

2001 INTENTIONAL VERSUS NEGLIGENT CONDUCT

There is a dispute in this case about whether the conduct of (defendant) in _____ (state the conduct in question) was intentional or negligent.

If (defendant) actually meant some harm to follow from a particular act or where some harm is substantially certain to follow from an act according to common experience, then (defendant) may be said to have intended the result and (his) (her) conduct was intentional.

Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.

If you find that the defendant intended to cause harm in some way, however great or small, or that (defendant)'s conduct was almost certain to cause harm in some way, however great or small, then (defendant)'s conduct was intentional.

If, however, the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

COMMENT

This instruction and comment were approved by the Committee in 1995. The instruction needs to be preceded or followed by the negligence instruction (JI-Civil 1005).

This instruction is based on the language in Gouger v. Hardtke, 167 Wis.2d 504, 512, 463 N.W.2d 882 (1992), where two classmates were involved in a mechanical shop class incident. Plaintiff threw a soapstone (metal marking chalk) at defendant hitting him in the head. Defendant retaliated and hit plaintiff in the eye. Plaintiff suffered vision impaired as a result and sued. The suit was not commenced until the statute of limitations had run on the intentional tort. Plaintiff alleged defendant's conduct in throwing the soapstone was negligent. Defendant's insurer had placed an "intentional acts" exclusion in its policy and argued defendant's act of throwing the soapstone was clearly intentional and therefore excluded from coverage under the policy. The trial court and the court of appeals agreed with the insurer, but the Supreme Court reversed, holding that

under these facts, intent could not be inferred as a matter of law; i.e., there was an issue of fact as to whether defendant's conduct was intentional or merely negligent. The Gouger decision also drew a distinction between the intent to hit and the intent to injure:

Significantly, the affidavit does not state that Hardtke was trying to or intended to injure Gouger; he merely intended to hit him. As explained above, the intent to hit does not translate automatically into an intent to injure.

167 Wis.2d at 516.