20.01A DAMAGES – INTRODUCTORY INSTRUCTION: LIABILITY CONTESTED

If you decide in favor of the plaintiff, you must then decide how much money, if any, will fairly compensate the plaintiff. I will list the items of loss claimed by the plaintiff. You may not assume because I list an item of loss or explain how to measure a particular loss that you are required to make an award for that loss. To make an award for a loss claimed by the plaintiff, you must decide that it is more likely true than not true that:

1. the plaintiff had such a loss or is reasonably probable to have such a loss in the future, and

2. the defendant’s conduct was a substantial factor in causing the loss.

(Insert Instruction 3.07 (Substantial Factor) if not already given as part of the liability instructions.)

If both of these things are more likely true than not true for a claimed loss, you must then decide how much money will fairly compensate the plaintiff for that loss. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

If you do not conclude that both of these things are more likely true than not true for a claimed loss, you may not make an award for that loss.

**[Option A (to be used in non-personal injury cases):**

The items of loss claimed by the plaintiff are the following:

1.

2. . . .]

**[Option B (to be used in all personal injury cases):**

The items of loss claimed by the plaintiff [fall into two categories known as economic losses and non-economic losses] [are known as economic losses] [are known as non-economic losses].

[The items of economic loss claimed by the plaintiff are: (list items of economic loss claimed).

1.

2.

The items of non-economic loss claimed by the plaintiff are: (list items of non-economic loss claimed)

1.

2. ]

I will now explain how to measure each of these claimed items of loss.

# **Use Note**

This instruction is intended primarily for use in tort cases, but it may be adapted for use with some other causes of action. Instruction 24.09A should be used as the introductory instruction for contract damages.

Instruction 20.01A introduces the damage instructions in cases where the liability of the defendant is contested. Instruction 20.01B should be used when the defendant’s liability has been established, and damages are the only issue before the jury.

This instruction must be followed by specific instructions explaining each item of loss claimed by the plaintiff. Note that a general verdict is not permitted in personal injury cases--a verdict form must specify past and future economic and non-economic losses. *See* AS 09.17.040(a).

In non-personal injury cases, only Option A is used. In personal injury cases, Option A is not used. Instead, use the appropriate bracketed language in Option B depending on whether the plaintiff claims economic loss, non-economic loss or both. In personal injury cases, the items that are listed for non-economic losses are limited to the categories listed in AS 09.17.010(a).

If there are counterclaims or cross-claims, this instruction should be repeated for each party’s claims against another.

## **Comment**

A plaintiff is entitled to recover damages only for losses proximately caused by the defendant’s conduct. *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d 492, 497 (Alaska 1973). These instructions use the “substantial factor” test for causation. See Comment to Instruction 3.01. *See also Long v. Arnold*, 386 P.3d 1217, 1222 (Alaska 2016) (approving use of Instruction 3.07 defining “substantial factor”).

For future damages, the plaintiff is required to show that there is a reasonable probability that the future loss or expense will occur. *Alexander v. State*, 221 P.3d 321, 325 (Alaska 2009); *Sherbahn v. Kerkove*, 987 P.2d 195,198 (Alaska 1999).

The court has used both “reasonable certainty” and “reasonable probability” when describing the necessary proof for future medical expenses.  *Sherbahn v. Kerkove*, 987 P.2d 195, 198-99 & n.12 (Alaska 1999); *Sampson v. Alaska Airlines, Inc.*, 467 P.3d 1072, 1075 (Alaska 2020).  This instruction uses the term “reasonably probable” to remain consistent with other instructions in this article. There is some risk of confusing the jury by using different terms for the same concept.  In order to avoid confusing the jury, the Committee has used the term “reasonably probable” rather than the term “reasonably certain” when discussing the likelihood that future medical expenses will be incurred.  As noted above, however, both have been approved by the court and are not erroneous.

Damage awards cannot be based on speculation, guess or conjecture. *Cameron v. Chang-Craft*, 251 P.3d 1008, 1021 n. 53 (Alaska 2011); *Alexander*, 221 P.3d at 325; *Orsisi v. Bratten*, 713 P.2d 791, 794 (Alaska 1986).