NOTICE TO THE BAR

RE: UPDATES TO MODEL CIVIL JURY CHARGES

Appended to this Notice are three new charges and two updated charges prepared by the Supreme Court Committee on Model Civil Jury Charges. The Administrative Office of the Courts has posted these charges on the Judiciary's Internet web site. The correction to charge 5.36E described below is also posted on the Judiciary's web site. The address for the web page is http://www.judiciary.state.nj.us/charges/civindx.htm.

1.11(I)	*Cell Phone, Pager and other Wireless Communication Devices (5/04)*; new Charge, after Charge 1.11(H).
4.25	*Motor Vehicle Lemon Law (5/03)*; new Charge, after Charge 4.24, *Lemon Law Verdict Sheet;* new Verdict Sheet, after Charge 4.25.
5.09	*Negligence — Gross (2/04);* new Charge, before Charge 5.10.
5.24B(2)	*Infant Trespasser – Defined and General Duty Owed (10/03);* supersedes Charge 5.24B(2), dated 3/00; *Infant Trespasser Jury Verdict Sheet;* new Verdict Sheet, after Charge 5.24B.
5.36E	*Erratum 5.36E -Medical Negligence — Pre-Existing Condition - Increased Risk/Loss of Chance – Proximate Cause* (approved 12/02; originally published 2/03). In the next to last jury charge paragraph that begins, "[f]or example, if the defendant claims . . ." the sentence concludes "then the defendant is only liable for that portion/ percentage of the injuries the defendant proves is related to the plaintiff's original condition." This final language is corrected to read, "then the defendant is only liable for that portion/ percentage of the injuries the defendant proves is related to the delay in treatment of the plaintiff's original condition."
6.11D(4)	*Damages – Personal Injuries — Loss of Earnings Where Plaintiff Has Received PIP Income Continuation Benefits* (Approved 12/88, Revised 2/04); supersedes Charge 6.11D(4), dated 12/88.

Any questions or comments regarding these model jury charges should be directed to:

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/s/ Richard J. Williams

Richard J. Williams, J.A.D.
Administrative Director of the Courts

Dated: August 31, 2004

1.11(I) Cell Phone, Pager and other Wireless Communication Devices (5/04)

If you have a cell phone, pager or other communication device, you must turn that device off while in the courtroom.

When serving on a trial, you must turn off cell phones and other communication devices and cannot use them for any purpose when in the courtroom or the jury room.

You will be given a telephone number at which you can be contacted during the trial.

Unless instructed otherwise by me, the trial judge, you can use those devices only when outside the courtroom or jury room during recesses.

4.25 MOTOR VEHICLE LEMON LAW (Approved 5/03)

The purpose of the so-called New Jersey "Lemon Law" is to protect buyers or lessees when they buy or lease a motor vehicle and the manufacturer cannot correct defects in the vehicle.

The lemon law does not apply to every defect in an automobile. It is not a guarantee against every defect. It applies to a defect that substantially impairs the use, value or safety of a vehicle.

To establish his/her claim under the Lemon Law, the plaintiff must prove by a preponderance of the credible evidence each of the following five elements of the claim. The elements are:

1. The plaintiff purchased/leased a vehicle manufactured by the defendant, *[insert the defendant's name]*;

2. The vehicle had nonconformity or nonconformities that is/are, a defect or defects that substantially impaired the use, value or safety of the vehicle.

To substantially impair, the defect or condition must impair the use, value or safety in an important, essential or significant way. When I use the term "substantial," I do not mean a defect, impairment or condition that is minor, trivial or unimportant.

In determining whether a defect or condition substantially impairs the use or value of the vehicle, you can consider whether the defects or conditions have shaken the plaintiff's confidence in the vehicle. If the defect has shaken the plaintiff's confidence in the vehicle, this loss of confidence may be the basis for you to find that the defect has impaired the vehicle's use or value. You must consider this from both a subjective and objective point of view.

From a subjective standpoint, the defects must be examined from the point of view of this particular plaintiff. From an objective standpoint, the defects that allegedly have shaken the plaintiff's confidence must be consistent with what a reasonable person in the plaintiff's position would have believed under the same or similar circumstances.

