

1020 NEGLIGENCE: UNDER SPECIAL CIRCUMSTANCES

[Withdrawn]

COMMENT

This instruction was approved by the Committee in 1960. It was withdrawn in 2011.

At the time the instruction was withdrawn, it read:

[While the rule never changes that a (person) (motor vehicle driver) (pedestrian) must exercise ordinary care, the degree of care or diligence which a person must exercise to come up to the standard of ordinary care varies with the circumstances naturally calculated to affect or increase the hazard of collision or injury. The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

[Alternative: The ordinary care which the law requires varies with the circumstances naturally calculated to affect or increase the hazard of injury or collision. (Under some circumstances, ordinary care may be a high degree of caution; whereas, under other circumstances, a slight degree of caution may be ordinary care.) The greater the danger which is or may be apparent to an ordinarily prudent person under the circumstances existing, the greater must be the degree of care which must be used to guard against such danger.]

Wisconsin Jury Instruction-Civil 1005 defines the standard of care of a negligent person. The instruction provides as follows:

A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

Wisconsin has been committed to the ordinary care standard formulation in negligence cases. Justice Heffernan summarized the formulation of negligence in Smith v. Milwaukee County, 162 Wis.2d 340, pp 355-360 (1990). While Justice Heffernan's summary is found in a dissent, the court's differences were not based on the negligence formulation, but were instead based on the belief that the majority was mistaken in ruling that there were no disputed issues of fact which would permit a finding of negligence.

Professor Richard Campbell was critical of formulations which deviate from the ordinary care standard because of special circumstance. In his article entitled "Law Governing Automobile Accidents" found in the 1962 Wis Law Rev 240, 250, Professor Campbell asserts:

b. The "Emergency" Rule. The loose nature of what we commonly call the "emergency doctrine" was fully presented in this *Law Review* in 1950.¹⁰⁵ The author concluded that we are not really administering a separate doctrine, but that the emergency rule is ". . . only one facet of ordinary care."¹⁰⁶ Cases since 1950 fully support his conclusion. The heart of the rule as stated in the 1960 recommended jury instructions is as follows:

". . . [Drivers] are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might make, if placed in the same position, even though it should afterwards appear not to have been the best or safest course. . . ."¹⁰⁷

It will be noticed that this is exactly the way all negligence is tested. The standard of the reasonably prudent man is the guide. The issue is determined by the situation at the time of action; not by the armchair deductions of the Monday morning quarterback.

The withdrawn instruction proposed to elevate the standard of care under "circumstances naturally calculated to affect or increase the hazard of collision or injury." In the second paragraph, the instruction minimized the care required, stating "under other circumstances, a slight degree of caution may be ordinary care." These standards deviated from the general standard of care found in JI-1005 in which a jury measures negligence by "the care a reasonable person would use under similar circumstances."