

1010 NEGLIGENCE OF CHILDREN

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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