For example, in deciding whether a specific defect or condition substantially impairs the use or value of a vehicle, you may consider whether the specific defect or condition complained of, in fact caused the plaintiff to lose confidence in this vehicle. Even if you find that the plaintiff's confidence in the vehicle was shaken, you must also consider whether or not the specific defect or condition, if any, was such that a reasonable person would have lost confidence in the vehicle.

Judge's Note

> If the manufacturer raises either or both of the affirmative defenses set forth below, the following language would be appropriate. *N.J.S.A.* 56:12-40.

The manufacturer, in this case, has raised as a defense to the plaintiff's claim that the alleged nonconformity does not substantially impair the use, value or safety of the vehicle and/or that the nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of the vehicle by someone other than the manufacturer or its dealer. If you find the manufacturer has proven, by a preponderance of the evidence, that the alleged nonconformity does not substantially impair the use, value or safety of the vehicle and/or that the nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of the vehicle by someone other than the manufacturer or its dealer, then you must find that there is no nonconformity within the meaning of the "Lemon Law."

Judge's Note – Charge Continues

3. The non-conformity occurred during the first 18,000 miles of use, or within two years after the date of original delivery to plaintiff, whichever is earlier.

4. The plaintiff reported the non-conformity to the manufacturer or its dealer during the first 18,000 miles of use, or during the period of two years following the date of original delivery to the plaintiff, whichever is earlier.

5. *[Insert the defendant's name]* through its authorized dealers, did not

repair the non-conformity or non-conformities within a reasonable time.

Judge's Note

> The following language should be charged in those cases where it is alleged the conditions for the presumption have been met. Note, the two year term and two year period specified shall be extended by any period of time during which repair services were not available to the consumer because of war, invasion or strike, or a fire, flood, or other natural disaster. *N.J.S.A.* 56:12-33.

It is presumed that a manufacturer or its dealer is unable to repair or correct a non-conformity within a reasonable time if, within the first 18,000 miles of operation, or during the period of 2 years following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date:

(a) substantially the same non-conformity has been subject to repair three or more times by the manufacturer, or its dealer, and the nonconformity continued to exist; or

(b) the motor vehicle was out of service by reason of repair for one or more nonconformities for a cumulative total of 20 or more calendar days.

(c) since the original delivery of the motor vehicle and nonconformity continues to exist.

This presumption, however, shall only apply against the manufacturer, if the manufacturer has received written notification, by or on behalf of the plaintiff, by certified mail, return receipt requested, of a potential claim pursuant to this law and has had one opportunity to repair or correct the defect or condition within 10 calendar

days following receipt of the notification. The notification by the plaintiff shall take place any time after the motor vehicle has had substantially the same nonconformity subject to repair two or more times or has been out of service by reason of repair for a cumulative total of 20 or more calendar days.

Judge's Note - Charge Continues

If you find by a preponderance of the evidence that the plaintiff has proven all five elements, then you must find for the plaintiff on the Lemon Law claim.

But, if you find that the plaintiff has failed to establish all five elements, then you will find for the defendant.

Judge's Note

> In the event that there are factual disputes as to any of the damage elements of a "Lemon Law" claim, the court should provide damage instructions. *See, N.J.S.A.* 56:12-32 and 56:12-42.
>
> In the event the parties have stipulated the amount of damages, the language set forth below would outline for the jury the ultimate outcome. *DiVigenze v. Chrysler Corp.*, 345 *N.J. Super.* 314 (App. Div. 2001).

If then a plaintiff reports a nonconformity in a motor vehicle to the manufacturer or its dealer during the first 18,000 miles of operation, or during the period of two years following the date of the original delivery of the motor vehicle to the plaintiff, whichever is earlier, the manufacturer is required to make, arrangements with its dealer to make, within a reasonable period of time, all repairs necessary to correct the nonconformity.

