

PJI 2:320 Damages— Damages—Actions for Wrongful Death and Conscious Pain and Suffering, Including Such Actions Based on Medical, Dental and Podiatric Malpractice Commenced Before July 26, 2003

Plaintiff is the (executor, administrator) of the estate of AB. Plaintiff makes two claims: the first claim seeks damages resulting from the death of AB and the second claim seeks damages for the injuries and losses that were sustained by AB before (he, she) died. You must separately consider each of these claims. As to the first claim, damages are the amount that you find to be fair and just compensation for the pecuniary injuries, that is economic losses, resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: *[list the distributees by name and state their relationship to decedent]*.

Plaintiff claims that these individuals have sustained economic loss as a result of AB's death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state defendant's claims in relation to distributees' alleged pecuniary loss]*.

The law limits damages resulting from AB's death to pecuniary injuries, which means economic losses. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must determine the economic value of AB to *[list the distributees by name]* on *[give date of death]*, when AB died. In determining that economic value, you should consider the character, habits and ability of AB; the circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and *[where the distributees include children]*; the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on *[state date of death]*.

AB was, at the time of (his, her) death *[state age]* and, according to the life expectancy tables, had a life expectancy of ___ years. (His, her) spouse was then *[state age]* and had a life expectancy of years. The children were *[state ages]* and had life expectancies, respectively of *[state number of years]*. Life expectancy tables are simply statistical averages. A person might live longer or die sooner than the time indicated by those tables. The figures I just mentioned are not controlling but may be considered by you together with the evidence you heard concerning the health, habits, employment and activities of AB prior to (his, her) death and those of *[list the distributees by name]* in determining what their respective life expectancies were at the time AB died.

You must decide what portion of (his, her) earnings AB would have spent for the care and support of [list the distributees by name]. In making your decision, you must consider: the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that AB contributed to the care and support of [list the distributees by name] and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings; the risks of (his, her) occupation; the condition of (his, her) health and the length of time that (he, she) would reasonably be expected to continue working. As to this last factor, the work expectancy of AB was, according to work expectancy tables, [state number of years]. That figure, like the life expectancy figures I mentioned earlier, is only a statistical average and is furnished simply as a guide. In determining what portion of (his, her) available earnings AB would have applied in the future to the care and support of (his, her) children, you should consider that AB was not legally obligated to contribute to the support of any child who became 21 years old. However, AB could have stopped supporting a child under 21 who [e.g., became self-supporting] or could have decided to continue to support a child who was older than 21. If, on the evidence, you deem it reasonably probable that any of the children would have [e.g., become self-supporting] prior to age 21, or that AB would have contributed to the support of any of them beyond age 21, you may use as the date of termination of support of that child a date which is earlier or later than 21 as you deem proper.

As I stated before, it is the economic value of AB to [list the distributees by name] that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by: [list the distributees by name].

[In actions subject to CPLR 4111[e], state:] The amount you decide as the amount of economic loss sustained by [list the distributees by name] must represent the full amount of such losses without reduction to present value. You must also decide the period of years for which that amount is intended to provide compensation.

You will make a separate award for those reasonable expenses that were (paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries, and for AB's funeral and burial lot.

As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by AB during such time as (he, she) was conscious from the moment of injury to the moment of death. In addition, plaintiff is entitled to recover those reasonable expenses that were paid or incurred by (AB, AB's estate) for medical aid, nursing and other care required to treat AB's injuries, and such amount for loss of

earnings as you find AB would have earned between the date of injury and the date of death had (he, she) not been injured.

[In actions subject to CPLR 4111(d and e), state:]

Your verdict will include answers to the following questions, which will be submitted to you in writing:

1. State the total amount of economic loss, if any, to each of [list the distributees by name] resulting from AB's death. [In cases tried in the Second Department, state: State the total amount of economic loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of economic loss for each individual]

2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation.

3. State the amount awarded, if any, to AB's (spouse) for the following items of damages:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Funeral expenses, including any burial lot.

4. State the amount awarded for the following items of damage, if any, incurred by AB prior to (his, her) death or for which AB's estate is responsible:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Dental expenses;
- (d) Loss of earnings;
- (e) Impairment of earning ability;
- (f) Custodial care;
- (g) Rehabilitation services;
- (h) Pain and suffering;
- (i) Funeral expenses, including a burial lot.

If you decide not to make an award as to any item, you will insert the word "none" as to that item.

PJI 2:320A Damages—Action for Wrongful Death and Conscious Pain Based on Medical, Dental or Podiatric Malpractice Commenced on or after July 26, 2003

Plaintiff is the (executor, administrator) of the estate of AB. Plaintiff makes two claims: the first claim seeks damages resulting from the death of AB and the second claim seeks damages for the injuries and losses that were sustained by AB before (he, she) died. You must consider each of these claims separately.

