

1 **13-1802. Measure of damages; general; with preexisting conditions.**

2 If you should decide in favor of the plaintiff on the question of liability, you must then fix  
3 the amount of money which will reasonably and fairly compensate ~~[[him]-[her]]~~ the plaintiff for  
4 any of the following elements of damages proved by the plaintiff to have resulted from the  
5 negligence [wrongful conduct] as claimed: \_\_\_\_\_.

6 *(NOTE: Here insert the proper elements of damages and, in a personal injury case, the*  
7 *instructions which immediately follow may be applicable but, in other types of litigation, the trial*  
8 *lawyers will need to insert here the proper elements applicable under the proven facts and the*  
9 *particular law governing the specific circumstances.)*

10 Whether any of these elements of damages have been proved by the evidence is for you to  
11 determine. [If you find that, before any injury in this case, plaintiff was already impaired by a  
12 physical or emotional condition, plaintiff is entitled to compensation for the aggravation or  
13 worsening of the condition, but not for elements of damages to the extent they were already being  
14 suffered.] [However, damages are to be measured without regard to the fact plaintiff may have  
15 been unusually susceptible to injury or likely to be harmed. The defendant is said to “take the  
16 plaintiff as ~~[he]~~ the defendant finds~~[-[him]-[her];~~” the plaintiff, meaning that the defendant, if  
17 liable, is responsible for all elements of damages caused by the defendant's conduct even if some  
18 of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

19 Your verdict must be based upon proof and not upon speculation, guess or conjecture.  
20 Further, sympathy or prejudice for or against a party should not affect your verdict and is not a  
21 proper basis for determining damages.

22 USE NOTES

1 This instruction is not complete in and of itself but this is the basic form of instruction to  
2 be utilized in all cases involving damages.

3 The pronoun will need to be changed in some instances. Likewise, the plural will need to  
4 be added in other instances when multiple parties are involved.

5 This instruction is not applicable in wrongful death cases. *See* UJI 13-1830 NMRA.

6 [As amended, effective November 1, 1991; March 1, 2005; as amended by Supreme Court Order  
7 No. S-1-RCR-2025-00126, effective for all cases pending or filed on or after December 31, 2025.]

8 **Committee commentary.** — The attorney for the plaintiff, in submitting instructions to the court,  
9 is charged with the duty of supplying the necessary elements of damages to be placed in the blank.  
10 A damages issue predicated on conjecture, guess, surmise or speculation should not be given to  
11 the jury. *Hebenstreit v. Atchison, T. & S.F. Ry.*, 1959-NMSC-019, 65 N.M. 301, 336 P.2d 1057  
12 [~~1959~~]. This instruction has been before the New Mexico appellate courts in the following cases:  
13 *Higgins v. Hermes*, 1976-NMCA-066, 89 N.M. 379, 552 P.2d 1227 [~~Ct. App.~~], *cert. denied*, 90  
14 N.M. 8, 558 P.2d 620 (1976); *Boulden v. Britton*, 1974-NMCA-111, 86 N.M. 775, 527 P.2d 1087  
15 [~~Ct. App. 1974~~], *rev'd on other grounds*, 87 N.M. 474, 535 P.2d 1325 (1975); *Demers v. Gerety*,  
16 1973-NMCA-134, 85 N.M. 641, 515 P.2d 645 [~~Ct. App. 1973~~], *rev'd on other grounds*, 86 N.M.  
17 141, 520 P.2d 869 (1974); *Francis v. Johnson*, 1970-NMCA-079, 81 N.M. 648, 471 P.2d 682 [~~Ct.~~  
18 ~~App. 1970~~].

19 The bracketed language addresses what was formerly considered under UJI Civil 13-1808 NMRA  
20 which has been withdrawn. Former UJI Civil 13-1808 addressed the aggravation of preexisting  
21 condition and the situation in which a plaintiff has a completely asymptomatic condition or disease,  
22 the "egg shell plaintiff". When the evidence shows that the plaintiff was experiencing symptoms  
23 from a preexisting condition and the same has been aggravated as a result of the injury and the

1 extent of the aggravation is proved, the bracketed portion of the instruction is proper. The New  
2 Mexico case of Hebenstreit, 1959-NMSC-019 [~~v. *Atehison, T. & S.F. Ry.*, 65 N.M. 301, 336 P.2d~~  
3 ~~1057 (1959)~~], cites cases from other jurisdictions and holds that in tort cases the plaintiff must  
4 prove the extent of aggravation of a preexisting condition with reasonable certainty, otherwise the  
5 issue should not go to the jury. *See also Britton v. Boulden, 1975-NMSC-029*, 87 N.M. 474, 535  
6 P.2d 1325 [~~(1975)~~]; *Vaca v. Whitaker, 1974-NMCA-011*, 86 N.M. 79, 519 P.2d 315 [~~(Ct. App.~~  
7 ~~1974)~~]; *Demers, 1973-NMCA-134* [~~v. *Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973)~~],  
8 *rev'd on other grounds*, 86 N.M. 141, 520 P.2d 869 (1974). In order to get the issue to the jury,  
9 plaintiff must prove the aggravation by medical evidence.

10 New Mexico also recognizes "the eggshell Plaintiff" where the victim has an underlying condition,  
11 which increases the victim's susceptibility or pre-disposition to injury. *See Thomas v. Henson,*  
12 1984-NMCA-113, 102 N.M. 417, [ 424,] 696 P.2d 1010, [~~1017 (Ct. App. 1984)~~] *rev'd on other*  
13 *grounds* 102 N.M. 326, 695 P.2d 476 (1985); *City of Roswell v. Davenport, 1907-NMSC-016*, 14  
14 N.M. 91, 89 P. 256 [~~(1907)~~]; *Boulden, 1974-NMCA-111* [~~v. *Britton*, 86 N.M. 775, 527 P.2d 1087~~  
15 ~~(Ct. App. 1974)~~]. It is important to instruct the jury on the rule which deems the injury and not the  
16 dormant condition, as the cause of Plaintiff's damages. *Woods v. Brumlop, 1962-NMSC-133*, 71  
17 N.M. 221, 377 P.2d 520 [~~(1962)~~].

18 [Revised[~~, effective March 1, 2005~~]; as amended by Supreme Court Order No. S-1-RCR-2025-  
19 00126.]

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