OFFICE OF JUDICIAL EDUCATION
2024

January 2024

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 56 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through October 2023.

The following material is included in Release No. 56:

New Instructions	Revised Instructions
8113	1511 2507 2550 2551 2780 3260.1

Content. The 1/2024 supplement updates the publication on legislative actions and judicial decisions through October 2023.

Information. For information on the status of the Committee's work, please contact Bryce Pierson at bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION
2024

Wis JI-Civil

(Release No. 56 – January 2024)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled

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7/2023 Supplement with (Release No. 55) in the right corner ..... (Release No. 56) in the right corner

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Summary of Contents (7/2023) ..... Summary of Contents (1/2024)

Introduction (7/2023) ..... Introduction (1/2024)

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initials date

FOR QUESTIONS:

If you have any questions about these filing instructions or the civil jury instructions, please contact the Committee's reporter, Bryce Pierson at Bryce.pierson@wicourts.gov.

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OFFICE OF JUDICIAL EDUCATION

2024

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

- 1/2024 Supplement (Release No. 56)

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WISCONSIN CIVIL JURY INSTRUCTIONS COMMITTEE (1959-2023)

CURRENT MEMBERS

Hon. William Sosnay, Milwaukee County (Chair)
Hon. Michael Fitzpatrick, Court of Appeals District IV
Hon. William Pocan, Milwaukee County
Hon. Michael Waterman, St. Croix County
Hon. Sarah Harless, Eau Claire County
Hon. Michael Aprahamian, Waukesha County
Hon. Emily Lonergan, Outagamie County

FORMER MEMBERS

Hon. Helmuth F. Arps (1959-1962)
Hon. M. Eugene Baker (1959-1975)
Hon. Michael J. Barron (1983-1996)
Hon. Dennis J. Barry (1994-1997)
Chief Justice Bruce F. Beilfuss (1959-1964)
Hon. Herbert A. Bunde (1962-1963)
Hon George A. Burns, Jr. (1976-1994)
Hon. Lewis J. Charles (1962-1976)
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Hon. Marc Hammer, (2017-2022)
Hon Gerald W. Jaeckle (1989-1994)
Hon. P. Charles Jones (1994-2004)
Hon. Barbara Key, (2016-2022)
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Hon. Paul Reilly (2013-2018)
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Hon. Joseph M. Troy (1994-2003)
Hon. Albert J. Twesme (1962-1980)
Hon. Clair H. Voss (1974-1978)
Hon. Francis T. Wasielewski (1996-2006)
Hon. Patrick Willis (2006-2016)

Reporter: Bryce Pierson, Office of Judicial Education – Wisconsin Court System

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FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Civil is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-three years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

The instructions provided in Wisconsin Jury Instructions – Civil respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in civil cases. All published jury instructions share the same objective to provide a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

This set of instructions has been enriched by valuable suggestions from the judges and lawyers who have used the instructions in preparing trials, as well as presenting cases to juries. The Committee hopes this set will continue to receive the same valuable scrutiny from those who use it. We are proud of this publication and hope those who use it find it valuable.

(September 2021)

Bryce Pierson
Legal Advisor & Committee Reporter
Office of Judicial Education

COMMITTEE HISTORY

Foundation of the Wisconsin Civil Jury Instructions

As it is known today, the Wisconsin civil jury instructions model draws its origins to a 1958 panel discussion on uniform jury instructions sponsored by the Judicial Administration Section of the American Bar Association at its annual convention in Los Angeles. After attending this conference, Hon. Andrew. W. Parnell, Circuit Judge of the Tenth Circuit of Wisconsin and the future Chairman of the Civil Jury Instructions Committee, delivered a paper to the Wisconsin Board of Circuit Judges in which he advocated the necessity for uniform instructions in Wisconsin. In his paper, Judge Parnell urged the Board to initiate the development of uniform civil jury instructions, reminding the Board that:

> The task seems monumental, but it surely is not insurmountable. It is and should be, a function of this Board to set up the original machinery looking to the production, in due course, of uniform jury instructions in civil cases in our state. The arguments for it are patent and predominate. The ideal of progress and improvement in the judicial administration of our state should ever possess us and make us leaders in that field.

In response, the Board of Circuit Judges, in cooperation with the University of Wisconsin Extension Law Department[1], and the University of Wisconsin Law School[2], organized and conducted two seminars oriented around jury instructions in June of 1959. At these seminars, attendees discussed and appraised the necessity and the merits of uniform jury instructions in Wisconsin. As Judge Parnell would eventually note in his introduction to the original 1960 edition of the Wisconsin Jury Instructions-Civil, it was the "interest, desire, and enthusiasm" of the participating members of these two seminars that "ignited the inspirational spark that launched the program."

Although neither of these seminars produced immediate or recognizable model jury instructions, they made apparent the need for a reference resource that could assist the bench and bar of the State of Wisconsin in the preparation of jury instructions. Therefore, it was determined that a comprehensive strategy would have to be formulated to organize, review, develop, approve, produce, and distribute a book of uniform civil jury instructions.

