20.09 LOSS OF PARENTAL CONSORTIUM

The (first, second, etc.) item of non-economic loss is claimed not by [name(s) of principal plaintiff(s)] but by (his) (her) (their) [child(ren)]. The child(ren) claim(s) that an injury to the [name(s) of principal plaintiff(s)] legally caused by the defendant(s) has damaged the relationship between the parent(s) and child(ren).

You may make an award for the fair value of the loss of the enjoyment, care, guidance, love and protection that the child(ren) (has) (have) suffered or are 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 nature of the relationship between the parent(s) and child(ren).

If you decide to make an award to the child(ren) for this claimed loss, your award must not include any amount that duplicates any award to [name(s) of principal plaintiff(s)]. For example, you should not make an award to the child(ren) for any loss of financial support from their parent(s), because that amount would already be included in the parent's right to recover for loss of earnings or loss of (his) (her) (their) ability to earn money.

# Use Note

This instruction should be used for claims of loss of parental consortium. Although technically the consortium claimants are also “plaintiffs,” for ease of understanding, the injured parent is referred to by name and the consortium claimants are referred to by name or as the plaintiff’s children.

Effective May 1986, the legislature enacted AS 09.17.010, limiting certain non-economic damages. Several legal issues that could affect claims for loss of parental consortium are raised by this statute. First, the application of AS 09.17.010 to claims for loss of parental consortium is unclear. AS 09.17.010 limits damages for non-economic loss 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.” This omission of loss of consortium damages from the list of categories could be explained by concluding that loss of parental consortium is included in the catch-all category of “other pecuniary damage.” Alternatively, it may be argued that loss of parental 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 child(ren)), or whether AS 09.17.010 (b) imposes a single $500,000 cap on all of the non-economic loss claims (including the 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 child(ren) cannot exceed $500,000. If there is a separate $500,000 cap for the child(ren)’s loss of consortium claim (and possibly other non-economic loss claims by the child(ren), 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. The list of potential areas of double compensation may be expanded if evidence suggests it will be a problem.

# Comment

In Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987), the Alaska Supreme Court recognized that minor children have a cause of action for loss of parental consortium. See also Truesdell v. The Halliburton Co., Inc., 754 P.2d 236 (Alaska 1988). Whether such a cause of action exists for non-minors is an open question, although the Hibpshman court referred to case law restricting the cause of action to minors. Hibpshman, 734 P.2d at 996 n.16. The third paragraph is supported by the Court’s decision in Hibpshman, 734 P.2d at 996.

The Alaska Supreme Court has not decided whether the parents of an injured child may sue for damage to the parent/child relationship. However, in Scott v. United States, 884 F.2d 1280 (9th Cir. 1989) the Court applied Alaska law and recognized such a cause of action. See also Yako v. United States, 891 F.2d 738 (9th Cir. 1989). In a case where such a claim is allowed, Instruction 20.09 can be modified to instruct on this element of recovery.