

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

<p>ZAW ZAW and ZIN LANG AUNG,</p> <p>Plaintiffs,</p> <p>v.</p> <p>KEVIN BIRUSINGH, M.D. and THE IOWA CLINIC,</p> <p>Defendants,</p>	<p>Case No.: LACL139628</p> <p><b>PLAINTIFFS' PROPOSED JURY INSTRUCTIONS</b></p>
<p>KEVIN BIRUSINGH, M.D., and THE IOWA CLINIC,</p> <p>Third-Party Plaintiffs,</p> <p>v.</p> <p>LANGUAGEtech, INC.,</p> <p>Third-Party Defendants</p>	

COME NOW, Plaintiffs Zaw Zaw and Zin Lang Aung, and submit their proposed jury instructions.

Respectfully submitted,

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**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on April \_\_29\_\_, 2019.

By: ☐ US Mail ☐ Fax  
☐ Hand Delivered ☒ EDMS  
☐ Federal Express ☐ Email

Signature /s/ Janet Vu Nguyen\_\_\_\_\_

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ZAW ZAW and ZIN LANG AUNG,

Plaintiffs,

v.

KEVIN BIRUSINGH, M.D. and THE IOWA  
CLINIC,

Defendants,

Case No.: LACL139628

**PLAINTIFFS' PROPOSED  
JURY INSTRUCTIONS**

KEVIN BIRUSINGH, M.D., and THE IOWA  
CLINIC,

Third-Party Plaintiffs,

v.

LANGUAGEtech, INC.,

Third-Party Defendant

Members of the Jury:

In this case, the Plaintiffs Zaw Zaw and Zin Lang Aung allege that Defendant Dr. Kevin Birusingh performed an unnecessary and unwanted wrong-site surgery on Plaintiff Zaw Zaw, failed to ascertain the proper surgery and, thereby, failed to obtain Zaw Zaw's informed consent for the wrong-site surgery. Dr. Birusingh was employed by The Iowa Clinic at the time he performed the surgery on Plaintiff Zaw Zaw. Zin Lang Aung makes a claim for loss of her husband, Zaw Zaw's, spousal consortium. The Defendants deny the allegations made by the Plaintiffs.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

**INSTRUCTION NO. \_\_\_\_\_**

**100.2 Duties Of Judge And Jury, Instructions As Whole.** My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the instructions together because no one instruction includes all of the applicable law.

The order in which I give these instructions is not important.

Your duty is to decide all fact questions.

As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.

**Authority**

Roushar v. Dixon, [231 Iowa 993](#), [2 N.W.2d 660](#) (1942)

**INSTRUCTION NO. \_\_\_\_\_**

**100.3 Burden Of Proof, Preponderance Of Evidence.** Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

**Authority**

Mabrier v. A.M. Servicing Corporation of Raytown, [161 N.W.2d 180](#) (1968)

**INSTRUCTION NO. \_\_\_\_\_**

**100.4 Evidence.** You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person or by deposition.
2. Exhibits received by the court.
3. Stipulations which are agreements between the attorneys.
4. Any other matter admitted (e.g. answers to interrogatories, matters which judicial notice was taken, and etc.).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

**Authority**

Iowa Rules of Evidence.

**INSTRUCTION NO. \_\_\_\_\_**

**100.5 Deposition Testimony.** Certain Testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

**Authority**

Iowa R. Civ. P. 1.704

Farley v. Seiser, [316 N.W.2d 857](#) (Iowa 1982)

**INSTRUCTION NO. \_\_\_\_\_**

**100.9 Credibility Of Witnesses.** You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and,
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

**Authority**

Burger v. Omaha & C.B. St. Ry. Co., [139 Iowa 645](#), 117 N.W.35 (1908)



**INSTRUCTION NO. \_\_\_\_\_**

**100.12 Opinion Evidence, Expert Witness.** You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

**Authority**

Crouch v. National Livestock Remedy Co., [210 Iowa 849](#), [231 N.W. 323](#) (1930).

**INSTRUCTION NO. \_\_\_\_\_**

**100.11 Hypothetical Question, Expert Testimony.** An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

**Authority**

Cody v. Toller Drug Co., [232 Iowa 475](#), [5 N.W.2d 824](#) (1942)

**INSTRUCTION NO. \_\_\_\_\_**

Some business entities act only through their agents or employees, and an employee of a business may bind the entity by acts within the scope of his duties as an employee of the entity. It is undisputed that Dr. Birusingh was an employee of The Iowa Clinic, and it is responsible for any of his acts or omissions.

**INSTRUCTION NO. \_\_\_\_\_**

**1600.2 Negligence - Duty Of Physician.** A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.

A violation of this duty is negligence.

