1760 PERSONAL INJURIES: PAST LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) past loss of earning capacity.

Your answer to this (question) (subdivision) should be the difference between what (plaintiff) was reasonably capable of earning as a ((his) (her) usual occupation) from the date of the accident to the present time had (he) (she) not been injured and what (he) (she) was reasonably capable of earning during the period in view of (his) (her) (the) injuries sustained as a result of the accident.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) past loss of earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of plaintiff's services to the business, (and the profits of the business).]

[If you find that (plaintiff) was delayed in graduating from (school), you may consider this delay in determining reasonable compensation for (his)(her) loss of earning capacity.]

COMMENT

The instruction and comment were originally published in 1969 as JI-Civil 1775. They were revised and renumbered in 1998. The instruction was revised in 1999 to incorporate former Wis JI-Civil 1788 and revised in 2016 to add the following words to the end of the second paragraph: "sustained as a result of the accident." The comment was updated in 2002 and 2016.

See Bach v. Liberty Mut. Fire Ins. Co., 36 Wis.2d 72, 86, 152 N.W.2d 911 (1967); Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 24, 119 N.W.2d 359 (1963); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 404, 88 N.W.2d 747, 756 (1958); Topham v. Casey, 262 Wis. 580, 585-86, 55 N.W.2d 892, 894-95 (1952); Schultz v. Miller, 259 Wis. 316, 328, 48 N.W.2d 477, 482 (1951); Brain v. Mann, 129 Wis.2d 447, 385 N.W.2d 227 (Ct. App. 1986); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis.2d 145, 370 N.W.2d 815 (Ct. App. 1985); LaChance v. Thermogas Co. of Lena, 120 Wis.2d 569, 357 N.W.2d 1 (1984); Fischer v. Cleveland Punch and Shear Work Co., 91 Wis.2d 85, 280 N.W.2d 280 (1979); Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975); Koele v. Radue, 81 Wis.2d 583, 260 N.W.2d 766 (1978); Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis.2d 354, 166 N.W.2d 148 (1969);

Johnson v. Misericordia Community Hosp., 97 Wis.2d 521, 294 N.W.2d 501 (Ct. App. 1980); Allen v. Bonnar, 22 Wis.2d 221, 125 N.W.2d 571 (1963); Reinke v. Woltjen, 32 Wis.2d 653, 146 N.W.2d 493 (1966); Ballard v. Lumberman's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966).

The supreme court approved a former version of this instruction in Carlson v. Drew of Hales Corners, Inc., 48 Wis.2d 408, 418, 180 N.W.2d 546 (1970). The court in Carlson expressly differentiated between an instruction for "loss of wages" and an instruction for "loss of earning capacity." Where the plaintiff is not employed at the time of an injury, the court said "it is imperative to frame the instruction in terms of loss of earning capacity." Moreover, the court stated that a "loss of wages" instruction under circumstances where the plaintiff is unemployed at the time of the injury is "ipso facto erroneous." Carlson v. Drews of Hales Corners, Inc., supra at 417.

The plaintiff is entitled to the lost earning capacity instruction regardless of whether the plaintiff would have chosen to work. "'In determining past and future loss of earning capacity the question is not whether plaintiff would have worked, by choice. He is entitled to compensation for his lost *capacity* to earn, whether he would have chosen to exercise it or not . . . '" See Carlson at p. 417, quoting from Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 608, 148 N.W.2d 65 (1967). In an appropriate case, the court may want to add the following language at the end of the second paragraph:

> It makes no difference whether the plaintiff would have chosen to work or not. (He) (She) is entitled to compensation for (his) (her) lost *capacity* to work, whether (he) (she) would have exercised it or not.

Even though wage loss is an accurate gauge of loss of earning capacity, the court in Carlson said that an instruction for damages in a personal injury suit couched in terms of "loss of wages" is always incorrect. Carlson, supra at 417. The court did note, however, that it is not prejudicial error to phrase the instruction in terms of loss of wages where the only evidence of loss of earning capacity is loss of wages. See also John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," 60 Marq. L. Rev., 201, 267 (1977).

Loss of Earning Capacity - Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co. 73 Wis.2d 273, 243 N.W.2d 806 (1976).

For delay in obtaining a degree, see Michaels v. Green Giant Co., 41 Wis. 2d 427, 164 N.W.2d 217 (1968); Webster v. Krembs, 230 Wis. 252, 282 N.W. 564 (1939).