

# HOW TO LITIGATE A MEDICAL MALPRACTICE CASE

## PART 6: THE TRIAL

Materials By  
Andrew Smiley

—New York State—  
**ACADEMY**  
OF TRIAL LAWYERS

PRESENTED LIVE  
JUNE 7, 2023  
1PM VIA ZOOM

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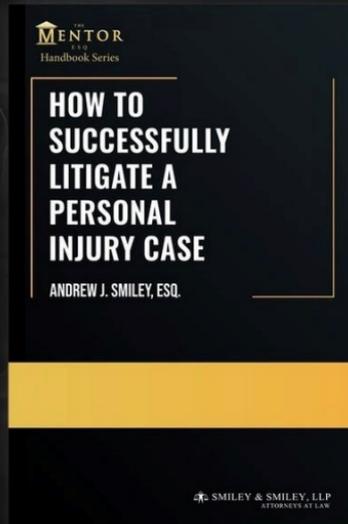




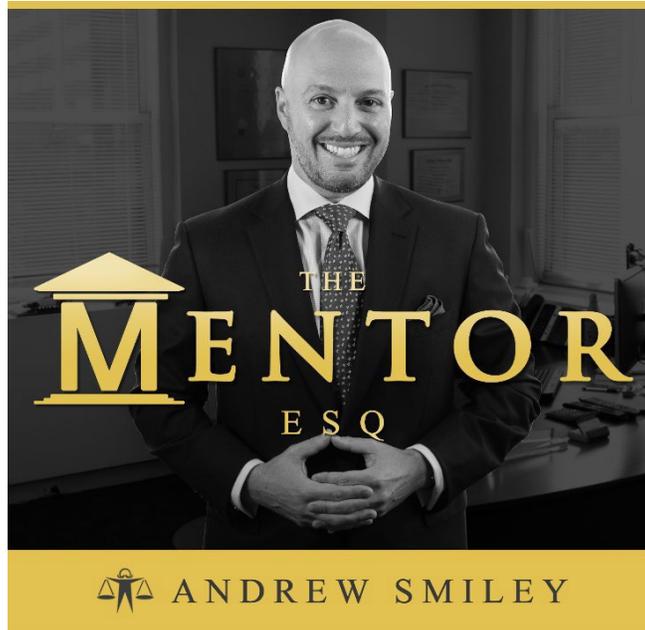
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***CURRICULUM VITAE***

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)  
Moot Court Honor Society - Competitor - National Appellate Trademark Competition  
Moot Court Honor Society – Coach, National Trial Team – Regional Champions  
CALI Excellence For The Future Award - Advanced Legal Research  
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

## Andrew J. Smiley, Esq. Curriculum Vitae, Page 2

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023

### Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont

### Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
  - Medical Malpractice Committee
  - Supreme Courts Committee
- American Bar Association
- The American Association for Justice

## Andrew J. Smiley, Esq. Curriculum Vitae, Page 3

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

### Publications

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide* (2022, The Mentor Esq. Handbook Series – Available on Amazon)

### Continuing Legal Education (CLE) Presentations:

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The NYS Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

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Continuing Legal Education (CLE) Presentations Continued:

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021

## Andrew J. Smiley, Esq. Curriculum Vitae, Page 5

### Continuing Legal Education (CLE) Presentations Continued:

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021

(34) *Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020

(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020

(30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

(29) *Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019

(28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019

(27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019

(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

(25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

(23) Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 6**

Continuing Legal Education (CLE) Presentations Continued:

- (19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015
- (18) *The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014
- (17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014
- (16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014
- (15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014
- (14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014
- (13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014
- (12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013
- (11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013
- (10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012
- (9) *“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011
- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011  
*Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 7**

Television Appearances – Legal Commentary:

*Fox News Channel*

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

*CNN -Anderson Cooper 360*

*ET – Entertainment Tonight*

*Bloomberg TV*

*Headline News*

*Tru TV*

*Court TV*

*The Morning Show with Mike and Juliet*

Interests, Hobbies:

Porsche Club, High Performance Driving Events, Sim Racing, Tennis, Lego

## [NY PJI 2:150A](#)

**New York Pattern Jury Instructions - Civil > DIVISION 2. NEGLIGENCE ACTIONS > G. SPECIFIC NEGLIGENCE ACTIONS > 4. Professional Malpractice**

