# CHAPTER 6

# DAMAGES FOR INJURIES TO PERSONS OR PROPERTY

## Introductory Note

**Measure of Damages**

1. The instructions in Part A of this chapter are intended for use primarily in negligence cases in which the limitations on damages for "noneconomic loss or injury" set forth in section 13-21-102.5, C.R.S., apply. For other tort claims, special damage instructions have been prepared that also apply to cases where the statutory limitations on noneconomic losses or injuries apply. For these other damage instructions, see the Detailed Table of Contents to this publication.

2. Part B of this chapter contains instructions on the proper measure of damages for the loss or destruction of personal property. For the proper measure of damages in cases involving physical damage to real property, see Instruction 18:4. See also the Source and Authority to Instruction 18:4 for the proper measure of damages for (1) the destruction of improvements to real property, (2) damages to crops, (3) damages to trees and timber, and (4) the appropriation of gravel, ore, coal, oil, or other minerals.

3. Instructions on the proper measure of damages in actions for breach of contract are set forth in Part E of Chapter 30. Also, for damages for wrongful discharge from employment, see Instructions 31:7 (breach of contract) and 31:15 (tort).

**Comparative Negligence and Pro Rata Liability**

4. In negligence cases in which either the comparative negligence statute, § 13-21-111, C.R.S., or the pro rata liability statute, § 13-21-111.5, C.R.S., or both, apply, the Instructions and special verdict forms in Part C of Chapter 9 should be used with Instruction 6:1, but not with the special verdict forms in Instructions 6:1A and 6:1B in Part A of this Chapter. In negligence cases in which neither the comparative negligence statute, § 13-21-111, nor the pro rata liability statute, § 13-21-111.5, applies, the Instructions in Chapter 9 should be used with Instructions 6:1, 6:1A, and 6:1B.

5. As an alternative in such cases, Instruction 4:20, the model unified verdict form, may be used with Instruction 6:1, 6:1A, and 6:1B instead of the special verdict forms in Part C of Chapter 9. Instructions 6:1, 6:1A, and 6:1B should also be used with product liability claims in which neither the comparative negligence statute, § 13-21-111, nor the pro rata liability statute, § 13-21-111.5, applies.

**Comparative Fault and Pro Rata Liability**

6. In product liability cases in which either the comparative fault statute, § 13-21-406, C.R.S., or the pro rata liability statute, § 13-21-111.5, or both, apply, the instructions and special verdict forms in Part E of Chapter 14 should be used with Instructions 6:1, 6:1A, and 6:1B in Part A of this chapter.

7. Again, as an alternative, Instruction 4:20, the model unified verdict form, may be used instead of the special verdict forms in Part E of Chapter 14.

**Pro Rata Liability in Other Tort Actions**

8. In other tort actions resulting in death or injury to persons or property in which the pro rata liability statute applies, Instruction 4:20, the model unified verdict form, should be used with the applicable special damage instruction for the specific kind of tortious conduct on which the claim is based rather than Instructions 6:1, 6:1A, and 6:1B.

**Tort Actions Against Health Professionals**

9. In tort actions against health care professionals or institutions subject to the limitations on damages provided by sections 13-21-102.5, 13-64-203 to -205, and 13-64-302, C.R.S., the instructions in subpart D of Part I of Chapter 15 should be used rather than Instructions 6:1, 6:1A, and 6:1B.

**Wrongful Death**

10. In actions for wrongful death, Instructions 10:3 and 10:4 should be used rather than Instructions 6:1, 6:1A, and 6:1 B.

**Economic Loss Rule**

11. For a discussion of the economic loss rule, see the Introductory Note to Chapter 9.

## A. PERSONAL INJURIES

### 6:1 PERSONAL INJURIES — ADULTS

**Plaintiff,** *(name)***, has the burden of proving, by a preponderance of the evidence, the nature and extent of** *(insert applicable pronoun)* **damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant(s),** *(name[s])***, (and) (,) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of the plaintiff[s],** *[name(s)]***), (and) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any noneconomic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and** *(insert any other recoverable nonecomonic losses for which there is sufficient evidence)***. (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be included in a separate category.)**

**2. Any economic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: loss of earnings or damage to** *(insert applicable pronoun)* **ability to earn money in the future, (reasonable and necessary) medical, hospital, and other expenses, and** *(insert any other recoverable economic losses of which there is sufficient evidence).* **(In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be included in a separate category.)**

**(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under either numbered paragraph 1 or 2 above.)**

#### Notes on Use

1. See the Introductory Note to this Chapter.

2. Use only those numbered paragraphs or parenthesized portions of the instruction that apply to the evidence in the case.

