dislodged by the swinging platform of a painting contractor coming into contact with the owner's building.

Contract Language. In other cases, the supreme court has found a duty exists because of the contractual relationship between the third party and the owner or principal contractor. See Medley v. Trenton Investment Co., 205 Wis. 30, 236 N.W. 713 (1931), where a landlord was found to have a duty to use reasonable care to protect tenants from injury (a tenant died from fumes leaking into her apartment from another apartment that was being fumigated); also Peterson v. Sinclair Refining Co., 20 Wis. 2d 576, 123 N.W.2d 496 (1963), in which gasoline was delivered to a home instead of the fuel oil contracted for and an explosion followed. The court stated that the contract between the parties included an implied promise of safe delivery which, if breached, gave rise to a tort action. Two other cases, Brooks v. Hayes, 133 Wis.2d 228, 395 N.W.2d 167 (1986), and Jacob v. West Bend Mut. Ins. Co., 203 Wis.2d 524, 553 N.W.2d 800 (1996), involved home constructions where the principal contractors attempted to defend the homeowner's suits for defective workmanship by claiming that the independent subcontractors were the proper defendants. In each case, the appellate court said that the principal contractor had agreed in its contract with the homeowner that it would provide the needed materials and labor to build the home so the principal contractor could not avoid liability by hiding behind its subcontractor.

Duty Under Safe Place Is Not Delegable. In Barry v. Employers Mutual Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517, the plaintiff argued that the owner's duty under the safe place statute was nondelegable, and, therefore, any causal negligence attributed to the independent contractor who installed unsafe loose nosing should be imputed to the owner. The property owner disagreed, pointing out the general rule that one who hires an independent contractor is not liable for the negligence of the independent contractor. The supreme court held that the duties imposed on employers under the safe place statute are nondelegable. It said the plaintiff's safe place statute claim against the property owner is separate and distinct from the owner's claim for contribution against the nosing contractor. The owner must answer to the plaintiff "for any violation of that duty regardless of whether another party contributed to the violation." The court concluded by saying: that [the property owner] may have contribution rights against [the contractor] to the extent of [the contractor]'s negligence does not diminish the nature of [the owner's] statutory duty.

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1023 MEDICAL NEGLIGENCE

In (treating) (diagnosing) (plaintiff)'s (injuries) (condition), (doctor) was required to use the degree of care, skill, and judgment which reasonable (doctors who are in general practice) (specialists who practice the specialty which (doctor) practices) would exercise in the same or similar circumstances, having due regard for the state of medical science at the time (plaintiff) was (treated) (diagnosed). A doctor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (doctor) was negligent.

A doctor is not negligent, however, for failing to use the highest degree of care, skill and judgment or solely because a bad result may have followed (his) (her) (care and treatment) (surgical procedure) (diagnosis). The standard you must apply in determining if (doctor) was negligent is whether (doctor) failed to use the degree of care, skill, and judgment which reasonable (general practitioners) (specialists) would exercise given the state of medical knowledge at the time of the (treatment) (diagnosis) in issue.

[Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods. (Doctor) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

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You have heard testimony during this trial from doctors who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonable doctor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts in the field of medicine and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

(Insert the appropriate cause instruction. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)

[The cause question asks whether there was a causal connection between negligence on the part of (doctor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition) or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

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[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (doctor)'s negligence and also the natural progression of (plaintiff)'s (injury) (condition), then you should find that the (doctor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (doctor) and placed (himself) (herself) under (doctor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (doctor). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under the doctor's care, has been aggravated or further impaired as a natural result of the negligence of (doctor)'s (treatment) (diagnosis).]

(Insert appropriate damage instructions.)

[(Plaintiff) sustained injuries before the (treatment) (diagnosis) by (doctor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the (treatment) (diagnosis) of by (doctor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (doctor)'s (treatment) (diagnosis) and allow (plaintiff) only the damages that naturally resulted from the (treatment) (diagnosis) by (doctor).]

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COMMENT

This instruction was approved by the Committee in 1963. It was revised in 1966, 1974, 1984, 1987, 1988, 1989, 1990, 1991, 1992, 1995, 1996, 1998, 2002, 2009, 2011, and 2012. The comment was updated in 1990, 1992, 1996, 2001, 2002, 2003, 2004, 2005, 2006, 2011, 2012, 2016, 2017 and 2019. The instruction was revised in 2009 to add "(diagnosis)" throughout the instruction to the alleged negligence.

The Committee recommends that the basic inquiry with respect to the defendant's conduct be framed in simple terms of negligence. Failure on the part of the doctor to conform to the applicable standard of care constitutes negligence. This form of submission is preferable to the form previously employed, i.e., stating the duty in the question. The statement of the duty is the function of the instruction. The Committee recommends that the general negligence instruction, JI-Civil 1005, not be used in addition to this instruction.

There are a series of concepts involved in the instruction. The duty of the doctor in his or her care, treatment, and procedures; the effects of bad results on liability; the degree of care, skill, and judgment required to satisfy his or her duty; the duty allows a choice of accepted alternative methods of treatment; the doctor's liability cannot be predicated on other than expert testimony (except in a res ipsa case); and the issue is not on the judgment the doctor made but on the degree and skill he or she exercised in arriving at the judgment. The Committee concluded that foreseeability of injury or harm is inherent in the standard expressed in the first paragraph, and if an issue in the case, it must be addressed by expert testimony.

If the trial judge prefers, this instruction can be divided into its components (i.e., negligence, cause, alternative care, damages, etc.) when instructing the jury and when providing the jury with written instructions during its deliberations.

Standard of Care. This instruction reflects the changes recommended by the Wisconsin Supreme Court in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996). The former version of this instruction was based on prevailing case law which measured ordinary care based on what an "average" physician would have done. The court in Nowatske said "the standard of care applicable to physicians in Wisconsin can not be conclusively established either by a reflection of what the majority of practitioners do or by a sum of the customs which those practitioners follow." Instead, the court said "it must be established by a determination of what it is reasonable to expect of a professional given the state of medical knowledge at the time of the treatment." Nowatske, supra, at 438-39. See also the comment to Wis JI-Civil 1005.

Standard of Care: Unlicensed First-Year Resident. The Wisconsin Supreme Court in Phelps v. Physicians Ins. Co., 2005 WI 85, 282 Wis.2d 69, 698 N.W.2d 643, has held that unlicensed first-year residents should be held to:

> the standard of care applicable to an unlicensed first-year resident . . .Although we anticipate this new standard of care to be lower than that of an average licensed physician in some cases, we do not expect that it will become a grant of immunity. After all, unlicensed first-year residents are graduates of a medical school who provide sophisticated health care services appropriate to their "in training" status. Therefore, unlicensed residents could still be found negligent if, for example, they undertook to treat outside the scope of their authority and expertise, or they failed to consult with someone more skilled and experienced when the standard of care required it.

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The court characterized the status of an unlicensed first-year resident as "unique." It said the resident's authority was limited:

> Although [resident] could refer to himself as an "M.D.," his freedom of action was more restricted than that of a licensed physician. Indeed, the circuit court found that Dr. Lindemann "had no authority or privileges to provide primary obstetrical care," and "was not supposed to act as the primary attending physician." Rather, "[h]is primary duty was to assess and report findings and differential diagnoses to an upper level senior resident or to the attending obstetrician."

Effect of Bad Results. The second paragraph states the rule as to the effects of bad results on the doctor's liability. Bad results raise no presumption of negligence. DeBruine v. Voskuil, 168 Wis. 104, 169 N.W. 288 (1918); Ewing v. Goode, 78 F. 442 (S.D. Ohio 1897); Wurdemann v. Barnes, 92 Wis. 206, 66 N.W. 111 (1896); Francois v. Mokrohisky, supra; Finke v. Hess, 170 Wis. 149, 174 N.W. 466 (1920); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1976). See also Nowatske v. Osterloh, supra.

The judgment of a doctor in his or her care, treatment, and procedures, whether good, bad, honest or mistaken, is not at issue on his or her liability. The issue raised is whether in making the judgment, he or she exercised that degree of care and skill imposed on him or her. If he or she failed to meet that standard, he or she was negligent and liable. Christianson v. Downs, supra; Hoven v. Kelble, supra; Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Wurdemann v. Barnes, supra; Jaeger v. Stratton, 170 Wis. 579, 176 N.W. 61 (1920).

"Not omniscience, but due care, diligence, judgment, and skill are required of physicians. When they meet such test, they are not liable for results or errors in judgment." Jaeger v. Stratton, supra.

"The question . . . is not whether a physician has made a mistake; rather, the question is whether he was negligent." Francois v. Mokrohisky, supra.

"The law . . . recognizes the medical profession for what it is: a class of fallible men, some of whom are unusually well qualified and expert, and some of whom are not. The standard to which they must conform is determined by the practices of neither the very best nor the worst of the class." Francois v. Mokrohisky, supra.

In 1988, the court in Schuster v. Altenberg, supra, reaffirmed the concept that liability will not be imposed under this negligence standard for mere errors in judgment. It quoted from its earlier holdings:

> The law governing this case is well settled. A doctor is not an insurer or guarantor of the correctness of his diagnosis; the requirement is that he use proper care and skill. Knief v. Sargent, 40 Wis.2d 4, 8, 161 N.W.2d 232 (1968). The question is not whether the physician made a mistake in diagnosis, but rather whether he failed to conform to the accepted standard of care. Francois v. Mokrohisky, 67 Wis.2d 196, 201, 226 N.W.2d 470 (1975). Christianson v. Downs, 90 Wis.2d 332, 338, 279 N.W.2d 918 (1979).

The second paragraph also deals with the extent and quality of the doctor's treatment required to satisfy his or her duty. A doctor is not required to exercise the highest degree of care, skill, and judgment. Hrubes v. Faber, 163 Wis. 89, 157 N.W. 519 (1916); DeBruine v. Voskuil, supra; Jaeger v. Stratton, supra; Trogun v. Fruchtman, supra; Christianson v. Downs, supra; Carson v. Beloit, supra; Francois v. Mokrohisky, supra; Hoven v. Kelble, supra.

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Alternative Methods. The bracketed language at the bottom of page one can be used in cases when there is evidence that more than one method of treatment or diagnosis is recognized as reasonable. See Nowatske v. Osterloh, supra, at 448. The reasonable pursuit of an accepted alternative method does not establish a doctor's liability, even if experts disagree on the method used. A physician is required by statute to inform a patient about the availability of all alternate, viable medical treatments and the benefits and risks of these treatments, Wis. Stat. § 448.30. For claims based on a failure by a physician to adequately inform a patient, see Wis JI-Civil 1023.2 Malpractice: Informed Consent.

Unnecessary and improper treatment constitutes medical malpractice. Northwest Gen. Hosp. v. Yee, 115 Wis.2d 59, 61-62, 339 N.W.2d 583 (1983).

Expert Testimony. Expert testimony is needed to support a finding of negligence on the part of the doctor. Kuehnemann v. Boyd, 193 Wis. 588, 214 N.W. 326 (1927); Holton v. Burton, supra; Lindloff v. Ross, 208 Wis. 482, 243 N.W. 403 (1932); Ahola v. Sincock, 6 Wis.2d 332, 94 N.W.2d 566 (1959); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978); McManus v. Donlin, 23 Wis.2d 289, 127 N.W.2d 22 (1964); Treptau v. Behrens Spa, Inc., supra.

The degree of care and skill (of a physician) can only be proved by the testimony of experts. Without such testimony, the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him or her. Kuehnemann v. Boyd, supra; Holton v. Burton, supra; Lindloff v. Ross, supra. In 2011, the Committee added language which instructs the jury that in determining the weight of an expert's testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion. See Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

For a discussion of the admissibility of expert evidence in a medical negligence case, see Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

The general instruction on expert testimony, Wis JI-Civil 260, should be used for issues in the trial other than standard of care.

Causation. The court in Young v. Professionals Ins. Co., 154 Wis.2d 742, 454 N.W.2d 24 (Ct. App. 1990), was critical of an earlier version of JI-1023 relating to cause. The present instruction concerning situations when there is evidence of both negligence and a condition of health resulting from the natural progression of a disease (injury) correctly states that a doctor's negligence may be causal, notwithstanding, that the plaintiff's present condition of health may in part be the result of the natural progression of plaintiff's disease (injury). This is because Wisconsin has long adopted the "substantial factor test" in deciding causation questions and no longer requires that the negligence be the sole or proximate cause. Matuschka v. Murphy, 173 Wis. 484, 180 N.W. 821 (1921), has been overruled because it is "likely to misstate the law of causation." See Young, supra at 749.

This instruction comports with the supreme court's decision in Fischer v. Ganju, 168 Wis.2d 834, 485 N.W.2d 10 (1992). In Fischer, the supreme court stated that a paragraph from a prior version JI-1023 (1989) was "less than completely accurate." The version given by the trial judge in Fischer in January 1990 was based on the 1989 version of this instruction which was published in April of 1989. This version was revised by the committee following the decision in Young v. Professionals Ins. Co., supra. The revised JI-1023 was published in May of 1991 as part of the 1991 supplement. This revision (1991) changed the language of the prior version dealing with causation. It has not been revised since the 1991 supplement. The Committee has closely compared this present version of JI-1023 to the court's criticism of the 1989 version of the instruction. The Committee concludes that the causation language of the

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present instruction is consistent with the discussion of causation in the Fischer decision and accurately states the law of causation in medical malpractice pre-existing condition cases.

Specialists. See Johnson v. Agoncillo, 183 Wis.2d 143, 515 N.W.2d 508 (Ct. App. 1994), where the First District Court of Appeals held that under current Wisconsin law, a doctor who practices one medical specialty is not held to the standard of care of another medical specialty, even when treating a patient in that latter specialty. Dr. Agoncillo was a family practitioner treating a high-risk obstetrical patient. Plaintiff Johnson requested an instruction that would hold Agoncillo to the standard of the "average physician who treats high risk obstetrical patients. . . ." The trial judge refused to give such an instruction and the court of appeals affirmed, stating:

> Thus, that Dr. Agoncillo chose to care for and treat Ms. Johnson during her high-risk pregnancy did not transform his class of physician to that of those who treat high-risk obstetrical patients; he was and he remained a general family practitioner who treated obstetrical patients and, as instructed by the trial court, he was thus 'required to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances' by the average physician in that class.

The court went on to say, however, that the physician who attempts to treat a patient outside her or his expertise is not, thereby, immunized from liability. Referring to a cardiologist who treats a cancer patient, the court said in Johnson at 152:

> If competent evidence establishes that the average cardiologist would either refer the cancer patient to an oncologist or would consult with an oncologist, the cardiologist could be found negligent for not referring or consulting.

Captain of Ship Doctrine. In a recent decision, the plaintiff in a medical malpractice action argued that the surgeon should be held vicariously liable for the negligence of two hospital nurses from a county-owned hospital who were responsible for counting sponges. Lewis v. Physicians Ins. Co., 2001 WI 60, 243 Wis.2d 648, 627 N.W.2d 484. The hospital was county-owned and, therefore, its liability at the time was limited to $50,000.

The trial court, on summary judgment, agreed with the plaintiff's argument that, as a matter of law, the surgeon is the "captain of the ship" and is responsible for the actions of the parties that were in the operating room. Interestingly, the plaintiff did not argue that the surgeon was vicariously liable for the nurses' actions under the doctrine of respondeat superior. Both the court of appeals and supreme court rejected the adoption of the captain of the ship doctrine to impose liability on the doctor. The supreme court said the "captain of the ship doctrine" has lost its vitality across the country as plaintiffs have been able to sustain actions against full-care modern hospitals for the negligence of their employees.

Psychiatric Malpractice Claims. The Wisconsin Supreme Court recognized in Schuster v. Altenberg, supra, that a psychiatrist may be negligent by:

1. negligent diagnosing and treating, including failing to warn of side effects of medication,
2. failing to warn a patient's family of the patient's condition and its dangerous implications,
3. failing to seek the commitment of the patient.

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Warning a patient of risks associated with a condition and the patient as to appropriate conduct constitutes treatment as to which a physician must use ordinary care. Schuster v. Altenberg, supra.
A psychiatrist may be held liable to third parties for failing to warn of the side effects of medication if the side effects were such that a patient should have been cautioned against driving, because it was foreseeable that an accident could result causing harm to the patient or third parties.

A psychotherapist has the duty to warn third parties or to institute proceeding for the detention or commitment of a dangerous individual for the protection of the patient or the public.

Dental Malpractice. For dental malpractice, see Wis JI-Civil 1023.14.

Determination of Future Economic Damages. In a claim based on injury from any treatment or operation performed by, or from any omission by, a person who is a health care provider, the determination of future economic damages must reflect present value, life expectancy, and the effects of inflation. Specifically, Wis. Stat. § 893.55(4)(e) states:

> (e) Economic damages recovered under ch 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

The Committee interprets this subsection as requiring the jury to make a reduction based on the time value of money and to consider inflation in determining future economic damages. The Committee believes that the statutory language quoted above does not mean that the trial judge should make allowance for present value of money or inflation immediately after the jury has determined economic damages or on motions after verdict.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical

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malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Bystander Recovery Claims for Negligent Infliction of Emotional Distress Based on Misdiagnosis. See the committee commentary to Wis. JI-Civil 1510 and 1511.

Answering Special Verdict Questions; Possibility of Inconsistent Verdicts. In medical negligence cases, allowing the jury to award damages regardless of how it answered negligence and cause verdict questions can lead to inconsistent verdicts under Runjo v. St. Paul Fire Marine Ins. Co., 197 Wis.2d 594, 541 N.W.2d 173 (Ct. App. 1995); LaCombe v. Aurora Medical Group, Inc., 2004 WI App 119, 274 Wis.2d 771, 683 N.W.2d 532; Hegarty v. Beauchaine, 2006 WI App 248, 297 Wis.2d 70, 727 N.W.2d 857. In Runjo, the jury was instructed to answer the damage questions only if it affirmatively answered the negligence and cause questions.

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1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: SPECIAL VERDICT; WIS. STAT. § 448.30 (2013)

Questions 1 and 2 of the special verdict form relate to the duty to inform a patient and read as follows:

QUESTION 1: On (date), was (doctor) negligent in informing (patient) about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of these alternate treatments?

Answer: _____
Yes or No

QUESTION 2: If you have answered question 1 "yes," then answer this question: Was the negligence of (doctor) in informing (patient) a cause of injury (death) to (patient)?

Answer: _____
Yes or No

COMMENT

This special verdict was approved in 2000 and revised in 2014. The commentary was updated in 2005, 2011, 2012, and 2014. This special verdict applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For the special verdict in a trial involving the failure to obtain informed consent prior to December 15, 2013, see the former version of Wis JI-Civil 1023.1 reprinted at the end of this commentary.

After the Wisconsin Supreme Court decision affirming the Court of Appeals in Jandre v. Wisconsin Injured Patients and Families Compensation Fund, 2012 WI 39, 340 Wis.2d 31, 813 N.W.2d 627, the Wisconsin Legislature passed 2013 Wisconsin Act 111 to modify the informed consent law, Wis. Stats. § 448.30. The legislation changed the standard for evaluating whether a doctor properly informed a patient of the patient's treatment options from a "reasonable patient" to "reasonable physician standard."

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In Jandre, the emergency medicine physician was not found negligent in arriving at her diagnosis of Bell's palsy by the jury. However, she was found negligent for not telling the patient that a carotid ultrasound could have been done. The jury found a reasonable patient would want to know about this test, which it was contended would have shown blockage. The jury also found that non-disclosure was a cause of damages sustained by the patient. The plaintiff contended that treatment of the blockage could have avoided the stroke suffered 10 days later. The verdict was for approximately two million dollars.

Under the existing law applied in Jandre, Wisconsin used a "reasonable patient" standard to determine whether a doctor was negligent in giving information. Under that standard, a jury is asked to determine what a reasonable person in the patient's position would want to know to make an informed decision.

The new act (2013 Wis. Act 111) requires doctors to disclose "only information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances." There is no liability for failure to inform patients about "any condition the physician has not included in his or her diagnosis at the time the physician informs the patient."

Damages. For instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

Trials Based on Alleged Failure to Obtain Informed Consent Prior to December 15, 2013. The version of this special verdict prior to the enactment of 2013 Wisconsin Act 111 read:

1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: SPECIAL VERDICT

Questions 1, 2, and 3 of the special verdict form relate to the issue of informed consent and read as follows:

QUESTION 1: Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

Answer: _____
Yes or No

QUESTION 2: If you answered question 1 "yes," then answer this question:
If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

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QUESTION 3: If you have answered both questions 1 and 2 "yes," then answer this question: Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

# # #

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1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT; Wis. Stat. § 448.30 (2013)

Question _____ asks: On (date), was Dr. _____ negligent in informing (patient) about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of these alternate treatments? A doctor has the duty to inform (his) (her) patient about reasonable alternate medical modes of treatment available to the patient and about the risks and benefits of the treatments that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. If a physician fails to perform this duty to inform, (he) (she) is negligent in informing (his) (her) patient.

A physician's duty to inform (his) (her) patient does not require disclosure of (include as applicable):

X Detailed technical information that in all probability a patient would not understand.

X Risks apparent or known to the patient.

X Extremely remote possibilities that might falsely or detrimentally alarm the patient.

X Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.

X Information in cases where the patient is incapable of consenting.

X Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

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You have heard testimony during this trial from doctors who have testified as expert witnesses. This is because information about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of the treatments that a reasonable physician would disclose to a patient in the circumstances of this case is not a matter within the common knowledge of lay persons. The reasonable physician's standard of informing a patient is within the special knowledge of experts in the field of medicine and can only be established by the testimony of experts. You may not speculate or guess what the standard of informing a patient is in deciding this case but rather must attempt to determine it from the expert testimony that you have heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

COMMENT

This instruction and commentary were approved in 2014. See Comment to Wis JI-Civil 1023.1.

This instruction applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For informed consent cases based on the failure to properly inform a patient prior to the effective date of Wis. Stat. § 448.30 (2013 Wisconsin Act 111), the following instruction applies:

1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT

Question _____ asks:

Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

A doctor has the duty to provide (his) (her) patient with information necessary to enable the patient to make an informed decision about a (diagnostic) (treatment) (procedure) and alternative choices of (diagnostic) (treatments) (procedures). If the doctor fails to perform this duty, (he) (she) is negligent.

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To meet this duty to inform (his) (her) patient, the doctor must provide (his) (her) patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject (a) (the) medical (diagnostic) (treatment) (procedure). In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a medical (diagnostic) (treatment) (procedure).

The doctor must inform the patient whether (a) (the) (diagnostic) (treatment) (procedure) is ordinarily performed in the circumstances confronting the patient, whether alternate (treatments) (procedures) approved by the medical profession are available, what the outlook is for success or failure of each alternate (treatment) (procedure), and the benefits and risks inherent in each alternate (treatment) (procedure).

However, the physician's duty to inform does not require disclosure of:

[X Information beyond what a reasonably, well-qualified physician in a similar medical classification would know;]

[X Detailed technical information that in all probability the patient would not understand;]

[X Risks apparent or known to the patient;]

[X Extremely remote possibilities that might falsely or detrimentally alarm the patient;]

[X Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment;]

[X Information in cases where the patient is incapable of consenting.]

[If (doctor) offers to you an explanation as to why (he) (she) did not provide information to (plaintiff), and if this explanation satisfies you that a reasonable person in (plaintiff)'s position would not have wanted to know that information, then (doctor) was not negligent.]

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1023.3 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: CAUSE

Question _____ asks: Was (physician)'s negligence in informing (plaintiff) a cause of (injury) (death) to (plaintiff)? A physician's negligence is a cause of a patient's (injury) (death) if the negligence was a substantial factor in producing the patient's (injury) (death). This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a death).

COMMENT

This instruction and comment were approved in 2000 and revised in 2015.

If this instruction is used, then Wis JI-Civil 1500 does not have to be given. If issues such as preexisting conditions or national progression of a condition are involved, see Wis JI-Civil 1023.

Effective Date. This instruction applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For informed consent cases based on the failure to properly inform a patient prior to the effective date of Wis. Stat. § 448.30 (2013 Wisconsin Act 111), the following instruction applies:

> **1023.3 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: CAUSE**
>
> Question _____ is a cause question. A physician's failure to disclose necessary information is a cause of a plaintiff's injury if the failure to inform was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of an injury.

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1023.4 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: CONTRIBUTORY NEGLIGENCE

NO INSTRUCTION IS RECOMMENDED.

COMMENT

This commentary was approved in 2000, and reviewed in 2014. The title was updated, but no instruction is recommended. A previous instruction, numbered JI-Civil 1023.4 and titled, "Cause: Medical Malpractice: Negligent Diagnosis or Omitted Treatment," was withdrawn in 1992.

In Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999), the supreme court said that the informed consent statute recognizes that a patient is not in a position to know treatment options and risks and, if unaided, is unable to make an informed decision. The court concluded that "as a general rule a jury should not be instructed that a patient can be found contributorily negligent for failing to ask questions or for failing to undertake independent research."

However, the court said that it did not mean to say "a patient may never be contributorily negligent for failing to seek information." It held that it would require a "very extraordinary fact situation" to render a patient negligent when the patient accepts and trusts the information a doctor provides.

The court, in Brown v. Dibbell, expressly said its decision did not address whether a patient's duty to use ordinary care requires the patient to volunteer information or to spontaneously advise the doctor of material, personal, family, or medical histories that the patient reasonably knows should be disclosed. 227 Wis.2d at 49 n. 13.

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1023.5 PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER AS A SPECIALIST IS NOT IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover or recognize the importance of relevant facts or legal principles which reasonably prudent lawyers would discover or recognize or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his) (her) representation, if (his)(her) efforts were those reasonably prudent lawyers would have taken.

[Use this paragraph if the parties stipulate or the trial judge finds as a matter of law that the lawyer presented himself or herself as a specialist in the relevant area of law: Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. This is the standard you should apply in considering question _____ of the special verdict.]

You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the

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field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265.)

SPECIAL VERDICT

1. Was (lawyer) negligent in providing legal services to (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1998, 2002, 2003, 2016, and 2020. If the status of the lawyer as a specialist is in dispute, see Wis JI-Civil 1023.5A.

Consistent with the supreme court's direction in medical malpractice cases, the Committee has eliminated reference to "guaranteed results" and has framed the duty of lawyers in terms of "reasonable care" rather than in reference to what is "usually exercised" by lawyers. See Nowatske v. Osterloh, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), and Comment to Wis JI Civil 1023.

Elements. The Wisconsin Supreme Court has said that the following rule governs legal malpractice actions:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action. Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

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To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979); Helmbrecht v. St. Paul Ins. Co., 122 Wis.2d 94, 103, 362 N.W.2d 118 (1985); see also Pierce v. Colwell, 209 Wis.2d 355, 563 N.W.2d 166 (Ct. App. 1997). This entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'" Lewandowski, 88 Wis.2d at 277, citing 7 Am. Jur. 2d, Attorneys at Law, sec. 188 at 156 (1963).

In Helmbrecht v. St. Paul Ins. Co., supra, the court made several important holdings which cleared up some uncertainty. First, in calculating damages due to the loss of a claim, an objective standard should be used, i.e., what a reasonable judge (jury) would have awarded in the initial action. Second, the court said the Code of Professional Responsibility, although beneficial as an ethical guide, "does not exhaustively define the obligations an attorney owes his client," nor does it "undertake to define standards for civil liability of lawyers for professional conduct." 122 Wis.2d at 111.

In Denzer v. Rouse, 48 Wis.2d 528, 534 180 N.W.2d 521 (1970), the court said that "between the end points of competence and malpractice lies a broad area of difficult and complex situations in which an attorney is bound to exercise his best judgment in the light of his education and experience, but is not held to a standard of perfection or infallibility of judgment."

Cause. The court of appeals in 1997 considered the following question: When a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same manner, can the first lawyer's alleged negligence be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but did not? The court of appeals concluded that the answer to this question was "no." Seltrecht v. Bremer, 214 Wis.2d 110, 571 N.W.2d 686 (Ct. App. 1997).

Outcome of Representation. In DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995), the court of appeals considered a lawyer's mistaken judgment that was made in good faith. The court stated: "we will not hold attorneys responsible when their decisions are ones that a reasonably prudent attorney might make even though they are later determined by a court of law to be erroneous." Id. at 724. The Committee believes that juries should be informed that the outcome of the representation is not determinative of lawyer's negligence. The jury should, instead, determine whether the representation conformed with reasonable care, considering all of the evidence.

Nature of Representation. If there is a dispute concerning the nature or scope of the representation, add the following paragraph:

Whether (lawyer) has discharged (his) (her) duty depends on the purpose for which (lawyer) was retained or agreed to provide representation. The purpose (or scope) of the representation for which the (lawyer) was retained is for you to determine from the evidence. It is irrelevant to the determination of the lawyer's negligence whether the lawyer was paid.

Specialists. The court of appeals has adopted the higher standard of care for lawyers who represent themselves as specialists in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995). The Committee recommends use of the higher standard paragraph when the trial court finds that there is credible evidence of such representation by the lawyer. See also JI-Civil 1023.5A. Since most areas of practice do not have State Bar sanctioned specialty certification, these

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cases will generally present a question of fact concerning whether the lawyer held himself or herself out as a specialist to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.)

Contributory Negligence. The contributory negligence of a client can be a defense in a legal malpractice action. Gustavson v. O'Brien, supra at 204.

Tort Versus Contract Claim. The Wisconsin Supreme Court has stated that legal malpractice may give rise to either a tort claim or a contract claim. The tort claim arises from a breach of the attorney's common law duty; whereas, the contract claim arises from a breach of a duty created by contractual agreement between the attorney and the client. See Milwaukee County v. Schmidt, Gardner, and Erickson, 43 Wis.2d 445, 168 N.W.2d 559 (1969); Klingbeil v. Saucerman, 165 Wis. 60, 160 N.W. 1051 (1917).

Expert Testimony. Expert testimony is not required to establish a standard of care in cases involving conduct not necessarily related to legal expertise where the matters to be proved do not involve special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study, or experience. Nor is expert testimony required where no issue is raised as to defendant's responsibility, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed to plaintiff for the court will not require expert testimony to define further that which is already abundantly clear. Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573 (1980). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506; DeThorne v. Bakken, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (1995). In Olfe v. Gordon, supra, the client's claim alleged negligence by the attorney in failing to follow specific instructions. The court concluded that proof of this negligence does not require expert testimony. Such a claim is controlled by the law of agency. Thus, the duties of care owed by the attorney to the client are established not by the legal profession's standards but by the law of agency. The court held that a jury is competent to understand and apply the standards of care to which agents are held. Olfe v. Gordon, supra at 184 (citing Wis JI-Civil 4000, Agency: Definition, and Wis JI-Civil 4020, Agent's Duties Owed to Principal).

Damages. The supreme court has said it is appropriate, in some complex cases, for the trial judge to determine reasonable attorney's fees as a matter of law. See Glamann v. St. Paul Fire & Marine Ins., 144 Wis.2d 865, 424 N.W.2d 924 (1988). For the determination and awarding of attorney fees (both trial and appellate), see Glamann, supra at 870-75.

Legal Malpractice Claim for Criminal Defense. The court of appeals has held that, in a legal malpractice claim for criminal defense, the plaintiff must prove that he or she did not commit the offenses of which he or she was convicted. Hicks v. Nunnery, 2002 WI App 87, 253 Wis.2d 721, 643 N.W.2d 809. The court said this proof requirement is based on public policy considerations. In such a case, the following language is suggested:

> Question no. _____ asks whether (Plaintiff) is innocent of the charge of _____. This charge consists of the following elements: (Here explain the elements of the offense from the appropriate instruction in Wisconsin Jury Instructions-Criminal.)
>
> (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) is innocent.

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[Give JI-Civil 200, Ordinary Burden of Proof]

The suggested question for the special verdict is:

Was Plaintiff innocent of the charge of _____?

The court of appeals in Hicks states that "the question of plaintiff's innocence is in addition to, not a substitute for, a jury question regarding whether the plaintiff would have been found not guilty absent the defendant's negligence. A defendant's negligence must . . . have been a substantial factor contributing to the plaintiff's conviction." Thus, the questions of existence of the attorney-client relationship, negligence, causation and damages would be first submitted for the jury's consideration.

Nonliability of an Attorney to a Non-Client. A longstanding rule in Wisconsin is that an attorney is not liable to a non-client for "acts committed in the exercise of his [or her] duties as an attorney. See Auric v. Continental Cas. Co., 111 Wis.2d 507, 512, 331 N.W.2d 325 (1983). However, there are exceptions to this rule in the context of estate planning. The "Auric exception," established in Auric, holds that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will even though the beneficiary is a third-party not in privity with the attorney. In general, this exception allows a named beneficiary to sue an attorney for malpractice when the beneficiary can show that he or she was harmed by attorney negligence that frustrated the intent of the attorney's client.

In 2009, the post-Auric decision of Tensfeldt v. Haberman, 2009 WI 77, 319 Wis.2d 329, 768 N.W.2d 641 seemed to narrowly limit the Auric exception to negligence by an attorney in drafting or supervising the execution of an estate-planning document which resulted in a loss to a named beneficiary. However, the supreme court's holding in MacLeish v. Boardman Clark LLP, 2019 WI 31, 386 Wis.2d 50, 924 N.W.2d 799, provided that "[t]he narrow Auric exception to the rule of nonliability of an attorney to a non-client applies to the administration of an estate in addition to the drafting of a will. That is, a non-client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent." Id. at ¶48.

For estate planning post-MacLeish, see Pence v. Slate, 387 Wis.2d 685, 928 N.W.2d 806 (Table), 2019 WI App 26.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.5A PROFESSIONAL NEGLIGENCE: LEGAL STATUS OF LAWYER AS SPECIALIST IS IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover relevant facts or legal principles which reasonably prudent lawyers would discover or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his)(her) representation if (his)(her) efforts were those reasonably prudent lawyers would have taken.

Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. It is for you to determine from the evidence whether (lawyer) presented (himself)(herself) to the public or (client) as having special experience, knowledge, or skill in the relevant area of law. If your answer to question ___ is "yes," that (lawyer) held (himself) (herself) out as a specialist, you should apply the standard of a specialist in answering question ___. If your answer to question ___ is "no," you should not apply the standard of a specialist when answering question ___.

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You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265.)

SPECIAL VERDICT - SPECIALIST STATUS IN DISPUTE

1. Did (lawyer) present (himself)(herself) to the public or (plaintiff) as having special experience, knowledge, or skill in (insert specialty, e.g., personal injury law)?

Answer: _____
Yes or No

If your answer to question 1 is yes, you should apply the higher standard of a specialist in considering question 2. If your answer to question 1 is no, you should apply the standard of a general practitioner in considering question 2.

2. Was (lawyer) negligent in (his)(her) representation of (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. See Comment to JI-Civil 1023.5. In particular, note the discussion of specialist status in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995), and DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995).

If there is a dispute concerning the nature or scope of the representation, add this paragraph:

Whether a lawyer has discharged (his)(her) duty depends on the purpose for which the lawyer was retained or agreed to provide representation. The purpose of the representation for which the lawyer was retained is for you to determine from the evidence.

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1023.6 NEGLIGENCE OF INSURANCE AGENT

An insurance agent, such as (defendant), must use the degree of care, skill, and judgment which is usually exercised under the same or similar circumstances by insurance agents licensed to sell insurance in Wisconsin.

While there is no duty to advise the policy holder of coverages available, the agent must use reasonable skill and diligence to put into effect the insurance coverage requested by his or her policy holder, act in good faith towards that policy holder, and inform him or her of the minimum statutory requirements. A failure on the agent's part to use that skill or diligence constitutes negligence.

[If evidence as to a special relationship is shown, then add the following:

(Plaintiff) contends that a special relationship existed between (him)(her) and (defendant).

If a special relationship did exist, then _____ had the duty to advise _____ about the types of insurance coverages that would be available to (him)(her) and the amount of insurance coverage that would be appropriate for (him)(her).

In determining whether a special relationship existed, you should consider the following factors:

1. Whether (defendant) held (himself)(herself) out to the public as a skilled insurance advisor or consultant;
2. Whether (defendant) took it upon (himself)(herself) to actually advise (plaintiff) on the coverages (plaintiff) should have beyond the usual relationship of agent and policy holder;

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3. Whether the policy holder relied on the agent's expertise;

4. Whether an additional fee was paid to the agent for special consultation and advice; and

5. Whether there was a long established relationship of entrustment between the agent and the insured.

If you find that a special relationship existed between (plaintiff) and (defendant), then (defendant) had the duty to advise (plaintiff) about available insurance coverages and recommend the appropriate amount of insurance coverage necessary to protect the insured.]

[If contributory negligence is an issue, then give the following:

An insured, such as (plaintiff), has a duty to use ordinary care when purchasing an insurance policy. Ordinary care is that degree of care that a reasonably prudent person would use under the same or similar circumstances.

When purchasing a policy, an insured must advise his or her agent of the type of insurance wanted, including the limits of the policy to be issued. An insured must read the policy once it is delivered to determine whether it provides the insurance coverage requested. However, an insured is not bound to comprehend every term and condition in the policy. An insured is only required to act as a reasonably prudent person would act under the same or similar circumstances. A failure to exercise ordinary care by the insured constitutes negligence.]

COMMENT

This instruction was approved by the Committee in 1992. The comment was updated in 1995 and 2016.

The general duty of care of an insurance agent does not include a duty to advise a prospective policy holder regarding the availability or adequacy of certain types of coverages, including underinsured motorist coverage. Nelson v. Davidson, 155 Wis. 2d 674, 680-82, 456 N.W.2d 343 (1990). Only paragraphs 1 and 2

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apply to a case premised upon an insurance agent's failure to procure coverage that a client actually requested the agent to procure. See Appleton Chinese Food v. Murken Ins., 185 Wis.2d 791, 519 N.W.2d 674 (1994).

Absent a special relationship, an agent's sole duty is to act in good faith, carry out the insured's instructions, and mention minimum statutory requirements. Nelson, at 681-82, Tackes v. Milwaukee Carpenters Health Fund, 164 Wis.2d 707, 476 N.W.2d 311 (Ct. App. 1991).

To constitute a special relationship between the parties, the agent must have assumed the role of a highly skilled consultant. Nelson, at 683-84.

The agent has no duty to advise a prospective insured regarding the availability of higher uninsured motorist limits than selected by the insured. The policy holder determines whether additional protection is necessary and whether to pay higher premiums for that additional coverage. Meyer v. Norgaard, 160 Wis.2d 794, 467 N.W.2d 141 (Ct. App. 1991), rev. denied.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.7 PROFESSIONAL NEGLIGENCE: REGISTERED NURSES AND LICENSED TECHNICIANS PERFORMING SKILLED SERVICES

At the time in question, (defendant) was a (registered nurse) (licensed technician) serving in this capacity at ____ Hospital. As a (registered nurse) (licensed technician), it was (defendant)'s duty in (describe the service rendered (plaintiff) to use the degree of care, skill, and judgment which reasonable (registered nurses) (licensed technicians) would exercise in the same or similar circumstances, having due regard for the state of learning, education, experience, and knowledge possessed by (registered nurses) (licensed technicians) at the time in question. A (registered nurse) (licensed technician) who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (defendant) was negligent.

A (registered nurse) (licensed technician) is not negligent solely because a bad result may have followed (describe the professional service rendered by the defendant). The standard you must apply in determining if (defendant) was negligent is whether (defendant) failed to use the degree of care, skill, and judgment which a reasonable (registered nurse) (licensed technician) would exercise at the time the service was rendered.

You have heard considerable testimony during this trial from experts in the field of nursing and medicine who have been called as expert witnesses by both sides. The reason for this is because the degree of care, skill, and judgment which a reasonable (registered nurse) (licensed technician) would exercise is not a matter within the common knowledge of laypersons. These standards are within the special knowledge of experts in the field of nursing and medicine and can only be established by their testimony. You, therefore, may not speculate or guess what those standards of care, skill, and judgment are in deciding this case, but rather must attempt to determine this from the expert testimony that you have heard

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during this trial. (In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.)

(Insert appropriate burden of proof instruction.)

(Insert appropriate cause instruction.)

COMMENT

The instruction and comment were originally approved in 1974 and revised in 1988, 1998, 2011, and 2016.

The instruction was revised in 1998 to conform to the explanation of professional negligence in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996). See Comment to Wis JI-Civil 1023. The previous version of this instruction based the standard of care on what was "usually exercised" by registered nurses or licensed technicians or what "the average" registered nurse or technician would do.

Tills v. Elmbrook Memorial Hosp., Inc., 48 Wis.2d 665, 180 N.W.2d 699 (1970); Shier v. Freedman, 58 Wis.2d 269, 206 N.W.2d 166 (1973); Trogun v. Fruchtman, 58 Wis.2d 596, 207 N.W.2d 297 (1973).

Expert Testimony. For the requirement of expert testimony on the standard of professional nursing care, see Kujawski v. Arbor View Health Care Center, 139 Wis.2d 455, 407 N.W.2d 249 (1987). In 2011, the Committee added language which instruct the jury that in determining the weight to be given expert testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.8 PROFESSIONAL NEGLIGENCE: CHIROPRACTORCTREATMENT

In providing chiropractic care to (plaintiff), (chiropractor) was required to use the degree of care, skill, and judgment which reasonable chiropractors would exercise in the like or similar circumstances, having due regard for the state of chiropractic knowledge at the time (plaintiff) was treated. A chiropractor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and treatment. The standard you must apply in determining if (chiropractor) was negligent is whether (chiropractor) failed to use the degree of care, skill, and judgment which reasonable chiropractors would exercise given the state of chiropractic knowledge at the time of the treatment in issue.

[Use this paragraph only if there is evidence of two or more alternative methods of chiropractic treatment recognized as reasonable: If you find from the evidence that more than one method of chiropractic treatment for (plaintiff)'s condition was recognized as reasonable given the state of chiropractic knowledge at that time, (chiropractor) was at liberty to select any of the recognized methods. (Chiropractor) was not negligent because (he) (she) chose to use one of these recognized treatment methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be

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established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

(Insert the appropriate cause language. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)

[The cause question asks whether there was a causal connection between negligence on the part of (chiropractor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of the (injury) (condition). In addition, (an injury) (a condition) can be caused jointly by a person's negligence and the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (chiropractor)'s negligence and the natural progression of (plaintiff)'s (injury) (disease), you should find that (chiropractor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (chiropractor) and placed (himself) (herself) under (chiropractor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (chiropractor). This question

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asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (chiropractor)'s care, has been aggravated or further impaired as a natural result of the negligence of (chiropractor)'s treatment.]

(Insert appropriate damage instructions.)

[(Plaintiff) sustained injuries before the treatment by (chiropractor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the treatment by (chiropractor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (chiropractor)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (chiropractor).]

SPECIAL VERDICT

Was (chiropractor) negligent in (his) (her) care and treatment of (plaintiff)?

Answer: _____
Yes or No

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COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1999, 2005, 2015, and 2016. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction follows the format for explaining professional negligence adopted by the Committee in Wis JI-Civil 1023. The standard, "what a reasonable chiropractor would have done," follows the reasoning in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996), and Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

Chiropractic Malpractice. The standard of care for a chiropractor is different than that imposed upon a medical doctor. Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

A chiropractor has a duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when an average chiropractic should be aware that the patient's condition will not be responsive to further treatment; and (3) if the ailment presented is outside the scope of chiropractic care, inform the patient that the ailment is not treatable through chiropractic means. In determining whether a chiropractor breaches these duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by an average chiropractor under like or similar circumstances. A chiropractor does not have a duty to refer the patient to a medical doctor. Kerkman v. Hintz, supra at 419-21.

As to the type of expert testimony which is required on the issue of chiropractic negligence, Kerkman v. Hintz, supra at 423, states:

> . . ., a chiropractor is qualified to testify regarding the practice of chiropractic and the corresponding standard of care. . . . Moreover, one who is not licensed to practice chiropractic may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given.

The Committee is still evaluating whether a chiropractor who claims to be a specialist or have special skills in treating certain conditions, e.g., sports injuries, is held to a higher standard of care. See Duffy Law Office v. Tank Transport, Inc., 194 Wis.2d 675, 535 N.W.2d 91 (1995).

For a discussion of a chiropractor's duty to recognize a medical condition, see Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App. 1998).

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

Duty to Refer. In a footnote in Hannemann v. Boyson, 2005 WI 94, 282 Wis.2d 664, 698 N.W.2d 714, fn. 11, the court noted the plaintiff argued that the chiropractor-defendant was negligent because he did not tell the plaintiff to see a medical doctor. The court addressed this argument by noting that it has previously held that a chiropractor does not have a duty to refer a patient who is not treatable through chiropractic means to a medical doctor.

Duty of a Chiropractor to Inform a Patient. See Wis JI-Civil 1023.15, 1023.16, and 1023.17.

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1023.9 PROFESSIONAL NEGLIGENCE: CHIROPRACTORCDETERMINING TREATABILITY BY CHIROPRACTIC MEANS

A chiropractor is required to use the degree of care, skill, and judgment which is exercised by a reasonable chiropractor under like or similar circumstances. A chiropractor who fails to conform to this standard is negligent. The burden is on the (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor may only treat a patient within the scope of chiropractic knowledge and training. If the patient has a problem which is treatable through chiropractic means, the chiropractor may provide chiropractic treatment to the patient. However, the chiropractor may not provide chiropractic treatment when a reasonable chiropractor would be aware that the patient's condition will not be responsive to chiropractic treatment. A chiropractor's decision to treat or to stop treatment must be tested according to chiropractic standards.

(**Give the following if the claim relates to the duty to inform or refer**: If the patient's condition is outside the scope of chiropractic treatment, a chiropractor must inform the patient that the condition presented is not treatable through chiropractic means. The chiropractor does not have the duty to refer the patient to a medical doctor.)

Expert witnesses have testified concerning the standard of care applicable to chiropractors. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by testimony of experts. Therefore, you may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

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COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1999.

Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988); Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App. 1998). In Kerkman, the court explained the duties of a chiropractor in the following way:

In summary, we hold that a chiropractor has a duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when a reasonable chiropractor should be aware that the patient's condition will not be responsive to further treatment; and (3) if the ailment presented is outside the scope of chiropractic care, inform the patient that the ailment is not treatable through chiropractic means. In determining whether a chiropractor breaches these duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances.

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1023.14 PROFESSIONAL NEGLIGENCE: DENTAL

In [(treating) (diagnosing) (plaintiff)'s (injuries) (condition)], (dentist) was required to use the degree of care, skill, and judgment which reasonable (dentists who are in general practice) (specialists who practice the specialty which (dentist) practices) would exercise in the same or similar circumstances, having due regard for the state of dental science at the time (plaintiff) was (treated) (diagnosed). A dentist who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (dentist) was negligent.

A dentist is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and (treatment) (diagnosis). The standard you must apply in determining if (dentist) was negligent is whether (dentist) failed to use the degree of care, skill, and judgment which reasonable (dentists who are in general practice) (specialists who practice the specialty which (dentist) practices) would exercise given the state of dental knowledge at the time of the (treatment) (diagnosis) of (plaintiff).

[Use this paragraph only if there is evidence of two or more alternative methods of dental treatment or diagnosis recognized as reasonable: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of dental knowledge at that time, (dentist) was at liberty to select any of the recognized methods. (Dentist) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnosis) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

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You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable dentist would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine it from the expert testimony that you heard during this trial.

[Insert the appropriate cause instruction. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.]

[The cause question asks whether there was a causal connection between negligence on the part of (dentist) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (dentist)'s negligence and also the natural progression of (plaintiff)'s (injury) (disease), you should find that the (dentist)'s negligence was a cause of the (plaintiff)'s present condition.]

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[The evidence indicates without dispute that when (plaintiff) retained the services of (dentist) and placed (himself) (herself) under (dentist)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (dentist). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (dentist)'s care, has been aggravated or further impaired as a natural result of the negligence of (dentist)'s treatment.]

[Insert appropriate damage instructions.]

[(Plaintiff) sustained injuries before the treatment by (dentist). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the treatment by (dentist).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (condition) (injuries) and, second, those that flow from (dentist)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (dentist).]

COMMENT

This instruction and comment were approved in 1998 as (JI-Civil 1023.10). The comment was updated in 2015 and 2016. The instruction was re-numbered in the January 2005 supplement. The instruction reflects the changes recommended by the Wisconsin Supreme Court for instructing juries on professional negligence. Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996).

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Expert Testimony. Expert Testimony is required. See Albert v. Waelti, 133 Wis.2d 142, 394 N.W.2d 752 (Ct. App. 1986). The degree of skill required of a dentist performing dental procedures, such as a root canal or removal of a cap, and the question of whether a violation of that standard caused the plaintiff's medical condition are not within the common knowledge of laypersons. Expert testimony is required on both these issues, except in the rare case where the common knowledge of laypersons affords a basis for finding negligence. In Waelti, the court of appeals saw no distinction between physicians and dentists.

Duty to Inform a Patient. See Wis JI-Civil 1023.15, 1023.16, and 1023.17.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1023.15 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT: SPECIAL VERDICT

Questions 1 and 2 of the special verdict form relate to the issue of the duty of a (chiropractor) (dentist) (optometrist) (podiatrist) to inform a patient and read as follows:

QUESTION 1: On (date), was (chiropractor) (dentist) (optometrist) (podiatrist) negligent in informing (patient) about the availability of reasonable alternate modes of treatment and about the risks and benefits of these treatments?

Answer: _____

Yes or No

QUESTION 2: If you have answered question 1 Ayes,@ then answer this question: Was the negligence of (chiropractor) (dentist) (optometrist) (podiatrist) in informing (patient) a cause of injury to (patient)?

Answer: _____

Yes or No

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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1023.16 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT

Question _____ asks: On (date), was Dr. _____ negligent in informing (patient) about the availability of reasonable alternate modes of treatment and about the risks and benefits of these treatments? A (chiropractor) (dentist) (optometrist) (podiatrist) has the duty to inform (his) (her) patient about reasonable alternate modes of treatment available to (patient) and about the risks and benefits of the treatments that a reasonable (chiropractor) (dentist) (optometrist) (podiatrist) would know and disclose under the circumstances. If a (chiropractor) (dentist) (optometrist) (podiatrist) fails to perform this duty to inform, (he) (she) is negligent in informing (his) (her) patient.

A (chiropractor) (dentist) (optometrist) (podiatrist)'s duty to inform (his) (her) patient does not require disclosure of (include as applicable):

- Detailed technical information that in all probability a patient would not understand.
- Risks apparent or known to the patient.
- Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- Information in cases where the patient is incapable of consenting.
- Information about alternate modes of treatment for any condition the (chiropractor) (dentist) (optometrist) (podiatrist) has not included in his or her

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diagnosis at the time the (chiropractor) (dentist) (optometrist) (podiatrist) informs the patient.

You have heard testimony during this trial from (chiropractors) (dentists) (optometrists) (podiatrists) who have testified as expert witnesses. This is because information about the availability of reasonable alternate modes of treatment and about the risks and benefits of the treatments that a reasonable (chiropractor) (dentist) (optometrist) (podiatrist) would disclose to a patient in the circumstances of this case is not a matter within the common knowledge of lay persons. The reasonable (chiropractor) (dentist) (optometrist) (podiatrist)'s standard of informing a patient is within the special knowledge of experts in the field of (chiropractor) (dentistry) (optometry) (podiatry) and can only be established by the testimony of experts. You may not speculate or guess what the standard of informing a patient is in deciding this case, but rather must attempt to determine it from the expert testimony that you have heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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1023.17 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR, DENTIST, OPTOMETRIST, OR PODIATRIST: DUTY TO INFORM A PATIENT: CAUSE

Question _____ asks: was (chiropractor) (dentist) (optometrist) (podiatrist)'s negligence in informing (plaintiff) a cause of injury to (plaintiff)? A (chiropractor) (dentist) (optometrist) (podiatrist)'s negligence in informing is a cause of a patient's injury if the negligence was a substantial factor in producing the patient's injury. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of an injury.

COMMENT

This instruction and comment were approved in 2015.

The duty of chiropractors, dentists, optometrists, and podiatrists to inform patients about the availability of reasonable alternate modes of treatment and about the risks and benefits of these alternate treatments was codified in 2013 Wisconsin Act 345 (effective April 25, 2014). The act created Wis. Stats § 446.08 (chiropractors); § 447.40 (dentists); § 448.697 (podiatrists); and § 449.25 (optometrists).

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If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (doctor) and if you further find (from expert medical testimony in this case) that the injury to the (name the part of the body that was injured) of (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (doctor) failed to exercise that degree of care and skill which reasonably prudent surgeons would exercise. This rule will not apply if (doctor) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (doctor)'s part to exercise due care and skill.

COMMENT

The instruction and comment were originally published in 1967. This revision was approved in 1980. The comment was updated in 1997, 2010, and 2017.

Kelley v. Hartford Casualty Ins. Co., 86 Wis.2d 129, 271 N.W.2d 676 (1978); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977); Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973); Burnside v. Evangelical Deaconess Hosp., 46 Wis.2d 519, 175 N.W.2d 230 (1970); see also Lecander v. Billmeyer, 171 Wis.2d 593, 492 N.W.2d 167 (Ct. App. 1992); Petzel v. Valley Orthopedics Ltd., 2009 WI App. 106, 320 Wis.2d 621, 770 N.W.2d 787.

Whether the evidence presented warrants the giving of a res ipsa loquitur instruction always presents a question of law for the trial court. Fehrman v. Smirl, 20 Wis.2d 1, 28b, 121 N.W.2d 255 (1963).

Res ipsa loquitur was first applied to medical malpractice actions in 1963. Fehrman v. Smirl, 20 Wis.2d 1, 121 N.W.2d 255 (1963). In this case, the supreme court loosened the rule that a physician's negligence could only be proven by expert testimony in situations where the errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care. Res ipsa loquitur is a rule of evidence that permits the jury to draw a permissible inference of the physician's negligence without any direct or expert testimony as to the physician's

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conduct at the time the negligence occurred. Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977). The doctrine can be involved in a medical malpractice action when: (1) there is evidence that the event in question would not ordinarily occur unless there was negligence; (2) the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) the evidence allows more than speculation but does not fully explain the event. See Lecander v. Billmeyer, 171 Wis.2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992); Walker v. Sacred Heart Hospital, Appeal No. 2015AP805 (decided January 4, 2017). In Richards v. Mendivil, 200 Wis.2d 665, 548 N.W.2d 85 (Ct. App. 1996), the court of appeals noted that there is a danger that when a plaintiff relies upon expert testimony that the evidence of negligence will be so substantial that a full and complete explanation of causation is provided and res ipsa loquitur will not be applicable.

The third element discussed above that the evidence allows more than speculation but does not fully explain the event was set forth in Fiumefreddo v. Mclean, 174 Wis.2d 10, 496 N.W.2d 226 (Ct. App. 1993). See also Lecander v. Billmeyer, supra.

In Kelley, the court stated, at 132:

> Before a res ipsa loquitur instruction can be given to a jury, the evidence must conform to these requirements:
>
> (1) The event in question must be of the kind which does not ordinarily occur in the absence of negligence; and (2) the agency or instrumentality causing the harm must have been within the exclusive control of the defendant. Trogun v. Fruchtman, 58 Wis.2d 569, 590, 207 N.W.2d 297 (1973).

With respect to these two conditions, the court in Hoven v. Kelble, supra at 451-52, stated:

> When these two conditions are present, they give rise to a permissive inference of negligence on the part of the defendant which the jury is free to accept or reject. It is settled that the doctrine may be applied in medical malpractice cases and that the likelihood that negligence was the cause may be shown by expert medical testimony in cases where it may not be so inferred on the basis of common knowledge. Fehrman v. Smirl, 20 Wis.2d 1, 21, 22, 25, 26, 121 N.W.2d 255, 122 N.W.2d 439 (1963); Trogun v. Fruchtman, supra.

Need for Expert Testimony. If the jury may be permitted to infer negligence on the basis of layman's knowledge (as whether the plaintiff's shoulder was injured during an appendectomy), omit the phrase in lines two and three "from expert medical testimony in this case."

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1025 NEGLIGENCE OF A COMMON CARRIER

In this case, (defendant) is a common carrier. A common carrier is not required to guarantee the safety of its passengers. However, to discharge the duty that it owes to its passengers, a common carrier must exercise the highest degree of care for their safety. The care required is the highest that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances, taking into consideration the type of transportation used and the practical operation of its business as a common carrier.

A failure to exercise the highest degree of care on the part of (defendant) is negligence.

COMMENT

This instruction and comment were originally approved in 1972 and revised in 1985. The comment was updated in 2005.

A similar instruction was approved in Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975). Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 124 N.W.2d 593 (1963); Bradford v. Milwaukee & Suburban Transp. Corp., 25 Wis.2d 161, 130 N.W.2d 282 (1964). See also Boynton Cab Co. v. ILHR Dep't, 96 Wis.2d 396, 416, 291 N.W.2d 850 (1980), and Sabinasz v. Milwaukee & Suburban Transp. Corp., 71 Wis.2d 218, 224, 238 N.W.2d 99 (1976). Werlein v. Milwaukee Elec. Ry & Transp. Corp., 267 Wis. 392, 395, 66 N.W.2d 185, 186-87 (1954); Dauplaise v. Yellow Taxicab Co., 204 Wis. 419, 235 N.W. 771 (1931); Scales v. Boynton Cab Co., 198 Wis. 293, 294-95, 233 N.W. 836 (1929); Ormond v. Wisconsin Power & Light Co., 194 Wis. 305, 307-08, 216 N.W. 489-90 (1927); Anderson v. Yellow Cab Co., 179 Wis. 300, 303, 191 N.W. 748 (1923).

The first paragraph is explained in United States Fidelity & Guar. Co. v. Milwaukee & Suburban Transp. Corp., 18 Wis.2d 1, 117 N.W.2d 708 (1962); Ormond v. Wisconsin Power & Light Co., 194 Wis. 305, 308, 216 N.W. 489 (1927). In Victorson, supra at 346, the court stated:

> Because the operation of a common carrier involves greater risks and potentially more serious harm through negligent conduct than would the operation of freight vehicles or individual modes of transport, recognition must be given to the circumstances in which the ordinarily prudent person is operating.

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For the determination of whether the defendant is a "common carrier," see Hunt v. Clarendon Nat'l Ins. Service, Inc., 2005 WI App 11, 278 Wis.2d 439, 691 N.W.2d 904.

The common-law duty as to common carriers applies equally to taxicabs. Dauplaise v. Yellow Taxicab Co., supra; Scales v. Boynton Cab Co., supra; Anderson v. Yellow Cab Co., supra. But Wis. Stat. § 194.01(5) is a regulatory statute and, hence (see Wis. Stat. § 194.02), is inapplicable to a taxicab company's negligence. Anderson v. Yellow Cab Co., supra.

The common law requires common carriers to use the highest degree of care for the safety of their passengers. This "highest degree of care" language does not create a special area within the field of negligence law. Victorson, supra at 345; Ormond v. Wisconsin Power & Light Co., supra at 308. In Ormond, the court held that the duty imposed upon common carriers to exercise the highest degree of care falls within the class of ordinary care, and their failure to observe that care amounts to ordinary negligence under our classification of negligence. 194 Wis. at 308.

For the liability of a common carrier for injuries to a pedestrian caused by the acts of passenger, see Hamed v. Milwaukee County, 108 Wis.2d 257, 321 N.W.2d 199 (1982); Finken v. Milwaukee County, 120 Wis.2d 69, 353 N.W.2d 827 (Ct. App. 1984).

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1025.5 BAILMENT: DEFINED

A bailment is the delivery of personal property (such as _____) by one person to another for a specific purpose under an express or implied contract with the understanding that the property delivered will be returned or accounted for when the purpose of the bailment has been fulfilled.

A bailment arises when the possession of personal property is temporarily transferred by one person to another but the title to the personal property remains in the hands of the original owner.

One who temporarily transfers possession of personal property to another is known as a bailor. The person who takes possession of the property is known as a bailee.

To be a bailee of property, a person must have such full and complete possession of it as to exclude, for the time of the bailment, the possession of the owner, and the person must have assumed the charge and control of the property as the sole custodian.

COMMENT

The instruction and comment were approved in 1974 and revised in 2009.

Fletcher v. Ingram and others, 46 Wis. 191, 202, 50 N.W. 424 (1879); Bradley v. Harper, 173 Wis. 103, 108, 180 N.W. 130 (1920); American Nat'l Red Cross v. Banks, 265 Wis. 66, 69, 60 N.W.2d 738 (1953); Moore v. Relish, 53 Wis.2d 634, 639, 193 N.W.2d 691 (1972); Bushweiler v. Polk County Bank, 129 Wis.2d 357, 384 N.W.2d 717 (Ct. App. 1986); 8 Am. Jur. 2d. 906, Bailments § 2.

A bailment is created by the delivery of personal property from one person to another to be held temporarily for the benefit of the bailee, the bailor, or both under an express or implied contract Bushweiler.

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1025.6 DUTY OF BAILOR FOR HIRE

It is the duty of the bailor to exercise ordinary care to furnish articles which are reasonably fit for the purpose of the bailment or capable of the use, known or intended, for which they are bailed. A person, who is a bailor, is required, in the exercise of ordinary care, to make all reasonable inspections to determine whether the article is safe for its intended use. A bailor is not an insurer of the safety of the article bailed. It is the bailor's duty to see that the bailed property is reasonably safe for its intended use and free from defects which are known or which could have been known in the exercise of ordinary care by reasonable inspections. Also, it is the bailor's duty to give warnings of any danger of which the bailor is aware.

COMMENT

This instruction and comment were approved in 1977. The comment 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.

Wadzinski v. Cities Serv. Oil Co, 275 Wis. 84, 91, 80 N.W.2d 816 (1957); Henricksen v. Mc Carroll, 45 Wis.2d 368, 373-75, 173 N.W.2d 153 (1970); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

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1025.7 BAILMENT: DUTY OF BAILEE UNDER A BAILMENT FOR MUTUAL BENEFIT

(Negligence: Defined, Wis JI-Civil 1005.)

A bailee for hire (in the absence of a contract to the contrary) owes a duty to exercise ordinary care with respect to the property which is the subject of the bailment. While a bailee for hire is not an insurer of the bailed property against loss, damage, or destruction, a bailee has the same duty to exercise ordinary care with respect to the property which an ordinary prudent person would exercise in the protection of his or her property from loss, damage, or destruction.

COMMENT

This instruction and comment were originally approved in 1974 and revised in 2009.

Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 N.W. 507 (1912); Insurance Co. of North America v. Krieck Furriers, Inc., 36 Wis.2d 563, 568, 153 N.W.2d 532 (1967); Yao v. Chapman, 2005 WI App 200, 287 Wis.2d 445, 705 N.W.2d 272; Bushweiler v. Polk County Bank, 129 Wis.2d 357, 384 N.W.2d 717 (Ct. App. 1986); 8 C.J.S. 401, Bailments, 27 (Bailment for Mutual Benefit); 8 Am. Jur.2d 1092, Bailments § 206.

A presumption of negligence arises when the bailor establishes that the bailed property was damaged while in the possession of the bailee. The bailee then has the burden of going forward with evidence to show that he or she was not negligence. Hildebrand v. Carroll, 106 Wis. 324, 81 N.W. 1003 (1900); Milwaukee Mirror & Art Glass Works v. Chicago, M & St P Ry., 148 Wis. 173, 134 N.W. 379 (1912); Afflerbaugh v. Geo. Grede & Bro, 182 Wis. 217, 196 N.W. 224 (1923).

Where a bailment is solely for the benefit of the bailor, the bailee is only required to exercise a slight degree of care. Smith v. Poor Hand Maids of Jesus Christ, 193 Wis. 63, 213 N.W. 667 (1927).

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1025.8 BAILMENT: LIABILITY OF A GRATUITOUS BAILOR

(Defendant) is a gratuitous bailor in this case; i.e., (he) (she) lent (property involved) to (plaintiff or third person) without receiving or expecting to receive any compensation for the use of (property involved). As a gratuitous bailor, (plaintiff)'s only duty was to inform (borrower) of any defect of which (he) (she) is aware and which might make the use of the loaned property dangerous to the borrower.

COMMENT

This instruction was approved by the Committee in 1995 and reviewed in 2008. Editorial revisions were made to the comment in 2009.

There is no Wisconsin case on this issue. The instruction follows 8 Am. Jur. 2d Bailments, § 162, at 894-95; 46 A.L.R. 2d 404, 427, § 10; and 8 C.J.S. Bailments, § 44, at 275-76. A minority of jurisdictions impose liability on the bailor if he or she should or could have known of the defect in the exercise of reasonable care.

If the property loaned is inherently dangerous, the lender has a further duty to examine the property before lending it.

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1026 BAILMENT: NEGLIGENCE OF BAILEE MAY BE INFERRED

[Give first paragraph of Wis JI-Civil 1005, Negligence: Defined.]

It is the duty of a person having the possession of the property of another to exercise ordinary care to protect the property from damage.

The burden of proof is upon the owner of the property, in this case (plaintiff), to show that the property of (plaintiff) which (defendant) had in (his) (her) possession was damaged as a result of the negligence of (defendant). This means that (plaintiff) must prove that (plaintiff)=s property was received by (defendant) in an undamaged condition and that, during the period of time that (defendant) had the property in (his) (her) care, (defendant) had exclusive possession of the property, and also that the damage to the property would not ordinarily occur without someone's negligence. Proof of these facts is sufficient for you to infer that (defendant) was negligent as to the care of (plaintiff)'s property. In other words, when such a showing is made, the law permits, but does not require, you to infer that (defendant)=s negligence was a cause of plaintiff's damage. You will not make this inference, of course, if (defendant) has offered an explanation, satisfactory to you, of how the damage occurred without (his) (her) fault.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1977. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. Editorial changes were made in 2004.

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This instruction will not be used if the plaintiff is able to offer direct evidence of defendant's negligence.

The instruction proceeds on the theory that the elements indicated create a res ipsa case, rather than raise a presumption of defendant's negligence. The use of res ipsa in bailment cases was held proper in Arledge v. Scherer Freight Lines, Inc., 269 Wis. 142 68 N.W.2d 821 (1955), though on the facts of that case (fire occurring in bailee's premises) the res ipsa requirement of an accident of a kind which ordinarily does not occur in the absence of someone's negligence was held not satisfied.

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1026.5 BAILMENT: NEGLIGENCE OF CARRIER PRESUMED

There is no dispute that (goods) were delivered to (carrier) in good condition and were damaged while in (carrier)'s possession. The law provides that, from these facts, you may presume that the damage to the goods was due to the negligence of (carrier). But there is evidence in the case which may be believed by you that (carrier) was free from negligence (or that, notwithstanding its negligence, the negligence did not contribute to the damage). You must resolve the conflict. Unless (carrier) convinces you by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (carrier)was not negligent, you must find (carrier) negligent.

COMMENT

This instruction and comment were approved in 1974. Editorial changes were made in 2004.

14 Am. Jur.2d Carriers, § 620, p. 134; M. Capp Mfg. Co. v. Moland, 22 Wis.2d 424, 430, 126 N.W.2d 34 (1964); Mastercraft Paper Co. v. Consolidated Freightways, 55 Wis.2d 674, 680-81, 200 N.W.2d 596 (1972); L. L. Richards Mach. Co. v. McNamara Motor Express, 7 Wis.2d 613, 616, 97 N.W.2d 396 (1959).

Wis. Stat. § 407.301(4) provides: "The issuer [carrier] may by inserting in the bill the words 'shipper's weight, load and count' or other words of like purport indicate that the goods were loaded by the shipper; and if such statement is true the issuer [carrier] shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages." See M. Capp Co. v. Moland, supra; Mastercraft Paper Co. v. Consolidated Freightways, supra.

"A notation or statement in a bill of lading that the goods were received by the carrier in apparent good order or condition makes a prima facie case, and the burden is then on the carrier to prove that they were not in good condition when received." 13 C.J.S. Carriers § 254(d) p. 538. "The presumption can be overridden if the carrier establishes the defect it claims existed was a hidden or concealed defect, . . . the burden is on the carrier to overcome the presumption." Allis-Chalmers Mfg. Co. v. Eagle Motor Lines, 55 Wis.2d 39, 46, 198 N.W.2d 162 (1972).

Damage caused by any carrier en route may be recovered from the delivering carrier, and the delivering carrier may recover, in turn, from the carrier on whose line the injury shall have been sustained.

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Carmack amendment to the Interstate Commerce Act, 49 U.S.C.A. § 20(11), (12); Rudy v. Chicago, M., St. P. & P. R.R., 5 Wis.2d 37, 42, 92 N.W.2d 367 (1958).

"The law imposes a duty of reasonable inspection on an intermediate railroad carrier with respect to employees of connecting carrier. . . . The duty of reasonable inspection imposed upon originating and intermediate carrier is 'to ascertain whether there is any fairly obvious defect in its construction or state of repair which constitutes a source of danger.'" Huck v. Chicago, St. P. M. & O. Ry., 16 Wis.2d 466, 470-71, 114 N.W.2d 811 (1962).

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1027 DUTY OF OWNER OF PLACE OF AMUSEMENT: COMMON LAW

This instruction was renumbered JI-8040 in 1985.

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1027.5 DUTY OF A PROPRIETOR OF A PLACE OF BUSINESS TO PROTECT A PATRON FROM INJURY CAUSED BY ACT OF THIRD PERSON

This instruction was renumbered JI-8045 in 1986.

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1027.7 DUTY OF HOTEL INNKEEPER

This instruction was renumbered JI-8050 in 1986.

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1028 DUTY OF OWNER OF A BUILDING ABUTTING ON A PUBLIC HIGHWAY

This instruction was renumbered JI-8030 in 1986.

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1029 HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY

This instruction was renumbered JI-8035 in 1986.

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1030 RIGHT TO ASSUME DUE CARE BY HIGHWAY USERS

Every user of a highway has the right to assume that every other user of the highway will obey the rules of the road. However, a person cannot continue to make this assumption if the person becomes aware, or in the exercise of ordinary care ought to be aware, that another user of the highway, by his or her conduct, is creating a dangerous situation. Under such circumstances, a person using the highway must use ordinary care to avoid the danger.

COMMENT

This instruction was approved in 1974 and revised in 1985. The comment 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.

The instruction is taken from Kellogg v. Chicago & N.W. Ry., 26 Wis. 223, 233-34, 237-38 (1870); Langhoff v. Milwaukee & Pr. du Ch. R. Co., 19 Wis. 515 (1865). See also Dekeyser v. Milwaukee Automobile Ins. Co., 236 Wis. 419, 295 N.W. 755 (1941).

This instruction cannot be given unless the plaintiff made an assumption that the defendant would exercise due care. Geis v. Hirth, 32 Wis.2d 580, 592, 146 N.W.2d 459 (1966).

If a driver approaching a green light is exercising due care, he or she is entitled to rely upon the favorable signal light, until it becomes apparent to the driver that the driver approaching the red light is going to proceed in disregard of the light and the rules of the road. See Sabinasz v. Milwaukee & Suburban Transp. Corp., 71 Wis.2d 218, 238 N.W.2d 99 (1976). Teas v. Eisenlord, 215 Wis. 455, 461, 253 N.W. 795 (1934); Zindell v. Central Mut. Ins. Co., 222 Wis. 575, 580, 269 N.W. 327 (1936); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942); and Wis JI-Civil 1191, Duty of Driver Entering Intersection with Green Light in His Favor: Lookout. See also Wis JI-Civil 1090, Driver on Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal.

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1031 CONDITIONAL PRIVILEGE OF AUTHORIZED EMERGENCY VEHICLE OPERATOR

Under some circumstances, the operator of an authorized emergency vehicle has a privilege to disregard rules governing the operation of other vehicles. This can include a privilege to (insert here the rule or rules of the road delineated in Wis. Stat. § 346.03(2) which the evidence show(s) (was) (were) disregarded, *e.g.*, exceed the posted speed limit.)

In this case, you should find (operator) was entitled to exercise the privilege if you find all of the following:

1. At the time of the accident, (operator) was operating an authorized emergency vehicle (responding to an emergency call) (in pursuit of an actual or suspected violator of the law) (responding to [but not returning from] a fire alarm). A (describe vehicle) is an authorized emergency vehicle.[1]

2. At the time of the accident, (operator) was:

X [*if § 346.03(2)(a) applies*: giving a visual signal by means of operating emergency lights.]

X [*if § 346.03(2)(b), (c), or (d) applies*: giving visual and audio signals by means of operating emergency lights and siren.[2]]

X [*if § 346.03(4) applies where the only rule violated is exceeding the speed limit*:

x obtaining evidence of a speed violation (or)

x responding to a call which (operator) reasonably believed involved a felony in progress and (operator) further reasonably believed (*choose one or more of the following*):

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- (knowledge of (operator)'s presence may have endangered the safety of a victim or other person)
- (knowledge of (operator)'s presence may have caused the suspected violator to evade apprehension)
- (knowledge of (operator)'s presence may have caused the suspected violator to destroy evidence of a suspected felony or may otherwise have resulted in the loss of evidence of a suspected felony)
- (knowledge of (operator)'s presence may have caused the suspected violator to cease the commission of a suspected felony before (operator) obtained sufficient evidence to establish grounds for arrest)].

3. (Operator) operated the authorized emergency vehicle with due care under the circumstances for the safety of all persons.[3]

If you are satisfied that these three conditions are met, you should find that (operator) was not negligent.

COMMENT

This instruction was approved in 2008 and reformatted in 2016. The notes were updated in 2016.

NOTES:

1. If there is a dispute as to whether the vehicle was an "authorized emergency vehicle," give instruction using one of the definitions in § 340.01(3).
2. The instruction uses the terms "emergency lights" and "siren" as the most common means of providing visual and audio signals. The instruction would have to be modified if other acceptable means of providing visual or audio signals, as described in § 346.03(3), are given.
3. See Legue v. City of Racine, 2014 WI 92, 357 Wis.2d 250, 849 N.W.2d 837; Estate of Cavanaugh v. Andrade, 202 Wis.2d 290, 319 (S. Ct. 1996) holds that governmental immunity will not protect the operator who fails to drive with due regard under the circumstances for the safety of others by virtue of § 346.03(5). § 346.03(5) further provides that the exemptions of § 346.03 do not "protect such operator from the consequences of his or her reckless disregard for the safety of others. " Generally, any operator who operates with reckless disregard for the safety of others also violates a duty to drive with due regard for the safety of all persons.

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1032 DEFECTIVE CONDITION OF AUTOMOBILE: HOST'S LIABILITY

COMMENT

This comment was originally published in its present form in 1961. The comment was reviewed by the Committee without change in 1980 and 1989. Editorial changes were made in 1992 to address gender references in the comment. No substantive changes were made to the comment.

There is no single instruction that is usually used in a situation where a guest sues the host for damages arising out of a defective condition of the host's automobile. In order to present to the jury the various elements set forth in the rule of law, each element which may be in issue is best presented as a question in the special verdict. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958), and Campbell v. Spaeth, 213 Wis. 162, 250 N.W. 394 (1933).

The presentation of the principles of law governing the fact situation under consideration, by means of instructions related to specific questions, in the special verdict removes the necessity of an instruction attempting to embody all the principles of law.

An automobile host may be held liable for injuries to a guest caused by a defective condition of the host's automobile, if the host knew of such defect and realized or should have realized that it involved an unreasonable risk to a guest, the defect was so concealed or hidden as to not be reasonably obvious to the guest, the defect and the risk involved were, in fact, unknown to the guest, and the host failed to warn the guest as to the defective condition and the risk involved therein. Campbell v. Spaeth, supra; Sweet v. Underwriters Casualty Co., 206 Wis. 447, 240 N.W. 199 (1932); Waters v. Markham, 204 Wis. 332, 339, 235 N.W. 797, 800 (1931); Poneitowcki v. Harres, 200 Wis. 504, 509, 228 N.W. 126 (1930); Sommerfield v. Flury, 198 Wis. 163, 168, 223 N.W. 408 (1929); O'Shea v. Lavoy, 175 Wis. 456, 186 N.W. 525 (1921).

The burden of proof is upon the guest to establish each and every element enumerated above. Jensen v. Jensen, 228 Wis. 77, 81, 279 N.W. 628, 630 (1938).

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1035 VOLUNTARY INTOXICATION: RELATION TO NEGLIGENCE

In answering the question(s) of the verdict relating to the negligence of any party, you are not to consider a person's drinking of intoxicants before the accident unless you determine that the intoxicants consumed affected the person to the extent that the person's ability to exercise ordinary care (in the operation of the vehicle) (and) (or) (for the person's own safety) was affected or impaired to an appreciable degree. A person who voluntarily consumes intoxicants must use the same degree of care in the operation of a vehicle or for his or her self-protection as one who has not consumed intoxicants.

COMMENT

This instruction and comment were approved in 1972 and revised in 1989 and 2003.

If blood texts are in evidence, see JI-Civil 1008.

This instruction should be given only when there is evidence permitting a reasonable inference that the drinking done by the driver or guest affected him or her to the extent stated.

In Landrey v. United Serv. Auto Ass'n, 49 Wis.2d 150, 158, 181 N.W.2d 407 (1970), the court stated the general rule on the relation between intoxication and negligence by quoting from 38 Am. Jur. Negligence § 36 as follows:

> Voluntary intoxication is not negligence per se. The law of negligence, however, does not put a premium upon voluntary drunkenness. From the standpoint of civil liability, the conduct of an intoxicated man is judged by the same standard as that applied to the conduct of a sober man. Ordinary care is not measured by what every prudent drunken man would do under like circumstances, but by what every prudent sober man would do under like circumstances.

Cases Relating to Driver: The Wisconsin Supreme Court has said that "it is negligence per se to operate a motor vehicle while under the influence of intoxicants." State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See also State v. Wolske, 143 Wis.2d 175, 182, 420 N.W.2d 60, 62 (Ct. App. 1988). Where it is not disputed that the intoxication caused the accident, then the trial judge can instruct that if the jury finds that the defendant's intoxicated state was a cause of the accident, it was negligence per se.

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Vonch v. American Standard Ins. Co., 151 Wis.2d 138, 442 N.W.2d 598 (Ct. App. 1989) (petition to review denied).

See also Landrey v. United Serv. Auto Ass'n, supra; Steffes v. Farmers Mut. Auto Ins. Co., 7 Wis.2d 321, 330, 96 N.W.2d 501, 507 (1959); Haag v. General Acc. Fire & Life Assur. Corp., 6 Wis.2d 432, 433-34, 95 N.W.2d 245, 247 (1959); Frey v. Dick, 273 Wis. 1, 9, 76 N.W.2d 716, 720 (1956).

Cases Relating to Guest: Watland v. Farmers Mut. Auto Ins. Co., 261 Wis. 477, 479-80, 53 N.W.2d 193, 194-95 (1952); Schubring v. Weggen, 234 Wis. 517, 521-22, 291 N.W. 788, 790 (1940).

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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).

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1046 CONTRIBUTORY NEGLIGENCE OF PASSENGER: PLACING SELF IN POSITION OF DANGER

If before or upon entering an automobile, a passenger becomes aware of, or in the exercise of ordinary care ought to become aware of, a danger which involves a risk of injury to the passenger, it is then the passenger's duty to exercise ordinary care to take such action for his or her protection as would be taken by a person of ordinary intelligence and prudence under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1972. The comment was updated in 1985 and 1986 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.

Baird v. Cornelius, 12 Wis.2d 284, 107 N.W.2d 278 (1961). See also Delmore v. American Family Mut. Ins. Co., 118 Wis.2d 510, 348 N.W.2d 151 (1984).

Basically, a passenger's negligence can be of two types: passive and active. In Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 105-06, 118 N.W.2d 140 (1962), Justice Hallows said that what is "active" and what is "passive" is a matter of causation. Thus, negligence which caused the collision is "active negligence." Negligence of the passenger which was only a cause of his or her own injuries is "passive negligence." Active negligence occurs where the passenger interferes with the safe operation of the car (e.g., grabbing the steering wheel) or where the passenger assumes some part of the driver's duties (e.g., coaching an inexperienced driver). The court noted in Delmore that "only in the exceptional case can a finding of active negligence (by a passenger) be appropriate." Passive negligence occurs when the passenger fails to use ordinary care for his or her own safety in entering a car or in riding in the car knowing of a hazard (e.g., condition of the car or driver, the driver's lack of skill, or any other hazard), or it may relate to lookout or failure to warn.

In Delmore, the court considered whether active negligence of the passenger would make the passenger liable for injuries to occupants of another car as well as to the driver of the passenger's car. After reviewing the progression of cases involving active/passive negligence, the court in Delmore concluded that a passenger who is actively negligent is liable to third parties-including passengers in another vehicle. Conversely, passive negligence does not provide a basis of liability to third persons.

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1047 CONTRIBUTORY NEGLIGENCE OF GUEST: RIDING WITH HOST

A passenger in an automobile has no duty with reference to the manner in which the vehicle is momentarily managed. A passenger may assume that the driver understands and appreciates the control he or she has over the car and that the driver will not operate it in a negligent manner.

However, if the driver during operation of the vehicle subjects the passenger to an unreasonable risk of injury and the passenger knows, or, in the exercise of ordinary care, ought to know, that the passenger is being exposed to such danger, it then becomes the passenger's duty to use ordinary care for his or her own protection by (taking such action open to him or her) (making such protest) as a person of ordinary intelligence and prudence would (take) or (make) under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1972. The comment was updated in 1986 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 can be used in two situations: (1) where the occupant did nothing, and it was claimed that some action was necessary; (2) where it is claimed that the occupant's action was inadequate.

Delmore v. American Family Mut. Ins. Co.. 118 Wis.2d 510, 348 N.W.2d 151 (1984). McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962); Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). See also, Comment, Wis JI-Civil 1046

Acquiescence to the other driver's behavior does not make the passenger a participant in an automobile race on a public highway. Mikaelian v. Woyak, 121 Wis.2d 581, 360 N.W.2d 706 (Ct. App. 1984).

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1047.1 NEGLIGENCE OF GUEST: ACTIVE: MANAGEMENT AND CONTROL

The management and control of a motor vehicle is the duty and responsibility of the driver alone. If a guest passenger, by physical action, interferes with the management and control of the driver, or if a guest passenger by any other action distracts the driver from the driver's duties of management and control, then the guest passenger is negligent as that word previously has been defined for you.

COMMENT

This instruction and comment were approved in 1974. The comment was updated in 1985 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.

Delmore v. American Family Mut. Ins. Co., 118 Wis.2d 510, 348 N.W.2d 151 (1984); Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 119 N.W.2d 393 (1962); Dutcher v. Phoenix Ins. Co., 37 Wis.2d 591, 155 N.W.2d 609 (1968).

Active negligence, such as grabbing the steering wheel, Dutcher v. Phoenix Ins. Co., supra, must be distinguished from passive negligence, such as accompanying an intoxicated or incompetent driver, McConville v. State Farm Mut. Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962); negligence of a guest with respect to lookout, Romberg v. Nelson, 8 Wis.2d 174, 98 N.W.2d 379 (1959); and negligence with respect to a guest's duty to warn, Teas v. Eisenlord, 215 Wis. 455, 253 N.W. 795 (1934).

See also Wis JI-Civil 1075, Lookout: Guest.

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1048 DRIVER, NEGLIGENCE: HIGHWAY DEFECT OR INSUFFICIENCY

An operator of a vehicle has the duty to exercise ordinary care to observe the roadway and its immediate surroundings to discover any dangerous condition or defect that would be discoverable by an ordinarily prudent operator under like or similar circumstances.

The exercise of such care requires the efficient use of one's eyes, faculties, and opportunities for observation that an ordinary prudent person would use under like circumstances in order to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight.

While an operator has a right to assume that a highway is reasonably safe, upon being timely made aware of a dangerous condition or defect, an operator then has the duty to exercise ordinary care to reduce speed, stop, change course, or take such other means as would be taken by an ordinarily prudent operator under the same or similar circumstances to avoid the dangerous condition or defect and avoid injury or damage.

COMMENT

This instruction and comment were approved in 1974. The comment 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.

As to the third paragraph, see Wall v. The Town of Highland, 72 Wis. 435, 438,30N.W. 560 (1888).

Also see Mondl v. F.W. Woolworth, 12 Wis.2d 571, 107 N.W.2d 472(1961); Hamus v. Weber, 199 Wis. 320, 226 N.W. 392 (1929).

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1049 PEDESTRIAN, NEGLIGENCE: SIDEWALK DEFECT OR INSUFFICIENCY

A pedestrian has a duty to exercise ordinary care to observe the sidewalk (roadway) and its immediate surroundings to discover any dangerous condition or defect that would be discoverable by an ordinarily prudent pedestrian under like or similar circumstances.

The exercise of such care requires the efficient use of one's eyes, faculties, and opportunities for observation that an ordinarily prudent person would use under like circumstances in order to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight.

COMMENT

This instruction was approved in 1974. The comment was reviewed without change in 1989.

Wis. Stat. §§ 81.15, 66.615. LeMay v. Oconto, 229 Wis. 65, 281 N.W. 688 (1938), held that Wis. Stat. § 81.15 applies to defects of sidewalks, as well as roads and streets.

See, generally, Hales v. Wauwatosa, 275 Wis. 445, 82 N.W.2d 301 (1957); Paulson v. Madison Newspapers, 274 Wis. 355, 80 N.W.2d 421 (1957); Pumorlo v. Merrill, 125 Wis. 102, 103 N.W.464 (1905); Hoffman v. North Milwaukee, 118 Wis. 278, 95 N.W. 274 (1903).

Knowledge of the defect does not conclusively establish contributory negligence. Hales v. Wauwatosa, supra; Zoellner v. Fond du Lac, 147 Wis. 300, 133 N.W. 35 (1911).

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1050 DUTY OF PERSONS WITH PHYSICAL DISABILITY

(Plaintiff) (Defendant) has a (visual) (hearing) (physical) disability. The extent of the disability is for you to determine from the evidence. A person with such a disability has the same right as others not having this disability to (use the streets and sidewalks) (operate a motor vehicle). (Plaintiff) (Defendant) is required as others are to use ordinary care in doing so. There is no difference in the standard of care for one who has a disability than for one who has not. Ordinary care requires that a person with a disability compensate for (his) (her) disability as necessary under the circumstances to use ordinary care.

COMMENT

This instruction and comment were approved in 1974. The instruction was revised in 1997. The comment was reviewed without change in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Before an instruction on the duty of a handicapped person is given, there must be evidence of a relationship between the handicap and some element of negligence. Lisowski v. Milwaukee Auto Ins. Co., 17 Wis.2d 499, 117 N.W.2d 666 (1962).

This instruction has been approved for use where a person with a sensory handicap is charged with negligence which resulted in injury to another. Merkley v. Schramm, 31 Wis.2d 134, 142 N.W.2d 173 (1966).

See also Davis v. Feinstein, 370 Pa. 449, 88 Atl.2d 659 (1952); Hanson v. Matas, 212 Wis. 275, 282-83, 249 N.W. 505 (1933); Short Way Lines v. Sutton's Adm'r, 291 Ky. 541, 552, 164 S.W.2d 809 (1942); Keith v. Worcester & D. V. St. R.R., 196 Mass. 478, 482-83, 82 N.E. 680 (1907); Smith v. Sneller, 245 Pa. 68, 72, 26 Atl.2d 452 (1942). 38 Am. Jur. Negligence § 210 (1941).

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1051 DUTY OF WORKER: PREOCCUPATION IN WORK MINIMIZES DUTY

Momentary diversion of attention or preoccupation of a worker in the performance of work minimizes or reduces the degree of care that would otherwise be required of him or her; nevertheless, a worker has the duty to use the same degree of care for his or her safety that an ordinarily prudent worker would use under such conditions (when preoccupied with work) (when his or her attention was momentarily diverted by work).

COMMENT

The instruction and comment were initially approved by the Committee in 1974. The instruction was revised in 1987 and 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. The comment was updated in 1995.

Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1973); Criswell v. Seaman Body Corp., 233 Wis. 606, 620, 290 N.W. 177 (1940); Patterson v. Edgerton Sand & Gravel Co., 227 Wis. 11, 277 N.W. 636 (1938); Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934); Sandeen v. Willow River Power Co., 214 Wis. 166, 252 N.W. 706 (1934); Hodgson v. Wisconsin Gas & Light Co., 188 Wis. 341, 206 N.W. 191 (1925). See also Prill v. Hampton, 154 Wis.2d 667, 453 N.W.2d 909 (Ct. App. 1990); Parlee, "Preoccupation with Work Defense to Contributory Negligence," Wisconsin Lawyer, May, 1995 at 24-26.

To justify use of this instruction, there must be evidence of a particular and immediate hazard that was unknown to one who was preoccupied with or momentarily diverted by work. Walsh v. Wild Masonry Co., 72 Wis.2d 447, 454, 241 N.W.2d 416, 419 (1976); Suhaysik v. Milwaukee Cheese Co., 132 Wis.2d 289, 295-96, 392 N.W.2d 98 (1986).

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1051.2 DUTY OF WORKER: WHEN REQUIRED TO WORK IN UNSAFE PREMISES

When a worker by direction of his or her employer is required to work on an unsafe premises in carrying out his or her employment, you must consider the reasonableness of the employee exposing himself or herself to the particular risk. The reasonableness of the worker's conduct is to be determined in the light of the utility of going to work at the designated place of employment, and performing work in the usual manner, even though there was a possibility that the premises might be unsafe. In such situations, a worker has a duty to exercise the same degree of care for his or her own safety that an ordinarily prudent worker would exercise under the same or similar conditions.

COMMENT

This instruction and comment were approved in 1977. The comment 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.

"In determining the contributory negligence of an employee who nevertheless proceeds to work in an unsafe place, a special factor is injected, i.e., the reasonableness of the employee exposing himself to the particular risk, the test being whether he was contributorily negligent, determined in the light of the utility of going to work at his usual place of employment, and performing work in the usual manner, even though there was a possibility that the premises might be unsafe." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 246, 208 N.W.2d 148 (1973).

Commenting on Meyer v. Val-Lo-Will Farms, 14 Wis.2d 616, 111 N.W.2d 500 (1961), the court stated ". . . whether the conduct of an injured person constituted contributory negligence was affected by the fact that the person attempted to be so charged was a workman at his place of employment. . . 'This fact may bear upon the reasonableness of their exposing themselves to the particular risk' [Meyer, at page 622] . . . [This case] by implication indicated that, when a jury is called upon to determine the contributory negligence of an employee who nevertheless proceeds to work in an unsafe place, that was a fact which the jury should consider." [McCrossen, at pages 255-56]

"[I]n a safe-place action, . . . the employee's contributory negligence is less when his act or omission has been committed in connection with the performance of his duties. . . [I]t may be more reasonable to assume certain risks in the employment situation than in other situations. Conduct constitutes negligence if the risk of

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harm involved is of such magnitude as to outweigh what the law regards as the utility of the act or the manner in which it is done." Young v. Anaconda Am Brass Co., 43 Wis.2d 36, 46, 47, 168 N.W.2d 112 (1969).

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1052 EQUIPMENT AND MAINTENANCE OF VEHICLES: GENERAL DUTY

(An owner) (A driver) of a motor vehicle has the duty to use ordinary care to discover any unsafe or defective condition of the vehicle and to have the vehicle in a reasonably safe condition for operation upon a public highway.

The vehicle should be (equipped) (and) (maintained) to make it reasonably safe and suitable for the particular kind of use for which it is to be employed so that the driver can control it to prevent its becoming a hazard to its occupants or other users of the highway.

The failure to use ordinary care to discover an unsafe condition, to equip the vehicle properly, or to maintain it is negligence.

However, if a defective condition which renders a vehicle unsafe was not known and would not have been discovered by the use of ordinary care, the (owner) (driver) is not negligent in (permitting it to be operated) (operating it) in the defective condition.

COMMENT

This instruction and comment were approved in 1974. The instruction was updated in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle as well as an owner. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Capello v. Janeczko, 47 Wis.2d 76, 85, 176 N.W.2d 395 (1970). As to the last paragraph, see Walk v. Boudheim, 223 Wis. 514, 271 N.W. 27 (1937). 60A C.J.S. Motor Vehicles § 260 (1969).

This instruction, paraphrased to some extent, may be appropriate where an unknown mechanical defect causes a hazard and the question of management and control arises between the time of the mechanical failure and the accident. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958), and Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936). The Byerly case has been overruled in part by Foellmi v. Smith, 15 Wis.2d 274, 112 N.W.2d 712 (1961).

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Wis. Stat. Ch. 347, Equipment of Vehicles, consists mainly of safety statutes, the violation of which constitutes negligence. Many sections of the chapter require specific equipment for various types of vehicles under defined conditions. Some sections require certain standards of maintenance and manner of use of specified equipment; others contain general exceptions to the rules stated. See the table of sections at the beginning of chapter 347.

Wis JI-Civil 1053 and 1054 do not attempt to set forth the provisions of each statute but are designed to provide forms that can be altered to accommodate the various statutory provisions relating to equipment.

Before an instruction is given, it is suggested that the statute be checked as to the date of its application and any statutory exemptions that may exist. See Wis. Stat. § 347.02.

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1053 EQUIPMENT AND MAINTENANCE OF VEHICLES: HEADLIGHTS

The Wisconsin statutes provide that:

[Use the appropriate following paragraph(s).]

(a) Every motor vehicle shall be equipped with at least two headlights. The headlights shall be mounted on the front of the vehicle at a height of not more than 54 inches nor less than 24 inches from the ground.

(b) The headlights must be multiple beam lights; the upper beam from both lights, aimed straight ahead, must be of such intensity to reveal persons and vehicles at a distance of at least 350 feet ahead, under normal atmospheric conditions, upon a straight and level unlighted highway, and under all conditions of loading. The lowermost beam from both lights must be of sufficient intensity to reveal persons and vehicles at a distance of at least 100 feet ahead under the same conditions.

(c) No person shall drive a vehicle upon a highway during hours of darkness unless all headlights, required by the statute, are lighted. "Hours of darkness" is that period of time from one-half hour after sunset to one-half hour before sunrise (and all other times when there is not sufficient natural light to render clearly visible any person or vehicle upon a highway at a distance of 500 feet).

(d) The driver of a vehicle shall keep all required headlights reasonably clean and in proper working condition at all times.

(e) Whenever a motor vehicle is being driven on a highway during hours of darkness, the driver shall use a beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance ahead except that the driver, when approaching

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an oncoming vehicle within 500 feet, shall dim, depress, or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the driver of the other vehicle.

(f) Whenever the driver of a vehicle equipped with multiple beam headlights approaches or follows another vehicle within 500 feet to the rear, the driver shall dim, depress, or tilt headlights on the vehicle so that the glaring rays are not reflected into the eyes of the driver of the other vehicle.

A failure to comply with any of these statutes is negligence.

COMMENT

The instruction and comment were originally published in 1962. The instruction was updated in 2008. The comment was updated in 1980 and reviewed without change in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction attempts to set forth the statutory requirements as to condition of headlights and the use of them for the ordinary passenger vehicle, under usual conditions. All of the requirements set forth above are not usually at issue in a given case. Therefore, the inappropriate paragraphs or parts of paragraphs should be stricken.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

The substance of paragraph (a) is from Wis. Stat. §§ 347.08, 347.09; paragraph (b) from § 347.10; paragraph (c) from §§ 347.06, 340.01(23); paragraph (d) from § 347.06(3); paragraph (e) from § 347.12(1)(a); paragraph (f) from § 347.12(1)(b).

If a vehicle is not operated in excess of 20 miles per hour at any time, headlights need only reveal persons or objects 75 feet ahead. Wis. Stat. § 347.10(4).

Different equipment is required or permissible for vehicles also equipped with adverse weather lamps, § 347.07; motorcycles or motor bicycles, §§ 347.09, 347.11; trucks or vehicles over 80 inches in width, § 347.16; highway maintenance vehicles, § 347.23; nonmotor vehicles, § 347.24; emergency vehicles and school buses, § 347.25. Also see provisions as to optional lighting equipment, § 347.26, and parked vehicles, § 347.27. When such other types of vehicles are in the case, the appropriate statute as to equipment and its use should be substituted or added.

In cases involving specialized commercial vehicles, orders of the Department of Transportation may have application to the issues.

In Zartner v. Scopp, 28 Wis.2d 205, 212, 137 N.W.2d 107 (1965), the court noted that the lighting of headlights has a warning function for approaching cars in addition to affording the driver greater visibility.

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1054 EQUIPMENT AND MAINTENANCE OF VEHICLES: BRAKES

Subdivision ___ of question ___ asks whether (driver) was negligent with respect to the (condition of the brakes on (his) (her) vehicle) (mechanical condition of (his) (her) vehicle).

The Wisconsin statutes provide that:

[Use the appropriate paragraph(s).]

(a) No person shall drive a motor vehicle upon a highway unless the motor vehicle is equipped with brakes adequate to control the movement of and to stop and hold the vehicle. The brakes must be capable of bringing the vehicle to a stop under normal conditions within 50 feet when traveling at a speed of 20 miles per hour.

(b) There shall be two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism will not leave the motor vehicle without operative brakes. One of the means of braking operation shall consist of a mechanical connection from the operating lever of the brake shoe or bands and this brake shall be capable of holding the vehicle on any grade on which it is driven, under all conditions of loading on a surface free from snow, ice, or loose material.

(c) The brakes shall be maintained in good working order at all times when the vehicle is used upon a public highway.

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If you are satisfied that the brakes on the vehicle driven by (driver) at the time of the collision did not comply with these statutory requirements, the (driver) was negligent.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1974. This instruction was revised in 2002 and 2008.

Wis. Stat. §§ 347.35 and 347.36.

Parts of the instruction that are not within the issues or proof should be stricken.

Where there is evidence of defective brakes, use of this instruction, rather than Wis JI-Civil 1052, Equipment and Maintenance of Vehicles: General Duty, is preferable. Capello v. Janeczko, 47 Wis.2d 76, 176 N.W.2d 395 (1970).

If there is an issue as to brake failure because of a faulty condition not known or discoverable by ordinary care, use paragraph 4 of Wis JI-Civil 1052, as a supplement to this instruction. See Walk v. Boudheim, 223 Wis. 514, 271 N.W. 27 (1937); 1955 Wis. L. Rev. 19.

Different statutory regulations apply to motor driven cycles, trailers, semitrailers, and towed vehicles. Wis. Stat. § 347.35(2) and (3).

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1055 LOOKOUT

A driver must use ordinary care to keep a careful lookout ahead and about him or her for the presence or movement of other vehicles, objects, or pedestrians that may be within or approaching the driver's course of travel. In addition, the driver has the duty [to use ordinary care] to lookout for the condition of the highway ahead and for traffic signs, markers, obstructions to vision, and other things that might warn of possible danger. The failure to use ordinary care to keep a careful lookout is negligence.

To satisfy this duty of lookout, the driver must use ordinary care to make observations from a point where the driver's observations would be effective to avoid the accident. Additionally, having made the observation, the driver must then exercise reasonable judgment in calculating the position or movement of persons, vehicles, or other objects.

[When approaching an intersection where a marked or unmarked crosswalk for pedestrians exists, the driver must maintain such a lookout as is reasonably necessary to avoid striking them (and to yield the right of way to pedestrians when they have the statutory right of way).]

[When hazards exist because of highway conditions, volume of traffic, obstructions to view, weather, visibility, or other conditions, care must be exercised consistent with the hazards.]

COMMENT

This instruction was initially approved in 1962. The instruction and comment were revised by the Committee in 1982, 1984, and 1997. The comment was updated in 1989. Editorial changes were made in 1992 to address gender references in the instruction.

Brown v. Travelers Indem. Co., 251 Wis. 188, 192, 28 N.W.2d 306 (1947); Hafemann v. Milwaukee Auto Ins. Co., 253 Wis. 540, 546, 34 N.W.2d 809, 812 (1948); Thieme v. Weyker, 205 Wis. 578, 580, 238 N.W. 389 (1931); Cunnien v. Superior Iron Works Co., 175 Wis. 172, 176, 184 N.W. 767 (1921). See also

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Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983). Where the alleged negligent lookout involves lookout to the rear, see Wis JI-Civil 1114 and 1355.

The duty of lookout has two aspects: namely, a duty of observation and a corollary duty to exercise reasonable judgment in calculating the position and movement of other persons, vehicles, and other objects. This dual aspect of the duty of lookout has been collectively referred to as "the requirement of efficient lookout." Gleason v. Gillihan, 32 Wis.2d 50, 55, 145 N.W.2d 90 (1966).

The requirement of efficient lookout was applied in Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492 (1957), wherein the court stated:

> Failure to properly evaluate what is seen is as much an element of lookout as not seeing the approaching vehicle at all.

Although the law does give the driver on a through highway a preference, the driver still has a duty of lookout. In Leckwee v. Gibson, 90 Wis.2d 275, 287, 280 N.W.2d 186 (1979), the court said:

> The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Having the right of way does not relieve one of the duty of watching the road for vehicles on the highway or entering thereon. (Citing Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163 (1959).)

See also Liles v. Employers Mut. Ins. of Wausau, 126 Wis.2d 492, 377 N.W.2d 214 (Ct. App. 1985).

The failure of a driver who does not see or become aware of danger in time to take effective steps to avoid an accident is negligent as to lookout, not management and control. Leckwee v. Gibson, supra at 291 n.7.

The claim of an existing emergency to negative acts of alleged negligence does not apply when the negligent conduct complained of is negligent lookout. Schmiedeck v. Gerard, 42 Wis.2d 135, 140, 166 N.W.2d 136 (1969).

The duty of lookout extends beyond the confines of the roadway being traveled. See Reshan v. Harvey, 63 Wis.2d 524, 530, 217 N.W.2d 302 (1974).

Wis. Stat. § 346.88 prohibits the obstruction of the driver's view by activities within the car or by covering of the glass.

The last two paragraphs can be added when facts presented at trial warrant their addition.

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1056 LOOKOUT: CAMOUFLAGE

A person who [claims to have] exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object is not negligent because of failure to see the object if the object is not seen because at least one of the factors of recognition (color, shape, texture, movement, position, or shadow) was not present causing the object to blend with its background.

You must decide whether the factor(s) of recognition claimed to be absent provide(s) a valid explanation for (party) who claims to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see the object.

COMMENT

The instruction and comment were originally published in 1963. The instruction was revised in 1997 and 2003. A spelling error was corrected in 2012. The comment was updated in 1980 and 1987 and was reviewed without change in 1989 and 2003.

This instruction is to be used in a case where there is no evidence of negligence as to speed.

Zoellner v. Kaiser, 237 Wis. 299, 296 N.W. 611 (1941); Pickett v. Travelers Indem. Co., 283 F.2d 837 (7th Cir. 1960); Gilberg v. Tisdale, 13 Wis.2d 249, 108 N.W.2d 515 (1961).

Although the camouflage instruction is typically involved only in cases involving nighttime motor vehicle accidents, "the instruction is proper anytime the party is accused of failure to see an object in plain sight, as long as there is adequate testimony excusing the failure on the ground that the object blends with its surroundings." Callan v. Peters Constr. Co., 94 Wis.2d 225, 236, 288 N.W.2d 146 (Ct. App. 1979). See also Suhaysik v. Milwaukee Cheese Co., 132 Wis.2d 289, 296-97, 392 N.W.2d 98 (Ct. App. 1986).

In Callan, the court defined six factors of recognition which influence perception of objects by the eye. The factors are:

1. Color
2. Shape
3. Texture
4. Movement
5. Position
6. Shadow

The court applied these factors to the law of camouflage in Wisconsin, stating:

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Applying the factors of recognition to the law of camouflage in Wisconsin, we hold that a person who claims to have exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object in plain sight, is not negligent because of failure to see an object in plain sight if the object is not seen because at least one of the factors of recognition was not present thereby causing the object to blend with its background, obscuring its presence and diminishing the reasonable prospect of its perception.

Obviously, the nighttime will present the most usual case for camouflage since factors of recognition are more apt to be absent than during the daytime. We cannot, however, restrict the camouflage instruction to the nighttime since we are convinced that at least one factor of recognition could be missing during a daytime observation, thereby causing a camouflage effect.

We further hold that it is a jury question whether the factors of recognition claimed to be absent provide a valid explanation for a person who professes to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see an object in plain sight. 94 Wis.2d at 240.

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1060 LOOKOUT: BACKING

[Insert appropriate paragraphs of Wis JI-Civil 1055, Lookout.]

A safety statute provides that the driver of a vehicle shall not back the vehicle unless the movement can be made with reasonable safety.

To comply with this statute, a driver must, before he or she backs the vehicle, use ordinary care to keep a careful lookout for the presence and location of other vehicles, objects, or pedestrians that may be approaching or within the driver's course of travel. In addition, the driver must exercise reasonable judgment in calculating the time required to reach a proper position on the highway (and the distance and speed of any vehicle seen by the driver to be approaching the driver=s course of travel).

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 2008. The comment was updated in 1980 and 2008.

Wis. Stat. § 346.87.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

As to calculation as a part of lookout, see Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498 (1957); Gleason v. Gillihan, 32 Wis.2d 50, 145 N.W.2d 90 (1966); Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966); Slattery v. Lofy, 45 Wis.2d 155, 172 N.W.2d 341 (1969).

In Slattery v. Lofy, supra, the court stated:

> The rule that a driver before entering an arterial highway must not only exercise a proper lookout but also must make a reasonable judgment or calculation as to the time it will take to enter and reach a proper position on the highway was inapplicable where the evidence established that the overtaking driver had reached a proper place on the highway more than 400 feet beyond the point he had entered. 45 Wis.2d at 159.

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1065 LOOKOUT: ENTERING OR CROSSING A THROUGH HIGHWAY

Because the law gives a preference to traffic on a through highway, a driver (entering upon) (crossing) a through highway as (name) was, with respect to lookout, has the duty to look sufficient distances to determine that a vehicle approaching on the through highway cannot reasonably be expected to interfere with the driver's (entering upon and taking a proper position on the through highway) (entering upon and turning left onto the through highway) (crossing the through highway) before the driver proceeds to do so.

In addition, the driver must use reasonable judgment in calculating the time required for (him) (her) to (enter and reach a proper position on the through highway) (cross the through highway) as well as the distance away and speed of any vehicle seen by (him) (her) to be approaching on the through highway. If the driver fails to use such reasonable judgment, the driver is negligent as to lookout.

COMMENT

This instruction was approved by the Committee in 1960 and revised in 2002.

This instruction, if used, should follow the first two paragraphs of Wis JI-Civil 1055, Lookout. The last clause relating to reasonable judgment in calculating the comparative distances and speeds of the two cars is based on Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498-99 (1957), where the court said, in reference to a driver entering a through highway from a private driveway, that "failure to properly evaluate what is seen is as much an element of lookout as not seeing the approaching vehicle at all." The Plog case was followed in Slattery v. Lofy, 45 Wis.2d 155, 159, 172 N.W.2d 341 (1969); Lundquist v. Western Casualty & Sur. Co., 30 Wis.2d 159, 163, 140 N.W.2d 241 (1965); Henschel v. Rural Mut. Casualty Ins. Co., 3 Wis.2d 34, 38, 87 N.W.2d 800, 802 (1958), and in Bowers v. Treuthardt, 5 Wis.2d 271, 275, 92 N.W.2d 878, 881 (1958).

The law does give the driver on a through highway a preference; however, it is not absolute. Leckwee v. Gibson, 90 Wis.2d 275, 286, 280 N.W.2d 186 (1979). The operator of the vehicle having the right of way on the arterial must still maintain a proper lookout. Leckwee, supra; Schmiedeck v. Gerard, 42 Wis.2d 135, 139, 166 N.W.2d 136 (1969).

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A driver, who stops at an intersection and finds his vision obstructed, must move into a position where he can efficiently observe traffic crossing his path, stop again, and make an effective observation in either direction. Failure to exercise this caution constitutes negligent lookout. Bey v. Transport Indem. Co., 23 Wis.2d 182, 127 N.W.2d 251 (1964).

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1070 LOOKOUT: FAILURE TO SEE OBJECT IN PLAIN SIGHT

A person who has the duty of keeping a lookout must look with such attention and care as to see what is in plain sight. [If a person looks and does not see what is in plain sight, the person did not keep a proper lookout, and the person is just as negligent as if the person did not look at all.]

[The duty to look means to look efficiently. A person who looks and fails to see what is in plain sight is in precisely the position he or she would be in if he or she did not look at all.]

COMMENT

The instruction and comment were originally published in 1960 and revised in 1984. The comment 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.

Weber v. Mayer, 266 Wis. 241, 255-56, 63 N.W.2d 318, 325-26 (1954); Lind v. Lund, 266 Wis. 232, 236, 63 N.W.2d 313, 315 (1954); Lake to Lake Dairy Coop. v. Andrews, 264 Wis. 170, 173, 58 N.W.2d 685 (1953); Pettera v. Collins, 203 Wis. 81, 83, 233 N.W. 545, 546 (1930); Mertens v. Lake Shore Yellow Cab & Transfer Co., 195 Wis. 646, 648, 218 N.W. 85 (1928); Grutzner v. Kruse, 87 Wis.2d 38, 41, 273 N.W.2d 373 (Ct. App. 1978).

This instruction is used, as the subtitle indicates, where the evidence shows that a party failed to see what was in plain sight. Westfall v. Kottke, 110 Wis.2d 86, 110, 328 N.W.2d 481 (1983).

In Leckwee v. Gibson, 90 Wis.2d 275, 290, 280 N.W.2d 186 (1979), the court stated with respect to lookout:

> The duty to look means to look efficiently. Gibson was negligent as to lookout in failing to see the vehicle approaching the intersection which he was attempting to enter and has concealed that fact. . . . A driver approaching a through highway on a nonarterial street must not only physically stop his car for the arterial, he also has the duty not to proceed into the intersection until it is safe to do so.

See Schmidt v. Jansen, 247 Wis. 648, 20 N.W.2d 542 (1945); Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954); Magin v. Bemis, 17 Wis.2d 192, 199, 116 N.W.2d 129 (1962); and Schlueter v. Grady, 20 Wis.2d 546, 555, 123 N.W.2d 458 (1963).

Looking and not seeing what is in plain sight is as negligent with respect to lookout as not seeing at all. Westfall v. Kottke, supra at 110. Grutzner v. Kruse, supra.

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1075 LOOKOUT: GUEST

A guest (passenger) in an automobile has a duty to exercise ordinary care for his or her own safety. This duty requires a guest to exercise ordinary care in maintaining a proper lookout to warn the driver of any danger of which the guest has reason to believe the driver may not be aware.

A guest (passenger), however, is not bound to maintain the same degree of diligence in keeping a lookout as is required of the driver of the car, because a passenger does not have the responsibility of operating and controlling the automobile. However, the fact that the passenger is not in charge of operating the automobile does not relieve the passenger from all duty to use care for his or her own safety. The passenger's duty with respect to lookout is to exercise that care and caution which a person of ordinary intelligence, care, and prudence would use while riding in the same passenger seat of the automobile as the plaintiff and under the same or similar circumstances as exist in this case.

COMMENT

The instruction and comment were revised by the Committee in 1982. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. An editorial correction was made in 1996.

Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140, 119 N.W.2d 393 (1962); Davis v. Allstate Ins. Co., 55 Wis.2d 56, 197 N.W.2d 734 (1972); Sulkowski v. Schaefer, 31 Wis.2d 600, 143 N.W.2d 120 (1966); Baker v. Herman Mut. Ins. Co., 17 Wis.2d 597, 606, 117 N.W.2d 725 (1962).

Romberg v. Nelson, 8 Wis.2d 174, 178, 98 N.W.2d 379, 381 (1959), quoting from Vandenack v. Crosby, 275 Wis. 421, 434, 82 N.W.2d 307, 313 (1957), and Tomberlin v. Chicago, St. P., M. & O. Ry., 208 Wis. 30, 33, 243 N.W. 208 (1932), recognizes that the duty of the passenger as to lookout is not the same as the duty upon the driver and that the negligence of the passenger depends upon the circumstances of each case and hence is generally a jury question.

Teas v. Eisenlord, 215 Wis. 455, 460, 253 N.W. 795, 797 (1934), states that if a guest saw or should have seen danger and it was apparent to the guest that the driver intended to do nothing to avoid danger, the guest has an absolute duty to warn. See also St. Paul Fire & Marine Ins. Co. v. Burchard, 25 Wis.2d 288, 294, 130 N.W.2d 866 (1964).

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A passenger has a right to assume that a driver will obey a stop sign. Lewis v. Leiterman, 4 Wis.2d 592, 597, 91 N.W.2d 89, 92 (1958). Also see Le Mere v. Le Mere, 6 Wis.2d 58, 61, 94 N.W.2d 166, 168 (1959).

Goehmann v. National Biscuit Co., 204 Wis. 427, 430, 235 N.W. 792, 793 (1931), states that a guest has no duty with reference to the momentary management and control of the car by the driver. Lampertius v. Chmielewski, 6 Wis.2d 555, 559, 95 N.W.2d 435, 436-37 (1959), quoting from Vandenack v. Crosby, supra, points out that a guest is held to a lesser degree of care than a driver and a back seat guest is held to a lesser degree than a front seat guest.

An automobile passenger is not held to the same degree of care with respect to lookout as is the driver. Sulkowski, supra at 604; Baker v. Herman Mut. Ins. Co., 17 Wis.2d 597, 606, 117 N.W.2d 725 (1962). A passenger's failure to see developing danger does not always raise a jury question as to negligence with respect to lookout. See Sulkowski, supra, and Lampertius, supra.

The guest is ordinarily chargeable only with "passive" negligence, i.e., negligence causal not of the collision but of the guest's injuries. Hoeft v. Friedel, 70 Wis.2d 1022, 1037, 235 N.W.2d 918 (1975). In Hoeft, however, the passenger acted as an instructor to an inexperienced driver.

The court said, in such a case, the issue of "active" negligence arises and the jury must be instructed as to the passenger's duties which extend beyond the mere obligation to exercise ordinary care for his or her safety. The instructor has the duty to use reasonable care to prevent injuries to others from the operation of the automobile. Liability of the instructor in Hoeft was based not upon an imputation of the driver's negligence to the instructor but upon the failure of the instructor in the exercise of his independent obligation of reasonable care. The trial court erred by failing to instruct the jury on the independent duty of the instructor to supervise and control the automobile.

For a discussion of the distinction between "active" negligence and "passive" negligence, see Comment to Wis JI-Civil 1047.1.

For formulation of special verdict questions in this area, see Theisen, supra at 104-08.

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1076 LOOKOUT: GUEST'S DUTY TO WARN

If a guest sees a situation ahead on the highway that presents a likely danger to safety, and if the guest notices or it is apparent to the guest that the driver does not see it or is oblivious to it, or if the driver sees it and takes no precaution or measure to avoid the danger, then it becomes the duty of the guest to warn the driver of the danger. Failure on the part of the guest to warn the host under such circumstances constitutes a failure to exercise ordinary care for the guest's safety.

COMMENT

This instruction was approved in 1974. The comment 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 supplements Wis JI-Civil 1075 and is intended for use in conjunction with or in addition to 1075 when circumstances require a positive duty of a guest to warn. Teas v. Eisenlord, 215 Wis. 455, 253 N.W. 795 (1934); Howe v. Corry, 172 Wis. 537, 179 N.W. 791 (1920); Wappler v. Schench, 178 Wis. 532, 190 N.W. 555 (1922).

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1080 LOOKOUT: LIMITED DUTY ON PRIVATE PROPERTY

The duty of a driver of a motor vehicle operating a vehicle on private property is not the same as it is on public highways; the obligation to look becomes operative when the driver knows, or in the exercise of ordinary care should know, that someone or something might be affected by the driver's movement. If it appears probable, or in the exercise of ordinary care should appear probable, that pedestrians, vehicles, or other objects may be affected by the driver's movement, then the driver must exercise ordinary care to keep a proper lookout to enable the driver to prevent a collision or injury.

COMMENT

This instruction was approved by the Committee in 1966. 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 from Heikkila v. Standard Oil Co., 193 Wis. 69, 71, 213 N.W. 652, 653 (1927), which was last approved in Culton v. Van Beek, 256 Wis. 217, 221, 40 N.W.2d 374, 376 (1949). The Culton case also cites Hartzheim v. Smith, 238 Wis. 55, 60, 298 N.W. 196, 198 (1941), and Patterson v. Edgerton Sand & Gravel Co., 227 Wis. 11, 18, 277 N.W. 636, 639 (1938). See also Czarnetzky v. Booth, 210 Wis. 536, 542, 246 N.W. 574, 577 (1933).

The common-law rules of negligence involving parking or management and control of automobiles apply to a private parking lot. Olsen v. Milwaukee Waste Paper Co., 36 Wis.2d 1, 5, 153 N.W.2d 45 (1967). A private road or parking lot is not a "highway" for purposes of the Motor Vehicle Code. Wis. Stat. § 340.01(22) and (46).

The instruction should be phrased in terms of "probability" of harm. In Olsen v. Milwaukee Waste Paper Co., supra at 5, the court said:

> Foreseeability of a possibility of harm is not enough to establish negligence. It is the reasonable probability that harm might ensue which is the basis of foreseeability as an element of negligence.

Also see Wis JI-Civil 1045, Driver's Duty When Children Are Present.

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1090 DRIVER ON ARTERIAL APPROACHING INTERSECTION: LOOKOUT; RIGHT OF WAY; FLASHING YELLOW SIGNAL

While a driver upon a through highway may assume (until the contrary becomes apparent or in the exercise of ordinary care should be apparent) that other users of the highway will obey the statutory rules of the road to stop and yield the right of way, a driver must, nevertheless, use ordinary care to maintain a reasonably careful lookout for vehicles entering upon such through highway so as to enable the driver to take reasonable precautions to avoid injury to the driver or others.

The user of a through highway, having the right to assume the driver on an intersecting highway will stop and yield the right of way, is not bound to so reduce speed at each intersection as to be able to stop at any time it becomes apparent that the other driver is not stopping. Such a requirement would defeat the purpose of the through highway.

When the operator of the vehicle on a through highway observes that the operator of the vehicle on an intersecting highway is not going to yield the right of way, then the driver on the through highway is under a duty to exercise reasonable care to avoid collision or injury, even though the other driver is in the wrong in his or her course of conduct.

(A flashing yellow traffic signal is intended to warn the driver on the through highway of the presence of an intersecting highway which carries an unusual amount of traffic. While the driver on the through highway is not required to stop for such a signal, the driver, to measure up to the standard of ordinary care, must use a higher degree of vigilance before entering upon and crossing such an intersection than would be required at an intersection at which there was no flashing yellow signal.)

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COMMENT

This instruction and comment were approved in 1974. The comment 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.

See Wis JI-Civil 1030, Right to Assume Due Care by Highway Users, and Wis JI-Civil 1191, Duty of Driver Entering Intersection with Green Light in his Favor.

As to the duty of the driver on the arterial highway to the driver on the nonarterial highway, see generally Lundquist v. Western Casualty & Sur. Co., 30 Wis.2d 159, 163, 140 N.W.2d 241 (1966); Schlueter v. Grady, 20 Wis.2d 546, 553-55, 123 N.W.2d 458 (1963); Gaspord v. Hecht, 13 Wis.2d 83, 87, 108 N.W.2d 137 (1961). The motorist on the arterial highway may have to stop even though he has the right of way. Seitz v. Seitz, 35 Wis.2d 287, 298, 151 N.W.2d 86 (1967).

The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163, 166 (1959); Crye v. Mueller, 7 Wis.2d 182, 189, 96 N.W.2d 520 (1959); Gibson v. Streeter, 241 Wis. 600, 602, 6 N.W.2d 662, 663 (1943).

As to the duty of the driver on a through highway when the driver observes that the driver of the vehicle on an intersecting highway is not going to yield the right of way, see Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 21, 119 N.W.2d 359 (1963); Lawrence v. E. W. Wylie Co., 267 Wis. 239, 244, 64 N.W. 820 (1954); Roeske v. Schmitt, 266 Wis. 557, 569, 64 N.W.2d 394 (1954).

A driver approaching a flashing yellow light or an arterial highway must exercise a higher degree of caution than is required of an arterial driver approaching an intersection without such signal. Ide v. Wamser, 22 Wis.2d 325, 332, 126 N.W.2d 59 (1964).

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1095 LOOKOUT: PEDESTRIAN

A pedestrian, who enters and crosses a street or highway on a crosswalk, must use ordinary care to observe timely the presence, location, and movement of vehicles that may be approaching.

[When a pedestrian crosses at a place other than a crosswalk, it is the pedestrian's duty to maintain a lookout reasonably necessary to enable the pedestrian to yield the right of way to vehicles.]

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1987 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on the duty of the pedestrian to yield the right of way. Wis. Stat. § 346.25. Schlewitz v. London & Lancashire Indem. Co., 255 Wis. 296, 299, 38 N.W.2d 700 (1949); Engstrum v. Sentinel Co., 221 Wis. 577, 580-81, 267 N.W. 536 (1936).

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1096 DUTY TO SOUND HORN

A driver must use ordinary care to sound the driver's horn when a careful driver would have sounded his or her horn to warn other users of the highway of the approach of danger.

COMMENT

This instruction and comment were approved in 1974. Editorial changes were made in 1992 to address gender references in the instruction. The instruction was revised in 2008.

Wis. Stat. § 347.38.

This instruction is appropriate in the driver-pedestrian, bicycle rider situation. While there are no Wisconsin decisions precisely in point, we believe that the instruction properly could be given in any case where the sounding of a horn would have alerted another driver of the imminence of danger. It is not designed to cover the passing-driver accident. For this, see Wis JI-Civil 1144 and Wis. Stat. § 346.07.

See also Cook v. Wisconsin Tel. Co., 263 Wis. 56, 56 N.W.2d 494 (1952); Straub v. Schadeberg, 243 Wis. 257, 10 N.W.2d 146 (1943); Patterson v. Edgerton Sand & Gravel Co., 227 Wis .11, 277 N.W. 636 (1938); Leckwe v. Ritter, 207 Wis. 333, 241 N.W. 339 (1932); Hanes v. Hermsen, 205 Wis. 16, 236 N.W. 646 (1931); Vanden Heuvel v. Schultz, 182 Wis .512, 197 N.W. 186 (1924); Tombal v. Farmers Ins. Exch., 62 Wis.2d 64, 214 N.W.2d 291 (1974).

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1105 MANAGEMENT AND CONTROL

A driver must use ordinary care to keep his or her vehicle under proper management and control so that when danger appears, the driver may stop the vehicle, reduce speed, change course, or take other proper means to avoid injury or damage.

[If a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control.]

COMMENT

This instruction and comment were approved in 1975 and revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. In 1995, the cross-reference to JI-Civil 1105A was added.

Simon v. Van de Hey, 269 Wis. 50, 54-55, 68 N.W.2d 529 (1955). See also Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000).

The duty is not to have the vehicle under control as to avoid accident but to use ordinary care to that end. Beer v. Strauf, 236 Wis. 597, 600-01, 296 N.W. 68 (1941); Schulz v. General Casualty Co., 233 Wis. 118, 126, 288 N.W. 803 (1939).

The second paragraph should be given when the court feels that the evidence raises the issue as to whether the party did or did not see the other car in time to take some effective action to avoid the collision.

For emergency situations, see JI-Civil 1105A.

Stopping is a method by which a driver can manage and control a vehicle. Totsky, supra.

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1105A MANAGEMENT AND CONTROL C EMERGENCY

When you consider negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by (his) (her) negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if (he) (she) makes a choice of action or inaction that an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that (his) (her) choice was not the best or safest course.

This rule does not apply to a person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless (he) (she) is without fault in creating the emergency.

You should consider this emergency rule only when you determine whether (name) was negligent as to management and control.

COMMENT

This instruction was approved in 1995 and revised in 2008 and 2015. An earlier version of this instruction was previously numbered Wis JI-Civil 1015. The comment was updated in 1999, 2009, and 2016.

The emergency doctrine is a rule which precludes a finding of negligence when the person is confronted with an emergency. For the doctrine to apply:

(1) the party seeking its benefits must be free from the negligence which contributed to the creation of the emergency;
(2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action;
(3) the element of negligence inquired into must concern management and control.

Edeler v. O'Brien, 38 Wis.2d 691, 697, 698, 158 N.W.2d 301 (1968); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582, 583, 164 N.W.2d 495 (1969); Leckwee v. Gibson, 90 Wis.2d 275, 288, 280 N.W.2d 186 (1979).

In Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000), the trial court decided that the emergency doctrine can never absolve a party of a violation of a safety statute. The court of appeals and supreme court disagreed.

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The supreme court said the emergency doctrine can apply to the violation of a safety statute, excusing what otherwise would be negligence per se, but only in situations where the three required tests of emergency are met.

The "emergency doctrine" was at issue in Leckwee v. Gibson, supra, wherein the court, discussed prevailing Wisconsin law on the doctrine:

> The plaintiff argues that he could not properly be found negligent as to management and control, invoking the principles of the emergency doctrine. The emergency doctrine, recently summarized in Tombal v. Farmers Ins Exchange, supra, 62 Wis.2d at 70, states:
>
> The doctrine, as stated in Papacosta v. Papacosta, 2 Wis.2d 175, 85 N.W.2d 790 (1957), is that a person faced with an emergency which his conduct did not create or help to create is not guilty of negligence in the methods he chose, or failed to choose, to avoid the threatened disaster if he is compelled to act instantly without time for reflection. Seif v. Turowski, 49 Wis.2d 15, 23 181 N.W.2d 388 (1970).

See also Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975).

To determine whether the emergency doctrine should be given or whether in certain cases it should be given as to one driver but not as to the other, see Gage v. Seal, 36 Wis.2d 661, 154 N.W.2d 354 (1967); Geis v. Hirth, 32 Wis.2d 580, 146 N.W.2d 459 (1966); Metz v. Rath, 275 Wis. 12, 18-19, 81 N.W.2d 34 (1957); Ackley v. Farmers Mut. Auto Ins. Co., 273 Wis. 422, 425-26, 78 N.W.2d 744 (1956); Misiewicz v. Waters, supra; Krause v. Milwaukee Mut. Ins. Co., 44 Wis.2d 590, 604-06, 172 N.W.2d 181 (1969); Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 405, 94 N.W.2d 577 (1959).

Since this instruction relieves a driver who is confronted with an emergency from being labeled negligent in connection with his manner of driving, i.e., his or her management and control, it should not be given unless that driver's management and control are at issue. Schmit v. Sekach, 29 Wis.2d 281, 289, 139 N.W.2d 88 (1966); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582-84, 164 N.W.2d 495 (1969), see also Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The emergency doctrine is directed to the question of negligence rather than the question of causation. Kuentzel v. State Farm Mut. Auto Ins. Co., 12 Wis.2d 72, 76, 106 N.W.2d 324 (1960).

In Garceau v. Bunnel, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988), the court of appeals said that the testimony did not support the conclusion that an insect striking the driver of a vehicle created an emergency situation. However, in a footnote, the court recognized there may be situations in which an insect sting or bite might create an emergency. See 148 Wis.2d at 154 n. 2.

Use in Non-Motor Vehicle Cases. For the adaptation of this instruction to a case not involving a motor vehicle, see McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973); see also Kelly v. Berg, 2015 WI App 69, 365 Wis.2d 83, 870 N.W.2d 481.

Rescue Rule. For a discussion of both the emergency doctrine and the rescue rule, see Kelly v. Berg, supra.

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1107 RACING

A safety statute provides that no driver of a motor vehicle shall participate in a race upon any highway.

A "race" is an intentional contest of speed or acceleration between two or more vehicles.

In determining whether (the drivers of the vehicles involved) were participating in a race, you should consider the conduct of the drivers as a whole, including speed of the vehicles, the relative position of the vehicles on the highway and with respect to each other, and whether there was an intention by them to compete.

Failure to comply with this safety statute is negligence.

COMMENT

This instruction and comment were approved by the Committee in 1981 and revised in 2008.

The first paragraph refers to Wis. Stat. § 346.94(2).

Madison v. Geier, 27 Wis.2d 687, 135 N.W.2d 761 (1964).

In a race, the participants share equally the responsibility for damage done by any participant. Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966).

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1112 OPERATION OF AUTOMOBILE FOLLOWING ANOTHER

The driver of a motor vehicle should not follow another vehicle more closely than is reasonable and prudent.

In determining whether a driver was following the vehicle ahead more closely than was reasonable and prudent, you should consider the speed and location of both vehicles, the amount of traffic, the condition of the highway, and the visibility at the time.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1984. The instruction was reviewed without change in 2008. The comment was updated in 1989. An editorial correction was made in 2015 to replace the term, "guilty of."

Wis. Stat. § 346.14(1).

The second paragraph is taken substantially from Hibner v. Lindauer, 18 Wis.2d 451, 456, 118 N.W.2d 873 (1963). See also Northland Ins. Co. v. Avis Rent-a-Car, 62 Wis.2d 643, 215 N.W.2d 437 (1974).

The trial court committed no error in instructing the jury in regard to negligence as to lookout and refusing to instruct on following too closely, where the evidence revealed that the factor resulting in the impact was failure to keep a proper and reasonably constant lookout, and there was no evidence from which one could have concluded that the truck driver could not have stopped in time or avoided the collision had he not been negligent as to lookout. Milwaukee & Suburban Transp. Corp. v. Royal Transit Co., 29 Wis.2d 620, 139 N.W.2d 595 (1966).

In Millonig v. Bakken, 112 Wis.2d 445, 458n.2, 334 N.W.2d 80 (1983), the plaintiff unsuccessfully argued that, under the facts presented at trial, the jury should have been given Wis JI-Civil 1055, Lookout, and Wis JI-Civil 1285, Speed, instead of Wis JI-Civil 1112.

In Northland Ins. Co. v. Avis Rent-A-Car, supra at 649, the court noted that Wis. Stat. § 346.14(1), "the tailgating statute," protects not only the preceding vehicle and its occupants but also all other cars and persons who are causally affected by the negligence of tailgating.

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The court, in Northland Ins. Co. v. Avis Rent-A-Car, also addressed itself to multiple rear-end collisions, stating:

> We do not think that because one person is negligent in his driving that other people on the highway are justified in driving negligently. We agree with Mr. Justice Fowler in his dissent to the Bourestom Case, 231 Wis. 666, 285 N.W. 426 (1934), when he said, page 676:
>
> The purpose of holding a trailing driver to a proper distance is to keep him in position to stop or so control his car as to prevent him from doing injury because of the action of the car ahead, whatever be the cause of that action, and regardless of whether that action results from something being in the road ahead of the preceding car as a result of negligence of a third person or independent of negligence of anybody. 62 Wis.2d at 648.

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1113 DUTY OF PRECEDING DRIVER: SLOWING OR STOPPING: SIGNALLING

The statutes provide that no person may stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal by brake lights or by hand to the driver of any vehicle immediately to the rear when there is opportunity to give a signal.

It is for you to determine whether (driver of the front car) indicated by proper signal (his) (her) intention to stop or suddenly decrease speed, and if not, then whether (driver of the front car) had an opportunity to do so.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 346.34(2), 346.35.

A driver who gives a timely signal of stopping by means of brake lights is not required to give a hand signal in addition. Johnson v. McDermott, 38 Wis.2d 185, 190, 137 N.W.2d 107 (1968); St. Clair v. McDonnell, 32 Wis.2d 469, 476, 145 N.W.2d 773 (1966); Thompson v. Nee, 12 Wis.2d 326, 328, 107 N.W.2d 150 (1961); Tesch v. Wisconsin Pub. Serv. Corp., 2 Wis.2d 131, 137, 85 N.W.2d 762 (1957); Wodill v. Sullivan, 270 Wis. 591, 598, 72 N.W.2d 396 (1955).

The duty of lookout to the rear of the preceding driver is dealt with in Wis JI-Civil 1114.

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1114 DUTY OF PRECEDING DRIVER TO FOLLOWING DRIVER: LOOKOUT

The driver of a vehicle who intends to deviate from (his) (her) course of travel, (suddenly stop) (or) (decrease speed) in such a manner that would create a hazard to vehicles following in a lawful manner must use ordinary care to make a lookout to the rear before making the movement. Otherwise, a driver owes no duty to the driver(s) of (a) (the) vehicle(s) behind (him) (her), except to use the road in the usual way, in keeping with the laws of the road.

Until a driver has been made aware of the car behind by signal or otherwise, the driver has a right to assume either that there is no other vehicle in close proximity to the rear or that being there, it is under such control as not to interfere with the free use of the road in front of and to the sides, in any lawful manner.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1980, 2002, and 2008. The comment was updated in 1989.

In Krainz v. Strle, 81 Wis.2d 26, 29, 259 N.W.2d 707 (1977). The court held that a driver of an automobile under some circumstances has the duty of making an observation to the rear to see if he or she can stop or slow down on a highway with safety. Bentzler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626 (1966); Diener v. Heritage Mut. Ins. Co., 37 Wis.2d 411, 155 N.W.2d 37 (1967).

This instruction should not be used when the driver of a front vehicle deviates from his or her lane of travel. Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983).

The court in Hillstead v. Smith, 44 Wis.2d 560, 568-69, 171 N.W.2d 315 (1969), clearly explained its retreat from the former principle regarding the duty of lookout to the rear:

> It is clear from Bentzler that it can no longer be said that a driver has no duty of lookout to the rear in all cases. In Bentzler, we took the position, following the dicta of Jacobson v. Greyhound Corp. (1965), 29 Wis.2d 55, 138 N.W.2d 133, that a duty to maintain a lookout to the rear clearly exists when a driver's position on the highway would be likely to constitute a hazard to drivers approaching from the rear

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> or when he was about to execute a maneuver which created a potential hazard to following traffic. In Diener v. Heritage Mut. Ins. Co. (1967), 37 Wis.2d 411, 155 N.W.2d 37, we required an efficient lookout to the rear, for the reason that lookout to the front was not preempted by circumstances that required the driver's attention and lookout ahead of him.

As to the duty of lookout of the preceding driver to the following driver when the preceding driver deviates or turns, see Wis JI-Civil 1354 and 1355.

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1115 PARKING: STOPPING: LEAVING VEHICLE OFF THE ROADWAY

A safety statute provides that the (parking,) (stopping,) (or) (standing) of a vehicle off the roadway is unlawful unless there is left an unobstructed width of at least 15 feet upon the roadway opposite the (parked) (stopped) (standing) vehicle for the free passage of other vehicles. A vehicle is off the roadway when it is upon the shoulder adjacent to the concrete or traveled portion of the highway.

The statute also provides that a standing vehicle must be left in a position that can be seen by drivers of other vehicles from a distance of 500 feet in each direction along the highway.

[If there is evidence that the vehicle was disabled, add Wis JI-Civil 1125 Parking; Stopping: Leaving Vehicles on the Roadway; Exceptions.]

COMMENT

This instruction and comment were approved in 1975 and revised in 2008.

Wis. Stat. § 346.51(1)(a) and 346.51(1)(b).

This instruction and the question covered by it are not to be given if the jury's answer to the question relating to negligence in stopping on the roadway is in the affirmative. The question should be given in the alternative to avoid duplication. Robinson v. Briggs Transp. Co., 272 Wis. 448, 453-58, 76 N.W.2d 294 (1956). It is prejudicial error to consider findings of negligence under § 346.51(1)(a) and (b) as cumulative to negligence under § 346.51(1). Guderyon v. Wisconsin Tel. Co., 240 Wis. 215, 229, 2 N.W.2d 242 (1942).

If there is an issue as to lighting equipment or display of warning devices, add an instruction based on Wis. Stat. § 347.27 or § 347.29. Robinson v. Briggs Transp. Co., supra at 456-61; Swanson v. Maryland Casualty Co., 266 Wis. 357, 364-65, 63 N.W.2d 743 (1954).

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1120 PARKING: STOPPING: LEAVING VEHICLE ON THE ROADWAY

A safety statute provides that no person shall (park) (stop) (or) (leave standing) any vehicle, whether attended or unattended, upon the roadway of any highway outside a business or residential district when it is practical to park, stop or leave standing the vehicle off the roadway. Roadway means that portion of a highway [between the regularly established curb lines or that portion] which is improved, designed, or ordinarily used for vehicular travel, excluding the berm or shoulder. [On a divided highway, the term refers to each roadway separately but not to all roadways collectively.]

In determining whether it was practical to move the vehicle to, and leave it standing at, a place off the roadway, you may consider the physical conditions adjacent to the place where the vehicle was parked, stopped, or left standing, any other possible parking spaces, in any direction, to which the vehicle might reasonably have been taken, as well as the reason for stopping.

[If there is evidence of disability, add Wis JI-Civil 1125.]

COMMENT

This instruction and comment were approved in 1975 and updated in 2008.

Wis. Stat. § 346.51(1); roadway, § 340.01(54). Exceptions to this statute are provided in Wis. Stat. § 346.51(a) and (b).

La Fave v. Lemke, 3 Wis.2d 502, 506, 89 N.W.2d 312 (1958); Puccio v. Mathewson, 260 Wis. 258, 267, 50 N.W.2d 390 (1951); Kline v. Johanneson, 249 Wis. 316, 319, 24 N.W.2d 595 (1946).

If there is an issue as to lighting equipment or display of warning devices, add an instruction based on Wis. Stat. § 347.27 or § 347.29. Robinson v. Briggs Transp. Co., 272 Wis. 448, 456-61, 76 N.W.2d 294, 298-300 (1956); Swanson v. Maryland Casualty Co., 266 Wis. 357, 364-65, 63 N.W.2d 743, 746-47 (1954).

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The graded, but unfinished bed of a highway lane under construction is not a "roadway" under Wis. Stat. § 340.01(54). Burg v. Cincinnati Cas. Ins. Co., 2002 WI 76, 254 Wis.2d 36, 645 N.W.2d 880.

Legislative Council Note, 1977: The definitions of "park and parking" in sub. (42m) and "stand or standing" in (59m) are derived from ss. 1–141 and 1–168, respectively, of the Uniform Vehicle Code (1968 revised edition; suppl. I, 1972). The principal difference between "parking" and "standing," as defined, is that "standing" infers a temporary cessation of movement other than for purposes of and while actually engaged in receiving or discharging passengers while "parking" infers a protracted cessation of movement for purposes other than temporarily halting to load or unload property or passengers. See the note to s. 349.13 (1) for further explanation. [Bill 465-A]

"Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term "roadway" refers to each roadway separately but not to all such roadways collectively. Wis. Stat. § 340.01(54).

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1125 PARKING: STOPPING: LEAVING VEHICLE ON OR OFF THE ROADWAY: EXCEPTION TO PROHIBITION

A statute further provides that the prohibition against (parking) (stopping) (leaving) a vehicle (on the roadway) (off the roadway) does not apply when the vehicle becomes disabled while (on the roadway) (off the roadway) in such a manner (to such an extent) that it is impossible to avoid stopping or temporarily leaving the vehicle in the prohibited place. A vehicle is disabled when the (parking) (stopping) (leaving) of the vehicle (on the roadway) (off the roadway) cannot reasonably be avoided, and it is impossible to move the vehicle under the existing conditions and circumstances. A vehicle is left temporarily when it is stopped for such period of time only as is necessary to permit the driver to take reasonable steps to remove the vehicle.

COMMENT

The instruction and comment were originally published in 1960 and revised in 2008. The comment was updated in 1980.

Wis. Stat. § 346.50(1). This instruction deals with one of the three exceptions in Wis. Stat. § 346.50.

Henthorn v. M.G.C. Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759, 764 (1957); Western Casualty & Sur. Co. v. Dairyland Mut. Ins. Co., 273 Wis. 349, 355-56, 77 N.W.2d 599, 602 (1956); Woodcock v. Home Mut. Casualty Co., 253 Wis. 178, 185, 33 N.W.2d 202, 204-05 (1948). See also Andraski v. Gormley, 3 Wis.2d 149, 87 N.W.2d 818 (1958), and "Law of Negligence Relating to Parking Regulations," 1955 Wis. L. Rev. 1955.

Where disability cannot be found as a matter of law, and where there is a conflict for the jury as to disability, this instruction is to be given along with Wis JI-Civil 1115, Parking: Stopping: Leaving Vehicle off the Roadway, or 1120, Parking: Stopping: Leaving Vehicle on the Roadway.

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1132 STOPPED SCHOOL BUS: POSITION ON HIGHWAY

A school bus when loading or unloading passengers must be stopped with its flashing red warning lights activated and must be stopped on the traveled portion of the highway as near as practicable to the right-hand edge of the lane farthest to the right which is improved, designed, or ordinarily used for vehicular travel excluding the berm or shoulder.

While the law provides that a school bus while loading or unloading with flashing red warning lights activated must stop on the traveled portion of the highway, nevertheless the law requires the school bus driver to use ordinary care to determine whether the stop can be safely made on the paved or traveled portion of the roadway of the highway. The driver is required to take into account such factors as weather, atmospheric conditions of visibility, conditions of the surface of the highway, the topography and the course of the highway, the visibility of the bus to oncoming traffic, and any and all other conditions and circumstances as would be taken into account by a reasonable school bus driver acting under the same or similar circumstances.

COMMENT

This instruction and comment were approved in 1977 and revised in 1990, 1992, and 2008.

Wis. Adm. Code Trans. § 300.16(8); Wis. Stat. § 346.48(2); Alden v. Matz, 8 Wis.2d 485, 477, 488, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 514, 34 N.W.2d 803 (1948).

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1133 SCHOOL BUS: FLASHING RED WARNING LIGHTS

A Department of Transportation regulation provides that a school bus shall be equipped with 2 red warning lamps at the rear, and 2 red warning lamps at the front of the bus which shall be controlled by a manually (actuated) activated switch, which lamps shall flash alternately to inform other users of the highway that the vehicle is stopped or about to stop on the highway to take on or discharge school children. These red warning lamps shall be visible from a distance of at least 500 feet to the front and to the rear of the bus in bright sunlight. There shall be a visible or audible means of giving clear or unmistakable indication to the bus driver when the signalling system is turned on.

A safety statute provides that the operator of a school bus equipped with flashing red warning lights shall activate the lights at least 100 feet before stopping to load or unload pupils or other authorized passengers and shall not extinguish the lights until loading or unloading is completed and persons who must cross the highway are safely across.

A failure to comply with the regulation and safety statute is negligence.

COMMENT

This instruction and comment were approved in 1977 and revised in 2008. The comment was updated in 1990.

Wis. Adm. Code Trans § 300.16(6); Wis. Stat. § 346.48(1); Alden v. Matz, 8 Wis.2d 485, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 34 N.W.2d 803 (1948).

If the bus was stopped in a special school bus loading area where the bus is entirely off of the traveled portion of the highway, or it is stopped in a residence or business district when passengers are to be loaded or unloaded where a sidewalk and curb are laid on both sides of the road, no flashing red warning lights are required to be activated as provided in Wis. Stat. § 346.48(2)(b)1, 2. It may be that if the bus were so stopped in the excepted places, some consideration might be given to instructing on the absence of the requirement of activating the flashing lights just to negative any possibility that some juror would come to the conclusion that the driver was negligent because he or she wasn't displaying his or her flashing lights.

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1135 POSITION ON HIGHWAY ON MEETING AND PASSING

A safety statute provides that upon all roadways of sufficient width, the operator of a vehicle shall drive on the right half of the roadway (and in the right-hand lane of a 3-lane highway) (except when _____).

[Define "roadway" appropriately to the facts of the case.]

Wisconsin statutes further provide that operators of vehicles proceeding in opposite directions shall pass each other to the right, and, upon roadways having width for not more than one line of traffic in each direction, each operator shall give to the other at least one-half of the main traveled portion of the roadway as nearly as possible.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. §§ 346.05, and 346.06.

Wis. Stat. § 346.05 contains exceptions as to the requirements of driving in the right lane or on the right side. See Wis JI-Civil 1140.

The term "roadway" is defined in Wis. Stat. § 340.01(54) and Wis JI-Civil 1160.

The presence of a vehicle on the left side of a highway may present a jury question as to negligence, Booth v. Frankenstein, 209 Wis. 362, 366, 246 N.W. 191 (1932), or may be negligence as a matter of law, Seligman v. Hammond, 205 Wis. 199, 202, 236 N.W. 115 (1931).

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1140 POSITION ON HIGHWAY ON MEETING AND PASSING; VIOLATION EXCUSED

Driving a motor vehicle on the wrong side of the roadway at the time of (or immediately before) a collision is negligence unless there was an explanation satisfactory to you that the driver was free from negligence in being on the wrong side of the roadway.

(Falling asleep at the wheel is not a satisfactory explanation. It is negligence itself.)

(If a driver is on the wrong side of the roadway as he or she approaches an oncoming car at such time and distance from the point of collision that the oncoming driver would be obliged to take some precaution to avoid an accident by reducing speed, stopping, or changing course of travel, then the driver is negligent with respect to yielding one-half of the travelable portion of the roadway, even though the driver may have returned to the proper side of the roadway before the impact.)

[Any of the following paragraphs may be used where appropriate:

(a) A driver is not negligent in failing to operate a vehicle on the right-hand side of the roadway when it is impossible to know where the right-hand side of the roadway is by reason of circumstances which occur suddenly and without warning and over which the driver had no control and for which the driver was in no way responsible, such as (glaring headlights of an oncoming automobile) (a sudden cloud of dust).

(b) A driver is not negligent in failing to operate a vehicle upon the right side of the roadway when it is impossible to do so because the vehicle, suddenly and without warning, due to mechanical failure such as (a blow-out) (other mechanical failure) caused the

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driver to lose control. This rule does not apply if the driver knew or in the exercise of ordinary care should have known of the faulty mechanical condition prior to the accident.

(c) (Skidding; see Wis JI-Civil 1280.)]

COMMENT

This instruction was approved in 1977 and revised in 2002 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

See Wis. Stat. §§ 346.05 and 346.06 and notes to these sections in Wis. Stat. Ann. The term "roadway" is defined in Wis. Stat. § 340.01(54).

Position on highway is covered in Wis JI-Civil 1135, Position on Highway on Meeting and Passing, parts of which should be used here.

Mere operation of a motor vehicle on the wrong side of highway is prima facie negligence, a genuine inference of fact and not a mere legal presumption which inference can be overcome only by an explanation of nonnegligence that the jury is bound to accept, Kempfer v. Bois, 255 Wis. 312, 314, 38 N.W.2d 483 (1949); Zeinemann v. Gasser, 251 Wis. 238, 243, 29 N.W.2d 49 (1947) (skidding); Hamilton v. Reinemann, 233 Wis. 572, 581, 290 N.W. 194 (1940) (tractor-trailer jack-knifing); Booth v. Frankenstein, 209 Wis. 362, 365-66, 245 N.W. 191 (1932) (blow-out of tire involved in impact rejected by jury as explanation, presumption of deceased's due care dropped out by wrong-side driving inference of negligence); approved to be given in exact words of Kempfer v. Bois, as applicable to both drivers in Schwartz v. Schneuriger, 269 Wis. 535, 545, 69 N.W.2d 756 (1955) (jury accepted defendant's explanation of last minute swing to left to avoid plaintiff who was driving in center). Kempfer v. Bois expressly overruled that part of Seligman v. Hammond, 205 Wis. 199, 204, 236 N.W. 115 (1931), which held that burden was to prove wrong-side driving was caused by negligence.

"The inference of negligence when one invades the wrong lane is a vigorous one; the inference is not dissipated unless the driver so invading the wrong lane proves that he was without fault." Voigt v. Voigt, 22 Wis.2d 573, 584, 126 N.W.2d 653 (1964).

Goldenberg v. Daane, 13 Wis.2d 98, 104, 108 N.W.2d 187 (1961), states that when some evidence of nonnegligence in wrong-side driving is introduced, there is no occasion to instruct on the inference of negligence from wrong-side driving. This is directly contrary to Schwartz v. Schneuriger, supra, and in conflict with statement in Voigt v. Voigt that wrong-side driver has "burden of going forward with evidence to prove that such invasion was non-negligent." The ultimate burden of course is on party asking a "yes" to the ultimate negligence question.

Sleeping is not a nonnegligent explanation. Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962).

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As to wrong-side driving with last minute switch-back to right side, see Havens v. Havens, 266 Wis. 282, 63 N.W.2d 86 (1954); Stevens v. Farmers Mut. Auto Ins. Co., 268 Wis. 25, 66 N.W.2d 668 (1954); Schwartz v. Schneuriger, supra; Nothem v. Berenschot, 3 Wis.2d 585, 89 N.W.2d 289 (1958).

As to dust as an unexpected condition, see Johnson v. Prideaux, 176 Wis. 375, 378, 187 N.W. 207 (1922). As to glaring headlights, see Odya v. Quade, 4 Wis.2d 63, 72, 90 N.W. 96 (1958).

See Bunkfeldt v. Country Mut. Ins. Co., 29 Wis.2d 179, 184, 138 N.W.2d 271 (1965), where evidence of mechanical failure was insufficient to rebut the inference of negligence which arose from wrong-side driving.

As to negligence concurring with unexpected mechanical failure nevertheless being a cause, see Foellmi v. Smith, 15 Wis.2d 274, 280, 112 N.W.2d 712 (1961).

Instructions on unexpected mechanical failure, especially where no collision with another, vehicle is involved, may be submitted under management and control, if the driver has warning of some abnormal operation probably caused by a defective condition, it being the driver's duty to stop and investigate. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 401, 88 N.W.2d 747 (1958).

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1141 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION

[Insert appropriate paragraphs of Wis JI-Civil 1055.]

A safety statute provides that upon any roadway where traffic is permitted to move in both directions simultaneously, the driver of a vehicle shall not drive to the left of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction, unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit the overtaking and passing to be done in safety.

To comply with the statute, the driver must, before making such movement, exercise reasonable care to make an efficient lookout. A driver must not only exercise ordinary care to determine the presence and location of other vehicles that may be approaching from the opposite direction, but must also exercise reasonable judgment in calculating the time required to overtake and pass the vehicle in front, as well as the distance away and speed of any vehicle approaching from the opposite direction.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.09(1).

On lookout generally, see Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957), and Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 463 (1961). Leckwee v. Gibson, 90 Wis.2d 275, 288, 280 N.W.2d 186 (1979).

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1142 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION; OBSTRUCTED VIEW

A safety statute provides that, upon any roadway where traffic is permitted to move in both directions simultaneously, the driver of a vehicle shall not drive on the left side of the center of the roadway upon any part of a grade or upon a curve in the roadway where the driver's view is obstructed for such a distance as to create a hazard in the event another vehicle might approach from the opposite direction.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.09(2).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver. "

This instruction is to be used, where appropriate under the evidence, with a question inquiring as to either management and control or position on the roadway.

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1143 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION: IN NO PASSING ZONE OR WHERE OVERTAKEN VEHICLE TURNING LEFT

A safety statute provides that the driver of a vehicle shall not drive on the left side of the center of a roadway, or any portion of the roadway which has been designated as a no-passing zone, either by a sign or by a yellow unbroken line on the pavement on the right side of, and adjacent to, the center line of the roadway, if the sign or lines would be clearly visible to an ordinarily observant person.

If you determine that the no-passing sign (lines) was (were) clearly visible to one who was ordinarily observant and you also determine that (_____) violated the provisions of this statute just before the collision, then (_____) would be negligent.

(A safety statute provides that, in any event, a driver of a vehicle shall not overtake and pass on the left any other vehicle which by means of a signal required by law indicates its intention to make a left turn.)

(The signal referred to in this safety statute is a signal given continuously by either a mechanical signal device or by hand and arm for a distance of not less than 100 feet before turning.)

COMMENT

This instruction and comment were approved by the Committee in 1977. The instruction was revised in 2008. The comment was updated in 2001.

Use paragraphs three and four where appropriate.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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Wis. Stat. §§ 346.09(3) and (4); 346.34(1); 346.35.

The first paragraph may not be applicable if the evidence reveals that the operator may have crossed the no passing line in an effort to avoid collision with an oncoming vehicle. The statute is meant to cover only the situation of overtaking and passing.

With respect to position on highway, see Wis JI-Civil 1135.

Passing on the Right. For an instruction on passing on the right, Wis. Stat. § 346.08, see Kaufman v. Postle, 2001 WI App 86, 243 Wis.2d 45, 626 N.W.2d 10. In Kaufman, the trial court gave the following instruction:

> A safety statute provides: The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety and only if the operator can do so without driving off the pavement or the main traveled portion of the roadway. A driver may not pass traffic on the right using any part of the road's shoulder. To do so is a violation of the Rules of the Road section permitting motor vehicle operators to pass on the right only when such can be done without driving off the main traveled portion of the roadway.

In Kaufman, the defendant's vehicle struck the plaintiff's vehicle while the defendant was driving on the right-hand paved shoulder in an attempt to pass the plaintiff. The defendant argued the trial court's instruction was wrong by telling the jury that a driver may not pass traffic on the right using any part of the road's shoulder. The defendant argued that Wis. Stat. § 346.08 allows a driver to use the shoulder of a road to pass another vehicle on the right side if the vehicle that is being passed is turning left and the shoulder is paved. The court of appeals rejected the defendant's analysis of the statute and held that the trial court's instruction was correct in explaining to the jury that a driver may not pass on the right using any part of the shoulder.

