

**WRONGFUL DEATH DAMAGE
STRATEGY, EVIDENCE AND
CALCULATIONS**

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I. Putting a Monetary Value on a Human Life

A human life is said to be priceless, but that concept means nothing to the law of wrongful death, which is not interested in how much your life meant to YOU. Rather, for the most part, wrongful death law is more concerned with how much your life was worth to those you left behind.

No matter how much the lawyers and judge lecture juries about what wrongful death law tells us, how much a life is worth is always in the back of the heads of most jurors. But there is no consensus on what that value is. In 2008, (Time Magazine, May 20, 2008, “The Value of a Human Life: \$129,000”) Time Magazine informed us of a Stanford University study that a human life was worth \$129,000 based on treatment data for kidney dialysis (don’t ask me how they came up with that number). Using a similar analysis most countries determined a treatment that saved one year of life was worth the cost if the cost was \$50,000 or less. The family of a soldier killed in Afghanistan or Iraq received \$500,000. Demonstrating that emotions and the facts surrounding a death influence how one values a life: the September 11 Victim Compensation Fund paid 2,880 death claims, averaging \$2,082,128 per death and paying up to \$7,100,000 for a death.

II. The Law of Wrongful Death

A. North Carolina Wrongful Death Statute

1. The Text

The damages portion of North Carolina’s Wrongful Death Law (NCGS 28A-18-2) reads as follows:

(b) Damages recoverable for death by wrongful act include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
 - (2) Compensation for pain and suffering of the decedent;
 - (3) The reasonable funeral expenses of the decedent;
 - (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
 - a. Net income of the decedent,
 - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
 - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
 - (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;
 - (6) Nominal damages when the jury so finds.
- (c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

2. Analysis

Most of the damages recoverable in Wrongful Death actions are straightforward. Reasonable medical and funeral expenses are recoverable, as are punitive damages (if the deceased could have recovered himself had he survived (subject to the restrictions on punitive damages in Chapter 1D of the North Carolina General Statutes). Items (b)(2) and (b)(4), which is the meat of the damages in most cases, will be discussed in depth below.

You should note that the legislature has opened the door wide in allowing “[a]ll

evidence which reasonably tends to establish any of the elements of damages . . . or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, *is admissible* in an action for damages for death by wrongful act.”

B. Wrongful Death Jury Instructions

1. The Jury Instruction

N.C.P.I. Civil 810.50 Wrongful Death Damages - Present Monetary Value of Deceased to Next-of-Kin

Damages for (name deceased)'s death also include fair compensation for the present monetary value of (name deceased) to his next-of-kin. (In this case, (name deceased)'s next-of-kin are (name persons and specify relationships).)

There is no fixed formula for determining the present monetary value of (name deceased) to his next of kin. You must determine what is fair compensation by applying logic and common sense to the evidence. You may consider:

[The net income (name deceased) would have earned during the remainder of his life. You must subtract from (name deceased)'s reasonably expected income the amount he would have spent on himself or for other purposes which would not have benefited his next of kin. The amount he would have earned depends upon his prospects in life, health, character, ability, industry and [the means he had for making money] [the business in which he was employed]. It also depends upon his life expectancy- that is, the length of time he could reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant.]

[The services, protection, care and assistance of (name deceased), whether voluntary or obligatory, to his next-of-kin. These words are to be given their ordinary meanings. You may consider the family and personal relations between (name deceased) and his next-of-kin, and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (name deceased) (or, as I will explain to you, over a shorter period).]

[The society, companionship, comfort, guidance, kindly offices and advice of

(name deceased) to his next-of-kin. These words are to be given their ordinary meaning. You may consider the family and personal relations between (name deceased) and his next-of-kin and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (name deceased) (or, as I will explain to you, over a shorter period.)]

As I have indicated, in determining [(name deceased)'s net income expectancy] [the value of (name deceased)'s (his) services, protection, care and assistance] [the value of (name deceased)'s (his) society, companionship, comfort, guidance, kindly offices and advice], you must consider his life expectancy. Life expectancy is the period of time (name deceased) may reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant. The life expectancy tables are in evidence. They show that for one of (name deceased)'s age at the time of his death, his life expectancy would have been (state expectancy) years. In determining (name deceased)'s life expectancy, you will consider not only these tables, but also all other evidence as to his health, his constitution and his habits.

(The life expectancy tables show that, at the time of the death of (name deceased), the life expectancy for (name next-of-kin) was (state expectancy), which was shorter than the expectancy shown by the tables for (name deceased). Therefore, you must determine the expectancy of (name next-of-kin) as well as the expectancy of (name deceased). In determining the expectancy of (name next-of-kin), you will consider not only these tables, but also all other evidence as to his health, his constitution and his habits. If you find that the expectancy of (name next-of-kin) is shorter than that of (name deceased), you will determine the monetary value of the (name deceased) to (name next-of-kin) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits he might have expected to receive during his own life.)

