1582 COMPARATIVE NEGLIGENCE: ADULT AND CHILD

If you are to answer question _____, you should consider that _____ was an adult and _____ was a child and consider and weigh the credible evidence bearing on the inquiries presented, in the light of the difference in the rules which you were previously instructed to apply in determining whether the conduct of the parties was negligent.

COMMENT

This instruction and comment were originally published in 1966 and revised in 1988. The comment was reviewed without change in 1990.

In Brice v. Milwaukee Auto Ins. Co., 272 Wis. 520, 524, 76 N.W.2d 337 (1956), a litigant contended that the negligence of a minor once found by the jury must be accorded the same weight by the jury in apportioning negligence as would be done in the case such child were an adult. The court stated: "With this we cannot agree. A jury in answering the comparative negligence question in a special verdict is called upon to weigh negligence and not causative effect."

In Hanson v. Binder, 260 Wis. 464, 467, 50 N.W.2d 676 (1952), the court stated:

> The mere fact that, in this collision between the two, the jury found that the child was more negligent than the adult demonstrated to the court's satisfaction that the jury did not appreciate that different standards of ordinary care apply to these different actors.

But, see dissent of Justices Gehl and Brown.

In the case of Rasmussen v. Garthus, 12 Wis.2d 203, 107 N.W.2d 264 (1961), the court found that the instructions were not prejudicially erroneous in not directing the jury to keep in mind the difference in the degree of care required of a child compared with the degree of care required of an adult but said that the court should have so directed the jury.

In Field v. Vinograd, 10 Wis.2d 500, 103 N.W.2d 671 (1960), the instruction given was as follows: "In apportioning the negligence, you should take into consideration the fact that Sherman Vinograd was an adult, and Billy Field was a child, at the time of the accident . . . ."

In the case of Bell v. Duesing, 275 Wis. 47, 52, 80 N.W.2d 821 (1957), it was stated that the fact one of the parties is an infant should be taken into consideration in apportioning negligence.

Language in this instruction was approved in Metcalf v. Consolidated Badger Coop., 28 Wis.2d 552, 560, 137 N.W.2d 457 (1965).

Also see the following: Gonzalez v. City of Franklin, 137 Wis.2d 109, 403 N.W.2d 747 (1987); Kohler v. Dumke, 13 Wis.2d 211, 108 N.W.2d 581 (1961); and Blair v. Staats, 10 Wis.2d 70, 102 N.W.2d 267 (1960), which confirm the view of this instruction.