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1144 PASSING: VEHICLES PROCEEDING IN SAME DIRECTION

A safety statute provides that the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left of the overtaken vehicle, at a safe distance, and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

COMMENT

This instruction and comment were originally approved in 1977. The instruction was revised in 2002 and reviewed without change in 2008. The comment was updated in 1989, 2002, and 2015.

Wis. Stat. § 346.07(2); for definition of "roadway," see Wis. Stat. § 340.01 (54), Wis JI-Civil 1160.

Whether § 346.07(2) or (3), or both, should be used in a particular case will depend upon the evidence. In this regard, see Engsberg v. Hein, 265 Wis. 58, 62, 60 N.W.2d 714 (1953). With respect to the instruction itself, see Bovi v. Mellor, 253 Wis. 458, 464, 34 N.W.2d 780 (1948).

Other possible elements of negligence which may arise at the time of passing, such as lookout or speed, will be submitted separately. This instruction might be used in connection with the question as to management and control, in lieu of the inquiry as to negligence with respect to the manner of passing. See Anderson v. Stricker, 266 Wis. 1, 4, 62 N.W.2d 396 (1953).

A statutory provision (§ 346.07(1)) requiring the overtaking vehicle to give an audible warning when passing in a non-business or non-residential district was repealed in 1977. 1997 Wisconsin Act 32. In 2014, a requirement in Wis. Stat. § 346.59(2) that the operator of a vehicle moving at a slow speed yield to an overtaking driver who gives an audible signal was removed. 2013 Wisconsin Act 365.

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1145 RES IPSA LOQUITUR

If you find (defendant) had (exclusive control of) (exclusive right to the control of) the (name the instrument or agency involved) involved in the accident and if you further find that the accident claimed is of a type or kind that ordinarily would not have occurred had (defendant) exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of (defendant) unless (defendant) has offered you an explanation of the accident which is satisfactory to you.

COMMENT

This instruction and comment were approved by the Committee in 1977. The comment was updated in 1989 and 2001.

The alternate phrase "exclusive right to the control of" should be used in those cases where defendant disavows exclusive control because he has delegated (by contract or otherwise) the duty of repair or maintenance of the instrument or agency to another. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Koehler v. Thiensville State Bank, 245 Wis. 281, 14 N.W.2d 15 (1944). Goebel v. General Bldg. Serv. Co., 26 Wis.2d 129, 131 N.W.2d 852 (1964), is a situation where several parties might have exercised control.

The following conditions must be present before the doctrine of res ipsa loquitur is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

The court decides as a preliminary matter of law that the inference is reasonable; if not, the instruction is not given.

Insert the facts of the case in the instruction if desired. This instruction was approved by implication in Brunner v. Van Hoof, 4 Wis.2d 459, 464, 90 N.W.2d 551 (1958); Colla v. Mandella, 271 Wis. 145, 149-50, 72 N.W.2d 755 (1955); and Georgia Casualty Co. v. American Milling Co., 169 Wis. 456, 460, 172 N.W. 148 (1919).

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The mere happening of a collision is not probative that someone has been negligent. Millonig v. Bakken, 112 Wis.2d 445, 334 N.W.2d 80 (1983). In Millonig, the court said that res ipsa loquitur "only creates a permissive inference" and for the doctrine to apply one of the necessary elements is that the accident probably would not have occurred but for the negligent of the defendant. 112 Wis.2d, at p. 457.

The instruction does not cover negligence on the part of plaintiff, since Wisconsin has a comparative negligence law.

This instruction applies to host-guest cases. Turk v. H. C. Prange Co., supra. Henthorn v. MGC Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759 (1957); Modl v. National Farmers Union Prop. & Casualty Co., 272 Wis. 650, 656, 76 N.W.2d 599 (1956).

Res ipsa can be used in strict liability cases. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 211 N.W.2d 810 (1973).

This instruction is proper even though plaintiffs have tried to prove specific negligence and have failed. Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 168, 72 N.W.2d 771 (1955).

If res ipsa loquitur rests on data which was used as the basis for an allegation of a specific act of negligence, but the inference of negligence so raised was rebutted, then res ipsa loquitur is not in the case. Brunner v. Van Hoof, supra at 464, citing Gay v. Milwaukee Elec. Ry. & Light Co., 138 Wis. 348, 353-54, 120 N.W. 283 (1909).

Where an event which caused injury to the plaintiff might have been caused by a specific act of X or by inferred negligence of the defendant who was in control of the situation, the jury should be instructed that res ipsa would be applicable only if it first found that the specific act did not cause the event. Mixis v. Wisconsin Pub. Serv. Comm'n, 26 Wis.2d 488, 132 N.W.2d 769 (1965).

The burden of proof (persuasion) does not shift from plaintiff to defendant, and it is error to so state. Ziino v. Milwaukee Elec. Ry. & Transp. Co., 272 Wis. 21, 24, 74 N.W.2d 791 (1956).

See Drechsler, "The Doctrine of Res Ipsa Loquitur," Wis. Bar Bulletin, April 1957, at 13.

If no instruction is requested in the trial court, the supreme court will not consider res ipsa loquitur for the first time on appeal. Ahola v. Sincock, 6 Wis.2d 332, 349, 94 N.W.2d 566 (1959).

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1153 RIGHT OF WAY: AT INTERSECTION WITH THROUGH HIGHWAY

A safety statute provides that the driver of a vehicle shall stop before entering a through highway and shall yield the right of way to other vehicles which have entered or are approaching the intersection upon the through highway.

The statutes define "right of way" as the privilege of the immediate use of the roadway.

The highway on which (name) was driving was, at the time of the collision, a "through highway" as defined by the statute.

An automobile on a through highway is approaching an intersection when it is so close to the intersection that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the automobile which stopped, as required, before entry onto the through highway moves onto the highway and into the path of the oncoming vehicle.

If you find that the oncoming automobile on the through highway had entered the intersection, or was approaching it as here defined, it then became the duty of the driver entering the through highway to yield the right of way to the automobile on the through highway.

COMMENT

This instruction and comment were originally published in 1966. The instruction was revised in 2008. The comment was revised in 1983.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 346.18(3) and 340.01(51).

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Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver. "

This instruction is based on the assumption that there is no issue on the record about one highway being a through highway, as defined by Wis. Stat. § 340.01(67). If, however, an issue develops as to whether the highway in question is a through highway, then a preliminary question would be required and would be covered by an instruction giving the statutory definition.

Although the law in Wisconsin gives the driver on a through highway a preference, such preference is not absolute. Leckwee v. Gibson, 90 Wis.2d 275, 280 N.W.2d 186 (1979). In Leckwee, the court, citing prior decisions, stated:

> It is clear that:
>
> . . . while one may have the right-of-way and may presume others will respect it, he may nevertheless be negligent in respect to management and control if his right-of-way is not respected and he does not do what he can do to prevent the accident. Chille v. Howell (1967), 34 Wis.2d 491, 497, 149 N.W.2d 600. Tombal v. Farmers Ins. Exchange, 62 Wis.2d 64, 69, 214 N.W.2d 291 (1974).
>
> The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Having the right of way does not relieve one of the duty of watching the road for vehicles on the highway or entering thereon. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163 (1959).

The former version of the comment to this instruction included an optional paragraph based on Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966). This optional paragraph expressed a view which held that a "special dignity" was to be afforded to a driver traveling on an arterial. The optional portion stated that the right of way of the driver on the through highway meant "not only the right to the immediate use of the roadway; but the enjoyment of such right without being required to brake one's rate of speed or divert one's course to the right or left."

Because of the contrary holdings in Leckwee and cases cited by the court in Leckwee which refused to extend an absolute preference to a driver on a through highway, the optional paragraph is withdrawn.

Where the issue is presented as to the negligence of the driver on a through highway with respect to management and control or lookout, see Wis JI-Civil 1030, 1090, 1190, and 1191.

Wis. Stat. § 346.18(3) is the stopping statute referred to in the first paragraph. If stopping is at issue, it would be covered by a separate question and by Wis JI-Civil 1325.

In regard to the duty to look and to calculate, see Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957).

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1155 RIGHT OF WAY: AT INTERSECTIONS OF HIGHWAYS

A safety statute provides that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.

The statutes define "right of way" as the privilege of the immediate use of the roadway.

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the automobiles in question approached or entered the intersection at approximately the same time, then it became the duty of (the driver of the automobile on the left) to yield the right of way to the automobile on the right. This duty compelled (driver) either to stop the automobile, if necessary, or to control and manage it so that (he) (she) could yield the right of way to the vehicle within the zone of danger on the right and avoid colliding with it.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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The first and second paragraphs refer, respectively, to Wis. Stat. § 346.18(1) and § 340.01(51).

The question of right of way is to be answered only in the event the driver of the vehicle on the right is not negligent with respect to speed. The last sentence of Wis. Stat. § 346.18(1) provides that, "The operator of any vehicle driving at an unlawful speed forfeits any right of way which he would otherwise have under this subsection."

This instruction is based on the language adopted in the case of Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 214, 79 N.W.2d 834 (1956), and Kraskey v. Johnson, 266 Wis. 201, 206, 63 N.W.2d 112 (1954), citing Vogel v. Vetting, 265 Wis. 19, 25, 60 N.W.2d 399 (1953). See also Nessler v. Nowicki, 12 Wis.2d 421, 425, 107 N.W.2d 616 (1961).

It is recommended that the verdict contain a direction to the jury that they should first consider the question of speed on the part of the driver who has the geographical right of way before the right of way of the competing driver is considered. See Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 388, 68 N.W.2d 2 (1955); Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 468, 62 N.W.2d 10 (1953); Johnson v. Fireman's Fund Indem. Co., 264 Wis. 358, 361, 59 N.W.2d 660 (1953).

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1157 RIGHT OF WAY: AT INTERSECTION OF HIGHWAYS; ULTIMATE VERDICT QUESTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the automobiles in question approached or entered the intersection at approximately the same time, then it became the duty of the driver of the automobile on the left to yield the right of way to the automobile on the right. This duty compelled the driver either to stop the driver's automobile, if necessary, or to control and manage it so that the driver could yield the right of way to the vehicle within the zone of danger on the driver's right and avoid colliding with it.

Another safety statute provides that the driver of any vehicle operating at an unlawful speed on a highway is negligent and forfeits any right of way which he would otherwise have. Thus, before you can find negligence for failure to yield the right of way, you must first find that the vehicle on the right was being driven at a lawful speed.

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COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008.

Wis. Stat. §§ 340.01(51) and 346.18(1); Baier v. Farmers Mut. Auto Ins. Co., 8 Wis.2d 506, 99 N.W.2d 709 (1959); Van Wie v. Hill, 15 Wis.2d 98, 103, 105, 112 N.W.2d 168 (1961).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Speed. Speed need not be causal to deprive a driver of his statutory right of way. Van Wie v. Hill, supra.

Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 79 N.W.2d 834 (1956).

Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954).

Nessler v. Nowicki, 12 Wis.2d 421, 107 N.W.2d 616 (1961).

Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 68 N.W.2d 2 (1955).

Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 62 N.W.2d 10 (1953).

Paragraph 5 should not be used unless, under the evidence, the right-hand driver can be found negligent as to speed. "Unlawful speed" mentioned in paragraph 5 is defined in Wis JI-Civil 1285. See Drake v. Farmers Mut. Auto Ins. Co., 22 Wis.2d 56, 125 N.W.2d 391 (1963).

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1158 RIGHT OF WAY: TO PEDESTRIAN CROSSING AT CONTROLLED INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that at an intersection or crosswalk where traffic is controlled by (traffic control signals) (a traffic officer), the driver of a vehicle shall yield the right of way to a pedestrian crossing or who has started to cross the highway on a green or 'WALK' signal.

If you find that (pedestrian) was crossing or had started to cross the highway (at the direction of a traffic officer) (with the green or 'WALK' signal in his or her favor), it became the duty of (driver) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1992 to address gender references in the instruction. The comment was reviewed without change in 2008.

Wis. Stat. §§ 340.01(51), 346.23(1). Schoehauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

If the highway is a divided highway or contains safety zones, use Wis JI-Civil 1160.

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1159 RIGHT OF WAY: PEDESTRIAN CONTROL SIGNAL: WALK SIGNAL

Question __ asks whether (name) failed to yield the right of way to (name).

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, "A pedestrian facing a 'Walk' signal may proceed across the roadway in the direction of the signal and shall be given the right of way by the operators of all vehicles."

If you find that (pedestrian) faced a 'Walk' signal and was proceeding across the roadway in the direction of the signal, then it became the duty of (name) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The second and third paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.38(1).

The pedestrian also retains the right of way if he or she has partially completed his or her walk to the far curb or to a safety island when the light changes to "Wait" or "Don't Walk." Wis. Stat. § 346.38(2).

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1160 RIGHT OF WAY: TO PEDESTRIAN AT INTERSECTIONS OR CROSSWALKS ON DIVIDED HIGHWAYS OR HIGHWAYS PROVIDED WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

In a divided highway, the term "roadway" refers to each roadway separately but not to all the roadways collectively.

The statutes further provide that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who (is crossing or) has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "WALK" signal in his or her favor.

Divided highway is defined as a highway with two or more roadways separated by spaces not intended for the use of vehicular traffic.

The term "safety zone" means the area or space officially set apart within a roadway for the exclusive use of pedestrians, including those about to board or alighting from public conveyances, and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

If you find that (pedestrian) (was crossing or) had started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone (at the direction of a traffic officer) (with the green or "WALK" signal in (his) (her) favor), then it became the duty of (the driver of the automobile) to yield the right of way to (pedestrian).

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COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph is from Wis. Stat. § 340.01(51).

The second and third paragraphs refer, respectively, to Wis. Stat. §§ 340.01(54) and 346.23(2).

The fourth and fifth paragraphs refer, respectively, to Wis. Stat. § 340.01(15) and 340.01(55).

If the facts warrant it, the court should instruct that the pedestrian no longer enjoys the right of way over an automobile if the signal turns against the pedestrian before the pedestrian leaves the center dividing space or safety zone. If that occurs, the right of way belongs to the vehicle lawfully proceeding directly ahead on a green or "GO" signal. Wis. Stat. § 346.23(2).

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1161 RIGHT OF WAY: PEDESTRIAN CROSSING ROADWAY AT POINT OTHER THAN CROSSWALK

COMMENT

This reference instruction was added in 1981.

(See Wis JI-Civil 1230.)

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1165 RIGHT OF WAY: TO PEDESTRIAN AT UNCONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who is crossing the roadway within a marked or unmarked crosswalk.

(A marked crosswalk is any portion of a roadway clearly indicated for pedestrian crossing by signs, lines, or other markings on the surface of the roadway.)

(An unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk at an intersection, across the roadway, to the sidewalk on the opposite side of the intersection.)

(If there is a sidewalk on only one side of an intersection, an unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk, at right angles to the centerline of the roadway, to the opposite side of the intersection.)

If you find that (plaintiff) was crossing the roadway within a (marked) (unmarked) crosswalk, then it became the duty of (defendant) to yield the right of way to (plaintiff). If, however, you find that (plaintiff) was crossing the roadway and was not within a (marked) (unmarked) crosswalk, then it became (plaintiff)'s duty to yield the right of way to (defendant).

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COMMENT

This instruction was approved in 1978 and revised in 1989. The instruction was reviewed without change in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.24(1). The appropriate statutory definition of "marked" or "unmarked" crosswalk should be given. Definitions are found in Wis. Stat. § 340.01(10)(a) or (b). There may be marked crosswalks at places other than intersections.

Burke v. Tesmer, 224 Wis. 667, 670-71, 272 N.W. 857 (1937), indicates that there are no unmarked crosswalks at intersections in the country where there are no sidewalks and that a pedestrian crossing at such an intersection is under a duty to yield the right of way to a car on the highway. Wis. Stat. § 346.24(2) is a statutory admonition to pedestrians not to suddenly leave a curb or other place of safety and walk or run into the path of a vehicle.

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1170 RIGHT OF WAY: BLIND PEDESTRIAN ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that a driver of a vehicle must stop the vehicle before approaching closer than 10 feet to a pedestrian carrying a cane or walking stick which is white in color or white trimmed with red and which is held in an extended or raised position and shall take such precautions as may be necessary to avoid accident or injury to the pedestrian. The fact that the pedestrian may be violating any of the laws applicable to pedestrians does not relieve the driver of a vehicle from the duties imposed by the rule just stated.

If you find that (pedestrian) was carrying a cane or walking stick identified by the specified colors and extended or raised in position, then it became the duty of (driver) of the vehicle to stop the vehicle before approaching closer than 10 feet to (him) (her) and to take such precautions as might be necessary to avoid accident or injury to the pedestrian.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.26(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

A blind person unidentified by cane or walking stick enjoys the rights of other pedestrians in crossing highways. Wis. Stat. § 346.26(2).

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1175 RIGHT OF WAY: ENTERING HIGHWAY FROM AN ALLEY OR NONHIGHWAY ACCESS POINT

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that the driver of a vehicle entering a highway from an alley or from a point of access other than another highway shall yield the right of way to all vehicles approaching on the highway which the driver is entering.

The word "entering" means going or moving into.

The phrase "point of access" means a place where an entry can be made onto a highway.

An automobile is said to be approaching the point where the entry on a highway is to be made when it is not so far distant the entry point that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the driver of the automobile intending to enter the highway undertakes to do so and drives an automobile across or into the path of the oncoming automobile.

If you find that the automobile on the highway was approaching the place where the entry onto the highway was to be made, then it became the duty of the driver entering the highway to yield the right of way to the automobile on the highway.

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 340.01(51) and 346.18(4).

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Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

If there is need for a definition of "alley," see Wis. Stat. § 340.01(2).

Plog v. Zolper, 1 Wis.2d 517, 525-29, 85 N.W.2d 492, 498-99 (1957).

The negligence of one using excessive speed on an arterial does not excuse one approaching the arterial for not yielding the right of way. Ogle v. Avina, 33 Wis.2d 125, 132, 146 N.W.2d 422 (1966). One entering an arterial must be reasonably sure he or she can enter into the flow of traffic thereon without disrupting it. Ogle v. Avina, supra at 133. However, having the right of way does not relieve a driver of the duty of watching the road for vehicles entering onto the highway. Leckwee v. Gibson, 90 Wis.2d 275, 287, 280 N.W.2d 186 (1979).

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1180 RIGHT OF WAY: FUNERAL PROCESSIONS; MILITARY CONVOYS

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that, "(Funeral processions) ([M]ilitary convoys) have the right of way at intersections when vehicles comprising such procession have their bright headlights lighted. . . ."

[Note: The preceding paragraph may be subject to certain conditions and exceptions in Wis. Stat. § 346.20(4)(a), (b), or (c). Conclude the paragraph with the statement of the law as to the applicable condition or exception.]

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2008.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.20(1).

This instruction is prepared solely as a suggested general pattern. It can be adapted to fit the particular need of any given situation.

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1185 RIGHT OF WAY: GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that vehicular traffic facing a green arrow signal may enter the intersection only to make the movement indicated by the arrow but shall yield the right of way to pedestrians lawfully within a crosswalk and to other traffic lawfully using the intersection.

["Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (_____).]

If you find that (_____) faced a green arrow signal before entry into the intersection, then it became (_____)'s duty to yield the right of way (to pedestrians lawfully within a crosswalk at the intersection) (to other traffic lawfully using the intersection).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 340.01(51) and 346.37(1)(d).

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

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1190 RIGHT OF WAY: GREEN SIGNAL

The Wisconsin statues define "right of way" as the privilege of the immediate use of the roadway.

The statutes further provide that vehicular traffic facing a green signal may proceed straight through or turn right or left unless a sign at the place prohibits either turn, but vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time the signal is exhibited.

"Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (_____).

"Adjacent" means near, close, or adjoining. As here used, it refers to (the crosswalk the driver of the vehicle will be compelled to cross if the driver moves straight ahead) (the crosswalk the driver will be compelled to cross on the intersecting street if the driver turns right or left).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer respectively to Wis. Stat. §§ 340.01(51) and 346.37(1)(a).

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

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1190.5 PLAINTIFF AND DEFENDANT EACH CLAIMS GREEN LIGHT IN THEIR FAVOR

Both drivers claim that the green traffic light (or "Go" signal) was facing them as they proceeded to cross the intersection in question. It was a physical impossibility for this to happen, in the absence of evidence that the lights were not in good working order. It is for you to determine which driver the green light was facing and which driver, at that same time, the red light was facing as each driver proceeded into the intersection.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Matthews v. Schuh, 5 Wis.2d 521, 526, 93 N.W.2d 364 (1958).

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1191 DUTY OF DRIVER ENTERING INTERSECTION WITH GREEN LIGHT IN DRIVER'S FAVOR: LOOKOUT

A driver entering an intersection with the light in his or her favor does not have an absolute right of way. The driver, when entering the intersection, has the duty of maintaining an efficient lookout to determine the presence of other vehicles approaching his or her course of travel and must also exercise reasonable judgment in calculating the distance and speed of any approaching vehicles so as to determine whether such approaching vehicle will run the light. If after such lookout and calculation it is apparent that the approaching vehicle is going to run the light, then the driver having the light in his or her favor must exercise ordinary care in an attempt to avoid a collision.

If the driver entering the intersection with the light in his or her favor properly determined that any automobile approaching the intersection was traveling at such speed and was at such distance from the intersection that the approaching driver could, as a matter of physical fact, yield the right of way if the driver responded to the red light, then the driver with lights in his or her favor, after entering the intersection, need not make continuing observations to either side for approaching traffic.

COMMENT

The instruction and comment were originally published in 1972. The instruction was reviewed without change in 2008. The comment was updated in 2008. Editorial changes were made in 1992 to address gender references in the instruction.

See Wis JI-Civil 1190, Right of Way: Green Signal; Wis JI-Civil 1030, Right to Assume Due Care; and Wis JI-Civil 1090, Driver at Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal.

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Hardware Dealers Mut. Fire Ins. Co. v. Home Mut. Ins. Co., 24 Wis.2d 381, 129 N.W.2d 214 (1964); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942); Gleason v. Gillihan, 32 Wis.2d 50, 55, 145 N.W.2d 90 (1966).

When approaching a green light, if a driver's view of traffic approaching on the intersection road is obstructed, the driver has a duty to make further observation at a point which will enable the driver to take effective steps to avoid a collision. Oelke v. Earle, supra at 483. But see Battice v. Michaelis, 255 Wis. 571, 576, 39 N.W.2d 702 (1949).

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1192 DUTY OF DRIVER APPROACHING INTERSECTION WHEN AMBER LIGHT SHOWS

A safety statute provides that a driver facing a yellow signal shown with or following a green light, shall stop before entering the intersection unless so close to it that a stop cannot be made in safety.

If you find that the yellow or amber light, which signifies caution, was showing before (_____) entered the intersection, then (_____) was required to stop unless (he) (she) was so close to the traffic signal that a stop could not be made in safety.

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.37(1)(b).

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1193 RED TRAFFIC CONTROL LIGHT SIGNALLING STOP

A safety statute provides that vehicles facing a red traffic light shall stop before entering the crosswalk on the near side of an intersection, or, if there is no crosswalk, at a point indicated by a clearly visible sign or other marking, or if there is no sign or marking, before entering the intersection, and shall remain standing until a green light or other signal permitting movement is shown.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.37(1)(c).

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1193.5 FLASHING RED TRAFFIC CONTROL LIGHT

When a red traffic control light is illuminated with rapid intermittent flashes, drivers of vehicles shall stop before entering the intersection at the nearest crosswalk or at a limit line if marked, or, if there is no crosswalk or limit line, then before entering the intersection; the right to proceed is subject to the rules applicable after making a stop at a stop sign.

[Here add appropriate parts of Wis JI-Civil 1325 Stop at Stop Signs.]

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.39(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1195 RIGHT OF WAY: LEFT TURN AT INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching from the opposite direction shall yield the right of way to that vehicle.

The word "approaching" involves a concept of nearness in space and time. An automobile is approaching an intersection when it is not so far distant from the intersection that, considering the speed at which it is traveling, it is reasonable to assume that a collision will occur if the driver of the automobile intending to turn left undertakes to do so by changing the course of the automobile from the right lane, across the center line, and into the path of the oncoming automobile.

If you find that the oncoming automobile was approaching the intersection, it became the duty of the driver turning left to yield the right of way to the approaching automobile.

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.18(2).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Wis. Stat. § 346.18(7) provides: "The operator of any vehicle intending to turn to the left into an alley or private driveway across the path of any vehicle approaching from the opposite direction shall yield the right of way to such vehicle." Thus this statute does impose a duty on the left-turning driver independent of lookout. Zartner v. Scopp, 28 Wis.2d 205, 216, 137 N.W.2d 107 (1965).

For the definition of "intersection," see Wis. Stat. § 340.01(25).

See Plog v. Zolper, 1 Wis.2d 517, 529, 85 N.W.2d 492 (1957).

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1200 RIGHT OF WAY: LIVESTOCK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of a motor vehicle must yield the right of way to livestock being driven over or along any highway. (But any person in charge of such livestock must use reasonable care and diligence to open the roadway for vehicular traffic.)

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008. The comment was updated in 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.21.

Note that Wis. Stat. § 346.21 imposes duties on the person in charge of the livestock as well as the operator of the motor vehicle. The committee does not believe that the duty of the driver to yield the right of way is lessened or made dependent on the care exercised by the person in charge of the livestock to use reasonable care and diligence. It may well be that the duty to yield is absolute. The duty imposed on the person in charge of the livestock may require a separate negligence question for a comparison of causal negligences.

For an instruction describing "reasonable care" and "diligence," see Wis JI-Civil 1005, Negligence Defined, and Wis JI-Civil 1010, Negligence of Children.

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1205 RIGHT OF WAY: MOVING FROM PARKED POSITION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that the driver of any vehicle that has been parked or standing shall, while moving the vehicle from its position, yield the right of way to all vehicles approaching on the highway.

An automobile is said to be "approaching" when it is not so far distant that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the automobile parked or standing is put in motion and moved onto the roadway and into the path of the oncoming automobile.

If you find that the oncoming automobile on the highway was approaching, then it became the duty of the driver of the parked or standing automobile, while moving it from its position, to yield the right of way to an automobile approaching on the highway.

COMMENT

The instruction and comment were originally published in their present form in 1960 and revised in 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.18(5).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1210 RIGHT OF WAY: ON APPROACH OF EMERGENCY VEHICLE

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that upon the approach of any authorized emergency vehicle giving audible signal by siren, the driver of a vehicle shall yield the right of way and shall immediately drive the vehicle to a position as near as possible and parallel to the right curb or to the right-hand edge of the shoulder of the roadway, clear of any intersection and, unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed.

[The (type of vehicle) was an emergency vehicle, as defined in the statutes.]

[Note: In the alternative, the language of Wis. Stat. § 340.01(3)(a), (b), (c), (d), (e), (f), or (g) may appropriately be used in defining "emergency vehicle."]

"Audible" means capable of being heard.

"Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel.

If you find that the emergency automobile of (name) was approaching, giving audible signal by siren, then it became the duty of (name) to yield the right of way.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008. An editorial correction was made in 1996.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.19(1).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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The definition of "audible" is its common meaning. "Roadway" is defined in Wis. Stat. § 340.01(54).

As to "audible signal," see Frankland v. Peterson, 268 Wis. 394, 397, 67 N.W.2d 865, 866 (1955); Swinkles v. Wisconsin Michigan Power Co., 221 Wis. 280, 287-88, 267 N.W. 1, 4-5 (1936).

If the fact of hearing the signal is in issue, and the evidence warrants, it may be desirable to expand the definition of "audible" to cover a siren in good operating condition, and a reasonably attentive vehicle operator or pedestrian. The operator giving the signal need not show that the signal was actually heard by the operator. Werner Trans. Co. v. Zimmerman, 201 F.2d 687, 691 (1953). Testimony that the signal was not heard may be negative testimony and may require an instruction on the value of such testimony. Anderson v. Stricker, 266 Wis. 1, 5-6, 62 N.W.2d 396, 398 (1953); Hunter v. Sirianni Candy Co., 233 Wis. 130, 132-33, 288 N.W. 766, 769 (1939); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126-27, 262 N.W.2d 581, 582-83 (1935). See Wis JI-Civil 315, Negative Testimony.

This instruction is based on the assumption that there is no issue on the emergency nature of the vehicle involved. If this issue develops, it may require a separate preliminary question with an instruction defining emergency vehicles.

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1220 RIGHT OF WAY: PEDESTRIAN'S DUTY: AT PEDESTRIAN CONTROL SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian may start to cross the roadway (or other vehicular crossing) in the direction of a "Don't Walk" signal, but a pedestrian who has partially completed crossing on the "Walk" signal may proceed to a sidewalk or safety island while the "Don't Walk" signal is showing.

If you find that (pedestrian) was facing a "Don't Walk" signal, then it was (pedestrian)'s duty before entering into the roadway to yield the right of way to an approaching vehicle on the roadway. If, however, you find that (pedestrian) started to cross the roadway on a "Walk" signal and had partially completed crossing when the signal turned to "Don't Walk," then (pedestrian) had the right to proceed to the (sidewalk) (safety island).

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1989. Editorial changes were made in 1992 to address gender references in the instruction. The instruction was revised in 1992 and 2008.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.38(2). See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

"Roadway" is defined in Wis. Stat. § 340.01(54).

See Sub. (1) of § 346.38 giving the pedestrian the right of way if on a "walk" signal.

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1225 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING AT CONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that at an intersection or crosswalk where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who has started to cross the highway on a green or "Walk" signal and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at (intersection), where traffic was controlled by (traffic control signals) (a traffic officer), (pedestrian) was in the act of crossing the highway on the (green) (Walk) signal, then (pedestrian) was entitled to the right of way over an approaching automobile. However, if you find that (pedestrian) was not crossing or had not started to cross the highway on a (green) (Walk) signal, then it became (pedestrian)'s duty to yield the right of way to an approaching automobile on the highway proceeding directly ahead on the (green) signal.

COMMENT

The instruction and comment were originally published in their present form in 1972. This comment was updated in 1989 and 2008. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.23(1). See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

For the definition of "intersection," see Wis. Stat. § 340.01(25); for "traffic control signal," see § 340.01(39); for "pedestrian," see 340.01(43); and for "crosswalk," see § 340.01(10)(a) and (b).

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For the right of way at intersections or crosswalks on divided highways or highway provided with safety zones, see Wis. Stat. § 346.23(2).

An instruction defining "crosswalk" was approved in Van Galder v. Snyder, 254 Wis. 120, 123, 35 N.W.2d 187, 188-89 (1948). The changing of a light does not justify an operator of an automobile to move forward until a reasonable opportunity is given to the pedestrian to reach the sidewalk. Raaber v. Brzoskowski, 204 Wis. 319, 321, 236 N.W. 133, 134 (1931).

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1230 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING ROADWAY AT POINT OTHER THAN CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that a pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles upon the roadway.

If you find that (pedestrian) was crossing the roadway at a point other than a marked or unmarked crosswalk, then it became (pedestrian)'s duty to yield the right of way to an automobile approaching on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1972. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.25. Also see the notes to these sections in Wis. Stat. Annot.

For the definition of "roadway," see Wis. Stat. § 340.01(54); for "marked" or "unmarked crosswalk," see § 340.01(10)(a) and (b).

Wis. Stat. § 891.44 provides an exception to § 346.25, and this instruction is not to be given when the pedestrian is a child under 7 years of age. Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 201 N.W.2d 745 (1972).

The duty of a pedestrian to yield the right of way under Wis. Stat. § 346.25 is absolute, regardless of any negligence on the part of the driver. Failure to yield is causal negligence as a matter of law. Field v. Vinograd, 10 Wis.2d 500, 505, 103 N.W.2d 671 (1960); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

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1235 RIGHT OF WAY: PEDESTRIAN'S DUTY: DIVIDED HIGHWAYS OR HIGHWAYS WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "Walk" signal in his or her favor. If the signal turns against a pedestrian before the pedestrian leaves the center dividing space or safety island, the pedestrian shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at (intersection on a divided highway), where traffic was controlled by traffic control signals, (pedestrian) was in the act of crossing the roadway from the near curb or shoulder with the (green) (Walk) signal in (his) (her) favor, then (pedestrian) was entitled to the right of way over an approaching automobile. However, if you find that the signal turned against (pedestrian) before (he) (she) left the center dividing space or safety island, then it was (pedestrian)'s duty to yield the right of way to a vehicle on the roadway lawfully proceeding directly ahead on the (green) signal.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

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The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.23(2).

For the definition of specific words and phrases, see Wis. Stat. § 340.01.

The instruction should be changed to accommodate it to the factual situation, as to crosswalk, or divided highway, or highways provided with safety zones, or if traffic is controlled by a traffic officer.

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1240 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian facing a green arrow signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.

If you find that (pedestrian) was facing a green arrow, then it became (pedestrian)'s duty, before entering onto the roadway, to yield the right of way to an approaching vehicle unless (pedestrian) could enter the roadway safely and without interference with vehicle traffic on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.37(1)(d)(2).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1245 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING RED SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no pedestrian facing a red signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.

If you find that (pedestrian) was facing a red signal, then it was (pedestrian)'s duty before entering onto the highway to yield the right of way to an approaching vehicle unless (he) (she) could enter the roadway safely and without interference with traffic on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.37(1)(c)(2).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1250 RIGHT OF WAY: PEDESTRIAN'S DUTY: STANDING OR LOITERING ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no person shall be on a roadway for the purpose of soliciting a ride from the driver of any vehicle other than a public passenger vehicle.

If you find that (pedestrian) was on the roadway for the purpose of soliciting a ride from the driver of any vehicle other than a public passenger vehicle, then it was (pedestrian)'s duty to yield the right of way to a vehicle approaching on the roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.29(1).

The instruction should be changed to accommodate it to the factual situation if the pedestrian is loitering on the roadway, as prohibited by Wis. Stat. § 346.29(2), or if the pedestrian is on a bridge, or approach thereto, to fish or swim, in violation of signs prohibiting his or her presence thereon for such purpose, as prohibited by subsection (3).

"Roadway" is defined in Wis. Stat. § 340.01(54).

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1255 RIGHT OF WAY: PEDESTRIAN'S DUTY AT UNCONTROLLED INTERSECTION OR CROSSWALK; SUDDENLY LEAVING CURB OR PLACE OF SAFETY

A safety statute provides that at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the driver of a vehicle shall yield the right of way to a pedestrian who is crossing the highway within a marked or unmarked crosswalk.

"Right of way" means the privilege of the immediate use of the roadway.

The statute further provides that a pedestrian shall not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is difficult for the driver of the vehicle to yield the right of way.

If you find that (pedestrian) suddenly left the curb (or other place of safety) and walk or run into the path of (_____) vehicle which was so close that it was difficult for (_____) to yield, then (driver) did not have a duty to yield the right of way; but if you find that (pedestrian) did not enter the roadway, then it became the duty of (driver) to yield the right of way to (pedestrian).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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Wis JI-Civil 1165 covers the duty of the motorist to yield the right of way to a pedestrian crossing an uncontrolled intersection within a crosswalk. Wis JI-Civil 1225 covers the right of way situation where the pedestrian crosses at a controlled intersection or crosswalk. Wis JI-Civil 1230 covers the duty of a pedestrian who crosses at a point other than a crosswalk.

This instruction covers the situation where the pedestrian is within the crosswalk but has darted into the street from a place of safety. Other combinations of pedestrian-motorist right of way situations can be handled in the manner suggested by this instruction.

Wis. Stat. §§ 340.01(51), 346.24(2).

Hintz v. Mielke, 15 Wis.2d 258, 263, 112 N.W.2d 720 (1961); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971); Schueler v. City of Madison, 49 Wis.2d 695, 183 N.W.2d 116 (1971).

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1260 POSITION ON HIGHWAY: PEDESTRIAN'S DUTY; WALKING ON HIGHWAY

A safety statute provides that a pedestrian walking along and upon a highway other than a sidewalk shall walk on and along the left side of the highway and upon meeting a vehicle shall, if practicable, step to the extreme outer edge of the traveled portion of the highway. The traveled portion of the highway includes the shoulder.

If you find that (pedestrian) was on the left side of the highway as (he) (she) walked on and along it, then it became (pedestrian)'s duty upon meeting a vehicle, if it could be practicably done by (him) (her), to step to the extreme outer limits of the traveled portion of the highway.

COMMENT

This instruction and comment were approved in 1977. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.28(1).

Pedestrian walking on right side of highway is negligent as a matter of law. Panzer v. Hesse, 249 Wis. 340, 24 N.W.2d 613 (1946); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

The traveled portion of the highway includes the shoulder. Wojciechowski v. Baron, 274 Wis. 364, 80 N.W.2d 424 (1957).

The jury may find a pedestrian walking on the edge of the blacktop roadway not negligent. Dahl v. Ellis, 35 Wis.2d 441, 151 N.W.2d 61 (1967).

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1265 RIGHT OF WAY: PERSONS WORKING ON HIGHWAY

A safety statute provides that a driver of a vehicle shall yield the right of way to persons engaged in maintenance or construction work on a highway whenever the driver is notified of their presence by flagmen or warning signs.

"Right of way" means the privilege of the immediate use of the roadway.

If you find that (plaintiff) was engaged in maintenance or construction work on a highway at the time and place in question and that a flagman or warning signs were present to notify (defendant) of (plaintiff)'s presence and occupation, then it became the duty of (defendant) to yield the right of way to (plaintiff).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. §§ 346.27 and 340.01(51).

As to the lessened duty of care imposed on persons so engaged in highway construction, see Knowles v. Stargel, 261 Wis. 106, 109-10, 52 N.W.2d 387 (1952); Gunning v. King, 249 Wis. 176, 180-81, 23 N.W.2d 602 (1946); Isgro v. Plankington Packing Co., 176 Wis. 507, 514-16, 186 N.W. 606 (1922).

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1270 RIGHT OF WAY: WHEN VEHICLE USING ALLEY OR NONHIGHWAY ACCESS TO STOP

A safety statute provides that the driver of a vehicle emerging from an alley or about to cross or enter a highway from any point of access other than another highway shall stop the vehicle immediately prior to moving onto the sidewalk, or onto the sidewalk area extending across the path of the vehicle, and shall yield the right of way to any pedestrian, and upon crossing or entering the roadway shall yield the right of way to all vehicles approaching on the roadway.

"Right of way" means the privilege of the immediate use of the roadway.

The words "emerging from" mean "leaving or coming out of."

"Point of access," means "a place where an entry can be made onto a highway."

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

The first and second paragraphs refer respectively to Wis. Stat. §§ 346.47(1) and 340.01(51).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

Wis. Stat. § 346.18(4) provides for yielding the right of way to vehicles approaching on the highway under these circumstances. Wis JI-Civil 1175 Right of Way: Entering Highway from an Alley or Non-Highway Access Point covers this situation.

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1275 RIGHT OF WAY: WHEN YIELD SIGN INSTALLED

A safety statute provides that the driver of a vehicle when approaching any intersection at which has been installed a yield right of way sign, shall yield the right of way to other vehicles which have entered the intersection from an intersecting highway or which are approaching so closely on the intersecting highway as to constitute a hazard of collision and, if necessary, shall reduce speed or stop to yield.

"Right of way" means the privilege of the immediate use of the roadway.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

The paragraphs refer, respectively, to Wis. Stat. §§ 346.18(6) and 340.01(51).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1277 SAFETY BELT: FAILURE TO USE

The automobile in which (plaintiff) was (driving) (a passenger) was equipped with safety belts. Question _____ asks whether (plaintiff) was negligent in failing to use an available safety belt. In answering this question, you must determine if the omission by (plaintiff) to use an available safety belt was a failure to exercise ordinary care for (his) (her) own safety.

If you determine that (plaintiff) was negligent in failing to use an available safety belt, you should answer question _____ which asks whether (plaintiff)'s failure to use the safety belt was a cause of (plaintiff)'s injuries.

If you determine that the failure to use a safety belt was a cause of (plaintiff)'s injuries, you should then determine what percentage of (plaintiff)'s total damages were caused by the failure to wear an available safety belt.

(Burden of Proof, Wis JI-Civil 200)

SPECIAL VERDICT

Question _____: At and just before the accident was (plaintiff) negligent in failing to wear an available safety belt?

Answer: _____
Yes or No

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Question _____: If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

Question _____: If you answer question _____ "yes," then answer this question:

Assuming the total damages to be 100%, what percentage of (plaintiff)'s total damages was caused by the failure to wear an available safety belt?

Answer: _____%

COMMENT

This instruction was approved in 1985 and revised in 1988. The comment was revised in 1988, 1991, and 2002. The comment was updated in 2003, 2004, and 2009.

In 2003, the Wisconsin Supreme Court held that the Foley methodology, upon which this instruction and comment are based, still applies to safety belt negligence even though it applied a different methodology to safety helmet negligence. Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 73; Hardy v. Hoefferle, 2007 WI 264, 306 Wis.2d 513, 743 N.W.2d 843. For helmet negligence, see JI-Civil 1278.

Expert Testimony. This instruction should not be used unless there is evidence before the jury that the plaintiff's injuries were caused by his or her failure to use an available safety belt. Expert testimony is necessary to establish how the plaintiff's failure to wear a safety belt affected the plaintiff's injuries. In Holbach v. Classified Ins. Corp., 155 Wis.2d 412, 455 N.W.2d 260 (Ct. App. 1990), the court of appeals said expert testimony is always required to establish a seatbelt defense. The court relied on Austin v. Ford Motor Co., 86 Wis.2d 628, 642, 273 N.W.2d 233, 239 (1979), in which the supreme court said "the effect of seatbelts in accidents of a particular type at a particular speed is not a question of fact to be determined by the average juror without benefit of specialized knowledge in the form of expert testimony."

In Bentzler v. Braun, 34 Wis.2d 362, 387, 149 N.W.2d 626 (1967), the court held that although failure to wear seat belts is not negligence per se, "where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard."

This instruction and the suggested special verdict were drafted by the Committee so that safety belt negligence is treated as a reducing factor in determining recoverable damages. The court, in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W. 2d 824 (1983), said that the seat belt defense is "this court's recognition that . . . those who fail to use available seat belts should be held responsible for the incremental harm caused by their failure to wear available seat belts." Foley, supra at 484.

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In Foley v. City of West Allis, supra at 478, the supreme court held that "when seat belt negligence is not a cause of the collision but is a cause of a party's injury, such negligence should not be used to determine the injured party's contributory negligence for purposes of Wis. Stat. § 895.045 but should be used only to reduce the amount of damages recoverable."

In explaining its decision, the court said that it is illogical and unnecessary to view "in a one-dimensional way" the negligence causing the collision together with the plaintiff's negligence in failing to use a seat belt. Instead, the court said it is helpful to think of the accident involving seat belt negligence as involving "not one incident but two." Foley, supra at 485. The first incident is the actual collision of the vehicles. The second incident occurs when an occupant of a vehicle hits the vehicle's interior. Seat belt negligence relates only to this second incident, and the failure to wear seat belts may cause additional injuries beyond those caused by the first incident.

The court, in Foley, emphasized that seat belt negligence is to be treated as a reducing factor and that damages for "the incremental injuries caused by the failure to use a seat belt can be treated separately for purposes of calculating recoverable damages." Foley, supra at 485. Requiring the jury to assess this incremental damage by apportioning damages between the first and second incidents borrows from the apportionment techniques used in two traditional tort doctrines: avoidable consequences and mitigation of damages. Through these doctrines, tort law recognizes that if a plaintiff does not minimize the harm, plaintiff's recovery will be reduced for damages which reasonably could be avoided. Foley, supra at 487.

In determining how seat belt negligence should specifically be applied to damage recovery, the court in Foley, supra at 489, stated:

> We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused but that the defendant is not liable for incremental injuries that the plaintiff could and should have prevented by wearing an available seat belt.

After reviewing the special verdict formulated by the trial court, the court in Foley recommended that this Committee draft an instruction "which advises the jury that if it determines that the failure to wear a seat belt was a cause of a person's injuries, the jury must determine what percentage of the total damages for that person's personal injuries was caused by his or her failure to wear a seat belt." Foley, supra at 495. In a footnote to this recommendation, the court stated:

> If this type of instruction is given, the calculation set forth in steps (4) and (5) at p. 490 should reflect the percentage of damages attributable to the plaintiff's failure to wear an available seat belt rather than the percentage of causal negligence attributable to plaintiff's failure to wear the seat belt. 113 Wis.2d at 495 n.15.

Steps 4 and 5 cited in this footnote refer to the five-step process adopted by the court for determining recoverable damages. 113 Wis.2d at 490. In response to this recommendation, the Committee approved this instruction and the suggested special verdict.

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It has been suggested that seat belt negligence should instead be treated as a concurrent tort and that the seat belt negligence must be compared to the negligence of the accident as a whole in determining plaintiff's recovery. In support of this theory, reference is made to steps 4 and 5 of the five-step process adopted in Foley. The court said, with regard to steps 4 and 5, that the plaintiff's damages should be reduced by the percentage of total negligence attributable to plaintiff's seat belt negligence. Under this theory, the jury would first determine the amount of damages attributable to the seat belt negligence. Then, the jury would compare the seat belt negligence to the total negligence in causing the collision.

After reviewing the Foley decision, the Committee concludes that formulating the instruction and special verdict under the concurrent tort theory would be inconsistent with the Foley decision as a whole and contrary to the express recommendation of the court to this Committee. Instead, the instruction and special verdict approved by this Committee follows the court's recommendation by reducing recoverable damages by the percentage of damages attributable to the plaintiff's seat belt negligence. This formulation is consistent with the court's recognition in Foley that damages for the incremental injuries caused by the seat belt negligence should be treated separately and that those who fail to use seat belts should be held responsible for the incremental harm.

Limitation on the reduction of damages. In 1987, the Wisconsin Legislature enacted legislation requiring motor vehicle operators and passengers to wear safety belts. 1987 Wisconsin Act 132. The legislation restricts the reduction of plaintiff's damages for failure to wear a safety belt. Specifically, under Wis. Stat. § 347.48(2m)(g) created by 1987 Wisconsin Act 132, a failure to wear a safety belt shall not reduce the plaintiff's recovery of damages caused by the failure to wear a safety belt by more than 15%. The statute expressly states that this limitation does not affect the determination of causal negligence in the action.

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1278 SAFETY HELMET: FAILURE TO USE

No instruction.

COMMENT

This commentary was prepared in 2004 and updated in 2009.

See Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Hardy v. Hoefferle, 2007 WI App 264, 306 Wis.2d 513, 743 N.W.2d 843; Wis. Stat. § 895.049.

There is no instruction covering the failure to wear a safety helmet. In 2002, the Wisconsin Supreme court decided Stehlik v. Rhoads, supra, in which the court considered the availability and effect of the "helmet defense."

The plaintiff in Stehlik was injured while riding an all-terrain vehicle. The jury concluded that both the plaintiff and the ATV's owners were negligent and apportioned the accident negligence (30% plaintiff/70% defendant) and the "helmet negligence" (40% plaintiff / 60% defendant). The jury also concluded that 90% of the plaintiff's injuries were attributable to his failure to wear a helmet. The trial court's special verdict followed the formula for seat belt negligence established in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W.2d 824 (1983).

On motions after verdict, the trial judge struck the special verdict questions regarding the defendant's negligence for Stehlik's failure to wear a safety helmet, and limited Stehlik's recovery to the damages attributable to the Rhoads' negligence in causing the accident. That is, the circuit court reduced Stehlik's recovery by his 30 percent accident-causing contributory negligence, and by a further 90 percentBthe percentage of his injuries the jury allocated to the failure to wear a helmet.

Applying Foley to Safety Helmet Cases. The supreme court in Stehlik concluded that a plaintiff's negligent failure to wear a safety helmet is governed by the principles applicable to a plaintiff's negligent failure to wear a seat belt established in Foley v. City of West Allis, supra. Foley separated the consideration of seat belt negligence from accident negligence and adopted a "second collision" methodology, adapted from successive tort and enhanced injury theories.

Helmet Verdict Format. The supreme court in Stehlik held the jury in a helmet defense case should apportion accident negligence *separately* from helmet negligence. Only the former is subject to Wis. Stat. § 895.045, because helmet negligence, like seat belt negligence, is a limitation on damages, not a potential bar to recovery. The court distinguished safety helmet negligence from seat belt negligence and said the helmet negligence comparison question should ask the jury to compare the plaintiff's **helmet negligence as against the total combined negligence of the defendants**, rather than treating the comparison as an allocation or division of injuries or damages, as in a successive tort or enhanced injury case.

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The court of appeals in Hardy v. Hoefferle summarized the helmet verdict format established by Stehlik as follows:

> Where the "helmet defense" is raised, a jury must make two negligence determinations. The jury must first determine and allocate "accident negligence," which refers to who caused the accident itself. The contributory negligence statute, Wis. Stat. § 895.045, applies to the jury's allocation of "accident negligence" and may reduce or bar the plaintiff's recovery.
>
> The amount that remains recoverable after applying the contributory negligence statute is then subject to a second negligence allocation, which our supreme court referred to as "helmet negligence." Before engaging in the "helmet negligence" inquiry, a jury must first decide whether the plaintiff's failure to wear a helmet was a causal factor in the plaintiff's injuries. If so, the jury must allocate "helmet negligence" between the plaintiff and the defendant. The percentage of "helmet negligence" allocated to the plaintiff further reduces the amount otherwise recoverable under the "accident negligence" inquiry. However, Wis. Stat. § 895.045's provision barring recovery where a plaintiff's negligence exceeds a defendant's negligence does not apply to a jury's allocation of "helmet negligence."

In Hardy, the court of appeals held that where § 895.049 applies to prohibit a reduction of damages, it necessarily also precludes a person's failure to wear a helmet from being considered a form of negligence. Hardy v. Hoefferle, supra. ¶12

Legislation on Failure to Wear Protective Headgear. In 2004, the Wisconsin Legislature enacted 2003 Wisconsin Act 148 (creating Wis. Stat. § 895.049 and 901.053) to override the common law established in Stehlik. The act is effective for actions commenced on or after March 30, 2004.

The effect of the statute is to exempt certain plaintiffs from the Stehlik "helmet negligence" inquiry. The legislation provides that: "failure by a person who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all-terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, to use protective headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action."

The legislation also provides that evidence of "use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33 (3g) or 347.485 (1), who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all-terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, is not admissible in any civil action for personal injury or property damage."

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1280 SKIDDING

Skidding of a motor vehicle may occur without fault of the driver and having begun, it may continue without fault for a considerable space and time. On the other hand, the skidding may have been precipitated by the negligence of the driver, or the driver may have controlled the vehicle negligently after the skid began.

You may consider the driver's knowledge of the road conditions; if the slippery condition appeared suddenly without warning, the driver would be excused from a charge of negligence. On the other hand, where the icy or slippery condition of a road increases the danger of travel, and the driver is, or ought to be, aware of the condition, then the driver is required to exercise a degree of care commensurate with the conditions.

You may consider the speed of the skidding vehicle prior to or at the time of skidding, or the manner in which (the driver) controlled the car prior to skidding, or after the skidding commenced, in determining whether (the driver) was negligent.

COMMENT

This instruction and comment were approved in 1977. The instruction was updated in 2008. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction.

If wrong-side driving is involved, see Wis JI-Civil 1140, Position on Highway on Meeting and Passing: Violation Excused.

This instruction is a correct statement of the law; it is not erroneous as being, in effect, an instruction on unavoidable accident. Abbott v. Truck Ins. Exch. Co., 33 Wis.2d 671, 677, 148 N.W.2d 116 (1967).

Voigt v. Voigt, 22 Wis.2d 573, 126 N.W.2d 543 (1964), requires the sudden skidding driver (or the insurer if driver is killed) to show the driver was free from negligence in invading the wrong lane.

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In regard to ordinary care on slippery streets with respect to speed prior to skid and control before and during skid, see Coenen v. Van Handel, 269 Wis. 6, 10, 68 N.W.2d 435 (1955); Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W.2d 831 (1955); Zeinemann v. Gasser, 251 Wis. 238, 29 N.W.2d 49 (1947).

Skidding cases are collected in Poole v. State Farm Mut. Auto. Ins. Co., 7 Wis.2d 65, 68-69, 95 N.W.2d 799 (1959).

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1285 SPEED: REASONABLE AND PRUDENT; REDUCED SPEED

A safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions and having regard for actual and potential hazards. This statute requires that a driver in hazardous circumstances use ordinary care to regulate the vehicle's rate of speed to avoid colliding with any object, person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and using due care.

The statute also provides that a driver must drive at an appropriate reduced speed (when approaching and crossing [an intersection] [a railway grade crossing]) (when approaching and going around a curve) (when approaching a hillcrest) (when traveling upon any narrow or winding roadway) (when passing [school children] [highway construction or maintenance workers] [other pedestrians]) (when special hazards exist with regard to other traffic or by reason of weather or highway conditions).

Appropriate reduced speed means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.

> [Here insert, if appropriate, Wis JI-Civil 1310 Speed: Obstructed Vision; Wis JI-Civil 1315 Speed: Obstructed Vision Nighttime; Wis JI-Civil 1320 Speed: Camouflage.]

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COMMENT

The instruction and comment were approved in 1977 and revised in 1984. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first and second paragraphs refer, respectively, to Wis. Stat. § 346.57(2) and (3). These subsections do not impose an absolute liability upon drivers to avoid accidents. They merely restate the common-law standard of prudent conduct. Millonig v. Bakken, 112 Wis.2d 445, 452, 455, 334 N.W.2d 80 (1983).

The source of the general instruction is Bailey v. Bach, 257 Wis. 604, 608, 44 N.W.2d 631 (1950). This instruction was approved in Kraft v. Charles, 268 Wis. 44, 50-51, 66 N.W.2d 618 (1954).

Note that the literal language of the statute imposes an absolute duty and, hence, the insertion of the phrase "exercise ordinary care" is necessary to conform the instruction to Culver v. Webb, 244 Wis. 478, 492-93, 12 N.W.2d 731 (1944), and Lembke v. Farmers Mut. Auto Ins. Co., 243 Wis. 531, 535, 11 N.W.2d 169 (1943).

Where a motorist struck a pedestrian who was crossing the highway, it was held not error to give paragraph 1 of this instruction and to refuse to give paragraph 2 of this instruction as it related to passing pedestrians. Greene v. Farmers Mut. Auto Ins. Co., 5 Wis.2d 551, 554-55, 93 N.W.2d 431 (1958).

Appropriate reduced speed is a relative standard. McGee v. Kuchenbaker, 32 Wis.2d 668, 671, 46 N.W.2d 387 (1966). See also Millonig v. Bakken, supra at 455.

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1290 SPEED: FIXED LIMITS

[This instruction may be used in addition to Wis JI-Civil 1285.]

A safety statute provides that no person shall drive a vehicle at a speed in excess of _ miles per hour ____; any speed in excess of that limit would be negligent speed regardless of (other) conditions.

It is for you to determine whether (name)'s speed was over this limit and, if under, whether it was nevertheless a negligent speed under the conditions and circumstances then present and under the rules of law given to you by these instructions.

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008.

Wis. Stat. § 346.57(4).

The blanks are provided for the insertion of the specific appropriate speed limit of the statute.

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1295 SPEED: SPECIAL RESTRICTIONS FOR CERTAIN VEHICLES

[This instruction may be used in addition to Wis JI-Civil 1285 and 1290.]

A statute further provides that in addition to complying with other speed restrictions imposed by law, no person shall drive a _____ in excess of _____ miles per hour.

It is for you to determine whether (name)'s speed was over this limit and, if under, whether it was nevertheless a negligent speed under the conditions and circumstances then present.

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 2008. The comment was updated in 1982 and 1989.

The statute mentioned in the instruction is Wis. Stat. § 346.58.

The blanks are provided for insertion of the specific appropriate phrase of the statute. The statute sets out only one category of motor vehicles to which a special speed restriction applies: Vehicles equipped with metal or solid rubber tires (15 m.p.h.).

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1300 SPEED: IMPEDING TRAFFIC

The statutes regulating the speed of motor vehicles, in addition to regulating maximum speeds, also provide that no person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation (or is necessary to comply with the law). To comply with this statute, a driver is required to use ordinary care under circumstances then and there existing.

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 2008. The comment was updated in 1982.

The phrase in parentheses is to be used where special speed restrictions apply or traffic is being controlled by an officer. See Wis. Stat. § 346.59(1).

This instruction was approved in Bentzler v. Braun, 34 Wis.2d 362, 375, 149 N.W.2d 626 (1967). Where appropriate, the following sentence may be added: "The statute does not apply to a vehicle until it has been on the highway a sufficient time to attain a normal speed." Bentzler v. Braun, supra at 376.

In Werner Transp. Co. v. Barts, 57 Wis.2d 714, 723, 205 N.W.2d 394 (1973), the court stated that Wis. Stat. § 346.59 is a safety statute "which invokes the rule of negligence per se."

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1305 SPEED: FAILURE TO YIELD ROADWAY

A safety statute provides that if the driver of a motor vehicle is moving the vehicle so slowly as to impede the normal and reasonable movement of traffic, then the driver shall, if practicable, yield the roadway to an overtaking vehicle and shall move at a reasonably increased speed or yield the roadway to overtaking vehicles when directed to do so by a traffic officer.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992, 2008, and 2015.

Wis. Stat. § 346.59(2) requires a slow moving vehicle to yield the right of way if practicable. In 2014, the requirement that the overtaking vehicle give "audible warning" was eliminated. 2013 Wis. Act 365.

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1310 SPEED: OBSTRUCTED VISION

A driver of a motor vehicle on a highway has a duty to drive at a rate of speed that will permit the driver to stop within the distance the driver can see ahead. [This means that if, by reason of (a grade) (fog) (rain) (snow) (dust) (smoke) (or otherwise), the distance that the driver can plainly see objects or obstructions ahead of is reduced, then the driver must drive at a rate of speed that will enable the driver to bring the car to a standstill within the reduced distance.] [When a driver's vision is completely obscured, it is the driver's duty to slow down, or even stop, until the cause of the obscured vision is at least in part removed.]

COMMENT

This instruction was initially approved in 1960. The instruction and comment were revised by the Committee in 1982. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on Guderyon v. Wisconsin Tel. Co., 240 Wis. 215, 227, 2 N.W.2d 242, 247 (1942), and Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 630-31 (1909). See also Barker Barrel Co. v. Fisher, 10 Wis.2d 197, 200, 102 N.W.2d 107 (1960); Bailey v. Hagen, 25 Wis.2d 386, 130 N.W.2d 773 (1964); Kinsman v. Panek, 40 Wis.2d 408, 162 N.W.2d 27 (1968). The Guderyon case involved a motorist who, in the daytime, blinded by a cloud of smoke, collided with a parked truck.

See also Wis. Stat. § 346.57(2) and (3).

It is recommended that the last sentence of this instruction be read with the other portions of the paragraph when the facts warrant. In prior versions of this instruction, the last sentence was enclosed in brackets to indicate that its inclusion in the instruction was optional. In Nelson v. Travelers Ins. Co., 80 Wis.2d 272, 284, 259 N.W.2d 48 (1977), the trial court omitted the last sentence. On appeal, the court stated:

> While it might not have been prejudicial to omit the last sentence of the pattern instruction because it is only a logical extension of what precedes it, we believe the instruction should have been given in its entirety. It is an accurate statement of the law and could have had application to one version of the facts.

Where the obstruction is in or on the vehicle itself, see Wis. Stat. § 346.88.

Wis JI-Civil 1315 and 1320, which follow, deal, respectively, with obstructed vision in the nighttime and with camouflage.

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1315 SPEED: OBSTRUCTED VISION: NIGHTTIME

A driver of a motor vehicle on a highway in the nighttime has a duty to drive at a rate of speed that will permit the driver to stop within [the range of the vehicle's headlights under the weather conditions then prevailing] [the distance the driver can see ahead]. [This means that if by reason of (a grade) (rain) (fog) (snow) (dust) (dazzling lights of an oncoming car) (or otherwise), the distance that the driver can plainly see objects or obstructions ahead is reduced, the driver must drive at a rate of speed that will enable the driver to bring the car to a standstill within the reduced distance.] [When a driver's vision is completely obscured, it is the driver's duty to slow down, or even stop, until the cause of the obscured vision is at least in part removed.]

COMMENT

This instruction was approved by the Committee in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is based on Schroeder v. Kuntz, 263 Wis. 590, 593, 58 N.W.2d 445, 447 (1953), and Quady v. Sickl, 260 Wis. 348, 353, 51 N.W.2d 3, 5 (1952), in each of which a driver ran into a parked car, blinded by the lights of an oncoming car; Reuhl v. Uszler, 255 Wis. 516, 522, 39 N.W.2d 444, 448 (1949), in which a hillcrest obstructed a driver's view; Kleist v. Cohodas, 195 Wis. 637, 640-41, 219 N.W. 366, 367 (1928), in which it was snowing; Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 630-31 (1909), in which a driver ran into a barrier on a dark, rainy night.

A car operator is not necessarily negligent in proceeding ahead over pavement he or she had observed by preview is clear of obstructions, even though thereafter blinded by approaching lights of an oncoming car. Cary v. Klabunde, 12 Wis.2d 267, 107 N.W.2d 142 (1961).

The last sentence is based on the Schroeder case, supra, and cited cases. See Comment to Wis JI-Civil 1310 as to inclusion of the last sentence.

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1320 SPEED: CAMOUFLAGE

This rule, however, does not apply to situations where the object or obstruction ahead, although within the range of the driver's (headlights) (vision), may not reasonably be discovered because it blends with the color of the roadway or surroundings. When I refer to an object or obstruction that may not reasonably be discovered, I mean an object or obstruction that may not be seen by a driver exercising ordinary care with respect to lookout in time to enable the driver to stop before reaching it.

COMMENT

This instruction was approved by the Committee in 1960. 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.

The camouflage instruction is found in Zoellner v. Kaiser, 237 Wis. 299, 303, 296 N.W. 611, 613 (1941); Butts v. Ward, 227 Wis. 387, 393, 279 N.W. 6, 8-9 (1938); and Mann v. Reliable Transit Co., 217 Wis. 465, 470, 259 N.W. 415, 416-17 (1935). See also Schroeder v. Kuntz, 263 Wis. 590, 593-94, 58 N.W.2d 445, 447 (1953).

Expressions in some of the cases indicate that the camouflage doctrine may bear upon negligence with respect to lookout rather than speed. It is clear, however, that the camouflage doctrine bears upon the question of speed and is in modification of the doctrine of Lauson v. Fond du Lac, 141 Wis. 57, 60-61, 123 N.W. 629, 631 (1909). Although these cases cover only the blending of objects with roads, it is considered that the principle also applies to the blending of objects with other surroundings.

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1325 STOP AT STOP SIGNS

A safety statute provides that the driver of a vehicle approaching an official stop sign at an intersection shall cause the vehicle to stop before entering the intersection.

The stop required shall be made in the following manner:

[Select the proper item or items below to complete the instruction.]

(a) If there is a clearly marked stop line, the driver shall stop the vehicle immediately before crossing this line.

(b) If there is no clearly marked stop line, the driver shall stop the vehicle immediately before entering the nearest crosswalk.

(c) If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection, the driver shall stop the vehicle before entering the intersection at a point from which the driver can efficiently observe traffic on the intersecting roadway.

[Note: If you use (a) or (b) above, then use paragraph (d).]

(d) If the driver cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the driver shall, before entering the intersection, again stop the vehicle at a point as will enable the driver to efficiently observe the traffic on the intersecting roadway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008.

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Safety Statute. Wis. Stat. § 346.46. This statute is a safety statute. Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000). The violation of Wis. Stat. 346.46(1) is negligence per se, but violation can be excused through application of the emergency doctrine. Totsky, supra; Wis JI-Civil 1105A.

Definitions. Statutory definitions of "intersection," "roadway," "highway," "crosswalk, " "stop," and "through highway," if needed, are set forth in Wis. Stat. § 340.01.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

If an issue arises as to an "official" stop sign, see Wis. Stat. §§ 349.07 and 349.08 for authority to designate through highways and for the type of sign.

Lookout and Right of Way. For related duties as to lookout and right of way, see Bowers v. Treuthardt, 5 Wis.2d 271, 275, 92 N.W.2d 878, 881 (1958); Lewis v. Leiterman, 4 Wis.2d 592, 598-99, 91 N.W.2d 89, 92-93 (1958); Plog v. Zolper, 1 Wis.2d 517, 527-28, 85 N.W.2d 492, 498 (1957); Wis JI-Civil 1065, Lookout: Entering or Crossing Through Highway.

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1325A STOP AT STOP SIGNS [ALTERNATE]

A safety statute provides that the driver of a vehicle must come to a full and complete stop before entering an intersection at which has been erected an official stop sign designating an artery for through traffic. (Highway) (Street), on which (name) was traveling at the time and place in question, was an arterial highway, and there was erected at the proper place on ____ an arterial stop sign, requiring drivers on that _____ to stop. The statute further provides that:

[Select one or more of the following items to complete this paragraph.]

(a) If there is a clearly marked stop line, as there was at the stop line here, the driver must stop before crossing such line.

(b) If there is no clearly marked stop line, which was the situation here, the driver shall, if there is a crosswalk, as there was here, stop before entering the crosswalk.

(c) If there is neither a crosswalk nor a stop line at the intersection, which was the situation here, the driver, before entering the intersection, shall stop the vehicle at a point from which the driver can efficiently observe traffic on the intersecting roadway.

[I have previously defined for you the meaning of the word intersection.]

["Intersection" means the area embraced within the prolongation of the lateral boundary lines of two or more highways which join one another at an angle, whether or not one highway crosses the other.]

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A "highway" is defined by statute as being every way or place, of whatever nature, open to the use of the public as a matter of right for the purposes of vehicular travel.

It is not sufficient that a driver before entering an arterial highway at which there is a (crosswalk) (marked stop line) stop at the (crosswalk) (marked stop line) only. If the driver cannot efficiently observe traffic on the arterial highway from that point, the driver must stop again, before entering the highway, at a point where the driver can efficiently observe traffic approaching on the arterial highway.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008.

Wis. Stat. § 346.46. This statute is a safety statute. Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000).

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1330 STOP: EMERGING FROM AN ALLEY

A safety statute requires that the driver of a vehicle:

[Select the proper item below to complete the paragraph.]

(a) emerging from an alley shall stop the vehicle immediately prior to moving onto the sidewalk or onto the sidewalk area extending across the path of the vehicle.

(b) proceeding on an alley shall stop the vehicle immediately before crossing or entering an intersecting alley, whether or not the intersecting alley crosses the alley on which the vehicle is being driven.

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008.

Wis. Stat. § 346.47. Subsection (1) of the statute also requires the operator emerging from an alley to yield the right of way to both pedestrians and vehicles. See the cases cited in comment to Wis JI-Civil 1325, Stop at Stop Signs. See the statutory definition of "alley" in Wis. Stat. § 340.01(2).

The statute seems no longer to require a stop before entering a highway from a point of access other than another highway unless a sidewalk or sidewalk area is involved. See Wis. Stat. § 346.47.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1335 EMERGING FROM A PRIVATE DRIVEWAY OR OTHER NONHIGHWAY ACCESS

A safety statute requires that the driver of a vehicle (emerging from an alley) about to cross or enter a highway from any point of access other than another highway shall stop the vehicle immediately prior to moving on to the sidewalk or on to the sidewalk area extending across the path of the vehicle and shall yield the right of way to any pedestrian and upon crossing or entering the roadway shall yield the right of way to all vehicles approaching on the roadway.

(Unless a traffic control officer or official traffic control device otherwise directs or permits, the driver of a vehicle about to cross or enter a highway from a point of access other than another highway is required to stop.)

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008.

Wis. Stat. § 346.47.

(The statute also provides that the driver of a vehicle on an alley shall stop the vehicle immediately before crossing or entering an intersecting alley, whether or not the intersecting alley crosses the alley on which the vehicle is being driven. Wis. Stat. § 346.47(2).)

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

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1336 RAILROAD CROSSING: DRIVER'S DUTY

A driver upon a highway, who is approaching a railroad grade crossing, has a duty to use ordinary care for his or her own safety. To perform this duty, a driver must not only look in both directions to determine whether a train is approaching but must listen as well. If by reason of any obstruction to his or her view as the driver approaches the tracks the driver is unable to make an efficient observation, the driver must slow down or stop the vehicle, if necessary, before entering upon the crossing to use his or her senses of hearing and vision effectively.

(If a driver claims to have looked and yet failed to see an approaching train which you determine must have been in plain sight or hearing, then the driver must either be deemed to have failed to look or to have looked and yet heedlessly submitted himself or herself to the danger.)

[Note: Add Wis JI-Civil 1338, Nonoperation of Railroad Crossing Signals, if appropriate.]

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

The first paragraph is supported by Bembister v. Aero Auto Parts, 12 Wis.2d 252, 107 N.W.2d 134 (1961); Keegan v. Chicago, M., St. P. & P. R.R., 251 Wis. 7, 27 N.W.2d 739 (1947); Bellrichard v. Chicago & N. W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945).

The second paragraph is supported by Odgers v. Minneapolis, St. P. & S. S. M. Ry., 261 Wis. 363, 52 N.W.2d 917 (1952), which quotes White v. Minneapolis, St. P. & S. S. M. Ry., 147 Wis. 141, 133 N.W. 148 (1911).

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Wis JI-Civil 1070, Lookout: Failure To See Object In Plain Sight, may be substituted for paragraph two.

The duty to look and listen before entering upon a railroad track is absolute. Bellrichard v. Chicago & N. W. Ry., supra, and a complete failure to look or listen or to see what had to be in sight would probably be negligence as a matter of law. Keegan v. Chicago, M., St. P. & P. R.R., supra.

However, the presence of safety measures or devices at the crossing may make the conduct of the plaintiff (as an exercise of ordinary care under the circumstances) a jury issue. See Wis JI-Civil 1338, Nonoperation Of Railroad Crossing Signals, and Comment.

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1337 STOP: ALL VEHICLES AT RAILROAD CROSSING SIGNALS

A safety statute requires that the driver of a vehicle shall not drive on or across a railroad crossing:

[Select the appropriate following paragraph.]

(a) While any traffic officer or railroad employee signals to stop;

(b) While any warning device signals to stop, except that, if the driver of the vehicle, after stopping and investigating, finds that no railroad train or railroad track equipment is approaching, the driver may proceed.

(c) If any crossbuck sign is maintained at the crossing, while a railroad train or railroad track equipment occupies the crossing or approaches so closely to the closing as to be a hazard of collision.

[The statute further provides that a driver of a vehicle shall not drive through, around, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.]

COMMENT

The instruction and comment were originally published in 1962. The instruction was revised in 1992, 2008, and 2015.

The last paragraph is to be used only in appropriate instances.

Wis. Stat. § 346.44.

In connection with paragraph (b), which permits a driver to proceed if, after investigation, a driver finds no train coming, it is suggested that under some fact situations additional questions on violations of duty to look and listen may be necessary. If an additional question is used, it will be desirable to expand this paragraph for use as an instruction with such question. If there is conflict in the evidence as to looking and listening, and no additional question is used, the instruction should be expanded to cover duty in these respects. See, for example, the last paragraph of Wis JI-Civil 1339.

Plog v. Zolper, 1 Wis.2d 517, 527, 85 N.W.2d 492, 498 (1957); Ligman v. Bitker, 270 Wis. 556, 72 N.W.2d 340 (1955).

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1337.5 STOP: PEDESTRIAN CROSSING RAILROAD TRACKS

A safety statute requires that a pedestrian may not enter or cross a railroad crossing: [Select the appropriate following paragraph.]

(a) While any traffic officer or railroad employee signals to stop;

(b) While any warning device signals to stop, except that, if the pedestrian, after stopping and investigating, finds that no railroad train or railroad track equipment is approaching, the pedestrian may proceed.

(c) If any crossbuck sign is maintained at the crossing, while a railroad train or railroad track equipment occupies the crossing or approaches so closely to the closing as to be a hazard of collision.

[The statute also provides that a pedestrian may not cross through, around, or under any crossing gate or barrier at a railroad crossing, while the gate or barrier is closed or is being opened or closed.] [The statute also provides that a pedestrian may not cross through or around or climb over or under a railroad train or railroad track equipment while the railroad train or railroad track equipment occupies a railroad crossing.]

COMMENT

The instruction and comment were approved in 2015.

Wis. Stat. § 346.445 (2013 Wis. Act 219).

The last two sentences are to be used only in appropriate instances.

See also Wis JI-Civil 1337, Commentary.

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1338 STOP: NONOPERATION OF RAILROAD CROSSING SIGNALS

A driver who intends to cross a railroad track may not rely on the nonoperation of a safety device (absence of the usual flagman) as an absolute assurance of safety and may not proceed without regard to his or her own safety; the driver must still exercise ordinary care for his or her own protection. However, the presence or absence of warning guards and the proper functioning or nonfunctioning of guards or signals are circumstances to be considered in determining whether the driver used ordinary care.

COMMENT

The instruction and comment were originally published in their present form in 1962. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

This instruction is to be used, in the proper instances, as a supplement to an instruction on lookout, listening, speed, or management and control, as may be appropriate.

Wasikowski v. Chicago & N. W. Ry., 259 Wis. 522, 525, 49 N.W.2d 481, 482 (1951); Gundlach v. Chicago & N. W. Ry., 172 Wis. 438, 441, 179 N.W. 577, 578, 885 (1920).

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1339 STOP: SPECIAL VEHICLES AT RAILROAD CROSSING

A safety statute requires that the driver of a vehicle (describe from Wis. Stat. § 346.45(1)) before crossing at grade any track of a railroad shall stop the vehicle within 50 feet but not less than 15 feet from the nearest rail of the railroad.

The driver of a vehicle required to stop before crossing any track shall listen and look in both directions along the track for any approaching train, and shall not proceed until such precautions have been taken and until the operator has ascertained that the course is clear. Whenever an auxiliary lane is provided for stopping at a railroad, driver of vehicles required to stop shall use the lane for stopping.

A stop need not be made at:

(a) a railroad grade crossing when a police officer or crossing flagman directs traffic to proceed.

(b) a railroad grade crossing when an official traffic control signal permits traffic to proceed.

(c) an abandoned railroad grade crossing with a sign indicating the rail line is abandoned.

COMMENT

The instruction and comment were approved by the Committee in 1980. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.45.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "operator" is more appropriate to the evidence, then substitute "operator" for "driver."

A stop also need not be made at a railroad grade crossing which is marked with a sign in accordance with Wis. Stat. § 195.285(3). Such signs shall be erected by the maintaining authority only upon order of the Commissioner of Railroads as set forth in § 195.285.

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1340 STOP: FOR SCHOOL BUS LOADING OR UNLOADING CHILDREN

The driver of a vehicle which approaches from the front or rear any school bus which has stopped on a street or highway and when the bus is displaying flashing red warning lights shall stop the vehicle not less than 20 feet from the bus and shall remain stopped until the bus resumes motion or the bus driver extinguishes the flashing red warning lights.

COMMENT

The instruction and comment were approved by the Committee in 1980. The instruction was revised in 2008. The comment was updated in 1989 and 2008.

See Wis. Stat. § 346.48(1) and (2) for the duty of the school bus driver to:

(1) stop and display lights when approaching another school bus,
(2) actuate lights at least 100 feet before stopping to load or unload,
(3) not to use red flashing lights.

See Wis. Stat. § 346.48(1) for the obligation of an operator of a vehicle proceeding in the opposite direction on a divided highway.

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1350 TURN OR MOVEMENT: SIGNAL REQUIRED

A safety statute provides that, if traffic may be affected by (the turning of a vehicle at an intersection) (the turning of a vehicle at a private road or driveway) (the turning of a vehicle from a direct course or by movement of the vehicle right or left upon the roadway), a person so (turning) (moving) shall give an appropriate signal by hand or directional signal of the intention to turn or move.

The statute also provides that the signal shall be given continuously not less than the last 100 feet traveled by the vehicle before turning.

COMMENT

This instruction and comment were approved by the Committee in 1980. The comment was revised in 1986. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 346.34(1) is a safety statute, the violation of which is negligence per se. Betchkal v. Willis, 127 Wis.2d 177, 183, 378 N.W.2d 684 (1985). Thus, making a turn in violation of Wis. Stat. § 346.34(1) is negligence as a matter of law. Grana v. Summerford, 12 Wis.2d 517, 521, 107 N.W.2d 463 (1961).

See also Wis JI-Civil 1352, Turn: Position and Method, and Wis JI-Civil 1354, Turn or Movement: Ascertainment that Turn or Movement Can Be Made with Reasonable Safety: Lookout.

Note that the sentence of § 346.34(1)(b), which creates the 100 feet signal requirement, does not specifically apply to deviation. Also, the operator of a bicycle must signal "continuously not less than the last 50 feet traveled before turning." Wis. Stat. § 346.34(1)(b).

When a vehicle is stopped for the purpose of turning, negligence from failure to signal turn may be found causal to rear end collision. Delong v. Sagstetter, 16 Wis.2d 390, 114 N.W.2d 788 (1962); Bannach v. State Farm Mut. Auto Ins. Co., 4 Wis.2d 194, 197, 90 N.W.2d 121 (1958); American Fidelity & Casualty Co. v. Travelers Indem. Co., 3 Wis.2d 209, 214, 87 N.W.2d 782 (1958). But see Greenville Coop. Gas Co. v. Lodesky, 259 Wis. 376, 48 N.W.2d 234 (1951).

Drivers not on the highway, but about to enter it, are not "traffic which may be affected" by the change in lanes. Donlea v. Carpenter, 21 Wis.2d 390, 124 N.W.2d 305 (1963).

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In Tuschel v. Haasch, 46 Wis.2d 130, 139-40, 174 N.W.2d 497 (1970), and later in Betchkal, supra, the court held that where conditions do not allow for a full 100 feet for signaling a turn, a driver is not automatically negligent in giving the signal for a lesser distance.

In Betchkal, the court said it was clear from the statutory language of Wis. Stat. § 346.34 that the legislature intended the statute to apply only to situations where at least 100 feet has been traveled by the turning vehicle. See also Tuschel v. Haasch, supra. In Betchkal and Tuschel, the court rejected its earlier holding in Sparling v. Thomas, 264 Wis. 506, 59 N.W.2d 433 (1953), which applied the signaling statute to situations where the turning vehicle had traveled less than 100 feet before turning by requiring a turning vehicle to yield the right of way to a following vehicle.

Forfeiture of Right of Way. The court said in Betchkal that it is error to interpret Wis. Stat. § 346.34(1)(b) as creating a right of way for the following driver when the turning driver has traveled less than 100 feet before turning. The court said that, in Wisconsin, a forfeiture of right of way does not shift or transfer the right of way to the other driver as suggested in Sparling. Thus, the court held that the trial court erred by instructing the jury, according to Sparling, that "if a vehicle cannot signal its intention to turn continuously for a distance of not less than 100 feet before turning, it is required to yield the right of way to a vehicle approaching from the rear." This instruction was error. Instead of right of way being transferred to the competing driver, the driver with the right of way loses it, and neither party has a statutory right of way.

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1352 TURN: POSITION AND METHOD WHEN NOT OTHERWISE MARKED OR POSTED

A safety statute prescribes the required position of a vehicle when making a (right turn) (left turn into an intersection) (left turn into a private road or driveway) (turn indicated by markers).

[Use the appropriate following paragraph.]

[Right Turn: The law requires that both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle or the nature of the intersecting roadway, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.]

[Left Turn: The law requires that the approach for a left turn shall be made in that lane farthest to the left which is lawfully available to traffic moving in the direction of travel of the vehicle about to turn left. This means (the lane immediately to the right of the center line or center dividing strip of the two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway). The intersection shall be entered in the lane of approach and, whenever practicable, the left turn shall be made in that portion of the intersection immediately to the left of the center of the intersection. The left turn shall be completed so as to enter the intersecting highway in the lane farthest to the left which is lawfully available to traffic moving in the direction of the vehicle completing the left turn. This means (the lane immediately to the right of the center line or center dividing strip of the

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two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway).]

[Left Turn into Private Road or Driveway: The law requires that the approach for a left turn into a private road or driveway shall be made in the lane farthest to the left which is lawfully available to traffic moving in the direction of travel of the vehicle about to turn left. This means (the lane immediately to the right of the center line or center dividing strip of the two-way highway) (the lane next to the left-hand curb or edge of the roadway of the one-way highway) (the center lane of the three-lane highway). If, because of the size of the vehicle or the nature of the intersecting private road or driveway, the turn cannot be made from the specified lane of approach, the turn shall be made with due regard for all other traffic.]

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 2008.

Wis. Stat. §§ 346.31, 346.32. For left turns on 3-lane highways, see Wis. Stat. § 346.31.

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1354, Turn or Movement: Ascertainment that Movement can be Made with Reasonable Safety: Lookout.

This instruction is not to be given when the highway is otherwise marked or posted.

Niedbalski v. Cuchna, 13 Wis.2d 308, 108 N.W.2d 576 (1961); Schwartz v. San Felippo, 11 Wis.2d 32, 103 N.W.2d 916 (1960); Wintersberger v. Pioneer Iron & Metal Co., 6 Wis.2d 69, 94 N.W.2d 136 (1959); Pedek v. Wegemann, 274 Wis. 47, 81 N.W.2d 49 (1957).

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1354 TURN OR MOVEMENT: ASCERTAINMENT THAT TURN OR MOVEMENT CAN BE MADE WITH REASONABLE SAFETY: LOOKOUT

A safety statute provides that no person shall (turn his or her vehicle at an intersection) (turn into a private road or driveway) (turn from a direct course or move right or left upon a roadway) unless and until the movement can be made with reasonable safety.

This statute requires the driver of the turning vehicle to use ordinary care to make an efficient lookout. This calls for the driver to use ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the driver's turn or movement. After having made these observations, the driver must also use reasonable judgment in calculating the time required to safely turn or move without interfering with other vehicles within or approaching the vehicle's course of travel.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1980, 1992, and 2009.

Wis. Stat. § 346.34(1).

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1352, Turn: Position and Method.

A jury question based on § 346.34(1) and another question based on lookout would result in duplicity. "When an inquiry is made in the form of the verdict of a statutory duty [ascertaining that turn can be made with reasonable safety] which includes several elements of conduct, one of those elements should not also be made the subject of a separate inquiry." Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 463 (1961).

"There is no duty to keep a lookout ahead independently of making the observation required under § 85.175(1) [now § 346.34(1)]. It is one and the same duty." Grana, supra at 524. However, questions on lookout and on position on the highway when turning would not be duplicitous.

If the evidence shows that the left-turning motorist failed to see approaching traffic, there was a failure as to lookout, and there is no need to instruct on calculation. Zartner v. Scopp, 28 Wis.2d 205, 214, 137 N.W.2d 107 (1965).

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Cases involving vehicles approaching from rear are Schweidler v. Caruso, 269 Wis. 438, 69 N.W.2d 611 (1955); J.W. Cartage Co. v. Laufenberg, 251 Wis. 301, 28 N.W.2d 925 (1947).

Cases involving vehicles approaching from opposite directions are Schwarz v. Winter, 272 Wis. 303, 74 N.W.2d 447 (1956); Mezera v. Pahmeier, 258 Wis. 229, 45 N.W.2d 620 (1951).

Cases involving reasonable judgment are Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957); DeBaker v. Austin, 233 Wis. 39, 287 N.W.2d 720 (1939).

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1355 DEVIATION FROM TRAFFIC LANE: CLEARLY INDICATED LANES

A safety statute provides that the driver of a vehicle shall drive as nearly as practicable entirely within a single lane and not deviate from the lane in which the driver is driving without first determining that the movement can be made with safety to other vehicles approaching from the rear.

A driver of the vehicle who is changing his or her lane of travel is required to use ordinary care to make an efficient lookout. This means the driver must use ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the change of lanes. After having made these observations, the driver must also use reasonable judgment in calculating the time required to safely deviate from a traffic lane without interfering with other vehicles.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1980 and 1984. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. §§ 346.13(1), 346.34(1). See also Westfall v. Kottke, 110 Wis.2d 86, 108, 328 N.W.2d 481 (1983).

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1114, Duty of Preceding Driver to Following: Lookout.

This instruction is to be given only when there are clearly indicated lanes. If lanes are not clearly indicated, the proper instruction is Wis JI-Civil 1354. Committee Notes, 1957, 40 W.S.A. at 331.

The provisions of this statute apply to the entire roadway. Schweidler v. Caruso, 269 Wis. 438, 447, 69 N.W.2d 611, 616 (1955); Green Bay-Wausau Lines, Inc. v. Mangel, 257 Wis. 92, 95-96, 42 N.W.2d 493, 495 (1950); J.W. Cartage Co. v. Laufenberg, 251 Wis. 301, 304, 28 N.W.2d 925, 926 (1947).

An additional verdict question on lookout would be duplication. Grana v. Summerford, 12 Wis.2d 517, 523, 107 N.W.2d 463 (1961).

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1380 NEGLIGENCE: TEACHER: DUTY TO INSTRUCT OR WARN

Question ___ asks whether the defendant, _____, was negligent with respect to instructing or warning the plaintiff, _____, of the dangers present in (conducting the experiment, using the trampoline, etc.).

A teacher occupies a position in relation to his or her pupils comparable to that of a parent to his or her children. A teacher has the duty to instruct and to warn the pupils in his or her custody of any dangers which the teacher knows, or in the exercise of ordinary care ought to know, are present in the classroom (laboratory, gymnasium, etc.) and to instruct them in methods which will protect them from those dangers, whether the danger arises from equipment, devices, machines, or chemicals. A failure to warn the students of such danger or instruct them in means of avoiding such danger is negligence.

COMMENT

The instruction was originally published in its present form in 1967. The comment was updated in 2010 and 2020. The 2020 revision updated case law citations.

Grosso v. Wittemann, 266 Wis. 17, 62 N.W.2d 386 (1954); 32 A.L.R.2d 1163-1186 (1953); Restatement, Second, Torts § 320 (1965); Heuser v. Community Insurance Corp., 2009 WI App 151, 321 Wis.2d 729, 774 N.W.2d 653.

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1381 NEGLIGENCE: TEACHER: DUTY TO SUPERVISE STUDENTS

Question _ asks whether the defendant, ____, was negligent in the supervision which he or she maintained over the plaintiff, ____, in his or her (conducting the experiment, using the trampoline, etc.).

As to his or her pupils, a teacher occupies a position comparable to that of a parent in regard to protecting his or her children from harm or injury. This relationship requires the teacher to maintain that degree of supervision which an ordinarily prudent (chemistry teacher, physical education teacher, manual arts teacher) would maintain under the same or similar circumstances.

In determining whether defendant, _____, exercised ordinary care, you may weigh and consider the age, intelligence, and experience which (defendant) knew, or ought to have known, that (plaintiff) and other students in the class possessed.

You may further weigh and consider the responsibilities which had been placed upon (defendant) by (his) (her) employment, such as the curriculum (he) (she) was required to carry out, the daily schedule which was imposed on (him) (her), the number of pupils assigned to (him) (her) in the class, the size and arrangement of the classroom, and the equipment, devices, and other objects therein.

COMMENT

The instruction and comment were originally published in 1967. The comment was updated in 1980 and 2016. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

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Grosso v. Wittemann, 266 Wis. 17, 62 N.W.2d 386 (1954); 32 A.L.R.2d 1163-1186 (1953); Restatement, Second, Torts § 320 (1965).

A teacher in a school has a common-law duty to use reasonable care in the supervision of those pupils in his or her charge. Larry v. Commercial Union Ins. Co., 88 Wis.2d 728, 738, 277 N.W.2d 821 (1979); Cirillo v. Milwaukee, 34 Wis.2d 705, 150 N.W.2d 460 (1967); Meihost v. Meihost, 29 Wis.2d 537, 545, 139 N.W.2d 116 (1966).

Where the teacher leaves a classroom, relevant considerations for examining the teacher's duty to use "reasonable care" include:

> . . . the activity in which the students are engaged, the instrumentalities with which they are working (band saws, dangerous chemicals), the age and composition of the class, the teacher's past experience with the class and its propensities, and the reason for and duration of the teacher's absence. Cirillo v. Milwaukee, supra at 715.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

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1383 EMPLOYER NEGLIGENCE: NEGLIGENT HIRING, TRAINING, OR SUPERVISION

In this case, (plaintiff) claims (defendant)'s employee, (employee's name), engaged in conduct that injured (him) (her). (Plaintiff) further claims that (defendant) was negligent in the (hiring) (training) (supervision) of (defendant's employee).

Question 1 asks you to determine whether the (defendant's employee) [was negligent (describe the alleged act or failure to act)] [describe the alleged intentional tort, e.g., committed a battery] [describe the alleged wrongful act that violates public policy]. [Insert here an appropriate instruction covering the wrongful act, whether it be a (1) negligent tort, (2) an intentional tort, or (3) a violation of public policy as evidenced by existing statutory law.]

Question 2 asks whether the (conduct) (negligence) of (defendant's employee) was a cause of the (accident) (injury to the (plaintiff)). If you are required to answer this question, you must consider whether there was a causal connection between the (conduct) (negligence) of (defendant's employee) and the (accident) (injury to the (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an (accident) (injury). The negligence of one person may cause an (accident) (injury to the (plaintiff)) or the combined negligence of two or more persons may cause it.] Before you find that the (accident) (injury) was caused by (defendant's employee)'s (conduct) (negligence), you must find that this (conduct) (negligence) was a substantial factor in producing the (accident) (injury to (plaintiff)).

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Question 3 asks whether (defendant) was negligent in (hiring) (training) (supervising) (employee). An employer is required to use ordinary care in (hiring) (training) (supervising) its employees. Ordinary care is the care which a reasonable person would use in similar circumstances. An employer is not using ordinary care and is negligent, if the employer, without intending to do harm, does something (or fails to do something) with respect to the (hiring) (training) (supervision) of an employee that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property from the employees conduct.

Question 4 asks whether the negligence of (defendant) was a cause of the (conduct) (negligence) of (defendant's employee). If you are required to answer this question, you must consider whether there was a causal connection between (defendant)'s negligence and the (conduct) (negligence) of (employee) which in turn was a cause of the (accident) (injury to (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of the employee's (negligence) (conduct). The negligence of one person may cause the employee's (negligence) (conduct) or the combined negligence of two or more persons may cause it.] Before you find that (defendant)'s negligence was a cause of (employee)'s (conduct) (negligence), you must find that the negligence was a substantial factor in producing the (accident) (injury to (plaintiff)).

SPECIAL VERDICT

1. [**Committee Note to Trial Judge**: This question requires the jury to determine whether the alleged wrongful act was committed by the employer's employee. The question will be adapted to whether the alleged wrongful conduct is a negligent tort, an intentional tort, or a violation of public policy evidenced by existing statutory law. If the evidence raises a jury question regarding the employee's negligence, the question might be: Was (defendant)'s employee negligent on (date)? If the alleged wrongful act

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is an intentional tort, the question might be: Did (defendant's employee) commit a battery on (date)? If the court has had to make a legal determination of the public policy behind a statute, the question might be: Did (defendant's employee) (fail to) (describe the act or omission which if proved would violate public policy)?]

Answer:_____
Yes or No

2. If you have answered question 1 "yes," then answer this question. Otherwise do not answer it. Was the (conduct) (negligence) of (defendant's employee) a cause of injury to (plaintiff)?

Answer:_____
Yes or No

3. If you have answered question 2 "yes," then answer this question. Otherwise do not answer it. Was (defendant) negligent in the (hiring) (training) (supervision) of (employee)?

Answer:_____
Yes or No

4. If you have answered question 3 "yes," then answer this question. Otherwise do not answer it. Was such negligence of (defendant) a cause of the (conduct) (negligence) of (defendant's employee) on (date)?

Answer:_____
Yes or No

5. [If the evidence indicates the contributory negligence of plaintiff was a cause of injury, then insert negligence and cause questions as to the plaintiff.]

6. [Negligence comparison question for all parties found causally negligent.]

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7. What sum of money will fairly and reasonably compensate (plaintiff) for the injuries sustained as a natural and probable consequence of the incident on (date) with respect to:

a. Past pain, suffering, and disability $_____

b. Other subparts as required by the evidence $_____

COMMENT

This instruction was approved by the Committee in 1999. The comment was updated in 2010, 2014, 2018, and 2019.

Wrongful Act by Employee. The Committee has substituted "conduct" for "wrongful act" out of concern that a jury might be inclined to make its own determination of what "conduct" is "wrongful." The Miller court has defined this term as follows:

> . . . While we stop short of requiring an underlying tort, we do conclude that there must be an underlying wrongful act committed by the employee as an element of the tort of negligent hiring, training or supervision. A wrongful act may well be a tort, but not necessarily. If the act of the employee is contrary to a fundamental and well-defined public policy as evidenced by existing statutory law, it is sufficient.

Miller v. Wal-Mart Stores, Inc., 219 Wis.2d 250, 263, 580 N.W.2d 233 (1998). Whether employee "conduct" occurred is a question of fact for the jury. Thus, where the evidence indicates the employee may have committed a tort, the elements of the tort should be submitted for jury determination.

However, if the evidence raises a question of violation of "fundamental and well-defined public policy as evidenced by existing statutory law," there may be a threshold question of law presented for court determination: what is the fundamental and well-defined public policy in the statute? After the court has decided this question, the jury may be asked whether the employee did or failed to do what was required by the public policy.

Negligent Hiring, Training, or Supervision Distinguished from Respondeat Superior. ". . . (W)ith a vicarious liability claim, an employer is alleged to be vicariously liable for a negligent act or omission committed by its employee in the scope of employment. See Shannon v. City of Milwaukee, 94 Wis.2d 364, 370, 289 N.W.2d 564 (1980). . . . (V)icarious liability is based solely on the agency relationship of a master and servant. In contrast, with a negligent supervision claim, an employer is alleged to be liable for **a negligent act or omission it has committed** in supervising its employee. Therefore, liability does not result solely because of the relationship of the employer and employee but instead because of the independent negligence of the employer." (Emphasis in original.) L.L.N. v. Clauder, 209 Wis.2d 674, 698-99 n.21, 563 N.W.2d 434 (1997). Also see Doyle v. Engelke, 219 Wis.2d 277, 291 n. 6, 580 N.W.2d 245 (1998).

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When a negligent supervision claim rests solely on an employee's intentional and unlawful act, such as assault and battery, without any separate basis for a negligence claim against the employer, no coverage exists. Accordingly, a negligent supervision claim can qualify as an occurrence only if facts exist showing that the employer's own conduct accidently caused plaintiff's injuries. See Talley v. Mustafa, 2018 WI 47, 381 Wis.2d 393, 423, 911 N.W.2d 55 (2018).

Causation. "With respect to a cause of action for negligent hiring, training, or supervision, we determine that the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." Miller v. Wal-Mart Stores, supra at 262. See also Hansen v. Texas Roadhouse, Inc., 2013 WI App 2, 345 Wis.2d 669, 827 N.W.2d 99.

If the jury finds employee negligence in question 1, there may be situations where the evidence raises a jury question as to whether the negligent conduct of others (including the plaintiff) may also be a cause of plaintiff's injuries. In such cases, the bracketed section in the third and fifth paragraphs may be appropriate. The jury would determine whether the negligence was causal and if so, answer a comparison question.

Negligence Comparison. Where the jury finds causal negligence on the part of the employee, current case law allows recovery from "any of several parties whose negligence combined to cause the injury and also permits the operation of comparative-negligence principles for the allocation of negligence between joint tortfeasors." Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 178, 290 N.W.2d 276 (1980), citing Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962). The Committee believes that the causal negligence, if any, of the plaintiff, employer, and employee should be compared under Wis. Stat. § 895.045. The parties should be treated as concurrent rather than successive tortfeasors.

There is a potential for juror confusion in comparing the causal negligence of the plaintiff, the employee, and the defendant employer. The jury is being asked to compare negligence which was a cause of the accident or injury to the plaintiff with negligence which was a cause of the employee's conduct (which was a cause of the accident or injury to the plaintiff). However, the language of the Miller court cited above clearly indicates this approach is to be followed.

Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Crest Chevrolet- Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986). An intentional tortfeasor is not entitled to contribution from a negligent tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

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Comparison. There is no comparison under the comparative negligence statute (§ 895.045) between intentional and negligent tortfeasors. Fleming, supra. For a sample verdict, see JI-Civil 1580.

Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct. Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Wis. Stat. 895.045(1) provides only for comparison of negligent conduct. Also see Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Also, a negligent tortfeasor may claim indemnification from a joint intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, et al, 131 Wis.2d 123, 130, 388 N.W.2d 908 (1986). An intentional tortfeasor has no claim for contribution from a joint negligent tortfeasor. Fleming, supra, p. 129, Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 619-620, 436 N.W.2d 311 (1989).

For a sample verdict to use in cases involving intentional and negligent acts of joint tortfeasors, see Wis JI-Civil 1580 (comment).

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1384 DUTY OF HOSPITAL: GRANTING AND RENEWING STAFF PRIVILEGES (CORPORATE NEGLIGENCE)

A hospital owes a duty to its patients to use reasonable care in granting and renewing staff privileges to permit only competent (physicians) and (surgeons) to use its facilities. This duty requires the hospital to use reasonable care to appoint only qualified physicians and surgeons to its medical staff (and to periodically monitor and review their competency). The failure to use reasonable care is negligence.

In investigating the qualifications of doctors applying for staff privileges, the duty of reasonable care requires that a hospital: (1) require an applicant to complete an application; (2) verify the accuracy of the applicant's statements especially in regard to the applicant's medical education, training, and experience; (3) solicit information from the applicant's peers, including those not referenced in the application, who are knowledgeable about the education, training, experience, health, competence, and ethical character of the applicant; (4) determine if the applicant is currently licensed to practice in this state and if the applicant's licensure or registration has been or is currently being challenged; (5) inquire whether the applicant has been involved in adverse medical malpractice actions and whether the applicant has lost (his) (her) membership in any medical organizations or privileges at any other hospital.

A hospital must evaluate the information gained through its investigation and make a reasonable judgment to approve or deny an application for staff privileges. With respect to its investigation and evaluation, the hospital must gather and evaluate all of the facts and

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knowledge that would have been acquired had it exercised reasonable care in investigating its medical staff applicants.

[Hospitals are not insurers of the competency of their medical staff. If the hospital exercised the degree of care, skill, and judgment as required of it, it cannot be found negligent simply because a member of its medical staff acted in a negligent manner.]

COMMENT

This instruction and comment were originally approved in 1988. The instruction and comment were revised in 1998. The comment was updated in 2017.

This instruction is based on the decision of the supreme court in Johnson v. Misericordia Community Hosp., 99 Wis.2d 708, 301 N.W.2d 156 (1981).

Standard of Care. The standard of ordinary care under the circumstances expressed in Osborn v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931) applies to hospitals. Johnson, supra at 738; Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969). The revision to this instruction in 1998 changed the standard of "average hospital" to "reasonable hospital." See Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996).

Need for Expert Testimony. In establishing the negligence of a hospital, the necessity for expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which requires special learning, study, or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 272, 260 N.W.2d 386 (1977). See also Walker v. Sacred Heart Hospital, Appeal No. 2015AP805. Because the procedures ordinarily used by hospitals to evaluate applications for staff privileges are not within the realm of the ordinary experience of mankind, expert testimony is generally required to prove negligence. Johnson, supra at 739. However, not every case will require expert testimony, e.g., where the hospital has made no effort to investigate the applicant.

Bifurcation of Trial. If at the pretrial, the plaintiff indicates that evidence will be presented relating to prior bad acts of medical treatment by the doctor to show the hospital's negligence, then bifurcation of the claims against the doctor and the hospital should be considered to prevent prejudice against the doctor. See Wis. Stat. § 904.03. Under this bifurcated format, the case against the doctor would be presented first. If the doctor is not negligent, then the trial is over unless there are claims against hospital employees (e.g., nurses or residents). The second phase would cover the hospital's negligence, comparison of negligence, and damages. The same jury should hear both phases of the trial.

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1385 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: PERFORMANCE OF ROUTINE CUSTODIAL CARE NOT REQUIRING EXPERT TESTIMONY

Question _____ asks if (hospital) was negligent in caring for (plaintiff)?

A hospital is responsible for the negligence of its employees. A hospital employee must use ordinary care in providing the services and attention to a patient required under the circumstances. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

In determining if the hospital's (employee)(s) (was) (were) negligent, you should consider (plaintiff)'s condition and whether the condition was known to (employee)(s), and if not, whether the condition should have been known to (employee)(s) had the (employee)(s) used ordinary care in performing (his) (her) (their) duties.

In answering these questions, you may consider the following:

- any information about the patient which was transmitted to the hospital by members of the patient's family or by the person who brought the patient to the hospital,
- what the patient says or does while in the hospital,
- the records kept by the hospital which were readily available to the employee(s), and
- any other information or instructions the employee(s) had at that time.

If, after considering all of the evidence, you find that employee(s) (was) (were) negligent, then (hospital) was negligent.

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COMMENT

The instruction and comment were originally published in 1971. This revision was approved by the Committee in 1999.

Dahlberg v. Jones, 232 Wis. 6, 285 N.W. 841 (1939); Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969); Cramer v. Theda Clark Memorial Hosp., 45 Wis.2d 147, 172 N.W.2d 427 (1969); Eden v. LaCrosse Lutheran Hosp., 53 Wis.2d 186, 191 N.W.2d 715 (1971); Wills v. Regan, 58 Wis.2d 328, 206, N.W.2d 398 (1973); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975); Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 260 N.W.2d 386 (1977); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978).

The duty of care owed a patient by a hospital is one of ordinary care under the circumstances. Payne v. Milwaukee Sanitarium Found., Inc., supra at 272. However, in applying the ordinary care standard, there is a recognized distinction between medical care and custodial or routine hospital care. Thus in Payne, the court noted that:

> Where the patient requires nursing or professional hospital care, then expert testimony as to the standard of that care is necessary.
>
> However, the standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony.

This need for expert testimony with respect to medical care was repeated by the court later in the decision:

> In establishing the negligence of a hospital the necessity of expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge or skill or experience on subjects that are not within the realm of ordinary experience of mankind, and which requires special learning, study or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 276 N.W.2d 386 (1977).

See also Kujawski v. Arbor View Center, 139 Wis.2d 455, 407 N.W.2d 249 (1987); "Necessity of Expert Testimony to Support Action against Hospital for Injury to or Death of Patient," 40 A.L.R.3d 515 (1971).

This instruction should be used only in actions against a hospital for negligent conduct that does not amount to malpractice. It should be given only where the hospital nurse or employee was in performance of custodial, housekeeping, or routine duties. Examples of these duties are discussed in Schuster v. St. Vincent Hosp., supra; Cramer v. Theda Clark Memorial Hosp., supra; Kujawski v. Arbor View Center, supra.

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For example, in Cramer and Kujawski, the court said where a nurse leaves a patient unattended and under inadequate restraint involves matters of routine care and does not require expert testimony. The use or non-use of restraints requires expert testimony only where the decision to leave a patient unattended is a matter of therapy. Kujawski, supra at 468.

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1385.5 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: SUICIDE OR INJURY RESULTING FROM ESCAPE OR ATTEMPTED SUICIDE

Question _____ asks if (hospital) was negligent in caring for (plaintiff)?

A hospital is responsible for the negligence of its employees. A hospital employee is negligent when (he) (she) fails to use reasonable care in providing for the hospital's patients. Reasonable care is that care which a person of ordinary intelligence and prudence would provide under the same or similar circumstances considering a patient's physical and mental condition.

A hospital has the duty to restrain or guard a patient only if employees knew, or in the exercise of reasonable care should have known, the propensity of the patient for (suicide, escape, self injury). In determining whether (employee[s]) knew or should have known of the possibility of (suicide, escape, self injury) you should consider information received by (employee[s]) from the attending physician, members of the family, persons who brought the patient to the hospital, the conduct and statements of the patient while in the hospital, as well as all the circumstances under which the patient was admitted to the hospital.

If, after consideration of all of the evidence, you find that (employee[s]) (was) (were) negligent, then (hospital) was negligent.

Question ____ asks whether at the time of the incident causing injury to (plaintiff) the (hospital) did know or should have foreseen the particular risk of harm that led to (plaintiff)'s injury. In determining whether the employee(s) of (hospital) knew or should have foreseen the particular risk of harm, you should consider information received by the employee(s) from the attending physician, the conduct and statements of (plaintiff) while in the hospital, as well the circumstances under which (plaintiff) was admitted to the hospital. A hospital is

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under no duty to take special precautions when there is no reason to anticipate the particular risk of harm. To answer this question "yes," you must be satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the employee(s) of the hospital knew or should have foreseen the particular risk of harm to (plaintiff) from (suicide, escape, self-injury).

Question ____ asks whether (plaintiff) was negligent with respect to (his) (her) safety. Generally, every person in all situations has a duty to exercise ordinary care for his or her own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to (himself)(herself).

This general rule of ordinary care is modified where the plaintiff has a mental disability, is under the custody and control of a hospital, and the hospital is negligent in not foreseeing a particular risk of harm in caring for the plaintiff. In these circumstances, plaintiff's duty to exercise ordinary care for his or her own safety is that of a reasonable person with the plaintiff's mental disability in similar circumstances.

There are circumstances in which mentally disabled persons are as able to appreciate danger as any other person and are able to control their actions. You must consider (plaintiff)'s mental state at the time of the accident. (Plaintiff) is negligent if (plaintiff) did something or failed to do something that a reasonable person with (plaintiff)'s mental disability would recognize as creating an unreasonable risk of harm.

Question ____ asks whether (plaintiff) was totally unable to appreciate the risk of harm that led to (his)(her) injury and the duty to avoid that risk.

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This question asks you to consider (plaintiff)'s mental state at the time of the accident, including the capacity of (plaintiff) to appreciate (his)(her) own conduct. (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he)(she) was utterly incapable of conforming (his)(her) conduct to the standard of ordinary care.

In answering this question, you should consider any observations of (plaintiff) noted by the attending physician, members of the family or persons who brought (plaintiff) to the hospital; (plaintiff)'s conduct and statements while at the hospital; the circumstances under which (plaintiff) was admitted to the hospital, including any diagnosis; and all other evidence received at trial bearing on (plaintiff)'s condition at the time of the accident.

[Insert where applicable: The evidence indicates that (plaintiff) was involuntarily committed. This does not necessarily establish that (he)(she) was so mentally disabled that (he)(she) lost (his)(her) mental capacity to appreciate the risk of harm from (his)(her) own conduct and the duty to avoid it. You must decide whether (plaintiff)'s mental disability which resulted in (his)(her) commitment was such that (plaintiff) was rendered incapable of appreciating the risk of harm and the duty to avoid that risk.]

SPECIAL VERDICT

Question 1: Was (defendant) negligent in caring for (plaintiff)?

Answer: _____
Yes or No

If you answered Question No. 1 "Yes" then answer Question No. 2. If you answered Question No. 1 "No" do not answer any other Questions.

Question 2: Was (defendant)'s negligence a cause of (plaintiff)'s injury?

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Answer: _____
Yes or No

If you answered Question No. 2 "Yes" then answer Question No. 3. If you answered Question No. 2 "No" do not answer any other Questions.

Question 3: At the time of the incident causing injury to (plaintiff) was (he) (she) in the custody and control of (defendant)?

Answer: _____
Yes or No

If you answered Question No. 3 "Yes" then answer Question No. 4. If you answered Question No. 3 "No" then go to Question No. 7.

Question 4: At the time of the incident causing injury to (plaintiff), did (defendant) know or should (defendant) have foreseen the particular risk of harm that led to (plaintiff)'s injury?

Answer: _____
Yes or No

If you answered Question No. 4 "Yes" then answer Question No. 5. If you answered Question No. 4 "No" then go to Question No. 7.

Question 5: Was (plaintiff) negligent with respect to (his)(her) safety? *

Answer: _____
Yes or No

If you answered Question No. 5 "Yes" then answer Question No. 6. If you answered Question No. 5 "No" then go to Question No. 10.

Question 6: Was (plaintiff) totally unable to appreciate the risk of harm that led to (his) (her) injury and (his) (her) duty to avoid that risk?

Answer: _____

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Yes or No

If you answered Question No. 6 "Yes" then go to Question No. 10. If you answered Question No. 6 "No" then go to Question No. 8.

Question 7: Was (plaintiff) negligent with respect to (his) (her) safety? **

Answer: _____
Yes or No

If you answered Question No. 7 "Yes" or Question No. 6 "No," then answer Question No. 8. If not, go to Question No. 10.

Question 8: Was (plaintiff)'s negligence a cause of (his) (her) injury?

Answer: _____
Yes or No

If you answered "Yes" to Question Nos. 2 and 8, then answer this question. If not, go to Question No. 10.

Question 9: Taking the total negligence that caused (plaintiff)'s injury to be 100%, what percentage do you attribute to:

a. Plaintiff _____%

b. Defendant _____%

TOTAL 100%

If you answered Question No.2 "Yes" then answer this question. Otherwise do not answer it.

Question 10: What sum of money will fairly and reasonably compensate (name of plaintiff) for (his) (her) injury?

$_____

* Subjective negligence standard

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** Objective negligence standard

COMMENT

This instruction and comment were approved in 2005.

This instruction is based on the decision in Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545. The Hofflander decision involved a claim of a mentally disabled person who was injured while trying to escape an emergency detention facility. The supreme court concluded:

> ¶35. A person who is mentally disabled is held to the same standard of care as one who has normal mentality. An exception to this rule may exist when a mentally disabled person is under the protective custody and control of another. When a mentally disabled plaintiff relies on this exception to seek recovery for a self-caused injury, the plaintiff must establish that (1) a special relationship existed between the defendant caregiver and the plaintiff, giving rise to a heightened duty of care; and (2) the defendant caregiver knew or should have foreseen the particular risk of harm that led to the plaintiff's injury. If a special relationship existed but the defendant could not have foreseen the particular risk of harm, then the defendant is entitled to assert the affirmative defense of contributory negligence, and the fact finder should evaluate the comparative negligence of the parties using an objective standard of care.
> ¶36. However, if a special relationship did exist, the particular risk of harm was foreseeable, and there is some evidence that the defendant caregiver failed to exercise the duty of care that was required under these circumstances, the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care. In this situation, if the mentally disabled plaintiff is able to show that she was totally unable to appreciate the risk of harm and the duty to avoid it, the plaintiff's contributory negligence should not be compared to the negligence of the defendant. It should be expunged as a matter of law.

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1390 INJURY BY DOG:

[Suggested Preliminary Instructions: Wis JI-Civil 100, 110, 115, 120, 125, 215, 145, and 200]

(Plaintiff) alleges that (Defendant) is liable for injuries caused (Plaintiff) by a dog, based on section 174.02, Wisconsin Statutes, which states in part, that the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property. Before you may find a person who owns a dog liable, you must first find that (Plaintiff) suffered an injury to (his) (her) person, domestic animal or property and that the dog caused injury.

Question No. 1 on the verdict asks whether (Defendant) "owned," "harbored," or "kept" the dog. (Defendant) claims that (he) (she) did not "own," "harbor," or "keep" the dog that injured (Plaintiff). You must decide whether (Defendant) "owned," "harbored," or "kept" the dog, and to do so you must look to all of the evidence presented. A person need not be the legal owner of a dog to keep or harbor the dog. A person keeps a dog if (he) (she) exercises a measure of care, custody, or control over the dog. A person's status as a keeper can change over time, with the focal point being the time of the injury. A person harbors a dog if (he) (she) shelters or gives refuge to a dog. Neither the casual presence of dogs on one's property, a meal of mercy to a stray dog, nor the mere ownership of the property on which the dog resides makes one a keeper or harborer. There must be evidence that (Defendant) furnished the dog with shelter, protection, or food or exercised some degree of control over the dog or the property where the dog resides.

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Question No. 2 on the verdict asks whether the actions of (Defendant)'s dog were a cause of injury to (Plaintiff). This question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. The actions of a dog were a cause of injury if they were a substantial factor in producing the injury. An injury may be caused by the actions of a dog or by the negligence of a person or by the combined actions of a dog and the negligence of a person.

A person's injury by a dog may involve negligence on (his) (her) own part. Question No. 3 asks about that. You must determine the extent of (Plaintiff)'s negligence, if any, with respect to (his) (her) own safety, at or before the contact with (Defendant)'s dog. A person is negligent when (he) (she) fails to exercise ordinary care. Every person in all situations has a duty to exercise ordinary care for (his) (her) own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent if the person does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to (himself) (herself).

If you answer question No. 3 on the verdict "yes," finding that (Plaintiff) was negligent with respect to (his) (her) own safety, then you will need to answer question No. 4. That question asks whether (Plaintiff)'s negligence was a cause of (his) (her) injury. Please note that this question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. Someone's negligence was a cause of (his) (her) injury if it was a substantial factor in producing the injury. An injury may be caused by the actions of a

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dog, by the negligence of a person, or by the combined actions of a dog and the negligence of a person.

If, by your previous answers, you are required to answer question No. 5, you will determine how much and to what extent (Defendant)'s dog and (Plaintiff)'s negligence are to blame for causing the injury. You will decide the percentage (a portion of 100%) attributable to each party in causing the injury.

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

You must answer question No. 6, the damage question no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.

[I have answered question 6(a) because the parties have agreed on the amount to be inserted. You should not conclude from the fact I have answered this question as to the amount of damages that any party has admitted fault or that any party may be responsible for the amount inserted. Finally, you should not assume that because I have answered this question, that a party already has or necessarily will recover this amount. Parties, may, as here, agree on an amount of damages without admitting they are responsible for the damages.]

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In answering the damage questions, completely disregard any percentages which you may have inserted as your answers to the subdivisions of question No. 5, the comparison question.

In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you or me.

Your answers to the damage questions should not be affected by sympathy or resentment or by the fact that one of the parties from whom damages are sought is an insurance corporation; nor should you make any deductions because of a doubt in your minds as to the liability of any party to this action.

In considering the amount to be inserted by you in answer to each damage question, the burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages with respect to the element or elements mentioned in the questions and the amount of the damages. The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the incident.

Determining damages for pain and suffering cannot always be made exactly or with mathematical precision; you should award damages in an amount which will fairly compensate (Plaintiff) for (his) (her) injuries.

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The amount you insert in answer to each damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinion or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence—carefully and dispassionately—and determine your answers from the evidence in the case.

Question 6(a) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past medical expenses. You will insert as your answer the sum of money you find has reasonably and necessarily been incurred from the date of the incident up to this time for the care of the injuries sustained by (Plaintiff) as a result of the incident.

Billing statements (which may include invoices) for health care services (Plaintiff) has received since the accident have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (Plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (Plaintiff) as a result of the incident.]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (Plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (Plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily

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provided to care for (Plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (Plaintiff)). You must still determine whether the medical expenses were provided for the injuries sustained by (Plaintiff) as a result of the accident.]

Question 6(b) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past pain, suffering, and disability. Your answer to this subdivision should be the amount of money that will fairly and reasonably compensate (Plaintiff) for the pain, suffering, and disability (he) (she) has suffered from the date of the incident up to this time as a result of the incident.

Pain, suffering, and disability includes any physical pain, humiliation, embarrassment, worry, and distress which (Plaintiff) has suffered in the past. You should consider to what extent (his) (her) injuries impaired (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life.

Question 6(c) asks what sum of money will fairly and reasonably compensate (Plaintiff) for future pain, suffering, disability.

If you are satisfied that (Plaintiff) will endure pain, suffering, and disability, in the future as a result of the incident, you will insert as your answer to this subdivision the sum of money you find will fairly and reasonably compensate (Plaintiff) for this future pain, suffering, and disability.

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Pain, suffering, and disability includes:

• physical pain

• worry

• distress

• embarrassment

• humiliation

In answering this damage question, you should consider the following factors:

- the extent (Plaintiff)'s injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life;
- the nature of (Plaintiff)'s injuries;

the effect the injuries are reasonably certain to produce in the future, bearing in mind (Plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

In answering questions 7 and 8, you must determine whether (dog), prior to (date), bit a person without provocation and with sufficient force to break the skin and cause permanent scarring or disfigurement. If you are required to answer questions 9 and 10, you must decide whether (Defendant), knew or was notified that (dog), previously bit a person without provocation and with sufficient force to cause permanent scarring or disfigurement.

[Follow with Wis JI-Civil 1735, 180, and 190]

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SPECIAL VERDICT

QUESTION NO. 1. Did (Defendant) own, harbor, or keep (dog) at the time of the injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 2. Was (Defendant)'s (dog) a cause of injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 3. At and before the contact with (Defendant)'s dog, was (Plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____
Yes or No

If you answered question No. 3 "yes," answer this question:

QUESTION NO. 4. Was (Plaintiff)'s negligence a cause of injury to (him) (her)?

Answer: _____
Yes or No

If you have answered question No.'s 2 & 4 "yes," please answer the following question:

QUESTION NO. 5. Assuming the conduct of (Defendant)'s (dog) and (Plaintiff)'s negligence caused 100% of (Plaintiff)'s injuries, what percentage do you attribute to:

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(a) (Defendant)'s (dog) _____

(b) (Plaintiff) _____

Total 100%

Answer the following question no matter how you answered the previous questions.

QUESTION NO. 6. What sum of money will fairly and reasonably compensate (Plaintiff) for (his) (her) injuries with respect to:

a. Past Medical Expenses $_____

b. Past Pain, Suffering & Disability $_____

c. Future Pain, Suffering & Disability $_____

QUESTION NO.7 Did (dog) bite (Plaintiff) with sufficient force to break the skin?

Answer: _____
Yes or No

If "Yes," then answer Question No. 8.

QUESTION NO. 8. Did the bite cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

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If "Yes," then answer Question No. 9.

QUESTION NO. 9. Did (dog) prior to (date) and without provocation, bite a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

If "Yes," then answer Question No. 10.

QUESTION NO. 10. Did (Defendant) know or was (he)(she) notified that (dog) had previously and without provocation bit a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

Dated at_____, Wisconsin, this day of , 20__.

_____
Presiding Juror

Dissenting Juror(s) (if any): Questions or Subdivision to which Juror Dissents

_____ _____

_____ _____

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COMMENT

This instruction has been completely re-created in light of 2015 Wisconsin Act 112 which changed Chapter 174 of the statutes as it relates to double damages. Effective November 13, 2015, the legislature removed "domestic animal" or "property" from the double damages provision under Wis. Stat. § 174.02(1)(b) and changed the "prior injury" standards. Only dog "bites" to a "person" are now eligible for double damages and that eligibility is further narrowed by the following conditions:

A "person" injured by a dog is eligible for double damages only if;
1. The injury is from a "bite" that had sufficient force to break the skin, and
2. The bite caused a "physical scar" or "disfigurement."

The Act also provides that the prior known "dog bite" had to be "without provocation," to a "person" (not a domestic animal or property) and had to be a bite that was of sufficient force to have broken the skin and left a scar or disfigurement. *See* § 174.02(1)(b). Prior to 15 Wis. Act 112, the plaintiff only had to prove that the owner was "notified" or knew that the dog had previously injured or caused injury to a person, domestic animal or property.

OLD DOUBLE DAMAGES	NEW DOUBLE DAMAGES
1. "injuring"	"biting" – sufficient force to break the skin
2. "causing injury"	cause scarring or disfigurement
3. "previously injured"	"without provocation bite"
4. Person/domestic animal/property	person

A claim for a dog injury *without notice* of prior injury (§174.02(1)(a)) is a jury claim as a claim for a dog's injury to one's person, property or domestic animal has long been known to exist in common law. The legislature is silent in §174.02, however, as to whether a statutory claim for a dog bite *after notice* is a jury claim. See *Wis JI-Civil 1 Right to a Jury Trial: Law Note for Trial Judges* for further discussion regarding the analysis of the constitutional right to a jury trial in statutory claims. Given our history of treating §174.02(1)(b) *after notice* dog bites as a jury issue, we recommend that Questions 7, 8, 9, and 10 continue to be answered by the jury.

Strict Liability. The dog injury statute, Wis. Stat. § 174.02(1)(a), imposes strict liability on the owner of a dog who injures another person, domestic animal, or property. *See* Campenni v. Walrath, 180 Wis. 2d 548, 509 N.W.2d 725 (1994); Pattermann v. Pattermann, 173 Wis. 2d 143, 496 N.W.2d 613 (Ct. App. 1992). While imposing strict liability, the statute does not impose absolute liability. Issues regarding causation and comparative negligence must still be examined. Questions 1 and 2 may often be answered as a matter of law. Questions 3 and 4 inquire about contributory negligence on the part of the Plaintiff and whether the Plaintiff's negligence was causal to (his) (her) injury. Question 5 asks the jury to compare the contributory negligence of the Plaintiff with the strict liability of the dog's owner. Such a comparison of negligence and strict liability is common in product liability actions. *See* Wis JI-Civil 3268 and 3290. Question 6 is a standard damages question. Questions 7-10 are to be given if there is a claim for double damages and evidence that such a prior injury occurred.

"Owner" as defined under Wis. Stat. § 174.001(5). An issue that has caused significant controversy is who is considered to be a "owner," "harborer," or "keeper" of a dog. *See* Wis. Stat. § 174.001(5). In Armstrong v. Milwaukee Mutual Insurance Co., 202 Wis. 2d 258, 549 N.W.2d 723 (1996), the court discussed

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who is a "keeper" of a dog. The court said that upon review of earlier Wisconsin case law, it concluded that several factors are critical in determining who is a keeper and, therefore, an owner within the confines of ch. 174. First, the person in question must exercise some measure of custody, care, or control over the dog; however, a person's status as a keeper can change over time and the focal point for the jury is the time of the injury. The purpose of Wis. Stat. § 174.02 is to protect those people who are not in a position to control a dog, rather than to protect those persons who are statutorily defined as owners.

A person who is employed to care for a dog is a "keeper" of that dog within the statutory definition of Wis. Stat. § 174.001(5). An owner injured while in control of the dog may not use the statute to hold another owner liable. Where there is negligence by the owner, a keeper may pursue a common law negligence claim against the owner.

In Fifer v. Dix, 2000 WI App 66, 234 Wis. 2d 117, 608 N.W.2d 740, a dog's owner loaned his dog to another individual. While the dog was in the control of the individual, it bit the plaintiff. The plaintiff argued that the owner of the dog was strictly liable under Wis. Stat. § 174.02(1) for the injuries the plaintiff incurred as a result of the bite. The defendant-owner argued that under Armstrong, an owner who is not negligent and is not exercising control over his or her dog cannot be held liable under § 174.02 for injuries incurred by a third person. The court concluded that the plain language of the statute unambiguously imposes strict liability on a dog owner whose dog injures a person who is neither its owner nor its keeper, and nothing in the Armstrong decision precludes the defendant-owner from being found liable to the plaintiff under the statute.

In Fire Insurance Exchange v. Cincinnati Insurance Co., 2000 WI App 82, 234 Wis. 2d 314, 610 N.W.2d 98, the court concluded that an owner of a dog may sue a keeper for contribution when an innocent third party has been injured. The court said the statute imposes liability on anyone who owns, keeps, or harbors a dog who injures a third party. Reading the statute to allow both owners and keepers to be liable, the court said, comports with the statute's policy of assigning responsibility to those in a position to protect innocent third parties from dog bites. Once two parties are liable to the person whom the dog has bitten, they are joint tortfeasors to whom a right of contribution accrues where one pays more than that party's fair share of the damages caused. *Id.*, ¶17.

Wis. Stat. § 174.02 is inapplicable where a person trips over a sleeping dog. Alwin v. State Farm Fire & Cas. Co., 2000 WI App 92, ¶14, 234 Wis. 2d 441, 610 N.W.2d 218. The court found that to impose liability upon a dog owner for injuries arising solely from a person tripping over a sleeping dog would effectively result in a pure penalty for dog ownership. *Id.*

In Pawlowski v. American Family Mutual Insurance Co., 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67, the court considered whether a homeowner who allows a dog owned by someone else to reside in her home is a person who either "harbors" or "keeps" a dog. In Pawlowski, the unleashed dog injured a third party after the dog was allowed out of the house by its legal owner. The court concluded that the homeowner "harbored" the dog and was thus a statutory "owner" of the dog under Wis. Stat. § 174.02 at the time of the dog bite incident. The court found that the homeowner's status as a harborer of the dog was not extinguished when the dog's legal owner took momentary control of the dog. *Id.*, ¶7.

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In contrast, a landlord is not liable in negligence for injuries caused by a tenant's dog, unless the landlord is an owner or keeper of that dog. Ladewig v. Tremmel, 2011 WI App 111, 336 Wis. 2d 216, 802 N.W.2d 511. In Augsburger v. Homestead Mutual Insurance Co., 2014 WI 133, 359 Wis. 2d 385, 856 N.W.2d 874, the court concluded that mere ownership of the property on which a dog resides is not sufficient to establish that an individual is an owner of a dog under Wis. Stat. § 174.02. The totality of the circumstances determines whether the legal owner of the property has exercised the requisite control over the property to be considered a harborer and thus an owner under the statute. *Id.*, ¶22.

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1391 LIABILITY OF OWNER OR KEEPER OF ANIMAL: COMMON LAW

An owner (keeper) of a(n) (insert name of animal) is deemed to be aware of the natural traits and habits which are usual to a(n) (name of animal) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.

In addition, if an owner (keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the owner (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.

(A person is said to be a keeper of an animal if, even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of his or her family or household to maintain the animal on his or her premises.)

SPECIAL VERDICT

1. Did (defendant) own or keep (animal)?

Answer: _____

Yes or No

2. Did (animal) cause injury or damage to the person or the property of another?

Answer: _____

Yes or No

(Verdict continued on page 2)

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If the answer to both question 1 and question 2 is "yes":

3. Was the injury or damage due to the animal's exercise of its natural traits and habits?

Answer: _____

Yes or No

If the answer to question 3 is "yes":

4. Did (defendant) use ordinary care to restrain and control the animal?

Answer: _____

Yes or No

COMMENT

This instruction and comment were approved by the Committee in 1974. The special verdict was added in 2016. The comment was updated in 1990, 1994, 1995, 2001, 2004, 2013, and 2015.

Control of Animal. This instruction sets forth the duty of the person who has control over the animal. White v. Leeder, 149 Wis.2d 948, 440 N.W.2d 557 (1989). It is not designed to set forth a duty as between the owner and keeper of an animal.

This instruction covers a claim based on common law negligence. The owner is also liable where the damage caused by the animal was caused by poor care and treatment of the animal. Denil v. Coppersmith, 117 Wis.2d 90, 343 N.W.2d 136 (Ct. App. 1983).

Stallions; Bulls; Boars; Rams; Goats. For liability of an owner or keeper for damage by a stallion over one year, a bull over six months, boar, ram, or billy goat over four months which runs at large, see Wis. Stat. § 172.01. The statute creates strict liability; no showing of fault by the owner is required. See also Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774 (1959).

For injuries caused by a horse on a highway, see Templeton v. Crull, 16 Wis.2d 416, 144 N.W.2d 843 (1962). For injuries caused by a muskie, see Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993).

For the negligence of a riding or stable master, see Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

Facts evidencing "unusual traits and habits likely to result in injury" are discussed in Denil v. Coppersmith, supra.

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Owners and Keepers. The casual presence of a dog on someone's premises does not make that person an owner or keeper. Patterman v. Patterman, 173 Wis.2d 143, 496 N.W.2d 613 (Ct. App. 1992).

This instruction does not distinguish between domesticated and wild animals but rather instructs the jury to hold owners of animals to the appropriate standard of care given the nature of the animal involved. See Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993)

The terms "owner" and "keeper" are defined in Koetting v. Conroy, 223 Wis. 550, 270 N.W. 625 (1937). See also White v. Leeder, supra at 957-58; Patterman v. Patterman, supra; Augsburger v. Homestead Mutual Ins. Co., 2014 WI 133, 359 Wis.2d 385, 856 N.W.2d 874. "Harboring" an animal lacks the proprietary aspect of keeping, Patterman, supra, at 149 n.4.

White v. Leeder, supra, contains the following discussion of the common law negligence rule with respect to animals.

> . . . . At common law, the cases have established that the owner or keeper of a domesticated animal is held to anticipate the general propensities of the class to which the animal belongs, as well as any unusual traits or habits of the individual animal. See Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774, 96 N.W.2d 821 (1959).
>
> The common-law rule first requires the owner or keeper to use ordinary care in controlling the characteristics normal to the animal's class. The owner or keeper of a bull is thus required to take greater precautions to keep it under effective control than would be required of the owner of a cow or steer. See Restatements, Second, Torts, sec. 518, comment g, p. 31 (1977).
>
> The common-law rule further allows the plaintiff to show that the individual animal had vicious or mischievous propensities and that the owner or keeper knew or should have known of them. A vicious propensity is a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation. See 3A C.J.S. Animals, sec. 180, p. 674 (1973).

Contributory Negligence. The doctrine of contributory negligence applies to plaintiff's actions. White v. Leeder, supra at 958.

Expert Testimony. In White v. Leeder, supra, the court agreed with the trial court that technical expert testimony was not required to establish causal negligence. The court said that the issues involving whether the matter in which the owner kept a bull negligently caused the plaintiff's injury was within the realm of comprehension.

Damages. A claim by an injured keeper against a dog's owner for common law negligence, is not governed by the damage provisions in the dog bite statute § 174.02. Malik v. American Family Ins. Co., supra, ¶ 31. The court concluded that the trial court correctly ruled that since the keeper's claim under § 174.02 was dismissed, she could not recover double damages under § 174.02(1)(b) even if she prevailed on the remaining common law negligence claim. Malik, 2001 WI App 82, ¶ 10.

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Liability of Landowner or Landlord. In Smaxwell v. Bayard, 2004 WI 101, the court limited liability arising from injuries caused by dogs. The court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

> "We hold, on public policy factors, that common law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.

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1395 DUTY OF PUBLIC UTILITY: HIGHWAY OBSTRUCTIONS: NONENERGIZED FACILITIES

Public highways are constructed primarily for the use of the public in traveling upon them. In addition to this use, public utilities are permitted to construct within the highway right-of-way facilities, such as poles, wires, and necessary supporting devices and guy wires.

A safety statute provides that the original construction of such facilities must be done in such a manner that the public use of any highway, bridge, stream, or body of water will not thereby be obstructed or incommoded. The original construction must be of such design and the materials used must be of such quality as to withstand the outside forces or deterioration, which would be reasonably anticipated by a person exercising ordinary care.

After the facilities have been constructed, it is the duty of the public utility to exercise ordinary care to maintain the facilities in a reasonably safe state of repair in order to avoid obstructing or incommoding the public use of the highway. The utility has a further duty to exercise ordinary care to make inspections from time to time to learn of any defects that may cause an obstruction or incommode the public use of the highway. The frequency of such inspections is determined by what a person of ordinary intelligence and prudence would do in view of the type and usual life span of the materials used in the constructions and the likelihood or unlikelihood of damage by outside persons or forces.

If a highway obstruction by a utility facility is caused by a force occurrence, such as fire, storm, or vandalism, for which the company was not responsible, then you cannot find the utility negligent unless the utility had notice of the obstruction, or, unless this condition occurred such a length of time prior to the accident that the utility, in the exercise of ordinary care, ought to have discovered the obstruction and repaired it. It is the duty of a utility upon

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receiving notice of damage to its facilities which causes, or is likely to cause, a highway obstruction to repair the facility as soon as is reasonable.

COMMENT

The instruction and comment were originally published in 1967. The comment was updated in 1980 and was reviewed without change in 1989.

Although Wis. Stat. § 182.017 provides that no utility facility "shall at any time obstruct or incommode. . .," the supreme court decided in Gray v. Wisconsin Tel. Co., 30 Wis.2d 237, 140 N.W.2d 203 (1966), that negligence per se was limited to the initial construction and not to inspection and maintenance.

As to the second paragraph regarding ordinary care in original construction, see 74 Am. Jur.2d Telecommunications § 38 (1974); 97 A.L.R.2d 664, 668 (1964); 86 C.J.S. Tel. & Tel., Radio & Television § 46 (1954).

As to the third paragraph, see Gray v. Wisconsin Tel. Co., supra; 86 C.J.S. Tel. & Tel., Radio & Television § 48 (1954); 97 A.L.R.2d 664, 671 (1964).

In Weiss v. Holman, 58 Wis.2d 608, 207 N.W.2d 660 (1973), the court noted that Wis. Stat. § 182.017(2) which describes the duty of a utility is supplemented by the definition of "highway" set forth in Wis. Stat. § 340.01(22).

> We conclude that the precise definition of "highway" found in the Vehicle Code applies to sec. 182.017(2), and defines the usage of "highway" therein. "Highway" includes the "roadway," which is that portion of the road usually used for vehicular travel, and the shoulder of such improved surface where one exists.

The court, in Weiss, also reviewed earlier Wisconsin case law on the issue of utility negligence and noted three legal principles:

> Three principles can thus be drawn from our Wisconsin decisions: First, public utilities as well as municipalities have been held liable in this state on a common-law theory of liability for the improper construction of poles and appurtenances which cause injury to sojourners. Second, while the early cases restricted recovery for injury to those who stayed within the confines of the traveled portion of the highway, the majority of cases since the last third of the 19th century have permitted recovery to sojourners who deviate from the highway proper. Third, although the cases involving nonutilities stress the foreseeability of the deviation rather than distance, the utility cases, especially the early ones, emphasize greatly the distance of the plaintiff's deviation from the highway. In one case, however, four feet was not regarded as too great.

For a case involving negligence of a power company in failing to adequately stabilize a utility pole located near excavation activity, see Jorgenson v. Northern State Power Co., 60 Wis.2d 29, 33, 208 N.W.2d 323 (1973).

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1397 NEGLIGENCE: VOLUNTARY ASSUMPTION OF DUTY TO A THIRD PERSON

A person is negligent if:

(1) The person volunteered to provide services to another;

(2) The person should have recognized those services were necessary for the protection of a third person or their property;

(3) The person failed to exercise ordinary care in providing the services; and

[the failure to exercise ordinary care increased the risk of harm to the third person] [; or]

[the services volunteered to be performed were a duty owed by another to the third person] [; or]

[harm was suffered because of reliance by the third person or another upon the person to provide the services].

COMMENT

This instruction and comment were approved in 2003. The comment was updated in 2011.

Instruct with one or more subsections of paragraph 3 based upon the evidence.

This instruction is taken substantially from Restatement, (Second), of Torts, Section 324A. See Stephenson v. Universal Metrics, Inc., 2002 WI 30, 251 Wis.2d 171, 641 N.W.2d 158; Gritzner v. Michael R., 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906; Ladewig v. Tremmel, 2011 WI App 111, 336 Wis.2d 216, 802 N.W.2d 511.

In Ladewig, supra, § 3, the court of appeals concluded that, "even assuming without deciding" that Restatement (Second) of Torts § 324 could create liability for landlords who use a lease provision prohibiting tenants from keeping vicious dogs, Wisconsin case law precludes liability on public policy grounds.

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1401 RAILROADS: DUTY TO RING ENGINE BELL WITHIN MUNICIPALITY

A safety statute provides that no railroad train [or locomotive] shall run over any public grade crossing within any city or village, except where gates are operated, or a flagman is stationed, unless the engine bell is rung continuously within 330 feet of the crossing and until the crossing is reached.

If you find that the train crew failed to sound the engine bell for the required distance, then you must find the crew to be negligent in that regard; however, if you are not satisfied that the crew failed to sound the bell as required by this statute, you must then find the crew not negligent in that regard.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005 and 2006. The comment was updated in 2006.

Wis. Stat. § 192.29(3).

There is no statutory provision or order requiring the blowing of the engine whistle or horn within a municipality. See Wis JI-Civil 1403.

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1402 RAILROADS: DUTY TO RING ENGINE BELL OUTSIDE MUNICIPALITY

A safety statute provides that a railroad train [or locomotive] running over any public traveled grade highway crossing outside the limits of municipalities shall ring the engine bell continuously from 1/4 mile (1,320 feet) from the crossing until the crossing is reached.

A failure to comply with this statute is negligence.

COMMENT

The instruction and comment were originally published in 1967 and updated in 2005 and 2006.

Wis. Stat. § 192.29(4) as amended by 2005 Wisconsin Act 179.

This statute also provides that the Office of the Commissioner of Railroads may by order dispense with such warning requirements at any particular crossing.

When a crossing is partly in and partly outside the municipality, this statute does not apply. Riley v. Chicago & N.W.Ry., 255 Wis. 172, 179, 38 N.W.2d 522 (1949).

For a discussion of the duty of a railroad train or locomotive to sound a warning bell at a crossing once the train or locomotive has reached the crossing, see Murawski v. Brown, 51 Wis.2d 306, 187 N.W.2d 194 (1971).

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1403 RAILROADS: DUTY TO BLOW TRAIN WHISTLE WITHIN MUNICIPALITY

INSTRUCTION WITHDRAWN.

COMMENT

The instruction and comment were originally published in 1967 and withdrawn by the committee in 2006. The withdrawn instruction and comment read:

> There is no safety statute, ordinance, or regulation that requires the blowing of a whistle as a train approaches a public highway within a municipality; there may arise situations where the blowing of the whistle is required in the exercise of ordinary care as a reasonable precaution to prevent a collision.
>
> If you find that (the engineer) (a member of the train crew) observed the approach of the automobile, and from the observations, knew or should have known that the (driver) (occupant) of the automobile (was) (were) unaware of the train's approach, and, if a whistle warning would have been effective timely to alert (him) (her) (them) to the dangers of a collision, then it became the duty of the (engineer) (member of the train crew) to blow the whistle.
>
> **COMMENT**
>
> See Wis. Stat. § 192.29(4); Devine v. McGowan, 15 Wis.2d 534, 113 N.W.2d 162 (1962); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945).
>
> The train crew is entitled to rely on the assumption that a traveler on a highway "will look and will listen and not go onto the track into danger when it is apparent that a train is approaching, and to continue this assumption until the contrary becomes apparent or he does something to indicate a contrary intention on his part." Keegan v. Chicago, M. St. P. & P. Ry., 251 Wis. 7, 27 N.W.2d 739 (1947). See also Wis JI-Civil 1030, Right to Assume Due Care by Highway Users.
>
> For a case involving a failure to sound a train's whistle at a crossing, see also Krolikowski v. Chicago & N.W. Transp. Co., 89 Wis.2d 573, 577n, 278 N.W.2d 865 (1979), where the jury was instructed on negligence in an emergency situation as follows:
>
>> Railroad engineers of a railroad train who are suddenly confronted by an emergency, not brought about or contributed by their own negligence and who are compelled to act instantly to avoid collision or injury are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might make if placed in the same position, even though it should afterwards appear not to have been the best or safest course.

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You will bear in mind, however, that the rule just stated does not apply to any person whose negligence wholly or in part created the emergency. One is not entitled to the benefit of the emergency rule unless he is without fault in the creation of the emergency.

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1405 RAILROADS: DUTY OF TRAIN CREW APPROACHING CROSSING

It is the duty of the railroad employees in charge of a locomotive to keep a proper lookout as to the track and the intersecting streets and highways and to observe the streets and highways adjacent to the tracks to ascertain whether persons or vehicles are in dangerous proximity to the track. If any persons or vehicles are in danger of being struck, the railroad employees must do what ordinarily careful and prudent employees would do under the same or similar circumstances to avoid injuring these persons or vehicles.

However, the railroad employees have a right to assume that travelers on a highway approaching a railroad track will look and listen, up to the last opportunity, before entering upon the track and that they will not go onto the track when it is apparent a train is approaching. A railroad employee is entitled to continue in that assumption until the contrary becomes apparent to a person in the position of a member of the railway crew exercising ordinary care.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005.

The first paragraph is taken from Hynek v. Kewaunee, G.B. & W. Ry., 251 Wis. 319, 321, 29 N.W.2d 45 (1947). See also Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 426, 129 N.W.2d 185 (1964). In Van Gheem v. Chicago & N.W. Ry., 33 Wis.2d 231, 243, 147 N.W.2d (1967), the court discussed the Hynek and Dombeck decision in the following manner:

> Hynek and Dombeck stand for the rule that although a railroad may be negligent as to lookout in approaching a crossing which an automobile is approaching at a slow rate of speed, that negligence as a matter of law may not be causal because the engine crew has a right to assume that the driver of an automobile traveling at a comparatively low rate of speed toward a grade crossing will stop his automobile in a place of safety. Hynek, supra at page 322; Dombeck, supra at pages 426-430. This proposition is based upon the physical fact that trains confronted with an emergency

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cannot effectively slow down or stop within a short distance and upon the duty of the driver of the car to look and listen before crossing the railroad track.

The second paragraph is based upon Keegan v. Chicago, M. & St. P. R.R., 251 Wis. 7, 27 N.W.2d 739 (1947); and Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945).

The second paragraph should be omitted in a fact situation where the evidence indicated no member of the crew saw, or saw too late, to take protective action. For example: (1) where no warning by bell or whistle was given, Van Gheem v. Chicago & N.W. Ry., supra at 244-45; (2) where the evidence would permit the inference that though the bell or whistle or both were first sounded the instant the danger was seen, an earlier observation would have resulted in an earlier warning, Gallagher v. Chicago & N.W. Ry., 255 Wis. 15, 18, 20, 37 N.W.2d 863 (1949).

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1407 RAILROADS: SPEED: FIXED LIMITS

An order of the Office of the Commissioner of Railroads limits the speed of all trains at the highway crossing in question to ____ miles an hour. Any speed in excess of that limit would be a negligent speed regardless of conditions.

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

The matter of train speeds at grade crossings is in the exclusive jurisdiction of the Office of the Commissioner of Railroads. Wis. Stat. § 192.29(1). This has been the law since 1949. Before then, the statute fixed limits at grade crossings in cities and villages. Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 129 N.W.2d 185 (1964).

See also Comment, Wis JI-Civil 1408.

Dombeck v. Chicago, M. St. P. & P. Ry., supra at 432, and its reference to Schulz v. Chicago, M. St. P. & P. Ry., 260 Wis. 541, 51 N.W.2d 542 (1952), alludes to the possibility that a railroad might be negligent if its train was exceeding a company rule as to speed at a crossing that was not affected by a Transportation Commission order.

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1408 RAILROADS: SPEED: NO LIMIT

Even though the Office of the Commissioner of Railroads has not fixed a maximum speed for trains approaching and crossing the highway (street) in question, it is, nevertheless, the duty of the train crew to operate a train at a speed that is reasonable and prudent under the circumstances when there exists in the immediate area of the crossing unusual or peculiar conditions with respect to obstructions to the view of a user of the highway (street) crossing who is in the exercise of due care.

If you find that there existed, at the time and place in question, unusual or peculiar conditions affecting the view of an oncoming train, then it was the duty of the train crew to exercise ordinary care to regulate the train's speed to avoid colliding with any user of the highways who is crossing the tracks in compliance with legal requirements and using due care.

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

A negligent speed is not causal merely because it brings the train to the grade crossing at the instant it did, even though, if the train had been traveling more slowly, the user of the highway might safely have crossed ahead of the train. Dombeck v. Chicago, M. St. P. & P. Ry., 24 Wis.2d 420, 129 N.W.2d 185 (1964). Also McLuckie v. Chicago, M. St. P. & P. Ry., 5 Wis.2d 652, 94 N.W.2d 182 (1958).

To be causal, the negligent speed must either: (1) mislead the motorist or user of the highway, Reinke v. Chicago, M. St. P. & P. Ry., 252 Wis. 1, 30 N.W.2d 201 (1947); Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945); or (2) interfere with the management and control of the train by the crew to the extent that the crew cannot effectively avoid a collision even though they exercise reasonable care with respect to management and control upon sighting danger. Dombeck, supra. See also Kurz v. Chicago, M. St. P. & P. Ry., 53 Wis.2d 12, 19-23, 192 N.W.2d 97 (1971).

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The Office of the Commissioner of Railroads may, upon petition, determine what maximum speed of a train over a crossing "is reasonably required by public safety and is consistent with the public need for adequate and expeditious passenger and freight service." Wis. Stat. § 192.29(1).

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1409 RAILROADS: NEGLIGENT SPEED, CAUSATION

If by your answer to question ____ you have determined that the train crew was negligent with respect to speed of the train, then to find the negligent speed a cause of the collision (accident), you must find that the negligent speed, under the circumstances, (misled the driver of the car as to the swiftness of the train's approach to the crossing) (prevented the operator of the train, after seeing danger, from slowing down, stopping, or otherwise controlling the train to avoid a collision (accident)).

COMMENT

The instruction and comment were originally published in 1967 and revised in 1980 and 2005.

Wis JI-Civil 1408 defines "negligence as to speed" where there is no limitation of speed by order of the Office of the Commissioner of Railroads. A negligent speed is not causal merely because it brings the train to the grade crossing at the instant it did, while if the train had been traveling more slowly the user of the highway might safely have crossed ahead of the train. Dombeck v. Chicago, M. St. P. & P. R.R., 24 Wis.2d 420, 129 N.W.2d 185 (1964).

To be causal the negligent speed must either: (1) mislead the motorist or user of the highway, Reinke v. Chicago, M. St. P. & P. Ry., 252 Wis. 1, 30 N.W.2d 201 (1947); Bellrichard v. Chicago & N.W. Ry., 247 Wis. 569, 20 N.W.2d 710 (1945); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945); or (2) interfere with the management and control of the train by the crew to the extent that the crew cannot effectively avoid a collision even though they exercise reasonable care with respect to management and control upon sighting danger. Dombeck, supra.

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1410 RAILROADS: DUTY TO MAINTAIN CROSSING SIGNS

A safety statute provides that every railroad corporation shall maintain a large signboard on each side of the track and near the track at every crossing of a public highway or street. The sign shall bear the words "RAILROAD CROSSING" in large letters so as to be visible to approaching traffic on the highway or street for a distance of at least 100 feet. If a railroad corporation through its employees knew or should have known that such a sign or signs were not maintained at the crossing in question and failed to erect such a sign within a reasonable time of the discovery of its absence, then it would be negligent with respect to its duty to warn users of the highway in the manner required by this statute.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005. The comment was also updated in 1980.

See Wis. Stat. § 192.29(5).

This instruction is to be used only where the crossing is not covered by an order of the Office of the Commissioner of Railroads. Since the office has exclusive jurisdiction to make rules, if the office has acted as to a certain crossing, then there is no other duty except the duty to comply with the order. Schulz v. Chicago, M. St. P. & P. Ry., 260 Wis. 541, 545, 51 N.W.2d 542 (1952).

In Schulz v. Chicago, M. St. P. & P. Ry., supra at 544, the court approved the principle of the following instruction though finding it inapplicable to the particular case:

> In addition to the requirements made by statute for every railroad crossing, the railroad company may be required in the exercise of ordinary care to take additional precautions or erect or maintain more adequate warning devices at grade crossings over a public highway where such crossing is unusually dangerous.

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While it is true that in the absence of statute, ordinance, or order, there is no duty upon the railroad to provide a flagman or other warning device at a crossing, yet a railroad may be negligent in obstructing a highway grade crossing – particularly at nighttime – where such obstruction is needless or unreasonable and incidental to operational requirements. McLaughlin v. Chicago, M. St. P. & P. Ry., 31 Wis.2d 378, 143 N.W.2d 32 (1966).

In Gamble-Skogmos v. Chicago & N.W. Transp. Co., 71 Wis.2d 767, 238 N.W.2d 744 (1976), the court distinguished between a situation where an order authorizes certain protective devices and where an order directs or requires such conduct. In the latter situation, the court concluded that a railroad is immunized against a claim that it was doing more or differently than the order directed and required. In the former situation, where the order simply authorizes or approves conduct, the immunity from the doctrines of common-law negligence is not so conferred. In Gamble-Skogmos, supra, the court discussed earlier case law on the issue and repeated the test for immunization first declared in Kurz v. Chicago, M. St. P. & P. R.R., 53 Wis.2d 12, 192 N.W.2d 97 (1971):

> Thus, under Kurz, to immunize from liability for common-law negligence it is not enough that the public service commission have authorized or approved plans for protective devices at a grade crossing. To confer such immunity the order of the commission must be based on a review of the public safety requirements of the particular crossing, and must direct and require the installation of such crossing protection devices as will meet such established safety requirements. Such holding is not inconsistent with the decision in Verrette, where the order of the commission clearly found the protective devices installed to be "consistent with the public safety." Nor is it inconsistent with Schulz holding immunity follows where, with public safety considered, the commission "has directed a crossing to be guarded in a particular manner and the railroad has done as directed." (Emphasis supplied.) Even if the Kurz decision did not thus square with Schulz and Verrette, we would follow Kurz as the latest and controlling statement of the rule of law involved. 71 Wis.2d at 773.

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1411 RAILROADS: DUTY TO MAINTAIN OPEN VIEW AT CROSSINGS

A statute provides that every railroad shall keep its right of way clear of brush or trees for a distance of not less than 330 feet in each direction from the center of its intersection at grade with a public highway and for such further distance as is necessary to provide an adequate view of approaching trains from the highway.

A failure to comply with this statute (unless excused by the Office of the Commissioner of Railroads) is negligence.

COMMENT

The instruction was originally published in 1967 and revised in 2005. The comment was updated in 1980 and 2005.

Wis. Stat. § 195.29(6); Wilmet v. Chicago & N.W. Ry., 233 Wis. 335, 345-46, 289 N.W. 815 (1939).

The purpose of Wis. Stat. § 195.29(6) is to provide highway traffic with a better view of approaching trains. It places a duty on railroads, municipalities, and persons or corporations owning or occupying lands to clear brush and trim trees to allow greater visibility. Violation of this duty, without excusal by the office of the Commissioner of Railroads, is subject to forfeiture. In Wells v. Chicago & N.W. Transp. Co., 91 Wis.2d 565, 568, 571, 283 N.W.2d (Ct. App. 1979), the court noted that Wis. Stat. § 195.29(6) constituted a "safety statute which would generally be considered to set the standard of conduct in negligence actions." In Wells, the court held that public policy reasons preclude subjecting a private landowner to civil liability to highway uses for violation of Wis. Stat. § 195.29(6). The court also restricted the sweep of the Wilmet decision stating that railroads and municipalities stand in an entirely different position from private landowners with regard to liability for accidents at railroad crossings.

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1412 RAILROADS: DUTY TO HAVE PROPER HEADLIGHTS

A safety regulation provides that every steam locomotive used in road service between sunset and sunrise shall have a headlight which affords/provides sufficient illumination to enable a person in the cab of the locomotive who possesses the usual visual capacity required of a locomotive engineer to see, in a clear atmosphere, a dark object as large as a man of average size standing at least 800 feet ahead and in front of the headlight, and the headlight must be maintained in good condition.

A failure to comply with this regulation is negligence.

COMMENT

The instruction and comment were originally published in 1967 and updated in 2005.

49 C.F.R. § 230.86 Federal Railroad Administration. For headlight regulations covering other locomotives, see 49 C.F.R. § 229.125.

The United States Supreme Court has determined that jurisdiction over railroads whose tracks are used in interstate commerce rests exclusively with the I.C.C. Chicago & N.W. Ry. v. Railroad Comm'n of Wisconsin, 272 U.S. 605 (1926).

The Wisconsin statute was substantially similar; see Randall v. Minneapolis, St. P. & S.S.M. Ry., 162 Wis. 507, 156 N.W. 629 (1916). This statute last appeared in the statute books in 1927 as § 192.45. It was considered abrogated by the U.S. Boiler Inspection Act; see Chicago & N.W. Ry. v. Railroad Comm'n of Wisconsin, supra. Chapter 504, § 120, Laws of 1929, ordered that § 192.45 no longer be printed.

49 C.F.R. § 230.129 (1979), Federal Railroad Administration requires similar lights on the rear of those locomotives which are regularly required to run backwards for any portion of a trip. 49 C.F.R. § 230.129 (1979) provides that locomotives used in yard service between sunset and sunrise shall have two (2) lights, one on the front and one on the rear, which will permit one in the cab to see – under the same conditions as set forth in § 230.129(a) – a distance of 300 feet.

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1413 RAILROADS: ULTRAHAZARDOUS OR UNUSUALLY DANGEROUS CROSSINGS: INCREASED DUTY

It is claimed that the crossing in question is unusually dangerous. In determining whether the crossing in question is ultrahazardous or unusually dangerous, you may consider the amount of traffic on the highway, obstruction to view, usual speed of trains, visibility of approaching trains to the travelers on the highway, and any other conditions which make a crossing unusually dangerous.