If the manufacturer is unable to correct nonconformity within a reasonable time, the manufacturer shall accept return of the motor vehicle from the plaintiff. The manufacturer shall also provide the plaintiff with a full refund of the purchase/lease price and any other charges, fees and costs, less a reasonable allowance for the use of the motor vehicle, which shall be calculated by the court.[1]

1 In the event there are claims for breach of expressed warranty on the sale of goods, or breach of implied warranty of fitness for a particular purpose. *See,* Model Jury Charges No. 4.21 and 4.22, respectively.

LEMON LAW MODEL JURY VERDICT SHEET

1. Did the plaintiff prove that he/she purchased/leased a vehicle manufactured by the defendant?

YES _____ VOTE _____

NO _____ VOTE _____

If your answer is "yes", proceed to question 2.
If your answer is "no", stop your deliberations and return your verdict.

2. Did the plaintiff prove that the vehicle had nonconformity or nonconformities, which substantially impaired the use, value or safety of the vehicle?

YES _____ VOTE _____

NO _____ VOTE _____

If your answer is "yes", proceed to question 3.
If your answer is "no", stop your deliberations and return your verdict.

3. Did the plaintiff prove the non-conformity occurred during the first 18,000 miles of use or within 2 years after the date of original delivery to plaintiff, whichever is earlier?

YES _____ VOTE _____

NO _____ VOTE _____

If your answer is "yes", proceed to question 4.
If your answer is "no", stop your deliberations and return your verdict.

4. Did the plaintiff prove he/she reported the non-conformity to the manufacturer or its dealer during the first 18,000 miles of use or during the period of 2 years following the date of original delivery to the plaintiff, whichever is earlier?

YES _____ VOTE _____

NO _____ VOTE _____

If your answer is "yes", proceed to question 5.
If your answer is "no", stop your deliberations and return your verdict.

5. Did the plaintiff prove that the manufacturer, through its authorized dealers, did not repair the non-conformity or non-conformities within a reasonable time?

YES _____ VOTE _____

NO _____ VOTE _____

[Insert specific damage question, if appropriate.]

See, N.J.S.A. 56:12-32 and *N.J.S.A.* 56:12-42.

5.09 NEGLIGENCE — GROSS (Approved 2/04)

Introductory Note

Gross negligence is the want or absence of, failure to exercise slight care or diligence. *Draney v. Bachman*, 138 *N.J. Super.* 503, 509-510 (Law Div. 1976) quoting *Oliver v. Kantor*, 122 *N.J.L.* 528, 532 (Sup. Ct. 1939), *aff'd* 124, *N.J.L.* (E.&A. 1941).

The facts of a particular case may require examination of relevant case law or certain statutes which utilize the term gross negligence to decide if the court should charge gross negligence to the jury or the different concepts of willful and wanton or recklessness. In *Draney, supra* gross negligence was applied to a defendant driver who failed to prevent her car from running off the roadway thereby injuring the plaintiff passenger. In *Shick v. Ferolito*, 167 *N.J.* 7, 20 (2001) a plaintiff who was struck in the eye by a golf ball was required to prove "recklessness" to recover from the defendant who failed to announce his tee shot at a golf course.

The Legislature has extended liability immunity for certain classes of individuals and organizations engaged in government, public or beneficial services and activities. Liability immunity is often qualified and immunity often does not extend to acts or omissions that are grossly negligent. For example, *N.J.S.A.* 2A:53A-7.1b (volunteer officers of nonprofit organizations have no immunity from willful, wanton or grossly negligent acts of commission or omission), *N.J.S.A.* 2A:62A-6 (school and volunteer sports coaches and officials), *N.J.S.A.* 2A:62A-9 (persons who attempt to mitigate hazardous spills), *N.J.S.A.* 2A:62A-12 to 14 (condominium associations) and *N.J.S.A.* 2A:62A-15 (local emergency planning committees).

