

**DAMAGES--WRONGFUL DEATH****INTRODUCTION**

Previously at common law, actions for personal injuries were abated if, before a verdict was returned, the plaintiff died from the injuries for which he sued. *Susemihl v. Red River Lumber Co.*, 376 Ill. 138, 33 N.E.2d 211 (1941). This was true in spite of the Survival Statute. 755 ILCS 5/27-6. The law was changed by the Illinois Supreme Court in *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974). The Survival Statute now has the same application to all cases resulting in death that it has always had in cases where death resulted from a cause other than the initial tortious injury.

If death results from the initial tortious injury, the Wrongful Death Act creates a cause of action in the name of the personal representative for the benefit of the widow and next-of-kin for their "pecuniary injuries." 740 ILCS 180/1, 180/2. The term "pecuniary injuries" has been interpreted to include benefits of a pecuniary value, which includes money, goods, and services received by the next of kin of the deceased. When there are surviving children, it also includes the instruction, moral training, and superintendence of education that the children would have received from the deceased parent. "Pecuniary injuries" has also been held to include the loss of consortium by the surviving spouse, *Elliott v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982); the loss of a minor child's society by the parents, *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984); the loss of an unmarried adult child's society by the parents, *Prendergast v. Cox*, 128 Ill.App.3d 84, 470 N.E.2d 34, 83 Ill.Dec. 279 (1st Dist. 1984); the loss of a parent's society by an adult child, *In re Estate of Keeling*, 133 Ill.App.3d 226, 478 N.E.2d 871, 88 Ill.Dec. 380 (3d Dist. 1985); and the proven loss of a sibling's society, *In re Estate of Finley*, 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992).

If there is both a survival action and a wrongful death action, pecuniary injuries, such as those for loss of support, should be carefully confined to the period after death. This helps avoid duplication of those damages allowable under the survival action for lost wages during the lifetime of the injured party.

Where the decedent leaves direct lineal kin, or a widow or widower, there is a presumption that they have suffered some substantial pecuniary loss by reason of the death. *Ferraro v. Augustine*, 45 Ill.App.2d 295, 196 N.E.2d 16 (1st Dist. 1964); *Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958); *Dukeman v. Cleveland, C., C. & St. L. Ry.*, 237 Ill. 104, 86 N.E. 712 (1908); *Dodson v. Richter*, 34 Ill.App.2d 22, 180 N.E.2d 505 (3d Dist. 1962). This presumption applies even where the decedent was an adult and the next of kin are also adults. *Ferraro, supra*; *Dukeman, supra*. The presumption of some substantial pecuniary loss will be an element which the jury must consider with other evidence, if there is other evidence, or alone, if there is no other evidence, to determine what they will award if they decide in favor of the plaintiff. The power of the jury to determine the weight that should be given to this presumption was upheld in *Flynn v. Vancil*, 41 Ill.2d 236, 239; 242 N.E.2d 237, 240 (1968), the court cites these instructions with approval.

*Bullard, supra*, held there is no longer a presumption of loss of earnings upon the death of a minor child, but there is a presumption of pecuniary injury to the parents in the loss of a minor child's society. *Ballweg v. City of Springfield*, 114 Ill.2d 107, 499 N.E.2d 1373, 102 Ill.Dec. 360 (1986), and *Prendergast v. Cox, supra*, extended this presumption to include the loss of an adult child's society by the parents. No such presumption attaches in the case of siblings. *In re Estate of Finley, supra*.

It is now also possible to recover for the wrongful death of an unborn child if the fetus was viable at the time of the tortious act. *Green v. Smith*, 71 Ill.2d 501, 377 N.E.2d 37, 17 Ill.Dec. 847 (1978). The presumption of the parents' loss of society injury extends to a stillborn child. *Seef v. Sutkus*, 145 Ill.2d 336, 583 N.E.2d 510, 164 Ill.Dec. 594 (1991). Of course, there can be no cause of action against a physician for the wrongful death of a fetus caused by an abortion which was permitted by law and where the requisite consent was given. 740 ILCS 180/2.2.

