1710 AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE

If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

COMMENT

This instruction was approved in 1960 and revised in 1983, 1991, and 1998. The instruction was reviewed without change in 2014. The comment was updated in 1991, 1998, and 2006.

This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident.

Fouse v. Persons, 80 Wis.2d 390, 397-98, 259 N.W.2d 92 (1977); Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 289, 187 N.W.2d 349 (1971); Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976); Selleck v. Janesville, 100 Wis. 157, 164, 75 N.W. 975 (1898). See also Spencer v. ILHR Dept., 55 Wis.2d 525, 532, 200 N.W.2d 611 (1972); 22 Am. Jur. 2d Damages § 113 (1965).

This instruction conveys to the jury the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the additional harm is either (1) part of the original injury, (2) the nature and probable consequence of the tortfeasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence. Butzow, supra at 285-86.

In Butzow, the court refused to accept the argument that a negligent doctor who aggravates the original injury is liable for the damage directly caused by the original tortfeasor. Liability of the doctor is limited solely to damages resulting from his own negligence and only to that extent is there joint and several liability between the doctor and the original tortfeasor. The original tortfeasor and the subsequent negligent doctor, even though the doctor's negligence aggravates the original injury, are not joint tortfeasors although they have joint liability in part. However, such joint liability does not give rise to any right of contribution. Butzow, supra at 287.

The phrase "not diminished" comes from Selleck v. Janesville, supra.

In 2006, the Wisconsin Supreme Court discussed Wis JI-Civil 1710 in Jo-el Hanson v. American Family, 2006 WI 97. This case dealt with the insurer's claim that plaintiff's damages were inflated due to over-treatment. The trial judge modified JI-Civil 1710. The court of appeals said this instruction conveys the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians," citing Lievrouw, 157 Wis.2d at 358.

The defendants argued that there is a difference between unnecessary medical treatment, as opposed to medical malpractice that causes aggravation of injuries. The defendants contended that there is no causal relationship between the accident and the surgery performed. Therefore, in the defendant's view, the case should not be subject to a Wis JI-Civil 1710 instruction, because the instruction "is to be used in cases where there is at issue aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident." Wis JI-Civil 1710 Comment.

The supreme court held that JI-Civil 1710 is correct and that the modification by the trial judge was erroneous and confusing. The court held that because the jury concluded that the plaintiff was injured in the accident, she was entitled to all of her past medical expenses, regardless of whether plaintiff's treating physician performed an unnecessary surgery, under the rule first enunciated in Selleck, 100 Wis. 157, as she used ordinary care in selecting her doctor.