105.00
PROFESSIONAL NEGLIGENCE

INTRODUCTION

The jury instructions in the 105.00 series deal with negligence actions brought against professionals, including doctors, dentists, attorneys, architects and others. Generally, professional negligence actions are predicated on a failure of the professional to conform to the appropriate standard of care. In prior editions, the term "malpractice" was used. However, the committee believes that "professional negligence" more accurately describes the type of case in which these instructions can be used.

Actions based on the performance of a procedure on a patient by a medical professional without the consent of the patient or authorized individual are brought under the legal theory of assault and battery.

In an action for medical professional negligence the plaintiff must prove by expert testimony that the defendant physician failed to conform to the applicable standard of care unless the alleged negligence is grossly apparent or is obvious to a layman. Addison v. Whittenberg, 124 Ill.2d 287, 529 N.E.2d 552, 124 Ill.Dec. 571 (1988); Purtill v. Hess, 111 Ill.2d 229, 242; 489 N.E.2d 867, 872; 95 Ill.Dec. 305, 310 (1986); Walski v. Tiesenga, 72 Ill.2d 249, 381 N.E.2d 279, 21 Ill.Dec. 201(1978); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975). *See* 735 ILCS 5/2-1113 (1994). The applicable standard of care may also be proven by explicit manufacturer's instructions for proper use of a medication (Ohligschlager v. Proctor Community Hosp., 55 Ill.2d 411, 303 N.E.2d 392 (1973)), by cross-examination of the defendant (Metz v. Fairbury Hosp., 118 Ill.App.3d 1093, 455 N.E.2d 1096, 74 Ill.Dec. 472 (4th Dist.1983)), or by hospital licensing regulations or accreditation standards (Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989)).

The same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances. Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill.App.3d 479, 493 N.E.2d 6, 97 Ill.Dec. 524 (1st Dist.1986) (registered nurse); St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983) (dentist); Thompson v. Webb, 138 Ill.App.3d 629, 486 N.E.2d 326, 93 Ill.Dec. 225 (4th Dist.1985) (doctor); Laukkanen v. Jewel Tea Co., 78 Ill.App.2d 153, 222 N.E.2d 584 (4th Dist.1966) (engineer); Brown v. Gitlin, 19 Ill.App.3d 1018, 313 N.E.2d 180 (1st Dist.1974) (attorney); Rosos Litho Supply Corp. v. Hansen, 123 Ill.App.3d 290, 462 N.E.2d 566, 78 Ill.Dec. 447 (1st Dist.1984) (architect); Horak v. Biris, 130 Ill.App.3d 140, 474 N.E.2d 13, 85 Ill.Dec. 599 (2d Dist.1985) (social worker); Cereal Byproducts Co. v. Hall, 16 Ill.App.2d 79, 147 N.E.2d 383 (1st Dist.1958), *aff'd*, 15 Ill.2d 313, 155 N.E.2d 14 (1958) (accountant); Spilotro v. Hugi, 93 Ill.App.3d 837, 417 N.E.2d 1066, 49 Ill.Dec. 239 (2d Dist.1981) (veterinarian); Barnes v. Rakow, 78 Ill.App.3d 404, 396 N.E.2d 1168, 33 Ill.Dec. 444 (1st Dist.1979) (surveyor). Therefore, regardless of the defendant's profession, the same jury instructions may be used with appropriate modifications, if needed.

The Medical Malpractice Act, P.A. 84-7, modified the law of medical negligence for cases filed after August 15, 1985. However, the Act did not require major changes in the professional negligence instructions in this chapter. The changes in jury instructions required by the Act are in the damages instructions. 735 ILCS 5/2-1109 (1994) (itemized verdicts); 735 ILCS 5/2-1707 (1994) (calculation of future damages).

Instructions dealing with informed consent, res ipsa loquitur, and the duty of a health care institution have been added to reflect the current state of the law. *See* 735 ILCS 5/2-622(3) (d) (1994).

105. 01 Professional Negligence – Duty

A _____ must possess and use
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

the knowledge, skill, and care ordinarily used by a reasonably careful

_____.
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

The failure to do something that a reasonably careful
_____
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

[practicing in the same or similar localities] would do, or the doing of something that a reasonably careful

would not do, under
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

circumstances similar to those shown by the evidence, is "professional negligence".

The phrase "deviation from the standard of [care][practice]" means the same thing as "professional negligence".

The law does not say how a reasonably careful
would act
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from [a] qualified [witness] [witnesses] [and] [evidence of professional standards][evidence of by-laws/rules/regulations/policies/procedures] [or similar evidence]. You must not attempt to

determine how a reasonably careful _____
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

would act from any personal knowledge you may have.

Instruction revised April 2020. Notes on Use revised September 2011. Comment revised December 2011.

Notes on Use

The bracketed language ("deviation from the standard of practice") in the second paragraph may be more appropriate for an accountant or attorney malpractice case than the "deviation from the standard of care" language that is most appropriate for medical negligence cases.

