

IN THE IOWA DISTRICT COURT FOR ALLAMAKEE COUNTY

DONNA JEAN LUBAHN and ERNEST
LUBAHN,

Plaintiffs,

vs.

VAL LYONS, M.D. and VAL O. LYONS,
M.D., P.C.,

Defendants.

)
)
) LAW NO. LACV 026101
)

) PLAINTIFFS' PROPOSED
) STATEMENT OF THE CASE AND
) INSTRUCTION OF THE COURT;
) JURY INSTRUCTIONS; JURY
) VERDICT FORM
)
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)
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)
)

Plaintiffs, by counsel and pursuant to the Iowa Rules of Civil Procedure, request that the attached instructions be given to the jury upon submission of this cause.

GENERAL INSTRUCTIONS

- | | |
|--------|--|
| 100.1 | Statement of the Case (<u>see attached</u>) |
| 100.2 | Duties of Judge and Jury, Instructions as a Whole (<u>stock instruction</u>) |
| 100.3 | Burden of Proof, Preponderance of Evidence (<u>stock instruction</u>) |
| 100.4 | Evidence (<u>stock instruction</u>) |
| 100.5 | Deposition Testimony (<u>stock instruction</u>) |
| 100.6 | Interrogatories (<u>stock instruction</u>) |
| 100.9 | Credibility of Witnesses (<u>stock instruction</u>) |
| 100.11 | Hypothetical Question, Expert Testimony (<u>stock instruction</u>) |
| 100.15 | Statements by Party Opponent (<u>stock instruction</u>) |
| 100.18 | General Instructions of Jury (<u>stock instruction</u>) |
| 100.21 | Cautionary Instruction-Juror's Notes (<u>stock instruction</u>) |
| 100.23 | Use of Electronic Devices (<u>stock instruction</u>) |

DAMAGES

- | | |
|-------|--|
| 200.1 | Elements-personal injury (<u>see attached</u>) |
| 200.6 | Past medical expenses (<u>stock instruction</u>) |

200.7	Future medical expenses (<u>stock instruction</u>)
200.10	Loss of Full Mind & Body-Past (<u>stock instruction</u>)
200.11B	Loss of Full Mind & Body-Future (<u>stock instruction</u>)
200.12	Physical & Mental Pain & Suffering-Past (<u>stock instruction</u>)
200.13B	Physical & Mental Pain & Suffering-Future (<u>stock instruction</u>)
200.35B	Definition of Present Value (<u>stock instruction</u>)
200.37	Mortality Table (<u>see attached</u>)
200.38	Quotient Verdict (<u>stock instruction</u>)

VICARIOUS LIABILITY

730.1	Liability of Employer/Professional Corp. (<u>stock instruction</u>)
730.2	Scope of Employment (<u>stock instruction</u>)

MEDICAL MALPRACTICE

700.1	Essentials for Recovery (<u>see attached</u>)
400.1	Fault defined (<u>stock instruction</u>)
700.2	Ordinary Care Common Negligence (<u>stock instruction</u>)
700.3	Cause defined (<u>stock instruction</u>)
700.3A	Scope of Liability (<u>stock instruction</u>)
1600.2	Negligence-Duty of Physician (<u>stock instruction</u>)
1600.3	Negligence-Duty of Specialist (<u>stock instruction</u>)

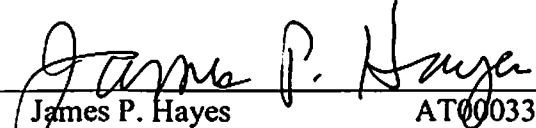
LOST CHANCE OF A BETTER OUTCOME


1600.17	Medical Malpractice-Lost Chance of a Better Outcome Definition (<u>see attached</u>)
1600.18	Medical Malpractice-Lost Chance of a Better Outcome (<u>see attached</u>)
1600.16	Essentials for Recovery (<u>see attached</u>)

VERDICT FORMS

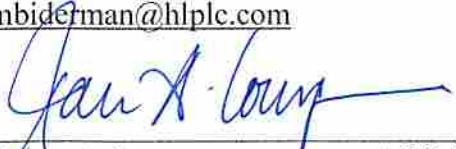
300.1	Return of Verdict (<u>see attached</u>)
	Proposed Verdict form (<u>see attached</u>)

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CERTIFICATE OF SERVICE

I hereby certify that on January 23 2017, I
electronically filed this document with the
Clerk of Court using the EDMS system,
which will serve it on the appropriate
parties or by mail.

