

14.00

Willful and Wanton Conduct

14.01 Willful and Wanton Conduct--Definition

When I use the expression “willful and wanton conduct” I mean a course of action which [shows actual or deliberate intention to harm] [or which, if not intentional,] [shows an utter indifference to or conscious disregard for (a person's own safety) (and) (the safety of others)].

Notes on Use

This instruction is to be given when an accompanying instruction has indicated the consequences of a finding of willful and wanton conduct in the given case. The first bracketed phrase should be used only when a deliberate intention to harm is alleged and is supported by evidence sufficient to make a submissible case. As to the distinction between willful and wanton conduct involving a deliberate intent to harm and “reckless” willful and wanton conduct, see *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994) (contribution case) and *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995).

If there is no issue as to the plaintiff's contributory fault, then there may be no need for a jury to determine which form of willful and wanton conduct was committed by the defendant. However, as the *Poole* decision emphasizes, if there is a submissible claim concerning the plaintiff's contributory fault, and if the jury finds the defendant's conduct to have been willful and wanton, there may need to be a jury finding (either on the verdict form or in a special interrogatory) as to whether the defendant's willful and wanton conduct was the “intentional” kind or the “reckless” kind.

Comment

This definition of willful and wanton conduct was approved in *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992), in *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994) (contribution case) and in *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995). A similar definition of willful and wanton conduct is found in §1-210 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-210).

Prior to the adoption of comparative negligence, defendant's willful and wanton conduct negated the defense of contributory negligence. *Green v. Keenan*, 10 Ill.App.2d 53, 60; 134 N.E.2d 115, 118 (2d Dist.1956). *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's negligence cannot be compared to a defendant's “intentional” willful and wanton conduct to reduce the amount of damages recoverable by the plaintiff, but it can be a damage-reducing factor if the defendant's willful and wanton conduct is “reckless.” Although an intentional tortfeasor cannot obtain contribution (*Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 206; 538 N.E.2d 530, 542; 131 Ill.Dec. 155, 167 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989)), *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994), held that a tortfeasor whose willful and wanton conduct is “reckless” but not “intentional” may seek contribution.

In addition to its importance in the determination of comparative fault, the doctrine of willful and wanton conduct is also important with respect to other legal issues:

1. As a basis for punitive damages. *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 150 Ill.Dec. 510 (1990); *Dunn v. Illinois Central Gulf R. Co.*, 215 Ill.App.3d 190, 574 N.E.2d 902, 158 Ill.Dec. 789 (4th Dist.1991).

2. When the plaintiff is a guest passenger in the defendant's automobile, 625 ILCS 5/10-201 (now limited to illegal hitchhikers).

3. When the plaintiff is a trespasser and the defendant is the owner or occupier of the premises. *Rodriguez v. Norfolk & W. Ry. Co.*, 228 Ill.App.3d 1024, 593 N.E.2d 597, 170 Ill.Dec. 708 (1st Dist.1992); *Miller v. General Motors Corp.*, 207 Ill.App.3d 148, 565 N.E.2d 687, 152 Ill.Dec. 154 (4th Dist.1990); *Eaton v. Baltimore & Ohio R. Co.*, 198 Ill.App.3d 137, 555 N.E.2d 790, 144 Ill.Dec. 431 (4th Dist.1990); *Harkins v. System Parking, Inc.*, 186 Ill.App.3d 869, 542 N.E.2d 921, 923; 134 Ill.Dec. 575, 577 (1st Dist.1989); *Sumner v. Hebenstreit*, 167 Ill.App.3d 881, 522 N.E.2d 343, 118 Ill.Dec. 888 (5th Dist.1988). See also *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 605 N.E.2d 493, 498; 178 Ill.Dec. 699, 704 (1992) (dictum, stating rule); 740 ILCS 130/3.

4. When the defendant's liability is limited by statute to cases where defendant's conduct is willful and wanton. See, e.g., 50 ILCS 750/15.1; 70 ILCS 605/4-40; 70 ILCS 3605/45; 210 ILCS 50/17; 225 ILCS 25/53, 25/54, 65/5, 90/35, 100/4, 115/21; 415 ILCS 5/4(r), 5/22.2(j) (3); 625 ILCS 5/10-201; 740 ILCS 75/1; 745 ILCS 10/2-202, 10/3-106, 109, 10/4-105, 10/5-103, 106, 20/1, 50/3, 50/4, 55/3, 75/2; 805 ILCS 105/108.70; 815 ILCS 645/14; 820 ILCS 225/5.1.

14.02 Contributory Willful And Wanton Conduct--Definition

When I use the expression “contributory willful and wanton conduct,” I mean willful and wanton conduct on the part of the plaintiff that proximately contributed to cause the [alleged] [injury] [death] [property damage].

Notes on Use

This instruction should be given only when IPI B14.03 is not used. If IPI B14.03 is given, do not use this instruction; it is incorporated in IPI B14.03.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

B14.03 Duty To Refrain From Willful And Wanton Conduct--Plaintiff

[1]. It was the duty of the plaintiff [under Count ___ of the complaint], before and at the time of the occurrence, to refrain from willful and wanton conduct that would endanger [his person] [and] [his property]. A plaintiff is contributorily willful and wanton if (1) his conduct is willful and wanton, and (2) such willful and wanton conduct is a proximate cause of the [alleged] [injury] [death] [property damage].

[Alternative 1]

[2]. [The plaintiff's contributory willful and wanton conduct, if any, which is 50% or less of the total proximate cause of the injury or damages for which recovery is sought, does not bar his recovery. However, the total amount of damages to which he would otherwise be entitled is reduced in proportion to the amount of his willful and wanton conduct. This is known as comparative fault.]

[3]. [If the plaintiff's contributory willful and wanton conduct is more than 50% of the total proximate cause of the injury or damages for which recovery is sought, it bars plaintiff's recovery and your verdict shall be for the defendant(s).]

[Alternative 2]

[4]. [The plaintiff's contributory willful and wanton conduct, if any, bars his recovery, and your verdict shall be for the defendant(s).]

Notes on Use

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Since the adoption of comparative fault, no Illinois case has yet decided the effect of a plaintiff's contributory willful and wanton conduct. If the trial court rules that the plaintiff's contributory willful and wanton conduct may be a damage reducing factor, paragraph [2] of this instruction should be used. If the trial court determines that the plaintiff's contributory willful and wanton conduct may be a complete bar to the plaintiff's recovery, paragraph [3] of this instruction should be used.

If there was either property damage or personal injury, but not both, omit the inapplicable bracketed material.

If this instruction is given, also give IPI 14.01 defining "willful and wanton conduct."

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

14.04 Duty To Refrain From Willful And Wanton Conduct--Defendant

It was the duty of the defendant [under Count _____ of the complaint], before and at the time of the occurrence, to refrain from willful and wanton conduct which would endanger the safety of the [plaintiff] [decedent] [and] [his property].

Notes on Use

If there are counts in the complaint charging both willful and wanton conduct and ordinary negligence, the number of the count charging willful and wanton conduct should be indicated by use of the first bracketed phrase.

If there was either property damage or personal injury, but not both, omit the inapplicable bracketed material.

The instruction should be used in conjunction with IPI 14.01 defining “willful and wanton conduct.”

Comment

A similar instruction was approved in *Kitten v. Stodden*, 76 Ill.App.2d 177, 185; 221 N.E.2d 511, 515 (5th Dist.1966).