20.08 LOSS OF SPOUSAL CONSORTIUM

The (first, second, etc.) item of loss is claimed not by (name of principal plaintiff) but by (name of loss of consortium claimant), (his wife) (her husband). (Name of loss of consortium claimant) seeks an award for damage to (his) (her) relationship with (name of principal plaintiff.)

You may make an award to (name of loss of consortium claimant) for the fair value of the loss of society, comfort, care, protection, affection and companionship that (name of loss of consortium claimant) has suffered or is reasonably probable to suffer in the future. In deciding whether such a loss has occurred and the amount of any award, you may consider, among other things, evidence relating to the closeness and harmony of the relationship between (names of husband and wife).

If you decide to compensate (name of loss of consortium claimant) for loss of this type, your award to (name of loss of consortium claimant) must not include any amount that duplicates any awards to (name of principal plaintiff). For example, you should not compensate (name of loss of consortium claimant) for any loss of financial support from (her husband) (his wife) because that amount would already be included in (name of principal plaintiff)'s right to recover for loss of past earnings or loss of (his) (her) ability to earn money in the future.

# Use Note

This instruction should be used for claims of loss of spousal consortium. Although technically the consortium claimant is also a “plaintiff,” for ease of understanding the names of each spouse should be used.

Effective May 1986, the legislature enacted AS 09.17.010 to limit certain non-economic damages. Several legal issues that could affect loss of spousal consortium claims are raised by this statute. First, the application of AS 09.17.010 to loss of consortium claims is unclear. Under AS 09.17.010(a), damages for non-economic loss are limited to particular categories. Loss of consortium is not listed as one of these categories of non-economic loss, but there is a catch-all reference to “other non-pecuniary damage.” The omission of loss of consortium damages from the list of categories could be explained by concluding that loss of consortium is included in the catch-all category of “other non-pecuniary damage.” Alternatively, it may be argued that loss of consortium claims are outside the scope of the damages that are affected by AS 09.17.010.

If it is concluded that AS 09.17.010 does not affect loss of consortium awards, this instruction may be given without modification, and Instructions 20.07A, B, C or D may also be given without modification. However, if the loss of consortium award is subject to AS 09.17.010(b), it may be necessary to modify this Instruction 20.08 or Instructions 20.07A, B, C or D to advise the jury that there is a cap on the loss of consortium award. The nature of the modifications depends on whether there is a separate $500,000 cap for each plaintiff’s non-economic losses (i.e., a separate $500,000 cap for the principal plaintiff and a separate $500,000 cap for the spouse), or whether AS 09.17.010(b) imposes a single $500,000 cap on all of the non-economic loss claims (including loss of consortium) arising out of a particular incident or injury. If there is a single limit of $500,000 for all of the claims, Instructions 20.07A, B, C or D may be modified to explain that the total of the non-economic loss awards to the principal plaintiff and loss of consortium awards to the spouse cannot exceed $500,000. If there is a separate $500,000 cap for the spouse’s loss of consortium claim (and possibly other non-economic loss claims by the spouse, such as claims for negligent infliction of emotional distress) a separate loss of consortium “cap” instruction may be necessary. This instruction could follow the pattern of Instruction 20.07A.

The list of elements included as part of a consortium award may be expanded depending on the evidence. In some jurisdictions “loss of enjoyment of sexual relations or ability to have children” are specifically mentioned. See Calif. Jury Instructions § 14.40 (6th Ed. 1977).

The list of potential areas of double compensation may be expanded if evidence suggests it will be a problem. See, e.g., Calif. Jury Instructions § 14.40 (6th Ed. 1977).

# Comment

A person has a cause of action for loss of consortium arising out of an injury to his or her spouse. Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974). Except in special cases in which it is impossible for the parties to bring suit together, joinder of the claims is mandatory. Id. The Alaska Supreme Court has approved awards of damages for loss of spousal consortium in a number of cases. See, e.g., Jakoski v. Holland, 520 P.2d 569, 571 (Alaska 1974); Grasle Electric Company v. Clark, 525 P.2d 1081, 1085 (Alaska 1974); Bemis v. Bertram, 532 P.2d 1012, 1013 (Alaska 1975); Yukon Equipment, Inc. v. Gordon, 660 P.2d 428, 435 (Alaska 1982).

The court has approved the giving of two separate instructions on damages for loss of consortium – the first instruction defining “consortium damages” and the second detailing how to evaluate in dollars the concepts of “society, companionship and conjugal relationship.” Grasle Electric Company v. Clark, 525 P.2d 1081, 1085 (Alaska 1974).

The spouse seeking an award for loss of consortium is not required to testify in order to sustain the claim. Where there is sufficient evidence from other sources to support a claim for loss of consortium, it is reversible error not to submit the loss of consortium claim to the jury. Rutherford v. State, 605 P.2d 16, 25-26 (Alaska 1979).

In City of Fairbanks v. Smith, 525 P.2d 1095 (Alaska 1974), the wife of the injured plaintiff sought damages for loss of consortium. The jury returned a verdict of $77,000 in damages for the plaintiff but $0 damages for the wife. The judgment was challenged as inconsistent but the court found no error. Id. at 1096-98. See also Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986); Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989).

Eggert v. Working, 599 P.2d 1389 (Alaska 1979) held that a wife’s consortium claim must be reduced by the percentage of comparative fault attributable to the husband. In such a case, the verdict forms should provide for this reduction.