Punitive damages may not be recovered in an action under the Wrongful Death Act. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 330 N.E.2d 509 (1975). Nor may a common law action for punitive damages survive under the Survival Act. *Froud v. Celotex Corp.*, 98 Ill.2d 324, 456 N.E.2d 131, 74 Ill.Dec. 629 (1983). However, a statutory right to punitive damages, such as that provided for under the Public Utilities Act, may pass unabated to decedent's estate under the Survival Act. *National Bank of Bloomington v. Norfolk & W. Ry.*, 73 Ill.2d 160, 383 N.E.2d 919, 23 Ill.Dec. 48 (1978); *Churchill v. Norfolk & W. Ry.*, 73 Ill.2d 127, 383 N.E.2d 929, 23 Ill.Dec. 58 (1978). (Effective January 1, 1986, the Public Utilities Act was amended to exclude railroads and certain other entities from its coverage. 220 ILCS 5/3-105.)

Under the "Family Expense Statute" (750 ILCS 65/15), a spouse or parent may be liable for medical and funeral expenses. Therefore, an independent cause of action may be maintained by a surviving spouse for any of these expenses not recoverable under the Survival Statute. *Thompson v. City of Bushnell*, 346 Ill.App. 352, 105 N.E.2d 311 (3d Dist. 1952) (spouse); *Saunders v. Schultz*, 20 Ill.2d 301, 170 N.E.2d 163 (1960) (spouse); *Graul v. Adrian*, 32 Ill.2d 345, 205 N.E.2d 444 (1965) (spouse); *Ragan v. Protko*, 66 Ill.App.3d 257, 383 N.E.2d 745, 22 Ill.Dec. 937 (5th Dist. 1978) (parent); *Rodgers v. Consolidated Railroad Corp.*, 136 Ill.App.3d 191, 482 N.E.2d 1080, 90 Ill.Dec. 797 (4th Dist. 1985) (parent). Alternatively, the administrator of an estate can bring an independent action for medical and funeral expenses. *Eggimann v. Wise*, 56 Ill.App.2d 385, 206 N.E.2d 472 (3d Dist. 1964).

### **31.01 Measure of Damages--Wrongful Death--Minor Child Decedent--Lineal Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g. parent] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin] from the death of the decedent.

“Pecuniary loss” may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] has sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [next of kin];]

[10. The relationship between [lineal next of kin] and the decedent.]

[The pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

*Instruction, Notes and Comment revised October 2007.*

### Notes on Use

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

### Comment

In *Bullard v. Barnes*, 102 Ill.2d 505, 517, 468 N.E.2d 1228, 1234, 82 Ill.Dec. 448, 454 (1984), the Illinois Supreme Court abolished the former presumption of loss of earnings and created a presumption for loss of the minor child's society. The Court held:

[T]here can be no presumption of loss of earnings upon the death of a child since such a presumption represents an aberration from, rather than a reflection of, the typical family experience. However, we have concluded that parents are entitled to a presumption of pecuniary injury in the loss of a child's society, based on the holding expressed earlier in this opinion that the pecuniary injury for which parents may recover under the wrongful death statute includes this form of loss.

### **31.01(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Lineal Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g., parent] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin, e.g., parent] from the death of the decedent.

“Pecuniary loss” may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin, e.g., parent], the law recognizes a presumption that the [lineal next of kin, e.g., parent] has sustained some substantial pecuniary loss by reason of the loss of the [decedent's] society. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [lineal next of kin e.g. parent] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

*Instruction, Notes and Comment created October 2007.*

#### **Notes on Use**

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining “society.”

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship the family may have enjoyed with the decedent. *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover

damages for their grief, sorrow and mental suffering.

### Comments

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v. Sutkus*, 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.*, 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); Illinois Wrongful Death Act, 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

### **31.02 Measure of Damages--Wrongful Death--Minor Child Decedent--Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin, e.g., brother] of the decedent for the pecuniary loss proved by the evidence to have resulted to [collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, and society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [collateral next of kin];]

[10. The relationship between [collateral next of kin] and [decedent].]

Whether pecuniary loss has been proved by the evidence is for you to determine.