In determining the amount of actual damages to be awarded to (name deceased)'s next-of-kin, you are not limited to the things which I have mentioned. You may consider any other evidence which reasonably tends to establish the monetary value of (name

deceased) to his next-of-kin.

Any amount you allow as damages for the future monetary value of (name deceased) to his next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (name deceased)'s future monetary value to his next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (name decedent)'s monetary value to his next-of-kin already has been reduced to present value, you must not reduce it again.)

2. Analysis

a) Loss of Future Income, Benefits, Inheritance

Basically, this boils down to the present value (discussed below) of how much less cash money (so to speak) the heirs will get due to the premature death of the deceased. This includes the loss of payments (or quantifiable benefits) that would have been made to the heirs during the deceased's lifetime had he lived his life expectancy as well as the reduction in inheritance due to the untimely death. The jury may use "logic and common sense" to determine how the heirs would have benefited monetarily had the deceased lived his life expectancy, considering such vague (and I would consider speculative) concepts as "his prospects in life, health, character, ability, industry" as well as "the means he had for making money" and "the business in which he was employed."

The Defendant(s) took away the deceased's dreams. As long as those dreams have a reasonable chance (not a *Dumb and Dumber* "so you're saying there's a chance"), present the decedent's hopes and dreams and let defense counsel look like a jerk trying to explain why the decedent's dreams meant nothing and how the Defendant(s) did not (sometimes literally) crash those "unreasonable" dreams. Ask the jury to put a value the diminished value of future income to the heirs and they will usually put a value on the deceased's hopes and dreams.

b) The services, protection, care and assistance

When the Wrongful Death Statute was enacted over forty years ago, the provision dealing with the loss of services, protection, care and assistance of the deceased to his next-of-kin was nicknamed “the Wife Bill.” Though now it sounds offensive (and maybe back then it did too, I was too young to remember), the provision was actually a recognition that a deceased person may perform many services that do not directly yield income. Think about the obvious for all people: childcare, cleaning up the house, caring for the yard, managing the household, driving the kids around, educating the children, doing chores, handyman work and other nonpaid assistance. You should also expand your mindset to other creative ways to get the heirs compensation for their losses. Remember “[y]ou may consider the family and personal relations between (name deceased) and his next-of-kin.” I successfully argued in a wrongful death trial that the loss of a grandparent’s care, assistance, society, companionship, comfort, kindly offices, and advice to his grandchildren was actually a loss of services, care, and assistance to his children (the parents of the grandchildren) and, thus, compensable as a wrongful death loss, because a grandparent’s help with raising grandchildren is obviously of value to a parent.

c) The society, companionship, comfort, guidance, kindly offices and advice

Unless an expert comes back with a huge number for the net loss of income and/or the loss of services, I usually do not put up evidence of (or even suggest) a number for these elements of wrongful death damages. The reason is that I do not want juries anchored to small numbers when they will come up with larger (sometimes huge) damages based on the loss of “society, companionship, comfort, guidance, kindly offices and advice.” I usually describe these losses as essentially the loss of love. People may say that it is impossible to put a price on love, but every time I have asked a jury (after a conclusion of a trial) or a focus group, they spend all of their time discussing their personal horrors of how much the love of their own parents/children/spouse is worth. Then they start to multiply that number by the number of heirs and the number of years,

and the amount of damages gets large. Plaintiff's counsel wants the jury talking about these concepts rather than bean counting loss of income. The reason is clear: in our own minds, we miss being with those we love more than the money they give us.

C. Conscious Pain and Suffering

1. The Law

N.C.P.I. Civil 810.46 Wrongful Death Damages - Pain and Suffering

Damages for (name deceased's) death also include fair compensation for the actual physical pain and mental suffering experienced by (name deceased) between the time of his injury and the time of his death. You may consider:

[the nature, extent and degree of the injury(ies) sustained by (name deceased)]

[the length of time (name deceased) lived and was conscious of his pain and suffering]

[state any other factor supported by the evidence].

There is no fixed formula for valuing physical pain and mental suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.

2. Using Medical Evidence to Prove Pain and Suffering

Pour through the medical records to find nuggets where the treating medical providers have commented on the mental status of your dying client. You can submit the medical record or, even better, call up the treating medical provider to testify as to what they saw, what it meant, and in their medical opinion how much pain and suffering was involved.

Even if the dying client was never awake, I have spoken to and prepared to introduce into a case expert doctors who will testify that one can suffer if they are in shock or even in a coma. As I write this, I am not sure I would put up an expert solely to testify to unconscious pain and suffering, but I absolutely would ask a doctor who was already on the stand about unconscious pain and suffering.

