

**1023.8 PROFESSIONAL NEGLIGENCE: CHIROPRACTOR TREATMENT**

In providing chiropractic care to (plaintiff), (chiropractor) was required to use the degree of care, skill, and judgment which reasonable chiropractors would exercise in the like or similar circumstances, having due regard for the state of chiropractic knowledge at the time (plaintiff) was treated. A chiropractor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and treatment. The standard you must apply in determining if (chiropractor) was negligent is whether (chiropractor) failed to use the degree of care, skill, and judgment which reasonable chiropractors would exercise given the state of chiropractic knowledge at the time of the treatment in issue.

**[Use this paragraph only if there is evidence of two or more alternative methods of chiropractic treatment recognized as reasonable:** If you find from the evidence that more than one method of chiropractic treatment for (plaintiff)'s condition was recognized as reasonable given the state of chiropractic knowledge at that time, (chiropractor) was at liberty to select any of the recognized methods. (Chiropractor) was not negligent because (he) (she) chose to use one of these recognized treatment methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be

established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

**(Insert the appropriate cause language. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)**

[The cause question asks whether there was a causal connection between negligence on the part of (chiropractor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of the (injury) (condition). In addition, (an injury) (a condition) can be caused jointly by a person's negligence and the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (chiropractor)'s negligence and the natural progression of (plaintiff)'s (injury) (disease), you should find that (chiropractor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (chiropractor) and placed (himself) (herself) under (chiropractor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (chiropractor). This question

asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (chiropractor)'s care, has been aggravated or further impaired as a natural result of the negligence of (chiropractor)'s treatment.]

**(Insert appropriate damage instructions.)**

[(Plaintiff) sustained injuries before the treatment by (chiropractor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you will consider only the damages (plaintiff) sustained as a result of the treatment by (chiropractor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (chiropractor)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (chiropractor).]

**SPECIAL VERDICT**

Was (chiropractor) negligent in (his) (her) care and treatment of (plaintiff)?

Answer: \_\_\_\_\_

Yes or No

**COMMENT**

This instruction and comment were approved in 1997. The comment was updated in 1999, 2005, 2015, and 2016. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction follows the format for explaining professional negligence adopted by the Committee in Wis JI-Civil 1023. The standard, "what a reasonable chiropractor would have done," follows the reasoning in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996), and Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

**Chiropractic Malpractice.** The standard of care for a chiropractor is different than that imposed upon a medical doctor. Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988).

A chiropractor has a duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when an average chiropractor should be aware that the patient's condition will not be responsive to further treatment; and (3) if the ailment presented is outside the scope of chiropractic care, inform the patient that the ailment is not treatable through chiropractic means. In determining whether a chiropractor breaches these duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by an average chiropractor under like or similar circumstances. A chiropractor does not have a duty to refer the patient to a medical doctor. Kerkman v. Hintz, *supra* at 419-21.

As to the type of expert testimony which is required on the issue of chiropractic negligence, Kerkman v. Hintz, *supra* at 423, states:

. . . , a chiropractor is qualified to testify regarding the practice of chiropractic and the corresponding standard of care. . . . Moreover, one who is not licensed to practice chiropractic may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given.

The Committee is still evaluating whether a chiropractor who claims to be a specialist or have special skills in treating certain conditions, *e.g.*, sports injuries, is held to a higher standard of care. See Duffy Law Office v. Tank Transport, Inc., 194 Wis.2d 675, 535 N.W.2d 91 (1995).

For a discussion of a chiropractor's duty to recognize a medical condition, see Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App. 1998).

**Negligence; Standard of Care.** See the comment to Wis JI-Civil 1005.

**Duty to Refer.** In a footnote in Hannemann v. Boyson, 2005 WI 94, 282 Wis.2d 664, 698 N.W.2d 714, fn. 11, the court noted the plaintiff argued that the chiropractor-defendant was negligent because he did not tell the plaintiff to see a medical doctor. The court addressed this argument by noting that it has previously held that a chiropractor does not have a duty to refer a patient who is not treatable through chiropractic means to a medical doctor.

**Duty of a Chiropractor to Inform a Patient.** See Wis JI-Civil 1023.15, 1023.16, and 1023.17.