As to the first claim, damages are the amount that you find to be fair and just compensation for the pecuniary injuries, that is economic losses, resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: *[list the distributees by name and state their relationship to decedent]*.

Plaintiff claims that these individuals have sustained economic loss as a result of AB's death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state defendant's claims in relation to distributees' alleged pecuniary loss]*.

The law limits damages resulting from AB's death to pecuniary injuries, which means economic losses. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must determine the economic value of AB to *[list the distributees by name]* on *[give date of death]*, when AB died.

In determining that economic value, you should consider the character, habits and ability of AB; the circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on *[state date of death]*.

AB was, at the time of (his, her) death *[state age]* and, according to the life expectancy tables, had a life expectancy of *[state number of years]* years. (His, her) spouse was then *[state age]* and had a life expectancy of *[state number of years]* years. The children were *[state ages]* and had life expectancies, respectively of *[state number*

of years]. Life expectancy tables are simply statistical averages. A person might live longer or die sooner than the time indicated by those tables. The figures I just mentioned are not controlling but may be considered by you together with the evidence you heard concerning the health, habits, employment and activities of AB prior to (his, her) death and those of *[list the distributees by name]* in determining what their respective life expectancies were at the time AB died.

[In actions subject to CPLR 4111[e], state:] The amount you decide as the amount of economic loss sustained by *[list the distributees by name]* must represent the full amount of such losses without reduction to present value. You must also decide the period of years for which that amount is intended to provide compensation.

You must decide what portion of (his, her) earnings AB would have spent for the care and support of *[list the distributees by name]*. In making your decision, you must consider: the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that AB contributed to the care and support of *[list the distributees by name]* and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings; the risks of (his, her) occupation; the condition of (his, her) health and the length of time that (he, she) would reasonably be expected to continue working. As to this last factor, the work expectancy of AB was, according to work expectancy tables, *[state number of years]*. That figure, like the life expectancy figures I mentioned earlier, is only a statistical average and is furnished simply as a guide. In determining what portion of (his, her) available earnings AB would have applied in the future to the care and support of (his, her) children, you should consider that AB was not legally obligated to contribute to the support of any child who became 21 years old. However, AB could have stopped supporting a child under 21 who *[e.g., became self-supporting]* or could have decided to continue to support a child who was older than 21. If, on the evidence, you deem it reasonably probable that any of the children would have *[e.g., become self-supporting]* prior to age 21, or that AB would have contributed to the support of any of them beyond age 21, you may use as the date of termination of support of that child a date which is earlier or later than 21 as you deem proper.

As I stated before, it is the economic value of AB to *[list the distributees by name]* that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by: *[list the distributees by name]*. Plaintiff claims that these individuals have sustained economic loss as a result of AB's death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state defendant's claims in relation to distributees' claimed pecuniary loss]*.

You will make a separate award for those reasonable expenses that were (paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries, and for AB's funeral and burial lot.

As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by AB during such time as (he, she) was conscious from the moment of injury to the moment of death. In addition, plaintiff is entitled to recover those reasonable expenses that were paid or incurred by (AB, AB's estate) for medical aid, nursing and other care required to treat AB's injuries, and such amount for loss of earnings as you find AB would have earned between the date of injury and the date of death had (he, she) not been injured.

[In actions subject to CPLR 4111(d and e), state:]

Your verdict will include answers to the following questions, which will be submitted to you in writing:

1. State the total amount of economic loss, if any, to each of [list the distributees by name] resulting from AB's death. [In cases tried in the Second Department, substitute: State the total amount of economic loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of economic loss for each individual]

2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation.

3. State the amount awarded, if any, to AB's spouse for the following items of damages:

- (a) Medical expenses;**
- (b) Nursing and other expenses;**
- (c) Funeral expenses, including any burial lot.**

4. State the amount awarded for the following items of damage, if any, incurred by AB prior to (his, her) death or for which AB's estate is responsible:

- (a) Medical expenses;**
- (b) Nursing and other expenses;**
- (c) Dental expenses;**
- (d) Loss of earnings;**
- (e) Impairment of earning ability;**
- (f) Custodial care;**
- (g) Rehabilitation services;**
- (h) Pain and suffering;**
- (i) Funeral expenses, including a burial lot.**

