

**1510 NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS
(BYSTANDER CLAIM)**

(Plaintiff) claims injury for severe emotional distress caused by [directly observing the (incident) (accident) which (seriously injured) (killed) _____] [coming upon the scene immediately after the (incident) (accident) and witnessing the aftermath of the (serious injury) (death) to _____].

If your answers to question 1 and question 2 of the verdict are "yes" [regarding the underlying (incident) (accident) involving _____ and (defendant), _____], then you must consider (plaintiff)'s claim of severe emotional distress.

Question ___ asks whether (plaintiff) suffered severe emotional distress.

Emotional distress may arise from the natural shock and grief of directly observing an (incident) (accident) which results in the (serious injury) (death) to a family member or from coming upon the scene minutes later and witnessing the aftermath. Emotional distress includes mental suffering, anguish, and shock. It can include fright, horror, grief, and worry. It need not include physical manifestations of injury, although these may also be present.

In order for (plaintiff) to recover, however, (his) (her) emotional distress must be severe. This means it must be more than temporary discomfort or a minor psychic or emotional shock. It must be an extreme emotional response.

Question ___ asks whether (defendant)'s negligence in the underlying (incident) (accident) was a cause of (plaintiff)'s emotional distress. Note that you are not to answer this question unless you answered the preceding question "yes."

The cause question asks whether there was a causal connection between (defendant)'s negligence in the underlying (incident) (accident) and (plaintiff)'s emotional distress. The

question does not ask about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an injury. The negligence of one person may cause an injury or the combined negligence of two or more persons may cause it. Before you find that (defendant)'s negligence in the underlying (incident) (accident) was a cause of plaintiff's emotional distress, you must find that (defendant)'s negligence was a substantial factor in producing (plaintiff)'s emotional distress.

Question ___ asks what sum of money, if any, will fairly and reasonably compensate (plaintiff) for the severe emotional distress. Note that you are not to answer this question unless you answered the previous question "yes."

In answering [these verdict questions] [verdict question ____] you should not consider the harm that naturally flows from the loss of a family member. Rather, the damages for emotional distress, if any, must arise solely from (plaintiff)'s observing the [describe incident].

[Include Relevant Instructions on Damages.]

SPECIAL VERDICT

Question ___: Did the plaintiff, _____, suffer severe emotional distress?

Answer: _____

Yes or No

If you answered the previous question "yes," answer this question:

Question ____: Was (defendant)'s negligence in the underlying (incident) (accident) a cause of (plaintiff)'s emotional distress?

Answer: _____

Yes or No

Question ____: What sum of money, if any, would fairly and reasonably compensate (plaintiff) for severe emotional distress?

(a) [indicate type of damages]

Answer: _____

(b) [indicate type of damages]

Answer: _____

(c) [indicate type of damages]

Answer: _____

COMMENT

This instruction and comment were approved by the Committee in 1996 and replaced the prior version which was based on the zone of danger rule. The instruction was revised in 2006. The comment was updated in 2001, 2003, 2004, 2005, 2006, 2010, and 2014.

For a direct claim based on negligent infliction of emotional distress, see Wis JI-Civil 1511.

This instruction is based upon the principles enunciated in Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). It is limited to one type of negligent infliction of emotional distress: severe emotional distress suffered by a bystander who witnesses an accident or the gruesome aftermath of an accident involving serious or fatal injuries to a close relative. The court set out the requirements of the claim of negligent infliction of emotional distress to a bystander as follows: "(1) that the defendant's conduct [in the underlying accident] fell below the applicable standard of care, (2) that the plaintiff suffered an injury [severe emotional distress], and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. See also Rabideau v. City of Racine, 2001 WI 57, 243 Wis.2d 486, 627 N.W.2d 795.

The Bowen court set out three public policy limitations on this claim: "First, the injury suffered by the victim must have been fatal or severe. Second, the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the plaintiff must have observed . . . the incident and injury or the scene soon after the incident with the injured victim at the scene." Id. at 633. In addition, borrowing from the tort of intentional infliction of emotional distress, the court limited the compensable injury to emotional distress that is severe.

