

1756 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services.

You will insert as your answer to this (question) (subdivision) the sum of money you find has reasonably and necessarily been incurred from the date of the accident up to this time for the care of the injuries sustained by (plaintiff) as a result of the accident.

Billing statements (which may include invoices) for health care services (plaintiff) has received since the accident have been admitted into evidence.

[NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff: These billing statements establish the value, reasonableness, and necessity of health care services provided to (plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

[NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff: The party challenging the (value of) (reasonableness and necessity of) (plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (plaintiff)). You must still determine

whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

COMMENT

This instruction was originally published in 1960 as JI-Civil 1765. It was revised in 1983 and renumbered and revised in 1998, 2008, and 2010. The comment was updated in 2000, 2005, 2006, 2008, 2010, and 2012. The instruction was reviewed without change in 2014.

Measure. The proper measure of damages for care rendered in a personal injury case is the reasonable value of the care necessarily required by the injury. Leitinger v. DBart, Inc., 2007 WI 84, 302 Wis.2d 110, 736 N.W.2d 1; Koffman v. Leichtfuss, 2001 WI 111, 246 Wis.2d 31, 630 N.W.2d 201. See also Fouse v. Persons, 80 Wis.2d 390, 259 N.W.2d 92 (1977); Green v. Rosenow, 63 Wis.2d 463, 217 N.W.2d 338 (1974); Cole v. Schaub, 164 Wash. 162, 168-69, 2 P.2d 669, 671-72 (1931); Nimlos v. Bakke, 223 Wis. 473, 476-77, 271 N.W. 33, 34 (1937); Gerbing v. McDonald, 201 Wis. 214, 218, 229 N.W.2d 860, 862 (1930). While the actual amount paid for services may reflect the reasonable value of the treatment rendered, the focus is on the reasonable value, not the actual charge. Thus, the value of services made necessary by the tort can be recovered although they have created no liability or expense to the injured person. See Leitinger, supra, ¶23 and Koffman, supra. The jury determines the reasonable value of the treatment rendered to the plaintiff, which is not necessarily the amount actually paid or the amount billed for the treatment. Leitinger, supra, ¶24.

Collateral Source. In Leitinger, the court considered whether evidence of the amount actually paid by the plaintiff's health insurer for the plaintiff's treatment was admissible in a personal injury action (not involving medical negligence) for the purpose of establishing the reasonable value of the medical treatment rendered. The supreme court said "no." It held that the collateral source rule prohibits parties in a personal injury action (not involving medical negligence) from introducing evidence of the amount actually paid by the injured person's health insurer.

An injured party is entitled to recover the reasonable value of medical services, which, under the collateral source rule, includes written-off medical expenses. Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775. Written-off expenses are the expenses "written off" or waived by a medical provider as a result of negotiated discounts between health insurers and the medical provider.

For a discussion of the collateral source rule in medical negligence cases, see Wis JI-Civil 1757.

Presumption of Reasonable Value; Presumption of Reasonable and Necessary Services; Collateral Source Payments (Wis. Stat. § 908.03(6m)(bm)). In 2009, the legislature enacted Wis. Stat. ¶ 908.03(6m)(bm), as part of the Budget Bill, which deals with presumptions to be given to health care records. The subsection states:

(bm) *Presumption.* Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

This language creates two "rebuttable" presumptions:

- 1) billing statements and invoices that are patient health care records are presumed to state the reasonable value of the health care services provided; and
- 2) the health care services provided are presumed to be reasonable and necessary to care for plaintiff.

Sec. 908.03(6m)(bm) also states that the party attempting to rebut the presumption of the reasonable value of the services provided to plaintiff may not present evidence of payments made or benefits conferred by collateral sources.

The committee took the following action to incorporate these new statutory presumptions:

1. Wis JI-Civil 1756 was revised to include the presumptions as to: (1) value and (2) reasonableness and necessity of services provided to plaintiff.
2. Wis JI-Civil 1757, which is applicable exclusively to medical negligence cases, was revised to add the presumptions created by § 908.03 (6m)(bm).