

CHAPTER 10

WRONGFUL DEATH

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10:1 CONTRIBUTORY NEGLIGENCE OF A DECEDENT

If you find the decedent, (*name*), was negligent and such negligence either caused or contributed to the death of the decedent, then the negligence, if any, of the decedent is chargeable to the plaintiff(s), (*name[s]*).

Notes on Use

While the contributory negligence of a decedent is a defense in a wrongful death action, **Willy v. Atchison, Topeka & Santa Fe Ry.**, 115 Colo. 306, 172 P.2d 958 (1946) (construing what is now section 13-21-202, C.R.S.); RESTATEMENT (SECOND) OF TORTS § 494 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 954 (5th ed. 1984), it is not necessarily a complete bar under section 13-21-111, C.R.S. For that reason, the applicable comparative negligence instructions (Instructions 9:22 and 9:26 through 9:28D), appropriately modified, should be used with this instruction.

Source and Authority

This instruction is supported by the authorities cited above in the Notes on Use.

10:2 CONTRIBUTORY NEGLIGENCE OF A PLAINTIFF

See Instructions 9:22 and 9:26 through 9:28D.

Note

While the contributory negligence of a plaintiff is a defense in a wrongful death action as to that plaintiff's claim, **Phillips v. Denver City Tramway Co.**, 53 Colo. 458, 128 P. 460 (1912); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 958 (5th ed. 1984), it is not necessarily a complete bar under section 13-21-111, C.R.S. For that reason, the applicable comparative negligence instructions (Instructions 9:22 and 9:26 to 9:28D), appropriately modified, if necessary, should be used. *But see* **Tanski v. Tanski**, 820 P.2d 1143 (Colo. App. 1991) (where husband of the decedent, in his capacity as surviving spouse and heir at law, sued himself for the wrongful death of his wife on the basis that his wife's death resulted from a one-car accident caused by his own negligence, public policy prohibited the plaintiff from recovering damages for a wrongful death which he, himself, negligently caused).

10:3 DAMAGES FOR WRONGFUL DEATH

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages (and the damages of those the plaintiff represents). If you find in favor of the plaintiff, you must determine the total dollar amount of the damages, if any, of plaintiff (and those that plaintiff represents), that were caused by the (*insert appropriate description, e.g., “negligence”*) of the defendant(s), (*name[s]*), (and) (,) (the [*insert appropriate description, e.g., “negligence”*], if any, of [*name of decedent*]), (and) (the [*insert appropriate description, e.g., “negligence”*], if any, of any designated nonparties).

In determining such damages, you shall consider the following:

(1. Any noneconomic losses, including grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff [and those the plaintiff represents] [has] [have] had to the present, and any grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff [and those the plaintiff represents] will have in the future;) (and)

(2. Any economic losses, including reasonable funeral, burial, interment, or cremation expenses, and any net financial loss which the plaintiff has [and those the plaintiff represents have] had because of the death of [*name of decedent*]. The net financial loss is the same as the financial benefit the plaintiff [and those the plaintiff represents] might reasonably have expected to receive from [*name of decedent*] had [he] [she] lived.)

In determining these damages, if any, you should consider the age, health, and life expectancy of (*name of decedent*), the age, health, and life expectancy of the plaintiff (and those the plaintiff represents), the (*name of decedent’s*) industriousness, ability to earn money, willingness to assist the plaintiff (and those the plaintiff represents), and the nature of the relationship between (*name of decedent*) and the plaintiff (and between [*name of decedent*] and those the plaintiff represents).

Notes on Use

1. Use whichever parenthesized and bracketed words are appropriate.
2. This instruction should be used in actions brought under section 13-21-202, C.R.S. Recoverable damages under this statute include “damages for noneconomic loss or injury as defined in section 13-21-102.5 and subject to the limitations of [section 13-21-203] and including within noneconomic loss or injury damages for grief, loss of companionship, pain and suffering, and emotional stress.” § 13-21-203(1)(a), C.R.S. As an alternative to these noneconomic damages, a set amount may be recovered as a solatium under section 13-21-203.5, C.R.S. Consequently, if the plaintiff has elected this solatium, the parenthesized numbered paragraph 1 of this instruction must be omitted, and the solatium should be awarded “upon a finding or admission of the defendant’s liability for the wrongful death.” § 13-21-203.5. A solatium award is not subject to reduction by operation of the comparative fault statute, § 13-21-

111, C.R.S., or by operation of the pro-rata liability statute, § 13-21-111.5, C.R.S. **B.G.’s, Inc. v. Gross**, 23 P.3d 691 (Colo. 2001); *see also* **Smith v. Vincent**, 77 P.3d 927 (Colo. App. 2003) (solatium award not subject to reduction by amount of insurance settlement payment from former defendant); **Dewey v. Hardy**, 917 P.2d 305 (Colo. App. 1995).