Gross negligence occurs on the continuum between ordinary negligence and intentional misconduct. The continuum runs from (1) ordinary negligence, through (2) gross negligence, (3) reckless misconduct , (4) willful and wanton misconduct to (5) intentional misconduct. The difference between negligence and gross negligence is a matter of degree. *Monaghan v. Holy Trinity Church*, 275 *N.J. Super*. 594, 599 (App. Div. 1994); *Stuyvesant Assoc. v. Doe*, 221 *N.J. Super.* 340, 344 (Law Div. 1987). Gross negligence does not imply willful or wanton misconduct or willfulness. *Stuyvesant Associates, supra*. "Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes." *G.S. v. Dept. Human Serv. DYFS*, 157 *N.J.*161, 179 (1999).

The Committee observes that gross negligence and willful and wanton misconduct are sometimes combined in qualified immunity statutes. For example, *N.J.S.A.* 62A-27c, states, "[t]his subsection (defibrillator use for emergency care) shall not immunize a person for any act of gross negligence or willful or wanton misconduct."

The terms are not equivalent and their meaning, within the context of a particular statute, must be analyzed to determine the minimal conduct that eliminates an immunity defense.

The punitive damages statute, *N.J.S.A.* 2A:15-5.10, defines "wanton and willful disregard" as a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.

The comparative negligence statute recognizes gross negligence as only different in degree from ordinary negligence. *Draney v. Bachman*, *supra.* Ordinary and gross negligence will generally only support a claim for compensatory damages, while willful and wanton misconduct will support punitive damages. *Edwards v. Our Lady of Lourdes Hospital*, 217 *N.J. Super.* 448, 462 (App. Div. 1987); *N.J.S.A.* 2A:15-5.12. Mere negligence, no matter how gross, will not suffice as a basis for punitive damages. *Smith v. Whitaker*, 160 *N.J.* 221 (1999) citing. *DiGiovanni v. Pessel*, 55 *N.J.* 188, 190 (1970); *Schick v. Ferolito*, 167 *N.J.* 7 (2001) (Verniero, J. concurring/dissenting opinion).

In defense to the plaintiff's claims, the defendant, *[insert the defendant's name]*, claims to have been acting within the course and scope of his/her duties as *[insert the defendant's claimed position and membership in an organization or governmental activity with qualified immunity from suit, e.g., compensated sports official, fire fighter, a member of a state professional board, an organization or entity deemed operating in the public interest]*.

If you find that the defendant, *[insert the defendant's name]*, was exercising or discharging a function associated with *[insert the appropriate organization or government activity]* and that the defendant was acting within the course and scope of his/her official duties, then in order to find for the plaintiff and impose liability upon the defendant, *[insert the defendant's name]*, you must determine that:

(1) The defendant *[insert the defendant's name]* was grossly negligent, as I will hereafter define the term; and

(2) The defendant's *[insert the defendant's name]* gross negligence was a cause of the plaintiff's loss.

To determine gross negligence you should consider what a reasonable person would or would not do under the same or similar circumstances as shown by the evidence.

Negligence is the failure to exercise ordinary or reasonable care; that is: what would be the conduct of an ordinarily prudent, careful person in the same or similar circumstances as the defendant found himself. The defendant's conduct is then measured against what an ordinarily prudent, careful person would have done or would have avoided doing.

In this case, the plaintiff must prove more than negligence. Plaintiff must prove gross negligence.

I will now define gross negligence for you. Gross negligence is an act or omission, which is more than ordinary negligence, but less than willful or intentional conduct. Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence.[2]

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[2] To aid the jury's grasp of this concept, the court may give examples of gross negligence that

To find gross negligence the facts as you find them at the time the defendant acted or failed to act must be such that the consequences of the defendant's conduct could reasonably have been foreseen. It must appear that the injury was not the result of inattention, mistaken judgment or the failure to exercise ordinary or reasonable care. Rather it must appear that the injury was the natural and probable result of the failure to exercise slight care or diligence.

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convey the notion that it (1) is the failure to exercise a slight degree of care, (2) is lack of even scant care, (3) implies the absence of care or indifference to others, (4) thoughtless disregard to the consequence that may follow from an act, (5) an act done with utter unconcern for the safety of others, or (6) an "omission of slight care that even an inattentive and thoughtless person never fails to take of their own concerns" *Capezzaro v. Winfrey*, 153 *N.J. Super*. 267 (App. Div. 1977) quoting *Dudley v. Camden and Phila. Ferry Co.*, 42 *N.J.L*. 25, 27 (Sup. Ct. 1880).

