

1870 DEATH OF SPOUSE: SURVIVING SPOUSE'S LOSS OF SOCIETY AND COMPANIONSHIP

Question ___ asks you to determine (spouse)'s loss of society and companionship resulting from the death of (deceased spouse).

Society and companionship includes the love, affection, care, and protection (spouse) would have received from (deceased spouse) had (he) (she) continued to live. It does not include the loss of monetary support or the grief and mental suffering caused by the spouse's death.

In determining (spouse)'s loss of society and companionship, you should consider the age of (deceased spouse) and the age of (surviving spouse); the past relationship between the spouses; the love, affection, and conduct of each toward the other; the society and companionship that had been given to (surviving spouse) by (deceased spouse); and the personality, disposition, and character of (deceased spouse). The amount inserted by you should reasonably compensate spouse for any loss of society and companionship (she) (he) has sustained since the death of (deceased spouse) and the amount you are reasonably certain (she) (he) will sustain in the future.

Although the law provides that a party cannot recover more than (\$350,000) (\$500,000) for the loss of a spouse's society and companionship, this dollar limit is not a measure of damage; it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (spouse) for any loss of society and companionship.

COMMENT

The instruction and comment were initially approved by the Committee in 1979. The instruction was revised in 1981, 1988, 1992, 1999, and 2000 to reflect legislative amendments increasing the maximum recovery and to make the instructions on loss of society and companionship consistent. The comment was updated in 1990, 1991, 1992, 1999, 2004, 2005, 2010, 2011, 2015, 2018 and 2019.

This instruction was cited by the court in Koltka v. PPG Industries, Inc., 130 Wis.2d 499, 519, 338 N.W.2d 160 (1986).

Loss of society and companionship does not create a new cause of action but only another element of damages. Herro v. Steidl, 255 Wis. 65, 37 N.W.2d 874 (1949); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944); Papke v. American Auto Ins. Co., 248 Wis. 347, 21 N.W.2d 724 (1946). For eligibility of claimants for this element of damages, see Cincoski v. Rogers, 4 Wis.2d 423, 90 N.W.2d 784 (1958).

The last paragraph of the instruction is mandated by Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

Statute. See Wis. Stat. § 895.03 and 895.04.

Damage Caps. The maximum recovery was increased in 1998 to \$350,000 in the case of a deceased adult and \$500,000 for a deceased minor. Wis. Stat. § 895.04(4).

Wrongful Deaths Outside of Wisconsin. In 2014, the Wisconsin Supreme Court considered a case involving a fatal snowmobile accident in Michigan, killing a Wisconsin resident. The surviving spouse brought a wrongful death action in Wisconsin. The circuit court determined that the wrongful death damage limitations in § 895.04 applied to the spouse's claim. The court of appeals disagreed. The Wisconsin Supreme Court affirmed. It said that the limitations on wrongful death claims in § 895.04 refer to wrongful death claims created by Wis. Stat. § 895.03. It ruled that § 895.04 cannot be applied separately from Wis. Stat. § 895.03. The court further held that because § 895.03 does not apply to deaths in another state, there is no conflict between Wisconsin law and Michigan's wrongful death statute and Michigan's limitation, higher than Wisconsin's damage limit, applies. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 895.04(4) (2011 Wisconsin Act 2).

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the \$350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - -

not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a \$750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called “rational basis with teeth, or meaningful rational basis.” However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that “the legislature’s comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis.” Therefore, the \$750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional.” See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Surviving Domestic Partners. Currently, there are two instructions covering a surviving spouse’s claim for wrongful death. Wis JI-Civil 1861 instructs on recovery of pecuniary loss and Wis JI-Civil 1870 applies to recovery of damages for loss of society and companionship.

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 domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), to include a domestic partner.