**Authority**

Speed v. State, [240 N.W.2d 901](#) (Iowa 1976)

Perin v. Hayne, [210 N.W.2d 609](#) (Iowa 1973)

**INSTRUCTION NO. \_\_\_\_\_**

**1600.3 Negligence - Duty Of Specialist.** Duty Of Specialist. Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner.

A violation of this duty is negligence.

**Authority**

McGulpin v. Bessmer, [241 Iowa 1119](#), 1132, [43 N.W.2d 121](#), 128 (1950)

**INSTRUCTION NO. \_\_\_\_\_**

**1600.10 Informed Consent - Essentials For Recovery.** The plaintiff claims Dr. Birusingh failed to obtain an informed consent from the plaintiff before performing the vasectomy.

The plaintiff must prove all of the following propositions:

1. The existence of material information concerning the vasectomy.
2. Material information concerning the vasectomy was unknown to the plaintiff.
3. The defendant failed to disclose material information concerning the vasectomy to the plaintiff.
4. Disclosure of material information concerning the vasectomy would have led a reasonable patient in plaintiff's position to reject the treatment.
5. The failure to obtain an informed consent was a cause of plaintiff's damage.
6. The nature and amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

**Authority**

Pauscher v. Iowa Methodist Medical Center, [408 N.W.2d 355](#) (Iowa 1987)  
Thompson v. Kaczinski, [774 N.W. 2d 829](#), 836-39 (Iowa 2009) (causation)  
Andersen v. Khanna, 913 N.W.2d 526, 544-547 (Iowa 2018)

**INSTRUCTION NO. \_\_\_\_\_**

**Informed consent – Types of Damages.** If you find Zaw Zaw is entitled to recover damages for Dr. Birusingh's failure to obtain his informed consent, you should consider whether he suffered any or all of the following types of damages:

**(1) Quality of life if he delayed or chose not to have any procedure.** For this type of damage, you are to consider: (a) Would Zaw Zaw have delayed or chosen not to have the surgery had he been properly informed that Defendants intended to perform a vasectomy; and if your answer is yes: (b) how long would he have delayed surgery (or if he chose to never have it, his life expectancy); and (c) how much, if any, would the quality of his life have been improved during that period, and the worth of that improvement?

**(2) An alternative would have produced a better outcome.** For this type of damage, you are to consider: (a) Would Zaw Zaw have chosen an alternative procedure had he been properly informed that Defendants were intending to perform a vasectomy; and if your answer is yes: (b) would that alternative have resulted in a better outcome compared with the surgery performed by Defendants; and if yes (c) how much, if any, would the improvement be worth?

**(3) Deprivation of the right to obtain informed consent.** For this type of damage, you do not have to find that Zaw Zaw would have had any improvement in his outcome or quality of life, although such findings do not preclude this type of damage either.

Rather, for this type of damage, you are to consider: (a) Did Dr. Birusingh inform Zaw Zaw of the risks of, and alternatives to, the procedure he performed; and if not (b) how much, if any, did the failure to have the opportunity to make an informed decision regarding his health care injure Zaw Zaw's dignity, privacy and emotional well-being?

**Authority**

Pauscher v. Iowa Methodist Medical Center, [408 N.W.2d 355](#) (Iowa 1987)

Thompson v. Kaczinski, [774 N.W. 2d 829](#), 836-39 (Iowa 2009) (causation)

Andersen v. Khanna, 913 N.W.2d 526, 544-547 (Iowa 2018)

**INSTRUCTION NO. \_\_\_\_\_**

**1600.12 Duty Of Physician As To Informed Consent.** A physician is required to obtain an informed consent from a patient prior to performing any procedure upon the patient. To obtain an informed consent, a physician must disclose to the patient all known material information concerning the vasectomy that would be significant to a reasonable patient's decision to consent to the procedure. Material information includes the fact of, risks of, alternatives to, and consequences of failing to have the procedure or treatment.

**Authority**

Pauscher v. Iowa Methodist Medical Center, [408 N.W.2d 355](#) (Iowa).



**INSTRUCTION NO. \_\_\_\_\_**

The plaintiffs must prove all of the following propositions regarding Dr. Kevin Birusingh:

1. He was negligent in one or more of the following ways:
  - a. In failing to ascertain the proper surgery;
  - b. In performing an unnecessary surgery;
  - c. In performing an unwanted surgery;
  - d. In failing to obtain informed consent for the surgery performed;
  - e. In committing medical battery by performing surgery in the wrong area.
2. The negligence was a cause of damage to the plaintiffs.
3. The amount of damage.

