

**1757 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES (MEDICAL NEGLIGENCE CASES) (NEGLIGENCE OF LONG-TERM CARE PROVIDER): COLLATERAL SOURCES**

(Question \_\_\_\_\_) (Subdivision \_\_\_\_\_ of Question \_\_\_\_\_) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services?

A person injured by medical negligence (the negligence of a long-term care provider) may recover the reasonable value of health care services reasonably required as a result of the injury. Billing statements (which may include invoices) for health care services (plaintiff) has received since (insert event giving rise to the medical negligence/the negligence of a long-term care provider) 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 (treatment) (diagnosis) by (\_\_\_\_\_).]

**[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 (treatment) (diagnosis) by (\_\_\_\_\_)].

The reasonable value of health care services made necessary by (medical negligence) (the negligence of a long-term care provider) may be awarded even though (plaintiff) did not incur any expense, obligation, or liability to pay for those services.

Evidence has also been received of payments made by (list sources) to (plaintiff) or on behalf of (plaintiff) for health care services.

[Evidence has also been received of services provided at no charge to (plaintiff) by (list providers).]

The evidence of payments by (list sources) has been received for the sole purpose of assisting you in determining the reasonable value of the services reasonably required by the injury. You may not reduce the reasonable value of the health care services on the basis of payments made by (list sources.)

Also (list subrogated entities) may be entitled to recover repayment or reimbursement of any amounts which you determine were the result of (the medical negligence) (the negligence of a long-term care provider).

#### COMMENT

This instruction was approved in 2005 and revised in 2010 and 2011. The comment was updated in 2012.

This instruction implements the decision of the Wisconsin Supreme Court in Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, 285 Wis.2d 1, 700 N.W.2d 201.

**Long-Term Care Provider.** Wis. Stat. § 893.555(8), allows the admission of evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury in an action to recover damages for negligence by a long-term care provider.

**Collateral Source Payments.** In Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, the supreme court concluded that, in medical negligence cases, the trial judge "must instruct the fact-finder that it must not reduce the reasonable value of medical services on the basis of the collateral source payments. Although the jury is instructed not to use the evidence of collateral source payments to reduce the award for medical services, evidence of collateral source payments may be used by the jury to determine the reasonable value of medical services." ¶5. See also Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

Evidence of collateral source payments is admissible under Wis. Stat. § 893.55(7) only if the evidence is relevant. In a medical malpractice action, evidence of collateral source payments is relevant if it is probative of any fact that is of consequence to the determination of damages. Weborg v. Jenny, *supra*. In Weborg, the circuit court admitted the evidence of life insurance proceeds and social security benefits without first determining in its discretion whether either piece of evidence was relevant to the jury's determination of damages. Because the circuit court applied an improper legal standard in admitting the evidence of life insurance proceeds and social security benefits, the supreme court concluded that the circuit court erroneously exercised its discretion.

In Lagerstrom, the court said because the jury was advised of collateral source payments and the net amount the estate paid for medical services, but was not advised of the estate's potential obligation to reimburse Medicare for medical services, the jury was not able to assess the reasonable value of medical services fully and fairly. ¶6. The court noted that typical collateral sources include Medicare, other state or federal government programs, medical provider write-offs pursuant to Medicare regulations, private insurance, income continuation plans, and volunteer services. ¶17, 30.

**Collateral Source Payments; Presumptions of Reasonable Value; Presumption of Reasonable and Necessary Services; 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 the care of 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 value and reasonableness and necessity of services provided to plaintiff.
2. Wis JI-Civil 1757 which is applicable exclusively to medical negligence cases, was revised to discuss the effect of § 908.03 (6m)(bm). Currently, § 893.55(7) provides that in med-mal cases, evidence of any compensation for bodily injury received by plaintiff from a source other than the defendant to compensate the plaintiff for injury is admissible. The committee concluded that the collateral source provision (*i.e.* that collateral source evidence is not admissible) in § 908.03 (6m)(bm) does not apply in med-mal cases. A canon of statutory construction holds that a specific statute controls over a general statute. Heritage Farms, Inc. v. Markel Ins. Co., 2009 WI 27. However, the language in § 908.03 (6m)(bm) creating the presumptions of reasonable value of health care services and reasonableness and necessity of the health care services provided to plaintiff will apply in med-mal cases, because § 893.55 (7) is limited to the admissibility of collateral source payments and is silent on the presumptions.

**Reasonable Versus Actual Damages.** In Lagerstrom, the court noted that a person injured by medical negligence may recover the reasonable value of the medical services reasonably required by the injury. ¶52. The court said "in most cases the reasonable value of medical services is the actual expense, but in some cases it is not." It said "the test is the reasonable value, not the actual charge, and therefore there need be no actual charge." The court was not persuaded "that Wis. Stat. § 655.009(2) changes the long-standing rule that the Reasonable value of medical services" is the reasonable value of medical services rendered, without limitation to amounts paid. This long-standing rule has been applied in both Chapter 655 medical malpractice actions and in other actions as the method for determining the reasonable value of medical services.

**Subrogation.** The court in Lagerstrom said that subrogation works in tandem with the collateral source rule. The collateral source rule prevents benefits received by the victim from inuring to the tortfeasor, and subrogation prevents the victim from receiving a double recovery because the payor of benefits may recover the payments from the tortfeasor or the victim.

The Lagerstrom court analyzed Wis. Stat. § 893.55(7) and concluded that for subrogation (or reimbursement) and the collateral source rule to work in tandem to prevent a victim's double recovery and protect subrogation, the statute must be interpreted to require courts to instruct juries to consider the collateral source payments only in determining the reasonable value of the medical services rendered. ¶72.