Following the June seminars, the chairperson and the executive committee of each seminar held several meetings to tentatively resolve preliminary details of sponsoring, publishing, authoring, and editing. The resulting conclusions were then presented to the Board of Circuit Judges at its fall meeting in 1959. As a result, the Board established by resolution the Circuit Judges Civil Jury Instructions Committee. The Board also approved the preliminary agreements that provided the Committee would constitute the authoring personnel. Additionally, Professor John E. Conway of the University of Wisconsin Law

School would serve as editor, and the Extension Law Department would sponsor and produce the uniform civil jury instructions publication.

The first meeting of the appointed Circuit Judges Civil Jury Instructions Committee was held in Madison in October of 1959. At this inaugural gathering, the Committee determined the time, frequency, and places of its meetings, the procedures to prepare the meeting agendas, the assignments for authorship, editing details, and the means of publication. The Committee also determined how it would gather submissions for review and the procedure it would follow for approving proposed instructions.

The Committee began its review process by assembling more than two hundred proposed instructions which were submitted by Wisconsin trial judges and members of the State Bar. Assignments of specific proposals for instruction were then provided to individual members of the Committee who were responsible for preparing a draft of each proposed instruction. An accompanying brief, comments, and supporting legal research were also sought. During the meeting, the author presented their prepared material and answered questions from the other participating members. If the Committee determined that amendments or corrections were necessary, the draft would be tabled until revision were made. If the proposed material was tentatively approved, the instruction was submitted to the editor for editing and arrangement and then returned for eventual approval by the whole Committee. The current Civil Jury Instructions Committee still utilizes this review and approval procedure.

Development of the Original Model Instructions

The Circuit Judges Civil Jury Instructions Committee met nine times between 1959 and 1960 and averaged approximately 17 instructions at each meeting. As a result of these efforts, the first edition of Wisconsin Jury Instructions-Civil was published by the University of Wisconsin-Extension Law Department in December 1960 and included 150 approved model instructions[3]. Following the publication of this edition, the Committee continued to meet consistently to maintain a regular record of updating material and producing supplements to the 1960 edition. In 1978, the Committee released a supplement that included a revised preface by Editor John E. Conway. This preface provided advice and expectations for how users should use the instructions. These objectives and explanations remain accurate today.

In 1981, a new edition of the Wisconsin Jury Instructions-Civil was published, which amended the product's format and added 70 new instructions. Supplementation of the 1981 edition has continued on frequent basis, with each new supplement designated "Release No._____." As of April 2021, 52 supplements have been published since the 1981 revised edition.

Court Reorganization and Publication Incorporation into the Wisconsin Court System

In 1978, the Wisconsin court system was reorganized, and the old statutory boards, including the Board of Circuit Court Judges, were abolished. Furthermore, the Circuit Judges Civil Jury Instructions Committee's name was changed to the Civil Jury Instructions Committee.

In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as its Office of Continuing Education and Outreach. That office was renamed Continuing Education and External Affairs in 2016. In 2021, the University of Wisconsin transitioned its publication responsibilities to the Wisconsin Court System's Office of Judicial Education. That same year, in partnership with the Wisconsin State Law Library, the Office of Judicial Education converted the production of supplemental releases from physical copies to an all-digital format. The entire set of Wisconsin Jury Instructions-Civil is now available at no cost to the user in Word and PDF format at https://wilawlibrary.gov/jury.

Characteristics of the Wis JI-Civil Model

Several characteristics of the civil jury instructions model add significantly to the product's strength and value. First and foremost is the model's orientation toward the trial judge. As the giving of instructions is exclusively a judicial function, a primary focus of the Committee is to assist colleagues on the trial bench who may handle a wide variety of cases. A common point of reference for the Committee when discussing a new or amended instruction is the hypothetical judge faced with a civil trial issue after rotating from a criminal or family law caseload.

Another critical aspect of the model's orientation toward the trial judge is the make-up of the Committee itself. The seven voting members of the Committee are ~~trial court~~ judges, and only they can approve proposed instructions or amendments. Additionally, the Committee's ability to approve and publish model instructions is done without any additional endorsement by the Judicial Conference or the Supreme Court. A direct result of this arrangement is that trial judges are allowed to use model instructions as guides instead of directives. When necessary, a trial judge may depart from the exact language of the instruction if it does not fit the facts of the case or when they believe an improvement to the model can be made. This model is opposed to a model, like that implemented in Missouri, in which instructions are approved by order of the state supreme court order and must be given without change.

Finally, another unique aspect of the civil jury instructions model is its association with the notion of "law in action." This concept examines the role of law, not just as it exists statutorily or in case law, but as it is actually applied in the courtroom. The

incorporation of this concept into the jury instructions model can be drawn back to the original partnership with the University of Wisconsin Law School and its pursuit of the Wisconsin Idea.[4] Utilizing the assistance of experts like Professor John E. Conway, early versions of the Wisconsin jury instructions committees provided an all-inclusive perspective of the law. Over the years, the committees have sought to continue this practice by recruiting member judges from across the state and support from non-voting emeritus members and law school faculty. Although the University of Wisconsin Law School is no longer part of the jury instructions model, the committees and the Wisconsin Court System still strive to achieve the objectives embodied in the "law in action" concept.

