

5.33A VERBAL THRESHOLD (Type 6, 7, 8 or 9 Injuries)¹ (3/10)

A. Introduction

In order to recover damages in this case, plaintiff must prove by a preponderance of the evidence that he/she sustained injuries which fit into one or more of the following categories:

NOTE TO JUDGE

Charge 1, 2, 3 or any combination of them, depending on the proofs in each case.

1. Permanent loss of use of a body organ, member, function or system (Type 6);
2. Permanent consequential limitation of use of a body organ or member. (Type 7); or,
3. Significant limitation of use of a body function or system (Type 8). If the injuries caused by the accident do not come within these categories, your verdict must be for defendant.

In cases with two or more defendants, some of whom have available the Limitation on Lawsuit Option defense and others who do not, charge the following:

¹ See N.J.S.A. 39:6A-8a. Though not numbered in the statute, the categories are: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The jury should answer two specific interrogatories as to each defendant: (1) was this defendant negligent; (2) if so, did the negligence proximately cause plaintiff's injuries? If more than one defendant was negligent and their negligence proximately caused plaintiff's injuries, the jury has to find what percentage of the total negligence or fault is attributable to each defendant. Once the jury answers those questions, it should then determine whether or not plaintiff satisfied the applicable threshold which applies to a defendant. Then the jury should affix damages. *Bolz v. Bolz*, 400 N.J. Super. 154 (App. Div. 2008).

B. Permanent Loss of Use of a Body Organ, Member, Function or System (Type 6)

The first category is permanent loss of use of a body organ, member, function or system. In this case, the plaintiff alleges permanent loss of use of *[insert body organ, member, function or system]*. In order to prevail, the plaintiff must prove all three of the following elements:

1. That he/she sustained a loss of use of his/her *[insert body organ, member, function or system]*.

In order to find that plaintiff sustained a loss of use of his *[insert body organ, member, function or system]*, you must find either that the *[insert body organ, member, function or system]* no longer operates at all, or that it operates only in some limited way.² It is not necessary that there be a total loss of use of *[insert body*

² *Bassett v. Romano*, 511 NYS 2d 298 (1987). Permanency may include persistent pain, operation of an organ in a limited way, or only with pain.

organ, member, function or system].

Plaintiff must show proof of the injury by objective, credible evidence; that is, the proofs must be both objective and credible. Objective means that the evidence must be verified by physical examination and observation and cannot be based solely on plaintiff's complaints. Credible means that the evidence is believable.

2. That the loss of use of *[insert body organ, member, function or system]* is permanent.

3. That the injury has had a serious impact on the plaintiff's life. This means that the plaintiff must prove that the injury has seriously affected one or more activities which were a significant and important component of the plaintiff's way of life.³

C. Permanent Consequential Limitation of Use of a Body Organ or Member (Type 7)

The second category is permanent consequential limitation of use of a body organ or member. In this case, the plaintiff alleges permanent consequential limitation of use of *[insert body organ or member]*.

³ *Oswin v. Shaw*, 129 N.J. 290, 318 (1992); *Dabal v. Sodora*, 260 NJ Super. 397, 401 (App. Div.

In order to prevail, the plaintiff must prove all three of the following elements:

1. That he/she sustained a consequential limitation of use of *[insert body organ or member]*.

The phrase “consequential limitation of use of a body organ or member” means that the limitation of use of a body organ or member must be significant.

In order to fall into this category, the limitation of use cannot be merely mild or minor. Rather, it must be important, significant, and of some consequence.

It is not necessary that there be a total loss of use of *[insert body organ or member]*. You must find that the *[insert body organ or member]* has been limited or restricted in its operation in some significant way. A minor, mild or slight limitation is not consequential. Thus, in order for you to find that any of the plaintiff’s injuries fall within this category, the plaintiff must prove that he/she has a limitation of use of his *[insert body organ or member]* that is of consequence and important in nature.

Plaintiff must show proof of the alleged injury by objective, credible evidence. That is, the proofs must be both objective and credible. Objective means that the evidence must be verified by physical examination and observation and cannot be based solely upon plaintiff’s complaints. Credible means that the evidence is

believable.

2. That the limitation of use of *[insert body organ or member]* is permanent.

3. That the injury has had a serious impact on the plaintiff's life. This means that the plaintiff must prove that the injury has seriously affected one or more activities which were a significant and important component of the plaintiff's way of life.⁴

**D. Significant Limitation of Use of a Body Function or System
(Type 8)**

The third category is significant limitation of use of a body function or system. In this case, the plaintiff alleges a significant limitation of use of *[insert body function or system]*.

In order to prevail, the plaintiff must prove:

1. That he/she sustained a significant limitation of use of his *[insert body function or system]*.

The phrase “significant limitation of use of a body function or system” means that the use of a body function or system is limited in a serious manner.

⁴ *Oswin v. Shaw*, *supra* at 318; *Dabal v. Sodora*, *supra* at 401.