The second paragraph must be given unless the Court determines that expert testimony is not necessary because the case falls within the "common knowledge" exception. *Jones v. Chicago HMO, Ltd. of Illinois,* 191 Ill.2d 278, 296, 730 N.E.2d 1119, 246 Ill.Dec. 654 (2000); *Borowski v. Van Solbrig,* 60 Ill.2d 418, 328 N.E.2d 301 (1975).

The bracketed language in paragraph three is limited to those cases where the evidence warrants its use and is not to be viewed as an alternative to expert testimony. *Studt v. Sherman Health Sys.,* 951 N.E.2d 1131, 2011 Ill. LEXIS 1093, 351 Ill.Dec. 467 (2011) (citing *Ohligshager v. Proctor Community Hosp.*, 55 Ill.2d 411, 303 N.E.2d 392 (1973); *Metz v. Fairbury Hosp.*, 118 Ill.App.3d 1093, 455 N.E.2d 1096, 74 Ill.Dec. 472 (1983)).

The locality rule has largely faded from current practice. If there is no issue of an applicable local standard of care, the locality language should be deleted. *Purtill v. Hess,* 111Ill.2d 229, 489 N.E.2d 867, 95 Ill.Dec. 305 (1986); *Karsten v. McCray,* 157 Ill.App.3d 1, 509 N.E.2d 1376, 109 Ill.Dec. 364 (2d Dist. 1987). The locality rule has also been applied in attorney malpractice cases. *O'Brien v. Noble,* 106 Ill.App.3d 126, 435 N.E.2d 554, 61 Ill.Dec. 857 (4th Dist. 1982).

Comment

In *Studt v. Sherman Health Sys.*, 951 N.E.2d 1131, 2011 Ill. LEXIS 1093, 351 Ill.Dec. 467 (2011), the Illinois Supreme Court distinguished between professional medical negligence and institutional medical negligence, holding that expert opinion testimony is required in a professional medical negligence action, except in limited circumstances. Compare with IPI Civil 105.03.01 Duty of a Healthcare Institution – Institutional Negligence.

This instruction supersedes IPI 105.01 found in the IPI 2011 and previous editions.

105.02 Duty Of Specialist--Professional Negligence

[Withdrawn]

IPI 105.02 is withdrawn. Use the current version of IPI 105.01 for professional negligence cases against a specialist.

105.03 Duty To Refer To Specialist--Professional Negligence

[Withdrawn]

Comment

IPI 2d (Civil) contained a duty instruction on the duty of a physician to refer a patient to a specialist when ordinary care would so require. That instruction is withdrawn, and the Committee recommends that no such instruction be given. These allegations can be included in an appropriate issues instruction. The Committee believes that the legal duty of a professional to refer to a specialist is adequately covered by IPI 105.01 or 105.02 when used in conjunction with appropriate issues instructions.

105.03.01 Duty Of A Health Care Institution--Institutional Negligence

Negligence by a [hospital/other institution] is the failure to do something that a reasonably careful [hospital/other institution] would do, or the doing of something that a reasonably careful [hospital/other institution] would not do, under circumstances similar to those shown by the evidence.

[In deciding whether the defendant [hospital/other institution] was negligent, you may consider (opinion testimony from qualified witnesses) (evidence of professional standards) (evidence of by-laws/rules/regulations/policies/procedures) (evidence of community practice) (and other evidence) presented in this case.]

The law does not say how a reasonably careful [hospital/other institution] would act under these circumstances. That is for you to decide.

Notes on Use

This instruction incorporates the duty of a hospital or other treating institution as defined in Darling v. Charleston Community Memorial Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965). *See also* Stogsdill v. Manor Convalescent Home, Inc., 35 Ill.App.3d 634, 343 N.E.2d 589 (2d Dist.1976); Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Wogelius v. Dallas, 152 Ill.App.3d 614, 504 N.E.2d 791, 105 Ill.Dec. 506 (1st Dist.1987); Alford v. Phipps, 169 Ill.App.3d 845, 523 N.E.2d 563, 119 Ill.Dec. 807 (4th Dist.1988). Ordinarily, this duty involves the hospital's own management responsibility.

This instruction does not apply where the institution's liability is based on vicarious liability for the professional negligence of a doctor or nurse or similar professional. For such vicarious liability, use IPI 105.01 with appropriate agency instructions.

This instruction does not apply if the case involves only ordinary principles of negligence, such as premises liability, as opposed to *professional* negligence.

If the jury is entitled to rely on “common knowledge” in determining the standard of care, omit the second paragraph of this instruction.

