

8.43 WRONGFUL DEATH (3/10)¹

The plaintiff brings this lawsuit as the representative of the survivors of the decedent, [*insert decedent's name*]. On behalf of the survivors, the plaintiff asserts that the defendant was responsible for the decedent's death and seeks money damages from the defendant for the actual financial losses the survivors have suffered, and will suffer in the future, as a result of the decedent's death.

UWhat Is Not Recoverable

A. In this category of damages, you are not to consider any physical injuries or suffering that the decedent may have sustained, such as pain and suffering or disability.²

B. You are also not to consider any emotional distress, anguish or grief the survivors may have suffered as a result of the decedent's death, or any loss of emotional satisfaction the survivors may have derived from the society and companionship of the decedent. These matters, although very real and distressing, cannot be considered in determining the extent of the financial loss suffered by the survivors.

¹ Although not specifically a jury charge issue, trial judges should be aware that the *New Jersey Probate Act* apparently changes the previous law concerning who is entitled to recover under the *Wrongful Death Act*. The changes to the *Probate Act* apply only to the estates of those who died after February 26, 2005.

² In cases where there is also a claim for pain and suffering, add "Those are separate claims that will be discussed later in this charge."

What Is Recoverable

Financial loss includes not only the actual monies the decedent would have earned and contributed for the benefit of the survivors, but also the reasonable value of the services, assistance, care, training, guidance, advice, counsel and companionship the survivors would have received from the decedent had he/she lived.

A. With regard to the decedent's earnings, you should consider the net earnings after taxes as of the time of the decedent's death. You should also give due regard to any evidence concerning the decedent's potential future income during the balance of his/her working life expectancy. The income figure you use should be net income, that is, income after taxes. This is because net income represents that portion of the decedent's income which would have been available for the benefit of the decedent's survivors.³ Net income also includes fringe benefits, such as monies the decedent would have obtained in the form of employer contribution to a retirement plan.⁴

³ See *Tenore v. Nu Car Carriers*, 67 N.J. 466, 494-95 (1975), where the Court held that the trial court erred in refusing to allow defendant to cross examine on income taxes.

⁴ See N.J.S.A. 2A:31-5 which uses the phrase "pecuniary injuries" not just "salary". Also see *Thalman v. Owens Corning Fiberglass*, 290 N.J. Super. 676 (App. Div. 1996), where the Appellate Division upheld a wrongful death award partially because decedent's "lost pension income totaled \$84,000".

Since money used for the decedent's personal maintenance and expenses would not have been available for the benefit of the survivors, you must subtract the decedent's personal expenses from the net income. You must find to what extent the decedent's net earnings were necessary for his/her personal needs and deduct that amount from the net income.

B. You may also consider the benefit the survivors would have received from the decedent in the form of services, assistance, guidance and training. In making such an award, you must determine the reasonable value of the services or benefits that will be lost by reason of the decedent's death.

C. In addition to the loss of anticipated direct financial contributions from the decedent to the survivors, as I explained previously, you should also consider the pecuniary value of the loss of the decedent's anticipated services to the survivors. This may include things such as chores the decedent would have performed including household chores, babysitting, etc.⁵ You should also consider the value of the loss of the companionship, advice and guidance of the deceased as the survivors grow older. You must remember, however, that your award for damages for these losses will be confined to their financial value and should not include any amount of emotional loss.⁶

⁵ *Green v. Bittner*, 85 N.J. 1, 6 (1980) Chores should be case specific depending on the decedent's relationship to plaintiff and the facts of each case.

⁶ *Green v. Bittner*, *supra* at 12.

Bear in mind that in fixing an award for services, companionship, care, advice and counsel, you must distinguish between their emotional value and their financial or economic value. We recognize that [children, parents, spouse] may provide valuable services such as companionship, care, advice and guidance over time as the survivor(s) face(s) advanced age or declining health. Remember, however, that no pecuniary value may be attached to the emotional satisfaction gained by the parent, spouse or child if the deceased has performed these services.

