1005 NEGLIGENCE: DEFINED

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

§ 288A provides as follows:

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

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

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

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

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

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

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