5.24(B)2 Infant Trespasser — Defined and General Duty Owed (10/03)

A trespasser is a person who enters or remains upon land in the possession of another person without a right to enter or remain on the property. A trespasser is one who is not invited, allowed, or privileged to be on another's property. The owner or occupier of property owes a duty to an adult trespasser only to refrain from acts, which would willfully injure the trespasser. This rule of law on the obligations of owners and occupiers of property towards adult trespassers is modified in the case of children trespassers.

Although a possessor of land generally is not required to keep his/her land safe for trespassers, an exception exists for those trespassers who are children. Because children may lack sufficient discretion for their own safety, a possessor of property, who maintains an artificial condition upon his/her property, will be liable for physical harm to a child trespassing on his/her property caused by the artificial condition if:

(a) the possessor of the property knows or has reason to know children are likely to trespass in the place where the condition exists, and

(b) the possessor of the property knows or has reason to know and realizes or should realize that the condition involves an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth either
    (1) do not discover the condition, or
    (2) do not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or

(3) do not realize the risk involved in intermeddling with the condition, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved, and

(e) the possessor of the property fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

In order for the defendant to be held liable for the plaintiff's injuries, the plaintiff must prove each and every one of these five elements.

Cases:

Restatement of Torts, 2d, §§339, p. 197 (1965); Ostroski v. Mount Propect Shoprite, Inc., 94 N.J.Super. 374 (App. Div. 1967), certif. denied, 49 N.J. 369 (1967); Scheffer v. Braverman, 89 N.J.Super. 452 (App. Div. 1965); Turpan v. Merriman, 57 N.J.Super. 590 (App. Div. 1959), certif. denied, 31 N.J. 549 (1960); Coughlin v. U.S. Tool Co., Inc., 52 N.J.Super. 341 (App. Div. 1958), certif. denied, 28 N.J. 527 (1959); Vega by Muniz v. Piedilato, 154 N.J. 496 (1998).

In this case the plaintiff has alleged that he/she was injured as a result of *[describe the artificial condition]*. I will now discuss each of these five elements with you as they relate to that ~~artificial~~ condition.

(a) the possessor of the property knows or has reason to know children are likely to trespass in the place where the condition exists,

If you find the landowner or occupant has no reason to anticipate the presence of children at a place of danger on his/her land, he/she has no duty to look out for children and no liability for injuries sustained by children trespassing at such place of danger.

When I say the plaintiff must prove the possessor of land "knows" or "has reason to know" children are likely to trespass at a place of danger on his/her land, I mean the law charges a defendant with information from which a person of reasonable intelligence would infer that children are likely to trespass on the property and would govern his/her conduct upon the assumption that they would.

Cases:

Long v. Sutherland-Backer Co., 48 N.J. 134 (1966), reversing 92 N.J.Super. 556 (App. Div. 1966); Callahan v. Dearborn Developments, Inc., 57 N.J.Super. 437 (App. Div. 1959), aff'd, 32 N.J. 27 (1960); Hoff v. Natural Refining Products Co., 38 N.J. Super. 222 (App. Div. 1955); Restatement of Torts 2d, §§339, Comment g., p. 201 (1965).

(b) the possessor of the property knows or has reason to know and realizes or should realize that the condition involves an unreasonable risk of death or serious bodily harm to such children,

When I say the plaintiff must prove the possessor of land "knows" or "has reason to know" that the condition involves an unreasonable risk of death or bodily harm, I mean the law charges a defendant with information from which a person of reasonable intelligence would infer that the condition involves an unreasonable risk of

death or bodily harm and would govern his/her conduct upon the assumption that the condition is likely to be dangerous to trespassing children.

