

1019 NEGLIGENCE: EVIDENCE OF CUSTOM AND USAGE

Evidence has been received as to the (practice in the community) (custom in the trade or work operation) (practice in the industry) with respect to (e.g., the use of 2 x 4's for rafters) (installations of 3/8" plywood for subflooring) (standing on running board to guide truck backing into shale pit). You should consider this evidence in determining whether (defendant) acted with ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has a good safety record under similar conditions could aid you in determining whether (defendant) was negligent.

COMMENT

This instruction was originally approved in 1974 and revised in 1985. The instruction and comment were updated in 1995.

Raim v. Ventura, 16 Wis.2d 67, 113 N.W.2d 827 (1962); Kalkopf v. Donald Sales & Mfg. Co., 33 Wis.2d 247, 147 N.W.2d 277 (1967).

This instruction was approved as a correct statement of the law in Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 351, 234 N.W.2d 332 (1975). See also D.L. v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983). In D.L. v. Huebner, supra, the court recommended that where there is evidence of a difference in pre- and post-manufacture industry custom, the instruction can be revised to state how the jury should consider the evidence.

See also Kolpin v. Pioneer Power & Light, 162 Wis.2d 1, 469 N.W.2d 595 (1991), in which the court affirmed the trial court's use of this instruction to explain the standard of care required in furnishing electricity to customers. The text of an instruction, proposed by the utility company and not given by the trial court, is set forth in a footnote. Kolpin, supra, at 31, n.6. Kolpin also discusses whether an instruction on the state-of-the-art of electricity should have been given. Kolpin, supra, at 31-35.