Perhaps the best way to describe the type of services that can be compensable under the category of loss of care are those substantially similar to the services provided by paid “companions” or “homemakers” who are often hired by the aged or the infirm, or substantially equivalent to services provided by nurses or practical nurses.⁷ Companionship in this sense, however, will not include true nursing services unless you find that the decedent had or was likely to have special training. The value of these services must be confined to what the marketplace would pay a stranger with similar qualifications to the deceased to perform such services. In interpreting the criteria of “similar qualifications,” you may also attach a financial value to the knowledge of the survivors’ likes, dislikes, abilities and habits which the decedent may have possessed.

⁷ *Green v. Bittner, supra* at 12.

Under the category of loss of the decedent's guidance, advice and counsel to the survivors, we are speaking only of its financial element. It is the loss of guidance, advice and counsel we all need from time to time in particular situations, for specific purposes, such as in making a business decision, or a decision affecting one's life generally, or even advice and counsel needed to relieve depression or personal dilemmas. It must be the kind of advice and guidance that could be purchased from a business advisor, a therapist, or a trained counselor, for instance.⁸ It is not the loss simply of the exchange of views, no matter how perceptive, when the survivor and loved ones are together nor is it the loss of the pleasure which accompanies such an exchange between family members because, again, emotional loss is not involved in this computation.

You must decide what services the decedent would have rendered to the survivors, as well as the value of these services. The survivors do not have to prove that they would have in fact purchased such companionship and advice after the decedent's death; it is sufficient that the decedent would have rendered it to

⁸ *In Brown v. Kennedy Memorial Hospital-University Medical Center*, 312 N.J. Super. 579 (App. Div. 1998), *certif. denied*, 156 N.J. 426 (1998), the Appellate Division affirmed the trial court's ruling that the evidence did not support a \$400,000 jury award for loss of housekeeping and clerical services. Compare *Morris v. Krauszer Food Stores, Inc.*, 300 N.J. Super. 529 (App. Div. 1997), where the Appellate Division allowed a \$1,000,000 award for loss of services after an expert calculated the loss of decedent's services to her children, including the cost of paying someone to cook, clean, shop and laundry, and the loss of guidance, instruction and training at \$45 an hour until the youngest child reached the age of emancipation.

them if he/she had lived.⁹ To the extent that it is relevant to the issue of the services the decedent would have provided, you should also consider the decedent's character, personality, habits and customs as well as his/her relationship with the survivors.¹⁰

As part of your deliberations in this regard, you should also consider the age and general health of the decedent and the survivors, since this may affect the period of time over which it would be reasonably expected that the decedent would have rendered the services to the survivors. You can consider the life expectancy and the work-life expectancy of the decedent at the time of death and the life expectancy of the survivor or survivors.

Compensation

If you find that plaintiff is entitled to an award, the amount recoverable is comprised of two parts:

- a. the amount of the financial loss to date; and
- b. the present value of any future financial loss.

⁹ *Green v. Bittner*, *supra* at 16-17.

¹⁰ Although the jury should consider a decedent's personality and character, "such evidence must be relevant to some aspect of the damages claimed by the plaintiff." *Johnson v. Dobrosky*, 187 N.J. 594, 606 (2006) (quoting Stewart M. Speiser, *Recovery for Wrongful Death & Injury*, §6:26 (4th ed. 2005) and holding that decedent's welfare fraud conviction should not have been admissible in a wrongful death case.

1. Past Loss

Once you have decided that the plaintiff is entitled to recover, the first thing you must determine is the amount of the financial loss from the date of death to the present. Financial loss means both categories of financial loss which I just described and the reasonable value of the benefits or services the decedent would have given the survivors.

2. Future Losses¹¹

A. Preliminary Charge to be Given Before Any Expert Testimony

In this phase of the case, you are about to hear expert opinion testimony on certain economic claims made. You will be the final judges of the reliability of these experts' projections of future economic losses. Any bottom line figure offered by the expert will be based on certain assumptions that the expert will make concerning probable future economic trends.

In evaluating the reliability of the expert's projections, you may consider the cross-examination by the attorneys and also any evidence presented by the opposing parties on this issue such as other expert testimony. At this state of the case, you should keep an open mind regarding the reliability of these bottom-line figures and not given them automatic acceptance. I repeat, it will be your responsibility and your responsibility alone to determine at the close of the case the

amount of economic losses suffered by the plaintiff, based upon all the credible evidence you choose to accept on this question.