Comment

A hospital is not an insurer of a patient's safety, but it owes the patient a duty of protection and must exercise reasonable care toward him as his known condition requires. Slater v. Missionary Sisters of the Sacred Heart, 20 Ill.App.3d 464, 314 N.E.2d 715 (1st Dist.1974). A hospital is under a duty to conform to the legal standard of reasonable conduct in light of the apparent risk. Ohligschlager v. Proctor Community Hosp., 55 Ill.2d 411, 303 N.E.2d 392 (1973); Johnson v. St. Bernard Hosp., 79 Ill.App.3d 709, 399 N.E.2d 198, 35 Ill.Dec. 364 (1st Dist.1979); Andrews v. Northwestern Memorial Hosp., 184 Ill.App.3d 486, 540 N.E.2d 447, 452; 132 Ill.Dec. 707, 712 (1st Dist.1989). “A hospital has an independent duty to its patients to review and supervise treatment.” *Id.*

Whether or not the defendant has conformed to this standard of care may be proved by a

wide variety of evidence, including, but not limited to, expert testimony, hospital by-laws, statutes, accreditation standards, customs, and community practice. Darling v. Charleston Community Memorial Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965); Andrews v. Northwestern Memorial Hosp., 184 Ill.App.3d 486, 540 N.E.2d 447, 452; 132 Ill.Dec. 707, 712 (1st Dist.1989). There is no case law on whether the breach of the duty of an institution must be proven generally only by expert testimony or other evidence of professional standards. Accordingly, the second paragraph of this instruction does not use the mandatory language contained in the third paragraph of IPI 105.01. *See* Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill.App.3d 479, 492; 493 N.E.2d 6, 15; 97 Ill.Dec. 524, 533 (1st Dist.1986); Andrews v. Northwestern Memorial Hosp., *supra* (expert *medical* testimony not required in an institutional negligence case to establish standard of care).

One must distinguish cases of institutional *professional* negligence from cases that involve only ordinary principles of negligence, such as premises liability. *Compare* Kolanowski v. Illinois Valley Community Hosp., 188 Ill.App.3d 821, 544 N.E.2d 821, 136 Ill.Dec. 135 (3d Dist.1989) (hospital's alleged failure to provide adequate patient restraints, such as bed rails, was professional negligence requiring expert testimony) *with* Owens v. Manor Health Care Corp., 159 Ill.App.3d 684, 512 N.E.2d 820, 111 Ill.Dec. 431 (4th Dist.1987) (fall from wheelchair in nursing home involved only ordinary negligence). This instruction necessarily applies only to the former.

The predecessor version of this instruction and its Notes on Use were criticized in Ellig v. Delnor Community Hospital, 237 Ill.App.3d 396, 411-412; 603 N.E.2d 1203, 177 Ill.Dec. 829 (2d Dist.1992).

105.04 Delegation Of Duties--Professional Negligence

[Withdrawn]

Comment

IPI 2d (Civil) contained a duty instruction on the appropriateness in certain situations of the delegation of duties by a physician. That instruction is withdrawn, and the Committee recommends that no such instruction be given. These allegations can be included in an appropriate issues instruction. The Committee believes that the legal duty of a professional arising from the delegation of duties is adequately covered by IPI 105.01 or 105.02 when used in conjunction with appropriate issues instructions.

105.05 Consent To Procedure--Battery--Non-Emergency

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained.

[However, (if the patient is a minor) (if the patient lacks mental capacity to give consent), then the [insert appropriate medical professional person] is excused from obtaining consent of the patient to the procedure. In this situation the consent must be obtained from a person authorized to give consent to the [describe the procedure performed].]

Notes on Use

Any operation performed without consent in a non-emergency situation constitutes a battery. This instruction should not be given when the issue is informed consent. This instruction should only be used when the cause of action is the intentional tort of battery.

Comment

In performing an operation upon a patient, it is necessary to obtain the consent of the patient. This consent must be obtained from the patient unless the patient is legally unable or the patient's condition is such that obtaining consent would endanger the health of the patient. There are also exceptions for emergencies that develop during an operation or when the doctor determines that it is impracticable to obtain the consent of the patient or authorized person. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Beringer v. Lackner, 331 Ill.App. 591, 73 N.E.2d 620 (1st Dist.1947).

If the issue is whether or not the patient consented to the physician that performed the procedure, this instruction should be modified. Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983).

105.06 Emergency Arising During A Procedure--Battery

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained unless during the course of the [describe the procedure performed] an emergency arises requiring further or different treatment to protect the patient's health, and it is impossible or impracticable to obtain consent either from the patient or from someone authorized to consent for him. Whether there was such an emergency and whether it was impossible or impracticable to obtain consent is for you to decide.

Notes on Use

This instruction is proper only if the initial operation has been properly consented to and the cause of action is battery. It should not be given when the issue is informed consent and the cause of action is negligence.

Comment

Authority for this instruction was found in dictum in Pratt v. Davis, 224 Ill. 300, 309; 79 N.E. 562, 565 (1906), and Beringer v. Lackner, 331 Ill.App. 591, 73 N.E.2d 620 (1st Dist.1947). See Comment to IPI 105.05.

105.07 Emergency Arising Before A Procedure--Battery

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained unless an emergency arises and treatment is required in order to protect the patient's health, and it is impossible or impracticable to obtain consent either from the patient or from someone authorized to consent for him. Whether there was such an emergency and whether it was impossible or impracticable to obtain consent is for you to decide.

Notes on Use

This instruction should not be given when the issue is informed consent and the cause of action is negligence. This instruction should only be given when the cause of action is battery.

Comment

See Pratt v. Davis, 224 Ill. 300, 309-310; 79 N.E. 562, 565 (1906).

