

# 66 From the Committee on Model Civil Jury Instructions

The Committee has adopted the following amended and new model civil jury instructions and deleted an additional instruction effective November 17, 2015.

## ADOPTED AND DELETED

### M Civ JI 19.07

#### Duty of Possessor of Land, Premises, or Place of Business to Trespasser

[Because plaintiff was a trespasser on defendant's [land/premises/place of business]]/If you find that plaintiff was a trespasser on defendant's [land/premises/place of business], then defendant had a duty to plaintiff only if you find that one or more of the following circumstances existed:

1. Defendant injured the plaintiff by willful and wanton misconduct, or
2. Defendant was aware or in the exercise of ordinary care should have known, of plaintiff's presence on the [land/premises/place of business], but [he/she/it] failed to use ordinary care to prevent injury to plaintiff arising from defendant's active negligence, or
3. Defendant knew, or should have known from facts within [his/her/its] knowledge, that trespassers constantly intrude on a limited area of [his/her/its] [land/premises/place of business] and plaintiff was harmed because:
  - a. Defendant carried on an activity in that limited area,
  - b. that involved a risk of death or serious bodily harm, and
  - c. [he/she/it] failed to use reasonable care for the trespasser's safety.

If you find that one or more of these circumstances existed, then defendant had a duty to exercise reasonable care to put the land in a condition reasonably safe for plaintiff or to carry on activities on the land so as not to endanger trespassers.

#### Notes on Use

If there is a factual question as to the legal status of the plaintiff as invitee, licensee, or trespasser, M Civ JI 19.01 should be given.

M Civ JI 19.01 defines "trespasser"; M Civ JI 14.11 defines "wanton misconduct"; 14.12 defines "willful misconduct."

"Active negligence" is not yet defined in MCL 554.583(2)(b) and since this statute has not yet been subject to judicial interpretation, the committee is not providing a definition.

This instruction may apply to a child trespasser who claims injury due to a non-artificial condition. See M Civ JI 19.07A.

This instruction does not affect the applicability of any instructions for immunities or defenses to which the defendant-possessor is otherwise entitled under statute or common law. See MCL 554.583(3).

#### Comment

See *Blakeley v White Star Line*, 154 Mich 635; 118 NW 482 (1908); MCL 554.583.

#### History

M Civ JI 19.07 was added January 1982. Amended November 2015.

### M Civ JI 19.07A

#### Duty of Possessor of Land, Premises, or Place of Business to Child Trespasser for Artificial Conditions

[Because plaintiff was a child trespasser/ If you find that plaintiff was a child trespasser], defendant had a duty to plaintiff only if you find that all of the following circumstances exist:

1. Plaintiff was injured by an artificial condition on defendant's [land/premises/place of business],
2. Defendant knew or had reason to know that a child would be likely to trespass on the place where the condition existed,
3. Defendant knew or had reason to know about the condition and realized or should have realized that it would involve an unreasonable risk of death or serious bodily harm to a child,
4. Plaintiff, because of [his/her] youth, did not discover the condition or realize the risk involved in meddling with it or coming within the area made dangerous by it,
5. The usefulness to defendant of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child, and
6. Defendant failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

If you find that all of these circumstances existed, then defendant had a duty to exercise reasonable care to put the land in a condition reasonably safe for plaintiff or to carry on activities on the land so as not to endanger child trespassers.

#### Notes on Use

If a child trespasser does not claim injury due to an artificial condition, then M Civ JI 19.07A is inapplicable. In such a case, M Civ JI 19.07 may be given.

This instruction does not affect the applicability of any instructions for immunities or defenses to which the defendant-possessor is otherwise entitled under statute or common law. See MCL 554.583(3).

M Civ JI 19.01 defines "trespasser."

#### History

Added November 2015.

### [DELETED] M Civ JI 19.08

#### Duty of Possessor of Land, Premises, or Place of Business to Trespasser Whose Presence is Known or Should Have Been Known to Possessor

This instruction was deleted because it was subsumed in the amended M Civ JI 19.07.

#### History

M Civ JI 19.08 was added January 1982. Deleted November 2015.

The Committee has adopted the following amended model civil jury instructions and modified Note on Use effective November 17, 2015.

## ADOPTED

### M Civ JI 97.12

#### Jury Must Only Consider Evidence; What Evidence Is; Prohibited Actions by Jurors

- (1) When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of the witnesses; the exhibits, such as documents or other things which I admit into

evidence; and anything else I tell you to consider as evidence.

\*(It may also include some things which I specifically tell you to consider as evidence.)

(2) There are some things presented in the trial that are not evidence, and I will now explain what is not evidence:

(a) The lawyers' statements, commentaries, and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. However, an admission of a fact by a lawyer is binding on [his/her] client.

(b) Questions by the lawyers, you, or me to the witnesses are not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(c) My comments, rulings, [summary of the evidence,] and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(3) In addition, you are not to consider anything about the case from outside of the courtroom as it is not evidence admitted during the trial. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside of the courtroom does not have to meet these standards, it could give you incorrect or misleading information that might unfairly favor one side, or you may begin to improperly form an opinion on information that has not been admitted. This would compromise the parties' right to have a verdict rendered only by the jurors and based only on the evidence you hear and see in the courtroom. So, to be fair to both sides, you must follow these instructions. I will now

describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, e-mails, blogs and social media posts, and commentary about this case are not evidence. Until I discharge you as jurors, do not search for, read, listen to, or watch any such information about this case from any source, in any form whatsoever.