B. Final Charge to be Given at Conclusion of Case if There is No Expert Testimony

Plaintiff also seeks to recover for financial support and services that will be lost in the future.¹² Obviously, the time period covering the survivor's future losses cannot go beyond that point when it was expected that the deceased and/or the survivor would live. The ability of an adult to render services may decrease with age or increase with age in the case of a child. You can take into account both life expectancy and work-life expectancy.¹³

But you should be aware that the figures that you have been given on life expectancy and work-life expectancy are only statistical averages. Do not treat them as necessary or fixed rules, since they are general estimates. Use them with caution and use your sound judgment in taking them into account.

For future loss of financial support, as well as past loss of financial support, you must base your decision on probable net earnings, the take-home pay, the amount left after taxes are deducted. It is the burden of the plaintiff to prove, by a

¹¹ These instructions are based upon *DeHanes v. Rothman*, 158 N.J. 90 (1999), overruling *Tenore v. Nu Car Carriers, Inc.*, *supra*.

¹² *Coll v. Sherry*, 29 N.J. 166, 175 (1959).

¹³ This concept should be charged if there is appropriate evidence received on the subject. See Charge 8.11G regarding life expectancy.

preponderance of the evidence, the deceased's net income and the probable loss of future support and services.¹⁴

In deciding what plaintiff's future losses are, understand that the law does not require of you mathematical exactness. Rather, you must use sound judgment based on reasonable probability.¹⁵

C. Effects of Interest and Inflation on Future Earnings

Once you have decided how much money plaintiff will lose in the future, you must then consider the effects of inflation and interest. As to inflation, you should consider the effects it probably will have in reducing the purchasing power of money. Any award for future losses may be increased to account for losses in the purchasing power of that money because of inflation. The consideration of interest requires that you should not just award plaintiff the exact amount of money that he/she will be losing in the future. The survivors will have that money now even though he/she/they will not have incurred the loss of that money until some time in the future. And that means that survivors will be able to invest the money and earn interest on it now even though he/she/they otherwise would not have had that money to invest until some future date.

¹⁴ See *Caldwell v. Haynes*, 136 N.J. 422, 436 (1994), which requires that the plaintiff prove net income in personal injury and wrongful death cases.

¹⁵ By analogy to future income loss in a wrongful death case. *Tenore v. Nu Car Carriers, Inc.*,

To make up for this, you must make an adjustment for the survivors having the money available now even though the loss will not be experienced until the future. This adjustment is known as discounting, and discounting gives you the value of the money that you get now instead of getting it at some future time. In other words, it gives you the present value or present worth in a single lump sum of money which otherwise was going to be received over a number of years at so much per year.

Your goal is to create a fund of money, which, if paid today, will fairly compensate plaintiff for his or her future loss of earnings. In arriving at the amount of that fund – the present value of future losses – you should consider the interest the fund will probably earn in future years; the probable amount by which taxation on the interest might decrease the money available to plaintiff and the effect of inflation in decreasing the purchase power of money. The higher the interest rate you believe the fund will earn in future years, the lower will be the amount of the fund needed to fairly compensate plaintiff for future earnings. On the other hand, the higher the probable rate of inflation in future years, the higher will be the amount of the fund needed to fairly compensate plaintiff. It is possible that the interest earned in the future could be offset exactly by the rate of inflation in which event these factors could cancel each other out and you could award the

supra at 494-495. See also, *Freidman v. C & S Car Service*, 108 N.J. 72, 78-79 (1987).

net lost wages for the appropriate number of years without any adjustment.¹⁶

D. Final Charge to be Given at Conclusion of Case if There was Expert Testimony on the “Bottom Line”

You have heard an expert (or an expert for each side) discuss the present value of plaintiff’s future losses including projections as to future interest, including its tax consequences, and inflation rates. You may consider some, all, or none of the opinions of the experts in determining a fair figure to compensate plaintiff for future losses. The experts have also given you their “bottom line” figures as to decedent’s future lost earnings. As I told you previously, you need not give any of these “bottom line” figures automatic acceptance. You are free to determine, based on all the evidence, including the expert testimony you choose to accept, what amount of dollars will fairly compensate plaintiff for his/her future losses.