### **PJI 2:150A. Malpractice--Informed Consent**

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Before obtaining a patient's consent to an operation or invasive diagnostic procedure or the use of medication, a doctor has the duty to provide certain information concerning what the doctor proposes to do, the alternatives to that operation, procedure or medication and the reasonably foreseeable risks of such operation, procedure or medication. It is the doctor's duty to explain, in words that are understandable to the patient, all the facts that would be explained by a reasonable medical practitioner so that when the patient does, in fact, consent, that consent is given with an awareness of (1) the patient's existing physical condition; (2) the purposes and advantages of the operation, procedure or medication; (3) the reasonably foreseeable risks to the patient's health or life which the operation, procedure or medication may impose; (4) the risks involved to the patient if there is no operation, procedure or use of medication; and (5) the available alternatives and the risks and advantages of those alternatives. The first question on this issue that you will be called upon to answer is whether the defendant, before obtaining plaintiffs (decedent's) consent, provided appropriate information.

The question reads as follows:

(1) Did defendant before obtaining plaintiffs (decedent's) consent to the (operation, procedure, use of medication) provide appropriate information?

Plaintiff maintains that the answer to this question is "No," contending that *[set forth the specific risks and/or alternatives that plaintiff claims were not disclosed]*. Defendant maintains that the answer to the question is "Yes" and contends that (the information was, in fact, provided, or a reasonable medical practitioner would not provide such information to the patient in a case such as this).

If you answer "No" to the question, the next question you must decide is whether a reasonably prudent person in the plaintiffs (decedent's) position would have decided not to undergo the operation or procedure or take the medication if given appropriate information concerning the risks and alternatives.

The question reads as follows:

(2) Would a reasonably prudent person in plaintiff's (decedent's) position at the time consent was given have decided not to undergo the *[state procedure]* *[state where appropriate: take the medication]* if given appropriate information?

Plaintiff maintains that the answer to this question is "Yes," contending that considering the nature of plaintiffs (decedent's) condition at the time and the risks involved in the (operation, procedure, use of medication) and the available alternatives, a reasonably prudent person would not have consented to the (operation, procedure, use of medication). Defendant maintains that the answer to this question is "No," contending that considering plaintiffs (decedent's) condition and the need for the (operation, procedure, use of medication) the omitted information would not have caused a reasonably prudent person to refuse to consent to the (operation, procedure, use of medication).

In answering this question it is important that you consider only plaintiffs (decedent's) condition at the time consent was given and the facts and circumstances that existed at that time and not events that occurred or knowledge that was obtained at a later time.

If you answer "Yes" to question two, the next and last question to be resolved on this issue is whether the (operation, procedure, medication) was a substantial factor in causing the injury to plaintiff (decedent).

The question reads as follows:

**(3) Was the (operation, procedure, medication) a substantial factor in causing the injury to plaintiff (decedent)?**

### Comment

**Caveat 1:** Expert testimony is required to establish a prima facie case. [CPLR 4401-a](#) requires dismissal at the close of plaintiff's case "if the plaintiff has failed to adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent," see *Alberti v St. John's Episcopal Hospital-Smithtown*, 116 AD2d 612, 497 NYS2d 701 (2d Dept 1986); [Lipsius v White](#), 91 AD2d 271, 458 NYS2d 928 (2d Dept 1983). Thus, in *Gonzalez v Moscarella*, 142 AD2d 550, 530 NYS2d 218 (2d Dept 1988), the informed consent cause of action was dismissed where plaintiff's expert did not express any opinion as to the adequacy of the information provided to plaintiff by defendants, see [Evans IT Holleran](#), 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993). Note that the deposition of one authorized to practice medicine may be offered by any party without a showing of unavailability or special circumstances, [CPLR 3117\(a\)\(4\)](#).

**Caveat 2:** Proximate cause must be charged unless the facts are undisputed, [PHL § 2805-d\(3\)](#); as to proximate cause see infra this Comment.

The charge assumes that there is no dispute as to the nature of the treatment to which plaintiff consented. If there is such a dispute, the jury should be instructed on that threshold issue.

