

1580 COMPARATIVE NEGLIGENCE: PLAINTIFF AND ONE OR MORE DEFENDANTS

If, by your previous answers, you are required to answer this question, you will determine how much and to what extent each party is to blame for causing the (injury) (damage) (accident). You will decide the percentage (a portion of 100%) attributable to each party in causing the (injury) (damage) (accident).

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

The instruction and comment were originally published in 1972. The instruction and comment were revised in 1979 and 2010.

See Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

Burden of Proof. See McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 265 Wis. 19, 28, 60 N.W.2d 399 (1953).

Comparison Issues. In May v. Skelly Oil Co., 83 Wis.2d 30, 264 N.W.2d 574 (1978), the court proposed in dictum that the negligence of an injured claimant should be compared to the combined negligence of the parties who caused the claimant's injuries. However, in Reiter v. Dyken, 95 Wis.2d 461, 290 N.W.2d 510 (1980), and Wisconsin Natural Gas v. Ford, Bacon & Davis Constr., 96 Wis.2d 314, 291 N.W.2d 825 (1980), the court declared that it would not make the change proposed in May. Instead, the court reaffirmed the prevailing common law rule of individual comparison, i.e., that plaintiff's causal negligence is individually compared to the causal negligence of each defendant. In its decision, the court in Reiter and Ford, Bacon & Davis stated that a change from the individual comparison rule to a combined comparison rule, as proposed in May, should be the result of legislative action. In 1979, however, the legislature failed to enact such a bill. The legislation, 1979 S.B. 589, would have amended the comparative negligence statute (§ 895.045) by adopting a combined or collective comparison approach.

In Ford, Bacon & Davis, the court also refused to abolish the doctrine of joint and several liability. 96 Wis.2d at 330-34.

In 1986, the court reaffirmed the holding in Reiter v. Dyken, *supra*, that a plaintiff's causal negligence is compared with the negligence of each defendant under the individual comparison rule. Delvaux v. Langenberg, 130 Wis.2d 464, 387 N.W.2d 751 (1986).

There is no comparison under the comparative negligence statute (§ 895.045(1)) between intentional and negligent tortfeasors. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, *supra*. An intentional tortfeasor is not entitled to contribution from a negligent joint tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Verdict Format for Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct: Cases involving negligent conduct and intentional conduct by joint tortfeasors present special problems in structuring a verdict. The committee drafted the suggested verdict shown below for a sample case involving a claim of intentional or negligent conduct by an assailant and a claim of negligent conduct by a property owner for failing to prevent the assault. The verdict questions assume the plaintiff alleges that the assailant's acts were either intentional or negligent.

SUGGESTED VERDICT

(For Case Involving Both Intentional and Negligent Tortfeasors;

Note: Defendant 1 refers to the alleged assailant.

Defendant 2 refers to the alleged negligent property owner.)

Question 1: Did (Defendant 1) intentionally [sexually assault, rob, batter, etc.] (Plaintiff) on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 1 "yes," then go to and answer Question 2.

If you answered Question 1 "no," then and only then answer Question 3.

Question 2: Was the intentional conduct of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 2 "yes," go to and answer Question 5.

If you answered Question 2 "no," go to and answer Question 3.

Question 3: At and immediately prior to the incident on (date) at (location), was (Defendant 1) negligent?

Answer: _____
(Yes or No)

If you answered Question 3 "yes," go to and answer Question 4.

If you answered Question 3 "no," go to and answer Question 5.

Question 4: Was the negligence of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 5: At and immediately prior to the incident on (date) at (location), was (Defendant 2) negligent?

Answer: _____
(Yes or No)

If you answered Question 5 "yes," go to and answer Question 6.

If you answered Question 5 "no," go to and answer Question 7.

Question 6: Was the negligence of (Defendant 2) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 7: At and immediately prior to the incident on (date) at (location), was (Plaintiff) negligent?

Answer: _____
(Yes or No)

If you answered Question 7 "yes," go to and answer Question 8.

If you answered Question 7 "no," go to and answer Question 9.

Question 8: Was the negligence of (Plaintiff) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you have answered "yes" to two or more of Questions 4, 6 or 8, answer the following question relative to each party that you determined was a cause of (Plaintiff)'s injuries.

*** NOTE: If you answered Question 2 "yes" concerning (Defendant 1), do not include (him) (her) in answer to the following question.**

Question 9: Taking the combined negligence of each party that you have determined was a cause of injuries to (Plaintiff) as 100%, what percentage of the negligence do you attribute to:

- | | | |
|---|---------------------------|---------|
| * | A. (<u>Defendant 1</u>) | _____ % |
| | B. (<u>Defendant 2</u>) | _____ % |
| | C. (<u>Plaintiff</u>) | _____ % |
| | TOTAL | 100% |

Question 10: Regardless of how you have answered any of the previous questions, answer this question:
What sum of money will fairly and reasonably compensate (Plaintiff) for (her) (his) injuries on (date) at (location) in damages with respect to:

- | | | |
|----|---------------------------------------|----------|
| A. | Past Medical Expenses | \$ _____ |
| B. | Past Wage Loss | \$ _____ |
| C. | Past Pain, Suffering and Disability | \$ _____ |
| D. | Future Medical Expenses | \$ _____ |
| E. | Future Wage Loss | \$ _____ |
| F. | Future Pain, Suffering and Disability | \$ _____ |