/s/ Mike H. Biderman

**PLAINTIFFS' STATEMENT OF THE
CASE AND INSTRUCTION OF THE
COURT; JURY INSTRUCTIONS**

Do not consider this summary as proof of any claim. I will now explain the general principles of law that apply to this case. You will then reach a verdict in this case by applying those principles of law to the evidence you receive in this court room.

Instruction No. _____

Duties Of Judge And Jury, Instructions As Whole. My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the instructions together because no one instruction includes all of the applicable law.

The order in which I give these instructions is not important.

Your duty is to decide all fact questions.

Do not be influenced by any personal likes or dislikes, sympathy, bias, prejudices or emotions.

Authority

Iowa Civil Jury Instruction no. 100.2

Roushar v. Dixon, 231 Iowa 993, 2 N.W.2d 660 (1942)

Instruction No. _____

Burden Of Proof, Preponderance Of Evidence. Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

Authority

Iowa Civil Jury Instructions no. 100.3

Mabrier v. A.M. Servicing Corporation of Raytown, 161 N.W.2d 180 (1968)

Instruction No. _____

Evidence. You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person or by deposition.
2. Exhibits received by the court.
3. Stipulations which are agreements between the attorneys.
4. Any other matter admitted (e.g. answers to interrogatories, matters which judicial notice was taken, and etc.).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

Authority

Iowa Civil Jury Instruction No. 100.4
Iowa Rules of Evidence.

Instruction No. _____

Deposition Testimony. Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

Authority

Iowa Civil Jury Instruction No. 100.5

Iowa R. Civ. P. 1.704

Farley v. Seiser, 316 N.W.2d 857 (Iowa 1982)

Instruction No. _____

Interrogatories. During this trial, you have heard the word 'interrogatory'. An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

Authority

Iowa Civil Jury Instruction No. 100.6

Iowa R. Civ. P. 1.509

Instruction No. _____

Credibility Of Witnesses. You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and,
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

Authority

Iowa Civil Jury Instruction No. 100.9

Burger v. Omaha & C.B. St. Ry. Co., 139 Iowa 645, 117 N.W.35 (1908)

Instruction No. _____

Hypothetical Question, Expert Testimony. An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

Authority

Iowa Civil Jury Instruction No. 100.11

Cody v. Toller Drug Co., 232 Iowa 475, 5 N.W.2d 824 (1942)

Instruction No. _____

Opinion Evidence, Expert Witness. You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority

Iowa Civil Jury Instruction No. 100.12

Crouch v. National Livestock Remedy Co., 210 Iowa 849, 231 N.W. 323 (1930).

Instruction No. _____

Statements by a Party Opponent. You have heard evidence claiming Dr. Lyons made statements before this trial [while under oath] and [while not under oath].

If you find such a statement was made, you may disregard the statement as evidence in this case the same as if Dr. Lyons had made it under oath during the trial.

If you find such a statement was made and was inconsistent with Dr. Lyons' testimony during the trial you may also use the statement as a basis for disregarding all or any part of Dr. Lyons' testimony during the trial but you are not required to do so. You should not disregard Dr. Lyons' testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

Authority

Iowa Civil Jury Instruction No. 100.15

Instruction No. _____

General Instruction To Jury. Upon retiring you shall select a foreman or forewoman. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges - judges of the facts. Your sole interest is to find the truth and do justice.

Authority

Iowa Civil Jury Instruction no. 100.18

Instruction No. _____

Cautionary Instruction - Juror's Notes. During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the noted in the jury room, and they will be destroyed.

Authority

Iowa Civil Jury Instruction No. 100.21

Iowa R. Civ. P. 1.926 (1)

Instruction No. _____

Use of Electronic Devices.

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced in the trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this state and you will have done an injustice. It is very important that you abide by these rules. [Failure to follow these instructions may result in the case having to be retried and could result in you being held in contempt and punished.]

It is important that we have your full and undivided attention during this trial.

Authority

Iowa Civil Jury Instruction No. 100.23

New 9/11

Instruction No. _____

Elements - Personal Injury And Vehicle Damage. If you find Donna Lubahn is entitled to recover damages, you shall consider the following items:

- Loss of full mind and body - past
- Loss of full mind and body - future
- Physical and mental pain and suffering- past
- Physical and mental pain and suffering- future
- Past medical expenses
- Future medical expenses

The amount you assess for physical and mental pain and suffering in the past and future, future earning capacity, loss of function of the mind and body in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority

Iowa Civil Jury Instruction No. 200.1
10/97

Instruction No. _____

Past Medical Expenses. The reasonable cost of necessary hospital charges, doctor charges, prescriptions, and other medical services from the date of injury to the present time.