The Bowen court struck down three prior legal principles involving negligent infliction of emotional distress to a bystander: (1) the concept of "zone of danger"; (2) the requirement that a plaintiff be in fear for his or her own safety; and (3) that the emotional distress be evidenced by physical manifestations.

This instruction recognizes that the claim for emotional distress to the plaintiff-bystander will normally be joined with an underlying claim involving the victim's serious injuries or death. Therefore, the emotional distress claim is premised on answers to previous questions that show the defendant's causal negligence with respect to the underlying accident. The instruction directs the jury to consider the claim for negligent infliction of emotional distress if the jury's answers to those questions were "yes."

If the plaintiff's claim for emotional distress is brought separate from a claim by or on behalf of the victim, the Committee believes that questions of negligence and cause with respect to the underlying incident or accident nevertheless must be asked as part of this claim.

This instruction also presumes that the trial judge has considered the three public policy limitations on this tort set out above. The Committee believes that these public policy limitations are legal cause questions for the trial judge and not questions for the jury.

In addition to these limitations, the Bowen court noted that other public policy considerations must be examined on a case-by-case basis either before trial by summary judgment or motion to dismiss or after trial "when the issues are complex or the factual connections attenuated, . . ." Id. at 655. The court set out six separate public policy considerations leading up to the ultimate question of whether liability in a given case would "shock the conscience of society." Id. at 656:

- (1) whether the injury is too remote from the negligence;
- (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor;
- (3) whether in retrospect it appears too extraordinary that the negligence would have brought about the harm;
- (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor;
- (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or
- (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. Id. at 655.

Comparative Negligence. There is no Wisconsin case law on whether a bystander recovery is reduced by the contributory negligence of the victim. The committee believes that if the jury finds contributory negligence, then a plaintiff's recovery should be reduced according to the jury's apportionment of comparative negligence. See Portee v. Jaffee, 84 N.J. 88, 101-02 (1980); State v. Eaton, 101 Nev. 705, 714-15, 710 P.2d 1370 (1985). In addition, it may also be proper to include any negligence by plaintiff (e.g. negligent supervision) in the comparative negligence apportionment.

Damages. The last paragraph was added in 2006 to avoid overlapping damages, e.g., wrongful death elements. See Wis JI-Civil 1880 and 1897.

Loss of Pet and Property Damage. In Rabideau, supra, the Wisconsin Supreme Court held that the rule of nonrecovery for the injury or death of a nonfamily member applies with equal force to a plaintiff who witnesses as a bystander the negligent injury or death of a best friend who is human as it does to a plaintiff whose best friend is a dog.

The supreme court rejected a claim of negligent infliction of emotional distress arising out of negligent damage to property after an examination of the claim under the six public policy considerations reviewed in Bowen and set forth above. Kleinke v. Farmer's Coop. Supply & Shipping, 202 Wis.2d 138, 549 N.W.2d 714. In Bowen, the court also refused to permit the dog's owner to maintain a claim for negligent infliction of emotional distress arising from property loss. Bowen, supra ¶27.

Medical Negligence Claims. In Phelps v. Physicians Insurance Co. of Wisconsin, Inc., 2009 WI 74, 319 Wis.2d 1, 768 N.W.2d 615, the supreme court held that Wis. Stat. Ch. 655 does not permit bystander claims for negligent infliction of emotional distress arising from medical malpractice of health care providers and their employees.

In Pierce v. Physicians Ins. Co. of Wis., the Wisconsin Supreme Court held that a mother who suffers the stillbirth of her infant as a result of medical negligence has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in addition to her derivative claim for wrongful death of the infant. Pierce, 2005 WI 14, 278 Wis.2d 82, 692 N.W.2d 558, ¶1. In Pierce, the court also stated that when Bowen rejected Waube's "Zone of danger rule," it did not undermine Westcott, 148 Wis.2d 239. The court said it continues to recognize a claim for negligent infliction of emotional distress where the claimant is directly involved in the tortious activity. Bowen did nothing to change this. Pierce, supra ¶17.

Claim Based on Media Broadcast. A plaintiff does not have a claim against a media defendant for negligent infliction of emotional distress if the contents of the broadcast were not false or defamatory. Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.