

## Chapter 11. Medical Negligence

### APPENDIX: Sample liability of a doctor for negligence and for performance of a procedure without consent.

#### FACTS

After two years of experiencing lower back and sciatic pain, Norma Richards consulted Dr. Louis Paul, an orthopedic surgeon. Dr. Paul diagnosed a herniated disc at L4-L5 and recommended its removal. Ms. Richards signed a consent form permitting the removal of the disc at L4-L5. The consent outlined bleeding and infection as two of the "ordinary complications" that often accompany disc surgery.

During surgery, Dr. Paul used a posterior approach to Ms. Richards' disc. Dr. Paul not only removed that portion of that disc that had herniated out and pressed on her spinal cord, but also proceeded deeper into the disc with his rongeur until he went through the entire thickness of the disc and emerged on the anterior or stomach side of Ms. Richards' spinal column. Dr. Paul continued to remove chunks of what he thought was Ms. Richards' disc. However, he was now taking large chunks of Ms. Richards' iliac artery and iliac vein which lay on the underside of her spinal column. Ms. Richards rapidly began to lose blood pressure and ultimately her pulse. Dr. Paul subsequently guessed what had happened and called a vascular surgeon to assist him. Ms. Richards was turned over on her back, a laparotomy was performed, and her iliac artery and vein were ultimately repaired.

Ms. Richards subsequently brought suit against Dr. Paul.

#### INSTRUCTIONS

*The instructions set forth below represent one way in which the instructions in a medical negligence case could be presented to the jury. There are other, equally acceptable, ways to arrange these instructions, provided the general design of the "302" series of instructions (UJI 13-302A through 13-302F) for the presentation of claims, defenses, and issues is followed. The goal is clarity. To that end some of the preliminary instructions have been split and their paragraphs paired with other instructions which address the same issue. The UJI numerical sequence has been disregarded and the logic of the instructions has been the guide in their sequencing. The terms "Plaintiff" and "Defendant" have been eliminated and the names of the parties inserted in their stead. Minor changes in wording have been made where they aid intelligibility without changing the meaning of the instruction. Finally, although it may be a convenient practice to submit individual instructions on separate pages during the process of settling instructions, modern word processing capabilities should make it possible to provide the jury with an integrated set of instructions contained on a few pages rather than fragmenting the instructions and giving the jurors numerous sheets of paper with a single instruction on each. This example is formatted accordingly. (Note:*

*instruction references in the left margin are for the convenience of the reader in understanding this example and should not be included in a set of instructions sent to the jury.)*

**UJI 13-301**

The time has now come to give you final instructions that will guide your deliberations as the sole judges of the facts of this case.

First, I will summarize the issues between the parties. Second, I will state the rules of law governing this case.

**UJI 13-2002**

The law of this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction, or parts thereof, and disregarding others.

**UJI 13-2005**

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case.

Neither sympathy nor prejudice should influence your verdict.

**UJI 13-2001**

Faithful performance by you of your duties is vital to the administration of justice.

**UJI 13-301**

Please pay close attention to these instructions. I will read them only once, but the written instructions will be given to you to take to the jury room.

**UJI 13-302A**

In this civil action Norma Richards is seeking compensation from Dr. Louis Paul for damages which Ms. Richards claims were caused by negligence and by performance of surgery on her without her consent.

**UJI 13-302B**

To establish her claim of negligence against Dr. Paul, Ms. Richards has the burden of proving that Dr. Paul failed to use the skill and care required of him in performing her back surgery, by going too far into the disc space of Ms. Richards' back, coming out on the other side of the disc, and unknowingly cutting Ms.

Richards' iliac artery and vein which lay immediately beneath her spinal column.

**UJI 13-302C**

Dr. Paul denies Ms. Richards' contentions. Dr. Paul contends that Ms. Richards' injuries were ordinary complications of disc surgery that occurred without negligence.

**UJI 13-1102**

Dr. Paul held himself out as a specialist in orthopedics. Having undertaken to operate on Norma Richards in this specialized field, Dr. Paul had a duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved. If Dr. Paul failed to do so, he was negligent.