How to Use the Model Jury Instructions[5]

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. Therefore, it must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, checklists, or minimum standards. A distinction must be drawn between general instructions, which may frequently be used without change, and the substantive law instructions, which may often have to be modified to fit the needs of the particular case.[6] The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered.[7]

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each category. Three-digit numbers are used for the general instructions and four-digit numbers for those dealing with substantive law. In the substantive law areas, they are arranged numerically. The gaps between the numbers have been left purposely to permit the insertion of later material. Where there is no remaining space between two whole numbers (see, numbers 1026 and 1027) and it is necessary to insert another instruction, a decimal number is used (1026.5). Instructions that are alternatives bear the same whole number, with one having an "A" suffixed (see 1325 and 1325A).

It is suggested that the comment and the footnotes appearing below the instruction be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Editorial directions will appear in the body of the instructions in brackets and centered upon the page. These directions tell the user to, for example, select a proper paragraph, insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals. Words and phrases which are to be used alternatively appear in parenthesis and italics. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraphs. Words and phrases which are not appropriate for every case, but which should be given in some situations, are also in brackets.

The book itself may be cited as "Wis JI-Civil" and each instruction by adding the appropriate number. For example, "Wis JI-Civil 405." It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he or she point out the nature of the change and the reason therefore.

INQUIRIES AND SUGGESTIONS

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and suggestions from those the Committee is trying to serve. Individuals are encouraged to contact the reporter by phone, mail, or e-mail or to consult with any Committee member. Copies of approved but not published material are available from the reporter, as are working drafts.

A list of all current members is provided, beginning on the following page. A list of all the former judges who served on the Committee follows.

Civil Jury Instructions Committee

Bryce Pierson
Legal Advisor & Reporter – Jury Instructions
Office of Judicial Education
110 E. Main St., Ste. 200
Madison, WI 53703-3328
Phone: (608) 535-3233
Email: Bryce.pierson@wicourts.gov

The Civil Jury Instructions Committee
Current Members and Emeritus Members as of 2023

Judges

Hon. William Sosnay, Chair	Milwaukee Co.
Hon. Michael Fitzpatrick	Court of Appeals District IV
Hon. William Pocan	Milwaukee Co.
Hon. Michael Waterman	St. Croix Co.
Hon. Sarah Harless	Eau Claire Co.
Hon. Michael Aprahamian	Waukesha Co.
Hon. Emily Lonergan	Outagamie Co.

Emeritus Members

Hon. Francis Wasielewski
Hon. Daniel Dillon
Hon. Lisa Stark
Hon. Emily Mueller
Hon. Dennis Moroney
Hon. Michael Schumacher
Hon. Paul Reilly
Hon. Barbara Key

Reporter

Bryce Pierson	Wis. Office of Judicial Education

The Civil Jury Instructions Committee
Members

Judges

Hon. Helmuth F. Arps	(1959-1962)
Hon. M. Eugene Baker	(1959-1975)
Hon. Michael J. Barron	(1983-1996)
Hon. Dennis J. Barry	(1994-1997)
Chief Justice Bruce F. Beilfuss	(1959-1964)
Hon. Herbert A. Bunde	(1962-1963)
Hon George A. Burns, Jr.	(1976-1994)
Hon. Lewis J. Charles	(1962-1976)
Hon. William E. Crane	(1978-1994)
Hon. Richard J. Dietz	(1997-2006)
Hon. Daniel Dillon	(2005-2018)
Hon. Edward M. DuQuaine	(1959-1961)
Hon. Mark J. Farnum	(1979-1989)
Hon. Merrill R. Farr	(1962-1975)
Hon. James P. Fiedler	(1981-1991)
Hon. Richard G. Greenwood	(1983-1994)
Hon. Marc Hammer	(2017-2022)
Hon Gerald W. Jaeckle	(1989-1994)
Hon. P. Charles Jones	(1994-2004)
Hon. Barbara Key	(2016-2022)
Hon. Philip Kirk	(2006-2009)
Hon. Norris Maloney	(1964-1978)
Hon. Robert Mawdsley	(1997-2007)
Hon. Dennis Moroney	(2010-2020)
Hon. Emily Mueller	(2004-2014)
Hon. Gordon Myse	(1978-1983)
Hon. Harvey L. Neelen	(1959-1977)
Hon. J. Michael Nolan	(1991-2001)
Hon. Daniel Noonan	(2003-2013)
Hon. William I. O'Neill	(1959-1974)
Hon. Richard W. Orton	(1959-1961, 1973-1979)
Hon. Robert J. Parins	(1970-1982)
Hon. Andrew W. Parnell	(1959-1982)
Hon. Robert F. Pfiffner	(1970-1987)
Hon. Paul Reilly	(2005-2018)
Hon. John Roethe	(2003-2007)

Hon. Michael Schumacher	(2011-2021)
Hon Richard H. Stafford	(1987-1997)
Hon. Lisa Stark	(2001-2011)
Hon. Michael P. Sullivan	(1994-2003)
Hon. Joseph M. Troy	(1994-2003)
Hon. Albert J. Twesme	(1962-1980)
Hon. Clair H. Voss	(1974-1978)
Hon. Francis T. Wasielewski	(1996-2006)
Hon. Patrick Willis	(2006-2016)

