

8.11 DAMAGES CHARGES - GENERAL

C. LOSS OF EARNINGS¹ (Approved 12/88; Revised 7/10)

1. Past Lost Earnings²

[Plaintiff] has a right to be compensated for any earnings lost as a result of injuries caused by defendant's negligence [or other wrongdoing].³

Any award for lost earnings must be based on net [take-home] pay, not on gross income.⁴ This is because only take-home pay — the amount left after taking out taxes

¹ It is unclear to the Committee whether economic damage awards and/or emotional distress damage awards under the *New Jersey Law Against Discrimination* are subject to either Federal and/or New Jersey State income taxation. *See generally*, 26 U.S.C. § 104(a); IRS Rev. Ruling 96-56; *United States v. Burke*, 504 U.S. 229, 112 S. Ct. 1867 (1992); and *Commissioner v. Schleier*, 515 U.S. 323, 115 S. Ct. 2159 (1995), regarding Federal taxation of awards under Federal discrimination law. Thus, it is unclear to the Committee whether the statement in the Charge that an award for lost earnings (Charge 8.11C) and an award for personal injury (Charge 8.48) is “not subject to federal or state income tax” is accurate with respect to awards under the *New Jersey Law Against Discrimination*. In *Wachstein v. Slocum*, 265 N.J. Super. 6, 24 (App. Div. 1993) *certif. denied*, 134 N.J. 563 (1993), the Appellate Division noted the “present uncertainty of the law in this area” and observed that “we believe the wisest course would be for the trial court to omit any reference to taxability in its instructions to the jury.” *See also*, *Abrams v. Lightolier, Inc.*, 50 F. 3d 1204, 1220 (3rd Cir. 1995) (citing *Wachstein*, the court states that “we are confident that the New Jersey courts would not require that the award be calculated on net income”). The Committee believes that the nature and scope of instructions, if any, on the tax consequences of these awards should await further guidance from the appellate courts.

² This section applies only where the plaintiff alleges a loss of salary. Where there is an allegation that plaintiff lost other benefits, such as medical coverage, pension benefits, etc., the instructions must be molded to incorporate those concepts.

³ *Smith v. Red Top Taxicab Corp.*, 111 N.J.L. 439, 443 (E.&A. 1933).

⁴ *Ruff v. Weintraub*, 105 N.J. 233, 238 (1987).

— would have been received by [plaintiff], and the amount you award is not subject to Federal and New Jersey income taxes.⁵

So, first, you must decide whether [plaintiff] proved that he/she was disabled by his/her injuries which in turn resulted in lost income? If so, you must then decide and fix the amount of lost earnings. Do this by considering the length of time during which [plaintiff] was not able to work, what his/her income was before the injuries, how much he/she earned upon return to work, whether the injuries affected his/her ability to do any tasks required on the job, and any lessening or decrease in his/her income after returning to work.

In your analysis, think about any special skills [plaintiff] has and whether there were other jobs available that he/she was able to do to earn income. [Plaintiff] must have tried to minimize the earnings lost, but extraordinary or impractical efforts are not necessary. All that is required are reasonable efforts and ordinary care in trying to reduce the loss.⁶

[If the lawsuit is brought pursuant to *N.J.S.A. 39:6A-8a*, the “verbal threshold” statute, the jury must be instructed: “regardless of whether you found that [plaintiff] proved that he/she sustained a permanent injury by a preponderance of the evidence,

⁵ *Ibid.*; *Bussell v. DeWalt Products*, 105 *N.J.* 233, 228-229 (1987).

⁶ *McDonald v. Miannecki*, 79 *N.J.* 275, 299 (1979), as to general duty to mitigate damages. Refer also to *Assoc. Metals Corp. v. Dixon Chem.*, 82 *N.J. Super.* 281, 307 (App. Div. 1964), and *Robinson v. Gonzalez*, 213 *N.J. Super.* 364, 371-372 (App. Div. 1986).

the jury may award [plaintiff] a sum of money for past lost earnings.] In determining the amount of lost earnings, decide the amount of earnings that were probably lost.⁷ This means that you must exercise your sound judgment; [plaintiff] does not have to prove the amount of lost earnings with precision, but only with reasonable probability.

2. Future Lost Earnings⁸

a. Preliminary Charge to be Given Before Any Expert Testimony

You will shortly hear expert opinion testimony on certain economic claims made. You will be the final judges of the reliability of an expert's projections of future economic losses. Any bottom line figure offered by the expert will be based on certain assumptions made by the expert concerning probable future economic trends.

