

1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: SPECIAL VERDICT; WIS. STAT. § 448.30 (2013)

Questions 1 and 2 of the special verdict form relate to the duty to inform a patient and read as follows:

QUESTION 1: On (date), was (doctor) negligent in informing (patient) about the availability of reasonable alternate medical modes of treatment and about the risks and benefits of these alternate treatments?

Answer: _____
Yes or No

QUESTION 2: If you have answered question 1 “yes,” then answer this question: Was the negligence of (doctor) in informing (patient) a cause of injury (death) to (patient)?

Answer: _____
Yes or No

COMMENT

This special verdict was approved in 2000 and revised in 2014. The commentary was updated in 2005, 2011, 2012, and 2014. This special verdict applies to a physician required to inform a patient about modes of treatment on or after December 15, 2013. For the special verdict in a trial involving the failure to obtain informed consent prior to December 15, 2013, see the former version of Wis JI-Civil 1023.1 reprinted at the end of this commentary.

After the Wisconsin Supreme Court decision affirming the Court of Appeals in Jandre v. Wisconsin Injured Patients and Families Compensation Fund, 2012 WI 39, 340 Wis.2d 31, 813 N.W.2d 627, the Wisconsin Legislature passed 2013 Wisconsin Act 111 to modify the informed consent law, Wis. Stats. § 448.30. The legislation changed the standard for evaluating whether a doctor properly informed a patient of the patient’s treatment options from a “reasonable patient” to “reasonable physician standard.”

In Jandre, the emergency medicine physician was not found negligent in arriving at her diagnosis of Bell's palsy by the jury. However, she was found negligent for not telling the patient that a carotid ultrasound could have been done. The jury found a reasonable patient would want to know about this test, which it was contended would have shown blockage. The jury also found that non-disclosure was a cause of damages sustained by the patient. The plaintiff contended that treatment of the blockage could have avoided the stroke suffered 10 days later. The verdict was for approximately two million dollars.

Under the existing law applied in Jandre, Wisconsin used a "reasonable patient" standard to determine whether a doctor was negligent in giving information. Under that standard, a jury is asked to determine what a reasonable person in the patient's position would want to know to make an informed decision.

The new act (2013 Wis. Act 111) requires doctors to disclose "only information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances." There is no liability for failure to inform patients about "any condition the physician has not included in his or her diagnosis at the time the physician informs the patient."

Damages. For instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

Trials Based on Alleged Failure to Obtain Informed Consent Prior to December 15, 2013. The version of this special verdict prior to the enactment of 2013 Wisconsin Act 111 read:

**1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT:
SPECIAL VERDICT**

Questions 1, 2, and 3 of the special verdict form relate to the issue of informed consent and read as follows:

QUESTION 1: Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

Answer: _____
Yes or No

QUESTION 2: If you answered question 1 "yes," then answer this question:
If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

QUESTION 3:

If you have answered both questions 1 and 2 “yes,” then answer this question: Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

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