

## CHAPTER 11

### MOTOR VEHICLES AND HIGHWAY TRAFFIC

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## A. DUTY OF CARE

### 11:1 DUTY TO MAINTAIN LOOKOUT

**A driver must maintain a proper lookout to see what that driver could and should have seen in the exercise of reasonable care.**

#### Notes on Use

1. When this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.

2. The giving of this instruction does not preclude giving Instruction 9:13. **Horton v. Mondragon**, 705 P.2d 977 (Colo. App. 1984).

#### Source and Authority

This instruction is supported by **Clibon v. Wayman**, 137 Colo. 495, 327 P.2d 283 (1958); **Union Pacific Railroad v. Cogburn**, 136 Colo. 184, 315 P.2d 209 (1957); **Ridenour v. Diffe**, 133 Colo. 467, 297 P.2d 280 (1956); **Werner v. Schrader**, 127 Colo. 523, 258 P.2d 766 (1953); and **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993). *See also* RESTATEMENT (SECOND) OF TORTS § 289 cmts. d, e (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 182 (5th ed. 1984).

## 11:2 DUTY OF CARE OF DRIVER HAVING RIGHT OF WAY

**Although a driver may have the right of way, the driver must exercise reasonable care considering the existing conditions.**

### Notes on Use

When this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.

### Source and Authority

1. This instruction is supported by **Hansen v. Dillon**, 156 Colo. 396, 400 P.2d 201 (1965); **Bennett v. Hall**, 132 Colo. 419, 290 P.2d 241 (1955); **Denver Equipment Co. v. Newell**, 115 Colo. 23, 169 P.2d 174 (1946); **Stocker v. Newcomb**, 91 Colo. 479, 15 P.2d 975 (1932); **Parker v. Ullom**, 84 Colo. 433, 271 P. 187 (1928); and **Kepley v. Kim**, 843 P.2d 133 (Colo. App. 1992).

2. The statutory provisions governing the rights of way between or among vehicles are sections 42-4-701 to -713, C.R.S.

### **11:3 DUTY OF CARE OF PEDESTRIAN OR BICYCLE OPERATOR HAVING RIGHT OF WAY**

**Although a (pedestrian) (bicycle operator) may have the right of way, the (pedestrian) (bicycle operator) must exercise reasonable care considering the existing conditions.**

#### **Notes on Use**

1. Use whichever parenthesized words or phrases are appropriate.
2. When this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.

#### **Source and Authority**

1. This instruction is supported by implication by the cases cited in the Source and Authority to Instruction 11:2.
2. It is also supported by the statutes governing the conduct of pedestrians, §§ 42-4-801 to -803; § 42-4-805, C.R.S., and bicyclists, § 42-4-1412, C.R.S.
3. “[A] pedestrian is ‘a person who travels on foot’ or ‘one walking as distinguished from one traveling by car or cycle.’” **Francen v. Colo. Dep’t of Revenue**, 2012 COA 110, ¶ 79 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1664 (2002)), *aff’d*, 2014 CO 54, 328 P.3d 111.

## 11:4 PEDESTRIAN IN CROSSWALK

**A pedestrian who is properly in a crosswalk has the right of way over vehicular traffic.**

### Notes on Use

This instruction should be appropriately modified if there is evidence that the pedestrian was not in a crosswalk. A pedestrian who is not properly in a crosswalk is not necessarily negligent, however, such failure must also have been a cause of the pedestrian's injuries. **Radetsky v. Leonard**, 145 Colo. 358, 358 P.2d 1014 (1961).

### Source and Authority

This instruction is supported by the statutory provisions governing the rights of way between pedestrians and motor vehicles, including sections 42-4-801 to -803 and 42-4-805 to -808, C.R.S. *See also* **Ridenour v. Duffee**, 133 Colo. 467, 297 P.2d 280 (1956).

## 11:5 DUTY OF CARE OF MINOR OPERATING MOTOR VEHICLE

**A minor driver has the same duty of care as an adult driver.**

### Notes on Use

1. This instruction should be used in cases where a minor is alleged to have operated a motor vehicle negligently. For the appropriate instruction when a child has allegedly acted negligently while engaged in other activities, see Instruction 9:9.
2. This instruction does not apply to a child under the age of seven. *See* Instruction 9:9.
3. This instruction applies whether the minor is licensed or unlicensed. *See* Instruction 11:7.