Physicians who provide emergency care without a fee are not liable for their negligence. 225 ILCS 60/30 (1994). Other professionals or occupations are protected by similar "good Samaritan" laws. 225 ILCS 25/53 (1994) (dentists); 745 ILCS 20/1 (1994) (law enforcement officers and firemen); 225 ILCS 90/35 (1994) (physical therapists).

105.07.01 Informed Consent--Duty And Definition--Professional Negligence

In providing medical [services] [care] [treatment] to [patient's name], a [insert appropriate medical professional] must obtain [patient's name]'s informed consent.

When I use the expression "informed consent" I mean a consent obtained from a patient by a [insert appropriate medical professional] after the disclosure by the [insert appropriate medical professional] of those [risks of] [and] [or] [alternatives to] the proposed treatment which a reasonably well-qualified [insert appropriate medical professional] would disclose under the same or similar circumstances. A failure to obtain informed consent is professional negligence.

[The only way in which you may decide what (risks) (and) (or) (alternatives) the [insert appropriate medical professional] should have disclosed to [patient's name] is from expert testimony presented in the trial. You must not attempt to determine this from any personal knowledge you have.]

Notes on Use

This instruction is to be used when the case involves an allegation that the defendant failed to fully apprise the plaintiff of relevant factors affecting the plaintiff's decision concerning the service to be rendered. Such an action is based upon negligence.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

The third paragraph must be given unless the court determines that expert testimony is not necessary because the case falls within the "common knowledge" exception. Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980).

This instruction is not to be used where the patient has given consent to one professional and an unauthorized professional performs the service. Perna v. Pirozzi, 92 N.J. 446, 457 A.2d 431 (1983); Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983). In such cases, *see* IPI 105.05 or 105.06.

The phrase "in the same or similar localities" is deleted from this instruction because Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983), adopted a national standard and noted the inapplicability of the locality rule in informed consent cases. *See also* Weekly v. Solomon, 156 Ill.App.3d 1011, 510 N.E.2d 152, 109 Ill.Dec. 531 (2d Dist.1987).

Comment

This instruction differs from instructions based upon failure to obtain consent. Such actions are brought under a theory of battery. Informed consent is a negligence concept.

"The physician has a duty to disclose to the patient those risks, results or alternatives that

a reasonable medical practitioner of the same school, in the same or similar circumstances, would have disclosed." Miceikis v. Field, 37 Ill.App.3d 763, 767; 347 N.E.2d 320, 324 (1st Dist.1976). *See also* Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980); Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Hansbrough v. Kosyak, 141 Ill.App.3d 538, 490 N.E.2d 181, 95 Ill.Dec. 708 (4th Dist.1986).

Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983), adopted a national standard in defining what a reasonable physician under similar circumstances would disclose and noted the inapplicability of the locality rule in informed consent cases. *But see* Weekly v. Solomon, 156 Ill.App.3d 1011, 510 N.E.2d 152, 109 Ill.Dec. 531 (2d Dist.1987).

At the time of filing a professional negligence case relying upon informed consent, there must be filed a report from the reviewing health professional that there was a violation of what a reasonable health professional would have disclosed. 735 ILCS 5/2-622(3) (d) (1994). *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

The standard of disclosure must be proved by expert testimony (Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Green v. Hussey, 127 Ill.App.2d 174, 262 N.E.2d 156 (1st Dist.1970); Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983); Sheahan v. Dexter, 136 Ill.App.3d 241, 483 N.E.2d 402, 91 Ill.Dec. 120 (3d Dist.1985)), unless the matters involved are common knowledge or within the experience of laymen (Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980)).

105.07.02 Informed Consent--Issues Made By The Pleadings--Professional Negligence--One Plaintiff And One Defendant

[The plaintiff's complaint consists of ____ counts. The issues to be decided by you under Count ____ of the complaint are as follows:]

The plaintiff claims that the defendant failed to inform the plaintiff of those [risks of] [and] [or] [alternatives to] the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;

The plaintiff further claims that if the defendant had disclosed those [risks] [and] [or] [alternatives], a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed]; and

The plaintiff further claims that he was injured, and that the defendant's failure to disclose those [risks] [and] [or] [alternatives] was a proximate cause of that injury.

The defendant [denies that he failed to inform the plaintiff of those (risks of) (and) (or) (alternatives to) the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;] [denies that a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed] after being told of those (risks) (and) (or) (alternatives)]; [denies that the plaintiff was injured or sustained damages (to the extent claimed);] [and] [denies that any failure to disclose those (risks) (and) (or) (alternatives) was a proximate cause of any injury].

Notes on Use

This instruction should be used only for professional negligence cases based upon the failure to obtain the informed consent of the plaintiff.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

If the defendant has alleged any affirmative defenses, or if the defendant claims that the plaintiff was contributorily negligent, and if the trial court rules that the defendant has made a submissible case on any of these defenses, then appropriate language will need to be added to this instruction. *See, e.g.*, IPI 20.01.

If this instruction is given, IPI 105.07.01, defining informed consent, IPI 15.01, defining proximate cause, and IPI 105.07.03, the informed consent burden of proof instruction, must also be given.