(b) Opinions of people outside of the trial are not evidence. You are not to discuss or share information, or answer questions, about this case at all in any manner with anyone—this includes family, friends, or even strangers—until you have been discharged as a juror. Don't allow anyone to say anything to you or say anything about this case in your presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(c) Research, investigations, and experiments not admitted in the courtroom are not evidence. You must not do any investigations on your own or conduct any research or experiments of any kind. You may not research or investigate through the Internet or otherwise any evidence, testimony, or information related to this case, including about a party, a witness, an attorney, a court officer, or any topics raised in the case.

(d) Except as otherwise admitted in trial, the scene is not evidence. You must not visit the scene of the occurrence that is the subject of this trial. If it should become necessary that you view or visit the scene, you will be taken as a group. You must not consider as evidence any personal knowledge you have of the scene.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone, or any other electronic device capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.

(b) Until I have discharged you as a juror, you must not talk to any party, lawyer,

or witness even if your conversation has nothing to do with this case. This is to avoid even the appearance of impropriety.

(5) If you discover that any juror has violated any of my instructions about prohibited conduct, you must report it to me.

(6) After you are discharged as a juror, you may talk to anyone you wish about the case. Until that time, you must control your natural desire to discuss the case outside of what I've said is permitted.

## History

M Civ JI 97.12 was added March 2005. Amended November 2015.

## M Civ JI 97.16 Questions by Jurors Allowed

(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.

(2) You should wait to ask questions until after a witness has finished testifying. If you still have an important question after all of the lawyers have finished asking their questions, don't ask it yourself. Instead, raise your hand, write the question down, and pass it to the bailiff. [He/she] will give it to me. Do not show the question to the other jurors, or announce what the question is.

(3) There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or I will not ask it at all.

## Note on Use

Allowing jurors to ask questions is optional.

## History

M Civ JI 97.16 was added March 2005. Amended November 2015.

## M Civ JI 97.19 Jurors Not to Discuss Case

(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in

# 68 From the Committee on Model Civil Jury Instructions

the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

(2) [Alternative A] (Before you are sent to the jury room to decide the case, you may discuss the case among yourselves during recesses in the trial, but there are strict rules that must be followed:

First, you may only discuss the case when (a) all of you are together, (b) you are all in the jury room, and (c) no one else is present in the jury room. You must not discuss the case under any other circumstances. The reason you may not discuss the case with other jurors while some of you are not present is that all of you are entitled to participate in all of the discussions about the case.

Second, as I stated before, you must keep an open mind until I send you to the jury room to decide the case. Your discussions before then are only tentative.

Third, you do not have to discuss the case during the trial. But if you choose to do so, you must follow the rules I have given you.)

[Alternative B] (Before you are sent to the jury room to decide the case, you are not to discuss the case even with the other members of the jury. This is to ensure that all of you are able to participate in all of the discussions about the case, and so that you do not begin to express opinions about the case until it has been submitted to you for deliberation.)

## Note on Use

The court will choose between Alternative A or B in paragraph 2 based on the court's decision whether to permit the jurors to discuss the evidence among themselves during trial recesses.

## History

M Civ JI 97.19 was added March 2005. Amended November 2015.

## M Civ JI 97.23

### Notetaking by Jurors Allowed

You may take notes during the trial if you wish, but of course, you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide on your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone see them. After you have begun your deliberations, it is then permissible to allow other jurors to see your notes. You must turn them over to the [bailiff/clerk] during recesses. If you do take notes, please write your name on the first page. The notes will be destroyed at the end of trial.

## History

M Civ JI 97.23 was added March 2005. Amended November 2015.

## M Civ JI 97.32

### Evidence

(1) When you discuss the case and decide on your verdict, you may only consider the evidence that has been properly admitted in this case. Therefore, it is important for you to understand what is evidence and what is not evidence.

(2) The evidence in this case includes only the sworn testimony of witnesses (the exhibits which I admitted into evidence, and anything else I told you to consider as evidence).

(3) Many things are not evidence and you must be careful not to consider them as evidence. I will now describe some of the things that are not evidence.

(4) The fact that a petition was filed alleging that the Court has jurisdiction over [Children's names], and that [he/she/they] [was/were] placed in foster care pending this hearing, and that [Mother's, Father's, Guardian's, Nonparent Adult's or Custodian's names] [is/are] present in court today is not evidence.

(5) The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and the theory of each party. The questions which the lawyers ask witnesses are also not evidence. You should consider these

questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

(6) My comments, rulings, questions, and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence.

(7) At times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else.

(8) Your decision should be based on all of the evidence regardless of which party produced it.

(9) You should use your own common sense and general knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, person or event. To repeat once more, you must decide this case based only on the evidence admitted during the trial.

## Note on Use

The reference in Subsection 4 to foster care should only be used if the fact the child is in foster care is made known to the jury. Subsection 7 should only be given when warranted.

## History

M Civ JI 97.32 was added March 2005.

## M Civ JI 97.46

### Deliberations and Verdict

(1) You will be given a written copy of the final jury instructions for your use in the jury room for deliberation. [I will also provide you with an electronically recorded copy of these instructions.]

(2) When you go to the jury room, you should first choose a foreperson. [He/she] should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

(3) When at least five of you agree upon a verdict, it will be received as the jury's verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of at least five of you.

(4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

(5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

(6) During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

(7) During your deliberations you may not communicate with persons outside the jury room (other than the judge), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available

through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

### History

M Civ JI 97.46 was added March 2005. Amended November 2015.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of

Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

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