Comment

1. The University of Wisconsin Extension Law Department was represented by Professor William Bradford Smith.

2. The University of Wisconsin Law School was represented by Professor John E. Conway.

3. The original 1960 edition included an introduction drafted by Judge Andrew W. Parnell. In that introduction, Judge Parnell provided the following claims and disclaimers made by the Committee concerning its work:

1. This book is the first tangible realization of a long-abiding dream of the Board of Circuit Judges relating to uniform jury instructions.
2. It is but a part of a projected end result.
3. It will be a readily available service to the trial judge in time of pressure of meeting deadlines on preparation of instructions.
4. It may be conveniently employed by the trial judge while the battle still rages about him, in his presence and hearing, deprived, as he then is, of the leisure and tranquility of legal research.
5. It will bring confidence to the new trial judges and remove for them the need of desperately seeking and gathering a disorganized file of prolix, unedited, and miscellaneous instructions from the usual sources of supply.
6. It will be an aid to the trial attorneys in preparing specific and pertinent requests for instructions.
7. It will avoid for the court the almost hopeless task of timely and correctly appraising, evaluating, and avoiding partial, slanted, and incomplete, or inaccurate submitted instructions at the close of trial.
8. It will minimize the ever-present hazards of hasty, ill-considered, or erroneous instructions.
9. It will reduce the frequency of retrials for avoidable errors.
10. It will make a small but fair contribution to the betterment of judicial administration in our state trial courts.

We Forcefully Disclaim that:

1. It its free from error, completely accurate, or a model of perfection in form statement,

or expression.

2. It is presented as a standard of instructions pattern to be blindly and unquestionably followed.
3. It is the final answer to all instructional problems.
4. It will remove all need for the trial judge's industry and ingenuity in the preparation of instructions.
5. It has grown to the full stature of its possibilities.
6. It will lessen the duties if the trial attorneys with respect to the preparation and submission of timely written instructions.
7. It is above criticism.
8. It forestalls any constructive suggestions for it improvement.
9. It is as clear, concise, and correct as it can or ought to be.

4. The Wisconsin Idea is often described as being based on the principle that "the boundaries of the University are the boundaries of the State." It also has a second aspect which recognizes that University faculty and staff who participate in activities like the jury instructions projects use the experience to enrich their teaching, research, and service responsibilities.

5. Much of the language provided in the "How to Use" section comes from both the Preface to the 1962 edition of Wisconsin Jury Instructions-Criminal authored by Editor John H. Bowers, and the Revised Preface to the 1978 edition of the Wisconsin Jury Instructions-Civil authored by Editor John E. Conway. The advice and expectations for how the instructions should be used provided by Mr. Bowers and Mr. Conway remain accurate today.

6. As Justice Currie stated in Sharp v. Milwaukee & Suburban Transport Co., 18 Wis.2d 467, 118 N.W.2d 905, 912 (1963): "While the instructions embodied in Wis JI-Civil - Part 1 are a valuable tool to the trial courts, charges to the jury sometimes require more than a compendium of extracts from these uniform instructions without varying their wording to fit the facts of the particular case at hand."

7. For example, a particular instruction may be limited to one ground of negligence; but in a trial where the evidence warrants submission of several grounds which are related, it may be necessary to modify the instructions suggested here to accommodate not only the facts of the case but also the impact of the two grounds of negligence on each other.

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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 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) that were caused by the (accident) (incident).

COMMENT

This instruction and comment were approved in 2005. The comment was updated in 2006 and 2018. This revision was approved by the Committee in September 2023; it updated case law citations in the comment.

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.

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.

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, 278 Wis2d 82 and 692 N.W.2d 558.

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, a 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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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, at the time of (making) (publishing) the statements, (he) (she) knew that such statements were false or (made) (published) them in reckless disregard as to the truth or falsity of them. 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.[1]

(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 (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.]

[3. 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.]

[4. 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.]

[5. If the (defendant) made (published) statements believed by (him) (her) to be true

and then added statements known by (him) (her) to be false[2], the privilege would be abused.]

(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

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: $ _____

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

2. See note 1, supra.

COMMENT

This instruction was approved in 1986 and revised in 2002. The comment was updated in 2003, 2020, and 2022. This revision was approved by the Committee in September 2023; it added to the comment.

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 that 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.

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 publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.

3. The defamatory matter is published for some purpose other than for which the privilege is given.

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 matters as well as privileged matters.

Every person has a lawful right to act for the protection of their (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 that 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 a 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:

> 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.

Privilege: statements made during legal or investigatory proceedings. In Wisconsin, the nature and context of statements made within the legal/investigatory process may dictate the type of privilege granted. This can be categorized into four main areas:

1. Statements Made During Judicial Proceedings: These are absolutely privileged, provided they are directly relevant to the case.

2. Statements Made During Quasi-Judicial Proceedings: These are absolutely privileged as long as they relate to the matter at hand.

3. Statements Made During Investigatory Proceedings: Specifically, statements directed to grand juries or to district attorneys in their official roles concerning ongoing investigations are granted absolute privilege.