**Caveat 3:** Lack of informed consent is a distinct cause of action from medical malpractice, [Figueroa-Burgos v Bieniewicz, 135 AD3d 810, 23 NYS3d 369 \(2d Dept 2016\)](#). Therefore, care must be taken to state the elements of the informed consent cause of action separately from those of causes of action based on other kinds of medical malpractice, see PJI 2:150. A special finding should be used for each cause of action submitted to the jury, see PJI 1:95 and PJI 1:26.

The charge is based on [Public Health Law § 2805-d](#); see [Figueroa-Burgos v Bieniewicz, 135 AD3d 810, 23 NYS3d 369 \(2d Dept 2016\)](#); [Johnson v Jacobowitz, 65 AD3d 610, 884 NYS2d 158 \(2d Dept 2009\)](#); [Marchione v State, 194 AD2d 851, 598 NYS2d 592 \(3d Dept 1993\)](#); [Farkas v Saary, 191 AD2d 178, 594 NYS2d 195 \(1st Dept 1993\)](#); [Lipsius y White, 91 AD2d 271, 458 NYS2d 928 \(2d Dept 1983\)](#); [Troy v Long Island Jewish-Hillside Medical Center, 86 AD2d 631, 446 NYS2d 347 \(2d Dept 1982\)](#) (citing **PJI**).

The jury must return an itemized verdict if it awards damages, see PJI 2:151A(1) and PJI 2:151A(2). The use of special verdicts is imperative since informed consent cases often present multiple, plausible theories and special verdicts help jurors reach a decision and maintain a record for appellate review, see [Lynn G. v Hugo, 96 NY2d 306, 728 NYS2d 121, 752 NE2d 250 \(2001\)](#); see generally PJI 1:26.

A special verdict form for use in conjunction with the pattern charge follows. Signature lines should be included after each question, see Comment, PJI 1:95. The complete special verdict form should be marked as a court exhibit.

New York Pattern Jury Instructions Civil

## [NY CLS CPLR R 4111](#)

Current through 2023 released Chapters 1-134

*New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 41 Trial by a Jury (§§ 4101 — 4113)*

### R 4111. General and special verdicts and written interrogatories

**(a) General and Special Verdict Defined.** The court may direct the jury to find either a general verdict or a special verdict. A general verdict is one in which the jury finds in favor of one or more parties. A special verdict is one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon.

**(b) Special Verdict.** When the court requires a jury to return a special verdict, the court shall submit to the jury written questions susceptible of brief answer or written forms of the several findings which might properly be made or it shall use any other appropriate method of submitting the issues and requiring written findings thereon. The court shall give sufficient instruction to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without demand, the court may make an express finding or shall be deemed to have made a finding in accordance with the judgment.

**(c) General Verdict Accompanied by Answers to Interrogatories.** When the court requires the jury to return a general verdict, it may also require written answers to written interrogatories submitted to the jury upon one or more issues of fact. The court shall give sufficient instruction to enable the jury to render a general verdict and to answer the interrogatories. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court shall direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or it shall require the jury to further consider its answers and verdict or it shall order a new trial. When the answers are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial.

**(d) Itemized verdict in medical, dental, or podiatric malpractice actions.** In all actions seeking damages for medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice, the court shall instruct the jury that if the jury finds a verdict awarding damages it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In all such actions, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the

verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future wrongful death damages, future loss of services, and future loss of consortium, the jury shall return the total amount of damages for each such item. In itemizing amounts intended to compensate for future pain and suffering, the jury shall return the total amounts of damages for future pain and suffering and shall set forth the period of years over which such amounts are intended to provide compensation. In itemizing amounts intended to compensate for future economic and pecuniary damages other than in wrongful death actions, the jury shall set forth as to each item of damage, (i) the annual amount in current dollars, (ii) the period of years for which such compensation is applicable and the date of commencement for that item of damage, (iii) the growth rate applicable for the period of years for the item of damage, and (iv) a finding of whether the loss or item of damage is permanent. Where the needs change in the future for a particular item of damage, that change shall be submitted to the jury as a separate item of damage commencing at that time. In all such actions other than wrongful death actions, the jury shall be instructed that the findings it makes with reference to future economic damages, shall be used by the court to determine future damages which are payable to the plaintiff over time.