3. This instruction, together with Instructions 6:1A and 6:1B, where applicable, can also be used in lieu of other, more specific, instructions on damages by deleting or adding such elements of damage as are appropriate in light of the evidence in the case.

4. The amount of damages prayed for should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974); *see*

Note 2 of the Notes on Use to Instruction 2:1; *see also* C.R.C.P. 8(a) (no dollar amount shall be stated in the demand or prayer for relief).

5. If the jury has found in favor of the plaintiff, then they have found that the defendant was negligent. Therefore, the phrase "if any" in the first paragraph is not necessary after "the negligence of the defendant(s)" but is necessary after the reference to the possible negligence of plaintiff and any nonparty.

6. Because the nature of the tortious conduct of the parties or designated nonparties need not be the same, the final clause of the first paragraph of this instruction must be tailored by including a description of the culpable conduct alleged against each party and designated nonparty. *See, e.g.*, **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). Additionally, where there are multiple defendants, and different types of tortious conduct have been alleged against different defendants (for example, negligence as against Defendant A and strict liability or "fault" as against Defendant B), the final clause of the first paragraph of this instruction must be altered to describe separately the nature of the tortious conduct alleged as to each defendant.

7. For civil actions other than any civil action or binding arbitration seeking tort damages against a health-care professional, as defined in section 13-64-202(3), the maximum amount of noneconomic and derivative noneconomic damages that may be awarded is set by section 13-21-102.5(3)(a) and (b), C.R.S., as adjusted periodically for inflation by the Colorado secretary of state. § 13-21-102.5(3)(c). As of the most recent certification of February 12, 2024, the secretary of state has certified the following adjusted limitations for these damages:

> For claims that accrue on or after January 1, 1998, and before January 1, 2008, $366,250, which may be increased by the court upon clear and convincing evidence of justification to a maximum of $732,500.
>
> For claims that accrue on and after January 1, 2008, and before January 1, 2020, $468,010, which may be increased by the court upon clear and convincing evidence of justification to a maximum of $936,030.
>
> For claims that accrue on and after January 1, 2020, and before January 1, 2022, $613,760, which may be increased by the court upon clear and convincing evidence to a maximum of $1,227,530.
>
> For claims that accrue on and after January 1, 2022, and before January 1, 2024, $642,180, which may be increased by the court upon clear and convincing evidence to a maximum of $1,284,370.
>
> For claims filed on or after January 1, 2024, and before January 1, 2026, or any claim for relief that accrues on or after January 1, 2024, other than civil action or binding arbitration seeking tort damages against a health-care professional, as defined in section 13-64-202(4), or a health-care institution, as defined in section 13-64-202(3), or wrongful death action, in which damages for derivative or direct noneconomic loss or injury may

be awarded, the total amount of such damages that may be awarded must not exceed the sum of one million five hundred thousand dollars.

For the most current information on these caps, see the secretary of state's website, www.sos.state.co.us.

8. "Noneconomic loss or injury" is defined as nonpecuniary harm including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. § 13-21-102.5(2)(b). "Derivative noneconomic loss or injury" is defined as "harm or emotional stress to persons other than the person suffering the direct or primary loss or injury." § 13-21-102.5(2)(a). However, nothing in section 13-21-102.5 is to be construed "to limit the recovery of compensatory damages for physical impairment or disfigurement. . . ." § 13-21-102.5(5).

9. The terms "physical impairment" and "disfigurement" are not expressly defined in section 13-21-102.5 or in any appellate decision. *But see* **Pringle v. Valdez**, 171 P.3d 624, 631 (Colo. 2007) ("'If someone tortiously inflicts a permanent injury on another he or she has taken away something valuable which is independent and different from other recognized elements of damages such as pain and suffering and loss of earning capacity.'" (quoting 2 Marilyn Minzer et al., *Damages in Tort Actions* § 12.02 (1992))); **Preston v. Dupont**, 35 P.3d 433, 441 (Colo. 2001) ("Recovery for [physical impairment] at common law thus flowed from the general principle that whoever unlawfully injures another shall make her whole.").