Comment

Just as in all other negligence cases, the plaintiff must prove that the injury resulting from

the defendant's failure to make the required disclosure was proximately caused by the lack of informed consent. Green v. Hussey, 127 Ill.App.2d 174, 262 N.E.2d 156 (1970). In addition, Illinois follows the majority rule that, in informed consent cases, the plaintiff must also prove that a reasonable person in plaintiff's position would have chosen another alternative if the required disclosure had been made. Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983); St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983); Lowney v. Arciom, 232 Ill.App.3d 715, 597 N.E.2d 817, 173 Ill.Dec. 843 (3d Dist.1992).

This instruction may need to be modified in the situation where the medical procedure involves some type of aesthetic cosmetic surgery. Zalazar v. Vercimak, 261 Ill.App.3d 250, 633 N.E.2d 1223, 199 Ill.Dec. 232 (3d Dist.1993) (subjective causation standard for cosmetic surgery).

In informed consent cases, proof of causation may need to include expert testimony. St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983).

See also the Comment to IPI 105.07.01.

105.07.03 Informed Consent--Burden Of Proof On The Issues--Professional Negligence--One Plaintiff And One Defendant

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First, that the defendant failed to inform the plaintiff of those [risks of] [and] [or] [alternatives to] the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;

Second, that if the defendant had disclosed those [risks] [and] [or] [alternatives], a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed].

Third, that the plaintiff was injured; and

Fourth, that the defendant's failure to disclose those [risks] [and] [or] [alternatives] was a proximate cause of the plaintiff's injury.

If you find from your consideration of all the evidence that all of these propositions have been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Notes on Use

This instruction should be used only for professional negligence cases based upon the failure to obtain the informed consent of the plaintiff.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

If the defendant has alleged any affirmative defenses, or if the defendant claims that the plaintiff was contributorily negligent, and if the trial court rules that the defendant has made a submissible case on any of these defenses, then the last paragraph of this instruction should be deleted and appropriate language added. *See, e.g.*, the last two paragraphs of IPI B21.02 (contributory negligence).

If this instruction is given, IPI 105.07.01, defining informed consent, IPI 15.01, defining proximate cause, and IPI 105.07.02, the informed consent issues instruction, must also be given.

Comment

See the Comments to IPI 105.07.01 and 105.07.02.

105.08 Ordinary Care--Duty To Follow Instructions--Submit To Treatment--Mitigation Of Damages--Professional Negligence

A patient must exercise ordinary care to [seek treatment] [follow reasonable medical (advice) (instructions)]. A physician is not liable for the consequences of a patient's failure to do so. A patient's failure to use ordinary care in obtaining treatment or in following instructions does not absolve the physician from any damages resulting from the physician's negligence. It only absolves the physician from any damages caused by the patient's failure to exercise ordinary care to [seek treatment] [follow reasonable medical (advice) (instructions)].

Notes on Use

This instruction applies only to those instances where the defendant claims that the plaintiff has failed to mitigate his damages by failing to use ordinary care in not seeking treatment or in not following the doctor's instructions concerning treatment. If this instruction is given, also use IPI 10.02 (ordinary care), modified as appropriate.

Comment

Once an injury has occurred as a proximate result of medical negligence, the patient has a continuing duty to follow the instruction of physicians in order to mitigate his damages. Haering v. Spicer, 92 Ill.App. 449 (1900); Littlejohn v. Arbogast, 95 Ill.App. 605 (1901). A physician will not be held liable for any injuries resulting from the patient's failure to follow instructions, but the physician will continue to be responsible for the injury caused by his original professional negligence. Wesley v. Allen, 235 Ill.App. 322 (4th Dist.1925); Krauss v. Ballinger, 171 Ill.App. 534 (1912).

This bar of recovery for additional injuries proximately caused by plaintiff's failure to mitigate damages has been consistently recognized in cases not involving professional negligence. Culligan Rock River Water Conditioning Co. v. Gearhart, 111 Ill.App.3d 254, 443 N.E.2d 1065, 66 Ill.Dec. 902 (2d Dist.1982). *See* IPI 33.01. Defendant must plead and prove plaintiff's failure to mitigate damages. Nancy's Home of the Stuffed Pizza, Inc. v. Cirrincione, 144 Ill.App.3d 934, 494 N.E.2d 795, 98 Ill.Dec. 673 (1st Dist.1986).

It is important, of course, to distinguish between mitigation of damages and contributory negligence. *See* Newell v. Corres, 125 Ill.App.3d 1087, 466 N.E.2d 1085, 81 Ill.Dec. 283 (1st Dist.1984).

105.09 *Res Ipsa Loquitur*--Burden Of Proof--Professional Negligence--Where No Claim Of Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [patient's name] was injured.

Second: That the injury [was received from] [occurred during] a [name of instrumentality or procedure] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, this injury would not have occurred if the defendant had used a reasonable standard of professional care while the [name of instrumentality or procedure] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality or procedure] while it was under his [control] [management].