3. Under section 13-21-203(1)(a), recoverable damages for noneconomic loss or injury “shall not exceed the limitations for noneconomic loss or injury set forth in section 13-21-102.5, unless the wrongful act, neglect, or default causing death constitutes a felonious killing, as defined in section 15-11-803(1)(b), C.R.S., and as determined in the manner described in section 15-11-803(7), C.R.S., in which case there shall be no limitation on the damages for noneconomic loss or injury recoverable in such action.” *See also* **Estate of Wright ex rel. Wright v. United Servs. Auto. Ass’n**, 53 P.3d 683 (Colo. App. 2001) (notwithstanding disposition in prior criminal proceedings, when issue is raised, court must determine whether there was a felonious killing in wrongful death action); **Aiken v. Peters**, 899 P.2d 382 (Colo. App. 1995). In addition, under section 13-21-203(1)(b), the “damages recoverable for noneconomic loss or injury in any medical malpractice action shall not exceed the limitations on noneconomic loss or injury set forth in section 13-64-302.”

4. The limitations on noneconomic damages set forth in section 13-21-203(1), and the amount of the solatium set forth in section 13-21-203.5, are to be adjusted periodically for inflation by the Colorado secretary of state. § 13-21-203.7, C.R.S. As of the most recent certification, on January 14, 2020, the secretary of state has certified the following adjusted limitations on these damages:

For all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$341,250.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$68,250.

For all claims for relief that accrue on and after January 1, 2008, and before January 1, 2020:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$436,070.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$87,210.

For all claims for relief that accrue on and after January 1, 2020:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$571,870.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$114,370.

For the most current information on these caps, see the secretary of state’s website, www.sos.state.co.us.

5. When multiple plaintiffs bring a wrongful death action based on a decedent’s death and the plaintiffs seek damages for noneconomic losses only, each plaintiff is not required to establish that he or she personally suffered damages for noneconomic losses to remain a party to the action. Though different heirs may suffer different noneconomic losses as a result of a decedent’s death, each heir-plaintiff is not required to prove noneconomic losses. Whether damages are awarded for economic or noneconomic losses, all damages awarded are owned

jointly and distributed through the statutes of descent and distribution. **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (citing section 13-21-201(2), C.R.S.; and **Steedle v. Sereff**, 167 P.3d 135 (Colo. 2007)).

6. A decedent's future tax liability must not be considered when calculating a plaintiff's net pecuniary loss in a wrongful death case. **Hoyal v. Pioneer Sand Co.**, 188 P.3d 716 (Colo. 2008).

7. In addition to the pecuniary losses recoverable under this instruction, funeral expenses may also be recoverable where the plaintiff has become obligated to pay them. *See* **Espinoza v. Gurule**, 144 Colo. 381, 356 P.2d 891 (1960) (action by parents for funeral expenses caused by wrongful death of son recognized as independent action apart from statute as property damage claim); **Publix Cab Co. v. Colo. Nat'l Bank**, 139 Colo. 205, 338 P.2d 702 (1959) (executor entitled to recover funeral expenses as separate property damage claim independent of death claim, and court notes that it is not required to rule on whether such expenses must be included in maximum statutory limits for wrongful death); **Dillon v. Sterling Rendering Works, Inc.**, 106 Colo. 407, 106 P.2d 358 (1940) (funeral expenses recoverable as part of death claim, and court did not determine whether independent right to recover funeral expenses existed).

8. Although punitive damages historically were not recoverable in wrongful death actions, *see, e.g.*, **Herbertson v. Russell**, 150 Colo. 110, 371 P.2d 422 (1962), since 2001 such damages have been recoverable under section 13-21-203(3)(a) and (b). This instruction applies to these claims, subject to the limitation that the amount of such damages shall not exceed the amount of actual damages, § 13-21-203(3)(a), and subject to the special pleading rules set out in section 13-21-203(3)(c), and the special substantive provisions set out in section 13-21-203(4)–(7).

9. The court should apply section 13-21-111.6, C.R.S., to the extent that section is applicable, to reduce any damages awarded by the jury. That section directs the court in any action “for a tort resulting in death or injury to person or property” to reduce the amount of damages awarded, before entering judgment, by the amount of certain collateral benefits received by the plaintiff, but not including collateral benefits paid “as a result of a contract entered into and paid for by or on behalf of such [injured] person.” However, this statute does not apply to a settlement payment from a joint tortfeasor. **Smith**, 77 P.3d at 930-31; *see* **Wal-Mart Stores, Inc. v. Crossgrove**, 2012 CO 31, ¶ 26, 276 P.3d 562, 568 (“The court of appeals correctly determined that the common law pre-verdict evidentiary component of the collateral source rule bars the admission of evidence of the amounts paid for medical services in collateral source cases.”); **Sunahara v. State Farm Mut. Auto. Ins. Co.**, 2012 CO 30M, ¶ 15, 280 P.3d 649, 655 (the “common law evidentiary component of the collateral source rule prohibits the admission of amounts paid evidence in collateral source cases, even for the purpose of determining the reasonable value of medical services rendered”); **Smith v. Jeppsen**, 2012 CO 32, ¶ 19, 277 P.3d 224 (upholding exclusion of pre-verdict admission of evidence of collateral benefits).