If you are satisfied that the crossing in question is unusually dangerous, the defendant, in the exercise of ordinary care, is required to take additional precautions, commensurate with the hazards existing, for the protection of persons using the crossing, by installing better safety devices and by taking other measures for their protection as are adequate under the circumstances and conditions existing at the crossing.

COMMENT

This instruction and comment were approved in 1977 and updated in 2005.

The question is phrased in terms of negligence and if used would follow the general instruction on negligence of railroads at crossings.

The court must first determine whether to submit the instruction – i.e., whether issues created by the evidence warrant its use.

Kurz v. Chicago, M. St. P. & P. R.R., 53 Wis.2d 12, 21, 23, 192 N.W.2d 97 (1971), states:

> A railroad at common law has the duty of ordinary care to install and maintain warning devices at a grade crossing . . . . This duty is not necessarily limited by statutory requirements such as sec. 192.29(5) Stats., relating to railroad signs.
>
> An "ultrahazardous crossing" is a relative term and simply means the hazards of the railroad crossing demand more or better safety devices than it has or that the maximum speed at which a train may cross such crossing should be lower and commensurate with the hazards.

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. . . [T]he general jurisdiction granted to the public service commission to require safety devices or to regulate railroad speed is not enough to immunize the railroad from the doctrine of common-law negligence. The public service commission must exercise its jurisdiction and make an order based upon the safety requirements of the crossing; the approval of plans for signals proposed by the railroad, without more is not enough. Consequently, the instruction in this case was proper if the evidence concerning the hazards justified it.

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1500 CAUSE

In answering question(s) _____, you must decide whether someone's negligence caused the (accident) (injury). (This) (These) question(s) (does) (do) not ask about "**the** cause" but rather "**a** cause" because an (accident) (injury) may have more than one cause. Someone's negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury). An (accident) (injury) may be caused by one person's negligence or by the combined negligence of two or more people.

COMMENT

This instruction was originally approved in 1989. It was revised in 1999 and 2005. The 2005 version attempts to express the instruction in simpler language.

This instruction is based on Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-38, 55 N.W.2d 29 (1952), and Osborne v. Montgomery, 203 Wis. 223, 242, 234 N.W. 372 (1931). It was approved in Ayala v. Farmers Mut. Auto Ins. Co., 272 Wis. 629, 639-40, 76 N.W.2d 563 (1956).

In Wisconsin, the test for whether negligence was causal is whether that negligence was a "substantial factor" in causing the injuries. Merco Distributing Corp. v. Commercial Police Alarm Co., Inc., 84 Wis.2d 455, 267 N.W.2d 652 (1978); see also Steinberg v. Jensen, 204 Wis.2d 115, 553 N.W.2d 820 (Ct. App. 1996). It is erroneous to instruct a jury that they must find that the negligence was "the" substantial factor in causing injury. Reserve Supply Co. v. Viner, 9 Wis.2d 530, 101 N.W.2d 663 (1960). In Steinberg v. Jensen, supra, the jury sent a note to the trial court asking: "With the cause question, do we all or only 10 to 2 majority, have to agree on the specific cause. It is sufficient for each of us to have some cause attributed to Dr. Jensen?" The trial judge gave the following supplemental instruction: "Specifically to your question the answer to that is no, not all have to agree but rather a 10 to 2 majority must agree and you must agree on a specific cause in that regard but the numbers are 10 to 2." On appeal, the court of appeals said that although the supplemental causation instruction did not use the term "the substantial factor in causing injury," the instruction implied that the jurors must agree that the negligence was "the cause," rather than "a cause." The use of the term "specific cause" informed the jury that they must agree on a particular, single, exclusive cause in order to answer "yes" to the causation question. The court said that instructing the jury in this manner resulted in a misstatement of the law regarding causation.

Intervening Cause. Where an intervening (superseding) cause allegedly produced by another is interposed as a defense by a defendant charged with the first act of negligence, the jury is first required to find whether the found negligence of such first actor was a substantial factor in causing the accident on which liability is sought to be predicated. See Pfeifer, supra. If the jury finds the negligence of the first actor is a substantial factor, then the defense of intervening cause is unavailing unless the court determines that there are policy factors which should relieve the first actor for liability. Ryan v. Cameron, 270 Wis. 325, 331, 71

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N.W.2d 408 (1955); Restatement, Second, Torts § 447 (1934); Campbell, "Law of Negligence in Wisconsin," 1955 Wis. L. Rev. 1, 40.

Public Policy Factors. In 2004, the Wisconsin Supreme Court reviewed the history behind the application of the six public policy factors used to preclude tort liability and the relationship between "public policy" and "proximate cause. " Mackenzie Fandrey v. American Family Mut. Ins. Co., 2004 WI 62, 272 Wis.2d 46, 680 N.W.2d 345. The court said that when "public policy" is used in the context of precluding liability, that term is being used as a *synonym* for "proximate cause." The supreme court noted that the term "proximate cause" referred to two distinct concepts. The first use of the term was to describe "limitations on liability and on the extent of liability based on lack of causal connection in fact." The second use of "proximate cause" was to describe limitations on liability and on the extent of liability based on public policy factors making it unfair to hold a party liable for tort damages.

The court said that the first use on meaning of "proximate cause" has long been abandoned in Wisconsin in favor of the "substantial factor" test used to establish cause-in-fact, which is a jury issue. The court then noted that the second use and meaning of "proximate cause" still remains a part of Wisconsin's legal cause analysis. After reviewing a series of decisions addressing terms such as "cause-in-fact," "legal cause," "proximate cause," and "public policy factors," the court wrote in a footnote:

> "Fn 7. This discussion is not intended as an invitation to reintroduce the term 'proximate cause' into Wisconsin's legal lexicon or to alter the current state of Wisconsin's tort jurisprudence. Rather, this discussion represents an accurate historical analysis of Wisconsin's use of the term 'proximate cause' in relation to public policy factors. We are simply recognizing that what has previously been labeled as 'proximate cause,' i.e. the second step in the legal cause analysis, is now referred to as 'public policy factors.' This concept has not changed; only the label has done so. We emphasize that this opinion does nothing to change Wisconsin's common law relating to duty, breach, and cause in negligence claims. Once it is established that a plaintiff's negligence was a substantial factor in producing an injury, the only limitation on liability is public policy factors--what was previously referred to as 'proximate cause.' We use the terms 'proximate cause' and 'public policy factors' interchangeably only because, historically, Wisconsin courts have used these terms interchangeably."
>
> In a concurring opinion, Justice Bradley addressed the above quoted footnote as follows:
>
> ¶45. The majority, at times, uses the terms "proximate cause" and "public policy" interchangeably. This may leave the reader wondering about the continued vitality of using proximate cause to limit liability. Footnote 7, however, provides the answer. Simply put, in Wisconsin we use public policy factors, not proximate cause, to limit liability.

Cause of Collision v. Cause of Injury. In submitting the cause question relating to a nondriver plaintiff (following a contributory negligence question), the inquiry is usually whether the negligence is a cause of plaintiff's injuries (or damage) rather than whether it is a cause of the collision. Causation of injury is the ultimate fact in every case but between drivers, the negligence causing the collision necessarily causes the injuries arising therefrom and so an inquiry as to "cause of the collision" is proper as between drivers as it is also in the rarer cases between a driver and the active negligence of the nondriver. Scory v. LaFave, 215 Wis. 21, 37, 254 N.W. 643 (1934); Weise v. Polzer, 212 Wis. 337, 345 N.W. 113 (1933). On distinction of active and passive negligence of a passenger as related to the cause question, see Theisen v. Milwaukee Auto Ins.

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Co., 18 Wis.2d 91, 105, 118 N.W.2d 140 (1962), and McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 385, 113 N.W.2d 14 (1962).

Lookout and failure to warn on the part of a guest may in exceptional cases be a substantial factor or a cause of the collision or accident, but ordinarily such negligence is not, although it may be, a cause of his or her injuries. Theisen v. Milwaukee Auto Ins. Co., supra.

If there is more than one cause, it is prejudicial error to say "the cause" instead of "a cause." Reserve Supply Co. v. Viner, 9 Wis.2d 530, 533, 101 N.W.2d 663 (1960). See also Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 292 N.W.2d 630 (1980).

If there is no issue of comparative negligence, it is preferable to use the term "the cause" instead of "a cause." Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 639, 124 N.W.2d 593 (1963). In this instance, eliminate sentences 2 and 3 of the instruction.

The supreme court will follow the substantial factor concept of causation under which there may be several substantial factors contributing to the same result. Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975). See also Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis.2d 723, 275 N.W.2d 660 (1979).

It need not be the sole factor, the primary factor, only a substantial factor. Schnabl v. Ford Motor Co., 54 Wis.2d 345, 353-54, 195 N.W.2d 602, 198 N.W.2d 161 (1972).

It is not important that the defects alleged did not cause the initial accident as long as they were a substantial factor in causing injury. Arbet v. Gussarson, 66 Wis.2d 551, 557, 225 N.W.2d 431 (1975). See also Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338, 360 N.W.2d 2 (1984).

The word "substantial" is used to denote the fact that conduct has such an effect in producing the harm as to lead a reasonable person to regard the conduct as a cause of the harm, using the word "cause" in the popular sense in which there always is implicit the idea of responsibility. Retzlaff v. Soman Home Furnishings, 260 Wis. 615, 620, 51 N.W.2d 514 (1952).

The cause may be differently expressed in specific situations. See, for example, Wis JI-Civil 1023.3 Cause in Medical MalpracticeCInformed Consent Cases.

Policy Factors. Policy factors may be applied by the court to limit liability for remote, extraordinary, highly unusual, or conscience-shocking results of harm. Farmers Mut. Auto Ins. Co. v. Gast, 17 Wis.2d 344, 117 N.W.2d 347 (1962); Dombrowski v. Albrent Freight & Storage Corp., 264 Wis. 440, 446, 59 N.W.2d 465 (1953); Pfeifer v. Standard Gateway Theater, Inc., supra at 238-39; O'Connell v. Old Line Life Ins. Co., 227 Wis. 671, 673-74, 278 N.W. 458 (1938); Osborne v. Montgomery, supra at 237; Kerwin v. Chippewa Shoe Mfg. Co., 163 Wis. 428, 431-33, 157 N.W. 1101 (1916); Habrouck v. Armour & Co., 139 Wis. 357, 366, 121 N.W. 157 (1909); Parnell, "Causation," Feb. 1957 Wis. Bar Bull. 17.

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1501 CAUSE: NORMAL RESPONSE

If a person's negligence creates a situation that triggers an act by (another person) (an animal) which is a normal response to the situation created by the negligence, you may find that any injuries that result from the responsive act were caused by the original negligence.

You must decide whether an act causing any (plaintiff)'s injuries was a normal response to the situation created by the original negligence and, whether injuries, therefore, should be attributed to that negligence.

COMMENT

This instruction was approved in 1969 and revised in 1998. The comment was reviewed without change in 1990.

It is suggested that this instruction be given in connection with Wis JI-Civil 1500, when appropriate.

An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about. Kramer v. Chicago, M., St. P. & P. Ry., 226 Wis. 118, 130, 276 N.W. 113 (1937).

See also Hatch v. Smail, 249 Wis. 183, 185-86, 23 N.W.2d 460 (1945); Brown v. Travellers Indem. Co., 251 Wis. 188, 194, 28 N.W.2d 306 (1946); Fields v. Creek, 21 Wis.2d 562, 573, 124 N.W.2d 599 (1963); Turk v. H.C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963).

Restatement, Second, Torts § 443 (1965).

For a discussion of the intervening and superseding cause doctrine, see the Comment to Wis JI-Civil 1500.

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1505 CAUSE: WHERE CAUSE OF DEATH IS IN DOUBT

(Name) was injured in the accident which occurred on (date) and (he) (she) died on (date). Question _____ asks whether the injuries sustained in the accident were a cause of (name)'s death. The question asks whether the injuries sustained in the accident were "a cause" rather than "the cause" of the death because there may be more than one cause of death. Before you may find that the injuries sustained in the accident were a cause of (name)'s death, you must find that the injuries were a substantial factor in causing the death.

COMMENT

This instruction and comment were approved in 1969 and revised in 1998.

In cases involving death, the causal relation between the injuries sustained and the death may be at issue. This instruction submits the issue to the jury as to the causal relationship. See Peters v. Zimmerman, 275 Wis. 164, 172, 81 N.W.2d 565 (1957); Merkle v. Behl, 269 Wis. 432, 436, 69 N.W.2d 459 (1955).

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1506 CAUSE: RELATION OF A MEDICAL PROCEDURE TO THE ACCIDENT

Question _____ asks whether the injury sustained in the accident on (date) was a cause of the (medical procedure). The question asks whether the injury was "a cause" rather than "the cause" of the (medical procedure). There may be more than one cause of a (medical procedure). To find that the injury sustained in the accident was a cause of the (medical procedure), you must be satisfied that the injury was a substantial factor in producing the medical condition which made the (medical procedure) a medical necessity.

COMMENT

This instruction and comment were originally approved in 1967. The instruction was revised in 1998.

This instruction is a modification of the instruction approved in Chapnitsky v. McClone, 20 Wis.2d 453, 122 N.W.2d 400 (1963), and, inferentially, again approved in Ide v. Wamser, 22 Wis.2d 325, 126 N.W.2d 59 (1964). In the typical negligence cases, this instruction, and the question at which it is directed, will not be used, for in such cases, causation C the relationship between physical and mental injuries and the accident C is taken care of in the damage question or questions and their applicable instructions, e.g.:

> . . . to fairly and justly compensate the person named in the question for the personal injuries or damages resulting to him as a natural consequence of the collision. Wis JI-Civil 1705, Burden of Proof in Tort Actions.

See also Wis JI-Civil 1715 and Wis JI-Civil 1720.

Although the court in Chapnitsky, and later in Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981), notes that an instruction and special fact causation question as to whether particular injuries of the plaintiff were caused by the accident were not recommended in the typical personal injury litigation, it does recognize their propriety and advisability where:

> (1) Plaintiff's damages resulting from an accident would be minimal unless a particularly serious mental or physical condition was also caused by the accident, and
>
> (2) There is sharp conflict in the testimony as to whether such serious condition was caused by the accident. Chapnitsky v. McClone, supra at 463-64; Johnson v. Ray, supra at 787.

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See also John A. Decker & John R. Decker, "Special Verdict Formulation," 60 Marq. L. Rev. 201, 264 (1977).

The instruction is not to be used in cases where either of two events, standing alone, would have been adequate to cause the injurious result. Chapnitsky v. McClone, supra at 464-66.

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1510 NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS (BYSTANDER CLAIM)

(Plaintiff) claims injury for severe emotional distress caused by [directly observing the (incident) (accident) which (seriously injured) (killed) _____] [coming upon the scene immediately after the (incident) (accident) and witnessing the aftermath of the (serious injury) (death) to _____].

If your answers to question 1 and question 2 of the verdict are "yes" [regarding the underlying (incident) (accident) involving _____ and (defendant), _____], then you must consider (plaintiff)'s claim of severe emotional distress.

Question ___ asks whether (plaintiff) suffered severe emotional distress.

Emotional distress may arise from the natural shock and grief of directly observing an (incident) (accident) which results in the (serious injury) (death) to a family member or from coming upon the scene minutes later and witnessing the aftermath. Emotional distress includes mental suffering, anguish, and shock. It can include fright, horror, grief, and worry. It need not include physical manifestations of injury, although these may also be present.

In order for (plaintiff) to recover, however, (his) (her) emotional distress must be severe. This means it must be more than temporary discomfort or a minor psychic or emotional shock. It must be an extreme emotional response.

Question ___ asks whether (defendant)'s negligence in the underlying (incident) (accident) was a cause of (plaintiff)'s emotional distress. Note that you are not to answer this question unless you answered the preceding question "yes."

The cause question asks whether there was a causal connection between (defendant)'s negligence in the underlying (incident) (accident) and (plaintiff)'s emotional distress. The

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question does not ask about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an injury. The negligence of one person may cause an injury or the combined negligence of two or more persons may cause it. Before you find that (defendant)'s negligence in the underlying (incident) (accident) was a cause of plaintiff's emotional distress, you must find that (defendant)'s negligence was a substantial factor in producing (plaintiff)'s emotional distress.

Question ___ asks what sum of money, if any, will fairly and reasonably compensate (plaintiff) for the severe emotional distress. Note that you are not to answer this question unless you answered the previous question "yes."

In answering [these verdict questions] [verdict question _____] you should not consider the harm that naturally flows from the loss of a family member. Rather, the damages for emotional distress, if any, must arise solely from (plaintiff)'s observing the [describe incident].

[**Include Relevant Instructions on Damages**.]

SPECIAL VERDICT

Question ___: Did the plaintiff, _____, suffer severe emotional distress?

Answer: _____

Yes or No

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If you answered the previous question "yes," answer this question:

Question ___: Was (defendant)'s negligence in the underlying (incident) (accident) a cause of (plaintiff)'s emotional distress?

Answer: _____

Yes or No

Question ___: What sum of money, if any, would fairly and reasonably compensate (plaintiff) for severe emotional distress?

(a) [indicate type of damages]

Answer: _____

(b) [indicate type of damages]

Answer: _____

(c) [indicate type of damages]

Answer: _____

COMMENT

This instruction and comment were approved by the Committee in 1996 and replaced the prior version which was based on the zone of danger rule. The instruction was revised in 2006. The comment was updated in 2001, 2003, 2004, 2005, 2006, 2010, and 2014.

For a direct claim based on negligent infliction of emotional distress, see Wis JI-Civil 1511.

This instruction is based upon the principles enunciated in Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). It is limited to one type of negligent infliction of emotional distress: severe emotional distress suffered by a bystander who witnesses an accident or the gruesome aftermath of an accident involving serious or fatal injuries to a close relative. The court set out the requirements of the claim of negligent infliction of emotional distress to a bystander as follows: "(1) that the defendant's conduct [in the underlying accident] fell below the applicable standard of care, (2) that the plaintiff suffered an injury [severe emotional distress], and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. See also Rabideau v. City of Racine, 2001 WI 57, 243 Wis.2d 486, 627 N.W.2d 795.

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The Bowen court set out three public policy limitations on this claim: "First, the injury suffered by the victim must have been fatal or severe. Second, the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the plaintiff must have observed . . . the incident and injury or the scene soon after the incident with the injured victim at the scene." Id. at 633. In addition, borrowing from the tort of intentional infliction of emotional distress, the court limited the compensable injury to emotional distress that is severe.

The Bowen court struck down three prior legal principles involving negligent infliction of emotional distress to a bystander: (1) the concept of "zone of danger"; (2) the requirement that a plaintiff be in fear for his or her own safety; and (3) that the emotional distress be evidenced by physical manifestations.

This instruction recognizes that the claim for emotional distress to the plaintiff-bystander will normally be joined with an underlying claim involving the victim's serious injuries or death. Therefore, the emotional distress claim is premised on answers to previous questions that show the defendant's causal negligence with respect to the underlying accident. The instruction directs the jury to consider the claim for negligent infliction of emotional distress if the jury's answers to those questions were "yes."

If the plaintiff's claim for emotional distress is brought separate from a claim by or on behalf of the victim, the Committee believes that questions of negligence and cause with respect to the underlying incident or accident nevertheless must be asked as part of this claim.

This instruction also presumes that the trial judge has considered the three public policy limitations on this tort set out above. The Committee believes that these public policy limitations are legal cause questions for the trial judge and not questions for the jury.

In addition to these limitations, the Bowen court noted that other public policy considerations must be examined on a case-by-case basis either before trial by summary judgment or motion to dismiss or after trial "when the issues are complex or the factual connections attenuated, . . ." Id. at 655. The court set out six separate public policy considerations leading up to the ultimate question of whether liability in a given case would "shock the conscience of society." Id. at 656:

> (1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence would have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. Id. at 655.

Comparative Negligence. There is no Wisconsin case law on whether a bystander recovery is reduced by the contributory negligence of the victim. The committee believes that if the jury finds contributory negligence, then a plaintiff's recovery should be reduced according to the jury's apportionment of comparative negligence. See Portee v. Jaffee, 84 N.J. 88, 101-02 (1980); State v. Eaton, 101 Nev. 705, 714-15, 710 P.2d 1370 (1985). In addition, it may also be proper to include any negligence by plaintiff (e.g. negligent supervision) in the comparative negligence apportionment.

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Damages. The last paragraph was added in 2006 to avoid overlapping damages, e.g., wrongful death elements. See Wis JI-Civil 1880 and 1897.

Loss of Pet and Property Damage. In Rabideau, supra, the Wisconsin Supreme Court held that the rule of nonrecovery for the injury or death of a nonfamily member applies with equal force to a plaintiff who witnesses as a bystander the negligent injury or death of a best friend who is human as it does to a plaintiff whose best friend is a dog.

The supreme court rejected a claim of negligent infliction of emotional distress arising out of negligent damage to property after an examination of the claim under the six public policy considerations reviewed in Bowen and set forth above. Kleinke v. Farmer's Coop. Supply & Shipping, 202 Wis.2d 138, 549 N.W.2d 714. In Bowen, the court also refused to permit the dog's owner to maintain a claim for negligent infliction of emotional distress arising from property loss. Bowen, supra ¶27.

Medical Negligence Claims. In Phelps v. Physicians Insurance Co. of Wisconsin, Inc., 2009 WI 74, 319 Wis.2d 1, 768 N.W.2d 615, the supreme court held that Wis. Stat. Ch. 655 does not permit bystander claims for negligent infliction of emotional distress arising from medical malpractice of health care providers and their employees.

In Pierce v. Physicians Ins. Co. of Wis., the Wisconsin Supreme Court held that a mother who suffers the stillbirth of her infant as a result of medical negligence has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in addition to her derivative claim for wrongful death of the infant. Pierce, 2005 WI 14, 278 Wis.2d 82, 692 N.W.2d 558, ¶1. In Pierce, the court also stated that when Bowen rejected Waube's "Zone of danger rule," it did not undermine Westcott, 148 Wis.2d 239. The court said it continues to recognize a claim for negligent infliction of emotional distress where the claimant is directly involved in the tortious activity. Bowen did nothing to change this. Pierce, supra ¶17.

Claim Based on Media Broadcast. A plaintiff does not have a claim against a media defendant for negligent infliction of emotional distress if the contents of the broadcast were not false or defamatory. Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

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1511 PERSONAL INJURIES: NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS (SEPARATE OR DIRECT CLAIM)

(Plaintiff) has alleged that (he) (she) sustained severe emotional distress as a result of the (accident) (incident) involved in this case [independent of (his) (her) claim of physical injuries] [in the absence of physical injuries.] Emotional distress is compensable with or without physical injuries if (defendant) was negligent with respect to the (accident) (incident) involved in the case, the (accident) (incident) caused the (plaintiff) emotional distress, and the emotional distress is severe. Therefore, there are three things that (plaintiff) must prove by the greater weight of the credible evidence to a reasonable certainty:

1. (defendant) was negligent with respect to the (accident) (incident) involved in the case;
2. the (accident) (incident) was a cause of (plaintiff)'s emotional distress; and
3. the emotional distress is severe.

First, as to negligence:

INSERT INSTRUCTION ON NEGLIGENCE (WIS JI-CIVIL 1005)

Second, as to emotional distress, "emotional distress" is sometimes referred to as mental suffering or mental anguish. [It is sometimes described as post-traumatic stress disorder.] It includes all highly unpleasant mental reactions such as fright, grief, anger and worry, and it may include physical manifestations of emotional distress such as nausea, insomnia, and hysteria.

However, in order for emotional distress to be an independent or direct legal claim, the emotional distress must be severe. Complete emotional tranquility is seldom attainable in this world, and some degree of emotional distress is part of the price of living among other

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people. The law permits a claim for emotional distress separate from physical injuries or in the absence of physical injuries only where the emotional distress is so severe that no reasonable person could be expected to endure it.

Third, as to cause:

INSERT INSTRUCTION ON CAUSE (WIS JI-CIVIL 1500)

If you are satisfied from the evidence that (defendant) was negligent with respect to the (accident) (incident) involved in this case; and the (accident) (incident) was a cause of emotional distress to (plaintiff), and the emotional distress was severe, you should award fair and reasonable compensation for the claim of severe emotional distress. If you are not satisfied, make no allowance for the claim of severe emotional distress and confine your award to fair and reasonable compensation for any other injuries to (plaintiff) which were caused by the (accident) (incident).

COMMENT

This instruction and comment were approved in 2005. The comment was updated in 2006 and 2018.

Overview. This comment should be read together with the comment to Wis JI-Civil 1510, "Negligent Infliction of Emotional Distress (Bystander Claim)." Together these comments provide assistance in understanding negligent infliction of emotional distress both historically and conceptually. As with Wis JI-Civil 1510 which follows the Bowen framework for a bystander claim, this instruction follows the Bowen framework for a separate or direct claim of negligent infliction of emotional distress. Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). See also Camp v. Anderson, 2006 WI App 170, 295 Wis.2d 714, 721 N.W.2d 146; Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797.

The tort of negligent infliction of emotional distress was discussed at length in Bowen. The Bowen court recognized that "[m]yriad circumstances may give rise to claims for negligent infliction of emotional distress." Id. at 631. The court outlined the elements of the claim as: "(1) that the defendant's conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. Borrowing from the tort of intentional infliction of emotional distress, Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963), the Bowen court indicated that "in a cause of action for negligent infliction of emotional distress the injury a plaintiff must prove is severe emotional distress; but the plaintiff need not prove physical manifestations of that distress." Id.

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Therefore, the framework for a claim of negligent infliction of emotional distress follows the traditional rules applicable to negligence claims, i.e., "negligent conduct, causation and injury (here severe emotional distress)." Id. at 652. Nevertheless, the claim has proven and continues to prove troublesome to the courts. As stated in Bowen at 637-38:

> The tort of negligent infliction of emotional distress has troubled this court and other courts for many years. . . . Historically, this court and other courts have been reluctant to compensate plaintiffs for emotional suffering. While courts are willing to compensate emotional harm incident to physical injury in a traditional tort action, they have been loath to recognize the right to recover for emotional harm alone. The common law traditionally distrusted emotion. Emotional suffering was deemed genuine and compensable only if it was associated with a provable physical injury claim in an accepted tort cause of action.

One of the major reasons for the historical distrust of claims for emotional harm is the difficulty with authenticating such claims. The Bowen court considered this difficulty and concluded that the traditional framework of negligent conduct, cause and injury coupled with public policy considerations would sufficiently protect against spurious or feigned claims. (see, Bowen at 655).

Development of the law. The Bowen court traced the development of the tort of negligent infliction of emotional distress. The court pointed out that the law has long permitted a claim for emotional suffering if it is a component of a claim for physical injury sustained in an accident. Emotional harm associated with physical injuries is defined in Wis JI-Civil 1767 as "worry, distress, embarrassment and humiliation."

From 1935 until 1984, the Supreme Court struggled with the doctrinal rule that compensable emotional harm had to accompany physical injuries. The so-called "impact rule" was replaced by the "zone of danger" rule in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). The "zone of danger" rule was broadened to "fear for one's own safety" in Klassa v. Milwaukee Gas Light Co., 273 Wis. 176 77 N.W.2d 397 (1953). The requirement of physical injuries was modified to "physical manifestations of emotional distress" in Ver Hagen v. Gibbons, 47 Wis.2d 220, 177 N.W.2d 83 (1970). When "physical manifestations of emotional distress" still proved problematic, the Court carved out exceptions to it on a case-by-case basis. (See, for example, La Fleur v. Mosher, 109 Wis.2d 112, 325 N.W.2d 314 (1982) and Garrett v. City of New Berlin, 122 Wis.2d 223, 362 N.W.2d 137 (1985)).

Observer or participant. In Garrett v. City of New Berlin, Connie Garrett, and her brother, Raymond, were among a group of teenagers watching an outdoor movie along a fence line at the edge of the theater owner's property. Connie was at the fence, her brother was about 15 feet away lying on a blanket. With headlights off and using a spotlight, a police officer in his police vehicle swept the area to round up the group. In the process, he ran over Raymond. Connie witnessed the police vehicle run over her brother and saw the bloody aftermath of her brother's severe injuries. She brought suit for negligent infliction of emotional distress even though she sustained no physical injuries, and never feared for her own safety.

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The Supreme Court upheld her claim, but the court could not agree on the proper legal analysis. Three of the six-justice plurality sought to overrule Waube and three other justices distinguished the facts of Waube from those in Garrett. The latter three "characterized the plaintiff in Waube as an observer who was not directly involved in the incident. They characterized Connie Garrett as a participant in the incident who was entitled to recover even though she had not feared for her own safety, had not suffered a physical symptom of her distress any more severe than insomnia, and had not been in the zone of danger." Bowen at 649.

The distinction between observer and participant was later approved by the Court of Appeals in Westcott v. Mikkelson, 148 Wis.2d 239, 434 N.W.2d 822 (Ct. App. 1988). In this medical malpractice action, Westcott, the mother of a stillborn baby, brought both a direct claim for negligent infliction of mental distress alleging she sustained emotional harm as a result of the delivery of her stillborn baby, and a derivative claim for damages as a result of the baby's wrongful death. Both claims were allowed by the appellate court. The court found that the plaintiff-mother was not just an observer of her baby's stillbirth, she was a participant in the activity that resulted in the baby being stillborn. The court wrote that whether Westcott "is an observer or a participant, it is difficult to imagine a more clear-cut example of the latter than a mother giving birth to a child in distress." Id. at 242.

This distinction between being an observer and being a participant was also a basis for the Supreme Court's holding in Mullen v. Walczak, 2003 WI 75, 262 Wis.2d 78, 664 N.W.2d 76; and Pierce v. Physicians Insurance Fund of Wisconsin, Inc., 2005 WI 14, 268 Wis.2d 843, 673 N.W.2d 410.

In Mullen, Mullen and his wife were involved in an automobile accident. Mullen was seriously injured and his wife was killed in the accident. Mullen brought three claims: first, derivative claim for his wife's wrongful death; second, a claim for his physical injuries sustained in the accident and third, a claim for the emotional distress he suffered in witnessing his wife's death at the scene. The parties stipulated to a resolution of Mullen's wrongful death claim and his personal injury claim. At issue was only whether Mullen could recover damages for the emotional distress he suffered solely as a result of witnessing his wife's death. The Supreme Court allowed the emotional distress claim. It noted that Mullen was not a bystander under the Bowen rubric because he was involved in the accident that led to his wife's death, and, therefore, was a participant in that event.

In Pierce, the court dealt with "the narrow issue of whether a mother who suffers the stillbirth of her infant as a result of medical malpractice has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in addition to her derivative claim for wrongful death of the infant." The court answered in the affirmative, holding that the mother may recover as a parent for the wrongful death of the infant and as a patient for her personal injuries including the negligent infliction of emotional distress. "Pierce was not a witness but rather a participant as a patient. " Id. at par. 27.

> "a patient who has suffered medical malpractice can bring a direct claim. The fact that the same patient may also have a derivative claim for wrongful death is unusual, and likely to arise in cases like this where the patient is also a victim/participant in the events at issue. " Id. at par. 15.

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1580 COMPARATIVE NEGLIGENCE: PLAINTIFF AND ONE OR MORE DEFENDANTS

If, by your previous answers, you are required to answer this question, you will determine how much and to what extent each party is to blame for causing the (injury) (damage) (accident). You will decide the percentage (a portion of 100%) attributable to each party in causing the (injury) (damage) (accident).

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

The instruction and comment were originally published in 1972. The instruction and comment were revised in 1979 and 2010.

See Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

Burden of Proof. See McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 265 Wis. 19, 28, 60 N.W.2d 399 (1953).

Comparison Issues. In May v. Skelly Oil Co., 83 Wis.2d 30, 264 N.W.2d 574 (1978), the court proposed in dictum that the negligence of an injured claimant should be compared to the combined negligence of the parties who caused the claimant's injuries. However, in Reiter v. Dyken, 95 Wis.2d 461, 290 N.W.2d 510 (1980), and Wisconsin Natural Gas v. Ford, Bacon & Davis Constr., 96 Wis.2d 314, 291 N.W.2d 825 (1980), the court declared that it would not make the change proposed in May. Instead, the court reaffirmed the prevailing common law rule of individual comparison, i.e., that plaintiff's causal negligence is individually compared to the causal negligence of each defendant. In its decision, the court in Reiter and Ford, Bacon & Davis stated that a change from the individual comparison rule to a combined comparison rule, as proposed in May, should be the result of legislative action. In 1979, however, the legislature failed to enact such a bill. The legislation, 1979 S.B. 589, would have amended the comparative negligence statute (§ 895.045) by adopting a combined or collective comparison approach.

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In Ford, Bacon & Davis, the court also refused to abolish the doctrine of joint and several liability. 96 Wis.2d at 330-34.

In 1986, the court reaffirmed the holding in Reiter v. Dyken, supra, that a plaintiff's causal negligence is compared with the negligence of each defendant under the individual comparison rule. Delvaux v. Langenberg, 130 Wis.2d 464, 387 N.W.2d 751 (1986).

There is no comparison under the comparative negligence statute (§ 895.045(1)) between intentional and negligent tortfeasors. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, supra. An intentional tortfeasor is not entitled to contribution from a negligent joint tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Verdict Format for Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct: Cases involving negligent conduct and intentional conduct by joint tortfeasors present special problems in structuring a verdict. The committee drafted the suggested verdict shown below for a sample case involving a claim of intentional or negligent conduct by an assailant and a claim of negligent conduct by a property owner for failing to prevent the assault. The verdict questions assume the plaintiff alleges that the assailant's acts were either intentional or negligent.

SUGGESTED VERDICT
(For Case Involving Both Intentional and Negligent Tortfeasors;
Note: Defendant 1 refers to the alleged assailant.
Defendant 2 refers to the alleged negligent property owner.)

Question 1: Did (Defendant 1) intentionally [sexually assault, rob, batter, etc.] (Plaintiff) on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 1 "yes," then go to and answer Question 2.

If you answered Question 1 "no," then and only then answer Question 3.

Question 2: Was the intentional conduct of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 2 "yes," go to and answer Question 5.

If you answered Question 2 "no," go to and answer Question 3.

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Question 3: At and immediately prior to the incident on (date) at (location), was (Defendant 1) negligent?

Answer: _____
(Yes or No)

If you answered Question 3 "yes," go to and answer Question 4.

If you answered Question 3 "no," go to and answer Question 5.

Question 4: Was the negligence of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 5: At and immediately prior to the incident on (date) at (location), was (Defendant 2) negligent?

Answer: _____
(Yes or No)

If you answered Question 5 "yes," go to and answer Question 6.

If you answered Question 5 "no," go to and answer Question 7.

Question 6: Was the negligence of (Defendant 2) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 7: At and immediately prior to the incident on (date) at (location), was (Plaintiff) negligent?

Answer: _____
(Yes or No)

If you answered Question 7 "yes," go to and answer Question 8.

If you answered Question 7 "no," go to and answer Question 9.

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Question 8: Was the negligence of (Plaintiff) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you have answered "yes" to two or more of Questions 4, 6 or 8, answer the following question relative to each party that you determined was a cause of (Plaintiff)'s injuries.

*** NOTE: If you answered Question 2 "yes" concerning (Defendant 1), do not include (him) (her) in answer to the following question.**

Question 9: Taking the combined negligence of each party that you have determined was a cause of injuries to (Plaintiff) as 100%, what percentage of the negligence do you attribute to:

*	A.	(Defendant 1)	_____%
	B.	(Defendant 2)	_____%
	C.	(Plaintiff)	_____%
		TOTAL	100%

Question 10: Regardless of how you have answered any of the previous questions, answer this question: What sum of money will fairly and reasonably compensate (Plaintiff) for (her) (his) injuries on (date) at (location) in damages with respect to:

A.	Past Medical Expenses	$ _____
B.	Past Wage Loss	$ _____
C.	Past Pain, Suffering and Disability	$ _____
D.	Future Medical Expenses	$ _____
E.	Future Wage Loss	$ _____
F.	Future Pain, Suffering and Disability	$ _____

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1582 COMPARATIVE NEGLIGENCE: ADULT AND CHILD

If you are to answer question _____, you should consider that was an adult and _____ was a child and consider and weigh the credible evidence bearing on the inquiries presented, in the light of the difference in the rules which you were previously instructed to apply in determining whether the conduct of the parties was negligent.

COMMENT

This instruction and comment were originally published in 1966 and revised in 1988. The comment was reviewed without change in 1990.

In Brice v. Milwaukee Auto Ins. Co., 272 Wis. 520, 524, 76 N.W.2d 337 (1956), a litigant contended that the negligence of a minor once found by the jury must be accorded the same weight by the jury in apportioning negligence as would be done in the case such child were an adult. The court stated: "With this we cannot agree. A jury in answering the comparative negligence question in a special verdict is called upon to weigh negligence and not causative effect."

In Hanson v. Binder, 260 Wis. 464, 467, 50 N.W.2d 676 (1952), the court stated:

> The mere fact that, in this collision between the two, the jury found that the child was more negligent than the adult demonstrated to the court's satisfaction that the jury did not appreciate that different standards of ordinary care apply to these different actors.

But, see dissent of Justices Gehl and Brown.

In the case of Rasmussen v. Garthus, 12 Wis.2d 203, 107 N.W.2d 264 (1961), the court found that the instructions were not prejudicially erroneous in not directing the jury to keep in mind the difference in the degree of care required of a child compared with the degree of care required of an adult but said that the court should have so directed the jury.

In Field v. Vinograd, 10 Wis.2d 500, 103 N.W.2d 671 (1960), the instruction given was as follows: "In apportioning the negligence, you should take into consideration the fact that Sherman Vinograd was an adult, and Billy Field was a child, at the time of the accident . . . ."

In the case of Bell v. Duesing, 275 Wis. 47, 52, 80 N.W.2d 821 (1957), it was stated that the fact one of the parties is an infant should be taken into consideration in apportioning negligence.

Language in this instruction was approved in Metcalf v. Consolidated Badger Coop., 28 Wis.2d 552, 560, 137 N.W.2d 457 (1965).

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Also see the following: Gonzalez v. City of Franklin, 137 Wis.2d 109, 403 N.W.2d 747 (1987); Kohler v. Dumke, 13 Wis.2d 211, 108 N.W.2d 581 (1961); and Blair v. Staats, 10 Wis.2d 70, 102 N.W.2d 267 (1960), which confirm the view of this instruction.

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1585 COMPARATIVE NEGLIGENCE: PLAINTIFF-GUEST AND HOST-DEFENDANT NEGLIGENT

You are to answer this question only if you have found both parties causally negligent. If, by your previous answers, you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find to a reasonable certainty is attributable to that party. You will determine how much and to what extent each party is to blame for the injuries to (plaintiff) and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that the party contributed to cause (plaintiff)'s injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you to a reasonable certainty by the greater weight of the credible evidence what your answer should be.

COMMENT

This instruction was approved by the Committee in 1979. The comment was also approved in 1979 and was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

Only causal negligence may be compared with causal negligence, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 532-33, 252 N.W. 721 (1934); instruction cited as to cause statement, Olson v. Siordia, 25 Wis.2d 274, 279, 130 N.W.2d 827 (1964).

On burden of proof, see McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 165 Wis. 19, 28, 60 N.W.2d 399 (1953).

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1590 COMPARATIVE NEGLIGENCE: PLAINTIFF-GUEST PASSIVELY NEGLIGENT; HOST (OR OTHER DRIVER) NEGLIGENT

You are to answer this question only if you have found the plaintiff causally negligent with respect to (his) (her) injuries and also found the defendant(s) causally negligent in the operation of (his) (her) (their) automobile. If by your previous answers you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find is attributable to that party. You will determine how much and to what extent each party is to blame for the injuries to (plaintiff) and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault each party contributed to cause the injuries to (plaintiff).

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is used in the situation where the guest's negligence did not cause the accident but did cause the guest's injuries.

Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

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Only causal negligence may be compared with causal negligence, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 532-33, 252 N.W. 721 (1934); instruction cited as to cause statement, Olson v. Siordia, 25 Wis.2d 274, 279, 130 N.W.2d 827 (1964).

On burden of proof, see McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 165 Wis. 19, 28, 60 N.W.2d 399 (1953).

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1591 COMPARATIVE NEGLIGENCE: GUEST PASSIVELY NEGLIGENT; CLAIMS AGAINST AND AMONG DRIVERS; APPORTIONMENT FROM ONE COMPARATIVE NEGLIGENCE QUESTION

You are to answer this question if you have found more than one party causally negligent. If, by your previous answers, you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find is attributable to that party in causing the injuries sustained by (plaintiff) and the extent to which the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that each party contributed to cause (plaintiff)'s injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 2015 to replace the term, "guilty of active negligence."

This question is submitted under Theisen v. Milwaukee Auto Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962), and Justice Fairchild's article in 46 Marquette Law Review 1 (1965). Justice Fairchild would use the total active negligence of all parties as the basis on which each party would, or would not, recover; e.g., if such active negligence of the parties totals 90% and the guest's passive negligence contributing to his or her injuries 10%, the guest would recover 90% of his or her damages. To determine the recovery or not of the negligent parties, their percentages of negligence; say A, 15%; B, 20%; and C, 55% (totaling 90%) would be converted to a new base of 100%: A, 15/90s; B, 20/90s; and C, 55/90s. If we assume that each party had damages of $1,000, reduced recoveries would be as follows: Guest would recover $900; $150 from A, $200 from B, and $550 from C; A would recover $834; $222 from B and $612 from C; B would recover $778 from C; C would recover nothing.

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1592 COMPARATIVE NEGLIGENCE: GUEST PASSIVELY NEGLIGENT; CLAIMS AGAINST AND AMONG DRIVERS; APPORTIONMENT OF COMPARATIVE NEGLIGENCE FROM TWO QUESTIONS

You are to answer question 1 (negligence of drivers which caused the accident) if you have found one or more drivers causally negligent. If by your previous answers you are required to answer this question, you will answer the subdivisions of this question, assigning to each driver such percentage, or part of 100%, which you find is attributable to that driver in causing the accident and the extent to which the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each driver in proportion to the fault that each driver contributed to cause the accident.

You are to answer question 2 (negligence which caused (plaintiff)'s injuries) if you find at least one driver as well as (plaintiff) negligent in causing (plaintiff)'s injuries. You will assign to the drivers taken as a group such percentage, or part of 100%, which you find is attributable to them in causing the injuries sustained by (plaintiff) and assign to (plaintiff) the percentage, or part of 100%, which is attributable to (plaintiff) in causing (his) (her) own injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 1989.

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These questions are submitted under McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1961). In this example, the guest sued three drivers and all drivers sued each other.

SPECIAL VERDICT EXAMPLE

No. 1. What percentage of all causal negligence which produced the accident do you attribute to:

(a)	Driver A -	30%)	
(b)	Driver B -	50%)	as to causes
(c)	Driver C -	20%)	of the accident?
		100%	

No. 2. What percentage of all causal negligence which produced plaintiff's injuries do you attribute to:

(a)	The combined causal negligence of drivers A, B, and C	90%)	as to cause of plaintiff's injuries?
(b)	The causal negligence of the plaintiff	10%)	
		100%	

The court translates the findings of question No. 1 as follows:

Driver A	30 x 90% = 27%)	
Driver B	50 x 90% = 45%)	90%
Driver C	20 x 90% = 18%)	
Plaintiff		10%
		100%

On the above questions and translations, the plaintiff would recover 90% of his or her award, and defendants would pay in accordance with their percentage of negligence as found in the translation.

In the claims among the drivers, Driver A would recover 70% of his or her award from B. B would have no right to contribution from C, as to A. C would have to contribute only to the award to plaintiff. C would recover 80% of his or her award from A and B on the basis of their percentage of liability. B would recover nothing.

If more than one guest is involved, question 2 would be repeated to accommodate the pertinent inquiries as to him or her. The added question would determine the percentage of plaintiff's contribution to his or her injuries compared to the found percentages of the combined negligence of the drivers. One guest may be more or less negligent than another guest.

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1595 COMPARATIVE NEGLIGENCE: WHERE NEGLIGENCE OR CAUSE QUESTION HAS BEEN ANSWERED BY COURT

You will note that the court has answered certain questions as matters of law. If you are required to answer question __, the comparative negligence question, then, in answering that question, you will not give the court's answer(s) any greater or lesser weight or importance than you give to any finding you make.

COMMENT

This instruction was approved in 1978. The comment was reviewed without change in 1990.

The supreme court advises giving this instruction. Reyes v. Lawry, 33 Wis.2d 112, 146 N.W.2d 510 (1961). Failure to give it may not, however, be error. Reyes, supra; Schmit v. Sekach, 29 Wis.2d 281, 291, 139 N.W.2d 88 (1966).

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1600 SERVANT: DRIVER OF AUTOMOBILE (PRESUMPTION FROM OWNERSHIP OF VEHICLE)

Uncontradicted evidence has been received in this case that _____ was the owner of the automobile driven by ____. From this fact alone, a presumption arises that (driver) was the servant of (owner). Other evidence has been introduced, however, for the purpose of showing that (driver) was not the servant of (driver) at the time of the accident.

A "servant" is a person employed to perform a service for another and who, with respect to (his) (her) physical conduct in the performance of the service, is subject to the other's control or right to control. The term "servant" as used in this instruction is not used in the ordinary sense, that is as only applying to domestic help.

In analyzing the relationship between (owner) and (driver) to determine whether (driver) was a servant, you should consider: (1) why (driver) was operating the vehicle; (2) the general understanding of the parties and their conduct which tend to characterize their relationship; and (3) the control which (owner) had over the use of the vehicle by (driver).

For (driver) to be the servant of (owner): (1) there must have been some agreement by (driver) to act on (owner)'s behalf or for (owner)'s benefit; (2) some benefit to (owner) must have resulted from (driver) operating the vehicle; and (3) (owner) must have the right to control (driver) and direct (driver) in accomplishing (owner)'s purpose. Benefit to (owner) is not confined to an undertaking conducted for financial gain. It includes any benefit to the owner, including the owner's own pleasure. The element of control by the owner does not mean the actual or physical operation of the vehicle but rather control as applied to the use of the automobile by (driver) to accomplish the owner's purpose.

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Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (driver) was not the servant of (owner), then you must find that (driver) was the servant of (owner). The burden is on (owner) to convince you that (driver) was not the servant of (owner) at the time of the accident and that the answer to the question should be "no."

SPECIAL VERDICT

At the time of the accident, was (driver) the servant of the (owner)?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The above special verdict question is an exception to the general rule that questions should frame the issue for the jury so that the burden of proof is placed on the person having the affirmative of the issue (i.e., a "yes" answer). See Wis JI-Civil 200, Burden of Proof. The common law presumption which this instruction covers provides that a driver of a vehicle is presumed to be the servant of the owner. The evidence code, Wis. Stat. § 903.01, states that once the basic fact (ownership) is found to exist, a presumption "imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." In this case, the presumed fact is that the driver was the owner's servant. Based on this evidence rule, the owner has the burden of affirmatively showing that it is more probable that the driver was not his or her servant. The committee feels that it would be confusing and awkward to ask the jury: At the time of the accident, was the (driver) not the servant of (owner)? Instead, the question should simply ask: Was (driver) the servant of the (owner)? The last paragraph of the instruction tells the jury that (owner) has the burden of showing that the question should be answered "no."

This instruction deals with the imputation of negligence to the owner of a vehicle which has been operated negligently by a nonowner. Often, this imputed negligence is termed "vicarious liability." Prosser, Torts, 4th Ed. (1971), § 69, p. 458. Under this concept of liability, a person (in this instruction, the owner of the vehicle) is held liable for damages resulting from the negligence of another because of a legal relationship between two persons. This instruction deals with the legal relationship of master-servant.

The distinction between being an "agent" and a "servant" is crucial in determining whether the principal is vicariously liable. An agent may or may not be a servant and, in most circumstances, the principal

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is not vicariously liable for the negligent physical conduct of an agent who is not a servant. Where the negligent actor is a servant, however, a master can be held liable under the doctrine of respondent superior for harm caused by the torts of his or her servants. A finding of agency, therefore, is not a sufficient basis upon which to predicate a principal's vicarious liability in tort.

Because an agent who is not a servant is not subject to any right of control by his or her employer over the details of his or her physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which the agent may commit. Prosser, Torts, § 70, p. 467.

Prior to Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978), older cases, dealing with the imputation of negligence to the owner, consistently adhered to the rule that a driver is presumed to be the agent of the owner. Hoeft v. Friedel, 70 Wis.2d 1022, 235 N.W.2d 918 (1975); Enea v. Pfister, 180 Wis. 329, 192 N.W. 1018 (1923); Laurent v. Plain, 229 Wis. 75, 281 N.W. 660 (1938); Sevey v. Jones, 235 Wis. 109, 292 N.W. 436 (1940); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937); Strupp v. Farmers Mut. Automobile Ins. Co., 14 Wis.2d 158, 109 N.W.2d 660 (1961); Cochran v. Allyn, 16 Wis.2d 20, 113 N.W.2d 538 (1962); Ruby v. Ohio Casualty Ins. Co., 37 Wis.2d 352, 155 N.W.2d 121 (1967); Gervais v. Kostin, 48 Wis.2d 190, 179 N.W.2d 828 (1970).

In Hoeft v. Friedel, the court said with respect to the common law presumption:

> Appellants correctly state the rule in this state that the driver of a motor vehicle is presumed to be the agent of the owner. Where this presumption is not rebutted, the rules of agency dictate that the driver's negligence be imputed to the owner. 70 Wis.2d at 1033.

Later in its opinion, the court, in Hoeft v. Friedel, explained the policy reason for the creation of the presumption:

> The presumption which arises with respect to the actual owner is attached as a matter of policy based upon the principle that "whether the car was at the time being operated in the prosecution of the defendant's [owner's] business is a matter peculiarly within the knowledge of the defendant [owner] and one upon which it is at times exceedingly difficult for the plaintiff to obtain proof." Enea v. Pfister, supra. If the evidence presented demonstrates that an agency relationship exists between the driver and someone other than the record owner, there is no reason not to apply the rule of imputation. 70 Wis.2d at 1034.

These passages from Hoeft typify what the court in Arsand v. City of Franklin described as "a confusion too often seen in the field of agency." 83 Wis.2d at 56.

The court in Arsand and subsequently in Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 415 n. 12, 331 N.W.2d 585 (1983), noted that the terms "agent" and "servant" are often incorrectly used synonymously and interchangeably. In particular, the court in Arsand stated:

> Our prior opinions reveal a confusion too often seen in the field of agency, a confusion which has caused error here and which should be avoided in the future. Our opinions in cases involving the law of agency have not used the terms "agent," "independent contractor" and "servant" in a consistent fashion. Although our prior

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> cases and the Wisconsin Civil Jury Instructions cite the Restatement and incorporate the concepts and standards set forth in the Restatement we have, in tort cases involving vicarious liability, used the term "agent" where, according to the usage required by Meyers v. Matthews, supra, we should have employed the term "servant." In several cases involving the liability of the defendant for the negligent conduct of another, we have stated that liability depends on whether the actor was an "independent contractor" or "agent." We should have said liability depends on whether the actor was an "independent contractor" or "servant." 83 Wis.2d at 56.

Based on the court's holdings in Arsand and later in Geise v. Montgomery Ward, Inc., and Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983), the Committee has revised this instruction to make it clear that the jury's determination is whether a master-servant relationship existed at the time of the accident and not simply whether the driver was an agent of the owner.

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1605 DRIVER: SCOPE OF EMPLOYMENT

Scope of employment means that at or about the time of the accident in question, (driver) was doing something directly or indirectly connected with the business of (his) (her) employer and in the course of (his) (her) duty as an employee.

COMMENT

This instruction and comment were approved in 1978. The comment was revised in 2013.

See Wis JI-Civil 4035, Servant: Scope of Employment and Wis JI-Civil 4040, Servant: Scope of Employment; Going to and from Place of Employment.

Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc., 2013 WI App 124, 351 Wis.2d 170, 840 N.W.2d 132; DeRuyter v. Wisconsin Elec. Power Co., 200 Wis.2d 349, 546 N.W.2d (Ct. App. 1996), aff'd 211 Wis.2d 169, 565 N.W.2d 118 (1997).

Fultz v. Lange, 238 Wis. 342, 345, 298 N.W. 60 (1941); Fawcett v. Gallery, 221 Wis. 195, 200, 265 N.W. 667 (1936); Bohnsack v. Huson-Ziegler Co., Inc., 212 Wis. 65, 248 N.W. 764 (1933); Barragar v. Industrial Comm'n, 205 Wis. 550, 238 N.W. 368 (1931).

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1610 JOINT ADVENTURE (ENTERPRISE): AUTOMOBILE CASES

A joint adventure is created when there is a financial or commercial agreement between the parties, either expressed or implied, to contribute money or services in a business venture. In such relation, the parties share the profits but not necessarily the losses, and each party has mutual control of the means employed to carry out their common purpose or control of the subject matter of the venture. "Control," as here used, does not mean the actual or physical operation of automobile but rather control as applied to the use of the automobile.

A joint adventure does not arise from a social relation or from a joint interest in the object or purpose of the trip.

COMMENT

This instruction and comment were approved in 1978. The comment was reviewed without change in 1990.

Bach v. Liberty Mut. Fire Ins. Co., 36 Wis.2d 72, 152 N.W.2d 911 (1967); Kuzel v. State Farm Mut. Ins. Co., 20 Wis.2d 558, 568, 123 N.W.2d 470 (1963); Estate of Starer, 20 Wis.2d 268, 270-71, 121 N.W.2d 872 (1963); Edelbeck v. Hooten, 20 Wis.2d 83, 88, 121 N.W.2d 240 (1963); Bowers v. Treuthardt, 5 Wis.2d 271, 280, 92 N.W.2d 878 (1958); Lewis v. Leiterman, 4 Wis.2d 592, 91 N.W.2d 89 (1958); Schweidler v. Caruso, 269 Wis. 438, 443, 69 N.W.2d 611 (1955); 30 Am. Jur. Joint Adventure § 2, p. 939 (1958).

When one party supplies services and the other party furnishes money, it is not necessary to prove an agreement to share the losses; such an agreement will be implied unless there is an express agreement to the contrary. Estate of Starer, supra at 271.

Parties can expressly agree not to share losses. Estate of Starer, supra.

Wisconsin cases holding that joint owners of an automobile engaged in joint use for a common purpose are joint adventures are overruled. Edlebeck v. Hooten, 20 Wis.2d 83, 91, 121 N.W.2d 240 (1963).

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1700 DAMAGES: GENERAL

The verdict contains the following damage questions, numbered __ through __.

[Read question(s).]

[Note: Select the following paragraphs which are appropriate.]

[I have answered question(s) _____ because the parties have agreed on the amount(s) to be inserted. You should not conclude from the fact I have answered (this) (these) question(s) as to the amount of damages that any party has admitted fault or that any party may be responsible for the amount(s) inserted. Finally, you should not assume that because I have answered (this) (these) question(s), that a party already has or necessarily will recover (this) (these) amount(s). Parties, may, as here, agree on an amount of damages without admitting they are responsible for the damages.]

[You must answer the damage question(s) no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.]

[In answering the damage question(s), completely disregard any percentages which you may have inserted as your answers to the subdivisions of question _____, the comparative negligence question.]

[In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you or me.]

[Your answer(s) to the damage question(s) should not be affected by sympathy or resentment (or by the fact that one (or more) of the parties from whom damages are sought

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(is an insurance corporation) (are insurance corporations)); nor should you make any deductions because of a doubt in your minds as to the liability of any party to this action.]

[**Note: Do not use this paragraph if Wis JI-Civil 202 is used**: In considering the amount to be inserted by you in answer to each damage question, the burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages with respect to the element or elements mentioned in the question and the amount of the damages. The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the accident.]

[Determining damages for (pain and suffering) (insert other type of damages) cannot always be made exactly or with mathematical precision; you should award as damages amounts which will fairly compensate (named party) for (his) (her) injuries.]

[The amount you insert in answer to each damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinion or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence – carefully and dispassionately – and determine your answers from the evidence in the case.]

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COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2000, 2002 and 2003. The revision in 2002 conformed the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. An editorial correction was made in 2004. The change in 2003 revised the second paragraph on page 1 and the first paragraph on page 2. The comment was revised in 2016.

These are suggested general instructions, which may be used when appropriate, but paragraph four should always be used when there is a comparison of negligence question.

Additional instructions on the need for assessing damages even though mathematical certainty cannot be attained are contained in Wis JI-Civil 1722 (apportionment among tortfeasors) and in Wis JI-Civil 1755 (pain and suffering).)

An adaptation of this instruction was discussed in Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981).

Answering Special Verdict Questions in Medical Negligence Cases. See Comment to Wis JI-Civil 1023.

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1705 DAMAGES: BURDEN OF PROOF IN TORT ACTIONS: FUTURE DAMAGES

INSTRUCTION WITHDRAWN

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was withdrawn in 2000.

This instruction read as follows when it was withdrawn:

> In considering the amount to be inserted by you in answer to each damage question, the burden rests upon each person claiming damages to convince you by the greater weight of the credible evidence to a reasonable certainty that such person has sustained damages (with respect to the element or elements mentioned in the question) and the amount thereof.
>
> The sum named by you must, in each instance, be an amount which will fairly and justly compensate the person named in the question for the damages sustained as a natural consequence of the accident.
>
> While the plaintiff has the burden of establishing (pecuniary loss) (loss of future earning capacity), the evidence relating to this item need not be as exact or precise as that needed to support findings as to other items of damage. The reason for this rule is that the concept of (pecuniary loss) (loss of future earning capacity) necessarily involves the consideration of factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the (pecuniary loss) (loss of future earning capacity) to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

The Committee decided to create Wis JI-Civil 202 to explain the burden of proof covered in paragraphs 1 and 2 of this withdrawn instruction. It then added the concept expressed in the third paragraph to each damage instruction on the future loss of earnings or pecuniary loss. See Wis JI-Civil 1762, 1817, 1835, 1861, 1880, 1885, 1890, and 1892.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Pecuniary injury for the wrongful death of a minor cannot be precisely established. See Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

See Wis JI-Civil 1750, Personal Injuries: Past and Future Disability; Wis JI-Civil 1890, Death of Minor Child: Pecuniary Loss.

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1707 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.

A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury. The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained.

A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

Factors you should consider in answering this question include:

1. the grievousness of the defendant's acts,

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2. the degree of malicious intention of the defendant or the recklessness of the defendant's conduct,
3. the potential damage which might have been done by such acts as well as the actual damage[, and]

[4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.]

(Burden of Proof, Middle Burden, use Wis JI-Civil 210.)

SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Was (defendant)'s conduct outrageous?

Answer: _____

Yes or No

If you answered the preceding question "yes," answer this question:

What sum, if any, do you assess against (defendant) as punitive damages?

Answer: $_____

*This question blank refers to the cause question relating to defendant's negligence.

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COMMENT

[**Special Note**: This instruction applies only to actions commenced before May 17, 1995. For actions commenced on or after this date, see JI-Civil 1707.1.]

This instruction was approved in 1989. The instruction was initially approved by the Committee in 1966. It was revised in 1981 following the decision of the Wisconsin Supreme Court in Jeffers v. Nysse, 98 Wis.2d 543, 297 N.W.2d 495 (1980), and again in 1985. The reference in the instruction to Wis JI-Civil 210 was added in 1981 following the decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980). Editorial changes were made in 1992 to address gender references in the instruction. Also, the comment was revised in 1990, 1992, and 1996. An editorial correction was made in 1994.

In 1991, the Committee reviewed JI-Civil 1707 and 1707A to determine if the instructions conform to the guidelines suggested by the United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991). In that decision, the Court upheld the award of punitive damages but suggested that the procedures for awarding punitive damages in some states might violate the due process clause of the United States Constitution.

In upholding the trial court's award of punitive damages, the Supreme Court reviewed the text of the trial court's punitive damage instruction. The Court found that the instruction enlightened the jury as to the punitive damages nature and purpose, identified the damages as punishment for civil wrongdoings of the kind involved, and explained that their imposition was not compulsory. In addition, the Court found that Alabama had established posttrial procedures for reviewing jury awards.

The Committee believes that both JI-Civil 1707 and 1707A conform to the requirements suggested in Haslip and provide adequate guidance in assessing punitive damages. See also comment to Wis JI-Civil 1707.1.

A. Conduct Justifying Punitive Damages

The availability of a punitive damage award is not dependent upon the classification of the underlying cause of action but, rather, upon proof that the conduct of the defendant was "outrageous." Brown v. Maxey, 124 Wis.2d 426, 431, 369 N.W.2d 677 (1985). The element of intent is not a prerequisite to the recovery of punitive damages. Thus, punitive damages may be recovered in tort actions based on negligence, intentional conduct, or strict liability. The court in Brown v. Maxey emphasized that "punitive damages are in the nature of a remedy and should not be confused with the concept of a cause of action." 124 Wis.2d at 431. In Brown v. Maxey, supra, the court specifically rejected the argument that punitive damages are not recoverable in a case of negligence. The court said that if the plaintiff proves only those elements constituting the negligence cause of action, punitive damages would not be available. Brown v. Maxey, supra at 432. However, the court went on to say that the mere fact that the cause of action is based upon negligent conduct does not preclude a punitive damage award if the plaintiff proves the necessary aggravating circumstances beyond ordinary negligence.

In discussing the type of conduct that must be shown to support the award of punitive damages, the court in Lundin v. Shimanski, 124 Wis.2d 175, 368 N.W.2d 676 (1985), and in Brown v. Maxey, supra at 434, cited a treatise on punitive damages written by Professors Ghiardi and Kircher. The authors explain that conduct justifying punitive damages is generally of two distinct types:

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> The first type is that in which the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow his conduct. With the second type of conduct the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences. Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence. J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 5, sec. 5.01.

The intent necessary to maintain an action for an intentional tort is different than the state of mind of the tortfeasor necessary to recover punitive damages. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Meshane v. Second Street Co., 197 Wis. 382, 387, 222 N.W. 320 (1928); see also Mid-Continent Refrigerator Co. v. Straka, 47 Wis.2d 739, 747, 178 N.W.2d 28 (1970).

In Wangen v. Ford Motor Co., supra at 268, the court used the term "outrageous" as an abbreviation for the type of conduct (malicious, or in wanton, willful, or reckless disregard of the plaintiff's rights) which justifies the imposition of punitive damages. If the plaintiff is able to prove the elements of "outrageous" conduct, then according to Wangen, it does not matter how the underlying tort justifying the recovery of compensatory damages is classified.

B. Punitive Damages in Survival Actions, Wrongful Death Actions, and Actions by Parents of an Injured Child

In Wangen v. Ford Motor Co., supra, the court made the following holdings regarding recovery of punitive damages in certain types of actions:

1. In a survival action, punitive damages incident to damages for pain and suffering may be awarded to the estate. The court noted that the deterrent and punishment purposes of punitive damages are met if they are allowed against a wrongdoer who survives even if the victim is dead. 97 Wis.2d at 311. The court said this holding was consistent with Wis. Stat. § 895.02 which prohibits the recovery of punitive damages from a deceased wrongdoer's executor or administrator. Punitive damages would serve no purpose after the wrongdoer's death.

2. Punitive damages may not be imposed on the wrongdoer in a wrongful death action. 97 Wis.2d at 315. Such damages are not recoverable under the wrongful death statute. Wis. Stat. §§ 895.03 and 895.04(4) and (5).

3. The parents of an injured minor may also recover punitive damages incident to their claim for loss of their child's services, society, companionship, and pecuniary support. 97 Wis.2d at 315. The court concluded that awarding punitive damages incident to the awards of compensatory damages to both the parents and the child would not constitute "double recovery." Instead, the court said it would punish and deter the tortfeasor for the willful and wanton invasion of the independent rights of each injured person.

C. Recovery Against Manufacturer in Products Liability Action

JI-Civil 1707A should be used in actions where the claim is based on products liability.

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In Wangen v. Ford Motor Co., supra, the court held that punitive damages may be awarded in products liability cases. See also Collins v. Eli Lilly Co., 116 Wis.2d 166, 201, 342 N.W.2d 37 (1984); Zeller v. Northrup King Co., 125 Wis.2d 31, 370 N.W.2d 809 (Ct. App. 1985). The court, in Wangen, suggested the following factors to guide the jury's determination of the amount of punitive damages to be awarded in a products liability action; 97 Wis.2d at 305:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect thereon of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

In Collins v. Eli Lilly Co., supra at 202, the court discussed "enterprise liability" as it relates to the award of punitive damages. It said "the concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous." The court found implicit in this concept the notion that it must be certain that the wrongdoer being punished because of his or her conduct actually caused the plaintiff's injuries. The plaintiff in a drug-related products liability action had sued multiple defendants and had stated that she could not prove which defendant had actually caused her injuries. Consequently, the court held that she could not recover punitive damages.

D. Evidence of the Wealth of a Defendant

Evidence of the wealth of the defendant is competent in determining the amount of punitive damages. Dalton v. Meister, 52 Wis.2d 173, 181, 188 N.W.2d 494 (1971); Jones v. Fisher, 42 Wis.2d 209, 220-21, 166 N.W.2d 175 (1969); Fuchs v. Kupper, 22 Wis.2d 107, 113, 125 N.W.2d 360 (1963); Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Gladfeldter v. Doemel, 2 Wis.2d 635, 648, 87 N.W.2d 490 (1958); Thomas v. Williams, 139 Wis. 467, 470, 121 N.W. 148 (1909); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884). See also Ghiardi, Personal Injury Damages in Wisconsin sec. 2.10 (Wis. Current Law Series 1964); Wikhem, The Rule of Exemplary Damages in Wisconsin, 2 Wis. L. Rev. 129, 154 (1923). Failure to show the net worth of the defendant does not invalidate the award of punitive damages but eliminates one factor by which the reasonableness of the award can be gauged. Fahrenberg v. Tengel, 96 Wis.2d 211, 235, 291 N.W.2d 516 (1980).

But, where there are two or more defendants, evidence of the wealth of the defendants is inadmissible. Ogodziski v. Gara, 173 Wis. 380, 181 N.W. 231 (1921); Fahrenberg v. Tengel, 96 Wis.2d 211, 291 N.W.2d 516 (1980); Meke v. Nicol, 56 Wis.2d 654, 664, 203 N.W.2d 129 (1973); McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919). Although evidence of the wealth of one joint tortfeasor is not admissible when sought against multiple defendants on joint and several liability, such evidence is properly admissible where the plaintiff seeks punitive damages against a defendant individual. Fahrenberg v. Tengel, supra at 225. See also J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 9, sec. 9.09.

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Thus, the parenthetical paragraph on page two is used only when punitive damages are sought from a defendant individually.

Wealth of Parent. Evidence of the wealth of the parents of a defendant is irrelevant where punitive damages could not be assessed against the parents for their conduct, even in situations in which the parents are obligated by statute to pay compensatory damages. Franz v. Brennan, 150 Wis.2d 1, 440 N.W.2d 562 (1989).

E. Necessity of Compensatory Damages; Application of Comparative Negligence Statute

The Wisconsin Supreme Court has held that in order for punitive damages to be available to a claimant, actual damages must have been awarded. Tucker v. Marcus, 142 Wis.2d 425, 418 N.W.2d 818 (1988). The court said an "award" represents a remedy recoverable in accordance with an order for judgment.

The court in Tucker v. Marcus, supra, also held that punitive damages are not "damages for negligence" under the comparative negligence statute. Wis. Stat. § 895.045. Thus, punitive damages are not subject to proportionate reduction based on plaintiff's comparative negligence.

F. Subsequent or Unrelated Bad Acts by the Defendant

If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

> **Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.**

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988); Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

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1707.1 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

(1) deliberate;

(2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and

(3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that (defendant) intended to cause harm or injury to (plaintiff).

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously

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or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you should determine the amount you believe will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question _____ include:

1. the grievousness of the defendant's acts,
2. the degree of malice involved,
3. the potential damage which might have been done by such acts as well as the actual damage, and
4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

[The law provides that punitive damage may not exceed twice the amount of compensatory damages you have awarded the plaintiff or $200,000.00, whichever is greater. These dollar limitations are not a measure of damages, but a limit on recovery. You should determine the amount, if any, you believe should be awarded in punitive damages.][1]

(Burden of Proof, Middle Burden, use Wis JI-Civil 205)

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SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer:_____

Yes or No

*[Note: This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.]

If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer:$_____

[Note: See Note 2 below if the claim involves operation of a vehicle while under the influence.][2]

NOTE

[1] **Punitive Damages Cap**. Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

The court can advise the jury of the cap on punitive damages if improper argument is made. Improper argument occurs when counsel would have the jury load-up on punitive damages with the hope that this would bleed money from the compensatory damages. An instruction on the cap is provided for use when improper argument occurs. See also Peot v. Ferraro, 83 Wis.2d 727 (1978). In cases in which the judge has instructed before closing arguments, the judge can give a supplemental instruction on the cap.

[2] **Operation of a Vehicle While Under the Influence; Cap on Punitive Damages.** There are no limitations (caps) on punitive damages where the claim involves operation of a vehicle "while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle." If the court exercises its gatekeeping function in favor of a punitive damages question in an OAWI vehicle case, the jury should be asked the following questions.

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If you awarded any punitive damages in answer to the previous question, then answer this question:

Did (defendant) operate (his) (her) vehicle while under the influence of an intoxicant?

Answer _____
(Yes or No)

Give Wis JI-Criminal 2663A or 2663B

If you answered question _____ "yes," then answer the question:

Did the defendant's intoxication render (defendant) incapable of the safe operation of (his) (her) vehicle?

Answer _____
(Yes or No)

COMMENT

This instruction and comment were approved in 1995 and revised in 2005 and 2011. The comment was updated in 1996, 1997, 1998, 2002, 2004, 2005, 2006, 2009, 2011, 2012, 2015, and 2018.

Punitive Damages Cap. Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

Conduct Necessary to Support Punitive Damages. In 2005, the Wisconsin Supreme Court issued decisions in two cases involving punitive damage claims. Strenke v. Hogner, 2005 WI 25, and Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al., 2005 WI 26. In Strenke, the court of appeals affirmed the jury award of punitive damages. The case was remanded to the court of appeals on the question of whether the jury's punitive damage award was excessive. In Wischer, the supreme court reversed the court of appeals' decision that the case was not appropriate for punitive damages. The case was remanded to the court of appeals as to the constitutionality of the amount of the trial court's punitive damages award.

Strenke v. Hogner. The Strenke case was decided first by the supreme court. Strenke v. Hogner expressly overruled the court of appeals' decision in Wischer. Some of the rulings made in Strenke v. Hogner were:

1. The court of appeals' decision in Wischer is erroneous and overruled. The correct interpretation of Wis. Stat. § 895.85(3) (now § 895.043(3)) is:

- There is no requirement of intent to injure or cause harm in a jury instruction. Rather the focus is on a disregard of rights.

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- The legislature did not intend an intentional disregard of the rights of the plaintiff to require intent to cause injury to the plaintiff.

2. The defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages to recover under Wis. Stat. § 895.85 (now § 895.043).

3. The court in Strenke agreed that the legislature tried to make it harder to recover punitive damages by enacting Wis. Stat. § 895.85(3) (now § 895.043(3)). According to the court's opinion, indifference on the person's part to the consequences of his or her actions is no longer sufficient. The statute requires an "intentional disregard of rights" as defined by Wisconsin Jury Instruction-Civil 1707.1. In Paragraph 37 of the Strenke decision, the supreme court states that the court's analysis is consistent with that of the Civil Jury Instructions Committee. The court concludes:

> Thus, in response to the first question certified by the Court of Appeals, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages. (Paragraph 38)

4. Strenke also dictates that trial judges serve as "gatekeepers" before sending a question on punitive damages to the jury. A punitive damages question is not to be sent to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite conduct. The middle burden of proof must be met. According to Justice Bradley's opinion,

> "punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an 'intentional disregard of rights' should a circuit court send the issue to the jury."

Little guidance is given in the Strenke opinion concerning the standard the trial judge is to apply in exercising this gatekeeping function. For two recent decisions involving the trial court's gatekeeping role as to punitive damages, see Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800 and Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205.

5. Last, the supreme court concluded in Strenke that the defendant's conduct was sufficiently aggravated to warrant punishment by punitive damages. The court could not agree, however, whether the punitive damages of $225,000.00 was excessive. The court remanded this issue to the court of appeals.

Wischer v. Mitsubishi Heavy Industries America. The supreme court's decision in Wischer reviewed the court of appeals' decision. This decision was overruled by Strenke v. Hogner. The question accepted for review in Wischer was "what proof was required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in Wis. Stat. § 895.85(3) (now § 895.043(3))." A supplemental briefing was done on the issue of whether the punitive damages award was unconstitutional.

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The supreme court affirmed the trial court's decision to submit the question of punitive damages to the jury.

The court, however, declined to address the issue of the constitutionality of the amount of the punitive damages award because of numerous unresolved issues. The court remanded those issues for review by the court of appeals under Trinity Evangelical Lutheran Church v. Tower Ins. Co., 261 Wis.2d 333 (2003); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) and, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

The Wischer decision contains an extensive analysis of the evidence. The court concluded:

> To sum up, we are satisfied that the evidence about MHIA's failure to determine and factor in the wind speed, if believed, was, under the circumstances of the present case, in and of itself sufficient evidence, that MHIA was aware that its conduct was substantially certain to result in the plaintiffs' rights being disregarded. (Paragraph 58)

Chief Justice Abrahamson's decision reaffirms the Strenke language that:

> A defendant's act or course of conduct must be deliberate. A defendant must be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded-the rights of the plaintiffs to safety, health, or life, a property right, or some other right. Furthermore, the course of conduct must actually disregard the rights of the plaintiff. Finally, the act or course of conduct must be sufficiently aggravated to warrant punishment by a punitive damages award. (Paragraph 30)

According to Chief Justice Abrahamson, the interpretation of the statute by the supreme court in Strenke v. Hogner is consistent with the explanation of the statute set forth in Wisconsin Jury Instructions-Civil 1707.1.

See also Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797 which discusses and applies the Strenke and Wischer decisions.

Gatekeeping Function of the Trial Judge. The trial court must initially determine whether the evidence establishes a proper case for the potential allowance of punitive damages and for the submission of the issue of punitive damages to the jury. As Justice Bradley notes in Strenke v. Hogner:

> Punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when conduct is so aggravated that it meets the elevated standard of 'intentional disregard of rights' should the circuit court send the issue to the jury. Additionally, the trial court will need to make this determination of the propriety of a punitive damages issue before evidence of wealth of the defendant is admitted.

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For recent cases involving the "gatekeeping" function of the trial judge, see Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis.2d 377, 845 N.W.2d 395; Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205; and Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800.

Henrikson v. Strapon, 314 Wis.2d 225 (2008), provides some guidance on the gatekeeping standards in a drunk driving case. In Henrikson, the court of appeals affirmed a dismissal of a punitive damages claim because the blood alcohol content (.11) was not sufficient to infer that the defendant's driving was substantially certain to result in a disregard of plaintiff's rights.

The Henrikson court focused on several factors:

1) The driving was run of the mill and not aggravated;
2) The level of intoxication was not excessively over the legal limit;
3) The defendant had no prior OAWI convictions;
4) No evidence of consumption of alcohol was in the record;
5) The prosecution reduced the OAWI charge to reckless driving and said it couldn't prove the OAWI charge beyond a reasonable doubt.

Absent a showing of intent, the standard that defendant's acts are practically certain to result in plaintiff's rights being violated is a high standard. See also Berner Cheese Corp v. Krug, 312 Wis.2d 251 (2008).

Constitutional Review. Following remand from the Wisconsin Supreme Court, the court of appeals in Strenke held that the award of punitive damages was not grossly excessive and not unconstitutional. Strenke v. Hogner, 2005 WI App. 194, 287 Wis.2d 135, 704 N.W.2d 309.

The United States Supreme Court has stated that: "the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996). The Court overturned a $2,000,000 punitive damage award wherein $4,000 in compensatory damages were awarded. BMW had failed to apprise a new car purchaser that his automobile had been repainted following damage in shipment. Recognizing the states' legitimate interest in punishing unlawful conduct and deterring its repetition, the Court refused to adopt any bright line mathematical formula in determining when punitive damages are excessive. However, the Court did say that a "general concern of reasonableness. . . properly enters into the constitutional calculus." BMW at 1602, quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993). The Court in BMW stated that punitive damages in state courts are limited to vindicating that state's (as opposed to other states' or the nation's) interest in punishment and deterrence. Evidence of a tortfeasor's out of state conduct may nevertheless be relevant but only on the issue of the reprehensibility of the defendant's conduct. BMW, at 1594, 1598. The trial judge may want to include a limiting instruction if out of state conduct is admitted in the record.

Three considerations enter into the determination of whether an award is "grossly excessive": (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual and potential harm suffered and the amount of the punitive damage award; and (3) the difference between the punitive damage award and any statutorily imposed state civil or criminal punishment for comparable conduct. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). The three State Farm factors were expanded into a six-factor by the Wisconsin Supreme Court in Trinity Evangelical Lutheran Church, supra. However, the supreme court in Kimble v. Land Concepts, supra, limited its analysis to the 3-factor test under Campbell and not the 6-factor test from Trinity, supra.

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Special Verdict. The instruction and verdict can be modified to fit the facts. If maliciousness is not argued, then the paragraph on maliciousness in the instruction can be deleted and the verdict question shortened.

Punitive Damages in Trespass Actions; Nominal Damages. The supreme court has held that when nominal damages are awarded for an intentional trespass to land, punitive damages may be awarded. Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997). In Jacque, the supreme court said the United States Supreme Court had recently clarified the three factors the court must consider when determining whether a punitive damages award violates the due process clause: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. 209 Wis.2d, at 627. The court said the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Punitive damages should reflect the egregiousness of the offense. In other words, some wrongs are more blameworthy than others and the punishment should fit the crime.

Subsequent or Unrelated Bad Acts by the Defendant. If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

> Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988); Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

Harm to Third Parties; Suggested Language. In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of $79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

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The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that Aevidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

> You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.

Defendant's Ability to Pay. Future earning capacity can be considered when weighing a defendant's ability to pay punitive damages. See Reyes v. Greatway Ins. Co., 220 Wis.2d 285, 582 N.W.2d 480 (Ct. App. 1998).

Punitive Damages for Battery; Provocation. In a battery action where punitive damages are sought and the defendant argues that the plaintiff provoked the battery, the following paragraphs may be added to the end of the instruction:

> Evidence has been received that (plaintiff) used abusive and insulting language toward (defendant) immediately prior to or at the time of the battery. Although abusive and insulting words cannot justify a battery, you may find that this conduct was a provocation that should mitigate or lessen, in whole or in part, any punitive damage award.
>
> In deciding if (plaintiff)'s conduct provoked the battery, you must determine whether (defendant)'s ability to exercise judgment was so affected by plaintiff's conduct that (defendant) acted in a manner a reasonably prudent person would act under the same circumstances. In other words, you must determine whether the conduct of (plaintiff) was so recent in time and so connected with the battery as to warrant the conclusion that the battery was actually influenced by the conduct.

Discrimination in Employment. Prior to the enactment of 2011 Wisconsin Act 219, Wisconsin Statute § 111.397(2) allowed a circuit court to order a defendant to pay to the person discriminated against compensatory damages and punitive damages under § 895.043 in an amount the circuit court or jury found appropriate. Act 219 repealed this provision.

Bifurcation of Punitive Damages. In Strenke v. Hogner, 2005 WI 25, the trial judge bifurcated the issues of liability and compensatory damages from the issue of punitive damages. In Strenke, bifurcation meant trying the case in two separate phases to the same jury. In the first phase, the jury awarded the plaintiff $2,000 in compensatory damages.

In phase two tried to the same jury immediately after phase one, evidence was introduced that defendant Hogner had four previous OAWI convictions, had consumed at least 16-18 12-ounce containers of beer within a five hour span, had a blood alcohol of .269%, and was on his way to another tavern to continue his drinking spree. The jury awarded $225,000 in punitive damages.

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On appeal, one of the questions initially posed was the propriety of the bifurcation mode of trial. The case of Waters v. Pertzborn, 243 Wis.2d 703, was cited for the proposition that bifurcation of issues of negligence and damages under Wis. Stat. § 805.05(2) is not sanctioned. Waters involved bifurcation with two separate juries. The bifurcation issue was withdrawn so no appellate decision was made on the propriety of the trial judge's approach.

Zawistowski v. Kissinger, 160 Wis.2d 292 (1991), involved a defamation case. The trial court bifurcated the trial to first try the issue of whether the defendant made the alleged statements before proceeding to trial on the issue of defamation. The trial court based its bifurcation on Wis. Stat. § 805.05(2). Section 805.05(2) provides:

> Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving [160 Wis.2d 299] inviolate the right of trial in the mode to which the parties are entitled.

The trial court reasoned that bifurcation was appropriate for trial economy and fairness. The trial court also found that bifurcation would not be an undue burden on either party and would not confuse the jury. The jury found statements were not made and a second trial was unnecessary.

On appeal, the trial court's ruling on bifurcation was affirmed. The court of appeals held that the plain language of section 805.05(2) does not authorize bifurcating individual issues for trial, but neither does it prohibit the trial court from taking such action. The appeals court also concluded that the trial court's bifurcation was authorized by section 906.11. Section 906.11 authorizes control by the trial court of the mode and order of interrogating witnesses and presenting evidence.

Waters v. Pertzborn, 243 Wis.2d 703 (2001), was a negligence action involving a defense of recreational immunity in a sledding accident. A secondary issue was a social guest exception to immunity. Because the case involved permanent and complex damage issues, the trial judge ordered separate trials before different juries.

On interlocutory appeal, the supreme court held that bifurcating issues of liability and damages for separate trials before different juries was not authorized for the following reasons:

1. The legislative history of Wis. Stat. § 805.05(2) clearly indicated that bifurcation of claims was permitted but bifurcation of issues was not (exception made for insurance coverage issues under Wis. Stat. § 803.04(2)(b).

2. Wis. Stat. § 805.09(2) requires that all questions on the verdict must be agreed to by the same five-sixths of the jury.

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The supreme court overruled the Zawistowski opinion stating on page 723:

> ¶30. In Zawistowski, the court of appeals concluded that while § 805.05(2) does not authorize bifurcating individual issues of trial, "neither does it prohibit the trial court from taking such an action." Id. at 299. This conclusion cannot stand in light of the statements of intent to disallow bifurcation revealed in the statutory history of § 805.05(2) presented above. While it is unclear from the Zawistowski decision whether the circuit court contemplated trials before the same or different juries, to the extent that opinion is inconsistent with today's decision, it is overruled.
>
> ¶31. Moreover, while we agree that the evidentiary rule § 906.11(1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered. It must give way where the exercise of discretion runs afoul of other statutory provisions that are not discretionary. In the context of bifurcation of issues for trial before different juries, § 805.05(2) and § 805.09(2) limit that discretion.[13] (emphasis supplied)

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1707.2 PUNITIVE DAMAGES: PRODUCTS LIABILITY

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

(1) deliberate;

(2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and

(3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that the defendant intended to cause harm or injury to the plaintiff.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive

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damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question _____ include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

(Burden of Proof, Middle Burden, use Wis JI-Civil 205)

SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer: _____

Yes or No

*This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.

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If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer: $_____

COMMENT

This instruction and comment were approved in 1995 and revised in 2005. See comment to Wis JI-Civil 1707.1.

The frame of mind of the alleged wrongdoer is a necessary consideration in determining whether punitive damages may be imposed. Some type of knowledge is a necessary component to the imposition of punitive damages because an alleged wrongdoer who is not aware of a product's defect cannot be recklessly disregarding the rights of another person. Sharp v. Case Corp. 227 Wis.2d 1, ¶44, 595 N.W.2d 380 (1999). In Sharp, the court stated:

> In a products liability case, a manufacturer may be found to have acted in reckless disregard if, after having gained specific knowledge of a product's defect and its potential harm, the manufacturer fails to take some action that the defect demands, such as adequate testing procedures, effective quality control, sufficient warnings or adequate remedial procedures such as product recalls or post-sale warnings. Walter, 121 Wis. 2d at 227-28.

Harm to Third Parties. In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. _____, 127 S. CT. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of $79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that Aevidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

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The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

Suggested Language:

You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.

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1707A PUNITIVE DAMAGES: PRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.

A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on (his) (her) part to the consequences of (his) (her) actions, even though (he) (she) may not intend insult or injury. The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss (he) (she) has sustained.

A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering this question include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;

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3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

(Burden of Proof, Middle Burden, use Wis JI-Civil 210.)

SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Was (defendant)'s conduct outrageous?

Answer: _____

Yes or No

If you answered the preceding question "yes," answer this question:

What sum, if any, do you assess against (defendant) as punitive damages?

Answer: $_____

*This question blank refers to the cause question relating to defendant's negligence.

COMMENT

[**Special Note**: This instruction applies only to actions commenced before May 17, 1995. For actions commenced on or after this date, see JI-Civil 1707.1 and 1707.2.] This instruction was approved in 1989. Editorial changes were made in 1992 to address gender references in the instruction. The comment was modified in 1996. This instruction is to be used in product liability actions. See Comment, Wis JI-Civil 1707 and 1707.1.

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1708 BATTERY: PUNITIVE DAMAGES: MITIGATION BY PROVOCATION

This instruction was withdrawn in 2009. A comment addressing battery and provocation was added to Wis JI-Civil 1707.1.

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1710 AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE

If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

COMMENT

This instruction was approved in 1960 and revised in 1983, 1991, and 1998. The instruction was reviewed without change in 2014. The comment was updated in 1991, 1998, and 2006.

This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident.

Fouse v. Persons, 80 Wis.2d 390, 397-98, 259 N.W.2d 92 (1977); Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 289, 187 N.W.2d 349 (1971); Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976); Selleck v. Janesville, 100 Wis. 157, 164, 75 N.W. 975 (1898). See also Spencer v. ILHR Dept., 55 Wis.2d 525, 532, 200 N.W.2d 611 (1972); 22 Am. Jur. 2d Damages § 113 (1965).

This instruction conveys to the jury the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the additional harm is either (1) part of the original injury, (2) the nature and probable consequence of the tortfeasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence. Butzow, supra at 285-86.

In Butzow, the court refused to accept the argument that a negligent doctor who aggravates the original injury is liable for the damage directly caused by the original tortfeasor. Liability of the doctor is limited solely to damages resulting from his own negligence and only to that extent is there joint and several liability between the doctor and the original tortfeasor. The original tortfeasor and the subsequent negligent doctor, even though the doctor's negligence aggravates the original injury, are not joint tortfeasors although they have joint liability in part. However, such joint liability does not give rise to any right of contribution. Butzow, supra at 287.

The phrase "not diminished" comes from Selleck v. Janesville, supra.

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In 2006, the Wisconsin Supreme Court discussed Wis JI-Civil 1710 in Jo-el Hanson v. American Family, 2006 WI 97. This case dealt with the insurer's claim that plaintiff's damages were inflated due to over-treatment. The trial judge modified JI-Civil 1710. The court of appeals said this instruction conveys the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians," citing Lievrouw, 157 Wis.2d at 358.

The defendants argued that there is a difference between unnecessary medical treatment, as opposed to medical malpractice that causes aggravation of injuries. The defendants contended that there is no causal relationship between the accident and the surgery performed. Therefore, in the defendant's view, the case should not be subject to a Wis JI-Civil 1710 instruction, because the instruction "is to be used in cases where there is at issue aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident." Wis JI-Civil 1710 Comment.

The supreme court held that JI-Civil 1710 is correct and that the modification by the trial judge was erroneous and confusing. The court held that because the jury concluded that the plaintiff was injured in the accident, she was entitled to all of her past medical expenses, regardless of whether plaintiff's treating physician performed an unnecessary surgery, under the rule first enunciated in Selleck, 100 Wis. 157, as she used ordinary care in selecting her doctor.

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1715 AGGRAVATION OF PRE-EXISTING INJURY

The evidence shows that the plaintiff was previously injured when (briefly describe event). If the injuries of the plaintiff received in the accident on (date) aggravated any physical condition resulting from the earlier injury, you should allow fair and reasonable compensation for such aggravation but only to the extent that you find the aggravation to be a natural result of the injuries received in the accident.

COMMENT

This instruction and comment were revised in 1983. The comment was reviewed without change in 1990.

Kablitz v. Hoeft, 25 Wis.2d 518, 523-25, 131 N.W.2d 346 (1964); Egan v. Travelers Ins. Co., 223 Wis. 129, 132, 269 N.W. 667 (1936). See also Lautenschlager v. Hamburg, 41 Wis.2d 623, 632-34, 165 N.W.2d 129 (1969); 22 Am. Jur. 2d Damages §§ 122 and 124.

The applicable principle is the same as that which controls when there is aggravation of an existing ailment that is more than a mere latent tendency. "The recovery includes no damages for injuries which result from the original condition but are confined to those which are due to its enhancement or aggravation." 22 Am. Jur. 2d Damages §§ 122 and 124 (1965).

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1720 AGGRAVATION OR ACTIVATION OF LATENT DISEASE OR CONDITION

In answering subdivision ___ of question ___, you cannot award any damages for any (pre-existing disease, condition, or ailment) (predisposition to disease) except insofar as you are satisfied that the (disease, condition, or ailment) (predisposition to disease) has been (aggravated) (activated) by the injuries received in the accident on (date). If you find that the plaintiff had a (pre-existing disease or condition which was dormant) (predisposition to disease) before the accident but that such (disease or condition) (predisposition to disease) was (aggravated) (brought into activity) because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate (plaintiff) for such damages (plaintiff) suffered as a result of such (aggravation) (activation) of the condition.

Any ailment or disability that the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in this accident, is not to be considered by you in assessing damages. You cannot award damages for any condition which has resulted, or will result, from the natural progress of the pre-existing disease or ailment or from consequences which are attributable to causes other than the accident.

If the plaintiff was more susceptible to serious results from the injuries received in this accident by reason of a (pre-existing disease or condition) (predisposition to disease) and that the resulting damages have been increased because of this condition, this should not prevent you from awarding damages to the extent of any increase and to the extent such damages were actually sustained as a natural result of the accident.

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COMMENT

This instruction was originally published in 1960. The instruction and comment were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Use either pre-existing or predisposition according to the facts.

Kablitz v. Hoeft, 25 Wis.2d 518, 523-25, 131 N.W.2d 346 (1964). Peters v. Zimmerman, 275 Wis. 164, 172, 81 N.W.2d 565, 569 (1957); Woodward v. City of Boscobel, 84 Wis. 226, 234-35, 54 N.W. 332, 334-35 (1893); McNamara v. Village of Clintonville, 62 Wis. 207, 213-14, 22 N.W. 472, 474-75 (1885); Stewart v. City of Ripon, 38 Wis. 584, 590-91 (1875); 23 Am. Jur. 2d Damages §§ 122 and 124 (1965).

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1722 DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS

Subdivision __ of question __ asks what sum will fairly and reasonably compensate (plaintiff) for any damages (plaintiff) incurred in the accident involving (plaintiff) and (defendant).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering this question (these questions), you should use your best judgment based on the evidence received during the trial to determine the damages incurred by (plaintiff) in the accident involving (defendant).

COMMENT

This instruction was originally approved by the Committee in 1963. The instruction and comment were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

See Comment to Wis JI-Civil 1722A.

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1722A DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS (To be used where several tortfeasors are parties)

Evidence has been received during the trial that (the plaintiff) may have received injuries from separate accidents.

Subdivision ___ of question ___ asks what percentage of any damages incurred by (plaintiff) and (defendant A). Subdivision ___ of question ___ asks the same question as to what percentage of any damages incurred by (plaintiff) was attributable to the accident involving (plaintiff) and (defendant B).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering these questions, you should use your best judgment, based on the evidence received during the trial, to apportion the percentages of any damage sustained by (plaintiff) to the separate accidents.

SPECIAL VERDICT

If you have answered "yes" to both questions ___ and ___ (i.e., causal negligence of both nonconcurrent tortfeasors), what percentage of all the damages received by the (plaintiff) do you attribute to:

SUBDIVISION A - The accident involving

(plaintiff) and (defendant A)? _____%

SUBDIVISION B - The accident involving

(plaintiff) and (defendant B)? _____%

TOTAL 100%

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COMMENT

This instruction and comment were approved in 1983. The comment was reviewed without change in 1990. Editorial changes were made to the instruction in 1992 and to the comment in 1996.

Wis JI-Civil 1722 and 1722A are to be used where the plaintiff has suffered injuries from nonconcurrent torts, also referred to as successive torts. This instruction (1722A) is to be used where more than one tortfeasor is in the lawsuit as a party.

The Committee recognizes the difficulties, in some cases, in apportioning damages between or among nonconcurrent tortfeasors. This instruction requires the jury to divide the damages even though such a division may be difficult because of the nature of the plaintiff's injuries.

Formerly, Wisconsin Jury Instructions - Civil contained a series of three instructions which dealt with the issue of apportioning damages from nonconcurrent torts. These instructions were: (1) Wis JI-Civil 1721, Damages: Indivisible Injuries from Nonconcurrent or Successive Torts: Expert Testimony; (2) Wis JI-Civil 1722, Damages: Divisible Injuries from Nonconcurrent or Successive Torts; and (3) Wis JI-Civil 1723, Damages: Conflict as to Whether Injuries are Divisible or Indivisible. These instructions were revised by the Committee in 1978 to conform the instructions to the supreme court's decisions in Johnson v. Heintz, 61 Wis.2d 585, 213 N.W.2d 85 (1973); and after retrial in Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976). According to its comment, Wis JI-Civil 1721 was to be used where the court determined as a matter of law that the defendants were not joint tortfeasors, and that the accidents were successive, and that there was uncontroverted expert testimony that the plaintiff's injuries were not divisible. Wis JI-Civil 1722 was to be used where the trial judge determined that the damages were divisible. Wis JI-Civil 1723 was to be used where there was a conflict in the trial testimony on whether the injuries were divisible. As discussed later in this comment, JI-Civil 1721 and 1723 have been withdrawn by the Committee. [In 1996, a new instruction, dealing with a different issue, was assigned the number JI-Civil 1723.]

In earlier case law, the Wisconsin Supreme Court had suggested that nonconcurrent tortfeasors were jointly liable for all injuries to the victim where it was impossible to divide the harm caused by each defendant. Heims v. Hanke, 5 Wis.2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955). Those two cases stood for the general proposition that because allocating responsibility for indivisible injuries would place an impossible burden on juries, contribution was appropriate for the actual injury, even though the injury was the result of successive (not joint) tortious acts. This suggestion in Heims and Bolick that joint liability could arise from the indivisibility of injuries was expressly rejected by the court in Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 187 N.W.2d 349 (1971). Justice Hallows, who authored that opinion, stated that juries should have no more difficulty in allocating damages to the respective negligence of two tortfeasors than they do in allocating contribution of negligence of two tortfeasors to the injury and damages.

In the first Johnson v. Heintz decision, the supreme court reaffirmed the holding in Butzow that inseparability of damages could not create joint liability of successive tortfeasors. Johnson No. 1, in rejecting 1721, clearly stated that a tortfeasor is only responsible for the percentage of the damages and injury as was caused by his or her negligence. The term "joint liability," as employed in earlier cases, was used in the generic sense. It is not a joint and several liability concept as in the typical two-car accident case where two sources of negligence concur in time and combine to produce one accident. There, of course, contribution will lie and the liability is joint and several.

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In the second Johnson v. Heintz decision, the court noted that in Johnson No. 1, it had stated that an "allocation of damages as to the impact was necessary." Nevertheless, the court, in dicta, suggested that expert testimony could be used to establish the indivisibility of the plaintiff's injuries and, consequently, the joint liability of nonconcurrent tortfeasors. This suggestion was dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant Heintz was solely responsible for all damages in the case.

After reviewing the case law on this issue, the Committee believes that the jury should apportion all damages received in nonconcurrent torts. As such, Wis JI-Civil 1721 (1978) and 1723 (1978) are withdrawn. [Reporter's Note: A new instruction dealing with enhanced injuries was numbered JI-Civil 1723 in 1995.] Wis JI-Civil 1722 has been simplified so that it applies where only one tortfeasor is a party. Wis JI-Civil 1722A has been added for use in cases where multiple tortfeasors are actually in the lawsuit. This instruction requires the jury to apportion the plaintiff's damages between the nonconcurrent tortfeasors. This conforms to the supreme court's decision in the first Johnson decision and to Justice Hallows' statement in Butzow that the concept of the inseparability of damages "is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted."

In Foley v. City of West Allis, 113 Wis.2d 475, 485-86, 335 N.W.2d 824 (1983), the court stated that "as a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, courts attempt to do so." Citing Prosser, Law of Torts § 65 (4th ed. 1971) and Restatement, Second, Torts §§ 433A and 465 (1975). Foley involved the apportionment of damages to "seat-belt negligence" by the plaintiff. The court noted that since failure to wear seat belts generally causes incremental injuries, damages should be allocated between the first incident (the actual collision) and the second incident (the collision within the plaintiff's car).

Section 433A of Restatement, Second, Torts, quoted in Foley, states:

433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

For a further discussion of the indivisibility of injuries under Wisconsin tort law, see Scott, "The Apportionment of 'Indivisible' Injuries," 61 Marq. L. Rev. 559 (1977).

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1723 ENHANCED INJURIES

This is a [crashworthiness] [second collision] [enhanced injury] case. (Plaintiff) does not claim (enhanced injury defendant) caused the [collision] [accident] to occur.

(Plaintiff) does claim that [enhanced injury defendant was negligent] [there existed a defect in (the product) which was unreasonably dangerous to a prospective user].

(Plaintiff) further claims that such [negligence] [defective product] was a substantial factor in producing enhanced injuries to (himself) (herself).

Questions _____ and _____ refer to those alleged enhanced injuries. It applies to those injuries that (plaintiff) received over and above any injuries (he) (she) would have received as a result of the [collision] [accident] if the [defendant was not negligent] [product was not unreasonably dangerous and defective].

First, you must determine whether the [defendant was negligent] [defendant's product was unreasonably dangerous and defective] as inquired about in question _____.

If you find [defendant was negligent] [the product was defective], then you must determine in question _____ whether that [negligence] [defective product] was a cause of enhanced injuries to (plaintiff); i.e., whether that [negligence] [defective product] was a substantial factor in producing injuries over and above what probably would have been sustained in the [collision] [accident].

[Burden of Proof, Wis JI-Civil 200]

If you have found that at least one party's negligence was a cause of injuries to (plaintiff) in the [collision] [accident] and have further found that (enhancing injury defendant)'s [negligence] [product] was a cause of enhanced injuries to (plaintiff), then you

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will answer question _____ and determine how much and to what extent (plaintiff)'s total injuries and damages were enhanced or increased by the negligence of (enhancing injury defendant). You will affix a percentage, or part of 100%, which you are satisfied should be attributable to (enhancing injury defendant).

Once (plaintiff) has established that (he) (she) sustained enhanced injuries as a result of (enhancing injury defendant)'s [negligence] [defective product], then the defendants have the burden of proof in apportioning how much of those injuries should be allocated between the [collision] [accident] and the alleged enhancement occurrence.

SPECIAL VERDICT

1. [Regular negligence question on defendant who allegedly caused the initial "accident" or "incident" and/or the following:]

   Was the (product), when it left the possession of (defendant), in such defective condition as to be unreasonably dangerous to a prospective user?

   Answer:_____
   Yes or No

2. If you answer question _____ "yes," then answer this question:

   Was such (negligence) (defective condition) a cause of (the accident) (injury to {the plaintiff})?

   Answer:_____
   Yes or No

3. Was (plaintiff) negligent with respect to caring for (his) (her) own safety?

   Answer:_____
   Yes or No

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4. If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (the accident) (injury) to (plaintiff)?

Answer:_____
Yes or No

5. [Regular comparison question on who was at fault in causing initial accident or incident.]

6. What sum of money will fairly and reasonably compensate (plaintiff) for all total damages sustained by (him) (her) as a natural and probable consequence of the incident on (date) with respect to:

a. Pain, suffering and disability to date? $_____

b. Other subparts as required by the evidence, etc. $_____

7. [Regular negligence question as to defendant who allegedly caused enhanced injuries to the plaintiff and/or:]

Was the (product), when it left the possession of (enhancing tortfeasor), in such a defective condition so as to be unreasonably dangerous to a prospective user?

Answer:_____
Yes or No

8. If you answer question _____ "yes," then answer this question:

Was such defective condition a cause of enhanced injuries to (plaintiff)?

Answer:_____
Yes or No

9. [If the evidence reflects the plaintiff was contributorily negligent in causing enhanced injuries to himself or herself, then insert negligence and cause questions as to the plaintiff.]

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10. [The Committee is suggesting three alternatives to determine the amount of damages attributable to the enhancing incident and who is responsible for same. Which alternative to use will be determined by the evidence and to a lesser degree by the style of the judge.]

a. If you have answered "yes" to at least one of questions 2 and 4 and have thus found at least one of the parties at fault in causing the (first accident), and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by (enhancing injury defendant)?

_____%

b. If you have answered "yes" to at least one of questions 2 and 4 and have found at least one of the parties at fault in causing the (first accident) and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by:

i) (Describe initial accident or incident)? _____%

ii) (Describe enhancement incident)? _____%

Total 100%

c. What sum of money will fairly and reasonably compensate the (plaintiff) for any part of his or her total damages that were sustained as natural and probable consequence (of the enhancing incident) (by the enhancing tortfeasor) with respect to:

i) Pain, suffering, and disability to date? $_____

ii) Other subparts as required by the evidence, etc. $_____

COMMENT

This instruction was approved in 1994 and revised, as to burden of proof language, in 2002. The comment was updated in 1998, 2000, and 2009.

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While the "aggravated injuries" doctrine has been the law since Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971), recent cases have applied this concept to situations where only a split second exists between the "first accident" and the "enhancement occurrence." Sumnicht v. Toyota Motor Sales, 121 Wis. 2d 338, 360 N.W.2d (1984); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985), rev. den.; Farrell v. John Deere Co., 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989), rev. den; Hansen v. New Holland North America, Inc., 215 Wis.2d 649, 574 N.W.2d 250 (Ct. App. 1997).

A Farrell type verdict was approved in Kutsugeras v. Avco Corp., 973 F. 2d 1341 (7th Cir. 1992), and Hansen v. Crown Controls Corp., 181 Wis. 2d 673, 512 N.W.2d 509 (Ct. App. 1993), rev. den.

The Committee does not believe the two comparison question format approved in Farrell to be mandatory. The trial judge has the discretion to craft the verdict to comport with the theories advanced and evidence presented.

Based on these cases, the Committee recommends one way to handle the problem would involve, first, having inquiries on who is responsible for the "first accident" as if no "enhanced injury" was present.

Second, would be an inquiry as to whether the "enhanced injury defendant" was negligent and/or its product was unreasonably dangerous and defective.

Third, would be an inquiry as to whether any such negligence or defective product was a cause of enhanced injuries to plaintiff.

Finally, a second percentage question would determine how much of plaintiff's total injuries and damages should be attributable to enhancing injury or successor tortfeasor.

Once plaintiff has produced sufficient evidence he or she sustained enhanced injuries, then the burden of allocating the damages between the two occurrences is upon the defendants. Johnson v. Heintz 73 Wis. 2d 286, 243 N.W.2d 815 (1976); Maskrey, supra at 154.

While the supreme court criticized the verbiage of "over and above" in the verdict concerning the causation question on enhanced injuries, Sumnicht, supra at 361, the Committee believes that criticism is not applicable to the instruction.

Since successive torts are involved, no joint liability occurs and thus contribution is not allowed. However, the accident causing tortfeasor would be entitled to equitable subrogation to the extent he or she paid for those damages attributable by the jury to the enhancing tortfeasor.

If an initial tortfeasor is the same as an enhancing tortfeasor, then the trial judge should tailor the suggested verdict in questions 1 and 7 to describe the acts of that tortfeasor to properly focus the jury's analysis of the alleged negligence of the defendant.

In Ellsworth v. Schelbrock, 229 Wis.2d 542, 600 N.W.2d 247 (Ct. App. 1999), the court held that it was not prejudicial error for the trial court to fail to instruct the jury on enhanced injuries. The court said that because the jury determined that the plaintiff's car was not unreasonably dangerous and that the manufacturer had no liability, the claim of error based on the failure to give the enhanced injury instruction was rendered moot. The court said that it could not conceive how the jury's deliberations would have changed even if the enhancement instruction had been given.

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1725 FURTHER INJURY IN SUBSEQUENT EVENT

In answering question(s) ___, which relate(s) to the amount of money which will reasonably compensate (plaintiff) for injuries sustained in the (occurrence) (accident) on _____, you may also consider that (plaintiff) later sustained another injury on ___.

If the earlier injury was a substantial factor in causing the later injury, then you may include in your answer to question(s) ____ reasonable compensation for the later injury.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 2002.

The Committee revised this instruction in 2002 to remove language suggesting that the plaintiff's contributory negligence in a subsequent event would foreclose all recovery for injuries in the subsequent event which were caused by the earlier injury.

This instruction is based upon Basche v. Vanden Heuvel, 260 Wis. 169, 175-76, 50 N.W.2d 383 (1951); Wagner v. Mittendorf, 134 N.E. 539, 540-41 (New York 1922); Annot., 9 A.L.R. 255 (1920); Annot., 20 A.L.R. 524 (1922).

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1730 DAMAGES: DUTY TO MITIGATE: PHYSICAL INJURIES

A person who has been injured must use ordinary care to mitigate or lessen (his) (her) damages. This duty to mitigate damages requires an injured person to use ordinary care to seek medical (and surgical) treatment and to submit to and undergo recommended medical (or surgical) treatment within a reasonable time to avoid or minimize any damage from physical injuries. "Ordinary care" is the degree of care usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.

An injured person is only required to submit to those medical (or surgical) treatments to which a reasonable person would have submitted. [A person is not required to undergo treatment if it will not improve (his) (her) condition.] [Also, a person is not required to undergo treatment if treatment is unreasonably dangerous or is not reasonably within his or her means.]

In determining damages, you should keep in mind this duty of (plaintiff) to use ordinary care to mitigate damages. If you find that (plaintiff) did not do so, you should not include in your answer to this damage question any amount for consequences of the injury which reasonably could have been avoided.

The burden of proof on this issue is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of credible evidence, that (plaintiff) did not use ordinary care in mitigating damages.

COMMENT

The instruction and comment were originally published in 1978 and revised in 1988 and 2011. The comment was updated in 1980, 1988, and 2011. This instruction was revised in 2002 to conform the language

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regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is taken from Lobermeier v. General Tel. Co. of Wisconsin, 119 Wis.2d 129, 349 N.W.2d 466 (1984); Loser v. Libal, 269 Wis. 418, 424, 69 N.W.2d 463, 465 (1955). See also Collova v. Mutual Serv. Casualty Ins. Co., 8 Wis.2d 535, 539, 99 N.W.2d 740, 743 (1958); Hargrove v. Peterson, 65 Wis.2d 118, 123, 221 N.W.2d 875 (1974). The general rule and exceptions are discussed in two annotations: "Duty of injured person to submit to surgery to minimize tort damages," 62 A.L.R.3d 9 (1975); "Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages," 62 A.L.R.3d 70 (1975).

Affirmative Defense. Failure to mitigate damages is an affirmative defense which must be raised by answer. Lobermeier v. General Tel. Co. of Wisconsin, supra at 148. Peeples v. Sargent, 77 Wis.2d 612, 631, 253 N.W.2d 459 (1977). If it is not raised, it is deemed waived. When properly raised, the burden of proving failure to mitigate is upon the party asserting it. Kuhlman, Inc. v. G. Heileman Brewery Co., 83 Wis.2d 749, 752, 266 N.W.2d 382 (1978); Howard v. State Farm Mut. Auto Liab. Co., 70 Wis.2d 985, 236 N.W.2d 643 (1975).

Reasonable Efforts to Mitigate. There is no need to instruct on the duty of a party to mitigate damages where the issue as to the reasonableness of the party's course of action was not raised at trial. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 607, 182 N.W.2d 448 (1971).

It is a matter of fact to be determined by the jury whether a reasonable person under the circumstances should have undergone medical treatment. Lobermeier v. General Tel. Co. of Wisconsin, supra at 143.

In Hargrove v. Peterson, supra at 123, the plaintiff contended that the trial judge erred in giving a similar instruction on duty to mitigate, in conjunction with the standard instruction on the duty of the jury not to speculate (Wis JI-Civil 1740). The court rejected the argument, noting the precedent in Loser v. Libel, supra, that applied the duty to mitigate to elective surgery in the future. The court specifically declared that the duty to mitigate instruction was appropriate where the situation presented involves future surgery or future medical treatment. Hargrove, supra at 126.

The court in Hargrove, supra, further stated that in the case of future medical treatment "the standard as to reasonableness involved is the adult standard as to what is reasonable in the acceptance or rejection of elective surgery to mitigate damages," 65 Wis.2d at 126. The adult standard applies even where the injured party is a minor.

The proper period for which damages are allowed is only for the length of time reasonably required to effect a cure. Lobermeier v. General Tel. Co. of Wisconsin, supra at 149.

Duty to Mitigate by Retraining. It is for the jury to determine whether the plaintiff should have sought vocational retraining as a part of the plaintiff's duty to mitigate damages. Garceau v. Bunnel, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988). In Garceau, the court said the trial court's instruction erroneously placed on the plaintiff a duty to seek and obtain vocational retraining as a matter of law.

For the duty to mitigate losses from negligent acts or breach of contract, see Wis JI-Civil 1731.

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1731 DAMAGES: DUTY TO MITIGATE: NEGLIGENCE OR BREACH OF CONTRACT

A person who has been damaged may not recover for losses that (he) (she) knows or should have known could have been reduced by reasonable efforts. It is not reasonable to expect a person to reduce (his) (her) damages if it appears that the attempt may cause other serious harm. A person need not take an unreasonable risk, subject (himself) (herself) to unreasonable inconvenience, incur unreasonable expense, disorganize (his) (her) business, or put (himself) (herself) in a position involving loss of honor and respect.

If you find that a reasonable person would have taken steps to reduce damages and if you find that (plaintiff) did not take such steps, then you should not include as damages any amount which (plaintiff) could have avoided. If a reasonable person would not have taken steps to reduce loss under the circumstances in this case, then (plaintiff)'s failure to act may not be considered by you in determining (plaintiff)'s damages.

The burden of proof is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of the credible evidence, that (plaintiff) should have taken steps to reduce (his) (her) loss and (failed to do so) (did not).

COMMENT

This instruction was approved by the Committee in 1982. It was re-titled and updated in 2011. The comment was updated in 1990 and 2011.

Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Monroe County Fin. Co. v. Thomas, 243 Wis. 568, 571, 11 N.W.2d 190 (1943); Restatement, Second, Contracts § 350.

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This instruction applies to damages for breach of contract or for damages in a tort action based on negligence that relate to property damage. For an instruction explaining mitigation of damages for negligently inflicted bodily injury, see Wis JI-Civil 1730; for an instruction explaining mitigation of damages from intentional acts, see Wis JI-Civil 1732.

See Comment to Wis JI-Civil 1806 for mitigation of damages to a growing crop.

Burden of Proof. Although the duty to mitigate damages rests with the aggrieved party, the burden of proof is upon the defaulting party to establish that the aggrieved party failed to do all that was reasonable to mitigate his damages. Sprecher, supra at 42; Byrnes v. Metz, 53 Wis.2d 627, 631, 193 N.W.2d 765 (1972). The failure to mitigate damages is an affirmative defense which must be raised by answer or be deemed waived. Wis. Stat. §§ 802.02 and 802.06; Sprecher, supra, Schiller v. Keuffel & Esser Co., 21 Wis.2d 545, 553, 124 N.W.2d 646 (1963). However, the court, in Sprecher, said a trial court has discretion to admit proof or lack of mitigation at variance with the pleadings and to amend the pleadings to conform to the proof.

Mitigation by Spending Money. Where the issue of mitigation centers on whether the plaintiff could reasonably have mitigated his damages by spending a sum of money, the following paragraph, based on the decision in Sprecher, supra at 42-49, may be inserted into the instruction:

> Sometimes it is possible for an injured person to minimize his damages by spending money. A plaintiff is required to spend a sum of money to minimize his damages only if (1) the sum of money is small in comparison to the possible losses or damages and (2) it is virtually certain that the risks incurred will avoid at least a part~~y~~ of the losses or damages. Damages should not be decreased where only a substantial expenditure would have minimized the total loss or where it is uncertain at the time that the expenditure would have decreased damages.

An expenditure of $9,000 was held not to be insignificant or slight under the facts of the case and thus plaintiff did not fail to mitigate by making such an expenditure. Crest Chevrolet-Oldsmobile Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692 (1986).

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1732 DAMAGES: DUTY TO MITIGATE: INTENTIONAL TORT

If you find that (plaintiff) knew of harm caused by (describe intentional conduct) and if you find that (plaintiff) (either) (intentionally failed to protect (his) (her) interests) (or) (was heedlessly indifferent to protecting (his) (her) interests), then you should not include as damages any amount that (plaintiff) could have avoided or minimized by reasonable efforts and failed to do so.

The burden of proof is upon (defendant) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that:

1. (plaintiff) knew of harm resulting from (describe intentional conduct); and
2. (plaintiff) intentionally failed to act to protect (his) (her) interests or was heedlessly indifferent to them.

You should not reduce (plaintiff)'s damages, if you determine that (plaintiff) was merely careless in protecting (his) (her) interests.

COMMENT

The instruction and comment were approved in 2011.

Mitigating Damages from an Intentional Tort: In S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19, the court of appeals discussed whether the duty to mitigate damages applies to a party injured by an intentional act.

The trial court said the policy behind the duty to mitigate is evident in the Restatement's section on avoidable consequences. Restatement (Second) of Torts § 918(2). The court of appeals explained the policy as follows:

> This section states that "[o]ne is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." This rule protects the "merely careless or stupid person" from consequences that the tortfeasor intended or was willing to

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have occurred, but it does not protect "the person who stubbornly refuses to protect his [or her] own interests" from the consequences of that same tortfeasor's conduct.

The court in S.C. Johnson & Son, supra, held that a party who is injured by intentional conduct has a duty to mitigate damages, but more than a negligent failure to mitigate must be shown by the intentional tortfeasor. Instead, the defendant must prove that the plaintiff intentionally failed to act or was heedlessly indifferent to the harm caused by the defendant.

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1735 DAMAGES: NOT TAXABLE AS INCOME

In determining the amount of damages for personal injuries, you must not include in the award, or add to it, any sum to compensate the plaintiff for state or federal income taxes, since damages received as an award for personal injuries are not subject to income taxes. You will not, of course, subtract from, or exclude from, your award of damages any amount because the plaintiff is not required to pay income taxes.

COMMENT

This instruction was approved by the Committee in 1960. The comment was updated in 1981 and reviewed without change in 1990.

This instruction was approved in Behringer v. State Farm Mut. Auto Ins. Co., 6 Wis.2d 595, 603-04, 95 N.W.2d 249, 254 (1959). The last sentence was suggested in the Behringer case and in Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 407-08, 94 N.W.2d 577, 583 (1959), both of which held that it is not error to refuse to give this instruction.

The federal rule, which was changed in Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980), appears to be substantially different from the current Wisconsin rule. Suits brought in state courts under the federal statutes, such as the Federal Employers Liability Act, are governed by the federal rule which requires that the jury be advised as to the nontaxability of an award for future earnings.

The Wisconsin rule which holds it is not error to refuse to advise the jury of the tax consequences of an award remains unchanged in all actions except those brought under federal statutes governed by federal substantive law.

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1740 DAMAGES: COMMON SCHEME OR PLAN; CONCERTED ACTION (WIS. STAT. § 895.045(2))

Question _____ asks whether the defendants engaged in concerted action?

Parties engage in concerted action when they pursue a common scheme or plan to accomplish a result that injures the plaintiff. Parties engaged in concerted action do not have to intend that plaintiff be injured.

Parties engage in concerted action if you determine that the following three elements existed:

1. there was an explicit or tacit agreement to act in accordance with a mutually agreed upon scheme or plan. The agreement need not be expressed in words, but it may be implied and understood to exist from the conduct itself; and
2. mutual acts were committed in furtherance of the common scheme or plan that were negligent or intentional; and
3. the acts undertaken to accomplish the common scheme or plan were the acts that resulted in damages.

SPECIAL VERDICT

If you have answered Question _____ and Question _____ "yes" as to (defendant), then answer Question ____.

Did (defendants) engage in concerted action (describe alleged action)?

Answer:_____

Yes or No

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COMMENT

This instruction and comment were first approved in 2005. They were revised in 2009.

If the jury does not find a defendant to have negligently or intentionally caused plaintiff's injuries, then that defendant is not liable for joint and several liability under Wis. Stat. § 895.045(2).

The Committee believes that the question of whether parties have acted in accordance with a common scheme or plan is a question of fact for the factfinder. It is not evident from the language of the statute that an improper motive or unlawful act is necessary for a common scheme or plan to exist.

Legislative Change. In 1995, the Wisconsin Legislature modified the common law of joint and several liability. Under 1995 Wisconsin Act 17 (amending Wis. Stat. § 895.045), the liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person whose percentage of causal negligence is 51% or more is jointly and severally liable for the damages allowed. However, if two or more persons "act in accordance with a common scheme or plan," the law imposes joint and several liability on each person. The 1995 legislative change is described by a statement prepared by the Director of State Courts regarding Senate Bill 11:

> This Bill revises the laws relating to comparative negligence and punitive damages. Presently, if several persons contribute to the cause of an injury to the plaintiff, each of the tortfeasors is jointly and severally liable for the plaintiff's damages, as reduced by the plaintiff's percentage of negligence. This bill provides that the negligence of the plaintiff is measured against each joint tortfeasors' percentage of negligence. A joint tortfeasors' liability is limited to the percentage of total causal negligence attributed to that party.

The legislation provided one exception to the limitation of joint and several liability. That exception is § 895.05(2) which states:

> (2) Concerted Action. Notwithstanding (1), if two or more parties' act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in § 895.85(5).

Civil Jury Instruction 1740 deals with this exception which creates an issue of fact for the fact finder.

Concerted Action Doctrine. In 2008, the supreme court concluded that Wis. Stat. § 895.045(2) is the legislative codification of the concerted action theory of liability. Richards v. Badger Mut. Ins. Co., 2008 WI 52, 309 Wis.2d 541, 749 N.W.2d 581. The court stated:

> ¶46 From our review of Wisconsin cases and learned treatises, wherein principles of concerted action are discussed, terms similar to those in Wis. Stat. § 895.045(2) are employed and the concerted action theory of liability is explained, we conclude that § 895.045(2) is the codification of the concerted action theory of liability. The statute is consistent with the concerted action theory as explained by Wisconsin courts and in learned treatises such as Prosser's The Law of Torts and the Restatement (Second) of Torts § 876. Our decision in this

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> regard is supported by those who considered this question when drafting the Wisconsin Civil Jury Instruction 1740.
> ¶47 Our conclusion that Wis. Stat. § 895.045(2) is the codification of the concerted action theory of liability does not change Wisconsin law in regard to whether the actions of a tortfeasor were a substantial factor in causing harm sustained by another. This is so because in order to fit within the parameters of § 895.045(2), a tortfeasor must already be causally negligent under substantive law. Danks, 298 Wis.2d 348, ¶39. One is causally negligent when his or her conduct is a substantial factor in causing injury to another. Johnson v. Misericordia Cmty. Hosp., 97 Wis.2d 521, 561, 294 N.W.2d 501 (Ct. App. 1980). Accordingly, under our interpretation of § 895.045(2), a person who is causally negligent with regard to a recovering plaintiff will have proportionate liability under § 895.045(1), unless something more is proved about that tortfeasor's conduct that will bring it within the purview of subsection (2). Danks, 298 Wis.2d 348, ¶39.

Elements of Concerted Action. In Richards, the supreme court held that for joint and several liability to exist "concerted action must be proved;" that something more than causal negligence is required before the actions of a tortfeasor will come within Wis. Stat. § 895.045(2). The court listed three "factual predicates necessary to proving concerted action:"

> ¶50 There are three factual predicates necessary to proving concerted action. First, there must be an explicit or tacit agreement among the parties to act in accordance with a mutually agreed upon scheme or plan. See Collins, 116 Wis.2d at 185. Parallel action, without more, is insufficient to show a common scheme or plan. Id. Second, there must be mutual acts committed in furtherance of that common scheme or plan that are tortious acts. See Ogle, 33 Wis.2d at 135. Third, the tortious acts that are undertaken to accomplish the common scheme or plan must be the acts that result in damages. See Collins, 116 Wis.2d at 184-85.

Instruction and Special Verdict. This instruction and suggested verdict are designed for a case involving only 2 defendants. If a party claims that he or she did not participate in a common scheme or plan with other defendants, it may be necessary to add questions directed at the alleged concerted action of each of the defendants individually, or possible combinations of defendants, *e.g.* A & B, A & B & C, A & C, or B & C.

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1741 PERSONAL INJURIES: NEGLIGENCE IN INFORMING THE PATIENT

If you have determined that (physician, chiropractor, dentist, optometrist, podiatrist) was negligent in informing (patient), you will insert as your answer to (damage question) the amount of money which, under the evidence, will reasonably and fairly compensate (patient) for the injuries suffered by (patient) as a result of (physician, chiropractor, dentist, optometrist, podiatrist)'s negligence.

(Add appropriate personal injury damage instructions.)

COMMENT

This instruction and comment were approved in 1978 (as JI-Civil 1751). They were retitled and renumbered in 1998. The instruction and comment were revised in 2014. See also Wis JI-Civil 1023.2.

If there is more than one claim, this instruction should refer to the subdivision of the damage question which asks about damages for negligence in informing the patient.

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1742 PERSONAL INJURIES: MEDICAL CARE: OFFSETTING BENEFIT FROM OPERATION AGAINST DAMAGES FOR NEGLIGENCE IN INFORMING THE PATIENT

(Note: This instruction will usually follow other instructions on damages.)

If you are satisfied that the (operation) (procedure) (treatment), even though not consented to by (patient), resulted in benefit to (patient), you may consider the value of the benefit and offset the value of the benefit against any damage to (patient).

In determining whether there should be any offset of benefit against damages, you should consider the nature of the (operation) (procedure) (treatment), (patient)'s condition before the (operation) (procedure) (treatment), and (patient)'s condition after the (operation) (procedure) (treatment). In comparing the benefit and damages, you must consider, on the basis of (medical) (chiropractic) (dental) (optometric) (podiatric) evidence, what (patient)'s condition would have been had the operation not been performed.

[If you find that benefits exceed damages, you must find that (patient) has suffered no damage.]

COMMENT

This instruction and comment were initially approved in 1978 (as JI-Civil 1751.5). They were retitled and renumbered in 1998. The instruction was revised in 2014.

"Where the defendant's tortious conduct has caused harm to the plaintiff or to his or her property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." Restatement, Torts § 920.

22 Am. Jur. 2d Damages § 204, p. 283. Dobbs, Remedies § 3.6, pp. 181-84. Maben v. Rankin, 358 P.2d 681 (Calif. 1961); Coleman v. Garrison, 281 A.2d 616 (Del. Superior 1971); Troppi v. Scarf, 187 N.W.2d 511 (Mich. 1971).

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1749 PERSONAL INJURIES: CONVERSION TABLE FOR 1998 REVISION OF DAMAGE INSTRUCTIONS

OLD INSTRUCTION NUMBER	PERSONAL INJURY INSTRUCTION (FORMER TITLE)	NEW INSTRUCTION NUMBER
1750	Past and Future Disability	1750.2
1750A	One Subdivided Question as to Past and Future Damages	1750.1
1751	Malpractice: Lack of Informed Consent	1741
1751.5	Malpractice: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent	1742
1752	Traumatic Neurosis or Severe Emotional Distress	1770
1754	One Subdivided Question as to Past Damages	1754[Withdrawn]
1755	Past Pain and Suffering	1766
1765	Past Medical and Hospital Expenses	1756
1775	Past Loss of Earning Capacity	1760
1780	Loss of Business Profits	1780[Withdrawn]
1785	Past Loss of Professional Earnings	1785[Withdrawn]

This conversion table includes all damage instructions revised, withdrawn, or renumbered by the Committee in 1998 as part of its updating of instructions on damages for personal injuries.

The above list does not include the following new instructions approved in 1998:

1758 Future Medical and Health Care Expenses
1762 Future Loss of Earning Capacity
1768 Past and Future Pain, Suffering, and Disability

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1750.1 PERSONAL INJURIES: SUBDIVIDED QUESTION AS TO PAST AND FUTURE DAMAGES

No Instruction.

COMMENT

This comment was approved in 1998 as part of a large scale revision and renumbering of the personal injury damage instructions.

In the past, an instruction, Wis JI-Civil 1750A (now withdrawn), was approved for use in trials where the plaintiff sought past and future medical expenses, loss of earnings and earning capacity and pain, suffering, and disability and the special verdict contained a single subdivided question on past and future damages. The Committee has withdrawn this instruction because it only repeated the language in the individual instructions on the separate categories of compensatory damages for personal injuries.

It has long been established that the trial court has absolute discretion as to the formulation of the special verdict. Traditionally, there has been great diversity of practice in the trial courts as to how the damage question in the special verdict is framed. Some courts combine all damage elements in a single question; others combine pain and suffering and disability, future medical, and loss of future earning capacity into a single question inquiring about plaintiff's personal injury, while submitting separate questions as to past medical expense and past wage loss which are often answered by the court. Others divide each element of damages into separate inquiries. This latter approach appears to be the prevailing method.

The Committee believes the preparation of separate instructions on each element of damages provides greater flexibility so that each judge can more easily adapt these instructions to his or her preferred special verdict form.

Special Verdict. A special verdict with subdivisions separating the elements of damages, allows each judge to submit the damage question/subdivision in the order or combination he or she deems appropriate in each case. It is suggested that the trial judge use the form of the damage question in each case which is most likely to be clear to the jury, fair to all parties, and to serve the interests of justice. Should separate inquiries be made, as seems to be recommended by the Wisconsin Supreme Court in Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis.2d 354, 166 N.W.2d 148 (1969), the following sequence of component instructions and special verdict questions may be considered when the question of permanency is raised.

a. Past Medical (JI-Civil 1756)
b. Future Medical (JI-Civil 1758)
c. Past Loss of Earning Capacity (JI-Civil 1760)
d. Future Loss of Earning Capacity (JI-Civil 1762)
e. Past Pain, Suffering, and Disability (JI-Civil 1766)
f. Future Pain, Suffering, and Disability (JI-Civil 1768)

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SPECIAL VERDICT

What sum of money will fairly and reasonably compensate (plaintiff) with respect to:

(a) past health care expenses? Answer: $_____

(b) future health care expenses? Answer: $_____

(c) past loss of earning capacity? Answer: $_____

(d) future loss of earning capacity? Answer: $_____

(e) past pain, suffering, and disability? Answer: $_____

(f) future pain, suffering, and disability? Answer: $_____

(g) (other:)

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1750.2 PERSONAL INJURIES: PAST AND FUTURE: ONE VERDICT QUESTION (EXCEPT PAST LOSS OF EARNINGS AND PAST MEDICAL EXPENSES)

[NOTE: The Committee believes use of this unsubdivided special verdict will be limited. See Comment.]

Question _____ asks what sum of money will fairly and reasonably compensate (plaintiff) for any personal injuries (he) (she) sustained as a result of the accident. Your answer to this question should be the amount of money that will fairly and reasonably compensate (plaintiff) for the personal injuries (he) (she) has suffered to date and is reasonably certain to suffer in the future as a result of the accident.

Personal injuries include pain, suffering, and disability (disfigurement) which means any physical pain, worry, distress, embarrassment and humiliation which (plaintiff) has suffered in the past and is reasonably certain to suffer in the future. You should consider also to what extent (his) (her) injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life. Consider the nature of (plaintiff)'s injuries, the effect produced by (plaintiff)'s injuries in the past, and the effect the injuries are reasonably certain to produce in the future, bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

Personal injuries can also include any loss of future earning capacity suffered by (plaintiff). If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question should include the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

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[**Where appropriate add the following paragraph**: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

Personal injuries can also include health care and treatment expenses. If you are satisfied that (plaintiff) will require health care and treatment in the future for injuries sustained as a result of the accident, include in your answer to this question the sum of money that will reasonably and necessarily be expended in the future for that care and treatment.

COMMENT

This instruction and comment were approved in 1969 as JI-Civil 1750. They were revised and renumbered in 1998.

This instruction covers a special verdict question which combines all damage elements except past loss of earnings and past medical expenses in a single question.

The Committee does not generally recommend the use of a single verdict question to determine damages where the plaintiff seeks to recover different types of damages for personal injuries. Instead, the Committee suggests the jury should be asked to answer separate questions or subdivisions to cover each of the types of damages sought by the plaintiff. However, there may be some cases in which, because of the evidence presented by the parties, it may be more expeditious to try the case so that the jury is simply asked a single question on damages which encompasses several different types of damages.

The instruction should be tailored to the evidence by only including the damage types sought by the plaintiff. See the separate types of damages covered by JI-Civil 1756 to 1768.

For evidence as to age and probable duration of plaintiff's life, see Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Doolittle v. Western States Mut. Ins. Co., 24 Wis.2d 135, 128 N.W.2d 403 (1963).

For prior physical condition, see Helleckson v. Loiselle, 37 Wis.2d 423, 155 N.W.2d 45 (1967); Freuen v. Brenner, 16 Wis.2d 445, 114 N.W.2d 782 (1961).

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1754 PERSONAL INJURIES: ONE SUBDIVIDED QUESTION AS TO PAST DAMAGES

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998 when the Committee revised and renumbered personal injury damage instructions (JI-Civil 1750 - 1785). This withdrawn instruction was simply a collection of separate instructions in the damage series.

As indicated in the Comment to JI-Civil 1750.1, the Committee recommends use of a verdict format in which the jury is asked to determine separately the various types of damages sought by plaintiff instead of lumping all recovery for personal injuries in a single unsubdivided question.

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1756 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services.

You will insert as your answer to this (question) (subdivision) the sum of money you find has reasonably and necessarily been incurred from the date of the accident up to this time for the care of the injuries sustained by (plaintiff) as a result of the accident.

Billing statements (which may include invoices) for health care services (plaintiff) has received since the accident have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (plaintiff)). You must still determine

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whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

COMMENT

This instruction was originally published in 1960 as JI-Civil 1765. It was revised in 1983 and renumbered and revised in 1998, 2008, and 2010. The comment was updated in 2000, 2005, 2006, 2008, 2010, and 2012. The instruction was reviewed without change in 2014.

Measure. The proper measure of damages for care rendered in a personal injury case is the reasonable value of the care necessarily required by the injury. Leitinger v. DBart, Inc., 2007 WI 84, 302 Wis.2d 110, 736 N.W.2d 1; Koffman v. Leichtfuss, 2001 WI 111, 246 Wis.2d 31, 630 N.W.2d 201. See also Fouse v. Persons, 80 Wis.2d 390, 259 N.W.2d 92 (1977); Green v. Rosenow, 63 Wis.2d 463, 217 N.W.2d 338 (1974); Cole v. Schaub, 164 Wash. 162, 168-69, 2 P.2d 669, 671-72 (1931); Nimlos v. Bakke, 223 Wis. 473, 476-77, 271 N.W. 33, 34 (1937); Gerbing v. McDonald, 201 Wis. 214, 218, 229 N.W.2d 860, 862 (1930). While the actual amount paid for services may reflect the reasonable value of the treatment rendered, the focus is on the reasonable value, not the actual charge. Thus, the value of services made necessary by the tort can be recovered although they have created no liability or expense to the injured person. See Leitinger, supra, ¶23 and Koffman, supra. The jury determines the reasonable value of the treatment rendered to the plaintiff, which is not necessarily the amount actually paid or the amount billed for the treatment. Leitinger, supra, ¶24.

Collateral Source. In Leitinger, the court considered whether evidence of the amount actually paid by the plaintiff's health insurer for the plaintiff's treatment was admissible in a personal injury action (not involving medical negligence) for the purpose of establishing the reasonable value of the medical treatment rendered. The supreme court said "no." It held that the collateral source rule prohibits parties in a personal injury action (not involving medical negligence) from introducing evidence of the amount actually paid by the injured person's health insurer.

An injured party is entitled to recover the reasonable value of medical services, which, under the collateral source rule, includes written-off medical expenses. Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775. Written-off expenses are the expenses "written off" or waived by a medical provider as a result of negotiated discounts between health insurers and the medical provider.

For a discussion of the collateral source rule in medical negligence cases, see Wis JI-Civil 1757.

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Presumption of Reasonable Value; Presumption of Reasonable and Necessary Services; Collateral Source Payments (Wis. Stat. § 908.03(6m)(bm). In 2009, the legislature enacted Wis. Stat. ¶ 908.03(6m)(bm), as part of the Budget Bill, which deals with presumptions to be given to health care records. The subsection states:

> (bm) ***Presumption.*** Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

This language creates two "rebuttable" presumptions:

1) billing statements and invoices that are patient health care records are presumed to state the reasonable value of the health care services provided; and
2) the health care services provided are presumed to be reasonable and necessary to care for plaintiff.

Sec. 908.03(6m)(bm) also states that the party attempting to rebut the presumption of the reasonable value of the services provided to plaintiff may <u>not</u> present evidence of payments made or benefits conferred by collateral sources.

The committee took the following action to incorporate these new statutory presumptions:

1. Wis JI-Civil 1756 was revised to include the presumptions as to: (1) value and (2) reasonableness and necessity of services provided to plaintiff.

2. Wis JI-Civil 1757, which is applicable exclusively to medical negligence cases, was revised to add the presumptions created by § 908.03 (6m)(bm).

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1757 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES (MEDICAL NEGLIGENCE CASES) (NEGLIGENCE OF LONG-TERM CARE PROVIDER): COLLATERAL SOURCES

(Question _____) (Subdivision _____ of Question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services?

A person injured by medical negligence (the negligence of a long-term care provider) may recover the reasonable value of health care services reasonably required as a result of the injury. Billing statements (which may include invoices) for health care services (plaintiff) has received since (insert event giving rise to the medical negligence/the negligence of a long-term care provider) have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the (treatment) (diagnosis) by (_____).]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (plaintiff)), you must find (the billing statements reflect the reasonable

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value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (plaintiff)). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the (treatment) (diagnosis) by (_____)].

The reasonable value of health care services made necessary by (medical negligence) (the negligence of a long-term care provider) may be awarded even though (plaintiff) did not incur any expense, obligation, or liability to pay for those services.

Evidence has also been received of payments made by (list sources) to (plaintiff) or on behalf of (plaintiff) for health care services.

[Evidence has also been received of services provided at no charge to (plaintiff) by (list providers).]

The evidence of payments by (list sources) has been received for the sole purpose of assisting you in determining the reasonable value of the services reasonably required by the injury. You may not reduce the reasonable value of the health care services on the basis of payments made by (list sources.)

Also (list subrogated entities) may be entitled to recover repayment or reimbursement of any amounts which you determine were the result of (the medical negligence) (the negligence of a long-term care provider).

COMMENT

This instruction was approved in 2005 and revised in 2010 and 2011. The comment was updated in 2012.

This instruction implements the decision of the Wisconsin Supreme Court in Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, 285 Wis.2d 1, 700 N.W.2d 201.

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Long-Term Care Provider. Wis. Stat. § 893.555(8), allows the admission of evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury in an action to recover damages for negligence by a long-term care provider.

Collateral Source Payments. In Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, the supreme court concluded that, in medical negligence cases, the trial judge "must instruct the fact-finder that it must not reduce the reasonable value of medical services on the basis of the collateral source payments. Although the jury is instructed not to use the evidence of collateral source payments to reduce the award for medical services, evidence of collateral source payments may be used by the jury to determine the reasonable value of medical services." ¶5. See also Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

Evidence of collateral source payments is admissible under Wis. Stat. § 893.55(7) only if the evidence is relevant. In a medical malpractice action, evidence of collateral source payments is relevant if it is probative of any fact that is of consequence to the determination of damages. Weborg v. Jenny, supra. In Weborg, the circuit court admitted the evidence of life insurance proceeds and social security benefits without first determining in its discretion whether either piece of evidence was relevant to the jury's determination of damages. Because the circuit court applied an improper legal standard in admitting the evidence of life insurance proceeds and social security benefits, the supreme court concluded that the circuit court erroneously exercised its discretion.

In Lagerstrom, the court said because the jury was advised of collateral source payments and the net amount the estate paid for medical services, but was not advised of the estate's potential obligation to reimburse Medicare for medical services, the jury was not able to assess the reasonable value of medical services fully and fairly. ¶6. The court noted that typical collateral sources include Medicare, other state or federal government programs, medical provider write-offs pursuant to Medicare regulations, private insurance, income continuation plans, and volunteer services. ¶17, 30.

Collateral Source Payments; Presumptions of Reasonable Value; Presumption of Reasonable and Necessary Services; Wis. Stat. § 908.03(6m)(bm). In 2009, the legislature enacted Wis. Stat. § 908.03(6m)(bm), as part of the Budget Bill, which deals with presumptions to be given to health care records. The subsection states:

> (bm) ***Presumption.*** Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

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This language creates two "rebuttable" presumptions:

1) billing statements and invoices that are patient health care records are presumed to state the reasonable value of the health care services provided; and
2) the health care services provided are presumed to be reasonable and necessary to the care of plaintiff.

Sec. 908.03(6m)(bm) also states that the party attempting to rebut the presumption of the reasonable value of the services provided to plaintiff may not present evidence of payments made or benefits conferred by collateral sources.

The committee took the following action to incorporate these new statutory presumptions:

1. Wis JI-Civil 1756 was revised to include the presumptions as to value and reasonableness and necessity of services provided to plaintiff.

2. Wis JI-Civil 1757 which is applicable exclusively to medical negligence cases, was revised to discuss the effect of § 908.03 (6m)(bm). Currently, § 893.55(7) provides that in med-mal cases, evidence of any compensation for bodily injury received by plaintiff from a source other than the defendant to compensate the plaintiff for injury is admissible. The committee concluded that the collateral source provision (*i.e.* that collateral source evidence is not admissible) in § 908.03 (6m)(bm) does not apply in med-mal cases. A canon of statutory construction holds that a specific statute controls over a general statute. Heritage Farms, Inc. v. Markel Ins. Co., 2009 WI 27. However, the language in § 908.03 (6m)(bm) creating the presumptions of reasonable value of health care services and reasonableness and necessity of the health care services provided to plaintiff will apply in med-mal cases, because § 893.55 (7) is limited to the admissibility of collateral source payments and is silent on the presumptions.

Reasonable Versus Actual Damages. In Lagerstrom, the court noted that a person injured by medical negligence may recover the reasonable value of the medical services reasonably required by the injury. ¶52. The court said "in most cases the reasonable value of medical services is the actual expense, but in some cases it is not." It said "the test is the reasonable value, not the actual charge, and therefore there need be no actual charge." The court was not persuaded "that Wis. Stat. § 655.009(2) changes the long-standing rule that the Areasonable value of medical services" is the reasonable value of medical services rendered, without limitation to amounts paid. This long-standing rule has been applied in both Chapter 655 medical malpractice actions and in other actions as the method for determining the reasonable value of medical services.

Subrogation. The court in Lagerstrom said that subrogation works in tandem with the collateral source rule. The collateral source rule prevents benefits received by the victim from inuring to the tortfeasor, and subrogation prevents the victim from receiving a double recovery because the payor of benefits may recover the payments from the tortfeasor or the victim.

The Lagerstrom court analyzed Wis. Stat. § 893.55(7) and concluded that for subrogation (or reimbursement) and the collateral source rule to work in tandem to prevent a victim's double recovery and protect subrogation, the statute must be interpreted to require courts to instruct juries to consider the collateral source payments only in determining the reasonable value of the medical services rendered. ¶72.

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1758 PERSONAL INJURIES: FUTURE HEALTH CARE EXPENSES

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future health care services.

If you are satisfied that (plaintiff) will require health care services in the future for injuries sustained as a result of (e.g. the accident), you will insert as your answer to this question (subdivision) the sum of money you find will reasonably and necessarily be incurred in the future to care for (plaintiff).

COMMENT

This instruction and comment were approved in 1998 and updated in 2010.

For future hospital and medical expenses, see Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 119 N.W.2d 359 (1962).

To sustain an award for future health care expenses, two criteria must be met: (1) there must be expert testimony of permanent injuries requiring future medical treatment and the incurring of future medical expenses; and (2) an expert must establish the cost of such medical expenses. Weber v. White, 2004 WI 63, 272 Wis.2d 121, 681 N.W.2d 137, ¶20 (citing Bleyer v. Gross, 19 Wis.2d 305, 311, 120 N.W.2d 156 (1963)).

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1760 PERSONAL INJURIES: PAST LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) past loss of earning capacity.

Your answer to this (question) (subdivision) should be the difference between what (plaintiff) was reasonably capable of earning as a ((his) (her) usual occupation) from the date of the accident to the present time had (he) (she) not been injured and what (he) (she) was reasonably capable of earning during the period in view of (his) (her) (the) injuries sustained as a result of the accident.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) past loss of earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of plaintiff's services to the business, (and the profits of the business).]

[If you find that (plaintiff) was delayed in graduating from (school), you may consider this delay in determining reasonable compensation for (his)(her) loss of earning capacity.]

COMMENT

The instruction and comment were originally published in 1969 as JI-Civil 1775. They were revised and renumbered in 1998. The instruction was revised in 1999 to incorporate former Wis JI-Civil 1788 and revised in 2016 to add the following words to the end of the second paragraph: "sustained as a result of the accident." The comment was updated in 2002 and 2016.

See Bach v. Liberty Mut. Fire Ins. Co., 36 Wis.2d 72, 86, 152 N.W.2d 911 (1967); Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 24, 119 N.W.2d 359 (1963); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 404, 88 N.W.2d 747, 756 (1958); Topham v. Casey, 262 Wis. 580, 585-86, 55 N.W.2d 892, 894-95 (1952); Schultz v. Miller, 259 Wis. 316, 328, 48 N.W.2d 477, 482 (1951); Brain v. Mann, 129 Wis.2d 447, 385 N.W.2d 227 (Ct. App. 1986); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis.2d 145, 370 N.W.2d 815 (Ct. App. 1985); LaChance v. Thermogas Co. of Lena, 120 Wis.2d 569, 357 N.W.2d 1 (1984); Fischer v. Cleveland Punch and Shear Work Co., 91 Wis.2d 85, 280 N.W.2d 280 (1979); Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975); Koele v. Radue, 81 Wis.2d 583, 260 N.W.2d 766 (1978); Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis.2d 354, 166 N.W.2d 148 (1969);

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Johnson v. Misericordia Community Hosp., 97 Wis.2d 521, 294 N.W.2d 501 (Ct. App. 1980); Allen v. Bonnar, 22 Wis.2d 221, 125 N.W.2d 571 (1963); Reinke v. Woltjen, 32 Wis.2d 653, 146 N.W.2d 493 (1966); Ballard v. Lumberman's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966).

The supreme court approved a former version of this instruction in Carlson v. Drew of Hales Corners, Inc., 48 Wis.2d 408, 418, 180 N.W.2d 546 (1970). The court in Carlson expressly differentiated between an instruction for "loss of wages" and an instruction for "loss of earning capacity." Where the plaintiff is not employed at the time of an injury, the court said "it is imperative to frame the instruction in terms of loss of earning capacity." Moreover, the court stated that a "loss of wages" instruction under circumstances where the plaintiff is unemployed at the time of the injury is "ipso facto erroneous." Carlson v. Drews of Hales Corners, Inc., supra at 417.

The plaintiff is entitled to the lost earning capacity instruction regardless of whether the plaintiff would have chosen to work. "'In determining past and future loss of earning capacity the question is not whether plaintiff would have worked, by choice. He is entitled to compensation for his lost *capacity* to earn, whether he would have chosen to exercise it or not . . . '" See Carlson at p. 417, quoting from Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 608, 148 N.W.2d 65 (1967). In an appropriate case, the court may want to add the following language at the end of the second paragraph:

> It makes no difference whether the plaintiff would have chosen to work or not. (He) (She) is entitled to compensation for (his) (her) lost *capacity* to work, whether (he) (she) would have exercised it or not.

Even though wage loss is an accurate gauge of loss of earning capacity, the court in Carlson said that an instruction for damages in a personal injury suit couched in terms of "loss of wages" is always incorrect. Carlson, supra at 417. The court did note, however, that it is not prejudicial error to phrase the instruction in terms of loss of wages where the only evidence of loss of earning capacity is loss of wages. See also John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," 60 Marq. L. Rev., 201, 267 (1977).

Loss of Earning Capacity - Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co. 73 Wis.2d 273, 243 N.W.2d 806 (1976).

For delay in obtaining a degree, see Michaels v. Green Giant Co., 41 Wis. 2d 427, 164 N.W.2d 217 (1968); Webster v. Krembs, 230 Wis. 252, 282 N.W. 564 (1939).

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1762 PERSONAL INJURIES: FUTURE LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future loss of earning capacity.

If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question will be the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

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COMMENT

This instruction and comment were approved in 1998 and revised in 2000. The comment was revised in 2002.

Loss of Earning Capacity - Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which business are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co., 73 Wis.2d 273, 243 N.W.2d 806 (1976).

Evidence of Future Loss. See Comment to Wis. JI-Civil 1760. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1766 PERSONAL INJURIES: PAST PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of Question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past pain, suffering, and disability (disfigurement).

Your answer to this (question) (subdivision) should be the amount of money that will fairly and reasonably compensate (plaintiff) for the pain, suffering, and disability (disfigurement) (he) (she) has suffered from the date of the accident up to this time as a result of the accident.

Pain, suffering, and disability (disfigurement) includes any physical pain, humiliation, embarrassment, worry and distress which (plaintiff) has suffered in the past. You should consider to what extent (his) (her) injuries impaired (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life.

COMMENT

This instruction and comment were originally published in 1960 (as JI-Civil 1755). They were revised in 1983 and renumbered and revised in 1998. Editorial corrections were made in 2009.

When, notwithstanding complete recovery at time of trial, there has been a substantial period during convalescence in which plaintiff endured discomfort rather than pain and suffering, in the sense that the latter words connote at least acute discomfort, the word discomfort may be added so that the instruction will relate to "discomfort, pain, and suffering."

When the proof shows curtailment of recreational activities to be of such substantial nature to warrant special mention, add a phrase to include "impairment of his or her ability to enjoy his or her usual pleasurable activities of life."

When evidence is presented that the plaintiff was unconscious for a period of time following the accident, this instruction should be modified to instruct the jury that it should only consider such pain and suffering as the plaintiff suffered while conscious. Leibl v. St. Mary's Hosp. of Milwaukee, 57 Wis.2d 227, 203 N.W.2d 715 (1973); Blaisdell v. Allstate Ins. Co., 1 Wis.2d 19, 24, 82 N.W.2d 886 (1957).

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In Staehler v. Beuthin, 206 Wis.2d 610 557 N.W.2d 487 (1996), the plaintiff argued that where the jury found liability for her physical injuries, the jury's failure to award anything for pain and suffering showed that justice had been miscarried in the case. The court of appeals rejected this argument concluding that when the jury has answered liability questions unfavorably to the plaintiff, which findings are supported by credible evidence, the granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse. The court of appeals cited Dickman v. Schaeffer, 10 Wis.2d 610, 103 N.W.2d 922 (1960) for the proposition that "in most cases where there are medical bills and loss of services, pain and suffering exist; but we cannot say as a matter of law that this is necessarily true in every case." The court of appeals concluded that a verdict is not inconsistent because it allows damages for medical expenses but denies recovery for personal injuries or pain and suffering. Staehler v. Beuthin, 206 Wis.2d at 623 supra. The court in Staehler said that the jury may well have concluded that the plaintiff's alleged pain and suffering were not related to her injuries from the accident but rather to other causes. It said this issue boiled down to the jury's assessment of the plaintiff's credibility, and the jury was not obligated to find the plaintiff's testimony credible regarding pain and suffering.

For disfigurement, see McCartie v. Muth, 230 Wis. 604, 284 N.W. 529 (1939).

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1767 PERSONAL INJURIES: FUTURE PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future pain, suffering, (and) disability, (and disfigurement).

If you are satisfied that (plaintiff) will endure pain, suffering, (and) disability, (and disfigurement) in the future as a result of the accident, you will insert as your answer to this (question) (subdivision) the sum of money you find will fairly and reasonably compensate (plaintiff) for this future pain, suffering, (and) disability, (and disfigurement).

Pain, suffering, (and) disability, (and disfigurement) includes:

- physical pain
- worry
- distress
- embarrassment
- humiliation

In answering this damage question, you should consider the following factors:

- the extent (plaintiff)'s injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life;
- the nature of (plaintiff)'s injuries;
- the effect the injuries are reasonably certain to produce in the future bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

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COMMENT

This instruction was approved in 1999.

For future pain and suffering, see Coryell v. Conn, 88 Wis.2d 310, 276 N.W.2d 723 (1979); Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Diemel v. Weirich, 264 Wis. 265, 88 N.W.2d 651 (1953).

For future disability, see Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1972); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958).

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1768 PERSONAL INJURIES: PAST AND FUTURE PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for any pain, suffering, (and) disability, (and disfigurement) (he) (she) sustained as a result of the accident.

Your answer to this question should be the amount of money that will fairly and reasonably compensate (plaintiff) for the pain, suffering, (and) disability, (and disfigurement) (he) (she) has suffered to date and is reasonably certain to suffer in the future as a result of the accident.

Pain, suffering, (and) disability, (and disfigurement) includes any physical pain, worry, distress, embarrassment, and humiliation which (plaintiff) has suffered in the past and is reasonably certain to suffer in the future.

You should also consider to what extent (his) (her) injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life. Finally, consider the nature of (plaintiff)'s injuries, the effect produced by (plaintiff)'s injuries in the past, and the effect the injuries are reasonably certain to produce in the future bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

COMMENT

This instruction and comment were approved in 1998. This instruction combines both past and future damages. If JI-1766 is given, then this instruction needs to be tailored to limit its coverage to future damages.

For future pain and suffering, see Coryell v. Conn, 88 Wis.2d 310, 276 N.W.2d 723 (1979); Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Diemel v. Weirich, 264 Wis. 265, 88 N.W.2d 651 (1953), and Comment to JI-Civil 1750A.

For future disability, see Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1972); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958).

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1770 PERSONAL INJURIES: SEVERE EMOTIONAL DISTRESS

[To be added to Wis JI-Civil where appropriate.]

(Plaintiff) claims that (he) (she) suffered severe emotional distress (in addition to the physical injuries (he) (she) sustained) as a result of the (accident) (incident) in question.

If you are satisfied that (plaintiff) suffered severe emotional distress and that the (accident) (incident) was a substantial factor in producing it, you should include in your award a fair and reasonable allowance for the severe emotional distress. If you are not satisfied, make no allowance for the severe emotional distress and confine your award to fair and reasonable compensation only for any other damages (resulting from personal injuries) to (plaintiff) which were caused by the (accident) (incident).

COMMENT

This instruction and comment were originally published in 1969 (as JI-Civil 1752).

This instruction can also be used in conjunction with Wis JI-Civil 1510, Wis JI-Civil 1511, and Wis JI-Civil 2725.

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1780 PERSONAL INJURIES: LOSS OF BUSINESS PROFITS

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998. The issue of loss of business profits is addressed in an optional paragraph in JI-Civil 1760 and 1762.

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1785 PERSONAL INJURIES: PAST LOSS OF PROFESSIONAL EARNINGS

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998. The Committee believes that loss of professional earnings can be properly measured by using JI-Civil 1760 and 1762.

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1788 LOSS OF EARNINGS: DELAY IN OBTAINING DEGREE

Instruction Withdrawn.

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was reviewed without change in 1990. The instruction was formerly numbered Wis JI-Civil 1708. It was renumbered in 1983. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction was withdrawn in 1999. The concept of the instruction was added to Wis JI-Civil 1760.

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1795 PERSONAL INJURY: LIFE EXPECTANCY AND MORTALITY TABLES

In determining future damages as a result of (plaintiff)'s injuries, you may consider the fact that at this time (plaintiff) is ___ years of age and has a life expectancy of ____ years.

A mortality table which gives the expectancy of life of a person of (plaintiff)'s age was received in evidence as an aid in determining such expectancy. It is not, however, conclusive or binding upon you as to (plaintiff)'s actual or probable expectancy of life. Mortality tables are based upon averages, and there is no certainty that any person will live the average duration of life rather than a longer or shorter period. To determine the probable length of life of (plaintiff), you will consider all of the facts and circumstances established by the credible evidence bearing upon that subject.

COMMENT

This instruction and comment were approved in 1974. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

The trial court may take judicial notice of tables published by government agencies and may include the figures in instructions to the jury. Donlea v. Carpenter, 21 Wis.2d 390, 124 N.W.2d 305 (1963).