### Source and Authority

This instruction is supported by **Doran v. Jensen**, 504 P.2d 354 (Colo. App. 1972) (not published pursuant to C.A.R. 35(f)) (approving instruction as correct statement of Colorado law). *See also* RESTATEMENT (SECOND) OF TORTS § 283A cmt. c (1965); 1 D. DOBBS, THE LAW OF TORTS § 127 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 181 (5th ed. 1984).

## **11:6 DUTY OF CARE OF PHYSICALLY OR MENTALLY HANDICAPPED DRIVER**

**A (mentally) (physically) handicapped driver has the same duty of care as a driver who is not handicapped.**

### **Notes on Use**

1. This instruction should be used whenever the negligence of a handicapped automobile operator is in issue.

2. While a handicap does not change a person's duty to exercise reasonable care, it is one of the "same or similar circumstances" as those terms are used in Instructions 9:6 (defining negligence) and 9:8 (defining reasonable care) that the jury should consider in determining whether a handicapped person was negligent. *See* RESTATEMENT (SECOND) OF TORTS §§ 283B & 283C (1965); 1 D. DOBBS, *THE LAW OF TORTS* §§ 119-121 (2000); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 175-79 (5th ed. 1984).

### **Source and Authority**

This instruction is supported by **Johnson v. Lambotte**, 147 Colo. 203, 363 P.2d 165 (1961), and the authorities cited in the above Notes on Use. *See also* **Renell v. Argonaut Liquor Co.**, 148 Colo. 154, 365 P.2d 239 (1961).

**11:7 DUTY OF CARE OF UNLICENSED DRIVER**

**An unlicensed driver has the same duty of care as a licensed driver.**

**Notes on Use**

This instruction should generally be given if evidence has been received of a driver's lack of a valid license.

**Source and Authority**

This instruction is supported by R.P. Davis, Annotation, *Lack of Proper Automobile Registration or Operator's License as Evidence of Operator's Negligence*, 29 A.L.R.2d 963 (1953).



## **11:8 DUTY OF CARE AS TO SPEED OF VEHICLE**

**The operator of a vehicle has a duty at all times to drive at a speed no greater than is reasonable under the conditions then existing.**

### **Notes on Use**

This instruction is applicable even though the party charged with negligence was operating his or her vehicle within the speed limit prescribed by statute or ordinance. *See, e.g.*, § 42-4-1101(1), C.R.S.

### **Source and Authority**

In addition to section 42-4-1101(1), this instruction is supported by **Bennett v. Hall**, 132 Colo. 419, 290 P.2d 241 (1955); **Lambrecht v. Archibald**, 119 Colo. 356, 203 P.2d 897 (1949); and **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993).

## **11:9 RIGHT TO ASSUME OTHERS WILL OBEY THE LAW**

**A person has the right to believe that others will obey applicable laws and regulations, unless there are reasonable grounds to believe otherwise.**

### **Notes on Use**

1. This instruction is primarily for use in a case where one person, having violated a law or regulation, thereby causing another's injury, sets up an affirmative defense of contributory negligence on the theory that the other person should have anticipated the violation. *See* Source and Authority below.

2. The basic rule set out in this instruction is applicable even though the roadway involved in the case was under construction or being repaved, at least so long as such conditions did not prevent orderly travel under the normal rules of the road. **Kennedy-Fudge v. Fink**, 644 P.2d 91 (Colo. App. 1982).

### **Source and Authority**

This instruction is supported by **Prentiss v. Johnston**, 119 Colo. 370, 203 P.2d 733 (1949); and **Gallagher Transportation Co. v. Giggey**, 101 Colo. 116, 71 P.2d 1039 (1937). *See also* **Ridenour v. Diffie**, 133 Colo. 467, 297 P.2d 280 (1956); **Ankeny v. Talbot**, 126 Colo. 313, 250 P.2d 1019 (1952).

## 11:10 DRIVING ON WRONG SIDE OF ROAD AS NEGLIGENCE

(When vehicles collide, the law presumes [, and you must find,] that a driver who was on the wrong side of the road at the time of the collision was negligent.)

### Notes on Use

1. This instruction may be used as the second paragraph of Instruction 3:5, when applicable. The bracketed phrase, “and you must find,” must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5. *See Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998) (no error in not giving instruction where evidence was insufficient to raise presumption and plaintiff tendered wrong version of instruction). An instruction on this presumption should be given only if there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the facts giving rise to the presumption are true. *Id.*

2. In general, the happening of an accident does not raise a presumption of negligence. *See* Instruction 9:12. However, when a driver driving on the wrong side of the road is involved in a collision, such a presumption is raised.