Citation:

Restatement of Torts 2d, §§339, Comment h, p. 201 (1965)

(c) the children because of their youth either
- **(1) do not discover the condition, or**
- **(2) do not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or**
- **(3) do not realize the risk involved in intermeddling with the condition,**

In determining whether a child because of his or her youth either did not discover the condition, or did not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or did not realize the risk involved in intermeddling with the condition, you are to determine whether the child's state of mind at the time of the accident was such that either he/she did not discover the condition, or he/she did not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or he/she did not realize the risk involved in intermeddling with the condition.

If you find that the child, regardless of his/her age, did in fact discover the condition and realize the risk and appreciate the danger involved, and still proceeded

despite knowledge and appreciation of the danger, he/she cannot recover for his/her injuries. The purpose of the duty placed upon the possessor of property is to protect children from dangers, which they do not appreciate, but not to protect them against harm resulting from their own immature recklessness in the case of dangers, which they know and appreciate. Therefore, even though the possessor of land should know that the condition is one that children are unlikely to appreciate the full extent of the danger of meddling with it or encountering it, the possessor of land is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but nonetheless chooses to encounter it out of recklessness or bravado.

Citation:

Vega by Muniz v. Piedilato, 154 *N.J.* 496, 506 (1998); *Restatement of Torts 2d, §§339, Comment i, p. 202 (1965); Ostroski v. Mount Prospect Shoprite, Inc., 94 N.J. Super. 374 (App. Div. 1967), cert. denied, 49 N.J. 369 (1967).*

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved,

In determining whether a particular condition maintained by a possessor of land, involves an unreasonable risk to trespassing children, you must compare the recognizable risk to the children, with the usefulness to the possessor of land in maintaining the condition. A particular condition is, therefore, regarded as not

involving an unreasonable risk to trespassing children unless it involves a risk of serious bodily harm to the children, which could be removed without any serious interference with the possessor's legitimate use of his land.

Citation:

Restatement of Torts 2d, §§339, Comment n, p. 205 (1965)

(e) the possessor of the property fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

The possessor of land is liable to the trespassing child only if he/she has failed to conform to the standard of care of a reasonable person in the same or similar circumstances.

Even if you find the possessor of land knew or had reason to know that children were likely to trespass on the property, and that the condition on the land involved an unreasonable risk of harm to the trespassing children, and even if you find the children were not likely to discover or appreciate the risk, the possessor of land is liable only if you find he/she failed to take such steps as a reasonable person would have taken to make the condition safe or to protect the children.

If you find that the possessor of land took the same care that a reasonable person in the same or similar circumstances would take to make the condition safe or

protect the children which he/she had reason to know would trespass on the property, then the possessor of property is not liable even though an injury has occurred to the trespassing child.

Citation:

Restatement of Torts 2d, §§339, Comment o, p. 206 (1965)

Judge's Note:

For definitions of trespasser, licensee and invitee, see Model Charges 5.24B1, 3 and 5: *Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959)*. Prior use of area by children is not sufficient to warrant a finding of licensee. *Ostroski v. Mount Prospect Shoprite, Inc., supra, 94 N.J.Super, at 382*. However, continued toleration of trespass and acquiescence therein may amount to permission or implied leave and license. *Imre v. Riegel Paper Corp., 24 N.J. 438, 446 (1957)*.

As to infant trespassers on railroad property, see *Egan v. Erie R. Co., 29 N.J. 243 (1959)* and *N.J.S.A. 48:12-152*. This statute absolves a railroad company from the duty to a trespasser, including an infant trespasser. Although in *Egan v. Erie R. Co., supra, 29 N.J. at 254*, the court held that the statute does not preclude recovery for injuries caused by a railroad's willful or wanton conduct, the failure to have watchmen present to protect infant trespassers is not wanton misconduct as a matter of law.

[Warning of Condition, Where Appropriate Add:]

In dealing with the obligation of the possessor to use reasonable care to eliminate the danger or otherwise protect an infant trespasser, you may consider whether a warning would have been sufficient. In a particular situation, a warning

may be sufficient, and if you find that the possessor gave such a warning, but that warning was disregarded by the child, you may find for the defendant. In that connection, you must also determine whether the child was mature enough to understand the full nature and scope of the warning and danger involved. Only if you find that the child was capable of understanding the warning and danger involved may you find for the defendant in this regard. If, however, you find that the child was too young to understand or heed the warning, or that the warning was not sufficient, a possessor may not relieve himself/herself from liability simply by giving such warning.