The only way in which you may decide whether Dr. Paul possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

**UJI 13-1105A**

The fact that a doctor communicates the inherent and potential hazards of a proposed procedure does not necessarily mean that those hazards, should they arise, are not the result of negligence in performing the proposed procedure.

The fact that a patient expressly or impliedly consents to a proposed procedure does not mean that the patient consents to the negligent performance of that procedure and therefore does not prevent you from considering whether the procedure was negligently performed.

**UJI 13-1112**

A doctor does not guarantee a good medical result. An unintended incident of treatment is not, in itself, evidence of any wrongdoing by the doctor. Instead, the patient must prove that the unintended incident of treatment was caused by the doctor's negligence.

**UJI 13-302B**

To establish Dr. Paul performed surgery on her without her consent, Norma Richards has the burden of proving that Dr. Paul performed a laporotomy on her without first obtaining her consent.

### **UJI 13-302C**

Dr. Paul admits performing the laparotomy without obtaining Ms. Richards' consent. However, Dr. Paul says that the laparotomy was an emergency procedure for which no consent was necessary.

### **UJI 13-302D**

To establish a defense to Ms. Richards' claim of lack of consent, Dr. Paul has the burden of proving that an emergency existed.

### **UJI 13-1109A**

Every adult of sound mind has a right to determine what shall be done with her own body. A doctor who performs an operation upon a patient without the patient's prior consent commits a legal wrong for which the doctor is liable in damages. It is also legally wrong to perform an operation upon one part of the body when the patient's consent was limited to another part of the body.

### **UJI 13-1107**

Consent is not required when the patient is unable to give consent during the course of an operation and an emergency arises requiring an immediate change in the operation or treatment necessary for life or health.

### **UJI 13-302B**

Ms. Richards has the burden of proving that any negligent or wrongful conduct on the part of Dr. Paul was a cause of her injury and damages.

### **UJI 13-305**

An [act] [or] [omission] [or] [\_\_\_\_\_ (*condition*)] is a "cause" of [injury] [harm] [\_\_\_\_\_ (*other*)] if [unbroken by an independent intervening cause,] it contributes to bringing about the [injury] [harm] [\_\_\_\_\_ (*other*)] [and if injury would not have occurred without it]. It need not be the only explanation for the [injury] [harm] [\_\_\_\_\_ (*other*)], nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the [act] [or] [omission] [or] [\_\_\_\_\_ (*condition*)], nonetheless, must be reasonably connected as a significant link to the [injury] [harm].

### **UJI 13-304**

Ms. Richards has the burden of proving every essential element of her claims by the greater weight of the evidence. Similarly, Dr. Paul has the burden of proving

the existence of an emergency by the greater weight of the evidence.

To prove by the greater weight of the evidence means to prove that something is more likely true than not true. When these instructions state that Norma Richards has the burden of proof, or Dr. Paul has the burden of proof, on a particular issue, they mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.

### **UJI 13-1801**

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

### **UJI 13-213**

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion.

However, a witness who is qualified as an expert in a subject may be permitted to state an opinion as to that subject. After considering the reasons stated for an opinion, you should give it such weight as it deserves. You may reject an opinion entirely if you conclude it is unsound.

### **UJI 13-307**

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court and any facts admitted or agreed to by counsel and any facts which the court instructs you to accept as true.

The production of evidence in court is governed by rules of law. From time to time it has been the court's duty to rule on the evidence. You must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

### **UJI 13-2003**

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, the witness' memory, the witness' manner while testifying,

any interest, bias or prejudice that the witness may have and the reasonableness of the witness' testimony, considered in light of all the evidence of the case.

**UJI 13-2004**

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

**UJI 13-2005**

You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.

**UJI 13-302F**

After considering the evidence and these instructions as a whole, the questions presented for you to answer on the special verdict form on the claim of Dr. Paul's negligence are as follows:

1. Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?
2. Was any negligence of Dr. Paul a cause of Norma Richards' injuries and damages?

If you answer "No" to either of these questions on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of negligence.

