

1385.5 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: SUICIDE OR INJURY RESULTING FROM ESCAPE OR ATTEMPTED SUICIDE

Question ____ asks if (hospital) was negligent in caring for (plaintiff)?

A hospital is responsible for the negligence of its employees. A hospital employee is negligent when (he) (she) fails to use reasonable care in providing for the hospital's patients. Reasonable care is that care which a person of ordinary intelligence and prudence would provide under the same or similar circumstances considering a patient's physical and mental condition.

A hospital has the duty to restrain or guard a patient only if employees knew, or in the exercise of reasonable care should have known, the propensity of the patient for (suicide, escape, self injury). In determining whether (employee[s]) knew or should have known of the possibility of (suicide, escape, self injury) you should consider information received by (employee[s]) from the attending physician, members of the family, persons who brought the patient to the hospital, the conduct and statements of the patient while in the hospital, as well as all the circumstances under which the patient was admitted to the hospital.

If, after consideration of all of the evidence, you find that (employee[s]) (was) (were) negligent, then (hospital) was negligent.

Question ____ asks whether at the time of the incident causing injury to (plaintiff) the (hospital) did know or should have foreseen the particular risk of harm that led to (plaintiff)'s injury. In determining whether the employee(s) of (hospital) knew or should have foreseen the particular risk of harm, you should consider information received by the employee(s) from the attending physician, the conduct and statements of (plaintiff) while in the hospital, as well the circumstances under which (plaintiff) was admitted to the hospital. A hospital is

under no duty to take special precautions when there is no reason to anticipate the particular risk of harm. To answer this question "yes," you must be satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the employee(s) of the hospital knew or should have foreseen the particular risk of harm to (plaintiff) from (suicide, escape, self-injury).

Question ____ asks whether (plaintiff) was negligent with respect to (his) (her) safety. Generally, every person in all situations has a duty to exercise ordinary care for his or her own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to (himself)(herself).

This general rule of ordinary care is modified where the plaintiff has a mental disability, is under the custody and control of a hospital, and the hospital is negligent in not foreseeing a particular risk of harm in caring for the plaintiff. In these circumstances, plaintiff's duty to exercise ordinary care for his or her own safety is that of a reasonable person with the plaintiff's mental disability in similar circumstances.

There are circumstances in which mentally disabled persons are as able to appreciate danger as any other person and are able to control their actions. You must consider (plaintiff)'s mental state at the time of the accident. (Plaintiff) is negligent if (plaintiff) did something or failed to do something that a reasonable person with (plaintiff)'s mental disability would recognize as creating an unreasonable risk of harm.

Question ____ asks whether (plaintiff) was totally unable to appreciate the risk of harm that led to (his)(her) injury and the duty to avoid that risk.

This question asks you to consider (plaintiff)'s mental state at the time of the accident, including the capacity of (plaintiff) to appreciate (his)(her) own conduct. (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he)(she) was utterly incapable of conforming (his)(her) conduct to the standard of ordinary care.

In answering this question, you should consider any observations of (plaintiff) noted by the attending physician, members of the family or persons who brought (plaintiff) to the hospital; (plaintiff)'s conduct and statements while at the hospital; the circumstances under which (plaintiff) was admitted to the hospital, including any diagnosis; and all other evidence received at trial bearing on (plaintiff)'s condition at the time of the accident.

[Insert where applicable: The evidence indicates that (plaintiff) was involuntarily committed. This does not necessarily establish that (he)(she) was so mentally disabled that (he)(she) lost (his)(her) mental capacity to appreciate the risk of harm from (his)(her) own conduct and the duty to avoid it. You must decide whether (plaintiff)'s mental disability which resulted in (his)(her) commitment was such that (plaintiff) was rendered incapable of appreciating the risk of harm and the duty to avoid that risk.]

SPECIAL VERDICT

Question 1: Was (defendant) negligent in caring for (plaintiff)?

Answer: _____
Yes or No

If you answered Question No. 1 "Yes" then answer Question No. 2. If you answered Question No. 1 "No" do not answer any other Questions.

Question 2: Was (defendant)'s negligence a cause of (plaintiff)'s injury?

Answer: _____
Yes or No

If you answered Question No. 2 "Yes" then answer Question No. 3. If you answered Question No. 2 "No" do not answer any other Questions.

Question 3: At the time of the incident causing injury to (plaintiff) was (he) (she) in the custody and control of (defendant)?

Answer: _____
Yes or No

If you answered Question No. 3 "Yes" then answer Question No. 4. If you answered Question No. 3 "No" then go to Question No. 7.

Question 4: At the time of the incident causing injury to (plaintiff), did (defendant) know or should (defendant) have foreseen the particular risk of harm that led to (plaintiff)'s injury?

Answer: _____
Yes or No

If you answered Question No. 4 "Yes" then answer Question No. 5. If you answered Question No. 4 "No" then go to Question No. 7.

Question 5: Was (plaintiff) negligent with respect to (his)(her) safety? *

Answer: _____
Yes or No

If you answered Question No. 5 "Yes" then answer Question No. 6. If you answered Question No. 5 "No" then go to Question No. 10.

Question 6: Was (plaintiff) totally unable to appreciate the risk of harm that led to (his) (her) injury and (his) (her) duty to avoid that risk?

Answer: _____

Yes or No

If you answered Question No. 6 "Yes" then go to Question No. 10. If you answered Question No. 6 "No" then go to Question No. 8.

Question 7: Was (plaintiff) negligent with respect to (his) (her) safety? **

Answer: _____
Yes or No

If you answered Question No. 7 "Yes" or Question No. 6 "No," then answer Question No. 8. If not, go to Question No. 10.

Question 8: Was (plaintiff)'s negligence a cause of (his) (her) injury?

Answer: _____
Yes or No

If you answered "Yes" to Question Nos. 2 and 8, then answer this question. If not, go to Question No. 10.

Question 9: Taking the total negligence that caused (plaintiff)'s injury to be 100%, what percentage do you attribute to:

a. Plaintiff _____ %

b. Defendant _____ %

TOTAL 100%

If you answered Question No.2 "Yes" then answer this question. Otherwise do not answer it.

Question 10: What sum of money will fairly and reasonably compensate (name of plaintiff) for (his) (her) injury?

\$ _____

* Subjective negligence standard

**** Objective negligence standard****COMMENT**

This instruction and comment were approved in 2005.

This instruction is based on the decision in Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545. The Hofflander decision involved a claim of a mentally disabled person who was injured while trying to escape an emergency detention facility. The supreme court concluded:

¶35. A person who is mentally disabled is held to the same standard of care as one who has normal mentality. An exception to this rule may exist when a mentally disabled person is under the protective custody and control of another. When a mentally disabled plaintiff relies on this exception to seek recovery for a self-caused injury, the plaintiff must establish that (1) a special relationship existed between the defendant caregiver and the plaintiff, giving rise to a heightened duty of care; and (2) the defendant caregiver knew or should have foreseen the particular risk of harm that led to the plaintiff's injury. If a special relationship existed but the defendant could not have foreseen the particular risk of harm, then the defendant is entitled to assert the affirmative defense of contributory negligence, and the fact finder should evaluate the comparative negligence of the parties using an objective standard of care.

¶36. However, if a special relationship did exist, the particular risk of harm was foreseeable, and there is some evidence that the defendant caregiver failed to exercise the duty of care that was required under these circumstances, the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care. In this situation, if the mentally disabled plaintiff is able to show that she was totally unable to appreciate the risk of harm and the duty to avoid it, the plaintiff's contributory negligence should not be compared to the negligence of the defendant. It should be expunged as a matter of law.