

1014.5 NEGLIGENT ENTRUSTMENT TO AN INCOMPETENT PERSON

To find (defendant) negligent in supplying (object) to (plaintiff), you must find that:

1. the (object) was under the control of (defendant);
2. (defendant) supplied (object) to (plaintiff) directly or through a third person; and
3. at the time the (object) was supplied to (plaintiff) (defendant) knew, or in the exercise of reasonable care should have known (plaintiff) was likely, because of (lack of capacity) (youth) (inexperience) (or otherwise) to use the (object) in a way that would create an unreasonable risk of harm to (himself/herself), others, or their property.

COMMENT

This instruction and comment were approved in 2004. The comment was revised in 2016.

This instruction is based on Restatement (Second) of Torts, § 390. See *Stehlik v. Rhoads*, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; *Erickson v. Prudential Ins. Co.*, 166 Wis.2d 82, 479 N.W.2d 552 (Ct. App. 1991).

Restatement (Second) of Torts, § 390 reads:

§ 390. Chattel for Use by Person Known to be Incompetent

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely [because of his youth, inexperience, or otherwise,] to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 is a special application of the rule stated in § 308. Section 308 applies when the person who is negligently entrusted with an object or activity injures another person. Section 390, on which this instruction is based, deals with the supplying of a chattel to a person incompetent to use it safely who subsequently injures himself or herself or another person or property. See Restatement (Second) of Torts § 390, comment b, and *Stehlik v. Rhoads*, 2002 WI 73, ¶22, 253 Wis.2d 477, 645 N.W.2d 889.

The court in *Stehlik* explained the difference between a claim based on § 308 and a claim under § 390:

¶23. A § 308 claim is a bit broader, and can be asserted any time the circumstances are such that the defendant knew or should have known that the person to whom he is entrusting an item is likely to use it in a way that creates an unreasonable risk of harm to others. But ' 308 has never been extended to cases such as this one involving self-inflicted harm by the one to whom an item is allegedly negligently entrusted.

For contributory negligence, see Wis. JI-Civil 1008.