It is not necessary that there be a total loss of use of (*insert body function or system*). You must find that there is a limitation of use of the [*insert body function or system*] which is significant, important or meaningful. A minor, mild or slight limitation of use is not sufficient. For this category, the limitation of use of [*insert body function or system*] need not be permanent.

Plaintiff must show proof of the alleged injury by objective, credible evidence. That is, the proofs must be both objective and credible. Objective means that the evidence must be verified by physical examination and observation and cannot be based solely upon plaintiff's complaints. Credible means that the evidence is believable.

2. That the injury has had a serious impact on the plaintiff's life. This means that the plaintiff must prove that the injury has seriously affected one or more activities which were a significant and important component of the plaintiff's way of life.⁵

E. Verbal Threshold (Type 9 Injuries) N.J.S.A.39:6A-8a

In order to recover damages in this case, plaintiff must prove by a preponderance (greater weight) of the evidence that the injury he/she sustained is:

⁵ *Oswin v. Shaw*, *supra* at 318 (1992); *Dabal v. Sodora*, *supra* at 401.

A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.⁶

In order to prevail, the plaintiff must prove all three of the following elements:

1. Plaintiff must satisfy you of the injury or impairment [*describe*] by objective, credible medical evidence; that is, the proofs must be both objective and credible. Objective means that the evidence must be verified by physical examination and/or testing and cannot be based solely on plaintiff's complaints. Credible means that the evidence is believable.
2. That the injury or impairment [*describe*] prevented the plaintiff from performing substantially all of the material acts which made up the plaintiff's usual and customary daily activities.

In determining plaintiff's usual and customary daily activities you are to consider all of the activities which were a significant part of the plaintiff's usual daily routine. While you may find the plaintiff's employment to be a usual activity, you must give equal attention to the details of the plaintiff's other usual and customary

⁶ N.J.S.A. 39:6A-8a.

activities such as marital, household, social, athletic or recreational activities.⁷ You are to consider all of the plaintiff's usual activities, not just a primary one.⁸

3. Once you have determined what material acts constituted the plaintiff's usual and customary daily activities before the injury or impairment,⁹ you must decide whether the plaintiff presented sufficient objective evidence showing that his/her injury or impairment [*describe*] prevented him/her from performing substantially all of these activities during at least 90 of the 180 days following the occurrence of the injury. The impact of the injury or impairment on these activities must have been to a great extent rather than a slight curtailment.¹⁰

If you find that the plaintiff has established these three elements, then your verdict must be in favor of the plaintiff on this verbal threshold issue and you will answer the question “yes.”

⁷ See *Jefferson v. Freeman*, 296 N.J. Super. 54, 66 (App. Div. 1996) (holding that jury instructions which focused the jury's attention on the time plaintiff was absent from work to the exclusion of other aspects of plaintiff's daily activities were erroneous).

⁸ See *Jefferson v. Freeman supra* at 63-64. See generally, *Duffy v. O'Connell*, 279 N.J. Super. 672 (App. Div. 1995).

⁹ See *Duffy v. O'Connell, supra* at 677 (noting that the cataloging plaintiff's usual and customary daily activities is an obvious part of plaintiff's case).

¹⁰ *Jefferson v. Freeman, supra* at 63.

If you find that plaintiff has not proved each of these elements then you must answer the question “no.”¹¹

F. Sample Interrogatories (Verbal Threshold Types 6, 7, 8 & 9)

1. Has the plaintiff sustained an injury, caused by this accident, consisting of a permanent loss of use of a body organ, member, function or system?
 Yes No

2. Has the plaintiff sustained an injury, caused by this accident, consisting of a permanent consequential limitation of use of a body organ or member?¹²
 Yes No

3. Has the plaintiff sustained an injury, caused by this accident, consisting of the significant limitation of use of a body function or system?
 Yes No

4. Has the plaintiff sustained an injury, caused by this accident, which prevented the plaintiff from performing substantially all of his/her customary daily activities for at least 90 of the first 180 days following the accident?
 Yes No

¹¹ A jury questionnaire must be submitted to the jury on this issue: Did the plaintiff sustain an injury or impairment which prevent him/her from performing substantially all of the material activities which constitute his/her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury or impairment — yes or no?

¹² The court, when going over this interrogatory with the jury, may want to state as follows: If you find permanent limitation of use, and that the limitation is consequential, as I have defined it, you must answer the question “Yes.” If you find that there is no permanent limitation, or the limitation is not consequential, you must answer the question “No.”

IF YOU ANSWERED ANY OF THE ABOVE FOUR QUESTIONS “YES,” CONTINUE TO QUESTION 5. IF YOU ANSWERED, ALL OF THE ABOVE QUESTIONS “NO,” CEASE DELIBERATIONS AND INFORM THE COURT YOU HAVE REACHED A VERDICT.

5. What amount of money will fairly and reasonably compensate plaintiff for the injuries proven to be proximately caused by this accident?

\$ _____

NOTE TO JUDGE

The court may add negligence and proximate cause questions to these interrogatories to make up a verdict sheet.