10. The Notes on Use to Instructions 6:1, 6:1A, and 6:1B are also applicable to this instruction.

11. When the plaintiff is suing not only on his or her own behalf, but also as a representative for other heirs under sections 13-21-201 and 13-21-203, the parenthetical phrase “and those the plaintiff represents” should be used to make it clear the plaintiff is entitled to recover damages sustained by all those entitled to share in any judgment. However, the limitation on noneconomic damages in section 13-21-203(1) applies on a per-claim basis, rather than on a per-defendant basis, capping a wrongful death plaintiff’s aggregate recovery at the amount in section 13-21-102.5 regardless of the number of defendants against whom suit is brought. **Lanahan v. Chi Psi Fraternity**, 175 P.3d 97 (Colo. 2008).

12. In a wrongful death claim against a person or entity subject to the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S., the statutory cap under section 24-10-114(1)(a), C.R.S., of the Act applies to limit the total recovery for the death. **Steedle v. Sereff**, 167 P.3d 135 (Colo. 2007). Likewise, in a wrongful death claim that is subject to the Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S., the Act’s damages cap limits the recovery of compensatory damages notwithstanding the application of the felonious killing exception to the wrongful death damages cap. **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007). The Ski Safety Act’s damages cap does not apply to an award of punitive damages in a wrongful death action. *Id.*

13. In cases arising under the Federal Tort Claims Act, to which Colorado substantive law is applicable, such substantive law includes any applicable statutory monetary limitations on recovery. **Bartch v. United States**, 330 F.2d 466 (10th Cir. 1964).

14. When the suit is one for the wrongful death of a child, Instruction 10:4 should be given with this instruction. In such cases, however, the last paragraph of this instruction should be omitted because the matters covered are included in the second paragraph of Instruction 10:4.

15. This instruction, with suitable modifications in the first paragraph, may be given in comparative negligence cases, *see* Instructions 9:22 and 9:26-9:28D, when any such instructions would otherwise be appropriate, for example, when there is sufficient evidence of contributory negligence on the part of the decedent or one or more of the plaintiffs.

16. In actions in which the negligence or fault of a nonparty has been properly put in issue under section 13-21-111.5(2) and (3)(b), as a cause, in whole or in part, of the plaintiff’s claimed damages, the first paragraph of this instruction should be appropriately modified. For such cases, see also Instructions 9:29-9:29B.

17. In general, the word “heir” refers to “a person who inherits real or personal property.” **Ferguson v. Spalding Rehab., LLC**, 2019 COA 93, ¶ 11, 456 P.3d 59, 61-62. But, the term “heirs” in section 13-21-201(1)(a), specifying who may sue for a wrongful death, refers only to the “lineal descendants” of a deceased and generally does not include the parents of the deceased. **McGill v. Gen. Motors Corp.**, 174 Colo. 388, 484 P.2d 790 (1971); **Whitenhill v. Kaiser Permanente**, 940 P.2d 1129 (Colo. App. 1997); **Potter v. Thieman**, 770 P.2d 1348 (Colo. App. 1989). A lineal descendant is “[o]ne who is in the line of descent from the ancestor.” **Ferguson**, 2019 COA 93, ¶¶ 16-25, 456 P.3d at 62 (holding decedent’s adult adoptee a lineal descendent under the wrongful death act). But section 13-21-201(1)(c) provides standing for parents if the deceased is an unmarried minor without descendants or an unmarried adult without

descendants and without a designated beneficiary. *See Whitenhill*, 940 P.2d at 1131. Whether the parent of a deceased adult has standing to bring a wrongful death action is determined as of the decedent’s date of death. **Hansen v. Barron’s Oilfield Serv.**, 2018 COA 132, ¶ 1, 429 P.3d 101 (parent of an adult deceased does not have standing to sue for wrongful death when the deceased was married at the time of her death). A designated beneficiary appointed under sections 15-22-101 to -112, C.R.S., may in some circumstances sue for wrongful death. *See* § 13-21-201(1)(a)(IV).

