

1009 NEGLIGENCE: VIOLATION OF SAFETY STATUTE

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

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

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

COMMENT

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

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

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

§ 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).