8.02 HEALTH CARE PROVIDER MALPRACTICE – NEGLIGENCE DEFINED

I will now define negligence for you. Negligence is the failure to meet the standard of care. The standard of care is the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant was practicing.

You must determine the standard of care only on the basis of opinions offered by [insert names of experts], who have testified as expert witnesses on the standard of care. If you are not able to decide the standard of care based on the expert testimony, you must return a verdict for the defendant.

If you are able to decide the standard of care based on the expert testimony, you must then determine whether the defendant met the standard of care. The defendant failed to meet the standard of care if [he] [she] either lacked the required degree of knowledge or skill, or failed to exercise the required degree of care. You must make this decision only on the basis of opinions offered by [insert names of experts] who have testified as experts on whether the defendant met the standard of care.

The mere fact that the plaintiff was harmed does not mean the defendant was negligent.

If you do not find that the defendant was negligent, you must return a verdict for the defendant. If you do find that the defendant was negligent, you must also decide whether that negligence was the legal cause of the plaintiff’s harm.

# Use Note

This instruction should be followed by Instruction 3.06 (Legal Cause). Instruction 1.07 dealing generally with the testimony of expert witnesses should also be given.

Expert testimony is generally required to prove both the standard of care and breach in cases involving the duties of a professional. However, expert testimony is not needed to prove breach of the standard of care “in non-technical situations where negligence is evident to lay people.” Kendall v. State, 692 P.2d 953, 955 (Alaska 1984). In such cases, the last sentence of paragraph three should be replaced by the following: “Although experts may have testified about whether the defendant met the standard of care, you need not base your decision on their testimony.” It is uncertain in such cases whether expert testimony is still required to prove the standard of care.

# Comment

AS 09.55.550 requires that the jury be instructed in accordance with the standard of proof specified in AS 09.55.540 for a health care provider’s negligence or willful conduct. AS 09.55.540 establishes the standard of care to be applied to health care providers. AS 09.55.550 also requires that the jury be instructed that injury alone raises no presumption of the health care provider’s negligence or misconduct.

Prior to the 1976 amendment to AS 09.55.540, Alaska law applied a standard of care based on that care provided in “similar communities.” However, the statute currently provides that the standard of care is simply “the degree of care ordinarily exercised under the circumstances.” AS 09.55.540 (a)(1); see Abille v. United States, 482 F. Supp. 703, 705 (N.D. Cal. 1980) (applying Alaska law); Baker v. Werner, 654 P.2d 263, 268 (Alaska 1982).

Alaska law requires expert testimony to support a jury finding of a breach of professional duty except in non-technical situations where negligence is evident to lay people. Kendall v. State, 692 P.2d 953, 955 (Alaska 1984); see also D.P. & R.P. v. Wrangell General Hospital, 5 P.3d 225, 228-29 (Alaska 2000) (allegation that a patient was not adequately supervised and safeguarded was one involving “ordinary negligence” which need not be supported by expert testimony).

AS 09.20.185 provides that a person may not testify as an expert witness on the issue of the appropriate standard of care in an action based on professional negligence unless the witness is: a professional licensed in Alaska or in another state or country; trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue. (The first requirement does not apply if the state has not recognized a board that has certified the witness in the particular field or matter at issue.) The statute is incorporated into Alaska Rule of Evidence 702(c).