**20.04 LOSS OF FUTURE EARNING CAPACITY**

The (first, second, etc.) item of economic loss claimed is the reduction in the ability of the plaintiff to earn money in the future.

You may award the plaintiff a fair amount for any reduction in future ability to earn money that [he she they] [is are] reasonably probable to experience.

To calculate this amount, you must determine the difference between the plaintiff's ability to earn money before the injury and [his her their] ability to earn money after the injury. To do this you may consider the plaintiff's health, physical and mental abilities; [his her their] work habits and occupation before the accident; the nature and extent of [his her their] injuries; and how long and to what extent [his her their] injuries will affect [his her their] earning ability in the future. Your calculation of the plaintiff's ability to earn money before the injury must be based on the plaintiff's life expectancy before the injury occurred.

To decide the plaintiff's earning ability, both before and after the injury, you may consider the wages [he she they] earned before and after the injury and any reasonably probable increases in those wages due to promotions or automatic step increases. You must not make any deduction for any future income taxes [, and you must not consider any pay increases due to increases in the cost of living].

# **Use Note**

This instruction should be used with Instruction 20.01A or 20.01B.

As 09.17.040(c) provides that unless the parties agree to apply the *Beaulieu* rule, future economic losses are adjusted for inflation and reduced to present value. In cases where the parties have not agreed to use the *Beaulieu* rule, the bracketed language in the final paragraph is not used, and the jury must be instructed on Inflation and Present Cash Value, Instruction 20.05. When the parties agree to use the *Beaulieu* rule, the bracketed language in the final paragraph must be used, and Instruction 20.05 (Inflation and Present Value) is not given. Instead, Instruction 20.10 (Future Damages) is given.

The clauses relating to life expectancy should be used only if it is claimed that the injury is permanent. In that event, Instruction 20.13 (Life Expectancy) should also be given.

# **Comment**

An award of damages for loss of future earnings or diminished earning capacity was approved in *Saslow v. Rexford*, 395 P.2d 36, 42 (Alaska 1964) (*see* trial court’s instruction on diminished earning capacity at 41); *State v. Harris*, 662 P.2d 946 (Alaska 1983); *American National Watermattress Corp. v. Manville*, 642 P.2d 1330, 1341-42 (Alaska 1982); *Eggert v. Working*, 559 P.2d 1389 (Alaska 1979); *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 934 (Alaska 1977); *State v. Guinn*, 555 P.2d 530, 544 n. 35 (Alaska 1976); *Morrison v. State*, 516 P.2d 402, 403-05 (Alaska 1973); *Fruit v. Schreiner*, 502 P.2d 133, 145 (Alaska 1972); *Chugach Electric Association v. Lewis*, 453 P.2d 345, 351 (Alaska 1969); *Beaulieu v. Elliott*, 434 P.2d 665, 668 (Alaska 1967); *City of Fairbanks v. Nesbett*, 432 P.2d 607, 615-17 (Alaska 1967); *National Bank of Alaska v. McHugh*, 416 P.2d 239, 244 (Alaska 1966); *Patrick v. Sedwick*, 413 P.2d 169, 173, 175 (Alaska 1966). *See also* *Buoy v. ERA Helicopters*, 771 P.2d 439 (Alaska 1989); *Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986) (rejecting challenges to adequacy of award for loss of future earnings).

Alaska case law holds that an award for lost earning capacity is made to compensate for the permanent diminution of the ability to earn money, as opposed to an actual loss of earnings. *Nesbett*, 432 P.2d at 617 (citing Restatement of Torts § 906, comment C at 550 (1939); *Morrison*, 516 P.2d at 404. Accordingly, an award of “lost earnings” would not satisfy the injured party’s right to compensation for the loss of earning capacity. *Morrison* 516 P.2d at 404; *Grimes*, 641 P.2d at 818. However, in 1986 the legislature enacted AS 09.17.040, which describes recovery for future economic damages. This statute describes an award for “the amount of wages the injured party could have been expected to earn during future years.” AS 09.17.040(b). The Supreme Court has not had an opportunity to indicate whether this language requires a change from the concept of a loss of earning capacity.

Evidence that plaintiff’s wages were higher for the year after the injury than for the year before and that plaintiff was working steadily at the time of trial is not conclusive to show lack of impairment of earning capacity. The court has held that where there is evidence that plaintiff has suffered a permanent injury, the whole span of the plaintiff’s life must be considered. Among factors to be considered are the plaintiff’s pre- and post-injury occupational competence and whether avenues of earning occupational advancement are now closed to the plaintiff. *See Chugach Electric Association v. Lewis*, 453 P.2d 345, 351 (Alaska 1969).

In a ruling related to the application of the “reasonable certainty” standard, the court has held that in most circumstances, a loss in future earning capacity cannot be inferred from the mere showing of permanent injury but that the plaintiff must present sufficient evidence so that earning capacity before and after the injury may be compared and the fact-finder may determine whether there has been an impairment in earning capacity and the extent of that impairment. The need for evidence of impairment is particularly important when the nature of the plaintiff’s injury and occupation is such that the jury could not use its common knowledge and experience to determine the extent of the impairment of the plaintiff’s earning capacity. *City of Fairbanks v. Nesbett*, 432 P.2d 607, 616-17 (Alaska 1967) (ankle injury to lawyer). *But see Chugach Electric Association v. Lewis*, 453 P.2d 345, 351 (Alaska 1969) (implying that jury could invoke its collective wisdom and experience in determining impact of eye injury on future wages and job opportunities of an electrical lineman); *American National Watermattress Corp. v. Manville*, 642 P.2d 1330 (explaining *Nesbett* on the basis of lack of evidence of effect of injury on employment).