The table referred to in Donlea is the table published in the annual Statistical Abstract of the United States, U.S. Bureau of the Census. In the 1972 edition, it is table No. 76 on page 56. A copy of the table taken from the 1961 Statistical Abstract can be found in Am. Jur. Desk Book, page 356.

See Nolop v. Skemp, 7 Wis.2d 462, 465, 96 N.W.2d 826, 828 (1959); Pedek v. Wegemann, 275 Wis. 57, 68, 81 N.W.2d 49 (1957); Gonzalez v. City of Franklin, 128 Wis.2d 485, 383 N.W.2d 907 (Ct. App. 1986).

See also Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974), in which the trial court properly refused to instruct on the life expectancy of a minor plaintiff.

Hayes, "Use of Mortality Tables in Tort Actions," June 1959 Wis. Bar Bull. 27.

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1796 DAMAGES: PRESENT VALUE OF FUTURE LOSSES

In determining the amount of damages for any loss of _____ which will be incurred by (plaintiff) in the future, you must determine the present worth in dollars of the future damages.

A lump sum of money received today may be worth more than the same sum paid in installments over a period of months or years. This is because a sum received today can be invested and earn money at current interest rates. By making a reduction for the earning power of money, your answer will reflect the present value in dollars of an award of future damages.

This instruction which asks you to reduce future damages to present value does not apply to that portion of future damages which represents future pain and suffering.

COMMENT

The instruction was approved by the Committee in 1978 and revised in 1985, 1992, and 2002. The last paragraph of the instruction was added in 1981. The comment was updated in 1990 and 1992.

The "present value" instruction is ordinarily required in two different fact situations: (1) Where damages are to be awarded for the loss of or the lessening of earning capacity over a period of time in the future. See Johnson v. Pearson Agri-Systems, Inc., 119 Wis.2d 766, 350 N.W.2d 127 (1984); Kramer v. Chicago, M., St. P. & P. R.R., 226 Wis. 118, 276 N.W. 113 (1937); or for the loss of future support for a dependent (as, for example, a widow) in a wrongful death case, see Sweet v. Chicago & N.W. Ry., 157 Wis. 400, 407, 147 N.W. 1054 (1914); Maloney v. Wisconsin Power, Light & Heat Co., 180 Wis. 546, 193 N.W. 399 (1923); McCaffery v. Minneapolis, St. P. & S.S.M. Ry., 222 Wis. 311, 327, 267 N.W. 326, 268 N.W. 872 (1932); (2) A wrongful death case where damages may be awarded for either the loss of or diminution of a future inheritance or in a personal injury case where damages may be awarded to compensate for a future hospital or medical expense.

Ordinarily, cases under (1) involve lost or lessened payments over a period of time, while cases under (2) involve a payment of a lump sum at a particular date in the future.

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The failure to give the "present value" instruction is not deemed prejudicial error unless counsel has specifically requested it. Walker v. Baker, 13 Wis.2d 637, 109 N.W.2d 499 (1961); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 186, 194 N.W.2d 602 (1972). However, in medical malpractice cases, see Wis. Stat § 893.55(4)(e) and Comment, Wis JI-Civil 1023.

In a period of monetary inflation, the effects of inflation must be taken into account. Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 562 (1977). For an instruction on the effects of inflation, see Wis JI-Civil 1797.

The present value of money concept does not apply to an action for breach of contract to loan money where the claimed damage is increased interest payments to be made in the future. Bridgkort Racquet Club v. University Bank, 85 Wis.2d 706, 271 N.W.2d 165 (1978).

It is inappropriate to discount a present sum as if it were a future sum without first accounting for future growth in the asset up to the time of distribution. Bloomer v. Bloomer, 84 Wis.2d 124, 134, 267 N.W.2d 235 (1978).

In Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984), the court said it is improper to measure the present value of future losses by using the cost of an annuity contract. But see Bychinski v. Sentry Ins., 144 Wis.2d 17, 423 N.W.2d 178 (Ct. App. 1988), in which the court of appeals said that the decision in Herman "merely upheld the trial court's exercise of its decision in excluding annuity evidence in that case."

The Committee added the third paragraph in 1981 to apprise the jury that an award for future pain and suffering should not be discounted to present value. The supreme court has recognized that pain and suffering cannot be reduced to any hourly basis or daily basis and that no precise mathematical formula is available for this purpose. See Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). In Affett v. Milwaukee & Suburban Transport. Corp., 11 Wis.2d 794, 106 N.W.2d 274 (1960), the court refused to allow counsel to use a mathematical formula to measure pain and suffering:

> The difficulty in using a mathematical formula to measure damages for pain and suffering is inherent in the nature of pain and suffering. It cannot be measured by any such mathematical standard. Pain and suffering has no market price. It is not bought, sold, or bartered. It has no equivalent in a commercial sense. We cannot agree with the reasoning in the Ratner case, [111 SO.2d 82, 88 (Fla. 1959)], that the absence of a fixed rule for the measurement of pain and suffering supplies a reason for the use of a mathematical formula. The present rule for measuring damage is as fixed as the nature of the subject matter will permit. True, counsel should be entitled to a reasonable latitude in argument and in commenting on the evidence, its nature and effect, and may make proper inferences which may reasonably arise from the evidence. However, we fail to see where a mathematical formula or a pain-on-a-per-diem or per-month basis has its basis in the evidence, or in logical inferences from the evidence. Such arguments are beyond the scope of proper argumentation.

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1797 DAMAGES: EFFECTS OF INFLATION

In computing the amount of future economic damages, you may take into account economic conditions, present and future, and the effects of inflation.

COMMENT

This instruction was previously numbered Wis JI-Civil 1702. The instruction and comment were initially approved by the Committee in 1978. The comment was updated in 1992.

This instruction is based on the decision in Dabareiner v. Weisflog, 253 Wis. 23, 29-30, 33 N.W.2d 220 (1948). "Inflation may be taken into account by the fact finder as a separate factor to arrive at an amount that will fairly compensate the victim for required future medical expenses." Cords v. Anderson, 80 Wis.2d 525, 551, 259 N.W.2d (1977). See also Maskrey v. Volkswagenwerk Aktiengesellschaft, 126 Wis.2d 267, 376 N.W.2d 89 (Ct. App. 1985).

The instruction would not be proper in a situation where the value of money has stabilized. Kincannon v. National Indem. Co., 5 Wis.2d 231, 92 N.W.2d 884 (1958).

The court of appeals has stated in reviewing Wis JI-Civil 1796 and 1797 that "once a jury has discounted a future loss to present value, taking inflation into account, its task has been accomplished. The jury is not instructed to take into account how much can then be earned with the discounted sum." Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984). Thus, it was permissible for the trial judge to exclude testimony on the cost of an annuity. But see Bychinski v. Sentry Ins., 144 Wis.2d 17, 423 N.W.2d 178 (Ct. App. 1988).

Medical Malpractice Cases. For determining future economic damages in medical malpractice claims, see Wis. Stat. § 893.55(4)(e) which provides:

> (e) Economic damages recovered under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

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1800 PROPERTY: LOSS OF USE OF REPAIRABLE AUTOMOBILE

In answer to question _____, if you find that (plaintiff) could not use (his) (her) automobile because of the (e.g., collision), insert the amount that will reasonably compensate (plaintiff) for the loss of its use.

You may consider the reasonable cost to rent a comparable automobile during the period of time reasonably necessary to repair the automobile (or to determine whether the automobile could be repaired), but this cost may not exceed the amount (plaintiff) spent or incurred to rent a temporary replacement.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 600-601, 182 N.W.2d 448 (1971).

Recovery for Renting a Comparable Automobile. A plaintiff whose automobile was damaged is entitled to the reasonable value of the loss of use even though he or she did not acquire a temporary replacement vehicle. Kim v. American Family Mut. Ins. Co., 176 Wis.2d 890, 501 N.W.2d 24 (1993), see also Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996). The plaintiff in Schrubbe unsuccessfully argued that Kim stood for the proposition that the financial circumstances of each individual plaintiff must be examined before a rule of damages can be applied. In rejecting this argument, the court said that under the proper measure of damages, when a motor vehicle is damaged, the owner of the vehicle is entitled to loss of use of the motor vehicle for a reasonable period of time necessary to repair the vehicle or obtain a comparable permanent replacement. This measure of damages is available to all persons who suffer the loss of a motor vehicle without regard to whether a temporary replacement vehicle was obtained and without regard to the reasons a temporary replacement vehicle may not have been obtained. The plaintiff in Schrubbe also argued that the rule of damages varies based upon the personal wealth of the injured plaintiff. The court rejected this argument and held that the general rule is that damages are measured the same without regard to the plaintiff's wealth. The court agreed, however, that when the measure of damages includes the calculation of a reasonable time to replace, the plaintiff's ability to pay may be a factor in determining the reasonableness of the time to replace. Citing Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co., supra. However, the court of appeals said it was inappropriate to evaluate the reasonable time to replace for a loss of use determination because the calves in Schrubbe were not producing income at the time of their death. Thus, the plaintiff would not suffer loss of use of the calves in the brief period necessary to acquire replacement calves in the market. Because the measure of damages in such a case does not include a reasonableness determination, the wealth of the plaintiff was not a proper consideration.

Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); 8 Am. Jur. 2d Automobiles § 607-610, paragraphs 1047-1048.

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1801 PROPERTY: LOSS OF USE OF NONREPAIRABLE AUTOMOBILE

In answer to question _____, if you find that (plaintiff) could not use (his) (her) automobile because of the _____, insert the amount that will reasonably compensate (plaintiff) for the loss of its use.

You may consider the reasonable cost to rent a comparable automobile during a reasonable period of time necessary to obtain a permanent replacement (including time to determine whether the automobile could be repaired), but this cost may not exceed the amount (plaintiff) spent or incurred to rent a temporary replacement.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 600-601, 182 N.W.2d 448 (1971); Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); 8 Am. Jur. 2d Automobiles § 607-610, paragraphs 1047-1048. See Comment to JI-Civil 1800.

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1803 PROPERTY: DESTRUCTION OF PROPERTY

Question ____ asks what amount will reasonably compensate (plaintiff) for the destruction of (his) (her) _____ as a result of _____.

When property, such as (type), has been destroyed, compensation to the owner is measured by the fair market value of the property at the time and place of its destruction. "Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

[Note: Use this paragraph when there is a question whether the property had a market value: (If) (Since) the property had no market value at the time of its destruction, compensation to the owner is measured by the value of the property to the owner at the time of its destruction. In determining the value of the (property) to the (plaintiff), you should consider: the nature of the property, its use, age, original cost and depreciation, the cost to replace the property [if the property can be replaced], and all other facts and circumstances received in evidence which bear on the value of the property to the (plaintiff).]

[You should not consider any sentimental value which (plaintiff) may have attached to the property.]

COMMENT

This instruction and comment were originally published in 1963. They were revised in 1983, 1997, and 2010.

Market Value. Paragraph three should be used where there is a question whether the property had a market value. If the court determines as a matter of law that the property had no market value, paragraph two should not be used and the word "since" should be substituted for the word "if" at the beginning of paragraph three. The last sentence in paragraph three should be used only if appropriate.

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Partial destruction is not applicable to cases of total destruction. Steel v. Ritter, 16 Wis.2d 281, 114 N.W.2d 436 (1962).

See Schwalbach v. Antigo Elec. & Gas, Inc., 27 Wis.2d 651, 135 N.W.2d 263 (1965). Harvey v. Wheeler Transfer and Storage Co., 227 Wis. 36, 277 N.W. 627 (1938); Webber v. Wisconsin Power & Light Co., 215 Wis. 480, 255 N.W. 261 (1934); Allen v. Chicago N.W. Ry., 145 Wis. 263, 129 N.W. 1094 (1911).

For a discussion of determining damages to property which has no market value, see Town of Fifield v. State Farm Ins. Co., 119 Wis.2d 220, 349 N.W.2d 684 (1984).

Destruction of Livestock. The basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with a reduction of any salvage value. Nelson v. Boulay Bros. Co., 27 Wis.2d 637, 643-44, 135 N.W.2d 254 (1965); Rosche v. Wayne Feed, Continental Grain, 152 Wis.2d 78, 447 N.W.2d 94 (Ct. App. 1989). Damages for loss of future births are not recoverable since to do so would result in a duplicate recovery. The afflicted animal's ability to reproduce is considered when the fact finder assesses its market value. Nelson v. Boulay Bros. Co., supra at 644. Lost profit is not the basic measure of damages for livestock that are injured or destroyed. Rosche, supra.

Injury to Livestock. The basic measure of damages for an injured animal is the difference between its market value before and after the injury. Lost profit is not the basic measure of damages for livestock that are injured or destroyed. Rosche, supra.

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1804 PROPERTY: DAMAGE TO REPAIRABLE PROPERTY

When property, such as (type), has been damaged and can be repaired, the loss to the owner is determined by one of two measures of damage. The first measure is the "Fair Market Value" rule. This rule measures the difference between the fair market value of the property immediately before the _____ and its fair market value immediately after the _____. "Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

The second measure of damage is the "Cost of Repair" rule. If the property can be restored to its condition before the _____, compensation to the owner is measured by the reasonable cost of the repairs necessary to restore the property to its prior condition. The measure under this second rule is the reasonable cost to restore the property to its former condition, not what may have been the actual cost of repair. [**Note: In a case involving loss of value following repairs, give the following:** If repairs (will) (did) not restore the (property) to its pre-injury value and (plaintiff) proves that (he) (she) (will be) (has been) harmed by a loss in value, then (plaintiff) is entitled to damages for this loss in value and you should add the loss in value to the cost of repairs in determining the total loss to (plaintiff). [The total damages cannot exceed the pre-injury fair market value of the (property.)]]

If the evidence allows you to apply both of these rules, and if in applying them you arrive at two different figures, your answer to question ____ should be the lower of the two figures.

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[If the (property) had no market value at the time of the _____, you should apply the cost of repair rule. Your answer to question ____ should be the reasonable cost of the repairs necessary to restore the property to its condition just prior to the _____.]

COMMENT

This instruction and comment were approved in 1977 and revised in 1997 and 2010.

Real Property and Personal Property. The committee concludes that the rule of damages explained in this instruction applies to both destroyed real property and personal property. See Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis.2d 741, 687 N.W.2d 37.

A. WHERE PROPERTY HAS MARKET VALUE

If there is evidence both as to cost of restoration and as to diminution in market value, use paragraphs one, two, and three.

Where property is not destroyed, one measure of damages is the difference between the value before and the value after; a second measure is what it would reasonably cost to put the property in such condition as it was before the _____ – not the actual cost of repair. Chapleau v. Manhattan Oil Co., 178 Wis. 545, 190 N.W. 361 (1922); Vetter v. Rein, 203 Wis. 499, 234 N.W. 712 (1931); Steel v. Ritter, 16 Wis.2d 281, 114 N.W.2d 436 (1962).

The correct rule in case of partial loss is either diminution in value of the property damaged or the cost of restoration. The plaintiff may introduce evidence as to either measure. If the defendant wants another theory applied, it is his or her duty to offer evidence on it. Engel v. Dunn County, 273 Wis. 218, 77 N.W.2d 408 (1956).

The owner of a damaged building may recover the entire cost of restoration to its former condition but not in excess of the diminution in value. Zindell v. Central Mut. Ins. Co., 222 Wis. 575, 269 N.W. 327 (1936).

The court received evidence of the cost of repairs of the building and the diminution in value and adopted the lesser of the two. This was the correct rule. Hickman v. Wellauer, 169 Wis.18, 28, 171 N.W. 635 (1919).

The plaintiff offered proof as to the cost of repairs. The defendant offered no proof. "This state of the evidence furnished the Circuit Court but one basis on which to calculate the damages, namely, the cost of repairs." This was not error. Mueller Real Estate Inv. Co. v. Cohen, 158 Wis. 461, 149 N.W. 154 (1914).

Where only a portion of a machine is damaged and repairs are necessary before any of it can be used, the reasonable cost or value of the repairs is the proper measure of damages. The Mueller case and the Zindell case are cited. L. L. Richards Mach. Co. v. McNamara Express Co., 7 Wis.2d 613, 97 N.W.2d 396 (1959).

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Where a luxury item is being taken into a special market for resale and is damaged in transit, the loss of market value, rather than the cost of repair, is the proper measure of damages. Cruis Along Boats, Inc., v. Standard Steel Prods. Mfg. Co., 22 Wis.2d 403, 123 N.W.2d 85 (1964).

B. WHERE PROPERTY HAS NO MARKET VALUE

If there is a partial loss, but the property has no ascertainable market value, use paragraph four only with appropriate introduction. The measure of damages is the reasonable cost of making such repairs as will restore the property to its former condition. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 182 N.W.2d 448 (1971).

C. WHERE PROPERTY HAS NO LOCAL MARKET VALUE

The fact that no market existed in the place of use is immaterial if a market existed nearby; the jury in figuring the damages should have allowed the market value as it actually existed at the time of destruction, plus the cost of transportation from the market to the place of use. Weber v. Wisconsin Power and Light Co., 215 Wis. 480, 255 N.W. 261 (1934).

In such a situation, the following paragraph may be used:

> If the property under consideration had no market value at the time and place where it was damaged but had a market value at a location within a reasonable distance away, you will consider such market value, together with the costs of transportation from such location to the place of damage, in determining the difference between the market value of the property before and the market value after the damage occurred.

D. DIMINISHED VALUE AFTER REPAIRS

If repairs to damaged property have not restored the property to its preinjury value, the plaintiff is entitled to damages for the lost value in addition to damages for the reasonable costs to repair the property. Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis. 2d 741. This concept was added to the instruction in 2010 when the bracketed language in the second paragraph was added. This note assumes that the cost of repairs and diminished value after repair are less than the diminishment in fair market value after the accident.

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1805 PROPERTY: DAMAGE TO NONREPAIRABLE PROPERTY

When property, such as (type), has been damaged and cannot be economically repaired, the loss to the owner is determined by the "Fair Market Value" rule. This rule measures the difference between the fair market value of the property immediately before the _____ and its fair market value immediately after the _____.

"Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

Evidence of the reasonable cost of repairs may be considered by you in determining the decrease in the fair market value of the (property) as a result of the _____.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997 and 2010.

See Comment to Wis JI-Civil 1804.

For definition of "market value," see Kremer v. Rule, 216 Wis. 331, 257 N.W. 166 (1934).

Reasonable cost of repair may be shown as bearing upon the diminution in the value of the vehicle resulting from the injury. McCormick, Damages § 124 at 472 (1935); Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); Chapleau v. Manhattan Oil Co., 178 Wis. 545, 550, 190 N.W. 361 (1922); Vetter v. Rein, 203 Wis. 499, 502, 234 N.W. 712 (1931).

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1806 PROPERTY: DAMAGE TO A GROWING CROP

Question _ asks what amount will reasonably compensate (plaintiff) for the damage to (his) (her) (type of crop).

Under normal conditions, a growing crop will mature and be sold for a certain price. When a growing crop is damaged, reasonable compensation to the owner is measured by the difference between the probable market value the original crop would have brought at maturity if it had not been damaged and the amount brought by the actual crop. From this difference, however, you should deduct the expenses the (plaintiff) saved by not having to cultivate, harvest, and market the damaged portion of the crop.

In determining the probable market value of (plaintiff's) original crop, you should consider the crop production figures on the land in other years and the average of these production figures. You may also consider the market value of undamaged (type of crop) from other fields in the same area in the year (plaintiff)'s crop was damaged.

In comparing the damage crop with crop projection figures in other years or crop production from other fields in the area in the same year, you may consider variations in weather conditions, variations in planting and cultivation methods, and any other factors which might affect production.

The determination of damages to growing crops cannot always be made with mathematical precision; you should award as damages, however, an amount which will fairly compensate (plaintiff) for the loss.

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COMMENT

This instruction and comment were approved by the Committee in 1981 and revised in 1997.

Cutler Cranberry Co. v. Oakdale Elec. Coop., 78 Wis.2d 222, 254 N.W.2d 234 (1977); First Wisconsin Land Corp. v. Bechtel Corp., 70 Wis.2d 455, 235 N.W.2d 288 (1975); Peacock v. Wisconsin Zinc Co., 177 Wis. 510, 188 N.W. 641 (1922). See also Strauss Bros. Packing Co. v. American Ins. Co., 98 Wis.2d 706, 298 N.W.2d 108 (Ct. App. 1980); Kolbeck v. Rural Mut. Ins. Co., 70 Wis.2d 655, 235 N.W.2d 466 (1975).

The first sentence of the instruction is taken from the decision in Peacock, supra at 514. In its decision, the court stated that the valuation of damages to growing crops must recognize that "a growing crop as such is valuable mainly by reason of potentialities," and that "its present value is therefore determined very largely by reference to that fact."

Because of this potential for increase in value, the use of replacement cost for the plants at the time of injury to measure the damage is not appropriate. In this regard, animal damage cases provide an excellent analogy. In fact, a court of appeals in Strauss Bros. Packing Co., supra at 708, stated that growing crops closely parallel growing livestock in that "each has a reasonable potential for increase in value." As to using replacement cost to value damage to animals, the supreme court has stated:

> . . . the proper measurement of value for animals is their replacement cost reflected in the market value at time of loss, unless they are expected to show a marked increase in the future (pelting minks for example). . . .
>
> Kolbeck, supra at 709; see also Brunette v. Slezewski, 34 Wis.2d 313, 149 N.W.2d 578 (1967).

In Brunette, the court distinguished, for purposes of measuring damages, between mink being raised as pelters and mink being raised as breeders. The court considered whether damages should be measured on the market value of mink at pelting age or whether such damages would be computed from replacement cost at the time of the wrong. The court held that market value should be based upon the value at pelting age because pelters have a "marked increase in market value." Conversely, because the value of a breeder is more stable, the court said damage from loss of a breeder is measured by the reasonable cost of replacing the mink with a comparable animal. By analogy, therefore, if a crop is comprised of plants which will have a relatively stable value for a period of time, then the replacement cost method would be more appropriate for measuring damages to that crop.

Evidence of crop production in other years is not too speculative or conjectural to be admissible, even though growing conditions vary from year to year. The Wisconsin Supreme Court has stated that differences between years in weather conditions and other factors which impact on productivity do not go to the admissibility of evidence of crop production in other years but only to its weight and sufficiency. Cutler, supra at 231. This same evidentiary treatment applies to evidence which seeks to compare the yield of the injured crop with the yield of crops on similar lands in the same locality during the same year.

Although damages must be proven with reasonable certainty, there is no absolute requirement of mathematical precision in measuring crop damage. Where the fact of damages is clear and certain, but there is

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uncertainty as to the exact amount of damages, the trier of fact has discretion to fix a reasonable amount. Cutler, supra at 235.

For a discussion of the rule of certainty in determining damages, see Town of Fifield v. State Farm Ins. Co., 119 Wis.2d 220, 349 N.W.2d 684 (1984). In that decision, the court said, at page 230, that even where the rule of certainty is applicable as an ideal in terms of a device to control juries, the following modifications are applicable:

> (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
> (b) Where the defendant's wrong has caused the difficulty of proof of damage, he or she cannot complain of the resulting uncertainty.
> (c) Mere difficulty in ascertaining the amount of damage is not fatal.
> (d) Mathematical precision in fixing the exact amount is not required.
> (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. McCormick, Damages, § 27, p.101.

It is also important that the trier of fact consider the cost savings which inure to the plaintiff by reason of being relieved of raising the damaged crops to maturity. Bechtel, supra at 463-64; Strauss Bros. Packing Co., supra at 709-10.

This rule for measuring damages may not apply where there is permanent destruction to perennial plants. See 21 Am. Jur. 2d Crops § 80 (1979). For timber loss, see Miller v. Neale, 137 Wis. 426, 119 N.W. 94 (1909).

For the destruction of ornamental trees, see Otto v. Cornell, 119 Wis.2d 4, 349 N.W.2d 703 (Ct. App. 1984); Gilman v. Brown, 115 Wis. 1, 91 N.W. 227 (1902).

There is no case law in Wisconsin on the specific obligation of a farmer to mitigate damages following an injury to a growing crop. Cases in other jurisdictions hold that a replanting must be undertaken where practical. 21 Am. Jur.2d Crops § 81; 20 Proof of Facts 2d, § 15, n. 80 (1979). In such a case, the defendant would be entitled to have credited to his or her liability the amount of any net gain realized from the second crop. In Wisconsin, however, courts have refused to force an injured party to mitigate losses, if "the effort, risk, sacrifice, or expense which the injured party must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline it." Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Weston's Bar, Inc., 78 Wis.2d 26, 44-49, 253 N.W.2d 493 (1977).

Livestock. The basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with an appropriate reduction for any salvage value. Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996), citing Rosche v. Wayne Feed Division, 152 Wis.2d 78, 447 N.W. 2d 94 (Ct. App. 1989). In Rosche, the court specifically addressed the issue whether the owner was entitled to damages for the loss of their offspring anticipated at the time of their death. The court disallowed damages for the loss of future offspring and limited the damages to the replacement cost at the time of their death less any salvage value. In Schrubbe the court did not address the issue whether the market value of the calves which died should be calculated as of the date it was reasonable to replaced the deceased calves. It could be argued the court said in a footnote that the market value of the plaintiff's calves should be calculated at the time it was reasonable to replace them, less the cost to raise the calves to that point. In Schrubbe the trial

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court declared that the appropriate measure of damages for the deaths of dairy calves was the market replacement value on their date of death, less any salvage value. The plaintiff contended that because he was financially unable to replace the calves on the date of their death, he was entitled to recover for anticipated lost milk profits the calves ultimately would have produced. The court rejected this argument. The court said the reasons underlying the general rule of damages are at least three fold. First, the market value of replacement animals is based in part upon their expected future productivity. Because future productivity is considered in assessing market value of livestock, additional recovery for the expected future productivity of the livestock would duplicate damages. Once the owner acquires a replacement animal, the loss of future productivity is eliminated. If future productivity were allowed together with the replacement cost, the owner would be twice compensated for the future productivity of the animal. The court in Schrubbe also held that the measure of damages stated in Rosche is also designed to minimize damages and avoid economic waste. The rule excludes recovery for damages that should have been avoided and deemed economically wasteful. By acquiring replacement animals, livestock productivity will be maintained and the damages measured in a way that will not exceed the economic potential of the lost property. Finally, the court in Schrubbe said the rule of damages set forth in Rosche reflects the fact that an animal's value is readily ascertainable and its replacement is readily available in the market. The court in Schrubbe recognized that the rule of damages reflected by Rosche was limited to livestock that is not producing income at the time of the loss. If the plaintiff lost milk-producing cows, some amount of milk production would be lost from the time of death to the time it was reasonable to replace the cows. Although the time to replace may be brief because of the availability of comparable animals in the market, the owner would be entitled nevertheless to the loss of use of the animal during the reasonable time necessary to replace it.

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1810 TRESPASS: NOMINAL DAMAGES

If you find that (Defendant) trespassed upon (Plaintiff)'s property, but do not find that (Plaintiff) has sustained measurable damages from the trespass, then your answer to Question _____ may be a nominal sum such as one dollar. A nominal damage award recognizes that although actual damages are immeasurable in dollars, actual harm to the property rights of (Plaintiff) has occurred from the trespass by (Defendant).

COMMENT

This instruction and comment were approved in 2012.

See Jacque v. Steenburg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997).

Nominal damages are always appropriate for a trespass. Jacobs v. Major, 139 Wis.2d 492, 407 N.W.2d 832 (1987). If proved, compensatory damages may also be awarded. Grygiel v. Monches Fish & Game Club, Inc., 2010 WI 93, 328 Wis.2d 436, 787 N.W.2d 6.

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1812 QUANTUM MERUIT: MEASURE OF SERVICES RENDERED

If you find that (name), in good faith, rendered services to (name), you will award (name) the reasonable value of such services, being the customary rate of pay for the work in the community at the time the work was performed.

COMMENT

This instruction and comment were originally published in 1960. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This measure of damages was approved in Barnes v. Lozoff, 20 Wis.2d 644, 123 N.W.2d 543 (1963), and Mead v. Ringling, 266 Wis. 523, 64 N.W.2d 222 (1954). See also Estate of Voss, 20 Wis.2d 238, 121 N.W.2d 744 (1963); Fieldhouse Landscape v. Gentile, 12 Wis.2d 418, 107 N.W.2d 491 (1961); Guentner v. Gnagi, 258 Wis. 383, 46 N.W.2d 194 (1951).

The value of the services may be recovered even though rendered under an invalid and unenforceable contract. Theuerkauf v. Sutton, 102 Wis.2d 176, 197, 306 N.W.2d 651 (1981); Mead v. Ringling, supra.

Wis. Stat. § 893.44 (1979) limits recovery of compensation to two years where there was no express agreement as to compensation and recovery is based upon quantum meruit. Estate of Nale, 61 Wis.2d 654, 213 N.W.2d 552 (1974).

The supreme court has recognized that the principle that "where one renders valuable services for another payment is expected" is "well-grounded in human experience." In Matter of Estate of Steffes, 95 Wis.2d 490, 500, 290 N.W.2d 697 (1980). The court further noted in that decision that "if one merely accepts services from another which are valuable to him, in general, the presumption of fact arises that a compensation equivalent is to pass between the parties." Steffes, supra at 500.

Recovery in quantum meruit is allowed for services performed for another on the basis of a contract implied in law to pay the performer for what the services were reasonably worth. However, before recovery can be permitted on quantum meruit, there must be sufficient competent evidence in the record which shows that the services were performed at the instance of the person to be charged and that the performer expected reasonable compensation. In Matter of Estate of Lade, 82 Wis.2d 80, 260 N.W.2d 665 (1978); Gename v. Benson, 36 Wis.2d 370, 376, 153 N.W.2d 571 (1967).

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1815 INJURY TO SPOUSE: LOSS OF CONSORTIUM

"Consortium" involves the love and affection, the companionship and society, the privileges of sexual relations, the comfort, aid, advice and solace, the rendering of material services, the right of support, and any other elements that normally arise in a close, intimate, and harmonious marriage relationship. A wrongful invasion, impairment, or deprivation of any of these rights, resulting from a disabling injury to a spouse, is a legal loss and a basis for damages to the other spouse harmed or deprived.

In answering this question, you should consider the nature, the form, and quality of the relationship that existed between (the spouses) up to the time of the injury. Based on that relationship, determine what sum will represent fair and reasonable compensation for any loss of consortium that was sustained by the deprived spouse as a result of the injury.

If you find that the loss will continue in the future, include in your answer damages for the period you are convinced it will continue to exist.

Compensation for loss of consortium, except as it relates to material services, is not measured by any rule of market value. Instead, it is measured on the basis of what you find is fair and reasonable compensation for the loss sustained by the deprived spouse. Compensation for material services is to be measured by what it would reasonably cost in the market for like services.

So as not to duplicate damages, do not include in your answer any allowance for loss of earnings or loss of earning capacity of the injured spouse. Those damages are dealt with in another question.

COMMENT

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The instruction and comment were originally published in 1978 and revised in 1984. The comment was updated in 1987, 1990, and 2011. An editorial correction was made in the comment in 1999.

The instruction was cited with approval in Kottka v. PPG Ind., Inc., 130 Wis.2d 499, 520, 388 N.W.2d 160 (1986).

In Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966), the court included "sexual companionship" as an element for the concept of consortium. In Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 185 (1967), the right of action for loss of consortium resulting from her husband's injury was extended to a wife. This case overruled Nickel v. Hardware Mut. Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955). There is no longer need to join the causes of action for injury and loss of consortium. See Fitzgerald v. Meissner & Hicks, Inc., 38 Wis.2d 571, 157 N.W.2d 595 (1968), which also includes suggested devices for avoiding double or duplicate recoveries.

Loss of consortium creates a derivative separate and independent cause of action resulting from the injuries to a spouse. Schwartz v. City of Milwaukee, 54 Wis.2d 286, 195 N.W.2d 480 (1972); Peeples v. Sargent, 77 Wis.2d 612, 643, 253 N.W.2d 459 (1977). A spouse's causal negligence can be imputed to the other spouse to reduce or defeat recovery for loss of consortium. White v. Lunder, 66 Wis.2d 563, 225 N.W.2d 442 (1975); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975). However, any other defenses (e.g., exculpatory contract) to the injured spouse's action are not available to release a spouse's consortium rights. Arnold v. Shawano County Agricultural Soc'y, 111 Wis.2d 203, 214-15, 330 N.W.2d 773 (1983).

The life expectancy of the spouse is an element for consideration in determining compensation for loss of consortium. Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975). For basis of determining damages for loss of consortium with respect to the several elements, see Selleck v. City of Janesville, 104 Wis. 570, 80 N.W. 944 (1899). As to the relevance of testimony on the injured spouse's marital and family problems, see Strelecki v. Firemans Ins. Co. of Newark, 88 Wis.2d 464, 276 N.W.2d 464 (1979).

Loss of Earnings as a Homemaker. In Lambert v. Wrensch, 135 Wis.2d 105, 399 N.W.2d 369 (1987), the supreme court held that the reference in this instruction to "the rendering of material services" covers the loss of the injured spouse's services as a homemaker. Therefore, giving a separate instruction on the injured spouse's loss of earnings as a homemaker would overlap with recovery for loss of consortium and result in a double recovery.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(4), limits the recovery for loss of consortium of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 893.55(4)(d) (2011 Wisconsin Act 2).

Fiancee. Loss of consortium suffered by a fiancee of an injured person is not compensable under Wisconsin law. Denil v. Integrity Mut. Ins., 135 Wis.2d 373, 401 N.W.2d 13 (Ct. App. 1986).

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1816 INJURY TO SPOUSE: PAST LOSS OF EARNING CAPACITY: HOUSEHOLD SERVICES

In your answer to subdivision ____ of question ___, if you find that as a result of the injuries sustained by (plaintiff), (he) (she) was unable to carry on (his) (her) normal household services from the date of the accident to the present date, you should allow such sum as you feel will fairly and reasonably compensate (him) (her) for the household services (he) (she) was unable to perform, not exceeding the amount for which (he) (she) could have employed other people to do the work.

COMMENT

This instruction and comment was approved by the Committee in 1992.

This instruction is to be used in cases where an injured spouse seeks compensation for his or her inability to perform household services from the date of the accident to date of trial. Conceptually, the claim is based on a past loss of earning capacity.

Case law does not seem to rule out the legality of such an instruction. The only case directly focusing on the problem, Lambert v. Wrensch, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), held that, because plaintiff's husband had a claim for loss of consortium which included loss of material services, plaintiff wife could not recover for her inability to do household chores. The Court ruled that to allow for such loss would constitute a double recovery.

In the case of Zintek v. Perchik, 163 Wis. 2d 439, 471 N.W.2d 522 (Ct. App. 1991), the plaintiff wife worked outside the home. There was testimony concerning her past wage loss. In addition, expert testimony established the value of household services which she normally would have performed had she not been injured. The appellate court upheld the jury award which combined a recovery of both elements. The appeal was based solely on the sufficiency of the evidence. In a footnote, the court indicated it did not address the Lambert problem - whether recovery for plaintiff's loss of household services was included in her husband's recovery for loss of consortium. (Zintek, supra at 481 n.22.)

It appears that Wisconsin appellate courts have tacitly approved a plaintiff's recovery for loss of ability to perform household services if the loss of consortium claim of the spouse does not include recovery for "material services." In a given case, a request by plaintiff's lawyer for jury verdict questions as to past loss of household services and loss of future ability to perform such services can be honored by amending the loss of consortium instruction.

If this instruction is used along with JI-Civil 1815, then delete the term "material services" from JI-Civil 1815.

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1817 INJURY TO SPOUSE: FUTURE LOSS OF EARNING CAPACITY: HOUSEHOLD SERVICES

Question _____ asks what sum of money will fairly and reasonably compensate (plaintiff) for loss of (his) (her) ability to perform household services in the future.

If you are satisfied that (plaintiff) has suffered an impairment of (his) (her) ability to perform household services in the future as a natural consequence of (his) (her) injuries, you should allow such sum as you feel will fairly and reasonably compensate (him) (her) for the impairment. The amount, if any, to be awarded by you should not exceed the amount for which (he) (she) will have to employ other people to perform the services.

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of loss of future earning capacity requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

This instruction and comment were approved by the Committee in 1992 and revised in 2000. See Committee Comment to JI-Civil 1816.

Evidence of Future Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1820 INJURY TO SPOUSE: NURSING SERVICES: PAST AND FUTURE

Subdivision ___ of question ___ asks what sum of money will compensate (name) for personal nursing care and services rendered to (his wife) (her husband). If you find that (name) performed services in nursing and caring for (his wife) (her husband) and that the services were necessarily rendered because of (her) (his) injuries, you should name such sum as you feel will fairly and reasonably compensate (name) for the personal nursing care and services, not exceeding the amount for which (name) could have employed others to do the work. If you find that for any foreseeable time in the future (he) (she) will be performing such necessary services, you should also make reasonable allowance for the future services.

COMMENT

This instruction and comment were originally published in 1960. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is applicable to services provided by either spouse. A spouse's claim for nursing services to an injured spouse is derivative. The causal negligence of the injured spouse bars or limits the recovery of the claiming spouse pursuant to the provisions of the comparative negligence statute. White v. Lunder, 66 Wis.2d 563, 225 N.W.2d 442 (1975).

Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Moritz v. Allied Mut. Fire Ins. Co., 27 Wis.2d 13, 133 N.W.2d 235 (1965); Verhelst Constr. Co. v. Galles, 204 Wis. 96, 102, 235 N.W. 556, 558 (1931). See also Comment, Wis JI-Civil 1815.

Loss of earning by the treating spouse is not a proper measure of the reasonable value of the nursing services provided to the injured spouse. Redepenning, supra at 137.

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1825 INJURY TO WIFE: MEDICAL AND HOSPITAL EXPENSES

Instruction withdrawn.

COMMENT

This instruction was originally published in 1960. It was withdrawn in 1995.

The doctrine of necessaries has been modified by Wis. Stat. § 765.001(2), part of Wisconsin's Marital Property law. Under this landmark change to the law of property ownership and family support obligations, Wisconsin law now imposes personal liability on each spouse for the other's necessaries. Section 765.001(2) provides:

> Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

The court of appeals has interpreted this new provision as providing that a spouse is equally responsible for medical expenses incurred by the other spouse while the two are married. St. Mary's Hosp. Med. Center v. Brody, 186 Wis.2d 100, 519 N.W.2d 706 (Ct. App. 1994).

As a result of this change in the doctrine of necessaries, the Committee withdrew this instruction which was based on the husband having primary responsibility for his wife's medical bills. Recovery of medical and hospital expenses by a plaintiff is covered in Wis JI-Civil 1750A, 1754, and 1765.

Under the prior common-law doctrine, the husband had the duty to support himself, his wife, and others in the family. The wife, however, had no duty to support and was not liable to a creditor for necessaries furnished to her or her husband. In applying this former doctrine, Wisconsin courts have held that a married woman was not liable for medical services furnished her (unless covered by an express contract) and, therefore, was not entitled to recover the value of the medical service from a tortfeasor. Instead, recovery of such expenses for medical services to the wife was for the husband. Luther Hosp. v. Garborg, 71 Wis.2d 460, 462, 238 N.W.2d 529 (1976); Seitz v. Seitz, 35 Wis.2d 282, 295, 151 N.W.2d 86 (1967); Fischer v. Fischer, 31 Wis.2d 293, 309, 142 N.W.2d 857 (1966); Fee v. Heritage Mut. Ins. Co., 17 Wis.2d 364, 117 N.W.2d 268 (1962); Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 349, 99 N.W.2d 163 (1959); Jewell v. Schmidt, 1 Wis.2d 241, 83 N.W.2d 487, 491092 (1957). Only if the injured wife obligated herself by contract to pay for medical care could the wife recover for the cost of such care. Seitz v. Seitz, 35 Wis.2d 282, 151 N.W.2d 86 (1967); Sulkowski v. Schaefer, 31 Wis.2d 600,143 N.W.2d 512 (1966). In Jewell, supra at 250, the court expressed the prevailing necessaries doctrine in the following manner:

> The early rule was that it was the husband's absolute duty to pay for medical services to his wife, and that this duty could not be altered even where the wife agreed to pay the bills, recognized them as her personal debt, and in fact made payments on them from time to time from her separate estate. Stack v. Padden (1901), 111 Wis. 42, 86 N.W. 568. This absolute

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> bar has been softened by subsequent decisions, based on the statutes extending the legal rights of married women. The present rule is that a married woman may contract for medical services in her own right but, in the absence of the establishment of such an express contract between the wife and the person rendering the service, the husband, and not the wife, is the person liable for such expenses and the one entitled to recover for them.

In Estate of Stromstead, 99 Wis.2d 136, 299 N.W.2d 226 (1980), the hospital which had rendered medical services to the wife sued the wife's estate for the value of such services. The estate argued that, based on the prevailing common law doctrine of necessaries, a married woman is not liable under implied contract principles for such medical services. On review, the supreme court said that a wife shares with her husband a limited legal duty of support of the family and that the wife may be held liable to an implied-in-law contractual obligation for the provision of medical services and other necessaries to her or family. Specifically, the court said a married woman "cannot be viewed as being immune from such a suit" as suggested in Jewell v. Schmidt, supra. The earlier line of cases cited above were overruled. However, the court in reshaping the necessaries doctrine refused to impose joint and several liability on the husband and wife. Instead, the court held that a creditor seeking to recover under the rule of necessaries for goods or services furnished to the wife or family members must first proceed against the husband as the primary responsible party. Stromstead, supra at 144. To the extent the husband is unable to satisfy his obligation in this regard, the creditor may seek satisfaction from the wife.

The reshaping of the necessaries doctrine in Stromstead was later reaffirmed by the court in Marshfield Clinic v. Discher, 105 Wis.2d 506, 314 N.W.2d 326 (1982).

In Marshfield Clinic, the court considered whether, under its Stromstead rule, a wife can be held liable for the necessary medical expenses incurred by her husband in the absence of her agreement to accept responsibility for the expenses. The court reaffirmed the doctrine it had developed in Stromstead which made the wife secondarily liable for the payment of necessaries furnished to family member. The court held that its rule was constitutional even though the classification incorporated in the rule was gender based because the rule served several important governmental objectives. Marshfield Clinic, supra at 509-17. The court also stated that the Stromstead rule only applies in the absence of an express agreement by the parties. Thus, if the medical provider had expressly agreed to look only to the husband for payment of his or his family's medical expenses, then the wife could not be liable.

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1830 INJURY TO WIFE: MEDICAL AND HOSPITAL BILLS: DISPUTE OVER OWNERSHIP OF CLAIM

Instruction withdrawn.

COMMENT

This instruction was originally published in 1966.

See Comment to Wis JI-Civil 1825.

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1835 INJURY TO MINOR CHILD: PARENT'S DAMAGES FOR LOSS OF CHILD'S EARNINGS AND SERVICES: PAST AND FUTURE

Question _____ asks you to determine [(parent)s'] [(parent)'s] loss of (child)'s services resulting from the injuries sustained by (child). The (parents) (parent) of an injured minor child (are) (is) entitled to the earnings and to the reasonable value of the services which the minor child was capable of rendering to the (parents) (parent) until the child reaches the age of 18.

You should award such sum as will reasonably compensate (parents) (parent) for any loss of income as you are satisfied (minor child) was reasonably capable of earning and for the loss of the reasonable value of the services to which (parents) (parent) were entitled during the period of (minor child)'s disability, to date, resulting from injuries received in (the accident).

If you find that (minor child)'s disability will continue in the future as a natural result of the injuries sustained in (this accident), you should allow (parents) (parent), and include in your award, an amount which will fairly and reasonably compensate (them) (him) (her) for any loss of income (minor child) would have been reasonably capable of earning and for the reasonable value of the services which (minor child) would have rendered to (parents) (parent), except for the disability, until (minor child)'s 18th birthday.

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but

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rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were initially approved by the Committee in 1979 and revised in 2000.

Webster v. Krembs, 230 Wis. 252, 260-61, 282 N.W. 564 (1939); Osborne v. Montgomery, 203 Wis. 223, 227, 234 N.W. 372 (1931); Callies v. Reliance Laundry Co., 188 Wis. 376, 380, 206 N.W. 198 (1925); Johnson v. St. Paul & Western Coal Co., 131 Wis. 627, 632, 111 N.W. 722 (1907).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

Evidence of Future Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1837 INJURY TO MINOR CHILD: PARENT'S LOSS OF SOCIETY AND COMPANIONSHIP

Question _____ asks you to determine (the parent)'s loss of society and companionship resulting from injuries sustained by (child).

Society and companionship includes the love, affection, care, and protection the parent would have received from (his) (her) child had the child not been injured. It does not include the loss of monetary support from the child or the grief or mental suffering caused by the child's injury.

In determining (parent)'s loss of society and companionship, you should consider the age of the (child) and the age of the parent; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the parent by the child; and the personality, disposition, and character of the child and the parent. The amount inserted by you should reasonably compensate the parent for any loss of society and companionship (he) (she) has sustained since the injury to (his) (her) child and the amount you are reasonably certain (he) (she) will sustain in the future.

If you find that (minor child)'s disability (injuries) will continue in the future as a natural result of the injury and that (parent) will sustain a loss of the child's society and companionship in the future, you should include in your award the sum that will fairly and reasonably compensate (parent) for this future loss but only until the injured child reaches (his) (her) 18th birthday.

COMMENT

The instruction and comment were initially approved by the Committee in 1979 and revised in 1984, 1988, and 2000. The comment was updated in 2000.

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This instruction was originally written to cover a claim by both parents for loss of society and companionship of their child. The instruction has been revised and is based on a special verdict in which a separate inquiry for each parent is submitted to the jury. To avoid any potential problem with motions after verdict, the Committee believes the better procedure is to submit separate verdict questions for each parent. Although in some cases, the parents will agree to a single question.

See Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 361 N.W.2d 297 (Ct. App. 1984).

Two causes of action arise for an injury to a child: the child's for his or her own injury and the parents for the invasion of the parents' interest. Korth v. American Family Ins. Co., 115 Wis.2d 326, 330, 340 N.W.2d 494 (1983).

Parents may maintain an action against a negligent tortfeasor for medical expenses and loss of society and companionship of the injured child. Korth v. American Family Ins. Co., supra; Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975). The parents' claim for loss of society and companionship must be combined with that of the child for personal injuries. Shockley v. Prier, supra at 404. In Korth, supra, the court stated that although Shockley v. Prier, supra, did not require the joinder of the parents' claim for medical expenses with the child's claim, as a practical matter the parents' claim for medical expenses should be joined with the parents' claim for loss of society and companionship. Korth v. American Family Ins. Co., supra at 331.

In Korth, supra, the court held that where the parents' claim for damages for loss of society and companionship and medical expenses was filed along with the minor child's within the statutory time period for filing the minor's claim, the parents' claim was timely filed.

Shockley v. Prier, supra, leaves undecided whether parents have a claim for damages after the child attains his or her majority.

The parents' claim is derivative but must be proved separately from the underlying claim of the child. Thus, distinct damages must be shown and any negligence of the parents in causing the child's injuries may reduce or defeat recovery through operation of the comparative negligence statute. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 405, 331 N.W.2d 585 (1983).

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1838 INJURY TO PARENT: MINOR CHILD'S LOSS OF SOCIETY AND COMPANIONSHIP

Question _____ asks you to determine (child)'s loss of society and companionship resulting from injuries sustained by (parent).

Society and companionship includes the love, affection, care, protection, and guidance the child would have received from (parent) had (he) (she) not been injured. It does not include the loss of monetary support from the parent or the grief or mental suffering caused by the parent's injury.

In determining (child)'s loss of society and companionship, you should consider the age of the child and the age of parent; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the child by the parent; and the personality, disposition, and character of the child and parent. The amount inserted by you should reasonably compensate (child) for any loss of society and companionship (child) has sustained since the injury to (parent) and the amount you are reasonably certain (he) (she) will sustain in the future.

If you find that (parent)'s disability (injuries) will continue in the future as a natural result of the injury and that (child) will suffer a loss of the (parent)'s aid, comfort, society, and companionship in the future, you should include in your award such sum as will fairly and reasonably compensate (child) for this future loss but only until (child) reaches (his) (her) 18th birthday.

COMMENT

The instruction and comment were approved in 1989 and revised in 2000.

In Theama v. City of Kenosha, 117 Wis.2d 508, 344 N.W.2d 513 (1984), the court held that a minor child may recover for the loss of care, society, companionship, protection, training, and guidance of an injured parent. See also Bell v. County of Milwaukee, 134 Wis.2d 25, 396 N.W.2d 328 (1986). See Wis JI-Civil 1837.

A child's claim will be barred or the amount permitted as recovery reduced by any defenses against the injured parent, such as contributory negligence. Recovery by a child is limited to the child's minority. Theama, supra at 527.

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1840 INJURY TO MINOR CHILD: PARENTS' DAMAGES FOR MEDICAL EXPENSES: PAST AND FUTURE

Subdivision __ of question __ asks what sums will reasonably compensate (plaintiff) for hospital, medical, and dental expenses incurred for the care and treatment of (his) (her) minor (son) (daughter).

Under the law, parents are liable for the reasonable expenses necessarily incurred in the care and treatment of their minor children.

You will carefully consider the credible evidence, and reasonable inferences therefrom, bearing on this inquiry and in answer name such sum as will fairly and reasonably compensate (plaintiff) for such hospital, medical, and dental expenses as (he) (she) necessarily incurred for the care of (minor child) in the treatment of the injuries sustained by (minor child) as a natural and direct result of this (collision) (accident). If you find that such expenses will continue to be incurred in the future by (plaintiff), you should allow, and include in your award, an amount which will fairly and reasonably compensate (plaintiff) for such medical, hospital, and dental expenses as (plaintiff) will necessarily incur for the care of (minor child) in the treatment of the injuries sustained by (him) (her) as a natural result of the (collision) (accident), during the period of (his) (her) minority, up to but not beyond the time (he) (she) will have reached (his) (her) 18th birthday.

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1980 and reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. An editorial correction was made in 1996.

Sulkowski v. Schaefer, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966); Knutson v. Fenelon, 200 Wis. 261, 265, 227 N.W. 857, 858 (1929); West v. Day, 193 Wis. 187, 195, 212 N.W. 648, 651 (1927); Grimes v. Snell, 174 Wis. 557, 560, 183 N.W. 895, 896 (1921); Kruck v. Wilbur Lumber Co., 148 Wis. 76, 83, 133

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N.W. 1117, 1120 (1912); Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 201 N.W.2d 745 (1972).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

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1845 INJURY TO CHILD: PARENTS' DAMAGES FOR SERVICES RENDERED TO CHILD: PAST AND FUTURE

Subdivision __ of question __ asks what sum will reasonably compensate (name) for additional home and personal nursing care and services rendered to (his) (her) minor (son) (daughter) because of the injuries sustained in this (collision) (accident).

You will carefully consider the credible evidence, and reasonable inferences therefrom, bearing on this inquiry and in answer name such sum as will fairly and reasonably compensate (_____) for such additional home and nursing care and services as the parents necessarily furnished and rendered to their minor (son) (daughter) in the care and treatment of the injuries sustained by (him) (her) as a natural result of this (collision) (accident).

The amount you will allow for such services, however, will not exceed an amount (_____) would have been compelled to pay others to render such or similar services.

If you find that such nursing care and services will continue to be incurred in the future, you may allow, and include in your award, an amount which will fairly and reasonably compensate (_____) for such home nursing care and services as the parents will necessarily render and furnish to their minor (son) (daughter) in the care and treatment of the injuries sustained by (him) (her) as a natural result of this (collision) (accident), during the period of (his) (her) minority, up to but not beyond the time (he) (she) will have reached (his) (her) 18th birthday. Such sum shall not exceed the amount (_____) would be compelled to pay others to render such or similar services.

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

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Sulkowski v. Schaefer, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966); Johnson v. St. Paul & Western Coal Co., 131 Wis.2d 627, 630-31, 111 N.W.2d 722, 723 (1907). See also Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 361 N.W.2d 297 (Ct. App. 1984).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

Parents may also recover damages for loss of aid, comfort, society, and companionship of a minor child who has been injured by the negligence of a third person. Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975); Comment, "Children: Chattels to Chums – Shockley v. Prier," 59 Marq. L. Rev. 169 (1976).

See also Wis JI-Civil 1835 and 1837.

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1850 ESTATE'S RECOVERY FOR MEDICAL, HOSPITAL, AND FUNERAL EXPENSES

NO INSTRUCTION.

SPECIAL VERDICT

Subdivisions ___ and ___ of question ___ ask what sum of money will fairly and reasonably compensate the estate of (name) for the medical and hospital expenses necessarily and reasonably incurred in the care of the deceased at the time of (name)'s death because of the injuries received in the accident and also such further sum as will fairly and reasonably compensate the estate of (name) for the funeral and burial expenses of (name).

COMMENT

This verdict question and comment were originally published in 1960. They were revised in 1983. The comment was revised in 2005. The "Special Verdict" heading was added in 2016.

Medical and funeral expenses are recoverable by the personal representative of the decedent's estate or relatives of the decedent. Wis. Stat. § 895.04(5); Wangen v. Ford Motor Co., 97 Wis.2d 260, 312, 294 N.W.2d 437 (1980).

For medical expenses and funeral expense in a medical negligence case, see Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, 700 N.W.2d 201. In Lagerstrom, the court discussed collateral source payments and subrogation (reimbursement) rights. See also Wis JI-Civil 1757.

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1855 ESTATE'S RECOVERY FOR PAIN AND SUFFERING

The law provides that the estate of a deceased person is entitled to be compensated fairly and reasonably for pain and suffering endured by (name) from the time of the accident up to the time of death.

Pain and suffering includes all physical pain and discomfort, worry and mental distress. In determining the amount of damages for pain and suffering, you will consider the nature, extent, and duration of all physical pain and suffering, mental anguish, apprehension, discomfort or sorrow the deceased consciously endured and suffered between the time of the accident and death and insert as your answer such sum as will, in your judgment, represent reasonable compensation for such pain and suffering as you are reasonably certain (name) endured and suffered as a natural result of injuries received in the accident.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The comment was updated in 2018.

Schultz v. General Casualty Co., 233 Wis. 118, 128 N.W. 803, 808 (1939); Prange v. Rognstad, 205 Wis. 62, 65-67, 236 N.W. 650, 652 (1931); Koehler v. Waukesha Milk Co., 190 Wis. 52, 56, 208 N.W. 901, 902-03 (1926); Tidmarsh v. Chicago M. & St. P. Ry., 149 Wis. 590, 598-99, 136 N.W. 337, 341 (1912).

In Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797, the court of appeals concluded that credible evidence relating to pre-death pain and suffering distinguished the case from Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994), and affirmed the trial court's holding that damages were properly awarded for pre-death pain and suffering.

For negligent infliction of emotional distress, see Wis JI-Civil 1510 and 1511.

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1860 DEATH OF HUSBAND: PECUNIARY LOSS

This instruction was withdrawn in 1992 and replaced with JI-Civil 1861.

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1861 DEATH OF SPOUSE (DOMESTIC PARTNER): PECUNIARY LOSS

(Plaintiff), as the surviving (spouse) (domestic partner) of (deceased), is entitled to be compensated for any financial loss (he) (she) sustained as a result of (his) (her) (spouse's) (domestic partner's) death.

In answering question ____, consider: (deceased)'s age, the age of (surviving spouse) (domestic partner), (deceased)'s condition of health prior to the accident, (deceased)'s earning capacity, and (his) (her) reasonable prospects for earning at the time of (his) (her) death. Your answer should be a sum, if any that equals the value of the support and protection (he) (she) would have furnished to (surviving spouse) (domestic partner) during the time (he) (she) probably would have lived. In determining this sum, consider the number and ages of (deceased)'s children, the assistance and services (he) (she) would have rendered to (surviving spouse) (domestic partner) had (he) (she) lived in keeping, maintaining, and supervising the home and in the caring for (his) (her) children.

[If (deceased) rendered gratuitous services to (surviving spouse) (domestic partner) in (spouse's) (domestic partner's) business for which (spouse) (domestic partner) would have to employ others to do the work (deceased) performed and, if you are reasonably certain that the services would have continued in the future had (deceased) lived, then you may consider the reasonable value of the future services and make allowance for them.]

[You should also consider any accumulations of property that would have resulted from the earnings of (deceased) during the time (he) (she) would probably have lived, and the reasonable expectation, if any, which (surviving spouse) (domestic partner) had of ultimately receiving the accumulations.]

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Do not include any amount for pain and suffering of (deceased) prior to death, for burial expenses, for the loss of society and companionship of (deceased), or for the grief or anguish suffered by (surviving spouse) (domestic partner) because of (deceased)'s death. [These items are covered by other questions in the verdict.]

[While (spouse) (domestic partner) has the burden of establishing pecuniary loss, the evidence relating to this type of damage need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You are not required in determining pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which reasonably supports your determination of damages.]

COMMENT

This instruction and comment were approved in 1991 and revised in 2000 and 2009. The instruction replaced Wis JI-Civil 1860 and 1865.

Wis. Stat. § 895.04(4).

See Wis JI-Civil 1796 for the present value of future losses.

Wis. Stat. § 895.04(2) denominates plaintiffs in wrongful death actions. If a deceased leaves a surviving spouse or domestic partner under Chapter 770, the spouse or domestic partner is the owner of the wrongful death action. Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967), held that the amendment to § 895.04(2) did not affect a change so far as priority of ownership of the cause of action was concerned. If a spouse or domestic partner survives, that person is the owner of the wrongful death cause of action and the children are not. A surviving domestic partner under Chapter 770 was given a claim in 2009 for wrongful death.

The Cogger case has been cited with approval in Hanson v. Valdivia, 51 Wis. 2d 466, 187 N.W.2d 151 (1971), and Steinbarth v. Johannes, 138 Wis. 2d 182, 405 N.W.2d 720 (1987).

Pecuniary Loss. In wrongful death cases, a jury is permitted to consider many elements in determining pecuniary loss, not just actual earnings. Ewen v. Chicago & N.W. Ry. Co., 38 Wis. 613, 624 (1875); Estate of Holt v. State Farm, 151 Wis. 2d 455, 460, 444 N.W. 2d 453 (Ct. App. 1989). In Estate of Holt, the court of appeals said "pecuniary injury" should be broadly construed. The court concluded that

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"pecuniary injury," in the wrongful death statute, means "a loss of any benefit which the beneficiary would have received from the decedent if the decedent had lived."

In Maloney v. Wisconsin Power, L. & H. Co., 180 Wis. 546, 193 N.W. 382 (1923), the supreme court approved the trial court's instruction which advised the jury that it was to consider the age of the deceased and the surviving wife, the condition of health of the deceased and his earning capacity, his reasonable prospects at the time of his death, the accumulations of property which would have resulted from his earnings during the time he probably would have lived and the reasonable expectation which his wife had of ultimately receiving such accumulations of property. The court went on to say that the jury could allow such sum as would equal the present value of such support and protection of the wife.

In Herro v. Northwestern Malleable Iron Co., 181 Wis. 198, 201, 194 N.W. 383 (1923), the court held that a surviving spouse was entitled to be compensated for the loss of services performed by the decedent in and about the business of such spouse which would continue after death.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

Surviving Domestic Partner. As part of the State Budget Bill, a domestic partnership was recognized.

The Budget Bill's provisions extended certain legal rights to domestic partners, including the right to recover damages for wrongful death of a deceased partner. Wis. Stat. 895.04(2) was amended as follows:

> **SECTION 3269**. 895.04(2) and (6) of the statutes are amended to read:
>
> 895.04**(2)** If the deceased leaves surviving a spouse **or domestic partner under ch. 770, and domestic partner under s. 770.05,** and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse **or surviving domestic partner,** and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse **or domestic partner** of the deceased; if no spouse **or domestic partner** survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled

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> to recover for the wrongful death. A surviving nonresident alien spouse **or a nonresident alien domestic partner under ch. 770** and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's **or surviving domestic partner's** interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

The legislation added "a surviving domestic partner" to § 895.04(6), but the legislation did not add "a surviving domestic partner" to § 895.04(4) which reads:

> **(4)** Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the **spouse, children or parents of the deceased, or to the siblings** of the deceased, if the siblings were minors at the time of the death. (Emphasis added)

Thus, while a domestic partner may recover for "pecuniary injury" from wrongful death, he or she does not apparently have the right to recover for loss of society and companionship under the second sentence. The committee revised Wis JI-Civil 1861 (pecuniary loss) to include a domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), other than mentioning in that instruction's commentary the problematic statutory language as to the recovery of loss of society and companionship damages by a domestic partner.

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1865 DEATH OF WIFE: PECUNIARY LOSS

This instruction was withdrawn in 1992 and replaced with JI-Civil 1861.

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1870 DEATH OF SPOUSE: SURVIVING SPOUSE'S LOSS OF SOCIETY AND COMPANIONSHIP

Question ___ asks you to determine (spouse)'s loss of society and companionship resulting from the death of (deceased spouse).

Society and companionship includes the love, affection, care, and protection (spouse) would have received from (deceased spouse) had (he) (she) continued to live. It does not include the loss of monetary support or the grief and mental suffering caused by the spouse's death.

In determining (spouse)s' loss of society and companionship, you should consider the age of (deceased spouse) and the age of (surviving spouse); the past relationship between the spouses; the love, affection, and conduct of each toward the other; the society and companionship that had been given to (surviving spouse) by (deceased spouse); and the personality, disposition, and character of (deceased spouse). The amount inserted by you should reasonably compensate spouse for any loss of society and companionship (she) (he) has sustained since the death of (deceased spouse) and the amount you are reasonably certain (she) (he) will sustain in the future.

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a spouse's society and companionship, this dollar limit is not a measure of damage; it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (spouse) for any loss of society and companionship.

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COMMENT

The instruction and comment were initially approved by the Committee in 1979. The instruction was revised in 1981, 1988, 1992, 1999, and 2000 to reflect legislative amendments increasing the maximum recovery and to make the instructions on loss of society and companionship consistent. The comment was updated in 1990, 1991, 1992, 1999, 2004, 2005, 2010, 2011, 2015, 2018 and 2019.

This instruction was cited by the court in Koltka v. PPG Industries, Inc., 130 Wis.2d 499, 519, 338 N.W.2d 160 (1986).

Loss of society and companionship does not create a new cause of action but only another element of damages. Herro v. Steidl, 255 Wis. 65, 37 N.W.2d 874 (1949); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944); Papke v. American Auto Ins. Co., 248 Wis. 347, 21 N.W.2d 724 (1946). For eligibility of claimants for this element of damages, see Cincoski v. Rogers, 4 Wis.2d 423, 90 N.W.2d 784 (1958).

The last paragraph of the instruction is mandated by Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

Statute. See Wis. Stat. § 895.03 and 895.04.

Damage Caps. The maximum recovery was increased in 1998 to $350,000 in the case of a deceased adult and $500,000 for a deceased minor. Wis. Stat. § 895.04(4).

Wrongful Deaths Outside of Wisconsin. In 2014, the Wisconsin Supreme Court considered a case involving a fatal snowmobile accident in Michigan, killing a Wisconsin resident. The surviving spouse brought a wrongful death action in Wisconsin. The circuit court determined that the wrongful death damage limitations in § 895.04 applied to the spouse's claim. The court of appeals disagreed. The Wisconsin Supreme Court affirmed. It said that the limitations on wrongful death claims in § 895.04 refer to wrongful death claims created by Wis. Stat. § 895.03. It ruled that § 895.04 cannot be applied separately from Wis. Stat. § 895.03. The court further held that because § 895.03 does not apply to deaths in another state, there is no conflict between Wisconsin law and Michigan's wrongful death statute and Michigan's limitation, higher than Wisconsin's damage limit, applies. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 895.04(4) (2011 Wisconsin Act 2).

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - -

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not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Surviving Domestic Partners. Currently, there are two instructions covering a surviving spouse's claim for wrongful death. Wis JI-Civil 1861 instructs on recovery of pecuniary loss and Wis JI-Civil 1870 applies to recovery of damages for loss of society and companionship.

As part of the State Budget Bill, a domestic partnership was recognized. The Budget Bill's provisions extended certain legal rights to domestic partners, including the right to recover damages for wrongful death of a deceased partner. Wis. Stat. 895.04(2) was amended as follows:

> **SECTION 3269**. 895.04(2) and (6) of the statutes are amended to read:
>
> 895.04**(2)** If the deceased leaves surviving a spouse **or domestic partner under ch. 770, and domestic partner under s. 770.05,** and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse **or surviving domestic partner,** and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse **or domestic partner** of the deceased; if no spouse **or domestic partner** survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse **or a nonresident alien domestic partner under ch. 770** and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's **or surviving domestic partner's** interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18

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> years of age shall be void unless approved by a court of record authorized to act hereunder.

The legislation added "a surviving domestic partner" to § 895.04(6), but the legislation did not add "a surviving domestic partner" to § 895.04(4) which reads:

> **(4)** Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the **spouse, children or parents of the deceased, or to the siblings** of the deceased, if the siblings were minors at the time of the death. (Emphasis added)

Thus, while a domestic partner may recover for "pecuniary injury" from wrongful death, he or she does not apparently have the right to recover for loss of society and companionship under the second sentence. The committee revised Wis JI-Civil 1861 (pecuniary loss) to include domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), to include a domestic partner.

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1875 DEATH OF SPOUSE: MEDICAL, HOSPITAL, AND FUNERAL EXPENSES

Subdivision ___ of question ___ asks what sum of money will fairly and reasonably compensate (plaintiff) for the medical and hospital expenses (plaintiff) necessarily incurred in the care and treatment of (his wife) (her husband) for the injuries sustained as a result of this accident and for the reasonable and necessary expenses incurred for (her) (his) burial.

COMMENT

This instruction and comment were originally published in 1966. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. § 895.04(5).

The instruction is applicable to both spouses.

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1880 DEATH OF PARENT: PECUNIARY LOSS

Subdivision __ of question __ asks what sum of money would fairly compensate the children of (name of deceased) for the pecuniary loss suffered by them as a result of the death of their (father) (mother).

In answering this subdivision of question __, you will insert as your answer such sum of money representing the pecuniary loss, if any, as you may find has been sustained by the plaintiff children by reason of the (father)'s (mother)'s death resulting from the injuries received in the accident.

The term "pecuniary loss" means the same as financial loss, and in answering this question and assessing damages to the plaintiff children, you are to restrict it to that meaning. You are not to include anything in your answer to the subdivision of question ___ on account of any grief or injury to feelings or like suffering on the part of the plaintiff children, nor should the fact that the (father)'s (mother)'s death may have hastened the period when the children came into possession of the (father)'s (mother)'s estate be considered by you in arriving at your answer to this subdivision.

In arriving at your answer to this subdivision, you will consider the number of years the (father) (mother) would probably have lived had it not been for the injury sustained as a result of the accident; the reasonable expectation of the amount of (his) (her) estate and property being increased, and the reasonable expectation which the plaintiff children had of pecuniary advantage by ultimately receiving a share of such earnings as one of (his) (her) next of kin; the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support, or otherwise, had the deceased continued to live without such injury.

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[In considering the pecuniary loss, if any, sustained by a minor child or children upon the death of a parent, you may consider the care and nurture and the intellectual, moral, and physical training which the parent would have given the child or children except for such parent's death, such as when obtained from others, must be for financial compensation.]

You may properly consider the state of health of the (father) (mother) at and before the time of (his) (her) death, (his) (her) habits of industry, and (his) (her) ability to work and save and accumulate property.

[While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.]

COMMENT

The instruction and comment were originally published in 1965 and revised in 2000. The comment was also updated in 1980, 1982, 1990, and 2016.

In 1975, Wis. Stat. § 895.04(4) was amended to broaden the right to recover pecuniary losses in wrongful death actions. Prior to this amendment, the right to pecuniary recovery for wrongful death was restricted to the spouse, the unemancipated or dependent children, or the parents of the deceased. Harris v. Kelley, 70 Wis.2d 242, 255, 234 N.W.2d 628 (1975); Rabe v. Outagamie County, 72 Wis.2d 492, 502, 241 N.W.2d 428 (1976). As explained in Rabe, the effect of the amendment is to permit awards of pecuniary losses to any person entitled to bring an action for wrongful death. The amendment, thus, allows such persons as nondependent and emancipated children as well as other relatives of the deceased to also recover pecuniary losses. For example, in Rabe, the court stated that, based on the legislative change, the sister of the deceased was allowed to seek recovery for pecuniary losses. Although the amendment broadened the right to pecuniary recovery, Wis. Stat. § 895.04(4) still restricts recovery for loss of society and companionship to the spouse, unemancipated or dependent children, or parents of the deceased.

If the plaintiff is an adult, the second from the last paragraph of the instruction should be deleted.

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This instruction was cited with approval in Boles v. Milwaukee County, 150 Wis.2d 801, 817, 443 N.W.2d 679 (Ct. App. 1989).

In regard to hastening the child's possession of the parent's estate, see Kaesler, Adm'r v. Milwaukee Elec. Ry. & Light Co., 195 Wis. 108, 113, 217 N.W. 687, 689 (1928); Stahler v. Philadelphia & R.R., 199 Pa. 383, 386, 49 Atl. 273, 274 (1901); 5 Sutherland, Damages § 1267 (4th ed. 1916).

In support of the fourth paragraph of the instruction, see Tuteur, Adm'r v. Chicago & N. W. Ry., 77 Wis. 505, 507-08, 46 N.W. 897, 898 (1880).

As to present worth of future payments and finding proper discount rate, see Miller v. Tainter, 252 Wis. 266, 31 N.W.2d 531 (1948). See also Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984).

A posthumous illegitimate child may not maintain an action for the death of his putative father under wrongful death statutes where the paternity has not been established either by admissions in writing or in court or in accordance with Wis. Stat. § 852.05(1). Robinson v. Kolstad, 84 Wis.2d 579, 267 N.W.2d 886 (1976).

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

Collateral Source Payments. See commentary to Wis JI-Civil 1757.

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1885 DEATH OF ADULT CHILD: PECUNIARY LOSS

In answering subdivision ___ of question ___, you will insert as your answer the sum of money representing the pecuniary loss, if any, you find has been sustained by the parents, _____, as a result of the death of their adult (son) (daughter) from injuries received in the accident.

By the term "pecuniary loss" is meant financial loss. In answering this subdivision, you must restrict your answer to a fair and reasonable compensation for any such loss. You must not consider or include anything on account of grief or other mental suffering of _____, the parents of _____.

The deceased (son) (daughter) in this case was over 18 years of age at the time of (his) (her) death and under the law a parent may not claim the services of such an adult child as a matter of right. When a child attains 18 years of age, (he) (she) is entitled to retain all of the money earned as the result of (his) (her) services and (he) (she) is not required to turn over the money to (his) (her) parents upon demand of the parents.

In arriving at your answer to this subdivision, you should consider the amount of money and the pecuniary value of services, if any, the deceased child contributed to (his) (her) parents after (he) (she) became of age and before (his) (her) death; [that (he) (she) was single at the time this money was contributed, and the likelihood of continued contributions in the event of (his) (her) marriage and acquiring a family of (his) (her) own;] the length of time the parents may reasonably expect financial aid from (him) (her). If you are satisfied that by reason of the age and physical health of the parents their life expectancy is limited to such a degree that they could not reasonably expect financial assistance for many years, you will make allowances for that fact.

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not

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required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were originally published in 1960 and revised in 2000. The comment was updated in 1980 and 2000.

Bump v. Voights, 212 Wis. 256, 261-62, 249 N.W. 508, 510 (1933); Prange v. Rognstad, 205 Wis. 62, 65-67, 236 N.W. 650, 650-52 (1931).

The fifth paragraph of this instruction was approved in Sandeen v. Willow River Power Co., 214 Wis. 166, 185, 252 N.W. 706, 713 (1934).

In Wisconsin, separate rules govern the recovery of premajority and postmajority pecuniary loss to a parent. Peot v. Ferraro, 83 Wis.2d 727, 733, 266 N.W.2d 586 (1978); Keithley v. Keithley, 95 Wis.2d 136, 279 N.W.2d 503 (1980).

There is no presumption in favor of parents receiving pecuniary benefits from their children after the children reach majority. Nordahl v. Peterson, 68 Wis.2d 538, 553, 229 N.W.2d 682 (1975). There must be some evidence justifying an inference that the parents would have received pecuniary benefits after the attainment of the child's majority if the death had not occurred. Peot v. Ferraro, supra at 734.

Wis JI-Civil 1890, Death of Minor Child: Premajority Pecuniary Loss, also includes a portion relating to postmajority pecuniary injury. See Peot, supra at 736.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1890 DAMAGES: DEATH OF MINOR CHILD: PREMAJORITY PECUNIARY LOSS

(Plaintiffs), as parents of (child), claim loss of wages and services they would have received from (child) during (child)'s minority had (he) (she) continued to live.

Although parents are responsible for the cost of providing for the care and maintenance of their child until the child reaches age 18, they are entitled to the value of the wages and services that their child was reasonably capable of (earning) (providing to the parents) until (he) (she) reached age 18. If you find that the value of these wages or services would have exceeded the costs (parents) would have incurred in raising (child) to age 18, you should insert the difference in answer to question __.

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were approved in 1978 and revised in 1997 and 2000.

Wis. Stat. § 895.04(4).

Premajority pecuniary loss is measured by the value of the wrongfully killed minor child's probable wages and services to the time of majority less the costs the parents probably would have incurred in raising the child to age 18. Prunty v. Schwantes, 40 Wis.2d 418, 426, 162 N.W.2d 34 (1968). The fact that the parents allowed or would have allowed the child to keep his or her earnings does not prevent the parents having the value of such wages and services considered and included in determining whether the wages and services of the child during his or her minority have a probable value exceeding the probable expenses the parents would have incurred for the reasonable care, maintenance, and necessities during the child's minority. Luessen v. Oshkosh Elec. Light & Power Co., 109 Wis. 94, 85 N.W. 124 (1901); Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

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Peot holds that, with respect to premajority pecuniary loss, the fact that the child would or would not have turned over his wages to the parents or would or would not have performed services is irrelevant. However, if both premajority and postmajority pecuniary loss is claimed arising out of the death of a child, evidence relating to what contributions were made during minority is relevant on the postmajority pecuniary loss claim.

It may be necessary under some circumstances where both premajority and postpecuniary loss is claimed to instruct the jury that they are not to consider in arriving at the answer to the premajority pecuniary loss question whether the deceased child was allowed to keep his or her wages or was not required to contribute his services (since neither event prevents the parents from having the value of the wages and services considered and included in determining whether the wages and services of the child before age 18 would have a probable value exceeding the probable expenses the parents would have incurred to raise the child to age 18), but that such evidence is relevant and can be considered by the jury with respect to the answer to the question concerning postmajority pecuniary loss.

For burden of proof, see Wis JI-Civil 202. Wis JI-Civil 1892 covers damages for postmajority pecuniary loss due to death of child. Wis JI-Civil 1796 covers the computation of the present value of future losses.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Pecuniary injury for the wrongful death of a minor cannot be precisely established. See Peot v. Ferraro, supra.

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1892 DAMAGES: DEATH OF MINOR CHILD: POSTMAJORITY PECUNIARY LOSS

(Plaintiffs), as parents of (child), claim loss of pecuniary benefits they would have received from (child) after (child) reached age 18 had (he) (she) continued to live. If you determine that (parents) would have received pecuniary benefits from (child) after (he) (she) reached age 18, you should insert the amount in answer to question __.

(Pecuniary benefits means gifts, assistance, and support that can be valued in money.)

In determining whether (parents) would have received pecuniary benefits, you should consider (parent)s' age, health, employment and earnings, and the degree to which they were dependent upon (child). You should also consider the (child)'s age, health, employment, earnings, amounts contributed in the past, if any, and the relationship between (child) and (parents).

(Give Wis JI-Civil 1796 on computation of present value.)

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were approved in 1979 and revised in 1997 and 2000.

Postmajority pecuniary loss is measured by the value of the benefits which the parents might reasonably have expected to receive from the child after he or she reached his or her majority at age 18. There must be some evidence justifying an inference that the parents would have received pecuniary benefits from the child after he or she reached majority if death had not occurred. McGonegle v. Wisconsin Gas & Elec. Co., 178 Wis. 594, 190 N.W. 471 (1922).

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Wis JI-Civil 1890 covers damages for premajority pecuniary loss; Wis JI-Civil 1796 covers computation of the present value of future losses.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1895 DEATH OF CHILD: PARENT'S LOSS OF SOCIETY AND COMPANIONSHIP

Question __ asks you to determine [(the parent)s'] [(parent)'s] loss of society and companionship resulting from the death of (child).

Society and companionship includes the love, affection, care, and protection the (parents) (parent) would have received from (their) (his) (her) child had (he) (she) continued to live. It does not include the loss of monetary support from the child or the grief and mental suffering caused by the child's death.

In determining [(parent)s'] [(parent)'s] loss of society and companionship, you should consider the age of the deceased child and the ages of the (parents) (parent); the past relationship between the child and the (parents) (parent); the love, affection, and conduct of each toward the other; the society and companionship that had been given to the (parents) (parent) by the child; and the personality, disposition, and character of the child. The amount inserted by you should reasonably compensate the (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) sustained since the death of (child) and the amount you are reasonably certain (they) (he) (she) will sustain in the future.

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a child's society and companionship, this dollar limit is not a measure of damage; it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) suffered.

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COMMENT

The instruction was approved in 1978 and revised in 1988, 1997, 1999, and 2000. The comment was updated in 2004, 2005, 2012, 2015, 2018, and 2019.

This instruction is by analogy from Cameron v. Union Auto Ins. Co., 210 Wis. 659, 666-67, 246 N.W. 420, 423 (1933), which involved a husband-wife relationship. In Potter v. Potter, 224 Wis. 251, 259, 272 N.W. 34, 37 (1937), the court's remarks with regard to a husband's loss of society and companionship also give some collateral support to the elements in the instruction.

The fourth paragraph follows the opinion in Peot v. Ferraro, 83 Wis.2d 727, 746, 266 N.W.2d 586 (1978): ". . . recovery is limited . . .; the statutory figure is not a measure of damage, but only a limit above which the jury cannot go. . . ."

Separate Inquiries for Parents' Claims. Where the parents are separated or divorced, it may be advisable to submit separate questions for each parent. Alternatively, the parents can stipulate at the beginning that they will split equally an award of loss of society and companionship.

Damage Cap. Wis. Stat. § 895.04(4). The limit for loss of society and companionship was raised from $150,000 to $350,000 for a deceased adult or $500,000 for a deceased minor by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. If the death of the child occurred before the effective date, the amount should be changed to $150,000.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Damage Cap Where Death Occurs in Another State. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324 and comment to Wis JI-Civil 1870.

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1897 DEATH OF PARENT: CHILD'S LOSS OF SOCIETY AND COMPANIONSHIP

Question ___ asks you to determine (child)'s loss of society and companionship resulting from the death of (parent).

Society and companionship includes the love, affection, care, protection, and guidance a child would have received from (his) (her) parent had (he) (she) continued to live. It does not include the loss of monetary support or the grief and mental suffering caused by the parent's death.

In determining (child)'s loss of society and companionship, you should consider the age of the deceased parent and the age of the child; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the child by the parent; the personality, disposition, and character of both the child and the parent. The amount inserted by you should reasonably compensate (child) for the loss of society and companionship (he) (she) has sustained since the death of (parent) and the amount (he) (she) will sustain in the future.

If you find that (child) will sustain a loss of the (parent)'s society and companionship in the future, you should include in your award such sum as will fairly and reasonably compensate (child) for the future loss [**Note**: In medical negligence cases, add the following: but only until (child) reaches (his) (her) 18th birthday; see note in Comment].

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a parent's society and companionship, this dollar limit is not a measure of damage. It is a limit on recovery. Therefore, you should determine the amount

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that you believe will reasonably compensate (child) for any loss of society and companionship (he) (she) has sustained.

COMMENT

This instruction and comment were approved by the Committee in 2000 and revised in 2001. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 2004, 2005, 2009, 2011, 2012, 2015, 2016, 2018 and 2019.

Damage Cap. The limit for loss of society and companionship was raised from $150,000 to $350,000 (for a deceased adult) and $500,000 (for a deceased minor) by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a parent in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 895.04(4) (2011 Wisconsin Act 2). The fifth paragraph follows the opinion in Peot v. Ferraro, 83 Wis.2d 727, 746, 266 N.W.2d 586 (1978): ". . . recovery is limited . . .; the statutory figure is not a measure of damage, but only a limit above which the jury cannot go. . . ." See also Guzman v. St. Francis Hospital, Inc., 2001 WI App 21, 240 Wis.2d 559, 623 N.W.2d 776.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice

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actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Post Majority Recovery. If the parent dies as a result of a cause unrelated to medical negligence, then Wis. Stat. § 895.04 allows recovery of loss of society and companionship by an adult child. See Pierce v. American Family Ins. Co., 2007 WI App 152, 303 Wis.2d 726, 736 N.W.2d 247. Conversely, if the cause of death is medical negligence, then a child may recover damages for loss of society and companionship but only until the child reaches his or her 18th birthday. In Czapinski v. St. Francis Hosp., 2000 WI 80, 236 Wis.2d 316, 613 N.W.2d 120, the deceased's adult children sought damages for the loss of their mother's society and companionship following her death during hip replacement surgery. The trial judge held that under Wis. Stat. § 893.55(4)(f), adult children lack standing to recover for the wrongful death of a parent caused by medical malpractice. The supreme court agreed. The supreme court said the classification of claimants entitled to bring a wrongful death suit for medical negligence is limited to those enumerated in Wis. Stat. § 655.007. It held that § 893.55(4)(f) which limits damages in medical malpractice cases does not expand the classification of claimants under § 655.007, entitled to recover for loss of society and companionship in the wrongful death of a parent caused by medical malpractice to include adult children. The court noted that § 895.04(2) includes adult children in the class of claimants that may recover damages for wrongful death.

In 2012, the Court of Appeals held that Wis. Stat. § 895.04 bars a decedent's adult child from recovering damages for loss of society and companionship if the wrongful death claim belongs to the surviving spouse. Bowen v. American Family Ins. Co., 2012 WI App 29, 340 Wis.2d 232, 811 N.W.2d 887.

If pecuniary loss for wrongful death is limited by a statute in effect at time of accident, the last paragraph should be tailored to advise the jury of the dollar limit on recovery for pecuniary loss, also.

Damage Cap Where Death Occurs in Another State. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324 and comment to Wis JI-Civil 1870.

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1900.2 SAFE-PLACE STATUTE: DUTY OF EMPLOYER

The immediate employer of (plaintiff) has a duty under the safe-place law to provide safe employment for (his) (her) employees.

Safe employment is broader in scope than a safe place of employment and may require something more than a safe place to work in the physical sense. It includes a safe place to work, but if the work situation is such, it may also require adequate training in the use of equipment, warnings, signals, or devices to advise employees of, and guard against, hazards of which they may not otherwise be apprised.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 1986. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

To be used in those cases where the evidence requires a question inquiring of the negligence of the employer. Connar v. West Shore Equip. of Milwaukee, Inc., 68 Wis.2d 42, 227 N.W.2d 660 (1975); Heldt v. Nicholson Mfg. Co., 72 Wis.2d 110, 240 N.W.2d 154 (1976); Miller v. Paine Lumber Co., 202 Wis. 77, 90, 91, 227 N.W. 933 (1930). Mulder v. Acme-Cleveland Corp., 95 Wis.2d 173, 290 N.W.2d 276 (1980).

This instruction would arise in a third-party action.

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1900.4 SAFE PLACE STATUTE: INJURY TO FREQUENTER: NEGLIGENCE OF EMPLOYER OR OWNER OF A PLACE OF EMPLOYMENT

(Give Wis JI-Civil 1005.)

Question 1 asks: Was (defendant) negligent in failing to (construct) (repair) (maintain) the premises as safe as the nature of its business would reasonably permit.

The Wisconsin Legislature enacted a law which is known as the Safe-Place Statute, which applies to this case. That law imposes a duty upon (defendant) in this case to (construct) (repair) (maintain) the premises upon which (plaintiff) was injured so as to make them safe. The law requires (defendant) to (furnish and use safety devices and safeguards) (adopt and use methods and processes) reasonably adequate to render the place of employment safe. Violation of this law is negligence.

The term "safe" or "safety," as used in this law, does not mean absolute safety. The term "safe" or "safety," as applied to the premises in this case, means such freedom from danger to the life, health, safety, or welfare of (plaintiff) as the nature of the premises will reasonably permit.

(Defendant) was not required to guarantee (plaintiff)'s safety but rather was required to (construct) (repair) (maintain) the premises as safe as the nature of the place would reasonably permit.

In determining whether (defendant)'s premises were as free from danger as its nature would permit, you will consider the adequacy of the (construction) (repair) (maintenance) of the premises, bearing in mind the nature of the business and the manner in which the business is customarily conducted.

[**Note**: The following paragraph should not be given where the defect is a structural defect: To find that (defendant) failed to (construct) (repair) (maintain) the

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premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

COMMENT

The instruction and comment were approved by the Committee in 1974. The instruction was revised in 1986, 1992, 1995, 1996, 1998, and 2003. This instruction was renumbered in 1976 from Wis JI-Civil 1900. The comment was updated in 1990, 1993, 1995, 1998, 2001, 2003, 2004, 2006, 2014, and 2020. The instruction was revised in 2003 to specifically refer to the statutory requirements. The 2020 revision updated case law citations.

See Petoskey v. Schmidt, 21 Wis.2d 323, 124 N.W.2d 1 (1963); For the form of the question, see Petoskey, supra; Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 101 N.W.2d 645 (1960).

The safe-place statute imposes a higher standard of care than ordinary negligence at common law, Krause, supra; Saxhaug v. Forsyth Leather Co., 252 Wis. 376, 31 N.W.2d 589 (1948); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 26, 284 N.W.2d 692 (1979); Topp v. Continental Ins. Co., 83 Wis.2d 780, 266 N.W.2d 397 (1978). Although the safe-place statute establishes a higher standard, failure of a safe place claim does not necessarily preclude a common law negligence claim arising out of the same condition. A safe-place statute addresses the condition of the premises while the common law claim looks at negligent acts. Megal v. Green Bay Area Visitor & Convention Bureau, et al., 2004 WI 98, Case No. 02-2932.

The giving of common-law negligence instruction followed by the safe-place instruction was approved in Carr v. Amusement, Inc., 47 Wis.2d 368, 375, 177 N.W.2d 388 (1970).

Although the statute creates a presumption that an injury was caused by a violation of the statute, the presumption does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's, Brons v. Bischoff, 89 Wis.2d 80, 88, 277 N.W.2d 854 (1979); Fondell v. Lucky Stores, supra; Imnus v. Wisconsin Public Ser. Corp., 260 Wis. 433, 51 N.W.2d 42 (1952).

In reading Wis. Stat. § 101.11, it is suggested that parts dealing solely with employment be omitted, as well as other portions inappropriate under the facts of the case. A community-based residential facility, as defined in Wis. Stat. § 50.01(1), is a place of employment. Wis. Stat. § 101.11(3).

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This instruction applies to an injury to a frequenter. For the definition of "frequenter," see Wis. Stat. § 101.01(2)(e) and JI-Civil 1901. Independent contractor employee as frequenter – McNally v. Goodenough, 5 Wis.2d 293, 300, 92 N.W.2d 890 (1958); Dykstra, supra; Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975); Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The definition of "safe" and "safety" is from Wis. Stat. § 101.01(2)(g).

Nature of Business. Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 446, 253 N.W. 579 (1934). Free from danger – Olson v. Whitney Bros. Co., 160 Wis. 606, 612-13, 150 N.W. 959 (1915); Dykstra v. Arthur G. McKee & Co., supra; Topp v. Continental Ins. Co., supra at 788; Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978). An Elks Club was held to be a "place of employment" in Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The defendant is not a guarantor of a frequenter's safety. Hipke v. Industrial Comm'n, 261 Wis. 226, 52 N.W.2d 401 (1952).

A business is not an insurer of a frequenter's safety. Zehren v. F. W. Woolworth Co., supra; Dykstra, supra; Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 166, 271 N.W.2d 867 (1978); May v. Skelly Oil Co., 83 Wis.2d 30, 36, 264 N.W.2d 574 (1978).

Safety is a relative, not an absolute, term. Sykes v. Bensinger Recreation Corp., 117 F.2d 964, 967 (7th Cir. 1941); Heckel v. Standard Gateway Theater, 229 Wis. 80, 281 N.W. 640 (1938); May v. Skelly, supra.

The statutory duty is to make the place as safe as the nature and place of employment will reasonably permit. Mullen v. Larson-Morgan Co., 212 Wis. 52, 249 N.W. 67 (1933); Saxhaug v. Forsyth Leather Co., supra. This duty is not a lesser standard than that imposed by the common law, Balas v. St. Sebastian's Congregation, 66 Wis.2d 421, 425, 225 N.W.2d 428 (1975).

A place is safe if it is as free from danger as the nature of the employment will reasonably permit when used in a customary or usual manner for the work intended or in such a manner as an ordinarily prudent and careful person might anticipate it might be used. Olson v. Whitney Bros. Co., supra; Topp v. Continental, supra.

The words "construction" or "constructing" should be used when, on the facts, faulty construction is involved.

Notice. Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708 (1959). There is no requirement of notice where the condition was created by the party sought to be charged. Merriman v. Cash-Way, Inc., 35 Wis.2d 112, 150 N.W.2d 472 (1967); Kosnar v. J. C. Penney Co., 6 Wis.2d 238, 242, 277, 132 N.W.2d 595 (1965).) Or where the alleged defect is a structural defect Hannebaum v. DiRenzo & Bomier, 162 Wis.2d 488, 469 N.W.2d 900 (Ct. App. 1991); see also Fitzgerald v. Badger State Mut. Casualty Co., 67 Wis.2d 321, 227 N.W.2d 444 (1975). Also, if the defendant claims that no defective condition existed, then proof of notice is not necessary. Petoskey v. Schmidt, supra.

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The employer must have notice of the defect except where the alleged defect is a structural defect, Fitzgerald, supra. Krause v. V. F. W. Post 6498, supra; Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930). As to the length of time of notice required, see Bergevin v. Chippewa Falls, 82 Wis. 505, 52 N.W. 588 (1892); Topp v. Continental Ins. Co., supra at 780; Fitzgerald v. Badger State Mut. Casualty Co., supra at 326; Dykstra, supra; May v. Skelly Oil Co., supra at 36.

Defect Versus Unsafe Condition. This instruction provides that a property owner is liable for injuries caused by a structural defect regardless of whether the owner knew or should have known that the defect existed. However, where the property condition that causes the injury is an unsafe condition associated with the structure, the owner is liable only if it had actual or constructive notice of the condition. This instruction contains an optional paragraph to be used in cases involving a structural defect. This paragraph reads:

> [**Note**: The following paragraph should not be given where the defect is a structural defect. To find that (defendant) failed to (construct) (repair) or (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

A decision of the supreme court discussed whether a loose stairway nosing that caused the plaintiff to fall down stairs was a "structural defect" or an "unsafe condition associated with the structure." The trial judge found that the loose nosing was a structural defect and, therefore, did not instruct the jury on notice. The court said that the classification of the loose nosing was a question of law. Barry v. Employers Mut. Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517. The court concluded that the nosing was an "unsafe condition." Thus, the court said the plaintiff was required to prove the defendant property owner had notice of the condition. Because the jury was not instructed on the notice issue, the court said the case was not fully tried and remanded the case. For a discussion of defect versus unsafe condition, see Mair v. Trollhaugen Ski Resort, 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598.

Constructive Notice. An owner or employer is deemed to have constructive notice when that defect or condition has existed a long enough time for a reasonably diligent owner to discover and repair it. May v. Skelley Oil Co., 83 Wis.2d 30, 36 (1978); Strack v. Great Atlantic & Pacific Tea Co., 35 Wis.2d 51, 55 (1967). Constructive notice requires evidence as to the length of time that the condition existed. Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 59 (Ct. App., 1994). Length of time required for constructive notice depends on the surrounding facts and circumstances, including the nature of the business and the nature of the defect. May, 83 Wis.2d at 37. The need for "length of time" evidence (and therefore any constructive notice) is obviated where harm from the method of merchandising is reasonably foreseeable. See Strack, 35 Wis.2d at 55.

Duty to Inspect. Wisconsin Bridge and Iron Co. v. Industrial Comm'n, 8 Wis.2d 612, 618, 99 N.W.2d 817 (1959). There is no duty to inspect and warn unless it is shown that the premises were not in a reasonably safe condition. Balas v. St. Sebastian's, supra.

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Acts of Operation Versus an Unsafe Condition. In Stefanovich v. Iowa Nat'l Mut. Ins. Co., supra at 166, the court stated that liability under the safe-place statute is based on unsafe conditions, not unsafe acts. See also Korenak v. Curative Workshop Adult Rehabilitation Center, 71 Wis.2d 77, 84, 237 N.W.2d 43 (1976). Similarly, the court in Leitner v. Milwaukee County, 94 Wis.2d 186, 195, 287 N.W.2d 803 (1980), concluded that injuries to a frequenter caused by unsafe conditions of an employer's premises are covered by the safe-place statute, while injuries caused by negligent, inadvertent, or even intentional acts committed therein are not. See also Viola v. Wisconsin Electric Power Co., 2014 WI App 5, 352 Wis.2d 541, 842 N.W.2d 515.

Recreational Use Immunity. If a private property owner is immune from liability under Wis. Stat. § 895.52(2), the owner is not subject to liability under the safe-place statute. However, if the recreational use immunity of § 895.52(2) is negated by Wis. Stat. § 895.52(6) (because the owner collects over $500 in payments), then the safe-place statute may apply to premises used for recreational purposes. Douglas v. Dewey, 154 Wis.2d 451, 453 N.W.2d 500 (Ct. App. 1990).

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1901 SAFE-PLACE STATUTE: DEFINITION OF FREQUENTER

The term "frequenter" means and includes every person except a trespasser who may go in or be in (a place of employment or a public building).

One who goes upon premises owned, occupied, or possessed by another without an invitation, express or implied, extended by the owner, occupant, or possessor, and solely for his or her pleasure, advantage, or purpose is a trespasser and not a frequenter.

The term "express invitation" means a specific invitation to come upon premises. An "implied invitation" is one which may be reasonably assumed from the circumstances which have caused a person to be on the premises of another.

[1. When the (owner) or (possessor) of premises has ordered a contractor to do work upon the premises, it is implied that the employees of the contractor have the invitation and consent of the (owner) or (possessor) to come upon the premises and do the work which has been ordered.]

[2. When a retail merchant, theater proprietor, etc., solicits the patronage of the public in the conduct of business, the invitation could be both express and implied.]

[3. Under some circumstances, an invitee, either express or implied, may be a frequenter of one part of the (owner)'s or (possessor)'s premises and a trespasser in another part to which (he) (she) has not been invited (behind the meat counter, in the boiler room, etc.).]

COMMENT

The instruction and comment were originally published in 1969. The instruction was revised in 1986. The comment was updated in 1980 and 1996. Editorial changes were made in 1992 to address gender references in the instruction.

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Wis. Stat. § 101.01(2)(e). Barthel v. Wisconsin Elec. Power Co., 69 Wis.2d 446, 230 N.W.2d 863 (1975).

Definition of "trespasser": Restatement, Second, Torts § 329 (1965); Antoniewicz v. Reszczynski, 70 Wis.2d 836, 843, 236 N.W.2d 1 (1975); Lloyd v. S. S. Kresge Co., 85 Wis.2d 296, 270 N.W.2d 423 (1978).

Trespasser in portion of building to which a person has not been invited, McNally v. Goodenough, 5 Wis.2d 293, 92 N.W.2d 890 (1958).

Implied invitation, Mustas v. Inland Constr. Inc., 19 Wis.2d 194, 121 N.W.2d 274 (1963); Reddington v. Beefeaters Tables, Inc., 72 Wis.2d 119, 123, 240 N.W.2d 363 (1976).

Wis JI-Civil 1901 is offered to meet a situation where it is an issue of fact whether the plaintiff is a frequenter or trespasser. The instruction is to be used when the verdict inquires whether plaintiff was a frequenter.

The provision of Wis. Stat. § 101.01(2)(d) which says: "Frequenter means every person other than an employee, who may go in or be in a place of employment or a public building" (emphasis added) does not exclude a frequenter from protection by the safe-place statute when on an entranceway to a retail store. Callan v. Peters Constr. Co., 94 Wis.2d 225, 242, 288 N.W.2d 146 (Ct. App. 1979).

An employee of an independent contractor doing work on the premises is a "frequenter working in a place of employment." Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The distinction in Wisconsin between invitees and licensees has been abolished. Clark v. Corby, 75 Wis.2d 292, 296-97, 249 N.W.2d 567 (1977).

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1902 SAFE-PLACE STATUTE: NEGLIGENCE OF PLAINTIFF FREQUENTER

(Plaintiff) had a duty to use ordinary care for (his) (her) own safety and protection and to observe the immediate surroundings and all other conditions surrounding (him) (her), and the dangers, if any, which were open and obvious to (him) (her), and to use for (his) (her) safety all such care and caution as the ordinarily prudent person ordinarily uses under like circumstances.

[However, (plaintiff) is not bound absolutely by law to see every hazard or danger, if any exists, in (his) (her) pathway, even should they be plainly observable, nor to remember the existence of every condition of which (he) (her) had knowledge. (Plaintiff) is only required to act as a reasonably prudent person under the same circumstances would act.]

[Ordinary care demands that such vigilance be increased where special circumstances exist. The degree of diligence with respect to keeping a proper lookout on the part of a (customer of a store) – such as (plaintiff) was – in order to measure up to the standard of ordinary care which the law requires varies with the time and place and the conditions which might normally be brought about by weather or traffic into a _____ (mercantile establishment), and the opportunity to observe things ahead of and about (him) (her), and all other circumstances then and there present.]

COMMENT

The instruction and comment were initially approved by the Committee in 1975. The instruction was revised in 1986. The comment was updated in 2003.

Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934).

Comparative negligence is applicable to violations of the safe place statute. Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545.

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In Hofflander v. St. Catherine's Hospital, supra, the court held that the Safe Place Statute "does not apply to unsafe conditions caused by an injured party's own negligence or recklessness . . ." It also said if a "structure's alleged disrepair requires reckless or negligent conduct by the plaintiff to achieve injury to herself, then the initial disrepair may not be construed as having caused the injury."

For lesser duty of plaintiff workman, see Wis JI-Civil 1051. The cases in the comment to Wis JI-Civil 1051 are of interest also in connection with the above.

The second paragraph is to be added in instances such as the following: plaintiff did not see the platform of weighing scale in the walk space, Zehren v. F. W. Woolworth Co., 11 Wis.2d 539, 542, 105 N.W.2d 563 (1960); plaintiff did not see that the pipes were joined by wire instead of bolts, Vogelsburg v. Mason, et al., 250 Wis. 242, 245, 26 N.W.2d 678 (1947); plaintiff tripped on the step close to the bottom of the door, Hommel v. Badger State Inv. Co., 166 Wis. 235, 249, 165 N.W. 20 (1917).

In connection with the second paragraph, note the following, from Steinhorst v. H. C. Prange Co., 48 Wis.2d 679, 680, 180 N.W.2d 525 (1970): "A customer in a retail store is not bound as a matter of law to see every defect or danger in his pathway, especially where the display of merchandise was so arranged and intended to catch the customer's attention and divert her from watching the floor." See also Carlson v. Drews of Hales Corners, Inc., 48 Wis.2d 408, 180 N.W.2d 546 (1970).

The language of the third paragraph is from Mondl v. F. W. Woolworth Co., 12 Wis.2d 571, 107 N.W.2d 472 (1961). This paragraph is to be used in situations where special conditions actually exist.

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1904 SAFE-PLACE STATUTE: PUBLIC BUILDINGS: NEGLIGENCE OF OWNER

Give Wis JI-Civil 1005.

In addition, the defendant has the duty to comply with the provisions of the statutes of Wisconsin which define a "public building" as any structure used by the public or by three or more tenants and require that every owner of a public building shall so construct, repair, or maintain such public building as to render the same safe. The term "public building" means and includes any structure, including exterior parts of such building, such as a porch, exterior platform, or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or used by the public or by three or more tenants.

(The defendant's building located at _____ Street, at the time in question, was a public building under the provisions of the law just referred to.)

Another section of the Wisconsin statutes provides that the term "safe" or "safety" as applied to a public building means such freedom from danger to the life, health, safety, or welfare of the public as the public building will reasonably permit.

[Here give the last three paragraphs of Wis JI-Civil 1900.4.]

COMMENT

The instruction and comment were originally published in 1965. The instruction was revised in 1986. The comment was reviewed without change in 1990.

Wis. Stat. §§ 101.01(2)(g) and (h) and 101.11(1). The last statute has not been quoted in full. The wording of the statutes should be used to conform with the facts of the case. Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 552, 101 N.W.2d 645, 648 (1960).

The third paragraph (in parentheses) is not to be used unless the building can be held to be a public building as a matter of law. In Knapke v. Grain Dealer Mut. Ins. Co., 54 Wis.2d 525, 527, 197 N.W.2d 737 (1972), a barn was held to be a public building as a matter of law.

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When a safe-place violation has been proved, the law presumes the damage was caused by the failure to perform the safe-place duty. Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978).

As to unsafe conditions, see Leitner v. Milwaukee County, 94 Wis.2d 186, 194, 287 N.W.2d 803 (1980); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 284 N.W.2d 692 (1979); Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 171, 271 N.W.2d 867 (1978); Zehren v. F. W. Woolworth Co., 11 Wis.2d 539, 105 N.W.2d 563 (1960).

The status of a defendant as an "owner" is discussed in Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226-31, 284 N.W.2d 621 (1979); Callan v. Peters Constr. Co., 94 Wis.2d 225, 288 N.W.2d 146 (Ct. App. 1979); Ruppa v. American States, Inc., 91 Wis.2d 628, 284 N.W.2d 318 (1979).

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1910 SAFE-PLACE STATUTE: PLACE OF EMPLOYMENT: BUSINESS

To be a place of employment, two things must concur:

First, a place where industry, trade, or business is carried on;

Second, an employment of another for the employer's gain or profit.

The ownership of a (parking lot) (apartment building) (house), and the keeping of the same in repair and renting, does not in and of itself constitute a business; but such transactions may amount to a business within the meaning of the statute if they are carried on to such extent as to require a substantial and habitual application of time and labor in the management and operation of the same.

You will determine from the evidence whether the defendant was conducting a business in the management and operation of the (parking lot) (apartment building) (house) or whether it was only an investment in rental property.

COMMENT

The instruction and comment were initially approved by the Committee in 1963. The instruction was revised in 1986. The comment was updated in 1990.

Wis. Stat. § 101.01(1) (1961); Padley v. Lodi, 233 Wis. 661, 290 N.W. 136 (1940); Cross v. Leuenberger, 267 Wis. 232, 65 N.W.2d 35 (1954); Frion v. Coren, 13 Wis.2d 300, 108 N.W.2d 563 (1960); Waldman v. Young Men's Christian Ass'n, 227 Wis. 43, 46, 277 N.W. 632 (1938); Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708, 100 N.W.2d 920 (1959); Schwenn v. Loraine Hotel Co., 14 Wis.2d 601, 608-09, 111 N.W.2d 495 (1961); Filipiak v. Plombon, 15 Wis.2d 484, 113 N.W.2d 365 (1962); Brueggeman v. Continental Casualty Co., 141 Wis.2d 406, 415 N.W.2d 531 (Ct. App. 1987); Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The term "trade" means an occupation pursued as a business or calling for a livelihood or profit. A place of trade is a place devoted to the business of buying or selling or applying some mechanical vocation. Sharpe v. Hasey, 134 Wis. 618, 114 N.W. 1118 (1908).

The term " industry" means any department or branch of art, occupation, or business conducted for a livelihood or profit, and it applies especially to a distinct branch of trade in which labor and capital are extensively employed. 21 Words and Phrases, Industry 509 (1960, Supp. 1963).

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The term "business" means some particular occupation or employment habitually engaged in for livelihood or profit. Vandervort v. Industrial Comm'n, 203 Wis. 362, 367, 234 N.W. 492 (1931); State v. Joe Must Go Club, 270 Wis. 108, 112, 113, 70 N.W.2d 681 (1955).

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1911 SAFE-PLACE STATUTE: CONTROL

Before a person has a duty to furnish a safe place of employment, the person must have the right to present control over the place so that the person can perform the duty to furnish a safe place of employment. This control of the premises need not be exclusive, nor is it necessary to have control for all purposes in order to impose a duty to furnish a safe place of employment.

If you find under the evidence that (the owner of the property) (the general contractor) (any contractor) (or both) had a duty to furnish a safe place of employment, that duty extends only to such use as the (owner, general contractor, contractor, or both) and (his) (her) employees made of the premises and the effect produced thereon by (his) (her) own work, materials, and equipment within (his) (her) supervision and control.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 1986. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Schwenn v. Loraine Hotel Co., 14 Wis.2d 601, 607, 111 N.W.2d 495 (1961); Singleton v. Kubiak & Schmitt, Inc., 9 Wis.2d 472, 101 N.W.2d 619 (1960); Criswell v. Seaman Body Corp., 233 Wis. 606, 290 N.W. 177 (1940); Boyle, Safe Place, §§ 103-04.

See also Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

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1920 NUISANCE: LAW NOTE

The Wisconsin Supreme Court has addressed nuisance law in a number of decisions issued since the Committee last revised the nuisance jury instructions.[1] As a result, the Committee has developed a series of six new instructions which follow this Note. (These instructions all pertain to nuisance actions for damages; actions seeking injunctive relief to abate a nuisance are equitable actions which the courts have jurisdiction to decide without a jury trial.[2])

"NUISANCE" DEFINED

The term "nuisance" refers to a condition or activity which unduly interferes with the use of land or a public place.[3] In the legal sense, it is important to keep in mind that "nuisance" does not refer to the conduct that causes the harm, but to the type of harm caused by the conduct.[4] Also, "nuisance" does not describe a cause of action for the interference, but rather a type of harm that may or may not be actionable. "(I)t is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm."[5]

CLASSIFICATION OF NUISANCES

Nuisances can be classified based on the type of interference involved and the nature of the conduct which is alleged to give rise to liability for the nuisance.

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Nuisances are divided into two types, depending on the nature of the interference: private or public. A private nuisance is a nontrespassory invasion of or interference with an interest in the private use and enjoyment of land.[6] A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community.[7] "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[8]

Although the type of harm suffered in the case of a private nuisance is different than that suffered where there is a public nuisance, the prerequisites to liability in either case are virtually identical.[9] In either case, the plaintiff must demonstrate that the interference resulted in significant harm.[10] There can be situations in which a plaintiff has a cause of action for both a private nuisance and a public nuisance arising out of the same conduct.[11]

The conduct giving rise to liability for creating or maintaining a nuisance can be either intentional or unintentional. A nuisance is the result of intentional conduct if the defendant either (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct. It is not necessary that the defendant act with a malicious intent to harm the plaintiff; the defendant need only realize that the nuisance is substantially certain to result from his conduct, even if the conduct itself has a laudable purpose.[12]

Liability can also arise from unintentional conduct. Where the plaintiff alleges the defendant unintentionally maintained or failed to abate a nuisance, the traditional rules

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for liability based on negligent conduct apply.[13] The usual defenses in a negligence action are also available to the defendant.[14]

There are situations where unintentional conduct can subject the defendant to strict liability regardless of the defendant's negligence. The Restatement describes these cases as arising out of conduct which is "abnormally dangerous."[15] Wisconsin court decisions suggest these types of nuisances are those unintentionally "created" as opposed to "maintained" by the defendant[16] Examples of what the Restatement and Wisconsin reported decisions refer to by these types of nuisances include a tannery or slaughter-house in a residential area, ownership of a vicious dog and blasting activities in an inappropriate place. In these cases, liability "does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."[17] In such situations, the defendant is subject to strict liability[18] and "no question of negligence or want of liability is involved."[19]

The Committee determined there should be a total of six separate instructions covering the various claims for liability based on nuisance. The appropriate classification of nuisances is shown in the following table:

CLASSIFICATION OF NUISANCES					
PRIVATE			PUBLIC		
INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT		INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT	
	Created by/ abnormally dangerous activity	Negligence		Created by/ abnormally dangerous activity	Negligence

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The instructions differentiate between claims for private and public nuisance. Within each of those classifications, there are separate instructions depending on whether the conduct involved is alleged to be intentional or unintentional. Finally, the instructions involving unintentional conduct differentiate between claims alleging negligence and claims alleging the conduct of an abnormally dangerous activity for which the defendant is strictly liable.

COMMENT

This law note was approved by the committee in 2009. The comment was updated in 2019.

[1] *See, e.g., Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77 (2002); *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635 (2005); *City of Milwaukee v. NL Industries*, 315 Wis.2d 443 (2008).

[2] *United States v. Richards*, 201 Wis. 130 (1930).

[3] *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

[4] Restatement (Second) of Torts § 821A, Comment b (1979).

[5] *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 (2005).

[6] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D. While the definition of a private nuisance in Restatement (Second) of Torts § 821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin case law consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts § 821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

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[7] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, ¶ 21. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See also Prosser and Keeton on Torts* § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co*., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id*. at 658-659.

[8] Restatement (Second) of Torts § 821C(1) (1979).

[9] "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." *Milwaukee Metropolitan Sewerage District, supra,* at 668.

"But as the tort action came into the picture, the use of the single word 'nuisance' to describe both the public and the private nuisance, led to the application in public nuisance cases, both criminal and civil, of an analysis substantially similar to that employed for the tort action for private nuisance." Restatement (Second) of Torts § 821B, comment e (1979).

[10] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F.

[11] Restatement (Second) of Torts § 821B, Comment h (1979).

[12] *Milwaukee Metropolitan Sewerage District, supra* at 663; Restatement (Second) of Torts § 825 (1979).

[13] *Milwaukee Metropolitan Sewerage District, supra* at 667-668; Restatement (Second) of Torts § 822 (1979).

[14] *Milwaukee Metropolitan Sewerage District, supra* at 668.

[15] Restatement (Second) of Torts § 822 (1979). *See, also,* Restatement (Second) of Torts § 519, 520 and

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Comments.

[16] "[I]n those cases where the nuisance is created by the defendant, no question of negligence or want of ordinary care is involved. As we explained in *Brown*, this rule applies in cases such as 'a tannery or a slaughter-house in the midst of a residential area, where the mere act of using the plant creates the nuisance.' *Id.*" *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 661 (2005), quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929). This quoted language from *Brown* appears to square with language in the comments to Restatement (Second) of Torts § 822, though the Restatement uses different terminology. Comment c to Restatement of Torts § 822 describes the bases for nuisance liability as follows:

> "An invasion of a person's interest in the private use and enjoyment of land by any type of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional. A person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case, and he is subject to liability for an unintentional invasion when his conduct is negligent, reckless *or abnormally dangerous*. These are the types of conduct that are stated in this Chapter as subjecting a person to liability for invasions of interests in the private use and enjoyment of land." (emphasis added). Restatement (Second) of Torts § 822, Comment c (1979).

The Comment makes clear that an unintentional invasion is actionable not only if the defendant's conduct is negligent or reckless, but also if it is "abnormally dangerous." The language in *Milwaukee Metropolitan Sewerage District* referencing the holding in *Brown, supra,* that no question of negligence is involved where the defendant created the nuisance, appears to contemplate the same type of conduct which the Comment in the Restatement characterizes as "abnormally dangerous." *Brown* gives as an example a "tannery or slaughter-house in a residential area." Comment j to § 822 gives the following examples:

> "The last basis for liability for a private nuisance is the defendant's abnormally dangerous activity, enterprise or maintained condition, under the rules stated in Chapters 20 and 21. Thus a dog known by the owner to be vicious may create a private nuisance when it interferes with the use or enjoyment of the land next door, and the owner may be subject to strict liability because of his knowledge of the dog's propensities. So likewise, blasting activities or the storage of a large quantity of explosives in an inappropriate place may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity."

Thus, although there has been no reported Wisconsin decision explicitly involving nuisance liability predicated on abnormally dangerous behavior, the Committee believes the court's discussion of nuisances "created by" the defendant in *Milwaukee Metropolitan Sewerage District* is intended to describe what the Restatement regards as abnormally dangerous behavior. (For specific recognition that Wisconsin recognizes intentional conduct, negligence and abnormally dangerous activity as the three grounds for maintaining a nuisance claim, *see, Physicians Plus, supra* at 145-146, J. Bradley concurring.) The Committee also believes "abnormally dangerous activity" is a better description of the conduct which triggers strict liability than the reference to a nuisance "created" by the defendant for a number of reasons. First, "abnormally dangerous activity" is a more precise description the type of conduct necessary to trigger strict liability. Second, use of the term "created" to describe situations where strict liability applies appears to have its origins from a time when a nuisance itself was considered actionable without any underlying tortious conduct. The *Brown* decision includes the following language: "'Negligence of the

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defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in *creating or maintaining* it, and the negligence of the defendant, unless in

exceptional cases, is not material.' *Lamming v. Galusha,* 135 N.Y. 239, 242, 31 N.E. 1024. *See, also,* Joyce,
Nuisances, 80." (emphasis added) *Brown, supra,* at 589. While *Milwaukee Metropolitan Sewerage District* quotes *Brown* for the proposition that negligence need not be proved where the defendant *created* a nuisance, *Brown* itself concludes that negligence need not be demonstrated where the defendant *maintained* a nuisance either. *Lamming*, the New York case cited for this proposition in *Brown*, was decided in 1892. *Lamming* itself quoted the language from *Congreve v. Smith,* 18 N. Y. 79, an 1858 New York appeals court decision. As noted in Restatement (Second) of Torts §822, Comment b:

> "In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields."

Whether the quoted language from *Brown* represents the current state of the law or is a remnant from the days when there was liability for a nuisance without tortious conduct is open to question. However, the relatively recent evolution of nuisance liability rules is another reason the Committee concludes that "abnormally dangerous activity" is a better description than a nuisance "created" by the defendant when referring to a situation that gives rise to strict liability.

[17] *Milwaukee Metropolitan Sewerage District, supra* at 661, quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

[18] Restatement (Second) of Torts § 822, Comment a (1979).

[19] *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

Anticipated Nuisance Claim. Under Wisconsin case law, "anticipated private nuisance" claims are recognized claims. Krueger v. AllEnergy Hixton, LLC., 384 Wis.2d 127, 132, 918 N.W. 2d 458 (2018). Such an action may be brought when the alleged anticipated nuisance "will necessarily result from the contemplated act or thing which it is [s]ought to enjoin." See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). A claim for anticipated nuisance must include factual allegations that, if true, would support each of the following conclusions:

> the defendant's proposed conduct will 'necessarily' or 'certainly' create a nuisance; and
>
> the resulting nuisance will cause the claimant harm that is 'inevitable and undoubted.'"
> See Wergin, 179 Wis. At 606-07.

Although Kruger focuses on an anticipated private nuisance claim, the most pertinent Wisconsin case also contemplates anticipated public nuisance claims. See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51

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(1923). While the court in Kruger used the term "anticipated" nuisance, synonymous terms include "threatened" nuisance, "prospective" nuisance, and "anticipatory" nuisance. See Wergin, 179 Wis at 606.

Filing a Written Notice of Injury. Each alleged nuisance causing action constitutes a separate "event" for the purposes of filing a written notice of injury. See The Yacht Club at Sister Bay Condominium Ass'n, Inc. v. Village of Sister Bay, 2019 WI 4, 922 N.W.2d 95, 101 (2019), reversing in part and remanding 378 Wis.2d 742, 905 N.W.2d 844 (Ct. App. 2017). Future nuisance actions are not barred if the written notice of injury pertaining to the new "event" giving rise to the claim is filed within 120 days after the happening of the event. Wis. Stat. § 893.80 (1d)(a).

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1922 PRIVATE NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

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[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a private nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the private nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's negligence caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's negligence or by the combined negligence of two or more people.]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:
Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:
Was (defendant) negligent?

ANSWER: _____
(Yes/No)

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Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) negligence a cause of the private nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, §821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F. The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

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[5] This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 667 (2005).

[6] Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, *see, e.g.,* Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed *supra*, in *Brown* we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. *Brown*, 199 Wis. at 589-90. The Restatement (Second) of Torts §824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in *Schiro*, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 669-670 (2005).

The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment *i*.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[8] "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.,* Vogel, 201 Wis. 2d at 425; *Stunkel*, 229 Wis. 2d at 669-70." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

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1924 PRIVATE NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

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(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the private nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's conduct caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) engage in an abnormally dangerous activity?

ANSWER: _____
(Yes/No)

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Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) abnormally dangerous activity a cause of the private nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: If you answered "Yes" to Question 4, then answer this question:

Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant's) abnormally dangerous activity and (plaintiff's) negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d (1979). "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d (1979). "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

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[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

[5] The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. *Fortier v. Flambeau Plastics Co.,* 164 Wis.2d 639, 667 (Ct. App 1991).

Comment *l* to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> *l. Function of court*. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous >is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." *Fortier v. Flambeau Plastics Co., supra,* at 668. While *Fortier* quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported Wisconsin decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

[6] This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because

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where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[8] In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443, 461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in *Dippel* applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

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1926 PRIVATE NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) intentionally caused the private nuisance. A person's conduct caused the private nuisance if it was a substantial factor in producing the nuisance.
A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:
(a) the gravity of the harm outweighs the utility of the actor's conduct, or

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(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[8]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) intentionally cause the private nuisance?

ANSWER: _____
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) conduct in causing the nuisance unreasonable?

ANSWER: _____
(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

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[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted). " *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

[5] Restatement (Second) of Torts §825.

[6] "In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Restatement (Second) of Torts §821D, Comment d.

[7] Restatement (Second) of Torts §826.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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1928 PUBLIC NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a public nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the public nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's negligence caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's negligence or by the combined negligence of two or more people.][7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:
Was (defendant) negligent?

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ANSWER: _____
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:
Was (defendant's) negligence a cause of the harm suffered by (plaintiff) as a result of the public nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][9]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:
Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff -Percentage:_____%
Defendant -Percentage:_____%
Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

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COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co*., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id*. at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

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The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus*, *supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. S*ee* Comments b and c to Restatement 2d Torts, §821C.

[5] This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 667 (2005). While this quoted language applies in the case of a private nuisance, the rule applies to public nuisances as well. "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." *Milwaukee Metropolitan Sewerage District, supra,* at 668.

[6] Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, *see, e.g.,* Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed *supra*, in *Brown* we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. *Brown*, 199 Wis. at 589-90. The Restatement (Second) of Torts § 824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in *Schiro*, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 669-670 (2005).

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The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment *i*.

[7] This paragraph is taken from JI 1500 Cause, as part of the rule that "when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra,* at 668.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[9] "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.,* Vogel, 201 Wis. 2d at 425; *Stunkel*, 229 Wis. 2d at 669-70." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

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1930 PUBLIC NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the public nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's conduct caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

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Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[7]

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) engaged in an abnormally dangerous activity?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant)'s abnormally dangerous activity a cause of the public nuisance?

ANSWER: _____

(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: If you answered "Yes" to Question 4, then answer this question:

Was (plaintiff) negligent?

ANSWER: _____

(Yes/No)

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Question No. 6: If you answered "Yes" to Question No. 5, then answer this question: Was (plaintiff)'s negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____

(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant)'s abnormally dangerous activity and (plaintiff)'s negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶21; *Schiro v. Oriental Realty Co*., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id*. at 658-659.

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It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus*, *supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. " (1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. S*ee* Comments b and c to Restatement 2d Torts, §821C.

[5] The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

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(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. *Fortier v. Flambeau Plastics Co.,* 164 Wis.2d 639, 667 (Ct. App 1991).

Comment *l* to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> *l. Function of court*. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous 'is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." *Fortier v. Flambeau Plastics Co., supra,* at 668. While *Fortier* quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

[6] This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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[8] In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443,461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in *Dippel* applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

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1932 PUBLIC NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) intentionally caused the public nuisance. A person's conduct caused the public nuisance if it was a substantial factor in producing the nuisance.

A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

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Did (defendant) intentionally cause the public nuisance?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant)'s conduct in causing the nuisance unreasonable?

ANSWER: _____

(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶21; *Schiro v. Oriental Realty Co*., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There

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must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord).a" *Id*. at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus*, *supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. S*ee* Comments b and c to Restatement 2d Torts, §821C.

[5] Restatement (Second) of Torts §825.

[6] The concept of unreasonableness described in the first element involves the unreasonableness of the interference with the use of a public place or the activities of an entire community and is an inherent part of the definition of a public nuisance itself. This fourth element requires the jury to find, in addition, that the

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particular actions of the defendant in creating the unreasonable interference were unreasonable themselves.

The standard in the instruction for evaluating the reasonableness of the defendant's conduct is taken from Restatement (Second) of Torts §826. Additional guidance in applying the standard can be found in Restatement (Second) of Torts §§827-831.

[7] Restatement (Second) of Torts §826.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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2000 INTENTIONAL TORT: LIABILITY OF MINOR

The fact that _____ was a minor, that is, under the age of 18, does not excuse (him) (her) in any way from liability for the injury (if any) caused to____. You will consider (his) (her) liability just as if (he) (she) were an adult.

COMMENT

The instruction and comment was originally published in 1963. The comment was updated in 1990. A citation was corrected in 2014.

Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891 (assault by child aged 14); Wisconsin Loan and Fin. Co. v. Goodnough, 201 Wis. 101, 107, 288 N.W. 484 (1930) (misrepresentation by minor aged 19); Kiefer v. Fred Howe Motors, Inc., 39 Wis.2d 20, 26, 158 N.W.2d 288 (1968).

If the tort involves the mental element of malice, the child must be old enough to form this mental attitude. See Kiefer v. Fred Howe Motors, Inc., supra.

A minor who acts maliciously may be liable for punitive damages. Anello v. Savignac, 116 Wis.2d 246, 342 N.W.2d 440 (Ct. App. 1983).

See Annot., 67 A.L.R. 573 (1930) and 67 A.L.R.2d 570-78, "Tort Liability of Child of Tender Age," and Wis JI-Civil 1010, Negligence of Children.

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2001 INTENTIONAL VERSUS NEGLIGENT CONDUCT

There is a dispute in this case about whether the conduct of (defendant) in _____ (state the conduct in question) was intentional or negligent.

If (defendant) actually meant some harm to follow from a particular act or where some harm is substantially certain to follow from an act according to common experience, then (defendant) may be said to have intended the result and (his) (her) conduct was intentional.

Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.

If you find that the defendant intended to cause harm in some way, however great or small, or that (defendant)'s conduct was almost certain to cause harm in some way, however great or small, then (defendant)'s conduct was intentional.

If, however, the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

COMMENT

This instruction and comment were approved by the Committee in 1995. The instruction needs to be preceded or followed by the negligence instruction (JI-Civil 1005).

This instruction is based on the language in Gouger v. Hardtke, 167 Wis.2d 504, 512, 463 N.W.2d 882 (1992), where two classmates were involved in a mechanical shop class incident. Plaintiff threw a soapstone (metal marking chalk) at defendant hitting him in the head. Defendant retaliated and hit plaintiff in the eye. Plaintiff suffered vision impaired as a result and sued. The suit was not commenced until the statute of limitations had run on the intentional tort. Plaintiff alleged defendant's conduct in throwing the soapstone was negligent. Defendant's insurer had placed an "intentional acts" exclusion in its policy and argued defendant's act of throwing the soapstone was clearly intentional and therefore excluded from coverage under the policy. The trial court and the court of appeals agreed with the insurer, but the Supreme Court reversed, holding that

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under these facts, intent could not be inferred as a matter of law; i.e., there was an issue of fact as to whether defendant's conduct was intentional or merely negligent. The Gouger decision also drew a distinction between the intent to hit and the intent to injure:

> Significantly, the affidavit does not state that Hardtke was trying to or intended to injure Gouger; he merely intended to hit him. As explained above, the intent to hit does not translate automatically into an intent to injure.

167 Wis.2d at 516.

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2004 ASSAULT

An assault occurred if:

1. (Defendant) intended to cause physical harm to (plaintiff); and

2. (Defendant) acted to cause (plaintiff) to reasonably believe (defendant) had the present intent and ability to harm (plaintiff).

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

[Burden of Proof, Wis JI-Civil 205]

COMMENT

This instruction and comment were first approved in 1972. They were revised in 2009.

As originally approved, the instruction stated that the intent necessary to commit an assault was either an intent to physically injure the plaintiff or an intent to put the plaintiff in fear that physical harm was to be committed upon the plaintiff. This element departed from Wisconsin case law having its origin in 1896 which held that an intent to physically harm was required to establish an assault. Degenhardt v. Heller, 93 Wis. 662, 68 N.W. 411 (1896). The holding in Degenhardt has been criticized. 1940 Wis. Law Review 103; 1955 Wis. Law Review 6. See also Prosser, Torts, p. 40-41; Restatement, Second, Torts, § 21, p. 37.

While the Committee believes intent to cause apprehension or fear should be sufficient to establish an intent, as it is in many states, Wisconsin case law supporting this position does not currently exist. Therefore, the Committee withdrew the original version of the assault instruction and replaced it with the version above which includes the requisite intent to cause physical harm as provided in Degenhardt.

For intentional infliction of emotional distress, see Wis JI-Civil 2725.

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2005 BATTERY: BODILY HARM

A battery occurred if:

1. (Defendant) intentionally caused bodily harm to (plaintiff); and

2. (Plaintiff) did not consent to the harm.

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

COMMENT

This instruction and comment were originally approved in 1977. The instruction was revised in 1994 and 2009. The comment was updated in 2010.

The definition of a battery is taken from Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), and McClusky v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973).

When there has been a bodily contact, without injury except to the dignity and personal sensibilities of the person subjected to the battery, use Wis JI-Civil 2005.5.

See also Wis JI-Criminal 1220.

For a suggested verdict in a case involving an alleged battery by one tortfeasor and negligence by another tortfeasor, see JI-Civil 1580, Comment.

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2005.5 BATTERY: OFFENSIVE CONTACT

A battery occurred if:

1. (Defendant) intentionally caused offensive contact with (plaintiff); and

2. (Plaintiff) did not consent to the contact.

A contact is "offensive" if a reasonable person in (plaintiff)'s situation would have been offended by the contact. [An offensive contact is one that offends a reasonable sense of personal dignity.]

The requirement that (defendant) intended to cause offensive contact means that (defendant) had the mental purpose to cause offensive contact to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause offensive contact to (plaintiff) (or another person).

COMMENT

This instruction was originally approved in 1962 and numbered 2010. It was revised and renumbered Wis JI-Civil 2005.5 in 2010. The comment was updated in 2015.

In Voith v. Buser, 83 Wis.2d 540, 266 N.W.2d 304 (1978), the trial court, after the jury had deliberated for over an hour, reread the original instruction, dealing with bodily harm battery, Wisconsin Jury Instruction-Civil 2005. It then, for the first time, read an instruction involving an offensive bodily contact battery. The supreme court held that it was error to give the additional battery instruction, because the plaintiff's case was in no way based on the theory of offensive bodily contact, but rather on a theory of causing bodily harm.

For trial issues involving the element of consent (where the plaintiff was a child under sixteen) see Brekken v. Knopf, Appeal No. 2013AP1900 (per curiam) and Beul v. ASSE International, Inc., 233 F.3d 441 (7th Cir. 2000).

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2006 BATTERY: SELF-DEFENSE

(Defendant) claims that any injury to (plaintiff) was inflicted by (defendant) in self-defense.

"Self-defense" is the right to defend one's person by the use of whatever force is reasonably necessary under the circumstances.

If (defendant) reasonably believed that (his) (her) life was in danger or that (he) (she) was likely to suffer bodily harm, then (defendant) had a right to defend (himself) (herself) by the use of force as under the circumstances (he) (she) reasonably believed was necessary. (Defendant), who alleges that (he) (she) acted in self-defense, has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that the use of some force was necessary to prevent injury and also that the amount of force used by (defendant) was reasonable under the circumstances.

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

In determining whether the force used by (defendant) was reasonably necessary, you may consider the actions of (plaintiff), the force or threat of force used by (plaintiff), the amount of force used by (defendant), the means or instrument by which the force was applied, as well as the relative strength and size of (plaintiff) and (defendant).

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If you determine that the (defendant) acted in self-defense, then you should answer "Yes" to Question No. _____, if you are required to answer that question.

SPECIAL VERDICT

Question No. 1.

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2.

Was the battery a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3.

Did (defendant) act in self-defense when (he) (she) struck (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

COMMENT

The instruction and comment were originally published in 1967. They were revised in 1994, 2010, 2011, and 2012. This instruction addresses the use of self-defense in cases not covered by Wis. Stat. § 895.62.

Privilege of Self-Defense. A defendant in a battery case can assert privilege as an affirmative defense. When the defendant's actions are privileged, "conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability." Restatement, Second,

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Torts § 10. This instruction deals with the privilege of self-defense, the most common example of privileged conduct asserted in a battery case.

See Maichle v. Jonovic, 69 Wis.2d 622, 230 N.W.2d 789 (1975), and Crotteau v. Karlgaard, 48 Wis.2d 245, 179 N.W.2d 797 (1970).

Use of more force than is reasonably necessary constitutes a battery to the extent of the force used in excess of the privilege. Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960); Palmer v. Smith, 147 Wis. 70, 77, 132 N.W. 614 (1911); Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902); McConaghy v. McMullen, 27 Wis. 73, 79 (1870); Restatement, Second, Torts § 71 (1965).

In the case of children, beliefs, instincts, and impulses are judged in relation to those of a reasonable person of like age, intelligence, and experiences. The reasonableness of the actor's beliefs, moreover, is not defeated by a subsequent determination that the beliefs were mistaken. Maichle v. Jonovic, supra at 627-28.

Oral abuse is not sufficient to justify a battery. See Crotteau, supra at 250. However, there may be situations involving what the court in Maichle described as an "overt act of an ambiguous character." In these situations, self-defense is a justifiable defense in a civil action where the act gives rise to "a reasonable belief of imminent bodily harm when coupled with knowledge of previous threats of physical harm and dangerous propensities exhibited by the victim." Maichle, supra at 630.

This instruction needs to be tailored when the affirmative defense is based on the defense of a third party.

A defendant who is the initial aggressor can lose the right to claim self-defense unless the defendant abandons the fight and gives notice to his or her adversary that he or she has done so. Root v. Saul, 2006 WI App 106, 293 Wis.2d 364, 718 N.W.2d 197. See also Wis JI-Criminal 815.

Burden of Proof. The burden of proof to prove self-defense as a justification for injurious physical contact with another is on the defendant. See Rinehart v. Whitehead, 64 Wis. 42, 24 N.W. 401 (1885).

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2006.2 BATTERY: SELF-DEFENSE; DEFENDANT'S DWELLING, MOTOR VEHICLE, PLACE OF BUSINESS; WIS. STAT. § 895.62

This case involves an allegation of unlawful and forcible entry into a (dwelling) (motor vehicle) (place of business) and self-defense is an issue. The law of self-defense allows (defendant) to intentionally use force if (defendant) believed (his) (her) (or) (another's) life was in danger, or that (he) (she) (or) (another) was likely to suffer bodily harm.

(Defendant), who alleges that (he) (she) acted in self defense, has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed the use of force was necessary to prevent death or bodily harm.

A belief may be reasonable even though mistaken. In determining whether (defendant)'s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in (defendant)'s position under the circumstances that existed at the time of the alleged offense. The reasonableness of (defendant)'s beliefs must be determined from the standpoint of (defendant) at the time of (his) (her) acts and not from the viewpoint of the jury now.

You may not consider whether (defendant) had an opportunity to flee or retreat before (he) (she) used force and (defendant) is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to (himself) (herself) (or) (another person), if you find that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business);
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business); and

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- (Defendant) knew or had reason to believe that an unlawful and forcible entry was occurring or had already occurred.

(NOTE: Insert a presumption instruction, Wis JI-Civil 350 or 352, adapted to the presumption created in Wis. Stat. § 895.62(3).)

[Alternative 1: Based on Wis JI-Civil 350:

There is a conflict in the evidence as to:

- Whether (plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- Whether (defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- Whether (defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

If you find the existence of each of these facts more probable than not, then by law a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is also evidence from which you may conclude that (defendant)'s belief was not reasonable. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that the (defendant)'s belief was not reasonable, you must answer question _____ "yes."]

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[Alternative 2: Based on Wis JI-Civil 352:

There is no dispute in the evidence that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- (Defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

From these facts, a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is evidence in the case which may be believed by you that (defendant)'s belief was not reasonable. You must resolve this conflict.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (defendant) did not reasonably believe the force used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person), you must answer question ____ "yes."]

SPECIAL VERDICT

Question No. 1.

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 1, then answer Question No. 2.

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Question No. 2.

Was the battery a cause of (plaintiff's) injuries?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3.

Did (defendant) act in self-defense when (he) (she) [e.g. struck] (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 2012. The word "not" was inadvertently omitted in the 2012 version from the last sentence of paragraph 3. This omission was corrected in 2015. The defense, created by Wis. Stat. § 895.62, refers to what is commonly termed the "Castle Doctrine." See also Wis JI-Criminal 805. The comment was updated in 2015.

On December 21, 2011, 2011 Wisconsin Act 94 became effective. It applies to a use of force that occurs on or after December 21, 2011. Act 94 creates Wis. Stat. § 895.62. It establishes a presumption of immunity in civil actions involving force that is intended or likely to cause death or great bodily harm if an actor reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person and either item 1. or 2., below, applies. A person is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person if either of the following applies:

1. The person against whom the force was used was unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business; the actor was on his or her property or present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The presumption does not apply if: (a) the actor was engaged in criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time he or she used force; or (b) the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties if the public safety worker identified himself or herself to the actor before force was used by the actor or the actor

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knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

The new law also provides that if either of the circumstances described above in paragraph 1 or 2 applies, the fact finder may not consider whether the actor had an opportunity to flee or retreat before he or she used force.

Presumption. It is not clear whether the presumption set out in Wis. Stat. § 895.62(3) is rebuttable; or whether read in conjunction with the presumption in Wis. Stat. § 939.48(1m)(ar), is not. The committee believes the more prudent course is to follow well-established law as to presumptions, and therefore recommends giving Wis JI-Civil 350 or 352, which would shift the burden of proof to the party seeking to overcome the presumption. The committee agrees that another reading of the statute would render the presumption conclusive, not subject to rebuttal. There is no logical way to harmonize these two views, and this is our recommendation until further guidance on this issue is received from the appellate courts or the legislature. The statutory presumption in Wis. Stat. § 895.62(3) does not apply if (1) the defendant was engaged in criminal activity or using his or her property to further a criminal activity or (2) the plaintiff was a public safety worker who identified himself or herself or who the defendant knew or reasonably should have known was a public safety worker. Wis. Stat. § 895.62(4).

Definition of Dwelling. The civil "Castle Doctrine" statute (Wis. Stat. § 895.62) incorporates the following definition of "dwelling" given in Wis. Stat. § 895.07(1)(h):

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

In a criminal case, the Court of Appeals held that the defendant was not entitled to an instruction under the criminal "Castle Doctrine" statute (Wis. Stat. § 939.48(1m)) because the defendant fired a gun at persons who were fleeing from the defendant's apartment building through a parking lot and were not in the defendant's "dwelling." State v. Chew, Appeal No. 2013AP2592 (recommended for publication). The court noted that "dwelling" is defined in Wis. Stat. § 895.07(1)(h).

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2006.5 BATTERY: DEFENSE OF PROPERTY

(Defendant) claims that any injury (plaintiff) sustained was inflicted by (defendant) in defense of (his) (her) property.

(Defendant) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that some force was necessary to prevent an interference with (his) (her) property.

(Defendant) further has the same burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the amount of force used was no more than a person of ordinary intelligence and prudence would have believed necessary under the same or similar circumstances.

A "reasonable belief" is the belief a person of ordinary intelligence and prudence would have under the circumstances confronting the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The fact that (defendant)'s belief may have been in error does not make (his) (her) conduct wrongful if a person of ordinary intelligence and prudence would have the same belief under the same or similar circumstances.

It is not reasonable to use force intended or likely to cause death or great bodily harm in defending one's property. "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

If you find that (defendant) reasonably believed some force was necessary to defend (his) (her) property and that the force used was reasonable, then you should find that there was no battery.

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COMMENT

This instruction was approved by the Committee in 1995. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 2011 and 2012.

See Oleson v. Fader, 160 Wis. 473, 152 N.W. 290 (1915); Wis JI-Criminal 855 and 860. See also Wis. Stat. § 895.529(3)(a) (created by 2011 Wisconsin Act 93) and the commentary to Wis JI-Civil 2006.2 for a discussion of self-defense.

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2007 BATTERY: LIABILITY OF AN AIDER AND ABETTOR

Question ___ asks whether (defendant) participated in a battery to _____.

A person may participate in a battery even though he or she does not physically attack the victim. A person participates in a battery if the person:

1. knowingly renders assistance to the person(s) committing the battery, or
2. indicates a readiness or willingness to join in the battery and the person(s) committing the battery knows of his or her willingness, or
3. is present at the scene of the battery and intentionally incites another person to unlawfully attack another person. The word "incite" means to move another person to action, to spur him or her on, or persuade him or her to commit the battery.

A person who is present at the time and place of a battery but does not make an act, word, or gesture to aid or encourage the physical attack is not deemed to have participated in the battery even though the person did nothing to prevent or stop the attack.

COMMENT

This instruction and comment were originally approved in 1966 and were revised in 1986 and 2010.

See Krudwig v. Kaepke, 227 Wis. 1, 277 N.W. 670 (1938); Krudwig v. Kaepke, 223 Wis. 244, 270 N.W.2d 79 (1936); Fredrickson v. Kabat, 266 Wis. 442, 63 N.W.2d 756 (1954); Rinehart v. Whitehead, 64 Wis. 42, 46, 24 N.W. 401 (1885); Hilmes v. Stroebel, 59 Wis. 74, 75, 17 N.W. 539 (1883); 6 Am. Jur.2d Assault and Battery § 128 (1963).

For one to incite another to commit a battery, it is necessary that he or she be present at the scene of the action. Krudwig v. Kaepke, 227 Wis. 1, 277 N.W.2d 670 (1938).

"To 'incite' one, that is move him to action, spur him on, or persuade him to action, as to commit an assault, the person inciting him must be present at the scene of the action and not merely directing, ordering, or procuring such action." Krudwig, 227 Wis. at 5.

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In Winslow v. Brown, 125 Wis.2d 327, 336, 371 N.W.2d 417 (Ct. App. 1985), the court concluded that a person is liable for aiding and abetting if: (1) the person undertakes conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) the person consciously desires or intends that the conduct will yield such assistance. The court of appeals also held that liability premised on aiding and abetting in the civil context is not limited to intentional conduct but also extends to negligent torts as well.

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2008 BATTERY: EXCESSIVE FORCE IN ARREST

Question ___ asks you to determine whether (defendant) used excessive force in arresting (plaintiff). It is admitted that (defendant) made contact with (plaintiff) and used force at the time of making the arrest, which force, if not reasonable under the circumstances, would constitute a battery.

As a law enforcement officer, (defendant) had the duty to enforce the laws of Wisconsin and in making an arrest may use reasonable force to overcome the resistance of the person being arrested. This force, however, must not be excessive; that is, the officer must not use more force than is reasonably necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between (defendant) and (plaintiff), which resulted in injury to (plaintiff), is not proof that (defendant) used excessive force.

(Defendant) had the lawful authority to use such force in making the arrest as a reasonable police officer would believe to be necessary. But the use of force beyond that which a reasonable police officer would believe necessary under all the circumstances then existing is excessive force.

The fact that (defendant) believed (plaintiff) was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.

[Give middle burden instruction, Wis JI-Civil 205.]

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COMMENT

The instruction and comment were approved by the Committee in 1981. A parenthetical reference to the burden of proof instruction was corrected in 2001. The comment was revised in 1998 and 2001.

Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981); Wirsing v. Krzeminski, 61 Wis.2d 513, 213 N.W.2d 37 (1973); McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Wis JI-Civil 2155.

In Wirsing, the court specifically recognized that a police officer's liabilities for a battery are founded on legal and policy considerations that are distinguishable from those in an ordinary battery case. The court stated that the general principle applicable to police officers making arrests is found in Restatement, Second, Torts § 118:

> The use of force against another for the purpose of effecting his arrest . . . [is] privileged if all the conditions stated in secs. 119-132 . . . exist.

The principal condition to the above Restatement provision is that an actor may not use force in excess of what the actor believes to be necessary. Restatement, Second, Torts § 132.

In Wirsing, the court stated that the trial court's instructions placing emphasis upon the special privilege of a police officer were correct and that they "reflected . . . the legal entitlement conferred by law upon a police officer to use necessary force." Wirsing, supra at 521. Where the relevant facts that emerge at trial are primarily concerned with the issue of excessive force, an instruction on self-defense is not necessary.

The burden upon the plaintiff to establish excessive force is the middle burden. Johnson, supra at 783. A plaintiff is entitled to be awarded compensation only for injuries and resulting damages caused by the use of excessive force by the police. Johnson, supra at 786.

Intentional Tort. In Kofler v. Florence, 216 Wis.2d 41, 573 N.W.2d 568 (Ct. App. 1997), the court said excessive force in arrest is an intentional tort. The plaintiff argued that despite its title, "battery: excessive force in arrest," the pattern jury instruction, Wis JI-Civil 2008, does not involve an intentional tort because there is no requirement for a finding that the defendant had the requisite mental intent for civil battery. The court of appeals disagreed. It said that the jury instruction is premised on the fact that the officer did commit a civil battery and that the further requirement under the instruction that the use of force must be reasonable does not change the tort to one in negligence. It is merely a limitation on the amount of force a police officer may use under his or her limited privilege to engage in civil battery.

Need for Expert Testimony. The Wisconsin Supreme Court has concluded that determinations of excessive use of force are not, in general, beyond the realm of ordinary experience and lay comprehension. It rejected a categorical requirement of expert testimony in excessive use of force cases. Robinson v. City of West Allis, 2000 WI 126, 239 Wis.2d 595, 619 N.W.2d 692.

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2010 ASSAULT AND BATTERY: OFFENSIVE BODILY CONTACT

[Instruction Renumbered JI-Civil 2005.5]

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2020 SPORTS INJURY: RECKLESS OR INTENTIONAL MISCONDUCT

A participant in a (recreational) (amateur) (professional) athletic activity that includes physical contact is liable for injury caused to another participant during the activity if the participant who caused the injury acted recklessly or with intent to cause injury.

[A participant acts with intent to cause injury if (he) (she) engages in conduct with the intent to cause injury by that conduct. An intent to cause injury exists where the participant either means to cause injury by (his) (her) conduct or where an injury is almost certain to follow from this conduct.]

[A participant acts recklessly if (his) (her) conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which (he) (she) knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and (he) (she) proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.]

In considering the conduct involved in this case, you should consider the sport involved; the rules, regulations, customs and practices governing the sport, including the types of contact and the level of violence generally accepted; the risks inherent in the game and those that are outside the realm of anticipation; and the protective equipment worn. You should also consider the age and physical attributes of the participants and their respective skills and knowledge of the rules and customs of the game.

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[If you find that (defendant) engaged in conduct and intended to cause injury by that conduct, however great or small, or that (defendant)'s conduct was almost certain to cause injury in some way, however great or small, then (defendant) acted with intent to injure.]

[If you find that (defendant) engaged in conduct which (he) (she) knew or a reasonable person under the same circumstance would know created a high risk of physical harm to another, and (he) (she) proceeded anyway, then (defendant) acted recklessly.]

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 2006 and 2018.

The instruction is based on Wis. Stat. § 895.525(4m) which codified the theory espoused by the dissent in Lestina v. West Bend Mut. Ins. Co., 176 Wis.2d 901, 501 N.W.2d 28 (1993). The statute reads:

> **(4m)** LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.
>
> (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

The Wisconsin Supreme Court has cited the language of paragraph 3 of this section with approval. See Noffke v. Bakke, 315 Wis. 2d 350, ¶ 36 (2009).

Paragraph four is taken from the majority opinion in Lestina. Although these considerations were intended to aid the fact-finder in defining actionable ordinary negligence in a sports injury context, the Committee thought they would be helpful in either intentional or reckless sports injury cases, as well.

For a case involving a sports-related injury, see Shain v. Racine Raiders Football Club, Inc., 2006 WI App 257, 297 Wis.2d 869, 726 N.W.2d 346.

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2100 FALSE IMPRISONMENT

Question _____ asks: Did (Defendant) falsely imprison (Plaintiff) on _____?

False imprisonment is the unlawful restraint by one person of the physical liberty of another person. Before you may find that (Defendant) falsely imprisoned (Plaintiff), you must find the following:

1. (Defendant) confined or restrained (Plaintiff).

   Although this requires actual restraint or confinement, it does not require that it be in a jail or prison. If (Defendant) deprived (Plaintiff) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (Plaintiff) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both;

2. (Defendant) confined or restrained (Plaintiff) intentionally.

   This means that (Defendant) acted with purpose to confine or restrain (Plaintiff) or knew that the confinement or restraint would be substantially certain;

3. (Defendant) did not have lawful authority to confine or restrain (Plaintiff); and

4. (Plaintiff) was confined or restrained without (his) (her) consent.

COMMENT

This instruction and comment were approved in 1974 and revised in 2014.

The essence of false imprisonment is the intentional, unlawful, and unconsented restraint by one person of the physical liberty of another. Herbst v. Wuennenberg, 83 Wis.2d 768, 266 N.W.2d 391 (1978).

False imprisonment defined: intent an element, Strong v. Milwaukee, 38 Wis.2d 564, 157 N.W.2d 619 (1968) (this case refers to Wis JI-Civil 2100).

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Unlawful restraint, Weber v. Young, 250 Wis. 307, 311, 26 N.W.2d 543 (1947); Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

False imprisonment against officer: Where the writ is defective on its face or beyond the jurisdiction of the officer issuing process, the officer serving process is not protected. The officer serving process is bound to know what the law is. Rubin v. Schrank, 207 Wis. 375, 378, 241 N.W. 370 (1932). Lueck v. Heisler and another, 87 Wis. 644, 646, 58 N.W. 1101 (1894).

Citizen's arrest (department store floor walker): Cobb v. Simon, 119 Wis. 597, 97 N.W. 276 (1903).

Unlawful imprisonment where no force or violence is actually used: Gunderson v. Struebing, 125 Wis. 173, 177, 104 N.W. 149 (1905).

False imprisonment may not be predicated upon a person's unfounded belief that he or she was restrained. Herbst v. Wuennenberg, supra.

For burden of proof, see Bursack v. Davis, 199 Wis. 115, 225 N.W. 738 (1929).

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2110 FALSE IMPRISONMENT: COMPENSATORY DAMAGES

No instruction.

COMMENT

This instruction was withdrawn in 2013. The Committee believes that the instructions on general compensatory damages adequately cover claims for false imprisonment.

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2115 FALSE ARREST; LAW ENFORCEMENT OFFICER; WITHOUT WARRANT

[Define the crime involved in the arrest.]

An arrest is the seizing or detaining of a person by any act or words which indicate an intention to take the person into custody, thereby causing the person arrested to believe that he or she is under the actual control and will of the person making the arrest. No formal declaration of arrest is required.

An arrest may be made without a warrant if the law enforcement officer has reasonable grounds to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

Reasonable grounds to believe means that amount of evidence or information which would lead a reasonable police officer to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

In determining reasonable grounds, the officer may take into account all facts, including his or her own observations, and information the office believes are dependable, even if received from others. Information received from others must be corroborated or received under circumstances which make it reasonable to rely on that information. If the arrest is made solely on the basis of information received from an informant, the officer must have independent knowledge of the reliability of the informant or else the information must be received under circumstances which make it reasonable to rely on that information, even though the officer may not know the informant's identity. The reasonableness of the grounds does not depend upon the outcome of the subsequent legal investigation or prosecution

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resulting from the arrest. The facts and circumstances within the officer's knowledge, and of which the officer had reasonably trustworthy information at the time of the arrest, must be sufficient in themselves to warrant a police officer of reasonable caution to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. § 968.07 Arrest by law enforcement officer.

Central idea of arrest: control of liberty: Huebner v. State, 33 Wis.2d 505, 147 N.W.2d 646 (1967).

Arrest may be made without a warrant for any crime committed in the officer's presence. State v. Smith, 50 Wis.2d 460, 184 N.W.2d 889 (1971).

Probable cause defined: State v. Herrington, 41 Wis.2d 757, 165 N.W.2d 120 (1969). "Probable cause" is a requirement of the fourth amendment of the United States Constitution, binding upon the states through the fourteenth amendment. Section 11, Article 1 of the Wisconsin Constitution is substantially like the fourth amendment of the United States Constitution. Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175, 131 N.W.2d 169 (1965).

"Probable cause," "reasonable cause," and "reasonable grounds" are concepts having the same meaning. Kluck v. State, 37 Wis.2d 378, 155 N.W.2d 26 (1967); United States v. Walker, 246 F.2d 519, 526 (7th Cir. 1957); United States v. Vasquez, 183 F. Supp. 190, 193 (E.D. N.Y. 1960); Draper v. United States, 358 U.S. 307 (1959).

As to what constitutes reasonable grounds, see State v. Camara, 28 Wis.2d 365, 373, 137 N.W.2d 1 (1965); Browne v. State, 24 Wis.2d 491, 503, 129 N.W.2d 175, 131 N.W.2d 169 (1965); Stelloh v. Liban, 21 Wis.2d 119, 125, 124 N.W.2d 101 (1963); Henry v. United States, 361 U.S. 98, 102 (1959).

As to the adequacy of evidence based on information received from others see State v. Camara, supra at 374; Browne v. State, supra at 506; Stelloh v. Liban, supra; Draper v. United States, supra.

The reasonableness of the grounds does not depend upon the outcome of the subsequent legal investigation. Stelloh v. Liban, supra at 125; Carson v. Pape, 15 Wis.2d 300, 308, 112 N.W.2d 693 (1961).

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2150 FEDERAL CIVIL RIGHTS: §§ 1981 & 1982 ACTIONS

(Plaintiff) has alleged that (defendant) has deprived (him) (her) of a federal civil right by discriminating against (him) (her) (in renting an apartment) (in purchasing a home) (making the contract in issue). The federal law states:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . (42 U.S. Code § 1981)
>
> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property. (42 U.S. Code § 1982)

Before you can answer question 1 "yes," you must find the following:

First, that (plaintiff), attempted (or offered) to lease an apartment as described in the evidence from (defendant) and was ready, willing and able to pay (defendant)'s rental price.

Second, that (defendant) refused to lease to (plaintiff), or to negotiate for the rental of or otherwise made unavailable, or discouraged or denied (plaintiff) an apartment.

Third, that race was a substantial factor actually operating as a basis for (defendant)'s conduct even if not the sole basis for (defendant)'s refusal to lease.

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COMMENT

This instruction and comment were originally approved by the Committee in 1983. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Section 1981 applies also to discrimination based upon ethnic affiliation, national origin, or alienage as well as race. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).

The U.S. Supreme Court has declared that Section 1982 prohibits both public and private acts of racial discrimination in the sale of or rental of housing. Memphis v. Greene, 451 U.S. 100 (1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Instances of unlawful discrimination in housing transactions may also be remedied by applying the provisions of the Fair Housing Act of 1968 (Title VIII), 42 U.S.C. § 3601, et seq. A claim under § 1982 is independent from a claim based on the Fair Housing Act. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The coverage of the Fair Housing Act is more limited than § 1982 in that Title VIII does not cover the sale or rental of a single-family house by the owner if the owner does not own more than three such houses at one time, sells or rents without the use of a real estate broker, and does not advertise in violation of the Act.

This instruction is derived from Sandford v. R. L. Coleman Realty Co., 573 F.2d 173 (4th Cir. 1978).

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2151 FEDERAL CIVIL RIGHTS: § 1983 ACTIONS

Instruction Withdrawn.

COMMENT

This instruction was approved by the Committee in 1987 and withdrawn in 2014. For federal civil rights jury instructions prepared by the Committee on Pattern Jury Instructions of the U.S. Court of Appeals for the Seventh Circuit, visit www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf

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2155 FEDERAL CIVIL RIGHTS: EXCESSIVE FORCE IN ARREST (IN MAINTAINING JAIL SECURITY)

Instruction Withdrawn.