If you do draw such an inference, and if you further find that [patient's name]'s injury was proximately caused by that negligence, your verdict should be for the plaintiff [under this Count]. On the other hand, if you find that any of these propositions has not been proved, or if you find that the defendant used a reasonable standard of professional care for the safety of [patient's name] in his [control] [management] of the [instrumentality or procedure], or if you find that the defendant's negligence, if any, was not a proximate cause of [patient's name]'s injury, then your verdict should be for the defendant [under this Count].

[Whether the injury in the normal course of events would not have occurred if the defendant had used a reasonable standard of professional care while the [instrumentality or procedure] was under his [control] [management] must be determined from expert testimony presented in this trial. You must not attempt to determine this question from any personal knowledge you have.]

Notes on Use

Where the defendant charges contributory negligence, use IPI B105.09 in lieu of this instruction.

Unlike the old versions of the *res ipsa loquitur* instructions, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase “burden of proof.”

If the patient's/client's contributory negligence is an issue, IPI B21.07 should also be given.

Use “had been” in the second element if the instrumentality was not under the defendant's control at the time of the injury.

The bracketed final paragraph should not be used when the relevant *res ipsa* issue falls within the common knowledge exception. In all other cases the paragraph must be used. *See* 735 ILCS 5/2-1113 (1994). *See also* Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989).

This instruction should only be given where *res ipsa* is raised in a professional negligence case. In all other cases use IPI B22.01.

Comment

The doctrine of *res ipsa loquitur* is clearly applicable to medical negligence cases. The doctrine that is applicable is the same as defined in Metz v. Central Illinois Elec. & Gas Co., 32 Ill.2d 446, 207 N.E.2d 305 (1965), and as incorporated in the present IPI *res ipsa* instructions, IPI 22.01. Gatlin v. Ruder, 137 Ill.2d 284, 560 N.E.2d 586, 148 Ill.Dec. 188 (1990); Spidle v. Steward, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980). *See also* Edgar County Bank & Trust Co. v. Paris Hosp., Inc., 57 Ill.2d 298, 312 N.E.2d 259 (1974); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975); Alton v. Kitt, 103 Ill.App.3d 387, 431 N.E.2d 417, 59 Ill.Dec. 132 (4th Dist.1982). In Walker v. Rumer, 72 Ill.2d 495, 500; 381 N.E.2d 689, 691; 21 Ill.Dec. 362, 364 (1978), the supreme court stated that *res ipsa* was applicable in every malpractice case where it is shown that the injury would not have happened had proper care been used. The Walker court stated:

> The requirement for the application of the doctrine of *res ipsa loquitur* is not that the surgical procedure be "commonplace" or that the "average person" be able to understand what is involved; the determination which must be made as a matter of law is whether "the occurrence is such as in the ordinary course of things would not have happened" if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of laymen or expert testimony.

There is no reason the doctrine would not also be applicable to other professionals outside the medical area.

735 ILCS 5/2-622 (1994) provides that at the time of filing a professional negligence case relying upon *res ipsa loquitur*, there must be filed a report from a reviewing health care professional that professional negligence has occurred in the course of treatment. In addition, there must be a certification that this doctrine is being relied upon. *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

See Comment to IPI B22.01.

B105.09 *Res Ipsa Loquitur*--Burden Of Proof--Professional Negligence--Where Contributory Negligence Is Claimed

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [patient's name] was injured.

Second: That the injury [was received from] [occurred during] a [name of instrumentality or procedure] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, this injury would not have occurred if the defendant had used a reasonable standard of professional care while the [name of instrumentality or procedure] was under his [control] [management].

[Whether the injury in the normal course of events would not have occurred if the defendant had used a reasonable standard of professional care while the [instrumentality or procedure] was under his [control] [management] must be determined from expert testimony presented in this trial. You must not attempt to determine this question from any personal knowledge you have.]

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to [instrumentality or procedure] while it was under his [control] [management].

If you do draw such an inference, and if you further find that [patient's name]'s injury was proximately caused by that negligence, you must next consider the defendant's claim that [patient's name] was contributorily negligent.

As to that claim, the defendant has the burden of proving each of the following propositions:

First, that [patient's name] acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, [patient's name] was negligent;

Second, that [patient's name]'s negligence was a proximate cause of his injury.

You must reach one of the following four verdicts (A, B, C, or D):

A:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has not proved both of the propositions required of him, then your verdict should be for the plaintiff [under this Count] and you will not reduce the plaintiff's damages.

B:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has proved both of the propositions required of him, and if you further find that [patient's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff [under this Count] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

C:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has proved both of the propositions required of him, and if you further find that [patient's name]'s contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.

D:. If you find that any of the propositions required of the plaintiff has not been proved, or if you find that the defendant used a reasonable standard of professional care for the safety of

[patient's name] in his [control] [management] of the [instrumentality or procedure], or if you find that the defendant's negligence, if any, was not a proximate cause of [patient's name]'s injury, then your verdict should be for the defendant [under this Count].

Notes on Use

This instruction should be used only if contributory negligence is claimed. If not, use IPI 105.09.

Unlike the old versions of the *res ipsa loquitur* instructions, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

The bracketed final paragraph should not be used when the relevant *res ipsa* issue falls within the common knowledge exception. In all other cases the paragraph must be used. *See* 735 ILCS 5/2-1113 (1994). *See also* Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989).

