

**1385 NEGLIGENCE: HOSPITAL: DUTY OF EMPLOYEES: PERFORMANCE OF ROUTINE CUSTODIAL CARE NOT REQUIRING EXPERT TESTIMONY**

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

A hospital is responsible for the negligence of its employees. A hospital employee must use ordinary care in providing the services and attention to a patient required under the circumstances. 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 a person or property.

In determining if the hospital's (employee)(s) (was) (were) negligent, you should consider (plaintiff)'s condition and whether the condition was known to (employee)(s), and if not, whether the condition should have been known to (employee)(s) had the (employee)(s) used ordinary care in performing (his) (her) (their) duties.

In answering these questions, you may consider the following:

- any information about the patient which was transmitted to the hospital by members of the patient's family or by the person who brought the patient to the hospital,
- what the patient says or does while in the hospital,
- the records kept by the hospital which were readily available to the employee(s), and
- any other information or instructions the employee(s) had at that time.

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

**COMMENT**

The instruction and comment were originally published in 1971. This revision was approved by the Committee in 1999.

Dahlberg v. Jones, 232 Wis. 6, 285 N.W. 841 (1939); Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969); Cramer v. Theda Clark Memorial Hosp., 45 Wis.2d 147, 172 N.W.2d 427 (1969); Eden v. LaCrosse Lutheran Hosp., 53 Wis.2d 186, 191 N.W.2d 715 (1971); Wills v. Regan, 58 Wis.2d 328, 206 N.W.2d 398 (1973); Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975); Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 260 N.W.2d 386 (1977); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978).

The duty of care owed a patient by a hospital is one of ordinary care under the circumstances. Payne v. Milwaukee Sanitarium Found., Inc., *supra* at 272. However, in applying the ordinary care standard, there is a recognized distinction between medical care and custodial or routine hospital care. Thus in Payne, the court noted that:

Where the patient requires nursing or professional hospital care, then expert testimony as to the standard of that care is necessary.

However, the standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony.

This need for expert testimony with respect to medical care was repeated by the court later in the decision:

In establishing the negligence of a hospital the necessity of expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge or skill or experience on subjects that are not within the realm of ordinary experience of mankind, and which requires special learning, study or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 276 N.W.2d 386 (1977).

See also Kujawski v. Arbor View Center, 139 Wis.2d 455, 407 N.W.2d 249 (1987); "Necessity of Expert Testimony to Support Action against Hospital for Injury to or Death of Patient," 40 A.L.R.3d 515 (1971).

This instruction should be used only in actions against a hospital for negligent conduct that does not amount to malpractice. It should be given only where the hospital nurse or employee was in performance of custodial, housekeeping, or routine duties. Examples of these duties are discussed in Schuster v. St. Vincent Hosp., *supra*; Cramer v. Theda Clark Memorial Hosp., *supra*; Kujawski v. Arbor View Center, *supra*.

For example, in Cramer and Kujawski, the court said where a nurse leaves a patient unattended and under inadequate restraint involves matters of routine care and does not require expert testimony. The use or non-use of restraints requires expert testimony only where the decision to leave a patient unattended is a matter of therapy. Kujawski, supra at 468.