*Instruction, Notes and Comment revised October 2007.*

#### **Notes on Use**

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

### Comment

Resolving a conflict in the decisions of the appellate court, the Illinois Supreme Court has ruled that proven loss of a sibling's society is a “pecuniary injury” for which the other siblings can recover. *In re Estate of Finley*, 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992). Unlike surviving spouses and lineal heirs, however, siblings are not entitled to any presumption of loss of society damages. *Id.*

Since there is no presumption of loss of a sibling's society, and there never has been any presumption of any loss of support or other damages in the case of siblings or other collateral heirs (*Rhoads v. Chicago & A. R.R.*, 227 Ill. 328, 335, 81 N.E. 371, 373 (1907); *Wilcox v. Bierd*, 330 Ill. 571, 580, 162 N.E. 170, 174, 175 (1928); *Howlett v. Doglio*, 402 Ill. 311, 316, 83 N.E.2d 708, 711 (1949); *Shehy v. Bober*, 78 Ill.App.3d 1061, 398 N.E.2d 80, 34 Ill.Dec. 405 (1st Dist. 1979); *Dodson v. Richter*, 34 Ill.App.2d 22, 25, 180 N.E.2d 505, 507 (3d Dist. 1962)), it follows that only proven wrongful death damages are recoverable by collateral heirs.

### **31.02(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin, e.g., brother] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [collateral next of kin, e.g., brother] from the death of the decedent.

“Pecuniary loss” may include loss of money, benefits, goods, services, and society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [collateral next of kin, e.g., brother] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

Whether pecuniary loss has been proved by the evidence is for you to determine.

*Instruction, Notes and Comment created October 2007.*

#### **Notes on Use**

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining “society.”

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship the family may have enjoyed with the decedent. *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover damages for their grief, sorrow and mental suffering.

#### **Comments**

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v.*

*Sutkus*, 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.*, 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); *Illinois Wrongful Death Act*, 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

### **31.03 Measure of Damages--Wrongful Death--Minor Child Decedent--Lineal and Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin, e.g. brother, parent, etc.] of the decedent for the pecuniary loss proved by the evidence to have resulted to [the lineal and collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] have sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

There is no presumption of pecuniary loss to the [collateral next of kin] of the decedent.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [next of kin];]

[10. The relationship between [lineal and collateral next of kin] and [decedent].]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

*Instruction, Notes and Comment revised October 2007.*

### **Notes on Use**

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

### **Comment**

*See* Comments to IPI 31.01 and 31.02.

### **31.03(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Lineal and Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin, e.g., parent, brother, etc.] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal and collateral next of kin, e.g., parent, brother, etc.] from the death of the decedent.

“Pecuniary loss” may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin, e.g., parent], the law recognizes a presumption that the [lineal next of kin, e.g., parent] has sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

There is no presumption of pecuniary loss to a [collateral next of kin, e.g., brother] of the decedent.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [collateral next of kin, e.g., brother] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

*Instruction, Notes and Comment created October 2007.*

#### **Notes on Use**

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining “society.”

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship

the family may have enjoyed with the decedent. *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover damages for their grief, sorrow and mental suffering.

### **Comments**

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v. Sutkus*, 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.*, 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); Illinois Wrongful Death Act, 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini*, 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

### **31.04 Measure of Damages--Wrongful Death--Adult Decedent--Widow and/or Lineal Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g., widow] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin] of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] have sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his child had he lived;]

[5. His age;]

[6. His sex;]

[7. His health;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [next of kin];]

[11. The relationship between [lineal next of kin, e.g. son] and [decedent].]

[12. The marital relationship that existed between [widow/widower] and [decedent].]

[Widow/widower] is not entitled to damages for loss of [decedent's] society and sexual relations after [date of remarriage].

*Instruction, Notes and Comment revised October 2007.*

### **Notes on Use**

Use only those factors 1-12 which are applicable to the facts of this case. If the surviving spouse has remarried, the bracketed paragraph should be utilized to insert the date of the remarriage. *See Carter v. Chicago & Ill. Midland Ry. Co.*, 130 Ill.App.3d 431, 474 N.E.2d 458, 85 Ill.Dec. 730 (4th Dist. 1985).

