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NY PJI 2:282

N.Y. Pattern Jury Instr.--Civil 2:282

New York Pattern Jury Instructions--Civil

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Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 2. Negligence Actions

J. Damages

3. Personal Injury

c. Aggravation of Pre-existing Injury

PJI 2:282 Damages--Personal Injury--Aggravation of Pre-existing Injury

If you find that before this (accident, occurrence) the plaintiff had a [*specify the particular condition*] and further find that because of the (accident, occurrence) this condition was aggravated so as to cause (increased) suffering and disability, then the plaintiff is entitled to recover for any (increased) disability or pain resulting from such aggravation. (He, she) is not, however, entitled to recover for any physical ailment or disability which existed prior to the (accident, occurrence) or for any injuries from which (he, she) may now be suffering which were not caused or contributed to by the (accident, occurrence). The plaintiff can recover only for damage caused by aggravation of the pre-existing condition, not the condition itself. The plaintiff should be compensated only to the extent that you find (his, her) condition was made worse by the defendant's negligence.

Comment

Where the defendant's wrongful act does not cause the condition, injury or illness, but only aggravates and increases the severity of a condition existing at the time of the injury, the plaintiff may recover only for such increased or augmented suffering or damage as are caused by the defendant's act, Ortiz v Mendolia, 116 AD2d 707, 497 NYS2d 761 (Court approved a charge substantially the same as the pattern charge); see McCahill v New York Transp. Co., 201 NY 221, 94 NE 616; Kirschoffer v Van Dyke, 173 AD2d 7, 577 NYS2d 512. As to the sufficiency of proof of causation of the aggravation, see Annot: 2 ALR3d 290; 2 ALR3d 384; 2 ALR3d 401; 2 ALR3d 434; 2 ALR3d 446; 2 ALR3d 464; 2 ALR3d 487.

Stated differently, in determining damages, the jury must consider the plaintiff's pre-existing condition and limit the award accordingly; i.e., to the extent to which he or she has been further disabled as a result of the defendant's negligence, Lopato v Kinney Rent-A-Car, Inc., 73 AD2d 565, 423 NYS2d 42; Roy v Hartogs, 85 Misc2d 891, 381 NYS2d 587; Castaldo v Transportation Vehicles, Inc., 16 Misc2d 948, 180 NYS2d 368, mod 10 AD2d 955, 201 NYS2d 601; Beaudoin v State, 24 Misc2d 962, 207 NYS2d 348; see Tobin v Steisel, 64 NY2d 254, 485 NYS2d 730, 475 NE2d 101; see Stewart v Olean Medical Group, P.C., 17 AD3d 1094, 795 NYS2d 420 (jury should be instructed to award only those damages proximately caused by defendant's negligence and not by plaintiff's underlying illness itself); Monahan v Weichert, 93 AD2d 984, 461 NYS2d 633 (same). It is error to refuse to instruct the jury as to the principles governing plaintiff's claim that a pre-existing condition was aggravated, Rosenberg v Rixon, 111 AD2d 910, 490 NYS2d 807 (citing PJI); see Miller v Sansone, 127 AD2d 569, 511 NYS2d 369, (requiring distinction between pre-existing condition and latent condition). A failure to request the charge may result in a waiver, Hancock by Hancock v 330 Hull Realty Corp., 225 AD2d 365, 638 NYS2d 654. As to subsequent injuries, see PJI 2:305 and PJI 2:306.

The aggravation of pre-existing disease or infirmities must be pleaded before recovery therefor can be allowed, Anderson

v Dainack, 39 AD3d 1065, 834 NYS2d 564; Behan v Data Probe Int'l, 213 AD2d 439, 623 NYS2d 886; De Mento v Nehi Beverages, Inc., 55 AD2d 794, 389 NYS2d 909; Von Sydow v Long Beach Bus Co., 249 App Div 838, 292 NYS 662; see Annot: 32 ALR2d 1447. The Fourth Department has held that a charge on aggravation of pre-existing injury may be given if plaintiff has not pleaded the theory but defendant has raised the issue, Mazurek v Home Depot U.S.A., Inc., 303 AD2d 960, 757 NYS2d 425; Martin v Volvo Cars of North America, Inc., 241 AD2d 941, 661 NYS2d 338. However, the Third Department has rejected the Fourth Department's approach, at least where there has been a wholesale failure by plaintiff to plead the theory, Anderson v Dainak, supra. A charge on aggravation of pre-existing injuries must be requested before the jury retires to consider its verdict, Hancock v 330 Hull Realty Corp., 638 NYS2d 654.

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NY PJI 2:282

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