

## Civil Death Damages – Wrongful Death and Conscious Suffering.

### (a) Compensation for Damages

*< add the following to medical malpractice or other negligence instructions—omit any category of damages that is not applicable>*

#### (1) Decedent's Conscious Pain and Suffering

You should consider damages for DCD's [decedent's] conscious pain and suffering, if any. You will see that Question \_ asks: "What amount of money, if any, do you award as full and fair compensation for DCD's conscious pain and suffering as a result of DFT's negligence?" In answering this question, you may award damages only for any pain and suffering that DCD experienced while s/he was still alive and conscious.

There are two kinds of pain and suffering: physical pain and suffering and mental pain and suffering.

For physical pain and suffering, you must consider any physical injuries to DCD's body resulting from DFT's negligence. You must consider the pain and suffering that DCD endured, while conscious, in each part of his/her body because of the negligence.

You should also consider any conscious mental suffering that DFT's negligence caused. Mental pain and suffering includes nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, if DCD's injuries caused him/her to lose enjoyment of activities such as work, play, family life or otherwise, then you should award damages for that reduction in the enjoyment of life.

*< if there is evidence of loss of function>* You should also award a fair, reasonable sum for any [temporary or] permanent condition that DCD sustained, while conscious during his/her life, because of DFT's negligence. This could include any loss of bodily function [or scarring].

*< if there is evidence of a pre-existing condition >* If DCD suffered from a preexisting medical [mental] condition, you may not award damages for that pre-existing condition itself. However, you should compensate DCD for any worsening of an existing condition that resulted from DFT's negligence. You should ask yourself: "Did the negligence worsen DCD's preexisting condition?" If so, then you may award damages only for the worsening of the condition.

When you have determined the amount of damages for DCD's conscious pain and suffering, you write the amount, in words and numbers, in response to Question \_\_.

### **(2) Decedent's Medical Expenses**

[See Model Instruction Personal Injury Damages – Medical Expenses.]

### **(3) Loss of Decedent's Income Prior to Death**

[See Model Instruction Personal Injury Damages – Lost Earning Capacity.]

### **(4) Funeral [and Burial] Expenses**

Question \_\_ addresses the final area of damages, which are the reasonable and necessary funeral [and burial] expenses resulting from DCD's death. PLF is entitled to compensation for those expenses, but only if they were reasonable in amount and were reasonably necessary for the funeral. Here, you must answer two questions:

- First: were the funeral [and burial] services provided to PLF reasonably necessary because of an injury that resulted from DFT's negligence? and
- Second: were the charges themselves reasonable in amount? If not, you should decide what funeral [and burial] expenses, if any, were reasonable.

## (5) Wrongful Death Damages to Next of Kin<sup>1</sup>

Question(s) \_\_ [and \_\_] deal(s) with compensation to DCD's next of kin, namely [list names = NOK,<sup>2</sup> as well as relationships]. In a wrongful death case like this one, a [person who] [company that] negligently causes someone's death must pay money damages to the surviving [spouse, child(ren), next of kin] for the value of that lost life. For purposes of the wrongful death claim, the phrase, "lost value" includes but is not limited to, the loss of reasonably anticipated services, protection, care, assistance, companionship, society, comfort, guidance, net income, support, counsel, and advice. "Lost value" does not include grief, anguish, or bereavement at DCD's death.

< *If there are multiple heirs, the judge may add* >: You will see that these questions calls for you to answer separately as to each of the next of kin.

### a. Existence of a Loss

[< *if the existence of a compensable NOK loss is contested, otherwise omit* >  
The parties dispute whether DCD's death caused NOK to suffer lost value as I have defined that word. Question \_\_ asks: "Was DFT's negligence a cause of lost value due to DCD's death for [NOK] [the following next of kin]?" If you answer Question \_\_ "Yes" [as to at least one surviving next of kin], then you must determine the amount of damages that NOK [each next of kin] suffered due to DCD's death. ]

### b. Compensation for the Loss

Question \_\_ asks what amount of money will fully and fairly compensate NOK [each next of kin] for DCD's "lost value", as our law defines that phrase.

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<sup>1</sup> While the substance of the Wrongful Death Act is set forth in G.L. c. 229, § 2, the next of kin who may be beneficiaries on a verdict slip are set forth in G.L. c. 229, § 1.

<sup>2</sup> If there are more than two or three next of kin entitled to claim wrongful death damages, the trial judge may prefer to state the names of qualifying claimants once and then use the phrase "next of kin" or "surviving family members" instead of listing multiple names each time.

If you reach this question [these questions], you should award an amount of money that will fully and fairly compensate NOK for the lost value of DCD's life. You must determine the fair monetary value of DCD to NOK on the day that s/he died, [insert date of death]. [If there are multiple next of kin: You will answer Question \_\_ separately for each of the next of kin, NOK].

