

**1816 INJURY TO SPOUSE: PAST LOSS OF EARNING CAPACITY:
HOUSEHOLD SERVICES**

In your answer to subdivision ____ of question ____, if you find that as a result of the injuries sustained by (plaintiff), (he) (she) was unable to carry on (his) (her) normal household services from the date of the accident to the present date, you should allow such sum as you feel will fairly and reasonably compensate (him) (her) for the household services (he) (she) was unable to perform, not exceeding the amount for which (he) (she) could have employed other people to do the work.

COMMENT

This instruction and comment was approved by the Committee in 1992.

This instruction is to be used in cases where an injured spouse seeks compensation for his or her inability to perform household services from the date of the accident to date of trial. Conceptually, the claim is based on a past loss of earning capacity.

Case law does not seem to rule out the legality of such an instruction. The only case directly focusing on the problem, Lambert v. Wrensch, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), held that, because plaintiff's husband had a claim for loss of consortium which included loss of material services, plaintiff wife could not recover for her inability to do household chores. The Court ruled that to allow for such loss would constitute a double recovery.

In the case of Zintek v. Perchik, 163 Wis. 2d 439, 471 N.W.2d 522 (Ct. App. 1991), the plaintiff wife worked outside the home. There was testimony concerning her past wage loss. In addition, expert testimony established the value of household services which she normally would have performed had she not been injured. The appellate court upheld the jury award which combined a recovery of both elements. The appeal was based solely on the sufficiency of the evidence. In a footnote, the court indicated it did not address the Lambert problem - whether recovery for plaintiff's loss of household services was included in her husband's recovery for loss of consortium. (Zintek, *supra* at 481 n.22.)

It appears that Wisconsin appellate courts have tacitly approved a plaintiff's recovery for loss of ability to perform household services if the loss of consortium claim of the spouse does not include recovery for "material services." In a given case, a request by plaintiff's lawyer for jury verdict questions as to past loss of household services and loss of future ability to perform such services can be honored by amending the loss of consortium instruction.

If this instruction is used along with JI-Civil 1815, then delete the term "material services" from JI-Civil 1815.