If the plaintiffs have failed to prove any of these propositions, the plaintiffs are not entitled to damages from the defendants. If the plaintiffs have proved these propositions, the plaintiffs are entitled to damages from the defendants in some amount.

**INSTRUCTION NO. \_\_\_\_\_**

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

**INSTRUCTION NO. \_\_\_\_\_**

If you find Zaw Zaw is entitled to recover damages, you shall consider the following items:

1. The present value of reasonable and necessary hospital charges, doctor charges, prescriptions and other medical services which will be incurred in the future.
2. Physical and mental pain and suffering from the date of the injury to the present time. Physical pain and suffering may include, but is not limited to, mental anguish and loss of enjoyment of life.
3. The future value of future physical and mental pain and suffering.
4. Loss of function of the body from the date of injury to the present time. Loss of body is the inability of a particular part of the body to function in a normal manner.
5. The future value of future loss of function of the body.
6. Loss of opportunity to make an informed decision regarding treatment. Loss of opportunity may also include damage to plaintiff's dignity and invasion of his privacy.
7. The future value of future loss of opportunity to make an informed decision regarding treatment.

The amount you assess for physical and mental pain and suffering in the past and future, loss of function of the body in the past and future, and loss of opportunity to make an informed decision regarding treatment in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendants as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

**Authority**

Pauscher v. Iowa Methodist Medical Center, [408 N.W.2d 355](#) (Iowa 1987)  
Thompson v. Kaczinski, [774 N.W. 2d 829](#), 836-39 (Iowa 2009) (causation)  
Andersen v. Khanna, 913 N.W.2d 526, 544-547 (Iowa 2018)  
Brant v. Bockholt, 532 N.W.2d 80, 803-804 (Iowa 1995)

**INSTRUCTION NO. \_\_\_\_\_**

**200.31 Elements - Spousal Consortium - Spouse's Damage.** "Spousal consortium" is the fellowship of a husband and wife and the right of each other to the benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's injury.

If you find Zin Lang Aung is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

1. The reasonable value of loss of spousal consortium which Zin Lang Aung would otherwise have received from the date of injury until the present time.
2. The present value of loss of spousal consortium which Zin Lang Aung would otherwise have received in the future.

Damages for loss of spousal consortium are limited in time to the shorter of the spouse's or plaintiff's normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

1. The circumstances of Zaw Zaw's life.
2. Zaw Zaw's and Zin Lang Aung's ages at the time of Zaw Zaw's injury.
3. Zaw Zaw's health, strength, character and life expectancy.
4. Zaw Zaw's capabilities and efficiencies in performing the duties of a spouse.
5. Zaw Zaw's skills and abilities in providing instructions, guidance, advice and assistance.
6. Zin Lang Aung's needs.
7. All other facts and circumstances bearing on this issue.

The amount you assess for loss of spousal consortium cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under

one item of damage to be included in any amount awarded under another item of damage.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

**Authority**

Gail v. Clark, [410 N.W.2d 662](#) (Iowa 1987)

Madison v. Colby, [348 N.W.2d 202](#) (Iowa 1984)

Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, [335 N.W.2d 148](#) (Iowa 1983)

Fuller v. Buhrow, [292 N.W.2d 672](#) (Iowa 1980)

Acuff v. Schmit, [248 Iowa 272](#), [78 N.W.2d 480](#) (1956)

**INSTRUCTION NO. \_\_\_\_\_**

Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiffs for future losses.

**INSTRUCTION NO. \_\_\_\_\_**

**200.37 Mortality Tables - Personal Injury.** A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Zaw Zaw is 38.59 years and the normal life expectancy for people who are the same age as Zin Lang Aung is 43.45 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Zaw Zaw and Zin Lang Aung's health, habits, occupation, and lifestyle, when deciding issues of future damages.

**Authority**

Ehlinger v. State, [237 N.W.2d 784](#) (Iowa 1976)  
Ruud v. Grimm, [252 Iowa 1266](#), [110 N.W.2d 321](#) (1961)  
Newman v. Blom, [249 Iowa 836](#), [89 N.W.2d 349](#) (1958)

**INSTRUCTION NO. \_\_\_\_\_**

**200.38 Quotient Verdict.** In arriving at an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates shall be your item of damage.

**Authority**

Moose v. Rich, [253 N.W.2d 565](#) (Iowa 1977)  
Sheker v. Jensen, [241 Iowa 583](#), [41 N.W.2d 679](#) (1950)  
Manna v. McIntosh, [519 N.W.2d 815](#) (Iowa App. 1994)



**INSTRUCTION NO. \_\_\_\_\_**

**100.18 General Instruction To Jury.** Upon retiring you shall select a foreman or forewoman. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges - judges of the facts. Your sole interest is to find the truth and do justice.