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

### **Comment**

Various factors in addition to loss of support or monetary contributions are proper in determining pecuniary damages. *Rasmussen v. Clark*, 346 Ill.App. 181, 104 N.E.2d 325 (2d Dist. 1952) (decedent's payment of utility bills and personal services at home); *Hudnut v. Schmidt*, 324 Ill.App. 548, 58 N.E.2d 929 (3d Dist. 1944) (mental and physical capacity, habits of industry and sobriety, usual earnings and probability of future earnings); *O'Brien v. Chicago & N.W. Ry. Co.*, 329 Ill.App. 382, 68 N.E.2d 638 (2d Dist. 1946) (prospects of increased earnings from inflation and rise of cost of living); *Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958) (loss of father's instruction and moral training); *Flynn v. Fogarty*, 106 Ill. 263 (1883) (net income); *Kaiserman v. Bright*, 61 Ill.App.3d 67, 377 N.E.2d 261, 18 Ill.Dec. 108 (1st Dist. 1978) (future support and attention, care, superintendence, and education); *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379 (1870) (prospective pecuniary benefits); *Graul v. Adrian*, 32 Ill.2d 345, 205 N.E.2d 444 (1965) (value of decedent's contributions to family unit); *Elliott v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982) (loss of consortium, consisting of society, companionship, and sexual relations, by the surviving spouse); *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984) (loss of a minor child's society by the parent); *Prendergast v. Cox*, 128 Ill.App.3d 84, 470 N.E.2d 34, 83 Ill.Dec. 279 (1st Dist. 1984) (loss of unmarried adult child's society by parents); *In re Estate of Keeling*, 133 Ill.App.3d 226, 478 N.E.2d 871, 88 Ill.Dec. 380 (3d Dist. 1985) (loss of parent's society by an adult child).

“Other deductions” do not include income taxes. *See Klawonn v. Mitchell*, 105 Ill.2d 450, 475 N.E.2d 857, 86 Ill.Dec. 478 (1985); *cf. McCann v. Lisle--Woodridge Fire Protection Dist.*, 115 Ill.App.3d 702, 450 N.E.2d 1311, 71 Ill.Dec. 432 (2d Dist. 1983).

In *Carter v. Chicago & Ill. Midland Ry. Co.*, 130 Ill.App.3d 431, 474 N.E.2d 458, 85

Ill.Dec. 730 (4th Dist. 1985), it was held that there can be no claim for loss of consortium by a spouse for the period of time after his or her remarriage.

### **31.05 Measure of Damages--Wrongful Death--Adult Decedent--Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, [and] society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. His age;]

[5. His sex;]

[6. His health;]

[7. His physical and mental characteristics;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [collateral next of kin];]

[11. The relationship between [collateral next of kin] and [decedent].]

Whether pecuniary loss has been proved by the evidence is for you to determine.

*Instruction, Notes and Comment revised October 2007.*

#### **Notes on Use**

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-11 which have a basis in the evidence.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

### **Comment**

*See* Comments to IPI 31.02 and 31.04.

### **31.06 Measure of Damages--Wrongful Death--Unmarried Adult Decedent--Lineal and Collateral Next of Kin Surviving**

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin] of the decedent for the pecuniary loss proved by the evidence to have resulted to [the next of kin] from the death of the decedent.

“Pecuniary loss” may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] has sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. His age;]

[5. His sex;]

[6. His health;]

[7. His physical and mental characteristics;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [next of kin];]

[11. The relationship between [next of kin] and [decedent].]

*Instruction, Notes and Comment revised October 2007.*

### **Notes on Use**

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-11 which have a basis in the evidence.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining “society” whenever loss of society is claimed.

### **Comment**

*See* Comments to IPI 31.02 and 31.04.

### **31.07 Measure of Damages--Wrongful Death--Factors Excluded**

[Under Count \_\_\_\_,] In determining “pecuniary loss” you may not consider the following:

- [1. The pain and suffering of the decedent;]
- [2. The grief or sorrow of the next of kin;] [or]
- [3. The poverty or wealth of the next of kin.]

*Instruction, Notes and Comment revised October 2007.*

#### **Notes on Use**

For causes of action that accrue after May 31, 2007, paragraph 2 should be deleted from this instruction. Under P.A. 95-3, effective May 31, 2007, next of kin may recover damages for their grief, sorrow and mental suffering.

This instruction is designed to prevent the jury from considering factors which are not elements of damage in a cause of action based on pecuniary injury. If used, it should follow IPI 31.01, 31.04, or 31.06.

Ordinarily evidence is not admitted as to wealth or poverty of the widow or next of kin. Item 3 may be used only when such evidence has been admitted.

In cases brought under the Survival Act, the decedent's pain and suffering may be compensable. Where a trial involves concurrent claims under the Survival Act and the Wrongful Death Act, paragraph 1 should be deleted from this instruction because of the possibility of confusing the jury.

#### **Comment**

The emotional aspects of a death are not compensable to the next of kin. *Chicago & A.R. Co. v. Shannon*, 43 Ill. 338 (1867); *Chicago & N.W.R. Co. v. Swett*, 45 Ill. 197 (1867) (pain and suffering of bereavement); *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170 (1928), *aff'g* 235 Ill. App. 126 (3d Dist. 1924) (wealth or poverty of beneficiary); *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379 (1870) (helplessness of beneficiary).

