

1897 DEATH OF PARENT: CHILD'S LOSS OF SOCIETY AND COMPANIONSHIP

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

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

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

If you find that (child) will sustain a loss of the (parent)'s society and companionship in the future, you should include in your award such sum as will fairly and reasonably compensate (child) for the future loss [**Note:** In medical negligence cases, add the following: but only until (child) reaches (his) (her) 18th birthday; see note in Comment].

Although the law provides that a party cannot recover more than (\$350,000) (\$500,000) for the loss of a parent'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 (child) for any loss of society and companionship (he) (she) has sustained.

COMMENT

This instruction and comment were approved by the Committee in 2000 and revised in 2001. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 2004, 2005, 2009, 2011, 2012, 2015, 2016, 2018 and 2019.

Damage Cap. The limit for loss of society and companionship was raised from \$150,000 to \$350,000 (for a deceased adult) and \$500,000 (for a deceased minor) by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a parent 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). The fifth 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. . . ." See also Guzman v. St. Francis Hospital, Inc., 2001 WI App 21, 240 Wis.2d 559, 623 N.W.2d 776.

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.

Post Majority Recovery. If the parent dies as a result of a cause unrelated to medical negligence, then Wis. Stat. § 895.04 allows recovery of loss of society and companionship by an adult child. See Pierce v. American Family Ins. Co., 2007 WI App 152, 303 Wis.2d 726, 736 N.W.2d 247. Conversely, if the cause of death is medical negligence, then a child may recover damages for loss of society and companionship but only until the child reaches his or her 18th birthday. In Czapinski v. St. Francis Hosp., 2000 WI 80, 236 Wis.2d 316, 613 N.W.2d 120, the deceased’s adult children sought damages for the loss of their mother’s society and companionship following her death during hip replacement surgery. The trial judge held that under Wis. Stat. § 893.55(4)(f), adult children lack standing to recover for the wrongful death of a parent caused by medical malpractice. The supreme court agreed. The supreme court said the classification of claimants entitled to bring a wrongful death suit for medical negligence is limited to those enumerated in Wis. Stat. § 655.007. It held that § 893.55(4)(f) which limits damages in medical malpractice cases does not expand the classification of claimants under § 655.007, entitled to recover for loss of society and companionship in the wrongful death of a parent caused by medical malpractice to include adult children. The court noted that § 895.04(2) includes adult children in the class of claimants that may recover damages for wrongful death.

In 2012, the Court of Appeals held that Wis. Stat. § 895.04 bars a decedent’s adult child from recovering damages for loss of society and companionship if the wrongful death claim belongs to the surviving spouse. Bowen v. American Family Ins. Co., 2012 WI App 29, 340 Wis.2d 232, 811 N.W.2d 887.

If pecuniary loss for wrongful death is limited by a statute in effect at time of accident, the last paragraph should be tailored to advise the jury of the dollar limit on recovery for pecuniary loss, also.

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.