

13-1802E. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that _____ (*one or more original tortfeasors*) negligently caused injury to the plaintiff and _____ (*one or more successive tortfeasors*) negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of _____:

Alternative A: the _____ (*successive tortfeasors*) caused a separate injury or made the original injury measurably worse.

Alternative B: the _____ (*original tortfeasor(s)*) caused an injury that is separate, in nature or extent, from the injury(ies) caused by _____ (*the successive tortfeasors*).

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for its proportionate share of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose [negligence/fault] contributed to _____ (*the first injury*) and then compare the negligence of each person whose [negligence/fault] contributed to _____ (*the second injury*).

_____ says that the plaintiff received injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] [_____ (*the successive tortfeasor or tortfeasors*)] that are distinct from injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] _____ therefore bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received [an original injury] [a second injury] that is separate and distinct from [a second injury or from enhanced injuries] [the original injury] and the amount of damages and injuries from the separate injuries.

USE NOTES

This instruction should be given when successive torts are at issue and the jury is to decide whether the plaintiff has suffered divisible injuries.

When suit is brought only against the original tortfeasor, this instruction should be drafted using "Alternative B" to ask the jury to determine whether the original tortfeasor caused injury that is separate and causally-distinct from any injury caused by the successive tortfeasor. See *Payne v. Hall*, 2006-NMSC-028, 139 N.M. 659, 137 P.3d 599. However, in other cases, the issue will be framed using "Alternative A" as whether the successive tortfeasor caused an injury that is separate and distinct from an injury caused by the original tortfeasor. This issue is for the trial court. Accordingly, the terms "original" and "successive," describing the tortfeasors, are bracketed so that the order may be changed, depending on the trial court's determination of how to frame the question of divisibility.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) damages are

separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix. The fourth paragraph of this instruction should be modified or deleted when there is only one successive tortfeasor and it is not necessary to compare negligence.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]