The court in *Beaulieu v. Elliott*, 434 P.2d 665, 668 (Alaska 1967), noted that the fact that the plaintiff could be employed in an alternative occupation should be considered in determining the award for loss of future earning capacity. Similarly, in awarding damages for the loss of future earnings in *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 934 (Alaska 1977), the trial court used the difference between the amount of earnings of the plaintiff’s employment before and after his injury, projected over his work-life. Actual alternative employment or a reasonable probability for future employment may be considered in determining a damage award for loss in earning capacity. *But see Saslow v. Rexford*, 395 P.2d 36, 42 (Alaska 1964).

An award for future loss of earnings is not to be reduced by the amount the plaintiff receives from a disability retirement pension, at least when the damage award represents expected future earnings exclusive of retirement pay and the disability pension is equivalent to expected retirement income. *Beaulieu v. Elliott*, 434 P. 2d 665, 672 (Alaska 1967).

In *Beaulieu*, however, the court initially held that in determining an award for loss of future earnings, wage increases which commonly occur as one progresses in his or her chosen profession were not to be taken into account. *Id*. Subsequently, the court has allowed consideration of automatic step increases in salary which are based on length of service, *State v. Guinn*, 555 P.2d 530, 546 (Alaska 1976), and merit increases (based on increase in employee’s skills and experience) which are shown with reasonable certainty as likely to occur, *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 937 (Alaska 1977). *Beaulieu’s* reference to the non-consideration of wage increases has been limited expressly to wage increases attributable to inflation. *Id*. at 937. In *State v. Harris*, 662 P.2d 946, 947-48 (Alaska 1983), the court held that evidence of automatic future wage increases guaranteed by contract may be admitted provided that the wage increases are attributable to factors other than inflation. In *Harris*, plaintiff showed that the future increases were to occur independently of increases in the general wage level; the increases were fixed and certain; and the evidence did not demonstrate they were attributable primarily to inflation. *Id*. at 948.

In two cases the Alaska Supreme Court has dealt with the issue of loss of earning capacity of persons who were not part of the wage-earning work force when they were injured. In both cases the Court indicated that the claimants could recover for a loss of their earning capacity. In *Morrison v. State*, 516 P.2d 402 (Alaska 1973), the trial court considered the loss of future earning capacity of a thirteen-year-old plaintiff. The trial court calculated the loss based on the assumption that the plaintiff would have worked for five years earning $8,000 per year, and that after those five years in the work force, she would have been married and would have left the work force. Under the trial court’s approach the loss of future earnings was $40,000. The Supreme Court rejected the trial court’s approach. The court emphasized that the issue was the plaintiff’s loss of earning capacity, i.e., the ability to earn money. The court indicated that a person may recover for a reduction in earning capacity even though they are not presently employed in a wage-earning job and had not made plans to be employed in a wage-earning job in the future. Applying this analysis to the case of a housewife, the court indicated that even if the plaintiff had not been employed before her injury and could still function as a housewife, she was entitled to an award for impaired earning capacity because she had lost the future capacity to work in commercial enterprises.

In *American National Watermattress Corp. v. Manville*, 642 P.2d 1330 (Alaska 1982), the Court relied on its decision in *Morrison* and affirmed an award for loss of earning capacity for a woman who worked in a family-owned business for a nominal salary. The court described *Morrison* as holding that a woman who voluntarily forgoes wages in the commercial market in order to work as a housewife is nevertheless entitled to an award for lost earning capacity. Evidence considered relevant as to the claim for impairment of future earning capacity in *Manville* included expert testimony concerning the value of the plaintiff’s services to the business, and testimony that the business was required to hire additional employees to perform her work.

In *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1986) the court recognized another category of economic loss consisting of the loss of non-market services such as performance of household chores. A separate instruction on this concept may be appropriate.

In determining damages for the loss in future earning capacity, the award is to be based on pre-injury life expectancy rather than on a shortened expectancy due to the injury. This is so because the tortfeasor should not be able to reap the benefit of the victim’s shortened life occasioned by permanent injury for which the wrongdoer is responsible. *Morrison v. State*, 516 P.2d 402, 406 (Alaska 1973) (*citing Restatement of Torts* § 924, comment e at 635 (1939) and C.  McCormick, *Handbook on the Law of Damages* § 86 at 303-04 (1935)).

The court has repeatedly held that future income taxes are not to be considered when awarding damages for impairment of future earning capacity. *Ehredt v. DeHavilland Aircraft Co. of Canada*, 705 P.2d 446, 453 (Alaska 1985); *City of Kotzebue v. McLean*, 702 P.2d 1309, 1317 (Alaska 1985); *Harris*, 662 P.2d at 948; *Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428, 434-35 (Alaska 1983). The court has indicated in dicta that prejudgment interest may be appropriate on an award of compensation for lost future earning capacity. *Hertz v. Berzanske*, 704 P.2d 767, 773 n.9 (Alaska 1985).

In *Grimes v. Haslett*, 641 P.2d 813, 818 n. 4 (Alaska 1982) the court recommended an instruction for use in cases involving a claim for loss of future earning capacity.