

N.C.P.I.—Civil 809.150

MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN—ECONOMIC DAMAGES.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2015

809.150 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN¹—ECONOMIC DAMAGES.²

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.50.)

NOTE WELL: N.C. Gen. Stat. § 90-21.19B specifies that "any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount, if any, is awarded for noneconomic damages." Whether any "services" provided by the deceased may be categorized as economic damages is an open question.

If the Court is persuaded that the law and evidence warrant such an instruction, then this instruction provides a mechanism for instructing the jury that some services provided by the deceased can be considered as "economic damages," along with such other damages as "net income." Which services, if any, may give rise to "economic damages" will likely be dependent on the type of service and whether there has been evidence of market value.

If there has been no evidence of market value for a service provided by the deceased, or if the Court determines that the law does not warrant such an instruction, then be mindful to omit references to "services" when giving this instruction. Likewise, if there has been evidence of market value of only certain services performed by the deceased, then be careful to limit this instruction to those services for which there has been such evidence of market value.

Damages for *(name deceased)*'s death also may include fair compensation for the present monetary value of *(name deceased)* to *his* next-of-kin.³ (In this case, *(name deceased)*'s next-of-kin are *(name persons and specify relationships)*.)

Economic damages for the present monetary value of *(name deceased)* to *his* next-of-kin can include *(name deceased)*'s [income] [services⁴ *(name deceased)* provided to *his* next-of-kin for which you find there is market value].

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For purposes of this instruction, you are not to consider the society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance that (*name deceased*) provided to *his* next-of-kin, or the services performed by (*name deceased*) for *his* next-of-kin about which there has been no evidence of market value. I will instruct you about those types of damages separately.

In determining the present monetary value of (*name deceased*) to *his* next-of-kin for (*name deceased*)'s [income] [services provided to *his* next-of-kin about which there has been evidence of market value such as (*specify services for which there has been evidence of economic value*)], you may consider:

[The net income (*name deceased*) would have earned during the remainder of *his* life. You must subtract from (*name deceased*)'s reasonably expected income the amount *he* would have spent on *himself* or for other purposes which would not have benefited *his* next-of-kin.⁵ The amount *he* would have earned depends upon *his* prospects in life, health, character, ability, industry and [the means *he* had for making money] [the business in which *he* was employed]. It also depends upon *his* life expectancy- that is, the length of time *he* could reasonably have been expected to live but for the negligence of the defendant.]

[You also may consider the services that (*name deceased*) provided to *his* next-of-kin, whether voluntary or obligatory, about which there has been evidence of market value such as (*specify services for which there has been evidence of economic value*).⁶ These words are to be given their ordinary meanings. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin, and what you find to be the reasonable

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monetary or market value, if any, of the loss to them of these things over the life expectancy of (*name deceased*)⁷ (or, as I will explain to you, over a shorter period).⁸]

As I have indicated, in determining (*name deceased*)'s [net income expectancy] [the value of *his* services of (*specify services for which there has been evidence of market value*)], you must consider *his* life expectancy.⁹ Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the negligence of the defendant. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.]¹⁰ They show that for one of (*name deceased*)'s age at the time of *his* death, *his* life expectancy would have been (*state expectancy*) years. In determining (*name deceased*)'s life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.¹¹

(The life expectancy tables show that, at the time of the death of (*name deceased*), the life expectancy for (*name next-of-kin*) was (*state expectancy*), which was shorter than the expectancy shown by the tables for (*name deceased*). Therefore, you must determine the expectancy of (*name next-of-kin*) as well as the expectancy of (*name deceased*). In determining the expectancy of (*name next-of-kin*), you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits. If you find that the expectancy of (*name next-of-kin*) is shorter than that of (*name deceased*), then you will determine the monetary value of (*name deceased*) to (*name next-of-kin*) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits *he* might have expected to receive during *his* own life.)¹²

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In determining the amount of actual economic damages to be awarded to (*name deceased*)'s next-of-kin, you are not limited to the things which I have mentioned, but you may not consider any other element of damages for which there has not been evidence of market or monetary value. Thus, insofar as you have not already taken it into account, you may consider any other evidence which reasonably tends to establish the monetary or economic value of (*name deceased*) to *his* next-of-kin.

Any amount you allow as damages for the future monetary value of (*name deceased*) to *his* next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (*name deceased*)'s future monetary value to *his* next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (*name decedent*)'s monetary value to *his* next-of-kin already has been reduced to present value, then you must not reduce it again.)

1 N.C. Gen. Stat. § 28A-18-2(b)(4).

2 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on “noneconomic damages.” As of January, 1, 2014, that limit is \$515,000. See N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). 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. N.C. Gen. Stat. § 90-21.19(c)(2) (emphasis added). The jury must not be instructed or told as to the existence of any limit. N.C. Gen. Stat. § 90-21.19(d). There is no limit, however, if BOTH (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 proximately caused the injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice. N.C. Gen. Stat. § 90-21.19(b)(1-2). That issue is to be submitted separately. See N.C.P.I.—Civil 809.160. If the jury verdict exceeds the \$515,000 limit on non-economic damages and the plaintiff does not meet the requirements for exemption from the limit, then the judgment entered should modify the verdict to comply with the \$515,000 limit. N.C. Gen. Stat. § 90-21.19(a).

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3 If the decedent's next-of-kin has not been stipulated or determined as a matter of law, then a separate issue must be submitted.

4 See *NOTE WELL* at the beginning of this instruction. Whether “services” are economic or non-economic damages is an open question, legally and factually, and may vary with the type of evidence offered. For instance, if there has been evidence that the deceased mowed the lawn every week and evidence of the fair market value for lawn mowing, then there is an argument for categorizing such damages as economic.

5 N.C. Gen. Stat. § 28A-18-2(b)(4)a. Only the net income of the deceased can be considered. *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

6 N.C. Gen. Stat. § 28A-18-2(b)(4)b.

7. *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 74, 191 S.E.2d 419, 422 (1972), *aff'd*, 283 N.C. 395, 196 S.E.2d 789 (1973).

8 *Id.* 16 N.C. App. at 74–77, 191 S.E.2d at 422–24. This and other parenthetical statements in the instruction keyed to this footnote should be used when there is evidence tending to show that the expectancy of one or more next-of-kin is shorter than that of the deceased.

9 *Bowen*, 16 N.C. App. at 74, 191 S.E.2d at 422.

10 “The [mortality] table is statutory, [N.C. Gen. Stat.] § 8-46, and need not be introduced but may receive judicial notice when facts are in evidence requiring or permitting its application.” *Chandler v. Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967).

11 A failure to include this sentence, or its equivalent, is reversible error. See *Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

12 See *supra* note 8. However, the above parenthetical paragraph will need revision if the contention of a shorter life expectancy for the next-of-kin is based upon health evidence (e.g., terminal cancer) rather than age.

