



SUPREME COURT OF MISSOURI

en banc

November 26, 2001

Effective January 1, 2002

IN RE: REVISIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

- MAI 21.01 VERDICT DIRECTING – ACTIONS AGAINST HEALTH CARE PROVIDERS – NO COMPARATIVE FAULT
(Committee Comment - Revision)
- MAI 21.06 LIMITING INSTRUCTIONS – ACTIONS AGAINST HEALTH CARE PROVIDERS – SETTLING TORTFEASOR
(Committee Comment – Revision)
- MAI 21.08 VERDICT DIRECTING – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF SURVIVAL – NO COMPARATIVE FAULT – MULTIPLE NEGLIGENT ACTS
(Committee Comment – Revision)
- MAI 21.12 VERDICT DIRECTING – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF RECOVERY (NON-DEATH) CASES – NO COMPARATIVE FAULT – MULTIPLE NEGLIGENT ACTS
(Committee Comment – Revision)
- MAI 36.21 FORM OF VERDICT – ACTIONS AGAINST HEALTH CARE PROVIDERS – PLAINTIFF VS. MULTIPLE DEFENDANTS – NO APPORTIONMENT OF FAULT AMONG DEFENDANTS AND NO COMPARATIVE FAULT
(Notes on Use – Revision)

- MAI 36.22 FORM OF VERDICT – ACTIONS AGAINST HEALTH CARE PROVIDERS – PLAINTIFF VS. SINGLE OR MULTIPLE DEFENDANTS – COMPARATIVE FAULT
(Notes on Use – Revision)
- MAI 36.25 FORM OF VERDICT – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF SURVIVAL – COMPARATIVE FAULT
(Notes on Use – Revision)
- MAI 36.27 FORM OF VERDICT – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF RECOVERY (NON-DEATH) CASES – COMPARATIVE FAULT
(Notes on Use – Revision)

ORDER

1. Revisions of previously approved MAI-CIVIL Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2002, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

STEPHEN N. LIMBAUGH, JR.
Chief Justice

21.01 [1998 Revision] Verdict Directing — Actions Against Health Care Providers — No Comparative Fault

(No Change)

Committee Comment (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

Where suit is for wrongful death, see MAI 20.01 and 20.02.

Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

Where there are multiple causes of damage, See MAI 19.01.

A doctor may be liable for failing to inform the patient of dangers incident to treatment. *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960). See also *Steele v. Woods*, 327 S.W.2d 187 (Mo. 1959), and *Kinser v. Elkadi*, 674 S.W.2d 226 (Mo. App. 1984), *Harrell v. Witt*, 755 S.W.2d 296 (Mo. App. 1988), and *Baltzell v. Van Buskirk*, 752 S.W.2d 902 (Mo. App. 1988).

Where comparative fault of the patient is in issue, see MAI 32.06, MAI Chapter 37.00, and MAI 21.02.

If fault is to be apportioned between two or more defendants in a case where no comparative fault is sought against the plaintiff, see Illustration 35.22 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

21.06 [1991 New] Limiting Instructions - Actions Against Health Care
Providers - Settling Tortfeasor

(No Change)

Committee Comment (2002 Revision)

(Approved November 26, 2001; Effective, January 1, 2002)

This instruction is to be used whenever the verdict form includes the name of a released person and the jury has knowledge that one or more persons have settled with the plaintiff. Case law will determine whether the jury is always entitled to know about the settlement or whether that fact will only be in evidence when it is relevant for some other purpose such as to show bias of a witness who has settled.

MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 and 36.24 through 36.27 are applicable only to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of sections 538.205 through 538.230, RSMo.

Compare the law regarding settlements and settling tortfeasors in comparative fault cases other than those involving actions against health care providers under sections 538.205 through 538.230, RSMo. See section 537.060, RSMo; *Jensen v. ARA Services, Inc.*, 736 S.W.2d 374 (Mo. banc 1987); *Allen v. Perry*, 722 S.W.2d 98 (Mo. App. 1986); and *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo. App. 1986).

See Illustrations 35.21 and 35.22 and Committee Comments.

21.08 [1995 Revision] Verdict Directing - Actions Against Health Care Providers
- Lost Chance of Survival - No Comparative Fault - Multiple
Negligent Acts

(No Change)

Committee Comment (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

Where there are multiple causes of lost chance of survival see MAI 19.01.

