

741.60 WARRANTIES IN SALES OF GOODS - REMEDY FOR BREACH OF
WARRANTY WHERE ACCEPTED GOODS ARE RETAINED - DAMAGES.

The (*state number*) issue reads:

"What amount of money damages is the plaintiff entitled to recover from the defendant for breach of warranty?"

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 damage resulting from the breach.

The plaintiff may also be entitled to recover actual damages.¹ 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 damages sustained, if any, as a result of the breach.

A person injured by a breach of warranty is entitled to be placed, insofar as this can be done by money, in the same position *he* would have occupied if there had been no breach of the warranty.

You may determine these damages this way:²

(1) first, find what the value of the (*name good*) would have been at the time and place of acceptance if it had been as it was warranted to be, and

(2) second, find what the value of the (*name good*) actually was at the time and place of acceptance, and

(3) third, subtract the second figure from the first figure,³

and add to the difference all incidental and consequential damages if any, sustained by the plaintiff.⁴

(Incidental damages recoverable by a buyer include expenses reasonably incident to delay or other breach.)

(Consequential damages recoverable by a buyer include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably have been prevented by the purchase of substitute goods or otherwise, and injury to person or property proximately resulting from any breach of warranty.)

The plaintiff's damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of the financial injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. However, an award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. You may not award any damages based upon mere speculation or conjecture.

Finally, as to this (*state number*) issue upon which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages sustained by the plaintiff by reason of the defendant's breach of warranty, 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 amount such as "One Dollar" in the blank space

provided.

1. *NOTE WELL: The statutorily provided remedies for breach of warranty may be modified, limited or even excluded. See N.C. Gen. Stat. § 25-2-316(4), § 25-2-718 and § 25-2-719 (1995). Thus, where the agreement-in-fact between buyer and seller excludes, limits or substitutes some other remedy, the jury should be instructed on what the parties have adopted. The power of the parties to modify or opt out of the statutory remedies is very broad, but there are some restrictions. For example, limitation of consequential damages for personal injury involving consumer goods is prima facie unconscionable. N.C. Gen. Stat. § 25-2-719(3) (1995). Likewise, statutory remedies are restored where, under the circumstances, a limited or exclusive remedy fails of its essential purpose. N.C. Gen. Stat. § 25-2-719(2) (1995). In addition, federal law restricts a warrantor's ability to limit remedies where he gives an express warranty as to certain types of consumer goods. See generally Magnusen-Moss Warranty Act of 1975, 15 U.S.C. § 2301 et seq.*

2. This is not the exclusive measure of damages for breach of warranty as to accepted goods. See N.C. Gen. Stat. § 25-2-714(2) (1995). For example, costs incurred by the buyer to repair a non-conforming good to put it in its warranted condition may be commercially reasonable conduct under the circumstances and, therefore, an acceptable measure of damages. See also *ITT-Industrial Credit Co. v. Milo Concrete Co., Inc.*, 31 N.C. App. 450, 462, 229 S.E.2d 814, 822 (1976).

3. N.C. Gen. Stat. § 25-2-714(2) (1995).

4. N.C. Gen. Stat. § 25-2-714(3) (1995).