1722A DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS (To be used where several tortfeasors are parties)

Evidence has been received during the trial that (the plaintiff) may have received injuries from separate accidents.

Subdivision ___ of question ___ asks what percentage of any damages incurred by (plaintiff) and (defendant A). Subdivision ___ of question ___ asks the same question as to what percentage of any damages incurred by (plaintiff) was attributable to the accident involving (plaintiff) and (defendant B).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering these questions, you should use your best judgment, based on the evidence received during the trial, to apportion the percentages of any damage sustained by (plaintiff) to the separate accidents.

SPECIAL VERDICT

If you have answered "yes" to both questions ___ and ___ (i.e., causal negligence of both nonconcurrent tortfeasors), what percentage of all the damages received by the (plaintiff) do you attribute to:

SUBDIVISION A - The accident involving

(plaintiff) and (defendant A)? _____%

SUBDIVISION B - The accident involving

(plaintiff) and (defendant B)? _____%

TOTAL 100%

COMMENT

This instruction and comment were approved in 1983. The comment was reviewed without change in 1990. Editorial changes were made to the instruction in 1992 and to the comment in 1996.

Wis JI-Civil 1722 and 1722A are to be used where the plaintiff has suffered injuries from nonconcurrent torts, also referred to as successive torts. This instruction (1722A) is to be used where more than one tortfeasor is in the lawsuit as a party.

The Committee recognizes the difficulties, in some cases, in apportioning damages between or among nonconcurrent tortfeasors. This instruction requires the jury to divide the damages even though such a division may be difficult because of the nature of the plaintiff's injuries.

Formerly, Wisconsin Jury Instructions - Civil contained a series of three instructions which dealt with the issue of apportioning damages from nonconcurrent torts. These instructions were: (1) Wis JI-Civil 1721, Damages: Indivisible Injuries from Nonconcurrent or Successive Torts: Expert Testimony; (2) Wis JI-Civil 1722, Damages: Divisible Injuries from Nonconcurrent or Successive Torts; and (3) Wis JI-Civil 1723, Damages: Conflict as to Whether Injuries are Divisible or Indivisible. These instructions were revised by the Committee in 1978 to conform the instructions to the supreme court's decisions in Johnson v. Heintz, 61 Wis.2d 585, 213 N.W.2d 85 (1973); and after retrial in Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976). According to its comment, Wis JI-Civil 1721 was to be used where the court determined as a matter of law that the defendants were not joint tortfeasors, and that the accidents were successive, and that there was uncontroverted expert testimony that the plaintiff's injuries were not divisible. Wis JI-Civil 1722 was to be used where the trial judge determined that the damages were divisible. Wis JI-Civil 1723 was to be used where there was a conflict in the trial testimony on whether the injuries were divisible. As discussed later in this comment, JI-Civil 1721 and 1723 have been withdrawn by the Committee. [In 1996, a new instruction, dealing with a different issue, was assigned the number JI-Civil 1723.]

In earlier case law, the Wisconsin Supreme Court had suggested that nonconcurrent tortfeasors were jointly liable for all injuries to the victim where it was impossible to divide the harm caused by each defendant. Heims v. Hanke, 5 Wis.2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955). Those two cases stood for the general proposition that because allocating responsibility for indivisible injuries would place an impossible burden on juries, contribution was appropriate for the actual injury, even though the injury was the result of successive (not joint) tortious acts. This suggestion in Heims and Bolick that joint liability could arise from the indivisibility of injuries was expressly rejected by the court in Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 187 N.W.2d 349 (1971). Justice Hallows, who authored that opinion, stated that juries should have no more difficulty in allocating damages to the respective negligence of two tortfeasors than they do in allocating contribution of negligence of two tortfeasors to the injury and damages.

In the first Johnson v. Heintz decision, the supreme court reaffirmed the holding in Butzow that inseparability of damages could not create joint liability of successive tortfeasors. Johnson No. 1, in rejecting 1721, clearly stated that a tortfeasor is only responsible for the percentage of the damages and injury as was caused by his or her negligence. The term "joint liability," as employed in earlier cases, was used in the generic sense. It is not a joint and several liability concept as in the typical two-car accident case where two sources of negligence concur in time and combine to produce one accident. There, of course, contribution will lie and the liability is joint and several.

In the second Johnson v. Heintz decision, the court noted that in Johnson No. 1, it had stated that an "allocation of damages as to the impact was necessary." Nevertheless, the court, in dicta, suggested that expert testimony could be used to establish the indivisibility of the plaintiff's injuries and, consequently, the joint liability of nonconcurrent tortfeasors. This suggestion was dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant Heintz was solely responsible for all damages in the case.

After reviewing the case law on this issue, the Committee believes that the jury should apportion all damages received in nonconcurrent torts. As such, Wis JI-Civil 1721 (1978) and 1723 (1978) are withdrawn. [Reporter's Note: A new instruction dealing with enhanced injuries was numbered JI-Civil 1723 in 1995.] Wis JI-Civil 1722 has been simplified so that it applies where only one tortfeasor is a party. Wis JI-Civil 1722A has been added for use in cases where multiple tortfeasors are actually in the lawsuit. This instruction requires the jury to apportion the plaintiff's damages between the nonconcurrent tortfeasors. This conforms to the supreme court's decision in the first Johnson decision and to Justice Hallows' statement in Butzow that the concept of the inseparability of damages "is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted."

In Foley v. City of West Allis, 113 Wis.2d 475, 485-86, 335 N.W.2d 824 (1983), the court stated that "as a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, courts attempt to do so." Citing Prosser, Law of Torts § 65 (4th ed. 1971) and Restatement, Second, Torts §§ 433A and 465 (1975). Foley involved the apportionment of damages to "seat-belt negligence" by the plaintiff. The court noted that since failure to wear seat belts generally causes incremental injuries, damages should be allocated between the first incident (the actual collision) and the second incident (the collision within the plaintiff's car).

Section 433A of Restatement, Second, Torts, quoted in Foley, states:

433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

For a further discussion of the indivisibility of injuries under Wisconsin tort law, see Scott, "The Apportionment of 'Indivisible' Injuries," 61 Marq. L. Rev. 559 (1977).