10. The limitations of section 13-21-102.5 are not to be disclosed to the jury, but are to be imposed by the court before judgment. § 13-21-102.5(4). To enable the court to do so, however, requires that the jury be instructed separately as to "economic" and "noneconomic" loss or injury as well as "physical impairment" or "disfigurement." *See, e.g.*, **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992), *aff'd on other grounds sub nom.* **Gen. Elec. Co. v. Niemet**, 866 P.2d 1361 (Colo. 1994); **Herrera v. Gene's Towing**, 827 P.2d 619 (Colo. App. 1992); **Hoffman v. Schafer**, 815 P.2d 971 (Colo. App. 1991), *aff'd on other grounds*, 831 P.2d 897 (Colo. 1992).

11. Before applying the limitations on damages set forth in section 13-21-102.5(3)(a) to an award of damages for noneconomic losses, the court first must apportion liability based upon the relative degree of negligence among the joint tortfeasors pursuant to section 13-21-111.5, C.R.S. *See* **General Elec. Co.**, 866 P.2d at 1367-68; *see also* **Estate of Ross v. Pub. Serv. Co.**, 2025 COA 31, ¶ 78, 569 P.3d 882 (trial court erred by apportioning the plaintiff's damages according to the jury's fault allocations before applying the damages cap); **Alhilo v. Kliem**, 2016 COA 142, ¶ 66, 412 P.3d 902 (under the Wrongful Death Act, §§ 13-21-201 to -204, C.R.S., court apportions fault before applying the damage cap to the amount awarded). The limitation amount applies to each party that recovers damages individually and not to all the recovering parties in the aggregate. **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009). The "felonious killing exception" to the noneconomic damages cap in the Wrongful Death Act applies to both corporations and individuals. **Estate of Ross**, ¶ 33, 569 P.3d at 890.

12. Also, in cases involving more than one defendant, the $250,000 cap on noneconomic damages in section 13-21-102.5(3)(a) applies to the amount of noneconomic damages that a plaintiff can recover from each defendant, rather than to the total amount of noneconomic damages awarded. **General Elec. Co.**, 866 P.2d at 1366; *see also* **Colo. Permanente Med.**

**Grp., P.C. v. Evans**, 926 P.2d 1218 (Colo. 1996) (distinguishing the $250,000 cap on noneconomic damages set forth in the medical malpractice damages statute, § 13-64-302, C.R.S., from the damage cap on noneconomic damages set forth in section 13-21-102.5(3)(a)).

13. Under section 13-21-111.5, the damages awarded against the nonsettling defendants should be reduced only by an amount equivalent to the percentage of liability attributed to the settling nonparties irrespective of the settlement amounts actually paid to the plaintiff. **Smith v. Zufelt**, 880 P.2d 1178 (Colo. 1994); *accord* **Sprung v. Adcock**, 903 P.2d 1224 (Colo. App. 1995). *But see* **Smith v. Vincent**, 77 P.3d 927 (Colo. App. 2003) (solatium award was not subject to reduction).

14. In cases where the jury returns a verdict against a defendant based solely on a principle of vicarious liability for the conduct of another party, such as respondeat superior, a monetary settlement with the party whose conduct led to the defendant's vicarious liability must be set off against the sum of the verdict plus statutory prejudgment interest as of the time of the settlement. **Marso v. Homeowners Realty, Inc.**, 2018 COA 15M, ¶¶ 1-2, 14-45, 418 P.3d 542.

15. Other damages limitations include section 13-64-302, for tort actions against health care professionals or institutions, *see* Instruction 15:14 and the related instructions in Part I, subpart D of Chapter 15, and sections 13-21-203 and 203.5, C.R.S., for wrongful death actions, *see* Instruction 10:3.

16. In addition to the general limitations on recoverable damages set out in section 13-21-102.5, other statutes impose limitations on recoverable damages in certain specific cases. When any such statute may apply, other instructions should be used or appropriate modifications must be made in this instruction. *See, e.g.*, § 13-64-302 (actions against health care professionals and institutions); §§ 24-10-114 & 118(1)(d), C.R.S. (public entities and public employees in actions brought under the Colorado Governmental Immunity Act); § 33-41-103(2)(a), C.R.S. (liability of landowner who makes land available to public entity for recreational purposes); § 33-44-113, C.R.S. (liability of ski area operators to various users); *see also* **Pyles-Knutzen v. Bd. of Cty. Comm'rs**, 781 P.2d 164 (Colo. App. 1989) (claim under Colorado Governmental Immunity Act is limited by section 24-10-114(1), but not by amount "requested" by plaintiff in notice of claim submitted under section 24-10-109(2)(e), C.R.S.). The Colorado Governmental Immunity Act damages cap is inclusive of costs and prejudgment interest. **Caylao-Do v. Logue**, 2025 COA 42, ¶ 66, 571 P.3d 909.