The Legislature has modified the Wrongful Death Act to permit recovery of damages for grief, sorrow and mental suffering of the lineal next of kin. This amendment applies to all causes of action accruing on and after May 31, 2007. 740 ILCS 180/2.

### **31.08 Damages--Wrongful Death--Contributory Negligence--More Than One Beneficiary**

[Withdrawn]

#### **Comment**

IPI 31.08 formerly read, “If you find that [surviving spouse] [or] [next of kin] negligently contributed to cause the death of the decedent, the negligence of that person does not bar recovery by the plaintiff, but in any award you make you may not include damages for any pecuniary injuries suffered by that person.” It has been withdrawn due to the amendment of section 2 of the Wrongful Death Act (740 ILCS 180/2).

*Instruction withdrawn March 2007.*

### **B31.08 Damages--Wrongful Death--Contributory Fault--Decedent**

If you find that decedent contributed to the total proximate cause of the death of the decedent you shall determine the percentage of contributory (fault) (negligence) of decedent.

If you find that the contributory (fault) (negligence) of the decedent was more than 50% of the total proximate cause of the death of the decedent, then you shall enter a verdict in favor of the defendant(s). If you find that the contributory (fault) (negligence) of the decedent was 50% or less of the total proximate cause of the death of the decedent, then your verdict should be for the plaintiff and you will reduce damages in the manner stated in the instructions.

*Instruction, Notes and Comment revised May 2014.*

#### **Notes on Use**

This instruction should be used whenever there is an issue of contributory fault of the decedent. If there is an issue of the beneficiaries' contributory fault, then also use either IPI B31.08.01 (several beneficiaries) or IPI B31.08.02 (sole beneficiary).

### **31.08.01B Damages--Wrongful Death--Contributory Fault --More Than One Beneficiary**

If you find that [any] beneficiary contributed to the total proximate cause of the death of the decedent you shall determine the percentage of contributory (fault) (negligence) of [that] beneficiary.

The contributory (fault) (negligence) of a beneficiary affects his/her right to recover damages.

If you find that the contributory (fault) (negligence) of [any] beneficiary was more than 50% of the total proximate cause of the death of the decedent, then [that] beneficiary shall not recover damages from this suit. However, you are not to consider this fact in arriving at the total amount of damages, if any, in this case.

If you find that the contributory (fault) (negligence) of [any] beneficiary was 50% or less of the total proximate cause of the death of the decedent, his/her damages shall be reduced in that proportion and the Court shall make the adjustments required by law with respect to the recovery of [that] beneficiary.

*Instruction, Notes and Comment revised May 2014.*

#### **Notes on Use**

This instruction should be used whenever there is an issue of contributory fault as to two or more of the beneficiaries on behalf of whom the suit is brought. If there is an issue of contributory fault of a sole beneficiary, use IPI B31.08.02.

#### **Comment**

Contributory fault of a beneficiary no longer bars recovery, but will only reduce that beneficiary's recovery if no greater than 50% of the total fault. 740 ILCS 180/2. The jury's verdict will be adjusted by the Court after a hearing on the issue of dependency. See provisions of 740 ILCS 180/2 for the proper procedure. If the contributory fault of the beneficiary is more than 50% of the total fault, that beneficiary takes nothing and the percentage of dependency the trial judge finds for that beneficiary will inure to the benefit of the defendant. If the contributory fault of the beneficiary is not more than 50% of the total fault, the damages he would recover based on the percentage of dependency are reduced by his fault, thus reducing the total judgment amount payable by the defendant.

### **B31.08.02 Damages--Wrongful Death--Contributory Fault -- Sole Beneficiary**

If you find that the beneficiary contributed to cause the death of the decedent, then you must determine the percentage of the contributory (fault) (negligence) of the beneficiary.

The contributory (fault) (negligence) of the beneficiary affects his/her right to recover damages.

If you find that the contributory (fault) (negligence) of the beneficiary was more than 50% of the total proximate cause of the death of the decedent, then your verdict should be for the defendant(s).

If you find that the contributory (fault) (negligence) of the beneficiary was 50% or less of the total proximate cause of the death of the decedent, then your verdict should be for the plaintiff and the beneficiary's damages shall be reduced in that proportion and the Court shall make the adjustments required by law with respect to the recovery of the beneficiary.

