

800.26 CRIMINAL CONVERSATION. (ADULTERY) - DAMAGES.¹

The (*state number*) issue reads:

“What amount is the plaintiff entitled to recover from the defendant?”

If you have answered the (*state number*) issue “Yes” in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical harm caused by the conduct of the defendant.

The plaintiff may also be entitled to recover actual damages.² On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately³ caused by the conduct of the defendant.

In determining the amount of money, if any, the plaintiff may recover, you may consider:⁴

[any mental anguish, shame, humiliation or disgrace suffered by the plaintiff⁵]

[any loss of sexual relations between the plaintiff and *his* spouse]

[any injury to reputation]

[any loss of support⁶ [or other economic loss⁷]

[any other adverse effect on the quality of the marital relationship].

[the loss by the plaintiff of the consortium of *his* spouse. Consortium means the marital fellowship of husband and wife, and the

right of each to the company, cooperation, affection and aid of the other.]

Any amount you allow as future damages must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future.⁸

(If the mortality tables have been introduced into evidence, it will be necessary to adapt and use an appropriate instruction from N.C.P.I.-Civil 810.14 (“Personal Injury Damages-Permanent Injury”).⁹

(If a *per diem* argument is made, adapt and use N.C.P.I.-Civil 810.56 (“Wrongful Death Damages-Final Mandate (*Per Diem* Argument by Counsel)”) in place of the following).

I instruct you that if you reach this issue, your decision must be based upon 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 measure of damages suggested by the parties or their attorneys. Your award must be fair and just. You are to 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 this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages caused by the conduct 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.

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1. *NOTE WELL: Criminal conversation claims are frequently joined in the same action with claims for alienation of affection.*

Professor Suzanne Reynolds states that "[w]hen plaintiffs allege and establish both torts in this state, . . . the trial court should combine them in determining damages. Since the elements of damages are so closely related, they do not support separate awards for each tort." Suzanne Reynolds, 1 Lee's North Carolina Family Law, § 5.48(A) (5th ed. 2009) (citing Sebastian v. Kluttz, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969) ("[T]he two causes of action and the elements of damages . . . are so connected and intertwined, only one issue of compensatory damages and one issue of punitive damages should have been submitted to the jury."). Compare Kluttz, 6 N.C. App. at 219-20, 170 S.E.2d at 115-16:

In a cause of action for alienation of affections[,] . . . the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by [plaintiff] through the defendant's wrong. . . . [Plaintiff] may also recover for the wrong and injury to [plaintiff's] health, feelings, or reputation. . . .

In a cause of action for criminal conversation the measure of damages is incapable of precise measurement; however, it has been [properly] held . . . that the jury in awarding damages may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support by the [plaintiff].

2. *See Carson v. Brodin, 160 N.C. App. 366, 371, 585 S.E.2d 491, 495 (2003) ("[A]ctions for damages for alienation of affections and criminal conversation constitute 'injury to person or property' as denoted by N.C. Gen. Stat. § 1-75.4(3).")*

3. *The jury should consider such elements of damages that it "may find [the plaintiff] has and will sustain as a proximate result of the tortious conduct of the defendant." Kluttz, 106 N.C. App. at 214, 170 S.E.2d at 112 (citations omitted); see also Powell v. Strickland, 163 N.C. 393, 403, 79 S.E. 872, 876 (1913) ("[S]ince the wrong relates to the injury which the husband sustains . . . which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong[,] . . . the plaintiff is entitled to recover compensatory damages[.]"); Oddo v. Presser, 158 N.C. App. 360, 365, 581 S.E.2d 123, 127 (2003) ("The general rule in North Carolina is that where a plaintiff is injured by the tortious conduct of a defendant, 'the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [the] defendant's tort.'" (citation omitted)).*

4. *An injured spouse is entitled to recover, as compensatory damages, actual pecuniary loss, as well as "loss of consortium, humiliation, shame, mental anguish, loss of sexual relations, and the disgrace the tortious acts of defendant have brought." Scott v. Kiker, 59 N.C. App. 458, 462, 297 S.E.2d 142, 146 (1982).*

5. *See Nunn v. Allen, 154 N.C. App. 523, 537, 574 S.E.2d 35, 44 (2002) ("[T]estimony by plaintiff's father as to his depressed mental state and plaintiff's own testimony that he began consulting with his pastor to help deal with his emotional turmoil" constituted "substantial evidence from which a jury could have determined that he experienced mental*

anguish and humiliation due to the affair between his wife and defendant.”).

6. See *Hutelmyer v. Cox*, 133 N.C. App. 364, 374, 514 S.E.2d 554, 561 (1999) (citing “plaintiff’s evidence showing a loss of income, life insurance, and pension benefits resulting from the actions of defendant”); *Gray v. Hoover*, 94 N.C. App. 724, 730, 381 S.E.2d 472, 475 (1989).

7. See *Presser*, 158 N.C. App. at 365-66, 581 S.E.2d at 127-28 (finding that loss of income as an investment adviser resulting from poor work performance stemming from defendant’s conduct was not “overly speculative”).

8. See *Kluttz*, 6 N.C. App. at 219, 170 S.E.2d at 115.

Punitive damages may also be awarded in appropriate cases. “Where there are sexual relations, the plaintiff will get to the jury on punitive damages whether the claim is for alienation of affections or for criminal conversation or, as is often the case, for both.” *Reynolds*, *supra* note 1, § 5.48(C).

9. See *Kluttz*, 6 N.C. App. at 215, 170 S.E.2d at 112.