17. The potentially competing claims of an injured party and a subrogated insurance carrier are subject to the provisions of section 10-1-135, C.R.S.

18. Omit any element of damage for which there is insufficient evidence. **Barter Mach. & Supply Co. v. Muchow**, 169 Colo. 100, 453 P.2d 804 (1969); **Stahl v. Cooper**, 117 Colo. 468, 190 P.2d 891 (1948). For example, "[a]n instruction on permanent injuries or future pain and suffering should not be given unless there is evidence from which it can be inferred with reasonable probability that such permanent injuries have been sustained or that such future pain and suffering will occur." **Sours v. Goodrich**, 674 P.2d 995, 996 (Colo. App. 1983). On the other hand, "if there is evidence of permanent disability, a court may instruct the jury on impairment of future earning capacity." **Phillips v. Monarch Recreation Corp.**, 668 P.2d 982,

987 (Colo. App. 1983). And the jury must compensate an injured party for proven damages. **Villandry v. Gregerson**, 824 P.2d 829 (Colo. App. 1991), *overruled on other grounds by* **Lee's Mobile Wash v. Campbell**, 853 P.2d 1140 (Colo. 1993); *see also* **Peterson v. Tadolini**, 97 P.3d 359 (Colo. App. 2004) (noneconomic damages award of zero was inconsistent with undisputed evidence of plaintiff's pain and loss of enjoyment of life, necessitating new trial on issue of damages).

## Source and Authority

1. The first paragraph of this instruction is supported by **Pullman Palace Car Co. v. Barker**, 4 Colo. 344 (1878). The remaining numbered paragraphs are based on section 13-21-102.5.

**Constitutionality of cap on noneconomic damages**

2. The constitutionality of the damages cap on noneconomic damages, *see* § 13-21-102.5(3), was upheld in **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997). *Accord* **Stewart v. Rice**, 25 P.3d 1233 (Colo. App. 2000), *rev'd on other grounds*, 47 P.3d 316 (Colo. 2002).

**Recoverable Damages**

3. Generally, as to the various elements of damages that may be recoverable, see **Thompson v. Tartler**, 166 Colo. 247, 443 P.2d 365 (1968) (loss of future earnings); **Van Schaack & Co. v. Perkins**, 129 Colo. 567, 272 P.2d 269 (1954); **Gerick v. Brock**, 120 Colo. 394, 210 P.2d 214 (1949); **Colo. Utils. Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931); **Denver Tramway Corp. v. Gentry**, 82 Colo. 51, 256 P. 1088 (1927); **Russo v. Birrenkott**, 770 P.2d 1335 (Colo. App. 1988); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975) (permanent injuries); and **Brncic v. Metz**, 28 Colo. App. 204, 471 P.2d 618 (1970). *See also* Colorado's Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. (describing recoverable damages in construction defect claims).

4. Damages for "loss of future earning capacity" are compensable even though they may be "uncertain in respect to the amount." **Brittis v. Freemon**, 34 Colo. App. 348, 354, 527 P.2d 1175, 1179 (1974); *see also* **Martinez v. Shapland**, 833 P.2d 837 (Colo. App. 1992); **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977). A plaintiff's immigration status may be relevant to a determination of future wage loss in some circumstances. **Silva v. Wilcox**, 223 P.3d 127 (Colo. App. 2009). Also, if there is evidence of permanent injury, to be awarded damages for loss of future earnings, a plaintiff need not show that but for the injury he or she could have earned more money. **Jones v. Cruzan**, 33 P.3d 1262 (Colo. App. 2001) (evidence that plaintiff was earning more money after the injury did not preclude an award of damages for diminished earning capacity where there was evidence of permanent injury).