In evaluating the reliability of the expert's testimony, consider the cross-examination by counsel, as well as any evidence presented by the opposing party on this issue, such as other expert testimony. Keep an open mind as to the reliability of any bottom-line figures; do not automatically accept them. It is your responsibility alone to determine the amount of economic losses suffered by [plaintiff], based on all the credible evidence you choose to accept on this question.

⁷ *Moore v. Pub. Serv. Coordin. Transp.*, 15 N.J.Super. 499, 510 (App. Div. 1951).

⁸ These instructions are based upon *DeHanes v. Rothman*, 158 N.J. 90 (1999), overruling *Tenore v. NuCar Carriers, Inc.* 67 N.J. 466 (1975).

b. Final Charge to be Given at Conclusion of Case if There is No Expert Testimony

[Plaintiff] also seeks to recover earnings that will be lost in the future. He/she has a right to be compensated for any earnings which you find will probably be lost and proximately caused by the injuries brought about by defendant's negligence [or other wrongdoing].⁹

If you decide from the evidence that it is reasonably probable that plaintiff will lose income in the future, because [either] he/she has not been able to return to work, [or] he/she has not been able to keep the same job, [or] he/she will be able to work for a shorter period of time only, then you should include an amount to compensate for those lost earnings. In deciding how much your verdict should be to cover future lost earnings, think about those discussed regarding past earning losses, including the nature, extent and duration of injury. Consider [plaintiff's] age today, his/her general state of health before [date of incident], how long you reasonably expect the loss of income to continue, and how much plaintiff can earn in any available job that he/she physically will be able to do. Obviously, the time period covering [plaintiff's] future lost earnings cannot go beyond that point when it was expected that he/she would stop working because of retirement, had he/she not been injured.¹⁰ Consider the

⁹ *Coll v. Sherry*, 29 N.J. 166, 175 (1959).

¹⁰ The collateral source rule (*see* cases under Model Civil Charge 8.11A) applies to loss of earnings

probabilities of increases in earnings resulting from raises for productivity or promotion and plaintiff's life expectancy and work-life expectancy before the injury.¹¹

Any figures you have heard on life expectancy and work-life expectancy are only statistical averages. They are not fixed rules; they are general estimates. Use them with caution. Use your sound judgment in taking them into account.

For future lost earnings, as well as past lost earnings, you must base your decision on probable net [take-home] earnings, the amount left after taxes are deducted. [Plaintiff] has the burden to prove, by a preponderance of the evidence, his/her net income and the probable loss of future earnings.¹² In deciding what [plaintiff's] future losses are, the law does not require of you mathematical exactness. The law requires that you must use sound judgment based on reasonable probability.¹³

as well as to medical and hospital expenses. Plaintiff may recover damages for loss of earnings although having been paid wages or their equivalent by employer pursuant to sick or annual leave benefits or retirement on half salary under a pension contract. *Rusk v. Jeffries*, 110 N.J.L. 307, 311 (E. & A. 1933). *Chap. 326, L. 1987*, eliminates the collateral source rule as to causes of action arising on or after December 18, 1987. Deduction of benefits, less premiums, is done by the court, not the jury. *See also N.J.S.A. 59:9-2(3)* for similar effect of *New Jersey Tort Claims Act*.

¹¹ This concept should be charged if there is appropriate evidence received on the subject. *See* Charge 8.11G regarding life expectancy.

¹² *See Caldwell v. Haynes*, 136 N.J. 422, 436 (1994), which requires that the plaintiff prove net income in personal injury and wrongful death cases.

¹³ By analogy to future income loss in a wrongful death case, *see Tenore v. NuCar Carriers, Inc.*, *supra*, at 494-495. *See also, Friedman v. C. S. Car Service*, 108 N.J. 72, 78-79 (1987).

[Verbal Threshold cases]

[If the lawsuit is brought pursuant to *N.J.S.A.* 39:6A-8a, the “verbal threshold” statute, the jury must be instructed: “regardless of whether you found that [plaintiff] proved that he/she sustained a permanent injury by a preponderance of the evidence, the jury may award [plaintiff] a sum of money for past lost earnings. If you find that [plaintiff] has proved a claim for future lost earnings by a preponderance of the evidence, your award must be limited only to that reasonable period of recuperation and recovery that proximately results from the non-permanent injury sustained.]

NOTE TO JUDGE

Haywood v. Harris, et al., A-1120-09T-3, decided July 2, 2010, addresses claims for future lost earnings in a case brought under *N.J.S.A.* 39:6A-8a, the “verbal threshold” statute. There, the Appellate Division mandated the charge parenthetically stated above. That decision also requires that the verdict sheet contain language in the appropriate case limiting “future lost earnings” to a “reasonable period of recuperation and recovery.”

c. Effects of Interest and Inflation on Future Earnings

NOTE TO JUDGE

Do not charge if parties stipulate that interest and inflation rates will offset each other.

