

1023.4 PROFESSIONAL NEGLIGENCE: MEDICAL: DUTY OF PHYSICIAN TO INFORM A PATIENT: CONTRIBUTORY NEGLIGENCE

NO INSTRUCTION IS RECOMMENDED.

COMMENT

This commentary was approved in 2000, and reviewed in 2014. The title was updated, but no instruction is recommended. A previous instruction, numbered JI-Civil 1023.4 and titled, “Cause: Medical Malpractice: Negligent Diagnosis or Omitted Treatment,” was withdrawn in 1992.

In Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999), the supreme court said that the informed consent statute recognizes that a patient is not in a position to know treatment options and risks and, if unaided, is unable to make an informed decision. The court concluded that “as a general rule a jury should not be instructed that a patient can be found contributorily negligent for failing to ask questions or for failing to undertake independent research.”

However, the court said that it did not mean to say “a patient may never be contributorily negligent for failing to seek information.” It held that it would require a “very extraordinary fact situation” to render a patient negligent when the patient accepts and trusts the information a doctor provides.

The court, in Brown v. Dibbell, expressly said its decision did not address whether a patient’s duty to use ordinary care requires the patient to volunteer information or to spontaneously advise the doctor of material, personal, family, or medical histories that the patient reasonably knows should be disclosed. 227 Wis.2d at 49 n. 13.