

1895 DEATH OF CHILD: PARENT'S LOSS OF SOCIETY AND COMPANIONSHIP

Question __ asks you to determine [(the parent)s'] [(parent)'s] loss of society and companionship resulting from the death of (child).

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

In determining [(parent)s'] [(parent)'s] loss of society and companionship, you should consider the age of the deceased child and the ages of the (parents) (parent); the past relationship between the child and the (parents) (parent); the love, affection, and conduct of each toward the other; the society and companionship that had been given to the (parents) (parent) by the child; and the personality, disposition, and character of the child. The amount inserted by you should reasonably compensate the (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) sustained since the death of (child) and the amount you are reasonably certain (they) (he) (she) 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 child'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 (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) suffered.

COMMENT

The instruction was approved in 1978 and revised in 1988, 1997, 1999, and 2000. The comment was updated in 2004, 2005, 2012, 2015, 2018, and 2019.

This instruction is by analogy from Cameron v. Union Auto Ins. Co., 210 Wis. 659, 666-67, 246 N.W. 420, 423 (1933), which involved a husband-wife relationship. In Potter v. Potter, 224 Wis. 251, 259, 272 N.W. 34, 37 (1937), the court's remarks with regard to a husband's loss of society and companionship also give some collateral support to the elements in the instruction.

The fourth paragraph follows the opinion in Peot v. Ferraro, 83 Wis.2d 727, 746, 266 N.W.2d 586 (1978): ". . . recovery is limited . . . ; the statutory figure is not a measure of damage, but only a limit above which the jury cannot go. . . ."

Separate Inquiries for Parents' Claims. Where the parents are separated or divorced, it may be advisable to submit separate questions for each parent. Alternatively, the parents can stipulate at the beginning that they will split equally an award of loss of society and companionship.

Damage Cap. Wis. Stat. § 895.04(4). The limit for loss of society and companionship was raised from \$150,000 to \$350,000 for a deceased adult or \$500,000 for a deceased minor by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. If the death of the child occurred before the effective date, the amount should be changed to \$150,000.

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 in 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.

Damage Cap Where Death Occurs in Another State. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324 and comment to Wis JI-Civil 1870.