

**SUMMARY OF
NEW AND REVISED
PATTERN JURY INSTRUCTIONS

MEDICAL MALPRACTICE
and TORT REFORM**

**Session Law 2011-400/Senate Bill 33
Session Law 2011-283/ House Bill 542**

20 June 2012

CIVIL PATTERN JURY INSTRUCTIONS COMMITTEE

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I. CORPORATE OR ADMINISTRATIVE MEDICAL MALPRACTICE

- A. N.C.P.I. – Civil 809.06; or N.C.P.I. – Civil 809.28 (for an emergency medical condition)
- B. For actions arising on or after 1 October 2011, the definition of medical malpractice cases is broadened to include actions for personal injury or death against a hospital, nursing home licensed under Chapter 131E or an adult care home licensed under Chapter 131D when the claim: (i) alleges a breach of *administrative or corporate duties to the patient*, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision; *and* (ii) arises from the same facts or circumstances as a claim for injury or death based on medical malpractice in performance of medical, dental or other health care by a provider. N.C. Gen. Stat. § 90-21.11(2) (emphasis added).
- If the duty at issue is not owed to the patient, then this provision does not apply.
- C. Administrative duties in case law previously were described in terms of a duty to use *reasonable care* and were ordinary negligence claims.
1. *See, e.g., Blanton v. Moses H. Cone Mem. Hosp.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987) (“a duty to use reasonable care in the selection, in section, and maintenance of equipment”).
 2. *See also Waters v. Jarman*, 144 N.C. App. 98, 104, 547 S.E.2d 142, 146 (2001) (addressing Rule 9j certification under previous law) (the “claims against defendant hospital assert negligence in the continuation of hospital privileges, failure to follow hospital policies, failure to monitor and oversee the performance of the physicians, and failure to adequately assess the credentials of the physicians prior to granting privileges. Because these claims assert administrative and management deficiencies and do not arise out of the furnishing of professional services in the performance of medical, dental or other health care, they are not claims for medical malpractice.”)
- D. The statute evinces an intention to embrace these ordinary negligence duties through its express language, referring to an alleged “breach of administrative or corporate duties to the patient, *including but not limited to*, allegations of negligent credentialing or negligent monitoring and supervision.” A footnote in the new pattern instruction refers to some of these common law duties. There are others.
- E. Because common law duties ascribed to health care providers have not been applied to corporate or administrative functions and were not referred to in the statute, only the statutory duty of care is included in pattern instruction. N.C. Gen. Stat. § 90-21.12(a). Similarly, the optional additional instructions

regarding limitations to common law duties— Highest Degree of Skill Not Required, Not Guarantor of Diagnosis/Result—are not included in the pattern instruction.

II. EMERGENCY MEDICAL CONDITION-MEDICAL MALPRACTICE

A. N.C.P.I. – Civil 809.20 through 809.28

B. For actions arising on or after 1 October 2011, in “any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition . . . , the claimant must prove a violation of the standards of practice *set forth in this section by clear and convincing evidence.*” N.C. Gen. Stat. § 90-21.12(b) (emphasis added).

C. The statute does not expressly allocate the burden of proving the existence of an emergency medical condition on any party. The pattern instruction specifies that the burden is on the defendant.

D. The statute defines “emergency medical condition” by incorporating a small section of the federal Emergency Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd(e)(1)(A). That definition is:

a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-

- (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
- (ii) serious impairment to bodily functions, or
- (iii) serious dysfunction of any bodily organ or part.

E. EMTALA generally provides a private right of action in connection with a hospital emergency room’s failure to treat a patient based only on the patient’s inability to pay (“patient dumping”).

1. EMTALA applies only to hospitals that have Medicare provider enrollment agreements. In 42 U.S.C. § 1395dd(a), EMTALA imposes on a hospital with an emergency room a duty provide an appropriate medical screening examination to determine whether an emergency medical condition exists. This provision is not incorporated into or referred to by the North Carolina law.