4. Statements Made to Law Enforcement Officers: Some statements made to law enforcement can be conditionally privileged.

See Bergman v. Hupy, 64 Wis.2d 747, 221 N.W.2d 898 (1974). See also Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906), and Keeley v. G.N.R. Co., 156 Wis. 181, 145 N.W. 664 (1914).

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2550 INVASION OF PRIVACY: PUBLICITY GIVEN TO A PRIVATE MATTER: WIS. STAT. § 995.50(2)(am)3.

Every person in Wisconsin enjoys a right of privacy. In this case, the plaintiff, (_____), claims that (his) (her) right of privacy was violated by the defendant, (_____), publicizing[1] a matter concerning (his) (her) private life, specifically (describe the alleged publication).

To establish a violation of (his) (her) right to privacy, the (plaintiff) must prove four separate elements:

1. (Defendant) intentionally[2] made a public disclosure of facts regarding (Plaintiff).

   This means that (defendant) communicated the facts either to the public at large or to a sufficient number of people, ensuring that the facts would become a matter of public knowledge.

   Intentionally means that (defendant) must have had the mental purpose to make the public disclosure.[3]

2. The facts disclosed were private facts.

   "Private facts" refer to information that (plaintiff) would not ordinarily share with anyone other than (his) (her) family or close friends. This does not include information that is already available to the public as a matter of public record.

3. The private matter made public would be highly offensive 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. This element is satisfied only if a reasonable person would be seriously aggrieved by the disclosure.

4. (Defendant) acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter or with actual knowledge that none existed.

If you conclude that the disclosure of the facts concerns a matter of legitimate public concern, then there is no invasion of privacy.

SPECIAL VERDICT

1. Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer: _____

Yes or No

NOTES

1. In Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 929, 440 N.W.2d 548, (1988), the Wisconsin Supreme Court interpreted the first element under § 995.50(2)(am)3 as requiring "publicity," meaning that "the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement 2d, Torts, sec. 652D, Comment a. at 384."

Therefore, "publicity" differs from "publication"—as the term "publication" is used "in connection with liability for defamation"—in that a "publication" "includes any communication by the defendant to a third person." RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a. "The distinction, in other words, is one between private and public communication," Id., with only the defendant's public communication being actionable under § 995.50(2)(am)3., Zinda, 149 Wis. 2d at 929. Moreover, a communication to the public at large necessarily means that the information **reaches the public**. See Id.; see also RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a., and Reetz v. Advocate Aurora Health, 2022 WI App 59, ¶20, 405 Wis.2d 298, 983 N.W.2d 669.

For a discussion of the "public disclosure" sufficient to support a claim under subsection (c), see 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" as opposed to "person" in the 2003 version of this jury instruction requires a disclosure to more than one person. The court concluded "that disclosure of private information to one person or to a small group does not, as a matter of law in all 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." Pachowitz v. LeDoux, supra, at ¶ 19-25.

2. Wis. Stat. § 995.50(2)(am)3 provides the following:

> 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.

Although § 995.50(2)(am)3 does not refer to "intent," the published opinion in Reetz v. Advocate Aurora Health, 2022 WI App 59, 405 Wis.2d 298, 983 N.W.2d 669 concluded that "intentional conduct is integral to the disclosure of private facts and that giving 'publicity' requires intentional conduct." Id. at ¶20.

NOTE: Each case and claim of invasion of privacy has its own unique facts. Therefore, based on these facts, the Committee recommends that the court decide if the element of intent should be considered.

3. It is unclear if the conclusion in Reetz, 2022 WI App 59, supra, concerning the intent requirement applies only to the first element or if it also applies to the fourth element as well. However, the Committee believes, based on the language of § 995.50(2)(am)3, the intent requirement pertains exclusively to the first element.

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, 2015, and 1/2023. This revision was approved by the Committee in October 2023. The revision amended the instruction by incorporating changes from the 2019 Wisconsin Act 72 and addressing the decision in the Reetz v. Advocate Aurora Health, 2022 WI App 59, 405 Wis.2d 298, 983 N.W.2d 669.

Previous versions of this instruction included optional bracket language describing the burden of proof. However, upon review, the Committee found no case law or statutory authority identifying the standard of proof for invasion of privacy. Therefore, language pertaining to the burden of proof was stricken in 2023.

This instruction addresses one of the four possible invasions of privacy set forth in Wis. Stat. § 995.50(2)(am), namely § 995.50(2)(am)3. The four types of invasions are:

(1) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, except as provided under par. (bm), in a place that a reasonable person would consider private, or in a manner that is actionable for trespass.

(2) 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.

(3) 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.

(4) 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.

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 that do not warrant a standard instruction in that the subject matter of these subparagraphs is 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).

Intent. In the case of Reetz v. Advocate Aurora Health, 2022 WI App 59, 405 Wis.2d 298, 983 N.W.2d 669, the court of appeals was presented with the question of whether Wis. Stat. § 995.50(2)(am)3 requires proof of intent for an invasion of privacy claim. Drawing upon the developing common law of privacy and referencing the U.S. District Court, W.D. Wisconsin decision in Fox v. Iowa Health System, 399 F.Supp.3d 780 (2019), the court concluded that such claims do require proof of intentional conduct.