*Instruction, Notes and Comment approved May 2014.*

#### **Notes on Use**

This instruction should be used whenever there is an issue of contributory fault by the sole beneficiary on whose behalf the suit is brought. If there is an issue of contributory fault as to two or more of the beneficiaries on behalf of whom the suit is brought, use IPI B31.08.01.

#### **Comment**

Contributory fault of a beneficiary no longer bars recovery, but will only reduce that beneficiary's recovery if no greater than 50% of the total fault. 740 ILCS 180/2. The jury's verdict will be adjusted by the Court after a hearing on the issue of dependency. See provisions of 740 ILCS 180/2 for the proper procedure. If the contributory fault of the sole beneficiary is more than 50% of the total fault, the beneficiary takes nothing and the verdict should be for the defendant(s). If the contributory fault of the sole beneficiary is not more than 50% of the total fault, the damages he or she would recover based on the percentage of dependency are reduced by his or her fault, thus reducing the total judgment amount payable by the defendant(s).

### **31.09 Action for Wrongful Death and Survival Action Brought by Personal Representative**

The plaintiff [administrator's or executor's name] brings this action in a representative capacity by reason of his being [administrator] [executor] of the estate of [deceased's name], deceased. He represents [names of widow and/or next of kin], the [widow] [and] [next of kin] of the deceased [, and the estate of the deceased]. They are the real parties in interest in this lawsuit, and in that sense are the real plaintiffs whose damages you are to determine if you decide for the [administrator] [executor] of the estate of [deceased's name].

#### **Notes on Use**

This instruction should be given in cases based on the Wrongful Death Act (740 ILCS 180/1 (1994)) and the Survival Statute (755 ILCS 5/27-6 (1994)), and should be accompanied by the appropriate charges enumerated in IPI 31.01 through 31.10.

If there is a survival action, the bracketed phrase “[and the estate of the deceased]” may be used after naming the widow and next of kin.

#### **Comment**

The Wrongful Death Act provides that “every such action shall be brought by and in the names of the personal representatives of” the deceased. 740 ILCS 180/1 (1994). This instruction properly informs the jury of the role the nominal plaintiff has assumed and that the administrator is merely representing the interests of the next of kin.

In the usual case, the widow and next of kin would be the only parties in interest, and there would be no need to mention the estate of the deceased. Under some circumstances, however, it may well be necessary to maintain a clear distinction between the wrongful death count and the survival count throughout the trial, even to the point of separate verdict forms. As is clearly pointed out in the dissent to *National Bank of Bloomington v. Norfolk & W. Ry. Co.*, 73 Ill.2d 160, 383 N.E.2d 919, 23 Ill.Dec. 48 (1978), the estate may include persons other than the widow and next of kin; or even if only the widow and next of kin are included, they may well take the money in significantly different proportions under each count.

### 31.10 Damages--Survival Action

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the estate for any of the following elements of damages proved by the evidence to have resulted from the [negligence] [wrongful conduct] of the defendant during the period between the time of the decedent's injuries and the time of his death, taking into consideration the nature, extent, and duration of the injury:  
[Here insert the elements of damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

#### Notes on Use

If there is both a wrongful death count and a survival count the specific count involved should be designated at the beginning of this instruction.

The bracketed words “wrongful conduct” in the first paragraph may be used instead of “negligence” when the misconduct alleged includes a charge such as wilful and wanton conduct or other fault.

Other phrases may be substituted for the bracketed terms “negligence” or “wrongful conduct” or “wrongful conduct of the defendant” where appropriate, such as “unreasonably dangerous condition of the product.”

#### Comment

The phrase “nature, extent, and duration of the injury” is no longer a separate element of damages; rather, it is a factor to be considered in evaluating the other elements. *See* Comment to IPI 30.02.

*Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974), specifically referred to survival-action damages of conscious pain and suffering, loss of earnings, medical expenses, physical disability, and property damage.

The fact that a decedent has suffered for only a short period of time is not a bar to a claim for conscious pain and suffering. The duration of the pain and suffering affects the amount of damages to be awarded, not the right to recover damages. *Glover v. City of Chicago*, 106 Ill.App.3d 1066, 436 N.E.2d 623, 62 Ill.Dec. 597 (1st Dist. 1982).

### 31.11 Damages--Loss of Society--Definition

When I use the term “society” in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.

#### Notes on Use

This instruction should be given whenever any other instruction includes the term “society.”

