

809.160 MEDICAL MALPRACTICE - DAMAGES - NO LIMIT ON NON-
ECONOMIC DAMAGES.

*(Use for medical malpractice claims filed on or after 1
October 2011.)*

*NOTE WELL: This instruction applies only if the
plaintiff seeks entry of a judgment that includes non-
economic damages greater than \$515,000, and
therefore seeks to overcome the limit on non-economic
damages in N.C. Gen. Stat. § 90-21.19(a).¹*

The *(state number)* issue reads:

"Did the plaintiff (*or name deceased*) suffer (disfigurement) (loss of
use of part of the body) (permanent injury) (death) that [was] [were]
proximately caused by conduct of the defendant that was (in reckless
disregard of the rights of others) (grossly negligent) (fraudulent)
(intentional) [or] (with malice)?"²

[You will answer this issue only if you have awarded actual
damages in answering issue *(state number)*.³]

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, two
things.

First, that the acts or failures of the defendant for which you
already have awarded relief caused as one of its consequences
(disfigurement) (loss of use of part of the body) [or] (permanent injury)
(or proximately caused the death of *(name deceased)*).

(If you answered issue *(state number)*⁴ "Yes" in favor of the
plaintiff, you already have found that the defendant's medical negligence
proximately caused the death of *(name deceased)* and have found that

the plaintiff has satisfied this element.)

(As I already have instructed you, an injury is permanent when any of its effects will continue throughout the plaintiff's life.⁵ These effects may include [medical expenses], [loss of earnings], [pain and suffering], [scarring or disfigurement], [(partial) loss (of use) of part of the body], or [(*state any other element of damages supported by the evidence*)] to be incurred or experienced by the plaintiff over *his* life expectancy.) (Your consideration of this issue is the same as it was in connection with issue⁶ (*state number*).)

Second, that the defendant's conduct that produced the injury was (grossly negligent) (committed in reckless disregard of the rights of others) (fraudulent) (intentional) (committed with malice).

[An act is grossly negligent when the defendant lacks even slight care, when *he* shows indifference to the rights and welfare of others or when *his* negligence is of an aggravated character.]⁷

[To find that an act was committed in reckless disregard for the rights and safety of others, you must find more than mere failure to exercise ordinary care. You must find that the defendant acted needlessly, manifesting a reckless indifference to others.]⁸

[Fraud means a false representation of material fact made by the defendant with intent to deceive which was reasonably calculated to deceive and which did, in fact, deceive and damage the plaintiff because of *his* reasonable reliance on it.]⁹

[Conduct is intentional if the defendant intentionally fails to carry out some duty imposed by law which is necessary to protect the safety of

the person or property to which it is owed.]]¹⁰

[Malice means a sense of personal ill will toward the plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff.]]¹¹

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant's acts or failures proximately caused the plaintiff (disfigurement) (loss of use of part of the body) [or] (permanent injury) (or proximately caused the death of *name deceased*); and that the defendant's conduct that produced the (injury) (death) was (grossly negligent) (committed in reckless disregard of the rights of others) (fraudulent) (intentional) (committed with malice), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is \$515,000. See N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). N.C. Gen. Stat. § 90-21.19(b) provides: "[T]here shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds both of the following: (1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death [and] (2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice."

2 N.C. R. Civ. P. Rule 42(b)(3) requires the court, upon motion of a party, to bifurcate issues of liability and damages when the plaintiff seeks damages greater than \$150,000, unless the court for "good cause shown orders a single trial." N.C. R. Civ. P. 42(b)(3) (2011). In such a bifurcated case, "[e]vidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable." *Id.* Arguably, but not expressly, the issue of gross negligence/permanent injury is one of damages- that is, whether there is a statutory cap on non-economic damages- that would be tried in the second phase of the case.

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3 If this issue is submitted to the jury along with all damages issues, use this sentence. *NOTE WELL: The jury must not be told or instructed in any way as to the existence of any limit on non-economic damages. N.C. Gen. Stat. § 90-21.19(d).* Alternatively, the issue may be submitted in a separate phase of the trial if the jury award of non-economic damages is in fact greater than the statutory limit.

4 If the medical malpractice claim is for wrongful death, and that issue already has been decided by the jury by separate issue, you may include this sentence.

5 "Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.'" *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760-61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231-32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff "did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'" as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

6 Refer here to the personal injury damages issue that was submitted to the jury in connection with N.C.P.I.-Civil 809.100.

7 *Cowan v. Brian Ctr. Mgmt. Corp.*, 109 N.C. App. 443, 448-49, 428 S.E.2d 263, 266 (1993).

8 See *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978) (*quoting Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953)); *Chewning v. Chewning*, 20 N.C. App. 283, 291, 201 S.E.2d 353, 358 (1973).

9 This definition is the same as that used in N.C.P.I.-Civil 810.96 for Punitive Damages Liability. See N.C.P.I.-Civil 800.90. Note that this summary definition must be adapted in "concealment" cases. In an appropriate case, the five elements of fraud set out in greater detail in N.C.P.I.-Civil 800.00 can be given. "Constructive fraud" also can qualify as "fraud" for the purposes of N.C. Gen. Stat. § 1D-15(a) if "an element of intent is present." N.C. Gen. Stat. § 1D-5(4). Thus, an intentional breach of fiduciary duty would be sufficient. In such instances, the jury could be instructed that, "Fraud occurs when a person who is a fiduciary for another intentionally fails to act in good faith and with due regard for such other person." See N.C.P.I.-Civil 800.96.

10 This definition is modeled on N.C.P.I.-Civil 102.86 (Gross Negligence Used to Defeat Contributory Negligence), *citing Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987).

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11 This definition is the same as that used in N.C.P.I.-Civil 810.96 for Punitive Damages Liability, although there are multiple other definitions of malice.