However, it is important to note the distinction provided in the language of § 995.50(2)(am)3. That section states that "invasion of privacy" means:

> 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.

The explicit wording of the statute seems to make clear that a requisite mental state of intent is not required for all causes of action for invasion of privacy. See also the unpublished decision Interest of E.K., 2022 WI App 55, 982 N.W.2d 361 in which the court concluded that an invasion of privacy claim under WIS. STAT. § 995.50(2)(am)1 does not require a demonstration of intent. This opinion drew from the statute's wording and the precedent set in Gillund v. Meridian Mut. Ins. Co., 2010 WI App 4, 323 Wis.2d 1, 778 N.W.2d 662. Furthermore, the court established that § 652(B) of the Restatement does not introduce an intent requirement to the invasion of privacy claim under § 995.50(2)(am)1.

The Committee decided that due to the discrepancy between the conclusion in Reetz and the language of the statute, the question of intent should be assessed on a case-by-case basis.

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2551 INVASION OF PRIVACY: HIGHLY OFFENSIVE INTRUSION; WIS. STAT. § 995.50(2)(am)1.

(Plaintiff) claims that (defendant) invaded (his) (her) privacy[1] by (insert intrusion). To prove this claim, (plaintiff) must prove the following three elements:

1. (Defendant) intruded upon the privacy of (plaintiff);
2. The intrusion by (defendant) was of a nature that would be highly offensive[2] to a reasonable person; and
3. The intrusion occurred (in a place that a reasonable person would consider private) (in a manner involving trespass).

(Definition of trespass; See Wis JI-Civil 8012)

SPECIAL VERDICT

Did (defendant) violate (plaintiff)'s right to privacy by (_____)?

Answer:_____

Yes or No

NOTES

1. Section 995.50 (2)(bm) provides the following exception:

> "Invasion of privacy" does not include the use of a surveillance device under s. 995.60.

Section 995.60 concerns the use of surveillance devices in connection with real estate sales.

2. 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

COMMENT

This instruction and comment were approved in 2011. This revision was approved by the Committee in October 2023; it amended the instruction to reflect changes made pursuant to 2019 Wisconsin Act 72. Additionally, the word "intentionally" was removed from the first element, and language concerning the burden of proof was removed.

Previous versions of this instruction included optional bracket language describing the burden of proof. However, upon review, the Committee found no case law or statutory authority identifying the standard of proof for invasion of privacy. Therefore, language pertaining to the burden of proof was stricken in 2023.

Wis. Stat. § 995.50(2)(am) states: In this section, "invasion of privacy" means any of the following:

> (1) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, except as provided under par. (bm), in a place that a reasonable person would consider private, or in a manner that is actionable for trespass.

Intentional Conduct. In Gillund v. Meridian Mut. Ins. Co., 2010 WI App 4, ¶29, 323 Wis. 2d 1, 778 N.W.2d 662, the court concluded that "There is no requirement that the actor have a particular mental state or intent in order to violate § 995.52(2)(am)1." See, also, E.K., ¶¶33-34.

Trespass. If the intrusion involves trespass, the jury may consider the following, taken from Wis JI-Civil 1812:

> 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."

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 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 the defendant's conduct and the 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.

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 the 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).[1]

SPECIAL VERDICT

First Question: Did (plaintiff) have a contract with (third party) at the time of (defendant)'s alleged interference?

Answer: _____
Yes or No

If you answered "Yes" to Question 1, then answer Question 2. If you answered "No,"

skip to [next cause of action/end].

[**Note**: In most cases, the first question can be answered by the court as a matter of law.]

Second Question: Did (defendant) interfere with (plaintiff)'s contract with (third party)?

Answer: _____
Yes or No

If you answered "Yes" to Question 2, then answer Question 3. If you answered "No," skip to [next cause of action/end].

Third Question: Was the interference on (defendant)'s part intentional?

Answer: _____
Yes or No

If you answered "Yes" to Question 3, then answer Question 4. If you answered "No," skip to [next cause of action/end].

Fourth Question: Was the interference on (defendant)'s part a cause of damages to (plaintiff)?

Answer: _____
Yes or No

If you answered "Yes" to Question 4, then answer Question 5. If you answered "No," skip to [next cause of action/end].

Fifth Question: Was the interference on (defendant)'s part justified?

Answer: _____
Yes or No

Answer Question 6 irrespective of how you answered Question 5.

Sixth Question: What amount of damages, if any, will compensate the (plaintiff) for (defendant's) interference?

$_____

NOTES

1. In Charolais v. FPC Securities, 90 Wis. 2d 97, 105-06 (Ct. App. 1979), Wisconsin adopted the Restatement (Second) of Torts, § 766, which concerns the cause of action of intentional interference with a contractual relationship. The Committee found no Wisconsin authority suggesting that the higher "clear and convincing evidence" standard should be applied to Questions 2, 3, and 4 in the special verdict. Other states that have adopted § 766 apply a preponderance of the evidence standard to prove such claims. Although rulings from these jurisdictions are not legally binding in Wisconsin, the Committee recommends using the same preponderance of the evidence standard for Questions 2, 3, and 4 of the special verdict form. This recommendation aims to maintain consistency with how other states implementing the Restatement handle these matters.

