

1013 PARENT'S DUTY TO CONTROL MINOR CHILD

A parent must use ordinary care to control (his) (her) minor child so as to prevent the child from intentionally harming others or from conducting (himself) (herself) so as to create an unreasonable risk or bodily harm to others, if the parent knows or should know:

- (1) that (he) (she) has the ability to control the child;
- (2) that there is a necessity for exercising such control; and
- (3) that there is an opportunity to do it.

A parent is not required to anticipate and guard against every logically possible instance of a child's misconduct. The parent must know, or should have known, that the child had a habit of engaging in the particular act or course of conduct which led to the plaintiff's injury.

COMMENT

This instruction and comment were initially published in 1974 and revised in 1984 and 2005. The comment was updated in 2002 and 2005.

This instruction is to be used in cases involving a claim of negligent failure to control a child. It is not to be used in a "negligent entrustment" type case.

This instruction is taken substantially from Restatement, Second, Torts § 316 (1965) as a correct statement of the law in Gerlat v. Christianson, 13 Wis.2d 31, 35, 108 N.W.2d 194 (1961); Statz v. Pohl, 266 Wis. 23, 31, 62 N.W.2d 556 (1954); and Siebert v. Morris, 252 Wis. 460, 463, 32 N.W.2d 239 (1948). See also Pawlack v. Mayer, 266 Wis. 55, 62 N.W.2d 572 (1954); Bruttig v. Olsen, 154 Wis.2d 270, 453 N.W.2d 153 (Ct. App. 1989). Gritzner v. Michael R. 235 Wis.2d 781, 611 N.W.2d 906, 2000 WI 68; Nielsen v. Spencer, 2005 WI App 207.

The duty extends to either parent who has an ability to control the child. Restatement, Second, Torts § 316 (1965); Siebert v. Morris, supra at 463.

In cases involving failure to control, as in negligent entrustment cases, the parent who has failed to exercise proper control is treated as a joint tortfeasor, whose separate act of negligence, for the imposition of liability, only becomes relevant upon the negligent act and injury by the child who should have been controlled. Bankert v. Threshermen's Mut. Ins. Co., 110 Wis.2d 469, 329 N.W.2d 150 (1983).

The tort differs from that of negligent entrustment, however. Although both the tort of negligent entrustment and of failure to control a child generally involve children improperly using an instrumentality which can be dangerous, entrustment requires that the instrumentality be "entrusted" to the trustee. Negligent control may be the failure to exercise ordinary care in allowing the instrumentality to be in the hands of a child, or it may be a failure in other respects, e.g., failure to properly instruct in use or a failure to warn of hazards.

The four general situations resulting in parental liability at common law are: (1) Where the parent negligently entrusts the child with an instrumentality which may become a source of danger to others; (2) where the child is acting as the parent's agent; (3) where the parent knows of the child's wrongdoing and consents to it or directs or sanctions it; and (4) where the parent who has the ability to control the child fails to exercise control over the child, although the parent knows, or should know, that injury to another is a probable consequence.

In Nielsen, supra, the court noted that the parent's duty under Restatement (Second) of Torts § 316 (1965) has been interpreted narrowly in Wisconsin and elsewhere. Mere knowledge by the parent of a child's mischievous and reckless, heedless, or vicious disposition is not of itself sufficient to impose liability with respect to torts of the child. Consequently, the court in Nielsen agreed that "no parental liability exists without notice of a specific type of harmful conduct and an opportunity to interfere with it." Nielsen, supra, ¶14.

Loco Parentis. A claim for negligent failure to control a minor child also may be based on the doctrine of loco parentis. Gritzner, 2000 WI 68, ¶48. In Gritzner, the court found that a friend of the mother of a minor who committed sexual abuse had assumed parental responsibility.