In determining the reasonable cost of necessary hospital charges, doctor charges, prescriptions, and other medical services you may consider the amount charged, the amount paid, or any other evidence of what is reasonable and proper for such medical expense.

Authority

Iowa Civil Jury Instruction No. 200.6

Pexa v. Auto-Owners Insur. Co., 686 N.W.2d 150 (Iowa 2004)

Worez v. Des Moines City Ry. Co., 175 Iowa 1, 156 N.W. 867 (1916)

Elzig v. Bales, 135 Iowa 208, 112 N.W. 540 (1907)

Instruction No. _____

Future Medical Expenses. The present value of reasonable and necessary hospital charges, doctor charges, prescriptions, and other medical services which will be incurred in the future.

Authority

Iowa Civil Jury Instruction No. 200.7

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

Zach v. Morningstar, 258 Iowa 1365, 142 N.W.2d 440 (1966)

Instruction No. _____

Loss Of Full Mind And Body - Past. Loss of function of the mind and body from the date of injury to the present time. Loss of mind and body is the inability of a particular part of the mind and body to function in a normal manner.

Authority

Iowa Civil Jury Instruction No. 200.10

Brant v Bockholt, 532 N.W.2d 801 (Iowa 1995)

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

Instruction No. _____

Loss Of Full Mind And Body - Future -Actions Filed On Or After July 1, 1997. The present value of future loss of function of the mind and body.

Authority

Iowa Civil Jury Instruction No. 200.11B

Iowa Code section 624.18 (2), 668.3(b)

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

Comment

In all actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18(2), 668.3(b)

12/01

Instruction No. _____

Physical And Mental Pain And Suffering - Past. Physical and mental pain and suffering from the date of injury to the present time.

Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.

Authority

Iowa Civil Jury Instruction No. 200.12

Poyzer v. McGraw, 360 N.W.2d 748 (Iowa 1985)

Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa App. 1977)

Instruction No. _____

Physical And Mental Pain And Suffering - Future - Actions Filed On Or After July 1, 1997. The present value of future physical and mental pain and suffering.

Authority

Iowa Civil Jury Instruction No. 200.13B

Iowa Code section 624.18 (2), 668.3(b)

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

Comment

In all actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code Section 624.18 (2), 668.3(b)

12/01

Instruction No. _____

Definition of Present Value-Actions Filed On Or After July 1, 1997. Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiff for future losses.

Authority

Iowa Civil Jury Instruction No. 200.35B

Iowa Code section 624.18(2), 668.3(b)

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

In re Millard Estate 251 1282, 105 N.W.2d 95 (1960)

Instruction No. _____

Mortality Tables - Personal Injury. A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Donna Lubahn is 7.3 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Donna Lubahn's health, habits, occupation, and lifestyle, when deciding issues of future damages.

Authority

Iowa Civil Jury Instruction No. 200.37

Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976)

Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961)

Newman v. Blom, 249 Iowa 836, 89 N.W.2d 349 (1958)

Instruction No. _____

Mortality Tables - Personal Injury. A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Ernest Lubahn is 5.4 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Ernest Lubahn's health, habits, occupation, and lifestyle, when deciding issues of future damages.

Authority

Iowa Civil Jury Instruction No. 200.37

Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976)

Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961)

Newman v. Blom, 249 Iowa 836, 89 N.W.2d 349 (1958)

Instruction No. _____

Quotient Verdict. In arriving at an item of damage or any percentage of fault you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage or a percentage of fault, and agreeing in advance that the average of those estimates shall be your item of damage or percentage of fault.

Authority

Iowa Civil Jury Instruction No. 200.38

Moose v. Rich, 253 N.W.2d 565 (Iowa 1977)

Sheker v. Jensen, 241 Iowa 583, 41 N.W.2d 679 (1950)

Manna v. McIntosh, 519 N.W.2d 815 (Iowa App. 1994)

Instruction No. _____

Liability of Employer: A corporation is liable for the negligent acts of an employee, officer or agent if the acts are done in the scope of the employment.