3. Driving on the wrong side of the road may also be negligence per se if, under the circumstances, it constituted a violation of statute or ordinance and there appears to have been no reasonable justification for the conduct. *Compare Ankeny v. Talbot*, 126 Colo. 313, 250 P.2d 1019 (1952), *with Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967), and *Sanchez v. Staats*, 34 Colo. App. 243, 526 P.2d 672 (1974), *aff’d*, 189 Colo. 228, 539 P.2d 1233 (1975). In such cases, Instruction 9:14 or 9:15 may be applicable rather than this instruction.

### Source and Authority

1. This instruction is supported by *Drake v. Hodges*, 114 Colo. 10, 161 P.2d 338 (1945), and *Larson v. Long*, 74 Colo. 152, 219 P. 1066 (1923). *See also Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

2. Statutes relating to driving on the correct side of the road include sections 42-4-1001 to -1003, 42-4-1005 to -1007, 42-4-1010, and 42-4-1013, C.R.S.

**11:11 RIGHT TO ASSUME THAT DRIVER ON WRONG SIDE OF ROAD WILL RETURN**

**A driver may assume that another driver approaching on the wrong side of the road will take action to avoid a collision, unless there are reasonable grounds to believe otherwise.**

**Notes on Use**

This instruction is primarily for use in a case where the claim is made that the person who was on the right side of the road was contributorily negligent in not properly responding to the other person's being on the wrong side of the road. *See* **Ringsby Truck Lines, Inc. v. Bradfield**, 193 Colo. 151, 563 P.2d 939 (1977).

**Source and Authority**

This instruction is supported by **Ringsby Truck Lines, Inc.**, 193 Colo. at 154, 563 P.2d at 942; and **Bird v. Richardson**, 140 Colo. 310, 344 P.2d 957 (1959) (citing earlier cases). *See also* cases cited in Source and Authority to Instruction 11:9.

## 11:12 REAR-END COLLISION — PRESUMPTION OF NEGLIGENCE

*Committee’s Note: Although approved in a 2015 Court of Appeals decision (see Note on Use 5), this instruction appears to be inconsistent with **Chapman v. Harner**, 2014 CO 78, 339 P.3d 519, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). In those cases, the Supreme Court held that a rebuttable presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 250 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, ¶ 25; **Krueger**, 205 P.3d at 1154, 1156. In neither scenario is the jury instructed about the presumption. See Instruction 3:5 and its Notes on Use.*

*However, these two cases address only: (a) the presumption of negligence arising from res ipsa loquitur (**Chapman**) and (b) the presumption of undue influence when a beneficiary of a will is in a fiduciary or confidential relationship with the testator (**Krueger**). The Supreme Court has not yet considered whether to apply these holdings beyond the specific presumptions at issue in those two cases.*

**When a driver of a motor vehicle hits another vehicle in the rear, the law presumes [ , and you must find,] that the driver was negligent.**

### Notes on Use

1. In general, the happening of an accident does not raise a presumption of negligence. See Instruction 9:12. In the case of a rear-end collision, however, a presumption of negligence is raised.

2. This instruction sets out a special application of the doctrine of res ipsa loquitur. As to whether or not, in a case governed by comparative negligence, the plaintiff must be “free from negligence” in order to avail him or herself of the doctrine, see the discussion in the Notes on Use 10 and 11 for Instruction 9:17.

3. When appropriate, Instruction 11:13 (brake or other equipment failure) should also be given with this instruction.

4. This instruction should not be given unless “both vehicles involved in the accident were located on the road or on the shoulder, were in relatively close proximity, and were facing the same direction.” **Bettner v. Boring**, 764 P.2d 829, 833 (Colo. 1988); see also **Davis v. Lira**, 817 P.2d 539 (Colo. App. 1991) (where plaintiff’s car struck the defendant’s truck, which had been abandoned in the middle of the highway, Instruction 11:12 was not applicable), *rev’d on other ground*, 832 P.2d 240 (Colo. 1992).

5. This instruction may be given where the plaintiff’s vehicle overtakes and collides with the defendant’s vehicle stopped ahead on the roadway, and regardless of whether defendant’s

vehicle moved forward after collision. **Vititoe v. Rocky Mountain Pavement Maint., Inc.**, 2015 COA 82, ¶¶ 95-96, 412 P.3d 767.