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. This revision was approved by the Committee in October 2023; it removed language concerning the standard of proof for the special verdict questions, modified the special verdict, and added to the comment.

In 2023, the Committee eliminated language from the instruction that described the burden of proof for special verdict questions one through five. Earlier versions of the instruction described the degree of proof required for questions 2, 3, and 4 as "clear, satisfactory, and convincing." However, upon review, the Committee could not find any Wisconsin authority to support the application of this elevated standard. For additional context, see note 1, supra.

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).

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.

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 a 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.

Intent. 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. See Restatement, Second, Torts, § 766 cmt. j (1979). However, this section of the Restatement "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 the defendant has a legally protected interest and believes his or her own interest would be impaired or destroyed by the performance of the contract; Restatement, Second,

Torts, § 773, and Cudd v. Crownhart, supra at 662.

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 the defendant has a financial interest in the party induced, where the 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.

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OFFICE OF JUDICIAL EDUCATION

2024

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME III

Wisconsin Civil Jury Instructions Committee

- 1/2024 Supplement (Release No. 56)

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3260.1 PRODUCT LIABILITY: WIS. STAT. § 895.047[1]

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 that 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 more safe, 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.

[NOTE: USE THE FOLLOWING DEFINITION FOR STRICT LIABILITY CLAIMS FOR DEFECTIVE DESIGN[2]:

This means the product design was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.[3]]

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.

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).]

[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 rendered (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 that you may believe 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 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)]

NOTES

1. This instruction applies to all actions commenced after January 31, 2011. While earlier versions of the instruction specified this date in the title, its removal does not change the content or application of the instruction.

2. In Murphy v. Columbus McKinnon Corp., 2022 WI 109, ¶52, 405 Wis.2d 157, 982 N.W.2d 898, the Wisconsin Supreme Court concluded that when the claim is for a defective design:

> (1) Wis. Stat. § 895.047(1)(a) requires proof of a more safe, reasonable alternative design, the omission of which renders the product not reasonably safe; (2) proof that the consumer contemplation standard as set out in § 895.047(1)(b) (for strict liability claims for a defective design) has been met, and (3) proof that the remaining three factors of a § 895.047(1) claim have been met.

While the Court's decision focuses on claims related to defective design, its opinion broadly discusses the consumer contemplation test and how it applies to Wis. Stat. § 895.047 in its entirety. As a result, the Committee concluded that the question of whether the consumer contemplation test applies to other types of defective products under § 895.047 remains undecided.

3. Wis. Stat. § 895.047(1) requires proof that the consumer-contemplation standard as set out in § 895.047(1)(b) (for strict liability claims for a defective design) has been met. See Murphy, supra, at ¶52. To prove a product design was "unreasonably dangerous" under the consumer contemplation test, a litigant must show that the product design was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Murphy, ¶21, quoting Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 33, 230 N.W.2d 794 (1975).

COMMENT

This instruction and comment were approved in 2012. This revision was approved by the Committee in October 2023; it amended language concerning the consumer contemplation test and its application for strict liability claims for defective design and added to the comment.

Product liability in Wisconsin is based on Wis. Stat. § 895.047(1). The statutory elements are as follows:

(a) 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.

(b) That the defective condition rendered the product unreasonably dangerous to persons or property.

(c) That the defective condition existed at the time the product left the control of the manufacturer.

(d) That the product reached the user or consumer without substantial change in the condition in which it was sold.

(e) That the defective condition was a cause of the claimant's damages.

Product liability claim: defective product design. Under Wis. Stat. § 895.047, to establish a claim of strict liability for a design defect, a plaintiff must allege and prove the following:

1. The foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.

2. The omission of the alternative design renders the product not reasonably safe.

3. Proof that the consumer-contemplation standard has been met, meaning the product's defect renders it unreasonably dangerous to persons or property according to the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product.

4. Proof of the remaining three factors of a § 895.047(1) claim.

See Murphy v. Columbus McKinnon Corporation, 2022 WI 109, ¶¶30, 33, 405 Wis.2d 157, 982 N.W.2d 898.

In Murphy, 2022 WI 109, at ¶28, the Court concluded that "While § 895.047 appears to borrow language from the Restatement (Third) of Torts, the legislature did not adopt the entirety of § 2, nor did it enact the Restatement's voluminous comments." The Court concluded that "Wis. Stat. § 895.047 remains loyal to Wisconsin's roots in the common law consumer-contemplation test" and retains the distinction between strict liability and negligence claims. Murphy, ¶¶32, 39, and 40; WIS. STAT. § 895.047(6).

"Reasonable/reasonably" in subsection (1)(a). The inclusion of the terms "reasonable" and "reasonably" in subsection (1)(a) should not be construed as embracing the risk-utility balancing test outlined in Restatement (Third) of Torts § 2(b) or the requirements presented in comment f. In the Murphy decision, the Court explicitly determined that incorporating "reasonable" and "reasonably" into §

895.047(1)(a) does not signify the legislature's intention to adopt the risk-utility balancing test or the provisions detailed in comment f of the Restatement (Third) of Torts, § 2. Murphy, 2022 WI 109, supra, at ¶¶ 34-35.

