

N.C.P.I.—Civil 809.156
 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—
 FINAL MANDATE (PER DIEM ARGUMENT BY COUNSEL)
 GENERAL CIVIL VOLUME
 JUNE 2012

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(Use for medical malpractice wrongful death claims filed on or after 1 October 2011 when a per diem argument is made. If a per diem argument is not made, use N.C.P.I.—Civil 809.154. For all other wrongful death claims filed before 1 October 2011, use N.C.P.I.—Civil 810.54 or 810.56.)

I instruct you that your findings on the *(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.¹ 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.²

¹ Damages may not be based on sheer speculation, *see Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) and *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966), but, by necessity, some speculation is necessary to determine damages, *see Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982), and this is acceptable as long as there are sufficient facts to support necessary speculation, *Gay, supra*, and *Beck, supra*.

² *See Weeks v. Holsclaw*, 306 N.C. 655, 661, 295 S.E.2d 596, 600 (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 the plaintiff'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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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.

Finally, as to the (*state number*) issue on which the estate has the burden of proof, if you find by the greater weight of the evidence the amount of economic damages proximately caused by the negligence of the defendant, then it would be your duty to write that amount in the blank space provided for "Economic Damages." If you find by the greater weight of the evidence the amount of non-economic damages proximately caused by the negligence of the defendant, then it would be your duty to write that amount in the blank space provided for "Non-economic Damages." You would then write the total of those two amounts of actual damages on the verdict sheet in the blank space provided for "Total Damages."

If, on the other hand, you fail to find any amount of actual damages, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space on the issue sheet for "Total Damages."