COMMENT

The instruction was approved by the Committee in 1980 and withdrawn in 2014. For federal civil rights jury instructions prepared by the Committee on Pattern Jury Instructions of the U.S. Court of Appeals for the Seventh Circuit, visit www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf

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2200 CONVERSION: DISPOSSESSION

A conversion is committed by a person who without consent of the owner (controls) (takes) property of another in a way that it seriously interferes with the right of the owner to control the property permanently or for an indefinite period of time. Before you may find that (defendant) committed a conversion of property belonging to (owner), you must find the following:

1. That (defendant) intentionally (controlled) (took) property belonging to (owner);
2. That (defendant) (controlled) (took) the property without the consent of (owner) or without lawful authority; and
3. That (defendant)'s act with respect to the property seriously interfered with the right of (owner) to possess the property.

Wrongful or unlawful intent is not an element of conversion. Thus, it is not necessary that (defendant) knew that (owner) was entitled to possession of the property or that (defendant) intended to interfere with (owner)'s possession. It is simply enough that (defendant) intended to deal with the property in a way that would seriously interfere with (owner)'s possession. Thus, a person may be liable for conversion where the person has exercised control over property even though he or she may be unaware of the existence of the rights with which he or she interferes.

COMMENT

This instruction and comment were originally approved in 1963 and revised in 1986. The instruction was revised in 1991. The comment was updated in 1995, 1999, 2009, and 2014.

Midwestern Helicopter v. Coolbaugh, 2013 WI App 126, 351 Wis.2d 211, 839 N.W.2d 167; H.A. Friend & Co. v. Professional Stationery, Inc., 2006 WI App 141, 294 Wis.2d 754, 720 N.W.2d 96. Production Credit Ass'n v. Nowatzski, 90 Wis.2d 344, 353, 280 N.W.2d 18 (1979); Production Credit Ass'n v. Equity Coop. Livestock, 82 Wis.2d 5, 10, 261 N.W.2d 127 (1977); Price v. Ross, 62 Wis.2d 335, 346, 214 N.W.2d 770 (1974); Schara v. Thiede, 58 Wis.2d 489, 497, 206 N.W.2d 129 (1974); Heuer v. Wiese, 265 Wis. 6, 60

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N.W. 2d 385 (1953); Adams v. Maxcy, 214 Wis. 240, 252 N.W. 598 (1934); Farm Credit Bank of St. Paul v. F&A Dairy, 165 Wis.2d 360, 477, Wis.2d 357 (Ct. App. 1991); Methodist Manor Health Center, Inc. v. Py, 2008 WI App 31, 307 Wis.2d 501, 746 N.W.2d 824. See also Bruner v. Heritage Co., 225 Wis.2d 728, 593 N.W.2d 814 (Ct. App. 1999). Prosser, Torts, § 15 (1971). See also Restatements, Second, Torts §§ 222-242 (1965).

Types of Conversion. Acts of conversion are ordinarily classified as: (1) a taking from the owner without his or her consent; (2) an unwarranted assumption of ownership; (3) an illegal use or abuse of the property; (4) a wrongful detention after demand. Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929).

Conversion is an intentional interference with another person's rights to possession of property. The intent required is not necessarily a matter of conscious wrongdoing. Wrongful intent or bad faith are not essential elements of conversion. Donovan v. Barkhausen Oil Co., supra at 199. Regas v. Helios, 176 Wis. 56, 186 N.W. 165 (1922). Conversion cannot be based on a negligent interference with the property. Lund v. Keller, 203 Wis. 458, 233 N.W. 769 (1931). It requires some intentional dominion or control over property which is inconsistent with the owner's rights. Prosser, Torts, § 15, p. 83 (1971). Thus, every theft is a conversion, but not every conversion is a theft.

Verdict Form. If there is a dispute in the evidence as to whether the plaintiff was entitled to possession at the time of conversion, a special verdict question should be included dealing with the plaintiff's possessory interest.

A conversion may consist of an assumption of complete control and dominion over the property without an actual taking or carrying away. Thus, a cause of action for conversion can include illegally withholding personal property by changing locks to the building in which the property was stored. Schara v. Thiede, supra at 497.

An agent may be liable for conversion if the principal engaged in the wrongful activity. The agent's good faith and lack of knowledge of a security on the property are not good defenses. Production Credit Ass'n v. Equity Coop. Livestock, supra at 8-9. Thus, an auctioneer may be held liable for the sale of personal property in which another holds a security interest. For another decision on the transfer of property subject to a security interest see Metropolitan Sav.& Loan Ass'n v. Zuelke's, Inc., 46 Wis.2d 568, 175 N.W.2d 634 (1970).

Conspiracy to Convert. For a civil conspiracy to convert, see Bruner v. Heritage Co., supra.

Causation. There is no causation element in conversion; the conversion must result in interference with the owner's rights to possess the property. Midwestern Helicopter v. Coolbaugh, supra; H.A. Friend & Co. v. Professional Stationery, Inc., supra.

Whether an unauthorized exercise of dominion is a conversion depends on the severity of interference with the owner's right to control. Midwestern Helicopter v. Coolbaugh, supra.

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2200.1 CONVERSION: REFUSAL TO RETURN UPON DEMAND (REFUSAL BY BAILEE)

A conversion is committed by a person who, without justification, refuses to surrender possession of property to one who is entitled to it. Before you may find that (defendant) committed a conversion of the property belonging to (owner), (plaintiff) must establish:

1. that (defendant), who had lawfully come into possession of the property, refused to surrender it to (owner) after (owner) demanded that the property be returned;
2. that (owner) was entitled to the return of the property; and
3. that the withholding of the property by (defendant) seriously interfered with the right of (owner) to control and use the property.

A refusal by a person to return the property because of a legitimate reason and for a reasonable length of time after demand is not a conversion. In addition, a person is not required to comply with a demand made at an unreasonable time or place, or in an unreasonable manner, or upon an employee who has no authority to return the property. [In addition, a person may in good faith detain property for a reasonable time to identify (owner) or to determine (owner)'s right to possession.]

COMMENT

This instruction was approved in 1986. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Price v. Ross, 62 Wis.2d 335, 346, 214 N.W.2d 770 (1974); Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929). Restatements, Second, Torts §§ 237-40 (1965). Prosser, Torts 4th Ed., § 15, p. 90-91 (1971).

See also Comment to Wis JI-Civil 2200.

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2200.2 CONVERSION: DESTRUCTION OR ABUSE OF PROPERTY

A conversion is committed by a person who without consent of the owner seriously interferes with the right of the owner of property to control his or her property permanently or for an indefinite period of time. Before you may find that (defendant) committed a conversion of property belonging to (owner), you must find the following:

1. that (defendant) intentionally (destroyed property belonging to (owner)) (abused or materially altered property belonging to (owner)) to such an extent as to change its identity or character;
2. that (defendant) (destroyed) (abused or materially altered) the property without the consent of (owner); and
3. that the (destruction) (abuse or material alteration) of the property seriously interfered with the right of (owner) to control and use the property.

Wrongful or unlawful intent is not an element of conversion. Thus, it is not necessary that (defendant) knew that (owner) was entitled to possession of the property or that (defendant) intended to interfere with (owner)'s possession of the property. It is simply enough that (defendant) intended to deal with the property in a way that would seriously interfere with (owner)'s possession of the property. Thus, a person may be liable for conversion by exercising control over property even though the person may be unaware of the rights with which the person interferes.

An act which is not intended to exercise any control over property but is merely negligent with respect to it is not a conversion, even though it may result in the loss of the property.

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COMMENT

This instruction was approved in 1986 and revised in 1991. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929); Restatement, Second, Torts § 226 (1965); Prosser, Torts, 4th Ed., p. 91. See also Comment, Wis JI-Civil 2200.

This instruction does not apply to situations in which the claim is based on negligence.

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2201 CONVERSION: DAMAGES

In determining what sum of money will reasonably compensate (plaintiff) for the conversion of (his) (her) property by (defendant), you must first determine the manner in which (defendant) came into possession of the (insert description of plaintiff's property).

[If (defendant) rightfully came into possession of the property, but later was unable or refused to return it upon demand, then you are to award (plaintiff), as damages, the value of the property on the date when the property should have been returned to (plaintiff) with interest to the time of trial.]

[If (defendant) wrongfully took (or converted) (plaintiff)'s property, then you are to award (plaintiff), as damages, the value of the property at the time (and place) of the wrongful taking with interest to the time of trial.]

[If (defendant) wrongfully took (plaintiff)'s property and later sold it, (plaintiff) may recover, as damages, the amount for which the property was sold or the value at the time (and place) of the wrongful taking, whichever is greater with interest to the time of trial.]

[If the property wrongfully taken (or converted) is still in the possession of (defendant), but (defendant) refuses to return it to (plaintiff), then (plaintiff) may recover the present value of the property at the place where the property was taken (or converted) in the condition it was when taken (or converted) with interest to the time of trial.]

COMMENT

This instruction and comment were approved in 1982 and revised in 1991, 2014, and 2016.

Production Credit Association v. Nowatzski, 90 Wis.2d 344, 280 N.W.2d 118 (1979); Ingram v. Rankin, 47 Wis. 406 at 420 (1879); Topzant v. Koshe, 242 Wis. 585 (1943); also see 18 Am. Jur.2d Conversion §§ 82-94 (1965).

Damages and Pre-Judgment Interest. The general rule regarding damages for conversion is that "the plaintiff may recover the value of the property at the time of the conversion plus interest to the date of the

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trial." Topzant, 242 Wis. at 588; Metropolitan Sav. & Loan Association v. Zuelke's, Inc., 46 Wis.2d 568, 577, 175 N.W.2d 64 (1970); Midwestern Helicopter, LLC v. Coolbaugh, 2013 WI App 126 at ¶ 9, 351 Wis.2d 211, 839 N.W.2d 167.

Additional Damages. The two cases cited above (Ingram v. Rankin, supra; and Topzant v. Koshe, supra) are also authority for the proposition that while the general rule limits plaintiff's recovery to the value of the property converted (whether it be at the time of the original taking or sale of the property by the converter), the plaintiff may recover additional damages if the plaintiff is deprived of some special use of the property which should be anticipated by the converter. Recovery of this additional damage requires a showing that the special use would have resulted in the plaintiff realizing some benefit from the property had it not been converted. Exemplary or punitive damages also may be awarded in addition to actual damages if the evidence is of such a character as to warrant the submission of punitive damages to the jury.

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LAW NOTE FOR TRIAL JUDGES

2400 MISREPRESENTATION: BASES FOR LIABILITY AND DAMAGES

Wisconsin recognizes three common law categories of misrepresentation: intentional, strict responsibility, and negligent misrepresentation. All three require that the defendant made an untrue representation of fact and that the plaintiff relied upon the representation. Intentional misrepresentation additionally requires that the defendant knowingly or recklessly made the untrue representation with the intent to deceive the plaintiff. Strict responsibility misrepresentation does not require a showing of an intent to deceive, rather the plaintiff must only show that the defendant had an economic interest in the transaction and made the representation on the defendant's personal knowledge under circumstances in which the defendant necessarily ought to have known the truth or untruth of the statement.[1] Negligent misrepresentation differs from intentional and strict responsibility misrepresentation in the circumstances and quality of the representation of fact. Under negligent misrepresentation, the untrue statement of fact need only be "negligently" made rather than intentional and the speaker does not require an economic interest in making the representation.

Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation either knowing that it was untrue, or recklessly not caring whether it was true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act to plaintiff's pecuniary damage; and (5) the plaintiff believed that the representation was true and relied on it.[2] The plaintiff's reliance on the representation must be justifiable.[3]

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Strict Responsibility Misrepresentation

The elements of strict responsibility misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it.[4] The plaintiff's reliance on the representation must be justifiable.[5]

Strict responsibility applies to those situations where public opinion calls for placing the loss on the innocent defendant rather than on the innocent plaintiff and requires the presence of two factors before liability may be found: (1) "a representation made as of defendant's own knowledge, concerning a matter about which he or she purports to have knowledge, so that he or she may be taken to have assumed responsibility as in the case of warranty, and (2) a defendant with an economic interest in the transaction into which the plaintiff enters so that defendant expects to gain some economic benefit."[6] The policy behind strict responsibility misrepresentation is that the speaker should know the pertinent facts of which he or she is speaking or else the speaker should not speak.[7]

The doctrine of strict responsibility misrepresentation has primarily been utilized in cases involving property transactions,[8] such as where there has been a representation as to the identification, boundaries, quantity and quality of the land, and existence of certain improvements upon the land, all of which were untrue. As discussed below, the creation of the economic loss doctrine (ELD) in 1989 has greatly impacted common-law claims involving property transactions.

Negligent Misrepresentation

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The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it.[9] Negligence for misrepresentation, like other actions for negligence, requires a duty of care, or a voluntary assumption of duty.

Measurement of Damages

Wisconsin has adopted the "benefit-of-the-bargain" measure of damages for intentional[10] and strict responsibility[11] claims. The "benefit-of-the-bargain" gives the difference between the fair market value of the property in the condition when purchased and the fair market value of the property as it was represented.[12] The "out-of-pocket" rule, which gives the difference between what the plaintiff gave as consideration and what the plaintiff actually received, is utilized in cases of negligent misrepresentation.[13]

Economic Loss Doctrine

The ELD was judicially created in 1989[14] to preserve the distinction between tort and contract law and requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim.[15] The ELD was designed to protect the freedom to allocate economic risk by contract and to encourage the party best situated to assess the risk of economic loss (the purchaser) to assume, allocate, or insure against that risk.[16] In 1999, the ELD barred negligence and strict liability claims arising in the context of consumer goods transactions.[17]

In 2003, the Supreme Court formally adopted a "narrow" exception to the ELD to promote "honesty, good faith and fair dealing during contract negotiations."[18] The "fraud in the inducement" exception was created to apply when an intentional misrepresentation

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occurred before the formation of the contract and the plaintiff is able to prove all five elements of intentional misrepresentation by "clear, satisfactory, and convincing evidence."[19]

Five years later, the Supreme Court further restricted the ability to prove an intentional misrepresentation claim in Below v. Norton.[20] Below involved a home purchase in which the buyer alleged that the seller intentionally failed to disclose that the sewer pipe running to the house was defective. Below sued under theories of intentional, strict responsibility, and negligent misrepresentation. The circuit court dismissed these common-law claims on the ground that the ELD barred recovery.[21]

The principal issue in Below was whether the ELD bars common-law claims for intentional misrepresentation that occur "in the context of residential, or noncommercial, real estate transactions."[22] Below argued that the ELD should apply only in "a commercial context," and that the "fraud in the inducement exception" should apply.[23] The Below court found that whether a buyer is a "commercial" or a "residential" buyer is not determinative in ELD analysis[24] and that in order for a "fraud in the inducement" exception to apply, "the misrepresentation must have induced the plaintiff to enter into the contract and must not have been specifically related to the subject matter of the contract," i.e., "the misrepresentation must be 'extraneous to, rather than interwoven with, the contract.'"[25] The "fraud in the inducement" exception did not apply to Below as the broken sewer line was not "extraneous" to the subject matter of the contract.[26]

The ELD does not, however, apply to statutory claims[27] such as a false advertising claim under Wis. Stat. § 100.18, or a fraudulent misrepresentation claim under Wis. Stat. § 895.446. One may recover "pecuniary" damages, costs and reasonable attorney fees upon proof of a §100.18 violation, and "actual damages," all costs of litigation and exemplary

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damages upon proof of a §895.446 violation.[28] See Wis JI-Civil 2418 & 2419, respectively. **The ELD also does not apply where the contract was for "services" rather than a "product."**[29]

Verdict

The verdict should be presented in alternatives if the evidence would permit findings on more than one of the three theories. The instructions on damages must indicate clearly to the jury which measure of damages to apply in connection with each finding.

NOTES:

1. Van Lare v. Vogt, Inc., 2004 WI 110, ¶32, 274 Wis. 2d 631, 683 N.W.2d 46.

2. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156

3. Id., ¶18. In Malzewski, the buyers waived their right to inspect the home despite the real estate condition report disclosing potential defects. The court found that the Malzewskis' reliance on the condition report was not justified to support a claim for intentional misrepresentation. Id.

4. Id., ¶19.

5. Id., ¶19.

6. Gauerke v. Rozga, 112 Wis. 2d 271, 280, 332 N.W.2d 804 (1983); *see also* Stevenson v. Barwineck, 8 Wis. 2d 557, 99 N.W.2d 690 (1959).

7. Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988).

8. Gauerke, 112 Wis. 2d 271; Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Lee v. Bielefeld, 176 Wis. 225, 186 N.W. 587 (1922); Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 692 (1921); First Nat'l Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914); Arnold v. National Bank of Waupaca, 126 Wis. 362, 105 N.W. 828 (1905); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888); Bird v. Kleiner, 41 Wis. 134 (1876).

9. Malzewski, 296 Wis. 2d 98, ¶20. A claim based on Anegligent misrepresentation inquires whether the buyer was negligent in relying upon the representation." Lambert v. Hein, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998).

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10. Anderson v. Tri State Home Improvement Co., 268 Wis. 455, 67 N.W.2d 853 (1954); Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).

11. Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas, 10 Wis.2d 47; Anderson v. Tri State Home Improvement Co., 268 Wis. 455.

12. See WIS JI-CIVIL 2405.

13. Gyldenvand v. Schroeder, 90 Wis. 2d 690, 280 N.W.2d 235 (1979).

14. Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989).

15. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶34, 262 Wis. 2d 32, 662 N.W.2d 652.

16. Id., ¶35.

17. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 225 Wis. 2d 305, 592 N.W.2d 201 (1999).

18. Digicorp, Inc. v. Ameritech Corp., 262 Wis. 2d 32, ¶50.

19. Id., ¶52.

20. Below v. Norton, 2008 WI 77, 310 Wis. 2d 713, 751 N.W.2d 351 (2008).

21. Id., ¶14.

22. Id., ¶20.

23. Id., ¶21.

24. Id., ¶41.

25. Id., ¶27.

26. Id., ¶39.

27. Id., ¶44; *see also* Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶33, 308 Wis. 2d 103, 746 N.W.2d 762.

28. Wis. Stat. §§ 100.18(11)(2), 895.446(3)(1)(a-c).

29. See the line of cases discussing "services" rather than a "product." Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis.2d 60, 699 N.W.2d 189; Ins. Co. of N. Am. v. Cease Elec. Inc., 2004 WI 139, 276 Wis.2d 361, 688 N.W.2d 462; 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2006 WI 94, 293 Wis.2d 410, 716 N.W.2d 822.

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COMMENT

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2401 MISREPRESENTATION: INTENTIONAL

To constitute intentional misrepresentation, there are five elements[1] which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts of conduct on the part of (defendant) [,or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter, such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support the speaker's opinion, may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that such untrue representation was made by (defendant) knowing the representation was untrue or recklessly without caring whether it was true or false.

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Representations made by a person who knows that he or she has no sufficient basis of information to justify them are reckless.[8]

Fourth, that (defendant) made the representation with intent to deceive and induce (plaintiff) to act upon it to (plaintiff)'s damage.[9]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[10] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[11]] Representations are to be tested by their actual influence on the person to whom made [not upon the probable effect of such representation upon some other person[12]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (plaintiff) would have acted in the absence of the representation.[13] It is not necessary that you find that such reliance was the sole and only motive inducing (plaintiff) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[14]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be untrue, then there can be no justifiable reliance as no one has the right to rely upon representation that he or she knew was untrue.[15]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (plaintiff) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[16]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[17]

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SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?

(State the ultimate facts alleged to be relied on.)

Answer: _____
Yes or No

Question 2: If you answer "yes" to question 1, answer this question:

Was the representation untrue?

Answer: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, answer this question:

Did (defendant) make the representation knowing it was untrue or recklessly without caring whether it was true or untrue?

Answer: _____
Yes or No

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Question 4: If you answered "yes" to question 3, answer this question:

Did (defendant) make the representation with the intent to deceive and induce (plaintiff) to act upon it?

Answer: _____
Yes or No

Question 5: If you answered all the preceding questions "yes," answer this question:

Did (plaintiff) believe such representation to be true and justifiably rely on it to (his) (her) financial damage?

Answer: _____
Yes or No

Question 6: If you answered all the preceding questions "yes," answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

Answer: $

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NOTE

Short form of ultimate fact (as used in Combined Verdict: Deceit or Negligence) was approved in Rud v. McNamara, 10 Wis.2d 41, 47, 102 N.W.2d 248 (1960), because: "Too many inquiries tend to confuse juries."

COMMENT

This instruction and comment were approved by the Committee in 1969. The comment was revised in 1997, 2001, 2004, 2014, 2016, 2017, and 2018.

For burden of proof, see Wis JI-Civil 205.

For punitive damages, see Wis JI-Civil 1707.1.

Intentional Misrepresentation to Induce Continued Employment. The Wisconsin Supreme Court has refused to recognize a new cause of action for intentional misrepresentation to induce continued employment. Mackensie v. Miller Brewing Co., 2001 WI 23, ¶ 21, 241 Wis.2d 700, 623 N.W.2d 739.

Rescission. Rescission is a remedy for intentional misrepresentation claims. Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451. The misrepresentation must be material. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller, supra.

Pecuniary. The Committee changed "pecuniary" to "financial" for plain language purposes.

NOTES:

1. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156.

2. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶42, 303 Wis. 2d 34, 734 N.W. 2d 827; Van Lare v. Vogt, 2004 WI 110, ¶33, 274 Wis.2d 631, 683 N.W. 2d 46; Novell v. Migliaccio, 2010 WI App 67, ¶10, 325 Wis. 2d 230, 783 N.W. 2d 897 (Ct App 2010); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am.Jur. Fraud and Deceit §§ 144-147 (1941); Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 5 N.W.2d 404 (1952). See also United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

4. 37 Am.Jur.2d Fraud and Deceit §§ 49, 77 (1968); "Opinions may be statements of fact if the representee may rely on them without being guilty of a want of ordinary care and prudence." Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

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5. J. H. Clark Co. v. Rice, 127 Wis. 451,106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934); Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916); Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 13.

8. Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Bachman v. Salzer, 168 Wis. 277, 169 N.W. 279 (1919); Prosser, Law of Torts (3d) § 102 at 716 (1964); Tietsworth v. Harley-Davidson, Inc., supra, ¶ 13.

9. Malzewski v. Rapkin, supra note 1; Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Cluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966).

10. Household Finance Corp. v. Christian, supra note 9.

11. Miranovitz v. Gee, supra note 7.

12. Neas v. Siemens, supra note 6.

13. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297,64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

14. Household Finance Corp. v. Christian, supra note 9; First National Bank of Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1964).

15. Household Finance Corp. v. Christian, supra note 9.

16. Prosser, Law of Torts (3d) § 103 at 731 (1964). Plaintiff must give ordinary attention to facts easily within his purview, Kraft v. Wodill, 17 Wis.2d 425, 430, 117 N.W.2d 261 (1962); Plaintikow v. Wolk, 190 Wis. 218, 222, 208 N.W. 922 (1926). To succeed on a claim for fraudulent misrepresentation, the representation must be a fact and made by the defendant, the representation must have been false, and the plaintiff must have believed the representation was true and relied on it to his damage. Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996), citing Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969). In Foss, the court said that the law will not permit a person to predicate damage upon statements which he or she does not believe to be true, for if he or she knows they are false, it cannot be said that he or she is deceived by them. Citing First Credit Corp. v. Behrend, 45 Wis.2d 243, 172 N.W.2d 668 (1969). The court said no one has the right to rely on representations he or she knows to be untrue.

17. Restatement, Second, Torts, §§ 540, 541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74,13 N.W.2d 534 (1944); 152 A.L.R. 459 (1944).

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2402 MISREPRESENTATION: STRICT RESPONSIBILITY

To constitute strict responsibility misrepresentation in this case, there are five elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant) [, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing;[1] or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that (defendant) made the representation as a fact based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of the statement. (Plaintiff) must prove that (defendant) represented the fact from (his) (her) personal knowledge, or was so situated that (he) (she) either had particular means of ascertaining the pertinent facts, or (his) (her) position made possible complete knowledge and (his) (her) statements fairly implied that (he) (she) had it.[8]

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Fourth, that (defendant) had an economic interest in the transaction, or, in other words, that (defendant) stood to make a financial gain if (plaintiff) entered into the transaction.[9] It is immaterial whether (defendant) in good faith believed such representation to be true.[10] Likewise, it is immaterial whether (defendant) had any intent to deceive (plaintiff).[11]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[12] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[13]] Representations are to be tested by their actual influence on the person to whom made, [not upon the probable effect of such representation upon some other person[14]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation.[15] It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[16]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be false, then there can be no justifiable reliance as no one has the right to rely upon a representation that he or she knew was untrue.[17]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (he) (she) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[18]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[19]

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SUGGESTED SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?
(State the ultimate facts alleged to be relied on.)

ANSWER: _____
Yes or No

Question 2: If you answer "yes" to question 1, then answer this question:
Was the representation untrue?

ANSWER: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

Did (defendant) make the representation as a statement based on (his) (her) personal knowledge or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of such a representation?

ANSWER: _____
Yes or No

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Question 4: If you answered "yes" to both questions 1, 2, and 3, then answer this question:

Did (defendant) have an economic interest in the transaction?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to questions 1, 2, 3 and 4, then answer this question:

Did (plaintiff) believe the representation to be true and justifiably rely on it to (his)(her) financial damage?

ANSWER: _____
Yes or No

Question 6: If you answered all the preceding questions "yes," then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

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COMMENT

See Law Note Wis JI-Civil 2400 for a discussion of the economic loss doctrine.

This instruction and comment were approved by the Committee in 1969 and revised in 2018.

For burden of proof, see Wis JI-Civil 205.

NOTES:

1. Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am. Jur. Fraud and Deceit §§ 144-147 (1941).

2. Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 50 N.W.2d 404 (1952).

4. 37 Am. Jur. Fraud and Deceit § 77 (1941). Prosser, Law of Torts (3d) § 104 at 742 (1964).

5. J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

8. Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983); Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988); Fowler and Harper, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 987-88 (1938).

9. Gauerke v. Rozga, supra note 8; Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Malzewski v. Rapkin, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156.

10. Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 69 (1921).

11. Haentz v. Toehr, 233 Wis. 583, 390 N.W. 163 (1940).

12. Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Malzewski v. Rapkin, supra note 9.

13. Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

14. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960).

15. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

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16. Household Finance Corp. v. Christian, supra note 12.

17. Malzewski v. Rapkin, supra note 9; First National Bank in Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1961).

18. Prosser, supra § 103 at 731.

19. Restatement, Second, Torts, §§ 540,541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W.2d 543 (1944); 152 A.L.R. 459 (1944).

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2403 MISREPRESENTATION: NEGLIGENCE

To constitute negligent misrepresentation in this case, there are four elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant)[, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact. However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support (his) (her) opinion, may in your discretion, be determined by you to be a representation of fact. In making your determination, you may consider the form and manner of expression [or the disparity of knowledge between the parties of the underlying facts; or the existence of a trust or confidence relationship between the parties].

Second, that the representation of fact was untrue.

Third, that (defendant) was negligent in making this representation. The word "negligence" has the same meaning as the phrase, "failure to exercise ordinary care." A person fails to exercise ordinary care when, without intending to do any wrong, (he) (she)

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makes a misrepresentation under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such misrepresentation will subject the interests of another person to an unreasonable risk of damage. [A person in a particular business or profession owes a duty to exercise the care that is usually exercised by persons of ordinary intelligence and prudence engaged in a like kind of business or profession.]

The making of a misrepresentation, even though made with an honest belief in its truth, is negligence if there was a lack of reasonable care in ascertaining the facts [or if it was made without the skill or competence required in a particular business or profession].

Fourth, (plaintiff) believed the representation to be true and relied on the representation to (his) (her) damage. The question is whether the representation actually misled (plaintiff) and materially affected (his) (her) conduct. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation. It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.

If you are called upon to answer the question as to whether (plaintiff) was negligent, then the question presented to you is whether (plaintiff) failed to exercise that care and caution which a person of ordinary intelligence and prudence usually exercised in a like or similar situation. In other words, (plaintiff) was negligent if (he) (she) failed to exercise that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances to ascertain the truth or untruth of the representation. [You are cautioned that the definition of "negligence" is different than the instruction on reliance previously given to you. The test here is the effect of the representation upon a person of

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ordinary intelligence and prudence and not the test of how the representation affected (plaintiff).]

The last question is the comparative negligence question. By your answer to this question you will determine how much or to what extent each party is to blame for the damages, if any, that (plaintiff) suffered. You will weigh the respective contributions of these parties to such damages, if any, and considering the conduct of the parties named in the question, considered as a whole, determine whether one made the same or a larger contribution than the other, and, if so, to that extent it exceeds that of the other. (Plaintiff) has the burden of proving the percentage attributable to (defendant). (Defendant) has the burden of proving the percentage attributable to (plaintiff).

SUGGESTED SPECIAL VERDICTS

Question 1: Did (defendant) make the representation of fact as to ____? (State the ultimate facts alleged to be relied on.)

ANSWER: _____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question: Was the representation untrue?

ANSWER: _____
Yes or No

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Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

Was (defendant) negligent in making the representation?

ANSWER: _____
Yes or No

Question 4: If you answered "yes" to question 3, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 6: If you answered "yes" to both questions 3 and 5, then answer this question:

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Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

____100____%

Question 7: If you answered "yes" to question 4, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: $_____

COMBINED VERDICT: DECEIT OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact, knowing it was untrue, or recklessly without caring whether it was untrue, and with the intent to deceive and induce (plaintiff) to act upon it?

ANSWER: _____
Yes or No

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Question 2: If you answered "yes" to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damages?

ANSWER: $_____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to (plaintiff)?

ANSWER: _____

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Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

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(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

COMBINED VERDICT: STRICT RESPONSIBILITY OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact as based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the facts?

ANSWER: _____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

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ANSWER: _____
Yes or No

Question 3: If you answered "yes" to questions 1 and 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to the (plaintiff)?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to (his) (her) financial damage?

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ANSWER: _____
Yes or No

Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

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ANSWER: $_____

COMMENT

This instruction and comment were approved by the Committee in 1969. The instruction was revised in 2018. The comment was revised in 2014, 2017, and 2018.

For burden of proof, see Wis JI-Civil 200

See Grube v. Daun, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992).

For a discussion of puffery as a question of fact, see United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

For a discussion of the effect of "as is" provisions, see Grube v. Daun, supra.

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2405 INTENTIONAL MISREPRESENTATION: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (BENEFIT OF THE BARGAIN)

A person, injured by intentional misrepresentation in the sale [exchange] of property, is entitled to be fairly and reasonably compensated for any damages the person sustained as a result of the intentional misrepresentation.

In answering question ____, you should determine the amount of money, if any, which represents [either:]

the difference between the fair market value of the property in its condition when purchased by _____ and the fair market value of the property if it had been as it was represented to be by (_____) [or the reasonable cost of placing the property in the condition in which it was represented to be].

"Fair market value" of property is the price paid by a willing buyer and accepted by a willing seller, neither of whom is then under obligation or force to buy or sell.

[For consequential damages, see Wis JI-Civil 3710.]

COMMENT

This instruction was approved by the Committee in 1979 and revised in 1992. The instruction was reviewed without change in 2018.

In cases of fraudulent misrepresentation, the measure of damages adopted in Wisconsin is the "benefit-of-the-bargain" rule. Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.2d 705 (1955); Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N.W.2d 95 (1980). Gyldenvand v. Schroeder, 90 Wis.2d 690-97, 280 N.W.2d 235 (1979).

Benefit-of-the-bargain damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased. Ollerman, supra.

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2. The reasonable cost of placing the property received in the condition in which it was represented to be. Ollerman, supra; Vandehey v. City of Appleton, 146 Wis.2d 411, 431 N.W.2d 679 (Ct. App. 1988).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of benefit-of-the-bargain damages. Ollerman, supra at 53; Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973) at 598.

For indirect or consequential damages for breach of contract, see Wis JI-Civil 3710.

In some cases, evidence will be introduced relating only to one of the alternative tests for benefit-of-the-bargain damages. In such a case, the instruction should be revised by eliminating the appropriate alternative measure.

In negligent misrepresentation cases, damages are determined by applying the "out-of-pocket" rule. See Wis JI-Civil 2406.

For fair market value, see Wis JI-Civil 8100.

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2405.5 STRICT RESPONSIBILITY: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (BENEFIT OF THE BARGAIN)

Question ___ asks: What sum of money will fairly and reasonably compensate plaintiff for (his) (her) loss of the bargain?

In determining (plaintiff)'s loss of the bargain, you should determine the amount of money, if any, which represents [either:]

the difference between the fair market value of the property in its condition when purchased by _____ and the fair market value of the property if it had been as it was represented to be by (_____) [or the reasonable cost of placing the property in the condition in which it was represented to be].

"Fair market value" of property is the price paid by a willing buyer and accepted by a willing seller, neither of whom is then under obligation or force to buy or sell.

[For consequential damages, See Wis JI-Civil 3710.]

COMMENT

This instruction and comment were approved by the Committee in 1992 and reviewed without change in 2018.

In cases of fraudulent misrepresentation, the measure of damages adopted in Wisconsin is the "benefit-of-the-bargain" rule. Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.2d 705 (1955); Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N. W.2d 95 (1980). Gyldenvand v. Schroeder, 90 Wis.2d 690-97, 280 N.W.2d 235 (1979).

Benefit-of-the-bargain damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased. Ollerman, supra.

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2. The reasonable cost of placing the property received in the condition in which it was represented to be. Ollerman, supra; Vandehey v. City of Appleton, 146 Wis.2d 411, 431 N.W.2d 679 (Ct. App. 1988).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of benefit-of-the-bargain damages. Ollerman, supra, at 53; Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973), at 598.

For indirect or consequential damages for breach of contract, see Wis JI-Civil 3710.

In some cases, evidence will be introduced relating only to one of the alternative tests for benefit-of-the-bargain damages. In such a case, the instruction should be revised by eliminating the appropriate alternative measure.

In negligent misrepresentation cases, damages are determined by applying the "out-of-pocket" rule. See Wis JI-Civil 2406.

For fair market value, see Wis JI-Civil 8100.

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2406 NEGLIGENT MISREPRESENTATION: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (OUT OF POCKET RULE)

A person injured by negligent misrepresentation in the sale [exchange] of property is entitled to be fairly and reasonably compensated for any damages the person sustained as a result of the misrepresentation.

In answering question ___, the measure of damages is the difference, if any, between the market value of the property at the time of purchase and the amount of money that (plaintiff) paid for the property.

[For consequential damages, see Wis JI-Civil 3710.]

COMMENT

This instruction was approved by the Committee in 1979 and revised in 1992. A reporter's note was deleted in 2014.

Gyldenvand v. Schroeder, 90 Wis.2d 690, 280 N.W.2d 235 (1979): "Prosser, Law of Torts (Hornbook Series, 4th ed. 1971), at 734, . . . notes that it has been suggested that the loss of bargain rule should be applied in cases of intentional misrepresentation, while the out-of-pocket rule applies where negligent misrepresentation is found." See also Costa v. Neimon, 123 Wis.2d 410, 336 N.W.2d 896 (Ct. App. 1985).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of out-of-pocket damages. Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973), at 598.

See instruction 3710 for consequential damages for breach of contract.

In intentional misrepresentation cases, damages are found by applying the "benefit-of-the-bargain" rule. See Wis JI-Civil 2405.

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2418 UNFAIR TRADE PRACTICE: UNTRUE, DECEPTIVE, OR MISLEADING REPRESENTATION: WIS. STAT. § 100.18(1)

To constitute an untrue, deceptive, or misleading representation in this case, there are three elements which must be proved by (plaintiff).

First, (defendant) made, published, or placed before one or more members of the public an advertisement, announcement, statement, or representation concerning the (sale) (hire) (use) (lease) (distribution) of _____ [**Note**: indicate nature of the sales promotion]. An advertisement, announcement, statement, or representation can be oral or written. It can appear in a newspaper, magazine, or other publication or it can be made by telephone or over radio or television. It may take the form of a notice, handbill, circular, pamphlet, letter, or any other means of (publishing) (disseminating) (circulating) it. [It may also take the form of a face-to-face communication.]

Second, the advertisement or announcement contained a(n) (assertion) (representation) (statement) that was untrue, deceptive, or misleading. A(n) (assertion) (representation) (statement) is untrue if it is false, erroneous, or does not state or represent things as they are. A(n) (assertion) (representation) (statement) is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief. The (assertion) (representation) (statement) need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to (sell) (distribute) the _____ [product or item] or with the intent to induce the (purchase) (use) of the _____ [product or item].

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Third, (plaintiff) sustained a monetary loss as a result of the (assertion) (representation) (statement). In determining whether (plaintiff)'s loss was caused by the (assertion) (representation) (statement), the test is whether (plaintiff) would have acted in its absence. Although the (assertion) (representation) (statement) need not be the sole or only motivation for (plaintiff)'s decision to (buy) (rent) (use) the _____ [product or item], it must have been a material inducement. That is, the (assertion) (representation) (statement) must have been a significant factor contributing to (plaintiff)'s decision. [You may consider the reasonableness of (plaintiff)'s reliance on the (assertion) (representation) (statement) by (defendant) in determining whether the (assertion) (representation) (statement) materially induced (plaintiff) to sustain a monetary loss.]

(Give Wis JI-Civil 200.)

COMMENT

This instruction and comment were approved in 1998. The instruction was revised in 2009. The comment was updated in 2001, 2004, 2008, 2009, 2014, 2016, and 2017. A reporter's note was removed in 2014.

Elements. There are three elements to a § 100.18 claim: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading," and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff. K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 & 49.

Reliance; Cause. In Novell v. Migliaccio, 2008 WI 44, 309 Wis.2d 132, 749 N.W.2d 544, the supreme court held that a plaintiff is not required to prove reasonable reliance as an element of a § 100.18 claim. However, the court said Areasonableness of a plaintiff's reliance may be relevant in considering whether the misrepresentation materially induced (caused) the plaintiff to sustain a loss. See also K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792.

In K&S Tool & Die Corp., the court contrasted § 100.18 claims with common law misrepresentation claims and concluded that unlike common law causes of action for misrepresentation, reasonable reliance is not the standard for a § 100.18 claim because the legislature created a distinct cause of action.

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The reasonableness of a person's actions in relying on representations is a "defense" and may be considered by a jury in determining cause. Novell, supra, ¶ 49. A jury may consider the reasonableness of a person's reliance on a representation in determining whether there had been a material inducement. Novell, supra, ¶ 50; K & S Tool & Die, supra, ¶ 36.

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the supreme court held that the economic loss doctrine bars common law claims for "intentional misrepresentation" in residential real estate transactions. It also held that a plaintiff in such a transaction would still have "statutory and contractual remedies," noting in particular that the plaintiffs § 100.18 claim was still viable because it had been remanded to the trial court.

Burden of Proof Under Wis. Stat. § 100.20 (5). In Benkoski v. Flood, 2001 WI App 84, ¶ 17, 242 Wis.2d 652, 626 N.W.2d 851, the court said the application of the ordinary civil burden of proof fosters the remedial purposes and policies underlying § 100.20(5).

Pecuniary Loss in Wis. Stat. § 100.20(5). The court of appeals has said that the "pecuniary loss" concept set out in Wis. Stat. § 100.20(5) is similar to the concept explained in JI-Civil 3735, Damages: Loss of Expectation. Benkoski v. Flood, 2001 WI App 84, ¶ 32, 242 Wis.2d 652, 626 N.W.2d 851. See also Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451, where the court of appeals discusses this instruction.

Silence. A non-disclosure does not constitute an "assertion, representation or statement of fact" under Wis. Stat. § 100.18(1). Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 4, 39, and 40. Silence is insufficient to support a claim.

Members of the Public. When there is an issue whether the plaintiff was a "member of the public" under § 100.18, see K & S Tool & Die Corp., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 and State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). Whether the plaintiff is a member of the public presents a question of fact. K & S Tool & Die Corp., supra.

Puffery. See United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

Advertisements. The court of appeals has held that the plain language of Wis. Stat. § 100.18 "shows that statements or representations may be actionable even when contained in bills or other documents not traditionally considered 'advertisements.'" MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2013 WI App 14, 346 Wis.2d 173, 828 N.W.2d 575. Applying this holding to the facts of the case, the court concluded that phone bills and representations in the bills that induced the plaintiff to pay for services it did not authorize are among the kind of misleading representations that Wis. Stat. § 100.18 prohibits.

Voluntary Payment Doctrine. The court in MBS, supra, also held that the voluntary payment doctrine does not apply to claims under Wis. Stat. § 100.18, 100.207, or the Wisconsin Organized Crime Control Act (Wis. Stat. §§ 946.80-946.88).

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Under the common law voluntary payment doctrine, a party cannot bring an action to recover payments that were paid voluntarily with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment. See MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, 338 Wis.2d 647, 809 N.W.2d 857.

Rescission. In 2014, the court of appeals held that Wis. Stat. § 100.18 permits plaintiffs, in some instances, to recover a refund of the purchase price. However, the statute which permits recovery only for "pecuniary loss," does not permit rescission as a remedy. A plaintiff can receive rescission as a remedy for intentional misrepresentation when the misrepresentation is material. Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451; see Wis JI-Civil 2405.

As-Is Clause. In Fricano v. Bank of America, 2016 WI App 11, 366 Wis.2d 748, 875 N.W.2d 143, the court said an "as is" and exculpatory clauses in the parties' contract did not relieve the bank/seller of liability under Wis. Stat. § 100.18 for its deceptive representation in the contract which induced agreement to such terms. The trial court in Fricano, instructed the jury on the "as is" clause as follows:

> An 'as is' clause does not relieve the defendant, Bank of America, from a duty to disclose a material adverse fact about the property.
>
> The buyer still has the burden of proof to prove that Bank of America had knowledge of the condition of the property and failed to disclose it. The buyer is entitled to rely upon a statement by the defendant, Bank of America, that it has no knowledge about the property. Bank of America may not use an as-is clause to relieve the bank of its responsibility to disclose conditions about the condition of the property. In these situations, the exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon.

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2419 PROPERTY LOSS THROUGH FRAUDULENT MISREPRESENTATION: WIS. STAT. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat. § 943.20)

To recover for a fraudulent misrepresentation, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following six elements were present:

First, that (defendant) made a representation to (plaintiff).

Second, that (defendant) knew that the representation was false.

Third, that (defendant) made the representation with intent to deceive and to defraud (plaintiff).

Fourth, that (plaintiff) was deceived by the representation.

Fifth, that (plaintiff) was defrauded by the representation.

Sixth, that (defendant) obtained money through the sale of property to (plaintiff).

The first element requires that (defendant) made a false representation to (plaintiff). This requires that the false representation be one of fact. It does not include expressions of opinions or representations of law.

The second element requires that (defendant) knew or believed that the representation was untrue.

The third element requires that (defendant) made the representation with intent to deceive and defraud (plaintiff). This element requires that (defendant) intended to deceive and defraud (plaintiff) or that (defendant) believed that (his) (her) representation would deceive and defraud (plaintiff).

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You cannot look into a person's mind to find out (his) (her) intent. You may determine intent directly or indirectly from all the facts in evidence. You may consider any statement or conduct of (defendant) that indicates (his) (her) state of mind.

The fourth element requires that (plaintiff) must have been misled by (defendant)'s false representation.

The fifth element requires that (plaintiff) was defrauded by the representation. This requires that (plaintiff) did in fact part with money in reliance (at least in part) on the false representation.

The sixth element requires that (defendant) obtained money through the sale of property by making a false representation.

[Burden of Proof: Give Wis JI-Civil 200.]

COMMENT

This instruction and comment were approved in 2000. The instruction was revised in 2018. The comment was updated in 2009. The statutory reference in the title was revised in 2009.

The instruction is based on a claim based on theft by fraud in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden. See Wis. Stat. § 895.446(2).

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the Wisconsin Supreme Court ruled that the Economic Loss Doctrine (ELD) bars common law claims for intentional misrepresentation in real estate transactions. It, nevertheless, noted that the plaintiff still had available "statutory and contractual remedies." The court noted "the issue of whether the ELD bars claims under Wis. Stat. § 895.446 (formerly Wis. Stat. § 895.80) for a violation of Wis. Stat. § 943.20(1)(d) also was presented for our review. However, we decline to address that issue . . ." The claim was remanded for development of the record. See 2008 WI 77, ¶ 7.

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2420 CIVIL THEFT: WIS. STAT. § 895.446 (Based on Conduct (Theft) Prohibited by Wis. Stat. §943.20(1)(a))

Theft is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)[1] movable property of another without consent and with intent to deprive the owner permanently of possession of the property. In order to recover for a civil theft, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following four elements were present:

First, that defendant intentionally took and carried away movable property of another.[2]

The term "intentionally" means the defendant must have had the mental purpose to take and carry away the property.[3] You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

"Movable property" means property whose physical location can be changed.[4]

Second, that the owner of the property did not consent[5] to the taking and carrying away the property.

Third, that the defendant knew that the owner did not consent.[6]

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Fourth, that the defendant intended to deprive the owner permanently of the possession of the property.

[Burden of Proof: Give Wis JI-Civil 200.]

COMMENT

This instruction and comment were approved by the Committee in 2018.

The instruction is based on a claim of theft in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on an innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden See Wis. Stat. § 895.446(2)

Damages. In Estate of Miller v. Storey, 2017 WI 99 (Nov. 30 2017), the Wisconsin Supreme Court held that civil theft actions, under Wis. Stat. section 895.446, are not actions based in tort – ruling that the estate could obtain a $10,000 actual damage award. The majority also ruled that double costs were authorized and that the estate could obtain attorney fees as "costs of investigation and litigation" under § 895.466(3)(b). However, a majority ruled that the appeals court did not commit an error in reversing the circuit court's award of $20,000 in exemplary damages.

1. One of the five alternatives in parenthesis should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes and carries away," which, in the Committee's judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis,2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in Wis JI-Criminal 1441. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and no that he had taken the property and transferred it. The Wisconsin Supreme Court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "ors" appeared in it: takes and carries away, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define "movable property of another" if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

> 939.22(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.
>
> 943.20(2)(c): "Property of another" includes property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

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3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of this instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of "movable property" in §943.20(2)(a) which provides:

> (a) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.
>
> Section 943.20(2) defines "property" as follows:
>
> (b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity and gas, documents which represent or embody a chose in action or other intangible rights.

5. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides and instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word "intentionally" in the statute.

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2500 DEFAMATION[1]: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The three basic components of a defamatory communication are:

a. the statement is false,

b. the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and

c. the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

1. **Elements**. The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. Ladd v. Uecker, 2010 WI App 28, 323 Wis.2d 798, 780 N.W.2d 216; Laughland v. Beckett, 2015 WI App 70, 365 Wis.2d 148, 870 N.W.2d 466.

2. **Libel or Slander**. A defamation action can be founded upon either libel or slander. Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1962).

3. **Truth**. Substantial truth of the statement is an absolute defense to a defamation claim. Schaefer v. State Bar of Wis., 77 Wis.2d 120, 252 N.W.2d 343 (1977); DeMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973).

4. **Publication**. Actionable defamation requires publication or communication. The required parts of this element are: (a) the words must be intentionally or negligently communicated to a person other than the person defamed, and (b) the communication must identify the person defamed expressly or by reasonable inference. Ranous v. Hughes, 30 Wis.2d 452, 461-62, 141 N.W.2d 251 (1966); Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931); Wis. Stat. § 802.03(6); Restatement, Second, Torts § 577 (1977).

5. **Opinion**. Generally, the defamatory communication must be a statement of fact. An expression of opinion generally cannot be the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the Supreme Court stated that there can be no such thing as a "false

[1] This law note was approved in 1987 and revised in 2016. The format was revised in 2002.

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idea." "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion. Restatement, Second, Torts § 566 (1977). Communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions, or beliefs. Converters Equip. Corp. v. Condes Corp., 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977); Laughland v. Beckett, 2015 WI App 70.

6. **Privilege**. Some defamatory statements are protected by privileges created by common law, state and federal constitutions, or by statute. These privileges are discussed on pages 7 and 8 of this law note.

KEY DEFINITIONS

1. **Defamatory**. Wisconsin has adopted the definition of "defamatory" stated in Restatement, Second, Torts § 559 (1977):

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement, 3 Torts, p. 156, sec. 559; Ranous v. Hughes, 30 Wis.2d 452, 460 (1966).

2. **Implied Malice**. Wisconsin law applies a strict liability theory to the communication of a defamatory falsehood by a private defendant about a private plaintiff when there is no conditional privilege involved. The law implies "malice" in the communication and no showing of "malice" is required to recover compensatory damages. Denny v. Mertz, 106 Wis.2d 637, 657, 318 N.W.2d 141 (1982).

3. **Express Malice**. Express malice arises from ill will, bad intent, or malevolence towards the defamed party. Such malice exists when slanderous words are uttered or libelous words are published from motives of ill will, envy, spite, revenge, or other bad motives against the person defamed. Polzin v. Helmbrecht, 54 Wis.2d 578, 587, 196 N.W.2d 685 (1972). This type of malice is sometimes referred to as "common-law" malice. See page 5 for a discussion of the difference between actual and express malice.

4. **Actual Malice**. Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Polzin, supra at 587-88. See page 5 for a discussion of the difference between actual and express malice.

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5. **Public Figure**. The court in Denny v. Mertz, supra at 649-50, adopted the following test based on Gertz v. Robert Welch, Inc., supra, to determine whether an individual is a public figure:

> Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public controversy. First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in Gertz, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors, relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. Gertz, 418 U.S. at 344-45.

The status of the plaintiff as a public figure or public official is significant in determining the level of "fault" the plaintiff must show to recover. A public figure suing a defendant protected by a conditional constitutional privilege must show actual malice instead of simple negligence.

TRIAL COURT'S INQUIRY ON WHETHER THE STATEMENT IS DEFAMATORY

The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a motion to dismiss. On a motion to dismiss, it is the function of the court to determine whether a communication is capable of a defamatory meaning. If the communication is capable of a defamatory as well as a nondefamatory meaning, then a jury question is presented. Only if the communication cannot reasonably be understood as defamatory should the motion be granted. Starobin v. Northridge Lakes, 91 Wis.2d 1, 287 N.W.2d 747 (1980). See also Denny v. Mertz, supra; Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 259 N.W.2d 691 (1977); Schaefer v. State Bar of Wis., supra; DiMiceli v. Klieger, supra; Polzin v. Helmbrecht, supra; Lathan v. Journal Co., 30 Wis.2d 146, 140 N.W.2d 417 (1966). The question to the jury is whether the communication made was reasonably understood in a defamatory sense by the persons to whom it was published. Schaefer, supra at 124-25.

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The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one. Meier v. Meurer, 8 Wis.2d 24, 29, 98 N.W.2d 411 (1959). In Frinzi v. Hanson, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966), the court said:

> The words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered.

Thus, Wisconsin applies the "reasonable interpretation" test. The trier of fact should not give the statement a "strained" or "unstructured construction," and the statement should be evaluated in context. Schaefer v. State Bar of Wis., supra. On a motion to dismiss, how does this "reasonable interpretation" standard relate to the requirement that complaints are to be liberally construed? Wis. Stat. § 802.03(6) governs pleadings in an action for libel or slander:

> (6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

MALICE IN DEFAMATION ACTIONS

Wisconsin defamation law recognizes three types of malice: implied malice, actual malice, and express malice.

1. **Implied Malice**. The element of malice creates some confusion in analyzing the various types of defamation actions. As a general principle, Wisconsin tort law holds that malice is an element of actionable defamation. Denny v. Mertz, supra at 657. However, the supreme court has implied the existence of such malice from the publication of a defamatory statement itself unless a conditional privilege applies. Polzin v. Helmbrecht, supra; Denny v. Mertz, supra at 657.

2. **Actual Malice and Express Malice**. In cases where a constitutional privilege is involved or where punitive damages are being sought, the difference between actual and express malice is important. The definitions of these two types of malice are contained in the following passage from Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975):

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"Actual malice" in defamation cases refers to a constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis.2d 578, 587, 588, 196 N.W.2d 685:

At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the supreme court in Rosenbloom also referred to this type of malice as "common law malice." "Actual malice" (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement was false or published with reckless disregard of whether it was false or not. "Actual malice" is what is required for a constitutional determination of libel under New York Times.

"Express" and "actual" malice are very different concepts.

The term "actual malice" arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279, 280 84 Sup. Ct. 710, 11 L.Ed.2d 686; 95 A.L.R.2d 1412.

The problem of actual malice arises in the cases involving first amendment protections afforded to the media, such as newspapers, television and radio, or comments made about public officers or public figures.

DEFENSES TO A DEFAMATION CLAIM

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1. **Truth**. As stated earlier, the "substantial truth" of the alleged defamatory statement is an absolute defense to the claim. Schaefer v. State Bar of Wis., supra. In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). At least in cases involving a media defendant, this holding changes Wisconsin common law which had placed the burden of proving that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982). Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege. It is uncertain whether the holding by the Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. The Court reserved this question. Special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

2. **Privilege**. Wisconsin law recognizes certain privileges which protect the communicator of a defamatory statement from liability. These privileges have been created to allow citizens, public officials, and media personnel to engage in communications which are useful to society with some protection from liability for the consequences which result from the communications. The most litigated of these privileges involve conditional privileges.

a. Absolute privilege

This type of privilege protects participants in judicial and legislative proceedings. Spoehr v. Mittlestadt, 34 Wis.2d 653, 150 N.W.2d 502 (1967); Hartman v. Buerger, 71 Wis.2d 393, 398-400, 238 N.W.2d 505 (1976); Restatement, Second, Torts §§ 583-92 (1977). As a general rule, this privilege protects the communicator of the defamatory statement if the statement has some relation to the matter involved in the proceeding.

b. Conditional privileges created by common law

Wisconsin law recognizes that some communications are conditionally privileged. In Lathan v. Journal Co., supra at 152, the court stated:

There are also certain occasions where a defamation is conditionally privileged. Conditional privileges or immunities from liability for defamation are based on public policy which recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation.

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At common law, a person is privileged to make a statement about another person even though it is defamatory, so long as he or she is making the statement to protect certain defined interests and he or she did not abuse the privilege.

The types of communications that are protected by a conditional privilege are those statements (1) to protect the communicator's interest; (2) to protect the interest of the recipient or a third person; (3) to protect a common interest or a family relationship; and (4) statements to a person who may act in the public interest. Restatement, Second, Torts §§ 594-98 (1977).

When the defamatory communication is privileged, the law will not imply or impute malice. Hett v. Ploetz, 20 Wis.2d 55, 121 N.W.2d 270 (1963). If the privilege is abused, the communicator of the defamatory statement is not protected. In earlier case law, the court had held that this type of privilege is "conditional" because the statement must be reasonably calculated to accomplish the privileged purpose and must be made without "malice." Hett v. Ploetz, supra. Later, in Ranous v. Hughes, supra, the court recognized that the word "malice" expressed in the Hett decision was "probably unfortunate." 30 Wis.2d at 468. The court, instead of retaining the "malice" concept from Hett, adopted the Restatement approach which speaks in terms of "abuse of privilege." The court then recognized the four conditions contained in Restatement, Second, Torts which may constitute an abuse of the privilege: (1) The defendant either did not believe in the truth of the defamatory matter, or, if believing the defamatory matter to be true, had no reasonable grounds for so believing; (2) because the defamatory matter was published for some purpose other than that for which the particular privilege is given; (3) because the publication was made to some person not reasonably necessary for the accomplishment of the particular privilege; or (4) because the publication included defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.

A finding of express malice, i.e., ill will, spite, etc., will also constitute an abuse of the conditional privilege. Calero, supra; Polzin, supra at 584; Ranous v. Hughes, supra at 469; Restatement, Second, Torts § 603 Comment a (1977).

Subsequent to the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., supra, the Restatement substituted a new test of abuse of privilege, namely: "actual knowledge of falsity or reckless disregard as to truth or falsity."

C. Conditional privileges created by the United States Constitution

A constitutional conditional privilege refers to the protection afforded media sources (and also to nonmedia persons, where the statement involves a matter of a public interest or concern) under the first amendment. The principal case establishing this constitutional

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privilege is New York Times Co. v. Sullivan, supra. The effect of the constitutional conditional privilege is that the court will require some finding of "fault" on the part of the defendant instead of allowing the strict liability which exists at common law where malice is implied. The degree of "fault" required by this privilege depends on the nature of the plaintiff. Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. Denny v. Mertz, supra. However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e., actual knowledge or with reckless disregard of whether the statement was true or false. In discussing the Gertz decision, the court, in Denny v. Mertz, explained the rationale in Gertz for permitting a less rigorous showing of "fault" when a private plaintiff was seeking recovery. The court, in Denny, supra at 645, stated:

The [Gertz] court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.

In Gertz v. Robert Welch, Inc., supra, the United States Supreme Court permitted the states to adopt the degree of protection to be afforded statements involving private persons so long as the states did not impose liability without fault. The Wisconsin Supreme Court, in response to Gertz, stated that in a defamation action involving a private plaintiff in a matter of private concern, the required showing of fault is simple negligence. Denny v. Mertz, supra.

D. Statutory privilege

Wisconsin statutes create an absolute privilege which protects persons reporting legislative, judicial, or other public official proceedings. Wis. Stat. § 895.05(1) states:

Damages in Actions For Libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication of such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

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TYPES OF DEFAMATION ACTIONS

Generally, an action for defamation will fall into one of four categories according to the nature of the parties. At the end of this law note, there is a chart which compares the various types of defamation actions. These categories are:

a. Private individual versus a private individual with no conditional privilege applicable.
b. Private individual versus a private individual with a conditional nonconstitutional privilege applicable.

c. Private individual versus a media defendant which will always involve a conditional constitutional privilege.

d. Public official or public figure versus a media or nonmedia defendant which will always involve a conditional constitutional privilege.

In each of these categories, the requisite showing of "fault" is different.

1. When the action is brought by a private individual against another private individual, with no privilege involved, existence of malice is implied from the libelous matter itself. Denny, supra at 657.

2. When the action is brought by a private individual against another private individual, with a conditional nonconstitutional privilege involved, liability can be established by proof of the defamatory statement, Calero v. Del Chemical Corp., supra at 500, and abuse of the conditional privilege, Ranous, supra at 468.

3. When the action is brought by a private individual against a media defendant, thereby involving a conditional constitutional privilege, liability is established by proof that the media defendant was negligent in broadcasting or publishing the defamatory statement. Denny, supra at 654.

4. In a case involving a public official or public figure, as defined in Denny, against a media defendant or a nonmedia individual, thereby involving a conditional constitutional privilege, the plaintiff must prove actual malice. New York Times Co., supra at 726; Calero, supra at 500; Polzin, supra at 586; see also Dalton v. Meister, 52 Wis.2d 173, 188 N.W.2d 494 (1971).

BURDEN OF PROOF TO ESTABLISH CAUSE OF ACTION

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1. In a case involving a private individual against another private individual, with no privilege involved, existence of malice is implied. The burden of proof of showing the defamatory statement was made is the ordinary burden. Denny, supra at 657.

2. In the case involving a private individual versus a private individual, with a conditional nonconstitutional privilege involved, the plaintiff has the ordinary burden of proof to show the defamatory statement was made; i.e., greater weight of the credible evidence to a reasonable certainty. Calero, supra at 500. The defendant has the ordinary burden to prove privilege as a defense to the action. Calero, supra at 499.

3. In the case involving a private individual versus a media defendant, the plaintiff has the ordinary burden of proof; i.e., the greater weight of the credible evidence to a reasonable certainty. There is no Wisconsin case directly stating that the plaintiff has the ordinary burden of proof. However, the Gertz decision permits individual states to define for themselves the appropriate standard of liability in such cases. The court in Denny, supra at 654, established for Wisconsin that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. With negligence as the standard, the Committee concluded that ordinary burden of proof applies.

4. In cases involving a public official or a public figure versus a media defendant or private individual, the plaintiff has the middle burden of proof, i.e.; by evidence that is clear, satisfactory, and convincing to a reasonable certainty. Polzin, supra at 586; Calero, supra at 500.

RECOVERY OF COMPENSATORY DAMAGES

It is not necessary in libel actions to plead or prove actual damages of a pecuniary nature, called special damages. Dalton v. Meister, supra; Lawrence v. Jewell Companies, Inc., 53 Wis.2d 656, 193 N.W.2d 695 (1972). If the writing alleged to be libelous is determined by the court to be capable of a defamatory meaning, an allegation of general damages is sufficient. Slanderous statements may, in certain instances, be classified as defamatory and slanderous per se, and, in such instances, the plaintiff may plead and recover general damages. Starobin v. Northridge Lakes Co., supra. Oral statements imputing certain crimes, a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, or of unchastity to a woman are actionable without proof of special damages. All other slander not falling into these seemingly artificial categories is not actionable without alleging and proving special damages. Martin v. Outboard Marine Corp., supra.

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In Denny v. Mertz, supra, the court stated that items of damage recoverable in libel and slander actions in Wisconsin are set forth in Wis JI-Civil 2516.

The burden of proof is the ordinary civil burden.

RECOVERY OF PUNITIVE DAMAGES

In cases involving a private individual against a private individual, whether or not a conditional unconstitutional privilege is involved, the plaintiff must establish express malice to recover punitive damages. Calero supra at 506; Dalton v. Meister, supra at 179.

In cases involving a private individual against a media defendant, the plaintiff must prove actual malice to recover punitive damages. Gertz, supra; Denny, supra at 659.

In cases involving a public official or public figure against a media defendant or nonmedia individual, the plaintiff can only recover punitive damages upon a showing of express malice.

> It should finally be noted that in a case such as this where the New York Times standards apply and where punitive damages are sought, there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet the criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all. Polzin at 588.

The decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), establishes the standard for the required degree of proof to be applied to punitive damage claims. In Wangen, the court held that the middle burden of proof shall apply to punitive damage claims. Therefore, the plaintiff must establish its punitive damage claims to a reasonable certainty by evidence that is clear, satisfactory, and convincing. This burden of proof applies to all types of defamatory actions, whether involving conditional privileges or not.

ADDITIONAL REFERENCE MATERIAL

For additional discussion of defamation law in Wisconsin, see Brody, "Defamation Law of Wisconsin," 65 Marq. L. Rev. 505 (1982).

TYPES OF DEFAMATION ACTIONS - CHART

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The following page compares the different types of defamation actions as to elements and burdens of proof.

TYPES OF DEFAMATION ACTIONS IN WISCONSIN

Type of Plaintiff	Type of Defendant	Degree of "Fault" Necessary for Compensatory Damages	Burden of Proof for Compensatory Damages	Conduct Necessary for Punitive Damages	Burden of Proof for Punitive Damages
Private individual	Private with no confidential privilege	Defamatory statement only (malice is implied or imputed)	Ordinary Calero v. Del Chemical 68 Wis.2d 487, 500	Express malice Dalton v. Meister 52 Wis.2d 173, 179, Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Private with nonconstitutional conditional privilege	Defamatory statement and abuse of privilege Ranous v. Hughes, 30 Wis.2d 452, 468	Ordinary, Calero, supra at 500	Express malice Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, p. 183	Negligence Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347, held that states establish the standard of liability; Denny v. Mertz, 106 Wis.2d 636, 654 established the negligence standard	Ordinary	Actual malice Denny, supra at 659 Gertz, supra at 350	Middle - Wangen, supra at 300
Public figure	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, supra at 183	Actual malice New York Times v. Sullivan, 376 U.S. 254, 279-280 Calero, supra at 500 Polzin v. Helmbrecht, 54 Wis.2d 578, 587-588	Middle Calero, supra at 500	Express malice Polzin, supra at 588	Middle - Wangen, supra at 300

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DEFAMATION SERIES

The following list shows the instructions on substantive law and damages included in this defamation series.

2501 Defamation: Private Individual Versus Private Individual, No Privilege
2505 Defamation: Truth as a Defense (Nonmedia Defendant)
2505A Defamation: Truth of Statement (First Amendment Cases)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard)
2510 Defamation: Truth as Defense Where Plaintiff Charged with Commission of a Crime
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)
2512 Defamation: Truth as Defense Where Plaintiff Not Charged with Commission of a Crime
2513 Defamation: Express Malice
2514 Defamation: Effect of Defamatory Statement or Publication
2516 Defamation: Compensatory Damages
2517 Defamation: Conditional Privilege: Abuse of Privilege
2517.5 Defamation: Public Official: Abuse of Privilege
2518 Defamation: Express Malice
2520 Defamation: Punitive Damages

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2501 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL, NO PRIVILEGE

Question 3 (2) asks whether the statement made (published) by (defendant) was defamatory.

A defamatory statement is one which: (1) is false, (2) is communicated (by speech) (by conduct) (in writing) to a third person, and (3) tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person.

The action of defamation is based upon the principle that a person's reputation and good name is of great value. Once such reputation and good name have been damaged by statements of another person, restoration is virtually impossible.

It is not necessary that the defamatory statement be communicated to a large or even a substantial number of persons. It is enough if it is communicated to a single person other than the one defamed. Nor is it necessary that the statement be made (published) with the intention to defame, for the intention of the speaker (author) is not material.

In determining whether (defendant) made or published a defamatory statement, you should consider the whole context of the communication, giving the particular words of defamation their natural and ordinary meaning.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the statement made (published) by (defendant) was defamatory.

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(As to Question 4 (3), the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF, ORDINARY, WIS JI-CIVIL 200.)

(As to Question 5 (4), express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513.)

(As to Question 6 (5), punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

(As to Questions 5 (4) and 6 (5), give BURDEN OF PROOF, MIDDLE, WIS JI-CIVIL 205.)

SPECIAL VERDICT - TRUTH OF THE STATEMENT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____
Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement substantially true?

Answer: _____
Yes or No

[Note: In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. __, 89 L.Ed.2d 783 (1986). At least in cases involving a media defendant, this holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n. 35, 318 N.W.2d 141 (1982). It is uncertain whether the holding by the court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. The Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision and the

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concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.]

Question 3: If you answered "no" to Question 2, then answer this question: Was such statement defamatory?

Answer: _____
Yes or No

Question 4: If you answered "yes" to Question 3, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 5: If you answered "yes" to Question 3, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____
Yes or No

Question 6: If you answered "yes" to Question 5, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

SPECIAL VERDICT - TRUTH OF THE STATEMENT NOT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____
Yes or No

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Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement defamatory?

Answer: _____
Yes or No

Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____
Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

COMMENT

This instruction was originally approved in 1986 and revised in 1991. The comment was revised in 1987. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Denny v. Mertz, 106 Wis.2d 636, 658, 318 N.W.2d 141 (1982); Martin v. Outboard Marine Corp. 15 Wis.2d 452, 462-63, 113 N.W.2d 135 (1962); Restatement, Second, Torts §§ 577, 558, 559 (1977).

See also Law Note, Wis JI-Civil 2500.

In all areas not protected by first amendment constitutional considerations, the burden of proof is the ordinary civil burden. Calero v. Del Chemical Corp. 68 Wis.2d 487, 500, 228 N.W.2d 737 (1975).

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2505 DEFAMATION: TRUTH AS A DEFENSE (NONMEDIA DEFENDANT)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

It is not necessary for (defendant) to establish the exact truth of the statement (made) (published). Slight inaccuracies of expression are immaterial provided that the statement is true in substance.

The burden of proof is upon (defendant) to establish the truth (substantial truth) of the statement.

COMMENT

This instruction was originally approved in 1986 and revised in 1988. The comment was revised in 1987, 2011, and 2014. This instruction should be used in defamation cases where no constitutional conditional privilege exists.

Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982); DiMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973); Restatement, Second Torts § 581A (1965). See also Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

In Lathan v. Journal Co., 30 Wis.2d 146, 151, 140 N.W.2d 417 (1966), the court established the decision-making format for a defamation action. It stated:

> In an action for libel the court must first determine whether the writing complained of is defamatory. If it is not, that ends the matter. In the event of defamation, the court must consider the defenses alleged. A matter, though defamatory, is still not actionable if it is true, since truth is a complete defense. Williams v. Journal Co. (1933), 211 Wis. 362, 370, 247 N.W. 435.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). This holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, supra. Philadelphia Newspapers, Inc. v. Hepps involved a constitutional conditional privilege. It is uncertain whether the holding by the U.S. Supreme Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. In fact, the Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision

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and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

In Denny v. Mertz, supra at 660-61 n.35, a 1982 decision, the Wisconsin Supreme Court reaffirmed earlier decisions which held that the defendant has the burden of proving as a defense the truthfulness of the alleged defamatory statement. The court strongly disagreed with cases from other jurisdictions that had put the burden of proving the falsity of the statement on the plaintiff. Following the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), other jurisdictions held that the Gertz constitutional protections apply to both media and nonmedia defendants. Because the plaintiff, under Gertz, must establish "fault" on the part of the defendant, jurisdictions applying the constitutional protections to all defendants do not require the defendant to prove truthfulness as a defense and instead require the plaintiff to prove falsity. This major shift in evidentiary burden was strongly rejected by the Wisconsin Supreme Court in Denny v. Mertz, supra at 660-61, when it noted:

> The decision in Jacron (350 A.2d 688) also stated that "truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff." 350 A.2d at 698. We strongly disagree with this allocation of the burden of proving the truth of a statement and reaffirm the law of this state that if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false. See, e.g., Schaefer, 77 Wis.2d at 125.

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2505A DEFAMATION: TRUTH OF STATEMENT (FIRST AMENDMENT CASES)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

The burden of proof is upon (plaintiff) to establish that the statement is false. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

COMMENT

This instruction and comment were approved in 1988.

See Comment, Wis JI-Civil 2505.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). This holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661n.35, 318 N.W.2d 141 (1982). Philadelphia Newspapers, Inc. v. Hepps involved a constitutional conditional privilege. It is uncertain whether the holding by the Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. In fact, the Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

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2507 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL WITH CONDITIONAL PRIVILEGE

(As to Question 1, give the definition of "defamation" from Wis JI-2501.)

Question 2 asks whether (defendant), in making (publishing) the statements about (plaintiff), abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to make (publish) defamatory statements about another. However, the privilege does not protect the speaker (author) if it is abused.

In this case, (defendant) had the privilege of making (publishing) statements about (plaintiff) for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., advising a prospective employer about the work capabilities of a former employee). However, it is for you to determine whether (defendant)'s privilege to make (publish) statements about (plaintiff) was abused under the circumstances of this case.

(Select the appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if (he) (she) at the time of making (publishing) the statements knew that such statements were false or made (published) them in reckless disregard as to the truth or falsity of them.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of the truth or falsity of defamatory statements.)]

[2. An abuse of privilege occurred if (defendant) made (published) the statements solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose).]

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[3. An abuse of (defendant)'s privilege occurred if (defendant) made the statements (made publication of the statements available) to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place even though third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that the making (publishing) of the statements was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).]

[The facts and circumstances available to (defendant) at the time the statements were made (published) must have been sufficient to cause a person of reasonable caution and prudence to believe that the information, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)'s privilege occurred if (he) (she) made (published) statements necessary for the purpose (insert purpose - e.g., (plaintiff)'s work habits to a prospective employer) and then made additional defamatory statements not necessary to accomplish that purpose.]

[6. If the (defendant) made (published) statements believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused.]

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(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in making (publishing) the statements.

(As to Question 3, the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF: ORDINARY, WIS JI-CIVIL 200.)

(As to Question 4, express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513, and BURDEN OF PROOF: MIDDLE, WIS JI-CIVIL 205.)

(As to Question 5, punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

SPECIAL VERDICT: (Proof of falsity assumed)

Question 1: Were the statements made (published) by (defendant) defamatory?

Answer: _____

Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: In making (publishing) the statements, did (defendant) abuse (his) (her) privilege?

Answer: _____

Yes or No

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Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statements?

Answer: _____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the statements?

Answer: _____

Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: _____

COMMENT

This instruction was approved in 1986 and revised in 2002. The comment was updated in 2003 and 2020.

See Restatement, Second, Torts § 619 (1977).

Whether a privilege exists at all is a question for the court. If the facts are in dispute, the jury determines the issues of fact, and the court decides whether the facts found by the jury make the publication privileged.

The jury determines whether the defendant abused the privilege.

For occasions in which a conditional privilege would arise, see Restatement, Second, Torts §§ 594-598A, (1977).

In Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966), the supreme court listed the four conditions which constituted an abuse of conditional privilege under the Restatement rules. Since that time, the Restatement had changed the wording of the first abuse of privilege from:

> (1) The defendant either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing; . . . Ranous, at 468.

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to:

> (a) knows the matter to be false; or
> (b) acts in reckless disregard as to its truth or falsity." Restatement, Second, Torts § 600 (1977).

In addition, the Restatement, Second, Torts § 605A (1977), has added a fifth rule constituting an abuse of conditional privilege. See also Restatement, Second, Torts Appendix, § 605, p. 117, Reporter's Note.

The five occasions giving rise to abuse of conditional privilege, as stated in the Restatement, Second, Torts §§ 600, 603-605A (1977) are:

1. The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity.

2. The defamatory matter is published for some purpose other than for which the privilege is given.

3. The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.

4. The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.

5. The publication includes unprivileged matter as well as privileged matter.

Every person has a lawful right to act for the protection of his or her (own bodily security, property, business or profession). When so acting, a person has the privilege, if such privilege is not abused, of making statements about another which may later turn out to be false and defamatory without being subjected to liability for the making of such statements. This privilege, however, is a conditional privilege which, if abused, does not shield a defendant from the liability imposed upon one who makes false and defamatory statements about another. Also, a person has a right to act for the protection of a third person, when either the life or property of such third person is imperiled by a threatened serious crime. When so acting, a person has the privilege, if such privilege is not abused, of making statements which may later turn out to be false and defamatory without being subjected to liability for the making of such statements.

A person also has a lawful right to act with respect to a matter which affects an important public interest when such public interest requires the communication of defamatory matter to a public officer or private citizen.

Employee References: Statutory Privilege Under Wis. Stat. § 895.487(2) for Employers. Wisconsin courts have long recognized a common law conditional privilege that protects communications that enable a prospective employer to evaluate an employee's qualifications. See Hett v. Ploetz, 20 Wis.2d 55, 59, 121 N.W.2d 270 (1963). The Wisconsin legislature has also codified this privilege under Wis. Stat. § 895.487, which permits an employer to make statements about a former employee. This statute reads:

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> An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322. (Emphasis added.)

In Gibson v. Overnite Transportation Company, 2003 WI App 210, ¶11, 267 Wis.2d 429, 671 N.W.2d 388 the employer/defendant argued that, to abuse the statutory privilege, statements by the employer must be made with actual malice, i.e. with knowledge of falsity or with reckless disregard for the truth. The court of appeals concluded that the Wisconsin Legislature intended to keep the same standard of malice as existed in the common law-express malice and, therefore, actual malice is not required. The court said:

> § 17. Our conclusion is further supported by the jury instructions. See **State v. Olson**, 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661 (1993) ("[W]hile jury instructions are not precedential, they are of persuasive authority."). Like Wis. Stat. § 895.487(2), Wis JI-Civil 2507 lists ways in which the jury can find that an employer abused its privilege to make statements about former employees. First, the jury may find that the defendant made the statements knowing that they were false or in reckless disregard as to the truth or falsity of them. This is actual malice. However, the jury may also find defamation where the defendant made statements solely from spite or ill will. This is express malice, which is what the jury found here. Actual malice is not required.

In this context, "express malicious" requires a "showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed." Gibson v. Overnite Transportation Company, supra, at ¶11.

In Hussain v. Ascension Sacred Heart – St. Mary's Hosp., No. 18-cv-00529-wmc, 2019 WL 5310677 (W.D. Wisc. October 21, 2019), the plaintiff appeared to argue that malice should be inferred from the mere fact that the "forever letter" evaluation drafted by his employer was overall negative. The court, however, concluded that such an argument "not only falls short of the legal standard for malice, it would also read out of existence any privilege extended in section 895.487(2)." Hussain, supra.

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2509 DEFAMATION: PRIVATE INDIVIDUAL VERSUS MEDIA DEFENDANT (NEGLIGENCE STANDARD)

(As to question 1, give the definition of "Defamation," from Wis. JI-Civil 2501.)

Question 2 asks whether (defendant) was negligent in making (publishing) the statement about (plaintiff). If you are satisfied from the credible evidence that (defendant) did not have a reasonable basis for making (publishing) the statement or did not use ordinary care in checking on the truth or falsity of the statement before making (publishing) it, then you will answer question 2 "yes."

Ordinary care is the degree of care which the great mass of mankind ordinary exercises under the same or similar circumstances. A person fails to use ordinary care when, without intending to do any wrong, he or she acts or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or the person's property, or the person or property of another, to an unreasonable risk of injury or damage.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) was negligent in making (publishing) the statement.

(As to question 3, the damage question, give Wis JI-Civil 2516.)

(As to question 4, actual malice, give the actual malice part of Wis JI-Civil 2511.)

(As to question 5, punitive damages, give Wis JI-Civil 2520.)

(As to question 3, burden of proof, give Wis JI-Civil 200.)

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(As to questions 4 and 5, actual malice and punitive damages, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., John Jones took a bribe) defamatory:

ANSWER: _____
(yes or no)

Question 2: If you answered "yes" to question 1, then answer this question:

Was (defendant) negligent in making (publishing such statement?

ANSWER: _____
(yes or no)

Question 3: If you answered "yes" to question 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

ANSWER:$ _____

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Question 4: If you answered "yes" to question 2, then answer this question:

Did (defendant) act with actual malice in making (publishing) such statement?

ANSWER: _____
(yes or no)

Question 5: If you answered "yes" to question 4, then answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

ANSWER:$ _____

COMMENT

This instruction and comment were approved by the Committee in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The Wisconsin Supreme Court determined in Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141 (1982), that the requisite showing of "fault" be media defendant sued by a private plaintiff is negligence. See Law Note, Wis JI-Civil 2500, Defamation, pages 12-13.

In cases involving a private individual versus a media defendant, the plaintiff must prove actual malice to warrant an award of punitive damages. Gertz v. Robert Welch, Inc., 94 S.Ct. 2997, 3012 (1974); Denny v. Mertz, supra at 659.

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2510 DEFAMATION: TRUTH AS DEFENSE WHERE PLAINTIFF CHARGED WITH COMMISSION OF A CRIME

This instruction was withdrawn in 1986.

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2511 DEFAMATION: PUBLIC FIGURE VERSUS MEDIA DEFENDANT OR PRIVATE FIGURE WITH CONSTITUTIONAL PRIVILEGE (ACTUAL MALICE)

(As to question 1, give the definition of "Defamation," from Wis JI-Civil 2501.)

Because of protections afforded a defendant such as (defendant) under the First Amendment of the Constitution, (plaintiff) must prove that any defamatory statements made (published) by (defendant) were made (published) with actual malice.

Your answers to questions 2 and 3 of the verdict will determine whether (defendant) acted with actual malice in making (publishing) the alleged defamatory statements.

A person acts with actual malice when such person makes (publishes) a defamatory statement knowing that the statement is false or with reckless disregard of whether it is false or not.[1]

To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.[2]

Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it.[3] It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff).[4] There must be sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[5]

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In the course of your deliberations, you need not accept as conclusive (defendant)'s testimony that (he) (she) believed the statement to be true or had no serious doubt as to the truth of the statement. You may consider such factors as whether there were obvious reasons for (defendant) to doubt the veracity of (his) (her) information or whether the statement is so inherently improbable that only a reckless person would have made (published) it.[6]

(Plaintiff) has the burden of proof to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant) made (published) the statement knowing it was false or with reckless disregard of whether it was false or not.[7]

(As to question 4, the damage question, give Wis JI-Civil 2516.)

(As to question 5, express malice, give Wis JI-Civil 2513.)

(As to question 6, punitive damages, give Wis JI-Civil 2520.)

(As to questions 4, 5, and 6, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., that John Jones took a bribe) defamatory?

Answer: _____
Yes or No

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Question 2: If you answered "yes" to question 1, answer this question:

Did (defendant) make (publish) such statement knowing that it was false?

Answer: _____
Yes or No

Question 3: If you answered "no" to question 2, answer this question:

Did (defendant) make (publish) such statement with reckless disregard of its truth or falsity?

Answer: _____
Yes or No

Question 4: If you answered "yes" to either of questions 2 or 3, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $

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Question 5: If you answered "yes" to either of questions 2 or 3, answer this question:

Did (defendant) act with express malice in making (publishing) such statement?

Answer: _____
Yes or No

Question 6: If you answered "yes" to question 5, answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $

COMMENT

This instruction and comment were approved in 1986. Nonsubstantive editorial changes were made to the instruction in 1993. The comment was updated in 1997. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995).

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There is an obvious problem of proof when the case is based upon reckless disregard of whether the defamatory statement is false or not. This problem was recognized by the U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 88 St. Ct. 1323 (1968):

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law. 88 S. Ct. 1325.

NOTES

1. The term "actual malice" was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and cited by Wisconsin in Polzin v. Helmbrecht, 54 Wis.2d 578 (1972), and Calero v. Del Chemical Corp., 68 Wis.2d 487 (1975). See also Wis JI-Civil 2500, Law Note.

2. Restatement, Second, Torts § 580A, Comment d (1977); Garrison v. State of Louisiana, 379 U.S. 64 (1964).

3. Restatement, Second, Torts § 580A, Comment d (1977); St. Amant v. Thompson, 390 U.S. 727 (1968).

4. Restatement, Second, Torts § 580A, Comment d (1977).

5. St. Amant, 88 S. Ct. 1325.

6. St. Amant, 88 S. Ct. 1326.

7. Calero, supra note 1, at 500.

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2512 DEFAMATION: TRUTH AS DEFENSE WHERE PLAINTIFF NOT CHARGED WITH COMMISSION OF A CRIME

This instruction was withdrawn in 1986.

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2513 DEFAMATION: EXPRESS MALICE

Express malice exists when a defamatory statement is made (published) concerning a person from motives of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed.

Express malice cannot be inferred solely from the fact that the statement was false and injurious to (plaintiff). In determining whether (defendant) acted with express malice in making (publishing) the statement, you will take into consideration the words used and all other facts and circumstances existing at the time the statement was made (published).

COMMENT

This instruction and comment were approved by the Committee in 1985. Nonsubstantive editorial changes were made to the instruction in 1993.

The definition of express malice as here used was adopted by the Wisconsin Supreme Court in Polzin v. Helmbrecht, 54 Wis.2d 578, 587-88, 196 N.W.2d 685 (1972), and approved in Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975).

In Reed v. Keith, 99 Wis. 672, 675, 75 N.W 392 (1898), the supreme court held that the malice which must be proved to support an award of punitive damages could not be inferred solely from the fact that the words were false and injurious to the plaintiff. Express malice could be implied from that fact along with all other facts and circumstances, including inferences drawn from the utterance of slanderous words.

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2514 DEFAMATION: EFFECT OF DEFAMATORY STATEMENT OR PUBLICATION

This instruction was withdrawn in 1986.

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2516 DEFAMATION: COMPENSATORY DAMAGES

A person wronged by a defamatory statement is entitled to recover money damages. The measure of recovery is such sum as will compensate the person for the damages suffered as a result of the statement.

In arriving at your answer, you should consider whether (plaintiff) has suffered any humiliation, mental anguish, physical injury, and damage to (his) (her) reputation in the community where (his) (her) reputation is known. The plaintiff's reputation is presumed to have been good at the time the statement was made (published). However, in determining damages, you should consider all evidence that has been offered bearing on (his) (her) reputation in the community.

It is not required that (plaintiff) prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. [Further, it is not necessary for (plaintiff) to prove an actual out-of-pocket loss.]

[If special damages are proved, add the following paragraph:

With respect to your answer to subdivision (b), you will insert the amount of the actual financial loss sustained by (plaintiff), including loss of income, loss of employment opportunities, and loss or injury to (plaintiff)'s credit standing.]

COMMENT

This instruction and comment were approved by the Committee in 1985 and revised in 1991.

This instruction should be used in all libel cases and in slander per se cases. If the slander alleged is not slanderous per se, eliminate the last sentence of paragraph 3 which appears in brackets because special damages in such a case must be proved.

Wisconsin has adopted the Restatement, Second, Torts §§ 569 through 575 in defining the type of damages recoverable. If the defamatory statement is in the form of libel, it is actionable without alleging

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special damages. If the statement is in the form of slander, and is not slander per se, it is not actionable without alleging special damages. Slander per se imputes to another a criminal offense or a loathsome disease or a matter affecting plaintiff's business or sexual misconduct. Martin v. Outboard Marine Corp. 15 Wis.2d 452, 461, 113 N.W.2d 135 (1962); Dalton v. Meister, 52 Wis.2d 173, 179, 188 N.W.2d 494 (1971).

> Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz v. Robert Welch, Inc., 94 S.Ct. 2997, 3012 (1974); Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982).

The burden of proof is the ordinary civil burden in all cases except those involving a public figure against a media defendant. In the latter type of case, the middle burden is required for recovery of compensatory damages. See matrix following Law Note for Trial Judges, Wis JI-Civil 2500.

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2517 DEFAMATION: CONDITIONAL PRIVILEGE: ABUSE OF PRIVILEGE

This instruction was revised and renumbered JI-Civil 2507 in 1986.

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2517.5 DEFAMATION: PUBLIC OFFICIAL: ABUSE OF PRIVILEGE

This instruction was revised and renumbered JI-Civil 2511 in 1986.

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2518 DEFAMATION: EXPRESS MALICE

This instruction was renumbered JI-Civil 2513 in 1986.

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2520 DEFAMATION: PUNITIVE DAMAGES

Punitive damages are not awarded to compensate (plaintiff) but are to punish (defendant) and to discourage and deter others from engaging in such conduct in the future. Punitive damages can only be assessed when a defendant, in making (publishing) a defamatory statement, was prompted by (express malice) (actual malice) toward a plaintiff.

(For express malice, give Wis JI-Civil 2513)

(For actual malice, give Wis JI-Civil 2511 (exclude paragraph 1))

Even if you find that (defendant) was prompted by (express malice) (actual malice) in making (publishing) the statement, you are not required to assess punitive damages. Whether you do or not is left to your sound judgment and discretion under these instructions and the evidence in this case.

(Plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that punitive damages should be awarded.

If you believe that you should assess punitive damages against (defendant) by way of punishment and as a warning to others, then you should award such damages as you deem just and proper. Otherwise, you will insert the word "nothing" in answer to question ___.

During the course of this trial, evidence was offered and received as to the wealth and financial standing of (defendant). Such evidence has a bearing in this case only on question __, relating to punitive damages, and is not to be considered by you in answer to question __, relating to compensatory damages. If, in your sound judgment and discretion, you determine that this is a proper case in which to award punitive damages, you may consider evidence of the wealth of (defendant). Such evidence was admitted solely to aid you in determining what amount you should assess as punishment for the defamation.

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You are further instructed that if you do not find any damages in your answer to question ___, then you must answer question ___ by inserting the word "nothing." Punitive damages cannot be awarded unless the jury awards compensatory damages.

COMMENT

This instruction and comment were approved by the Committee in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Whether the plaintiff must prove express or actual malice to support an award of punitive damages depends on the identity of the parties. In the following cases, proof of express malice is required:

a. Private individual versus private individual with or without a conditional privilege. Dalton v. Meister, 52 Wis.2d 173, 179, 188 N.W.2d 494 (1971); Calero v. Del Chemical Corp., 68 Wis.2d 487, 506, 228 N.W.2d 737 (1975).

b. Public figure versus media defendant or private individual with constitutional privilege. Polzin v. Helmbrecht, 54 Wis.2d 578, 588, 196 N.W.2d 685 (1972).

In cases involving a private individual versus a media defendant, the plaintiff must prove actual malice to warrant an award of punitive damages. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3012; Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982).

Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), has set the standard of proof in all cases involving punitive damages as the middle burden of proof.

Evidence of a defendant's wealth and ability to pay is admissible and relevant in assessing punitive damages. Fahrenberg v. Tengel, 96 Wis.2d 211, 225, 291 N.W.2d 516 (1980); Wangen, supra at 304. But, where there are multiple defendants, see Comment, Wis JI-Civil 1707, Punitive Damages.

Compensatory damages must be awarded before punitive damages can be given. Widemshek v. Fale, 17 Wis.2d 337, 340, 117 N.W.2d 275 (1962); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis.2d 617, 633, 305 N.W.2d 149 (Ct. App. 1981). However, if the compensatory damages are nominal, that is - six cents, punitive damages cannot be awarded. Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Wussow v. Commercial Mechanisms, Inc., 90 Wis.2d 136, 140, 279 N.W.2d 503 (Ct. App. 1979).

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2550 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: WIS. STAT. § 995.50(2)(c)

Every person in Wisconsin enjoys a right of privacy. In this case, the plaintiff, (_____), contends that (his) (her) right of privacy was violated by the defendant, (_____), publicizing a matter concerning (his) (her) private life, namely (here describe the alleged publication).

For (plaintiff) to establish that (his) (her) right of privacy was violated, (he) (she) must prove four separate elements:

1. (Defendant) made a public disclosure of true facts concerning (plaintiff) and that the facts were communicated either to the public at large or a sufficient number of persons to insure that the facts become a matter of public knowledge.

2. The facts disclosed must be private facts. The term "private facts" suggests that the subject matter concerns something that (plaintiff) would not ordinarily disclose to anybody but (his) (her) family or close personal friends. It does not include information about a person that is already available to the public as a matter of public record.

3. The private matter must be one that would be highly sensitive to a reasonable person of ordinary sensibilities. In this regard, you may consider the information disclosed about (plaintiff) in relation to the customs of the time and place where the disclosure was made, [(plaintiff)'s occupation], and the habits of neighbors and fellow citizens. Only if the facts disclosed are such that a reasonable person would be seriously aggrieved by their disclosure is this element satisfied.

4. (Defendant), in disclosing the facts, acted either recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts disclosed, or

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(defendant) actually knew that the public had no legitimate interest in knowing the facts. If you conclude that the disclosure of the facts concerns a matter of legitimate public concern, then there is no invasion of privacy.

(Burden of Proof: Ordinary)

SPECIAL VERDICT

1. Did (defendant) violate (plaintiff)'s right of privacy by _____?

COMMENT

This instruction and comment were approved by the Committee in 1993. The instruction was revised in 2006. The comment was updated in 1995, 2006, 2009, 2014, and 2015.

This instruction addresses one of the four possible invasions of privacy set forth in Wis. Stat. § 995.50(2), namely § 995.50(2)(c). The four types of invasions are:

> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
>
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
>
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.
>
> (d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

Public Disclosure. For a discussion of the "public disclosure" sufficient to support a claim under subsection (c), see Zinda, supra, p. 929; Hillman v. Columbia County, 164 Wis.2d 376, 395 n. 10, 474 N.W.2d 913 (Ct. App. 1991); Olson v. Red Cedar Clinic, 2004 WI App. 102, 273 Wis.2d 728, 681 N.W.2d 306. See also Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

In Pachowitz v. LeDoux, 2003 WI App 120, 265 Wis.2d 631, 666 N.W.2d 88, the court of appeals rejected the appellant's assertion that a disclosure of private information to one person can never constitute "publicity." Further, the court said it was not persuaded that the use of the term "persons" opposed to "person" in the 2003 version of this jury instruction requires a disclosure to more than one person. The court concluded Athat disclosure of private information to one person or to a small group does not, as a matter of law in all

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cases, fail to satisfy the publicity element of an invasion of privacy claim. Rather, whether such a disclosure satisfies the publicity element depends upon the facts of the case and the nature of plaintiff's relationship to the audience who received the information. 2003 WI App, ¶ 19-25.

Privileges. Section 995.50(3) states that the right of privacy is to be interpreted in accordance with the "developing common law of privacy, including defenses of absolute and qualified privilege . . ." For the treatment of a conditional privilege, see Wis. JI-Civil 2507.

Section 995.50(2)(a) and (b) describe invasions of privacy which do not warrant a standard instruction in that the subject matter of these subparagraphs are self-explanatory and in most instances, liability under these two sections will be decided by one fact question which contains a description of the privacy invasion set out in the statute. For a claim under subsection (d), see Wis JI-Criminal 1396.

A quasi-judicial officer and court-appointed expert witness enjoy absolute immunity so long as the statements "bear a proper relationship to the issues." Snow v. Koeppl, 159 Wis.2d 77, 464 N.W.2d 215 (Ct. App. 1990).

Elements. The Committee believes that a claim based on a violation of § 995.50(2)(c), which is embodied in the foregoing instruction, requires a more detailed jury instruction in light of Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1989), wherein our supreme court discusses the necessary elements to prove a cause of action under this subparagraph. See also Hillman v. Columbia County, 164 Wis.2d 376, 474 N.W.2d 913 (Ct. App. 1991).

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2551 INVASION OF PRIVACY: HIGHLY OFFENSIVE INTRUSION; WIS. STAT. § 995.50(2)(a)

(Plaintiff) claims that (defendant) (invaded) (his) (her) privacy by (insert intrusion). To prove this claim, (plaintiff) must prove the following three elements:

1. (Defendant) intentionally intruded upon the privacy of (plaintiff);
2. The intrusion by (defendant) was of a nature that would be highly offensive to a reasonable person; and
3. The intrusion was (in a place that a reasonable person would consider private) (or) (in a manner involving trespass).

(Definition of trespass; See Wis JI-Civil 8012)

(Burden of Proof: Middle; See Wis JI-Civil 205)

SPECIAL VERDICT

Did (defendant) violate (plaintiff)'s right to privacy by (_____)?

Answer:_____
Yes or No

COMMENT

Wis. Stat. § 995.50(2) states: In this section, "invasion of privacy" means any of the following:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

This invasion of privacy consists of an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his or her person or as to his or her private affairs or concerns, of a kind that is highly offensive. Restatement of Torts, Second, § 652B. The claim does not require a physical intrusion or publicity given to the person whose interest is invaded.

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Intentional Conduct. The following can be added to explain "intentional conduct":

> The requirement that (defendant) intended to intrude means that (defendant) had the mental purpose to intrude upon the privacy of (plaintiff) or was aware that (his) (her) conduct was practically certain to intrude upon the privacy of (plaintiff) (or another person).

Highly Offensive Intrusion. The following language can be added to the instruction to guide the jury in determining if the intrusion would be highly offensive to a reasonable person:

> In deciding whether an intrusion is highly offensive, among the things you may consider are:
>
> 1. The degree of intrusion,
> 2. The context, conduct, and circumstances of the intrusion,
> 3. (Defendant)'s motives or objectives,
> 4. The setting in which the intrusion occurred, and
> 5. How much privacy a reasonable person could expect in that setting

Trespass. If the intrusion is claimed to be a trespass, the following, taken from Wis JI-Civil 1812, can be added:

> A person who goes upon premises owned, occupied, or possessed by another, without consent, is a trespasser.

Privilege. Wis. Stat. § 995.50(3) provides the right of privacy recognized in the section should be interpreted in accordance with the "developing common law of privacy," including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

Conduct. In Poston v. Burns, 2010 WI App 73, 325 Wis.2d 404, 784 N.W.2d 717, the court of appeals held that the recording of sounds from the plaintiffs' home using a common recording device placed inside the defendants' window was not an intrusion "of a nature highly offensive to a reasonable person."

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2552 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: CONDITIONAL PRIVILEGE

(Note: Inquire in question 1 whether the (plaintiff)'s right to privacy was violated. See suggested question at Wis JI-2550.)

Question 2 asks whether (defendant), in publicizing a matter concerning (plaintiff)'s private life, abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to publicize a matter concerning the private life of another. However, the privilege does not protect the (defendant) if it is abused.

In this case, (defendant) had the privilege of publicizing a matter concerning (plaintiff)'s private life for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., employer advising other employees of reason of termination of plaintiff fellow employee). However, it is for you to determine whether (defendant)'s privilege to publicize a private matter about (plaintiff) was abused under the circumstances of this case.

(Select appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if (he) (she) at the time of publicizing the private matter knew that such statements were false or publicized them in reckless disregard of their truth or falsity.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of truth or falsity in defamation, adapting it where necessary.)]

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[2. An abuse of privilege occurred if (defendant) publicized a private matter concerning the (plaintiff) solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose for which court has determined a conditional privilege exists.)]

[3. An abuse of (defendant)'s privilege occurred if (defendant) publicized the private matter to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place where third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that publicizing the private matter was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).

The facts and circumstances available to (defendant) at the time the private matter was publicized must have been sufficient to cause a person of reasonable caution and prudence to believe that such action, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)'s privilege occurred if (he) (she) publicized private matters necessary for the purpose (insert purpose) and then publicized additional private matters not necessary to accomplish that purpose.]

[6. If the (defendant) publicized private matters believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused:]

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(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in publicizing the private matter.

SPECIAL VERDICT

Question 1: Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer:_____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question: Did (defendant) abuse (his) (her) privilege in publicizing a private matter concerning the (plaintiff)?

Answer:_____
Yes or No

COMMENT

This instruction and comment were approved in 1998. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is to be used with Wis JI-Civil 2550.

Wis. Stat. § 895.50(3) recognizes a defense of conditional privilege which "shall be interpreted in accordance with the developing common law of privacy, with due regard for maintaining freedom of communication, privately and through the public media." Also see Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 931, 440 N.W.2d 548 (1989).

Circumstances which give rise to conditional privilege for defamation claim can also apply to an invasion of privacy claim. Zinda, supra, citing Restatement, Second, Torts § 652G at 401.

Once it is determined by the court that a conditional privilege applies, the burden of proof shifts to the plaintiff to show abuse. Calero v. Del Chemical Corp., 68 Wis.2d 487, 499, 228 N.W.2d 737 (1975).

Abuse of a conditional privilege results in its loss. Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966). Five occasions giving rise to abuse of conditional privilege as stated in the Restatement,

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Second, Torts §§ 600 - 605A and adopted in Zinda, supra, at 925 are as follows: (1) The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity. (2) The defamatory matter is published for some purpose other than for which the privilege is given. (3) The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege. (4) The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given. (5) The publication includes unprivileged matter as well as privileged matter.

The jury determines whether the defendant abused the privilege unless the facts are such that only one conclusion can be reasonably drawn. Zinda, supra, at 926.

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2600 MALICIOUS PROSECUTION: INSTITUTING A CRIMINAL PROCEEDING

Question _____ asks did (defendant) maliciously prosecute (plaintiff).

To establish malicious prosecution, (plaintiff) must prove the following six elements:

1) A criminal proceeding was brought against (plaintiff).

2) (Defendant) was actively involved in instituting the criminal proceeding (prosecution) against (plaintiff).

3) The criminal proceeding was terminated in favor of (plaintiff).

4) (Defendant) acted with malice in instituting the criminal proceeding (prosecution).

5) The criminal charges were made without probable cause.

6) (Plaintiff) suffered damages as a result of the criminal proceeding (prosecution) on those charges.

The fourth element requires that (defendant) acted with malice in instituting the criminal proceeding (in causing the (prosecution)) (in causing charges to be brought). A person acts with malice when he or she has a hostile or vindictive motive, or acts primarily for a purpose other than bringing a guilty person to justice.

The fifth element relates to whether the charges made by (defendant) were without probable cause. This element is satisfied if, at the time (defendant) made the charges against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was not guilty of the charge(s). There is no probable cause if you are satisfied that (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) had committed a criminal offense.

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It is not enough that (plaintiff) establish that (defendant) acted with malice in instituting the criminal proceeding (in causing the prosecution); (plaintiff) must also prove that (defendant) had no probable cause to make the charges.

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

Answer: _____
(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

Answer: $

COMMENT

The instruction and comment were initially approved by the Committee in 1966. The instruction and comment were revised in 1986, 1991, 2014, and 2015.

Elements. The six essential elements in an action for malicious prosecution are:

(1) a prior institution of judicial proceedings against the plaintiff;
(2) such former proceedings must have been put in motion by or at the instance of the defendant in the malicious prosecution action;
(3) such proceedings must have terminated in favor of the defendant in such criminal proceedings;
(4) malice in instituting the former proceedings;
(5) want of probable cause for instituting the former proceedings;
(6) damage.

See Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Elmer v. Chicago & N.W. Ry., 257 Wis. 228, 43 N.W.2d 244 (1950).

The first three elements may be determined by the court. Ordinarily, the first three elements do not arise in a malicious prosecution action, as they are generally established beyond question by the records in the criminal proceedings. Therefore, no special instruction is necessary on these elements.

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The fourth element, "malice in instituting the criminal proceedings," and the fifth element, lack of probable cause, are submitted in this instruction.

Instigation of Prior Proceedings. A party will be found to have instigated prior criminal proceedings against the present plaintiff if that party was instrumental in prosecuting the present plaintiff. Thus, the malicious swearing and signing of a criminal complaint can satisfy the instigation-of-prior-proceedings element for malicious prosecution. Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1952). But, no malicious prosecution action will lie where the defendant supplied the authorities with information and the prosecution was begun only after the authorities conducted their own independent investigation. Pollock v. Vilter Mfg. Corp., 23 Wis.2d 29, 126 N.W.2d 602 (1964).

Termination of Prior Criminal Actions. Dismissal of one count of a criminal complaint does not constitute favorable termination of the proceedings where the defendant in the prior action is convicted on another count arising out of the same incident. Heilgeist v. Chasser, 98 Wis.2d 97, 295 N.W.2d 26 (Ct. App. 1980).

Malice. The plaintiff must prove that the defendant acted "maliciously" in order to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, a voluntary dismissal may not be used to infer the existence of malice. Id; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters, supra.

Lack of Probable Cause for the Prior Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

For prior criminal proceedings, the court should not apply the state of mind of a prosecutor in determining whether a private party had probable cause to believe that another person committed a crime. Rather, the court should decide whether there was a quantum of evidence that would lead an ordinary and reasonable layman in the circumstances to believe that the present plaintiff committed a crime. Hajec v. Novitzke, 46 Wis.2d 402, 175 N.W.2d 193 (1970). Discharge of the present plaintiff in the prior criminal proceeding is prima facie evidence of want of probable cause. Id.

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Advice of Counsel. Advice of counsel is an affirmative defense. If the defense of advice of counsel is in the case, then the Committee suggests that the trial judge submit that question to the jury first. In Elmer, supra, the court held that advice of counsel is a complete defense. This was affirmed in Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

If full disclosure of all facts within the knowledge of the defendant was made to the district attorney or his lawyer for the purpose of obtaining legal guidance and the disclosure results in advice which is honestly followed in commencing the criminal proceedings, such proof constitutes a complete defense. The result is that one of the essential elements of malicious prosecution, i.e., want of probable cause, is negated and the entire malicious prosecution action fails. Also, in some instances, the determination of whether there has been such a full and fair disclosure is a matter of law and not properly for the jury. See Smith v. Federal Rubber Co., 170 Wis. 497, 175 N.W. 808 (1920).

Differences Between Abuse of Process and Malicious Prosecution. For a discussion of the differences between the tort of malicious prosecution and abuse of process, see Brownsell v. Klawitter, 102 Wis.2d 108, 306 N.W.2d 41 (1981), Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983), and Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

Burden of Proof. The Committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

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2605 MALICIOUS PROSECUTION: INSTITUTING A CIVIL PROCEEDING

Question _____ asks: did (plaintiff) maliciously prosecute (defendant) [by instituting a civil proceeding].

To establish a malicious prosecution based on instituting a civil proceeding, (plaintiff) must prove the following six elements:

1) A judicial proceeding was (brought) (continued) against (plaintiff). [Insert type of civil proceeding] is a judicial proceeding.
2) The proceeding was (brought) (continued) by, or at the instance of, (defendant).
3) The proceeding was terminated in favor of (plaintiff).
4) (Defendant) acted with malice in instituting the proceedings.
5) The proceeding was instituted without probable cause.
6) (Plaintiff) suffered damages as a result of the proceeding.

The third element requires that the proceeding was terminated in favor of (plaintiff). [A voluntary compromise or settlement of the prior suit does not satisfy this element.]

The fourth element requires that (defendant) acted with malice in instituting the proceeding. A proceeding is maliciously instituted when a person who brings the proceeding has a hostile or vindictive motive or when the person's primary purpose was something other than succeeding on the merits of the claim.

The fifth element relates to whether the proceeding instituted by (defendant) was without probable cause. This element is satisfied if, at the time (defendant) initiated the proceeding against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was not [insert facts necessary to establish probable cause]. There is no probable cause if you are

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satisfied (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) [insert facts establishing a claim.]

The sixth element requires that (plaintiff) suffered damages as a result of the proceeding.

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____

(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

This instruction and comment were approved in 2015.

See also Comment to Wis JI-Civil 2600.

Institution of a Prior Civil Action. In Wisconsin, the unjustified institution of a prior criminal or civil action may provide a valid claim for malicious prosecution as long as the other five elements of malicious prosecution are present. Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette Univ., 50 Wis.2d 287, 184 N.W.2d 168 (1970).

Termination of Prior Action in Present Plaintiff's Favor. The prior civil action is terminated in the present plaintiff's favor when the prior action results in a defense verdict or dismissal on the merits with prejudice. However, the voluntary compromise and settlement of a prior civil suit does not satisfy the "favorable termination" element and, thus, bars a subsequent malicious prosecution suit. Thompson v. Beecham, 72 Wis. 2d 356 (1976); Tower Special Facilities, Inc. v. Investment Club, Inc., 104 Wis.2d 221 (Ct. App. 1981). Similarly, termination of the prior proceeding by some act, trick, or device of the present defendant does not constitute a "favorable termination." See Bristol v. Eckhardt, 254 Wis. 297 (1948);

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Schwartz v. Schwartz, 206 Wis. 420 (1932) (no bar to malicious prosecution suit where settlement of prior action induced by duress).

Malice. The plaintiff must prove that the defendant acted "maliciously" to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, the voluntary dismissal may not be used to infer the existence of malice. Id; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

Lack of Probable Cause for the Prior Civil Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

Probable cause may be lacking with respect to prior civil proceedings where the party initiating the prior proceedings acted without a reasonable belief in the existence of the facts underlying the claim or did not reasonably believe that such facts state a valid claim. Neumann, supra. Generally, for purposes of a malicious prosecution action, no inference of want of probable cause arises from the dismissal of the prior civil proceeding. Novick v. Becker, 4 Wis.2d 432, 90 N.W.2d 620 (1958). However, the dismissal of an involuntary bankruptcy petition or insanity proceeding is prima facie evidence of lack of probable cause because these actions "stand in the same class as a criminal case." Neumann, supra.

Advice of Counsel. See Wis JI-Civil 2611.

Damages. For malicious prosecution suits involving prior civil proceedings, Wisconsin adheres to the minority "English" rule that the plaintiff must plead and prove special damages. Krieg, supra; Schier v. Denny, 9 Wis.2d 340 (1960); Johnson v. Calado, 159 Wis.2d 446; 464 N.W.2d 647 (1991). "Special damages" are injuries in the nature of an interference with the person or property of the present plaintiff by the prior action. See Schier, supra, Myhre v. Hessey, 242 Wis. 638, 9 N.W.2d 106 (1943). Special damages are present where the present plaintiff has been subjected to a wrongfully brought garnishment action (Novick, supra) or a wrongful winding up of a partnership which interfered with the plaintiff's possession and use of property (Luby v. Bennett, 111 Wis. 613 (1901)).

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An allegation that the present plaintiff incurred expenses in defending himself against the prior proceeding fails to allege special damages. See Myhre, supra. In Schier, supra, the Wisconsin Supreme Court concluded that the plaintiff's claims of business reputation damage, mental anguish, public ridicule, humiliation, embarrassment, and attorney fees failed to allege such interference with the plaintiff's person or property as to amount to special damages.

Burden of Proof. The committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

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2610 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CRIMINAL PROCEEDING)

(Defendant), contends that prior to instituting a criminal prosecution against (plaintiff), (he) (she) made a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of the material facts within (his) (her) knowledge which relate to (plaintiff)'s alleged commission of the criminal offense of _____.

The term "full and fair disclosure of the material facts within the knowledge of (defendant)," does not necessarily mean all the facts discoverable, but rather all the facts within the knowledge of the person making the statements. If (defendant) knew facts, either personally or in reliance upon credible information, and fully and fairly stated them to (the district attorney) ([his] [her] own lawyer), and honestly acted upon the advice given (him) (her) in commencing the criminal proceedings, it can then be said that (defendant) had probable cause or good reason to press criminal charges.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to (instituting) (pursuing) (continuing) (assisting) a criminal prosecution, (defendant) did make a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of all material information possessed by (him) (her) in relation to the alleged criminal offense and honestly followed the advice of (the district attorney) ([his] [her] own lawyer).

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SPECIAL VERDICT

Question 1: Before (instituting) (assisting in) (continuing) (pursuing) criminal charges against (plaintiff), did (defendant) make a full and fair disclosure of facts to (the district attorney) ([his] [her] own attorney)?

ANSWER: _____

(yes or no)

If you answered no to Question 1, then answer this question:

Question 2: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____

(yes or no)

Question 3: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

The instruction and comment were initially approved by the Committee in 1962. The instruction was revised in 1986, 1991, 2002, and 2015.

If this defense is raised and proved, then it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. See Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). If the defendant raises advice of counsel as a defense, then this question should be submitted to the jury before asking whether the defendant has maliciously prosecuted the plaintiff.

Reliance on Advice of Counsel. The advice of an attorney whom a client has no reason to believe to be personally interested is conclusive evidence of the existence of probable cause for initiating a prior proceeding in reliance upon such advice when it is sought in good faith and given after a full disclosure of the facts within the client's knowledge and information. Meyer, supra; Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966). A "fair and full disclosure" does not mean disclosure of all discoverable facts but disclosure of all of the facts within the knowledge of the person making the statement. Neumann, supra. This knowledge may be based upon personal observation or upon credible information. Id.

Burden of Proof. The burden of proof to establish the affirmative defense is the lower civil burden.

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2611 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CIVIL PROCEEDING)

(Defendant) contends that prior to commencing a civil proceeding against (plaintiff), (he) (she) made a full and fair disclosure to ([his] [her] lawyer) of all the material facts within (his) (her) knowledge which relate to the civil proceeding.

The term "full and fair disclosure of all of the material facts within the knowledge of the defendant," does not necessarily mean all the facts discoverable, but rather all the facts within the knowledge of the person making the statements. If (defendant) knew facts, either personally or in reliance upon credible information, and fully and fairly stated them to ([his] [her] lawyer), and honestly acted upon the advice given (him) (her) in commencing the civil proceedings, it can then be said that (defendant) had probable cause or good reason to start the civil proceeding.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to starting the civil proceeding, (defendant) made a full and fair disclosure to ([his] [her] lawyer) of all material information possessed by (him) (her) in relation to the civil proceeding and honestly followed the advice of ([his] [her] lawyer).

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SPECIAL VERDICT

Question 1: Before commencing the civil proceeding against (plaintiff), did (defendant) make a full and fair disclosure of facts to ([his] [her] attorney) and honestly follow the advice of the attorney?

ANSWER: _____
(yes or no)

If you answered no to Question 1, then answer this question:

Question 2: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____
(yes or no)

Question 3: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

The instruction and comment were approved in 2015.

If this defense is raised and proved, it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. If the defendant raises advice of counsel as a defense, this question should be submitted to the jury before asking whether the defendant has maliciously prosecuted the plaintiff.

Reliance on advice of Counsel. The advice of an attorney whom a client has no reason to believe to be personally interested is conclusive evidence of the existence of probable cause for initiating a prior proceeding in reliance upon such advice when it is sought in good faith and given after a full disclosure of the facts within the client's knowledge and information. Meyer v. Ewald, 66 Wis.2d 168 (1974); Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966). A "fair and full disclosure" does not mean disclosure of all discoverable facts but disclosure of all of the facts within the knowledge of the person making the statement. Neumann, supra. This knowledge may be based upon personal observation or upon credible information. Id.

Burden of Proof. The burden of proof to establish the affirmative defense is the lower civil burden.

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2620 ABUSE OF PROCESS

An abuse of process occurs when a person uses a legal process against another primarily to accomplish a purpose for which it is not designed. In this case, (defendant) (state the legal process used, e.g., caused a subpoena to be issued to plaintiff; commenced an involuntary commitment proceeding against plaintiff; etc.) The purpose of (a subpoena)(involuntary commitment proceeding) is (state purpose).

To establish an abuse of process, (plaintiff) must prove that:

1. (Defendant) had a purpose other than that which the process was designed to accomplish; and

2. (Defendant) subsequently misused the process to accomplish a purpose other than that it was designed to accomplish.

Both elements must be proved to establish an abuse of process. The process must be used for something more than a proper use with a bad motive.

SPECIAL VERDICT

1. Did (defendant) engage in an act of abuse of process in (state process used) against (plaintiff)?

Answer: _____
Yes or No

2. If you answered "yes" to question 1, answer this question:

Did the use of (state process used) cause (plaintiff) damages?

Answer: _____
Yes or No

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3. If you answered "yes" to question 2, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) damages?

$_____

COMMENT

This instruction and comment were approved by the Committee in 1994 and revised in 2012.

Definition. "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement, 3 Torts 2d, p. 474, sec. 682. Adopted in Brownsell v. Klawitter, 102 Wis. 2d 108, 114, 306 N.W.2d 41 (1981).

". . . : it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement, 3 Torts 2d, p. 474, sec. 682.

Elements. There are two elements of the tort. (1) A purpose other than that which the process was designed to accomplish and (2) a subsequent misuse of the process. Thompson v. Beecham, 72 Wis. 2d 356, 362 (1976); Strid v. Converse, 111 Wis. 2d 418, 427, 331 N.W.2d 350 (1983). Both elements must be met in order to establish an abuse of process. The process must be used for something more than a proper use with a bad motive. The improper purpose must also culminate in an actual misuse of the process to obtain some collateral or ulterior advantage. In Schmit v. Klumpyan, 2003 WI App 107, 264 Wis.2d 414, 663 N.W.2d 331, the court of appeals held that the second element requires a showing that the process was used to obtain a collateral advantage:

> A key component of the second element is the requirement that the process be used to obtain a collateral advantage, an advantage that is "not a benefit to the suitor that the process was designed to secure." The attempt to obtain a collateral advantage is an important component because the tort is characterized as an attempt to use process as a means of extortion. An early decision of the Wisconsin Supreme Court clarifies that the inquiry is "whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he would not legally be compelled to do."

General. Abuse of process is broader than malicious prosecution and may provide a remedy where malicious prosecution will not. Malice, want of probable cause, and termination in the plaintiff's favor are not required in an abuse of process claim. Strid, supra at 426.

"Abuse of process lies even in those instances where legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it is not designed. The gist of the tort is misuse or misapplying process justified in itself for an end other than that which it was destined to accomplish. The purpose for which the process is

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used. . . is the only thing of importance." Maniaci v. Marquette University, 50 Wis. 2d 287, 299-300, 184 N.W.2d 168 (1971) .

An action for abuse of process may be the subject of counterclaim since proof of termination of the underlying proceedings is not required. Brownsell v. Klawitter, supra at 115. However, if the cause of action for abuse of process is based upon lack of probable cause, then termination of the proceedings is necessary to establish the absence of probable cause. Brownsell, supra at 116; Badger Cab Co. v. Soule, 171 Wis. 2d 754, 767-68, 492 N.W.2d 375 (Ct. App. 1992)

Burden of Proof. The committee believes the burden of proof to show abuse of process is the middle burden. See Wis JI-Civil 205.

Lawyer Immunity. The Wisconsin Supreme Court has recognized that an attorney who is acting in a professional capacity has qualified rather than absolute civil immunity. Nevertheless, the immunity does not apply when the attorney acts in a malicious, fraudulent, or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled. Strid, supra at 429-30.

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2720 HOME IMPROVEMENT PRACTICES ACT VIOLATION; WISCONSIN ADMINISTRATIVE CODE CHAPTER ATCP 110; WIS. STAT. § 100.20

Wisconsin has administrative rules known as the Home Improvement Practices Act. This act prohibits persons engaged in the business of making or selling home improvements from engaging in unfair methods of competition or unfair trade practices including [insert each specific prohibited conduct from Wis. Admin. Code Ch. ATCP 110.02 alleged by (plaintiff), for example (for a detailed list of examples, see Comment):

(• Making any false, deceptive or misleading representation to induce a person to enter into a home improvement contract;)

(• Soliciting or accepting payment for home improvement material or services which the seller does not intend to provide according to the terms of the contract)]

In this case, (insert project) is a home improvement.

Question _____ asks: (insert question based on prohibited conduct, e.g. Did (_____) made a false, deceptive, or misleading representation to induce (_____) to enter into the home improvement contract?)

(Insert explanation(s) of the prohibited conduct alleged by (plaintiff) e.g. definition of "false, deceptive, or misleading representation"; "soliciting.")

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VERDICT

1. Did (defendant) make a false, deceptive, or misleading representation to induce (plaintiff) to enter into the home improvement contract?

Answer: _____
Yes or No

If you answered question 1 "yes," answer question 2. If you answered question 1 "no," go to question 3.

2. Did (plaintiff) suffer a monetary loss because of the false, deceptive, or misleading representation?

Answer: _____
Yes or No

3. Did (defendant) solicit or accept payment for a home improvement material or service which (he) (she) did not plan to provide according to the terms of the home improvement contract?

Answer: _____
Yes or No

If you answered this question "yes," answer question 4. If you answered question 3 "no," go to question 5.

4. Did (plaintiff) suffer a monetary loss because of the solicitation or acceptance of payment?

Answer: _____
Yes or No

If you answered question Nos. 2 or 4, "yes," answer question 5, otherwise, do not answer it.

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5. What sum of money will fairly and reasonably compensate (plaintiff) for damages suffered because of (defendant)'s actions? $ _____

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2012.

The Home Improvement Practices Act lists 11 categories of prohibited practices. The instruction and verdict will need to be adapted to explain the alleged conduct described in the subsections of ATCP 110.02.

Definitions. "Home improvement" and "home improvement contract" are defined at Wis. Admin. Code ATCP § 110.01(2)

Prohibited Acts. ATCP 110.02 prohibits a seller from making any false, deceptive or misleading representation in order to:

- Get a buyer to enter into a home improvement contract.
- Obtain or keep any payment under a home improvement contract.
- Delay performance under a home improvement contract.

ATCP 110 also prohibits a seller from engaging in a number of specific practices, such as:

- Misrepresenting that the buyer's home will be used as a "model" or "advertising job."
- Misrepresenting that products or materials meet certain standards or specifications.
- Misrepresenting that the buyer's home contains a defective or dangerous condition requiring repair.
- Engaging in "bait and switch" sales tactics.
- Misrepresenting the seller's identify, status or affiliation.
- Misrepresenting that the seller is licensed, bonded or insured. If a seller claims to be licensed, bonded or insured, the seller must provide the buyer with a written statement describing the type of license, bond or insurance that the seller possesses.
- Advertising any free, gift or bonus offer without specifying the terms and conditions of that offer.
- Misrepresenting that the buyer is getting a special price or offer because of a closeout, factory sale, survey, leftover materials or other specific circumstances.
- Misrepresenting the contract price or other contract terms and obligations.
- Pressuring a buyer into a home improvement contract by delivering materials or starting work before the buyer has entered into a contract.
- Making false statements about a competitor, or the competitor's products or services.
- Misrepresenting that a home improvement contract will aid any charity or other organization.
- Encouraging the buyer to misrepresent the buyer's financial condition in order to obtain financing.
- Falsifying the contract price, or encouraging the buyer to falsify the contract price, in order to obtain financing.
- Asking the buyer to sign a completion slip or make final payment before the job is completed.

For a complete list of prohibited practices, see Wis. Ad. Code ATCP § 110.02(1)-(11).

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Who May Sue under HIPA? "Buyer" means either of the following persons who is a party or prospective party to a home improvement contract:

(a) The owner of residential or noncommercial property to which the home improvement contract pertains.

(b) The tenant or lessee of residential or noncommercial property to which the home improvement contract pertains if the tenant or lessee is or will be obligated to make a payment under the home improvement contract. Wis. Admin. Code DATCP § 110.01(3)

Who Can Be Sued under HIPA? Individuals personally liable under the definition of "seller" in Wis. Admin. Code § ATCP 110.01(5) include "person[s] engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees."

Formulating a Verdict. First, the verdict should contain a "yes or no" question for each of the alleged HIPA violations; and there could be several complained about under the same contract. Second, for each of the "yes" answers, the verdict should ask a separate "cause" question, such as, "did the plaintiff suffer a monetary loss as a result of the violation," or did the defendant's violation "cause" plaintiff to suffer a monetary loss. Third, ask a damage question.

Damages. Violation of administrative code regulations for trade practices allow plaintiffs suffering pecuniary loss to seek damages as set forth in Wis. Stat. § 100.20(5), including double damages and attorney fees. Wisconsin case law holds that these "pecuniary losses" as defined in Wis. Stat. § 100.20(5) are contractual in nature. Benkoski v. Flood, 2001 WI App 84, ¶¶ 26, 32, 242 Wis. 2d 652, 626 N.W.2d 851.

In Benkoski, the plaintiff sued under ATCP 125 (another administrative code enabled under Wis. Stat. § 100.20(5)) to curb unfair trade practices relating to the sale of a mobile home. In concluding that the damages were contractual in nature, the trial court stated:

> Although this is not a contract case, we find additional support for our holding in the law of contracts. [The defendant's] ***unfair trade practices*** thwarting [the plaintiff's] potential sale caused damages akin to those caused by a breach of contract. WISCONSIN JI-CIVIL 3735, entitled "Damages: Loss of Expectation" states,
>
> > [t]he measure of damages for a breach of contract is the amount which will compensate the plaintiff for the loss suffered because of the breach. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed.
> >
> > We conclude that the "***pecuniary loss***" concept set out in Wis. Stat. § 100.20(5) is ***similar to*** this concept of ***damages set out in the law of contracts***.
> >
> > Benkoski, 2001 WI App 84, ¶ 32

In instructing the jury on damages, the trial court can include the following explanation which is a modified version of Wisconsin JI-Civil 3735, entitled ADamages: Loss of Expectation:

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Damages: Loss of Expectation (JI-Civil 3735 as modified for Home Improvement Act Violations under Wis. Stat. § 100.20(5)):

The measure of damages for violations of the Home Improvement Act is the amount which will compensate the plaintiff for the loss suffered because of the violation. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the violation not occurred. The fundamental basis for an award of damages for a violation is just compensation for losses necessarily flowing from the violation.

A party seeking to enforce a Home Improvement Act violation is not entitled to be placed in a better position because of the violation than that party would have been had the violation not occurred. The injured party is entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the Home Improvement Act violation by the other party.

This instruction is consistent with contractual approach to measure damages in an ATCP violation.

In Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, 308 Wis.2d 103, 746 N.W.2d 762, the plaintiff sued for both negligence and violation of HIPA. The jury apportioned total damages of $96,000, 75% to negligence and 25% to the HIPA violation. The supreme court held that the entire $96,000 in damages should be doubled. Specifically, the supreme court said:

> ¶21, we hold that the HIPA should be applied to require the petitioners to pay double damages on the Stuarts' entire pecuniary loss, even though the Stuarts alleged other, non-HIPA, claims. While the HIPA is silent on whether the doubling of damages applies to the entire amount of the pecuniary loss when other conduct by the contractor contributes to the loss, remedial statutes must be liberally construed to advance the remedy that the legislature intended to be afforded. Benkoski v. Flood, 2001 WI App 84, 242 Wis.2d 652, 626 N.W.2d 851.

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2722 THEFT BY CONTRACTOR (Wis. Stat. § 779.02(5))[1]

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims are paid [in full] [proportionally in case of a deficiency].[2]

To sustain a claim based on theft by contractor, the plaintiff must prove the following elements:

First, (Defendant) entered into an oral or written agreement for the improvement of land. (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.

Second, (Defendant) received money from the owner under the agreement for the improvement of land. ["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.[3]]

Third, (Defendant) intentionally used part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency].[4]

Fourth, the use of the money was without the consent of the owner of the land and contrary to (Defendant)'s authority.

Fifth, (Plaintiff) suffered a monetary loss as a result of (Defendant)'s use of the money.

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You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

VERDICT

Question No. 1: Did (Defendant) enter into an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "yes" to Question 1, then answer this question:

Did (Defendant) receive money from the owner under an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "yes" to Question 2, then answer this question:

Did (Defendant) intentionally use part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency]?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "yes" to Question 3, then answer this question:

Was (Defendant)'s use of the money without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)

Question No. 5: If you answered "yes" to Question 4, then answer this question:

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Did (Plaintiff) suffer a monetary loss as a result of (Defendant)'s use of the money?[5]

ANSWER: _____

(Yes/No)

Question No. 6: If you answered "yes" to Question 5, then answer this question:

What is the amount of the monetary loss suffered by (Plaintiff) as result of (Defendant)'s use of the money?

ANSWER: $_____

[IF THE PLAINTIFF REQUESTS EXEMPLARY DAMAGES UNDER §895.446, ADD THE FOLLOWING QUESTION:

Question No. 7: If you answered "yes" to Question 4, then answer this question:

Did (Defendant) know that the use of the money was without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)][6]

NOTES

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[1] The jury instruction for a criminal violation of Wis. Stat. §779.02(5) is WIS JI-CRIMINAL 1443. Where relevant, this instruction follows and is consistent with WIS JI-CRIMINAL 1443. As discussed more fully in Note 6, there may be cases in which a civil recovery is warranted without the criminal intent necessary to support a criminal conviction.

[2] § 779.02(5) prohibits a contractor's use of moneys paid for purposes other than the payment of claims until the claims have been paid in full "or proportionally in cases of a deficiency." The deficiency situation is discussed in State v. Keyes, 2008 WI 54, 309 Wis.2d 516 (Ct. App. 2008) at ¶ 20-34. Use the language in the second set of brackets in the case of a deficiency.

[3] This definition is based on the definition of "Owner" in Wis. Stat. §779.01(2)(c).

[4] The criminal jury instruction note on this element points out that "The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): 'The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust.' No further intent – to defraud or to permanently deprive – is required."

[5] If the plaintiff is proceeding on other causes of action such as breach of contract, the verdict questions

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on damages will have to be integrated. Because damages for theft by contractor may be eligible for actual costs and exemplary damages under §895.446, it will be necessary to differentiate such damages from damages based on other claims.

[6] This verdict question addresses the element of criminal intent, which is not necessary to sustain a simple claim for civil damages under §779.02(5), but is necessary to sustain a claim for exemplary damages and litigation costs under §895.446. The Wisconsin Supreme Court decision in Tri-Tech v. Americomp, 254 Wis.2d 418 (2002) contemplates the possibility of a civil claim based on a violation of Wis. Stat. §779.02(5) which would not qualify for treble damages if the violation was not the result of the requisite criminal intent:

> Because Wis. Stat. §943.20 is one of the offenses that qualifies for the treble damages remedy of Wis. Stat. §895.80 [now renumbered to §895.446], we agree with the court of appeals' conclusion that treble damages are available for theft by contractor under Wis. Stat. § 779.02(5), provided, however, that the elements of both the civil *and* the criminal statutes are proven, albeit to the civil preponderance burden of proof. Stated differently, the basis of liability for criminal theft by contractor is a violation of the trust fund provisions of Wis. Stat. §779.02(5), plus the criminal intent required by Wis. Stat. § 943.20(1)(b). 254 Wis.2d at 430.

What exactly is it the plaintiff must prove to demonstrate criminal intent? The court in Tri-Tech explained the requirement as follows:

> Accordingly, to sustain a cause of action for treble damages under Wis. Stat. § 895.446 for theft by contractor under Wis. Stat. § 943.20, the plaintiff must prove, by a preponderance of the credible evidence, the elements of the criminal offense, including that the defendant knowingly retained, concealed, or used contractor trust funds without the owner's consent, contrary to his authority, and with intent to convert such funds to his own use or the use of another. *Id.* at 433.

The Criminal Jury Instructions Committee discusses the required level of intent in its footnote 8 to WIS JI-CRIMINAL 1443:

> In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractors requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).
>
> The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

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This note was cited with apparent approval in State v. Sobkowiak, . . .

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, . . . The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

The Civil Jury Instructions Committee shares the view of the Criminal Jury Instructions Committee that the Supreme Court in Tri-Tech intended to hold that the criminal level of intent described in current JI-1443 is what is required to sustain a civil claim for treble damages. Verdict Question No. 7 mirrors the fifth and final element of WIS JI-CRIMINAL 1443.

COMMENT

This instruction was approved in 2015. See also Wis JI-Criminal 1443.

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2725 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A person may recover damages for the intentional infliction of severe emotional distress upon him or her by another.

A person who by extreme and outrageous conduct intentionally causes emotional distress to another is liable to that person if the resulting emotional distress is severe.

Four factors must be established for an injured person to recover:

1. That the conduct was intended to cause emotional distress,
2. That the conduct was extreme and outrageous,
3. That the conduct was a cause of the person's emotional distress, and
4. That the emotional distress was extreme and disabling.

For a person's conduct to be intentional, you must find that the person acted for the purpose of causing emotional distress to the other person.

For conduct to be extreme or outrageous, you must find that the average member of the community would find the conduct as a complete denial of the individual's dignity as a person. The conduct must be gross and extreme and not merely in the field of carelessness or bad manners.

For a person's conduct to be a cause of a party's emotional distress, you must find that the conduct had a substantial effect in producing the emotional distress.

For a person's emotional response to be extreme and disabling, you must find that the person was unable to function in other relationships because of the emotional distress caused by the conduct. Temporary discomfort is not extreme and disabling and cannot be the basis of recovery.

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COMMENT

This instruction and comment were approved by the Committee in 1980. The instruction was revised in 1991 and 2002. The comment was updated in 1997, 2001, 2004, 2005, 2014, and 2020. The 2020 revision updated case law citations.

Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963); Wright v. Hasley, 86 Wis.2d 572, 273 N.W.2d 319 (1979); Przybyla v. Przybyla, 87 Wis.2d 441, 444, 275 N.W.2d 112 (1978); Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978).

Burden of Proof. Wis JI-Civil 205, Burden of Proof, Middle Burden, is appropriate and should be used.

For negligent infliction of emotional distress, see Wis JI-Civil 1510 and 1511.

In a 2001 decision, the plaintiff argued that she was entitled to damages for intentional infliction of emotional distress because a police officer acted intentionally when he shot her dog. Rabideau v. City of Racine, 2001 WI 57, 243 Wis.2d 486, 627 N.W.2d 795. The court rejected the plaintiff's argument, concluding that to prevail on a claim for intentional infliction of emotional distress:

> There must be something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional distress.

Matter of Public Concern. A claim for intentional infliction based on disclosure of information is precluded by the First Amendment if the disclosure discussed a "matter of public concern." Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

Media Defendant. A plaintiff does not have a claim against a media defendant for intentional infliction of emotional distress if the contents of the broadcast were not false. Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

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2750 EMPLOYMENT RELATIONS: WRONGFUL DISCHARGE — PUBLIC POLICY

In Wisconsin, an employer may discharge an employee for good reason, for no reason, or even for a reason that is morally wrong, without committing a legal wrong. An exception to this rule is [where the termination of the employee's job violates] [where the employee is discharged for refusing an employer's command to do something that would itself violate] a well-established and important public policy. Public policy in Wisconsin prohibits the firing of an employee for (insert policy).

(Plaintiff) claims that (he) (she) was fired from (his) (her) job by (defendant) because (give public policy being violated, e.g., (he) (she) refused to commit perjury). If you find that (defendant) fired (plaintiff) for that reason, then (plaintiff) was wrongfully discharged.

A discharge is not wrongful merely because it is retaliatory, unreasonable, or motivated by bad faith or malice. Further, a discharge is not wrongful merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

SPECIAL VERDICT

Was (plaintiff) wrongfully discharged from (his) (her) employment by (defendant)?

ANSWER: _____

Yes or No

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COMMENT

This instruction was approved in 1985 and revised in 1991 and 1995. The comment was updated in 1986, 1987, 1995, 1998, 2018, and 2020.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983); Ferraro v. Koelsch, 124 Wis.2d 154, 368 N.W.2d 666 (1985); Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Yanta v. Montgomery Ward & Co., Inc., 66 Wis.2d 53, 244 N.W.2d 389 (1974). See also Schultz v. Industrial Coils, Inc., 125 Wis.2d 520, 373 N.W.2d 74 (Ct. App. 1985). A claim for wrongful discharge based on public policy may be grounded upon an administrative rule. Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992).

Employment-at-Will Doctrine. In Brockmeyer, the court expressly refused to require good faith in the termination of employment contracts. However, the court did recognize the "public policy exception" to the employment-at-will doctrine. The court stated that the public policy claimed by the plaintiff must be evidenced by a constitutional or statutory provision. The other two exceptions to employment-at-will are: (1) where an employment contract specifies a period of employment and (2) where a statutory provision governs the employment agreement. The various Wisconsin statutory provisions prohibiting the discharge of an employee for certain reasons are listed by the court in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d at 567 and 568 n.9.

In Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986), the court concluded that Wis. Stat. § 103.455 articulates a "fundamental and well-defined public policy" within the public policy exception to the employment-at-will doctrine. This statute proscribes economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence, or willful misconduct. Wandry, supra at 47.

In Hausman v. St. Croix Care Center, 214 Wis.2d 654, 571 N.W.2d 393 (1997), the supreme court examined the employment-at-will doctrine, surveyed the breadth of the narrow public policy exception to the doctrine, and determined whether the case fell within its requirements. In its decision, the court rejected the plaintiffs' claims that the facts as alleged fit within the existing public policy exception and declined to adopt a broad whistle-blower exception. However, the court recognized that the plaintiffs' compliance with an affirmative legal duty requiring them to take action to prevent abuse or neglect of nursing home residents comports with a well-defined public policy and the rationale of the court's public policy exception to the employment-at-will doctrine.

The plaintiff-employee bears the burden of proving that the dismissal violates a clear mandate of public policy. Kempfer v. Automated Finishing, Inc., 211 Wis.2d 100, 564 N.W.2d 692 (1997). In Kempfer, the court said that if a public policy is not contained in a statutory, constitutional, or administrative provision, it cannot fall under the public policy exception to the employment-at-will doctrine. However, just because a public policy is evidenced by a statutory, constitutional, or administrative provision does not mean that it falls under the exception. 211 Wis.2d at 112. The public policy must still be found to be fundamental and well defined. In Kempfer, the court noted that an administrative rule is less likely to satisfy the fundamental and well defined requirements than a statutory provision and that a statutory provision is less likely to rise to the level of fundamental and well defined than a constitutional provision. In Kempfer, the supreme court made clear that the Wisconsin public policy exception to the employment-at-will doctrine is very narrow. It only provides that an employee

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may not be discharged for refusing a command to violate a fundamental and well-defined public policy that is evidenced by a constitutional, statutory, or administrative provision. With the exception of such a public policy, an employer may discharge an employee at will for any reason or for no reason.

Procedure. In Brockmeyer, the court explained the format for wrongful discharge litigation. The threshold determination of whether the public policy asserted by the plaintiff is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Brockmeyer v. Dun & Bradstreet, supra at 574. At trial, the plaintiff must then "demonstrate" to the jury that "the conduct that caused the discharge was consistent with a clear and compelling public policy." The decision in Brockmeyer, supra at 574, suggests by way of dicta that an employer must then produce evidence to prove that the dismissal was for "just cause." See also Winkelman, supra at 24. The Committee is of the opinion that "just cause" need not be proved but only that the discharge was for a reason other than a violation of a clear and compelling public policy.

Remedies. In Brockmeyer v. Dun & Bradstreet, supra, the court determined that a wrongful discharge claim is a contract action. It specifically rejected tort remedies including punitive damages. Instead, it stated, at 113 Wis.2d at 575:

> We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole."

The court, in Brockmeyer, also held that where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive. 113 Wis.2d at 576 n.17.

Effect of Employee Handbooks. Representations in an employee's handbook may limit the power of an employer to terminate an employment relationship which would otherwise be terminable at will. Ferraro v. Koelsch, supra. A handbook may convert the employment relationship into one that can only be terminated by adherence to contractual terms.

Attorney's Fee. Attorney's fees are not available in a common law wrongful discharge cause of action. Winkelman v. Beloit Memorial Hosp., supra.

Intentional disability discrimination. An employer engages in employment discrimination if it terminates a person from employment "because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322(1). Two methods of determining whether an employer intentionally terminated employment "because of" disability are available. The first method asks whether the employer held "actual discriminatory animus against an employee because that employee was an individual with a disability[.]" Maeder v. Univ. of Wisconsin-Madison, ERD Case No. CR200501824 (LIRC June 28, 2013). The alternative method, known as the "inference method," finds intent to discriminate when an employer bases its adverse action on "a problem with that employee's behavior or performance which is caused by the employee's disability." See Id. A violation of Wis. Stat. § 111.322(1) cannot be found to have occurred under the inference method of proving intentional discrimination unless the employee proves the employer knew that a disability caused the conduct on which adverse employment decision was made, and that the employer had this knowledge at the time it made the decision. Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2018 WI 76, 382 Wis.2d 624, 657, 914 N.W.2d 1 (2018).

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Probationary Employees: For decisions discussing the applicability of procedural guarantees outlined in sec. 62.13(5) as they pertain to probationary employees, see Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 104 Wis.2d 498, 311 N.W.2d 646 (1981); and State v. City of Prescott, 390 Wis.2d 378, 938 N.W.2d 602, 2020 WI App 3.

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2760 BAD FAITH BY INSURANCE COMPANY (EXCESS VERDICT CASE)

A policy of insurance is a contract between the insurance company and the person who buys the policy, who is known as the "insured." Under the terms of a policy, the insurance company reserves the right to exclusively control the defense of a claim filed by an injured party against the insured and the company. If the claim or demand is less than the limits of the policy, normally the insured is excluded from interfering in any way in the investigation and the negotiations for settlement of the claim and has no voice in the legal procedures to be followed by the insurance company in defending the claim filed against him or her and the insurance company.

Thus, so long as the ultimate settlement or recovery by the injured party does not exceed the monetary limits of the insured's policy, the question of whether the claim should be settled or the manner in which it is defended usually is of no concern to the insured.

When, however, an injury does occur and a claim or demand is made, which should alert the insurance company that the injured party's recovery might exceed the insured's policy limits, then the interest of the policyholder must become a matter of concern to the insurance company.

At this point, certain duties on the part of an insurance company do arise. Stated generally, it is a duty to exercise ordinary care in the handling of the injured party's claim to the end that the insured's interest will be protected. This duty arises because the insured, by virtue of the policy with the insurance company, has agreed to let the company investigate and defend the claim, has given the insurance company the exclusive right to settle or compromise the claim, has given the company complete control in the defense of the claim,

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and further has agreed not to participate except at his or her own expense by hiring his or her own lawyer to represent him or her on any financial risk above the limits in the policy.

Because of this relationship, an insurance company has the following duties to its insured in handling an injured party's claim filed against it and the insured:

1. To conduct an investigation of the facts and circumstances of the accident by all available and reasonable means, as well as to inform itself of the nature and extent of the injuries sustained by an injured party and the extent to which the injured party has recovered from those injuries. [This duty includes gathering information about who was at fault in causing the accident, which would include interviewing witnesses to the accident or taking or attending depositions of those persons who had personal knowledge of the facts necessary to make an overall evaluation of the case.]

On the basis of all information learned from its investigation, the company then must make a reasonable appraisal of the injured party's chances of winning if the lawsuit should go to trial and the amount of damages the injured party will probably recover against it and the insured if the case were tried.

2. The further duty to advise its insured if it is satisfied from the investigation and evaluation of all the facts that it appears probable that the injured party will recover an amount in excess of the policy limits so that the insured can take appropriate and timely action for his or her own protection. (This could involve the insured's desire to retain his or her own lawyer to represent him or her on any probable monetary claim above the policy limits.)

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3. To timely and adequately advise the insured of any and all meaningful negotiations for settlement between the company and the injured party, particularly of any offers and counter-offers of settlement.

The proper fulfillment of these obligations which I have just given to you imposes upon an insurance company a duty to act fairly and reasonably toward its insured at all stages of its investigation and in the handling of the defense of the injured party's claim. To put it another way, the insurance company must use reasonable diligence, which means such care and diligence as the ordinarily prudent insurance company would use under like or similar circumstances in investigating, evaluating, defending, and negotiating on behalf of its insured. While there is no requirement that an insurance company must absolutely exhaust all sources of information, it is required to exercise reasonable care and diligence to that end.

In answering question 1, the burden of proof is on (plaintiff) to satisfy you, by the greater weight of the credible evidence, to a reasonable certainty, that the question should be answered "yes."

Question 2 reads as follows: "If you have answered question 1 'yes,' then answer this question. Did the failure of the insurance company to perform its duties to its (plaintiff), as found in question 1, demonstrate such a significant disregard of (plaintiff)'s interests that the insurance company's final decision not (to pay policy limits) to settle the case was made in bad faith?"

In answering question 2, you are now called upon to determine whether the company's refusal to settle the case (for policy limits), and thereby expose its insured to a judgment over the policy limits, was made in bad faith.

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"Bad faith" is a term of broad application, and it is sometimes difficult to exactly define within the framework of every case. The term "bad faith" carries with it a suggestion of dishonest or deceitful conduct. In deciding whether the insurance company acted in bad faith in this case, you should carefully consider whether the company, in failing to perform the duties it owed to (plaintiff), demonstrated a significant disregard of (plaintiff)'s rights and economic interests.

In deciding not (to pay (plaintiff)'s policy limits) to settle the case, you are advised that an insurance company, because it has the right to exercise its own judgment whether the claim should be contested or settled, has an obligation to its insured to make an informed and reasonable judgment.

Its conduct should be accompanied by considerations of good faith. Its decision not to settle (by paying an insured's policy limits) should be an honest one, taking into consideration both the interest of the company and the interest of the insured. It should be the result of weighing of probabilities in a fair and honest way.

Even though you may have concluded that the insurance company acted negligently in the performance of its duties in your answer to question 1, that alone is not enough to show that the company acted in bad faith. Rather, you should consider the totality of the company's conduct in the handling of the injured party's claim to determine whether the company's decision to expose its insured to a judgment over the policy limits was an intellectually honest and reasonable decision. If you determine that it was not an honest and reasonable decision, then the company may be said to have acted in bad faith. On the other hand, if you conclude from all the evidence that the insurance company's decision not to settle the case was reasonable under the circumstances and made in the honest belief that the injured party's

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claim could be defeated or that the damages could be kept within the insured's policy limits, then you should find that the insurance company did not act in bad faith in refusing to settle the case.

The burden of proof to satisfy you that question 2 should be answered "yes" is on (plaintiff). This means that (plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant insurance company) acted in bad faith toward (plaintiff) in the performance of its duties.

SPECIAL VERDICT

Question 1: Did (insurance company) acting through its lawyers breach any of the duties that it owed to its insured, (insured), in the handling of (injured party)'s claim against (insured) and the insurance company?

Answer:_____
Yes or No

Question 2: If you have answered question 1 "yes," then answer this question. Did the failure of (insurance company) to perform its duties to (insured), as found in question 1, demonstrate such a significant disregard of (injured)'s interests that the insurance company's final decision not to [pay policy limits to] settle the case was made in bad faith?

Answer:_____
Yes or No

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COMMENT

This instruction was formerly Wis JI-Civil 3120. It was revised and renumbered in 1980 and revised in 1984 and 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 1986, 1991, 1996, and 1998.

Under Wisconsin case law, an insurance company, owing to its fiduciary relationship with an insured, has certain well-defined duties to perform in the handling of a claim against its insured. These duties are as follows:

1. The duty to make a diligent effort to ascertain all of the facts of the accident upon which an informed and reasonable evaluation can be made of the claim against its insured;

2. The duty to advise its insured that the recovery could exceed policy limits so that the insured might take timely and independent action to protect his or her own interest; and

3. The duty to keep the insured timely and adequately informed of any offers of settlement made to the insurance company or its attorney and the progress of the settlement negotiations. (See Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 231 N.W. 257 (1931), and Baker v. Northwestern Nat'l Casualty, 22 Wis.2d 77, 125 N.W.2d 370 (1963), and 26 Wis.2d 306,132 N.W.2d 493 (1965).) See also Kranzush v. Badger State Mut. Casualty Co., 103 Wis.2d 56, 307 N.W.2d 256 (1982).

These duties arise because the policy between the insurer and the insured gives the insurer complete control over the investigation, settlement negotiations, and, most importantly, the final decision whether to settle the case within policy limits. Mowry v. Badger State Mut. Casualty, 129 Wis.2d 496,510, 385 N.W.2d 171 (1986). If the case is settled within policy limits, there is no exposure to the insured and his or her rights under the policy are not violated.

Some members of the bench and bar believe that the ultimate question of bad faith rests solely upon negligence considerations and that there is no requirement to show any dishonest or deceitful conduct by an insurance company or its lawyers toward the insured. This view seems to be supported by dicta in Alt v. American Family Mut. Ins. Co., 71 Wis.2d 340, 354, 237 N.W.2d 706 (1976), in which the court states:

> While the Hilker case makes it clear that the liability of the insurance company in a situation such as this is for negligence, i.e., the breach of ordinary care in a fiduciary relationship, the burden of proof is higher than that required in most negligence cases. The claimant must assume the middle burden of proof, and the breach of the insurer's duty must be proved by clear and convincing evidence. The insurance company, however, to be liable, need not be found to have committed fraud or to have acted dishonestly in respect to its insured.

A close reading of Wisconsin decisions involving bad faith by an insurer shows that Wisconsin is committed to what Professor Keeton calls the "dual standard" in deciding excess verdict bad faith cases. The conduct of the insurance company in dealing with its insured (i.e., the manner in which it performs its duties to the insured) is conceptually a negligence question; its ultimate decision not to settle within policy limits is then properly one of good or bad faith. See Keeton, "Liability Insurance and Responsibility for Settlement," 67

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Harv. L. Rev., 1136 (1954), and "Insurer's Excess Liability: Evaluating Conduct and Decision in Refusal of Settlement Offers," Rebecca Leair, FIC Quarterly/Summer 1983, pp. 371-396.

The Committee believes that the passage from Alt quoted above can only be reconciled with other Wisconsin cases by reading it to mean not that liability but rather that the performance of an insurance company's duties to its insured are tested by negligence law. The proper inquiry then is whether the insurance company, by act or omission, performed its duties as a reasonable insurance company would in the conduct of its own business.

If the trier of fact determines that the company has not acted as a reasonable insurer, then there has been a breach of fiduciary duty. However, the ultimate question of whether the company's refusal to settle the case within policy limits was made in bad faith can be answered only after giving overall consideration to the nature and extent of the company's acts of negligence. As stated in Baker v. Northwestern Nat'l Casualty Co., 26 Wis.2d 306, 315, 132 N.W.2d 493 (1965):

> The extent and character of the negligence, however, are factors to be considered by the trier of fact in weighing the matter of bad faith. To hold the carrier liable for the excess judgment, the insured must show by clear, satisfactory, and convincing evidence, that the carrier acted in bad faith.

If the trier of fact determines that the company's conduct was of a character to evince a significant disregard of its insured's rights, then it can be said to have acted in bad faith. The reason that this must be established by clear and satisfactory evidence is because the concept of bad faith under Wisconsin law is, and always has been, a species of fraud and carries with it the suggestion of the company's not having dealt fairly and honestly with its insured.

Based on its review of the case law, the Committee revised this instruction to more clearly present to the jury the two-step fact-finding process. If the jury concludes that the insurer has breached its duties to an insured to the extent that the breach evinces a significant disregard of the insurer's rights, then, under Wisconsin law, its conscious decision not to pay the insured's policy limits is deceitful and bad faith conduct. This process was approved in Warren v. American Family Mut. Ins. Co., 122 Wis.2d 381, 361 N.W.2d 724 (Ct. App. 1984).

The suggested special verdict has also been revised so that two questions, rather than one, are presented. The first question deals with the conduct of the insurer; the second question deals with the insurer's decision. The Committee believes this two-question verdict most clearly presents the "dual standard" and avoids begging the question by including the term "bad faith" in the same question which asks whether the insurance company breached any of its duties. For this reason, two separate questions are necessary.

It is not bad faith for an insurer to refuse an offer of settlement within policy limits when the question of policy coverage is fairly debatable. See Mowry v. Badger State Mut. Casualty, supra.

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Expert Witness Testimony. For the requirement of expert testimony in bad faith actions, see Weiss v. United Fire & Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1996). In that decision, the supreme court rejected a bright-line rule requiring expert testimony in all bad faith tort claims.

The court of appeals has held that insurers are responsible for the negligence of its attorneys in conducting the actual litigation of a case. Majorowicz v. Allied Mut. Ins. Co., 212 Wis.2d 513, 569 N.W.2d 472 (Ct. App. 1997). In this case, the insurer argued that only if an employer has the right to control an employee's performance may it be held vicariously liable, under traditional agency principles for that individual's conduct. Therefore, the insurer said the trial court had erred in holding it responsible for the negligence of its counsel in conducting the actual litigation in the case. It argued that an insurer has no right to control the independent professional judgment of the counsel it hires to defend its insured. Moreover, it asserted, because an insurer cannot practice law itself, its contractual duty to defend must be delegable. The court of appeals concluded, however, that an insurance company's contractual relationship with its insured to exercise good faith is not delegable. It said the nondelegable duty exception is based upon the theory that certain responsibilities of a principle are so important that the principle should not be permitted to bargain away the risks of performance. Majorowicz v. Allied Mut. Ins. Co., supra at 526. In Majorowicz, the trial judge modified the patterned bad faith jury instruction. It added the following language to Wis JI-Civil 2760:

> [an insurance company has more than a passive role, that in some circumstances at least, it has an affirmative duty to seize whatever reasonable opportunity may present itself to protect its insured from excess liability.]

The court of appeals in Majorowicz determined that the language that was added to the jury instruction was taken verbatim from Alt v. American Family Mut. Ins. Co., supra. The court of appeals held that this passage accurately summarized Wisconsin bad faith law and concluded that there was no err in the modified jury instruction.

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2761 BAD FAITH BY INSURANCE COMPANY: ASSURED'S CLAIM

To prove bad faith against (insurance company), the (plaintiff) must establish that there was no reasonable basis for the insurance company's denying (plaintiff)'s claim for benefits under (his) (her) policy and that (insurance company), in denying the claim, either knew or recklessly failed to ascertain that the claim should have been paid.

Bad faith on the part of an insurance company towards its insured is the absence of honest, intelligent action or consideration of its insured's claim.

Bad faith exists if, upon an examination of the facts found by you, you are able to conclude that (defendant) had no reasonable basis for denying (plaintiff)'s claim.

In answering this question, you may consider whether (plaintiff)'s claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. If you find that (insurance company) either refused to consider the (plaintiff)'s claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which the (plaintiff)'s claim is based, the insurance company can be found to have exercised bad faith. This is because you may infer from these facts a reckless disregard on the insurance company's part to learn that there was no reasonable basis for it to deny (plaintiff)'s claim.

If, on the other hand, you find that the insurance company, after conducting a thorough investigation of the facts and circumstances giving rise to the (plaintiff)'s claim, reasonably concluded that the claim is debatable or questionable, then there is no bad faith even though it refused to pay the claim.

(Burden of Proof: Middle Burden, Wis JI-Civil 205)

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SPECIAL VERDICT

Did (defendant) exercise bad faith in denying the claim of (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction was approved in 1979 and revised in 1991. The comment was updated in 1997, 1998, and 2011.

Bad faith conduct by an insurer towards its insured is a tort separate and apart from any breach of contract. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Davis v. Allstate Ins. Co., 101 Wis.2d 1, 303 N.W.2d 596 (1981); Kranzush v. Badger State Mut. Casualty Co., 103 Wis.2d 56, 306 N.W.2d 256 (1982); Benke v. Mukwonago Mut. Ins. Co., 110 Wis.2d 356, 329 N.W.2d 243 (Ct. App. 1982); Brethorst v. Allstate, 2011 WI 41, 334 Wis.2d 23, 798 N.W.2d 467, at ¶ 24.

An insurance company is liable in bad faith only when it has denied a claim without a reasonable basis. The test of the company's conduct in such claims is whether a reasonable insurer under the particular facts and circumstances would have denied or delayed payment of the claim. Poling v. Wisconsin Physicians Serv., 120 Wis.2d 603, 608, 357 N.W.2d 293 (Ct. App. 1984), citing Anderson v. Continental Ins. Co., supra.

The supreme court has said that it is well settled that if an insurer fails to deal in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for bad faith. DeChant v. Monarch Life Ins. Co., 200 Wis.2d 559, 547 N.W.2d 592 (1996). By virtue of the relationship between the parties created by an insurance contract, a special duty arises, the breach of which is a tort and is unrelated to contract damages. The tort of bad faith "is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by the contract. DeChant, at 569. When such a breach occurs, the insurer is liable for any damages which are the result of that breach.

The tort of bad faith was created to protect the insured. Its primary purpose is to redress all economic harm proximately caused by an insurer's bad faith. DeChant, at 570, citing Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973).

In Dechant, the court said that it is the fiduciary relationship between the insured and the insurer that is the key element justifying the use of tort remedies for the insurer's breach of the contractual obligation.