#### Comment

*See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585; 94 S.Ct. 806, 815; 39 L.Ed.2d 9 (1974) (“embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection”) (cited in *McDonald v. Federal Barge Lines, Inc.*, 496 F.2d 1376 (5th Cir. 1974)); *Bullard v. Barnes*, 102 Ill.2d 505, 514; 468 N.E.2d 1228, 1232; 82 Ill.Dec. 448, 452 (1984) (“companionship, guidance, advice, love, and affection”); Vernon's Ann.Mo. Stat. § 537.090 (“companionship, comfort, instruction, guidance, counsel, training, and support”); California Jury Instructions Civil (BAJI) No. 14.50 (“love, companionship, comfort, affection, society, solace or moral support”); Washington Pattern Jury Instructions Civil No. 31.02 (“love, care, guidance, training, instruction, and protection”).

A similar instruction was approved in *Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988), and *Drake v. Harrison*, 151 Ill.App.3d 1082, 503 N.E.2d 1072, 1076; 105 Ill.Dec. 66, 70 (5th Dist. 1987). *See also Lorenz v. Air Illinois, Inc.*, 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988) (similar instruction not error).

### 31.12 Wrongful Death Case--Discount of Future Damages

If you find for the plaintiff, then in assessing damages you may consider how long the [names of widow and/or next of kin] will be likely to sustain pecuniary losses as a result of [decedent's name]'s death, considering how long [decedent's name] was likely to have lived and how long [names of widow and/or next of kin] [is] [are] likely to live.

In calculating the amount of these pecuniary losses consisting of money, benefits, goods or services, you must determine their present cash value. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those pecuniary losses at the times in the future when they will be sustained.

Damages for [loss of sexual relations] [loss of society] are not reduced to present cash value.

#### Notes on Use

If mortality tables are in evidence use IPI 31.13 instead.

#### Comment

This instruction was formerly IPI 34.03.

See Comments to IPI 34.02 and 34.04.

This instruction is intended to satisfy the requirement that the jury be informed that they must reduce to present cash value any award for future pecuniary damages suffered by next of kin. *Allendorf v. Elgin, J. & E. Ry. Co.*, 8 Ill.2d 164, 133 N.E.2d 288 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956).

See 59 Ill. B.J. 581, 60 Ill. B.J. 97, and 60 Ill. B.J. 520.

This instruction and IPI 31.13 (formerly IPI 34.03 and 34.05) were approved in *Baird v. Chicago, B. & Q.R. Co.*, 32 Ill.App.3d 1, 7, 334 N.E.2d 920, 925 (4th Dist. 1975), *aff'd*, 63 Ill.2d 463, 349 N.E.2d 413 (1976).

The appellate court has held that damages for loss of a decedent's consortium or society are not reduced to present cash value. *Lorenz v. Air Illinois, Inc.*, 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988); *Exchanges Nat'l Bank of Chicago v. Air Illinois, Inc.*, 167 Ill.App.3d 1081, 522 N.E.2d 146, 118 Ill.Dec. 691 (1st Dist. 1988). See also *Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988) (issue waived, but would not have been error even absent waiver).

For a discussion of a stipulated calculation of future damages from date of death rather than from date of trial, see *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*,

644 F.2d 633 (7th Cir. 1981) (court construes the requirement of this instruction and IPI 31.13 (formerly IPI 34.03 and 34.05) as requiring discounting of future earnings from date of trial).

### 31.13 Mortality Tables as Evidence of Damages--Wrongful Death Case

If you find for the plaintiff, then in assessing damages you may consider how long the [names of widow and/or next of kin] will be likely to sustain pecuniary losses as a result of [decedent's name]'s death, considering how long [decedent's name] was likely to have lived and how long [names of widow and/or next of kin] [is] [are] likely to live.

According to a table of mortality in evidence, the life expectancy of a [male] person aged \_\_\_\_ years is \_\_\_\_ years. That of a [female] person aged \_\_\_\_ years is \_\_\_\_ years [and that of a (male) person aged \_\_\_\_ years is \_\_\_\_ years]. These figures are not conclusive. They are the average life expectancies of persons who have reached those ages. They may be considered by you in connection with other evidence relating to the probable life expectancies of the decedent and [his widow] [and] [his next of kin] including evidence of the decedent's occupation, health, habits and activities, bearing in mind that some persons live longer and some persons live less than the average.

