

106.40 WRONGFUL DEATH DAMAGES.

The (*state number*) issue reads:

"What amount is the estate of (*name deceased*) entitled to recover for wrongful death?"

If you have answered the (*state number*) issue "Yes" (and the (*state number*) issue "No") in favor of the estate, the estate is entitled to recover nominal damages even without proof of actual damages.¹

Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the estate.

The estate may also be entitled to recover actual damages.² On this issue, the burden of proof is on the estate. This means the estate must prove, by the greater weight of the evidence, the amount of actual damages [proximately caused by the negligence] of the defendant.

Actual damages are the fair compensation to be awarded to the estate for the death of (*name deceased*) [proximately caused by the negligence] of the defendant. Such damages may include:

(NOTE WELL: Set forth below are the four types of damages permitted by the wrongful death statute. Give only those bracketed components supported by the evidence.)

[expenses for care, treatment and hospitalization incident to the injury resulting in death]³

[pain and suffering]⁴

[reasonable funeral expenses]⁵

[the present monetary value of (*name deceased*) to *his* next-of-

kin].⁶

The total of all damages⁷ are to be awarded in one lump sum.⁸ I will now explain the law of damages as it relates to (each of) these.

[Use where there is evidence of medical expenses: Expenses for care, treatment and hospitalization⁹ include all [hospital] [doctor] [drug] [state other] expenses reasonably paid¹⁰ or incurred¹¹ by (*name deceased*) as a [proximate result of the negligence] of the defendant.

(The parties have agreed and stipulated that (*name deceased's*) reasonable medical expenses were (*state amount*).)]

[Use where there is evidence of pain and suffering: Damages for (*name deceased's*) death also include fair compensation for the actual physical pain and mental suffering¹² experienced by (*name deceased*) between the time of *his* injury and the time of *his* death. You may consider:

[the nature, extent and degree of the injury(ies) sustained by (*name deceased*)¹³]

[the length of time (*name deceased*) lived and was conscious¹⁴ of *his* pain and suffering]

[*state any other factor supported by the evidence*].

There is no fixed formula for placing a value on physical pain and mental suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.]

[Use where there is evidence of funeral expenses: Damages for (*name deceased's*) death also include all funeral (and burial)¹⁵ expenses

reasonably paid¹⁶ or incurred¹⁷ by the estate.

(The parties have agreed and stipulated that the estate's reasonable funeral (and burial) expenses were (*state amount*).)]

[*Use where there is evidence of the deceased's monetary value to next-of-kin:*¹⁸ Damages for (*name deceased's*) death also include fair compensation for the present monetary value of (*name deceased*) to *his* next-of-kin. (In this case, (*name deceased's*) next-of-kin are (*name persons and specify relationships*).)]¹⁹

There is no fixed formula for determining the present monetary value of (*name deceased*) to *his* next-of-kin. You must determine what is fair compensation by applying logic and common sense to the evidence.²⁰ You may consider:

[The net income (*name deceased*) would have earned during the remainder of *his* life. You must subtract from (*name deceased's*) reasonably expected income the amount *he* would have spent on *himself* or for other purposes which would not have benefited *his* next-of-kin.²¹

The amount *he* would have earned depends upon *his* prospects in life, health, character, ability, industry and [the means *he* had for making money] [the business in which *he* was employed]. It also depends upon *his* life expectancy- that is, the length of time *he* could reasonably have been expected to live but for the [negligence] of the defendant.]

[The services, protection, care and assistance of (*name deceased*), whether voluntary or obligatory, to *his* next-of-kin.²² 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*)²³ (or, as I will explain

to you, over a shorter period).^{24]}

[The society, companionship, comfort, guidance, kindly offices and advice of (*name deceased*) to *his* next-of-kin.²⁵ 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*)²⁶ (or, as I will explain to you, over a shorter period.)]

As I have indicated, in determining (*name deceased's*) [net income expectancy] [the value of *his* services, protection, care and assistance] [the value of *his* society, companionship, comfort, guidance, kindly offices and advice], you must consider *his* life expectancy.²⁷ Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant. The life expectancy tables are in evidence.²⁸ They show that for one of (*name deceased's*) age at the time of *his* death, *his* life expectancy would have been (*state expectancy*). 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.²⁹

(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*), 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.)³⁰

In determining the amount of actual damages to be awarded to (*name deceased's*) next-of-kin, you are not limited to the things which I have mentioned. You may consider any other evidence which reasonably tends to establish the monetary value of (*name deceased*) to *his* next-of-kin.

Any amount you allow as damages for the future monetary 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 has already 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 deceased's*) monetary value to *his* next-of-kin has already been reduced to present value, you must not reduce it again.))

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 to you with respect to the measure of damages.³¹ You are not required to accept the amount of damages suggested by the parties or their attorneys.