If, on the other hand, you answer "Yes" to both of these questions, you shall determine the amount of money that will compensate Norma Richards for her injury and damages. You will also answer the other questions required of you on the special verdict form which I will hand to you at the conclusion of these instructions.

After considering the evidence and these instructions as a whole, the question presented for you to answer on the special verdict form on the claim of lack of consent for surgery is as follows:

1. Was Dr. Paul required to obtain Norma Richards' consent before

performing the laparotomy upon her?

If you answer "No" to that question on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of lack of consent for surgery.

If, on the other hand, you answer "Yes," you shall determine the amount of money that will compensate Ms. Richards for the injury and damages caused by the unconsented to procedures.

**UJI 13-2008**

You are not to discuss damages unless you have first determined that there is liability.

**UJI 13-1802**

If you decide Dr. Paul was negligent, you must determine the amount of money which will fairly compensate Norma Richards for any of the following damages proved by her to have resulted from Dr. Paul's negligence.

**UJI 13-1803,  
to 13-1807 and  
13-1825**

1. The value of lost earnings and the present cash value of earning capacity reasonably certain to be lost in the future.
2. The reasonable expense of necessary medical care, treatment, and services received.
3. The reasonable value of necessary nonmedical expenses and services which have been required as a result of the injury.
4. The nature, extent and duration of the injury.
5. The pain and suffering experienced and which will be experienced in the future as a result of the injury.

You must also determine whether as a result of Dr. Paul's negligence, Ms. Richards will need future medical care and related benefits.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to both parties.

**UJI 13-1821**

As to loss of future earning ability, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.

**UJI 13-1822**

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you might make would, if properly invested, earn interest. You should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total future damages, if any.

Damages for any future pain and suffering are not to be so reduced.

**UJI 13-2006**

The jury acts as a body. Therefore, on every question which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least ten of you must agree upon the answer; however, the same ten need not agree upon each answer.

**UJI 13-2007**

After you hear these instructions on the law governing this case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

**UJI 13-2009**

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.



When as many as ten of you have agreed upon a verdict, your foreperson must sign the appropriate form and you will all then return to open court.

### SPECIAL VERDICT FORM

#### Part I - Negligence

##### UJI 13-2220

On the questions submitted on the claim of Dr. Paul's negligence, the jury finds as follows:

**Question No. 1:** Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?

**Answer** \_\_\_\_\_ (*Yes or No*)

If the answer to Question No. 1 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

**Question No. 2:** Was any negligence of Dr. Paul a cause of Norma Richards' injury and damages?

**Answer** \_\_\_\_\_ (*Yes or No*)

If the answer to Question No. 2 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

If the answer to Question No. 2 is "Yes", you are to answer Questions 3 and 4, then proceed to Part II.

**Question No. 3:** In accordance with the damage instructions given by the court, we find the total amount of damages (excepting any future medical care and related benefits) suffered by Norma Richards as a result of Dr. Paul's negligence to be \$\_\_\_\_\_.

##### UJI 13-1125

**Question No. 4:** Do you find that plaintiff Norma Richards is in need of future medical care and related benefits?

**Answer** \_\_\_\_\_ (*Yes or No*)

## Part II - Lack of Consent

On the question submitted on the claim of Dr. Paul's failure to obtain consent before performing surgery, the jury finds as follows:

**Question No. 5:** Was Dr. Paul required to obtain Norma Richards' consent before performing the laparotomy upon her?

**Answer** \_\_\_\_\_ (*Yes or No*)

If the answer to Question No. 5 is "No", your verdict is for the defendant and against the plaintiff on this claim. Do not answer any further questions. Your foreperson must sign this special verdict, and you will return to open court.

If the answer to Question No. 5 is "Yes", you are to answer Question No. 6. Your foreperson must then sign this special verdict, and you will return to open court.

**Question No. 6:** In accordance with the damages instructions given by the court, we find the total amount of damages suffered by Norma Richards as a result of Dr. Louis Paul performing surgery without her consent to be \$\_\_\_\_\_.

When as many as ten of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will return to open court.

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**Foreperson**