**(e) Itemized Verdict in Certain Actions.** In an action brought to recover damages for personal injury, injury to property or wrongful death, which is not subject to subdivision (d) of this rule, the court shall instruct the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In actions in which article fifty-A or fifty-B of this chapter applies, in computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.

**(f)** [Redesignated]

## History

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Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1976, ch 955, § 8; L 1984, ch 701, § 3, eff Oct 1, 1984; L 1985, ch 294, § 6; L 1985, ch 760, § 5; L 1986, ch 485, § 7; L 1986, ch 682, § 7; [L 1994, ch 100, § 5](#), eff May 16, 1994; [L 2003, ch 86, § 1](#), eff July 26, 2003; [L 2009, ch 494, §§ 4, 5](#) (Part F), eff Nov 12, 2009.

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## NY PJI 1:26

*New York Pattern Jury Instructions - Civil > DIVISION 1. GENERAL CHARGES > B. CHARGE AFTER TRIAL*

### **PJI 1:26. General Instruction-Special Verdicts & General Verdicts Supported by Written Interrogatories**

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This case will be decided on the basis of answers you give to written questions that will be submitted to you. Each of the questions calls for *[Insert appropriate phrase, such as: (a "Yes" or "No" answer), (some numerical figure), (some percentage), etc.]*. While it is important that the views of all jurors be considered, five of the six of you must agree on the answer to any question, but the same five persons need not agree on all the answers. When five of you have agreed on any answer, the foreperson of the jury will write the answer in the space provided for each answer and each of you will sign in the appropriate place to indicate your agreement or disagreement. Each question will be followed by an instruction as to how you will proceed based upon your answer to that question.

If you disagree with an answer that five jurors have agreed upon, you should not stop deliberating and you should not stop voting on the rest of the questions that need to be answered. In other words, you should continue participating in the deliberations and voting on all questions that require answers. *([In a bifurcated case where the verdict on liability was not unanimous and the same jury will address damages, add:]* You must still deliberate, even if you disagreed with one or more of the answers to the questions submitted to you during the liability phase of the trial.) When you have answered all the questions that require answers, report to the court.

#### **Comment**

**Caveat 1:** The pattern jury instructions contained in these volumes anticipate that, at the conclusion of the charge, the jury will be instructed with the charge above if, as is usually the case, the jury is to be given a verdict sheet with interrogatories. However, trial judges may want to modify each of the substantive instructions to include references to the specific questions that will be presented in the verdict sheet. For example, prior to instructing the jurors on the law of negligence they could be told that the first question they will be asked to answer is: "Was the defendant negligent?" Each question on the verdict sheet would then be appropriately placed in the charge preceding the specific instruction explaining it. Whether or not the charge is so modified, the judge may review the contents of the verdict sheet with the jurors and may distribute it.

**Caveat 2:** In the rare circumstance where a simple general verdict will be rendered without written interrogatories, PJI 1:95 should be substituted for this charge.

Based on NY Const Art I, Sec 2; [CPLR 4113\(a\)](#); see [Sharrow v Dick Corp., 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 \(1995\)](#); see also [CPLR 4111\(a\)](#), (b) (special verdicts); [CPLR 4111\(c\)](#) (general verdicts supported by written interrogatories).

For a more detailed discussion of verdicts, see Comment after **PJI 1:95**, *infra*.

New York Pattern Jury Instructions Civil

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End of Document

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF [REDACTED]

Index No.: [REDACTED]

-----X  
[REDACTED], individually and as Executor of  
the [REDACTED], Deceased,

Plaintiff,

-against-

[REDACTED], M.D.,

Defendant.  
-----X

**PLAINTIFF'S  
PROPOSED  
REQUESTS  
TO CHARGE**

In addition to the standard Requests to Charge, the plaintiff respectfully requests that the following charges be given to the jury:

**PJI 2:70 Proximate Cause-In General**

An act or omission is regarded as a cause of injury or death if it was a substantial factor in bringing about the injury or death. That is, if it had such an effect in producing the injury or death that reasonable people would regard it a cause of the injury or death. A substantial factor is conduct which has such an effect in producing the harm as to lead reasonable people to regard it as a cause. See *Ortiz v. Kinoshita*, 30 A.D.2d 334 (1<sup>st</sup> Dept. 1968); *Wild v. Catholic Health System*, 21 NY3d 951 (Court of Appeals 2013).