(Use only if counsel makes a *per diem* argument: 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. ³²⁾

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 actual damages [proximately caused by the negligence] 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.

1. *Porter v. Leneave*, 119 N.C. App. 343, 458 S.E.2d 513 (1995).

2. N.C. Gen. Stat. § 28A-18-2(b).

3. N.C. Gen. Stat. § 28A-18-2(b)(1).

4. N.C. Gen. Stat. § 28A-18-2(b)(2).

5. N.C. Gen. Stat. § 28A-18-2(b)(3).

6. N.C. Gen. Stat. § 28A-18-2(b)(4).

7. In addition, punitive damages may be awarded for wrongful death of the deceased through the malice or willful or wanton conduct of the defendant as defined at N.C. Gen. Stat. § 1D-5. N.C. Gen. Stat. § 28A-18-2(b)(5). Punitive damages issues should be submitted separately, however. See *Jones v. McCaskill*, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

8. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1968).

9. N.C. Gen. Stat. § 28A-18-2(b)(1).

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10. The cases speak of "actual" expenses. See *Taylor v. Boger*, 289 N.C. 560, 570, 223 S.E.2d 850, 356 (1976); *Williams v. Charles Stores Co.*, 209 N.C. 591, 601, 184 S.E.2d 496, 502 (1936). Where there is an issue as to the reasonableness of the medical expenses, the jury should also be instructed:

As to the reasonableness of the expenses, the plaintiff has the burden of proof by the greater weight of the evidence. However, where the plaintiff has testified regarding the amount of such expenses and has provided records or copies of such charges, you may find from this evidence alone that the charges are reasonable, but you are not compelled to do so.

See N.C. Gen. Stat. §§ 8-58.1 and Rule of Evidence 301.

11. If the expense has been incurred, there need not be evidence of actual payment. See *Williams*, 209 N.C. at 601-02, 184 S.E. at 502 (1936). Further, the fact that medical expenses were paid by the plaintiff's employer, his medical insurer, or some other collateral source generally does not deprive the plaintiff of the right to recover them. *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987); *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981).

12. N.C. Gen. Stat. § 28A-18-2(b)(2).

13. If reasonably established, a recovery may be had for pain and suffering to a fetus. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

14. *Livingston v. United States*, 817 F.Supp. 601 (E.D.N.C. 1993).

15. There is no right of recovery for burial expenses separate and apart from the right to recover for wrongful death. Burial expenses are to be recovered out of the amount to be recovered in the action. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947).

16. Where there is an issue as to the reasonableness of the funeral or burial expenses, the jury may also be instructed:

As to the reasonableness of the expenses the Estate has the burden of proof by the greater weight of the evidence. However, where the Estate has put into evidence the amount of such expenses and has provided records or copies of such charges, you may find them this evidence alone that the charges are reasonable, but you are not compelled to do so.

See N.C. Gen. Stat. §§ 8-58.1 and Rule of Evidence 301.

17. Proof of actual payment need not be made as long as the evidence competently establishes that the expense was incurred. Furthermore, the fact that some or all of the decedent's funeral or burial expenses were paid by a third party insurer or some, other collateral source generally does not deprive the Estate of the right to recover them.

18. N.C. Gen. Stat. § 28A-18-2(b)(4).

19. If the decedent's next-of-kin has not been stipulated or determined by the Court as a matter of law, a separate issue must be submitted.

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20. The jury may also 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).

21. N.C. Gen. Stat. § 28A-18-2(b)(4)a. Only the net income of the deceased can be considered. *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. Denied*, 490 U.S. 1100, 109 S.Ct. 2453, 104 L.Ed.2d 1007 (1989).

22. N.C. Gen. Stat. § 28A-18-2(b)(4)b.

23. *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 191 S.E.2d 419 (1972), *aff'd*, 283 N.C. 395, 196 S.E.2d 789 (1973).

24. *Id.* 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.

25. N.C. Gen. Stat. § 28A-18-2(b)(4)c.

26. These damages are not available where the deceased is a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *rehearing denied*, 320 N.C. 799, 361 S.E.2d 73 (1987). Loss of decedents (particularly grandchildren) are not grounds for recovery under this section. *Livingston v. United States*, 817 F.Supp. 601 (E.D.N.C. 1993).

27. *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 191 S.E.2d 419 (1972), *aff'd*, 283 N.C. 395, 196 S.E.2d 789 (1973).

28. "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. Chemical Co.*, 270 N.C. 395, 154 S.E.2d 502 (1967).

29. 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).

30. See note 7. 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.

31. Damages may not be based on sheer speculation, *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, *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*.

32. See *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (1982), where the court

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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 Estate's testimony and he suffered pain almost constantly, backed up by details of the pain and the ways in which the pain had altered his lifestyle.