2. The only provision of EMTALA expressly incorporated into North Carolina law, 42 U.S.C. § 1395dd(e)(1)(A), does not refer to the context of an emergency room or expressly limit its terms to that setting.
 3. To have a viable claim for relief, an EMTALA plaintiff must prove either that (i) the hospital did not provide adequate screening to an emergency room patient or (ii) the hospital had actual knowledge of the “emergency medical condition” and did not treat or stabilize the condition based only the patient’s financial means. Thus, although “emergency medical condition” is defined within EMTALA, the fact finder in an EMTALA case is not called on to decide whether or not an emergency medical condition existed.
 4. EMTALA is not a malpractice statute: “The Act does not hold hospitals accountable for failing to stabilize conditions of which they are not aware, or even conditions of which they should have been aware.” *Vickers v. Nash Gen. Hosp., Inc.*, 78 F.3d 139, 145 (4th Cir. 1996) (indicating that "EMTALA would otherwise become coextensive with malpractice claims for negligent treatment").
 5. EMTALA does not address the context presented by N.C. Gen. Stat. § 90-21.12(b), in which the plaintiff’s burden of proof is heightened upon a finding of the existence of an “emergency medical condition.”
 - *Pre-trial Discovery Note:* Parties may seek to discover results of a hospital’s screening of whether an emergency medical condition existed for a patient. Parties also may seek to discover if and how the provider evaluates whether an emergency medical condition exists.
- F. If it is not preliminarily decided as a matter of law, it may be necessary to first submit the threshold issue of Existence of Emergency Medical Condition (N.C.P.I. – Civil 809.20) before submitting any other issues. Once the jury returns its answer on the Existence of Emergency Medical Condition issue, the proper liability issues--ordinary or emergency medical condition--may be submitted.
1. This process may affect the order and content of closing arguments.
 2. When Existence of Emergency Medical Condition is submitted as a threshold issue, consider modifying the summary jury instructions (*e.g.*, N.C.P.I. – Civil 150.45) to notify the jury that they will be asked to decide other issues after a determination of this first issue. Such language might include a concluding statement such as, “You will then

be returned to the courtroom to announce your answer to this first issue, and you will then receive further instructions on the remaining issues in this case.”

- G. According to the plain language of the statute, “the standards of practice *set forth in this section*” must be proved by clear and convincing evidence. The statute does not refer to the common law duties that are not set forth in the statute.
1. The liability issue pattern instructions for emergency medical condition therefore reflect two burdens of proof: (1) “greater weight of the evidence” for alleged breach of common law duties; and (2) “clear and convincing evidence” for alleged breach of statutory standards of practice.
 2. For the reasons stated previously, common law duties are not included in the Emergency Medical Condition--Corporate or Administrative Medical Malpractice instruction (N.C.P.I. – Civil 809.28).

III. SEGREGATION OF AND LIMIT ON MEDICAL MALPRACTICE NON-ECONOMIC DAMAGES

- A. N.C.P.I. – Civil 809.100 through 809.160, and 809.199 (sample verdict form).
- B. Medical Malpractice Damages Pattern Instructions appear in the Medical Malpractice Chapter, not in the general Damages Chapter.
- C. For actions commenced on or after 1 October 2011, N.C. Gen. Stat. § 90-21.19(a) limits *non-economic damages* to a total of \$500,000 against all defendants in a medical malpractice action. The limit also applies to one defendant “for all claims brought by all parties arising out of the same professional services.”
- D. The verdict “shall indicate specifically what amount, if any, is awarded for noneconomic damages.” *Id.* § 90-21.19B.
- E. “If applicable, the court shall instruct the jury on the definition of noneconomic damages.” *Id.* The pattern instructions incorporate the statutory definition.
1. Non-economic damages are defined as: “Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage*,” but not punitive damages. *Id.* § 90-21.19(c)(2) (emphasis added).

