

**1007 CONTRIBUTORY NEGLIGENCE: DEFINED**

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

**ADDITIONAL OR OPTIONAL PARAGRAPHS**

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

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

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

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

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

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

## COMMENT

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

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

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

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

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

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

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

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

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

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

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