

Case Law on Series: Standard of Care (Malpractice)

The “Case Law on Series” addresses different legal issues of interest to chiropractors. Each part of the series highlights recent decisions from the Wisconsin State Courts that specifically involve chiropractors or aspects of chiropractic. On occasion, leading opinions from the Wisconsin Attorney General will be cited when those opinions are relevant to the legal issue. This issue in the series addresses the chiropractor’s **standard of care**.

Relevant Case: Kerkman v. Hintz, 142 Wis. 2d 404, 418 N.W.2d 795 (1988).

Relevant Facts: Patient consulted with a chiropractor with complaints of soreness in shoulders and neck; as well as numbness in his hands. Doctor obtained a history, analyzed a subluxation of the cervical spine and performed a chiropractic adjustment. Chiropractic treatment was provided over several weeks involving limited number of adjustments. Approximately two (2) months later, patient consulted with medical doctor and neurosurgeon who diagnosed a compressed spinal column and recommended an operation. Multiple operations were performed following which the patient continued to have problems with numbness in his hands, walking, and bladder control. Patient filed a lawsuit alleging negligent chiropractic treatment.

Legal Issues(s): (1) What is the appropriate standard of care by which to measure a chiropractor’s diagnosis, treatment, or referral of a patient?

(2) What level of competency is required of a non-chiropractic expert witness to testify regarding a breach of the chiropractic standard of care?

Principle Rule of Law: [To Question 1] “A chiropractor must exercise that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances... A chiropractor may only treat a patient within the scope of chiropractic knowledge and training. A chiropractor is required first to determine whether the patient presents a problem which is treatable through chiropractic means. If the patient has a problem which is treatable through chiropractic

means, the chiropractor may provide chiropractic treatment to the patient. However, the chiropractor must refrain from further chiropractic treatment when a reasonable chiropractor should be aware that the patient's condition will not be responsive to further treatment. If the patient presents a problem which is outside the scope of chiropractic treatment, then the chiropractor must inform the patient that the problem presented is not within the chiropractor's license to treat." (Kerkman, 142 Wis. 2d 419-420)

[To Question 2] "A chiropractor is qualified to testify regarding the practice of chiropractic and the corresponding standard of care. One who is not licensed to practice chiropractic may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given." (Kerkman, 142 Wis. 2d 423)

Additional Ruling(s) or Commentary: (1) through the enactment of legislation, "the legislature has recognized the practice of chiropractic as a separate healthcare discipline." (Kerkman, 142 Wis. 2d 415)

(2) "... the legislature has recognized that the practice of chiropractic is distinct from the practice of medicine." (Kerkman, 142 Wis. 2d 416)

(3) "... a chiropractor does not treat or diagnose disease. Instead, a chiropractor's practice is limited to the analysis and correction of subluxation." (Kerkman, 142 Wis. 2d 416)

(4) "A chiropractor does not have a duty to refer a patient who is not treatable though chiropractic means to a medical doctor." Since implicit in such a requirement would be the imposition upon the chiropractor to make a "medical determination that the patient needs medical care" under the circumstances where such a determination would require "medical knowledge" which is beyond the training and knowledge of a chiropractor. (Kerkman, 142 Wis. 2d 421) **Note** – this duty to simply "inform" has been superseded by legislation adopted in 2009. Under the new legislation, a chiropractor is required to "inform" the patient when the doctor determines that the patient will no longer respond to further chiropractic treatment. In that situation, the chiropractor also

has a duty to “refer” the patient to a physician. [Further information relating to this statutory “duty to refer” is provided at other resources of this website.]

Other Considerations: This decision was more recently followed in the Appellate Court decision of Goldstein v. Janusz Chiropractic Clinics, S.C. 218 Wis. 2d 683, 582 N.W.2d 78 (1998) It should be noted that a chiropractor who practices outside of the authority granted by a licensing agency may be engaging in the practice of medicine and held to a different standard of care. See decision in Treptau v. Behrens Spa, Inc., 247 Wis. 438(20) N.W.2d 108 (1945). Finally, commentary from the Court may be relied upon to challenge the opinions of a non-chiropractor as to the need for and nature of chiropractic treatment rendered to patient. A doctor challenging such opinions may argue that the non-chiropractor lacked the necessary “knowledge, skill, experience, training or education” which is exercised by the professional, such as a chiropractor, under like or similar circumstances. (See Kerkman, 142 Wis. 2d 418-419)

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