

**1046 CONTRIBUTORY NEGLIGENCE OF PASSENGER: PLACING SELF IN POSITION OF DANGER**

If before or upon entering an automobile, a passenger becomes aware of, or in the exercise of ordinary care ought to become aware of, a danger which involves a risk of injury to the passenger, it is then the passenger's duty to exercise ordinary care to take such action for his or her protection as would be taken by a person of ordinary intelligence and prudence under the same or similar circumstances.

**COMMENT**

This instruction and comment were approved in 1972. The comment was updated in 1985 and 1986 and was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Baird v. Cornelius, 12 Wis.2d 284, 107 N.W.2d 278 (1961). See also Delmore v. American Family Mut. Ins. Co., 118 Wis.2d 510, 348 N.W.2d 151 (1984).

Basically, a passenger's negligence can be of two types: passive and active. In Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 105-06, 118 N.W.2d 140 (1962), Justice Hallows said that what is "active" and what is "passive" is a matter of causation. Thus, negligence which caused the collision is "active negligence." Negligence of the passenger which was only a cause of his or her own injuries is "passive negligence." Active negligence occurs where the passenger interferes with the safe operation of the car (e.g., grabbing the steering wheel) or where the passenger assumes some part of the driver's duties (e.g., coaching an inexperienced driver). The court noted in Delmore that "only in the exceptional case can a finding of active negligence (by a passenger) be appropriate." Passive negligence occurs when the passenger fails to use ordinary care for his or her own safety in entering a car or in riding in the car knowing of a hazard (e.g., condition of the car or driver, the driver's lack of skill, or any other hazard), or it may relate to lookout or failure to warn.

In Delmore, the court considered whether active negligence of the passenger would make the passenger liable for injuries to occupants of another car as well as to the driver of the passenger's car. After reviewing the progression of cases involving active/passive negligence, the court in Delmore concluded that a passenger who is actively negligent is liable to third parties-including passengers in another vehicle. Conversely, passive negligence does not provide a basis of liability to third persons.