Where this verdict directing instruction, MAI 21.08, is used to submit a “lost chance of recovery (survival)”, see MAI 21.09 for the damage instruction and MAI 36.24 for the verdict form.

Where comparative fault of the patient is in issue, see MAI 32.06, MAI Chapter 37.00, MAI 21.10, and MAI 36.25.

If fault is to be apportioned between two or more defendants in a case where no comparative fault is sought against the decedent, see Illustration 35.22 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

This instruction applies to the cause of action for “lost chance of recovery (survival)” established in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. banc 1992). *Wollen* discussed the “lost chance of recovery” theory in the context of a survival action under section 537.020, RSMo, brought by a personal representative of the estate of an individual who died after losing a material

chance of recovery from cancer. *Wollen* also discussed the “lost chance of recovery” theory in the context of “loss of a limb”.

See the provisions affecting “lost chance” in section 537.021, RSMo, which provides that a person in the class entitled to recover for wrongful death under section 537.080, RSMo, may request the appointment of a plaintiff ad litem to maintain the “loss of a chance” action instead of a personal representative. The proceeds of the “loss of a chance” action are for the benefit of those class members delineated under section 537.080, and the “lost chance” theory may be maintained as an alternative theory in a wrongful death case.

21.12 [1994 New] Verdict Directing - Actions Against Health Care Providers -
Lost Chance of Recovery (Non-Death) Cases - No Comparative Fault
- Multiple Negligent Acts

(No Change)

Committee Comment (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

Where there are multiple causes of a lost of a chance, see MAI 19.01.

Where this verdict directing instruction, MAI 21.12 is used to submit a “loss of a chance” in “lost limb” cases, see MAI 21.13 for the damage instruction and MAI 36.26 for the verdict form.

Where comparative fault of the patient is in issue, see MAI 32.06, MAI Chapter 37.00, MAI 21.14, and MAI 36.27.

If fault is to be apportioned between two or more defendants in a case where no comparative fault is sought against the decedent, see Illustration 35.22 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Wollen v. DePaul Health Center, 828 S.W.2d 681 (Mo. banc 1992), discussed the “lost chance of recovery” theory in the context of a survival action under section 537.020, RSMo, brought by a personal representative of the estate of an individual who died after losing a material chance of recovery from cancer.

Wollen also discussed the “lost chance of recovery” theory in the context of “loss

of a limb”. This instruction applies to the “loss of a limb” lost chance theory, which is not necessarily limited to the loss of an arm or leg but may also apply to a lost chance of recovery from cancer or spinal injury and the like.

36.21 [1988 New] Form of Verdict - Actions Against Health Care Providers - Plaintiff vs. Multiple Defendants - No Apportionment of Fault Among Defendants and No Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

1. Verdicts will be designated alphabetically (A, B, C, etc.).
2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.
3. Do not submit any category of damage that is not supported by the evidence.
4. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

If fault is to be apportioned between two or more defendants in a case where no comparative fault is sought against the plaintiff, see Illustration 35.22 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Parenthetical directions to “*state the name*” in the above form are addressed to counsel. The appropriate party’s name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each “package” other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of “packaging.”

Verdict forms should not be read by the court to the jury.

36.22 [1988 New] Form of Verdict - Actions Against Health Care Providers -
Plaintiff vs. Single or Multiple Defendants - Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

1. Verdicts will be designated alphabetically (A, B, C, etc.).
2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.
3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: Section 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to section 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a

percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to “(*state the name*)” in the above form are addressed to counsel. The appropriate party’s name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each “package” other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of “packaging”.

Verdict forms should not be read by the court to the jury.

36.25 [1995 Revision) Form of Verdict - Actions Against Health Care
Providers - Lost Chance of Survival - Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

1. Verdicts will be designated alphabetically (A, B, C, etc.).
2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.
3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: Section 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to section 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a

percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to “(*state the name*)” in the above form are addressed to counsel. The appropriate party’s name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each “package” other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of “packaging”.

Verdict forms should not be read by the court to the jury.

36.27 [1994 New] Form of Verdict - Actions Against Health Care Providers -
Lost Chance of Recovery (Non-Death) Cases – Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved November 26, 2001; Effective January 1, 2002)

1. Verdicts will be designated alphabetically (A, B, C, etc.).
2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.
3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: Section 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to section 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a

percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to “(*state the name*)” in the above form are addressed to counsel. The appropriate party’s name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each “package” other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of “packaging”.

Verdict forms should not be read by the court to the jury.