

13-1830. Measure of damages; wrongful death (including loss of consortium).

This lawsuit has been brought by _____ (*plaintiff*) [individually and] on behalf of the surviving beneficiaries of _____ (*name of decedent*) who is now deceased. The surviving beneficiaries are _____ (*names of surviving beneficiaries*).

New Mexico law allows damages to be awarded to the surviving [spouse], [parent(s)], [grandparent(s)], [other familial caretaker(s)] [and] beneficiaries if the death or the related damages described in this instruction were caused by the wrongful act, neglect, or default of another. If you should find for _____ (*plaintiff*) on the question of liability, you must then fix the amount of money which you deem fair and just for the life of _____ (*name of decedent*), including in your award compensation for any of the following elements of damages proved by the evidence:

1. The reasonable expenses of necessary medical care and treatment and funeral and burial;
2. The pain and suffering experienced by _____ (*name of decedent*) between the time of injury and death;
3. The lost earnings, the lost earning capacity and the value of the lost household services of _____ (*name of decedent*) considering _____'s (*name of decedent*) age, earning capacity, health, habits, and life expectancy. In considering loss of earnings or earning capacity, deductions must be made for income taxes, social security taxes, other taxes, and personal living expenses of _____ (*name of decedent*). The damages set forth in this paragraph are damages for future loss of money and are paid in a lump sum. Therefore, a reasonable discount must be made for the future earning power of the damages awarded;
4. The value of the _____'s (*name of decedent*) life apart from _____'s (*name of decedent*) earning capacity;
5. The mitigating or aggravating circumstances attending the wrongful act, neglect or default;
- [6. The emotional distress to the [spouse], [parent(s)], [grandparent(s)], [other familial caretaker(s)] caused by the loss of [society,] [guidance,] [companionship] and [sexual relations] enjoyed with _____ (*name of decedent*);]
7. The loss of guidance and counselling to _____'s (*name of decedent*) minor children.
8. You may also consider the loss to the beneficiaries of other expected benefits that have a monetary value. While the presence or absence of a measurable monetary loss to beneficiaries is a factor for consideration, damages may be awarded even where monetary loss to the surviving beneficiaries cannot be shown.

The property or wealth of the beneficiaries or of the defendant is not a legitimate factor for your consideration.

No fixed standard exists for determining fair and just damages. You must use your judgment to decide a reasonable amount. Your verdict must be based on evidence, not on speculation, guess, or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family [or the loss of the deceased's society to the family].

USE NOTE

The wrongful death instruction enumerates the various elements of damage which may be recovered upon the wrongful death of an individual. It is important to note that the elements of damage listed in the instruction may not all be recoverable by the same person or entity. For example, a personal representative is not entitled to recover for the surviving spouse's or familial caretaker's loss of consortium unless the personal representative is one and the same as the surviving spouse or familial caretaker. Similarly, the personal representative may not always recover each of the elements of damages depending upon the evidence produced at trial. If there are no minor children, item 7 should be excluded. Similarly, if there are no lost earnings, earning capacity or household services item 3 should be excluded, and so on. Only those elements supported by the evidence are to be included in the instruction given the jury.

If the personal representative is also the surviving spouse or familial caretaker, the damages described in item 6 should be included and the bracketed material in the last sentence of the instruction should be excluded. If the personal representative is not the surviving spouse or familial caretaker, the damages in item 6 should not be included in the instruction and the bracketed language in the last sentence should remain in the instruction. The amount awarded to the beneficiary's personal representative must be set out separately in a special verdict form from the amount awarded to the surviving spouse or familial caretaker for her or his loss of consortium. In addition, various elements of damages can be broken out separately on the special verdict form if the court determines that there is a need to do so in order to identify damages recoverable by the estate, by the statutory beneficiaries and by the surviving spouse or familial caretaker for loss of consortium. If there is a factual dispute whether the person seeking loss of consortium damages for a minor child was the "familial caretaker", then the jury should be provided with a definition of "familial caretaker". The Supreme Court described a "familial caretaker" as a person who lived with and cared for the child for a significant period of time prior to the death or injury. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-39, 126 N.M. 263, 273, 968 P.2d 774.

[As amended, effective October 1, 1996; March 20, 2000; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008; as amended by Supreme Court Order No. 16-8300-018, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — The wrongful death instruction was drafted as a consequence of the Court's opinion in *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994). *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, 126 N.M. 263, 968 P.2d 77, recognized loss of consortium for a "familial caretaker", such as a parent or grandparent who loses a child to death or where the child suffers a serious injury.