5. Medical expenses are compensable to the extent they are reasonable in amount as well as necessary. **Kendall v. Hargrave**, 142 Colo. 120, 349 P.2d 993 (1960); **Oliver v. Weaver**, 72 Colo. 540, 212 P. 978 (1923); **Denver City Tramway Co. v. Hills**, 50 Colo. 328, 116 P. 125 (1911). *But see* **Wal-Mart Stores, Inc. v. Crossgrove**, 2012 CO 31, ¶ 18, 276 P.3d 562 (pre-verdict component of the collateral source rule required exclusion of evidence of amount paid by medical insurer, even when offered solely to prove reasonable value of medical services). As to

when gratuitously rendered medical services or medical expenses paid by others are "incurred," and hence compensable, see **City of Englewood v. Bryant**, 100 Colo. 552, 68 P.2d 913 (1937); and **Gomez v. Black**, 32 Colo. App. 332, 511 P.2d 531 (1973). *But see* **Smith v. Kinningham**, 2013 COA 103, ¶ 19, 328 P.3d 258 ("gratuitous government benefits" exception to collateral source rule set forth in **City of Englewood** and **Gomez** was abrogated by section 10-1-135(10)(a)). *See also* **Gilley v. Oviatt**, 2025 COA 27, ¶¶ 1, 16-18, 21, 568 P.3d 276 (plaintiff seeking recovery of medical care costs does not need explicit expert testimony that amounts charged were reasonable; authenticated evidence of amount billed is sufficient to allow jury to infer the reasonableness of the charges).

6. While lost wages or income prior to trial, "loss of enjoyment of life," etc., have been recognized as compensable, **Hildyard v. Western Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974), "loss of business profits" as a separate element of damages has not. **Ford Motor Co. v. Conrardy**, 29 Colo. App. 577, 488 P.2d 219 (1971).

7. In medical malpractice cases, damages for emotional distress based on a reasonable fear of an increased risk of cancer are recoverable where plaintiff demonstrates that his or her condition physically worsened as a result of the alleged malpractice. **Boryla v. Pash**, 960 P.2d 123 (Colo. 1998); *see also* **Salazar v. Am. Sterilizer Co.**, 5 P.3d 357 (Colo. App. 2000).

8. Under Colorado's survival statute, § 13-20-101(1), C.R.S., neither punitive damages nor other penalties can be awarded against a defendant who has died. **Guar. Tr. Life Ins. Co. v. Casper**, 2018 CO 43, ¶¶ 9-10, 418 P.3d 1163. Where a deceased plaintiff's claim is based upon personal injury, any damages awarded are limited to loss of earnings and expenses before death and cannot include pain, suffering, disfigurement, or prospective profits or earnings after death. § 13-20-101(1). For purposes of the survival statute, a claim for violation of section 10-3-1116 (unreasonable delay or denial of first-party insurance benefits) is not a "tort action based upon personal injury." **Casper**, ¶¶ 14-17. For instructions on claims for breach of sections 10-3-1115 and -1116, see Instructions 25:4 through 25:6.

9. For the damages one may recover against a defendant who made illegal drugs available to an illegal user and the use of such drugs caused damages to others, see Drug Dealer Liability Act, §§ 13-21-801 to -13, C.R.S. Such damages may include punitive damages, reasonable attorney fees, and costs of suit. As to the persons who may recover such damages, see section 13-21-804(1), and as to the persons who may be held liable for such damages, see section 13-21-804(2)(a) and (b).

10. For a discussion of the admissibility of expert testimony based on the "willingness-to-pay" approach to determining damages for loss of enjoyment of life, sometimes referred to as hedonic damages, see **Scharrel**, 949 P.2d at 92.

**Whether Expert Testimony Is Required**

11. Expert medical testimony is not necessarily required to establish that a plaintiff suffered a permanent injury. **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994). A plaintiff seeking recovery of medical care costs does not need explicit expert testimony that amounts charged were reasonable; authenticated evidence of amount billed is sufficient to allow

jury to infer the reasonableness of the charges. **Gilley v. Oviatt**, 2025 COA 27, ¶¶ 1, 16-18, 21, 568 P.3d 276.