Authority

Iowa Civil Jury Instruction No. 730.1

Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984)

Graham v. Worthington, 146 N.W.2d 626 (Iowa 1966)

Instruction No. _____

Scope of Employment: For an act to be within the scope of an employee's employment, the act must be necessary to accomplish the purpose of the employment, and it must be intended to accomplish that purpose.

Authority

Iowa Civil Jury Instruction No. 730.2

Merchants Nat'l Bank of Cedar Rapids v. Waters 447 F.2d 234 (8th Cir. 1971)

Sandman v. Hagan, 154 N.W. 2d 113 (Iowa 1967)

Instruction No. _____

Essentials for Recovery The Plaintiffs must prove all of the following propositions:

1. Dr. Lyons was negligent in one or more of the following ways:
 - a.) Failing to internally fix Donna Lubahn's left hip and instead performing a hemiarthroplasty;
 - b.) Failing to reestablish leg lengths;
 - c.) Failing to comment about a concern for leg length equality in the operative note;
2. The negligence was a cause of the damage to the Plaintiffs.
3. The amount of damage.

If the Plaintiffs have failed to prove any of these propositions, the Plaintiffs are not entitled to damages. If the Plaintiffs have proved all of these propositions, the Plaintiffs are entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction No. 700.1

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Rinkleff v. Knox, 375 N.W. 2d 262 (Iowa 1985)

Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969)

Thompson v. Kaczinski, 774 N.W. 2d 829, 836-39 (Iowa 2009)(causation)

Instruction No. _____

Essentials for Recovery The Plaintiffs must prove all of the following propositions:

1. Val O. Lyons, M.D., P.C. was negligent in one or more of the following ways:
 - a.) Failing to internally fix Donna Lubahn's left hip and instead performing a hemiarthroplasty;
 - b.) Failing to reestablish leg lengths;
 - c.) Failing to comment about a concern for leg length equality in the operative note;
2. The negligence was a cause of the damage to the Plaintiffs.
3. The amount of damage.

If the Plaintiffs have failed to prove any of these propositions, the Plaintiffs are not entitled to damages. If the Plaintiffs have proved all of these propositions, the Plaintiffs are entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction No. 700.1

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Rinkleff v. Knox, 375 N.W. 2d 262 (Iowa 1985)

Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969)

Thompson v. Kaczinski, 774 N.W. 2d 829, 836-39 (Iowa 2009)(causation)

Instruction No. _____

Fault - Defined. In these instructions I will be using the term "fault". Fault means one or more acts or omissions towards the person of the actor or of another which constitutes negligence.

Authority

Iowa Civil Jury Instruction No. 400.1

Iowa Code section 668.1

Comment

Note: Select the particulars applicable to the case.

Instruction No. _____

Ordinary Care - Common Law Negligence - Defined. "Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Authority

Iowa Civil Jury Instruction No. 700.2

Bartlett v. Chebuhar, 479 N.W.2d 321 (Iowa 1992)

Schalk v. Smith, 224 Iowa 904, 277 N.W. 303 (1938)

Comment

Note: If a party is intoxicated, add: "An intoxicated person is held to the standard of care of a sober person."

Note: If a party is a child, add: "At the time of the injury, (name) was a child. Ordinary care of a child is the care which a reasonable child of like age, intelligence and experience would do under similar circumstances."

Intoxication - Yost v. Miner, 163 N.W.2d 557 (Iowa 1968)

Child - Peterson v. Taylor, 316 N.W.2d 869 (Iowa 1982)

Instruction No. _____

Cause - Defined. The conduct of a party is a cause of damage when the damage would not have happened except for the conduct. There can be more than one cause of an injury or damage.

Authority

Iowa Civil Jury Instruction No. 700.3

Thompson v. Kaczinski, 774 N.W.2d 829, 836-39 (Iowa 2009)

Royal Indemnity Co. v. Factory Mut. Ins. Co., ___ N.W.2d ___, ___, No. 07-1324 slip. op. at 19 (Iowa June 11, 2010)

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26

Comment

Note: In a case where the evidence may show more than one cause contributed to the injury or damages, the following sentence should be added: "There can be more than one cause of an injury or damage."

Note: A separate instruction must be given where the evidence may show "multiple sufficient causes."
See Thompson, 774 N.W.2d at 837 n. 3

Note: Consider appropriateness of giving this instruction in addition to Iowa Civil Jury Instruction 220.34 Previous Infirm Condition where "Eggshell Plaintiff Rule" applies.

