

**1021 NEGLIGENCE OF MENTALLY DISABLED**

Evidence has been received (it appears without dispute) that the defendant at the time of (collision, accident, fire, or other alleged tort) was mentally disabled. A person who is mentally disabled is held to the same standard of care as one who has normal mentality, and in your determination of the question of negligence, you will give no consideration to the defendant's mental condition.

**COMMENT**

This instruction and comment were originally published in 1971. The comment was revised in 1994, 1996, 1998, 1999, 2000, 2003, 2004, and 2005.

Hofflander v. St. Catherine=s Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545; Jankee v. Clark County, 2000 WI 64, 235 Wis.2d 700, 612 N.W.2d 297; Gould v. American Family Mut. Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996); Burch v. American Family Mut. Ins. Co., 198 Wis.2d 465, 543 N.W.2d 277 (1996); Breunig v. American Family Ins. Co., 45 Wis.2d 536, 542, 173 N.W.2d 619 (1970); Guardianship of Meyer, 218 Wis. 381, 261 N.W. 211 (1935); Restatement, Second, Torts § 283B and appendix (1966); 57 Am. Jur.2d Negligence § 82 (1971); 1955 Wis. L. Rev. 12; Prosser, Law of Torts (4th) § 135 at 1000 (1971).

This instruction holds mentally disabled defendants to the reasonable person standard of care.

In Jankee, the court noted that the policy rationales for the rule embodied in this instruction trace their origins to the 1930s, when the court observed that imposing liability on the mentally disabled: (1) better apportions loss between two innocent persons to the one who caused the loss, (2) encourages restraint of the disabled, and (3) prevents tortfeasors from feigning incapacity to avoid liability. The court went on to recognize “more contemporary justifications” for the general rule. It said the reasonable person standard of care obligates mentally disabled persons to conform their behavior to the expectations of the communities in which they live. The court also recognized a more practical rationale. It said the reasonable person standard of care allows courts and juries to bypass the imprecise task of distinguishing among variations in character, emotional equilibrium, and intellect. Jankee, supra, at 734.

The supreme court has fashioned limited defenses for mentally disabled individuals on two occasions. In Breunig, the court said a defendant cannot be found negligent when he or she is suddenly overcome without forewarning by a mental disability or disorder that makes it impossible for the defendant to appreciate the duty to exercise ordinary care. A second exception to liability was created in Gould for persons in institutionalized settings who do not have the capacity to control or appreciate their conduct when they cause injury to caretakers employed for financial compensation. The court said that the expansion of the narrow Gould

exception to other circumstances based on a party's capacity to control or appreciate conduct would eviscerate the common law rule. Jankee, supra, at 738.

**Mentally Disabled Person Under Custody and Control: Contributory Negligence.** See Wis. JI-Civil 1385.5.