If you decide not to make an award as to any item, you will insert the word "none"

as to that item

Effect of Legislation Applicable to Actions Commenced on or after July 26, 2003

In 1985, the Legislature adopted CPLR Article 50-A to require that certain money judgments in medical, dental and podiatric malpractice actions be paid over a period of time through “structured” plans, L 1985, ch 294, § 9. In 1986, the Legislature adopted CPLR Article 50-B, which applied essentially the same requirements to most other tort actions, L 1986, ch 682, § 9. A significant overhaul of the structured judgments provisions occurred in 2003, when the Legislature revised CPLR Article 50-A, L. 2003, ch 86, § 4. Included among the changes was a provision that all damages in wrongful death actions based on medical, dental and podiatric malpractice be paid in a lump sum (as opposed to payment in structured form), CPLR 5031(b). The revisions to CPLR 50-A were made applicable to medical, dental and podiatric malpractice actions commenced on or after July 26, 2003, L 2003, ch 86, § 4. No similar revisions were made to CPLR Article 50-B.

The 2003 revisions to CPLR Article 50-A resulted in some seeming anomalies. First, although the revisions made the structured judgment requirements inapplicable to post-July 26, 2003 wrongful death actions for medical, dental and podiatric malpractice actions, it did not alter the provision in CPLR 4111(e) (former CPLR 4111[f]) requiring that the jury be instructed that it must not only itemize the damages but must also set forth the period of years over which the amounts for future damages are intended to provide compensation. An instruction requiring the jury to set forth the period of years for which its award of future damages is intended to compensate has no practical utility where future damages are awarded in a lump sum and may be particularly problematic in cases tried in the Second Department, where the controlling precedent, *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588, holds that courts should not ask the jury to itemize the amount of economic loss to be awarded to each distributee

Second, the 2003 revisions to CPLR Article 50-A altered the structured judgment scheme applicable to actions involving medical, dental and podiatric malpractice by exempting awards for future damages in wrongful death cases from the structuring requirements, CPLR 5031(d). Although,

CPLR 5031 as amended now requires future damages to be awarded in a lump sum, that statute is silent on the question whether the award should be reduced to its present value. If there were no other relevant statutory provisions, the common-law approach to that question would, presumably, be revived. Under the common law, the parties could submit expert evidence on the present-value question, including evidence of the effects of inflation, and the jury could return a verdict reflecting a reduction of its future-damages award to its present value. However, the final sentence of CPLR 4111(e) (former CPLR 4111[f]), which was not amended in 2003, still requires an instruction that the jury must “award the full amount of future damages, as calculated, without reduction to present value.” If, as the language suggests, that sentence is applicable to wrongful death actions based on medical, dental and podiatric malpractice, then any consideration of reduction to present value is precluded.

An alternative reading of CPLR 4111(e), which is suggested by CPLR 4111’s respective subdivision headings as well as by the first sentence of subdivision (e), is that CPLR 4111(d) is the exclusive governing provision for medical, dental and podiatric malpractice actions. Since CPLR 4111(d) contains no language prohibiting consideration of present value, this alternative reading of the statute would permit consideration of – and reduction to – the present value of a future-damages award.

PJI 2:320A has been drafted to reflect the first view of the statute discussed above. Accordingly, it incorporates both the last sentence of CPLR 4111(e), which precludes reduction of the future-damages award to present value, and the second to last sentence of that subdivision, which directs the jury to specify the period of years over which the future-damages award is intended to provide compensation. In the absence of legislative clarification and in the absence of any appellate case law on the issue, the question of which interpretative approach should be taken is one that trial courts will have to resolve as a matter of first impression or the parties will resolve by agreement. Where the parties have agreed or the court has determined that reduction to present value is appropriate, the following charge may be utilized:

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In determining the economic loss sustained by [list the distributees by name], you must also consider the fact that a lump sum of money

received today is worth more than the same amount paid in installments over a period of time, because the lump sum can be invested to earn interest. Your award is being made now, even though the earnings from which AB would have contributed to the support of by *[list the distributes by name]* would have been received in the future. For that reason, you must reduce the amount which you find that AB would have contributed each year from (his, her) earnings to the support of by *[list the distributes by name]* to its present cash value in order to make allowance for the earning power of the money.

You will determine the present cash value of the money by deciding a discount rate for each year and then using that discount rate to deduct from your award a reasonable allowance for the earning power of money. In deciding what discount rate to use for each year, you must consider the rate of interest that is fairly to be expected from reasonably safe investments made by a person of ordinary prudence who does not have any special financial skill or experience. On the other hand, you must also consider that inflation may reduce the value of a dollar in the future. For example, if I invest \$1 today, I will earn interest on that dollar but I will not actually come out ahead unless the interest rate that I earn is greater than the inflation rate. Therefore the discount rate you use will be the interest rate you selected as affected by the inflation rate you find appropriate.