3. Medical and Funeral Expenses

The plaintiff is also entitled to an award for reasonable and related medical expenses and funeral expenses.

¹⁶ See *Kappovich v. Lewinter*, 43 N.J. Super. 528 (App. Div. 1957), *certif. denied*, 24 N.J. 112 (1957), which mandates utilization of life expectancy charts. A trial judge is not to provide jurors with either a wage increase chart or an interest rate chart in any case with an expert. In a case without any experts, the court may consider, subject to *Rule 201(b)*, *New Jersey Rules of Evidence*, whether it should show the jury the wage and interest rate charts, subject to a cautionary instruction.

Cases and Comment

1. New Jersey now allows “properly qualified experts to testify about the aggregate net sums of the economic losses that they have calculated ... and to introduce into evidence the exhibits that they have prepared”. *DeHares v. Rothman*, 158 N.J. 90, 103 (1999). The trial judge must caution the jury about uncritical acceptance of same. *Id.*
2. It is possible for a wrongful death case to be tried without an expert. *See Green v. Bittner*, *supra* at 17; *Brown v. Kennedy Memorial Hosp.*, *supra*, 312 N.J. Super. at 593- 595; and *Correia v. Sherry*, 335 N.J. Super. 60, 69 (L.Div. 2000). In a case without any expert testimony, that court may, subject to N.J. Ev. Rule 201(b), consider whether it can take judicial notice of wage and interest rate figures compiled by recognized authorities. If a court were to take such judicial notice, the jury would have to be instructed that such charts are illustrative only and need not be followed by the jury if the jury believes that different figures would apply in the future, or in the case of wages, that decedent’s wage would have risen more rapidly, less rapidly or, not at all.
3. A question may arise as to how the jury should report its verdict. In *Eyoma v. Falco*, 247 N.J. Super. 435, 455 (App. Div.1991), it was held to be plain error for the jury to divide its verdict amongst the survivors, since N.J.S.A. 2A:31-4 states that the proportions to be awarded the survivors “should be determined by the court without a jury”. In *Black v. Seabrook Associates, Ltd.*, 298 N.J. Super. 630, 639 (App. Div. 1997), the Appellate Division stated that a verdict should be broken down between decedent’s pain and suffering and the survivors’ financial loss. As to breaking down the award into constituent components such as past loss and future losses, *Bussell v. DeWalt Products Corp.*, 204 N.J. Super. 288, 295, (App. Div.), *rev’d*, 105 N.J. 233 (1987), indicates that this is desirable. *See also, Nylander v. Rogers*, 41 N.J. 236, 239 (1963) (“there can be no doubt of the power of a trial judge to direct a jury to assess and report damage separately on a plaintiff’s separate claims or even, in special situations, on items of a single claim. The power should be freely and liberally exercised . . . While discretionary in the sense that failure to direct separate verdicts would rarely if ever constitute error absent a reasoned request . . . the power should be applied almost as a matter of course where the claims are independent . . . and in other situations where some realistic benefit is pointed out . . . Any

confusing burden on the jury can be avoided by delivering to it a list of the separate verdicts to be returned”) *See also* R. 4:39-1 and R. 4:39-2 which allow for special verdicts and interrogatories. Accordingly, the Committee recommends instructing the jury to (a) divide the loss into past and future losses and (b) subdivide both past and future losses into the income lost and the service lost. This will also help the trial court on motions for additurs and remitturs. Separate verdicts for Survival Action Damages under N.J.S.A. 2A:15-3 should always be used for the decedent’s pain and suffering. See Model Jury Charge 8.42. Compensation for medical expenses and funeral expenses under the *Wrongful Death Act* should also be awarded separately. Of course, medical expenses which are allowed under both N.J.S.A. 2A:31-5 and N.J.S.A. 2A:15-3 can only be awarded once and are subject to review after trial by the court under the Collateral Source. N.J.S.A. 2A:15-97.