When an insurer acts in bad faith by denying benefits, it is liable to the insured in tort for any damages which are the proximate result of that tort. DeChant, supra. In DeChant, the court concluded that attorney's fees and bond premiums are recoverable by a prevailing party in a first party bad faith action as part of those compensatory damages resulting from the insurer's bad faith.

Elements. In Brethorst v. Allstate, supra, ¶ 65, the court concluded that "some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured.

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The Brethorst court noted that traditionally, to prove a first-party bad faith claim, the insured has been required to establish two elements. The first element, an objective measure, is that there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy. The second element is subjective and requires that the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim.

The court in Brethorst noted that the case was "the first to come before this court in which the insured has initiated a bad faith claim without filing any accompanying claim for breach of contract." 2011 WI 41, at ¶ 51.

In Brethorst v. Allstate, the plaintiff filed a first-party bad faith claim without also filing a breach of contract claim. The case involved an uninsured motorist contract. The trial court denied a motion for bifurcation and a stay after concluding that Wisconsin law allowed a party to bring a bad faith claim separately from any underlying breach of contract claim. The Wisconsin Supreme Court affirmed the trial court, but required the plaintiff to establish a wrongful denial of some contracted for benefit as a prerequisite where the suit was for a bad faith claim only. According to the majority, breach of contact is a required showing both as to discovery and proof of a claim of first-party bad faith.

The court in Brethorst v. Allstate, supra, quoted this instruction (JI-Civil 2761) in full. After reviewing Brethorst, the Committee concluded that this instruction is a proper statement of the elements of bad faith. In cases, where the plaintiff proceeds only on bad faith, a showing of breach of contract is required.

Expert Testimony. In DeChant v. Monarch Life Ins. Co., supra, at 567, the court of appeals certified the following issue: "Is expert testimony required as a predicate to instructing the jury in a bad faith action in conformity with Wis JI-Civil 2761, as to the conduct of a reasonable insurer?" The supreme court concluded that the circuit court had correctly determined that expert testimony was not required in the case. The court said that to establish a claim for bad faith, the insured "must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Citing Anderson v. Continental Ins. Co, supra. The insured must establish that, under the facts and circumstances, a reasonable insurer could not have denied or delayed payment of the claim. In other words, the trier measures the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances. In Weiss v. United Fire and Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1995). The supreme court addressed the question of whether an insured can prevail on a bad faith tort claim against an insurer without first introducing expert testimony. In Weiss, the court rejected a categorical rule requiring expert testimony in all bad faith tort claims. Instead, the court held that:

> Cases presenting particular complex facts and circumstances outside the common knowledge and ordinary experience of an average juror will ordinarily require an insured to introduce expert testimony to establish a prima facie case for bad faith. Under the facts and circumstances of other cases, however, the question of whether an insurer has breached its duty as a reasonable insurer to evaluate its insured's claim fairly and neutrally will remain well within the realm of the ordinary experience of an average juror and therefore will not require expert testimony.

The supreme court concluded that the circuit court correctly determined that the insured was not required to introduce expert testimony to establish a cause of action against the insurer for bad faith denial of his claim because the jury in the case did not need special knowledge or skill or experience to properly understand and analyze the insurer's conduct.

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Damages. A concurring opinion in DeChant noted that attorney's fees incurred in proving a bad faith claim are not awarded as attorney's fees, but rather as an item of damages caused by an insurer's bad faith refusal to pay benefits owed. But the very theory supporting an award of attorney's fees as damages resulting from an insurer's bad faith precludes an award of attorney's fees incurred in proving punitive damages.

Punitive Damages. For the award of punitive damages in bad faith cases, see Anderson v. Continental Ins. Co., supra at 697; McEvoy v. Group Health Cooperative, supra, at 526.

Claims Against Health Maintenance Organizations (HMOs). The Wisconsin Supreme Court has held that bad faith claims may properly be maintained against HMOs. McEvoy v. Group Health Cooperative, 213 Wis.2d 507, 570 N.W.2d 397 (1997). It said to prevail, a plaintiff must plead facts sufficient to show, upon objective review: (1) the absence of a reasonably basis for the HMO to deny the plaintiff's claim for out-of-network coverage or care under his or her subscriber contract; and (2) that the HMO, in denying such a claim, either knew or recklessly failed to ascertain that the coverage or care should have been provided. A plaintiff must make this showing by evidence that is clear, satisfactory, and convincing.

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2762 BAD FAITH BY INSURANCE COMPANY: THIRD PARTY EMPLOYEE CLAIM AGAINST WORKER'S COMPENSATION CARRIER

Instruction withdrawn.

COMMENT

An instruction on this subject was approved by the Committee in 1979. The instruction was withdrawn by the Committee in 1996. This comment was revised in 2005 and 2009. Section 102.18(1)(bp) of the Wisconsin Statutes authorizes the Department of Workforce Development to assess a penalty for bad faith against a workers compensation insurer. This statutory provision states that the penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith. In Jadofski v. Town Kemper Ins. Co., 120 Wis. 2d 494, 335 N.W.2d 550 (Ct. App. 1984), the court held that this statute is the exclusive remedy for acts occurring after November 28, 1981.

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2769 WISCONSIN FAIR DEALERSHIP LAW: EXISTENCE OF DEALERSHIP

Question _____ of the special verdict asks whether a dealership [was established] [existed] between (_____) and (_____).

To find that a dealership existed between (_____) and (_____) you must determine that two elements were present:

- A contract or agreement existed in which (dealer) was given the right by (grantor) to [sell or distribute (a product) (a service)] [or] [use a trade name, trademark, service mark, logotype, advertising or other commercial symbol]. The contract or agreement may be written or oral; and
- A community of interest existed between (grantor) and (dealer). This means the parties shared a continuing financial interest in which the parties cooperated and coordinated their activities in operating the dealership business or marketing the dealership's (goods) (or) (services) and share common goals in their business relationship.

In determining if a community of interest existed between (dealer) and (grantor), among the things you should consider are:

- How long the parties dealt with each other;
- The extent and nature of the obligations imposed on the parties in any contract or agreement between them;

The percentage of time or revenue the (dealer) devoted to (grantor)'s products or services;

- The percentage of the gross proceeds or profits (dealer) derived from (grantor)'s products or services;

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- The extent and nature of (grantor)'s grant of territory to (dealer);
- The extent and nature of (dealer)'s uses of (grantor)'s proprietary marks (such as trademarks or logos);
- The extent and nature of (dealer)'s financial investment in inventory, facilities, and good will of the alleged dealership;
- The personnel which (dealer) devotes to the alleged dealership;
- How much (dealer) spent on advertising or promotional expenditures for the (grantor)'s products or services;
- The extent and nature of any supplementary services provided by (dealer) to consumers of (grantor)'s products or services.

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002. The comment was updated in 2004, 2009, 2010, and 2020.

Wis. Stat. § 135.02(2); Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987); Baldewein Co. v. Tri-Clover, Inc., 233 Wis.2d 57, 606 N.W.2d 145 (2000); Central Corp. v. Research Products Corp., 2004 WI 76, 272 Wis.2d 561, 681 N.W.2d 178; Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

In Baldewein Co. v. Tri-Clover, the court said the definition of "dealership" in Wis. Stat. § 135.02(2) is both "extremely broad and highly nuanced." The court also remarked that "community of interest" has been the most vexing phrase in the "dealership definition for courts faced with applying the law."

Determining Whether a Community of Interest Exists; Factors. The list of factors in paragraph 3 can be modified based on the evidence. This list is taken from Ziegler, supra. In Central Corp., supra, the Wisconsin Supreme Court said that while the list of factors set forth in Ziegler does not recite every factor that may be considered, it does provide questions that are useful in determining whether a community of interest exists. In Central Corp. v. Research Products Corp., supra, the court said several facts of the parties' business relationship led to the conclusion that summary judgment should not

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have been granted. The supreme court listed the following factors and the alternative inferences that may be drawn from them in determining whether a dealership relationship existed:

1. the parties' 20-year business relationship;

2. the significant financial investment by the dealer in the construction of a warehouse based, in part, on the amount of the grantor's product in inventory;

3. the dealer's practice of keeping a substantial amount of the grantor's product in inventory;

4. the grantor's desire to limit the dealer's sales to a specific territory; and

5. the dealer's practice of keeping spare parts for grantor's products, on hand, at cost to its customers.

The supreme court in Ziegler, supra, established a multiple factor test for determining whether a community of interest exists. The community of interest concept serves to limit the application of the Fair Dealership Law and requires a person "seeking the protections of the law to demonstrate a stake in the relationship large enough to make the grantor's power to terminate, cancel or not renew a threat to the economic health of the person (thus giving the grantor inherently superior bargaining power). Ziegler, supra, p. 605; Baldewein, supra.

In Baldewein, the court stated that a dealership is a "symbiotic relationship." It said:

> The dealer benefits by generating income through sales, without having to undertake the expense of manufacturing. The grantor benefits by having the dealer undertake important marketing functions through investment in inventory, receivables and facilities, and by applying its efforts and experience in merchandising and selling the product.
>
> The WFDL protects dealers who have made a substantial investment in the dealership and who are substantially dependent on the grantor's product line. Ziegler, 139 Wis. 2d at 605. The statute's requirement of a "community of interest" between the parties captures this concept and ensures that the WFDL's protections apply only to those business relationships that involve a higher level of financial interdependence than the typical vendor-vendee relationship.

When a dealer sinks substantial resources into its relationship with a particular grantor-time, money, employees, facilities, inventory, advertising, training-or derives substantial revenue from the relationship (as a percentage of its total), or some combination of the two, the grantor's power to terminate, cancel, or not renew the relationship becomes a substantial threat to the economic health of the dealer and a community of interest can be said to exist.

Modifying the Factors. While the trial court has discretion in deciding how to instruct the jury and thus can modify these instructions, the ten factors used to determine whether a community of interest exists as set forth in Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987), remain appropriate instructions. Water Quality Store v. Dynasty Spas, Inc., 2010 WI App 112, ¶¶44-45. The standard for determining a community of interest as set forth in Home Protective Services, Inc. v. ADT

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Security Services, Inc., 438 F.3d 716, 720 (7th Cir. 2006), is not the law in Wisconsin even though it interpreted Wisconsin law. Water Quality Store, at ¶2.

Where no factual dispute exists, including those arising from the existence of reasonable alternative inferences drawn from otherwise undisputed facts, the community of interest question is one of law for the court. Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

Logo/Commercial Symbol: Even if a party lacks the right to sell, it may still qualify as a dealer if the party makes substantial use of a commercial symbol. However, mere permission to utilize a manufacturer's commercial symbol does not create a dealership. A dealer must instead show considerable investment in promoting a trademark or logo such that the dealer has tied its fortunes to the manufacturer. As the Wisconsin Supreme Court stated in Foerster, Inc. v. Atlas Metal Parts Co., 105 Wis.2d 17, 313 N.W.2d 60 (1981), "[T]here must be more than the mere use of a calling card identifying a manufacturer's representative as an agent for a company." See also, PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc., 941 F.3d 325, 331, (7th Cir. 2019) where the Seventh Circuit Court of Appeals held that the plaintiff's use of the defendant's logos on its website did not involve a substantial investment that would in turn create an imbalance of power between the two parties.

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2770 WISCONSIN FAIR DEALERSHIP LAW: GOOD CAUSE FOR TERMINATION, CANCELLATION, NONRENEWAL, FAILURE TO RENEW, OR SUBSTANTIAL CHANGE IN COMPETITIVE CIRCUMSTANCES (WIS. STAT. § 135.03)

The plaintiff claims that (grantor) violated the Wisconsin Fair Dealership Law by (terminating) (cancelling) (failing to renew) (substantially changing the competitive circumstances) of its dealership agreement w/_____ without good cause. Question ____ of the special verdict asks:

Was the dealership agreement between (dealer) and (grantor) (e.g. terminated, cancelled, etc.) by (grantor) for good cause?

To answer this question "yes" you must determine whether (grantor) had good cause to (e.g. terminate) the dealership agreement it had with (dealer). The burden of proof on this question is on (grantor) to satisfy you that it had good cause to (e.g. terminate) the dealership agreement.

To determine if good cause existed, you must consider the efforts of (dealer) in fulfilling the terms of the agreement. [(Grantor) had good cause to (e.g. terminate) its dealership agreement with (dealer) if (dealer) did not substantially comply with an essential and reasonable requirement imposed by (grantor). [A requirement that discriminates against (dealer) and does not apply to other similar dealers either by its terms or in the way it is enforced is not an essential and reasonable requirement.)]

[**Where evidence of bad faith by a dealer is presented**: [(Grantor) had good cause to (insert act) if (dealer) acted in bad faith in carrying out the dealership agreement. Bad faith means an intention to take unfair advantage of (grantor) through fraud, dishonesty, or failure

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to cooperate or to provide accurate information, or by other activities that render the transaction unfair to (grantor).

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002 and revised in 2004.

Wis. Stat. § 135.03. For the definition of "good cause," and the burden of proof, see Wis. Stat. § 135.02(4).

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2771 WISCONSIN FAIR DEALERSHIP LAW: ADEQUATE NOTICE BY GRANTOR (WIS. STAT. § 135.04)

Question ____ asks whether (grantor) failed to give (dealer) adequate notice of the (termination) (cancellation) (failure to renew) (substantial change in competitive circumstances). The Fair Dealership Law requires that a grantor, such as_____, give a dealer, such as ____, written notice of a (termination) (cancellation) (nonrenewal) (substantial change in competitive circumstances). To be an adequate notice, the notice must:

1. be given to the dealer 90 days in advance of the (termination) (cancellation) (failure to renew) (substantial change in the competitive circumstances); (and)

2. state the reasons for the (e.g. termination)(;) (and)

3. state the steps required of the dealer to correct the deficiency to avoid the (e.g. termination), allowing 60 days for correction.

The burden of proof that the notice was not adequate is on (dealer).

SPECIAL VERDICT:

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002 and revised in 2004.

This instruction is used where the dealer challenges the adequacy of the grantor's notice required by Wis. Stat. § 135.04.

Notice. The notice provisions of Wis. Stat. Ch. 135.04 do not apply if the termination, etc., is grounded in insolvency or an assignment for the benefit of creditors or bankruptcy.

The statutory notice under § 135.04 must be given when the grantor "substantially changes the competitive circumstances of the dealership." Jungbluth v. Hometown, Inc., 201 Wis.2d 320, 548 N.W.2d 519

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(1996). In this case, the court rejected that the grantor's argument that the 90-day notice only applies to a substantial change in the competitive circumstances of a dealership agreement.

Where the termination, etc., is based upon nonpayment of sums due under the dealership, Wis. Stat. § 135.04 provides that the grantor must provide the dealer with at least 90-days' prior written notice. The notice must provide that the dealer has 10 days in which to remedy the default. White Hen Pantry v. Buttke, 100 Wis.2d 169, 177, 301 N.W.2d 216 (1981).

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2772 WISCONSIN FAIR DEALERSHIP LAW: SPECIAL VERDICT

Question ____: Did a dealership exist between (_____) and (_____)?

ANSWER: _____
Yes or No

If you answered "yes," to question _____, then answer the following question:

Question ____: Did (grantor) (e.g. terminate, cancel, fail to renew, substantially change the competitive circumstances) of the dealership agreement with (dealer)?

ANSWER: _____
Yes or No

If you answered "yes," to question _____, then answer the following question:

Question ____: Was the dealership agreement between (dealer) and (grantor) (e.g. terminated, cancelled, etc.) by (grantor) for good cause?

ANSWER: _____
Yes or No

If you answered "no," to question _____, then answer the following question(s):

[**Note:** If adequate notice is at issue (see JI-Civil 2771):

Question ____: Did (grantor) fail to provide adequate notice to (dealer) of the (e.g. termination, cancellation, etc.)?

ANSWER: _____
Yes or No

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[**Note:** If correction of the deficiency is at issue:

Question ____: Was the deficiency corrected within 60 days?

ANSWER: _____
Yes or No

Question ____: What sum of money will compensate (dealer) for the termination (cancellation, etc.) of the dealership agreement by (grantor)?

ANSWER: $_____

COMMENT

This special verdict was approved in 2002 and revised in 2004.

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2780 INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

Question _____ of the Special Verdict asks whether (plaintiff) had a contractual relationship (prospective contractual relationship) with (3rd party).

[If there is an issue on whether the relationship amounts to a contract, use appropriate contract instructions.]

Question ____ of the Special Verdict asks whether (defendant) interfered with the (prospective) contractual relationship (plaintiff) had with (3rd party).

An interference may consist of any conduct or words conveying to (3rd party) the defendant's desire to influence (3rd party) to refrain from dealing with the plaintiff. It could be a simple request or persuasion, exerting only moral pressure, as well as threats or promises of some benefit to (3rd party). It does not require ill will or expression of malice towards the plaintiff.

Question _____ of the Special Verdict asks whether that interference on (defendant)'s part was intentional.

In determining (defendant)'s intent, you may consider (his) (her) actions and statements. Ordinarily, it is reasonable to infer that a person intends the natural and probable consequences of (his) (her) acts.

Although other reasons may appear, (plaintiff) must prove that (defendant)'s prime purpose was to interfere with the contractual relationship (plaintiff) had with (3rd party) or (defendant) knew or should have known that such interference was substantially certain to occur as a result of the conduct.

[If knowledge (plaintiff)'s relationship with (3rd party) is an issue, add the following: It is not necessary that (defendant) had actual knowledge of this specific

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contract. It is sufficient that (defendant) had knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual relationship between (plaintiff) and (3rd party). This is sometimes referred to as "constructive knowledge."]

Question ____ asks whether a causal connection existed between the interference by (defendant) and the damages claimed by (plaintiff).

Before you can find that (defendant)'s conduct was a cause of the claimed damages, you must find that the defendant's conduct was a substantial factor; that is, it had a substantial influence in producing the damages claimed by the plaintiff. In other words, there must be a real causal connection between defendant's conduct and plaintiff's claimed damages.

Question _____ asks whether (defendant) was justified (or privileged) to interfere with the contractual relationship (plaintiff) had with (3rd party).

In determining whether (defendant)'s conduct was justified, you should weigh all the circumstances of the case. Among the factors you should consider are (1) the nature, type, duration, and timing of the conduct; (2) whether (defendant) had an improper motive; (3) whether (defendant) was motivated by self-interest as opposed to a public interest; (4) the type of interest allegedly interfered with; (5) society's interest in protecting both freedom of action on (defendant)'s part and contractual relationship of parties; (6) the closeness or remoteness of (defendant)'s conduct to the alleged interference; (7) whether (plaintiff) and (defendant) are competitors; and (8) whether (defendant)'s conduct, even though intentional, was fair and reasonable under the circumstances.

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A defendant's conduct may only be found justified if the means employed by the defendant were lawful. A person's conduct cannot be justified if the person acted from ill will or an improper motive towards the plaintiff. Some ill will does not preclude the possibility of justification, so long as defendant acted in substantial part with a proper motive in mind.

[**For privileges, see Comment**.]

The burden of proof as to questions one, two, three, four, and six is on (plaintiff). The burden of proof as to question five is on (defendant). In questions one and five, the party contending that the question should be answered "yes" must satisfy you, by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer.

Before you may answer "yes" to questions two, three, or four, (plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be your answer as to the questions under consideration.

SPECIAL VERDICT

First Question: Did (plaintiff) have a contract with (third party) at the time of (defendant)'s alleged interference?

Answer: _____

Yes or No

[**Note**: In most cases, the first question can be answered by the court as a matter of law.]

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Second Question: If you have answered question 1 "yes," answer this question: Did (defendant) interfere with (plaintiff)'s contract with (third party)?

Answer: _____

Yes or No

Third Question: If you have answered question 2 "yes," answer this question: Was the interference on (defendant)'s part intentional?

Answer: _____

Yes or No

Fourth Question: If you have answered question 3 "yes," answer this question: Was the interference on (defendant)'s part a cause of damages to (plaintiff)?

Answer: _____

Yes or No

Fifth Question: If you have answered question 4 "yes," answer this question: Was the interference on (defendant)'s part justified?

Answer: _____

Yes or No

Sixth Question: Damages.

COMMENT

This instruction and comment were approved by the Committee in 1990. The instruction was revised in 2002 and 2005 as to the burden of proof language. The comment was updated in 1996, 2001, 2005, 2014, and 2020. The 2020 revision updated case law citations.

Wisconsin adopted the 1939 version of the Restatement of Torts, § 766, in Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 101 N.W.2d 805 (1960). The updated 1979 version of this section of Restatement, Second, Torts was adopted in Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).

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Also actionable is preventing a party from performing a contract or causing performance to be more expensive or burdensome, § 766A, or interfering with a prospective contractual relationship, § 766B Restatement, Second, Torts; Cudd v. Crownhart, 122 Wis.2d 656, 659, 364 N.W.2d 158 (Ct. App. 1985) rev. den.

Evidentiary Burden. No Wisconsin appellate court has determined whether the plaintiff must show "improper" interference or if the defendant must prove that his or her interference was justified. Nor does the Restatement delineate on whom the burden lies. The Committee concurs with two federal courts' interpretation of Wisconsin law that plaintiff establishes a prima facie case by showing an intentional interference with his or her contract by defendant, and the latter must then prove justification for his or her acts. See Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216, 1221 (E.D. Wis. 1975), aff'd., 549 F.2d 804 (1977); and Federal Pants, Inc. v. Stocking, 762 F.2d 561 (7th Cir. 1985).

A plaintiff does not have to show malicious intent to sustain a claim. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 541 N.W.2d 203 (Ct. App. 1995).

The plaintiff does not have the burden of proving lack of privilege. Rather, proof by the plaintiff of intentional interference with the existing contractual relations of another is sufficient to establish liability. This shifts the burden of proving justification or privilege for any interference to the defendant. Finch v. Southside Lincoln-Mercury, Inc., 2004 WI App 110, 274 Wis.2d 719, 685 N.W.2d 154 (citing Chrysler Corp. v. Lakeshore Commercial Fin. Corp., supra, and Wis JI-Civil 2780). See also Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin, S.C., 2005 WI App 217, 287 Wis.2d 560, 706 N.W.2d 667.

Interference. Interference may also be found where the actor knows the interference is certain or substantially certain to occur as a result of his or her action. Foseid, supra at 790 n.11. However, this concept based on Restatement, Second, Torts, applies only where it is apparent at the outset that the tortfeasor acted with the intention to interfere with the prospective contract or acted in such a fashion and for such purpose that he knew that the interference was "certain, or substantially certain, to occur." Foseid, supra at 791 n.11, citing Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis.2d 207, 221, 249 N.W.2d 547, 554 (1977).

Defenses. Affirmative defenses include truthful information or honest advice within the scope of a request for advice by a defendant to a third party, Restatement, Second, Torts, § 772, and Liebe v. City Fin. Corp., 98 Wis.2d 10, 295 N.W.2d 16 (Ct. App. 1980) rev. den.; Hale v. Stoughton Hosp. Ass'n, Inc., 126 Wis.2d 267, 282, 376 N.W.2d 89 (Ct. App. 1985), and a free speech privilege to assert complaints. Augustine v. Anti-Defamation League B'nai Brith, 75 Wis.2d 207, 218, 249 N.W.2d 547 (1977).

A claim for intentional interference with contract based on disclosure of information is precluded by the First Amendment where the broadcast was a "matter of public concern." Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

Another example would be where defendant has a legally protected interest and believes his or her own interest would be impaired or destroyed by performance of the contract; Restatement, Second, Torts, § 773, and Cudd v. Crownhart, supra at 662.

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If the contract involved is one terminable at will, competition is not an improper basis for interference as long as no wrongful means are employed, no restraint of trade occurs, and the purpose of defendant's actions is to advance his or her own competitive interests; Restatement, Second, Torts, § 768, and Liebe v. City Fin. Co., supra; Pure Milk Prod. Coop. v. National Farmers' Org., 90 Wis.2d 781, 796, 280 N.W.2d 691 (1979).

Other possible avoidances of liability involve situations where defendant has a financial interest in the party induced, where defendant is responsible for the welfare of another, or where the contract is an illegal one or contrary to public policy; Restatement, Second, Torts, §§ 769, 770, and 774.

Damages. Assuming a causal relationship between the defendant's actions and plaintiff's losses, damages may include: (a) pecuniary loss of benefits of the contract, (b) causally related consequential losses, and (c) emotional distress which is reasonably expected to so result from the interference; Restatement, Second, Torts, § 774A.

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2790 TRADE NAME INFRINGEMENT

(Plaintiff) alleges that (defendant) has infringed (plaintiff)'s trade name. Trade names are entitled to protection from infringement to protect the reputation and goodwill of the trade name owner.

A trade name is a word or designation (symbol), or a combination of words or designations, that is used in a manner that identifies a business and distinguishes it from the business or enterprise of others.

To find infringement in this case, you must find first that (plaintiff)'s use of the name "_____" is a trade name; and, second, that the use of the name "_____" by (defendant) creates a likelihood of confusion among the consuming public with (plaintiff)'s trade name, "_____."

A designation is protectable as a trade name only if the designation is distinctive. Designations can be either inherently distinctive or can acquire distinctiveness, through secondary meaning. Inherently distinctive designations are designations that are likely to be perceived by prospective purchasers as symbols that indicate an association with a particular source. Secondary meaning describes the function of identifying goods or services with a particular or single source. A name that is inherently distinctive does not require secondary meaning to be protectable. A name that is not inherently distinctive requires secondary meaning to be protectable. Secondary meaning occurs when the consuming public has come to recognize the trade name as one that identifies the business. The consuming public must recognize the trade name as identifying and distinguishing a (plaintiff)'s goods or services. Secondary meaning can be established

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through: direct evidence, such as consumer testimony or consumer surveys, or through circumstantial evidence, such as evidence of exclusivity, length and manner of the trade name's use, the amount and manner of advertising, amount of sales, market share, and number of customers.

To constitute an infringement, it is not necessary that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the prominent portion, it may be given greater weight than surrounding words.

(Plaintiff) and (defendant) do not have to be in direct competition for you to find infringement.

[A designation that is understood by prospective customers to denominate the general category of services or business with which it is used is a generic designation. The user of a generic designation, for example, barber shop, lumber company, hospital, or plumber, can never acquire rights in the generic designation as a trade name.]

Once (plaintiff) has established that the designation it seeks to protect is distinctive, either inherently or through secondary meaning, it must prove that (defendant)'s use of a similar designation will cause a likelihood of confusion. In determining whether there is or was a likelihood of confusion between (plaintiff)'s [trade] name and (defendant)'s use of "_____" you may draw on your common experience as citizens of the community.

The factors you may consider in determining likelihood of confusion are:

- the degree of similarity between the names

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- the similarity of the products and overlap of marketing channels
- the area and manner of concurrent use
- the degree of care likely to be used by consumers in selecting the (goods) (services)
- the strength and distinctiveness of (plaintiff)'s name
- evidence of actual confusion, and (defendant)'s intent when selecting the name.

No one factor or consideration is conclusive. Each aspect should be weighed in light of the total evidence presented at the trial. However, while actual confusion or deception is not essential to a finding of trade name infringement, this evidence is entitled to substantial weight.

SPECIAL VERDICT

Question 1: Did (plaintiff) establish that its use of the name "_____" is a trade name?

ANSWER: _____

Yes or No

If you answered "yes" to question 1, then answer the following question.

Question 2: Does (defendant)'s use of the name "_____" infringe (plaintiff)'s trade name?

If you answered "yes" to question 2, then answer the following question.

Question 3: Was (defendant)'s infringement a cause of damages to (plaintiff)?

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ANSWER: _____

Yes or No

If you answered "yes" to question 3, then answer the following question.

Question 4: What sum of money, if any, do you award against (defendant) as damages for the trade name infringement?

$ _____

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2020.

Trade Name. The Wisconsin Supreme Court defined trade name in First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), in which the court adopted the rationale of Restatement (Second) of Torts, Tentative Draft No. 8 as the common law in Wisconsin. The court said:

> Restatement (Second) of *Torts*, capsulizes this trend of the courts to bring the definitions of trade names and trademarks in harmony with their function. Tentative Draft No. 8 (1963), sec. 715, defines both trademarks and trade names which have acquired a secondary meaning as trademarks. The term, "trade name," standing alone, refers to a business name. Sec. 716, supra. Sec. 715 defines trademark:
>
> "A trademark is a word, name, symbol, device, letter, numeral, or picture, or any combination of any of them in any form or arrangement, which is used by a person on or in connection with his goods or services in a manner which identifies them as his and distinguishes them from those of others, provided such use is not prohibited by legislative enactment or by an otherwise defined public policy."

"[i]f a trade name has acquired distinctiveness, or secondary meaning, and thus identifies a particular business entity, the user of such trade name is entitled to protection against infringement of that trade name in the same manner and to the same extent as the user of a trademark which has acquired a secondary meaning, that is, to protect the user of the trade name in his business and to protect the public against confusion and deception. The mere fact of the use of a trade name, however, is not sufficient to entitle the user to enjoin all other uses. It is necessary to show that the effect of the use has been to identify the particular business entity and to distinguish it from others and that the actor's use of likely to cause confusion and deception." 85 Wis.2d 54, at p. 62-63; Sec. 717, supra, comment a.

General principles of trademark law. In Ritter v. Farrow, 2019 WI App 46, 388 Wis.2d 421, 933 N.W.2d 167, the Wisconsin Court of Appeals addressed an issue concerning the assignment of

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trademark rights as they pertained to an association of condominium owners. Setting forth certain principles of Wisconsin and federal trademark law, the court noted that, "Although Wisconsin has long recognized a common-law cause of action for trademark infringement, see, e.g., Listman Mill Co. v. William Listman Milling Co., 88 Wis. 334, 60 N.W. 261 (1894), we have also recognized that our case law addressing trademarks is relatively 'undeveloped.' Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, ¶34, 275 Wis. 2d 397, 685 N.W.2d 853. Accordingly, we 'look to federal law for guidance' when necessary to resolve a trademark dispute." 2019 WI App 46, footnote 9.

Infringement Claims; Jury Instructions. In D. L. Anderson, 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803, the Wisconsin Supreme Court discussed the elements, proof, damages, and jury instructions for trade infringement cases.

The supreme court approved the Wichman analysis of trade name infringement for use in jury instructions, in D. L. Anderson's Lakeside Leisure Co., Inc. v. Anderson:

> "¶42 The trade name infringement jury instructions given by the circuit court were based directly on language in Wisconsin case law.[fn15] In First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), this court adopted the approach enunciated in the Restatement (Second) of Torts §§ 715, 716, 717 (Tentative Draft No. 8, 1963). There this court said, "[T]he user of [a] trade name is entitled to protection against infringement of that trade name." Wichman, Page 1985 Wis.2d at 62-63. Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 157 Wis.2d 298, 459 N.W.2d 581 (Ct. App. 1990), which like this case dealt with a trade name in connection with the purchase of a business appears to be the source of the sections in the jury instructions on trade names that include family names: "Ordinarily, a party has a right to do business under his or her own name. The right may, however, be voluntarily limited by contract. . . . [W]hen a family name is part of a trade name, the family name may be transferred to the purchaser the same as any other asset of the business." Id. at 308 (citations omitted).

Elements. The plaintiff must prove two elements to establish infringement: First, that the plaintiff's trade name has acquired a secondary meaning, and, second, that there is a likelihood of confusion between plaintiff's name and the one the defendant is using.

Anderson approved the trial court's instructions on secondary meaning and likelihood of confusion as follows:

> ¶ 50 Next we proceed to the question of whether the evidence was sufficient to support the jury's verdict. The jury was instructed as follows regarding trade name infringement:
>
> When a trade name has acquired a secondary meaning, the name is entitled to protection from unfair competition based on trade name infringement. . . . If you find that plaintiff's trade name has acquired secondary meaning, you must then determine whether there is a likelihood of confusion between plaintiff's trade name, "D. L. Anderson Co." and defendant's name, "Anderson Marine" . . . . It is not necessary to constitute an

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> infringement that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the salient portion, it may be given greater weight than surrounding words.
>
> ¶ 51 The jury instructions thus lay out the two elements a plaintiff must establish to prevail on a trade name infringement Page 23 claim: that the name had secondary meaning and that a second party's use created a likelihood of confusion.
>
> ¶ 52 Secondary meaning "describes the function of identifying goods or services with a particular or single source. . . . Key to establishing secondary meaning for a trade name is evidence that the relevant target group mentally identifies the trade name as the single source for the product." Spheeris, 157 Wis.2d at 312 (citations omitted). . .

Damages for Infringement. Anderson approved the use of the tort damage instruction, modified Wis JI-Civil 1700. On this point, the supreme court reversed the court of appeals, and clarified that a damage verdict for trade name infringement does not require precise mathematical evidence:

¶ 62 As we noted, the jury was instructed here that the party claiming damages must "satisfy [the jury] by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages . . . and the amount of the damages." Wis JI-Civil 1700.

> ¶ 63 In evaluating the sufficiency of the evidence on a damage award in tort, there is thus a two-step analysis: the fact of damages and the amount.
>
> ¶ 64 "[T]he fact of damage need only be proved with reasonable, not absolute, certainty. And once the fact of damage is established with reasonable certainty, the amount of damages need only be shown with as much certainty as the nature of the tort and the circumstances of the case permit." 4 Rudolf Callmann, Callmann on Unfair Competition, Trademarks and Monopolies § 23:55 (4th ed. 2003).

Reverse trademark confusion. For a decision discussing the theory of reverse trademark confusion, see Fabick, Inc. v. JFTCO, Inc., 944 F.3d 649, (7th Cir. 2019).

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2791 TRADE NAME INFRINGEMENT: DAMAGES

Question _____ asks: What sum, if any, do you award against (defendant) as damages for the trade name infringement?

In considering the amount to be inserted by you in answer to the damage question, the burden of proof rests upon the person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (plaintiff) sustained damages [with respect to the element or elements mentioned in the question and the amount of the damages.] The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the trade name infringement.

[In determining damages, you may consider whether (plaintiff) suffered any measurable loss to its goodwill. The goodwill of a company is an intangible business value that reflects the basic human tendency to do business with merchants who offer products and services of the type and quality the customer desires and expects. Service to the customer, and a willingness to stand behind a warranty and other representations about the quality of the products or services sold by a merchant, are factors that help establish the goodwill of a business. If you find that (plaintiff)'s goodwill has been damaged either by injury to its general business reputation or by damage to a particular product or service, you may assess damages as you find to be shown by the evidence.]

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The fact that (defendant) did not actually intend, anticipate, or contemplate that these losses would occur is not a relevant factor to be considered by you.

Determining damages for trade name infringement cannot always be made exactly or with mathematical precision; you should award as damages amounts which will fairly compensate (plaintiff) for its injuries.

COMMENT

This instruction and comment were approved in 2009.

See the comment to Wis JI-Civil 2790.

This instruction is based on a verdict in which the jury is asked for damages as a lump sum. As an alternative, the verdict on damages could ask subdivided questions on the specific elements of damages, e.g. loss of business, additional expenses, and loss of goodwill. See D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson, 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803.

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2800 CONSPIRACY: DEFINED

A "conspiracy" is a combination of two or more persons acting together to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy.

The evidence need not show that the members entered into any express or formal agreement or that they directly, by words spoken or written, stated between themselves what their objectives or purposes were, or the details of them, or the means by which the objectives or purposes were to be accomplished. A conspiracy may be established by evidence that the members in some way or manner, or through some contrivance, positively or without it being openly expressed, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence need not show that all the means or methods claimed by the plaintiff(s) were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation. Nor need the evidence show that all persons alleged to have been members of the claimed conspiracy were indeed members.

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COMMENT

This instruction and comment was approved in 1980 and revised in 1984 and 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee=s 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 1984, 1995, 1998, 1999, and 2018.

Abdella v. Catlin, 79 Wis.2d 270, 275, 255 N.W.2d 516 (1977); Radue v. Dill, 74 Wis.2d 239, 241, 246 N.W.2d 507 (1976); Onderdonk v. Lamb, 79 Wis.2d 241, 246-47, 255 N.W.2d 507 (1977); Dalton v. Meister, 71 Wis.2d 504, 520, 238 N.W.2d 9 (1976); North Highland Inc. v. Jefferson Mach. & Tool Inc., 2017 WI 75, 377 Wis. 2d 496, 898 N.W. 2d 741. See also Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Maleki v. Fine-Lando Clinic, 162 Wis.2d 73, 469 N.W.2d 629 (1991); Modern Materials v. Advanced Tooling Spec., 206 Wis.2d 435, 557 N.W.2d 835 (Ct. App. 1996); City of Milwaukee v. NL Industries, 2005 WI App 7, 278 Wis.2d 313, 691 N.W.2d 888.

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Eastern States Retail Lumber Dealers' Ass'n v. United States, 342 U.S. 600, 611, 612 (1914); c.f., United States v. Standard Oil Co., 316 F.2d 884, 889 (7th Cir. 1963). See also United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665 (1964); 3 Devitt and Blackmar, Federal Jury Practice and Instructions, 3d § 90.07 at 155-56.

The Wisconsin Supreme Court has repeatedly held that there is no such thing as a civil action for conspiracy. Instead, there is an action for damages incurred by acts performed pursuant to the conspiracy. A recent expression of this rationale is contained in Onderdonk v. Lamb, 79 Wis.2d 241, 146-47, 255 N.W.2d 507 (1977), wherein the court stated:

> The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful. Radue, supra at 244. Such a conclusion was reached by the federal court in Weise v. Reisner, 31 F. Supp. 580, 583 (E.D. Wis. 1970):
>
> . . . However, in an action for civil conspiracy, it is not the conspiracy, as such, that constitutes the cause of action, but the overt acts that result from it. Thus, any concomitant damage to the plaintiffs stems from the acts done in furtherance of the conspiracy, not from the conspiracy itself. See Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959).

The necessity for overt acts is also reflected in the following passage from a 1977 decision of the supreme court:

> At a minimum, to show a conspiracy there must be facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end. Augustine v. Anti-Defamation Lg. B'nai B'rith, 75 Wis.2d 207, 216, 249 N.W.2d 547 (1977). (Emphasis added.)

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The word "unlawful" need not be a criminal act since any willful, actionable violation of a civil right is sufficient. Cranston v. Bluhm, 33 Wis.2d 192, 198, 147 N.W.2d 337 (1967), appeal after remand 42 Wis.2d 425, 167 N.W.2d 236 (1969); Martens v. Reilly, 109 Wis. 464, 473,84 N.W. 840 (1901).

Conspiracy to Convert. A civil conspiracy entails two or more persons knowingly committing wrongful acts. Bruner v. Heritage Co., 225 Wis.2d 728, 593 N.W.2d 814 (Ct. App. 1999). A conspiracy to convert involves the knowing or intentional conversion of property. It contemplates an agreement to commit wrongful acts. Bruner, supra, at 738.

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2802 CONSPIRACY: PROOF OF MEMBERSHIP

Before you may find that a defendant, or any other person, was a member of a conspiracy, you must be satisfied that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

"To act or participate knowingly" means to act or participate voluntarily and intentionally and not because of mistake, accident, or other innocent reason. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the plan, he or she thereby becomes a knowing participant – a conspirator.

An unlawful conspiracy may exist even though all of the conspirators do not meet or agree simultaneously. Unlawful conspiracies may be formed without such simultaneous action or agreement on the part of the conspirators.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. It is not necessary that each member of the conspiracy knows exactly what part other members are playing. It is not necessary that each of the conspirators knows the identity or role of the other participants in the conspiracy.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he or she had been one of the originators or instigators of the conspiracy. Such a person is deemed to have adopted and assumed responsibility for everything done and said up to that time.

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So, too, one who acquiesces, submits or tacitly assents to an illegal scheme is as much a conspirator as one who creates or promotes it. Even the fact that it may have been forced upon a person does not excuse such acquiescence.

In determining whether a defendant was a member of a conspiracy, you should not consider what others may have said or done. That is to say, the membership of a defendant in a conspiracy must be established by evidence in the case as to the person's own conduct, by what the person knowingly said or did.

[Burden of Proof, Wis JI-Civil 205]

COMMENT

This instruction was approved by the Committee in 1980 and revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. National City Lines, 186 F.2d 562 (7th Cir. 1951), cert. denied, 341 U.S. 916 (1951); 3 Devitt and Blackman, Federal Jury Practice and Instructions, 3d § 90.12 at 160.61; United States v. Wise, 329 F.2d 829 (9th Cir. 1964).

Joining an conspiracy after its formation: Lincoln v. Claflin, 74 U.S. (7 Wall.) 132 (1868); Hernandez v. United States, 300 F.2d 114, 122 (9th Cir. 1962); United States v. Bausch & Lomb Optical Co., 34 F. Supp. 267, 268 (S.D. N.Y. 1940); Van Riper v. United States, 13 F.2d 961, 1967 (2d Cir. 1926); United States v. Sanno, 456 F.2d 875, 878 (1st Cir. 1972).

Acquiescence in illegal scheme: United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

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2804 CONSPIRACY: INDIRECT PROOF

There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you, the jury, find facts from the evidence.

A conspiracy may be, and often must be, proved by circumstantial evidence. Inferences arising from surrounding facts and circumstances are sufficient to prove a conspiracy. It is not necessary that the plaintiffs prove that there was an express agreement. Any conformance by a defendant to an agreed or contemplated pattern of joint conduct will warrant an inference of conspiracy.

You may consider the business behavior of the defendants in determining whether one or more of them engaged in a conspiracy, since the existence of a conspiracy may be inferred from such behavior.

Whether an unlawful conspiracy exists is to be proved by what the parties did, not necessarily by what they said. Conspiracy may be found in or inferred from a course of dealings or other circumstances, as well as through an exchange of words.

If you find that any defendant had a unity of purpose or common design and understanding or a meeting of the minds as to an unlawful arrangement with any of the defendants or with other persons, then you may find that a conspiracy has been established.

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COMMENT

This instruction and comment were approved in 1980. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The initial portion of this instruction is taken from 2 Devitt and Blackman, Federal Jury Practice and Instructions, 3d § 72.02 at 600. That a conspiracy may be proved from circumstantial evidence is supported by these authorities: 16N Von Kalinowski, Business Organizations-Antitrust Laws and Trade Regulations, § 112.05(4) at 112-17; Pennington v. United Mine Workers of America, 325 F.2d 804, 811 (6th Cir. 1963); Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537,540-41 (1954).

Express agreements need not be proved. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969). Conspiracy may be inferred from conformance to an agreed to contemplated pattern of conduct. United States v. Twentieth Century Fox Film Corp., 137 F. Supp. 78 (S.D. Cal. 1955). Conspiracy may be inferred from business behavior. Norfolk Monument Co., supra.

Conspiracy is to be shown by what the parties did, not by what they said, and the jury may conclude that a conspiracy was established if they find the conspirators had a unity of purpose or common design and understanding or meeting of minds in an unlawful arrangement. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

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2806 CONSPIRACY TO BE VIEWED AS A WHOLE

In determining whether a conspiracy existed, you are not to isolate various acts and events and determine separately whether each was illegal, unfair, or unreasonable. Rather, you are to consider all of the evidence – all of the acts and events – as a whole in determining whether a conspiracy existed and, if so, its character and effects.

Acts in and of themselves lawful may nevertheless constitute or be a part of an illegal conspiracy if they are part of a concerted plan. Even lawful agreements, legal actions, and business activities may help make up a pattern of conduct that is unlawful.

COMMENT

This instruction and comment were approved in 1980. Nonsubstantive editorial changes were made to the instruction in 1993.

United States v. Patten, 226 U.S. 525 (1913), and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

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2808 CONSPIRACY BETWEEN AFFILIATED CORPORATIONS

INSTRUCTION WITHDRAWN.

COMMENT

This instruction was withdrawn by the committee in 2009. The withdrawn instruction (approved in 1980) read:

> Affiliated corporations are separate entities or "persons" in the eyes of the law. Accordingly, even though the defendants are affiliated, they are capable of conspiring with one another, as well as with others.

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation and its wholly-owned subsidiary were unable to conspire within the meaning of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (2000). The Supreme Court held that because of the complete unity of interests between a parent corporation and its wholly-owned subsidiary they could not conspire together for the purposes of antitrust law. The Copperweld decision overruled cases cited by this committee to support the former instruction.

There may be cases where it is disputed whether there is sufficient unity of interests between or among alleged co-conspirators for the intracorporate conspiracy doctrine articulated in Copperweld to apply. See Brew City Redevelopment Group v. The Ferchill Group, 2006 WI 128, ¶ 47-50, 297 Wis.2d 606, 724 N.W.2d 879. If the trial judge concludes that the intracorporate conspiracy doctrine does not apply because of insufficient unity of interest among affiliated defendants, then the trial judge may wish to instruct the jury that the affiliated entities are capable of conspiring with one another, as well as with others.

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2810 CONSPIRACY: OVERT ACTS

Question ___ asks whether any of those parties you may have found entered into an unlawful conspiracy (to deprive the plaintiff of business) performed any act to carry out the unlawful conspiracy.

You will answer this question only if you have found both [two or more] of the parties named in the previous question entered into an unlawful conspiracy (to deprive plaintiff of business [or other claimed unlawful deprivation]).

You will answer this question only if you are satisfied by evidence which is clear, satisfactory, and convincing, to a reasonable certainty, that any of the following acts were performed by any of the parties named in the question in furtherance or for the purpose of carrying out the conspiracy.

(List the overt acts which the evidence requires.)

COMMENT

This instruction and comment were approved in 1980. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

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2820 INJURY TO BUSINESS: WIS. STAT. § 134.01

Section 134.01 of the Wisconsin statutes makes it unlawful for two or more persons to act together to maliciously injure another person's reputation, trade, business, or profession.

(Plaintiff) claims that the (defendants) (defendant) and (_____) acted together in violation of this Wisconsin law to maliciously injure (his) (her) (reputation) (trade) (business) (profession).

To establish a violation, (plaintiff) must prove four things:

First, that the (defendants) (defendant) and (_____) acted together.

Second, that the (defendants) (defendant) and (_____) acted with a common purpose to injure the (plaintiff's) (reputation) (trade) (business) (profession).

Third, that the (defendants) (defendant) and (_____) acted maliciously in carrying out the common purpose.

Fourth, the acts of the (defendants) (defendant) and (_____) financially injured the plaintiff.

The first thing (plaintiff) must prove is that the (defendants) (defendant) and (_____) acted together. This means that they agreed, combined, associated or mutually undertook a common purpose.

The second thing (plaintiff) must prove is that the agreed upon purpose was to injure (plaintiff)'s (reputation) (trade) (business) (profession).

The third thing (plaintiff) must prove is that the persons who acted with the common purpose to injure the (plaintiff)'s (reputation) (trade) (business) (profession) acted maliciously; that is, with a malicious motive. For conduct to be malicious, it must be intended

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to cause harm for harm's sake. The harm must be an end in itself, and not merely a means toward some legitimate end.

The fourth thing the (plaintiff) must prove is that the harmful acts of the (defendants) (defendant) and (_____) financially injured (plaintiff). This means that (plaintiff) sustained economic damage as a result of the acts of the (defendants) (defendant) and (_____) in carrying out their malicious purpose.

[Burden of Proof, Wis. JI-Civil 205]

COMMENT

This instruction was approved in 2002. The comment was updated in 2008.

Section 134.01, Wis. Stats. prohibits two distinct illegal activities: (1) A conspiracy by two or more persons to wilfully and maliciously injure another in his or her reputation, trade, business or profession; and (2) a conspiracy by two or more persons to maliciously compel another to do an act against his or her will or to prevent or hinder another from doing or performing a lawful act. The leading Wisconsin case is Malecki v. Fine-Lando Clinic, 162 Wis.2d 73 (1991). See also Brew City Redevelopment Group v. The Ferchill Group, 2006 WI 128, 297 Wis.2d 606, 724 N.W.2d 879; Radue v. Dill, 74 Wis.2d 239, 245, 246 N.W.2d 507 (1976). In Brew City Redevelopment Group, the court said that while Wis. Stat. § 134.01 is a criminal statute, it provides the basis for civil tort liability (citing Radue).

The key difference between a conspiracy under this statute and a common law conspiracy is the requirement of malice. Malice is an integral element of a § 134.01 violation and must be proved in respect to all parties to the conspiracy. Allen & O'Hara v. Barrett Wreckers, Inc., 898 F.2d 512 (7th Cir. 1990).

Malecki makes clear that the conspirators must act maliciously; that is, all must act with the same specific malicious purpose. Id. at 85-86. (". . . whatever other evidence is produced, an essential element of the cause of action is the malicious motive of the conspirators sought to be charged.") Id. at 88.

There is no such thing as a civil action for conspiracy. See Malecki, supra; Brew City Redevelopment Group, supra, fn. 5. Instead, there is an action for damages incurred by acts performed pursuant to a conspiracy. Therefore, a § 134.01 action is not a statutory claim for conspiracy, rather it is a claim for the damages that occurred as a result of a § 134.01 conspiracy. Malecki makes clear that the essence of the legal action under § 134.01 are the damages that arise out of the conspiracy. ("In civil conspiracy, the essence of the action is the damages that arise out of the conspiracy, not the conspiracy itself."). Id. at 87.

Although the statute uses both the terms "wilfully and maliciously" in the first section, Justice Holmes in the U.S. Supreme Court case, Aikens v. Wisconsin, 195 U.S. 194, (1904), pointed out that the words must be read conjunctively and not disjunctively. Wisconsin law has accepted this interpretation. (Malecki at 91, ftnt. 10)

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Malecki makes clear that § 134.01, Stats., requires that there be a conspiracy of two or more persons. The prohibited conduct, if done by one acting alone, is not a violation of § 134.01. Id. at 88 citing Hawarden v. The Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 550 (1901).

Where a key issue in the case is the nature and purpose of the conspiracy, the following language may be considered and added to the jury instruction:

> Competition that incidentally harms another when the purpose is to improve one's competitive advantage is not malicious if it is not done with a malicious motive or purpose.

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2822 RESTRAINT OF WILL: WIS. STAT. ' 134.01

Section 134.01 of the Wisconsin statutes makes it unlawful for two or more persons, acting together, to maliciously compel another to perform an act against his or her will or to maliciously prevent or hinder another from performing a lawful act.

(Plaintiff) claims that the (defendants) (defendant) and (_____) acted together in violation of this Wisconsin law to maliciously injure (him) (her) by [compelling (him) (her) to] [preventing or hindering (him) (her) from] _____ (state the act) _____.

To establish a violation, (plaintiff) must prove four things:

First, that the (defendants) (defendant) and (_____) acted together.

Second, that the (defendants) (defendant) and (_____) acted with a common purpose to (compel plaintiff to) (prevent or hinder plaintiff from) _____ (state the act) _____.

Third, that the (defendants) (defendant) and (_____) acted maliciously in carrying out the common purpose.

Fourth, the acts of the (defendants) (defendant) and (_____) financially injured the plaintiff.

The first thing (plaintiff) must prove is that the (defendants) (defendant) and (_____) acted together. This means that they agreed, combined, associated or mutually undertook a common purpose.

The second thing (plaintiff) must prove is that the agreed upon purpose was to (compel plaintiff to) (prevent or hinder plaintiff from) _____(state the act) _____.

The third thing (plaintiff) must prove is that the persons who acted with the common purpose to compel (plaintiff) to perform an act against (his) (her) will or prevent or hinder

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(him) (her) from performing a lawful act, acted maliciously; that is, with a malicious motive. For conduct to be malicious, it must be intended to cause harm for harm's sake.

The fourth thing the (plaintiff) must prove is that the harmful acts of the (defendants) (defendant) and (_____) financially injured (plaintiff). This means that (plaintiff) sustained economic damage as a result of the acts of the (defendants) (defendant) and (_____) in carrying out their malicious purpose.

[Burden of Proof, Wis. JI-Civil 205]

COMMENT

This instruction was approved in 2002. See comments to Wis JI-Civil 2820, § 134.01: Injury to Business.

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LAW NOTE FOR TRIAL JUDGES

2900 TORT IMMUNITY: IMMUNITIES ABROGATED

No instruction is necessary on the question of immunity. Following is a list of the immunities which have been abrogated.

1. Immunity of parent against action by unemancipated minor child. Eliminated by Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963). Effective date: June 28, 1963.

2. Immunity of unemancipated minor child against action by parent. Eliminated by Ertl v. Ertl, 30 Wis.2d 372, 141 N.W.2d 208 (1966). Effective date: June 28, 1963.

3. Immunity of husband against action by wife. Eliminated by Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926). Effective date: March 19, 1881, date of publication of Chapter 99, Laws of 1881, Wis. Stat. § 246.07 (1965).

4. Immunity of wife against action by husband. Eliminated by Wis. Stat. § 246.075 (1965) (as to personal injuries only). Effective date: May 24, 1947, date of publication of Chapter 164, Laws of 1947.

5. Immunity of charitable organizations.

   a. As to paying hospital patients. Eliminated by Kojis v. Doctors Hosp., 12 Wis.2d 367,107 N.W.2d 131, 107 N.W.2d 292 (1961). Effective date: January 10, 1961.

   b. As to nonpaying, charitable, or indigent patients. Eliminated by Duncan v. Steeper, 17 Wis.2d 226, 116 N.W.2d 154 (1962). Effective date: January 10, 1961.

6. Immunity of religious organizations. Eliminated by Wedell v. Holy Trinity Catholic Church, 19 Wis.2d 648, 121 N.W.2d 249 (1963). Effective date: July 1, 1963.

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7. Immunity of governmental bodies. Eliminated by Holytz v. Milwaukee, 17 Wis.2d 26,115 N.W.2d 618 (1962). Effective date: July 15, 1962.

8. Immunity from direct action of "no-action clause" insurers, with respect to accidents outside of Wisconsin. Eliminated by Chapter 14, Laws of 1967 (Wis. Stat. § 260.11(1)). Effective date: April 1, 1967 (see Miller v. Wadkins, 31 Wis.2d 281, 142 N.W.2d 855 (1965)).

9. Immunity of tortfeasor from suit by wife for loss of husband's consortium. Eliminated by Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1966). Effective date: July 15, 1921. (Date of publication of Chapter 529, Laws of 1921, enacting Wis. Stat. § 6.015, now § 246.15.)

COMMENT

This law note was approved by the Committee in 1969. Nonsubstantive editorial changes were made in 1993.

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3010 AGREEMENT

For a contract to be binding, three things must concur: first, the offer; second, the acceptance; and third, the consideration.

For the parties to come to an agreement, it is necessary that there be a meeting of the minds of the parties upon the essential terms and conditions of the subject about which they are agreeing; that is, they must be in accord upon the essential terms and conditions. There must be a mutual assent.

The language used and the conduct of the parties must disclose sufficiently the fact that the minds of the parties have met, or have been in accord, on all the terms of the agreement, or, in other words, disclose the fact that there has been a mutual assent. One party cannot make an agreement; both parties must, by their words or actions, assent to the agreement.

Usually, the form of an agreement is that one party makes an offer and the other party accepts the offer.

[An agreement may be written, oral, or partially written and partially oral.]

COMMENT

This instruction and comment were approved in 1975 and revised in 2004. A spelling error was corrected in 2010.

See, generally, 17 Am. Jur. Contracts § 18 et seq; Ballentine's Law Dictionary (2d ed.) 59.

Elements: Briggs v. Miller, 176 Wis. 321, 186 N.W. 163 (1922).

The definiteness requirement as mutual consent, or "meeting of the minds," does not mean that parties must subjectively agree to the same interpretation at the time of contracting. Management Computer Services v. Hawkins, Ash, Baptie, 206 Wis.2d 158, 557 N.W.2d 67 (1996). See also Kernz v. J.L. French Corp., 2003 WI App 140, 266 Wis.2d 124, 667 N.W.2d 751. The key is not necessarily what the parties intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit. If parties evidentially intended to enter a contract, the trier of fact should not frustrate their intentions but rather should attach a sufficiently definite meaning to the contract language if possible. The supreme court has also said that even though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of

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interpretation with a reasonable degree of certainty, they may cure this defect by their subsequent conduct and by their own practical interpretation. Nelson v. Farmer's Mut. Automobile Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958). Therefore, the court said in Management Computer Service, supra, that if the jury can determine the parties' intentions, indefiniteness disappears as a reason for refusing enforcement. Parties do not need to agree subjectively to the same interpretation at the time of contracting in order for there to be a mutual assent because a literal meeting of the minds is not required. Instead, mutual assent is judged by an objective standard, looking to the express words the parties used in the contract. Second, when parties disagree about their intentions at the time they entered into a contract, the question is one of contract interpretation for the jury, not mutual assent or contract formation. In fact, if a disagreement between parties as to their intent could support a claim of indefiniteness, juries would rarely be called upon to interpret a contract because nearly every contract challenged in court would be void for indefiniteness. Management Computer Services v. Hawkins, Ash, Baptie, supra. The supreme court also said that parties often agree to a contract provision that is ambiguous and thereby gamble on a favorable interpretation should a dispute arise, rather than take the time to work out all possible disagreements, especially since such disagreements may never have any consequence. When this occurs, the entire contract is not void for indefiniteness; instead, the parties submit to have any dispute over interpretation resolved by a jury. This is the function of a jury in a contract caseCto resolve interpretive questions founded on ambiguity.

In Management Computer Services v. Hawkins, Ash, Baptie, supra, the supreme court said it is well established that a material breach by one party may excuse subsequent performance by the other. However, a party is not automatically excused from future performance of contract obligations every time the other party breaches. If the breach is relatively minor and not of the essence, the plaintiff is himself or herself still bound by the contract; he or she cannot abandon performance and get damages for a total breach by the defendant. In other words, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. Moreover, even where such a material breach has occurred, the nonbreaching party may waive the claim of materiality through its actions.

The issue of whether a party's breach excuses future performance of the contract by the nonbreaching party presents a question of fact. The restatement of contracts lists several circumstances relevant to this determination, including the extent to which the injured party will be deprived of the benefit that he or she reasonably expected, and the extent to which the injured party can be adequately compensated for his or her loss. Restatement (Second) of Contract §§ 241, 242 (1981). In Management Computer Services, supra, the court said the special verdict used by the trial court was not sufficient to support the circuit court's determination that the jury, in considering the evidence that was presented without doubt, found that the plaintiff's breach was a material breach of the contract, particularly in light of the lack of instruction the jury received on the issue.

For a discussion of how to structure the special verdict on a material breach issue, see Management Computer Services v. Hawkins, Ash, Baptie, supra.

An agreement so vague as to be incapable of a reasonably certain interpretation may be cured by the parties' subsequent conduct and their own practical interpretation. Nelsen v. Farmers Mut. Auto Ins. Co.,4 Wis.2d 36, 51, 90 N.W.2d 123 (1958); 1 Corbin, Contracts § 101 (1950, Supp. 1960).

An acceptance which varies from the offer in respect to essential terms amounts to a rejection. Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n, 238 Wis. 39, 298 N.W. 226 (1941).

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3012 OFFER: MAKER

The person making an offer is called the offeror; the person to whom the offer is made is called the offeree.

An offer is a communication by an offeror of what he or she will give or do in return for some act or promise of the offeree. An offer may be addressed to a particular individual or to the public, but must look to the future and be promissory in nature.

A mere expression of intention, opinion, or prophecy is not an offer. A communication intended merely as a preliminary negotiation or willingness to negotiate is not an offer.

While no particular form of words or mode of communication is necessary to create an offer, it must reasonably appear that the alleged offeror has agreed to do the thing in question for something in return. An offer must be so definite in its terms, or require such definite terms in acceptance, that the promises and performances to be rendered by each party are reasonably certain.

When an offer is made, it is presumed to continue for the period of time expressed or, if no time limit is expressed, for a reasonable time.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Offer: Estate of Lube, 225 Wis. 365, 368, 274 N.W. 276 (1937); 17 Am. Jur. 2d Contracts § 34; Goetz v. State Farm Mut. Auto Ins. Co., 31 Wis.2d 267, 273, 142 N.W.2d 804 (1966); Moulton v. Kershaw, 59 Wis. 316, 18 N.W. 172 (1884).

Definiteness: 5 Williston on Contracts (3rd Ed) § 670; Restatement Contracts § 32; Machesky v. Milwaukee, 214 Wis. 411, 253 N.W. 169 (1934); Petersen v. Pilgrim Village, 256 Wis. 621, 42 N.W.2d 273 (1950).

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Continuance of offer: Sherley v. Peehl, 84 Wis. 46, 52, 54 N.W. 267 (1893); Conrad Milwaukee Corp. v. Wasilewski, 30 Wis.2d 481, 485, 141 N.W.2d 240 (1966); 17 Am. Jur. 2d Contracts § 35.

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3014 OFFER: ACCEPTANCE

To create a contract, an offer must be accepted by one having the right to accept, while the offer is still open. Acceptance of an offer is an assent by the offeree to its terms without qualification; acceptance may be made by a communication to the offeror, either in writing or orally; acceptance may also be implied from the conduct of the parties.

If the offer requires the acceptance to be communicated to the offeror in a specified manner, there is an effective acceptance if the acceptance is made in that manner. If the manner of communicating the acceptance has not been specified, any reasonable manner or means of communication may be used. In either case, if actual notice of the acceptance reaches the offeror while the offer is still open, it makes no difference how it reached the offeror.

An attempted acceptance coupled with any condition that varies or adds to the offer amounts to a rejection of the offer and is instead the submission of a counteroffer. However, a mere suggestion, inquiry, or request which is not made a condition of acceptance and which does not vary the terms of the offer will not defeat the acceptance.

[Where goods or merchandise are involved, a definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless such terms materially alter the contract or are seasonably objected to by the offeror.]

An offeree has a right to make no reply to an offer, and his or her silence or inaction cannot be construed as an acceptance unless the relationship between the parties has been such as to give the significance of an acceptance to silence or inaction.

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If the offer asks the offeree for a promise, the making of the promise is an acceptance. If the offer asks the offeree for an act, the commencement of the act by the offeree is the acceptance.

[But where goods are involved, the commencement of performance by an offeree can be effective as an acceptance so as to bind the offeror only if commencement is followed within a reasonable time by notice to the offeror.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Acceptance: 17 Am. Jur. 2d Contracts § 41; Morris F. Fox & Co. v. Lisman, 208 Wis. 1, 237 N.W. 267, 240 N.W. 809, 242 N.W. 679 (1932); Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 346, 118 N.W. 853 (1908).

Communication of acceptance: Wis. Stat. § 402.26(1)(a); Zimmerman Bros. & Co. v. First Nat'l Bank, 219 Wis. 427, 431, 263 N.W. 361 (1935); 17 Am. Jur. 2d Acceptance § 43, p. 381.

Counteroffer: Hess v. Holt Lumber Co., 175 Wis. 451, 185 N.W. 522 (1921); Todorovich v. Kinnickinnic Mut. Loan & Bldg Ass'n, 238 Wis. 39, 298 N.W. 226 (1941); Leuchtenberg v. Hoeschler, 271 Wis. 151, 155, 72 N.W.2d 758 (1955).

Counteroffer by merchants: Wis. Stat. § 402.207.

Effect of silence: Sell v. General Elec. Supply Corp., 227 Wis. 242, 253, 278 N.W. 442 (1938).

Acceptance by promise or act: Restatement Contracts § 52.

Acceptance by performance in sale of goods: Wis. Stat. § 402.206(2).

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3016 OFFER: REJECTION

Failure of the offeree to accept the offer either according to its material terms, or within a reasonable time, may be treated as a rejection. Having once rejected the offer, the offeree cannot revive it by subsequently tendering an acceptance.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Kukuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 170, 235 N.W. 403 (1931).

1 Williston on Contracts (3d ed.) § 37, § 73; Cass v. Haskins, 154 Wis. 472, 143 N.W. 162 (1913).

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3018 OFFER: REVOCATION

An offer may be revoked by a communication from the offeror received by the offeree before the offeree accepts, which communication states or implies that the offer is withdrawn.

[An offer to buy or sell goods, in writing and signed by a merchant, which contains an assurance that the offer will continue, is not revocable during the time stated or, if no time is stated, for a reasonable time.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 41; Frank v. Metropolitan Life Ins. Co., 227 Wis. 613, 618, 277 N.W. 643 (1938); Larson v. Superior Auto Parts, 275 Wis. 261, 270, 81 N.W.2d 505 (1956).

Offer by merchant: Wis. Stat. § 402.205.

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3020 CONSIDERATION

[Insert first paragraph of 3010 and first paragraph of 3012 if desired.]

Consideration is an essential element of a contract; it is necessary to the validity and enforceability of a contract.

Consideration is the price bargained and paid for a promise – that is, something intended by the parties to be given in exchange for the promise.

Consideration is an act or a promise which is either a detriment incurred by the offeree, or a benefit received by the offeror, at the request of the offeror, either of which does not occur gratuitously, but which is accepted and regarded as consideration by both the offeror and the offeree. Detriment as used here means any act which occasioned the offeree the slightest trouble or inconvenience, and which the offeree was not otherwise obliged to perform or refrain from performing. Benefit as used here means anything of slight or trifling value to the offeror.

[For a detriment to the offeree, or a benefit to the offeror, to rise to the status of consideration in a legal sense, the forbearance, detriment, loss or responsibility borne by the one party, or the right, interest, profit or benefit accruing to the other party, must not consist of an already existing legal obligation.]

It is not a proper function of the jury to determine whether the consideration is a fair and adequate exchange for the promise. Fairness and adequacy are for the offeror and offeree to judge for themselves. Any legal consideration, no matter how slight, will be sufficient. However, the mere inconvenience of making or receiving a promise is not itself consideration. [Love and affection alone are not sufficient to support a contract.]

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[If consideration is sufficient in other respects, it does not matter from whom or to whom it moves. The consideration may move to the offeror or a third person, and may be given by the offeror or a third person.]

[Mutual promises for the future performance of acts by the parties may constitute consideration for each other if the promises are capable of being performed, are given in exchange for each other, and are mutually binding upon the parties. The promises must be equally binding upon both parties, but it is not necessary that the value of the promises be equal.]

[Something given or received before the time a promise is made, and therefore without reference to such promise, is past consideration which is not sufficient to support a contract.]

[A moral obligation may operate as consideration where the offeror has previously received a material pecuniary benefit from the offeree who expected to be compensated therefor and who was not under an existing legal or moral duty to confer the benefit without compensation. Thus, reaffirmation of a past legal obligation, such as a debt that has been discharged in bankruptcy, is sufficient consideration.]

[In order that forbearance to sue upon a claim may constitute a valid consideration, the claim need not be one which could be successfully prosecuted, but the claim must not be brought in bad faith, or be frivolous or vexatious.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Consideration; benefit; detriment: Briggs v. Miller, 176 Wis. 321, 325, 186 N.W. 163 (1922); 17 Am. Jur. 2d Contracts §§ 85, 92, 97; Restatement Contracts § 75; Home Savings Bank v. Gertenbach, 270 Wis. 386, 395, 71 N.W.2d 347, 72 N.W.2d 697 (1955); Onsrud v. Paulsen, 219 Wis. 1, 261 N.W. 541 (1935); Barr

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v. Granahan, 255 Wis. 192, 196, 38 N.W.2d 705 (1949); 1 Williston Contracts (3d ed.) §§ 102, 102A; First Wisconsin National Bank v. Oby, 52 Wis.2d 1,5, 6, 188 N.W.2d 454 (1971); Estate of Hatten, 233 Wis. 199, 216, 288 N.W. 278 (1940).

Existing legal obligation: Beacon Fed. Savings & Loan Ass'n v. Panoramic Enterprises, Inc., 8 Wis.2d 550, 99 N.W.2d 696 (1959).

Adequate consideration: Estate of Hatten, supra; 17 Am. Jur. 2d Contracts § 102; Briggs v. Miller, supra.

Love and affection: Estate of Briese, 240 Wis. 426, 431, 3 N.W.2d 691 (1942).

Consideration to or from a third person: Durand West, Inc. v. Milwaukee Western Bank, 61 Wis.2d 454,460, 213 N.W.2d 20 (1973).

Mutual promises: Stack v. Roth Bros. Co., 162 Wis. 281,156 N.W. 148 (1916); Atlee v. Bartholomew, 69 Wis. 43, 33 N.W. 110 (1887); Levin v. Perkins, 12 Wis.2d 398, 107 N.W.2d 492 (1961).

Past consideration: Chudnow Constr. Corp. v. Commercial Discount Corp., 48 Wis.2d 653, 180 N.W.2d 697 (1970); 17 Am. Jur. 2d Contracts § 125.

Moral obligation: Estate of Schoenkerman, 236 Wis. 311, 313,294 N.W. 810 (1940); Cohen v. Lachenmaier, 147 Wis. 649, 652, 133 N.W. 1099 (1912); McLean v. McLean, 184 Wis. 495, 199 N.W. 459 (1924); First Trust Co. v. Holden, 168 Wis. 1,168 N.W. 402 (1918).

Forbearance to sue: Elmergreen v. Kern, 174 Wis. 622, 182 N.W. 947 (1921).

Promissory estoppel as consideration: Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965). 17 Am. Jur. 2d Contracts § 89.

A seal on a written contract imports only a rebuttable presumption of consideration. Wis. Stat. § 891.27; Schwartz v. Evangelical Deaconess Society of Wisconsin, 46 Wis.2d 432, 441, 175 N.W.2d 225 (1970).

If any part of the consideration for a promise is illegal, the promise is void, for it is impossible to say what part of the consideration induced the promise. Menominee River Boom Co. v. Augustus Spies Lumber & Cedar Co., 147 Wis. 559, 571, 132 N.W. 1118 (1912).

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3022 DEFINITENESS AND CERTAINTY

A vague or indefinite agreement is not enforceable as a contract. The subject of the agreement, the object to be accomplished, and the requirements as to performance must be clear.

It is not enough that the parties think they have made a contract if they have not expressed their intentions in a manner that can be understood. It is not even enough that they have actually agreed on some matter or matters if their expression of agreement, when interpreted in the light of accompanying facts and circumstances, is not such that the essential terms of the contract can be determined. For example, an agreement which provides only that one party is to receive something but which does not supply, either expressly or by implication, any standard by which performance can be measured is unenforceable due to indefiniteness and uncertainty.

If it is apparent that the parties intended to enter into a contract, and if the conduct of the parties in the surrounding circumstances will reasonably permit omitted terms to be inferred, the contract is not indefinite. But where the parties have indicated an intention to leave some essential matter to be agreed upon in the future, no provision as to that matter omitted can be inferred, for the jury may neither write nor rewrite an agreement between the parties, nor supply any essential term.

Where the parties disagree in their recollection concerning the provisions of an oral contract, the jury must determine what the provisions were.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

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Words which fix an ascertainable fact or event by which the term of contract duration can be determined make the contract definite and certain in that particular. Pallange v. Mueller, 206 Wis. 109, 238 N.W. 815 (1931).

See Wis. Stat. § 402.305 concerning open price term

See Wis. Stat. § 402.306 regarding the enforceability of output, requirements, and exclusive dealing contracts. (Contra Hoffman v. Pfingsten, 260 Wis. 160, 50 N.W.2d 369 (1951).) Also see Comment, 1964 Wis. L. Rev. 684.

Indefiniteness: Shetney v. Shetney, 49 Wis.2d 26,38,39, 181 N.W.2d 516 (1970); Taylor v. Bricker, 262 Wis. 377, 379,55 N.W.2d 404 (1952); 1 Corbin on Contracts § 95; 1 Williston on Contracts (3d ed.) § 37; Freeman v. Morris, 131 Wis. 621, 627, 42 N.W.2d 273 (1950).

Contract term inferred: Dreazy v. North Shore Publishing Co., 53 Wis.2d 38,44, 191 N.W.2d 720 (1971); Kelley v. Ellis, 272 Wis. 333, 337, 75 N.W.2d 569 (1956).

Jury function: Dreazy, supra.

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3024 IMPLIED CONTRACT: GENERAL

[Use paragraphs of Wis JI-Civil 3010 if appropriate.]

An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if from such conduct it can fairly be inferred that the parties mutually intended to agree on all the terms. This type of agreement is known as an implied contract. An implied contract may rest partially on words expressed in connection with conduct or solely upon conduct.

[If a party expressly declares that it is not his or her intention to make a contract, an implied promise may not be found and enforced against the party.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

17 Am. Jur. 2d Contracts § 3, p. 334; Williston, Contracts § 22(a); Restatement Contracts § 21; Gerovac v. Hribar Trucking, Inc., 43 Wis.2d 328, 168 N.W.2d 863 (1969).

"[T]he conduct and words of the parties can imply a contract." California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 122, 121 N.W.2d 308 (1963).

"[I]f a person performs valuable services for another at his request, the law implies the making of a promise by the latter and acceptance thereof by the former to pay the one performing service the reasonable value thereof." Estate of Ansell, 2 Wis.2d 1, 6, 85 N.W.2d 786 (1957); citing Estate of St. Germain, 246 Wis. 409,17 N.W.2d 582 (1945).

"A contract implied in fact may arise from an agreement circumstantially proved, but even an implied contract must arise under circumstances which show a mutual intention to contract. The minds of the parties must meet on the same thing." Kramer v. Hayward, 57 Wis.2d 302, 306-07, 203 N.W.2d 871 (1973).

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3026 IMPLIED CONTRACT: PROMISE TO PAY REASONABLE VALUE

[Use paragraphs of Wis JI-Civil 3024 if appropriate.]

If a person performs services, furnishes property, or expends money for another at the other's request and there is no express agreement as to compensation, a promise to pay the reasonable value of the services or property or to reimburse for money expended may be properly implied; there must be some conduct of the person benefited from which his or her free election to promise to pay may be fairly inferred.

A promise to pay will not be implied where the service or other benefit was intended by the performer as a gratuity, or without expectation of payment.

If a party expressly declares that it is not his or her intention to make a contract, an implied promise may not be found and enforced against the party.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646, 129 N.W. 1068 (1911); Klug v. Sheriffs, 129 Wis. 468, 109 N.W. 656 (1906).

Gratuity: Segnitz v. A. Grossenbach Co., 158 Wis. 511, 149 N.W. 159 (1914). See Wis. Stat. § 401.208 on commercial customs and usages.

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3028 CONTRACTS IMPLIED IN LAW (UNJUST ENRICHMENT)

This case involves a claim based upon alleged unjust enrichment.

The elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be unfair for him or her to retain it without paying the value thereof.

A claim of unjust enrichment does not arise out of an agreement entered into by the parties.

It is not necessary to prove that the recipient of the benefit was at fault or guilty of wrongdoing in any way, but it must be established that as between the parties it would be unfair for the recipient to retain the benefit without paying the reasonable value of the benefit.

A benefit to the defendant may be (services rendered for (defendant)) (goods or merchandise received by (defendant)) (improvements to (defendant)'s real estate) (money paid to (defendant) or someone else on (defendant)'s behalf).

A loss to the plaintiff without an actual benefit to the defendant is not recoverable as unjust enrichment.

If a person declines in advance a benefit to be conferred by another, then the person conferring the benefit may not recover for unjust enrichment.

[It is not a defense to the action that (defendant) is a minor or otherwise incompetent to make a contract, but a minor may show that in equity and good conscience, (plaintiff) is not entitled to recover in whole or in part.]

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[In this case, (plaintiff) has alleged fault or wrongdoing on the part of (defendant) (fraud) (duress) (nonperformance or breach of contract) which is elsewhere in these instructions defined for you. The burden of proof is on (plaintiff) to establish wrongdoing by (defendant).]

COMMENT

This instruction was originally approved by the Committee in 1979. Editorial changes were made in 2015. This revision of the instruction and comment were approved by the Committee in 2020.

In cases where an unjust enrichment claim is based on contributions made by one party for the benefit of another, the unjust enrichment claim must demonstrate that, viewed in their entirety, the contributions were made to a "joint enterprise" in which the parties were mutually engaged, and which resulted in an accumulation of wealth that a party had unfairly retained. See Sands v. Menard, 2017 WI 110 at pg. 23.

"A claim for unjust enrichment may exist when two people work together or when two people combine assets for defendant's benefit." See Lawlis v. Thompson, 137 Wis.2d 490 at pg. 493.

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3030 MODIFICATION BY MUTUAL ASSENT

One party to an existing contract cannot alter its provisions without the consent of the other party. In order that any new provisions may become part of an existing contract, it is necessary that there be a meeting of the minds of the parties on all essential terms and conditions of the new provisions. The parties must agree that the new provisions are to be made part of the existing contract. The usual procedure in modifying a contract is for one party to propose a modification and for the other party to assent to the proposal.

A modification of a contract may be written, oral, or partially written and partially oral. Regardless of whether a prior contract is oral or written, it may be modified orally.

To constitute a modification, the language used and the conduct of the parties must show that there has been a meeting of the minds of the parties on all terms of the contract modification.

[No new consideration is required to support modification of a contract which has not been fully performed.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Consent necessary: Meyers v. Wells, 252 Wis. 352,31 N.W.2d 512 (1948); Weil v. Biltmore Grande Realty Corp., 251 Wis. 13, 27 N.W.2d 713 (1947).

Meeting of the minds: 17A C.J.S. Contracts § 375; 17 Am. Jur. 2d Contracts § 465.

Oral modification: Gutknechtv. C. A. Lawton Co., 231 Wis. 413, 285 N.W. 411 (1939); ABC Outdoor Advertising, Inc. v. Dolhun's Marine, Inc., 38 Wis.2d 457, 157 N.W.2d 680 (1967); Wis. Stat. § 402.209(3).

New consideration unnecessary: Everlite Mfg. Co. v. Grand Valley Machine & Tool Co., 44 Wis.2d 404, 171 N.W.2d 188 (1969); Wis. Stat. § 402.209(1).

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If the original contract was required by the statute of frauds to be in writing, it cannot be modified orally; this termination is made by the judge, and in such case, paragraph 2 would not be given.

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3032 MODIFICATION BY CONDUCT

If you determine that one party to a contract has performed in a manner differing from the strict obligations imposed on him or her by the contract, and the other party by conduct or other means of expression induced a reasonable belief by the first party that strict performance was not insisted upon, but that the modified performance was satisfactory and acceptable as equivalent, you may then conclude that the parties have assented to a modification of the original terms of the contract and that the parties have agreed that the different mode of performance will satisfy the obligations imposed on the parties by the contract.

The acts which are relied upon to show modification of a contract may not be ambiguous in character. Acts which are ambiguous, and which are consistent either with the continued existence of the original contract or with a modification, are not sufficient to establish a modification.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Will of Bate, 225 Wis. 564, 275 N.W. 450 (1937); 17A C.J.S. Contracts § 375.

Ambiguity: Nelsen v. Farmers Mut. Automobile Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958).

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3034 NOVATION

The parties to a contract may mutually agree to create a new contract which discharges their legal obligations under the original contract by [the substitution of a new obligation between the same parties with intent to extinguish the old obligation] [the substitution of a consenting new debtor in place of the old debtor, with intent to release the old debtor] [the substitution of a consenting new creditor in place of the old creditor, with intent to transfer the rights of the old creditor to a new creditor].

If the parties intended only to modify the contract or to expand or diminish the obligations thereunder, then the contract is not discharged.

Consideration and a meeting of the minds of all parties to the new contract are required before discharge of the original contract can be found. However, it is not required that the agreement to discharge the original contract be shown by express words, for it may be implied from the circumstances of the relationship and the conduct of the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Navine v. Peltier, 48 Wis.2d 588, 180 N.W.2d 613 (1970); 58 Am. Jur. 2d §§ 1, 3; 58 Am. Jur. 2d § 23.

Consideration: Bohn Mfg. Co. v. Reif, 116 Wis. 471, 93 N.W. 466 (1903).

Novation implied: Bishop-Babcock Co. v. Keeley, 160 Wis. 546, 152 N.W. 189 (1915).

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3040 INTEGRATION OF SEVERAL WRITINGS

[Separate writings that have been executed at or about the same time between the same parties and in relation to a common transaction may be considered as one agreement which is known as an integrated contract. It is for the jury to determine whether or not the separate writings were intended by the parties to be an integrated contract.]

[Writings executed at the same time as one transaction in order to effectuate a single purpose, and referring to one another, must be considered together as an integrated contract.]

Separate writings which constitute an integrated contract must be construed together as to all persons who had notice of their contents and their relation to each other for the purpose of determining the character of the transaction and the true intent and agreement of the parties.

To be taken together as evidencing an integrated contract, the writings must not only relate to a common transaction, but must have the same objective. It is for the jury to determine the overall agreement of the parties from the several writings.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Common transaction: Norton v. Kearney, 10 Wis. 386 (1860); Bank of Sheboygan v. Fessler, 218 Wis. 244, 260 N.W. 441 (1935).

Single purpose: 17 Am. Jur. 2d § 263; Bailey v. Hovde, 61 Wis.2d 504, 213 N.W.2d 69 (1973).

Construed together: Fessler, supra.

Same objective: Brest v. Maenat Realty, 245 Wis. 631, 15 N.W.2d 798 (1944).

It is for the court to determine preliminarily whether or not two writings are so related that the provisions of one are necessarily to be imported into the other. Seaman v. McNamara, 180 Wis. 609, 193 N.W. 377 (1923); Thorp v. Mindeman, 123 Wis. 149, 101 N.W. 417 (1904).

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If, after integration, there are remaining unrelated and nonintegrated provisions, they must be given effect as independent instruments. Construction of separate writings in insurance contracts: Martell v. National Guardian Life Ins. Co., 27 Wis.2d 164, 133 N.W.2d 721 (1965).

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3042 PARTIAL INTEGRATION — CONTRACT PARTLY WRITTEN, PARTLY ORAL

A contract may be partly written and partly oral. It is for the jury to determine whether the oral and written provisions were intended by the parties to be an integrated contract.

In determining whether the oral and written provisions were intended by the parties to constitute an integrated contract, you are cautioned that prior or concurrent oral provisions which contradict the written provisions cannot be considered by you.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

17 Am. Jur. 2d Contracts § 68; Hannon v. Kelly, 156 Wis. 509, 512, 146 N.W. 512 (1914); Conrad Milwaukee Corp. v. Wasilewski, 30 Wis.2d 481, 141 N.W.2d 240 (1966).

Necessity for and elements of a writing: Wis. Stat. §§ 241.02, 401.206, 402.201, 408.319, 409.203.

This instruction is proper only if the court has determined that the parol evidence rule does not apply. Paragraph 2 must not be used to assign to the jury the decision whether or not the rule should apply.

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3044 IMPLIED DUTY OF GOOD FAITH (PERFORMANCE OF CONTRACT)

Question _____ asks whether (defendant) breached the duty of good faith in performing (his) (her) contract with (plaintiff).

Under Wisconsin law, the contract between (defendant) and (plaintiff) requires that each party act in good faith towards the other party and deal fairly with that party when (performing) (enforcing) (carrying out) the expressed terms of the contract. This requirement to act in good faith is a part of the contract just as though the contract stated it.

In this case, the plaintiff claims defendant had an obligation to use good faith when performing the following contractual term: (insert contractual term).

As to this term, (plaintiff) claims that (defendant) breached the contract's good faith obligation by: (insert relevant conduct).

Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were. Therefore, in deciding whether the defendant breached the duty of good faith by (e.g., terminating the contract, invoking the force majeure clause), you should determine the purpose of the agreement; that is, the benefits the parties expected at the time the agreement was made.

This duty of good faith means that each party to a contract will not do something which will have the effect of injuring or destroying the (rights) (ability) of the other party to receive the benefits of the contract.

[A contracting party can breach the duty of good faith even if (he) (she) did not violate any express term of the contract.]

[It is not a breach of the duty of good faith if a course of action available to (plaintiff) could have avoided the harm and this course was not followed.]

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SPECIAL VERDICT

Did (defendant) breach the duty of good faith in performing (his) (her) contract with (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were first approved in 1975 and revised in 1998. The comment was updated in 2006.

This instruction addresses only the duty of good faith in the performance of a contract. It does not cover negotiations. Under Hauer v. Union State Bank of Wautoma, 192 Wis.2d 576, 598, 532 N.W.2d 456 (Ct. App. 1995), there can be an implied duty of good faith during negotiation and formation in a non-UCC case. But there may be a lesser duty during this time. Market Street Assoc. Ltd. Ptrshp. v. Frey, 941 F.2d 588, 594-96 (7th Cir. 1991). Tort liability for the breach of the duty of good faith is limited to cases involving insurance companies. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 792, 541 N.W.2d 203, 211 (Ct. App. 1995). Hauer v. Union State Bank of Wautoma, supra at 595. See Wis JI-Civil 2760, 2761.

Absent proof of an underlying tort, punitive damages are not recoverable for breach of the duty of good faith. Hauer v. Union State Bank of Wautoma, supra at 603.

Wisconsin common law reads the duty of good faith into every contract. Estate of Chayka, 47 Wis.2d 102, 108, 176 N.W.2d 561, 564 (1970); Hauer v. Union State Bank of Wautoma, supra at 598. See also Crown Life Ins. Co. v. LaBonte, 111 Wis.2d 26, 44, 330 N.W.2d 201 (1983); Metropolitan Ventures v. GEA Assoc., 2006 WI 71, 291 Wis.2d 393, 717 N.W.2d 58.

In Metropolitan Ventures, supra, ¶ 36, the court said "the duty of good faith arises because parties to a contract, once executed, have entered into a cooperative relationship and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party."

Type of Conduct. Courts have found different types of conduct to constitute a breach of the duty of good faith. In some cases, the breaching conduct has been found actionable under other legal theories. In Chayka, supra, at 108-09, otherwise tortious conduct (fraud) was found to be a breach of the duty of good faith. In Market Street Assoc., supra at 595, the 7th Circuit Court of Appeals, applying Wisconsin law, described the duty of good faith as ". . .halfway between a fiduciary duty (the duty of utmost good faith) and the duty to refrain from active fraud." Generally, scienter is not an element in a contract action. Failure to perform a contract need not be willful or negligent to constitute a breach. Restatement (Second) of Contracts, § 235, comment a (1979). Wisconsin does not recognize an action for tortious breach of contract. Anderson v. Continental Ins. 85 Wis.2d 675, 271 N.W.2d 368 (1978); Autumn Grove Joint Venture v. Rachlin, 138 Wis.2d 273, 405 N.W.2d 759 (Ct. App. 1987).

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A failure to give notice is not necessarily a breach of the duty of good faith. Wis JI-Civil 3044 discussed in Schaller v. Marine Nat'l Bank of Necedah, 131 Wis.2d 389, 402, 388 N.W.2d 645 (Ct. App. 1986).

The conduct need not be a breach of the express terms of the agreement to violate the duty of good faith. Chayka, supra at 107; Foseid, supra at 796; Where a party not at the mercy of the other could have taken steps to avoid the harm but didn't, the duty of good faith is not breached. Schaller, supra at 403; Where a party's conduct is found to be specifically authorized by express terms of a written agreement, there is no breach of good faith. Super Value Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

Separate Claim. A claim for breach of the implied duty of good faith may be maintained separately from a claim for breach of contract. Foseid, supra at 794-95.

Uniform Commercial Code. R. Eisenberg, "Good Faith Under the Uniform Commercial Code," 54 Marq. L. Rev. 1 (1971)

Wis. Stat. § 401.201(19) is discussed in Schaller v. Marine Nat'l Bank of Neenah, supra at 402. The UCC definition of good faith may limit the common law duty in cases where the definition applies. Market Street Assoc., supra at 596.

Wis. Stat. § 401.203 is applicable only to performance and enforcement of agreements under the UCC. The duty of good faith under this section does not apply during negotiation and formation of contracts. A breach of the duty of good faith under the UCC cannot be brought as a separate claim. Hauer v. Union State Bank of Wautoma, supra at 595-97.

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3045 DEFINITIONS — "BONA FIDE"

The term "bona fide" means: "In or with good faith; honestly; openly and sincerely; without deceit or fraud." "Bona fide" is also defined as "Truly; actually; without simulation or pretense . . . real, actual, genuine, and not feigned."

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Kansas City Star Co. v. ILHR Department, 60 Wis.2d 591, 601, 211 N.W.2d 488 (1973), states:

> The term "bona fide" is not specifically defined in ch. 108, Stats., and therefore it must be "interpreted in accordance with common and approved usage thereof and in accordance with other accepted rules of statutory construction." [Wis. Stat. § 108.02(21)] The term generally "'signifies a thing done really, with a good faith, without fraud or deceit, or collusion . . .' . . . Bona fide means real, actual, genuine . . . ." [Bridgeport Mortgage & Realty Corp. v. Whitlock, 128 Conn. 57,61, 20 Atl.2d 414 (1941).]

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3046 IMPLIED PROMISE OF NO HINDRANCE

If one person enters into a contract with another, there is an implied promise by each that he or she will do nothing to hinder or obstruct performance by the other. [If cooperation is necessary for the performance of the contract, there is an implied promise to give the necessary cooperation.] [Failure to cooperate may constitute a hindrance or obstruction of performance.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is identical to the first paragraph of Wis JI-Civil 3060.

Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 203, 124 N.W. 291 (1910).

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3048 TIME AS AN ELEMENT

The importance of time in connection with the performance of a contract depends upon the nature of the contract, the terms of the contract, and the circumstances appearing from the conduct of the parties. Time is not to be regarded as of the essence of the contract unless it is clear that the parties intended to make it so by their conduct or by the terms on which they have agreed.

Time is not to be regarded as of the essence of the contract merely because a definite time for performance is stated in the contract, in the absence of any further provision regarding the effect of nonperformance at the time stated.

If there is no provision in a contract as to the time for performance, the law will imply a reasonable time which means a somewhat more protracted time than directly, forthwith, or as soon as possible.

If you determine that performance at the exact time agreed upon was intended to be of vital importance to the parties, you may find that time was of the essence so that failure of the party to perform on time may constitute a breach of contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. The language of the instruction was revised in 2016.

Zuelke v. Gergo, 258 Wis. 267, 45 N.W.2d 690 (1951); Wauwatosa Realty Co. v. Bishop, 6 Wis.2d 230, 94 N.W.2d 562 (1959).

Appleton State Bank v.Lee, 33 Wis.2d 690, 693, 148 N.W.2d 1 (1967); Rottman v. Endejan, 6 Wis.2d 221, 226, 94 N.W.2d 596 (1959).

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Rottman v. Endejan, supra at 225; Restatement, Contracts § 276(a).

Reasonable time implied: Delap v. Institute of America, Inc., 31 Wis.2d 507, 512, 143 N.W.2d 476 (1966); 17 Am. Jur. 2d Contracts § 329.

This instruction does not apply to cases under the Commercial Code involving the sale of goods. See Wis. Stat. § 402.601 and following sections.

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3049 DURATION

[A contract which specifies the period of its duration, terminates at the end of the period.]

[A contract which provides that it is to continue for an indefinite period continues for a reasonable time under the circumstances.]

[A contract which does not contain a termination date may be terminated at any time by either party upon reasonable notification to the other party.]

[A contract which provides that the contract is to continue for an indefinite period, but contains a limitation on whether the contract can be terminated, terminates on the happening of the event specified in the limitation.]

[A contract which does not contain a termination date, but which contains a limitation on whether the contract can be terminated, terminates on the happening of the event specified in the limitation.]

COMMENT

This instruction and comment were approved by the Committee in 1975 and revised in 2016.

Irish v. Dean, 39 Wis. 562 (1876); California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 124-25, 121 N.W.2d 308 (1963); Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 214 N.W.2d 281 (1974).

The fourth and fifth paragraphs are based on the decision in Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 214 N.W.2d 281 (1974). An example of an event that may trigger termination is "good cause."

The Wisconsin Supreme Court held in MS Real Estate Holdings, LLC v. Fox Family Trust, 2015 WI 49, 362 Wis.2d 258, 864 N.W.2d 83, that:

> . . . Wisconsin courts do not favor perpetual contracts. We are "reluctant to interpret a contract as providing for a perpetual contractual right unless the intention of the contracting parties to provide for the same is clearly stated." Capital Investments, Inc. v. Whitehall Packing Co., Inc., 91 Wis.2d 178, 193, 280 N.W.2d 254 (1979). When the time that a contract is to endure is indefinite, this court will imply a reasonable time for the duration of the contract. Farley v.

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Salow, 67 Wis.2d 393, 402, 227 N.W.2d 76 (1975). However, we do not require parties to express duration in temporal terms in order to avoid indefiniteness. Rather, parties are free to identify triggering events that give rise to termination of the contract in one form or another. Schneider v. Schneider, 132 Wis.2d 171, 389 N.W.2d 835 (1986).

Duration of Right of First Refusal Contracts. See MS Real Estate Holdings, LLC v. Fox Family Trust, supra. In that decision, the court said "a specified triggering event, though uncertain to occur, may render a right of first refusal contract sufficiently definite and establish the duration of the right."

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3050 CONTRACTS: SUBSEQUENT CONSTRUCTION BY PARTIES

Whether the parties to a contract gave it a particular construction is to be regarded by you in giving effect to the provisions of the contract. The subsequent acts of the parties, showing the construction that they themselves have put upon the agreement, are to be considered by you for the purpose of assisting you in arriving at a determination of what the arrangement was between the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Nelsen v. Farmers Mut. Auto Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958).

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3051 CONTRACTS: AMBIGUOUS LANGUAGE

The parties dispute the meaning of the following language in their contract: (*insert language found by the court to be ambiguous*).[1]

It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement.[2] In determining the meaning of the language, you should consider [include such of the following as are supported by the evidence]:

-- the words in dispute,[3]

-- the purpose of the contract,[4]

-- the circumstances surrounding the making of the contract,[5]

-- the subsequent conduct of the parties, [6]

-- other language in the contract, [7]

-- [list any other specific factors relating to the case][8]

If you are unable to decide the intention of the parties after considering these factors, then you should interpret the disputed language against the party who prepared the contract.[9]

NOTES

1. This instruction concerns contracts that are enforceable, but contain one or more ambiguous provisions. (JI-3022 addresses contracts alleged to be so vague and indefinite as to be unenforceable.) It may be given to the jury, but only after the court has concluded that language in the contract is ambiguous. "Whether ambiguity exists in a contract is a question of law." Brown v. Maxey, 124 Wis. 2d 426, 442 (1985). "The existence of ambiguity is an issue of law to be decided by the court, not an issue of fact to be decided by the jury." S. A. Healy v. Milwaukee Metropolitan Sewerage District, 50 F. 3d 476, 480 (7th Cir. 1995). Once the court determines that a provision is ambiguous, interpretation of that provision then becomes a question of fact for the jury. Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis.2d 158, 177 (1996).

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2. "The primary goal in contract interpretation is to give effect to the parties' intentions." Seitzinger v. Community Health Network, 270 Wis. 2d 1, 22 (2004).

3. "We ascertain the parties' intentions by looking to the language of the contract itself." *Id.*

4. "Ambiguities in an agreement must be construed in a manner consonant with its dominant purpose and conducive to the accomplishment of that purpose." Capital Investments, Inc. v. Whitehall Packing Co. Inc. 91 Wis. 2d 178, 191 (1979) quoting from Huck v. Chicago St. Paul M & O Ry. Co., 5 Wis.2d 124, 128 (1958).

5. "Where the acts of the parties are inconsistent indicating different constructions, the court will look to the purpose of the contract and the circumstances surrounding its execution to determine the intent." Jones v. Jenkins, 88 Wis. 2d 712, 723 (1979).

6. "It is a well-settled principle of Wisconsin law that, where contract terms may be taken in two senses, evidence of practical construction by the parties is highly probative of the intended meaning of those terms and the court will normally adopt that interpretation of the contract which the parties themselves have adopted." Zweck v. D. P. Way Corp., 70 Wis.2d 426, 435 (1975).

7. "The contract must be read as a whole and every part will be read with reference to the whole." "The general rule as to the construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." Seitzinger, supra at 37 (Abrahamson, dissenting) (other citations omitted).

8. "In resolving the ambiguity and determining the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence. Additionally, the court may rely on the canons of construction which are designed to ascertain the intentions of the parties entering into a contract." Capital Investments, Inc., supra, at 190. In individual cases, there may be other factors relating to contract interpretation which are appropriate, *e.g.* custom in the trade, etc.

9. Wisconsin courts have consistently restated the well-established rule that in cases of contract ambiguity, the contract is to be construed against the party that drafted it. See, *e.g.* Seitzinger, supra, at 22. A closely related question that has not been specifically addressed in any reported Wisconsin appellate decision is: At what point in its analysis does the finder of fact apply this rule? Many other courts have held that an ambiguous contract is only construed against the drafter if its meaning is not established by other extrinsic evidence. See, *e.g.* Affiliated F. M. Ins. Co. v. Constitution Reinsurance Corp., 626 N.E. 2d 678 (Mass. 1994).

The Committee believes if presented with the issue, Wisconsin appellate courts would not invoke the rule that a contract is construed against the drafter unless the ambiguity cannot be resolved by other evidence. First, as the supreme court has stated the rule, construing the contract against the drafter comes after the consideration of extrinsic evidence. "If the language within the contract is ambiguous, two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties' intent and (2) ambiguous contracts are interpreted against the drafter." Seitzinger, supra, at 14. Second, Restatement (Second) of Contracts 2d §206 appears to follow the rule that the contract is only construed against the drafter if other evidence is inconclusive. The Comment to §206 states that "In cases of doubt, therefore, *so long as other factors are not decisive*, there is substantial reason for preferring the meaning of the other party." (emphasis added). Third, although the Wisconsin Supreme Court has not directly addressed the question, the issue is

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discussed in a concurrence. In Roth v. City of Glendale, 237 Wis. 2d 173 (2000) Justice Sykes wrote as follows:

> "A 'default rule,' properly understood, is a judicial canon of contract construction (such as the rule that we construe contracts against the drafter) that applies only in the event of an unresolvable ambiguity-a tie-and only at the end of the process after extrinsic evidence has failed to clear up the question." Roth v. City of Glendale, 237 Wis. 2d 173 (2000) (J. Sykes, concurring).

The Committee concludes the jury should be instructed to construe the contract against the drafter only if the ambiguity cannot be resolved following consideration of other extrinsic evidence.

COMMENT

The instruction and comment were approved in 2011.

The last sentence in the instruction may have to be modified if there is a dispute concerning which party prepared either the entire contract or the specific language found by the court to be ambiguous. There may be other situations in which the sentence should be eliminated entirely, such as where the contract is a result of negotiations between the parties and the evidence would not sustain a finding that either party alone prepared the contract or the ambiguous language.

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3052 SUBSTANTIAL PERFORMANCE

Each party to a contract has a duty to perform his or her obligations under the contract.

Evidence has been received that (defendant) may not have completely performed his or her obligations. A failure to complete performance under a contract, or a defective performance, does not prevent recovery if you find that there was substantial performance of the contract. You must first find that there was a good faith effort to perform; if you find that a good faith effort was made, you will then proceed to determine whether the performance was, in a legal sense, substantial.

Performance may be substantial even though every detail is not in strict compliance with the terms of the contract; something less than perfection is required. Some measure of nonperformance will be tolerated if (defendant) has received, with relatively minor and unimportant deviations, what he or she bargained for. But if the defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction. An editorial correction was made in 1994.

Substantial performance: theory of recovery; what is substantial performance: Kreyer v. Driscoll, 39 Wis.2d 540, 159 N.W.2d 680 (1968); Plante v. Jacobs, 10 Wis.2d 567, 103 N.W.2d 296 (1960); 17 Am. Jur. 2d Contracts §§ 631, 632, 633, and 634; Corbin on Contracts §§ 700-705; 5 Williston on Contracts § 805, et seq.

Good faith effort: Nees v. Weaver, 222 Wis. 492, 269 N.W. 266 (1936). See Wis JI-Civil 3044 - Good Faith.

As to sale: contracts, see Wis. Stat. § 402.601, as modified by Wis. Stat. §§ 402.612, 402.508, 402.608, 402.614(1), 402.504(2), 401.203.

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Notwithstanding the inability of the plaintiff to show substantial performance, plaintiff may be entitled to compensation under a quantum meruit theory. Kreyer, supra.

A finding that plaintiff substantially performed does not insulate plaintiff from a claim for damages for the unfulfilled or defectively performed obligations under the contract. DeSombre v. Bickel, 18 Wis.2d 390, 118 N.W.2d 868 (1963); Corbin on Contracts § 702.

There are other situations in which the substantiality of the performance of one party to a contract may have important legal consequences. Corbin on Contracts § 700.

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3053 BREACH OF CONTRACT

A party to a contract breaches it when performance of a duty under the contract is due and the party fails to perform. Failing to perform a duty under the contract includes defectively performing as well as not performing at all.

COMMENT

This instruction and comment were approved in 2006.

Restatement of Contracts (Second) sec. 235; Steele v. Pacesetter Motor Cars, Inc., 2003 WI App 242, 267 Wis.2d 873.

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3054 DEMAND FOR PERFORMANCE

Before an action may be maintained for breach of a contract, a demand for performance in accordance with the contract must be made. [However, a demand is unnecessary if the party alleged to have breached the contract (denies the existence of the contract) (declares an intention not to perform).]

A request for performance which differs materially from the terms of the contract is not a sufficient demand.

It is for the jury to determine whether a demand for performance in accordance with the terms of the contract was made.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2011. A citation was corrected in 2014.

Corbitt v. Stonemetz, 15 Wis. 170 (1862); Scherg v. Puetz, 269 Wis. 561, 69 N.W.2d 490 (1955).

If the contract requires payment of a certain sum at specified intervals, no demand is necessary. Gall v. Gall, 120 Wis. 270, 97 N.W. 938 (1904).

Uniform Commercial Code Cases. The Uniform Commercial Code requires a notice of breach when a buyer has accepted delivery of goods and then discovers a nonconformity. Wis. Stat. § 402.607(3). When a seller under the U.C.C. fails to make a delivery or repudiates the contract, there is no requirement to provide notice of breach. Wis. Stat. § 402.711.

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3056 SALE OF GOODS: DELIVERY OR TENDER OF PERFORMANCE

A seller of goods or merchandise has the obligation to transfer and deliver the goods or merchandise; the obligation of the buyer is to accept and pay for the goods or merchandise in accordance with the contract.

The seller must put and hold goods or merchandise which conform to the terms of the contract at the buyer's disposition, and give the buyer any notification reasonably necessary to enable the buyer to take delivery.

Upon delivery, the buyer must stand ready to pay according to the terms of the contract. If the contract does not specify otherwise, payment may be by any means or manner currently used in the ordinary course of business, unless the seller demands payment in legal tender and provides an extension of time reasonably required by the buyer to procure payment.

The manner, time, and place of transfer and delivery are determined by the agreement of the parties, but must be at a reasonable hour. The goods or merchandise must be kept available for a period reasonably necessary to enable the buyer to take possession.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Obligation: Shy v. Industrial Salvage Material Co., 264 Wis. 118, 58 N.W.2d 452 (1953); Wis. Stat. §§ 402.301, 402.511.

Payment: Alpirn v. Williams Steel & Supply Co., 199 F.2d 734 (7th Cir. 1952); Wis. Stat. §§ 402.511, 402.503.

Kept available: Wis. Stat. § 402.503.

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3057 WAIVER

Waiver means that a person is precluded from asserting a right, a claim or privilege because he or she has previously knowingly, voluntarily, and intentionally relinquished or given up that right, claim, or privilege.

Waiver must be a voluntary act and implies a knowing choice by a person to dispense with something of value or to forego a right or advantage which the person might have demanded and insisted upon. It only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply; nor need there be a detriment or harm to the party claiming the waiver.

The following elements must appear before the doctrine of waiver can apply:

1. That the person had a right, claim, or privilege in existence at the time of the claimed waiver.

2. That the person who is alleged to have waived such a right had knowledge, actual or constructive, of the existence of his or her rights or of the important or material facts which were the basis of his or her right.

3. That the person waiving such right did so intentionally and voluntarily.

Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence. If a person is ignorant of a material or important fact, that is, if he or she lacks actual or constructive knowledge, a waiver is not possible.

The intent to waive can be inferred from the conduct of the party against whom the waiver is claimed. However, the conduct or act out of which the waiver is sought to be

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established must have been done intentionally and with present knowledge of the rights involved, or of the material or important facts which are the basis of those rights.

Unreasonable delay in taking or not taking action may be taken into account in considering whether there has been conduct amounting to a waiver.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2018.

The doctrines of estoppel and waiver are related, but separate, doctrines. Knapke v. Grain Dealers Mut. Ins. Co., 54 Wis.2d 525, 532, 196 N.W.2d 737 (1972); 28 Am. Jur. 2d Estoppel and Waiver § 30; Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957).

Waiver is the voluntary and intentional relinquishment of a known right. Bank of Sun Prairie v. Opstein, 86 Wis.2d 669, 681, 237 N.W.2d 279 (1979).

Ryder v. State Farm Mutual Auto Ins. Co., 51 Wis.2d 318, 326, 187 N.W.2d 176 (1971) (Failure of insurer to rescind because of misrepresentation is not estoppel because no reliance by insured; and not waiver because hearsay knowledge by agent not known to underwriter at time of reissuance of policy); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954) (Payment under cost-plus contract of wage claims is not waiver because of ignorance that wage rate included overcharges), 28 Am. Jur. 2d Estoppel and Waiver § 154.

Consideration not necessary: Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957); Will of Rice: Cowie v. Strohmeyer, 150 Wis. 401, 468, 136 N.W. 956 (1912). See 17 Am. Jur. 2d Contracts § 391.

Knowledge: Attoe v. State Farm Mut. Auto Ins. Co., 36 Wis.2d 539, 545-56, 153 N.W.2d 575 (1967) (Insurer's answer without raising plea in abatement waived non-action defense); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954); Joplin v. John Hancock Mut. Life Ins. Co., 55 Wis.2d 650, 655, 200 N.W.2d 607 (1972).

Voluntary: 28 Am. Jur. 2d Estoppel and Waiver §§ 157, 158; Broadbent v. Hegge, 44 Wis.2d 719, 726, 172 N.W.2d 34 (1969); Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 142 N.W.2d 218 (1966); Hanz Trucking, Inc. v. Harris Bros. Co., 29 Wis.2d 254, 138 N.W.2d 238 (1965).

Delay: Somers v. Germania National Bank, 152 Wis.210, 220, 138 N.W. 713 (1913). See also Thompson v. Village of Hales Corners, 115 Wis.2d 289, 319, 340 N.W.2d 704 (1983).

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3058 WAIVER OF STRICT PERFORMANCE

A party to a contract may waive strict and full performance of any provisions made for his or her benefit. To be effective, however, a waiver must be the voluntary and intentional relinquishment of a known right. Contract provisions may be waived expressly or the waiver may be inferred from the conduct of the parties.

If performance under a contract is defective but a party consents to such performance with knowledge of the circumstances and, after full opportunity for examination, that party fails to give timely notice of the defect to the performing party, any requirement of strict performance is deemed to be waived.

[A partial or total payment on a contract does not constitute an acceptance of less than full performance insofar as hidden defects are concerned. Payment by a party with knowledge of a particular defect is a waiver of strict performance in the absence of any other circumstances tending to show a waiver was not intended.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Waiver: Godfrey Co. v. Crawford, 23 Wis.2d 44,49, 126 N.W.2d 495 (1964); Lukens Iron & Steel Co. v. Hartmann-Greiling Co., 169 Wis. 350, 355, 172 N.W. 894 (1919); 17 Am. Jur. 2d Contracts § 390.

Failure of notice: Wis. Stat. § 402.606; The J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 449, 453, 82 N.W. 299 (1900); Fun-N-Fish, Inc. v. Parker, 10 Wis.2d 385, 103 N.W.2d 1 (1960).

Payment with knowledge: Milaeger Well Drilling Co. v. Muskego Rendering Co., 1 Wis.2d 573, 580, 85 N.W.2d 331 (1957).

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3060 HINDRANCE OR INTERFERENCE WITH PERFORMANCE

If one person enters into a contract with another, there is an implied promise by each that each person will do nothing to hinder or obstruct performance by the other. [If cooperation is necessary for the performance of the contract, there is an implied promise to give the necessary cooperation.] [Failure to cooperate may constitute a hindrance or obstruction of performance.]

The implied promise is as binding as if spelled out [and failure to fulfill the promise constitutes a breach of contract]. The doing of acts or the failure to do acts which one party knows or ought to know would hinder or prevent the other from performing his or her obligations under the contract may constitute such a breach.

(But if hindrance or obstruction of the performance of a party [is reasonably necessary or] was contemplated at the time the contract was made, it would not be considered a breach.)

(The conduct of a party which may have been sufficient to hinder or prevent performance by the other party to a contract does not constitute a breach if the other party would not have performed in any event.)

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Implied promise: Gessler v. Erwin Co., 182 Wis. 315, 193 N.W. 363 (1924); Edward E. Gillen Co. v. John H. Parker Co., 170 Wis. 264, 171 N.W. 61 (1919); Kehm Corp. v. United States, 93 F. Supp. 620 (1950).

Breach: Edward E. Gillen Co., supra.

Corbin on Contracts, Vol. 4, § 947; 17 Am. Jur. 2d Contracts § 442.

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Hindrance contemplated: Corbin on Contracts, Vol. 3, § 571, Vol. 4, § 947.

No breach by hindrance if other party would not have performed: Corbin on Contracts, Vol. 3, § 571, n. 6.

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3061 IMPOSSIBILITY: ORIGINAL

If performance of a promise is impossible because of a state of facts existing when the contract was made and the promisor had no knowledge or reason to know of such facts, there is no duty to perform.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 456; Estate of Zellmer, 1 Wis.2d 46, 49, 82 N.W.2d 891 (1957).

Impossibility of performance may excuse a condition, even a condition precedent, if the existence or occurrence of the condition is not a material part of the exchange for the promisor's performance, and enforcement of the condition would operate as a forfeiture. Restatement, Contracts § 301. In an action on a life and disability policy, a condition precedent requiring notice or proof of disability was excused where its performance was impossible by reason of the physical and mental incapacity of the insured during the period when proof should have been furnished. Schlintz v. Equitable Life Assurance Soc'y, 226 Wis. 255, 276 N.W. 336 (1937); Kraus v. Wisconsin Life Ins. Co., 27 Wis.2d 611, 135 N.W.2d 329 (1965).

If the contract imposes an absolute duty regardless of the existing situation, then, as a matter of law, impossibility would not be a defense.

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3062 IMPOSSIBILITY: SUPERVENING

If performance of a contract is possible only if a certain state of facts continues to exist, then a cessation or termination of the state of facts which makes performance impossible will excuse failure to perform. But if performance becomes impossible by reason of contingencies which should have been foreseen by a party, then such party is not excused from the duty to perform.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Cook v. McCabe, 53 Wis. 250, 259, 10 N.W. 507 (1881); Jennings v. Lyons, 39 Wis. 553 (1876).

Financial inability of a party to perform does not amount to impossibility in a legal sense. Green v. Kaemph, 192 Wis. 635, 640, 212 N.W. 405 (1927).

See Comment to Wis JI-Civil 3061.

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3063 IMPOSSIBILITY: PARTIAL

If a party cannot do part of what the party has promised to do because of circumstances beyond his or her control and not within his or her ability to foresee, but the rest of the performance can be made without material difficulty or disadvantage, then the duty of the promisor to perform may be excused only to the extent of the partial impossibility.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Hess Bros., Inc. v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921); Appleton Elec. Co. v. Rogers, 200 Wis. 331, 228 N.W. 505 (1930); Restatement, Contracts § 463.

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3064 IMPOSSIBILITY: TEMPORARY

If performance is temporarily made impossible without fault of a party, his or her duty to perform is excused during the period of the impossibility. The contract is not terminated unless the impossibility of performance continues for such a long period of time that the object of the contract is defeated.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 462; Hess Bros., Inc. v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921).

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3065 IMPOSSIBILITY: SUPERIOR AUTHORITY

If performance of a promise is prevented by the act of a superior authority such as legislative enactment or a judicial, executive, or administrative order duly made, the duty to perform the promise is discharged.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 458; Hess Brothers v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921).

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3066 IMPOSSIBILITY: ACT OF GOD

If the intervention of unforeseen and uncontrollable superior agencies such as storms or drought render performance impossible, the duty to perform the promise is discharged.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

1 Am. Jur. 2d Act of God § 12; 17 Am. Jur. 2d Contracts §§ 404, 410; Jennings v. Lyons, 39 Wis. 553 (1876); Gill v. Benjamin, 64 Wis. 362, 25 N.W. 445 (1885).

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3067 IMPOSSIBILITY: DISABILITY OR DEATH OF A PARTY

If the promise to be performed is one which the promisor alone is competent to do, the duty of the promisor is discharged if he or she is prevented by mental or physical disability or death from performing.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Jennings v. Lyons, 39 Wis. 553 (1876); Rowe v. Compensation Research Bureau, Inc., 265 Wis. 589, 595, 62 N.W.2d 581 (1954).

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3068 VOIDABLE CONTRACTS: DURESS, FRAUD, MISREPRESENTATION

There must be full and free consent by the parties to the terms of a contract. If consent of a party is gained through duress, fraud, or misrepresentation, that party may either avoid or ratify the contract.

[Follow with instructions Wis JI-Civil 2400 et seq. on misrepresentation.]

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2016.

Corbin on Contracts § 6, 17 Am. Jur. 2d Contracts §§ 151, 153, 154.

Seidling v. Unichem, Inc., 52 Wis.2d 552, 191 N.W.2d 205 (1971); Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201 (1969); Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 101 N.W.2d 805 (1960).

Rescission. A misrepresentation of fact must be material before it can render a contract void or voidable. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451.

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3070 FRUSTRATION OF PURPOSE

Frustration of purpose is a defense to enforcement of a contract. To excuse a party claiming this defense of their obligation under the contract, that party must prove:

1. Their principal purpose(s) in making the contract was (were) frustrated; (The purpose that is frustrated must have been a principle purpose of the party claiming the defense in making that contract. It is not enough that they had in mind some specific object without which they would not have made the contract. The object must be so completely the basis of the contract that as both parties understood, without it the transaction would have made little sense.)
2. The frustration of purpose was not their fault;
3. The purpose(s) was (were) frustrated by an event, the non-occurrence of which was a basic assumption under the contract. (The frustrating event must strike at the foundation of the contract where the basic assumption on which the contract was made was such that the party's performance was virtually worthless or meaningless due to the unexpected occurrence.)

COMMENT

This instruction was approved by the Committee in 1975, and the comment was revised in 2011. This revision was approved by the Committee in January 2020; it revised the elements of the doctrine of frustration, as well as added to the comment.

It is a "well-settled rule" in Wisconsin that death alone does not discharge contractual obligations. In re Estate of Sheppard, 2010 WI App 105, 328 Wis.2d 533, 789 N.W.2d 616; Volk v. Stowell, 98 Wis. 385, 390, 74 N.W.118 (1898). One of the many exceptions to this rule include personal service contracts. In re Estate of Sheppard, supra.

See also Restatement (Second) of Contracts § 265.

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The doctrine of frustration of purpose, referred to generally as "frustration" or as "discharge by supervening frustration" by Restatement (Second) of Contracts § 265, is as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. Section 265.

In 1974, the Wisconsin Supreme Court adopted a tentative draft of Section 265 into the common law. Wm. Beaudoin & Sons, Inc. v. Milwaukee County, 63 Wis.2d 441, 217 N.W.2d 373 (1974).

Frustration of purpose requires that "(1) the party's principal purposes in making the contract is frustrated; (2) without that party's fault; (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N.W. Transp. Co., 82 Wis.2d 514, 523-24, 263 N.W.2d 189 (1978). This doctrine addresses situations in which "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." Restatement (Second) of Contracts § 265 cmt. a. If these elements are met, a party's duties under an agreement are discharged. Ryan v. Estate of Sheppard, supra.

The doctrine of frustration is "given a narrow construction" and "applied sparingly." Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40, citing 17A Am. Jur. 2d Contracts § 641 (2016). This is so because it renders null the explicit terms of the contract and is counter to the strong impulse in the law to enforce contracts as written. Id. The party asserting the defense has the burden to prove frustration of purpose. Id. §§ 632, 640.

Principal Purpose: As the restatement explains: "[T]he purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he [or she] had in mind some specific object without which he [or she] would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a. For example, in Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40, AP Marketing executed a fuel supply agreement (FSA) with Bulk Petroleum Corporation. Under this agreement, AP Marketing agreed to submit to certain branding requirements that might be imposed by the "branded" fuel supplier chosen by Bulk Petroleum. After the branded supplier was chosen, AP failed to comply with the agreement, citing the cost that it would incur if forced to meet the suppliers branding requirements of indoor restrooms. In deciding this matter, the second district court of appeals held that the principal purpose of the FSA was to supply fuel to AP's gas station. The prospect of reduced profitability or financial losses incurred by AP in complying with the branding requirements did not constitute a substantial frustration of the FSA's principal purpose. Id. at ¶22. As the court noted in its decision reversing the district court, "While the modification may have been more expensive than AP hoped, costs that are unwanted or higher than expected are not the same as ones that are unforeseeable, the non-occurrence of which underlie the making of the deal." Id. at ¶23.

Excuse of performance: Frustration of purpose only excuses performance where the frustration is "so severe that it is not fairly to be regarded as within the risks … assumed under the contract."

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Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 363, 933 N.W.2d 110, 2019 WI App 40 citing RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a. The frustrating event must strike at the foundation of the contract – a basic assumption on which the contract was made such that the party's performance, due to this unexpected circumstance, would be "virtually worthless" and "meaningless." Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40 citing 17A Am. Jur. 2d Contracts § 641 (2016).

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3072 AVOIDANCE FOR MUTUAL MISTAKE OF FACT

You are instructed that a mutual mistake of fact exists where both parties to a contract are unaware of the existence of a past or present fact material to their agreement, or where both parties believe a fact exists which is actually non-existent. The unawareness or belief, however, must arise from a lack of knowledge of the possibility that the fact may or may not exist. If the parties are conscious or aware of, or alerted to, the possibility that a fact does or does not exist, and they waive any inquiry or make no investigation with respect to it, they are not legally mistaken with respect to it.

If there was conscious doubt or uncertainty on the part of the parties as to the existence or non-existence of a fact or situation, and the parties reached an agreement under such circumstances, it is considered that it was their intention and contemplation to accept and compromise the consequences of the doubt and uncertainty, and they would not then be acting under mutual mistake of fact.

A mistake to be mutual must involve both parties. A mere mistake on the part of one, in the absence of fraud on the part of the other, will not avoid a contract obligation.

[A mutual mistake of fact exists when both parties believe and rely on medical representation as to the nature and extent of injuries, which later prove to be erroneous, even though such representations were made in good faith. The representations, however, must refer and apply to existing facts and not be mere expressions of opinion as to future events or development.]

COMMENT

This instruction and comment were approved by the Committee in 1975 and revised in 2014.

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Mistake of fact: Grand Trunk Western R.R. v. Lahiff, 218 Wis. 457, 261 N.W. 11 (1935); Meeme Mut. Home Protective Fire Ins. Co. v. Lorfeld, 194 Wis. 322, 216 N.W. 507 (1927); Kowalke v. Milwaukee Elec. Ry. & Light Co., 103 Wis. 472, 79 N.W. 762 (1899). See also Ivancevic v. Reagan, 2013 WI App 121, 351 Wis.2d 138, 839 N.W.2d 416.

Reliance on medical representations: Bryan v. Noble, 5 Wis.2d 48, 92 N.W.2d 226 (1958); Schmidtke v. Great Atlantic & Pacific Tea Co. of America, 236 Wis. 283, 294 N.W. 828 (1940), and Granger v. Chicago M. & St. P. Ry., 194 Wis. 51, 215 N.W. 576 (1927).

Misrepresentations of material facts made by physician employed by the releasee, even though innocently made, constitute constructive fraud sufficient to sustain a setting aside of a release where relied on in good faith by the releasor in executing the release. The fact that such a mistake may be unilateral and not mutual is not material, because the basis for setting aside the release is the misrepresentation, not the mistake of fact. Doyle v. Teasdale, 263 Wis. 328, 343, 57 N.W.2d 381 (1953).

Inadequate consideration is given considerable significance if supported by other evidence, in establishing fraud, mistake, etc. Jandrt v. Milwaukee Auto Ins. Co., 244 Wis. 618, 626, 39 N.W.2d 698 (1949); Doyle v. Teasdale, supra at 345.

Even though the release expressly covers unknown injuries, whether the parties intended the release to cover unknown injuries is usually a question of fact. Doyle v. Teasdale, supra at 346.

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3074 ESTOPPEL: LAW NOTE FOR TRIAL JUDGES

The Committee withdrew the instruction Wis JI-Civil 3074, ESTOPPEL, and replaced it with this law note. The withdrawal is based on the Committee's determination that either of the two doctrines of estoppel recognized in Wisconsin can be best applied by the court on the basis of special fact inquiries to the jury without the necessity of specific instructions bearing on all of the elements of estoppel. Instructing on the ultimate issue of estoppel is tantamount to telling the jury what the result of the lawsuit will be. The Committee believes instructions on estoppel should be tailored to the specific facts of each individual case. Whether an estoppel results from established facts is a question for determination by the court.

There may be many situations where only one element is in dispute, such as whether a representation was made or whether a promise was made or whether there was reliance. So long as the instructions are otherwise proper and sufficient, it is immaterial that the plea of estoppel as such is not submitted under the designation of estoppel for consideration by the jury.

EQUITABLE ESTOPPEL - ESTOPPEL IN PAIS

The doctrine of equitable estoppel in pais has long been recognized in Wisconsin. An estoppel arises where a person is prevented from asserting or denying a fact because of prior conduct by which a contrary position has been admitted or implied. Such conduct may consist of action or nonaction and includes representations or silence where there is a duty to speak or respond. To apply, it is necessary that the action or nonaction of one induce another to rely thereon, to his or her detriment. The burden of proof, the middle civil burden, is upon the person asserting the estoppel.

PROMISSORY ESTOPPEL

The doctrine of promissory estoppel was first recognized in Wisconsin in Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1964). It is distinguished from equitable estoppel by the fact that it arises from an express or implied promise rather than out of action or nonaction by the other party. Promissory estoppel arises where there is a promise, express or implied, even though made without valuable exchange, if it was intended to be relied upon and if it was in fact relied upon by the other party. In addition to a promise, express or implied, it is necessary that the promisor should reasonably expect reliance by

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another which, in fact, does induce action or forbearance by the other. The burden of proof in cases of promissory estoppel is the same as in equitable estoppel.

Traditionally, the word "estoppel" is used to describe a doctrine upon which a party to a lawsuit may defend and prevent a recovery, but the doctrine of promissory estoppel provides a ground for a cause for action upon which a recovery may be made. Thus, the doctrine of promissory estoppel offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action.

COMMENT

This law note and comment were approved by the Committee in 1985. Case authority was added to the comment in 2006, 2009, 2016, and 2018.

Equitable estoppel or estoppel in pais defined: Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 46, 142 N.W.2d 218 (1966); Bratt v. Peterson, 31 Wis.2d 447, 454, 143 N.W.2d 538 (1966); Wendy M. v. Helen E.K., 2010 WI App 90 ¶ 13, 327 Wis.2d 749, 787 N.W.2d 848.

Silence: Dunn v. Pertzsch Const., Inc., 38 Wis.2d 433, 437, 157 N.W.2d 652 (1968). 28 Am.Jur.2d Estoppel and Waiver § 53 (1966); Gabriel v. Gabriel 57 Wis.2d 424, 429, 204 N.W.2d 494 (1973); 28 Am.Jur.2d Estoppel and Waiver §§ 76, 77, 78 (1966).

"Equitable estoppel" and "estoppel in pais" are terms that are interchangeable. 28 Am.Jur.2d Estoppel and Waiver §§ 26, 27, 29 (1966).

Defense of equitable estoppel is not limited to actions brought in equity, and equitable estoppel may apply to preclude assertion of rights and liabilities under a note or contract. Gabriel v. Gabriel, supra.

There is a close relationship between the doctrines of equitable estoppel and part performance. See Bunbury v. Krauss, 41 Wis.2d 522, 164 N.W.2d 473 (1969).

In Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797, the court of appeals concluded that it was not error to apply equitable estoppel to bar a defense based on the statute of limitations for contracts.

Promissory estoppel defined: Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1984); Janke Const. Co., Inc. v. Balcan Materials Co., 527 F.2d 772 (1976); Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408. Gruen Industries, Inc. v. Biller, 608 F.2d 274 (1979); Landess v. Borden, Inc., 667 F.2d 628 (1981).

Promissory estoppel as grounds for a cause of action (a sword as distinguished from a shield): Hoffman v. Red Owl Stores Inc., supra at 696.

Promissory estoppel involves a third requirement: that the remedy can only be invoked where necessary to avoid injustice. This third element involves a policy decision for the court and not for the jury. Hoffman v. Red Owl Stores, Inc., supra.

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Implied promise: see Silberman v. Roethe, 64 Wis.2d 131, 218 N.W.2d 723 (1973).

Burden of proof: see Eckstein v. Northwestern Mut. Life Ins. Co., 226 Wis. 60, 275 N.W. 916 (1937).

Facts for the jury - estoppel for the court: see Nesbitt v. Erie Coach Co., 416 Penn. 89, 204 Atl.2d 473 (1964); General Elec. Co. v. N.K. Ovalle, Inc., 335 Penn. 439, 6 Atl.2d 835, 838 (1939). See also Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408; Kramer v. Alpine Valley Resort, Inc., 108 Wis.2d 417, 321 N.W.2d 293 (1982).

Instructions proper without designating estoppel: see Darst v. Fort Dodge D.M. & S.R.R., 194 Iowa 1145, 191 N.W. 288 (1922); Miller v. Conn, 193 Iowa 458, 186 N.W. 902 (1922). Wisconsin in accord, Foellmi v. Smith, 15 Wis.2d 274, 112 N.W.2d 712 (1961).

Form of verdict for promissory estoppel: see Hoffman v. Red Owl Stores, Inc., supra.

For the award by the court of reliance damages or expectation damages: see Skebba, supra, and Tynan v. JBVBB, LLC, 2007 WI App 265, 306 Wis.2d 522, 743 N.W.2d 730.

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3076 CONTRACTS: RESCISSION FOR NONPERFORMANCE

Not every breach of a contract or failure exactly to perform entitles the other party to rescind. Rescission is not permitted for a slight, casual, trivial, or technical failure to perform the obligations of the contract.

A contract may be rescinded by a party only if the other party has breached the contract in a substantial manner so serious as to destroy the essential objects or purposes of the contract.

Where a party unjustifiably or persistently refuses to perform a material contract obligation or is so neglectful in the performance of the contract as to indicate an intention not to comply substantially with the contract, the other party to the contract is entitled to regard the attitude of the first party as a repudiation of the contract, and may rescind the contract by indicating this rescission to the first party.

COMMENT

This instruction and comment were approved by the Committee in 1975. An editorial correction was made in 2001.

17 Am. Jur. 2d §§ 503, 504; Restatement, Contracts, § 293; Appleton State Bank v. Lee, 33 Wis.2d 690, 148 N.W.2d 1 (1967); Hoffman v. Danielson, 251 Wis. 34, 27 N.W.2d 739 (1947).

Repudiations as basis for rescissions: Gedanke v. Wisconsin Evaporated Milk Co., 215 Wis. 370, 254 N.W. 660 (1934); Shy v. Industrial Salvage Material Co., 264 Wis. 118, 58 N.W.2d 452 (1953).

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3078 ABANDONMENT: MUTUAL

Obligations under a contract may be terminated if the contract is abandoned by both the parties. The abandonment of a contract is purely a matter of intent to be ascertained from the facts and circumstances existing at the time the abandonment is alleged to have occurred.

In addition to acts by the parties which would show that an abandonment has occurred, it must appear that there was an actual mutual intention to abandon the contract. Intent to abandon may be express or may be inferred from the conduct of the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Gessler v. Erwin Co., 182 Wis. 315, 340, 193 N.W. 363 (1924); 17 Am. Jur. 2d Contracts § 484.

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3082 TERMINATION OF SERVANT'S EMPLOYMENT: INDEFINITE DURATION

If a contract of employment does not specify the duration of the employment but fixes compensation at a certain amount per (week) (month) (year), and if the employee furnishes no consideration in addition to the services incident to the employment, the contract is an indefinite general hiring, terminable at the will of either party. In such circumstances, a discharge without cause does not constitute a breach of the employment contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Brown v. Oneida Knitting Mills, Inc., 226 Wis. 662, 277 N.W. 653 (1938); Saylor v. Marshall and Ilsley Bank, 224 Wis. 511, 272 N.W. 369 (1937).

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3083 TERMINATION OF SERVANT'S EMPLOYMENT: EMPLOYER'S DISSATISFACTION

If, by the terms of the employment contract, the employer may discharge the employee if the employer is dissatisfied with the employee, it makes no difference whether the employer's reasons which led to the discharge exist in fact or are merely imaginary, as long as the employer's belief is real and in good faith. That is, the employer's dissatisfaction must not be capricious or mercenary, nor result from a dishonest design to be dissatisfied.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 124, 121 N.W.2d 308 (1963); Lieberman v. Weil, 141 Wis. 635, 124 N.W. 262 (1910).

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3084 TERMINATION OF SERVANT'S EMPLOYMENT: ADDITIONAL CONSIDERATION PROVIDED BY EMPLOYEE

If an employee, in connection with a contract or agreement of employment, furnishes some consideration to his or her employer in addition to his or her normal services, the employee can be discharged only for cause or for justifiable reasons. Consideration is defined as anything of substantial value contributed by the employee to the employer. Cause is defined as action which shows a substantial disregard for the interests of the employer.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Forrer v. Sears, Roebuck & Co., 36 Wis.2d 388, 153 N.W.2d 587 (1967); California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 126, 121 N.W.2d 308 (1963).

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3086 REAL ESTATE LISTING CONTRACT: VALIDITY: PERFORMANCE

A contract, to constitute a valid real estate listing contract, must, in writing, describe the real estate, express the price for which the same may be sold, the commission to be paid, and the period during which the agent or broker shall procure a buyer. The contract must be complete at the time it is signed by the person agreeing to pay the commission.

Before a real estate broker is entitled to any commission under a real estate listing contract, the broker must procure a purchaser who is ready, willing, and able to meet the express terms of the listing contract. (A seller has the right to reject an offer that does not conform to the terms specified in the listing contract. When a seller refuses to accept an offer which is substantially in accordance with the listing contract, but which contains variances from the terms of the listing contract, the seller to relieve himself or herself from liability for the broker's commission must, when rejecting the offer, point out the variances to the broker so that the broker may be afforded an opportunity to obtain an offer that does comply. However, where the variance is a substantial one, such as one that is directly in conflict with a material provision in the listing contract, then there has been no substantial performance by the broker which would entitle the broker to the commission and the owner is under no obligation to specify the reasons for rejection.)

To "procure a purchaser" means to obtain an unequivocal written offer, which in this case means an offer to pay $_____ at the time the seller specifies.

A purchaser must be ready, willing, and able to pay $_____. All three elements must exist before it can be said that the broker has procured a purchaser. The purchaser must not only be ready and willing, but must be able to pay $_____. The purchaser

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need not have the required cash in hand, but must be able to command the necessary funds at the required time.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was revised in 2019.

Substantial Variance. Sellers can reject an offer to purchase without giving a reason and without triggering a broker's entitlement to a commission if there are "substantial" variances between the terms of the listing contract and the terms of the offer. Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964). Subsequent to the Kleven decision, the court held in Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W.2d 439 (1967) that offer terms may constitute a "substantial variance" only if they directly conflict with express terms specified in the listing contract. No conflict or tension was observed between Kleven and Libowitz when the court examined both in Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972) and the implicit conclusion was that they present the same standard. Kleven thus remains the law with regard to determining whether a substantial variance exists between the listing contract and the offer to purchase. Although a term of the offer to purchase that is directly in conflict with the listing contract is a substantial variance, it is not the sole manner in which substantial variance may be shown. Kleven offered direct contradiction as an example, not as a limitation. McNally v. Capital Cartage, Inc., 2018 WI 46, ¶ 41, 381 Wis. 2d 349, 365, 912 N.W.2d 35, 43.

Wis. Stat. § 240.10; this section is an extension of Statute of Frauds; it requires that the listing contract be signed by the person who is to pay the commission. It does not indicate which of multiple owners must sign the contract, nor apply to the question of whether or not a sale must be consummated. Winston v. Minkin, 63 Wis.2d 46, 216 N.W.2d 38 (1974).

Sale price or rentals must be specified. Wozny v. Basack, 21 Wis.2d 86, 123 N.W.2d 513 (1963); Buckman v. E. H. Schaefer & Associates, Inc., 50 Wis.2d 755, 185 N.W.2d 328 (1971).

"Able to purchase" in a situation where the buyer must borrow means that a mortgagee or other lender must have made commitment to loan. Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972).

At time of rejection, the seller must specify insubstantial variances in order to avoid paying the commission. Libowitz v. Lake Nursing Home, Inc., 35 Wis.2d 74, 150 N.W.2d 439 (1967).

For damages in this situation, see Wis JI-Civil 3740.

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3088 REAL ESTATE LISTING CONTRACT: TERMINATION FOR CAUSE

A real estate broker employed by a seller under a real estate listing contract is bound to exercise reasonable care and skill. The broker must exert himself or herself with reasonable diligence in endeavoring to make a sale of the property to the best advantage of the seller. The seller is entitled to the benefit of the broker's skill, knowledge, and best judgment in effecting a sale of the property.

A real estate broker's failure to perform his or her duty, or negligence, or misconduct on the broker's part, may constitute cause which would justify termination by the seller of the listing contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

12 Am. Jur. 2d § 96.

For damages in this situation, see Wis JI-Civil 3740.

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3090 REAL ESTATE LISTING CONTRACT: BROKER'S COMMISSION ON SALE SUBSEQUENT TO EXPIRATION OF CONTRACT CONTAINING "EXTENSION" CLAUSE

The real estate listing contract involved in this case provided that the contract was to be in effect until _____, and, in addition, provided that if a sale was made during an extended period of _____ months after that date, to a person with whom the broker had negotiated during the term of the contract, then the broker was entitled to the commission.

A broker who works under such a contract is entitled to a commission if two conditions are satisfied; first, if a sale is made during the extended period of the contract to a person (called the actual purchaser) with whom the broker dealt during the original stated term of the contract; second, if the dealing went to a point where that person could be considered a likely purchaser before the original period of the contract expired.

In determining whether the actual purchaser in this case was a likely purchaser in the meaning of the law, you should consider whether under all the facts and circumstances it was probable that as a result of the broker's activity the purchaser would make an acceptable offer during the extended period.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Jessup v. LaPin, 35 Wis.2d 186, 150 N.W.2d 342 (1967); 51 A.L.R.2d 1149, 1158, 1181.

This instruction is to be given only if the real estate listing contract contained a subsequent sale "extension" clause and if the sale or exchange was made within the terms of such extension of seller's liability to broker.

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3094 RESIDENTIAL EVICTION: POSSESSION OF PREMISES[1]

The plaintiff, who has also been referred to as landlord,[2] claims that the defendant was (his) (her) (its) tenant at a property located at (address) and that the defendant breached their lease agreement[3] by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)]. The plaintiff is asking that the defendant(s) be evicted and possession of (address) be returned to the plaintiff. The defendant(s) deny(ies) that (he) (she) (they) should be evicted and that [(he) (she) (they)] [(is) (are)] entitled to remain in possession of (address) as [(he) (she) (they) did timely pay the rent], [the alleged (breach) (waste) did not occur] [the (breach) (waste) was corrected within the time specified in the notice].[4]

In order for you to find in favor of the plaintiff/landlord, the plaintiff/landlord must prove by the greater weight of the credible evidence, to a reasonable certainty, all of the following;

1. that there was a valid lease with the defendant(s),
2. that the defendant(s) breached the lease by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)], and
3. that the defendant(s) (was) (were) given the required written notice and did not comply with the notice.

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Lease

The plaintiff must first prove by the greater weight of the credible evidence, to a reasonable certainty, that a lease existed. A lease is an agreement in which one party, the landlord, transfers the right to the possession of real property to another person for a definite period of time. [You will hear testimony from the parties regarding the issue of the lease for the property at (address)]. The plaintiff has the burden to prove to you by the greater weight of the credible evidence that the lease existed and that the defendant breached one or more conditions of the lease agreement by [not paying rent when due/committing waste/breach of condition of lease].

WRITTEN NOTICE

The plaintiff must also prove by the greater weight of the credible evidence, to a reasonable certainty, that proper notice was given to the defendant(s). Before a landlord can evict a tenant for a breach of a lease agreement a landlord is obligated by law to give their tenant written notice. The landlord must give notice by one of the following methods: [choose applicable provisions]

a. By giving a copy of the notice personally to the tenant or by leaving a copy at the tenant's usual place of abode in the presence of some competent member of the tenant's family at least 14 years of age, who is informed of the contents of the notice.

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b. By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last known address.

c. If notice cannot be given by either (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last known address.

d. By mailing a copy of the notice by registered or certified mail to the tenant at the tenant's last-known address.

e. By serving the tenant as prescribed in s. 801.11 for service of a summons.

Actual Notice Wis. Stat. 704.21(5) (if applicable)[5]

If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence.

Type of Notice

In this case the landlord was required to provide the following notice; [choose applicable provision]:

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A. <u>Month-to-Month & Week-to-Week Tenancies</u>[6]:

1. **<u>Failure to pay rent</u>: 5-Day:** If (a month-to-month) (a week-to-week) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay.

2. **Failure to pay rent/Waste: 14-Day:** A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, commits waste, or breaches the lease other than for payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the notice is given.[7]

3. **Waste: 5-Day:** If a month-to-month tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

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4. **[Drug/Gang House notification by law enforcement: see §704.17(1p)(c) – 5 day notice]**

B. One Year Or Less & Year-To-Year Tenancies[8]:

1. **Failure to pay rent: 5-Day:** If (a one year or less) (a year-to-year) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay accordingly.

2. **Failure to pay rent: 14-Day:** If a tenant within the prior year has been given written notice of failure to pay rent and the tenant fails to pay a subsequent installment of rent on time the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

3. **Waste: 5-Day:** If (a one year or less) (a year-to-year) tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable

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diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. **Waste: 14-Day:** If a tenant within the prior year has been given written notice of committing waste or a breach of the lease other than for payment of rent and the tenant again commits waste or breaches the same or any other condition of the lease other than for payment of rent, the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

5. **[Drug/Gang House notification by law enforcement: see § 704.17(2)(c) – 5 day notice]**

C. Lease For More Than One Year[9]:

1. **<u>Failure to pay rent, waste, or other breach</u>: 30-Day:** If a tenant under a lease for more than one year fails to pay rent when due, or commits waste or breaches the lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

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2. **[Drug/Gang House/Criminal activity notification by law enforcement: see § 704.17(2)(c) & (3m) – 5-day notice]**

Failure to Comply With Notice

If you find that the plaintiff gave valid notice to the defendant(s), then the plaintiff must prove to you that the defendant(s) did not comply with the notice as: [give as appropriate from evidence received]

A. **Failure to pay rent:** Defendant(s) failed to pay the rent within 5 days after the 5-day notice was received,

B. **Waste or Breach:** Defendant(s) did not within 5 days after notice was received [promptly take reasonable steps to remedy the breach], [proceed with reasonable diligence to repair the damage or correct the breach], [make a bona fide and reasonable offer to pay the landlord all damages for the breach].

[NOTE: Valid 14-day notices have no remedy for defendant but may require an inquiry on the special verdict as to whether the tenant, within the prior year, had been given written notice of a prior breach]

SPECIAL VERDICT: Eviction: Possession of Premises

We, the jury find as follows:

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[If the lease period is (week-to-week) (month-to-month), use the following special verdict when 5-day notice at issue]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes_____ No

Question 3: Did [the tenant(s)] pay the full amount of the past due rent within the 5-day notice period?

Answer: _____ Yes_____ No

[If the lease period is month-to-month, use the following special verdict when 5-day notice for waste or other breach at issue]:

Question 1: As of [date], had the [tenant(s)] committed waste or otherwise breached the lease?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to repair or fix the damage or other breach or vacate the premises?

Answer: _____ Yes_____ No

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Question 3: Did [the tenant(s)] comply with the notice by [promptly taking reasonable steps to remedy the breach and proceeding with reasonable diligence] [making a bona fide and reasonable offer to pay the landlord all damages for the breach within the 5-day notice period]?

Answer: _____ Yes_____ No

[If the lease period is month-to-month, use the following special verdict when 14-day notice is alleged]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

[Alternate Question 1]: As of [date of waste or other breach], did [the tenant(s) (commit waste) (breach the lease)]?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate the premises?

Answer: _____ Yes_____ No

[If the lease period is year-to-year or one year or less use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

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Question 2: Did [the landlord] properly provide a 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes_____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 5-day notice period?

Answer: _____ Yes_____ No

[use if a 14-day notice has been given alleging a prior notice within a year]:

Question 1: Within the prior year had [the tenant(s)] failed to pay rent when due and been given prior written notice to pay rent or vacate the premises?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate?

Answer: _____ Yes_____ No

[If the lease period is for more than one year use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

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Question 2: Did [the landlord] properly provide a 30-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 30-day notice period?

Answer: _____ Yes _____ No

Dated _____

Presiding Juror:

_____

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

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Alternate Special Verdict

Special Verdict Question No. 1:

Who Is Entitled To Possession of (address): (circle party entitled to possession of the premises):

Plaintiff/Landlord or Defendant/Tenant

Dated this __ day of _____, 20____.

_____

Foreperson

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

COMMENT

The instruction and comment were approved by the Committee in 2019. An editorial correction was made to the comment in 2020.

This instruction is created as a result of § 799.20(4) which requires that in a "residential eviction action" a jury or court trial on the issue of "possession of the premises" must be held within 30 days of the return date if the defendant "claims a defense to the action." This instruction addresses the instructions and special verdict required for deciding the eviction; i.e. who is entitled to the possession of the premises.

The reader should be aware that there is a discrepancy in the statutes; as noted § 799.20(4) requires a trial if a defendant "claims a defense" to the eviction action at the return date, whereas § 799.206(3) states that in an eviction action if a party at the return date "raises valid legal grounds for a contest," then the matter is to be scheduled for a "hearing" before a judge (not a court commissioner) within 30 days of the return date. We leave to you the significance, if any, regarding the competing language in the above statutes.

Residential Rental Practices are regulated in Wisconsin in Chapter 134 ATCP, Wis. Admin. Code and the reader should modify any instructions per the code provisions. Substantive statutes regarding

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Landlord and Tenant are found in Chap. 704 Wis. Stats., and procedural rules regarding eviction actions are found in Chap. 799 Wis. Stats., (Small Claims).

1. § 799.20(4).
2. ATCP 134.02(5)
3. ATCP 134.02(6) (10) & §704.01(1)
4. ATCP 134.02(9)
5. § 704.21(5)
6. § 704.17(1p)
7. § 704.17(1p)(a) & §704.17(b)(2)
8. § 704.17(2)
9. § 704.17(3)

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3095 LANDLORD-TENANT: CONSTRUCTIVE EVICTION

Constructive eviction consists of any disturbance of the tenant's possession of property by the landlord (or someone acting under the landlord's authority) which renders the premises unfit for occupancy for the purposes for which they were leased or which deprives the tenant of the beneficial enjoyment of the premises if:

- the landlord is given notice of the disturbance of possession and fails to remedy the disturbance within a reasonable time;
- the tenant abandons the premises within a reasonable time of the disturbance of possession; and
- the disturbance of possession caused the tenant to abandon the premises.

The disturbance must be substantial and of such duration that is can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time.

SPECIAL VERDICT

Was (plaintiff) constructively evicted?

Answer: _____
Yes or No

COMMENT

This instruction and comment were originally approved in 1987 and revised in 2012.

Whenever a constructive eviction takes place, the tenant is released from the obligations under the lease to pay rent accruing after the eviction. First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis.2d 258, 268, 286 N.W.2d 360, 365 (1980). In First Wisconsin, the court explicitly required that the tenant abandon the premises for there to be a constructive eviction.

Wis. Stat. § 704.07, deals with the physical condition of property, rather than a disturbance of tenant's possession by the landlord, but likewise allows a tenant to leave the premises and not be responsible for further rent if the premises become untenantable. The statute forbids a tenant from withholding rent in full if the tenant maintains possession of the premises and, instead, provides for an abatement of rent.

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3100 INSURANCE CONTRACT: MISREPRESENTATION OR BREACH OF AFFIRMATIVE WARRANTY BY THE INSURED

The first question in the verdict calls upon you, the jury, to determine whether the statement made and inquired about in the question was false. (A representation) (An affirmative warranty) is a statement of fact made in connection with the negotiation or procurement of an insurance policy. Such (representations) (affirmative warranties) must be true.

[If you answer the first question "yes," and thus find that the representation was false, the second question calls upon you to determine if (name of the person making the statement) knew or should have known that the representation was false.

[The (third) question requires you to determine if (insurer) had knowledge of the true or correct fact regarding (summarize false statement made in negotiating or procuring the insurance policy) at the time it issued the policy. Knowledge of an agent of the company constitutes knowledge in the company of the true or correct fact. [Caution - See Wis. Stat. § 631.11(4)(a) - knowledge of agent is not constructive knowledge to company if application is in insured's handwriting.] You will, therefore, determine whether an agent or the company had knowledge of the true fact, whether obtained from the applicant for insurance or from other sources at the time the policy was issued.]

The (fourth) question asks you to determine if the fact that was allegedly (misrepresented) (falsely warranted) contributed to the loss that was incurred.

The (fifth) question asks whether (the insurer) relied upon the statement made by (insured) in negotiating or procuring the insurance policy. An insurer relies upon the statement when the insurer acts on a statement believing it to be true.

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The (sixth) question asks whether the statement made is material to a determination to issue a policy and insure a risk such as those at issue here. A statement is material when it has a significant bearing upon an insurer's decision to insure the risks the policy is to cover.

The (seventh) question asks whether there was "intent to deceive." The word "intent" has been defined as a mental attitude made known by acts and, also, as a state of mind which precedes or accompanies an act. To "intend" means a present intention to do something. To "deceive" means to ensnare or mislead; to cause to believe the false or disbelieve the truth.

SPECIAL VERDICT (UNDER WIS. STAT. § 631.11(2))

Question 1: Did (plaintiff) make a false (representation) (affirmative warranty) to the effect that (recite alleged representation or warranty made) in negotiating for or procuring the insurance policy?

Answer:_____

Yes or No

[Include the next question only in actions commenced after May 6, 1996, and only if the statement involved is a representation and not an affirmative warranty. See Comment below.]

Question 2: If you have answered question 1 "yes," then answer this question: Did (plaintiff) know, or should (plaintiff) have known, that this representation was false?

Answer:_____

Yes or No

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[Committe Note: Include the next question only in actions involving the insurer's knowledge of the true facts. See Comment below.]

Question 3: If you have answered (Question 1) (Questions 1 and 2) "yes," then answer this question: Did (insurer) have knowledge of the true fact regarding (recite the representation or affirmative warranty made) at the time it issued the policy?

Answer:_____

Yes or No

Question 4: If you have answered (Question 3 "no" and) (Question 1) (Questions 1 and 2) "yes," then answer this question: Did the true fact regarding (recite the representation or affirmative warranty made) contribute to the loss sustained?

Answer:_____

Yes or No

Question 5: If you have answered (Question 3 "no" and) (Question 1) (Questions 1 and 2) "yes," then answer this question: Did the (insurer) rely upon the (representation) (affirmative warranty) made by (plaintiff)?

Answer:_____

Yes or No

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Question 6: If you have answered question 5 "yes," then answer this question: Was the (representation) (affirmative warranty) material to the determination by (insurer) to issue coverage such as that offered by the policy?

Answer:_____

Yes or No

Question 7: If you have answered question 5 "yes," then answer this question: Was such (representation) (affirmative warranty) made by (plaintiff) with intent to deceive (insurer)?

Answer:_____

Yes or No

COMMENT

This instruction and comment were revised in 1998. The revisions constitute a revamping of the old Civil JI-3100, approved in 1980.

Wis. Stat. § 631.11(1) relieves an insurance company of its obligations under an insurance policy if information supplied by the insured during the negotiation or procurement of the policy (1) appears in the stated format, (2) constitutes a misrepresentation or breach of an affirmative warranty, and (3) has the specified effect.

The Format. Wis. Stat. § 631.11(1)(a) states that representations or warranties made in negotiating or procuring an insurance policy may not be used by the insurer to escape its obligations under the policy unless they are stated in the policy, in the application for the policy (and the application is attached to the policy), or in a written communication provided by the insurer to the insured within 60 days after the effective date of the policy.

Misrepresentation or Breach of an Affirmative Warranty. Wis. Stat. § 631.11(1)(b) states that only a misrepresentation or a breach of an affirmative warranty made by a person other than the insurer or an agent of the insurer will affect the insurer's obligations under the policy; however, for actions commenced after May 6, 1996, a misrepresentation qualifies only if the person knew or should have known that the representation was false. Generally, the determination as to whether a statement is a representation or affirmative warranty is a matter of law to be determined by the trial judge.

A representation is a statement that precedes the contract of insurance (and is not part of the contract unless otherwise stipulated) and that relates to the facts needed by the insurer to decide whether it will accept the risk, and at what premium. Lee R. Russ and Thomas F. Segalla, Couch on Insurance 3d, 81:5 (1996). An affirmative warranty, on the other hand, is a statement of fact that appears in the insurance contract and is a condition precedent to the validity of that contract. Id. at 81:13. If there is some doubt as to the nature of a

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statement, and if the contract itself does not make a designation, the statement should be construed as a representation. Id. at 81:28. In terms of the formats allowed by Wis. Stat. § 631.11(1)(a), it could be said that representations will generally appear in the application for the policy or in a written communication provided by the insurer to the insured within 60 days after the effective date of the policy and affirmative warranties will generally appear in the policy itself.

In the event the issue is raised that the company gained knowledge of the misrepresentation or breach of an affirmative warranty, then the trial judge must ask the jury when the company learned of the misrepresentation or breach of an affirmative warranty. Under Wis. Stat. § 631.11(4)(a), the false statement does not affect the insurer's obligations if, at the time the policy is issued, the insurer has knowledge of the true facts. Wis. Stat. § 631.11(4)(b) provides that if, after issuance of a policy, the company acquires knowledge of sufficient facts to rescind or constitute a general defense to all claims under the policy, the defenses are not available unless the company notifies the insured within 60 days after acquiring such knowledge of its intention to defend against a claim if one should arise (or within 120 days if it is deemed necessary by the insurer to secure additional medical information). Under Wis. Stat. §§ 631.09(1) and 631.11(4)(a), an insurer is deemed to know any material fact that is known by an agent of the insurer who is involved with the transaction unless the application is in the handwriting of the applicant.

Note also two related situations to which Wis. Stat. § 631.11(1) does not apply. Where the misrepresentation relates to the information contained in the "proof of loss," as opposed to the application, see Tempelis v. Aetna Casualty & Surety Co., 164 Wis.2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), in which the Third District Court of Appeals held that the language of § 631.11(2) [renumbered § 631.11(1)(b)]" . . .applies a reliance requirement only to misrepresentations made in the negotiation or application for insurance." Also, breach of a promissory warranty is governed by Wis. Stat. § 631.11(3). See Wis JI-Civil 3105. A promissory warranty is an obligation that remains in effect for the duration of the policy.

The Effect. To relieve an insurer of its obligations under the policy, the fact that is falsely stated must (1) contribute to the loss, or (2) be relied upon by the company, and must be either (a) material, or (b) made with intent to deceive. Thus, if the insured's misrepresentation or false affirmative warranty during the negotiation or procurement of the policy is made with "intent to deceive," and it is relied upon by the company, there need be neither materiality of the misrepresentation or false affirmative warranty nor contribution to the loss by the fact misrepresented or falsely warranted to relieve the company of its obligations under the contract. Likewise, if the fact misrepresented or falsely warranted contributes to the loss (for example, the loss is a fire and the insured had falsely claimed to have a sprinkler system), there need be neither materiality nor intent to deceive.

Verdict. A verdict should be prepared to cover: (1) whether there was a misrepresentation or breach of affirmative warranty; (2) whether, if there was a misrepresentation, it was known or should have been known by the applicant for actions commenced after May 6, 1996; (3) whether, if there was a relevant false statement, the insurer knew the true facts; whether, if there was a relevant false statement and the insurer did not know the true facts; (4) the fact misrepresented or falsely warranted contributed to the loss, or (5) the company relied on the misrepresentation or affirmative warranty; and whether the relied upon misrepresentation or affirmative warranty was (6) material to the company's decision to issue the policy or (7) made with intent to deceive. As indicated above, to relieve an insurer of its obligations under the policy, the jury must answer "yes" to question 1 and any question 2, and must answer "no" to any question 3, at which point it is sufficient for the jury to:

Answer "yes" to question 4,

or

Answer "yes" to question 5 and answer "yes" to either question 6 or question 7.