Rev. 10/09

Instruction No. _____

Scope of Liability – Defined. You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiff's claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid.

Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Authority

Iowa Civil Jury Instruction No. 700.3A

Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009)

Royal Indemnity Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839 (Iowa 2010)

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §§ 29, 30 & model instruction No. 2 (modified, at page 517).

Comment

In most cases, scope of liability will not be in dispute or will be adjudicated by the court on a dispositive motion. This instruction should be given only if under the facts of the particular case scope of liability is a question for the jury.

New 10/09

Instruction No. _____

Negligence - Duty Of Physician. A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.

A violation of this duty is negligence.

Authority

Iowa Civil Jury Instruction No. 1600.2

Speed v. State, 240 N.W.2d 901 (Iowa 1976)

Perin v. Hayne, 210 N.W.2d 609 (Iowa 1973)

Instruction No. _____

Negligence - Duty Of Specialist. Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner.

A violation of this duty is negligence.

Authority

Iowa Civil Jury Instruction No. 1600.3

McGulpin v. Bessmer, 241 Iowa 1119, 1132, 43 N.W.2d 121, 128 (1950)

Instruction No. _____

Medical Malpractice - Lost Chance Of Better Outcome – Definition.

Lost chance of a better outcome means reduction in the chance of a better outcome from the underlying condition because plaintiff failed to receive treatment required by the standard of care. Damages recoverable are limited to the value of this loss of chance. This is measured by the difference between the chance of a better outcome if treatment had been given required by the standard of care. Plaintiff may not recover for harm caused by the pre-existing condition to which defendant's negligence did not contribute.

Authority

Wendland v Sparks, 574 NW2d 372 (Iowa 1998)

Sanders v Ghrist, 421 NW2d 520 (Iowa 1998)

DeBurkarte v Louvar, 393 NW2d 131 (Iowa 1998)

6/98

*Modified

Instruction No. _____

Medical Malpractice - Lost Chance Of Better Outcome

If you find from the evidence that Dr. Lyons and/or Val O. Lyons M.D., P.C. were negligent in the treatment of Donna Lubahn and that this negligence was a substantial factor in reducing Donna Lubahn's chance of a better outcome, then you will award such damages as will fairly compensate Donna Lubahn for this lost chance of a better outcome.

Authority

Wendland v Sparks, 574 NW2d 372 (Iowa 1998)

Sanders v Ghrist, 421 NW2d 520 (Iowa 1998)

DeBurkarte v Louvar, 393 NW2d 131 (Iowa 1998)

Comment

The instruction is drafted for use in a death case. There may be other situations in which the concept is applicable as noted in Wendland v Sparks, 574 NW2d 372 (Iowa 1998).

6/98

*Modified

Instruction No. _____

Lost Chance of Survival - Essentials for Recovery – Death. After considering Plaintiffs' medical malpractice claims as set forth in Instruction No. _____, you must then consider plaintiffs' additional claim for lost chance of a better outcome related to Donna's Lubahn infected hip and hip revision procedure performed by Dr. Lawrence on May 13, 2014.

The plaintiffs claim that the Dr. Lyons caused Donna Lubahn to lose a chance of a better outcome. The plaintiffs must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:
 - Performing a hemiarthoplasty instead of internally fixing Donna Lubahn's hip
2. The negligence caused a loss of a chance of a better outcome.
3. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction No. 1600.16
Mead v. Adrian, 670 N.W.2d 174 (Iowa 2003)
Wendland v Sparks, 574 N.W.2d 327 (Iowa 1998)
Sanders v Ghrist, 421 N.W.2d 520 (Iowa 1988)
DeBurkarte v Louvar, 393 N.W.2d 131 (Iowa 1986)
Thompson v. Kaczinski, 774 N.W. 2d 829, 836-39 (Iowa 2009) (causation)

Comment

A lost chance of survival claim can exist in a non-death case. See, e.g., DeBurkarte v Louvar, 393 N.W.2d 131 (Iowa 1986).

*Modified

Instruction No. _____

Lost Chance of Survival - Essentials for Recovery – Death. After considering Plaintiffs' medical malpractice claims as set forth in Instruction No. _____, you must then consider plaintiffs' additional claim for lost chance of a better outcome related to Donna's Lubahn infected hip and hip revision procedure performed by Dr. Lawrence on May 13, 2014.