You should compensate NOK for any or all of the following lost values, which also appear in the text of Question \_\_ on the verdict slip: the loss of DCD's reasonably expected society, companionship, comfort, guidance, counsel, net income, services, assistance, protection, care and advice, if any, to NOK.<sup>3</sup> This list is not exclusive; you may consider and compensate NOK for other losses as long as they represent the fair value of the loss of DCD and do not duplicate the items I mentioned.

*<If net income is an issue:>* Most of those items are self-explanatory, but I'll give you some further guidance on one item, namely the loss of "net income." During the trial, you heard testimony about DCD's [gross] [net] income and DCD's expectations on how long s/he would work. That does not directly match the test for damages, because, as I have said, the question is not what DCD lost; the question is the loss of net income, if any, that NOK suffered because of DCD's death. So, you may be wondering why there was testimony about DCD's expected [gross] [net] earnings. The answer is that his/her [anticipated net earnings may help you estimate] [anticipated gross earnings may help you estimate DCD's net earnings and, therefore,] the amount he was likely to contribute to NOK if he had lived. So you may consider evidence of DCD's [net] [gross earnings], but only for the purpose of determining the portion of DCD's income that NOK would likely have received. In deciding that issue, you may have to reach conclusions by relying upon your good judgment, best reasoning, and life experiences to

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<sup>3</sup> If the parties contest the existence of any loss, the judge may wish to omit or shorten this paragraph, as the jury already will have heard these principles. See above.

reach a number that reflects NOK's loss of the benefit of DCD's earnings in the past and through the rest of their joint lifetimes.

### **c. No Compensation For Bereavement**

While you must consider certain losses, such as loss of companionship and net income, you may not consider certain other things. Although losing a loved one is very difficult emotionally, the law does not allow NOK [any of the survivors] to recover damages for their grief, anguish, or bereavement. The monetary value of DCD's life depends upon the companionship, emotional, financial, and other benefits s/he would have provided to NOK if s/he had lived. Therefore, you must not award damages for NOK's grief, anguish, or bereavement.

### **d. Future Damages, If Applicable**

If you find that NOK will suffer any future loss of DCD's value, you should also award damages for that future loss. [You will see that I have divided Question 5 into two parts.<sup>4</sup> Question 5(a) addresses any damages suffered in the past. Question 5(b) is for any future damages.]

There will be no future trial to evaluate any future damages that NOK may suffer. So, you must keep in mind that NOK will receive any judgment in this case in a lump sum and may invest it and earn money. Therefore, if you award damages for future loss, you must reduce that portion of the damages to its present value as of [year case was filed], when this case was filed.<sup>5</sup> The figures in Question 5(b) must reflect present value. You

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<sup>4</sup> There is a debate about whether wrongful death cases under G.L. c. 229, § 2, arising out of alleged medical negligence are subject to the requirement to itemize damages in medical malpractice cases. See G.L. c. 231, § 60F (applicable to "every action for malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services against a provider of health care . . ."). The judge should use the bracketed language if the judge rules that the law requires itemization, or chooses to ask the jury for itemized damages as a matter of discretion, to avoid a possible issue on appeal.

<sup>5</sup> See *Griffin v. General Motors Corp.*, 380 Mass. 362, 367 (1980); *Copson vs. New York, New Haven, and Hartford Railroad Company*. 171 Mass. 233, 236-237 (1898).

cannot award damages for the time after the expected end of DCD's life if he had recovered from his illness in [year of death].

#### (6) Conclusion on Wrongful Death Damages

***<NOTE TO JUDGE: If the judge also instructs on personal injury damages, the judge should choose when to give the following instructions, to avoid duplication.>***

I'll conclude with some general rules about damages. The purpose of your damages award is to compensate NOK for the injuries or harm s/he suffered because of DFT's negligence. You must not use your damages award to reward NOK, nor may you use it to punish DFT.

The law gives you no special formula to assess PLF's damages. So, working together as the jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars and cents an amount that will fairly and reasonably compensate NOK for the loss of value of DCD's life. PLF must show, more likely than not, what the damages are. However, the law does not require any witness to express an opinion about the amount of such damage. PLF may prove damages by direct evidence, indirect evidence, or both.

Sometimes there is some uncertainty in proving one or more area of damages. There is no book or chart that tells you the value of a person's life. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence. Even so, you may not determine the plaintiff's damages by guessing. It is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.

[Second, the law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or

floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.]

Finally, once you have calculated damages for [past, present, and future] loss, you should add each of these areas of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire injury. You must avoid duplication or double counting of any elements of damages. When you have made your determination on the amount of damages, using the instructions I have just given, you should write down an amount both in numbers and in words on the verdict slip.