Thus, the verdict could be structured so that the jury need answer no further questions if the insurer prevails on either question 4 or questions 5 to 7. However, the Committee decided that the jury should answer all questions in the interest of judicial economy in case any part of the verdict is challenged.

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Also note that not all cases will require inquiry into all statutory elements, so the verdict questions should relate only to the issues disclosed by the evidence, and only those portions of the above instructions that relate to the questions that are ultimately in the verdict should be used.

Burden of Proof. The burden of proof as to all questions covered by the instruction is upon the insurance company and is the middle burden. See Wis JI-Civil 210.

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3105 INSURANCE CONTRACT: FAILURE OF CONDITION OR BREACH OF PROMISSORY WARRANTY

The policy issued by the insurance company provides (recite the condition or promissory warranty contained in the policy). The first question of the verdict merely inquires whether there was (a failure of this condition or breach of this promissory warranty) that existed at the time of the loss in question, and in this case specifically whether there was (a failure to have a night watchman on the premises, there were inflammables stored on the premises) at the time the (fire occurred) (loss was sustained).

If you have answered the first question finding a failure of this condition of the policy in existence at the time of the loss, then you will answer the second question which I have just read to you. The word "risk" refers to the risks the company insured against in its policy. Risk is increased whenever the chance of loss is increased by a failure of the condition or breach of promissory warranty.

If you have answered the first question finding a failure of this condition of the policy, then you will answer this second question which I have just read to you. "To contribute to the loss" means simply whether the (use of the premises for storage of inflammables) was a factor contributing to the loss. This does not mean that (the prohibited storage of inflammables) has to be the sole cause of the fire or even a cause of the fire itself. Any contribution whether great or small to the loss or the extent of the loss that (the storage of inflammables) had is sufficient.

COMMENT

This instruction and comment were approved by the Committee in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

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Wis. Stat. § 631.11(3) (1977). The burden of proof is upon the insurance company as to all questions and it is the middle burden. See Wis JI-Civil 210.

Warranties are of two kinds, affirmative and promissory. Failures of condition and breach of promissory warranty are closely related and for most purposes can be treated as synonymous. Promissory warranties are those that require that something shall or shall not be done after the policy takes effect. Therefore, the above instruction is framed in terms of failure to have a night watchman on the premises and storage of inflammables so as to give examples of what breach of promissory warranty or condition might give rise to the "increase in risk" and "contribution to the loss" the statute speaks of.

This instruction is patterned after Wis. Stat. § 631.11(3) and in part on Polar Mfg. Co. v. Integrity Mut. Ins. Co., 7 Wis.2d 443, 96 N.W.2d 822 (1959).

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3110 INSURANCE CONTRACT: DEFINITION OF "RESIDENT" OR "MEMBER OF A HOUSEHOLD"

Question No. ___ asks was _____ a resident of _____'s household at the time of the (accident) (injury).

A resident of a household is one, who, in a manner consistent with the closeness of a family or household, lives under the same roof.

However, a person may be a resident of more than one household for insurance purposes. Residents of a household are not required to live under the same roof to be considered part of the same household for insurance purposes provided they have the intent to return to live under the same roof.

Factors you may consider in determining residency include:

- The subjective or declared intent to return, if any, and actions evidencing this intent;
- Whether the parties live in a close, intimate, and informal relationship;
- Whether the intended duration of the relationship is likely to be substantial;
- Whether it is reasonable to conclude that the parties would consider the relationship when contracting for insurance;
- The age of the respective parties;
- Whether a separate residence is established;
- The self-sufficiency of the person;
- The frequency and duration of stays in the residence;
- Whether personal possessions remain in the home;

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- Whether a person is driving or has the opportunity to drive cars interchangeably rather than by merely causal use; and,
- Whether the residence continues to be the mailing address of the parties.

A determination of residency is based upon the facts of each individual case. Consider all of the relevant facts and circumstances in determining whether _____ was a resident of _____'s household at the time of the (accident) (injury). No single factor is controlling, but all of the elements must combine to a greater or lesser degree to establish the relationship.

The burden of proof on the issue of whether _____ was a resident of _____'s household is upon (plaintiff).

If, after review of all the facts and circumstances in this case you find that (plaintiff) was a resident of _____'s household at the time of the (accident) (injury), you should answer question _____ on the Special Verdict "yes." If not, you should answer that question "no."

COMMENT

This instruction and comment were approved in 2002 and revised in 2012. The comment was also updated in 2003.

Muskevitch-Otto v. Otto, 2001 WI App 242, 248 Wis.2d 1, 635 N.W.2d 611 (Ct. App. 2001); Seichter v. McDonald, 228 Wis.2d 838, 845, 599 N.W.2d 71, 74 (Ct. App. 1999); Ross v. Martini, 204 Wis.2d 354, 555 N.W.2d 381, (Ct. App. 1996); Londre v. Continental Western Ins. Co., 117 Wis.2d 54, 58, 343 N.W.2d 128 (Ct. App. 1983); Belling v. Harn, 65 Wis.2d 108, 112-114 (1974); Pamperin v. Milwaukee Mutual Ins., 55 Wis.2d 27, 35-37, 197 N.W.2d 783 (1972); Doern v. Crawford, 30 Wis.2d 206, 140 N.W.2d 193 (1966); National Farmers Union Property & Casualty v. Maca, 26 Wis.2d 399, 407-408 (1965).

Resident; Member. Although not explicitly stated, the terms "resident" or "member" of a household appear to be equivalent. The Supreme Court has used them interchangeably. Belling, pp. 109, 111; Pamperin, pp. 33-34.

The term "resident or member of the same household" as used in policies of automobile liability insurance is not ambiguous. It should be given its plain and common meaning regardless of whether it is used to define exclusion or inclusion from coverage or whether the question is one of creating or terminating the relationship. Pamperin, p. 37.

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Factors. No single factor is the sole or controlling test of whether a person is a resident of a household. Londre, p. 54. The issue of residency for insurance purposes "is fact specific to each case." Seichter, p. 845. The Seichter court approved use of considerations from a Minnesota case, Schoer v. West Bend Mutual Ins. Co., 473 N.W.2d 73, 76 (Minn. App. 1991) which had been cited with approval in Ross v. Martini, supra. The list of factors in paragraph 4 is not exhaustive.

Unmarried persons can be residents of the same household, but whether they are depends on the facts in each case. Quinlan v. Coombs, 105 Wis.2d 330, 333, 314 N.W.2d 125, (Ct. App. 1981).

Residence Distinguished from Domicile. "It might be said that 'domicile' includes residence, but 'residence' does not necessarily include domicile. Domicile is generally regarded as the place where a man has his fixed and permanent home or residence to which he intends to return whenever he is absent therefrom." Estate of Daniels, 53 Wis.2d 611, 614-5 (1971).

The length of time necessary to establish residency for insurance purposes is sufficient if "the intended duration is likely to be substantial." Pamperin, p. 37 "[W]hile the intended duration does not require the permanency generally associated with the establishment of a legal domicile, something more is required than a mere temporary sojourn." Pamperin, p. 35.

Thus, a person may have only one domicile but may have more than one household for insurance purposes. Londre, p. 58.

Children. A child placed in a family-operated foster home pursuant to a court dispositional order under sec. 48.34 Stats. is considered a resident of that household for insurance purposes. A.G. v. Travelers Ins. Co., 112 Wis.2d 18, 24 (Ct. App. 1983).

The intent of minor children of divorced parents is discussed in Ross v. Martini, supra, pp. 358-9. Where the child is of tender years, the finder of fact would look to the intent of the child's parent or custodian. Muskevitch-Otto v. Otto, par. 9 p. 8. Generally, the issue of residence for minor children of divorced parents is "inexorably linked" to custody provided in the divorce decree. Ross, p. 359. It is possible in joint custody situations for children to be members of both parents' households for insurance purposes. Londre, supra, p. 59.

Divorce. As a matter of public policy, removal from a household following commencement of divorce proceedings and during the pendency of the action is not a factor to be given weight in determining residency in a family household. Language to the contrary in the Doern case is withdrawn. Belling v. Harn, 65 Wis.2d 108, 115-116, 221 N.W.2d 888 (1974). However, this modification of Doern appears to be limited to divorce proceedings. Seichter, p. 843, fn. 1.

Intent. While Pamperin, pp. 35, 37, Seichter, pp. 843-844, and other cases hold that no one element is controlling on the question of household membership, and an individual's subjective or declared intent, while a fact to be considered, is also not controlling, the Court of Appeals in Muskevitsch-Otto v. Otto supra, approved an instruction which made intent "the key element." The instruction provided that "In deciding whether a person is a resident of a particular household, **the** key element is the intent of that person to be a resident of the household in question and to live under the same roof . . . ." (emphasis supplied). In harmonizing these decisions, the Committee believes that because of the fact-driven nature of these cases, intent might assume more importance in a particular situation. However, none of the Pamperin elements (including intent) predominates as a matter of law. Until further guidance on this issue is received from the appellate courts, the Committee believes the more prudent course is to follow Pamperin and Seichter.

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"In Your Care" Policy Language. For cases involving policy language dealing with the term "in your care," see also, Cierzan v. Kriegal, 2002 WI App 317, 259 Wis.2d 264, 655 N.W.2d 217. In this decision, the court of appeals listed the relevant considerations in determining whether a person is in the care of the insured.

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3112 OWNER'S PERMISSION FOR USE OF AUTOMOBILE

If an owner of an automobile gives his or her permission to another to use his or her automobile, that person has the right to use the vehicle as long as he or she does not substantially violate the terms and conditions placed upon its use by the owner.

An owner of an automobile may restrict or limit the length of time or the kind of use to which the automobile is to be put by the person using it.

If the person, to whom permission was given by the owner, does not obey the restrictions placed upon its use, as those restrictions relate to a period of time, or the purpose for which the car was to be used, and you determine that the use was a substantial deviation from the restrictions placed by the owner at the time permission for its use was granted, then you must find that the use of the car was not within the scope of permission.

As used in this instruction, the term "substantial deviation" means that the person borrowing the car exceeded the scope of the permitted use significantly in a way that was clearly not in the contemplation of the parties at the time permission was initially granted by the owner.

[A person who uses a car with the owner's permission may allow another person to drive it unless expressly prohibited by the owner from so doing and so long as such driving is within the scope of the permission granted by the owner. Any express prohibition by the owner against another person's driving the car is a valid restriction and must be recognized by you as binding upon the person to whom permission was initially granted.]

The limitations, if any, upon the scope or extent of the permission must be determined from the understanding, either express or implied, between the owner and the person using

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the car. This understanding is to be determined from all of the facts and circumstances surrounding the granting of permission.

It is for you, the jury, to determine whether under the facts of this case, the owner did restrict the permission given by limiting the time or purpose of such use, and if you find that there were restrictions, whether the user substantially deviated from those restrictions placed upon the car's use by the owner.

COMMENT

This instruction and comment were originally approved by the Committee in 1980. The instruction was revised in 1992. The comment was updated in 1992.

Wis. Stat. § 632.32.

Krebsbach v. Miller, 22 Wis.2d 171, 125 N.W.2d 408 (1963). Employers Ins. Co. v. Pelczynski, 153 Wis.2d 303, 451 N.W.2d 300 (Ct. App. 1989). As to statutory purpose for the benefit of injured persons, see Pavelski v. Roginski, 1 Wis.2d 345, 84 N.W.2d 84 (1957). Prisuda v. General Cas. Co., 272 Wis. 41, 74 N.W.2d 777 (1956). 7 Am. Jur.2d Automobile Insurance §§ 109-126 at 420-446 (1963). An insured to whom a policy has been issued and who has the complete possession and control of the vehicle is considered to be an "owner" under these instructions. See 7 Am. Jur.2d Automobile Insurance § 115 at 428 (1963).

Where a minor is the real owner of the vehicle and is exercising an owner's control over the vehicle, and where title of the car and insurance has been taken in the name of the father as a matter of convenience or economy, when the son loans the vehicle to another the father's consent or permission is presumed as a matter of law. No jury issue is presented. Nordahl v. Peterson, 68 Wis.2d 538, 229 N.W.2d 682. American Family Mutual Ins. Co. v. Osusky, 90 Wis.2d 142, 279 N.W.2d 719 (Ct. App. 1979).

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3115 FAILURE OF INSURED TO COOPERATE

Question ____ inquires whether the insured, ____, failed to cooperate with his or her insurer, _____, in its defense.

Cooperation does not mean that _____, the insured, is to combine with _____, the insurer, to present a sham defense. Cooperation does mean that there shall be a fair, frank and truthful disclosure of information reasonably demanded by the insurer for the purpose of enabling it to determine whether or not there is a genuine defense.

An insurer must have from the insured a complete and truthful statement of the facts in order to prepare an adequate defense in cases of contested liability or to prepare a just settlement. This statement must be made in a spirit of cooperation and helpfulness by the insured, who is in many cases the only source of information available to the insurer. Any untruthful statement or testimony must be made consciously, that is, it must be deliberate and willful falsification.

The burden of proof with respect to your answer to this question is upon the insurer, _ ___, who contends that you should answer this question "yes."

COMMENT

This instruction was approved by the Committee in 1967. The comment was updated in 1980 and revised in 2016. An editorial correction was made in 1996.

As to the first paragraph, see Buckner v. General Cas. Co., 207 Wis. 303, 309, 241 N.W. 342 (1932); Dietz v. Hardware Dealers Mut. Fire Ins. Co., 88 Wis.2d 496, 276 N.W.2d 808 (1979); McDonnell v. Hestnes, 47 Wis.2d 553, 177 N.W.2d 845 (1970).

As to the second paragraph, see Kurz v. Collins, 6 Wis.2d 538, 546, 95 N.W.2d 365 (1958); Buckner v. General Cas. Co., supra at 309.

Over-cooperation is not a failure to cooperate, Buchberger v. Mosser, 236 Wis. 70, 75, 294 N.W. 492 (1940).

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Willful refusal to verify an answer is noncooperation, Jenkinson v. New York Cas. Co., 241 Wis. 328, 332, 6 N.W.2d 192 (1942).

The question of noncooperation should be tried after the trial on the negligence liability issue. Kurz v. Collins, supra at 549-550.

With respect to the defense of noncooperation by a motor vehicle liability insurer, Wis. Stat. § 632.34 (1979) states that such defense is not effective against a third person making a claim, unless there was collusion between the third person and the insured or unless the claimant was a passenger in the insured vehicle.

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3116 FAILURE TO COOPERATE: MATERIALITY

Question _____ inquires whether the failure of the insured, _____, to cooperate with the insurer, _____, in its defense was so material as to prejudice _____, the insurer.

By your answer to this question, you are to determine whether the (false statements) (false testimony) (were) (was) harmful, injurious, or damaging to _____, the insurer, to the extent that it was unable to make a thorough investigation so as to prepare an adequate defense or to make a just settlement.

The burden of proof with respect to this question is upon the insurer, ____, who contends that you should answer this question "yes."

COMMENT

This instruction and comment were approved by the Committee in 1967. The comment was updated in 1980 and revised in 2016.

To avoid liability, the insurer must also prove that the failure of the insured to cooperate is material and prejudicial. Ansul v. Employers Ins. Co. of Wausau, 345 Wis.2d 373, 393 (Ct. App. 2012). The insurer must demonstrate actual prejudice, not merely the possibility of prejudice. Foote v. Douglas County, 29 Wis.2d 602, 608 (1966).

"Where the rights of an injured third party have intervened subsequent to the issuance of the contract of insurance, the insurer should not be freed from liability to such third party on the ground of non-cooperation of the insured unless the insurer is harmed thereby." Kurz v. Collins, 6 Wis.2d 538, 551, 95 N.W.2d 365 (1958).

With respect to the defense of non-cooperation by a motor vehicle liability insurer, Wis. Stat. § 632.34 (1979) states that such defense is not effective against a third person making a claim, unless there was collusion between the third person and the insured, or unless the claimant was a passenger in the insured vehicle.

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In Dietz v. Hardware Dealers Mut. Fire Ins. Co., 88 Wis.2d 496, 276 N.W.2d 808 (1979), the court cited from Kurz v. Collins regarding the relation between materiality and prejudice:

> When it is stated that a false statement or testimony must be material in order to breach a policy co-operation condition, it means that the same must be material to the issue of the liability of the company on its policy. In a sense, whether a false statement or testimony is material to the insurance company's liability on its policy is closely akin to whether the company has been prejudiced thereby, but we deem materiality to be broader in scope than prejudice. Kurz v. Collins, supra at 546.

The burden of proof is on the insurer. Dietz v. Hardware Dealers Mut. Fire Ins. Co., 88 Wis.2d 496, 276 N.W.2d 808 (1979); Schauf v. Badger State Mut. Cas. Co., 36 Wis.2d 480, 153 N.W.2d 510 (1967); Foote v. Douglas Co., 29 Wis.2d 602, 607, 139 N.W.2d 628 (1965).

See also McDonnell v. Hestnes, 47 Wis.2d 553, 177 N.W.2d 845 (1970); Boschek v. Great Lakes Mut. Ins. Co., 19 Wis.2d 514, 520, 120 N.W.2d 703 (1962); Schneck v. Mutual Serv. Co., 18 Wis.2d 566, 576, 119 N.W.2d 342 (1962); Stippich v. Morrison, 12 Wis.2d 331, 336-7, 107 N.W.2d 125 (1960).

Where the insured's contradictory statements were exposed only 6 days before trial, a continuance should have been granted to allow the insurer a more exhaustive investigation based upon the effects of the new facts. Dietz v. Hardware Dealers Mut. Fire Ins. Co., supra at 507.

See also Comment, Wis JI-Civil 3115.

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3117 FAILURE TO GIVE NOTICE TO INSURER

Question ____ inquires whether the insured, ____, failed to give (immediate written notice) (written notice as soon as practicable) to the insurer, of the collision in question.

The terms of the contract of insurance require the insured, ____, to give (immediate notice, etc.).

("Immediate" in this connection means as soon as reasonably necessary under the circumstances to do the thing required.)

("As soon as practicable" in this connection means notice to be given with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of the case.)

The burden of proof with respect to your answer to this question is upon the insurer, ____, who contends that you should answer this question "yes."

COMMENT

This instruction and comment were approved by the Committee in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 632.26 (1979); Wis. Stat. § 631.81(1) (1975). See also Gerrard Realty Corp. v. American States Inc. Co., 89 Wis.2d 130, 146, 277 N.W.2d 863 (1979); Ehlers v. Colonial Penn. Inc. Co., 81 Wis.2d 64, 259 N.W.2d 718 (1977).

Ignorance of policy provisions or a belief coverage is questionable is not an excuse for the failure to give notice. Gerrard Realty Corp. v. American States Inc. Co., supra at 145; State Bank of Viroqua v. Capitol Indem., 61 Wis.2d 699, 214 N.W.2d 42 (1974).

"As soon as practicable," "immediately," "forthwith," "promptly" were collectively defined in RTE Corp. v. Maryland Cas. Co., 74 Wis.2d 614, 627, 247 N.W.2d 171 (1976) in the following manner:

> The words "immediately," "forthwith," "promptly," "as soon as practicable" all require notice in "a reasonable time." See: 5A Appleman, Insurance Law and Practice, §§ 3501-03; Annot., 18 A.L.R.2d 443, 448 (1951).

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The court, in RTE Corp., supra at 628-629 also compiled a comprehensive listing of Wisconsin cases wherein various periods of delay were found not to be "as soon as practicable":

> Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 147 N.W.2d 255 (1967) (Auto liability policy; delay of seven and one-half months not "as soon as practicable" as a matter of law; excuse based on apparently trivial nature of accident rejected on the facts.); . . . Buss v. Clements, 18 Wis.2d 407, 118 N.W.2d 928 (1963) (Auto liability policy; where insured knew of accident and injury at the time, not "as soon as practicable" to give notice three years later, as a matter of law.); Britz v. American Ins. Co., 2 Wis.2d 192, 86 N.W.2d 18 (1957) (Insurance against theft of truck; unexplained delay of three months not "as soon as practicable" as a matter of law.); Calhoun v. Western Cas. & Sur. Co., 260 Wis. 34, 49 N.W.2d 911 (1951) (Auto liability policy; delay in notice of one year, apparently unexplained, held not "as soon as practicable" as a matter of law.); Parrish v. Phillips, 229 Wis. 439, 282 N.W. 551 (1938) (Auto liability policy; notice required "as soon as practicable" after twenty days from accident; unexplained delay for additional thirteen days was non-compliance as a matter of law.) . . . .

Before a court may find noncompliance with notice provisions as a matter of law, it must be able to say:

(1) that there is no material issue of fact as to when notice was given, and when under the policy the duty to give it arose; and

(2) that no jury could reasonably find the delay to have constituted only such time as was "reasonably necessary" under the circumstances. Gerrard Realty Corp. v. American States Ins. Co., supra at 144n; RTE Corp. v. Maryland Cas. Co., supra at 628-629.

See also Ehlers v. Colonial Penn. Ins. Co., 81 Wis.2d 64, 259 N.W.2d 718 (1977); Kolbeck v. Rural Mut. Ins. Co., 70 Wis.2d 655, 235 N.W.2d 466 (1975); Allen v. Ross, 38 Wis.2d 209, 156 N.W.2d 435 (1968); Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 147 N.W.2d 255 (1966); Peterson v. Warren, 31 Wis.2d 547, 562, 143 N.W.2d 560 (1965); American Ins. Co. v. Rural Mut. Cas. Ins. Co, 11 Wis.2d 405, 105 N.W.2d 798 (1960); Illinois Cent. R.R. Co. v. Blaha, 3 Wis.2d 638, 644, 89 N.W.2d 197 (1957); Calhoun v. Western Cas. & Sur. Co., 260 Wis. 34, 49 N.W.2d 911 (1951); Parrish v. Phillips, 229 Wis. 439, 282 N.W. 551 (1938); Underwood Veneer Co. v. London Guar. & Accident Co., 100 Wis. 378, 381, 75 N.W. 996 (1898); Foster v. Fidelity & Cas. Co. of New York, 99 Wis. 447, 451-452, 75 N.W. 69 (1898).

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3118 FAILURE TO GIVE NOTICE TO INSURER: MATERIALITY

Question ____ inquires whether the failure of the insured to give timely notice to the insurer was immaterial so as not to prejudice the insurer.

By your answer to this question, you are to determine whether the failure of the insured to (give timely written notice) (give written notice as soon as practicable) was harmless and noninjurious, so that the insurer was not prevented from making a thorough investigation and from presenting every available defense.

The burden of proof with respect to your answer to this question is upon the insured, ___, who contends that you should answer this question "yes."

COMMENT

This instruction and comment were approved by the Committee in 1971. The comment was updated in 1980 and 2001.

Wis. Stat. § 631.81(1) (1975); Wis. Stat. § 632.26 (1979).

See Comment, Wis JI-Civil 3117.

See also Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 309, 147 N.W.2d 255 (1966); Peterson v. Warren, 31 Wis.2d 547, 564, 143 N.W.2d 560 (1965); Kohls v. Glassman, 29 Wis.2d 324, 139 N.W.2d 37 (1965); Buss v. Clements, 18 Wis.2d 407, 118 N.W.2d 928 (1962).

In Mt. Pleasant v. Hartford Accident & Indemnity, 2001 WI App 38, ¶ 13 n.3, 241 Wis.2d 327, 625 N.W.2d 317, the court found prejudice to the insurer where the insured gave notice 30 months late. The court said because of the late notice, the insurer: (1) could not seek an immediate determination of coverage; (2) could not participate in prelawsuit mediation; (3) could not select defense counsel and control the defense; and (4) was prevented from selecting the same counsel representing an unrelated defendant, Awhich would have kept the attorney's fees much lower.

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3200 PRODUCTS LIABILITY: LAW NOTE

Products liability falls into three categories: (1) breach of warranty (expressed or implied); (2) common law negligence; and (3) strict liability in tort.

In each of the above theories, it is necessary to establish that: (a) the product was defective; (b) the defect existed at the time the manufacturer or seller relinquished control; (c) the injury resulted from the use of the product.

1. **Breach of Warranty**

A claim for breach of warranty ordinarily depends upon a contractual relationship between the parties. The doctrine of privity of contract is essential to a breach of warranty claim.[1]

The requirement as to privity of contract does not apply to members of the buyer's family or guests in the buyer's home, both of whom may take advantage of any warranty existing between the buyer and the seller if it is reasonable to expect that the person may use, consume, or be affected by the goods, and that person is injured by the breach of the warranty, expressed or implied.[2]

There may exist both an express warranty and implied warranty in the same sale.[3]

The most significant implied warranties relate to merchantability and fitness for intended purpose.[4]

Two provisions of the Uniform Commercial Code under Ch. 402 of the Wisconsin Statutes present difficulty for the consumer or user who is injured by the defective product, namely: (1) the requirement that the defendant be given notice of the breach of warranty

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within a reasonable period of time, and (2) disclaimer which allows the seller to disclaim all warranties, including warranty of merchantability, by giving an appropriate notice.[5]

Notice of breach of warranty within a reasonable time is a condition precedent to liability.[6] The notice need not be in any particular form (written or oral), but it must fairly inform the seller of the breach of warranty and that the buyer will look to the seller for damages.[7] The notice requirement applies to both expressed and implied warranties.[8]

Although the question of timeliness of notice is usually one of fact for the jury, an unreasonable delay may be determined as a matter of law.[9] Knowledge by the seller of the facts which give rise to breach of warranty does not relieve the buyer of the requirement to give notice.[10]

Under proper circumstances, a seller may be held to have waived the statutory requirement of notice of breach of warranty and may also be held to be estopped from asserting want of notice by the buyer, but waiver and estoppel must be pleaded by the buyer.[11]

The seller may disclaim a warranty either orally or in writing.[12] A written disclaimer must be sufficiently conspicuous so as to charge the buyer with knowledge of it, and this question is for the court.[13]

Disclaimers which are contrary to public policy or contrary to statute are void.[14] An "as is"disclaimer negates any implied warranty of fitness for a particular purpose.[15]

The product, as warranted, must be used for its intended purpose. When the buyer misuses, alters the product, or uses it for a purpose other than its intended use, warranty does not apply.[16]

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2. **Negligence**

Privity. The privity of contract rule is inapplicable to actions predicated upon common law negligence.[17]

Duty. The duty of a manufacturer or supplier of a product is to exercise ordinary care to insure that the product will not create an unreasonable risk of injury or damage to the user or owner when used in its intended or foreseeable manner.[18] This duty must be "approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of the defendant manufacturer or supplier."[19] A manufacturer, among other requirements, is required to exercise ordinary care in the manufacture of its product in the following respects: (1) safe design of the product so that it will be fit for its intended or foreseeable purpose; (2) construction of the product so that the materials and workmanship furnished will render the product safe for its intended or foreseeable use; (3) adequate inspections and tests to determine the extent of defects both as to materials and workmanship; (4) adequate warnings of danger in the use of the product and adequate instructions as to the proper use of the product which is dangerous when used as intended.[20]

Warnings and Instructions. A warning or instruction, when required, must be reasonably calculated to reach and be understood by those likely to use the product. The warning must be sufficient to inform the average user of the nature and extent of the danger which he or she may encounter in the use of the product.[21]

Before a seller can be held responsible for failure to warn, the seller must have actual or constructive notice of the dangers of the product.[22] Where a seller undertakes to give instructions as to the proper use of a product, the seller assumes the duty of adequate instructions and to calling attention to dangers to be avoided.[23]

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Res Ipsa Loquitur. The plaintiff may invoke the doctrine of res ipsa loquitur. The following elements must concur before res ipsa loquitur will be invoked: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by the agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to the contributory negligence of the plaintiff.[24] The contributory negligence referred to in element (3), as to res ipsa loquitur, does not bar recovery since Wisconsin adheres to the comparative negligence rule.[25] In applying the res ipsa loquitur doctrine, the right to control is the important factor and actual control is not necessary.[26] Where the product has been subject to misuse and abuse by the user, the doctrine of res ipsa loquitur may not apply.[27] This doctrine has been applied in two exploding bottle cases.[28]

Contributory Negligence. Contributory negligence is a defense in products liability actions predicated upon common law negligence. The buyer has a duty to use ordinary care for his own safety and protection.

Defenses. The following conduct on the part of the plaintiff may constitute defenses to an action based on a defective product: (1) negligent failure to discover the defective condition; (2) use of the product after discovery of the defect; and (3) use of the product in a manner that could not have been reasonably foreseen by the manufacturer.[29]

Statutory Violations. Generally, when a statute is designated to protect a certain class of persons from a particular hazard, and the statute sets up a standard of conduct, the violation of such statute constitutes negligence as a matter of law or at least is evidence of negligence.[30]

Generally, a violation of a criminal statute constitutes negligence per se.[31]

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3. **Strict Product Liability** (Common Law; Before 2011 Wisconsin Act 2, effective for actions that are commenced on or after February 1, 2011)

The law of strict product liability was substantially altered in 2011 with the enactment of 2011 Wisconsin Act 2. This section covers the common law of strict liability that existed prior to the enactment of 2011 Wisconsin Act 2. For a summary of the changes to strict products liability law in Wisconsin made by the new legislation, see the comment to Wis JI-Civil 3260.1.

Strict liability applies not only to the manufacturer but also to the distributor, wholesaler, and retailer.[32] The concept of strict tort liability may be misleading. Strict tort liability does not make the manufacturer or seller an insurer, nor does it impose absolute liability. Rather, it relieves the injured "user" from proving specific acts of negligence and protects him or her from the contractual defenses of notice of breach, disclaimer, and lack of privity.[33]

Elements. The following elements must be proved to warrant recovery under the doctrine of strict liability in tort: (1) that the product was in a defective condition unreasonably dangerous; (2) that the product was defective when it left the possession or control of the seller; (3) that the defect was a cause (substantial factor) of the plaintiff's injury; (4) that the seller was engaged in the business of selling such products (it does not apply to an isolated or infrequent sale); and (5) that the product was one which the seller expected to and did reach the consumer without substantial change.

The term "seller" includes restauranteur, manufacturer, distributor, wholesaler, and retailer.[34] One who represents a product to be his or her own is subject to the same liability as if he or she was the manufacturer.[35] A product is unreasonably dangerous when it is

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dangerous beyond that contemplated by the ordinary user who purchases it with the ordinary knowledge common to the community as to its characteristics.[36]

A defective product is one which, when sold by a seller, is in a condition not contemplated by the ordinary consumer which is unreasonably dangerous.[37] A product may be defective by reason of manufacturer or design. A failure to give adequate directions or warnings may likewise constitute a "defective" condition.[38]

Where an adequate warning is given, the seller may reasonably assume that it would be read and heeded; a product bearing such warning, which would be safe for use if followed, is not in a defective condition nor is it unreasonably dangerous.[39]

The mere showing of product malfunction evidences a defective condition.[40]

A seller cannot immunize himself against liability under strict tort liability theory by inserting an exculpatory clause in the sales contract as he or she may do with respect to negligence and warranty.[41]

Defenses. The liability under the strict tort liability theory is subject to the defense of contributory negligence. Some of the defenses of contributory negligence: (1) failure to use the product for the intended purpose; (2) abuse or alteration of the product; and (3) use of the product where its intended use is coupled with inherent danger. The mere failure of the user of the product to discover a defect or guard against the possibility of a defect does not render the user of the product contributorily negligent.[42] A user may be contributorily negligent if he or she voluntarily exposes himself or herself to a known danger.[43]

4. **Strict Product Liability** (Wis. Stat. § 895.045(3), 895.046, and 895.047, (Effective for Actions Commenced On or After February 1, 2011)

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The law controlling product claims based on strict liability was substantially altered by the legislature in 2011 with the enactment of 2011 Wisconsin Act 2. The act's provisions are effective for actions commenced after January 31, 2011.

Section 895.047(1)(a) specifies three ways in which a product may be defective: a manufacturing defect, design defect or an inadequate instructions/warnings defect. Each of these are defined in the Act. The definitions are taken from the Restatement (Third) of Torts: Products Liability, sec. 2. Strict liability is retained for manufacturing defects, while design and inadequate instructions/warnings defects use the negligence concept of "foreseeable risks of harm." For a summary of the changes to products liability contained in this Act, see the comment to Wis JI-Civil 3260.1.

COMMENT

This law note was approved by the Committee in 1971. It was updated in 2001 and 2011.

FOOTNOTES

1. Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967); Strahlendorf v. Walgreen Co., 16 Wis.2d 421, 114 N.W.2d 326 (1962); Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959); Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 105 N.W.2d 696 (1960); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927); Barlow v. DeVilbiss Co., 214 F. Supp. 540 (E.D. Wis. 1963).

2. Wis. Stat. § 402.318. Express warranty is defined in Wis. Stat. § 402.313. Implied warranty is defined in Wis.2d 402.314.

3. Hellenbrand v. Bowar, 16 Wis.2d 264, 114 N.W.2d 418 (1962).

4. Wis. Stat. §§ 402.314 and 402.315; Calumet Cheese Co. v. Chas. Pfizer & Co., 25 Wis.2d 55, 130 N.W.2d 290 (1964); Hellenbrand v. Bowar, supra note 3; Kennedy-Ingalls Corp. v. Meissner, supra note 1; Betehia v. Cape Cod Corp., 10 Wis.2d 232, 103 N.W.2d 64 (1960).

5. Wis. Stat. § 402.316.

6. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

7. Wis. Stat. § 402.607; Wojciuk v. United States Rubber Co., 13 Wis.2d 173, 108 N.W.2d 1949 (1961); Mack Trucks, Inc. v. Sunde, 19 Wis.2d 129, 119 N.W.2d 321 (1963); Hellenbrand v. Bowar, supra note 3; Kennedy-Ingalls Corp. v. Meissner, supra note 1.

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8. Tews v. Marg, 246 Wis. 245, 16 N.W.2d 795 (1944).

9. Schaefer v. Weber, 265 Wis. 160, 60 N.W.2d 696 (1953) (delay of 5 months); Lumbermen's Mut. Cas. Co. v. S. Morgan Smith Co., 251 Wis. 218, 28 N.W.2d 343 (1947) (delay of 10 months); Wood v. Heyer, 179 Wis. 628, 192 N.W. 689 (1923) (delay of 8 months); Tegen v. Chapin, 176 Wis. 410, 187 N.W. 185 (1922) (delay of 57 days).

10. Hellenbrand v. Bowar, supra note 3.

11. Mack Trucks, Inc. v. Sunde, supra note 7.

12. Wis. Stat. § 402.316.

13. Wis. Stat. § 401.201(10); Calumet Cheese Co. v. Chas. Pfizer & Co., supra note 4.

14. Metz v. Medford Fur Foods, 4 Wis.2d 96, 90 N.W.2d 106 (1958).

15. Hyland v. G.C.A. Tractor & Equip. Co., 274 Wis. 586, 80 N.W.2d 771 (1957); Wis. Stat. § 402.316(3)(a).

16. 1 Hursh, American Law of Products Liability § 3:10 (1961); Crown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Strahlendorf v. Walgreen Co., supra note 1; Prosser, Law of Torts (3d) 656 (1964).

17. Smith v. Atco Co., supra note 1.

18. Smith v. Atco Co., supra note 1; Restatement, Second, Torts § 395 (1965); Prosser, supra note 16, at 648-650.

19. Smith v. Atco Co., supra note 1.

20. Schwalbach v. Antigo Elec. & Gas Co., 27 Wis.2d 651, 135 N.W.2d 263 (1965); Smith v. Atco Co., 266 Wis. 630, 64 N.W.2d 226 (1954); Marsh Wood Products Co. v. Babcock & Wilcox Co., supra note 6; Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); 1 Frumer and Friedman, Products Liability § 6.8 (1966); Restatement, Second, Torts § 395 (1965); 6 A.L.R.3d 91 (1966).

21. Harper and James, 2 Law of Torts § 28.7 at 1548-1549 (1956).

22. Strahlendorf v. Walgreen Co., supra note 1; Restatement, supra note 20, § 401 at 339 (1965).

23. Karsteadt v. Phillip Gross H. & S. Co., 179 Wis. 110, 190 N.W. 844 (1922).

24. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Ryan v. Zweck-Wollenberg Co., supra note 20.

25. Turk v. H. C. Prange Co., supra note 24.

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26. Id.

27. Wojciuk v. United States Rubber Co., supra note 7.

28. Weggeman v. Seven-Up Bottling Co., 5 Wis.2d 503, 93 N.W.2d 467 (1958); Zarling v. LaSalle Coca-Cola Bottling Co., 2 Wis.2d 596, 87 N.W.2d 263 (1958).

29. Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948); 38 Am. Jur. Negligence §§ 181, 182, 184, 188, 190, 191 (1941 and pocket part).

30. Note, Products Liability Based on Violation of Statutory Standards, 64 Mich. L. Rev. 1388 (1966); Prosser, supra note 16, § 35 at 202.

31. Perry Creek C. Corp. v. Hopkins Ag. Chem. Co., 29 Wis.2d 429, 139 N.W.2d 96 (1966); Arndt Brothers Minkery v. Medford Fur Foods, 274 Wis. 627, 80 N.W.2d 776 (1957); McAleavy v. Lowe, 259 Wis. 463, 49 N.W.2d 487 (1951); Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912).

32. 13 A.L.R.3d 1057, 1096-1100 (1967).

33. Dippel v. Sciano, supra note 1.

34. Restatement, Second, Torts § 402A, Comment f at 350 (1965).

35. Wojciuk v. United States Rubber Co., supra note 7.

36. Restatement, supra note 34, Comment i at 352.

37. Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772, 629 N.W.2d 727.

38. Id., Canifax v. Hercules Powder Co., 237 Cal. App.2d 44, 46 Cal. Rptr. 552 (1965); Crane v. Sears Roebuck & Co., 218 Cal. App.2d 855, 32 Cal. Rptr. 754 (1963).

39. Restatement, supra note 34, Comment j at 353; Yaun v. Allis-Chalmers Mfg. Co., supra note 29.

40. Greco v. Bueciconi Eng'r Co., 283 F. Supp. 978 (W. D. Pa. 1967), aff'd, 407 F.2d 87 (3d Cir. 1969).

41. Restatement, supra note 34, Comment m at 356; Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 256, 403 P.2d 145 (1965).

42. Restatement, supra note 34, Comment n at 356.

43. Id.; Prosser, Law of Torts (3d) 538, 540 (1964); Sweeney v. Matthews, 94 Ill. App. 6, 236 N.E.2d 439 (1968); Williams v. Brown Mfg. Co., 93 Ill. App. 334, 236 N.E.2d 125 (1968).

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3201 IMPLIED WARRANTY: MERCHANTABILITY DEFINED

An "implied warranty" is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

A warranty that the goods (product) shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. "Merchantability" means reasonable fitness for the general purpose for which the goods (product) are (is) sold. When a purchase is made, the seller warrants or guarantees that the goods (product) purchased:

[would pass without objection in the trade under the contract description;]

[in the case of bulk goods, are of average quality within the description;]

[are fit for the ordinary purposes for which such goods are used;]

[run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;]

[are adequately contained, packaged, and labeled as the agreement may require;]

[conform to the promises or affirmations of fact made on the container or label if any.]

COMMENT

The instruction and comment were originally published in 1971. The comment was updated in 1980 and 2009.

Wis. Stat. § 402.314; "Merchant" is defined in Wis. Stat. § 402.104(3).

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The issue of merchantability presents a question of fact. Takera v. Ford Motor Co., 86 Wis.2d 140, 271 N.W.2d 653 (1978). A finding of merchantability requires an examination of the defects alleged to exist in the particular product in light of the standard of quality expected for that product. Takera v. Ford Motor Co., supra at 146.

Where automobiles are concerned, the term "unmerchantable" has only been applied where a single defect poses a substantial safety hazard or numerous defects classify the car as a "lemon." Takera v. Ford Motor Co., supra at 146. See also Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 265 N.W.2d 513 (1978).

Wis. Stat. § 402.314(1) "imposes an implied warranty, not because of a sale alone, but because of the special responsibilities that are placed upon a merchant who is defined as one holding himself out as having knowledge and skill peculiar to the trade involved." Samson v. Riesing, 62 Wis.2d 698, 215 N.W.2d 662 (1973). In Samson, the court held that the Wauwatosa Band Mothers, selling food in a fund raising activity, were not merchants as contemplated by the statute.

Under Wis. Stat. § 402.314, an implied warranty of merchantability can be excluded or modified pursuant to the provisions of Wis. Stat. § 402.316. Recreatives, Inc. v. Myers, 67 Wis.2d 255, 226 N.W.2d 474 (1975).

For the measure of damages for a claim under Wis. Stat. § 402.314, see Wis. Stat. § 402.714(2).

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3202 IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE

An "implied warranty" is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

When the seller at the time of sale has reason to know any particular purpose for which the goods (product) are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods (product), there is an implied warranty that the goods (product) shall be fit for such purpose. In determining whether the goods (product) were fit for such purpose, you will consider its use in the light of common knowledge of the nature of the goods (product) sold. [A warranty of this kind does not mean that the goods (product) can be used with absolute safety, or that they are perfectly adapted to the intended use, but only that they shall be fit for such purpose.]

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 402.315.

In order for there to be a jury question as to an implied warranty of fitness for a particular purpose, there must be some credible evidence in the record demonstrating reliance by the buyer. Valiga v. National Food Co., 58 Wis.2d 232, 257, 206 N.W.2d 377 (1973). See also Wisconsin Elec. Power Co. v. Zallea Bros., Inc., 606 F.2d 697 (7th Cir. 1979). Moreover, the supreme court has stated that for this statutory section to be applicable the seller must select the goods. Ewers v. Eisenzopf, 88 Wis.2d 482, 276 N.W.2d 802 (1979). In supporting this holding, the court in Ewers quoted the following explanation from Williston, Sales:

> Obviously, in order for the implied warranty of fitness for a particular purpose to arise, and for the buyer to be able to apply § 2-315, there must be a reliance on the seller by the buyer and that seller must select goods which turn out to be unfit for the particular purpose indicated by the buyer. Where the buyer makes his own selection

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> of goods, he cannot expect to recover upon the implied warranty of fitness for a particular purpose, since he does not meet the criteria for applying § 2-315 . . . . Id. at Vol. 3 at 125 (4th ed. 1974).

The above instruction does not apply if there are exclusions or modifications of warranties as listed in Wis. Stat. § 402.316.

By adopting the Uniform Commercial Code the "trade name exception" of the old Wis. Stat. § 121.15(4) has been eliminated. Under the UCC, the fact that the article was ordered by trade name would merely be a factor in determining whether the buyer relied on the seller's skill or judgment to furnish suitable goods.

Accordingly, a number of earlier Wisconsin decisions discussing this exception are no longer applicable. E.g., Ohio Electric Co. v. Wisconsin-Minnesota Light and Power Co., 161 Wis. 632, 155 N.W. 112 (1915); Northwestern Blaugas Co. v. Guild, 169 Wis. 98, 171 N.W. 662 (1919); Fox v. Boldt, 172 Wis. 333, 179 N.W. 1 (1920); Russell Grader Mfg. Co. v. Budden, 197 Wis. 615, 222 N.W. 788 (1929); Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 58 N.W. 232 (1894); LaCrosse Plow Co. v. Helgeson, 127 Wis. 622, 106 N.W. 1094 (1906); LaCrosse Plow Co. v. Brooks, 142 Wis. 640, 126 N.W. 3 (1910).

For a general discussion of what constitutes a "particular purpose," see 83 A.L.R.3d 669 (1978).

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3203 IMPLIED WARRANTY: BY REASON OF COURSE OF DEALING OR USAGE OF TRADE

An implied warranty that a product as sold is of a particular quality or fit for a particular purpose may arise from a (course of dealing) or (usage of trade).

(A "course of dealing" is defined as a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.)

(A "usage of trade" is defined as any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction.)

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 402.314(3).

Wis. Stat. § 401.205(1).

Wis. Stat. § 401.205(2).

Implied warranty of merchantability is explained in Wis JI-Civil 3201.

Implied warranty of fitness for a particular purpose is explained in Wis JI-Civil 3202.

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3204 IMPLIED WARRANTY: SALE OF FOOD

An "implied warranty" is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

When food is purchased there is an implied warranty that it is fit for human consumption. The test of fitness for human consumption is what is reasonably to be expected by the consumer in the form in which the food is sold.

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 402.314(1) and (2)(c); Samson v. Riesing, 62 Wis.2d 698, 711, 215 N.W.2d 662 (1974); Betehia v. Cape Cod Corp., 10 Wis.2d 323, 103 N.W.2d 64 (1960).

This instruction may be used for common law as well as statutory actions under warranty.

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3205 IMPLIED WARRANTY: EXCLUSION OR MODIFICATION

The seller may exclude or modify an implied warranty of merchantability, or any part of the warranty, provided, at the time of the sale, the seller specifically informs the buyer that any implied warranty as to merchantability is to be excluded or modified.

Any written exclusion or modification of an implied warranty set forth in any contract, advertisement, label, or brochure must, at the time of sale, be called directly to the attention of the buyer.

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions such as "with all faults," "as is," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

COMMENT

The instruction and comment were originally published in 1971 and revised in 2009.

This instruction is given only in situations where it is contended that an exclusion or modification was made orally, or where there is a written inconspicuous exclusion or modification of an implied warranty which it is contended was at the time of sale called to the attention of the buyer. When the modification or exclusion is made in writing only, no instruction is required because the existence or nonexistence of a modification or exclusion is for the court to decide.

Wis. Stat. § 402.316(2); Wis. Stat. § 402.316(3).

"Conspicuous" is defined in Wis. Stat. § 401.201(10).

Pokrojac v. Wade Motors, Inc., 266 Wis. 398, 402, 63 N.W.2d 720 (1954); Hyland v. GCA Tractor & Equip. Co., 274 Wis. 586, 589-591, 80 N.W.2d 771 (1957); 24 A.L.R.3d 465 (1966).

See Wis JI-Civil 3206 for another means of exclusion.

Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 414, 265 N.W.2d 513 (1978); Recreatives, Inc. v. Myers, 67 Wis.2d 255, 226 N.W.2d 474 (1975).

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3206 IMPLIED WARRANTY: EXCLUSION BY REASON OF COURSE OF DEALING OR USAGE OF TRADE

An implied warranty can be excluded or modified by (a course of dealing or course of performance) or (usage of the trade). This means that a warranty will not be implied if the conduct of the parties by reason of a (course of dealing or course of performance) or (usage of the trade) indicates that no warranty existed.

(A "course of dealing" is defined as a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.)

(A "usage of trade" is defined as any practice or method of dealing having such regularity or observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.)

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 402.316(3)(c).

Wis. Stat. § 401.205(1).

Wis. Stat. § 401.205(2).

See Wis. Stat. § 401.205(6) in regard to the notice requirement for "usage of trade" evidence.

See Wis. Stat. § 402.208(2) for rules of construction for usage of trade and course of dealing, course of performance.

Wis JI-Civil 3205 should be used when the exclusion or modification is expressed.

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3207 IMPLIED WARRANTY: USE OF PRODUCT AFTER THE DEFECT KNOWN

When a buyer of a product knows or in the exercise of ordinary care should have known that the product was defective and in spite of this knowledge uses the product and as a result of using it sustains injury or damage, then there is no breach of warranty.

COMMENT

The instruction and comment were originally published in 1971. The instruction was updated in 2009. The comment was updated in 1980.

Northern Supply Co. v. Vangard, 117 Wis. 624, 94 N.W. 785 (1903); 33 A.L.R.2d 514 (1954). See also Valiga v. National Food Co., 58 Wis.2d 232, 257-59, 206 N.W.2d 377 (1973); Concrete Equip. Co. v. Smith Contract Co., Inc., 358 F. Supp. 1137 (W.D. Wis. 1973).

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3208 IMPLIED WARRANTY: FAILURE TO EXAMINE PRODUCT

When a buyer before entering into the contract has examined the goods (product) or the sample or model as fully as he or she desired or has refused to examine the goods (product), there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him or her.

COMMENT

The instruction and comment were originally published in 1971. The instruction was updated in 2009. The comment was updated in 1980.

Wis. Stat. § 402.316(3)(b); Valiga v. National Food Co., 58 Wis.2d 232, 257, 206 N.W.2d 377 (1973).

See also Nelson v. Boulay Bros. Co., 27 Wis.2d 637, 135 N.W.2d 254 (1965).

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3209 IMPLIED WARRANTY: SUSCEPTIBILITY OR ALLERGY OF USER

Any warranty with respect to the produce sold is based on the assumption that the product will be used by a normal person. There is no warranty to a person who is unusually susceptible or unusually allergic to the use of the product.

A susceptibility or allergy is unusual if it exists in only an insignificant percentage of people.

COMMENT

The instruction and comment were originally published in 1971. The title was updated in 2009. The comment was updated in 1980.

Prosser, Law of Torts (3d) § 96 at 668-69 (1964); 26 A.L.R.2d 966 (1952).

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3210 IMPLIED WARRANTY: IMPROPER USE

An "implied warranty" is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

Any warranty of a product sold is based on the assumption that such product will be used in a manner suitable to its intended use. The seller is entitled to assume, in the absence of information to the contrary, that a use will be made of the product, for the purpose for which it is intended and in accordance with directions properly given. There is no breach of warranty if the product sold is put to a use for which the product was not intended or used not in accordance with the directions given as to its use.

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Recreatives, Inc. v. Myers, 67 Wis.2d 255, 264, 226 N.W.2d 474 (1975). In Recreatives, Inc., the court quoted with approval the following excerpt from Williston, Sales:

> . . . . The whole point of an implied warranty of fitness for a particular purpose is that the product sold by the seller to the buyer will be suitable for the specific purpose which the buyer has, and any similar product which the seller may sell to the buyer which is not so suited will breach that warranty of fitness for the particular purpose. Of course abnormal or unique use may result in the prevention of the application of this implied warranty. 3 Williston, Sales (4th ed. 1974), p. 120, § 19-6. (Emphasis added.)

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3211 IMPLIED WARRANTY: NOTICE OF BREACH

A seller is not liable for a breach of warranty unless the buyer notifies the seller of the breach (defect) within a reasonable time after he or she discovers or should have discovered any breach. What is a reasonable time depends upon the nature of the act to be done, the nature of the contract, and the facts and circumstances of the transaction. The notice need not be in any particular form and it may be oral or written. It must, however, fairly inform the seller of a breach of warranty (defect).

COMMENT

The instruction and comment were originally published in 1971. The instruction was revised in 1992. The comment was updated in 1980 and 1992.

Wis. Stat. § 402.607(3)(a); It is no longer a requirement under § 402.607(3)(a) that the notice must inform the seller that the buyer looks to the seller for damages for the breach. Paulson v. Olson Implement Co., Inc., 107 Wis. 2d 510, N.W.2d 855 (1982). See also Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 235(a), 120 N.W.2d 47 (1963); Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 384, 105 N.W.2d 696 (1960).

Wis. Stat. § 401.204 allows the seller to fix any time which is not manifestly unreasonable. For a discussion of the reasonableness of limits on warranties, see Takera v. Ford Motor Co., 86 Wis.2d 140, 271 N.W.2d 653 (1978).

In Samson v. Riesing, 62 Wis.2d 698, 215 N.W.2d 662 (1974), the court reaffirmed the holding in Tew v. Marg, 246 Wis. 245, 249, 16 N.W.2d 795 (1944), that implied warranties require the statutory notice of breach.

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3220 EXPRESS WARRANTY: GENERAL

An "express warranty" is an express statement of fact material to the transaction which is a part of the contract between the parties (and collateral to the express object of such contract). Any direct and positive representation of a fact (affirmation of a fact) (or acts equivalent to such affirmation) made by the seller to the purchaser during the negotiations to effect a sale respecting the quality of the article or the efficiency of the property sold, constitutes a warranty if relied upon by the purchaser in making the purchase.

The principal elements of an express warranty are: (1) (affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction by the seller); (2) inducement to the buyer; (3) reliance thereon by the buyer. The test in determining whether (name) made an express warranty is not whether the seller actually intended to be bound by the statement but whether he or she made (an affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction), the natural tendency of which was to induce a sale and which in fact did induce a sale.

In your consideration of the question as to whether (name) made an express warranty [here set out the purported warranty], you will take into consideration what the parties said at the time of the negotiations of the sale; the relation between the parties and what both parties fairly understood by the language that was used at the time of the sale, together with all other credible evidence in this case bearing upon this subject matter.

No particular form of words or expression is necessary to constitute an express warranty; nor is it necessary that the seller use formal words such as "warrant" or "guarantee," or other words of precisely the same meaning. Any word of affirmation used in such a manner as to show that one party expects or desires that the other party rely thereon as

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a matter of fact, instead of taking it as an expression of opinion or mere sales talk, constitutes a warranty. But a statement purporting to be merely the seller's opinion or belief with respect to the transaction, not amounting to a positive statement or affirmation of fact, does not create a warranty.

COMMENT

The instruction and comment were originally published in their present form in 1967. The comment was updated in 1980. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

As to the second paragraph, see Ewers v. Eisenzopf, 88 Wis.2d 482, 489, 276 N.W.2d 802 (1979).

An "affirmation of fact" is any statement concerning a subject matter of a transaction, which might otherwise be only an expression of an opinion or "seller's talk," and which is affirmed as an existing fact material to the transaction and reasonably induces the other party to consider and rely upon it as a fact. 3 Pomeroy's Equity Jurisprudence (5th) §§ 877 and 878 (1941). 2A, Words and Phrases, Affirmation of Fact, 361 (1955). See also 94 A.L.R.3d 729 (1979).

As to the last paragraph, see Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 265 N.W.2d 513 (1978); Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 29 Wis.2d 355, 138 N.W.2d 729 (1965); Borg v. Downing, 221 Wis. 463, 266 N.W. 182 (1936); White v. Stelloh, 74 Wis. 435, 43 N.W. 99 (1889); Tenney v. Cowles, 67 Wis. 594, 31 N.W. 221 (1887).

A statement subsequent to the bargain cannot amount to a warranty unless there is a new consideration. Zinzow Constr. Co. v. Giovannoni, 263 Wis. 185, 56 N.W.2d 782 (1952).

In Garner v. Charles A. Krause Milling Co., 193 Wis. 80, 213 N.W. 637 (1927), it was said that the rights of parties to a sales contract are not necessarily determined exclusively under the Uniform Sales Act. Wis. Stat. §§ 401.102(3) and 401.103 make it clear that the Uniform Commercial Code is not necessarily the exclusive determinant of the parties' rights to a sales contract.

See also 67 A.L.R.2d 619, 633 (1959); 77 C.J.S. Sales § 310 (1952, Supp 1963).

For earlier Wisconsin cases involving express warranties, see Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Hoffman v. Dixon, 105 Wis. 315, 81 N.W. 491 (1900); White v. Stelloh, 74 Wis. 435, 43 N.W. 99 (1889); Neave v. Arntz, 56 Wis. 174, 14 N.W. 41 (1882).

See Wis JI-Civil 3230 and Wis. Stat. § 402.313 for express warranties under the Uniform Commercial Code.

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3222 EXPRESS WARRANTY: NO DUTY OF INSPECTION

If you find that there existed an express warranty by the seller, then there is no duty of inspection on the buyer. Even though the buyer may be negligent in failing to discover a defect in the goods purchased, he or she may, nevertheless, rely on the representations and on the warranty of the seller.

COMMENT

The instruction and comment were originally published in their present form in 1967. The comment was updated in 1980. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Jones v. Pittsburgh Plate Glass Co., 246 Wis. 462, 17 N.W.2d 562 (1944).

Under the UCC, a seller of goods may limit his or her contractual liabilities by: (1) disclaiming or limiting his or her warranties pursuant to Wis. Stat. § 402.316, or (2) limiting the buyer's remedies for a breach of warranty, pursuant to Wis. Stat. § 402.719.

Where an express warranty conflicts with a preceding disclaimer of all warranties, the language of the express warranty must control. Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 417, 265 N.W.2d 513 (1978).

The seller cannot substitute "repair" for an express warranty of "replacement" except where a buyer knowingly accepts a "repair" instead of a "replacement" and thereby waives the express warranty provision of the agreement. Ross v. Faber, 2 Wis.2d 296, 86 N.W.2d 409 (1957). See also Murray v. Holiday Rambler, Inc., supra at 420.

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3225 EXPRESS WARRANTY: STATEMENT OF OPINION

A statement which is not based on actual knowledge but is a mere expression of a conclusion or judgment is an opinion. If the statement deals with a matter of common knowledge, it is generally an opinion since the parties to the agreement are both deemed to know facts of common knowledge. Where the thing represented is susceptible of actual knowledge, it is one of fact. A seller may resort to "puffing" his or her goods, provided his or her salesmanship remains within the range of "dealer's talk" and constitutes a mere expression of opinion.

"Puffing" refers generally to an expression of opinion not made as a representation of fact.

If the statement, although it is "puffing" or an opinion, is stated as a material fact and is made for the purpose of inducing a sale, and does in fact induce the sale, then such statement becomes an express warranty. In determining whether the statement made by the seller is mere "puffing" or an expression of opinion or a statement of fact, you will consider the surrounding circumstances under which it was made, the way the statement was made, and the usual effect and meaning of the words used in such statement.

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. § 402.313(2) states, in part: "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

In Ewers v. Eisenzopf, 88 Wis.2d 482, 491, 276 N.W.2d 802 (1979), the court stated:

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> Courts of this state should carefully consider and evaluate the circumstances surrounding transactions where there is a claim made of an express warranty in a sale. Judicial decisions must not inhibit the free flow of relevant information between the buyer and the seller. Nevertheless, a merchant must be cautious in going beyond "puffing" in making claims and representations about their product. Further, the seller must give specific directions when he claims the goods are suitable for an intended and limited use. A merchant's vague or incomplete directions will induce the purchase of merchandise and often these directions are as misleading as when erroneous affirmations of fact are given. A merchant who knows the limitations of his product will bear no liability as long as he is truthful and accurate in his representations to the customer.

See also Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 105 N.W.2d 748 (1960); Vodrey Pottery Co. v. H. E. Home Co., 117 Wis. 1, 93 N.W. 823 (1903); White v. Stelloh, 74 Wis. 435, 43 N.W. 99 (1889); Tenney v. Cowles, 67 Wis. 594, 31 N.W. 221 (1887).

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3230 EXPRESS WARRANTY UNDER THE UNIFORM COMMERCIAL CODE

Any affirmation of fact (or promise) made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation (or promise).

(Any description of goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.)

(Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. In order to constitute a sale by sample, it must appear that the parties contracted with reference to the sample, with the understanding that the whole was like it. Whenever the designation of the quality is by reference to a sample, the sale is by sample. Otherwise, whether a sale is by sample is determined by the intent of the parties as shown by the terms of the contract and the circumstances surrounding the transaction.)

COMMENT

The instruction and comment were originally published in their present form in 1967. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 402.313.

The first paragraph is from Wis. Stat. § 402.313(1)(a).

A buyer has the burden of proving the purchase was consummated on the basis of factual representation regarding the title, character, quality, identity, or condition of the goods. Ewers v. Eisenzopf, 88 Wis.2d 482, 491, 276 N.W.2d 802 (1979). The court in Ewers noted that the UCC does not require a warranty to be stated with any degree of preciseness, only that the seller's statements are an affirmation of fact that the goods shall conform to the affirmation or promise. Additionally, the court stated that "no technical or particular words need be used to constitute an express warranty, yet whatever words are used must substantially mean the seller promises or undertakes to insure that certain facts are, or shall be, as he represents them." 88 Wis.2d at 488.

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The second element to establish the express warranty is that the affirmation of fact or promise becomes a "basis of the bargain." This statutory phrase does not require the affirmation to be the sole basis for the sale, only that it is a factor in the purchase. Moreover, the seller's intent to establish a warranty and the buyer's reliance on the affirmation are not determinative as to whether the representation is a basis of the bargain. Ewers v. Eisenzopf, supra at 488.

The prevailing test in Wisconsin for determining whether an express warranty has been created is set forth in Ewers. The court, quoting a federal decision, stated at 489:

> The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it. Citing Pritchard v. Liggett & Myers Tobacco Co., C.A. 1965, 350 F.2d 479, 481 cert. denied, 86 S. Ct. 549, 382 U.S. 987, 15 L. Ed.2d 475, opinion amended 370 F.2d 95, cert. denied, 87 S. Ct. 1350, 386 U.S. 1009, 18 L. Ed.2d 436.

The seller's lack of experience in the field is inconsequential to the determination of whether a warranty was made during a sale. Ewers v. Eisenzopf, supra at 490.

See also Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 29 Wis.2d 355, 138 N.W.2d 729 (1965); Hellenbrand v. Bowar, 16 Wis.2d 264, 114 N.W.2d 418 (1961); Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 105 N.W.2d 748 (1960); 67 A.L.R.2d 619 (1959).

The second paragraph is from Wis. Stat. § 402.313(1)(b) (1965).

The third paragraph is from Wis. Stat. § 402.313(1)(c).

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3240 NEGLIGENCE: DUTY OF MANUFACTURER

It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render the product safe for its intended use and also safe for unintended uses which are reasonably foreseeable.

It is the further duty of the manufacturer, in the exercise of ordinary care, to make all reasonable and adequate tests and inspections of its product so as to guard against any defective condition which would render such product unsafe when used as it is intended to be used. A manufacturer is charged with the knowledge of its own methods of manufacturing its product and the defects in such methods, if any.

Failure of the manufacturer to perform any such duty constitutes negligence.

COMMENT

This instruction and comment were originally published in 1971. The comment was updated in 1995, 1998, 1999, and 2006. The instruction was revised in 2006.

Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 64 N.W.2d 226 (1954); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Restatement, Second, Torts § 395 (1965); 3 A.L.R. (3d) 1016, 1024-28 (1965) (testing, inspecting, and the failure of the manufacturer to do so in regard to defects).

Wisconsin has abolished privity as a test of liability in tort actions for negligence. The question of liability should be approached from the standpoint of the standard of care of the manufacturer or supplier and, thus, any necessity of determining whether a particular product is inherently dangerous is eliminated. Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959).

The use of "unsafe" in the instruction is based on Smith v. Atco Co., supra.

As to the putting out of a product by a vendor, where it is made by another, and vendor's liability, see Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 231, 120 N.W.2d 47 (1963); Restatement, supra § 400.

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Product Use or Misuse. A manufacturer may be required to reasonably anticipate other uses than the one for which the chattel is primarily intended. Restatement, supra § 395, Comment m.

In Morden v. Continental AG, 2000 WI 51, 235 Wis.2d 325, 611 N.W.2d 659, the supreme court upheld a verdict which found Continental AG negligent in the design and manufacture of the tires on Plaintiff's VW van. Plaintiff's expert opined at trial that both rear tires blew out simultaneously after passing over a bump or dip on a highway overpass in Florida. After losing control of the van, it swerved, slid, bounced and rolled over into the grassy median area rendering Plaintiff a quadriplegic.

The first sentence of WCJI 3240 provides: "It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render such product safe for its intended use."

In discussing the duty of care of a manufacturer, the Morden Court at ¶ 47, p. 356 states:

> ....Moreover, the test of foreseeability expects manufacturers to "anticipate the environment which is normal for the use of his product." Tanner, 228 Wis.2d at 367 (quoting Kozlowski v. John E. Smith's Sons Co., 87 Wis.2d 882, 896, 275 N.W.2d 915 (1979)). **Consequently, the duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers**, id. at 368 (citing Schuh, 63 Wis.2d at 742-43), **and to act accordingly.** (Emphasis supplied).

The supreme court in Schuh did not at pp. 742-43 make the statement attributed to it by the Morden Court. The Schuh Court stated at 742-43 as follows:

> Although the plaintiff testified he thought the machine was off, he still was "misusing" the machine by standing on the edge of the hopper and using it as a perch. Therefore, it becomes necessary for the jury to determine whether the defendant could reasonably foresee such misuse of its product. ". . . [T]he manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable. The issue is one of foreseeability, and misuse may be foreseeable." (Emphasis in original.) Authorities cited.

The language attributed to the Schuh Court comes from Tanner v. Shoupe, 228 Wis.2d 357, 368 where the Court of Appeals stated as follows:

> . . . In other words, the manufacturer has the duty to foresee all reasonable uses and misuses and the resulting foreseeable dangers. Schuh, 63 Wis.2d at 742-43 . . . .

One who undertakes to rebuild or repair a chattel has the same duty as a manufacturer. 1 Frumer and Friedman, Products Liability § 5.03(3), (1966); Restatement, supra § 404.

The manufacturer of a final product has a duty to make all reasonable tests and inspections of the various component parts of the final product, even though some or all of the component parts are manufactured by another. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Cedarburg Light & Water Comm'n v. Allis-Chalmers, 33 Wis.2d 560, 148 N.W.2d 13 (1967); 78 A.L.R.2d 481 (1961); 3 A.L.R.3d 1016 (1965).

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Liability of a Machine Reconditioner. A reconditioner does not have a duty to bring the machines it reconditions into compliance with applicable safety standards in effect when it reconditions the machines so long as it does not hold itself as bringing machines into compliance with safety standards and is not requested to do so by the machines owner. Rolph v. EBI Cos., 159 Wis.2d 518, 464 N.W.2d 667 (1991).

Tailoring This Instruction to the Facts of the Case. In Anderson v. Alfa-Laval Agri, Inc., 209 Wis.2d 337, 564 N.W.2d 788 (Ct. App. 1997) the court of appeals encouraged trial courts to customize the patterned instructions based on the specific facts of the case to better assist the jury in understanding the nature of the law and how the law is to be applied to those specific facts.

In this case, a series of tailored jury instructions were requested involving the defendant's duty to incorporate foreseeable safety features into its product and the defendant's duty to all foreseeable persons who would have contact with the product, including bystanders and not just the purchaser or consumer of the product. Customized jury instructions were also sought in regard to the defendant's post-sales and nondelegable duties. The trial court, however, denied these requested instructions and gave patterned jury instructions. While recommending that specifically tailored jury instructions be used in the appropriate case, the court of appeals concluded that the trial court adequately instructed the jury even though it should have better assisted the jury with instructions specifically tailored to the factual issues raised in this case.

Negligent Design. In Sharp v. Case Corp., 227 Wis. 2d 1, 595 N.W.2d 380 (1999), the court was asked to overrule Greiten v. LaDow, 70 Wis.2d 589, 235 N.W.2d 677 (1975). The Greiten court held that a jury finding that a product is not unreasonably dangerous does not preclude a jury finding of negligent design. The court in Sharp declined to overrule Greiten. It further concluded that the jury finding that the product was not unreasonably dangerous was consistent with the jury finding that after manufacture and sale of the product, the manufacturer learned of a defect posing a serious hazard which originated and was unforeseeable at the time of manufacture, yet it failed to warn customers of the danger.

Effect of the Adoption of Restatement, Third, of Torts. In Sharp v. Case Corp., supra, the court acknowledged that Restatement, Third, of Torts was published in 1998 and may offer new insights into products liability law, but it declined "at this time" to overrule Greiten.

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3242 NEGLIGENCE: DUTY OF MANUFACTURER (SUPPLIER) TO WARN

A manufacturer (supplier) of a product has a duty to exercise ordinary care to warn of dangers which he or she knows, or should know, are associated with the proper use of the product. This duty exists whether or not the product was properly designed. "Proper use" means a use which is intended by the manufacturer (supplier). In addition, a manufacturer (supplier) has the duty to warn of dangers inherent in a use not intended by the manufacturer (supplier) if such unintended use is reasonably foreseeable by the manufacturer (supplier).

However, a manufacturer (supplier) does not have a duty to warn about dangers that are known to the user, or are obvious to or readily discoverable by potential users, or are so commonly known that it can reasonably be assumed that users will be familiar with them. Additionally, the manufacturer does not have to warn about dangers associated with unforeseeable misuses of the product.

COMMENT

This instruction and comment were revised by the Committee in 1982. The comment was updated in 2010 and 2020. The 2020 revision updated case law citations.

Strahlendorf v. Walgreen Co., 16 Wis.2d 421, 114 N.W.2d 326 (1962); Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959); Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 64 N.W.2d 226 (1954); Galst v. American Ladder Co., 165 Wis. 307, 162 N.W. 319 (1917); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909); Restatement, Second, Torts §§ 388, 389, 392, 394 (1965); Prosser, Law of Torts § 96, pp. 646-50 (4th Ed. 1971).

Before a seller can be held responsible for failure to warn, he or she must have actual or constructive notice of the dangers of the product. Strahlendorf, supra.

Negligence: Duty of Manufacturer (Supplier) to Warn. A failure to warn is not an affirmative act of negligence. Thus, a supplier of a chattel who has failed to warn of its danger has committed an act of omission, not commission. See Tatera v. FMC Corp., 2010 WI 90, ¶ 30, 328 Wis.2d 320, 786 N.W.2d 810.

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The duty to warn runs to all whom the supplier or manufacturer should expect to use the chattel or be endangered by its use. This includes purchasers, users, consumers, and handlers of the product. Restatement, Second, Torts § 388, Comment a (1965).

See also Wis JI-Civil 3262 for strict liability for failure to warn.

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3244 NEGLIGENCE: DUTY OF MANUFACTURER (SELLER) TO GIVE ADEQUATE INSTRUCTIONS AS TO THE USE OF A COMPLICATED MACHINE (PRODUCT)

A manufacturer (seller), in the exercise of ordinary care, has the duty to give proper instructions as to the use of a machine (product) where the mechanism of the machine (product) is so complicated that it may not be readily understood by the user thereof, and the manufacturer (seller) was aware of or ought, in the exercise of ordinary care, to have been aware of the danger involved.

COMMENT

This instruction and comment were originally published in their present form in 1971. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Graass v. Westerlin & Campbell Co., 194 Wis. 470, 216 N.W. 161 (1928).

See also Wis JI-Civil 3242.

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3246 NEGLIGENCE: DUTY OF MANUFACTURER (SELLER) WHO UNDERTAKES TO GIVE INSTRUCTIONS AS TO THE USE OF A MACHINE (PRODUCT)

When a manufacturer (seller) undertakes, by printed instructions or otherwise, to advise the user of the machine (product) of the proper methods of its use, such manufacturer (seller), in the exercise of ordinary care, has the duty to give accurate and adequate information with respect to the use thereof and possible dangers involved with respect to the use of such machine (product).

COMMENT

This instruction and comment were originally published in their present form in 1971. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Karsteadt v. Phillip Gross H. & S. Co., 179 Wis. 110, 190 N.W. 844 (1922); 80 A.L.R.2d 598, 612 (1961).

See also Wis JI-Civil 3242.

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3248 NEGLIGENCE: DUTY OF RESTAURANT OPERATOR IN SALE OF FOOD CONTAINING HARMFUL NATURAL INGREDIENTS

It is the duty of one engaged in the business of selling or serving food for human consumption, on or off his or her premises, to exercise ordinary care in the preparation and processing of such food so as to render the same reasonably fit for human consumption.

The test, in determining whether a restaurant operator is negligent in permitting harmful natural substances (ingredients) to remain in the final food product, is not whether the substance (ingredient) may have been natural or proper at some time in the preparation of the soup (sandwich) but whether the presence of such substance (ingredient) is natural and ordinarily expected to be found in the final product as served.

A restaurant operator is not an insurer of the reasonable fitness for human consumption of the food prepared by him or her for sale or service but has the duty of ordinary care to eliminate or remove, during the preparation of food he or she serves or sells, such harmful natural substance (ingredients, bones) as the consumer of the food, as served, would not ordinarily anticipate and guard against.

COMMENT

This instruction and comment were originally published in their present form in 1971. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Betehia v. Cape Cod Corp., 10 Wis.2d 323, 103 N.W.2d 64 (1960).

See also 2 Hursh, American Law of Products Liability § 12.33 (1961).

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3250 NEGLIGENCE: DUTY OF SELLER: INSTALLING (SERVICING) PRODUCT

It is the duty of a person, who, while delivering (installing, servicing) a machine (equipment), has observed defects in the same, to exercise ordinary care to repair such defects so as to render such machine (equipment) safe for its intended use, or give the buyer or user thereof notice of the danger involved in the use thereof.

COMMENT

This instruction and comment were originally published in their present form in 1971. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Bruss v. Milwaukee Sporting Goods Co., 34 Wis.2d 688, 150 N.W.2d 337 (1967); 2 Frumer and Friedman, Products Liability § 18.03(4) (1966); 65 C. J. S. Negligence § 100(5) (1966).

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3254 DUTY OF BUYER OR CONSUMER: CONTRIBUTORY NEGLIGENCE

The buyer (consumer) has a duty to use ordinary care for his or her own safety and protection and to observe all defects and dangerous conditions, if any, which are open and obvious to him or her if he or she is using reasonable care and caution for his or her own safety and protection. The danger, however, must not only be obvious, but also must be understood by the buyer (consumer). The failure to use a product in accordance with its instructions, if you find they were adequate, or the use of the product in an abnormal manner is negligence.

A person is not required to see every defect or dangerous condition or even to remember the existence of every defect or dangerous condition of which he or she had knowledge. He or she is only required to act as a reasonably prudent person under the same or similar circumstances would act.

A person is not required to anticipate negligent acts or omissions on the part of others and is not negligent in failing to look out for danger when there is no reason to suspect danger.

COMMENT

This instruction and comment were originally published in their present form in 1971. The instruction was revised in 2015 to simplify the language and to replace the term, "guilty of negligence." Editorial changes were made in 1994 to address gender references.

Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948).

38 Am. Jur. Negligence §§ 181, 182, 184-88, 192 (1941).

Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 104-07, 195 N.W. 388 (1923).

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3260 STRICT LIABILITY: DUTY OF MANUFACTURER TO ULTIMATE USER (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

A manufacturer of a product who sells (places on the market) a defective product which is unreasonably dangerous to the ordinary user or consumer, and which is expected and does reach the consumer without substantial change in the condition in which it is sold, is regarded by law as responsible for harm caused by the product even though he or she has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used.

A product is said to be defective when it is in a condition not contemplated by the ordinary user or consumer which is unreasonably dangerous to the ordinary user or consumer, and the defect arose out of design, manufacture, or inspection while the article was in the control of the manufacturer. A defective product is unreasonably dangerous to the ordinary user or consumer when it is dangerous to an extent beyond that which would be contemplated by the ordinary user (consumer) possessing the knowledge of the product's characteristics which were common to the community. A product is not defective if it is safe for normal use.

A manufacturer is not under a duty to manufacture a product which is absolutely free from all possible harm to every individual. It is the duty of the manufacturer not to place upon the market a defective product which is unreasonably dangerous to the ordinary user (consumer).

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Question 1 on the verdict form asks:

When (product) left the possession of (manufacturer) was (product) in a defective condition so as to be unreasonably dangerous to a prospective (user) (consumer)?

Before you can answer question _____ "yes," you must be satisfied that: (1) the product was in a defective condition; (2) the defective condition made the product unreasonably dangerous to people; (3) the defective condition of the product existed when the product was under the control of the manufacturer; and (4) the product reached the user (consumer) without substantial change in the condition in which it was sold.

[There is no claim in this case that (product) failed to perform its intended purpose of (insert purpose of product, for example, protecting against the transmission of bloodborne pathogens). You may find the (product) was dangerous beyond the reasonable contemplation by an ordinary user or consumer, even if it served its intended purpose.]

[Lack of knowledge on the part of (defendant) that (insert condition of product, e.g. proteins in natural rubber latex may sensitize and cause allergic reactions) to some individuals is not a defense to the claims made by (plaintiff). A manufacturer is responsible for harm caused by a defective and unreasonably dangerous product even if the manufacturer had no knowledge or could not have known of the risk of harm presented by the condition of the product.]

COMMENT

This instruction and comment were approved by the Committee in 1971. The instruction was revised in 2001. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 1995, 1999, 2001, and 2010. The title was updated in 2011. A reporter's note was removed in 2014.

For actions commenced after January 31, 2011, see Wis JI-Civil 3260.1.

This instruction reflects Wisconsin adoption of Restatement, Second, Torts § 402A: Strict Liability (1965), for "products liability." Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Strict liability is

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discussed, generally, in: 2 Frumer and Friedman, Products Liability § 16A (1966); Schreiber and Rheingold, Products Liability 2:121 (1967).

Section 402A applies to all "sellers" (manufacturers) of products. Restatement supra Comments a and f. Accordingly, the maker of a component part, or assembler of component parts who markets the whole product as his, or anyone in the "chain of distribution" may be liable under strict liability. 13 A.L.R.3d 1057, 1096-1100 (1967). This section may apply even when the seller never has possession of the product, nor participates in the design, construction, manufacture, use, or directions for use of the product. Little v. Maxam, Inc., 310 F. Supp. 875 (S.D. Ill. 1970) (case dealing with manufacturer's representative). But the seller (manufacturer) must be in the "business" of selling (manufacturing) the product for this section to apply. Restatement, supra Comment f. For related instruction defining "business," see Wis JI-Civil 3264.

Where case law or statute prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk and harm, violation of that standard, which is negligence per se, may constitute an "unreasonable risk" under this section. Dippel v. Sciano, 37 Wis.2d 443, 462, 155 N.W.2d 55 (1967); Kalkopf v. Donald Sales & Mfg., 33 Wis.2d 247, 147 N.W.2d 277 (1967); Metz v. Medford Fur Foods, 4 Wis.2d 96, 90 N.W.2d 106 (1958).

In Sharp v. Case Corp., 227 Wis. 2d 1, 595 N.W.2d 380 (1999), the court was asked to overrule Greiten v. LaDow, 70 Wis.2d 589, 235 N.W.2d 677 (1975). The Greiten court held that a jury finding that a product is not unreasonably dangerous does not preclude a jury finding of negligent design. The court in Sharp declined to overrule Greiten. It further concluded that the jury finding that the product was not unreasonably dangerous was consistent with the jury finding that after manufacture and sale of the product, the manufacturer learned of a defect posing a serious hazard which originated and was unforeseeable at the time of manufacture, yet it failed to warn customers of the danger.

For related instructions in products liability, see Wis JI-Civil 3200 et seq : Warranty; and Wis JI-Civil 3240 et seq: Negligence.

The Committee revised the general strict products liability instruction following the decision in Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772, 629 N.W.2d 727. This lawsuit arose from a strict products liability claim by a health care worker who alleged the defendant manufactured defective and unreasonably dangerous latex medical gloves which caused her allergic reactions to the proteins in the gloves. At the time the plaintiff began experiencing her injuries in 1989, the health care community was generally unaware that persons could develop a latex allergy. Evidence at trial indicated that between 5 and 17 percent of health care workers have a latex allergy. The judge modified the then approved jury instruction on strict products liability. The jury awarded the plaintiff $1,000,000 after finding the gloves were defective and unreasonably dangerous.

Consumer Contemplation Test. The supreme court in Green considered several issues concerning the jury instructions given by the trial judge. First, the court considered whether the trial judge erred in instructing the jury that a product can be defective and unreasonably dangerous based solely on consumer expectations about that product. The trial court deviated from the then approved Wis JI-Civil 3260 which provided in part that "a product is said to be defective when it does not reasonably fit for the ordinary purposes for which such product was sold and intended to be used," and instead instructed the jury that "a product is said to be defective when it is in a condition not contemplated by the ordinary user or consumer which is unreasonably dangerous to the ordinary user or consumer."

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The manufacturer said this "consumer-contemplation" language used by the trial judge defined "defect" by the same terms that the trial court defined unreasonable danger and thus erroneously merged the elements of "defect" and "unreasonable danger" based solely on consumer contemplation. The supreme court disagreed and approved the revised instruction published above.

The court noted five factors from Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338 (1984), that may be "relevant" to determining whether the ordinary consumer could anticipate, and therefore, contemplate an alleged unreasonably dangerous defect. These factors are:

> 1) [C]onformity of defendant's design to the practices of other manufacturers in its industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; . . . 3) the extent of the claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident . . .; 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design.

Manufacturer's Knowledge of the Risk of Harm. The supreme court in Green, supra, next reviewed whether the trial judge erred by instructing the jury that a product can be deemed defective and dangerous regardless of whether the manufacturer knew or could have known of the risk of harm the product presented to consumers. The supreme court said the instruction was proper.

It noted that foreseeability of harm is an element of negligence, not strict products liability, which "focuses not on the defendant's conduct, but on the nature of the product." It also noted that foreseeable use must not be confused with foreseeable risk of harm.

The court refused to adopt a provision from the new Restatement, Third, Torts § 2(6) that a product:

> is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

The court said this new Restatement provision blurs the distinction between strict products liability and negligence claims.

How to Prove an Allergy-Causing Product is Unreasonably Dangerous. The court in Green, supra, also explained how to handle a strict products liability claim based on an allergy-causing product.

The court said:

> . . . , [w]e conclude that in order to prove that an allergy-causing product is unreasonably dangerous, a plaintiff must prove the following elements: (1) the product contains an ingredient that can cause allergic reactions in a substantial number of consumers; and (2) the ordinary consumer does not know that the ingredient can cause allergic reactions in a substantial number of consumers. Upon the plaintiff making this showing, the burden then shifts to the manufacturer to prove that the product includes a warning or directions that effectively alert the ordinary consumer that the ingredient can cause allergic reactions in a

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substantial number of consumers; if the manufacturer fails to meet this burden, a trier of fact can properly conclude that the product is unreasonably dangerous.

Liability of a Machine Reconditioner. A reconditioner who does not manufacture, distribute, or sell the products it reconditions is not liable in strict liability for the defects in the machines it reconditions. Rolph v. EBI Cos., 159 Wis.2d 518, 464 N.W.2d 667 (1991).

Effect of the Adoption of Restatement, Third, of Torts. In Sharp v. Case Corp., 227 Wis.2d 1, 19, 595 N.W.2d 380, the court acknowledged that Restatement, Third, of Torts was published in 1998 and may offer new insights into products liability law, but it declined "at this time" to overrule Greiten v. LaDow, supra 227 Wis.2d at 19.

Injury to Bystander. In a 2009 decision, the Wisconsin Supreme Court addressed the issue of whether a "bystander" falls within the "consumer contemplation test" for strict products liability and held that the bystander does not. Horst v. Deere & Co., 2009 WI 75, 319 Wis.2d 147, 769 N.W.2d 536. The plaintiff argued that Wis JI-Civil 3260 should include a "bystander contemplation test."

The jury instructions given by the trial judge were based on Wisconsin Jury InstructionBCivil 3260 with a supplemental statement regarding bystander claims. The jury was informed that a bystander personal injury claim in strict products liability is only available if the product is unreasonably dangerous based on the expectations of an ordinary user or consumer (the "consumer contemplation test"). Plaintiffs claimed that this jury instruction was an incorrect statement of the law. The plaintiff contended that when a product is dangerous only to a bystander and not to user or consumer, the consumer contemplation test is inappropriate. The plaintiff argued the jury should be instructed that a product is unreasonably dangerous based on the contemplation and expectations of an ordinary bystander.

The supreme court held that the consumer contemplation test, and not a bystander contemplation test, governs all strict products liability claims in Wisconsin, including cases where a bystander is injured. While bystanders may recover when injured by an unreasonably dangerous product, the determination of whether the product is unreasonably dangerous is based on the expectations of the ordinary consumer.

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3260.1 PRODUCT LIABILITY: WIS. STAT. § 895.047 (FOR ACTIONS COMMENCED AFTER JANUARY 31, 2011)

To prove liability of (defendant manufacturer) in this case, (plaintiff) must establish all of the following five elements:

1. The product is defective because

   [SELECT ONE OR MORE OF THE FOLLOWING THREE BRACKETED ITEMS]

   [it contains a manufacturing defect which departs from its intended design even though all possible care was exercised in the manufacture of the product.]

   [the foreseeable risks of harm posed by the product's design could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe.]

   [of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe.]
2. The defective condition rendered the product unreasonably dangerous to persons or property.
3. The defective condition existed at the time the product left the control of the manufacturer.
4. The product reached the user or consumer without substantial change in the condition in which it was sold.
5. The defective condition was a cause of (plaintiff)'s damages.

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Question No. 1 on the verdict form asks:

When the product left the control of (manufacturer) and has reached the user or consumer without substantial change in the condition it was sold, was it in such a defective condition as to be unreasonably dangerous to a (user) (person) (property)?

[NOTE: USE THE FOLLOWING PARAGRAPH IF EVIDENCE HAS BEEN RECEIVED ON THE PRODUCT'S COMPLIANCE WITH STANDARDS, CONDITIONS, OR SPECIFICATION ADOPTED OR APPROVED BY A FEDERAL OR STATE LAW OR AGENCY. SEE WIS. STAT. § 895.047(3)(b).]

[There was evidence received that at the time of sale, the product complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency. From this evidence, a rebuttable presumption arises that the product was not defective. However, there is also evidence which may be believed by you that the product is defective. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable than not that the product was defective, then in answering Question No. 1, you should find that the product was not defective.]

Question No. 2 on the verdict form asks:

Was the defective condition of the product a cause of injury to (plaintiff)?

(Read Wis JI-Civil 1500)

[NOTE: USE THE FOLLOWING PARAGRAPHS IF EVIDENCE HAS BEEN RECEIVED ON DRUG USE OR ALCOHOL CONSUMPTION BY PLAINTIFF. SEE WIS. STAT. § 895.047(3)(a).]

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[There was evidence received regarding the consumption of (drugs) (alcohol) by (plaintiff). If you are satisfied by clear, satisfactory, and convincing evidence to a reasonable certainty, that at the time of the injury, (plaintiff) was under the influence of any controlled substance [or controlled substance analog] [or had a concentration of .08 or more of alcohol in (100) (210) milliliters in (his) (her) (blood) (breath), then a rebuttable presumption arises that [being under the influence of a controlled substance (controlled substance analog)] [having an alcohol concentration of .08 or more at the time of the injury] was the cause of (plaintiff)'s injury.]

[The term "under the influence" means that at the time of injury, (plaintiff)'s ability to operate (use) the manufacturer's product, was impaired because of consumption of a controlled substance (controlled substance analog) which renders (him) (her) incapable of safely operating (using) the product.]

(Read Wis JI-Civil 205 Burden of Proof: Middle)

[The words "the cause" mean that neither the product nor the conduct of any other party was a substantial factor in producing (plaintiff)'s injury and that (plaintiff)'s [alcohol concentration of .08 or more] [being under the influence of a controlled substance (controlled substance analog)] was the single, exclusive cause of (his) (her) injury. However, there is evidence which may be believed by you that (plaintiff)'s injury had more than one cause. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable than not that there was an additional cause which produced (plaintiff)'s injury, you must find that [being under the influence of a controlled substance (controlled substance analog)] [having an alcohol

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concentration of .08 or more] was the cause of (plaintiff)'s injury and you must answer Question No. 2, relating to a cause "no."]

[Question No. _____ on the verdict form asks:

Was (plaintiff) negligent with respect to (his) (her) safety?

(Read WIS JI-CIVIL 3268 CONTRIBUTORY NEGLIGENCE modified as necessary to address the defenses of contributory negligence or misuse, alteration, or modification of the product by plaintiff. See Wis. Stat. § 895.047(3)(c).)

Question No. _____ on the verdict form asks:

Was (plaintiff)'s negligence a cause of the injury?

(Read Wis JI-Civil 200 Burden of Proof: Ordinary)]

COMMENT

This instruction and comment were approved in 2012. A reporter's note was deleted in 2014.

2011 Wisconsin Act 2, on which this instruction is based, became effective February 1, 2011. For a comparison of how this act changed common law products liability, see the discussion that follows.

Former Products Liability Law. Before the enactment of 2011 Wisconsin Act 2, products liability was based on common law. See Wis JI-Civil 3260, which is based upon Restatement (Second) of Torts, sec. 402A which was adopted in Dippel v. Sciano, 37 Wis.2d 443 (1967). Dippel elements for a product liability claim include the following:

1. That the product was in defective condition when it left the possession or control of the seller

2. That it was unreasonably dangerous to the user or consumer

3. That the defect was a cause (a substantial factor) of the plaintiff's injuries or damages

4. That the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and

5. That the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.

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Liability is imposed under Restatement (Second) of Torts although a person "has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used." Sec. 402A(2)(a), Wis JI-Civil 3260.

The "consumer contemplation" test is used to determine elements #1 & #2, above. A product is said to be "defective" when it is in a condition not contemplated by the ordinary user or consumer which is unreasonably dangerous to the ordinary user or consumer. Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772 Par. 77. A "defect" is not subject to any general definition and must be determined on a case-by-case relying on expectations of the ultimate consumer. Sumnicht v. Toyota, 121 Wis.2d 338, 368 (1984).

Sec. 402A(2)(b) abolished the privity defense, imposing liability "although the user or consumer has not bought the product from or entered into any contractual relation with the seller."

New Products Liability Law Created by 2011 Wisconsin Act 2. New products liability in Wisconsin is based on Wis. Stat. § 895.047(1) created by 2011 Wisconsin Act 2. The new law applies to any claim filed after January 31, 2011. The statutory elements are as follows:

1. That the product is defective because it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product contains a manufacturing defect if the product departs from its intended design even though all possible care was exercised in the manufacture of the product. A product is defective in design if the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe. A product is defective because of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe. This statutory language is taken from Restatement (Third) of Torts, sec. 2.

2. That the defective condition rendered the product unreasonably dangerous to persons or property.

3. That the defective condition existed at the time the product left the control of the manufacturer.

4. That the product reached the user or consumer without substantial change in the condition in which it was sold.

5. That the defective condition was a cause of the claimant's damages.

This new law makes the following changes to the common law:

1. Categorizes types of defect [manufacture, design and failure to instruct/warn] under two different liability standards: (1) manufacturing defects: strict liability; and (2) design and failure to instruct/warn defects: failure to reduce foreseeable risks of harm (which is an element of negligence) See Green, supra, Par. 54-56.

2. Introduces the "reasonable alternative design" test in cases where the design defect is at issue (apparently discarding the consumer contemplation test).

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3. In design defect cases, the Restatement Third approach adopted by the statute increases plaintiff's burden by requiring proof of the manufacturer's negligence, and also adding an additional element of proof (i.e. reasonable alternative design) to the negligence standard. This approach was rejected in Green, which predated enactment of Act 2.

Problem Areas. Act 2 leaves several important questions unanswered. First, is there any difference between "not reasonably safe" and "unreasonably dangerous"?, i.e. Can proof of one stand as proof of the other? See Restatement (Third) of Torts, Comment G. To Section 2. Second, since neither a manufacturing defect or a failure to warn/instruct defect implicates product design, how would the alternative reasonable design test apply in these circumstances? Or, should the consumer contemplation test (see Green, supra) be applied to these cases? If not applicable, what test is to be used to determine whether a product is defective and unreasonably dangerous due to a manufacturing defect or a failure to warn/instruct defect?

Some say the consumer contemplation test should remain applicable to all three categories of defects. See *Wisconsin Lawyer* July 2011 article "A New Era: Products Liability Law in Wisconsin." The article implies that the reasonable alternative design test applies to all three categories of defects.

The Restatement (Third) of Torts indicates that the consumer contemplation test may remain relevant even in some design defect cases. Comment g to sec. 2 of the Restatement (Third) suggests that "although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe."

Sellers and Distributors. The new law reduces the exposure of sellers and distributors. To establish liability, plaintiff must establish that "manufacturer would be liable" and that one of the following applies:

1. Seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings/instructions.

2. Neither the manufacturer nor its insurer can be served within Wisconsin. (If the manufacturer subsequently submits to jurisdiction, a seller or distributor shall be dismissed.)

3. The trial court determines that a judgment against the manufacturer or its insurer would be unenforceable in Wisconsin.

Defenses. Defenses created in Act 2 include:

1. If defendant can show plaintiff had an alcohol concentration of .08 or more or was under the influence of a controlled substance or controlled substance analog, this creates a rebuttable presumption that alcohol or the drug was the cause of plaintiff's injury.

2. Compliance in material respects with relevant standards, conditions or specifications adopted or approved by a state or federal law or agency creates a rebuttable presumption that the product is not defective.

3. Defendant's damages shall be reduced by the percentage of causal responsibility attributable to plaintiff's misuse, alteration, or modification of the product.

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4. Upon a showing that the plaintiff's damage was caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge, the action shall be dismissed.

5. There is no seller or distributor liability, if the product was received from the manufacturer in a sealed container with no reasonable opportunity to test or inspect.

See concurring opinions in Godoy v. E.I. du Pont De Nemours et al, 2009 WI 78, 319 Wis.2d 91 and Horst v. Deere & Company, 2009 WI 75, 319 Wis.2d 147, which support the adoption of Restatement (Third) Torts.

Presumptions. For commentary on the use of presumptions in civil cases, such as Wis. Stat. § 895.047(3)(a) and (b), see Wis JI-Civil 350 and 352.

Contributory Negligence. Wis. Stat. § 895.047(3)(c) calls for a reduction in damages by "the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product." See Wis JI-Civil 3268.

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3262 STRICT LIABILITY: DUTY OF MANUFACTURER (SUPPLIER) TO WARN (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

A manufacturer (supplier) of a product must provide warnings concerning any dangerous condition of the product or any danger connected with its proper use of which he or she knows or should know. "Proper use" means a use which is intended by the manufacturer (supplier). In addition, a manufacturer (supplier) has the duty to warn of dangers inherent in a use not intended by the manufacturer (supplier), if such unintended use was reasonably foreseeable by the manufacturer (supplier).

However, a manufacturer (supplier) does not have a duty to warn about dangers that are known to the user, or are obvious to or readily discoverable by potential users, or are so commonly known that it can reasonably be assumed that users will be familiar with them. Additionally, the manufacturer does not have to warn about dangers associated with unforeseeable misuses of the product.

COMMENT

This instruction and comment were originally published in 1971 and revised by the Committee in 1982. The title was updated in 2011. The comment was updated in 2014. For a comparison of how 2011 Wisconsin Act 2 changed common law products liability, see Wis JI-Civil 3260.1.

Schuh v. Fox River Tractor Co., 63 Wis.2d 728, 213 N.W.2d 279 (1974); Kozlowski v. John E. Smith's Sons Co., 87 Wis.2d 882, 275 N.W.2d 915 (1979); Shawver v. Roberts Corp., 90 Wis.2d 672, 686, 280 N.W.2d 266 (1979); Wisconsin Elec. Power Co. v. Zallea Bros. Inc., 606 F.2d 697 (7th Cir. 1979); Restatement, Second, Torts § 402A, Comments h, j, and k (1965); Crane v. Sears Roebuck & Co., 218 Cal. App.2d 855, 32 Cal. Rptr. 754, 757 (1963); 13 A.L.R.3d 1057, 1078-80 (1967).

The failure to give a warning when required by the above instruction constitutes the product "defective" and unreasonably dangerous even though it is faultlessly made and, therefore, within the strict liability rule. Restatement, Second, Torts § 402A, Comments j and k (1965).

The Wisconsin Supreme Court has recognized that "foreseeable use is a requirement for a case in strict liability in tort, just as it is in negligence or warranty cases." Schuh, supra at 742 (citing 2 Frumer, Products Liability, Scope of Liability, pp. 3-297 to 3-301, § 16A(4)(d)).

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A manufacturer or supplier of a product is only obligated to warn of dangers that are known or reasonably foreseeable and anticipated. Restatement, Second, Torts § 402A, Comment j (1965); Wisconsin Elec. Power Co. v. Zallea Bros. Inc., 606 F.2d 697 (7th Cir. 1979).

In Kozlowski, supra at 899, the court said the existence of a hidden as opposed to an obvious defect is properly a jury question.

A manufacturer is not obligated to warn of the danger inherent in a product that has been altered or modified by the user. Shawver v. Roberts Corp., supra.

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3264 STRICT LIABILITY: DEFINITION OF BUSINESS

The term "business" means some particular occupation or employment habitually engaged in for livelihood or gain.

It is not necessary that the (manufacturer) (seller) be engaged solely in the business of selling the product involved herein, provided it is more than an occasional or isolated sale. The term "business" does not apply to an isolated or an occasional sale of a product by one who is not engaged in that activity as a part of his or her business.

COMMENT

This instruction and comment were originally published in their present form in 1971. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Schreiber and Rheingold, Products Liability 2:124 (1967); State v. Joe Must Go Club, 270 Wis. 108, 70 N.W.2d 681 (1955); Restatement, Second, Torts § 402A, Comment f (1965).

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3268 STRICT LIABILITY: CONTRIBUTORY NEGLIGENCE

Negligence is the failure to exercise ordinary care.

The user of a product has the duty to exercise ordinary care for his or her own safety and protection. If you find that (plaintiff) (misused the product) (used the product knowing it to be defective or unreasonably dangerous) (used the product after altering or modifying the product) (used the product knowing the product was worn out in such a manner as to render the product unsafe) (failed to follow the instructions and warnings as to the use of the product), then you should find (plaintiff) negligent. If you are not so satisfied, you should find (plaintiff) not negligent.

COMMENT

This instruction and comment were originally published in 1971 and revised in 2011, 2013, and 2015.

Wis. Stat. § 895.047(3)(c)(2012) provides that: "damages for which a manufacturer, seller or distributor would otherwise be liable shall be reduced by the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product."

Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967); 13 A.L.R.3d 1057, 1100-1103 (1967); Restatement, Second, Torts (2d) § 402A, Comment n (1965).

For related instructions, see Wis JI-Civil 1007, 3207, 3208, 3210, and 3254.

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3290 STRICT PRODUCTS LIABILITY: SPECIAL VERDICT (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

Question 1: When (product) left the possession of (seller) was (product), in a defective condition so as to be unreasonably dangerous to a prospective (user) (consumer)?

Answer:_____

Question 2: If you answer question 1 "yes," answer this question:

Was the defective condition a cause of (plaintiff)'s injuries?

Answer:_____

Question 3: Was (plaintiff) negligent with respect to (his) (her) own safety?

Answer:_____

Question 4: If you answer question 3 "yes," answer this question:

Was the negligence of (plaintiff) a cause of (his) (her) injuries?

Answer:_____

Question 5: If you have answered questions 2 and 4 "yes," answer the following:

Assuming that the defective condition of the product and (plaintiff)'s negligence caused 100% of (plaintiff)'s injuries, what percentage do you attribute to:

(a) The product? _____

(b) (Plaintiff)? _____

_____

Total 100%

COMMENT

[**Reporter's Note:** For a comparison of how 2011 Wisconsin Act 2 changed common law products liability, see Wis JI-Civil 3260.1, Comment.]

This special verdict and comment were approved by the Committee in 1975. They were revised in 2001. The last line ("Total 100%") was added in 2010. The comment was revised in 2006 and updated in 2011. The reporter's note was revised in 2014.

This instruction is for use in strict product liability actions commenced before February 1, 2011. For actions commenced on February 1, 2011 or after, see Wis JI-Civil 3290.1.

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The plaintiff must prove five elements to establish the liability of the seller:

1. That the product was defective when it left the seller's possession;
2. That it was then unreasonably dangerous to the user;
3. That the defect was a cause of the plaintiff's injuries;
4. That the seller was engaged in selling the product (not an isolated sale unrelated to the principal business of the seller); and
5. That the product was expected to and did reach the user without substantial change.

The proposal does not include inquiries with respect to elements 4 and 5 because, generally, they will not be in issue and can and should be resolved as findings by the court. If jury issues are presented on these questions, they could be submitted with the following questions:

Question _____: Did (defendant), as part of its business, sell the product in question?
Answer: _____

Question _____: If you answer "yes" to the foregoing question, answer this question:
Did (defendant) expect the product to reach (plaintiff), as an ultimate user, without substantial change in its original condition?
Answer: _____

The verdict makes reference only to a seller. If the facts warrant, the inquiry could be adapted to apply to a manufacturer, wholesaler, jobber, or retailer. (See Restatement, Second, Torts § 402A, Comments, p. 350, and illustration on p. 355 (1965).)

The inquiry as to plaintiff's negligence is submitted in ultimate form. The elements of contributory negligence would be contained in the instructions. It could involve: misuse or abuse of the product; failure to protect himself or herself against known or apparent dangers; using the product in a manner other than the use for which it was intended; use of worn-out product; carelessness in using or handling an inherently dangerous product; and others.

Strict Liability, Negligence, and Comparative Negligence. In 2001, the Committee revised the special verdict questions for strict product liability claims following the supreme court's decision in Fuchsgruber v. Custom Accessories, 2001 WI 81, 244 Wis.2d 758, 628 N.W.2d 833. In this case, the court considered whether the 1995 amendment to the comparative negligence statute, Wis. Stat. § 895.045(1), applies to strict product liability actions. The court said it does not. The amended comparative negligence statute, Wis. Stat. § 895.045(1), reads:

> (1) COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally

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> negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed. [Emphasis added.]

The 1995 amendment to § 895.04 had two purposes: (1) to codify the pre-existing requirement in negligence actions that, where there are multiple defendants, a plaintiff's negligence is compared against the separate rather than the combined negligence of the defendants for purposes of determining liability; and (2) to modify joint and several liability. As to the latter, under the statute, only a defendant found 51 percent or more causally negligent can be jointly and severally liable for a plaintiff's total damages (adjusted for any contributory negligence). The liability of a defendant whose causal negligence is less than 51 percent is limited to the percentage of causal negligence attributed to that defendant.

The court, in Fuchsgruber, supra, said that earlier case law, while analogizing strict product liability to negligence per se, did not establish the tort as a species of negligence. If it was negligence, then the comparative negligence statute would require a comparison of the plaintiff's negligence to each defendant's negligence, as in an ordinary negligence action. Because strict liability is not negligence, the comparison in a product liability action is plaintiff-to-product, and secondarily, in multiple defendant cases, the defendants to each other, for purposes of contribution.

The court in Fuchsgruber, supra, disagreed with the then published pattern special verdict which suggested that the defective condition of the product constitutes "negligence" on the part of the seller. The court said in strict liability cases there is no "defendant" negligence to be compared against the plaintiff, either separately or in the aggregate with other defendants. The court concluded that the comparison in strict product liability actions is not a comparison of one party's conduct against another, but rather, a comparison of the extent to which the plaintiff's injuries were attributable to his or her own contributory negligence as against the product's defective condition.

Contribution; Special Verdict Format. If more than one defendant is charged with strict liability, a second comparison question (shown on page 4) should be added to determine the rights of contribution, if any, which each defendant has in relation to the other defendants. The jury instruction to cover the special verdict question reads:

> If you are required to answer question ____ which asks you to compare the conduct of the defendants, you will determine how much or to what extent, if any, each defendant named in the question contributed to produce the injury caused by the defective product. You may consider the conduct of each of the parties so named, and taking the conduct of all of the parties as a whole, determine whether each one made a larger, equal, or smaller contribution than the other(s).

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SPECIAL VERDICT:

Question _____: If you answered questions 2 and 4 (defective product and cause) "yes," answer this question: Assuming the total conduct by defendants involved to be 100%, what percentage, if any, do you attribute to:

(a) (the manufacturer)? _____
(b) (the assembler)? _____
(c) (the dealer)? _____
(d) (the seller)? _____
Total 100%

Form of Special Verdict in Cases Involving Claims of Both Strict Liability and Negligence. For a discussion of formulating special verdicts in a case involving both strict liability claims and negligence claims, see Decker, "Special Verdict Formulation in Wisconsin," Marquette Law Review Volume 60, pages 273-79 and 290-95.

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3290.1 PRODUCT LIABILITY: WIS. STAT. § 895.047: VERDICT (FOR ACTIONS COMMENCED AFTER JANUARY 31, 2011)

1. When (product) left the control of (manufacturer) and has reached the user or consumer without substantial change in the condition it was sold, was it in such a defective condition as to be unreasonably dangerous to a (user) (person) (property)?

2. If you answered "yes" to Question No. 1, then answer this question. Otherwise, do not answer it. Was the defective condition a cause of the injury?

3. Was (plaintiff) negligent with respect to (his) (her) own safety?

4. If you answered "yes" to the preceding question, then answer this question. Otherwise, do not answer it. Was (plaintiff)'s negligence a cause of the injury?

[NOTE: IF THERE IS SUFFICIENT EVIDENCE THAT PARTIES OTHER THAN A PRODUCT DEFENDANT AND PLAINTIFF WERE NEGLIGENT (SEE WIS. STAT. § 895.045(3)(a)), THEN THE JURY SHOULD ANSWER THE FOLLOWING TWO QUESTIONS FOR EACH DEFENDANT.]:

5. Was Defendant _____ negligent?

6. If you answered "yes" to the preceding question, then answer this question. Otherwise, do not answer it. Was Defendant _____'s negligence a cause of the injury?

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7. If you answered "yes" to two or more of Questions No. 2 through 6, then answer this question. Otherwise, do not answer it. Assuming the total causal responsibility for the injury to be 100%, what percentage of that causal responsibility do you attribute to:

   A. Defective condition of the product _____%

   B. Plaintiff _____ _____%

   C. Defendant (Non-product) _____ _____%

[NOTE: IF THERE IS SUFFICIENT EVIDENCE THAT ADDITIONAL DEFENDANTS ARE RESPONSIBLE FOR THE DEFECTIVE CONDITION OF THE PRODUCT (i.e., ADDITIONAL MANUFACTURERS, SEE WIS. STAT. § 895.047(1), OR SELLER/DISTRIBUTOR, SEE WIS. STAT. § 895.047(2)), THEN ADD QUESTIONS INQUIRING AS TO EACH DEFENDANT'S RESPONSIBILITY FOR THE DEFECTIVE CONDITION OF THE PRODUCT.]

8. If you answered "yes" to two or more of Questions No. 2, 4, or 6, then answer this question. Otherwise, do not answer it. Assuming the total responsibility for the defective condition of the product to be 100%, what percentage of that total responsibility do you attribute to:

   A. Product Defendant A _____%

   B. Product Defendant B _____%

   C. Product Defendant C _____%

COMMENT

This instruction and comment were approved in 2012.

See Wis. Stat. § 895.047 (2011 Wisconsin Act 2).

If the case involves the liability of distributors or sellers under Wis. Stat. § 895.047(2), they should be added to the verdict.

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3294 RISK CONTRIBUTION: NEGLIGENCE: VERDICT (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

Question 1: Did (plaintiff) ingest white lead carbonate?

Answer: _____
Yes or No

If your answer to Question 1 is "no," then do not answer any other question. If you answer Question 1 "yes," then answer Question 2.

Question 2: Was white lead carbonate a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

If the answer to Question 2 is "no," do not answer any other question.

Question 3: Answering separately for each defendant listed below, did that defendant produce or market the type of white lead carbonate ingested by (plaintiff)?

Defendant (A):	Yes _____	No _____
Defendant (B):	Yes _____	No _____
Defendant (C):	Yes _____	No _____
Defendant (D):	Yes _____	No _____

Considering only those defendants for whom you answered "yes" to Question 3, answer this question:

Question 4: Answering separately for each defendant listed below, did the defendant prove that it did not produce or market the white lead carbonate ingested by (plaintiff)?

Defendant (A):	Yes _____	No _____
Defendant (B):	Yes _____	No _____
Defendant (C):	Yes _____	No _____
Defendant (D):	Yes _____	No _____

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Considering only those defendants for whom you answered "no" in Question 4, answer this question:

Question 5: Answering separately for each defendant, was the defendant negligent in producing or marketing the white lead carbonate?

Defendant (A):	Yes _____	No _____
Defendant (B):	Yes _____	No _____
Defendant (C):	Yes _____	No _____
Defendant (D):	Yes _____	No _____

Question 6: Was (plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____
Yes or No

If you answered Question 6 "yes," then answer Question 7. If your answer is "no," then skip to Question 9.

Question 7: Was the negligence of (plaintiff) a cause of (his) (her) injuries?

Answer: _____
Yes or No

If you answered Question 7 "yes," then answer Question 8. If you answered Question 7 "no," then go to Question 9.

Question 8: Assuming the total negligence that caused the injury to (plaintiff) to be 100%, what percentage of the total negligence do you attribute to:

(a)	All defendants for whom you answered Question 5 "yes"	_____%
(b)	(Plaintiff)?	_____%
	TOTAL	100 %

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Before you answer Question 9, draw a line through those producers or marketers of white lead carbonate to whom you did not answer "yes" in Question 5. As to the rest, answer this question:

Question 9: Regardless of your answer to 8(a) above, assuming the total negligence of the remaining producers or marketers to be 100%, what percentage of negligence, if any, do you attribute to:

Defendant (A):	_____%
Defendant (B):	_____%
Defendant (C):	_____%
Defendant (D):	_____%
TOTAL	100 %

COMMENT

This suggested verdict for a negligence claim was approved in 2009. The comment was updated in 2010 and 2011. See comment to Wis JI-Civil 3295 for a discussion of the constitutionality of the risk contribution theory. A reporter's note was deleted in 2014.

In 2011, the Wisconsin Legislature enacted Wis. Stat. § 895.46 (2011 Wisconsin Act 2) which addresses risk contribution claims. The new law (applicable to actions commenced after January 31, 2011) provides the remedy for claims where the plaintiff is unable to provide specific product identification. See Wis JI-Civil 3296.

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3295 RISK CONTRIBUTION: NEGLIGENCE CLAIM (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

Question No. 1 of the verdict asks whether (plaintiff) "ingested" white lead carbonate. The word "ingest" means to take into the body by mouth.

[give Wis JI-Civil 1500 Cause]

Question No. 3 of the verdict asks whether the defendants produced and marketed the type of white lead carbonate ingested by (plaintiff). To answer this question "yes," you must conclude that the products are of such a kind or nature that one specimen (or part) may be used in place of another specimen (or equal part). This question asks whether the products are interchangeable or capable of mutual substitution.

Chemical identity of the products is not necessary. Instead, you should consider the following factors:

- The characteristic of the product's function at issue;
- The physical appearance of the product and the physical similarity of the product; and
- The risks posed by the product's use and whether such products have substantially identical defects which pose a uniformity of risk.

Question No. 4 asks whether the defendant has proved that it did not produce or market the white lead carbonate ingested by (plaintiff). Each defendant has the burden of proof to satisfy you that the answer to the question as to that defendant should be "yes."

A defendant may not be held liable for (plaintiff)'s injuries unless the defendant's product or conduct reasonably could have contributed to (plaintiff)'s alleged injury. A defendant could not reasonably have contributed to (plaintiff)'s injury if the defendant proves that its white lead carbonate pigment could not reasonably have reached the residence(s) where (plaintiff) lived.

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In making this determination, you should consider the following factors, if any, established by the evidence:

- The time period during which the white lead carbonate pigments that allegedly injured (plaintiff) were produced or marketed.
- The time period in which each manufacturer defendant produced or marketed its white lead carbonate pigments.
- The geographic locations in which each manufacturer produced or marketed the product at the time the product that allegedly injured (plaintiff) was produced or marketed.
- Other relevant factors raised by the evidence in the case.

[In answering the questions on the verdict about each of the defendants, you should consider only the evidence that was received for or against that defendant.]

[For Question No. 5, give Wis JI-Civil 1005; for Question No. 6, give Wis JI-Civil 1007; for Question No. 8, see Wis JI-Civil 1580 and 3290.]

If you are required to answer Question No. 9, you will determine to what extent, if any, the conduct of each producer or marketer of white lead carbonate contributed to produce the injury. Taking the conduct of the remaining producers or marketers as a whole, determine whether each one made a larger, equal, or smaller contribution than the others. Considering this question, some factors which you may but are not required to consider are:

- Testing for safety of the product;
- The market share of the producer-distributor in the relevant area;
- The role of the defendant in producing or marketing the product;
- Whether the defendant issued warnings about the dangers of the product;

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- Whether the defendant produced or marketed the product after it knew or should have known of the potential hazards the product presented to the public; and
- Whether the defendant took any affirmative steps to reduce the risk of injury to the public.

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2010 and 2011. A reporter's note was deleted in 2014.

The instruction is tailored for use in a trial involving the ingestion of lead paint. It can be adapted for other cases involving a fungible product. The instruction and verdict (Wis JI-Civil 3294) are tailored for a claim based on negligence. They will need to be modified for a risk contribution claim based on strict liability. For actions commenced after January 31, 2011, see Wis JI-Civil 3296.

Risk Contribution Theory. The risk contribution method of recovery was first adopted by the Wisconsin Supreme Court in Collins v. Eli Lilly Co., 116 Wis.2d 166 (1984). In Collins, the plaintiff's mother ingested a drug known as DES during her pregnancy. The plaintiff was diagnosed as suffering from full cell cancer of the vagina. The plaintiff was unable to identify the precise producer or marketer of the DES taken by her mother "due to the generic status of some DES, the number of producers or marketers, the lack of pertinent records, and the passage of time." Collins, supra, p. 177.

In Thomas v. Mallett, 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523, the plaintiff claimed damages based on ingesting lead paint. The supreme court made rulings that permitted the plaintiff to proceed against the lead paint manufacturers on a risk contribution theory. The supreme court ruled that even though the plaintiff had sued landlords and made a recovery, this did not prevent the plaintiff from pursuing lead paint manufacturers. The court rejected the paint manufacturer's claim that because Thomas had a remedy, there was no need to apply the risk contribution theory to his case.

Constitutionality of Risk Contribution Theory. The Thomas v. Mallett decision reserved ruling on the defendants' claims of 14th Amendment due process violation holding that they were not ripe for adjudication on a summary judgment record. A federal district court has held that application of the risk contribution theory to a successor corporation of a lead paint manufacturer violated substantive due process. Gibson v. American Cyanamid, Case No. 07-C-864 (E.D., Wisconsin, June 15, 2010). The district judge found that imposition of liability on a successor corporation not directly involved in the manufacture of white lead carbonate was "arbitrary and irrational," because the tradition causation requirement for liability in tort was eliminated. In a subsequent decision in Gibson v. American Cyanamid, the federal district judge dismissed all lead paint manufacturers. The basis of the judge's decision was that elimination of the causation requirement under the risk contribution rule violates substantive due process. The case has been appealed. In April of 2011, a different federal judge in Milwaukee issued a decision that allowed a lawsuit based on risk contribution to proceed. Burton v. Sherwin-Williams Co., (U.S. Dist. Ct., E.D. Wis.)

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The Gibson v. American Cyanamid ruling was footnoted by the majority's opinion in a 2010 decision of the Wisconsin Supreme Court, State v. Henley, 2010 WI 97, 328 Wis.2d 544, 787 N.W.2d 350, in which the court noted, at footnote No. 29:

> To support its expansive views of inherent authority, the dissent cites Article 1, Section 9 of the Wisconsin Constitution. See dissent, ¶¶111, 115, 120-21. This provision states in relevant part, "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." Wis. Const. art. I, § 9.
>
> But we have made clear that this provision does not entitle litigants to the remedy they desire, but only to their day in court. Wiener v. J.C. Penney Co., 65 Wis.2d 139, 222 N.W.2d 149 (1974).
>
> . . . [W]e note that this court's unwarranted expansion of its own powers through Article 1, Section 9 has recently been checked. In Gibson v. American Cyanamid Co., the Eastern District of Wisconsin held that this court's holding in Thomas v. Mallett, 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523, which created a new remedy under Article 1, Section 9, was arbitrary and irrational and violated the Fourteenth Amendment. Gibson, 2010 U.S. Dist. LEXIS 59378, slip op., *16-18 (E.D. Wis. June 15, 2010). Despite the dissent's broad description of our inherent authority, we simply do not have the authority to craft any remedy we want.

Applicability of the Doctrine. The committee believes that the applicability of the risk contribution doctrine is initially a matter for the court to decide.

Fungibility. According to the supreme court in Thomas v. Mallett, the word "fungible" means: 1) of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in a satisfaction of an obligation; 2) capable of mutual substitution; interchangeable. In the committee's view, the fungibility (similarity) of the lead paint made by the various manufacturers is an issue of fact for the jury. See paras. 140-149 of the Thomas v. Mallett decision and footnote 47. Based on this analysis, the committee included Question 3 on the verdict, Wis JI-Civil 3294.

Elements of a Risk Contribution Claim. The court in Thomas v. Mallett laid out the requirements for the plaintiff's proof on both negligence and strict liability claims based on risk contribution in the following passage:

> ¶ 161. Thomas has brought claims for both negligence and strict products liability. **Applying the risk contribution theory to Thomas's negligence claim**, he will have to prove the following elements to the satisfaction of the trier of fact:
>
> (1) That he ingested white lead carbonate;
>
> (2) That the white lead carbonate caused his injuries;
>
> (3) That the Pigment Manufacturers produced or marketed the type of white lead carbonate he ingested; and

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(4) That the Pigment Manufacturers' conduct in producing or marketing the white lead carbonate constituted a breach of a legally recognized duty to Thomas.

Because Thomas cannot prove the specific type of white lead carbonate he ingested, he need only prove that the Pigment Manufacturers produced or marketed white lead carbonate for use during the relevant time period: the duration of the houses' existence.

¶ 162. **Applying the risk contribution theory to Thomas's strict products liability claim**, Thomas will have to prove the following elements to the satisfaction of the trier of fact:

(1) That the white lead carbonate was defective when it left the possession or control of the pigment manufactures;

(2) That it was unreasonably dangerous to the user or consumer;

(3) That the defect was a cause of Thomas's injuries or damages;

(4) That the pigment manufacturer engaged in the business of producing or marketing white lead carbonate or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business or the pigment manufacturer; and

(5) That the product was one which the company expected to reach the user or consumer without substantial change in the condition it was when sold.

Defenses; Exculpation. The supreme court said a manufacturer could avoid liability based on risk contribution by proving that the "manufacturer did not produce or market white lead carbonate, either during the relevant time period or in the geographical market where the house is located." This issue is addressed in Question 4 of Wis JI-Civil 3294.

Contributory Negligence. Lead paint cases will not involve a question of contributory negligence because the age of children who ingest white lead carbonate is normally under seven years. Children under seven cannot be negligent.

Negligence of Others Not Producers or Marketers. If there are other defendants who did not produce or market a product, but whose negligence might have caused injury to the plaintiff, such as a parent or landlord in a lead paint case, then the verdict should include questions on the negligence, causation, and causal negligence comparison of these parties. The comparison question should include the defendant-companies and the parents, landlords, etc.

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3296 RISK CONTRIBUTION: NEGLIGENCE: VERDICT (WIS. STAT. § 895.046) (FOR ACTIONS COMMENCED AFTER JANUARY 31, 2011)

Question 1: Did (plaintiff) ingest white lead carbonate?

Answer: _____

Yes or No

If your answer to Question 1 is "no," then do not answer any other question. If you answer Question 1 "yes," then answer Question 2.

Question 2: Was white lead carbonate a cause of (plaintiff)'s injuries?

Answer: _____

Yes or No

If the answer to Question 2 is "no," do not answer any other question.

Question 3: Answering separately for each defendant listed below, did that defendant (manufacture) (distribute) (sell) (promote) the white lead carbonate ingested by (plaintiff)?

Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

If you answered "yes" to a defendant in Question 3, then do not answer Questions 4 or 5 and go to Question 6. If you answered Question 3 "no" to all defendants, then answer Question 4.

Question 4: Answering separately for each defendant listed below, did that defendant (manufacture) (distribute) (sell) (promote) a completely integrated product in the form (used by the plaintiff) (to which the plaintiff was exposed)?

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Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

Question 5: If you answered Question 4 "yes," as to any defendant, then as to those defendants only answer these questions.

(a). Did that defendant (manufacture) (distribute) (sell) (promote) a product chemically and physically identical to the product (used by the plaintiff) (to which the plaintiff was exposed).

Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

(b). Did that defendant (manufacture) (distribute) (sell) (promote) the product in the geographic market where the plaintiff was injured?

Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

(c). Did that defendant (manufacture) (distribute) (sell) (promote) the product during the time period in which the product that caused the plaintiff's injury was (manufactured) (distribute) (sold) (promoted)?

Defendant (A): (Yes or No)

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Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

(d). Was the product (manufactured) (distributed) (sold) (promoted) by the defendant distributed or sold without any labeling or other distinctive characteristics that identified that (manufacturer) (distributor) (seller) (promoter)?

Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

Considering only those defendants for whom you answered "yes" to Question 5(a), 5(b), 5(c), or 5(d), answer Question 6. If you answered "no" as to all defendants, then do not answer any further questions in this verdict.

Question 6: Answering separately for each defendant, was the defendant negligent in producing or marketing the product?

Defendant (A): (Yes or No)

Defendant (B): (Yes or No)

Defendant (C): (Yes or No)

Defendant (D): (Yes or No)

Question 7: Was (plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____

Yes or No

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If you answered Question 7 "yes," then answer Question 8. If your answer to Question 7 is "no," then go to Question 9.

Question 8: Was the negligence of (plaintiff) a cause of (his) (her) injuries?

Answer: _____

Yes or No

If you answered Question 8 "yes," then answer Question 9. If you answered Question 8 "no," then go to Question 10.

Question 9: Assuming the total negligence that caused the injury to (plaintiff) to be 100%, what percentage of the total negligence do you attribute to:

(a)	All defendants for whom you answered Question 6 "yes"	_____%
(b)	(Plaintiff)?	_____%
	TOTAL	100%

Before you answer Question 10, draw a line through those manufacturers or marketers of white lead carbonate to whom you did not answer "yes" in Question 6. As to the rest, answer Question 10.

Question 10: Regardless of your answer to 9(a) above, assuming the total negligence of the remaining producers or marketers to be 100%, what percentage of negligence, if any, do you attribute to:

Defendant (A):	_____%
Defendant (B):	_____%
Defendant (C):	_____%
Defendant (D):	_____%
TOTAL	100%

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COMMENT

This verdict was approved in 2011. A reporter's note was deleted in 2011. The verdict is tailored for use in a trial involving the ingestion of lead paint and can be adapted for claims involving other products. It is based on a claim for negligence. The verdict will need to be modified for a claim based on strict liability.

New Law. In 2011, the Wisconsin Legislature enacted Wis. Stat. § 895.046 (2011 Wisconsin Act 2) covering remedies against manufacturers, distributors, sellers, and promoters of products.

This new section, effective for actions commenced after January 31, 2011, recognizes two categories of actions against manufacturers and others in the stream of commerce: (1) actions involving specific product identification, and (2) actions without specific product identification.

The suggested verdict is structured for a case where the plaintiff presents evidence of specific product identification (i.e. a specific defendant (manufactured) (distributed) (sold) (promoted) the specific product alleged to have harmed plaintiff); and also evidence without specific product identification (i.e. risk contribution).

Risk Contribution. Under Wis. Stat. § 895.046(4), product liability attaches only if the plaintiff shows:

1. That no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm.
2. That the claimant has suffered an injury or harm that can be caused only by a manufactured product chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.
3. That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a complete integrated product, in the form used by the claimant or to which the claimant was exposed, and that meets all of the following criteria:

   a. Is chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

   b. Was manufactured, distributed, sold, or promoted in the geographic market where the injury or harm is alleged to have occurred during the time period in which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted.

   c. Was distributed or sold without labeling or any distinctive characteristic that identified the manufacturer, distributor, seller, or promoter.

The plaintiff must also name manufacturers of at least 80% of all of the product sold in Wisconsin during the relevant time period. Section 895.046(5) establishes a 25-year statute of limitations from the date of last manufacture, distribution, sale, or promotion of the product and the date the plaintiff's claim occurred.

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3300 LEMON LAW CLAIM: SPECIAL VERDICT

Question 1:

Did (plaintiff)'s vehicle have at least one nonconformity?

Answer:_____
Yes or No

If you answered question 1 "no," stop here. Do not answer any other questions.

If you answered question 1 "yes," answer questions 2 and 3.

Question 2:

Did the same nonconformity(ies) found to exist in question 1 continue to exist after the fourth time the vehicle was made available to (defendant) (or authorized dealers) for repairs?

Answer:_____
Yes or No

Question 3:

Was (plaintiff)'s vehicle out of service for an aggregate of at least 30 calendar days (within the term of the warranty) (within the first year after delivery) because of warranty nonconformity(ies)?

Answer:_____
Yes or No

If you answered either question 2 or 3 "yes," answer questions 4 and 5.

If you answered both question 2 and 3 "no," do not answer questions 4 and 5 and answer question 6.

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Question 4:

A. What sum of money did (plaintiff) pay as the purchase price for the vehicle?

$_____

B. What amount of money did plaintiff pay for sales tax?

$_____

C. What sum was paid by (plaintiff) in finance charges to purchase the vehicle?

$_____

D. What sum will compensate (plaintiff) for collateral costs in connection with the repair of any nonconformity?

$_____

Question 5:

How many miles were on (plaintiff)'s vehicle when a nonconformity was first reported to (manufacturer or manufacturer's authorized dealer)?

_____ miles

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Question 6:

Did (defendant) or its authorized dealers fail to repair any nonconformity in the (plaintiff)'s vehicle before the expiration (of the warranty) (of one year after delivery)?

Answer:_____
Yes or No

If you answered question 6 "yes," answer question 7.

Question 7:

What sum of money, if any, will fairly compensate (plaintiff) for any pecuniary loss?

$_____

COMMENT

This instruction and comment were approved by the Committee in 1999. The comment was revised in 2000, 2001, 2005, 2008, 2012, and 2016.

The special verdict covers two separate claims. Questions 1, 2, 3, 4, 5 deal with remedies established under Wis. Stat. § 218.0171(2)(b) – replacement or refund. Questions 1, 6, 7 deal with the remedy established under Wis. Stat. § 218.0171(2)(a). The distinction between the two claims is described in Vultaggio v. General Motors, 145 Wis.2d 874, 891, 429 N.W.2d 93 (1988).

Personal Injury. The Lemon Law does not permit a plaintiff's claim for personal injury damages. Gosse v. Navistar Int'l Transp. Corp., 2000 WI App 8, 232 Wis.2d 163, 605 N.W.2d 896. In Gosse, the court said that to allow recovery for personal injury damages would be contrary to the purpose of Wisconsin's Lemon Law. It said if a vehicle's construction is so defective that it causes injury to the consumer, the consumer can both pursue Lemon Law remedies to get the vehicle repaired, replaced, or to obtain a refund, and bring a separate claim for personal injuries under appropriate law. 2000 WI App 8, ¶ 14.

Manufacturer's Affirmative Defense and Burden. In Marquez v. Mercedes-Benz USA, 2012 WI 57, 341 Wis.2d 119, 815 N.W.2d 314, the Wisconsin Supreme Court held that to avoid the remedies provided by Wis. Stat. § 218.017(7) for not issuing a refund or replacement within the 30-day statutory period, a manufacturer must prove that the consumer intentionally prevented the manufacturer from providing a refund or replacement within the 30-day statutory period. The manufacturer's burden for this question is "clear, satisfactory and convincing evidence to a reasonable certainty." See Wis JI-Civil 205.

Comparable Replacement Vehicle. Where the case involves whether a "comparable vehicle" was provided, see Porter v. Ford Motor Co., 2015 WI App 39, 362 Wis.2d 505, 865 N.W.2d 207.

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3301 LEMON LAW CLAIM: NONCONFORMITY

Question 1 asks: Did (plaintiff)'s vehicle have at least one "nonconformity"?

Wisconsin law defines a "nonconformity" as a condition or defect which (1) substantially impairs the use, value, or safety of a motor vehicle and (2) is covered by an express warranty applicable to the vehicle or a component of the vehicle. [Nonconformity does not include a condition or defect which is the result of abuse, neglect, or unauthorized modification or alteration by the consumer.]

[Committee Note: Insert any stipulated language concerning the delivery of vehicle or stipulated warranty periods.]

A condition or defect that substantially impairs the use, value, or safety of a vehicle must be more than a minor annoyance or inconvenience. However, the (plaintiff)'s vehicle need not have been undriveable for the nonconformity to substantially impair its use, value, or safety. Also, the nonconformity may substantially impair use, value, or safety even if the vehicle was able to provide simple transportation.

COMMENT

This instruction and comment were approved in 1999. The comment was updated in 2000.

(Note: Refer to general instructions on burden of proof, argument of counsel, and evidence.) Chmill v. Friendly Ford-Mercury, 144 Wis.2d 796, 424 N.W.2d 747 (Ct. App. 1988).

Buyer's Reliance. The supreme court has said that the Lemon Law contains no "hidden defect" or lack of knowledge requirement. Therefore, it allowed consumers who were aware of scratches to their trucks at the time they took delivery to pursue Lemon Law remedies. In so holding, the supreme court reversed the court of appeals which had concluded that consumers who are aware of defects in a motor vehicle at the time they accept delivery may not sue the vehicle manufacturer under the Lemon Law when repair efforts fail. Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis.2d 670, 610 N.W.2d 832.

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3302 LEMON LAW CLAIM: FOUR ATTEMPTS TO REPAIR: SAME NONCONFORMITY

Question 2 asks whether the same nonconformity (ies), found to exist in Question 1, continued to exist after the fourth time the plaintiff's vehicle was made available to the defendant or its authorized dealer for repairs.

Wisconsin law requires a manufacturer or its authorized dealer to repair a nonconformity in four or less attempts.

In order to answer "yes" to this question, you must find:

1. that the same nonconformity was made available for repair to the manufacturer or any of its authorized dealers at least four times (within the terms of the warranty) (within the first year after delivery); AND
2. that the nonconformity continued after the fourth time the vehicle was made available for repairs.

The "same nonconformity" means that the identical or substantially similar condition(s) or defect(s) (is) (are) made available for four or more repair attempts.

A nonconformity is made "available for repairs" regardless of whether any repairs were actually attempted by the manufacturer or its authorized dealers. Also a nonconformity is made available for repairs regardless of whether any nonconformity was verified at the time by the manufacturer or authorized dealer.

COMMENT

This instruction and comment were approved in 1999.

Chmill v. Friendly Ford-Mercury, 144 Wis.2d 796, 424 N.W.2d 747 (Ct. App. 1988); Carl v. Spickler Ent. Ltd, 165 Wis.2d 611, 478 N.W.2d 248 (Ct. App. 1991).

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3303 LEMON LAW CLAIM: OUT OF SERVICE WARRANTY NONCONFORMITY (Warranty on or after March 1, 2014)

Question 3 asks whether (plaintiff)'s vehicle was "out of service" for an aggregate of at least 30 calendar days because of any nonconformities (within the term of the warranty) (within one year after delivery).

To answer question 3 "yes," you must find that (plaintiff) notified the manufacturer or any authorized dealer of a (the) nonconformity (ies) and gave the manufacturer or dealer an opportunity to repair the condition or defect. "Out of service," with respect to a motor vehicle, means that the vehicle is unable to be used by the consumer for the vehicle's intended purpose as a result of:

1. The vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity; or

2. The vehicle is in the possession of (plaintiff) and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle and that has been subject to an attempt to repair on at least 2 occasions.

COMMENT

This instruction and comment were originally approved in 1999. The comment was updated in 2014 and 2016. The committee revised this instruction in 2014 following the enactment of 2013 Wisconsin Act 10 which is first effective for motor vehicles for which the express warranty commences on March 1, 2014. See Wis. Stats. § 218.0171(1)(g).

The prior version of this instruction which applies to motor vehicles for which the express warranty predates March 1, 2014 is reproduced at the end of this comment.

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The Legislative Council's memo to 2013 Wisconsin Act 101 explains changes in the act to existing Lemon Law provisions, including the following:

- Retains the 30-day time period for refunds elected by the consumer, but creates a 45-day time period for comparable new motor vehicles and 120-day time period for comparable new heavy-duty vehicles. The Act defines "heavy-duty vehicle" as any motor vehicle having a gross vehicle weight rating or actual gross weight of more than 10,000 pounds.

- Requires a consumer to complete a form prescribed by the Department of Transportation (DOT) to report a nonconformity for repair or to elect a comparable new motor vehicle or refund. If the consumer does not provide all information on the form, the time period for a manufacturer to act in providing a comparable new motor vehicle or refund may not begin until the consumer provides additional information.

- Provides that, if the consumer elects a comparable new motor vehicle, no later than 30 days after receiving the DOT form, the manufacturer must agree, in writing, to provide the consumer with the comparable new motor vehicle or refund of the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale, and collateral costs.

- Provides that an action in court must be commenced within 36 months after first delivery of the motor vehicle to a consumer.

- Removes the requirement to award twice the amount of any pecuniary loss in an action in court.

- Provides that if a court finds that any party has failed to reasonably cooperate with another party's efforts to comply with obligations under the "lemon law" that hinders the other party's ability to comply with or seek recovery, the court may extend any deadlines; reduce any damages, attorney fees, or costs that may be awarded; strike pleadings; or enter default judgment against the offending party.

- Creates a definition for "out of service," which is used in the definition of "reasonable attempt to repair" under current law. In the Act, "out of service," with respect to a motor vehicle, means that the vehicle cannot be used by the consumer for the vehicle's intended purpose as a result of any of the following:

    - The vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity.

    - The vehicle is in the possession of the consumer and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle if the nonconformity has been subject to an attempt to repair on at least two occasions.

Flexibility for Repairs. For the modification of this instruction in a case where the consumer took the vehicle to a "repair facility acting on the manufacturer's behalf," see Burzlaff v. Thoroughbred Motorsports, Inc., 758 F.3d 841 (Seventh Circ., 2014). The court held that Wis. Stat. § 218.0171 (2) (a) does not say that the vehicle is available for repair only if it is actually taken to the manufacturer or an authorized dealer. The Lemon Law protects consumers who go to a repair facility authorized by the manufacturer whether the facility is a manufacturer's authorized motor vehicle dealer or not. Burzlaff v. Thoroughbred Motorsports, Inc., supra.

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For claims involving a warranty before March 1, 2014, the following instruction applies:

3303 LEMON LAW CLAIM: OUT OF SERVICE WARRANTY NONCONFORMITY (Warranty Before March 1, 2014)

Question 3 asks whether (plaintiff)'s vehicle was "out of service" for an aggregate of at least 30 calendar days because of any nonconformities (within the term of the warranty) (within one year after delivery).

To answer question 3 "yes," you must find that (plaintiff) notified the manufacturer or any authorized dealer of a (the) nonconformity (ies) and gave the manufacturer or dealer an opportunity to repair the condition or defect. If repairs are not made and (plaintiff) thereafter continued to give them an opportunity to repair the nonconformity (ies), the 30-day clock starts running from the date of that initial failed repair opportunity. As long as there exists notice and opportunity to repair with respect to a nonconformity, the 30-day clock runs.

"Out of service" is not limited to only those periods in which the vehicle is unavailable to (plaintiff). "Out of service" includes those periods when the vehicle is not capable of rendering service as warranted due to a nonconformity, even though the vehicle may be in the possession of the consumer and may still be driven in spite of the nonconformity.

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3304 LEMON LAW CLAIM: FAILURE TO REPAIR (RELATING TO SPECIAL VERDICT QUESTION 6) [WIS. STAT. § 218.0171(2)(a)]

If a new vehicle does not conform to an applicable express warranty, the consumer must report the nonconformity to the manufacturer or any of the manufacturer's authorized dealers (before the expiration of the warranty) (within one year after first delivery of the vehicle to the consumer.) The vehicle must also be made available for repair within one year after first delivery of the vehicle to the consumer.

Any nonconformity reported by the consumer and made available for repair, must be repaired by the manufacturer or its authorized dealers.

It is undisputed that (dealer) was a manufacturer's authorized dealer.

(Plaintiff) must prove that:

(a) the vehicle did not conform to an applicable express warranty, and

(b) that the nonconformity was reported to the manufacturer or its authorized dealer before (date), and

(c) that the vehicle was made available for repair[1] of the nonconformity on or before (date), and

(d) that the nonconformity was not repaired by the manufacturer or its authorized dealer, and

(e) that the nonconformity continues after expiration of (the warranty period) (one year).

COMMENT

This instruction and comment were approved in 1999. The statutory reference in the title was revised in 2005.

Vultaggio v. General Motors Corp., 145 Wis.2d 874, 429 N.W.2d 93 (Ct. App. 1988).

NOTE

[1]If only a Wis. Stat. § 218.0171(2)(a) claim, use Wis JI-Civil 3301 for definition of "nonconformity" and last paragraph of Wis JI Civil 3302 for definition of "available for repairs."

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3310 MAGNUSON-MOSS WARRANTY CLAIM (Express Warranty)

The Magnuson-Moss Warranty Act is a federal law that provides for certain rights in connection with warranties and service contracts applying to consumer products.

Under the Magnuson-Moss Warranty Act, (plaintiff) has the burden of proving the following elements:

1. that (defendant) supplied (plaintiff) with a (name of consumer product) that was defective or that malfunctioned;
2. that the defect or malfunction was covered by the warranty;
3. that (plaintiff) afforded (defendant) or defendant's representative a reasonable opportunity to repair the defect or malfunction;
4. that (defendant) failed to repair the (name of consumer product) at no charge to (plaintiff) within a reasonable time.

If (plaintiff) proves these elements, then (defendant) violated the Magnuson-Moss Warranty Act.

The act does not allow (defendant) an unlimited time to perform repairs that are required to be performed under a written warranty. Rather, the repairs must be performed within a reasonable time. It is for you to determine what is a reasonable time based on the facts and circumstances as you find them.

[It is not a defense to (plaintiff)'s claim that (defendant) tried to fix the (name of consumer product) within a reasonable time but was unable to do so. Commendable efforts alone do not relieve the defendant of its obligation to repair under the warranty.]

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SPECIAL VERDICT

Question 1: Did (defendant) supply (plaintiff) with a (name of consumer product) that was defective or that malfunctioned?

Answer: _____
Yes or No

Question 2: If you answered "yes" to question 1, answer this question:

Was the defect or malfunction covered by the terms of the warranty?

Answer: _____
Yes or No

Question 3: If you answered "yes" to question 2, answer this question:

Did (plaintiff) provide (defendant or defendant's representative) a reasonable opportunity to repair the defect or malfunction?

Answer: _____
Yes or No

Question 4: If you answered "yes" to question 3, answer this question:

Did (defendant or defendant's representative) fail to repair the defect or malfunction within a reasonable time?

Answer: _____
Yes or No

Question 5: If you answered "yes," to question 4, answer questions 5a & b:

a) What is the difference, if any, between the value of the (name of consumer product) if it had been as warranted and the value of the (name of consumer product) with the defect or malfunction?

Answer: _____

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COMMENT

This instruction and comment was approved in 2005. The comment was updated in 2008 and 2020. The 2020 revision updated case law citations.

The Magnuson-Moss Warranty Act, 15 USCS § 2301 et seq., allows a "consumer" to bring a lawsuit where he or she claims to be damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Act or under a written warranty, implied warranty, or service contract. 15 USCS § 2310 (d).

Magnuson-Moss claims usually involve motor vehicles and are usually brought with Lemon Law claims. However, Magnuson-Moss claims can be brought with respect to any consumer product. See 15 USCS § 2301(1).

Because the vast majority of cases involve defects covered by a written warranty, the verdict and the instruction focus on express warranty claims under the Magnuson-Moss Act.

The term "supplier" means "any person engaged in the making of a consumer product directly or indirectly available to consumers." 15 USCS § 2301 (4). The term "consumer" means a "buyer, transferee, or person entitled to enforce a warranty or service contract" 15 USCS § 2301(3).

The Act provides that a "warrantor must at a minimum remedy such consumer product within a reasonable time and without charge in the case of a defect, malfunction, or failure to conform with such warranty." 15 USCS § 2304(a)(1). The language "failure to conform with such written warranty" can be the basis of a claim, but how this claim differs from a product with a defect or malfunction is uncertain. Therefore, the committee has no suggested form of verdict or instruction involving this kind of claim under the Act.

Service Contracts. For the coverage of service contracts under the Magnuson-Moss Warranty Act, see Tang v. C.A.R.S. Protection Plus Inc., 2007 WI App 134, 301Wis.2d 752, 734 N.W.2d 169.

Lessee as a "Consumer." In 2005, the Wisconsin Supreme Court considered whether the plaintiff, as a lessee, met the definition of "consumer" under the MMWA, such that she could maintain a cause of action under the Magnuson-Moss Warranty Act for breach of written warranty against the manufacturer and warrantor of an allegedly defective vehicle. The court held the plaintiff alleged sufficient facts to qualify as a category two consumer under the Act because the facts alleged in her complaint indicated that the manufacturer's warranty satisfies the definition of "written warranty" and because she alleged that the vehicle in question was transferred to her during the duration of the warranty. The court said the warranty constituted a "written warranty" under the MMWA because the plaintiff alleged that it was issued by the manufacturer in connection with the sale of the vehicle by an authorized dealer to a lending institution in order to facilitate the lease, the warranty was part of the basis of the bargain between the dealership and the lending institution, and the lending institution purchased the vehicle for purposes other than resale.

Furthermore, the court concluded that the lessee had pled sufficient facts to qualify as a category three consumer because the facts alleged in her complaint indicated that the manufacturer's warranty satisfied the definition of "written warranty" and because she alleged that she was entitled by the terms of warranty to enforce the warranty against the manufacturer. Peterson v. Volkswagen of America, Inc., 2005 WI 61, 281 Wis.2d 39, 697 N.W.2d 61.

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3700 BUILDING CONTRACTS: MEASURE OF DAMAGES

Question 1 asks whether (builder/contractor) breached the contract.

Question 2 asks what amount of money, if any, will fairly compensate (plaintiff/owner) for the breach by (builder/contractor)? In answering Question 2, you must first determine the diminished value of (the structure). "Diminished value" is the difference between the value of the structure as built and the value of the structure if it had been built according to the contract.

If you determine that the structure cannot be repaired, the diminished value is your answer to Question 2.

If, however, you determine that the structure can be repaired, you must also determine the cost of repairs to the structure. "Cost of repairs" is defined as the reasonable cost of remedying defects, so far as can be done practicably. If the "diminished value" of the structure and the "cost of repairs" of the structure are different, the lesser of the two is your answer to Question 2.

SPECIAL VERDICT

1. Did (builder/contractor) breach the contract?

Answer: _____

Yes or No

2. If you have answered "yes" to Question 1, what amount of money, if any, will fairly compensate (plaintiff/owner) for the breach by (builder/contractor)?

Answer: $_____

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[ALTERNATIVE:

If you have answered "yes" to Question 1, what is the reasonable cost of repairs?

Answer: $_____

If you have answered "yes" to Question 1, what is the diminished value of the property?

Answer: $_____]

COMMENT

This instruction and comment were approved in 2005. The comment was revised in 2011.

A damaged party is entitled to have what he or she contracts for or its equivalent. Champion Companies v. Stafford Development, 2011 WI App 8, 331 Wis.2d 208, 794 N.W.2d 916; Jacob v. West Bend Mut. Ins. Co., 203 Wis. 2d 524, 543, 553 N.W.2d 800 (Ct. App. 1996). The application of this rule is "troublesome" when there is an issue on whether the defective construction should be repaired or whether the work was substantially performed. A "damaged party" is not entitled to be placed in a better position than if the contract had been performed. Pleasure Time, Inc. v. Kuss, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977). Instead, a party is only entitled to a remedy that puts the party in as good a position as if the contract had been fully performed. Champion Companies, supra, ¶ 11 and ¶ 13. For a discussion of the economic waste rule, see Hinkston, Mark, "Repair or Replace," Wisconsin Lawyer, August 2011, p.6.

The measure of damages is the reasonable cost of remedying defects, so far as can be done practicably, and the diminished value of the property so completed because of defects not so remediable. W.G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc., 62 Wis. 2d 220, 226, 214 N.W.2d 413 (1974). If reconstruction involves unreasonable economic waste, then the injured party is to recover the difference between the value of the property if it had been properly constructed and the value that the property has as constructed. W.G. Slugg Seed at 226. Diminished value is defined as the "difference between the value of the house as it stands with faulty and incomplete construction and the value of the house if it had been constructed in strict accordance with the plans and specifications." Plante v. Jacobs, 10 Wis. 2d 567, 103 N.W.2d 296 (1960). "Where defects are such that they may be remedied without destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent is sometimes held to be the cost of making the work conform to the contract." DeSombre v. Bickel, 18 Wis. 2d 390, 398, 118 N.W.2d 868 (1963).

Once the jury provides its damage answers as to cost of repairs and diminution in value, the trial court is in a position to determine the appropriate measure of damage. Jacob at 543. In Jacob, the judge substituted the stipulated cost of replacement by the parties for the jury's determined cost of repair/diminution in value to make the plaintiffs whole and give the plaintiffs exactly what they contracted for.

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The "reasonable cost of repairs" rule was applied because the cost did not "involve any reconstruction of the building or great sacrifice of inwrought material." Buchholz v. Rosenberg, 163 Wis. 312, 314, 156 N.W. 946 (1916). The "diminished value" rule was applied as to the basement floor in Buchholz because, in order to put the basement into the form contracted for, such an effort would require a substantial reconstruction of the building and sacrifice of much of the work already put into the project. Buchholz at 314.

The rules of damages set forth here are rules of law, and are not waived in the same manner as objections to evidence are waived. Venzke v. Magdanz, 243 Wis. 155, 160, 6 N.W.2d 604 (1943).

Usually, a trier of fact should determine which measure is more appropriate. W.G. Slugg Seed at 227. "[T]he burden to prove by credible evidence to a reasonable certainty the damages and the amount thereof is with the claimant. He must establish at least to a reasonable probability the amount of these damages." Naden v. Johnson, 61 Wis. 2d 375, 387, 212 N.W.2d 585 (1973). If the claimant only brings forth evidence regarding the cost of repairs, it is the respondent's burden to bring forth further evidence about diminution in value in order for the trier of fact to consider both measures of damages. Engel v. Dunn County, 273 Wis. 218, 222, 77 N.W.2d 408 (1956). "The absence of such evidence does not render evidence of cost of repairs insufficient to support a finding of damage in that amount." Engel at 222. "Damages must be proven with reasonable certainty." DeSombre at 398 (citing Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 2d 179, 70 N.W.2d 577 (1954)). The claimant must put some "reasonable basis of computation" into evidence. DeSombre at 399 (citations omitted). See Pleasure Time, Inc. v. Kuss, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977).

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3710 CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT

The law provides that a person who has been damaged by a breach of contract shall be fairly and reasonably compensated for his or her loss. In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and probable results of the breach.

COMMENT

This instruction and comment were approved in 1980. The comment was updated in 2018.

Repinski v. Clintonville Sav. & Loan Ass'n, 49 Wis.2d 52, 181 N.W.2d 351 (1970), states, "An award of damages for breach of contract should compensate the injured party for losses necessarily flowing from the breach." The losses must be the natural and probable results of the breach. Thurner Heat Treating Corp. v. Menco, Inc., 252 Wis. 16, 30 N.W.2d 228 (1947).

"Those naturally arising damages, referred to as 'consequential damages,' include 'all losses that are natural and probable results of the breach.' " Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797.

"The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach." Dehnart v. Waukesha Brewing Co., 21 Wis.2d 583, 124 N.W.2d 664 (1963).

Loss of profits could be included as a loss. Pressure Cast Products Corp. v. Page, 261 Wis. 197, 51 N.W.2d 808 (1952).

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3720 DAMAGES: INCIDENTAL

Damages may be awarded in such sum as will compensate the injured party for expenses reasonably incurred in the inspection, receipt, transportation, care, or resale of goods or merchandise; and for commissions, interest, and any other reasonable expense incident to the breach of the contract.

COMMENT

This instruction and comment were originally published in their present form in 1975. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. §§ 402.710, 402.715.

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3725 DAMAGES: FUTURE PROFITS

The loss of (prospective) (future) profits is a proper basis for awarding damages resulting from a breach of contract when the circumstances are such that the future damages may be computed with some reasonable certainty. The law places the burden of proof of establishing loss of future profit upon (plaintiff). If you find the evidence in this case to be so uncertain that you cannot do more than merely guess, speculate, or conjecture as to whether (plaintiff) is entitled to recover certain damages due to the loss of future profits, then you cannot award damages for future profits.

The law allows only such damages as have been proved by the greater weight of the credible evidence, to a reasonable certainty. The burden to prove damages is not satisfied by evidence which merely shows that something might or might not exist or might or might not occur in the future. Mere possibilities leave the resolution of the issue of damages for future profits in the field of speculation and conjecture to such an extent as to afford no basis for an inference; and, in the absence of at least such inference, there is no sufficient basis for awarding damages for the loss of future profits.

Although damages may not be based on speculation, it is not necessary that you should arrive at a conclusion of loss of future profits with mathematical certainty. In the very nature of things, such profits cannot be definitely determined. If the wrong itself is of such a nature as to preclude the determination of the amount of damages with certainty, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable estimation, although the result may only be approximate.

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With these general principles in mind, you are instructed that evidence of prior profits in the same business may be used by you as a basis for a computation of loss of future profits as well as any other evidence in the case bearing upon the issue.

Loss of future profits is to be determined by you as of the date of the breach of contract.

Damages may be awarded for loss of profits only if you determine that the wrongful act of the defendant caused the loss.

You may award damages for loss of profits only if you first determine that the defendant at the time the contract was made had reason to foresee the loss of profits as a probable result of a breach.

COMMENT

This instruction and comment were originally published in their present form in 1975. Editorial changes were made in 1994. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee=s 2002 revisions to Wis. JI-Civil 200 and 205. A typographical error was corrected in 2008.

Restatement of Contracts §§ 330, 331 (1933); White v. Benkowske, 37 Wis.2d 285, 155 N.W.2d 74 (1967); Krueger v. Steffen, 30 Wis.2d 445, 141 N.W.2d 200 (1966); Baker v. Northwestern Nat'l Cas. Co., 26 Wis.2d 306, 132 N.W.2d 493 (1965); Buxbaum v. G. H. P. Cigar Co., 188 Wis. 389, 206 N.W. 59 (1925); American Steam Laundry Co. v. Riverside Printing Co., 171 Wis. 644, 177 N.W. 852 (1920); Dickson v. Pritchard, 111 Wis. 310, 87 N.W. 292 (1901); 22 Am. Jur.2d, Contracts, § 174; Corbin on Contracts, § 1007.

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3735 DAMAGES: LOSS OF EXPECTATION

The measure of damages for a breach of contract is the amount which will compensate the plaintiff for the loss suffered because of the breach. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed. The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach. A party whose contract has been breached is not entitled to be placed in a better position because of the breach than the party would have been had the contract been performed. The injured party is entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the failure of the other party to perform.

COMMENT

This instruction and comment were originally published in their present form in 1975. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Schubert v. Midwest Broadcasting Co., 1 Wis.2d 497, 85 N.W.2d 449 (1957); Dehnart v. Waukesha Brewing Co., 21 Wis.2d 583, 124 N.W.2d 664 (1963); 55 C.J.S., Damages, § 74.

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3740 DAMAGES: TERMINATION OF REAL ESTATE LISTING CONTRACT (EXCLUSIVE) BY SELLER; BROKER'S RECOVERY

If the real estate listing contract was improperly terminated by the defendant, then you must determine the amount of recovery by the plaintiff.

If you find that the plaintiff had procured a buyer ready, willing, and able to purchase the property upon the terms specified in the listing contract (or on terms acceptable to the owner), then the plaintiff is entitled to recover the commission.

If, on the other hand, you find that the broker had not produced a buyer, then the plaintiff's recovery is an amount sufficient to compensate the plaintiff for his or her losses. That is, those losses which have been proved by the plaintiff to have flowed directly and necessarily from the improper termination of the listing contract by the defendant. In determining this amount, you may take into consideration the time spent by him or her in the performance of the work undertaken on seller's behalf, the difficulties involved, and the plaintiff's standing in the brokerage profession. You may also consider any profits which plaintiff could show would have accrued to the plaintiff had the contract not been improperly terminated, taking into account the probability of procuring a buyer on the seller's terms and all other relevant circumstances.

COMMENT

This instruction and comment were originally published in their present form in 1975. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

To recover loss profits, the broker must prove, with reasonable certainty, that he or she would have earned the commission but for the seller's breach.

Sniden v. Laabs, 30 Wis.2d 618, 141 N.W.2d 865 (1966); Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972); Winston v Minkin, 63 Wis.2d 46, 216 N.W.2d 38 (1974). [It should

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be noted that this is a measure of damages for the breach of a listing contract, not the measure which might be appropriate in an action based on the theory of quantum meruit, though many of the factors considered by the jury would be the same in the two cases.]

See 22 Am. Jur. Damages, § 48 - Effect of Breach on Damages - repudiation; Damages, § 174 - Breach of Contract.

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3750 DAMAGES: BREACH OF CONTRACT BY PURCHASER

The questions that you will be required to answer inquire as to the money damages sustained by the plaintiff-seller because of the defendant-buyer's refusal to carry out his or her part of the contract. Answer these questions with only the accompanying explanation to each individual question in mind. The court will determine from your answers the amount of damages due the plaintiff.

(If no resale by plaintiff)

Question 1: What is the difference between the contract price—what the defendant had agreed to pay for the goods—and the fair market value of such goods at the time when and place where the goods were to have been delivered?

Fair market value is that sum of money which the goods would have brought if sold by an owner, willing but not required to sell, to a buyer, willing but not required to buy.

Question 2: What incidental damages, if any, did the plaintiff-seller suffer because of the defendant-buyer's (failure to accept) (repudiation)?