In calculating the amount of these pecuniary losses consisting of money, benefits, goods or services, you must determine their present cash value. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those pecuniary losses at the times in the future when they will be sustained.

Damages for [loss of sexual relations] [loss of society] are not reduced to present cash value.

#### Notes on Use

If mortality tables are not in evidence, use IPI 31.12 instead.

The age of the deceased at the time of his death and his life expectancy and the ages of the widow and respective next of kin and their life expectancies should be placed in the appropriate blanks in this instruction. The bracketed material should be used when the evidence requires it.

#### Comment

This instruction was formerly 34.05.

See Comments to IPI 34.02 and 34.04.

This instruction (as IPI 34.05) was approved by the Illinois Supreme Court. *Baird v. Chicago, B. & Q. R. Co.*, 63 Ill.2d 463, 471, 349 N.E.2d 413, 417 (1976).

The appellate court has held that damages for loss of a decedent's consortium or society are not reduced to present cash value. *Lorenz v. Air Illinois, Inc.*, 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988); *Exchange Nat'l Bank v. Air Illinois, Inc.*, 167

Ill.App.3d 1081, 522 N.E.2d 146, 118 Ill.Dec. 691 (1st Dist. 1988). *See also Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988) (issue waived, but would not have been error even absent waiver).

### 31.14 Funeral Expenses – Independent Action by Administrator/Executor

If you find for the plaintiff, then in assessing damages under Count \_\_\_\_, brought by the [administrator] [executor] of the estate of [decedent's name], you must then fix the amount of money that will reasonably and fairly compensate the estate for the funeral and burial expenses proved by the evidence to have been incurred by the estate.

[Further, if you decide for the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate the estate for medical bills proved by the evidence to have resulted from the [negligence] [wrongful conduct] of the defendant during the period between the time of the decedent's injuries and the time of [his/her] death.]

Whether any of the elements of damages has been proved by the evidence is for you to determine.

*Instruction, Notes on Use and Comment approved May 2018.*

#### Notes on Use

Where there is a wrongful death, but no claim under the “Family Expense Statute” (750 ILCS 65/15), the administrator or executor of the decedent's estate may bring an independent action seeking the funeral and burial expenses paid by the estate and the medical expenses caused by the defendant's negligent or wrongful conduct. This instruction may be used to address damages for funeral and burial expenses and medical expenses incurred by the decedent's estate that are not otherwise recoverable under a Survival Act claim.

The bracketed words “wrongful conduct” in the first paragraph may be used instead of “negligence” when the misconduct alleged includes a charge such as willful and wanton conduct or other fault.

Other phrases may be substituted for the bracketed terms “negligence” or “wrongful conduct” or “wrongful conduct of the defendant” where appropriate, such as “unreasonably dangerous condition of the product.”

#### Comment

Where a decedent leaves no spouse or parent, expenses for medical and/or funeral expenses cannot be recovered under the “Family Expense Statute” (750 ILCS 65/15). In the circumstance where there is no surviving spouse or parent, the administrator or executor of an estate can bring an independent action for medical and funeral expenses. *Eggimann v. Wise*, 56 Ill.App.2d 385, 206 N.E.2d 472 (3<sup>rd</sup> Dist. 1964); *Chidester v. Cagwin*, 76 Ill.App.2d 477, 222 N.E. 2d 274 (2<sup>nd</sup> Dist. 1966); *Strandell v. Jackson County, Ill.*, 684 F. Supp. 126 (1986). The damages for funeral expenses are not otherwise collectable under a Wrongful Death Act claim. See *Sanders v. Schultz*, 20 Ill.2d 301, 170 N.E. 2d 163 (1960), *Baez v. Rosenburg*, 409 Ill.App.3d 525, 949 N.E. 2d 250 (1<sup>st</sup> Dist. 2011).

The Survival Act has been interpreted to include only those damages sustained by the decedent prior to “succumbing” to the injuries at issue. See *Murphy v. Martin Oil*, 56 Ill.2d 423, 308 N.E.2d 583 (1974); *Harrison v. Burlington Northern R. Co.*, 750 F. Supp. 316 (N.D. Ill. 1990). As such, funeral expenses may be excluded from claims under the Survival Act. Medical expenses that are not recoverable under the “Family Expense Statute” may also be recovered by the estate. See *Eggimann v. Wise*, 56 Ill.App.2d 385, 206 N.E.2d 472 (3<sup>rd</sup> Dist. 1964).