18. Section 13-21-203(1), prohibits successive wrongful death actions for the death of a decedent. **Estate of Kronemeyer v. Meinig**, 948 P.2d 119 (Colo. App. 1997) (trial court properly dismissed plaintiff’s wrongful death action where plaintiff had already settled previous action for the wrongful death of the same decedent). Because section 13-21-203(1) limits wrongful death claims to “only one civil action” for the death of a decedent, if venue is proper as to one defendant in a wrongful death action, it is proper as to all other co-defendants. **Hernandez v. Downing**, 154 P.3d 1068 (Colo. 2007) (trial court erred in granting co-defendant’s motion for severance and change of venue in wrongful death action). Under the “one civil action” limitation in section 13-21-203(1), a surviving spouse’s pre-litigation settlement of a wrongful death claim precludes another heir from bringing a later wrongful death action. **Barnhart v. Am. Furniture Warehouse Co.**, 2013 COA 158, ¶ 28, 338 P.3d 1027.

19. Under section 13-21-202, there is no requirement that the decedent had a viable claim on the date of death as a condition precedent to a wrongful death action. **Rowell v. Clifford**, 976 P.2d 363 (Colo. App. 1998).

Source and Authority

This instruction is supported by the statutory provisions providing for wrongful death actions, §§ 13-21-201 to -204, C.R.S. *See also* §§ 8-2-201 to -204, C.R.S.

10:4 WRONGFUL DEATH OF CHILD — DETERMINING PECUNIARY LOSS

The net economic loss, if any, incurred by the plaintiff(s) as the parent(s) of *(name of child)* would be the reasonable value of any services *(name of child)* would have provided and earnings (he) (she) might have made while a minor together with any support (he) (she) might reasonably have been expected to provide the plaintiff(s) after (he) (she) became an adult, less the expenses the plaintiff(s) might reasonably have incurred in maintaining *(name of child)* and providing (him) (her) an education.

In determining the net economic loss, if any, you should consider *(name of child)*'s as well as the plaintiff('s)(s') ages, health, conditions of life, probable duration of their lives and their abilities to earn money. You should also consider *(name of child)*'s work habits and (his) (her) likelihood to aid and assist the plaintiff(s), taking into account not only the legal relationship between *(name of child)* and the plaintiff(s) but also the actual relationship between them as shown by acts of service or financial assistance, if any, provided by *(name of child)* to the plaintiff(s).

Notes on Use

1. This instruction should be given only in conjunction with Instruction 10:3 and when so given, the last paragraph of Instruction 10:3 should be omitted.

2. When the parents of a minor child have allowed the child to retain his or her earnings, the refusal to instruct the jury that the earnings of a minor child belong to the child's father has been held not to be error. **Harman v. Chase**, 160 Colo. 449, 417 P.2d 784 (1966).

3. The Notes on Use to Instruction 10:3 are also applicable to this instruction.

4. For cases discussing net pecuniary benefit, see **Kogul v. Sonheim**, 150 Colo. 316, 372 P.2d 731 (1962) (in a suit for death of child, parents limited to net pecuniary loss and parental grief is not an element of damages); **Herbertson v. Russell**, 150 Colo. 110, 371 P.2d 422 (1962) (same); and **Rigot v. Conda**, 134 Colo. 375, 304 P.2d 629 (1956) (directed verdict proper where insufficient evidence of pecuniary loss). See also **Morrison v. Bradley**, 655 P.2d 385 (Colo. 1982) (evidence of pecuniary loss sufficient to support amount of damages awarded by jury).

5. A decedent's future tax liability must not be considered when calculating a plaintiff's net pecuniary loss in a wrongful death case. **Hoyal v. Pioneer Sand Co.**, 188 P.3d 716 (Colo. 2008).

6. As to the factors the jury may consider in assessing damages, see **Pierce v. Conners**, 20 Colo. 178, 37 P. 721 (1894); and **Murphy v. Colo. Aviation, Inc.**, 41 Colo. App. 237, 588 P.2d 877 (1978). See also **Ford v. Bd. of Cty. Comm'rs**, 677 P.2d 358 (Colo. App. 1983) (in suit by minor child for wrongful death of father, evidence that father might have remarried, thus reducing amount of pecuniary support child might receive, was irrelevant).

7. For a discussion of the situation where a deceased child leaves no surviving spouse or child, see **Public Service Co. of Colorado v. District Court**, 674 P.2d 383 (Colo. 1984).

Source and Authority

This instruction is supported by **Kogul**, 150 Colo. at 319, 372 P.2d at 732 (supports first paragraph of instruction); **Herbertson**, 150 Colo. at 116-17, 371 P.2d at 426 (first and second paragraphs); **Stevens v. Strauss**, 147 Colo. 547, 364 P.2d 382 (1961) (second paragraph); **McEntyre v. Jones**, 128 Colo. 461, 263 P.2d 313 (1953) (first and second paragraphs); and **Lehrer v. Lorenzen**, 124 Colo. 17, 233 P.2d 382 (1951) (first and second paragraphs). *See also* **Millican v. Wolfe**, 701 P.2d 107 (Colo. App. 1985).