This instruction should only be given where *res ipsa* is raised in a professional negligence case. In all other cases use IPI B22.01.

Comment

The doctrine of *res ipsa loquitur* is clearly applicable to medical negligence cases. The doctrine that is applicable is the same as defined in Metz v. Central Illinois Elec. & Gas Co., 32 Ill.2d 446, 207 N.E.2d 305 (1965), and as incorporated in the present IPI *res ipsa* instructions, IPI B22.01. Gatlin v. Ruder, 137 Ill.2d 284, 560 N.E.2d 586, 148 Ill.Dec. 188 (1990); Spidle v. Steward, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980). *See also* Edgar County Bank & Trust Co. v. Paris Hosp., 57 Ill.2d 298, 312 N.E.2d 259 (1974); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975); Alton v. Kitt, 103 Ill.App.3d 387, 431 N.E.2d 417, 59 Ill.Dec. 132 (4th Dist.1982). In Walker v. Rumer, 72 Ill.2d 495, 500; 381 N.E.2d 689, 691; 21 Ill.Dec. 362, 364 (1978), the supreme court stated that *res ipsa* was applicable in every malpractice case where it is shown that the injury would not have happened had proper care been used. The Walker court stated:

> The requirement for the application of the doctrine of *res ipsa loquitur* is not that the surgical procedure be "commonplace" or that the "average person" be able to understand what is involved; the determination which must be made as a matter of law is whether "the occurrence is such as in the ordinary course of things would not have happened" if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of laymen or expert testimony.

There is no reason the doctrine would not also be applicable to other professionals outside the medical area.

735 ILCS 5/2-622 (1994) provides that at the time of filing a professional negligence case relying upon *res ipsa loquitur*, there must be filed a report from a reviewing health care professional that professional negligence has occurred in the course of treatment. In addition, there must be a certification that this doctrine is being relied upon. *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

See Comment to IPI B22.01.

105.10 Claims Based On Apparent Agency--Both Principal And Agent Sued--Principal Sued Under Respondeat Superior Only--Medical Malpractice Actions--Reliance On Principal Alleged

Under certain circumstances, the liability of a party may arise from an act or omission of that party's apparent agent.

In the present case, [plaintiff's name] has sued [principal's name] as the principal and [apparent agent's name] as [his] [her] [its] apparent agent. [Principal's name] denies that any apparent agency relationship existed.

In order for an apparent agency relationship to have existed, [plaintiff's name] must prove the following:

First, that [principal's name] held [himself] [herself] [itself] out as a provider of [type of care, *e.g.*, complete emergency room care] and that [plaintiff's/decedent's name] neither knew nor should have known that [apparent agent's name] was not an agent or employee of [principal's name].

Second, that [plaintiff's/decedent's name] [or others] did not choose [apparent agent's name] but relied upon [principal's name] to provide [type of care, *e.g.*, complete emergency room care].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, and if you find that [apparent agent's name] is liable, then both [defendant] and [defendant] are liable.

If you find that [apparent agent's name] is not liable, then neither [defendant] nor [defendant] is liable for the acts of [apparent agent's name].

If you find that [apparent agent's name] is liable, but that [he] [she] [it] was not the apparent agent of [principal's name] at the time of the occurrence, then [principal's name] is not liable for the acts of [apparent agent's name].

Notes on Use

This instruction should be used where the issue of apparent agency is in dispute, the principal and agent are sued in the same case, and plaintiff alleges reliance on a "holding out" by the principal. If plaintiff alleges reliance on a "holding out" by an agent and "acquiescence" by the principal, refer to *Gilbert v. Sycamore*, 156 Ill.2d 511, 190 Ill.Dec. 758, 622 N.E.2d 788 (1993) for a discussion of the necessary elements. If there is a basis for liability against the principal

independent of apparent agency, this instruction should be modified accordingly or replaced by other instructions.

This instruction is intended to apply where apparent agency is alleged relative to a hospital or other such institutional provider. The instruction should not be used without modification where apparent agency is alleged relative to a health maintenance organization or health insurance provider. *See Petrovich v. Share Health Plan of Ill.*, 188 Ill.2d 17, 241 Ill.Dec. 627, 719 N.E.2d 756 (1999). Moreover, the instruction should not be used without modification where apparent agency is alleged in contexts other than medical negligence. *See O'Banner v. McDonald's Corp.*, 173 Ill.2d 208, 218 Ill.Dec. 910, 670 N.E.2d 632 (1992).

The bracketed phrase "or others" in the instruction should be used where there is evidence that a person or persons other than the plaintiff or the decedent relied upon the principal to provide the medical care under consideration. Please refer to the Comment below for a discussion of this issue.

If the issue of apparent agency is in dispute and the principal is sued alone, IPI 105.11 should be used.

