

1815 INJURY TO SPOUSE: LOSS OF CONSORTIUM

"Consortium" involves the love and affection, the companionship and society, the privileges of sexual relations, the comfort, aid, advice and solace, the rendering of material services, the right of support, and any other elements that normally arise in a close, intimate, and harmonious marriage relationship. A wrongful invasion, impairment, or deprivation of any of these rights, resulting from a disabling injury to a spouse, is a legal loss and a basis for damages to the other spouse harmed or deprived.

In answering this question, you should consider the nature, the form, and quality of the relationship that existed between (the spouses) up to the time of the injury. Based on that relationship, determine what sum will represent fair and reasonable compensation for any loss of consortium that was sustained by the deprived spouse as a result of the injury.

If you find that the loss will continue in the future, include in your answer damages for the period you are convinced it will continue to exist.

Compensation for loss of consortium, except as it relates to material services, is not measured by any rule of market value. Instead, it is measured on the basis of what you find is fair and reasonable compensation for the loss sustained by the deprived spouse. Compensation for material services is to be measured by what it would reasonably cost in the market for like services.

So as not to duplicate damages, do not include in your answer any allowance for loss of earnings or loss of earning capacity of the injured spouse. Those damages are dealt with in another question.

COMMENT

The instruction and comment were originally published in 1978 and revised in 1984. The comment was updated in 1987, 1990, and 2011. An editorial correction was made in the comment in 1999.

The instruction was cited with approval in Kottka v. PPG Ind., Inc., 130 Wis.2d 499, 520, 388 N.W.2d 160 (1986).

In Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966), the court included "sexual companionship" as an element for the concept of consortium. In Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 185 (1967), the right of action for loss of consortium resulting from her husband's injury was extended to a wife. This case overruled Nickel v. Hardware Mut. Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955). There is no longer need to join the causes of action for injury and loss of consortium. See Fitzgerald v. Meissner & Hicks, Inc., 38 Wis.2d 571, 157 N.W.2d 595 (1968), which also includes suggested devices for avoiding double or duplicate recoveries.

Loss of consortium creates a derivative separate and independent cause of action resulting from the injuries to a spouse. Schwartz v. City of Milwaukee, 54 Wis.2d 286, 195 N.W.2d 480 (1972); Peeples v. Sargent, 77 Wis.2d 612, 643, 253 N.W.2d 459 (1977). A spouse's causal negligence can be imputed to the other spouse to reduce or defeat recovery for loss of consortium. White v. Lunder, 66 Wis.2d 563, 225 N.W.2d 442 (1975); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975). However, any other defenses (e.g., exculpatory contract) to the injured spouse's action are not available to release a spouse's consortium rights. Arnold v. Shawano County Agricultural Soc'y, 111 Wis.2d 203, 214-15, 330 N.W.2d 773 (1983).

The life expectancy of the spouse is an element for consideration in determining compensation for loss of consortium. Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975). For basis of determining damages for loss of consortium with respect to the several elements, see Selleck v. City of Janesville, 104 Wis. 570, 80 N.W. 944 (1899). As to the relevance of testimony on the injured spouse's marital and family problems, see Strelecki v. Firemans Ins. Co. of Newark, 88 Wis.2d 464, 276 N.W.2d 464 (1979).

Loss of Earnings as a Homemaker. In Lambert v. Wrensch, 135 Wis.2d 105, 399 N.W.2d 369 (1987), the supreme court held that the reference in this instruction to "the rendering of material services" covers the loss of the injured spouse's services as a homemaker. Therefore, giving a separate instruction on the injured spouse's loss of earnings as a homemaker would overlap with recovery for loss of consortium and result in a double recovery.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(4), limits the recovery for loss of consortium of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 893.55(4)(d) (2011 Wisconsin Act 2).

Fiancee. Loss of consortium suffered by a fiancée of an injured person is not compensable under Wisconsin law. Denil v. Integrity Mut. Ins., 135 Wis.2d 373, 401 N.W.2d 13 (Ct. App. 1986).