**INSTRUCTION NO. \_\_\_\_\_**

**100.21 Cautionary Instruction - Juror's Notes.** During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room and they will be destroyed.

**Authority**

Iowa R. Civ. P. 1.926 (1)

**INSTRUCTION NO. \_\_\_\_\_**

Occasionally, after a jury retires to the jury room, the members have questions. I have prepared the instructions after carefully considering this case with the parties and lawyers. I have tried to use language which is generally understandable. Usually questions about instructions can be answered by carefully re-reading them. If however, any of you feel it necessary to ask a question, you must do so in writing and deliver the question to the court attendant. I cannot communicate with you without first discussing your question and potential answer with the parties and lawyers. This process naturally takes time and deliberation before I can reply. The foreperson shall read my response to the jury. Keep the written question and response and return it to the Court with the verdict.

The court attendant who has been working with me on this case is in the same position as I am. [He] [She] has taken an oath not to communicate with you except to ask if you have agreed upon a verdict. Please do not put [him] [her] on the spot by asking [him] [her] any questions. You should direct your questions to the Court and not to the court attendant.

**INSTRUCTION NO. \_\_\_\_\_**

**300.1 Return Of Verdict - Forms Of Verdict.** I am giving you \_\_\_\_\_ verdict forms [and questions]. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict [and answers to questions] must be signed by your foreman or forewoman.

After deliberating for six hours from \_\_\_\_\_ o'clock \_\_\_\_\_.m. excluding meals or recesses outside your jury room, then it is necessary that only (seven) (six)\* of you agree upon the answers to the questions. In that case, the verdict [and questions] must be signed by all (seven) (six)\* jurors who agree.

When you have agreed upon the verdict [and answers to questions] and appropriately signed it, tell the Court Attendant.

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

ZAW ZAW and ZIN LANG AUNG,

Plaintiffs,

v.

KEVIN BIRUSINGH, M.D. and THE IOWA  
CLINIC,

Defendants,

Case No.: LACL139628

**VERDICT FORM**

KEVIN BIRUSINGH, M.D., and THE IOWA  
CLINIC,

Third-Party Plaintiffs,

v.

LANGUAGEtech, INC.,

Third-Party Defendant

We find the following verdict on the questions submitted to us:

**QUESTION NO. 1:** Was the negligence of Defendant The Iowa Clinic a cause of any item of damage to the Plaintiffs Zaw Zaw and Zin Lin Aung?

Answer “yes” or “no”.

ANSWER: \_\_\_\_\_

**QUESTION NO. 2:** Was the negligence of Defendant Dr. Kevin Birusingh, M.D. a cause of any item of damage to the Plaintiffs Zaw Zaw and Zin Lin Aung?

Answer “yes” or “no”.

ANSWER: \_\_\_\_\_

**QUESTION NO. 3:** Was the negligence of Third-Party Defendant Languagetechnology, Inc. a cause of any item of damage to the Plaintiffs Zaw Zaw and Zin Lin Aung?

Answer “yes” or “no”.

ANSWER: \_\_\_\_\_

**QUESTION NO. 4:** What is the percentage of negligence (0-100%) that you find for each Defendant?

The Iowa Clinic: \_\_\_\_\_

Dr. Kevin Birusingh: \_\_\_\_\_

Languagetech, Inc.: \_\_\_\_\_

TOTAL: \_\_\_\_\_  
(must equal 100%)

**QUESTION NO. 5:** State the amount of damages that were sustained by Plaintiff Zaw Zaw and caused by Defendant(s)' negligence as to each of the following items of damage. If Plaintiff Zaw Zaw has failed to prove any item of damage or has failed to prove that any item of damage was caused by Defendant(s)' negligence, enter 0 for that item.

- |   |          |
|---|----------|
| 1. Past loss of full function of mind and/or body   | \$ _____ |
| 2. Future loss of full function of mind and/or body | \$ _____ |
| 3. Past physical and/or mental pain and suffering   | \$ _____ |
| 4. Future physical and/or mental pain and suffering | \$ _____ |

TOTAL (add the separate items of damage) \$ \_\_\_\_\_

**QUESTION NO. 6:** State the amount of damages that were sustained by Plaintiff Zin Lin Aung and caused by Defendant(s)' negligence as to each of the following items of damage. If Plaintiff Zin Lin Zung has failed to prove any item of damage or has failed to prove that any item of damage was caused by Defendant(s)' negligence, enter 0 for that item.

- |                                     |          |
|-------------------------------------|----------|
| 1. Past mental pain and suffering   | \$ _____ |
| 2. Future mental pain and suffering | \$ _____ |