Citation:

Restatement of Torts 2d, §§339, Comment o, p. 206 (1965).

[Artificial Condition, Where Appropriate Add:]

A landowner or occupant is responsible for harm caused by artificial conditions upon his or her land.

Conversely, a landowner or possessor is not responsible for harm caused by a natural condition upon the land, even if you find the natural condition of the property was a proximate cause of the accident and the minor plaintiff's injuries.

Case:

Ostroski v. Mount Prospect Shoprite, Inc., supra, 94 N.J.Super. 374 at 380 (App. Div. 1967).

[Creation of Condition, Where Appropriate Add:]

In order for you to find the defendant liable it is not necessary that he/she be the person who created the condition, which caused the plaintiff's injuries. You may find defendant liable even though the condition was created by some third person, provided you find the defendant had actual knowledge of the condition and should have foreseen the condition would create an unreasonable risk of harm to children entering the property. However, the landowner has no obligation to make regular inspections upon his/her property for dangers created by others.

Cases:

Caliguire v. City of Union City, 104 N.J.Super. 210 (App. Div. 1967), aff'd, 53 N.J. 182 (1969); Simmel v. N.J. Coop Co., 28 N.J. 1, 11 (1958); Lorusso v. DeCarlo, 48 N.J.Super. 112 (App. Div. 1957).

Comparative Negligence Of Trespassing Child

In this case, the defendant claims the minor plaintiff was negligent, in other words, that the minor plaintiff failed to exercise that degree of care or caution for his or her own safety that you would expect of a reasonable child of the same age.

In order to decide whether or not the minor plaintiff was negligent, you must consider the child's actions or inactions by an evaluating whether or not the child

failed to exercise that degree of care for his or her own safety which a person of the same age would have exercised under the same or similar circumstances.

A. In General (7 years and older)

A child, old enough to be capable of negligence, is required to act with the same amount of care as children of similar age, judgment and experience. In order for you to determine whether a child has acted negligently, you should take into consideration the child's age, intelligence and experiences. Also, you must consider the child's capacity to understand and avoid the danger to which he/she was exposed in the actual circumstances and situation in this case. You, the jury, must decide the factual question of whether this child was comparatively negligent.

B. Where Child Under 7 Years

There is a presumption in the law that a child under the age of seven years is not capable of acting negligently. You may reject this presumption only if the party who is claiming the child was negligent, proves that this particular child had the experience and the capacity to avoid the danger, which was present in this situation.

If you decided that this child had the capacity to act negligently, then you must review the facts to see if the child failed to use that amount of care to avoid the

danger, which should have been exercised by children with like experiences and intelligence.

If you find that the minor plaintiff deviated from this standard of care, then you will find that the minor plaintiff was also negligent, and you will then consider whether or not the negligence of the minor trespassing plaintiff was a proximate cause of the accident and the injuries, which you find were caused by the accident.

Note:

Paragraph "A" and "B" are taken from Model Jury Instruction 8.11. Please refer to Note 8:11.

The Supreme Court in *Vega by Muniz v. Piedilato, 154 N.J. 496, 506 (1998)*, citing with approval *Colls v. City of Chicago, 212 Ill.App. 3d 904, 571 N.E.2d 951 (1991)*, held that a comparative negligence charge in a trespassing child case was proper.

The Court held that in determining whether an infant plaintiff has met his/her burden on element c of the *prima facie* case the jury is to use a subjective standard in evaluating the plaintiff's state of mind. If the jury concludes that the defendant is negligent, the jury must then determine whether the infant plaintiff is negligent under an objective evaluation of whether he or she failed to use that degree of care which persons of the same age should exercise for their own safety in the same or similar circumstances.