**PJI 2:150 Malpractice-Physician**

Malpractice is professional negligence and medical malpractice is the negligence of a doctor. Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice.

A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an average specialist who provides that treatment in the medical community in which the doctor practices.

The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability. However, every doctor is required to keep reasonably informed of new developments in his field and to practice medicine in accordance with approved methods and means of treatment in general use. A doctor must also use his best judgment and whatever superior knowledge and skill he possesses, even if the

knowledge and skill exceeds that possessed by the average specialist in the medical community where the doctor practices.

By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if he was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence.

If the doctor is negligent, that is, lacks the skill or knowledge required of him, in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harmed caused.

In this case, the plaintiff is alleging that Dr. [REDACTED] was negligent because he departed from good and accepted practices and that such departures were a substantial factor in bringing about the death of [REDACTED] and/or diminishing her chance of a better outcome; or decreased her chance of survival or cure. See, *Clune v. Moore*, 142 A.D.3d 1330 (2016); *Goldberg v. Horowitz*, 73 A.D.3d 691 (2010); *Allen v. Uh*, 82 A.D.3d 1025 (2011); and *Semel v. Guzman*, 84 A.D.3d 1054 (2011). A deprivation of a substantial chance for a cure can constitute a substantial factor contributing to a decedent's injuries and/or death. You must determine whether it was more probable than not that Dr. [REDACTED]'s departures were a substantial factor in causing the death of [REDACTED] or diminishing her chance of survival or cure or better outcome. *Goldberg v. Horowitz*, supra.

## **PJI 2:320 Damages-Actions for Wrongful Death and Conscious Pain and Suffering**

As you have heard, the plaintiff, [REDACTED], is the representative of the estate of [REDACTED]. [REDACTED] makes two claims: the first claim seeks damages on behalf of the estate of [REDACTED], and the second claim seeks damages for the injuries suffered and losses sustained by [REDACTED] before she died. You must separately consider each of these claims.

As to the first claim, damages are the amount that you find to be fair and just compensation for the monetary losses resulting in [REDACTED]'s death to each of the persons for whom is claim is brought. Those persons are [REDACTED] and [REDACTED], children of the decedent, [REDACTED].

[REDACTED] claims that he and his sister, [REDACTED], have sustained pecuniary loss as a result of [REDACTED]'s death in that they have sustained a loss of parental guidance.

The law limits damages resulting from [REDACTED]'s death to monetary injuries. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must decide the monetary losses to [REDACTED] and [REDACTED] caused by [REDACTED]'s death on September 19, 2012. In deciding the amount of monetary losses, you should consider the character, habits and ability of [REDACTED]; the circumstances and condition of [REDACTED] and [REDACTED]; the services that [REDACTED]

██████████ would have performed for them; the value of the intellectual, moral, and physical training, guidance and assistance that ██████████ would have given her children, ██████████, had she lived. ██████████ was, at the time of her death 71 years of age and, according to the life expectancy tables, had a life expectancy of 15.5 years. Life expectancy tables are simply statistical averages. A person might live longer or die sooner than the time indicated by those tables. The figures I just mentioned are not controlling but may be considered by you together with the evidence you heard concerning the health, habits, and activities of ██████████ prior to her death.

As I stated before, it is the monetary value of ██████████ to each of her children that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in deciding the amount of the monetary loss suffered by each of her children.

As to the claim for damages sustained by ██████████, before she died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for ██████████'s pain and suffering during such time as she was conscious from the time of the malpractice to the moment of death. Conscious pain and suffering means pain and suffering of which there is some level of awareness by ██████████

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF [REDACTED]

Index No.: [REDACTED]

-----x  
[REDACTED], individually and as Executor of  
the ESTATE OF [REDACTED] Deceased,

Plaintiff,

**VERDICT SHEET**

-against-

[REDACTED], M.D.,

Defendant.

-----x

1. (a) Did Dr. [REDACTED] depart from accepted medical practice by failing to recognize the potential warning sign of a headache as being a possible intracerebral bleed at the time of his note at 8:50 in the morning?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 1(b) only if you answered "Yes" to question 1(a). If you have answered "No" to question 1(a), proceed to question 2(a).

