

33.00

DAMAGES—MITIGATION

33.01 Mitigation of Damages--Personal Injury

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that an injured person must exercise ordinary care to obtain medical treatment. Damages proximately caused by a failure to exercise such care cannot be recovered.

Notes on Use

This instruction should never be given unless (1) there is evidence creating an issue of fact as to the plaintiff's negligence in securing medical attention, and (2) the damages resulting to the plaintiff from the failure to exercise due care in obtaining medical care are separable from his other injuries. *Kennedy v. Busse*, 60 Ill.App. 440 (1st Dist.1895); *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N.E. 290 (1896); *Wong v. Richards*, 10 Ill.App.3d 514, 294 N.E.2d 784 (4th Dist.1973); *Bartimus v. Paxton Community Hosp.*, 120 Ill.App.3d 1060, 1071; 458 N.E.2d 1072, 1080; 76 Ill.Dec. 418, 426 (4th Dist.1983).

A doctor's failure to exercise ordinary care is not a basis for giving of this instruction if the plaintiff has used ordinary care in the selection of the doctor. *Chicago City Ry. Co. v. Saxby*, 213 Ill. 274, 72 N.E. 755, 68 L.R.A. 164, 104 Am.St.Rep. 218 (1904); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20 (1884). See IPI 30.23.

Comment

This instruction recognizes the proposition that an injured person must mitigate his damages by using ordinary care in obtaining medical treatment. *Chicago Union Traction Co. v. Mee*, 136 Ill.App. 98 (1st Dist.1907).

No instruction should be given with reference to the plaintiff's duty to submit to major surgical operations. Whether the plaintiff is to undergo a serious operation is a matter for him to decide. *Howard v. Gulf M. & O. R. Co.*, 13 Ill.App.2d 482, 142 N.E.2d 825 (4th Dist.1957); *Morris v. Despain*, 104 Ill.App. 452 (2d Dist.1902); *Lapidus v. Hahn*, 115 Ill.App.3d 795, 450 N.E.2d 824, 71 Ill.Dec. 136 (1st Dist.1983); *Montgomery v. Terminal R.R. Ass'n*, 73 Ill.App.3d 650, 392 N.E.2d 77, 29 Ill.Dec. 520 (5th Dist.1979) (trial court properly refused evidence that surgery was recommended to improve plaintiff's condition, and the reasons for plaintiff's rejection of that recommendation).

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).

33.02 Mitigation of Damages--Property

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person whose [property] [business] is damaged must exercise ordinary care to minimize existing damages and to prevent further damage. Damages proximately caused by a failure to exercise such care cannot be recovered.

Comment

This instruction recognizes the proposition that a plaintiff must use ordinary care to mitigate damage to his property. *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, 57 N.E. 863 (1900).

See also Behrens v. W. S. Bills & Sons, Inc., 5 Ill.App.3d 567, 283 N.E.2d 1 (3d Dist.1972) (plaintiff's instruction providing that "while reasonable efforts to avoid loss are required," plaintiff was not required to take action which he was financially unable to take, correctly stated applicable law).

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).