Incidental damages include any commercially reasonable charges, expenses, or commissions the plaintiff-seller incurred in stopping delivery, in transporting, or in caring for the goods as a result of the defendant-buyer's breach.

Question 3: What expenses, if any, did the plaintiff-seller save because the contract was not fulfilled by the defendant-buyer?

Question 4: What is the profit which the seller would have made from full performance by the buyer?

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(If resale by plaintiff)

If the evidence in this case satisfies you that the price obtained by the plaintiff on the resale was a fair price, or if you are not so satisfied as to that fact but are satisfied that the plaintiff used all reasonable efforts to secure the best price obtainable, then you must answer the following questions:

Question 1: What is the difference between the resale price and the contract price?

Question 2: What incidental damages, if any, did the plaintiff-seller suffer because of the defendant-buyer's (failure to accept) (repudiation)?

Question 3: What expenses, if any, did the plaintiff-seller save because the contract was not fulfilled by the defendant-buyer?

(If action for price by seller—goods have been accepted or conforming goods have been lost or damaged after risk of their loss has passed to the buyer.)

If you find that the buyer failed to pay the price of the goods as agreed upon in the contract as the price became due, the seller may recover the price as agreed upon in the contract if:

(1) The seller has been unable after reasonable effort to resell them at a reasonable price; or

(2) Such a resale effort would not be reasonable under the circumstances of this case.

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In addition to the price of the goods, the plaintiff-seller may recover incidental damages. Incidental damages include any commercially reasonable charges, expenses or commissions the plaintiff-seller incurred in stopping delivery, in transporting, or in caring for the goods as a result of the defendant-buyer's breach.

COMMENT

This instruction and comment were originally published in their present form in 1977. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. §§ 402.708, 402.710, 402.706(1).

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3755 DAMAGES: BREACH OF CONTRACT BY SELLER

The questions that you will be requested to answer inquire as to the money damages sustained by the plaintiff-buyer because of the defendant-seller's refusal to carry out his or her part of the contract. Answer these questions with only the accompanying explanation to each individual question in mind. The court will determine from your answers the amount of damages due the plaintiff.

(Cover not effected.)

Question 1: What is the difference between the market price at the point in time when the buyer of the goods learned that the seller would not deliver or perform his or her part of the contract and the contract price?

"Market value" is the prevailing price or the price at which goods of the same quantity and quality could have been purchased by the buyer from a different seller.

Before you may determine the difference between the contract price and the market price, you must first be satisfied that (<u>at the time and place of delivery</u>) (<u>at the time of the refusal to deliver</u>) the plaintiff had access to an available market where goods of the same quantity and quality could there have been purchased by the plaintiff. If there was no available market at the place of delivery and (<u>at the time of delivery</u>) (<u>at the time of refusal to deliver</u>), but such a market existed a reasonable distance therefrom, you may then, in computing damages, use the market price of the goods at such distant market, adding thereto the cost of transporting the goods from such distant market to the place where the goods were to have been delivered by the defendant.

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Question 2: What incidental damages, if any, did the plaintiff-buyer suffer because of the defendant-seller's breach?

Incidental damages include all reasonable expenses incurred due to a delay or breach of a contract. (If the goods were rightfully rejected, these damages include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of these goods.)

Question 3: What consequential damages, if any, did the plaintiff-buyer suffer because of the defendant-seller's breach?

"Consequential damages" are damages that are awarded for those consequences of the breach which were reasonably foreseeable at the time the contract was entered into as probable if the contract were broken. Any knowledge on the part of the seller of the buyer's particular need for the goods, or of the generally recognized need for buyers of such goods, is evidence of the foreseeable consequences the breach would have on the part of the buyer. The buyer is entitled to consequential damages only if he or she could not reasonably prevent the damages resulting from the breach. Consequential damages include any injury proximately resulting from the seller's breach to the person or property of the buyer.

Question 4: What expenses, if any, did the plaintiff-seller save because the contract was not fulfilled by the defendant-buyer?

(If cover was effected.)

If you find that the plaintiff made a reasonable purchase or contract to purchase goods in substitution for those due from the seller and that this purchase or contract was made in good faith and without reasonable delay, then answer the following questions:

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Question 1: What is the difference between the cost of the substitution purchase and the contract price?

Question 2: What reasonable expenses, charges, or commissions did the plaintiff-buyer have to pay because the buyer was forced to purchase goods from a different seller to replace the goods contracted for?

COMMENT

This instruction and comment were originally published in their present form in 1977. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. §§ 402.711(1)(b), 402.713, 402.723(2), 402.712.

This instruction breaks down the question of damages from the appropriate statutory sections so that the jury will not become confused with the arithmetic functions that need to be computed. The court can readily calculate the total damages due the plaintiff. The measure of damages is:

(If no cover effected.) The difference between the market price and contract price plus incidental damages plus consequential damages minus expenses saved the plaintiff.

(If cover effected.) The difference between the price of the goods purchased to cover and the contract price plus incidental damages.

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3760 DAMAGES: ATTORNEY FEES

In determining the amount of compensation to which an attorney is entitled for such services as the attorney rendered on behalf of a client, you may take into consideration the time spent by the attorney in the performance of his or her work, the difficulties involved therein, the results obtained for the client, together with the attorney's reputation in his or her profession for learning, skill, ability, and integrity.

You may also take into consideration amounts customarily charged in this community for similar services. You are to make your determination on all of the evidence in this case.

The burden of proof as to the amount of reasonable compensation is on the plaintiff.

The burden of proof as to the amount of payments that have been made is on the defendant.

COMMENT

This instruction was approved by the Committee in 1979. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

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4000 AGENCY: DEFINITION

An agency is created as the result of the conduct of two parties.

The party for whom action is to be taken is the principal. The party who is to act is the agent.

An agency is based on an agreement between the parties which embodies three factual elements:

(1) the conduct of the principal showing that the agent is to act for him or her;

(2) the conduct of the agent showing that he or she accepts the undertaking;

(3) the understanding of the parties that the principal is to control the undertaking.

The conduct on the part of the principal must show that he or she is willing that the agent act for him or her and must indicate that the agent is to do so, subject to the principal's control. The conduct on the part of the agent must show that the agent acts or agrees to act on the principal's behalf, subject to principal's control.

A principal-agent relationship may be created or exist between the parties as a result of their acts and conduct, even if they had no knowledge or intent that the relationship was, or is being, created.

[Burden of Proof, Wis. JI-Civil 200]

COMMENT

The instruction and comment were approved by the Committee in 1978. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. A case citation was corrected in 2005. A comment was added in 2019.

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Rule v. Jones, 256 Wis. 102, 110, 40 N.W.2d 580 (1949); Seavey v. Jones, 235 Wis. 109, 111, 292 N.W. 436 (1940); Georgeson v. Nielsen, 214 Wis. 191, 196, 252 N.W. 576, 578 (1934); Restatement, Second, Agency § 1 (1958).

It is recommended that Instruction 4000 not be used as a basis for the establishment of vicarious liability. Instruction 4030 is more appropriate for that purpose. If, however, 4000 is used, then this paragraphs should be added to the instruction: "Before you can find that an agency existed in this case, you must be satisfied by the greater weight of the credible evidence, to a reasonable certainty, that _____ was an agent-servant of _____, that is, that _____ controlled or had the right to control the physical conduct of _____ in the performance of his or her services."

A servant is necessarily an agent, but an agent is not invariably a servant. To find a principal vicariously liable for the tort of his or her agent, the relationship must be that the agent is an agent-servant who is controlled by the owner or is subject to the owner's right to control the agent in the performance of his or her services, Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978).

See Wis JI-Civil 1600, Servant: Driver of Automobile.

Recreational Activities; Liability. Wisconsin Stat. § 895.52 does not include a definition for the term “agent”, however, “agent” is included in § 895.52 (2), (3), (4) and (5) in a list of those who may have immunity from liability. To find an agent relationship for the purpose of immunity, the relationship must result from the manifestation of control, or the right to control the details, means or methods of the “agent” by the principal, including any acts that cause injury. Whether an independent contractor is an agent is a fact-bound inquiry. Westmas v. Creekside Tree, 2018 WI 12, 379 Wis.2d 471, 493, 907 N.W.2d 68.

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4001 GENERAL AGENT: DEFINITION

A "general agent" is an agent authorized to conduct a series of transactions involving a continuity of service. In determining whether _____ was a general agent, you may take into consideration the number of acts he or she was to perform in accomplishing the result he or she was authorized to obtain, the number of people the general agent had to deal with, and the length of time needed to accomplish the results of his or her agency.

A general agent may also be defined as one who is so situated with respect to his or her principal that he or she does not require separate authorization for each transaction he or she performs for that principal.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is drafted from the definition of a general agent and the comments thereto set forth in Restatement, second, Agency § 3 (1958).

Comment (d) of § 3 points out the importance of the distinction between a general and a special agent as follows:

> The distinction between a special and a general agent has several important consequences. Thus, the general agent may have a power to bind his principal in excess of his authority or apparent authority in many situations in which the special agent may not have such power.

See Restatement, second, Agency §§ 161, 161A and 194 (1958). Again, the continuity of the employment of the general agent may result in the continuance of apparent authority after the termination of his or her authority when this would not result in the case of a special agent. See §§ 127-132. Furthermore, manifestations of the principal to a general agent in connection with his or her authority may be interpreted as merely advice or as instructions not intended to affect the rights of third persons, when similar manifestations made to a special agent would be interpreted as limiting his or her authority or power to bind the principal. See Comment b of § 34.

Meyers v. Matthews, 270 Wis. 453, 71 N.W.2d 368 (1955), discusses the "soliciting agent."

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4002 SPECIAL AGENT: DEFINITION

A "special agent" is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.

In determining whether or not _____ was a special agent, you may take into consideration the number of acts the special agent was to perform in accomplishing the result he or she was authorized to obtain, the number of people the special agent had to deal with, and the length of time needed to accomplish the results of his or her agency.

A special agent may also be defined as one who is authorized by his or her principal to conduct a single transaction or a series of transactions as a special assignment from his or her employer, which does not involve continuity in his or her employment.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

See Comment to Wis JI-Civil 4001.

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4005 AGENCY: APPARENT AUTHORITY

Question _____ involves the question of the apparent authority of _____ as agent for _____, the principal.

If a third person, because of appearances for which the principal was responsible, believed and had reasonable ground to believe, that the agent possessed power to act for the principal in the particular transaction, and if such third person was, in the exercise of reasonable prudence, justified in believing that the agent possessed the necessary authority, then the apparent authority of the agent is established and the principal is responsible to such third person the same as if the agent actually possessed all the power he or she assumed to possess.

The apparent authority for which the principal may be liable must be traceable to him or her and cannot be established solely by the acts and conduct of the agent. The principal is liable only for that appearance of authority caused by the principal. If, however, it is contended that the words, acts, or conduct of the agent were relied upon to establish the apparent authority, then it must be shown to your satisfaction that the principal had knowledge of and acquiesced in them.

Three elements are necessary to establish apparent authority:

(1) acts by the agent or principal justifying belief in the agency;

(2) knowledge thereof by the principal, sought to be held;

(3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

You will carefully consider and weigh the credible evidence and the reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that the

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elements necessary to establish the apparent authority of the agent have been proved, you will answer the question "yes"; otherwise you will answer it "no."

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Apparent authority of an agent would arise only when there is no question or dispute that the agency exists. The relationship of principal and agent must be established, and the question may then arise as to whether or not the agent had apparent authority to transact the business he or she transacted.

This instruction is taken substantially from Hansche v. A. J. Conroy Co. Inc., 222 Wis. 553, 559, 269 N.W. 309, 311 (1936). Also see Idzik v. Reddick, 10 Wis.2d 547, 552, 103 N.W.2d 300, 303 (1960); Sater v. Cities Service Oil Co., 235 Wis. 32, 40, 291 N.W. 355, 359 (1940); Sell v. General Elec. Supply Corp., 227 Wis. 242, 248, 278 N.W. 442, 445 (1938); Weil-McLain Co. v. Maryland Cas. Co., 217 Wis. 126, 129, 258 N.W. 175, 176 (1935); Walter v. Four Wheel Drive Auto Co., 213 Wis. 559, 569, 252 N.W. 346, 349 (1934); Commonwealth Tel. Co. v. Paley, 203 Wis. 447, 450, 233 N.W. 619, 621 (1930); Zummach v. Polasek, 199 Wis. 529, 533, 227 N.W. 33, 34 (1929); Voell v. Klein, 184 Wis. 620, 621, 200 N.W. 364, 365 (1924); Weigell v. Gregg, 161 Wis. 413, 416, 154 N.W. 645, 646 (1915); Freeman v. Dells Paper & Pulp Co., 150 Wis. 93, 99, 135 N.W. 540, 543 (1912); Garlick v. Morley, 147 Wis. 397, 399, 132 N.W. 601, 602 (1911); Restatement, second, Agency § 8 (1958); Callighan's Wis. Digest Principal and Agent § 116 (1950).

Where there is conflicting evidence on the question of apparent authority, it is material error not to give an instruction on apparent authority. Saveland v. Western Wis. R. Co., 118 Wis. 267, 270, 95 N.W. 130, 131 (1903).

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4010 AGENCY: IMPLIED AUTHORITY

Beyond the express authority conferred on an agent by his or her principal, an agent has the implied authority to do such acts and employ such means as are usual, appropriate, necessary, or proper to accomplish the purposes and objects of the agency.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

It is recognized that a principal, in creating an agency, cannot outline in detail all of the authority necessary and proper for his or her agent to have to accomplish the end result of the agency. It is assumed that the authority is given in broad general terms, and it is recognized that the agent has broader authority and powers than those specifically enumerated to him or her by his or her principal. The law does recognize this delegation of implied authority, and this instruction attempts to state, in instructional form, the principle of law involved. Medley v. Trenton Investment Co., 205 Wis. 30, 34, 236 N.W. 713, 714 (1931); U.S.F. & G. Co. v. Forest County State Bank, 199 Wis. 560, 565, 227 N.W. 27, 29 (1929); Voell v. Klein, 184 Wis. 620, 623, 200 N.W. 364, 366 (1924); Restatement, second, Agency § 35 (1958); Callaghan's Wis. Digest Principal and Agent § 121 (1950).

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4015 AGENCY: RATIFICATION

Question _____ inquires whether _____ ratified the previously unauthorized acts of _____.

A person for whom another assumes or purports to act as his or her agent (a principal for whom his or her agent acted beyond his or her authority) may ratify, give effect to, and render binding upon himself or herself any act or transaction not previously authorized, by affirming the conduct of his or her (purported) agent.

A principal affirms the unauthorized acts of his or her agent if he or she indicates by his or her words or acts that he or she accepts and treats the conduct of his or her agent as authorized.

The ratification of an unauthorized act or transaction of a(n) (purported) agent must be based on the principal's knowledge of all of the material facts involved in the conduct of his or her (purported) agent.

Ratification can only be effected by one who has the power and the competency to accomplish it, and it must involve conduct which is capable of being ratified.

Ratification must relate to the entire act or transaction and not only to a part or parts thereof, since one may not make available to himself or herself the fruits and benefits of an act or transaction and avoid or reject their burdens and obligations.

You will carefully consider and weigh the credible evidence and the reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that an unauthorized act or transaction of _____ was ratified and affirmed by _____, under the rules

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which I have just stated, you will answer the question "yes"; otherwise you will answer it "no."

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Saros v. Carlson, 244 Wis. 84, 11 N.W.2d 676 (1943); Waldheim & Co., Inc. v. Mitchell St. Bank, 220 Wis. 552, 265 N.W. 561 (1936); Przybylski v. Von Berg, 211 Wis. 178, 248 N.W. 101 (1933); Bright v. City of Superior, 163 Wis. 1, 14-15, 156 N.W. 600, 605 (1916); Garlich v. Morley, 147 Wis. 397, 132 N.W. 601 (1911); Fisher v. Lutz, 146 Wis. 664, 132 N.W. 592 (1911); Callaghan's Wis. Digest Principal and Agent § 210-230 (1950); Restatement, second, Agency §§ 82-99 (1958).

Ratification is an issue for the jury, Garcia v. Samson's Inc., 10 Wis.2d 515, 103 N.W.2d 565 (1960), and ratification may be inferred from:

(1) silence, acquiescence, or inaction [See Callaghan's Wis. Digest Principal and Agent § 219 (1950) and cases cited.];
(2) failure to repudiate unauthorized acts [Home Savings Bank v. Gertenbach, 270 Wis. 386, 72 N.W.2d 697 (1954); Lechner v. Ebenreiter, 235 Wis. 244, 292 N.W. 913 (1940)];
(3) the act of prosecuting or defending actions based on unauthorized acts [Smader v. Columbia Wisconsin Co., 188 Wis. 530, 205 N.W. 816 (1926); Chicago & N.W. R. Co. v. James, 24 Wis. 388 (1869); Weiseger v. Wheeler, 14 Wis. 109 (1861)].

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4020 AGENT'S DUTIES OWED TO PRINCIPAL

An agent occupies a position of trust and confidence with respect to his or her principal and is under obligation to exercise good faith, reasonable diligence, and standard skill in the performance of his or her duties in behalf of, and in following the directions of, his or her principal. These obligations compel the agent to discharge his or her duties with absolute fidelity and loyalty to the interests of his or her principal; to keep his or her principal informed with respect to, and to make full disclosure to him or her of, all material facts that affect the subject of his or her agency; to consult with him or her on emergency developments, if opportunity exists to do so; to exercise the skill and care standard for such employment in the community; in all respects, to discharge faithfully his or her duties, so as to protect and serve the best interests of his or her principal.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

This is intended as a general instruction on the duties of an agent. For details as to the respects in which this instruction can be amended to fit particular factual situations, see Restatement, second, Agency §§ 377-398 (1958); Callighan's Wis. Digest Principal and Agent §§ 50-52 (1950).

Prisuda v. General Cas. Co. of Amer., 272 Wis. 41, 74 N.W.2d 777 (1956); Bockemuhl v. Jordan, 270 Wis. 14, 70 N.W.2d 26 (1955); Shevel v. Warter, 256 Wis. 503, 41 N.W.2d 603 (1950); Bank of Calif., v. Hoffmann, 255 Wis. 165, 38 N.W.2d 506 (1949); Faultersack v. Clintonville Sales Corp., 253 Wis. 432, 34 N.W.2d 682 (1948); Weinhagen v. Hayes, 174 Wis. 233, 178 N.W. 780, 183 N.W. 162, 187 N.W. 756 (1921); McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 N.W. 472 (1907).

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4025 AGENCY: WITHOUT COMPENSATION

Where a person volunteers his or her services to another, and that other accepts such services, the relation of principal and agent (master and servant) may result, even though there is no agreement between the parties to compensate the volunteer for his or her services, nor any expectation on his or her part to receive compensation therefor.

COMMENT

This instruction and comment were originally published in 1962. Editorial changes were made in 1994 to address gender references in the instruction. The comment was updated in 2004.

Heims v. Hanke, 5 Wis.2d 465, 468, 93 N.W.2d 455 (1958); Kryzko v. Gaudynski, 207 Wis. 608, 615, 242 N.W. 186 (1932); Restatement, second, Agency § 225 (1958).

A servant need not be under formal contract to perform work for a master, nor is it necessary for a person to be paid in order to occupy the position of a servant. Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328.

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4027 AGENCY: TERMINATION: GENERAL

A principal may terminate his or her agent's authority at any time before the agent undertakes to execute the transaction he or she was authorized to accomplish, by notifying the agent that he or she withdraws, suspends, or revokes his or her authority.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Reid v. Milwaukee Air Pump Co., 211 Wis. 242, 247 N.W. 868 (1933); Kirby v. Corning, 54 Wis. 599, 12 N.W. 69 (1882); Restatement, second, Agency § 118 (1958).

A principal may not revoke his or her agent's authority after the agent, on the strength of that authority, has committed himself or herself to some obligation from which he or she cannot withdraw. Wiger v. Carr, 131 Wis. 584, 111 N.W. 657, (1907). Further, the termination of authority does not terminate apparent authority. Restatement, second, Agency § 124A (1958).

Georgeson v. Nielsen, 214 Wis. 191, 252 N.W. 576 (1934), holds that where the agency is gratuitous, there is no obligation on the part of either party to continue the relationship. See also Restatement, second, Agency § 16b Comment b (1958).

The agent may terminate the relationship by renouncing it, that is, manifesting to his or her principal his or her dissent to its continuance. Restatement, second, Agency § 118 (1958).

As to effect on third parties, see Wis JI-Civil 4028.

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4028 AGENCY: TERMINATION: NOTICE TO THIRD PARTIES

Where a person has previously dealt with an agent of a known principal, or knows him or her to be the principal's agent, or is apt to deal with him or her on the basis of his or her knowledge of that relationship, he or she has the right to assume that the agent's authority continues, and he or she may continue so to assume until he or she knows or is notified of the principal's revocation of the agent's authority. There is no particular form of notice of revocation that is required, and, generally, it is sufficient if it imparts such knowledge to the third party as would put reasonable persons on inquiry as to the revocation of the agent's authority.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Bernhagen v. Marathon Fin. Corp., 212 Wis. 495, 250 N.W. 410 (1933). 43 A.L.R. 1219; Restatement, second, Agency § 135 (1958). The Bernhagen case involved the continuance of an agent's apparent authority, even though his authority had been terminated.

Termination of an agent's authority by the principal does not revoke his or her apparent authority because that arises from a manifestation by the principal to third parties of his or her agent's authority to deal with them. The right of third parties to deal with agents on the basis of their apparent authority remains unaffected until they have knowledge or are notified that the agent's authority has been terminated. Restatement, second, Agency §§ 124A-133 (1958).

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4030 SERVANT: DEFINITION

Question ____ inquires whether, at the times material hereto, ____ was a servant of ____.

A "servant" is one employed to perform service for another in his or her affairs and who, with respect to his or her physical conduct in the performance of the service, is subject to the other's control or right to control.

In arriving at your decision as to what your answers to this question should be, you may consider the nature of the transaction, the methods pursued, the general understanding of the parties in their dealings with each other which tend to reveal the nature of their relationship, and any and all other surrounding circumstances, including the conduct of the parties, which tend to characterize the relationship.

You will carefully consider the credible evidence and reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that ____ was, at all times material hereto, acting in the capacity of a servant of _____, as that term is here defined, you will answer the question "yes"; otherwise, you will answer it "no."

COMMENT

The instruction and comment were approved by the Committee in 1962. The comment was updated in 2001 and 2004. An editorial correction was made in 2015.

The second paragraph is taken from Heims v. Hanke, 5 Wis.2d 465, 468, 93 N.W.2d 455 (1958), which relies on Restatement, Second, Agency § 225 (1958). See also Arsand v. City of Franklin, 83 Wis.2d 40, 265 N.W.2d 579 (1978); Harris v. Richland Motors, 7 Wis.2d 472, 96 N.W.2d 840 (1959); Meyers v. Matthews, 270 Wis. 453, 71 N.W.2d 368 (1955); Phaneuff v. Industrial Comm'n, 263 Wis. 376, 57 N.W.2d 406 (1953); Thurn v. LaCrosse Liquor Co., 258 Wis. 448, 46 N.W.2d 212 (1951); Ryan v. Department of Taxation, 242 Wis. 491, 8 N.W.2d 393 (1943). See also Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328.

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The third paragraph is based on Nestle's Food Co. v. Industrial Comm'n, 205 Wis. 467, 237 N.W. 117 (1931).

The test of the relationship is not the exercise of control by the principal, but his or her right to exercise control over the other. Employers Mut. Ins. Co. v. Industrial Comm'n, 230 Wis. 670, 676, 284 N.W. 548 (1939). See Harris v. Richland Motors, supra; Thurn v. LaCrosse Liquor Co., supra; Badger Furniture Co. v. Industrial Comm'n, 200 Wis. 127, 227 N.W. 288 (1929).

This instruction covers the common-law definition of a servant under a master-servant relationship. It is assumed that it could very well be employed to define an employee under an employer-employee relationship since ". . . the relationship of employer and employee is substantially the same as that of master and servant." Ryan v. Department of Taxation, supra at 497.

When the cause of action arises under special acts, such as Compensation, Unemployment, Social Security or Federal Employer's Liability, the language of the particular act should be examined to see if there are definitions of the relationship contained therein, and, if so, whether they conform to the common-law statement.

There are certain matters of fact which may be considered in arriving at a determination of whether a person is acting as a servant of another. These may be found by reference to Restatement, Second, Agency § 220 (1958). They are not included in this general definition of a servant; if the facts warrant, the general instruction may be tailored to include some or all of the material matters of fact involved.

Captain of Ship Doctrine. In a recent decision, the plaintiff in a medical malpractice action argued that the surgeon should be held vicariously liable for the negligence of two hospital nurses from a county-owned hospital who were responsible for counting sponges. Lewis v. Physicians Ins. Co., 2001 WI 60, 243 Wis.2d 648, 627 N.W.2d 484. The hospital was county-owned and, therefore, its liability at the time was limited to $50,000.

The trial court, on summary judgment, agreed with the plaintiff's argument that, as a matter of law, the surgeon is the "captain of the ship" and is responsible for the actions of the parties that were in the operating room. Interestingly, the plaintiff did not argue that the surgeon was vicariously liable for the nurses' actions under the doctrine of respondeat superior. Both the court of appeals and supreme court rejected the adoption of the captain of the ship doctrine to impose liability on the doctor. The supreme court said the "captain of the ship doctrine" has lost its vitality across the country as plaintiffs have been able to sustain actions against full-care modern hospitals for the negligence of their employees.

In Kerl v. Rasmussen, 2004 WI 86, the court said a "master" is a principal who employs an agent to perform service in his or her affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. ¶ 19.

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4035 SERVANT: SCOPE OF EMPLOYMENT

Question _____ inquires whether, at the times material hereto, _____ was acting within the scope of his or her employment as a servant of _____.

This question, in effect, asks you to determine whether, at the times material hereto, _____ was within the field of action of his or her employment or whether he or she deviated or departed therefrom, for personal or other reasons.

A servant is within the scope of his or her employment when he or she is performing work or rendering services he or she was engaged to perform and render within the time and space limits of his or her authority and is actuated by a purpose to serve his or her master in doing what he or she is doing. He or she is within the scope of his or her employment when he or she is performing work or rendering services in obedience to the express orders or direction of his or her master, or doing that which is warranted within the terms of his or her express or implied authority, considering the nature of the services required, the instructions which he or she has received, and the circumstances under which his or her work is being done or the services are being rendered.

A servant is outside the scope of employment when he or she deviates or steps aside from the prosecution of his or her master's business for the purpose of doing an act or rendering a service intended to accomplish an independent purpose of his or her own, or for some other reason or purpose, not related to the business of the master.

Such deviation or stepping aside must be sufficient to amount to a departure from the master's services for purposes entirely personal to him or her or for some person other than the master.

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Such deviation or stepping aside from the master's business may be momentary and slight, measured in terms of space of time, but if it involves a change of mental attitude or purpose in serving his or her personal interests, or the interests of another, instead of his or her master's, his or her conduct falls outside the scope of his or her employment.

You will carefully consider and weigh all the credible evidence and the reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that the servant _____ was within the scope of his or her employment, as here defined for you, you will answer the question "yes"; otherwise you will answer it "no."

COMMENT

This instruction and comment were published in 1966. The comment was updated in 1997, 2013, 2016, and 2020.

The Restatement of the Law on Agency and the cases cited do not contain a very clear or satisfactory definition of scope of employment. This instruction has been prepared with a view of incorporating the essential ingredients of the definitions of scope of employment from the Restatement and the cases.

Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941); Mittleman v. Nash Sales, Inc., 202 Wis. 577, 232 N.W. 527 (1930); Geldnick v. Burg, 202 Wis. 209, 231 N.W. 624 (1930); Johnson v. Holmen Canning Co., 191 Wis. 457, 211 N.W. 157 (1926); Eckel v. Richter, 191 Wis. 409, 211 N.W. 158 (1926); Kleeman v. Chicago & N.W.R. Co., 186 Wis. 482, 202 N.W. 295 (1925); Miller v. Epstein, 185 Wis. 112, 200 N.W. 645 (1924); Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N.W. 841 (1921); Seidl v. Knop, 174 Wis. 397, 182 N.W. 980 (1921); Gewanski v. Ellsworth, 166 Wis. 250, 164 N.W. 996 (1917); Firemen's Fund Ins. Co. v. Schrieber, 150 Wis. 42, 135 N.W. 507 (1912); Steffen v. McNaughton, 142 Wis. 49, 124 N.W. 1016 (1910); Sample v. United States, 178 Fed. Supp. 259 (1959); 12 Callaghan's Wis. Digest Master and Servant §§ 442-453 (1950); Restatement, second, Agency §§ 228-237 (1958); Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

Normally, the scope of employment issue is presented to the jury because it entails factual questions. Desotelle v. Continental Casualty Co., 136 Wis.2d 13, 26-28, 400 N.W.2d 524 (Ct. App. 1986). But see DeRuyter v. Wisconsin Electric Power Co., 200 Wis.2d 349, 546 N.W. 2d 534, (Ct. App. 1995) and Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc., 2013 WI App 124, 351 Wis.2d 170, 840 N.W.2d 132.

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Under the doctrine of respondeat superior, employers can be held vicariously liable for the negligent acts of their employees while they are acting within the scope of their employment. Shannon v. City of Milwaukee, 94 Wis.2d 364, 370, 289 N.W. 2d 564 (1980). The court of appeals in DeRuyter said this doctrine is a "bedrock of American tort law."

The touchstone of scope of employment issues is employer control over the employee. See Olsen v. Moore, 56 Wis.2d 340, 353-54, 202 N.W.2d 236 (1972). This employer control test is firmly entrenched in Wisconsin law. The general maxim is:
Where an employee works for another at a given place of employment, and lives at home or boards himself, it is the business of the employee to present himself at the place of employment, and relation of master and servant does not exist while he is going between his home and place of employment. Geldnich v. Burg, 202 Wis.2d 209, 231 N.W.2d 624 (1930). Thus, only when the employer exercises control over the method or route of the employee's travel to or from work can the employee be said to be acting within his or her employment. See Kamp v. Curtis, 46 Wis.2d 423, 175 N.W. 2d 267 (1970).

Special Circumstances. In DeRuyter, the plaintiff contended that "special circumstances" can exist that except an employee from the employer control rule. The plaintiff pointed to other jurisdictions that have adopted a "special mission" exception to the general rule that an employee is not acting within the scope of employment while traveling to and from work. Under this exception, a special mission exists when an employee is not simply traveling from his home to his normal place of employment, or returning from his normal place of employment to his home for his own purposes, but is traveling from his home or returning to it on a special errand either as part of his regular duties or at the specific order or request of his employer. In DeRuyter, the court said that the law in Wisconsin is clear that the mere payment of an employee's travel costs vests no right of control with the employer, unless the employer exercises such control or retains the right to control the employee's route or method of travel. Also, the fact that the employer provided an employee with a map depicting the layout of a training center and provided general directions for employees unfamiliar with its location did not establish that the employer controlled the route. Further, the fact that the employer has a "fitness for duty policy" which prohibits employees from consuming or being under the influence of alcohol during the four hours preceding their duty time was insufficient to trigger an employer's liability under respondeat superior.

Wis. Stat. § 102.03(1)(c) (1963) enlarges scope of employment to include the performance of services "growing out of and incidental to" a servant's employment. It is not considered that this expanded definition of scope of employment would apply in cases other than worker compensation cases. This paragraph also provides that an employee injured on the premises of his or her employer while going to and from his or her employment is performing service incidental to his or her employment. J. F. McNamara Corp. v. Industrial Comm'n, 24 Wis.2d 300, 128 N.W.2d 635 (1964), interpreted this paragraph so that the term "premises of his or her employer" includes the premises of any other person on whose premises service is being performed and also that portion of premises controlled by the employer (even though there may be a tenant in possession) over which his or her employees travel in the ordinary and usual way.

"Personal comfort doctrine" as it related to Wis. Stat. § 102.03(1)(f): First recognized in Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N.W. 998 (1915), the personal comfort doctrine is devised to:

> Cover the situation where an employee is injured while taking a brief pause from his labors to minister to the various necessities of life. Although technically the employee

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> is performing no services for his employer in the sense that his actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form or better work from a happy and rested workman, and on the theory that such a minor deviation does not take the employee out of his employment. Marmolejo v. DILHR, 92 Wis. 2d 674, 678, 285 N.W.2d 650 (1979) (quoting Comment, Workmen's Compensation: The Personal Comfort Doctrine, 1960 WIS.L.REV.91, 91).

See also the unpublished decision (three-judge) Brown v. Muskego Norway School Dist. Group Health Plan, 389 Wis.2d 377, 936 N.W.2d 418 (Table), 2019 WI App 65.

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4040 SERVANT: SCOPE OF EMPLOYMENT; GOING TO AND FROM PLACE OF EMPLOYMENT

Where an employee works for another at a given place of employment and lives at home or boards himself or herself, it is the business of the employee to present himself or herself at the place of employment, and the relationship of master and servant does not exist while he or she is going between his or her home and his or her place of employment.

[However, where, by the contract of employment, it is made the duty of the master to transport the servant from (to) his or her home, or other designated place, to (from) the place of his or her work, the relationship of master and servant exists during the course of the transportation.]

COMMENT

This instruction and comment were originally published in 1962. The comment was updated in 2004 and 2013.

Ohrmund v. Industrial Comm'n, 211 Wis. 153, 246 N.W. 589 (1933); Geldnich v. Burg, 202 Wis. 209, 231 N.W. 624 (1930); Bloom v. Krueger, 182 Wis. 29, 195 N.W. 851 (1923). See also Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328, fn. 4; Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc., 2013 WI App 124, 351 Wis.2d 170, 840 N.W.2d 132.

The Ohrmund case expressed the general rule that an employee injured while returning to work after having been to dinner is not injured in the course of his employment; the case held further that this was true even though he was driving a car belonging to his employer, which he had been permitted to use so that he could hurry back to work; this phase of Ohrmund was overruled in Krause v. Western Casualty & Surety Co., 3 Wis.2d 61, 70, 87 N.W.2d 875 (1958). The court determined that Ohrmund was contrary to the rule laid down in Rock County v. Industrial Comm'n, 185 Wis. 134, 200 N.W. 657 (1924), and Sellmer Co. v. Industrial Comm'n, 264 Wis. 295, 59 N.W.2d 628 (1953). The court said:

> . . . where the employer provides the transportation for an employee going to and from work and such employee is injured while making use of such transportation for such purpose, such injury occurs while the employee is in the course of his employment. Therefore, we expressly overrule the holding to the contrary in Ohrmund v. Industrial Comm'n, supra.

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4045 SERVANT: SCOPE OF EMPLOYMENT WHILE TRAVELING

The first question to be resolved by you is whether the trip in question was that of the employer or the employee. If the trip is determined to be the employer's, the employee is engaged in his or her employer's business and acting within the scope of his or her employment while going to or returning from the place where his or her employer's business required him or her to go. If it is the employee's trip, he or she is not within the scope of his or her employment while traveling on the trip.

If the work of the employee for his or her employer creates the necessity for travel, the employee is in the course of his or her employment while traveling on the trip, even though he or she is serving at the same time some purpose of his or her own. If, however, the work of the employee for his or her employer has had no part in creating the necessity for travel, the travel then becomes the personal trip of the employee and outside the scope of his or her employment.

In case it is the employer's trip and the employee makes any detours for purely personal objectives, such detours must be separated from the main trip and the employee held to be outside the scope of his or her employment during such detours. If it is the employee's own trip, then detours which are made for the purpose of dispatching business for his or her employer are within the scope of his or her employment.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction. The comment was updated in 2020.

The instruction is taken substantially from Barrager v. Industrial Comm'n, 205 Wis. 550, 553, 238 N.W. 368 (1931). The second paragraph is from Matter of Marks v. Gray, 251 N.Y. 90, 167 N.E.

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181 (1929), approved in Barrager and Fawcett v. Gallery, 221 Wis. 195, 201, 265 N.W. 667 (1936). Also see Fultz v. Lange, 238 Wis. 342, 298 N.W. 60 (1941), and Price v. Shorewood Motors, 214 Wis. 64, 251 N.W. 244 (1934).

Wis. Stat. § 102.03(1)(f) (1959), a section of the Workmen's Compensation Act, defines conditions of liability for compensation purposes when a servant's employment requires him or her to travel. This definition is somewhat broader than the common law rule, and care must be exercised not to employ the standard of the act in cases other than compensation cases. Butler v. Industrial Comm'n, 265 Wis. 380, 61, N.W.2d 490 (1953), distinguished liability under common law from liability under the Compensation Act. For cases arising under § 102.03(1)(f), see Turner v. Industrial Comm'n, 268 Wis. 320, 67, N.W.2d 392 (1954); Simmons v. Industrial Comm'n, 262 Wis. 454, 55, N.W.2d 358 (1952); Hansen v. Industrial Comm'n, 258 Wis. 623, 46, N.W.2d 754 (1951); 1957 Wis. L. Rev. 260. See also the unpublished decision (three-judge) Brown v. Muskego Norway School Dist. Group Health Plan, 389 Wis.2d 377, 936 N.W.2d 418 (Table), 2019 WI App 65.

"Personal comfort doctrine" as it related to Wis. Stat. § 102.03(1)(f): First recognized in Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N.W. 998 (1915), the personal comfort doctrine is devised to:

Cover the situation where an employee is injured while taking a brief pause from his labors to minister to the various necessities of life. Although technically the employee is performing no services for his employer in the sense that his actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form or better work from a happy and rested workman, and on the theory that such a minor deviation does not take the employee out of his employment. Marmolejo v. DILHR, 92 Wis. 2d 674, 678, 285 N.W.2d 650 (1979) (quoting Comment, Workmen's Compensation: The Personal Comfort Doctrine, 1960 WIS.L.REV.91, 91).

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4050 SERVANT: MASTER'S RATIFICATION OF WRONGFUL ACTS DONE OUTSIDE SCOPE OF EMPLOYMENT

It is considered that Wis JI-Civil 4015, Agency: Ratification, may be adapted to cover a required instruction under this topic.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994. No substantive changes were made to the instruction.

A master is not liable for acts of his or her servant done outside the scope of his or her employment, unless they are ratified by him or her. Rigby v. Herzfeldt-Phillipson Co., 160 Wis. 228, 151 N.W. 260 (1915).

A master is liable for acts of his or her servants done outside the scope of his or her employment if he or she accepts and adopts the benefits thereof. Underwood v. Paine Lumber Co., 79 Wis. 592, 48 N.W. 673 (1891); Lee v. Lord, 76 Wis. 582, 45 N.W. 601 (1890).

Retention of a servant in the master's employ after wrongful conduct committed outside the scope of employment is not evidence of ratification, but the rule is otherwise if the misconduct occurred within the scope of employment. Mandell v. Bryam, 191 Wis. 446, 211 N.W. 145 (1926); Marlatt v. Western Union Tel. Co., 167 Wis. 176, 167 N.W. 263 (1918).

Nonrepudiation, with full knowledge of the circumstances, constitutes ratification. Lechner v. Ebenreiter, 235 Wis. 244, 258, 292 N.W. 913 (1940); Topolewski v. Plankinton Packing Co., 143 Wis. 52, 67, 126 N.W. 554 (1910); Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N.W. 938 (1909).

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4055 SERVANT: VICARIOUS LIABILITY OF EMPLOYER

In this case, (employer) is liable for the negligence of its employee(s). If, after considering all of the evidence, you find that (employe) was negligent, then (employer) was negligent.

COMMENT

This instruction was approved by the Committee in 1995. The comment was updated in 2004.

For a discussion of vicarious liability arising out of agency, see Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328.

Franchisor Liability. Kerl, supra, discusses the vicarious liability of a franchisor. In Kerl, the court stated:

> (¶ 36) Quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes.
>
> (¶ 39) The franchisor must control or have the right to control the daily conduct or operation of the particular "instrumentality" or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor . . . The quality and operational standards typically found in franchise agreements do not establish the sort of close supervisory control or right to control necessary to support imposing vicarious liability on a franchisor . . .
>
> (¶ 50) . . . (T)he quality, marketing, and operational standards and inspection and termination rights commonly included in franchise agreements do not establish the close supervisory control or right to control over a franchisee necessary to support imposing vicarious liability against the franchisor. A franchisor may be subject to vicarious liability for the tortious conduct of its franchisee only if the franchisor had control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm.

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4060 INDEPENDENT CONTRACTOR: DEFINITION

Question _____ inquires whether, at the times material hereto, _____ was an independent contractor.

An "independent contractor" is a person who contracts with another to do something for him or her, but who is not controlled by the other, nor subject to the other's right to control, with respect to his or her physical conduct in the performance of the undertaking.

In arriving at your decision as to what your answer to this question should be, you may consider the contract between the parties; (the course of conduct of the parties, if the terms of the contract are in doubt as to control); the nature of the business or occupation of the parties; the party furnishing the instrumentalities or the tools for the work; the place of the work; the time of employment; the method of payment; the right to summarily discharge employees; the intent of the parties to the contract, so far as it is ascertainable; and any and all of the surrounding circumstances that tend to characterize the relationship.

COMMENT

This instruction and comment were published in 1962. The comment was revised in 1997 and 2004. Editorial changes were made in 1994 to address gender references in the instruction.

The general rule is that the liability of an independent contractor may not be imputed to a general contractor. See Wagner v. Continental Casualty Co., 143 Wis.2d 373, 421 N.W.2d 835 (1988); Jacob v. West Bend Mut. Ins. Co, 203 Wis.2d 524, 553 N.W.2d 800 (Ct. App. 1996); Kettner v. Wausau Ins. Co., 191 Wis.2d 723, 530 N.W.2d 399 (Ct. App. 1995). A contractor qualifies as an independent contractor when the principle contractor does not control the details of his or her work. The Wisconsin Supreme Court has ruled that this rule does not apply when a written contract between a general contractor and the land owner obligates the general contractor to "provide all necessary labor and materials and perform all work of every nature what so ever to be done in the erection of a residence." Brooks v. Hayes, 133 Wis.2d 228, 395 N.W.2d 167 (1986). In Brooks, the general contractor contracted to construct a residence for the plaintiff and subcontracted with a mason who negligently installed a control on a fireplace. A fire caused damage to the plaintiffs' structure. The plaintiffs sued the general contractor who defended claiming that he was not responsible for the negligence of the subcontractor whose work he did not control. Relying on the contract language which obligated the general contractor to provide all necessary labor and materials and to perform all the work necessary to construct the

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residence, the supreme court rejected the argument. The court said that the delegation of the performance of a contract does not, unless the obligee agrees otherwise, discharge the liability of the delegating obligor. The court also held that the contract language implicitly imposed on the general contractor the duty to perform with due care. The court said accompanying every contract is a common law duty to perform with care, skill, reasonable expediency, and faithfulness the thing that they agreed to be done, and a negligent failure to observe any of the conditions is a tort, as well as a breach of contract.

The phrase in parentheses in the third paragraph should only be used if the terms of the contract are ambiguous or in doubt as to control and the right to control.

The language of the Restatement, Second, Agency § 2(3) (1958) was employed in this instruction in preference to the language employed in cases preceding the Restatement. In the case of Madix v. Hockgreve Brewing Co., 154 Wis. 448, 451, 143 N.W. 189 (1913), the following definition of an independent contractor was suggested:

> One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control to his employer, except as to the result of his work.

The second paragraph is taken from Badger Furniture Co. v. Industrial Comm'n, 200 Wis. 127, 227 N.W. 288 (1929). For other cases, see Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328, ¶ 24; Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978); Weber v. Hurley, 13 Wis.2d 560, 109 N.W.2d 65 (1961); Harris v. Richland Motors Inc., 7 Wis.2d 472, 96 N.W.2d 840 (1959); Phaneuf v. Industrial Comm'n, 263 Wis. 376, 57 N.W.2d 406 (1953); Pleucner v. Industrial Comm'n, 249 Wis. 370, 24 N.W.2d 669 (1946); Sprecher v. Roberts, 212 Wis. 69, 248 N.W. 795 (1933); Nestle's Food Co. v. Industrial Comm'n, 205 Wis. 467, 237 N.W. 117 (1931); Tesch v. Industrial Comm'n, 200 Wis. 616, 229 N.W. 194 (1930); Habrich v. Industrial Comm'n, 200 Wis. 248, 227 N.W. 877 (1929); Medford L. Co. v. Industrial Comm'n, 197 Wis. 35, 221 N.W. 390 (1928); Kneeland-McClurg L. Co. v. Industrial Comm'n, 196 Wis. 402, 220 N.W. 199 (1928); Miller & Rose v. Rich, 195 Wis. 468, 218 N.W. 716 (1928); and Weyauwega v. Industrial Comm'n, 180 Wis. 168, 192 N.W. 452 (1923).

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4080 PARTNERSHIP

A partnership is an association of two or more persons to carry on as co-owners a business for profit. [Persons may include any of the following: individuals, partnerships, limited liability companies, corporations, other associations] [and to the extent authorized by governing instrument or court order, personal representatives and trustees]. A business includes any trade, occupation, or profession.

Four elements must be present for you to find a partnership exists:

1. The persons intended to form a partnership and agreed to accept the legal requirements and duties of that relationship.
2. The persons have a shared interest in the partnership property.
3. The persons have an equal right in management and conduct of the partnership.
4. The persons share and distribute profits and losses from the partnership and its property.

   [The receipt of a share of the profits of a business by a person is evidence that person is a partner in the business except if the profits were received for the following reasons:

   a. As payment for a debt;
   b. As wages of an employee or rent to a landlord;
   c. As an annuity to a surviving spouse or representative of a deceased partner;
   d. As interest on a loan; or
   e. As consideration for the sale of the goodwill of a business or other property.]

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COMMENT

This instruction and comment were approved in 2009. This instruction is for use in cases where no written partnership agreement exists. The instruction is taken substantially from Chapter 178 of the Wisconsin Statutes, The Uniform Partnership Act. See §§178.03, 178.01(2)(b) and (e), and 178.04(4) for the definition of a Partnership. See also; Anderson v. Anderson, 54 Wis. 2d 666, 196 N.W.2d 727 (1972); Skaar v. Dept of Revenue, 63 Wis. 2d 506, 217 N.W. 2d 326 (1974); In re Estate of Schaefer, 72 Wis. 2d 600, 241 N.W.2d 607(1976).

Additional Considerations. Additional considerations in determining whether a partnership exists include:

- Persons who are not partners to each other are not partners to third persons;
- The manner in which property is owned or titled, does not of itself establish a partnership, whether the co-owners do or do not share any profits made by the use of the property;
- The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common interest in any property for which the returns are received;
- No person can become a member of the partnership without the consent of all the partners.

See Wis. Stat. §§178.04 and 178.15(7).

Intent. A partnership agreement, whether expressed or implied, may be in writing or proven by circumstantial evidence demonstrating that the conduct of the parties was of such a nature as to clearly express the mutual intent of the parties to enter into a contractual relationship. Sander v. Newman, 174 Wis. 321, 328, 181 N.W. 822 (1921); Hayton v. Appleton Machine Co., 179 Wis. 587, 601, 192 N.W. 168 (1923); Bartelt v. Smith, 145 Wis. 31, 129 N.W. 782 (1911). Every partnership depends on the mutual consent and understanding of its members, and as a result, there must be a meeting of minds of the parties, and thus the intention of one party alone cannot create a partnership. Morris v. Resnick, 268 Wis. 410, 415, 67 N. W.2d 848 (1955); Anderson v. Anderson, 54 Wis. 2d 666, 669, 196 N.W.2d 727 (1972).

The ultimate and controlling test as to the existence of a partnership is the parties' intention of carrying on a definite business as co-owners. Such intention may be determined from the terms of the parties' agreement or from their conduct under the circumstances of the case. Bartelt v. Smith, supra at 35; Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 286 N.W.2d 831, (1980).

Burden of Proof. The party claiming that a partnership exists has the burden of proving the existence of a partnership. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 360, 286 N.W.2d 831, 836 (1980); Morris v. Resnick, supra; Anderson v. Anderson, supra.

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5001 PATERNITY: CHILD OF UNMARRIED WOMAN

It is undisputed in this case that the petitioner, _____, gave birth to a (male, female) child in the _____ of _____, County of _____, State of _____, on the _____ day of _____, 20__, and that at the time of the birth of that child, the petitioner was unmarried. The petition in this action alleges that (respondent) is the father of that child.

(Respondent) denies that he is the father of the petitioner's child, and it is for you, the jury, to determine from the evidence, under my instructions, whether (respondent) is the father of (child).

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

Wis JI-Civil 205, Burden of Proof: Middle

The verdict consists of only one question.

"Is the respondent, _____, the father of _____, born on the _____day of _____, 20__?"

You must answer this question either "yes" or "no."

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It is not necessary for (petitioner) to prove the exact date on which the child was conceived. It must be proved to have occurred on such a date as will satisfy you [by the degree of proof required] that (child) was the result of sexual intercourse with (respondent).

The testimony in this case established that the child, _____, was born on the ____ day of _____, 20__, and weighed ___ lbs. ___ ozs. at birth.

A section of the Wisconsin statutes provides that the mother is competent to testify as to the child's birth weight. Where such birth weight is 5 2 pounds or more, the child is presumed to be full term (unless competent evidence to the contrary is present). The conception of the child shall be presumed to have occurred within a span of time extending from 240 to 300 days before birth (unless competent evidence to the contrary is presented to the court).

Therefore, petitioner's child is presumed to have been conceived between the _____ day of _____, 20__, and the _____ day of _____, 20__.

(Previously the court ordered (child), (petitioner), and (respondent) to submit to genetic tests. Although so ordered, (respondent) refused to submit to the genetic test. You may consider the refusal along with all the other evidence in the case in determining whether he is the father.)

Previously, the court ordered the child, the petitioner, and the respondent to submit to genetic tests. The reports of those tests have been received in evidence as Exhibit __.

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The genetic test establishes a statistical probability of paternity. You may give the test results such weight as you deem appropriate on the issue of whether (respondent) is the father of (child).

(If the statistical probability of paternity is 99.0% or higher, give the following instruction.)

In this case, the genetic test report establishes a statistical probability of ____% that (respondent) is the father of (child). From this genetic test, a presumption arises that (respondent) is the father of (child). But there is evidence in the case which may be believed by you that (respondent) is not the father. You must resolve the conflict. Unless you are convinced by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that he is not the father, you must consider this presumption as conclusive evidence of paternity and find that he is the father.

Wis JI-Civil 180, Five-Sixths Verdict.

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be careful and deliberate in weighing the evidence. I charge

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you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

When you retire to the jury room, your first duty will be to elect one juror to preside over your deliberations and write in the answer you have agreed upon. His or her vote, however, is entitled to no greater weight than the vote of any other juror. When your deliberations are concluded and your answer inserted in the verdict, the presiding juror will sign the verdict, fix the date on the verdict, and all of you will return with the verdict into the court.

The clerk may now swear the bailiffs.

SPECIAL VERDICT

Is the respondent, _____, the father of _____, born on the _____ day of _____, 20__?

Answer:_____
Yes or No

COMMENT

This instruction was approved in 1988. The instruction and comment were updated in 1995 and 1996. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

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Wis. Stat. § 767.47(8) provides that the party bringing the action shall have the burden of proof by clear and satisfactory preponderance of the evidence. The Committee interprets that language to mean the middle burden as expressed in Wis JI-Civil 205.

Wis. Stat. § 767.48(4). If any party refuses to submit to a genetic test, this fact shall be disclosed to the fact finder.

Wis. Stat. § 767.50(1). The trial shall be by jury only if the respondent verbally requests a jury trial either at the initial appearance or pretrial hearing or requests a jury trial in writing prior to the pretrial hearing.

Wis. Stat. § 767.50(2). The jury shall consist of 6 persons with the verdict to be agreed upon by at least 5 jurors.

Wis. Stat. § 767.475(3). Evidence as to the time of conception may be offered as provided in Wis. Stat. § 891.395.

Wis. Stat. § 767.48(1m). If the statistical probability of the respondent being the father is 99.0% or higher, he shall be rebuttably presumed to be the child's parent.

Wis. Stat. § 891.395 provides:

> In any paternity proceeding . . ., the mother shall be competent to testify as to the birth weight of the child whose paternity is at issue, and where the child whose paternity is at issue weighed 5-1/2 pounds or more at the time of its birth, the testimony of the mother as to the weight shall be presumptive evidence that the child was a full-term child, unless competent evidence to the contrary is presented to the court. The conception of the child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

The Committee revised the paternity instruction in 1988 in response to legislation and decisions of the court of appeals and supreme court. The Wisconsin Legislature in the 1987-89 budget bill (1987 Wisconsin Act 27) revised procedures in paternity actions.

The court of appeals in 1987 held that before the jury can consider the statistical probability of paternity as shown by blood tests as evidence of paternity, it must first find that the mother and the alleged father had intercourse during the conception period. In re Paternity of M.J.B., 137 Wis.2d 157, 404 N.W.2d 64 (Ct. App. 1987). See also In re Paternity of Taylor R.T., 199 Wis.2d 500, 544 N.W.2d 926 (Ct. App. 1996); T.A.T. v. R.E.B. 144 Wis.2d 638, 650, 425 N.W.2d 404 (1988). Therefore, the court of appeals found that the jury instruction should provide that if the evidence does not prove that the mother and alleged father had sexual intercourse at a time when the child could have been conceived, then the jury should find nonpaternity regardless of the probability of paternity results in the blood test reports. The supreme court reversed In re Paternity of M.J.B., 144 Wis.2d 638, 425 N.W.2d 404 (1988). The court stated:

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> We disagree with the court of appeals that an independent determination of sexual intercourse must be made by the jury before it can consider the statistical probability of paternity as evidence of paternity. Section 767.50 provides that "the main issue shall be whether the alleged . . . father is or is not the father of the mother's child." It is true that one of the elements in a paternity suit is sexual intercourse between the mother and alleged father occurring during the conceptive period. However, the occurrence of sexual intercourse during the time of possible conception is not an issue separate from the main issue. It does not require an independent determination by the jury; it is an element of the case. If the petitioner fails to introduce sufficient evidence of sexual intercourse to establish a prima facie case of paternity, the defendant can simply move for a dismissal of the case. Likewise, the petitioner is precluded from introducing the blood test results until evidence of sexual intercourse is received.

Effect of Statutory Presumption. The presumption of paternity only applies where each set of admissible blood tests is 99.0% or higher. In re Paternity of J.M.K, 160 Wis.2d 429, 465 N.W.2d 833 (Ct. App. 1991). In J.M.K., there was blood test data showing a 97.06% probability and additional blood tests showing a 99.45% probability. The trial court refused to instruct the jury on the rebuttable presumption of paternity as contained in this instruction and the court of appeals affirmed. The court of appeals noted that the record disclosed no request to instruct the jury on the presumption if it chose to accept the higher test result nor did the parties present evidence on the superiority of one test over the other. The court of appeals, therefore, did not address the propriety of a "modified presumption instruction in such cases. J.M.K., supra at 433.

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7030 CHILD IN NEED OF PROTECTION OR SERVICES — WIS. STAT. § 48.13

Withdrawn

[**Reporter's Note**: Jury instructions dealing with Child in Need of Protection or Services (CHIPS) and involuntary termination of parental rights cases are drafted and approved by the Wisconsin Juvenile Jury Instructions Committee. These instructions are published by the University of Wisconsin Law School in Wisconsin Jury Instructions - Children. For information on this publication, please contact the UW Law School at: www.wisc.edu/clew/publications/jury_instructions_children.html; or (800)-355-5573 or (608)-262-3833.]

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7039 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CHILD IN NEED OF PROTECTION OR SERVICES - PRELIMINARY INSTRUCTION

Withdrawn

[**Reporter's Note**: Jury instructions dealing with Child in Need of Protection or Services (CHIPS) and involuntary termination of parental rights cases are drafted and approved by the Wisconsin Juvenile Jury Instructions Committee. These instructions are published by the University of Wisconsin Law School in Wisconsin Jury Instructions - Children. For information on this publication, please contact the UW Law School at: www.wisc.edu/clew/publications/jury_instructions_children.html; or (800)-355-5573 or (608)-262-3833.]

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7040 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES

Withdrawn

[**Reporter's Note**: Jury instructions dealing with Child in Need of Protection or Services (CHIPS) and involuntary termination of parental rights cases are drafted and approved by the Wisconsin Juvenile Jury Instructions Committee. These instructions are published by the University of Wisconsin Law School in Wisconsin Jury Instructions - Children. For information on this publication, please contact the UW Law School at: www.wisc.edu/clew/publications/jury_instructions_children.html; or (800)-355-5573 or (608)-262-3833.]

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7042 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT UNDER WIS. STAT. § 48.415(1)(a)2 OR 3

Withdrawn

[**Reporter's Note**: Jury instructions dealing with Child in Need of Protection or Services (CHIPS) and involuntary termination of parental rights cases are drafted and approved by the Wisconsin Juvenile Jury Instructions Committee. These instructions are published by the University of Wisconsin Law School in Wisconsin Jury Instructions - Children. For information on this publication, please contact the UW Law School at: www.wisc.edu/clew/publications/jury_instructions_children.html; or (800)-355-5573 or (608)-262-3833.]

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7050 INVOLUNTARY COMMITMENT: MENTALLY ILL

(Insert Wis JI-Civil 100, Opening.)

A petition has been filed seeking the involuntary commitment of (respondent). The petition alleges that (respondent) is mentally ill; that (his) (her) mental illness is subject to treatment; and that (he) (she) is dangerous to (himself) (herself) or another person.

The fact that a petition has been filed is not evidence that (respondent) is mentally ill, dangerous, or a proper subject for treatment. Our law presumes that a person is not mentally ill until you are convinced that the person is mentally ill. The burden of proving the allegations in the petition is on (petitioner).

This is a civil, not a criminal, case. [The fact that the district attorney is present does not mean that (respondent) is accused of a crime. The district attorney and _____, the other attorney, are required to be here by the Wisconsin statutes.] While (respondent) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of (respondent)'s personal liberty. Therefore, you should approach this task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

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At the end of the trial, I will give you a special verdict consisting of three questions.

Wis JI-Civil 205, Middle Burden of Proof

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 asks: Is (respondent) mentally ill? The term "mentally ill" means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs the judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Question 2 asks: Is (respondent) dangerous to (himself) (herself) or to others?

A person is dangerous to (himself) (herself) or to others if (he) (she):

[NOTE: SELECT THE BRACKETED PARAGRAPH(S) THAT (APPLIES) (APPLY).]

[Evidences a substantial probability of physical harm to (himself) (herself) as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.] [or]

[Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm.] [or]

[Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is substantial probability of physical impairment or injury to (himself) (herself) or other individuals. The probability of physical

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impairment or injury is not substantial (if reasonable provision for (respondent)'s protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services) (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor: if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or § 938.13(4)) (where the subject is a minor: (Respondent)'s status as a minor does not automatically establish a substantial probability of physical impairment or injury). Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for (himself) (herself), by a person other than a treatment facility, does not constitute reasonable provision for the individual's protection available in the community.] [or]

[Evidences behavior manifested by recent acts or omissions that, due to mental illness, (he) (she) is unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the (respondent) receives prompt and adequate treatment for this mental illness. No substantial probability of harm exists (if reasonable provision for (respondent)'s treatment and protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services), (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor; if the (respondent) is appropriate for services or placement

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under § 48.13(4) or (11) or § 938.13(4).) (Respondent)'s status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease. Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community.] [or]

[Has recently had explained to (him) (her) the advantages and disadvantages of and alternatives to accepting a particular medication or treatment and; (1) Due to mental illness, (respondent) is (incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives) (substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of (his) (her) mental illness to make an informed choice as to whether to accept or refuse medication or treatment); and (2) There is a substantial probability, as demonstrated by both (respondent)'s treatment history and (his) (her) recent acts or omissions, that (he) (she) needs care or treatment to prevent further disability or deterioration, and further, there exists a substantial probability that, if left untreated, (he) (she) will lack the services necessary for (his) (her) health or safety, and will suffer severe mental, emotional, or physical harm that will result in (respondent)'s loss of ability to function independently in the community or loss of cognitive or volitional control over (his) (her) thoughts or actions; and (3) There is no reasonable probability that (respondent) will avail (himself) (herself) of services in the community for care or

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treatment necessary to prevent (him) (her) from suffering severe mental, emotional, or physical harm.]

Question 3 asks: Is (respondent) a proper subject for treatment? A person who is mentally ill is a proper subject for treatment if (his) (her) mental illness is treatable. In determining if (respondent)'s mental illness is treatable, you should consider whether the administration of any, or a combination of, techniques may control, improve, or cure the substantial disordering of the person's thought, mood, perception, orientation, or memory.

Do not concern yourselves with the length of custody or nature of any treatment that I might order as a result of your answers to the questions of the Special Verdict.

[**Note**: Give Wis JI-Civil 180, Five-Sixths Verdict and Wis JI-Civil 190, Closing.]

SUGGESTED VERDICT

Question 1: Is _____ mentally ill?

Answer:_____

Yes or No

Question 2: If you answered question 1 "yes," then answer this question:

Is _____ dangerous to (himself) (herself) or to others?

Answer:_____

Yes or No

[**Note**: For a trial involving several of the statutory definitions of "dangerous," see the comment below on the "dangerous" standard for advice on subdividing verdict question 2.]

Question 3: If you answered questions 1 and 2 "yes," then answer this question:

Is _____ a proper subject for treatment?

Answer:_____

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COMMENT

The instruction was revised in 1981, 1989, 1998, 2002, 2006, 2014, and 2018. The comment was updated in 2011, 2012, 2014, 2015, 2016, 2017, 2018, 2019, and 2020.

While this verdict and jury instruction are designed for an alleged mentally ill case, they can, by substitution of the disability terms, be converted to a verdict and jury instruction for an alleged drug dependent case or developmentally disabled case.

Proper Subject for Treatment. The court of appeals approved the language of the instruction dealing with the determination of whether the individual is a proper subject for treatment in verdict question three. In Matter of Mental Condition of C.J., 120 Wis.2d 355, 354 N.W.2d 219 (Ct. App. 1984). A person with Alzheimer's disease is not a proper subject for treatment under Chapter 51. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179. See also Waukesha County v. J.W.J., Case No. 2016 AP 46-FT.

In Fond du Lac County v. Helen E.F., the supreme court said the court of appeals in C.J., supra, provided a "useful and well-constructed fact-based test for determining whether a subject individual is capable of rehabilitation, and therefore treatable under Wis. Stat. § 51.01(17)." The supreme court said the following test from C.J. accurately reflects the interests embodied in chs. 51 and 55.

> If treatment will "maximize[e] the [] individual functioning and maintenance" of the subject, but not "help [] in controlling or improving their disorder []," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will "go beyond controlling . . . activity" and will "go to controlling [the] disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment. Fond du Lac County v. Helen E.F., supra, at ¶36.

Mental Illness. The definition of "mental illness" does not include alcoholism. Wis. Stat. § 51.20(13)(b).

Alzheimer's disease does not fall within the definition of a mental illness as it is a "degenerative brain disorder." An individual with Alzheimer's disease is not a proper subject for treatment. Ch. 51 provides for active treatment for those who are proper subjects for treatment, while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

"Dangerous" Standard. The history of the requirement of dangerousness was reviewed by the Wisconsin Supreme Court in Outagamie County v. Michael H., 2014 WI 127, 359 Wis.2w 272, 856 N.W.2d 603. In most cases, the trial judge would not give all five subsections of question 2, only the applicable ones based on the evidence. If a judge instructs using two or more of the different definitions of "dangerousness" and one of the definitions used in Wis. Stat. § 51.20(1)(a) 2.e. (the fifth paragraph under question (2), question 2 of the verdict should be broken into subdivisions which separately relates to the specific definition of dangerousness. This is because a person committed based on dangerousness under Wis. Stat. § 51.20(1)(a) 2.3. (the fifth bracketed paragraph under question 2) can only be treated on an inpatient basis for up to 30 days. See Wis. Stat. § 51.20(13)(g)2d.b.

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The Wisconsin Supreme Court has upheld the fifth dangerousness standard against a constitutional challenge based on vagueness, overbreadth, equal protection, and due process. In re Commitment of Dennis H., 2002 WI 104, 255 Wis.2d 359, 647 N.W.2d 851.

The issue of dangerousness is an element in all commitment or recommitment proceedings concerning individuals not in prison, and the Committee urges the use of at least one or more of the five alternatives in the instruction as the evidence supports. For commitment or recommitment proceedings concerning individuals in prison, see Winnebago County v. Christopher S. (C.S. I), 2016 WI 1, 366 Wis.2d 1, 878 N.W.2d 109. See also, Matter of Commitment of C.S., 386 Wis.2d 612, 927 N.W.2d 576, 2019 WI App 16.

[REPORTER'S NOTE: On August 15, 2019, the Wisconsin Supreme Court accepted for review Winnebago County v. C.S., 388 Wis.2d 657, 933 N.W.2d 489 (Table), 2019 WI 90, on the following issue: Does Wis. Stat. § 51.61(1)(g) violate substantive due process because it does not require a finding of dangerousness to involuntarily medicate a prisoner? Oral argument was held on January 15, 2020.]

In 2014, 2013 Wisconsin Act 158 added the words "or other individuals" to Wis. Stat. § 51.20(1)(a)2c.

Threats. In Outagamie County v. Michael H., supra, the court concluded that in evaluating dangerousness, "an articulated plan is not a necessary component of a suicide threat." Paragraph 6. The court concluded that it did not need to adopt a precise definition for "threat" for purposes of Wis. Stat. § 51.20.

Showing of Dangerousness in Recommitment Proceedings Concerning Persons Not In Prison. If the individual has been the subject of inpatient treatment for mental illness immediately prior to commencement of the proceeding as a result of a voluntary admission, a commitment or protective placement or protective services ordered by a court, the requirements of a recent overt act, attempt, or threat to act or a pattern of recent acts, omissions, or behavior may be satisfied by a showing that there is a substantial likelihood, based on the individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn. Wis. Stat. § 51.20(1)(am). If the individual has been admitted voluntarily to an inpatient treatment facility for not more than 30 days prior to the commencement of these proceedings and remains under voluntary admission at the time of the commencement of these proceedings, the requirements of a specific recent overt act, attempt, or threat to act or pattern of recent acts or omissions may be satisfied by a showing of an act, attempt or threat to act, or a pattern of acts or omissions which took place immediately previous to the voluntary admission.

Therefore, if the proceeding is a recommitment proceeding, the following sentence should be added after the bracketed paragraph on page 5 of the instruction:

> This is a recommitment proceeding. Therefore, the law provides that you may also find that _____ is dangerous to himself) (herself) or others if you find that there is a substantial likelihood, based on _____'s treatment record, that _____ would be a proper subject for commitment if treatment were withdrawn.

Acceptance of Medication and Treatment. A petition under the fifth bracketed paragraph must be approved by the attorney general. Wis. Stat. § 51.20(1)(a)2.e. The probability of suffering severe

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mental, emotional or physical harm is not substantial under this subd.2.e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual may be provided protective placement or protective services under § 55.06. See Wis. Stat. § 51.20 (1) (a)2.e.

Commitment is available under this fifth standard for individuals who have dual diagnoses; i.e. a diagnosis of mental illness and also a diagnosis of drug dependency or developmental disability. In re Kelly M., 2011 WI App 69, 333 Wis.2d 719, 798 N.W.2d 697.

Medication is a "service" within the meaning of the community services exclusion of the fifth standard. In re Kelly M., supra. Individuals who are under a Ch. 55 protective placement or who are a proper subject for a Ch. 55 protective placement come within the Ch. 55 exclusion within the fifth standard and Wis. Stats. § 55.14 should be utilized for the petition for the involuntary administration of medication.

Right to Remain Silent. Under Wis. Stat § 51.20(5), the subject individual has the right to remain silent at the commitment hearing. If requested by the individual, the trial court should instruct the jury on the individual's failure to testify. See Wis JI-Criminal 315.

Cooperation with Doctors. If there is evidence that the patient did not properly cooperation with the doctors, then this instruction should be included following the instruction on expert testimony:

> There is testimony in this case that _____ was unresponsive to the doctors. You are advised that he has the constitutional right to remain unresponsive and to say nothing. He was so informed by the court and by the officials at the hospital. He also had then the right to refuse treatment. In answering question 1, you may consider his silent behavior only if you are convinced that his silence was related to his mental condition and was not an exercise of his constitutional right to remain silent.

Temporary Protective Placement. If the jury returns a verdict finding that the individual is mentally ill and dangerous but not a "proper subject for treatment," the trial judge may consider ordering temporary protective placement for the individual pursuant to Wis. Stat. § 51.67 which states:

> **51.67 Alternate procedure; protective services.** (intro.) If, after a hearing under § 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted and that the subject individual is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days. Temporary protective placement for an individual in a center for the developmentally disabled is subject to § 51.06(3). Any interested party may then file a petition for permanent guardianship or protective placement or services, including medication, under ch. 55. If the individual is in a treatment facility, the individual may remain in the facility during the period of temporary protective placement if no other appropriate facility is available. The court may order psychotropic medication as a temporary protective service under this section if it finds that there is probable cause to believe

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> the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for an participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after the advantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual ….

Definition of a Drug. In a case involving drug-dependency and the definition of the term "drug," see Wis. Stat. § 450.01(10) and § 961.01(11). See also an unpublished decision (one-judge) which discusses the court's jury instruction allowing the jury to consider multiple definitions of the term "drug." Marathon County v. Zachary W., Appeal No. 2014AP955.

Prisoner. Wis. Stat. § 51.20(1)(ar) governs the involuntary commitment of inmates of the Wisconsin state prison system. If a commitment or recommitment proceeding concerns a prisoner, § 51.20(1)(ar) replaces the third element of "dangerousness" with four additional elements. Specifically, under sec. 51.20(1)(ar), "a county must show that (1) the individual is an inmate of the Wisconsin state prison system; (2) the inmate is mentally ill; (3) the inmate is a proper subject for treatment and is in need of treatment; (4) appropriate less restrictive forms of treatment were attempted with the inmate, and they were unsuccessful; (5) the inmate was fully informed about his treatment needs, the mental health services available, and his rights; and (6) the inmate had an opportunity to discuss his treatment needs, the services available, and his rights with a psychologist or a licensed physician." For the involuntary commitment of a mentally ill prisoner, see Winnebago County v. Christopher S., 2016 WI 1, ¶27, 366 Wis.2d 1, 878 N.W.2d 109.

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7054 PETITION FOR GUARDIANSHIP OF THE PERSON: INCOMPETENCY; WIS. STAT. § 54.10(3)(a)2.

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual). The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (a degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent.

The fact that a petition has been filed is not evidence that (individual) is incompetent as that term will be defined to you. Every person is presumed to be competent. The burden of proving incompetency is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could have a significant impact on (his) (her) life. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

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At the end of the trial, you will be given a special verdict consisting of one question. You must answer it according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 "yes," you must find all of the following:

a. That (individual) is aged at least 17 years and 9 months; and

b. That (individual) suffers from (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities).

c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety).

"Meet the essential requirements for health or safety" means perform those actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur[1]; and

d. That (individual)'s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

[A "developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with

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mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

["Degenerative brain disorder" means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

["Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

["Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody.]

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Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SPECIAL VERDICT

Question 1: Is (individual) incompetent?

Answer:_____

Yes or No

COMMENT

This instruction was approved in 2009 and revised in 2019. This instruction is for a hearing on a petition that an individual is incompetent. Other grounds for the appointment of a guardian are that the individual is a spendthrift (see JI-Civil 7056) or a minor. See Wis. Stat. § 54.44 and 54.46.

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency. Wis. Stat. § 54.44(2).

The terms "developmental disability," "degenerative brain disorder," "serious and persistent mental illness" and "other like incapacities" are defined in Wis. Stat. §§ 54.01(8), 54.01(6), 54.01(30), 54.01(22) respectively.

A petition for the appointment of a guardian may include an application for protective placement or protective services or both under ch. 55. Wis. Stat. § 54.34. See Wis JI-Civil 7060 and 7061.

A finding of incompetency and appointment of a guardian under Chapter 54 is not grounds for involuntary protective placement or the provision of protective services. Wis. Stat. § 54.48.

In jury trials under Chapter 54 and Chapter 55, the court or guardian ad litem may tell the jury that the guardian ad litem represents the best interests of the proposed ward or ward. Wis. Stat. § 54.40(5).

1. Wis. Stat. § 54.01(19)

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7055 PETITION FOR GUARDIANSHIP OF THE ESTATE: INCOMPETENCY; WIS. STAT. § 54.10(3)(a)3.

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for the estate of (individual). The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed for (his) (her) estate. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent.

The fact that a petition has been filed is not evidence that (individual) is incompetent. Every person is presumed to be competent. The burden of proving incompetency is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could have a significant impact on (his) (her) life. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

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At the end of the trial, you will be given a special verdict consisting of one question. You must answer it according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 "yes," you must find all of the following:

a. That (individual) is aged at least 17 years and 9 months; and

b. That (individual) suffers from (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness), (or other like incapacities); and

c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions related to the management of his or her property or financial affairs, to the extent that any of the following applies:

1. (individual) has property that will be dissipated in whole or in part.

2. (individual) is unable to provide for his or her support.

3. (individual) is unable to prevent financial exploitation; and

4. That (individual)'s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

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[A "developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

["Degenerative brain disorder" means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

["Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

["Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody.]

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Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SPECIAL VERDICT

Question 1: Is (individual) incompetent?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 2009. This instruction is for a hearing on a petition that an individual is incompetent. Other grounds for the appointment of a guardian are that the individual is a spendthrift (see JI-Civil 7056) or a minor. See Wis. Stat. § 54.44 and 54.46.

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency. Wis. Stat. § 54.44(2).

The terms "developmental disability," "degenerative brain disorder," "serious and persistent mental illness" and "other like incapacities" are defined in Wis. Stat. §§ 54.01(8), 54.01(6), 54.01(30), 54.01(22) respectively.

A petition for the appointment of a guardian may include an application for protective placement or protective services or both under ch. 55. Wis. Stat. § 54.34. See Wis JI-Civil 7060 and 7061.

A finding of incompetency and appointment of a guardian under Chapter 54 is not grounds for involuntary protective placement or the provision of protective services. Wis. Stat. § 54.48.

In jury trials under Chapter 54 and Chapter 55, the court or guardian ad litem may tell the jury that the guardian ad litem represents the best interests of the proposed ward or ward. Wis. Stat. § 54.40(5).

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7056 PETITION FOR GUARDIANSHIP OF THE ESTATE: SPENDTHRIFT; WIS. STAT. § 54.10 (2)

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for the estate of (individual). The petition alleges that (individual) is a spendthrift and needs a guardian appointed for (his) (her) estate. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found to be a spendthrift.

The fact that a petition has been filed is not evidence that (individual) is a spendthrift. The burden of proving (individual) is a spendthrift is upon (petitioner). The evidence must show that (individual) is a spendthrift at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could have a significant impact on (his) (her) life. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, you will be given a special verdict consisting of two questions. You must answer them according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

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Question 1 in the verdict reads: Is (individual) aged 18 years at the time of this hearing?

Question 2 in the verdict reads: Is (individual) a spendthrift at the time of this hearing? A spendthrift is a person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively (his) (her) financial affairs or is likely to affect the health, life, or property of (himself) (herself) or others so as to endanger (his) (her) support and the support of (his) (her) dependents, if any, or to expose the public to responsibility for (his) (her) support.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SPECIAL VERDICT

Question 1: Is (individual) aged at least 18 years?

Answer:_____

Yes or No

Question 2: Is (individual) a spendthrift?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 2009. This instruction is for a hearing on a petition that an individual is a spendthrift.

The middle burden of proof (clear, satisfactory, and convincing) applies. Wis. Stat. § 54.44(2).

In jury trials under Chapter 54 and Chapter 55, the court or guardian ad litem may tell the jury that the guardian ad litem represents the best interests of the proposed ward or ward. Wis. Stat. § 54.40(5).

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7060 PETITION FOR GUARDIANSHIP OF INCOMPETENT PERSON AND APPLICATION FOR PROTECTIVE PLACEMENT; WIS. STAT. § 54.10 AND 55.08(1)

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual) and for (his) (her) protective placement. The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed and protective placement. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent. Protective placement means a placement that is made to provide for the care and custody of an individual.

The fact that a petition has been filed is not evidence that (individual) is incompetent or in need of protective placement. Every person is presumed to be competent. The burden of proving incompetency and the need for protective placement is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of personal liberty. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

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Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, you will be given a special verdict consisting of three questions. You must answer them according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 "yes," you must find the following:

a. That (individual) is aged at least 17 years and 9 months; and

b. That (individual) suffers from ("a developmental disability") ("degenerative brain disorder") ("serious and persistent mental illness"), or ("other like incapacities"); and

c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety).

"Meet the essential requirements for health or safety" means perform those actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur[1]; and

d. That (individual)'s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

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[A "developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

["Degenerative brain disorder" means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

["Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

["Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued

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consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody].

Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Question 2 of the verdict reads: If you answer question 1 "yes," then answer this question: Is the condition permanent or likely to be permanent?

You should answer "yes" if (individual)'s incompetence is likely to continue for the balance of (his) (her) life.

Question 3 of the verdict reads: If you answer question 2 "yes," then answer this question: Is (individual) in need of protective placement?

A person is considered to be in need of protective placement if that person:

1. As a result of (insert incapacity), is so totally incapable of providing for (his) (her) own care or custody as to create a substantial risk of harm to (himself) (herself) or others; and

2. Has a primary need for residential care and custody.

Serious harm may be evidenced by overt acts or acts of omission.

If your answer to each of the questions in the Special Verdict is "yes," then the court may order a protective placement. However, a protective placement will be ordered only after (individual)'s needs have been comprehensively evaluated, and (individual) will be placed in the least restrictive environment consistent with (his) (her) needs.

Do not concern yourself with the length or nature of the protective placement.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

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SUGGESTED VERDICT

Question 1: Is (individual) incompetent?

Answer:_____

Yes or No

Question 2: If you answer question 1 "yes," then answer this question:

Is (his) (her) condition permanent or likely to be permanent?

Answer:_____

Yes or No

Question 3: If you answer question 2 "yes," then answer this question:

Is (individual) in need of protective placement?

Answer:_____

Yes or No

COMMENT

This instruction was approved in 2006 and revised in 2009 and 2019. The comment was updated in 2012 and 2019.

A petition for guardianship of an incompetent person shall be heard prior to ordering protective placement or protective services. Wis. Stat. § 55.075(3).

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency and to the need for protective placement. Wis. Stat. § 54.44(2) and § 55.10(4)(d) .

The terms “individual found incompetent,” “developmental disability,” “degenerative brain disorder,” “serious and persistent mental illness”), and “other like incapacities” are defined in Wis. Stat. §§ 54.01(16), 54.01(8), 54.01(6), 54.01(30), and 54.01(22) respectively.

The second and third verdict questions are based on the findings required to establish the need for protective placement. Wis. Stat. § 55.08(1).

Alzheimer's disease is a "degenerative brain disorder" and does not fall within the definition of a mental illness under Ch. 51. Alzheimer's is properly addressed under the provisions of Ch. 55. Ch. 51 provides for "active" treatment for those who are proper subjects for treatment while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

1. Wis. Stat. § 54.01(19)

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7061 PETITION FOR GUARDIANSHIP OF INCOMPETENT PERSON AND APPLICATION FOR PROTECTIVE SERVICES; WIS. STAT. § 54.10 AND 55.08(2)

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual) and for protective services for (him) (her). The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed and protective services. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent. Protective services include: (insert services that may be ordered under the facts)

(a) Outreach.

(b) Identification of individuals in need of services.

(c) Counseling and referral for services.

(d) Coordination of services for individuals.

(e) Tracking and follow-up.

(f) Social services.

(g) Case management.

(h) Legal counseling or referral.

(i) Guardianship referral.

(j) Diagnostic evaluation.

(k) Any services that, when provided to an individual with developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacity,

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keep the individual safe from abuse, financial exploitation, neglect, or self-neglect or prevent the individual from experiencing deterioration or from inflicting harm on himself or herself or another person.

The fact that a petition has been filed is not evidence that (individual) is incompetent or in need of protective services. Every person is presumed to be competent. The burden of proving incompetency and the need for protective services is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could have a significant impact of (his) (her) life. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, you will be given a special verdict consisting of two questions. You must answer them according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

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Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 "yes," you must find the following:

a. That (individual) is aged at least 17 years and 9 months; and

b. That (individual) suffers from ("a developmental disability") ("degenerative brain disorder") ("serious and persistent mental illness"), or ("other like incapacities"); and

c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety) (perform those actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur); and

d. That (individual)'s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

[A "developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

["Degenerative brain disorder" means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide

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adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

["Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

["Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody.]

Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Question 2 of the verdict reads: If you answer question 2 "yes," then answer this question: Is (individual) in need of protective services?

(Individual) is considered to be in need of protective services if (he) (she) will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided.

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If your answer to both of these questions in the Special Verdict is "yes," then the court may order protective services. However, protective services will be ordered only after (individual)'s needs have been comprehensively evaluated.

Do not concern yourself with the nature of the protective services.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SPECIAL VERDICT

Question 1: Is (individual) incompetent?

Answer:_____

Yes or No

Question 2: If you answer question 1 "yes," then answer this question:

Is (individual) in need of protective services?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 2006 and revised in 2009 to reflect the legislative changes in 2007 Wis. Act 45. The comment was updated in 2014.

A petition for guardianship of an incompetent person shall be heard prior to ordering protective services. Wis. Stat. § 55.075(3).

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency and to the need for protective services. Wis. Stat. § 54.44(2) and § 55.10(4)(d).

The terms "individual found incompetent," "developmental disability," "degenerative brain disorder," "serious and persistent mental illness," and "other like incapacities" are defined in Wis. Stat. §§ 54.01(16), 54.01(8), 54.01(6), 54.01(30), and 54.01(22) respectively.

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The second verdict question is based on the findings required to establish the need for protective services. Wis. Stat. § 55.08(1).

Alzheimer's disease is a "degenerative brain disorder" and does not fall within the definition of a mental illness under Ch. 51. Alzheimer's is properly addressed under the provisions of Ch. 55. Ch. 51 provides for "active" treatment for those who are proper subjects for treatment while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

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7070 INVOLUNTARY COMMITMENT: HABITUAL LACK OF SELF-CONTROL AS TO THE USE OF ALCOHOL BEVERAGES

(Insert Wis JI-Civil 100, Opening)

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

A petition has been filed to involuntarily commit (respondent) for treatment. The petition alleges (that) (commitment is needed because) (respondent) habitually lacks self-control as to the use of alcohol beverages and uses alcohol beverages to the extent that (he) (she) is substantially impaired or endangered and (his) (her) social or economic functioning is substantially disrupted. The fact a petition has been filed is not evidence that (respondent) is in need of commitment and treatment.)

This is a civil, not a criminal, case. The fact the district attorney is present does not mean that (respondent) is accused of a crime. The district attorney and (attorney), the other attorney, are required to be here by the Wisconsin statutes. While (respondent) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of (respondent)'s personal liberty. Therefore, you should approach this task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

Wis JI-Civil 120, Judge's Demeanor

Wis JI-Civil 130, Stricken Testimony

Wis JI-Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

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At the end of the trial, you will be given a special verdict consisting of three questions.

Wis JI-Civil 205, Middle Burden of Proof

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

The first question of the special verdict reads as follows: Is the condition of (respondent) such that (he) (she) habitually lacks self-control as to the use of alcoholic beverages and uses such beverages to the extent that health is substantially impaired or endangered and social or economic functioning is substantially disrupted.

The second question of the special verdict reads: If you answer question 1 "yes," then answer this question: Is the condition of (respondent) evidenced by a pattern of conduct dangerous to (himself) (herself) or to others?

Before you can answer question 2 "yes," you must be satisfied that there is a relationship between the condition of _____ and (his) (her) pattern of conduct during the 12-month period immediately preceding the filing of the petition, and this pattern of conduct was a danger to (respondent) or to others.[1] The filing date of the petition is _____.

Question 3 of the special verdict reads: If you answer questions 1 and 2 "yes," then answer this question: Is (respondent) in need of commitment?

Before you can answer question 3 "yes," you must be satisfied that the following three elements have been established:

1. That there is an extreme likelihood that (respondent)'s pattern of conduct will continue or repeat itself without intervention of involuntary treatment or institutionalization.

2. That there is no suitable alternative available in which _____ will voluntarily participate.

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3. That the (agency involved) is able to provide the most appropriate treatment and that the treatment is likely to be beneficial to _____.

Do not concern yourselves with the length of custody or nature of any treatment that the court might order as a result of your answers to the questions of the special verdict.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SPECIAL VERDICT

Question 1: Is the condition of (_____) such that (he) (she) habitually lacks self-control as to the use of alcohol beverages and uses alcohol beverages to the extent (his) (her) health is substantially impaired or endangered and (his) (her) social or economic functioning is substantially disrupted?

Answer: _____

Yes or No

Question 2: If you answer question 1 "yes," then answer this question: Is the condition of ___ evidenced by a pattern of conduct dangerous to (himself) or (herself) or to others?

Answer: _____

Yes or No

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Question 3: If you answer questions 1 and 2 "yes," then answer this question: Is _____ in need of commitment?

Answer: _____

Yes or No

NOTES

[1] Even though Wis. Stat. § 51.45(3)(g) uses the term "established to a reasonable medical certainty," the Committee feels that this statutory language applies only to the admissibility of the expert testimony and does not change the burden of proof (i.e., clear and convincing - clear, satisfactory, and convincing).

COMMENT

The instruction and comment were approved by the Committee in 1981. The instruction was revised in 1987 and 2002.

Involuntary commitment is provided under Wis. Stat. § 51.45. The maximum period of an involuntary commitment following the hearing is 90 days.

A refusal to undergo treatment is not evidence of a lack of judgment as to the need for treatment. Wis. Stat. § 51.45(13).

The Committee believes that Wis. Stat. § 51.45(g)2 which provides that commitment may not be ordered without a showing of no suitable alternative and the ability of the agency to provide treatment requires a jury finding. The statutory language of this provision includes a burden of proof equivalent to other jury findings.

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8012 TRESPASSER: DEFINITION

A person who enters or remains upon property in possession of another without express or implied consent is a trespasser.

COMMENT

This instruction was revised in 2012 in accordance with Wis. Stat. ' 895.529(1)(b) (2011 Wisconsin Act 93).

Wendt v. Manegold Stone Co., 240 Wis. 638, 4 N.W.2d 134 (1942); Grossenbach v. Devonshire Realty, 218 Wis. 633, 261 N.W. 742 (1935); Antoniewicz v. Reszczynski, 70 Wis.2d 836, 236 N.W.2d 1 (1975); Reddington v. Beefeaters Tables, Inc., 72 Wis.2d 119, 240 N.W.2d 363 (1975); Monsivais v. Winzenried, 179 Wis.2d 750, 508 N.W.2d 620 (Ct. App 1993).

For an instruction on the issue of consent, see Wis JI-Civil 8015.

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8015 CONSENT OF POSSESSOR TO ANOTHER'S BEING ON PREMISES

Consent to be on the premises of another may be express or implied. There is an express consent when the possessor expressly invites or authorizes another person to be on his or her premises. There is an implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other person's being on the premises.

In determining whether an implied consent exists, you should look at all of the circumstances then existing, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any, of the premises by others (including the plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises. If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff be on the premises, then there was consent.

COMMENT

This instruction and comment were originally published in 1978. The comment was updated in 2012.

2011 Wisconsin Act 93 codifies the civil liability of possessors of property to trespassers. See Wis. Stat. § 895.529. Under the new law, a possessor owes no duty of care to a trespasser on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser, except under certain circumstances. The act defines a "trespasser" as anyone who enters onto private property without the express or implied consent of the property owner.

In Antoniewicz v. Reszczynski, 70 Wis.2d 836, fn. 4, 236 N.W.2d 1 (1975), the court abolished the distinction between the duty owed to licensees and invitees by possessors of land. It created one common and equal duty that the possessor of land owes to all persons on his lands (excepting trespassers) and that is the duty to exercise ordinary care under the circumstances.

The instruction is framed to accompany the following question in the special verdict: Was the plaintiff at the time of the accident on the premises with the defendant's consent?

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8017 DUTY OF HOTELKEEPER TO FURNISH REASONABLY SAFE PREMISES AND FURNITURE FOR GUESTS

This instruction was renumbered JI-Civil 8051 in 1986. Editorial changes were made in the title in 1994 to address gender references.

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8020 DUTY OF OWNER OR POSSESSOR OF REAL PROPERTY TO NONTRESPASSER USER

(An owner) (A possessor) of property must use ordinary care under the existing circumstances to (construct) (manage) (maintain) his or her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm.

"Ordinary care" is the degree of care which the great mass of people ordinarily uses under the same or similar circumstances. A person fails to use ordinary care when, without intending to do any wrong, he or she does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence should reasonably foresee that the act or omission will subject another person or property of another to an unreasonable risk of injury or damage.

In performing this duty, (an owner) (a possessor) of premises must use ordinary care to discover conditions or defects on the property which expose a person to an unreasonable risk of harm. If an unreasonable risk of harm existed and the (owner) (possessor) was aware of it, or, if in the use of ordinary care (he) (she) should have been aware of it, then it was (his) (her) duty to either correct the condition or danger or warn other persons of the condition or risk as was reasonable under the circumstances.

COMMENT

This instruction and comment were originally published in 1963 and revised in 1982 and 1996. The comment was updated in 1988, 1992, 1996, 2000, 2004, 2012, and 2020.

For the duty of an owner or possessor of real property to trespassers, see Wis JI-Civil 8025.

In Antoniewicz v. Reszczynski, 70 Wis.2d 836, 236 N.W.2d 1 (1975), the Wisconsin Supreme Court declared the duty of a land occupier to persons on premises with consent to be "ordinary care under the circumstances." The court abrogated common-law immunities of owners and occupiers and declared:

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"By such standard of ordinary care, we mean the standard that is used in all other negligence cases in Wisconsin."

Antoniewicz was followed by Pagelsdorf v. Safeco Ins. Co. of Am., 91 Wis.2d 734, 284 N.W.2d 55 (1979), in which the court addressed the issue of a landlord's duty toward his or her tenant invitee. In its decision, the court reaffirmed its earlier abrogation of common-law immunities, holding that a landlord (owner) owes a duty of ordinary care in maintaining premises to his or her tenant and others on the premises with permission. The court stated that issues of notice of defect, obviousness, control of premises, etc., are relevant only insofar as they bear on the ultimate issue: "Did the landlord exercise ordinary care in maintenance of the premises under all of the circumstances?" Antoniewicz was given only prospective effect while Pagelsdorf is unlimited in its application.

The foregoing cases were followed by Maci v. State Farm Fire & Casualty Co., 105 Wis.2d 710, 314 N.W.2d 914 (1981), a landlord liability case in which the court of appeals recognized the effect of Antoniewicz and Pagelsdorf in increasing a landlord's liability exposure by requiring him or her to exercise the duty of ordinary care to any person on his or her premises with permission but being of the opinion that Pagelsdorf did not abrogate the "warning/open and obvious" limitations on liability. The appeals court then interpreted Treps v. City of Racine, 73 Wis.2d 611, 243 N.W.2d 520 (1976), an invitee case, as adopting the "open, unconcealed, and obvious" rule, as set forth in Restatement, Second, Torts § 343A (1965), that "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

The Treps case was pre-Pagelsdorf and applied the common-law possessor-invitee rule. There may be some conflict between the holding in Maci and the statement in Pagelsdorf that issues of notice of defect, obviousness, and control of the premises are all relevant only insofar as they bear on the ultimate question of ordinary care. Maci purports to continue the "warning/open and obvious" limitations to liability as viable, thus perpetuating an immunity. See Maci, supra at 717. The Committee feels that since Pagelsdorf, there are no immunities and questions of "warning/open and obvious" should be addressed in terms of ordinary care and foreseeability. See also Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

The court of appeals, in a line of decisions, relied on Treps to support the conclusion that neither Pagelsdorf nor Antoniewicz eliminated the "open and obvious limitation" on landowner or possessor liability. In 1989, however, the supreme court noted what it termed a "split of authority" on the issue of whether the "open and obvious danger" limitation on landowner or possessor liability still exists in Wisconsin. Shannon v. Shannon, 150 Wis. 2d 434, 442 N.W.2d 25 (1989). The supreme court reiterated its holding in Pagelsdorf that "issues of notice of [a] defect, its obviousness, control of the premises . . . are all relevant only insofar as they bear on the ultimate question: Did the landlord exercise ordinary care in the maintenance of the premises under all the circumstances? Shannon v. Shannon, 150 Wis. 2d 445-46." The court in Shannon responded to the line of apparent contrary holdings by the court of appeals in the following way:

> Notwithstanding this language, the court of appeals has held in a continuing line of cases that our decisions in Antoniewicz and Pagelsdorf did not abrogate the open and obvious limitation on landowner or possessor liability. . . . We decline to resolve this apparent conflict today because this issue has not been adequately briefed, and the facts have not been adequately developed to allow us to make a reasoned determination.

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In the Shannon case, cited above, the adjoining land owner defendants, unsuccessfully argued that because the minor Shannon child fell into the lake abutting their property, they were entitled to dismissal on the grounds that the lake was an open and obvious danger to the minor child, therefore relieving them of liability. The supreme court noted that there appeared to be a split of authority on the issue of whether the open and obvious danger limitation on landowner or possessor liability still existed in this state. Citing Pagelsdorf v. Safeco Ins. Co. of Am., supra, the court reaffirmed its prior holding that a landlord owes his or her tenant or anyone else on his or her premises a duty to exercise ordinary care. The court expressly noted: "we also held [in Pagelsdorf] that issues of notice of a defect, its obviousness, . . . are all relevant only insofar as they bear on the ultimate question: did the landlord exercise ordinary care in the maintenance of the premises under all of the circumstances?"

In the 1991 case of Griebler v. Doughboy Recreational, Inc., 160 Wis. 2d 547, 466 N.W.2d 897 (1991), our supreme court, without discussing Shannon v. Shannon, appeared to resurrect the "open and obvious defense" in those cases where the court is able to conclude as a matter of law that the danger is open and obvious. In Griebler, the supreme court reversed the court of appeals and affirmed the trial court's granting of a summary judgment to the defendants because the plaintiff, Griebler, had "voluntarily confronted an open and obvious danger" under circumstances where he, Griebler, conceded that he did not know of the water's depth when he dove into the pool owned by the defendants. Griebler was followed by a number of court of appeals applying the open and obvious danger doctrine to a variety of property conditions. In 1996, the supreme court in Rockweit v. Senecal 197 Wis.2d 409, 541 N.W.2d 742 (1995), again addressed what it described as the apparent conflict of authority among the court of appeals again with respect to the application of the open and obvious danger doctrine. The supreme court, expressly reaffirmed its prior holding in Pagelsdorf, stating:

> In the ordinary negligence case, if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery.

Although the court in Rockweit never referred to the Griebler decision, the Committee interprets Rockweit to overrule Griebler as to the effect of open and obvious dangers on the responsibilities of plaintiffs and defendants.

As to the application of comparative negligence principles and the application of the open and obvious danger doctrine, see Wagner v. Wisconsin Municipal Mut. Ins. Co., 230 Wis.2d 633, 601 N.W.2d 856 (Ct. App. 1999). In Wagner, the court said that because Wisconsin is a comparative negligence state, application of the open and obvious danger doctrine should be limited to cases where a strong public policy exists to justify such a direct abrogation of comparative negligence principles. 230 Wis.2d at 638.

A commercial landlord is held to the same duty as a residential landlord. Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

Impact of Smaxwell v. Bayard. The decision in Smaxwell v. Bayard, 2004 WI 101, raises three important issues concerning liability arising from property ownership:

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- First, the Court limited liability arising from injuries caused by dogs. The Court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

  > "We hold, on public policy factors, that common-law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.

- Second, the Court in Smaxwell raised the question of whether a landlord's liability for injuries incurred on the leased property are limited to those caused by defects in or maintenance of the physical property. After some discussion of the issue, the Court observed that: " . . . all of the cases in Wisconsin involving landlord liability . . . concerned actual defects in the leased property." Id. at par. 38. However, the Court concluded that it was unnecessary to determine whether a landlord's duty extends beyond defects in or maintenance of the property, because the issue in Smaxwell was resolved on separate public policy grounds. Id.

- Finally, the Smaxwell court makes note of the holding in Shannon v. Shannon, 150 Wis.2d 434, 442 N.W.2d 25 (1989) that held that the duty of landowners to those on their property with consent of the owner is one of ordinary care, and is not restricted "to defects or conditions which may be on such premises." Id. at 443. The landowners in Shannon were actually occupying the land at the time in question, and were not landlords. Footnote 7 suggests that "In light of Shannon. . . . (Wis JI-Civil 8020) incorrectly states the law as far as a landowner's duty is concerned." Presumably, that is because a landowner's duty may be of a more general nature, and is not limited to property defects or maintenance. Nonetheless, it is the Committee's considered opinion that most claims arising from property ownership indeed do involve allegations of defect or maintenance. For those cases, Wis JI-Civil 8020 would remain an accurate statement of the law. If the allegations do not arise from alleged defects or inadequacy of maintenance, the general negligence instruction Wis JI-Civil 1005 is recommended by the Committee.

Modification of jury instruction by statute or ordinance. The modification of Wis JI-Civil 8020 to reflect statutory provisions or local ordinances may not be proper unless an expression of legislative intent to impose civil liability exists. In Smith v. Goshaw, 387 Wis.2d 620, 928 N.W.2d 619, 2019 WI App 23 the court of appeals addressed whether a modification to Wis JI-Civil 8020 based on provisions found in the Wisconsin Administrative Code and a City of Eau Claire Ordinance was proper. In its decision, the court determined that reversible error occurred when the trial court added the sentence "[E]very building and all parts thereof shall be kept in good repair," at the beginning of the first paragraph of the instruction. Citing the analysis provided in Raymaker v. American Family Mut. Ins. Co., 2006 WI App 117, 293 Wis. 2d 392, 718 N.W.2d 154, the court concluded that neither the administrative code provision nor the local ordinance at issue supported negligence per se. Specifically, the court noted that "A violation of a statute constitutes negligence per se only when the plaintiff demonstrates that the harm inflicted was of the type the statute was designed to prevent, the person injured was within the class of persons protected by the statute, and there is some expression of legislative intent to impose civil liability." Smith, citing Raymaker, 2006 WI App 117, ¶20.

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Additionally, the court in Smith also held that the modification included in the jury instruction presented the landlord's duty "as being absolute," which in turn, likely had the effect of misleading the jury regarding the correct legal standard for negligence. Id. at ¶3. Highlighting the problematic nature of the modified language, the court stated "As we have explained, a reasonable juror could understand the 'good repair' instruction as permitting it to find fault without regard to whether Goshaw had exercised ordinary care in inspecting or maintaining the premises." Id. at ¶16.

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8025 TRESPASS: OWNER'S DUTY TO TRESPASSER; DUTY TO CHILD TRESPASSER (ATTRACTIVE NUISANCE)

TRESPASSER: DEFINITION

A person who enters or remains upon property in possession of another without express or implied consent is a trespasser.[1]

Consent to be on the premises of another may be express or implied. There is an express consent when the possessor expressly invites or authorizes another person to be on his or her premises. There is an implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other person's being on the premises.

In determining whether an implied consent exists, you should look at all of the circumstances then existing, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any, of the premises by others (including the plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises. If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff be on the premises, then there was consent.

Question ____ asks: At the time and place in question, was (plaintiff) a trespasser?

If by your answer to Question ____ you have found that the plaintiff, _____, was a trespasser, it will then be for you to determine whether the defendant, _____, as the (owner) (occupant-possessor) of the premises, complied with those rules of law relating to the duties owed by an owner-occupant to a trespasser.

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A trespasser enters upon premises of another at his or her peril. The (owner) (occupant-possessor) is under no duty to anticipate a trespasser's entry or to provide for a trespasser's safety. An (owner) (occupant-possessor) may engage in any lawful work conducted in a customary manner, upon his or her premises without incurring liability to a trespasser. This is so even though some danger to trespassers reasonably may be anticipated due to the nature of the work being performed or the manner in which it is being conducted. The (owner's) (occupant-possessor's) only duty to a trespasser is to refrain from acts which willfully, wantonly, or recklessly cause injury or death to trespassers. If (owner) (occupant-possessor) becomes aware, or in the exercise of ordinary care should have become aware, of the presence of trespassers upon his or her premises, (he) (she) may not affirmatively act or set any force in motion likely to cause injury or death to trespassers.

Willful actions are deliberate acts with intent to accomplish a result. Wanton or reckless actions are those so unreasonable and dangerous that the actor knows or should know that it is highly probable harm to another will result.[2]

Question ____ asks:

At or immediately before the (injury to) (death of) (plaintiff), were the actions of (defendant) willful, wanton, or reckless?

If you determined that the actions of (defendant) were willful, wanton, or reckless, then you must determine if the actions were a cause of (plaintiff)'s (injury)(death);

Question ____ asks:

Was the action of (defendant) a cause of (injury)(death) to (plaintiff)?

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(NOTE: If the plaintiff is a child and his or her claim is based on "attractive nuisance," the following instruction should be given. For a suggested verdict, see Wis JI-Civil 8027.)

CHILD TRESPASSER

When a child trespasses upon the premises of another, the owner-occupant owes no duty of care to a child injured or killed unless all of the following apply:

a) The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children.

b) The possessor of real property knew or should have known that children trespassed on the property.

c) The possessor of real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.

d) The injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property or in playing in close proximity to the inherently dangerous artificial condition.

e) The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.

An artificial condition, as used in this instruction, includes a machine or device as well as a land condition artificially created. The duty of the possessor is to exercise ordinary care to eliminate dangers or otherwise protect children. Ordinary care is that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. The duty placed upon the possessor is to take such steps as a reasonable person would take under the circumstances. The duty of the possessor does not apply to children who know, or should know, of the danger involved in the condition.

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In determining whether the (artificial condition), maintained on the land known to be subject to trespass by children, involves an unreasonable risk to them, you should consider and compare the recognizable risk to the children with the utility to the possessor of maintaining the condition. In this regard, you should consider whether safeguards could reasonably be provided which would obviate the danger without materially interfering with the purpose for the artificial condition. You must further decide if the (artificial condition) was a cause of the (injury to) (death of) (child).

NOTES

1. Wis. Stat. § 895.529(1)(b). This instruction was revised in accordance with 2011 Act 93.

2. This exception does not apply if the possessor used reasonable and necessary force for the purpose of self-defense or the defense of others under Wis. Stat. § 939.48 or used reasonable and necessary force for the protection of property under § 939.49.

COMMENT

The committee revised the instruction and comment in 2012. The comment was revised in 2016.

Wis. Stat. § 895.529. See Wis. Stat. § 895.529(4) which states: "This section does not create or increase any liability on the part of a possessor of real property for circumstances not specified under this section and does not affect any immunity from or defenses to liability available to a possessor of real property under common law or another statute."

This instruction incorporates the former Wis JI-Civil 8012: Trespasser: Definition and Wis JI-Civil 8015: Trespass: Consent of Possessor to Another's Being on Premises. The instruction also covers a claim based on attractive nuisance which formerly had been addressed in Wis JI-Civil 1011.

Special Verdicts. For special verdicts on the duty of a possessor of property, see Wis JI-Civil 8026 and 8027.

It is the opinion of the committee that there is no comparative negligence comparison involving an owner's duty to a child trespasser (attractive nuisance). It is our opinion that Wis. Stat. § 895.529(3)(b) is designed to limit the liability of a landowner and that the statute does not provide for a comparison of negligence.

Burden of Proof. The committee believes the burden of proof as to the first verdict question (*i.e.* was the plaintiff a trespasser?) is on the defendant to show the plaintiff was a trespasser. The middle burden of proof applies to the question: "At or immediately before the injuries to plaintiff, were the actions of defendant willful, wanton, or reckless"?

Attractive Nuisance. See Wis. Stat. § 895.529(3)(b); Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981); Restatement, Second, Torts § 339. For a suggested verdict, see Wis JI-Civil 8027.

Duty to Non-Trespassers. In Antoniewicz v. Reszczynski, 70 Wis.2d 836, fn. 4, 236 N.W.2d 1 (1975), the court abolished the distinction between the duty owed to licensees and invitees by possessors of land. The decision created one common and equal duty that a possessor of land owes to all persons on his or her lands (excepting trespassers) and that is the duty to exercise ordinary care. See Wis JI-Civil 8020.

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8026 TRESPASS: SPECIAL VERDICT

Question 1: At the time and place in question, was (plaintiff) a trespasser?

ANSWER: _____
Yes or No

Answer Question 2, only if you answered Question 1 "yes."

Question 2: At or immediately before the (injury)(death) of (plaintiff), were the actions of (defendant) willful, wanton, or reckless?

ANSWER: _____
Yes or No

Answer Question 3, only if you answered Question 2 "yes."

Question 3: Were the actions of (defendant) a cause of (injury)(death) to (plaintiff)?

ANSWER: _____
Yes or No

COMMENT

This instruction and comment were approved in 2012. The comment was revised in 2016.

See Wis. Stat. § 895.529.

Burden of Proof. The middle burden of proof applies to Question 2.

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8027 TRESPASS: CHILD TRESPASSER (ATTRACTIVE NUISANCE): SPECIAL VERDICT

Question 1: Was (child) a trespasser upon (landowner)'s property?

ANSWER: _____
Yes or No

If you answered Question 1 "no," then answer no further questions.

If you answered Question 1 "yes," then answer the following questions.

Question 2: Did (landowner) maintain or allow to exist an artificial condition on the property that (landowner) knew or should have known was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children?

ANSWER: _____
Yes or No

Question 3: Could (landowner) have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist?

ANSWER: _____
Yes or No

Question 4: Did (landowner) know or should (he) (she) have known that children trespassed on the property?

ANSWER: _____
Yes or No

If you answered "yes" to questions 2, 3, and 4, then answer the following question. If you answered "No" to question 2, 3, or 4, then answer no further questions.[1]

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Question 5: Did (child) because of (his) (her) youth or tender age fail to discover the artificial condition or realize the risk involved in entering onto the property or playing in close proximity to the inherently dangerous artificial condition?

ANSWER: _____
Yes or No

If you answered "No," then answer no further questions.

Question 6: Was the artificial condition a cause of (child)'s injury?

ANSWER: _____
Yes or No

NOTE

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1. This instruction may need to be modified to address the following possibilities: Plaintiff will likely plead that child had consent to be on property and allege that Landowner failed to use ordinary care under the existing circumstances in [constructing/managing/maintaining] his or her property so as to avoid exposing persons who are on the property with consent to an unreasonable risk of harm. If Landowner does not contest this allegation or if the jury answers "No" to question No.1, the facts may warrant the giving of the following question:

Did (landowner) use ordinary care under the existing circumstances in [constructing/managing/maintaining] (his) (her) property to avoid exposing persons who are on (landowner)'s property with consent to an unreasonable risk of harm?

A second scenario that could arise is an alternative claim by plaintiff/child that if he or she was a trespasser, the landowner "willfully, wantonly or recklessly inflicted injury" upon the child. Depending upon the facts presented, the following question may be warranted (assumes an answer of "yes" to the child being a trespasser):

At or immediately before the (injury) (death) of (child), were the actions of (defendant) willful, wanton, or reckless?

COMMENT

This special verdict was approved in 2012.

See Wis. Stat. § 895.529; Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981).

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8030 DUTY OF OWNER OF A BUILDING ABUTTING ON A PUBLIC HIGHWAY

An owner of a building abutting a public (highway) (sidewalk) must use ordinary care to see that those portions of the building which might cause injury are in reasonably safe condition and will not endanger the safety of persons lawfully using the (highway) (sidewalk) or who deviate from it in the ordinary course of travel where such deviation is reasonably foreseeable.

While an owner is not required to guarantee the safety of the public using the (highway) (sidewalk), the owner has the duty to use ordinary care and skill in the construction and maintenance of his or her building.

Ordinary care requires the owner of a building to make such inspection of the building as is reasonably required to guard against dangerous effects of deterioration from natural or other causes. These inspections must be frequent and thorough enough to determine existing conditions.

COMMENT

The instruction and comment were approved in 1974 as Wis JI-Civil 1028. The instruction was revised and renumbered in 1985. Editorial changes were made in 1994. No substantive changes were made to the instruction. The comment was updated in 2005.

If the defendant is not the owner of the building, substitute "one in control of" for "an owner" and "such person in control" for "such owner."

Weiss v. Holman, 58 Wis.2d 608, 207 N.W.2d 660 (1973). Lee v. Milwaukee Gas Light Co., 20 Wis.2d 333, 338, 122 N.W.2d 374 (1963); Delaney v. Supreme Inv. Co., 251 Wis. 374, 29 N.W.2d 754 (1947); Majestic Realty Corp. v. Brant, 198 Wis. 527, 244 N.W. 743 (1929). 25 Am.Jur. Highways § 364 (1940); 7 A.L.R. 204 (1920); 138 A.L.R. 1078 (1942). See also Restatement, Second, Torts § 368 (1965).

The circumstances of the case may be such as to warrant the application of the doctrine of res ipsa loquitur. See Lee, supra at 338-39.

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If the liability arises from something other than a building, such as a falling tree, substitute "premises" for "building." In Schicker v. Leick, 40 Wis.2d 295, 162 N.W.2d 66 (1968), mud was carried from the premises onto the highway.

Icy Sidewalk. When a properly working downspout built in the ordinary and usual manner discharges water upon the property and the water finds its way to the public sidewalk because of the natural slope and topography of the land, the resulting runoff onto the sidewalk is a natural condition for which the property owner incurs no liability. Holschbach v. Washington Park Manor, 2005 WI App 55 ¶ 1, 280 Wis.2d 264, 694 N.W.2d 492.

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8035 HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY

Every municipality has the duty to exercise ordinary care to construct, maintain, and repair its (highways) (sidewalks) so that they will be reasonably safe for public travel. This duty does not require the municipality to guarantee the safety of its (highways) (sidewalks) or render them absolutely safe for all persons who travel upon them. It is sufficient if they are constructed (and) (maintained) so as to be reasonably safe.

A (highway) (sidewalk) is defective when it is not (constructed) (maintained) so as to be reasonably safe for anticipated public use.

(However, before you may find (municipality) negligent because of the existence of a defective condition, you must first find that (municipality) through its officers or employees had either actual notice of the defect, or constructive notice, because the defect had existed for such a length of time before the accident that the municipality through its officers and employees in the exercise of ordinary care should have discovered it in time to remedy the defect.)

You may consider the topography and development of the locality (the standard of sidewalk construction which this part of the municipality had attained), as well as the amount and character of traffic on the (highway) (sidewalk) and the intended use of the (highway) (sidewalk) by the public.

COMMENT

This instruction was approved in 1974 and numbered Wis JI-Civil 1029. It was renumbered in 1985. Editorial changes were made in 1994. The instruction and comment were updated in 2004. The comment was updated in 2015.

Prior to being amended in 2012, Wis. Stat. § 893.83(1) (formerly numbered Wis. Stat. § 81.15) provided that a municipality may be held liable for damages of up to $50,000 that "happen to any person or his

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or her property by reason of the insufficiency or want of repairs of any highway that any town, city, or village is bound to keep in repair." Under this statutory provision, a municipality was not liable for damages sustained by reason of an accumulation of snow or ice upon a bridge or highway, unless the accumulation existed for three weeks or more.

In 2012, Wis. Stat. § 893.83(1) was amended by 2011 Wisconsin Act 132, (effective April 5, 2012). This legislation repealed that part of Wis. Stat. § 893.83(1) which imposed liability for insufficiency or want of repairs of any highway. As amended, this statute continues to authorize legal actions for injuries sustained by reason of an accumulation of snow or ice that has existed on a bridge or highway for three weeks or more.

Prior to the amendment in 2012, the Wisconsin Supreme Court had held that the general grant of immunity found in Wis. Stat. § 893.80(4) would not bar a claim under Wis. Stat. § 81.15. Morris v. Juneau County, 219 Wis.2d 543, 557, 579 N.W.2d 690 (1998). The supreme court has also intimated that in abolishing municipal tort immunity, Holytz v. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962), provides an independent basis for proceeding in these actions. Schwartz v. City of Milwaukee, 43 Wis.2d 119, 123 (1969); Schwartz v. City of Milwaukee, 54 Wis.2d 286, 288-89 (1972). The court stated, at 54 Wis.2d 288-89, that:

> ...sec.81.15 might as well be repealed by the legislature since its purported language creating a cause of action has been supplanted by Holytz v. Milwaukee . . .

This language was cited with approval in Morris v. Juneau County, supra at p. 555.

The Committee believes that claims for insufficiency or want of repairs of a roadway remain viable under Wis. Stat. § 893.80(4) and Holytz v. Milwaukee, supra. However, governmental immunity, under Holytz, supra, may bar some claims.

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8040 DUTY OF OWNER OF PLACE OF AMUSEMENT: COMMON LAW

Persons conducting places of amusement have a duty to use ordinary or reasonable care to keep them safe for the public. Such person is not an insurer of the patrons. He or she owes them only what under the particular circumstances is ordinary or reasonable care.

[This duty requires that the owners make such timely and periodic inspection of their premises as would reveal existing defects therein or which may develop thereon and seasonably repair all defects which might reasonably suggest the probability of danger or injury to the invitees thereon. It is the duty of owners to repair all defects known by them to exist, if any such defects did exist, and to repair defects that have existed a sufficient length of time to give the owners constructive notice of their presence and which, in the exercise of ordinary care, should have been discovered by them.]

COMMENT

This instruction was approved in 1977 and numbered Wis JI-Civil 1027. It was renumbered in 1985. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Emerson v. Riverview Rink & Ballroom, 233 Wis. 595, 598, 290 N.W. 129 (1950); Reiher v. Mandernack, 234 Wis. 568, 570-71, 291 N.W. 758 (1940); Eide v. Skerbeck, 242 Wis. 474, 480, 8 N.W.2d 282 (1943).

This duty cannot be delegated to an independent contractor. Eide v. Skerbeck, supra.

When patron is injured by act of third person, see Wis JI-Civil 8045.

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8045 DUTY OF A PROPRIETOR OF A PLACE OF BUSINESS TO PROTECT A PATRON FROM INJURY CAUSED BY ACT OF THIRD PERSON

As the proprietor of a (tavern, etc.) who opens it to the public for his or her business purposes, (proprietor) had a duty to use ordinary care to protect members of the public while on the premises from harm caused to them by the accidental, negligent, or intentional acts of third persons if by using ordinary care, he or she could have discovered that the acts were being done or were about to be done, and he or she could have protected the (injured patron) by controlling the conduct of the third person or by giving a warning adequate to enable them (injured patron) to avoid harm. However, (proprietor) is not required to guarantee the safety of patrons against injuries inflicted by other patrons on the premises.

(If the nature of the particular business is such that the proprietor should expect a risk of harm to patrons by third persons, then he or she is under a duty to employ a reasonably sufficient number of employees to afford a reasonable protection.)

(A person who assembles a number of people upon his or her property for financial gain to himself or herself must use ordinary care to protect the individuals from injury from causes reasonably to be anticipated. This duty requires that the proprietor furnish a sufficient number of guards or attendants and take other necessary precautions to control the actions of the crowd.)

(It is for you to determine whether the guards furnished or the precautions taken were sufficient under all the circumstances.)

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COMMENT

This instruction was approved in 1977 and numbered Wis JI-Civil 1027.5. It was renumbered in 1985 and revised in 1987. The comment was updated in 1998, 2010, and 2011.

Kowalczuk v. Rotter, 63 Wis.2d 511, 513-14, 217 N.W.2d 332 (1974); Weihert v. Piccione, 273 Wis. 448, 455-56, 78 N.W.2d 757 (1956); Radloff v. National Food Stores, Inc., 20 Wis.2d 224, 121 N.W.2d 865 (1963); Emerson v. Riverview Rink & Ballroom, 233 Wis. 595, 290 N.W.2d 129 (1940); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951); Lee v. National League Baseball Club, 4 Wis.2d 168, 89 N.W.2d 811 (1958); Beyak v. North Central Food Systems, Inc., 215 Wis.2d 64, 571 N.W.2d 912 (Ct. App. 1997); Restatement, Torts §§ 346, 348 (1934).

This instruction would apply where the business is a place of amusement.

Premises. In Delvaux v. Vanden Langenberg, 130 Wis.2d 464, 487, 387 N.W.2d 751 (1986), the Wisconsin Supreme Court said that a tavern owner's duty does not extend beyond his business premises. For cases discussing the "premises," see Symes v. Milwaukee Mutual Ins. Co., 178 Wis.2d 564, 505 N.W.2d 143 (Ct. App. 1993) and Flynn v. Audra's Corp., 2010 AP 882 (2011).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986). An intentional tortfeasor is not entitled to contribution from a negligent tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct. Where the jury finds that the third person's wrongful act is an intentional tort and further finds the proprietor negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Wis. Stat. 895.045(1) provides only for comparison of negligent conduct. Also see Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960); Fleming, supra.

Also, a negligent tortfeasor may claim indemnification from a joint intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, et al, 131 Wis.2d 123, 130, 388 N.W.2d 908 (1986). An intentional tortfeasor has no claim for contribution from a joint negligent tortfeasor. Fleming, supra, p. 129, Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 619-620, 436 N.W.2d 311 (1989).

For a sample verdict for use in cases involving intentional and negligent acts by joint tortfeasors, see Wis JI-Civil 1580 (comment).

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8050 DUTY OF HOTEL INNKEEPER: PROVIDING SECURITY

A hotel innkeeper, who holds an establishment open to the public, has a duty to provide reasonable security for the person and property of guests as well as the normal and usual comforts customarily afforded. In providing reasonable security, it is the duty of a hotel innkeeper to exercise ordinary care to provide adequate protection for guests and their property from assaultive and other types of criminal activity.

A hotel innkeeper is not a guarantor of safety for guests and their property but is required to provide security commensurate with the facts and circumstances that are or should be apparent to the ordinarily prudent person, depending on the particular circumstances of the location of the hotel (motel). On the other hand, there is no duty on the part of a hotel innkeeper to guard against abnormal or unusual events or things which with reasonable care, skill, and foresight could not have been anticipated, discovered, or prevented; his or her duty is to protect only against those risks which the innkeeper could have discovered in the exercise of ordinary care.

In some situations, greater than normal or usual security may be required, such as a security force, closed circuit television surveillance, deadbolt and chain locks on individual rooms or security doors on hotel entrance ways located away from the lobby. In other situations, less security may be adequate. In determining whether ordinary care was exercised in providing security, you may take into consideration industry standards, the community crime rate, the extent of assaultive or criminal activity in the area or in similar business enterprises, the presence of suspicious persons, the particular security problems posed by the

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hotel's design, and any other facts and circumstances shown by the evidence bearing on the subject.

COMMENT

The instruction and comment were approved by the Committee in 1980. The instruction was formerly numbered Wis JI-Civil 1027.7 and was renumbered in 1985. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

Peters v. Holiday Inns, Inc., 89 Wis.2d 115, 278 N.W.2d 208 (1979).

Wis JI-Civil 8050 may be applicable to a tavern or other place of business. A defendant hotelkeeper, tavern proprietor, has a duty to protect his or her patrons from crime and from negligent or intentional torts committed by other patrons.

See Wis JI-Civil 8045, Duty of Proprietor to Protect Patron for Injury Caused by Third Person. In an appropriate case, Wis JI-Civil 8045 may be an adequate instruction if hotelkeeper's patron is injured by another patron.

See Wis JI-Civil 8051, Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for His or Her Guests.

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8051 DUTY OF HOTELKEEPER TO FURNISH REASONABLY SAFE PREMISES AND FURNITURE FOR GUESTS

You are instructed that a hotelkeeper, though not an insurer, is required to exercise reasonable care to provide his or her guests with safe premises and with furniture which may be used in an ordinary and reasonable way without danger.

It is the further duty of a hotelkeeper to make all reasonable inspections so as to guard against dangerous conditions, and such inspection must be frequent and thorough enough to determine existing dangerous conditions.

You are further instructed that a hotelkeeper is not responsible for injuries caused by a latent or hidden defect which would not have been revealed in the course of a reasonable inspection. The duty of a hotelkeeper to furnish reasonably safe premises and furniture for his or her guests does not require him or her to do the impossible or to discover defects entirely latent in the premises or the furniture.

A "latent defect" is one which cannot be discovered by a reasonably careful inspection.

COMMENT

This instruction and comment were approved in 1966 as Wis JI-Civil 8017. The instruction was renumbered in 1985. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction. The instruction was revised in 2020 to correct a typographical error in the third paragraph.

Dwyer v. Jackson Co., 20 Wis.2d 318, 121 N.W.2d 881 (1963).

A motelkeeper may be obligated to inform guests of potentially dangerous conditions. Phoenix Ins. Co. v. Wisconsin Southern Gas Co., 45 Wis.2d 471, 173 N.W. 610 (1970).

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8060 ADVERSE POSSESSION NOT FOUNDED ON WRITTEN INSTRUMENT (WIS. STAT. § 893.25)

(Name of adverse possessor) claims ownership of real estate based on adverse possession. To claim ownership of real estate based on adverse possession, a person, together with his or her predecessors in interest, must have had uninterrupted adverse possession of the real estate for at least 20 years. Real estate is adversely possessed when the person claiming adverse possession (together with (his) (her) predecessors in interest) has had actual continued occupation of the real estate, under a claim of title, exclusive of any other right and the real estate claimed and occupied is either protected by a substantial enclosure or is usually cultivated or improved.

[In determining whether real estate is adversely possessed, you must look at the physical character of the possession. The physical possession must be open, notorious, exclusive, continuous, and hostile for at least 20 years.]

[The adverse possession must be sufficiently open and obvious to have apprised (title holder) of both the fact of the possession and the intent to exclude others from possession. Exclusive possession does not mean absolutely exclusive but rather the kind of possession that would characterize an owner's use.]

[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature: Where the adverse possession is seasonal in character, the requirement of continuity of possession is satisfied by the use of the real estate according to the existing seasonal uses, needs, requirements, and limitations, taking into consideration the location and the adaptability of the real estate for the seasonal use.]

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["Hostile" does not mean a deliberate, willful, or unfriendly intent. If the characteristics of open, notorious, exclusive, and continuous possession are satisfied, the law presumes the element of hostile intent. "Hostile" means that the person in actual possession of the land claims exclusive right to it.]

[Land is "actually occupied" when it is used in a way it is ordinarily capable of being used and in such a manner as an owner would use it. Actual occupation is not limited to structural encroachment, although that it is a common physical characteristic of possession.]

The requirement of "substantial enclosure" must alert a reasonable person of a dispute over the land. "Usually cultivated or improved" means the one in possession has put the land to the same kind of use that a title holder might generally put the land.

(Title holder) is presumed to be in possession of the land claimed by (adverse possessor). Therefore, the burden is on (adverse possessor) to establish (his) (her) claim.

Finally, (adverse possessor) has the burden of proof to clearly define the area of land claimed to be adversely possessed. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which to determine the boundary of the land adversely possessed.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1996. The comment was updated in 2011, 2015, 2016, and 2018. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Elements. To constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." Pierz v. Gorski, 88 Wis.2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979) (citations omitted); see also Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280. "Hostile" does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other

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requirements of open, notorious, continuous, and exclusive use are satisfied. Burkhardt v. Smith, 17 Wis.2d 132, 139, 115 N.W.2d 540 (1962). Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164. "Both the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own." Allie v. Russo, 88 Wis.2d 334, 343-44, 276 N.W.2d 730 (1979) (citations omitted). The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim. See Pierz, 88 Wis.2d at 139.

In 2017, the Wisconsin Legislative Council published an information memorandum, IM-2017-04, which provides background information on the law of adverse possession and provides an overview of relevant court decision and statutes.

Tacking. The Judicial Council Committee's note following Wis. Stat. § 893.25 indicates that the phrase "in connection with his or her predecessors in interest" expresses the doctrine of "tacking" together periods of possession by adverse possessors in privity with each other.

Presumption of Hostile Possession. In Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280, the Wisconsin Supreme Court held that evidence regarding a possessor's subjective intent to claim title may be relevant in an adverse possession claim to rebut the presumption of hostility that arises when all other elements of adverse possession are satisfied. The court said the circuit court properly considered the predecessors in interest subjective intent and concluded that the adverse possession claimants failed to establish adverse possession for the requisite statutory period. The question presented in this case was whether the plaintiffs could establish that they adversely possessed the disputed property when their predecessors in interest expressly disclaimed ownership of it and sought permission to use the property from an entity that they mistakenly believed was its true owner.

Burden of Proof. This instruction is similar to the one used by the trial court in Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). It also conforms with the supreme court's clarification in Kruse as to the burden of proof to be used in adverse possession cases. The court held that the civil burden, not the middle burden, of proof applies in adverse possession cases. Some older cases used the term "clear and positive" evidence regarding evidence of possession. The court stated at page 362:

> The confusion surrounding the phrase "clear and positive," derives from the word, "clear," which frequently appears in the middle burden of proof. Because of the confusion which this portion of the instruction may cause, we direct that the words, "must be clear and positive and," be omitted from the instruction. The amended instruction will therefore read, "The evidence of possession must be strictly construed against the claimant." The instruction as so modified comports with the presumption of § 893.30 Stats. that favors the holder of the legal title.

Titleholder. As suggested in a footnote in Kruse (p. 361), this instruction uses the term "title holder" as opposed to the term "true owner" to avoid possible confusion.

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Seasonal Use. In both Laabs v. Bolger, 25 Wis.2d 17, 23, 130 N.W.2d 270 (1964) [involving a deer-hunting shack] and Kraus v. Mueller, 12 Wis.2d 430, 440, 107 N.W.2d 467 (1960) [involving a summer-cottage property], the court cites the A.L.R. annotation, "Adverse Possession: Sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes," 24 A.L.R. 2d 632, 633, for the rule that seasonal use can satisfy the continuity requirement under certain circumstances, with the annotation stating:

> The requirement of continuity of possession as one of the essential elements of adverse possession is satisfied, as regards activities which are seasonal in character (other than those relating to agriculture and logging), by the use of land commensurate with and appropriate to existing seasonal uses, needs, requirements, and limitations, having regard for the location and adaptability of the land to such uses.

Defining the Area Possessed. The requirement that the adverse possessor provide a reasonably accurate basis upon which a legal description of the occupied area can be based is stated in Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 146; 276 N.W.2d 356 (Ct. App. 1979). The trial court must be provided with a reasonably accurate basis to determine the boundary. Otto v. Cornell, 119 Wis.2d 4, 11, 349 N.W.2d 703 (1984).

The court of appeals in Klinefelter v. Ditch, 161 Wis.2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991) notes:

> § 893.25 Stats. makes no distinction between "wild lands" and any others. Whether land is wild or not, a substantial enclosure plus "actual continued occupation" under a claim of right results in adverse possession if maintained for twenty years.

Permission. Hostile intent does not exist if the use is pursuant to the titleholder's permission. Northwoods Dev. Corp. v. Klement, 139 Wis.2d 695, 129 N.W.2d 121 (1964). See also Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280.

Substantial Enclosure. See Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Illinois Steel Co. v. Bilot, 109 Wis. 418, 444, 84 N.W.2d 855 (1901); Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164.

Acquiescence. The adverse possessor may contend that, by tolerating his or her use, the titleholder was acquiescing in the use rather than permitting it, and argue that use by acquiescence is adverse. Allie v. Russo, 88 Wis.2d 334, 343, 276 N.W.2d 730 (1979). However, for the doctrine of acquiescence to apply, the adverse possessor's use of the disputed property must be exclusive. See Allie v. Russo, supra, at pp. 345-47, and cases cited therein.

The doctrine of acquiescence is a "supplement" to the older rule of adverse possession which held that adverse intent was the first prerequisite of adverse possession. Chandelle Enters., LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, 282 Wis.2d 806, 699 N.W.2d 241. Northrop v. Opperman, 2010 WI App 80, 325 Wis.2d 445, 784 N.W.2d 736; Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631. Courts have developed the doctrine of acquiescence, which substitutes "mutual acceptance" for adverse or hostile intent. Buza v. Wojtalewicz, 48 Wis.2d 557, 562-63, 180 N.W.2d 556 (1970). See also Shrestha, Jessica, "Hey! That's My Land," Wisconsin Lawyer, Vol. 83, No. 3, March 2010 and Vol. 88, No. 7, June 2015.

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8100 EMINENT DOMAIN: FAIR MARKET VALUE (TOTAL TAKING)

The sole question in the Special Verdict asks "What was the fair market value of the property on (date of evaluation)?"

In answering this question, consider only the price for which the property would have sold on (date of evaluation) by a seller then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the seller or his or her unwillingness to sell the property.

You should consider the use to which the property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the property is the use to which the property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon speculation, theory or conjecture. You should consider every element that establishes the fair market value of the property.

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SPECIAL VERDICT

What was the fair market value of the property on (date of evaluation)?

$ _____

COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009, 2010, 2011, 2014, 2015, and 2020. The 2020 revision updated case law citations.

Wis. Stat. § 32.09(5).

Fair Market Value. The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005). The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of taking is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986). See also 260 North 12th Street, LLC v. State of Wisconsin Dep't of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381.

Date of Evaluation. Under Wis. Stat. § 32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; The Lamar Co. v. Country Side Restaurant, 2012 WI 46, 340 Wis.2d 335, 814 N.W.2d 159.

The Wisconsin Supreme Court discussed the "unit rule" in City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority, 2009 WI 84, 319 Wis.2d 553, 768 N.W.2d 749. The issue in the case was expressed as follows: "If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just compensation under Article I, Section 13 of the Wisconsin Constitution been violated? In other words, the court is asked to determine whether the application of the unit rule in the present case violates the just compensation clause when the fair market value of the property is zero, rendering the VFW entitled to $0 for the loss of its property interest as a lessee."

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The court concluded that using the unit rule in the case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. The court said that the VFW receives just compensation when it receives no compensation for its leasehold interest in a property that has no value.

The VFW court explained the unit rule as follows:

> . . . under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property.[21] When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest.[22] Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for the property taken and the payment is then apportioned among the various owners.[23]
>
> That property is valued as an integrated and comprehensive unit does not mean that the individual components of value may not be examined or considered in arriving at an overall fair market value.[24] "The unit rule requires only that the various components be valued as contributing parts of an organic whole."[25]
>
> In Wisconsin jurisprudence, "acceptance [of the unit rule] is beyond question."[26] Indeed the unit rule is accepted in the majority of American jurisdictions.[27] The unit rule is a carefully guarded rule and only in rare and exceptional situations are departures permitted.[28]

Environmental Contamination and Remediation Costs. In 260 North 12th Street, LLC v. State of Wisconsin Dept. of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381, the Wisconsin Supreme Court held that a property's environmental contamination and the costs to remediate it are relevant to the property's fair market value if they would influence a prudent purchaser who is willing and able, but not obliged, to buy the property. 2011 WI 103, ¶7, 47, and 48. In this case, the trial judge instructed the jury according to JI-Civil 8100. See 260 North 12th Street, supra, ¶65-67.

Damages for the Taking of an Easement or a Loss of Direct Access. See 118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486.

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8101 EMINENT DOMAIN: FAIR MARKET VALUE (PARTIAL TAKING)

Question 1 of the Special Verdict asks "What was the fair market value of the entire property on (date of evaluation)?"

In answering this question, consider only the price for which the entire property would have sold on (date of evaluation) by an owner then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the entire property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the entire property.

You should consider the use to which the entire property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the entire property is the use to which the entire property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation).

If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon

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speculation, theory or conjecture. You should consider every element that establishes the fair market value of the entire property.

Question 2 of the Special Verdict asks "What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)?"

In answering this question, consider only the price for which the remaining property, with the public project completed, would have sold on (date of evaluation) by an owner then willing, but not forced to sell, to a buyer who was then willing and able, but not forced to buy. However, fair market value is not what the remaining property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the remaining property.

You should consider the use to which the remaining property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use thus shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the remaining property is such use to which the remaining property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon speculation, theory or

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conjecture. You should consider every element that establishes the fair market value of the remaining property.

SPECIAL VERDICT

Question 1: What was the fair market value of the entire property on (date of evaluation)? $_____

Question 2: What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)? $_____

COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009 and 2011.

Wis. Stat. § 32.09(6).

The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005).

Date of Evaluation. Under s.32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

Value. The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of evaluation is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986); see also 260 North 12th Street, LLC v. State of Wisconsin Dep't of Transportation, 2011 WI 103, ___ Wis.2d ___, ___ N.W.2d ___ in which the court held that evidence of contamination and related remediation costs is admissible in eminent domain cases for valuing the property.

To determine appropriate compensation for the partial taking of property, the jury must determine the fair market value of the entire property on the date of evaluation and the fair market value of the remaining property on the date of evaluation, assuming completion of the public project. Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W. 2d 809 (Ct. App. 1996).

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Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648.

For additional discussion of the unit rule, see Comment, Wis JI-Civil 8100.

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8102 EMINENT DOMAIN: SEVERANCE DAMAGES*

The term "severance damages" has been used during the trial. Severance damages reduce the fair market value of the remaining property because of the partial taking.

If you conclude that severance damages exist, you should subtract the amount of the severance damages from the fair market value of the remaining property in answering Question 2 of the Special Verdict.

COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2008.

*This instruction should be given in partial taking cases when evidence has been received that the part of the Property not taken has been damaged by the partial taking, but no cost-to-cure evidence has been received.

Wis. Stat. § 32.09(6)(e), Wis. Stats.

The definition of "severance damages" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005). See also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648.

Justmann v. Portage County, 278 Wis. 2d 487, 692 N.W.2d 273 (Ct. App. 2004); Alsum v. WISDOT, 276 Wis. 2d 654, 689 N.W.2d 68 (Ct. App. 2004)

Sec. 14A.04(1) and (2), Nichols on Eminent Domain (3rd Ed).

See also Braun v. Wisconsin Elec. Power Co., 6 Wis.2d 262, 267, 94 N.W.2d 593 (1959), Renk v. State of Wis., 52 Wis.2d 539, 191 N.W.2d 4 (1971); and Narloch v. State of Wis. Dept of Transp., 115 Wis.2d 419, 340 N.W.2d 542 (1983).

The term "just compensation" includes not only the value of the portion taken but also the diminution of the value of the parcel(s) from which it is severed. Parks v. Wisconsin Central R. Co., 33 Wis. 413, 420 (1873), citing Bigelow v. West Wis. Ry. Co., 27 Wis. 478 (1871).

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8103 EMINENT DOMAIN: SEVERANCE DAMAGES: COST-TO-CURE*

The term "severance damages" has been used during the trial. Severance damages reduce the fair market value of the remaining property because of the partial taking.

If you conclude that severance damages exist, you should subtract the amount of the severance damages from the fair market value of the remaining property in answering Question 2 of the Special Verdict.

Evidence has been received about the cost of measures(s) which [could be/could have been] taken to partially or completely cure the condition(s) which caused the severance damages. You should consider this cost-to-cure evidence only if you are convinced that:

1. The cost-to-cure is less than the severance damages, and
2. The curative measures are reasonable to partially or completely restore the remaining property to its condition or status immediately before the partial taking.

If you are convinced that the curative measure(s) would only partially cure the condition(s) sought to be cured, you should consider any severance damages which would remain after the curative measure(s) [has/have] been implemented.

COMMENT

This instruction and comment were approved in 2006.

*This instruction should be given in partial taking cases when evidence has been received that the part of the Property not taken has been damaged by the partial taking, and cost-to-cure evidence has been received. Ken-Crete Products Company v. State Highway Commission, 24 Wis. 2d 355, 129 N.W.2d 130(1964).

Wis. Stat. § 32.09(6)(e).

The definition of "severance damages" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005).

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Justmann v. Portage County, 278 Wis. 2d 487, 692 N.W.2d 273 (Ct. App. 2004); Alsum v. WISDOT, 276 Wis. 2d 654, 689 N.W.2d 68 (Ct. App. 2004).

Sec. 14A.04(1) and (2), Nichols on Eminent Domain (3rd Ed).

See also Braun v. Wisconsin Elec. Power Co., 6 Wis.2d 262, 267, 94 N.W.2d 593 (1959), Renk v. State of Wis., 52 Wis.2d 539, 191 N.W.2d 4 (1971); and Narloch v. State of Wis. Dept of Transp., 115 Wis.2d 419, 340 N.W.2d 542 (1983).

Just compensation requires compensation not only for the value of the portion taken but also for the diminution of the value of the parcel(s) from which it is severed. Parks v. Wisconsin Central R. Co., 33 Wis. 413, 420 (1873), citing Bigelow v. West Wis. Ry. Co., 27 Wis. 478 (1871).

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8104 EMINENT DOMAIN: UNITY OF USE – TWO OR MORE PARCELS

In considering the fair market value of both the entire property and the remaining property, you must first determine whether the parcels of real estate owned by (plaintiff) were used as a single unit, or whether they were used as separate units. The fact that the parcels were touching does not, by itself, make them a single unit, nor does the fact that the parcels were not touching, by itself, make them separate units. You may consider that they were touching or separated, in connection with all the credible evidence received in this case, in determining whether the parcels were used as a single unit or as separate units.

If you determine that two or more parcels of real estate owned by (plaintiff) were used as a single unit, consider the taking as a partial taking from all of those parcels as the entire property.

However, if you determine that the parcels of real estate owned by (plaintiff) were used as separate units, you will then make your determination of fair market value only with respect to the parcel(s) from which the taking occurred.

In determining the value of the entire property, you may consider it as a single amount or as the sum of the value of the individual parcels making up the entire property.

COMMENT

This instruction and comment were approved in 2006.

The instruction is based, in part, on Spiegelberg v. State of Wisconsin, 2004 AP 3384, 2006 WI 75 (2006).

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Separation of parcels by public streets, green spaces, or buffer zones, does not necessarily destroy unity of use. City of Milwaukee v. Roadster LLC, 265 Wis.2d 518, 666 N.W.2d 524 (Ct. App. 2003). Welch v. Milwaukee St. P.R.R., 27 Wis. 108 (1870).

Diversity of ownership ordinarily prevents unity of use as a matter of law; however, title in fee to one parcel and a valid leasehold or contractual interest in another is sufficient ownership to permit proof of unity of use in fact. Jonas v. State, 19 Wis. 2d 638, 121 N.W.2d 235 (1963).

Contiguity of parcels does not necessarily make them a unit. Lippert v. Chicago & N.W. Ry. Co., 170 Wis. 429, 175 N.W. 781 (1920).

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8105 EMINENT DOMAIN: LANDS CONTAINING MARKETABLE MATERIALS*

You have heard testimony about the presence of (name of material) (in/on) the property, (including the portion taken by (defendant)). Whether the presence of (name of material) affects the fair market value of the property on (date of evaluation) is for you to determine.

You should consider the presence of (name of material) only as explaining and supporting the opinions given of the fair market value of the entire property immediately before (and the remaining property after) (date of evaluation). You should not consider the value of (name of material) separately from the fair market value of the property, nor should you consider or value it as potential merchandise. You must value the entire property immediately before (and the remaining property after)(date of evaluation) with the (name of material) (in/or) on the property given such consideration as you determine affects the fair market value.

COMMENT

This instruction and comment were approved in 2006. The instruction was revised in 2008.

*This instruction may be used in either total or partial taking cases. In partial taking cases, add the bracketed language.

Volbrecht v. State Highway Comm'n, 31 Wis.2d 640, 143 N.W.2d 429 (1966). It is the duty of the landowner to show that there is a market for the materials on or in the property (other than a market created by the particular taking) before the quantity and value of such deposits may be shown to the jury to be used as a factor in an expert's opinion of value.

See also, Rademann v. State of Wisconsin Dept. of Transp., 252 Wis.2d 191, 642 N.W.2d 600 (Ct. App. 2002)(regarding valuation of quarry property).

See also, Ch. 14F "Appropriation and Valuation of Mineral Deposits, Nichols on Eminent Domain, 3rd Ed.

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8107 EMINENT DOMAIN: SEVERANCE DAMAGES; UNITY OF USE

This instruction was revised and renumbered JI-Civil 8104 as part of a complete revision of the eminent domain series published in the 2007 supplement.

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8110 EMINENT DOMAIN: CHANGE IN GRADE*

You have heard testimony about a change in grade on the property.

A change in grade may affect the fair market value of the remaining property. If the completed public project changes the grade of the remaining property, you are to consider the change in grade when you determine the fair market value of the remaining property immediately after (date of evaluation) as if the public project was completed by (date of evaluation).

COMMENT

This instruction and comment were approved in 2006. The instruction was revised in 2008.

*This instruction is to be used only in partial taking cases. Read in conjunction with Wis. JI-Civil 8102. See also Wis. Stat. § 32.09 (6)(f).

There can also be a change in grade under Wis. Stat. § 32.18 where no property has been taken. A modification of this instruction should be used in such cases.

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8111 EMINENT DOMAIN: ACCESS RIGHTS

The term "right of access" has been used during the trial. Right of access means a right of the owner to enter or leave his or her property by using an abutting street or highway, without obstruction.

COMMENT

This instruction and comment were approved in 2006. The comment was updated in 2015 and 2020. The 2020 revision updated case law citations.

Wis. Stat. § 32.09(6)(b) and Wis. Stat. § 66.1035.

The following statutes and cases address one or more of the issues where access to a property is removed, modified, restricted or substituted and provide a basis from which a specific instruction may be drafted.

Wis. Stat. § 84.25; Wis. Stat. § 84.295; Wis. Stat. § 84.29; Wis. Stat. § 83.027; see National Auto Truckstop, Inc. v. WISDOT, 263 Wis. 2d 649, 665 N.W.2d 198 (2003); Narloch v. Department of Transportation, 115 Wis. 2d 419, 430, 340 N.W.2d 542 (1983); Seefeldt v. WISDOT, 113 Wis. 2d 212, 336 N.W.2d 182 (1983); Surety Savings & Loan Association v. WISDOT, 54 Wis. 2d 438, 195 N.W.2d 464 (1972); Schneider v. State of Wisconsin, 51 Wis. 2d 458, 187 N.W.2d 172 (1971); Hastings Realty Corp. v. Texas Co., 29 Wis. 2d 305, 313, 137 N.W.2d 79 (1965); Stephan Auto Body v. State Highway Comm., 21 Wis. 2d 363, 124 N.W.2d 319 (1963).

Loss of Direct Access; Temporary Limited Easement. For a decision involving the loss of direct access and for a temporary limited easement, see 118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486.

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8112 EMINENT DOMAIN: AIR RIGHTS

The term "air rights" has been used during the trial. Air rights means a right of the owner to the air space above the property. This right is not absolute. The right extends only to that part of the air space necessary for a full and complete use and enjoyment of the property.

COMMENT

This instruction and comment were approved in 2006.

Wis. Stat. § 114.03.

Maitland v. Twin City Aviation Corp., 254 Wis. 541, 545, 37 N.W.2d 74 (1949).

See also sec. 5 Nichols on Eminent Domain 3rd Ed.

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8115 EMINENT DOMAIN: SPECIAL BENEFITS*

The term "special benefits" has been used during the trial. Special benefits increase the fair market value of the remaining property after (date of evaluation) because of the (defendant)'s public project.

Special benefits are different from "general benefits." General benefits are those benefits that are enjoyed by the community as a result of (defendant)'s public project. Special benefits arise because of the unique relationship between the remaining property and the completed public project.

Before you may find that special benefits have accrued to the remaining property, you must first find that the benefit is peculiar to the remaining property and provides it with an uncommon advantage. You need not find that the remaining property's use has changed.

The burden of proof is on (defendant) to establish that the remaining property received a direct and immediate special benefit because of the public project. (Defendant) must show that the claimed special benefits are direct, immediate and certain, rather then remote and speculative, as to both time and place.

If you find that special benefits have accrued to the remaining property, you should consider the special benefits in answering Question 2 of the Special Verdict.

COMMENT

This instruction and comment were approved in 2006. The instruction was revised in 2008.

*This instruction is to be given only in partial taking cases.

Wis. Stat. § 32.09(3).

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Red Top Farms v. State Dept. of Transp., Div. of Highways, 177 Wis. 2d 822, 503 N.W.2d 354 (Ct. App. 1993).

The burden is on the condemnor to establish "special benefits." Heitpas v. State, 24 Wis. 2d 650, 130 N.W. 2d 248 (1964); Petkus v. State of Wis., 24 Wis. 2d 643, 130 N.W.2d 253 (1964).

See also Real Estate Valuation in Litigation, 2nd Ed. Ch. 15, pp. 323-350.

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8120 EMINENT DOMAIN: COMPARABLE SALES APPROACH*

You have heard testimony about other sales [and contracts] to assist you in determining the fair market value of the property on (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation), as if the public project had been completed by (date of evaluation)].

In determining fair market value, you may consider the price and other terms and circumstances of any good faith sale of [or contract for the sale of] comparable property. A sale [or contract] is comparable if it was made within a reasonable time before or after (date of evaluation) and if that property is sufficiently similar with respect to location, situation, usability, improvements and other characteristics to warrant a reasonable belief that it is comparable to the property [or remaining property] being valued.

You are to consider all the elements of similarity and dissimilarity in deciding whether the other sales [or contracts] assist you in determining the fair market value of the property on (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation) as if the public project had been completed by (date of evaluation)].

COMMENT

This instruction and comment were approved in 2006 and revised in 2008.

*The bracketed language is to be used in partial taking cases.

Wis. Stat. § 32.09 (1m).

See Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W.2d 809 (Ct. App. 1996)(citing Kamrowski v. State of Wis., 37 Wis.3d 195, 201-02, 155 N.W.2d 125, 129 (1967)); Rademann v. State Dept. of Transportation., 252 Wis. 2d 191, 642 N.W.2d 600 (Ct. App. 2002); Alsum v. Wisconsin Dept. of Transportation, 276 Wis. 2d 654, 689 N.W.2d 68 (Ct. App. 2004); Justmann v. Portage County, 278 Wis. 2d 487, 692 N.W.2d 273 (Ct. App. 2004) and Rosen v. Milwaukee, 72 Wis. 2d 653, 242 N.W.2d 681, (1976).

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Income Approach to Valuation. The trial judge must decide if evidence on the income approach is admissible. See Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; Alsum v. Wisconsin Dept. of Transportation, 276 Wis.2d 654, 689 N.W.2d 68 (Ct. App. 2004); National Auto Truckstops, Inc. v. State, Dept. of Transportation, 263 Wis. 2d 649, 665 N.W. 2d 198 (2003); Wisconsin Dept. of Transportation, supra; Rademann v. State Dept. of Transportation, 252 Wis. 2d 191, 642 N.W.2d 600 (Ct. App. 2002).

See also the comment to Wis JI-Civil 8130.

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8125 EMINENT DOMAIN: INCONVENIENCE TO LANDOWNER

This instruction was withdrawn in the 2007 supplement when a revision of the entire eminent domain series was published.

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8130 EMINENT DOMAIN: INCOME APPROACH

Evidence has been received during this trial as to the fair market value of (the subject property) based on the income approach. Under the income approach, the amount of future net income the owner of (the subject property) could reasonably expect to receive is first determined. The net income is then capitalized at (divided by) an appropriate rate of return to arrive at the value of the property. The appropriate rate of return is the rate that a prudent investor would expect to receive on his or her investment. In considering this evidence, you should consider only the income which was produced by the property, not income produced as a result of the owner's particular labor or skill.

COMMENT

This instruction and comment were approved in 2008. In 2007, an instruction entitled "Capitalization of Rental Income" and numbered Wis JI-Civil 8130 was withdrawn.

This instruction would be used only in cases where the Court determines that income evidence is admissible. The second, third, and fourth sentences of this instruction are taken from 5 Nichols on Eminent Domain Sec. 19.01 at 19-3. The fifth sentence is taken from Alsum v. Wisconsin Dept. of Transportation, 2004 WI App. 196, 276 Wis.2d 654, 689 N.W.2d 68. Under Wisconsin law, income evidence is generally not admissible to prove the value of property taken by eminent domain where comparable sales data is available. National Auto Truckstops, Inc. v. Wisconsin Dept. of Transportation, 263 Wis.2d 649, 665 N.W.2d 198 (2003). However, there are three exceptions to the general rule of inadmissibility of income evidence: (1) when the character of the property is such that profits are produced without the labor and skill of the owner, (2) when the income reflects the property's chief source of value, and (3) when the property is so unique that comparable sales are not available. Vivid, Inc. v. Fiedler, 219 Wis.2d 764, 580 N.W.2d 644 (1998); Alsum v. Wisconsin Dept. of Transportation, supra.

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8135 EMINENT DOMAIN: COST APPROACH

You have heard testimony that under the cost approach to the valuation of property, the value of the land is added to what it would cost to replace the building and improvements on the property, as reduced by depreciation. Evidence has been received to assist you in determining the fair market value of the property immediately before (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation) as if the public project had been competed by (date of evaluation)].

Cost of replacement means the cost to rebuild the building and improvements on the property on (date of evaluation) so that the new facility has the same utility as the property being valued. The cost of replacement new is not reproduction cost, which is the cost to build a replica.

Depreciation includes three elements: physical depreciation, economic obsolescence and functional obsolescence.

1. Physical depreciation represents that loss in value, if any, caused by the wear and tear which the building and improvements have experienced since their construction.

2. Economic obsolescence means that loss in value, if any, caused by factors outside the property itself, such as changes in the neighborhood.

3. Functional obsolescence means that loss in value, if any, caused by aspects of the building and improvements themselves, such as their design or style, which may reduce the desirability of the building and improvements in the marketplace or which may reduce the capability of the building and improvements to be fully and efficiently used for their proper function.

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You may determine the value of the property as of (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation) as if the public project had been completed by (date of evaluation)] by subtracting the amount of depreciation you have concluded exists from the cost of replacement of the building and improvements on the property and adding the land value you have determined.

COMMENT

This instruction and comment were approved in 2006 and revised in 2008.

Definitions of "replacement cost" and "reproduction cost" are found in Milwaukee Rescue Mission, Inc. v. Redevelopment Authority of the City of Milwaukee, 161 Wis. 2d 472, 482, 468 N. W. 2d 663 (1991).

See secs. 20.02, 20.04, Nichols on Eminent Domain (3rd Ed.) and Appraisal of Real Estate (12th Ed.), pp. 357-58, 403-414.

Date of Evaluation. For a discussion of the date of evaluation, see the comment to Wis JI-Civil 8100.

Income Approach to Valuation. The trial judge must decide if evidence on the income approach is admissible. See Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; Alsum v. Wisconsin Dept. of Transportation, 276 Wis.2d 654, 689 N.W.2d 68 (Ct. App. 2004); National Auto Truckstops, Inc. v. State of Dept. of Transportation, 263 Wis. 2d 649, 665 N.W. 2d 198 (2003); Rademann v. State Department Transportation, 252 Wis. 2d 191, 642 N.W.2d 600 (Ct. App. 2002).

See also the comment to Wis JI-Civil 8130.

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8140 EMINENT DOMAIN: LEGAL NONCONFORMING USE, LOT OR STRUCTURE (DEFINITIONS)

You have heard testimony during the trial using the term

[legal nonconforming use]

[legal nonconforming lot]

[legal nonconforming structure]

to describe a characteristic of

[the property]

[the remaining property]

The entire property and the remaining property]

A legal nonconforming [use] [lot] [structure] is a [use] [lot] [structure] which was legally permitted on (date of taking) because it was legal when it was created, but which would not be permitted under the zoning regulations in effect on (date of taking) if it were to be first proposed on (date of taking).

COMMENT

This instruction and comment were approved in 2006.

Wis. Stat. § 32.09(6)(d).

Loeb v. Board of Regents, 29 Wis. 2d 159, 138 N.W.2d 227 (1965).

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8145 EMINENT DOMAIN: ASSEMBLAGE

You have heard testimony that the highest and best use of the property is for it to be assembled with other property for an integrated use. Before you may value the property for such a highest and best use, you must first determine that the use is reasonably probable and not speculative or remote.

COMMENT

This instruction and comment were approved in 2006.

Assemblage may apply even though the owner whose property is being condemned is not the owner of the parcel to be assembled. Clarmar Realty Co., Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 383 N.W.2d 890 (1986).

Assemblage and plottage are related terms. "Sometimes highest and best use results from assembling two or more parcels of land under one ownership. If the combined parcels have a greater unit value than they did separately, plottage value is created. Plottage is an increment of value that results when two or more sites are combined to produce a larger site with greater utility." The Appraisal of Real Estate, 12th Edition, p. 197.

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