1. (b) Was that departure a substantial contributing factor in [REDACTED]'s eventual death and/or reducing her chances of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 2(a)

2. (a) Did Dr. [REDACTED] depart from accepted medical practice at the time of his 1:37 P.M. note in failing to diagnose or treat the intracerebral bleed in [REDACTED] at that time?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 2(b) only if you have answered "Yes" to question 2(a). If you have answered "No" to question 2(a), proceed to question 3(a).

2. (b) Was that departure a substantial contributing factor in [REDACTED]'s eventual



death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 3(a)

3. (a) Did Dr. [REDACTED] depart from good and accepted practice in failing to notify any of the medical staff at [REDACTED] to be on the lookout for any further change in [REDACTED]'s condition following his 1:37 P.M note?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 3(b) only if you have answered "Yes" to question 3(a). If you have answered "No" to question 3(a), proceed to question 4(a).

3. (b) Was that departure a substantial contributing factor to [REDACTED]'s eventual death and/or reducing of her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 4(a)

4. (a) Did Dr. [REDACTED] depart from good and accepted practice in failing to order a CT Scan?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 4(b) only if you answered "Yes" to question 4(a). If you have answered "No" to question 4(a), proceed to question 5(a).

4. (b) Was that departure a substantial factor in [REDACTED]'s eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 5(a)



5. (a) Did Dr. [REDACTED] depart from accepted medical practice by failing to discontinue the thrombolytic therapy?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 5(b) only if you answered "Yes" to question 5(a). If you have answered "No" to question 5(a), proceed to question 6(a).

5. (b) Was that departure a substantial contributing factor to [REDACTED]'s eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 6(a)

6. (a) Did Dr. [REDACTED] depart from accepted medical practice by failing to communicate to anyone at [REDACTED] his assessment of the condition of [REDACTED] upon learning of her severe headache?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 6(b) only if you answered "Yes" to question 6(a). If you have answered "No" to question 6(a), proceed to question 7(a).

6. (b) Was that departure a substantial contributing factor to [REDACTED]'s eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 7(a)

7. (a) Did Dr. [REDACTED] depart from accepted medical practice in failing to notify someone at [REDACTED] that she was in need of a CT Scan?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_



Answer question 7(b) only if you answered "Yes" to question 7(a). If you have answered "No" to question 7(a), proceed to question 8(a).

7. (b) Was that departure a substantial contributing factor to [REDACTED]'s eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 8(a)

8. (a) Did Dr. [REDACTED] depart from accepted medical practice in failing to tell [REDACTED] that she could have an intracerebral bleed; that she could be in a life-threatening situation or that it was an urgent situation.

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 8(b) only if you answered "Yes" to question 8(a). If you have answered "No" to question 8(a), proceed to question 9(a).

8. (b) Was that departure a substantial contributing factor to Monica Simotas's eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 9(a)

9. (a) Did Dr. [REDACTED] depart from accepted medical practice in failing to timely diagnose [REDACTED]'s intracerebral hemorrhage?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Answer question 9(b) only if you answered "Yes" to question 9(a). If you have answered "No" to question 9(a), proceed to the instructions on the next page.

9. (b) Was that departure a substantial contributing factor to [REDACTED]'s eventual death and/or reducing her chance of survival?

Yes \_\_\_\_\_

No \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to instructions below

If you have answered "Yes" to ANY ONE of questions numbered 1(b), 2(b), 3(b), 4(b), 5(b), 6(b), 7(b), 8(b), 9(b) PROCEED to Question 10. If you did not answer "Yes" to any of questions 1(b), 2(b), 3(b), 4(b), 5(b), 6(b), 7(b), 8(b), 9(b), then you have rendered a verdict in favor of the defendant, Dr. Johnson. Proceed no further and report your verdict to the Court.

10. State the total amount of monetary loss, to [REDACTED] and [REDACTED]; resulting from [REDACTED]'s death. This award for monetary loss should include the deprivation of the intellectual, moral and physical training and education that [REDACTED] would have provided. State this loss in total without specifying the amount of monetary loss for each individual.

\$ \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Proceed to question 11

11. State the amount awarded for the pain and suffering of [REDACTED] from the time of the malpractice to the moment of death.

\$ \_\_\_\_\_

Dissenting Juror, if any \_\_\_\_\_

Report your verdict to the Court.

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