2. Notwithstanding the mention of punitive damages in the statutory definition of non-economic damages, the pattern instructions suggest omitting any mention of “punitive damages” unless it is the rare case in which the punitive damages issue is submitted to the jury along with the compensatory damages issue.
- F. The court “*shall not* instruct the jury with respect to the limit of noneconomic damages.” *Id.* § 90-21.19(d) (emphasis added). Lawyers and witnesses cannot mention it either. *Id.*
- G. Types of damages allowed in injury and death medical malpractice cases include both economic and non-economic damages. In some cases, whether a type of damage is economic or non-economic may not be clear. In all cases, the jury must be instructed to calculate economic damages separately from non-economic damages.
1. For example, damages recoverable for permanent injury historically have included medical expenses, loss of earnings, pain and suffering, scarring or disfigurement, and (partial) loss (of use) of part of the body. Because some of these types of permanent injury damages are economic and some are non-economic, there are now two permanent injury pattern instructions for use in medical malpractice cases-- N.C.P.I. – Civil 809.114 (economic) and 809.115 (non-economic). Although not specifically included in the definition of “noneconomic damages,” scarring, disfigurement and loss of use of a part of the body have been included in the non-economic damages instruction.
 2. Similarly, damages recoverable for wrongful death historically have included the present monetary value to the next-of-kin, which is comprised of multiple elements: net income, society, companionship, kindly offices, advice, and *services* provided by the deceased. There are now two present monetary value to next-of-kin pattern instructions for use in medical malpractice cases— N.C.P.I. – Civil 809.150 (economic) and 809.151 (non-economic). The question of whether damages for services provided by the deceased are economic or non-economic is an open one, and may be fact-specific. The pattern instructions note this issue.
- H. The new medical-malpractice specific “general” and “final mandate” damages pattern instructions should be used for cases commenced on or after 1 October 2011.
- I. A sample verdict form is included in the medical malpractice instructions (N.C.P.I. – Civil 809.199) to facilitate the segregation of economic and non-economic damages. Its format works with the “final mandate” pattern instructions for medical malpractice cases. It also facilitates compliance

with the statutory mandate that the verdict must “indicate specifically” the amount of non-economic damages.

IV. EXCEPTION TO LIMIT ON MEDICAL MALPRACTICE NON-ECONOMIC DAMAGES

- A. N.C.P.I. – Civil 809.160, and 809.199 (last issue on sample verdict form)
- B. For actions commenced on or after 1 October 2011, pursuant to N.C. Gen. Stat. § 90-21.19(b), “there shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds both of the following:
 - (1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death [and]
 - (2) The defendant’s acts or failures, which are the proximate cause of the plaintiff’s injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.”
- C. The trial judge must decide whether to submit this issue along with all other damages issues, or delay its submission until such time as the jury in fact awards non-economic damages greater than \$500,000.
- D. The jury must not be informed that there is a limit on non-economic damages. If the no-limit issue is submitted to the jury along with all other damages issues, the jury should be instructed to answer it without regard to how it answers the compensatory damages issue.
- E. If the jury does not answer this issue in favor of the plaintiff, when entering judgment the trial judge must reduce to \$500,000 the amount of non-economic damages returned by the jury.

V. MORE MEDICAL MALPRACTICE INSTRUCTION CHANGES

- A. For actions arising on or after 1 October 2011, N.C. Gen. Stat. § 90-21.12(a) adds language to the statutory standard of care for medical negligence. The language now includes “*under the same or similar circumstances.*”
 - 1. The entire phrase is: “in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities

under the same or similar circumstances at the time the health care is rendered.”

2. This language appears in multiple instructions, including N.C.P.I. – Civil 809.00A, 809.03A, 809.05A, 809.22 through 809.28.
3. NOTE: There is no change to the liability standard in the Informed Consent instruction, N.C.P.I. – Civil 809.45. The Informed Consent provision appears in a different section of Chapter 90, N.C. Gen. Stat. § 90-21.13, which was not amended.

B. In footnotes in multiple instructions, the definition of a covered “health care provider” has been updated to be consistent with the expanded definition in N.C. Gen. Stat. § 90-21.11(1)(d).

1. The inclusion of “nursing home” was amended to specify “nursing home licensed under Chapter 131E of the General Statutes.”
2. The definition was broadened to include an “adult care home licensed under Chapter 131D.”

