

102.97 ACTION FOR LOSS OF CONSORTIUM.

The (*state number*) issue reads:

"Did the negligence of the defendant proximately cause (*name claimant*)¹ to lose the consortium of *his* spouse?"

You will answer this issue only if you answer the issue number _____, which is the issue of negligence, "Yes" in favor of the plaintiff². (Furthermore, you will answer this issue only if you answer issue number _____, which is the issue of contributory negligence, "No" in favor of the plaintiff.)³

On this issue the burden of proof is on (*name claimant*). This means that (*name claimant*) must prove, by the greater weight of the evidence, four things:

First, that (*name claimant*) and *his* spouse were legally married at the time of the plaintiff's injury.⁴ (All of the evidence tends to show that (*name claimant*) and (*name claimant's spouse*) were married on (*state date*).⁵

Second, that (*name claimant's*) marital relationship with *his* spouse had at least one of the following aspects: marital services, society, affection, companionship or sexual relations.⁶ These aspects of a marital relationship constitute the consortium between a husband and a wife. You are to give these words their ordinary meanings.

Third, that (*name claimant*) lost the consortium of *his* spouse. A loss of consortium means any loss or disruption of marital services, society, affection, companionship or sexual relations between a husband and a wife. (Loss of consortium is not restricted solely to loss of sexual relations. Therefore, even if you find that there were no sexual relations

between (*name claimant*) and *his* spouse prior to the injury, or that there has been no loss of sexual relations since the injury, a disruption of the marital relationship exists if there has been a loss of marital services, society, companionship or affection).⁷

Fourth, that the defendant's negligence was a proximate cause of the loss of consortium. As I have previously instructed you, proximate cause is a cause which in a natural and continuous sequence produces a person's injury, and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result. There may be more than one proximate cause of an injury. Therefore, (*name claimant*) need not prove that the defendant's negligence was the sole proximate cause of the loss of consortium. (*Name claimant*) must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

Finally, as to this (*state number*) issue on which (*name claimant*) has the burden of proof, if you find by the greater weight of the evidence that the negligence of the defendant proximately caused (*name claimant*) to lose the consortium of *his* spouse, then it would be your duty to answer this issue "Yes" in favor of (*name claimant*).

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. *Nicholson v. Chatham Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980) allows an action for loss of consortium. Only one recovery is allowed for the lost consortium between husband and wife. *Nicholson* states that, "the injury involved is to the marriage as an entity." Therefore, if husband and wife are both injured, both may have a claim for loss of consortium, but their claim must be jointly, and not separately, brought. 300 N.C. at 303, 266 S.E.2d at 823.

2. Loss of consortium is a derivative action, and, under *Nicholson*, a spouse cannot recover for loss of consortium unless the action of the injured plaintiff is successful.

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3. The contributory negligence of the injured plaintiff is also a bar to the recovery of the spouse. The contributory negligence of the spouse is also a bar to recovery. Normally, the negligence of the spouse will be an issue in the case-in-chief. In the rare case where contributory negligence has not been decided in the main action, the jury should be instructed on the issue of the contributory negligence of the spouse seeking consortium damages after completion of the present instruction.

4. *Nicholson*, 300 N.C. at 304, 266 S.E.2d 823 and n. 1. As a general rule, damages for loss of consortium are limited to the joint lives of the husband and wife. In other words, no action lies for loss of consortium after the death of either the injured plaintiff or the non-injured spouse.

5. This portion of the instruction should be used if the element of marriage is uncontested. If the legality of the marriage is in dispute, given the applicable instruction from the N.C.P.I.-Civil 815.00 series. A voidable marriage is sufficient to establish a right to an action for lost consortium.

6. *Nicholson*, 300 N.C. at 301-302, 266 S.E.2d at 822.

7. *Nicholson*, 300 N.C. at 301, 266 S.E.2d at 822.