### Source and Authority

1. This instruction is supported by **Iacino v. Brown**, 121 Colo. 450, 217 P.2d 266 (1950). *See also Dilts v. Baker*, 162 Colo. 568, 427 P.2d 882 (1967) (plaintiff entitled to directed verdict on issue of negligence); **Rhodig v. Cummings**, 160 Colo. 499, 418 P.2d 521 (1966) (same); **Moseley v. Lamirato**, 149 Colo. 440, 370 P.2d 450 (1962) (same); **McClintic v. Hesse**, 151 P.3d 611 (Colo. App. 2006), *rev'd on other grounds*, 176 P.3d 759 (Colo. 2008).

2. For a discussion as to the sufficiency of the evidence to rebut the presumption of negligence set forth in this instruction, see **Huntoon v. TCI Cablevision of Colo., Inc.**, 969 P.2d 681 (Colo. 1998).

3. A jury could properly find abrupt, unwarranted stopping by plaintiff to be contributory negligence. *See Gaulin v. Templin*, 162 Colo. 55, 424 P.2d 377 (1967).

### **11:13 BRAKE OR OTHER EQUIPMENT FAILURE**

**The (driver) (person in charge) (owner) of a vehicle is not negligent because of a sudden failure of the vehicle's equipment if that person could not have reasonably foreseen the sudden equipment failure and that person has done all that a reasonably careful person would have done.**

#### **Notes on Use**

Use whichever parenthesized words are appropriate.

#### **Source and Authority**

This instruction is supported by **Bartlett v. Bryant**, 166 Colo. 113, 442 P.2d 425 (1968); **Daigle v. Prather**, 152 Colo. 115, 380 P.2d 670 (1963); and **Eddy v. McAninch**, 141 Colo. 223, 347 P.2d 499 (1959).

**11:14 DRIVING UNDER THE INFLUENCE — DEFINED**

**No instruction prepared.**

**Note**

When there is sufficient evidence that a person was driving while under the influence of intoxicating liquor or drugs, Instruction 9:14, with insertions based on the relevant provisions of sections 42-4-1301(1) and (2), C.R.S., should be used. Such definitional instructions as may be necessary, based on the language of the statute, should also be given.



**B. RESERVED FOR FUTURE USE**

## C. VICARIOUS LIABILITY — MOTOR VEHICLES

### 11:15 FAMILY CAR DOCTRINE

For the defendant, (*name*), to be held liable under the Family Car Doctrine for the negligence of the driver, you must find:

1. The defendant was the head of the household;
2. The vehicle was used by a member of that household;
3. The defendant had control of the use of the vehicle; and
4. The vehicle was used with the express or implied permission of the defendant.

#### Notes on Use

1. If the defendant has control over the use of the vehicle although the defendant may not be the owner, the defendant may nonetheless be liable under the family car doctrine. **Ferguson v. Hurford**, 132 Colo. 507, 290 P.2d 229 (1955); **Boyd v. Close**, 82 Colo. 150, 257 P. 1079 (1927); **Hasegawa v. Day**, 684 P.2d 936 (Colo. App. 1983), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

2. The family car doctrine is not applicable against one who is not the head of the household even though the person may be a co-owner of the vehicle. **Lee v. Degler**, 169 Colo. 226, 454 P.2d 937 (1969); *see also* **Ross v. Douglas**, 470 P.2d 900 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)) (mother, though owner of car, not liable as head of household for negligence of son where husband and father was employed, lived at home and supported family).

3. There may be circumstances giving rise to liability where the driver was not a member of the defendant's household, but the vehicle was being used for a family purpose. *See* **Boyd**, 82 Colo. at 155, 257 P. at 1081.

#### Source and Authority

This instruction is supported by **Hutchins v. Haffner**, 63 Colo. 365, 167 P. 966 (1917), which adopted the family car doctrine substantially as set out in this instruction. Also in support are **Appelhans v. Kirkwood**, 148 Colo. 92, 365 P.2d 233 (1961) (citing and discussing several earlier cases); **Vick v. Zumwalt**, 130 Colo. 148, 273 P.2d 1010 (1954); **Hasegawa**, 684 P.2d at 938 (father had sufficient control over use of the vehicle though vehicle owned by driver-member of the household); and **McCall v. Roper**, 32 Colo. App. 352, 511 P.2d 541 (1973). *See also* **Halsted v. Peterson**, 797 P.2d 801 (Colo. App. 1990) (neither parent liable under family car doctrine for damages caused by daughter in operation of vehicle when daughter was no longer member of parents' household), *rev'd on other grounds*, 829 P.2d 373 (Colo. 1992).

