

N.C.P.I.—Civil 809.151

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

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2015

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809.151 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN<sup>1</sup> —NON-ECONOMIC DAMAGES.<sup>2</sup>

*(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 use N.C.P.I.-Civil 809.150 to instruct the jury about those services provided by the deceased that could be considered as "economic damages." 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 use this instruction to refer to all "services" provided by the deceased. Similarly, if there has been evidence of market value of only certain services provided by the deceased, then be careful to limit this instruction to those services for which there has been no such evidence of market value.*

(As I have instructed you already,) Damages for *(name deceased)*'s death also include fair compensation for the present monetary value of *(name deceased)* to *his* next-of-kin.<sup>3</sup> (In this case, *(name deceased)*'s next-of-kin are *(name persons and specify relationships)*.)

Non-economic damages for the present monetary value of *(name deceased)* to *his* next-of-kin can include society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance and services

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provided by (*name deceased*) to *his* next-of-kin (for which you do not find a market value. For purposes of this instruction, you are not to consider (*name deceased*)'s income (or services<sup>4</sup> (*name deceased*) provided to *his* next-of-kin for which you have found a market value and an economic loss), as I already have instructed you on those economic damages.)<sup>5</sup>

There is no fixed formula for determining the present monetary value of (*name deceased*) to *his* next-of-kin in connection with *his* society, companionship, comfort, guidance, kindly offices, advice, protection, care, or assistance or of the services (*name deceased*) provided to *his* next-of-kin (for which there is no evidence of market value).<sup>6</sup> You must determine what fair compensation is by applying logic and common sense to the evidence.<sup>7</sup> You may consider:

[You may consider the protection, care and assistance of (*name deceased*) to *his* next-of-kin and the services provided by (*name deceased*) to *his* next-of-kin (for which you have not found a market value),<sup>8</sup> whether voluntary or obligatory,<sup>9</sup> 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 value of the loss to them of these things over the life expectancy of (*name deceased*)<sup>10</sup> (or, as I will explain to you, over a shorter period).<sup>11</sup>]

[You may consider the society, companionship, comfort, guidance, kindly offices, or advice that (*name deceased*) provided to *his* next-of-kin.<sup>12</sup> These words are to be given their ordinary meaning. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)<sup>13</sup> (or, as I will explain to you, over a shorter period.)]

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As I have indicated, in determining the value of [(*name deceased*)'s society, companionship, comfort, guidance, kindly offices and advice to *his* next-of-kin] [the protection, care and assistance and services (*name deceased*) provided to *his* next-of-kin (for which you have not found a market value)<sup>14</sup> ], you must consider (*name deceased*)'s life expectancy.<sup>15</sup> 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.]<sup>16</sup> 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. (As I have instructed you,) 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.<sup>17</sup>

(Also as I have instructed you,) (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 the (*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.)<sup>18</sup>

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In determining the amount of actual non-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 about which I already have instructed you. Insofar as you have not already taken it into account, you may consider any other evidence which reasonably tends to establish the value of (*name deceased*) to *his* next-of-kin.

(As I have instructed you,) any amount you allow as damages for the future 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.)

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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. Although not expressly listed as such, "society, companionship, comfort, guidance, kindly offices, advice, protection, care and assistance" and any "services" for which there is no evidence of market value are likely "nonpecuniary compensatory damages" that are subject to the limit on non-economic damages, and have been treated that way in these instructions. The jury must not be instructed as to the existence of any limit. 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. That issue is 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).

3 If the decedent's next-of-kin has not been stipulated or determined as a matter of

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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 and may vary with the type of evidence offered. Specifically, 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 *NOTE WELL: If the jury was instructed about “services” pursuant to N.C.P.I.-Civil 809.150, use this parenthetical.*

6 See *supra* note 5.

7 The jury also may consider all negative factors that would tend to diminish the present value of the deceased to his or her next-of-kin. Thus, a young decedent's low level of educational achievement, lack of regular employment, dependency on parents for financial support and history of substance abuse was relevant. *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E.2d 889 (1985). See also *Hales v. Thompson*, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

8 See *supra* note 5.

9 N.C. Gen. Stat. § 28A-18-2(b)(4)b.

10 *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).

11 *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.

12 N.C. Gen. Stat. § 28A-18-2(b)(4)c.

13 These damages are not available where the deceased is a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

14 See *supra* note 5.

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

16 “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).

17 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).

18 See *supra* note 11. 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.