Retention of the consumer contemplation test. In Murphy v. Columbus McKinnon Corporation, supra, the Wisconsin Supreme Court confirmed that the state legislature had retained the consumer contemplation test. This test, which determines whether a product design is unreasonably dangerous due to a defective product design, was codified in §895.047(1)(b) and was supported by both the canon of imputed common law and the legislative history of the statute. It is important to note that although §895.047 eliminates the consumer contemplation test for the "defect" element of the claim, it should still be used to determine whether a product design is unreasonably dangerous.

"Not reasonably safe" vs. "unreasonably dangerous." In a previous version of this comment, it was noted that paragraph (a) uses the term "not reasonably safe," and paragraph (b) uses the term "unreasonably dangerous." The comment then questioned whether proving one term could serve as proof of the other. In Murphy v. Columbus McKinnon Corp., the court addressed this question by stating that paragraph (a) codifies language from the Restatement (Third), while paragraph (b) codifies the consumer-contemplation test from this state's common law. The court further explained that the legislature retained the consumer-contemplation test in the statute. See Murphy, 2022 WI 109, supra, at ¶¶ 37. Therefore, the codified terms can be read in harmony because they both require proof that a product design was dangerous to a degree beyond what an ordinary consumer would expect under the consumer-contemplation test.

Bringing a claim in negligence for product design. Wis. Stat. § 895.047(6) clarifies that the products liability section does not apply to negligence or breach of warranty claims. Consequently, plaintiffs can bring a common law negligence claim alongside a strict liability cause of action against a product manufacturer, as the statute does not preclude such claims. See Murphy, 2022 WI 109, supra at ¶¶39-40.

Contributory negligence: damages for injuries caused by a defective product. In a strict liability action for injuries from a defective product, the fact finder must initially ascertain the injured party's eligibility for damages. This involves apportioning the total causal responsibility for the injury among the injured person, the defective product, and any other contributory negligence.

If the injured party's contributory negligence exceeds the causal responsibility attributed to the product's defect, he or she is precluded from recovering damages from any entity involved in the product's commercial distribution. Should the injured party's causal responsibility be equal to or lesser than that of the product's defect, he or she may recover damages, albeit reduced by their own contributory percentage.

If multiple defendants are implicated in the product's defect, and the injured party is eligible for recovery, the fact finder must apportion causal responsibility among each defendant. This is then multiplied by the defective product's share of causal responsibility for the injury. Defendants with 51% or greater liability are jointly and severally responsible for all damages, while those with less than 51% liability are accountable only for their proportional share of damages.

Should the injured party be eligible for recovery, surpassing an individual defendant's liability does not disqualify the injured party from seeking damages from that specific defendant.

This subsection does not apply to actions based on negligence or a breach of warranty. See Wis. Stat. § 895.045(3).

Sellers and Distributors. The new law reduces the exposure of sellers and distributors. To establish liability, the plaintiff must establish that "manufacturer would be liable" and that one of the following applies:

1. The 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 the defendant can show that the 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 the 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. The defendant's damages shall be reduced by the percentage of causal responsibility attributable to the plaintiff's misuse, alteration, or modification of the product.

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.

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.

8113 TAKING OF A LIMITED EASEMENT

The term "temporary limited easement" (TLE) has been used during the trial. The taking of a temporary limited easement requires the payment of just compensation. Question [__] of the Special Verdict asks, "What amount of compensation should be paid to the plaintiff owner as a consequence of the TLE?"

You should consider the rental value of the TLE, taking its duration into account. [You should also consider (the loss of site improvements, landscaping, and fixtures within the TLE area) (damages to the plaintiff-owner's remaining property caused by the taking of the TLE) (insert other damages at issue) or any other damages caused by the TLE.]

SPECIAL VERDICT

Question [__]: What amount of compensation should be paid to the plaintiff owner as a consequence of the TLE?

$_____

COMMENT

This instruction and comment were approved by the Committee in October 2023.

118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486, and Backus v. Waukesha County, 2022 WI 55, 402 Wis.2d 764, 976 N.W.2d 492 addresses

the issues of loss of direct access and taking a limited easement.

In 118th Street, the Wisconsin Supreme Court assumed without deciding that a temporary limited easement was compensable under Wis. Stat. § 32.09(6g). However, in Backus, the court found that a "…reasonable reading of 32.09(6g) is that it applies only to easements that continue to exist beyond the completion of a public improvement project. Therefore, § 32.09(6g) does not apply to TLEs, which must instead be compensated under constitutional and common law principles." Id., at ¶19.

The Backus court included a footnote clarifying that its opinion was not intended to limit access to compensation for provable damages caused by the TLE, offering examples of "rental value of the TLE and damages for permanent loss of site improvements within the TLE." Id., at ¶19, n.12. That footnote provides as follows:

> To be abundantly clear, this opinion does not limit a property owner's access to compensation for any provable damages caused by a TLE. This includes, but is not limited to, elements of value currently included in the WI DOT Real Estate Program Manual section 2.4.6.4, such as the rental value of the TLE and damages for permanent loss of site improvements.

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