Comment

This instruction reflects the opinion of the Illinois Supreme Court in *Gilbert v. Sycamore*, 156 Ill.2d 511, 190 Ill.Dec. 758, 622 N.E.2d 788 (1993). *Gilbert* set forth and explained the elements necessary to establish apparent agency, namely, a "holding out" and "justifiable reliance." In *Gilbert*, the court further held that apparent agency cannot be established in situations where a patient knew or should have known that the physician providing treatment was not an agent or employee of the hospital. *Id.* at 524. In reaching its decision, the *Gilbert* court referred to "two realities of modern hospital care": first, that health care providers increasingly hold themselves out to the public as providers of health care through their marketing efforts; and, secondly, that patients have come to rely upon the reputations of hospitals in seeking health care. *Id.*

The element of "holding out" is satisfied where it is proven that the principal acted in a manner which would lead a reasonable person to conclude that the physician alleged to be negligent was an agent or employee of the principal. *Id.*

The element of "justifiable reliance" is satisfied where there is reliance upon the hospital to provide care, rather than upon a specific physician. *Id.* A pre-existing physician-patient relationship will not preclude a claim by the patient of reliance upon the hospital. *Malanowski v. Jabamoni*, 293 Ill.App.3d 720, 727, 228 Ill.Dec. 34, 688 N.E.2d 732, 738 (1st Dist. 1997).

Although *Gilbert* involved an emergency room setting, the *Gilbert* analysis is not limited to such situations. *See, e.g.*, *Malanowski v. Jabamoni*, 293 Ill.App.3d 720, 228 Ill.Dec. 34, 688 N.E.2d 732 (1st Dist. 1997) (applying *Gilbert* to an outpatient clinic situation).

In the absence of proof of actual reliance by plaintiff, several appellate decisions hold that the element of justifiable reliance may be satisfied where there is reliance by those acting on behalf of the plaintiff. *See, e.g.*, *Monti v. Silver Cross Hosp.*, 262 Ill.App.3d 503, 507-08, 201 Ill.Dec. 838, 637 N.E.2d 427 (3d Dist. 1994) (emergency personnel brought the patient to the hospital); *Golden v. Kishwaukee Cmty. Health Servs.,* 269 Ill.App.3d 37, 46, 206 Ill.Dec. 314, 645 N.E.2d 319 (1st Dist. 1994) (plaintiff brought to hospital at the direction of plaintiff's friends); *Kane v. Doctors Hosp*., 302 Ill.App.3d 755, 235 Ill.Dec. 811, 706 N.E.2d 71 (4th Dist. 1999) (plaintiff's personal physician arranged for treatment at the hospital); *Scardina v. Alexian Bros. Med. Ctr.*, 308 Ill.App.3d 359, 241 Ill.Dec. 747, 719 N.E.2d 1150 (1st Dist. 1999) (plaintiff's physician referred him to a hospital where he was seen by a radiologist). *But see Butkiewicz v. Loyola Univ. Med. Ctr.*, slip op. No. 1-98-2899 (1st Dist. Feb. 7, 2000) (disagreeing with *Kane*, distinguishing *Monti*, and finding that plaintiff's reliance on his "trusted" physician did not constitute "justifiable reliance" as to the defendant hospital).

Instruction revised May 2019.

105.11 Claims Based On Apparent Agency--Principal Sued, But Not Agent--Principal Sued Under Respondeat Superior Only--Medical Malpractice Actions--Reliance On Principal Alleged

Under certain circumstances, the liability of a party may arise from an act or omission of that party's apparent agent.

In the present case, [plaintiff's name] has sued [principal's name] as the principal. [Plaintiff's name] claims that [apparent agent's name] was the apparent agent of [principal's name]. [Principal's name] denies that any apparent agency relationship existed.

In order for an apparent agency relationship to have existed, [plaintiff's name] must prove the following:

First, that [principal's name] held [himself] [herself] [itself] out as a provider of [type of care, *e.g.*, complete emergency room care] and that [plaintiff's/decedent's name] neither knew nor should have known that [apparent agent's name] was not an agent or employee of [principal's name].

Second, that [plaintiff's/decedent's name] [or others] did not choose [apparent agent's name]
but relied upon [principal's name] to provide [type of care, *e.g.*, complete emergency room care].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, then any act or omission of [apparent agent's name] was the act or omission of [principal's name], and [principal's name] is liable for the acts or omissions of [apparent agent's name].

If you find that [apparent agent's name] was not the apparent agent of [principal's name] at the time of the occurrence, then any act or omission of [apparent agent's name] was not the act or omission of [principal's name], and [principal's name] is not liable for the acts or omissions of [apparent agent's name].

Notes on Use

This instruction should be used where the issue of apparent agency is in dispute, the principal alone is sued, and plaintiff alleges reliance upon a "holding out" on the part of the principal. If plaintiff alleges reliance upon a "holding out" by the agent and "acquiescence" by the principal, see *Gilbert v. Sycamore*, 156 Ill.2d 511, 190 Ill.Dec. 758, 622 N.E.2d 788 (1993), for a discussion of the necessary elements. If there is a basis for liability against the principal independent of apparent agency, this instruction should be modified accordingly or replaced by other instructions. IPI 105.10 should be used when the issue of apparent agency is in dispute and when the principal and agent are sued in the same case.

Comment

See Comment to IPI 105.10.

Instruction revised May 2019.