

N.C.P.I.—Civil 809.115
MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT
INJURY—NON-ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.115 MEDICAL MALPRACTICE PERSONAL INJURY
DAMAGES—PERMANENT INJURY—NON-ECONOMIC DAMAGES.

(Use for medical malpractice cases filed on or after 1 October 2011. For all other cases, use N.C.P.I.-Civil 810.14.)

NOTE WELL: Be mindful of which category of permanent injury the plaintiff seeks for the purpose of segregating non-economic damages (pain, disfigurement, loss of use of part of the body) from economic damages (medical expenses, earnings) in the issue sheet. Giving this instruction and N.C.P.I.-Civil 809.114 (permanent injury/economic) may be necessary.

When this instruction is given, you also should give N.C.P.I.-Civil 810.16 ("Future Worth in Present Value").

Non-economic damages¹ for personal injury also include fair compensation for permanent injury² incurred by the plaintiff as a proximate result of the negligence of the defendant. An injury is permanent when any of its effects will continue throughout the plaintiff's life.³ These effects may include [pain and suffering] [scarring and disfigurement] [(*partial*) loss (*of use*) of part of the body] [loss of consortium] [*state any other element of non-economic damages supported by the evidence*] to be incurred or experienced by the plaintiff over *his* life expectancy. (*For purposes of this instruction, you are not to consider [medical expenses] [loss of earnings] [state any other element of economic damages supported by the evidence]. I already have instructed you about those types of damages separately.*)

However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you already have allowed for [pain and suffering] [scarring and disfigurement] [(*partial*) loss (*of use*) of part of the body] [loss of consortium] [*state any other element of non-economic damage supported by the evidence*] because of permanent injury.

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Life expectancy is the period of time the plaintiff may reasonably be expected to live. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.]⁴ They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.

In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.⁵

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N.C. Gen. Stat. § 8-46. Mortality tables as evidence.

NOTE WELL: Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age / Expectation

0 / 75.8	29 / 48.5	58 / 22.7
1 / 75.4	30 / 47.5	59 / 21.9
2 / 74.5	31 / 46.6	60 / 21.1
3 / 73.5	32 / 45.7	61 / 20.4
4 / 72.5	33 / 44.7	62 / 19.7
5 / 71.6	34 / 43.8	63 / 18.9
6 / 70.6	35 / 42.9	64 / 18.2
7 / 69.6	36 / 42.0	65 / 17.5
8 / 68.6	37 / 41.0	66 / 16.8
9 / 67.6	38 / 40.1	67 / 16.1
10 / 66.6	39 / 39.2	68 / 15.5
11 / 65.6	40 / 38.3	69 / 14.8
12 / 64.6	41 / 37.4	70 / 14.2
13 / 63.7	42 / 36.5	71 / 13.5
14 / 62.7	43 / 35.6	72 / 12.9
15 / 61.7	44 / 34.7	73 / 12.3
16 / 60.7	45 / 33.8	74 / 11.7
17 / 59.8	46 / 32.9	75 / 11.2
18 / 58.8	47 / 32.0	76 / 10.6
19 / 57.9	48 / 31.1	77 / 10.0
20 / 56.9	49 / 30.2	78 / 9.5
21 / 56.0	50 / 29.3	79 / 9.0
22 / 55.1	51 / 28.5	80 / 8.5
23 / 54.1	52 / 27.6	81 / 8.0
24 / 53.2	53 / 26.8	82 / 7.5
25 / 52.2	54 / 25.9	83 / 7.1
26 / 51.3	55 / 25.1	84 / 6.6
27 / 50.4	56 / 24.3	85 & over / 6.6
28 / 49.4	57 / 23.5	

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1 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). Although not expressly listed as such, scarring and loss of use of part of the body are likely “nonpecuniary compensatory damages” that are subject to the limit on non-economic damages, and have been treated that way in this instruction.

2 A jury may consider permanent injury as an element of damages where there is sufficient evidence showing that the injury is permanent and that it proximately resulted from the wrongful act. See *Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46–47 (1964); *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 84, 539 S.E.2d 356, 358 (2000); *Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999).

3 “Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.” *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760–61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231–32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff “did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'” as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

4 Ordinarily the “mortality tables” will be in evidence. However, since they are statutory (see N.C. Gen. Stat. § 8-46), “judicial notice” of them may be taken. See *Chandler v. Moreland Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967); *Rector v. James*, 41 N.C. App. 267, 272, 254 S.E.2d 633, 637 (1979). The annuity tables (see N.C. Gen. Stat. § 8-47) are different and should not be admitted in evidence. As pointed out in *Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953), the annuity tables have nothing to do with the establishment of life expectancy and it would be error to admit them for this purpose. Where the life expectancy to be determined is that of the plaintiff, *his* age is to be measured as of the date the jury charge is given.

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