The plaintiffs claim that the Val O. Lyons, M.D., P.C. caused Donna Lubahn to lose a chance of a better outcome. The plaintiffs must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:
 - Performing a hemiarthoplasty instead of internally fixing Donna Lubahn's hip
2. The negligence caused a loss of a chance of a better outcome.
3. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction No. 1600.16
Mead v. Adrian, 670 N.W.2d 174 (Iowa 2003)
Wendland v Sparks, 574 N.W.2d 327 (Iowa 1998)
Sanders v Ghrist, 421 N.W.2d 520 (Iowa 1988)
DeBurkarte v Louvar, 393 N.W.2d 131 (Iowa 1986)
Thompson v. Kaczinski, 774 N.W. 2d 829, 836-39 (Iowa 2009) (causation)

Comment

A lost chance of survival claim can exist in a non-death case. See, e.g., DeBurkarte v Louvar, 393 N.W.2d 131 (Iowa 1986).

*Modified

Instruction No. _____

Return Of Verdict - Forms Of Verdict. I am giving you _____ verdict forms and questions. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict and answers to questions must be signed by your foreman or forewoman.

After deliberating for six hours from _____ o'clock _____.m. excluding meals or recesses outside your jury room, then it is necessary that only (seven) (six)* of you agree upon the answers to the questions. In that case, the verdict and questions must be signed by all (seven) (six)* jurors who agree.

When you have agreed upon the verdict and answers to questions and appropriately signed it, tell the Court Attendant.

Authority

Iowa Civil Jury Instruction No. 300.1

Comment

Note: *Use if a juror has been excused during the trial.

Rev. 3/12

1. Loss of full mind and body- past

2. Loss of full mind and body- future _____
3. Physical and mental pain and suffering- past _____
4. Physical and mental pain and suffering- future _____
5. Past Medical Bills _____
6. Future Medical Bills _____
7. CMS Lien _____
8. Humana Lien _____
9. Ernest Lubahn's loss of consortium-past _____
10. Ernest Lubahn's loss of consortium-future _____
11. Loss of full mind and body-past (from the hip
infection and May 13, 2014 procedure) _____
12. Loss of full mind and body-future (from the hip
infection and May 13, 2014 procedure) _____
13. Physical and mental pain and suffering-past
(from the hip infection and May 13, 2014
Procedure) _____
14. Physical and mental pain and suffering-future
from the hip infection and May 13, 2014
procedure) _____
15. Past Medical Bills (from the hip infection and
May 13, 2014 procedure). _____
16. Future Medical Bills (from the hip infection and
May 13, 2014 procedure) _____
17. Ernest Lubahn's loss of consortium-past (for
the hip infection and May 13, 2014 procedure) _____
18. Ernest Lubahn's loss of consortium-future (for
the hip infection and May 13, 2014 procedure) _____

TOTAL (add the separate items of damage) \$ _____

FOREMAN OR FOREWOMAN

Authority

Iowa Code section 668.3(8)

Johnson v. Knoxville Comm. Sch. Dist., 570 NW2d 633, 644 (Iowa 1997)

Thompson v. Kaczinski, 774 N.W.2d 829, 836-39 (Iowa 2009)

Comment

Note: *The above is merely an example of format. The list of items should be consistent with the damage marshaling instruction.

IN THE IOWA DISTRICT COURT FOR ALLAMAKEE COUNTY

DONNA JEAN LUBAHN and ERNEST LUBAHN

Plaintiff,

VS.

VAL LYONS, M.D.; and VAL O. LYONS,
M.D., P.C.

Defendants.

LAW NO. LACV 026101

SUPPLEMENTAL VERDICT FORM

We find the following verdict on the questions submitted to us:

QUESTION NO.1: Was Dr. Lyons negligent in his care of Donna Lubahn?

Answer "yes" or "no."

ANSWER _____

If your answer to Question 1 is “no” do not answer any further questions on this verdict form and your verdict will be for Defendant Val Lyons, M.D. and Val O. Lyons, M.D., PC

QUESTION NO. 2: Was the negligence of Dr. Lyons a cause of Donna Lubahn hip infection and May 13, 2014 operation?

Answer "yes" or "no."

ANSWER

If your answer to Question No. 2 is "no", do not answer any further questions on this verdict form.

QUESTION NO. 3: What percentage of lost chance to avoid the harm of Donna Lubahn's hip infection and May 13, 2014 operation do you find?

ANSWER

FOREMAN OR FOREWOMAN