Once you have decided how much money plaintiff will lose in the future, you must then consider the effects of inflation and interest. Consider the probable effects

of inflation on reducing the purchasing power of money in the future. Your award for future losses may be increased to account for a loss in the purchasing power of money because of inflation.

Consider the probable effects of interest which will be earned on your award. You must not award [plaintiff] the exact amount of money that he/she will be losing in the future, because he/she will have that money now, although he/she will not have incurred the loss of that money until some time in the future. That means that he/she can invest the money and earn interest on it now, even though he/she otherwise would not have had that money to invest until a future date.

Therefore, you must make an adjustment for the award being available now, even though the loss will not be experienced until the future. This adjustment is called “discounting”; it gives you the present value of the money one receives now instead of at some future time. Discounting gives you the present value or present worth in a single amount of money which otherwise would to be received over a number of years at so much per year.

Your goal is to create a fund of money, which, if paid today, will fairly compensate plaintiff for his/her future loss of earnings. In doing so — in finding the present value of future losses — you must consider the interest the fund will probably earn in future years, as well as the effects of taxation on the interest earned and the effects of inflation in decreasing the purchase power of money. The higher the

interest rate you believe the fund will earn in the future, the lower will be the amount of the fund needed today to fairly compensate [plaintiff] for future earnings. The higher the probable rate of inflation in the future, the higher the amount of the fund will be needed to fairly compensate [plaintiff]. Possibly, interest earned in the future could be offset exactly by the rate of inflation, causing these factors to cancel each other out; in that event, you need not adjust your award of future lost earnings for inflation or interest.

d. Final Charge to be Given at Conclusion of Case if There was Expert Testimony on the "Bottom Line"

You have heard expert testimony about the present value of [plaintiff's] future lost earnings, including projections as to future interest, including its tax consequences, and inflation rates. You may consider some, all, or none of the opinions of the expert[s] in determining a fair figure to compensate [plaintiff] for his/her future lost earnings. You [may] have heard [a] "bottom line" figure[s] as to [plaintiff's] future lost earnings. Do not automatically accept these figures. You are free to determine, based on all the evidence, including the expert testimony you choose to accept, what amount will fairly compensate [plaintiff] for his/her future lost earnings.

3. Loss of Future Earning Capacity: Infant Plaintiff With Permanent, Severe Injury¹⁴

If you find the evidence establishes that [the infant plaintiff] suffered a severe injury with lasting or permanent effects and that the injury will within reasonable probability reduce [his/her] future earning capacity, you may consider that reduction. No one knows what job or profession [the infant plaintiff] would eventually undertake, without this severe injury.

Therefore, as to an infant's loss of future earning capacity, the law provides no better yardstick than your own sound judgment and experience. You must not award damages for [an infant plaintiff's] loss of earning capacity arbitrarily; rather, you must use your own good conscience, sound judgment, and experience and determine what loss of future earning capacity is reasonably probable to result from plaintiff's injury.

NOTE TO JUDGE

Add appropriate language concerning present value of future loss of earnings.

4. Loss of Earnings Where Plaintiff has Received P.I.P. Income Continuation Benefits (Approved 12/88, Deleted 2/04)

NOTE TO JUDGE

This charge is deleted in its entirety. While *Ruff v. Weintraub, supra*, requires all wage losses to be determined by the jury on a “net” basis rather than “gross” wages, *N.J.S.A. 39:6A-12* bars the admission of PIP

¹⁴ *Lesniak v. Cty. of Bergen*, 117 N.J. 12 (1989).

benefits, wage losses or medical expenses into evidence. *See, Clifford v. Opdyke*, 156 *N.J. Super.* 208, 213 (App. Div. 1978).

Note that *N.J.S.A.* 39:6A-12 bars admission of wage loss benefits into evidence whether they are “paid” or just “collectible.”

In practice, the jury should determine plaintiff’s “net” wage loss after taxes are deducted from “gross” income, and counsel should disclose to the court if the plaintiff was covered by a policy of insurance that would provide PIP wage loss benefits. The court would then mold the jury’s verdict to credit defendant according to each week that the jury found plaintiff lost wages. Unless the plaintiff purchased supplemental, increased PIP coverages, the maximum credit is set by statute. *See N.J.S.A.* 39:6A-4. These benefits would be treated similar to other “collateral sources.” *See Adamson v. Chiavaro*, 308 *N.J. Super.* 70, 78-81 (App. Div. 1998) (New York PIP policy).