## 11:16 HEAD OF HOUSEHOLD — DEFINED

**A head of a household is a person who assumes or shares the primary responsibility for supervising the general affairs of the household. There may be more than one head of household.**

### Notes on Use

Joint ownership of the vehicle by a wife with her husband does not by itself make the wife a head of the household for purposes of the family car doctrine. **Lee v. Degler**, 169 Colo. 226, 454 P.2d 937 (1969). *See also* **Ross v. Douglas**, 470 P.2d 900 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)) (wife and mother not the head of the household where the husband and father was employed, lived at home, and supported the family).

### Source and Authority

This instruction is supported by Colorado Constitution, article II, section 29 (by implication); and **Greenwood v. Kier**, 125 Colo. 333, 243 P.2d 417 (1952) (citing and discussing earlier cases in which a person other than a father or husband has been held liable under the family car doctrine). *See also* **Ferguson v. Hurford**, 132 Colo. 507, 290 P.2d 229 (1955) (widow held liable).

## 11:17 HOUSEHOLD OR FAMILY — DEFINED

A household consists of those persons who are living together as a family.

(A child may reside in more than one household under a shared parenting time arrangement.)

### Notes on Use

Where a person living in the household is not related by blood, marriage or adoption, but has been treated as a member of the family by being accorded the usual privileges as a family member, the policy behind the family car doctrine would appear to be applicable. *See Hutchins v. Haffner*, 63 Colo. 365, 167 P. 966 (1917).

### Source and Authority

1. This instruction is supported by *Halsted v. Peterson*, 797 P.2d 801 (Colo. App. 1990) (a “household” consists of those who dwell under the same roof and comprise a family), *rev'd on other grounds*, 829 P.2d 373 (Colo. 1992). *See also Hasegawa v. Day*, 684 P.2d 936 (Colo. App. 1983), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

2. The second paragraph is supported by *Midwest Mutual Insurance Co. v. Titus*, 849 P.2d 908 (Colo. App. 1993).

## 11:18 IMPUTATION OF DRIVER'S NEGLIGENCE TO OWNER OR CO-OWNER — PRESUMPTION OF CONTROL

When the [owner] [co-owner] of a motor vehicle is riding [in] [on] it as a passenger, and the vehicle is being used for a purpose in common with the driver, the law presumes [, and you must find,] that the [owner] [co-owner] has a right to control the vehicle, and the [owner] [co-owner] and the driver are both responsible for any negligence of the driver.

### Notes on Use

1. This instruction, when otherwise applicable, may be used as the second paragraph of Instruction 3:5.

2. Use whichever bracketed words are appropriate. In particular, the bracketed phrase “and you must find” must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5.

3. The right to control does not necessarily mean the right and ability to control physically, but rather a right to direct or command. **Lasnetske v. Parres**, 148 Colo. 71, 365 P.2d 250 (1961), *overruled on other grounds by* **Watson v. Reg'l Transp. Dist.**, 762 P.2d 133 (Colo. 1988).

4. As between themselves, the negligence of one co-owner is not imputable to the other to bar or reduce the latter's claim against the former. **Price v. Sommermeyer**, 41 Colo. App. 147, 584 P.2d 1220 (1978), *aff'd*, 198 Colo. 548, 603 P.2d 135 (1979).

5. This instruction does not apply to an owner-passenger who is suing a defendant third party where the defendant is seeking to impute, as vicarious contributory negligence, the negligence of the driver to the plaintiff, as owner-passenger. In rejecting the imputed contributory negligence rule of earlier cases, the supreme court held, “an owner-passenger's recovery for injuries negligently inflicted by a third party should be limited only if the owner-passenger . . . is [personally] negligent and if that negligence is a proximate cause of [the owner-passenger's] injury.” **Watson**, 762 P.2d at 139-40.

6. The presumption set out in this instruction, however, is still applicable in cases in which the owner (or co-owner) passenger is being sued vicariously as a defendant for the negligence of a driver on the theory that the owner and driver were acting as joint venturers. For such cases, see Instruction 7:5, and the supreme court's discussion in **Watson**, 762 P.2d at 137 n.7.

### Source and Authority

This instruction is supported by **Lasnetske**, 148 Colo. at 76-78, 365 P.2d at 253-54; **Moore v. Skiles**, 130 Colo. 191, 274 P.2d 311 (1954), *overruled on other grounds by* **Watson**, 762 P.2d at 141; and **Hover v. Clamp**, 40 Colo. App. 410, 579 P.2d 1181 (1978), *overruled on*

*other grounds by **Watson**, 762 P.2d at 141. See also RESTATEMENT (SECOND) OF TORTS § 491 cmt. j (1965).*