**VI. ALL TORTS -- MEDICAL AND FUNERAL EXPENSES
PRESUMPTION OF REASONABLENESS**

- A. N.C.P.I. – Civil 810.04A through 810.04D (personal injury/medical); N.C.P.I. – Civil 809.44A through 810.44D (wrongful death/medical); and N.C.P.I. – Civil 809.48A through 810.48D (wrongful death/funeral).
- B. For *all tort* cases commenced on or after 1 October 2011, including medical malpractice cases, there is a rebuttable presumption that medical and funeral charges are reasonable. N.C. Gen. Stat. § 8-58.1(b)-(c).
- C. Testimony that charges are (or can be) satisfied by an amount less than that charged rebuts the presumption, and creates a rebuttable presumption that the lesser satisfaction amount is the reasonable amount.
- D. For each type of damages (personal injury/medical, wrongful death/medical, and wrongful death/funeral), there is a pattern instruction that corresponds to whether there is a dispute for the jury to decide and, if so, what type.

N.C.P.I. [#]A – Stipulation (amount and nexus)

N.C.P.I. [#]B – Stipulation to amount, but not nexus to conduct

N.C.P.I. [#]C – No Stipulation, No Rebuttal Evidence

N.C.P.I. [#]D – No Stipulation, Rebuttal Evidence Presented

- F. The related evidence rule, N.C. R. Evid. 414, also was changed for cases commenced on or after 1 October 2011. The amended rule limits medical expenses evidence to amounts *actually paid* to satisfy the bill or, if not yet paid, the amount that would satisfy the bill:

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of the payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

- G. The Rule does not change existing law that the fact that medical expenses were paid by the plaintiff's employer, a medical insurer, or some other collateral source generally does not deprive the plaintiff of the right to recover them.

VII. PRACTICAL CONSIDERATIONS

- A. The new instructions seek to implement new legislation, not case law. Open questions remain.
- B. Particularly given the intricacy of damages instructions, the Committee recommends giving jurors written copies of the instructions and/or verdict sheet while reading the instructions to the jury in court. Remember to collect the written instructions and verdict sheet from the jury members before they are excused to the jury room to select the foreperson. There should be only one verdict form sent to the jury room. If there are no corrections or additions to the jury instructions after the final instructions are read in the courtroom, the copies of instructions reviewed by the jury may be given to them for use in the jury room.
- C. Even when a case is bifurcated or trifurcated (or more), sequentially number issues as the case moves forward. Do not start over with “Issue One” at each phase.
- D. Remember to keep your alternate jurors through initial phases of the trial—*e.g.*, the Existence of Emergency Medical Condition phase; the liability phase, when it is bifurcated from the damages determination; and the compensatory damages phase, when it is separated from the no-limit on non-economic damages phase or punitive damages phase.
- E. The effect of the reform legislation on the conduct of medical malpractice and tort cases is not limited to how the jury is instructed. Some of those changes

are footnoted in the instructions. Thus, review of the pattern instructions at the beginning of a case may facilitate your work. Such changes include:

- Bifurcation “Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars (\$150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.” N.C. R. Civ. P. 42(b)(3) (applies to cases commenced on or after 1 October 2011).
- Expert qualifications For cases commenced on or after 1 October 2011, Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify “in the form of an opinion, or otherwise”:
(1) the testimony must be “based on sufficient facts or data”; (2) the testimony must be the product of “reliable principles and methods”; and (3) the “witness has applied the principles and method reliably to the facts of the case.” These requirements apply in addition to the specific qualifications required of an expert witness testifying on the appropriate standard of health care. N.C. R. Evid. 702(b)–(f).

F. Effective dates appear in notes at the top of pattern instructions. If there is no note, then the instruction is not limited to a time period.

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- **Bold text** – new numbering and new instructions
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¹ PJI 809.65A is a new instruction based on the reform legislation. The instruction that previously was identified as "NCPI 809.65A" was moved and renumbered as "NCPI 809.66" (see note 2).

² This is a new number, but not a new instruction (see note 1). Also, in the current online Index for Research Assistant, N.C.P.I. 809.65A (now N.C.P.I. 809.66) erroneously appeared *after* 809.75. That misplacement is corrected here.

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