3. Other Ways to Prove Pain and Suffering

Medical evidence and doctors' testimony is good, but witness testimony is better. Present evidence of what happened and let the jurors come up with the details. Individually and collectively, they will create their own narratives (which are compelling to them individually) as to what was going on in the minds of your dying client. In one case, I had a client that raised his arm from his body while he lay on the street after an accident. When I spoke to people about what was going through his mind, I got twelve different stories (he was reaching to God, he was reaching for his dead loved ones, he was reaching for his wife, he was fighting to get up like a champion fighter after being knocked out). All I had presented was how he got to the position on the road, what his injuries were, and that he was conscious enough to raise his arm. The jury could come up with their own personal images that spoke to them individually.

D. Life Expectancy and Present Value

1. Statutory Tables

a) N.C.G.S. §8-46. Mortality tables as evidence

§8-46. Mortality tables as evidence.

Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively

Completed Age	Expectation
0	75.8
1	75.4
2	74.5 . . .

2. How to use Mortality Table

I always use the mortality table provided by North Carolina law as a starting place for life expectancy. It should always be admitted into evidence, even in those cases

where it is only a backup plan for whatever life expectancy evidence you provide. All you do is go to the column titled “Completed Age” and find the age at the last birthday of the deceased, then find the corresponding number

Remember that if the (now) deceased person’s life expectancy is more than the life expectancy than an heir, then it is the life expectancy of the heir that is used. In other words, if a deceased child had a life expectancy of 74.5 years and his sole heir father has a life expectancy of 38.3 years, then the loss would only be for 38.3, because that would be the expected time they lost together.

Though the life expectancy table “shall be received in all courts and by all persons having power to determine litigation, as evidence,” it may be accompanied by “other evidence as to the health, constitution and habits of the person.” This evidence can be given by lay persons with knowledge or by experts. Most cases will include testimony about how vigorous the now deceased had been. In addition, the doctors of the deceased or other experts can establish a life expectancy more or less than the tables would otherwise show. In one case, my client had a broken neck and was paralyzed. It turns out that there was a registry that tracked the lives of people with various spine injuries by vertebra. I hired the expert, who testified in his opinion how many years my client would have lived with his injury. After this testimony, all of his treating doctors fell in line with the expert’s opinion on life expectancy and the case settled.

3. Present Value

Present value is basically how much future dollars are worth compared to a lump sum of today’s dollars. In other words, what amount of today’s dollars would one trade for a particular income stream of future dollars.

As you might expect, the best thing to do to figure this amount is to hire an expert to do it for you UNLESS you believe the amount the expert will come up with will be small. In those cases, let the jury do the math. Most of the time, they will just add up the damages per year and multiply by the life expectancy, which is a larger number than true present value in almost all imaginable scenarios. In those cases, I leave it up to the defense counsel to explain the math.

III. Pain/Suffering/Mental Anguish Damages for Surviving Family Members

In short, unless surviving family members have a separate cause of action (e.g. negligent/intentional infliction of emotional distress), they do not directly recover for their pain, suffering or mental anguish. As a practical matter, evidence of family member's pain, suffering and mental anguish is admissible to show the love they lost. Thus, a jury sees the pain and suffering of the heirs and, many times, incorporates it into their loss calculations "through the backdoor."

IV. Apportionment of Damages Among Family

A. "Heirs at Law"

The Wrongful Death Statute allows for those persons identified as heirs in the Intestate Succession Act (North Carolina General Statutes Chapter 29) to recover damages for wrongful death. This means, if you are on the "list" of heirs, then you can present your losses to the jury and you can recover your share of damages. The damages of all the heirs are cumulative, adding up to one amount determined by the jury that is then split up by the Personal Representative of the Estate according to each heir's intestate share.

The damages are shared according to their intestate share, even though the relationships are different and the jury intended for one heir to get more damages than another. A jury could think one heir's claim was worth \$900,000 and the other's claim \$100,000, but if their intestate share of the Estate is each 50%, then each gets \$500,000. The estranged son who has been in jail his whole life and has not talked to his father for decades still shares.

B. Intestate Succession

Was the deceased married? If so, the spouse gets a share (the exact share changes depending on how many children or their children's lineal descendants there are as well as if there are surviving parents of the deceased). If there are no children (or their

descendants) and no surviving parents of the deceased, then the spouse gets everything.

Did the deceased have children? If these children (or their lineal descendants) are legitimate, they get shares. The exact share for each child (or their lineal descendants) is dependent on how many children (or their lineal descendants) there are and whether there was a surviving spouse.

If there is no surviving spouse and no children (or their lineal descendants), then the surviving parents get a share. If there is no surviving spouse, no children (or their lineal descendants), and no surviving parents, then the brothers and sisters (or their lineal descendants) get a share. If there is no surviving spouse, no children (or their lineal descendants), no surviving parents, and no surviving brothers and sisters (or their lineal descendants), then it shares go to surviving grandparents, uncles or aunts (or their lineal descendants), depending on the complicated circumstances laid out in the statutes.

C. Does the Will Matter?

Not really with regards to who gets to share in the wrongful death proceeds. The Will may name an Executor, who controls the wrongful death claim and files a lawsuit, if necessary.