

**1861 DEATH OF SPOUSE (DOMESTIC PARTNER): PECUNIARY LOSS**

(Plaintiff), as the surviving (spouse) (domestic partner) of (deceased), is entitled to be compensated for any financial loss (he) (she) sustained as a result of (his) (her) (spouse's) (domestic partner's) death.

In answering question \_\_\_\_, consider: (deceased)'s age, the age of (surviving spouse) (domestic partner), (deceased)'s condition of health prior to the accident, (deceased)'s earning capacity, and (his) (her) reasonable prospects for earning at the time of (his) (her) death. Your answer should be a sum, if any that equals the value of the support and protection (he) (she) would have furnished to (surviving spouse) (domestic partner) during the time (he) (she) probably would have lived. In determining this sum, consider the number and ages of (deceased)'s children, the assistance and services (he) (she) would have rendered to (surviving spouse) (domestic partner) had (he) (she) lived in keeping, maintaining, and supervising the home and in the caring for (his) (her) children.

[If (deceased) rendered gratuitous services to (surviving spouse) (domestic partner) in (spouse's) (domestic partner's) business for which (spouse) (domestic partner) would have to employ others to do the work (deceased) performed and, if you are reasonably certain that the services would have continued in the future had (deceased) lived, then you may consider the reasonable value of the future services and make allowance for them.]

[You should also consider any accumulations of property that would have resulted from the earnings of (deceased) during the time (he) (she) would probably have lived, and the reasonable expectation, if any, which (surviving spouse) (domestic partner) had of ultimately receiving the accumulations.]

Do not include any amount for pain and suffering of (deceased) prior to death, for burial expenses, for the loss of society and companionship of (deceased), or for the grief or anguish suffered by (surviving spouse) (domestic partner) because of (deceased)'s death. [These items are covered by other questions in the verdict.]

[While (spouse) (domestic partner) has the burden of establishing pecuniary loss, the evidence relating to this type of damage need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You are not required in determining pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which reasonably supports your determination of damages.]

#### COMMENT

This instruction and comment were approved in 1991 and revised in 2000 and 2009. The instruction replaced Wis JI-Civil 1860 and 1865.

Wis. Stat. § 895.04(4).

See Wis JI-Civil 1796 for the present value of future losses.

Wis. Stat. § 895.04(2) denominates plaintiffs in wrongful death actions. If a deceased leaves a surviving spouse or domestic partner under Chapter 770, the spouse or domestic partner is the owner of the wrongful death action. Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967), held that the amendment to § 895.04(2) did not affect a change so far as priority of ownership of the cause of action was concerned. If a spouse or domestic partner survives, that person is the owner of the wrongful death cause of action and the children are not. A surviving domestic partner under Chapter 770 was given a claim in 2009 for wrongful death.

The Cogger case has been cited with approval in Hanson v. Valdivia, 51 Wis. 2d 466, 187 N.W.2d 151 (1971), and Steinbarth v. Johannes, 138 Wis. 2d 182, 405 N.W.2d 720 (1987).

**Pecuniary Loss.** In wrongful death cases, a jury is permitted to consider many elements in determining pecuniary loss, not just actual earnings. Ewen v. Chicago & N.W. Ry. Co., 38 Wis. 613, 624 (1875); Estate of Holt v. State Farm, 151 Wis. 2d 455, 460, 444 N.W. 2d 453 (Ct. App. 1989). In Estate of Holt, the court of appeals said "pecuniary injury" should be broadly construed. The court concluded that

"pecuniary injury," in the wrongful death statute, means "a loss of any benefit which the beneficiary would have received from the decedent if the decedent had lived."

In Maloney v. Wisconsin Power, L. & H. Co., 180 Wis. 546, 193 N.W. 382 (1923), the supreme court approved the trial court's instruction which advised the jury that it was to consider the age of the deceased and the surviving wife, the condition of health of the deceased and his earning capacity, his reasonable prospects at the time of his death, the accumulations of property which would have resulted from his earnings during the time he probably would have lived and the reasonable expectation which his wife had of ultimately receiving such accumulations of property. The court went on to say that the jury could allow such sum as would equal the present value of such support and protection of the wife.

In Herro v. Northwestern Malleable Iron Co., 181 Wis. 198, 201, 194 N.W. 383 (1923), the court held that a surviving spouse was entitled to be compensated for the loss of services performed by the decedent in and about the business of such spouse which would continue after death.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepinning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972).

**Evidence of Loss.** The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

**Surviving Domestic Partner.** As part of the State Budget Bill, a domestic partnership was recognized.

The Budget Bill's provisions extended certain legal rights to domestic partners, including the right to recover damages for wrongful death of a deceased partner. Wis. Stat. 895.04(2) was amended as follows:

**SECTION 3269.** 895.04(2) and (6) of the statutes are amended to read:

895.04(2) If the deceased leaves surviving a spouse **or domestic partner under ch. 770, and domestic partner under s. 770.05**, and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse **or surviving domestic partner**, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse **or domestic partner** of the deceased; if no spouse **or domestic partner** survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled

to recover for the wrongful death. A surviving nonresident alien spouse **or a nonresident alien domestic partner under ch. 770** and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's **or surviving domestic partner's** interest in the amount recovered. If the amount allocated to any child under this subsection is less than \$10,000, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

The legislation added "a surviving domestic partner" to § 895.04(6), but the legislation did not add "a surviving domestic partner" to § 895.04(4) which reads:

**(4)** Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed \$500,000 per occurrence in the case of a deceased minor, or \$350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the **spouse, children or parents of the deceased, or to the siblings** of the deceased, if the siblings were minors at the time of the death. (Emphasis added)

Thus, while a domestic partner may recover for "pecuniary injury" from wrongful death, he or she does not apparently have the right to recover for loss of society and companionship under the second sentence. The committee revised Wis JI-Civil 1861 (pecuniary loss) to include a domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), other than mentioning in that instruction's commentary the problematic statutory language as to the recovery of loss of society and companionship damages by a domestic partner.