

DEFENDANT'S PERSONAL INJURY DAMAGES (COUNTERCLAIM)--FINAL  
MANDATE (PER DIEM ARGUMENT BY COUNSEL).

*(Use this instruction in place of 109.20 when a per diem argument has been made.)*

I instruct you that your findings on this *(state number)* issue must be based on the evidence and the rules of law I have given you with respect to the measure of damages. You are not required to accept the amount of damages suggested by the parties or their attorneys.

An attorney is allowed to suggest an amount of damages and therefore can suggest an amount for each *(specify unit(s) of time, e.g., day, hour or minute)* of physical pain or mental suffering. However, I instruct you that there is no fixed mathematical formula for computing damages for physical pain or mental suffering. Furthermore, an attorney's argument is not evidence but is merely an approach to the damage issue which you may consider but need not adopt.<sup>1</sup>

Your award must be fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

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<sup>1</sup>See *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (1982), where the court held that the per diem argument is appropriate, but only if (1) there is a factual basis for it, and (2) cautionary instructions are given. In *Weeks*, the factual basis was defendant's testimony that he suffered pain almost constantly, backed up by details of the pain and the ways in which the pain had altered his lifestyle.

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MANDATE (PER DIEM ARGUMENT BY COUNSEL). (Continued).

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence the amount of actual damages proximately caused by the negligence of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.