INFANT TRESPASSER JURY VERDICT SHEET

1. Did the Plaintiff prove that the Defendant knew or had reason to know that children were likely to trespass on his/her property?

YES _____ NO _____

If your answer is "YES", proceed to question 2. If your Answer is No, cease deliberations.

2. Did the Plaintiff prove that the Defendant knew or had reason to know that (describe dangerous condition) involved an unreasonable risk of death or serious bodily harm to children trespassing on his/her property?

YES _____ NO _____

If your answer is "YES", proceed to question 3. If your Answer is No, cease deliberations.

3. Did the plaintiff prove that because of the child's youth either he/she

(A) did not discover the condition, or
(B) did not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or
(C) did not realize the risk involved in intermeddling with the condition?

If your answer to any one of the three subparts of question 3 is "YES", then your answer to question 3 is YES. If your answer to all subparts is "NO", then your answer to question 3 is NO.

YES _____ NO _____

If your answer is YES, proceed to question 4. If your Answer is No, cease deliberations.

4. Did the plaintiff prove that the usefulness to the defendant of maintaining the condition and the burden of eliminating its danger were slight as compared with its risk of death or serious bodily harm to the Plaintiff?

YES _____ NO _____

If your answer is “YES”, proceed to question 5. If your Answer is No, cease deliberations.

5. Did the Plaintiff prove that the Defendant failed to exercise reasonable care to eliminate the danger of the condition or otherwise protect the trespassing children from the danger of the condition?

YES _____ NO _____

If your answer is “YES”, proceed to question 6. If your answer is No, cease deliberations.

6. Did the Plaintiff prove that the Defendant’s negligence was a proximate cause of the plaintiff’s injuries?

YES _____ NO _____

If your answer is “YES”, proceed to question 7. If your Answer is No, cease deliberations.

7. Did the Defendant prove that the Plaintiff failed to exercise that degree of care or caution for his/her own safety that you would expect of a reasonable child of the same age as Plaintiff?

YES _____ NO _____

If your answer is “YES”, proceed to question 8. If your Answer is No, proceed to question 10.

8. Did the Defendant prove that the Plaintiff's negligence was a proximate cause of the plaintiff's injuries?

YES _____ NO _____

If your answer is "YES", proceed to question 9. If your Answer is No, proceed to question 10.

9. By answering questions 5, 6, 7 and 8 "YES" you have found both the Plaintiff and Defendant negligent and that their negligent conduct proximately caused the accident. Taking the combined negligence of both Plaintiff and Defendant which caused this accident as being 100%, what percentage of such total negligence is attributable to:

Defendant	_____
Plaintiff	_____
Total	100%

10. What sum of money will fairly and reasonably compensate the Plaintiff for damages sustained as a proximate result of this accident?

$_____

6.11(D)4. Loss of Earnings Where Plaintiff Has Received P.I.P. Income Continuation Benefits (Approved 12/88, Revised 2/04)

This charge is deleted in its entirety. While *Ruff v. Weintraub*, 105 *N.J.* 233, 242 (1987) requires all wage losses to be determined by the jury on a "net" basis rather than "gross" wages, *N.J.S.A.* 39:6A-12 bars the admission of PIP benefits, wage losses or medical expenses into evidence. *See, Clifford v. Opdyke*, 156 *N.J. Super*. 208, 213 (App. Div. 1978).

Note that *N.J.S.A.* 39:6A-12 bars admission of wage loss benefits into evidence whether they are "paid" or just "collectible."

In practice, the jury should determine plaintiff's "net" wage loss after taxes are deducted from "gross" income, and counsel should disclose to the Court if the plaintiff was covered by a policy of insurance that would provide PIP wage loss benefits. The Court would then mold the jury's verdict to credit defendant with $100 for each week that the jury found plaintiff lost wages. Unless the plaintiff purchased supplemental, increased PIP coverages, the maximum credit would be $5,200. *N.J.S.A.* 39:6A-4.

These benefits would be treated similar to other "collateral sources." *See Adamson v. Chiavaro*, 308 *N.J. Super*. 70, 78-81 (App. Div. 1998) (New York PIP policy).