

1723 ENHANCED INJURIES

This is a [crashworthiness] [second collision] [enhanced injury] case. (Plaintiff) does not claim (enhanced injury defendant) caused the [collision] [accident] to occur.

(Plaintiff) does claim that [enhanced injury defendant was negligent] [there existed a defect in (the product)] which was unreasonably dangerous to a prospective user].

(Plaintiff) further claims that such [negligence] [defective product] was a substantial factor in producing enhanced injuries to (himself) (herself).

Questions _____ and _____ refer to those alleged enhanced injuries. It applies to those injuries that (plaintiff) received over and above any injuries (he) (she) would have received as a result of the [collision] [accident] if the [defendant was not negligent] [product was not unreasonably dangerous and defective].

First, you must determine whether the [defendant was negligent] [defendant's product was unreasonably dangerous and defective] as inquired about in question _____.

If you find [defendant was negligent] [the product was defective], then you must determine in question _____ whether that [negligence] [defective product] was a cause of enhanced injuries to (plaintiff); i.e., whether that [negligence] [defective product] was a substantial factor in producing injuries over and above what probably would have been sustained in the [collision] [accident].

[Burden of Proof, Wis JI-Civil 200]

If you have found that at least one party's negligence was a cause of injuries to (plaintiff) in the [collision] [accident] and have further found that (enhancing injury defendant)'s [negligence] [product] was a cause of enhanced injuries to (plaintiff), then you

will answer question _____ and determine how much and to what extent (plaintiff)'s total injuries and damages were enhanced or increased by the negligence of (enhancing injury defendant). You will affix a percentage, or part of 100%, which you are satisfied should be attributable to (enhancing injury defendant).

Once (plaintiff) has established that (he) (she) sustained enhanced injuries as a result of (enhancing injury defendant)'s [negligence] [defective product], then the defendants have the burden of proof in apportioning how much of those injuries should be allocated between the [collision] [accident] and the alleged enhancement occurrence.

SPECIAL VERDICT

1. [Regular negligence question on defendant who allegedly caused the initial "accident" or "incident" and/or the following:]

Was the (product), when it left the possession of (defendant), in such defective condition as to be unreasonably dangerous to a prospective user?

Answer: _____
Yes or No

2. If you answer question _____ "yes," then answer this question:

Was such (negligence) (defective condition) a cause of (the accident) (injury to {the plaintiff})?

Answer: _____
Yes or No

3. Was (plaintiff) negligent with respect to caring for (his) (her) own safety?

Answer: _____
Yes or No

4. If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (the accident) (injury) to (plaintiff)?

Answer: _____
Yes or No

5. [Regular comparison question on who was at fault in causing initial accident or incident.]

6. What sum of money will fairly and reasonably compensate (plaintiff) for all total damages sustained by (him) (her) as a natural and probable consequence of the incident on (date) with respect to:

a. Pain, suffering and disability to date? \$ _____

b. Other subparts as required by the evidence, etc. \$ _____

7. [Regular negligence question as to defendant who allegedly caused enhanced injuries to the plaintiff and/or:]

Was the (product), when it left the possession of (enhancing tortfeasor), in such a defective condition so as to be unreasonably dangerous to a prospective user?

Answer: _____
Yes or No

8. If you answer question _____ "yes," then answer this question:

Was such defective condition a cause of enhanced injuries to (plaintiff)?

Answer: _____
Yes or No

9. [If the evidence reflects the plaintiff was contributorily negligent in causing enhanced injuries to himself or herself, then insert negligence and cause questions as to the plaintiff.]

10. [The Committee is suggesting three alternatives to determine the amount of damages attributable to the enhancing incident and who is responsible for same. Which alternative to use will be determined by the evidence and to a lesser degree by the style of the judge.]

- a. If you have answered "yes" to at least one of questions 2 and 4 and have thus found at least one of the parties at fault in causing the (first accident), and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by (enhancing injury defendant)?

_____ %

- b. If you have answered "yes" to at least one of questions 2 and 4 and have found at least one of the parties at fault in causing the (first accident) and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by:

i) (Describe initial accident or incident)? _____ %

ii) (Describe enhancement incident)? _____ %

Total 100%

- c. What sum of money will fairly and reasonably compensate the (plaintiff) for any part of his or her total damages that were sustained as natural and probable consequence (of the enhancing incident) (by the enhancing tortfeasor) with respect to:

i) Pain, suffering, and disability to date? \$ _____

ii) Other subparts as required by the evidence, etc. \$ _____

COMMENT

This instruction was approved in 1994 and revised, as to burden of proof language, in 2002. The comment was updated in 1998, 2000, and 2009.

While the "aggravated injuries" doctrine has been the law since Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971), recent cases have applied this concept to situations where only a split second exists between the "first accident" and the "enhancement occurrence." Sumnicht v. Toyota Motor Sales, 121 Wis. 2d 338, 360 N.W.2d (1984); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985), rev. den.; Farrell v. John Deere Co., 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989), rev. den.; Hansen v. New Holland North America, Inc., 215 Wis.2d 649, 574 N.W.2d 250 (Ct. App. 1997).

A Farrell type verdict was approved in Kutsuheras v. Avco Corp., 973 F. 2d 1341 (7th Cir. 1992), and Hansen v. Crown Controls Corp., 181 Wis. 2d 673, 512 N.W.2d 509 (Ct. App. 1993), rev. den.

The Committee does not believe the two comparison question format approved in Farrell to be mandatory. The trial judge has the discretion to craft the verdict to comport with the theories advanced and evidence presented.

Based on these cases, the Committee recommends one way to handle the problem would involve, first, having inquiries on who is responsible for the "first accident" as if no "enhanced injury" was present.

Second, would be an inquiry as to whether the "enhanced injury defendant" was negligent and/or its product was unreasonably dangerous and defective.

Third, would be an inquiry as to whether any such negligence or defective product was a cause of enhanced injuries to plaintiff.

Finally, a second percentage question would determine how much of plaintiff's total injuries and damages should be attributable to enhancing injury or successor tortfeasor.

Once plaintiff has produced sufficient evidence he or she sustained enhanced injuries, then the burden of allocating the damages between the two occurrences is upon the defendants. Johnson v. Heintz 73 Wis. 2d 286, 243 N.W.2d 815 (1976); Maskrey, supra at 154.

While the supreme court criticized the verbiage of "over and above" in the verdict concerning the causation question on enhanced injuries, Sumnicht, supra at 361, the Committee believes that criticism is not applicable to the instruction.

Since successive torts are involved, no joint liability occurs and thus contribution is not allowed. However, the accident causing tortfeasor would be entitled to equitable subrogation to the extent he or she paid for those damages attributable by the jury to the enhancing tortfeasor.

If an initial tortfeasor is the same as an enhancing tortfeasor, then the trial judge should tailor the suggested verdict in questions 1 and 7 to describe the acts of that tortfeasor to properly focus the jury's analysis of the alleged negligence of the defendant.

In Ellsworth v. Schelbrock, 229 Wis.2d 542, 600 N.W.2d 247 (Ct. App. 1999), the court held that it was not prejudicial error for the trial court to fail to instruct the jury on enhanced injuries. The court said that because the jury determined that the plaintiff's car was not unreasonably dangerous and that the manufacturer had no liability, the claim of error based on the failure to give the enhanced injury instruction was rendered moot. The court said that it could not conceive how the jury's deliberations would have changed even if the enhancement instruction had been given.