**Interest**

12. Under section 13-21-101(1), C.R.S., in a personal injury action based on tort, a plaintiff may recover interest on his or her personal injury damages from the date the action accrued, rather than from the date of filing suit. **Briggs v. Cornwell**, 676 P.2d 1252 (Colo. App. 1983). In a property damage case where damages are measured by repair and/or replacement costs, prejudgment interest accrues from the date the costs were incurred, not the date of the original damage. **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008). Prejudgment interest, as an element of damage, is to be determined by the court. § 13-21-101(1). The trial court is to calculate interest on the amount of the reduced award, after application of any statutory damages caps, regardless of the amount awarded by the jury. **Morris v. Goodwin**, 185 P.3d 777 (Colo. 2008) (analyzing interest and damages cap of section 13-64-302). Where a settlement with an agent is to be set off against a verdict against the principal based on respondeat superior, however, prejudgment interest is to be calculated on the verdict first, before applying the setoff. **Marso**, ¶¶ 2, 35-45, 418 P.3d at 544, 548-49.

**Collateral Source Rule**

13. A collateral source payment is an amount by which an injured plaintiff is wholly or partially compensated by a person or entity other than the defendant. § 13-21-111.6, C.R.S. The "collateral source rule" comprises a pre-verdict component and a post-verdict component. The pre-verdict component provides that the "fact or amount of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor" or in an action to recover benefits for an injury caused by an uninsured motorist. § 10-1-135(10)(a). For cases applying the pre-verdict component of the rule, see **Ronquillo v. EcoClean Home Servs.**, 2021 CO 82, ¶¶ 20-30, 500 P.3d 1130 (Discounted amounts paid to medical providers by medical finance company to enable plaintiff to obtain prompt medical treatment are not collateral source payments where plaintiff remained liable to pay full amounts billed by providers, so the pre-verdict component of the collateral source rule does not exclude evidence of payments by finance company. This result may be different under sections 38-27.5-103 and 104, C.R.S., which had not taken effect at the time of the events in **Ronquillo**.); **Smith**, ¶ 19, 328 P.3d at 262 (Medicaid payments are inadmissible collateral source benefits, and the "gratuitous government benefits" exception set forth in **City of Englewood**, 100 Colo. at 554, 68 P.2d at 915, and **Gomez**, 32 Colo. App. at 336, 511 P.2d at 533, was overruled by section 10-1-135(10)(a)); **Crossgrove**, ¶ 18, 276 P.3d at 566 (pre-verdict component of the collateral source rule required exclusion of evidence of amount paid by medical insurer for plaintiff's medical expenses, even where offered solely to prove reasonable value of medical services); **Smith v. Jeppsen**, 2012 CO 32, ¶¶ 20-22, 277 P.3d 224 (companion case to **Crossgrove**); **Sunahara v. State Farm Mut. Auto. Ins. Co.**, 2012 CO 30M, ¶¶ 13-19, 280 P.3d 649 (companion case to **Crossgrove**).

14. The post-verdict component of the collateral source rule, codified by section 13-21-111.6, directs the court, in any action "for a tort resulting in death or injury to person or property," to reduce the amount of damages awarded, before entering judgment, by the amount of certain collateral benefits received by the plaintiff, but not including collateral benefits paid "as a result of a contract entered into and paid for by or on behalf of such [injured] person." *See,*

*e.g.*, **Keelan v. Van Waters & Rogers, Inc.**, 820 P.2d 1145 (Colo. App. 1991) (personal injury award obtained by Denver firefighter could not be reduced by amount of disability benefits received by firefighter through statewide fund created pursuant to statute because disability benefits were paid as a result of firefighter's employment contract with the City of Denver), *aff'd*, 840 P.2d 1070 (Colo. 1992); *see also* **Volunteers of Am. Colo. Branch v. Gardenswartz**, 242 P.3d 1080 (Colo. 2010) (contract clause of statutory collateral source rule, § 13-21-111.6, applies where plaintiff's medical insurer paid discounted amounts to medical providers, and, under the common-law collateral source rule, plaintiff's damages are not reduced by the amount of the discount); **Colo. Permanente Med. Grp.**, 926 P.2d at 1230; **Forfar v. Wal-Mart Stores, Inc.,** 2018 COA 125, ¶ 31, 436 P.3d 580 (plaintiff's damages are not reduced in post-verdict proceedings by the amount of Medicare benefits received because such benefits fall within the contract exception in section 13-21-111.6); **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶ 14 (plaintiff's damages are not reduced in post-verdict proceedings by the amount of Medicaid benefits received because such benefits fall within the contract exception in section 13-21-111.6), *overruled on other grounds by* **Rudnicki v. Bianco**, 2021 CO 80, 501 P.3d 776; **Dep't of Human Servs. v. State Personnel Bd.**, 2016 COA 37, ¶¶ 31-42, 371 P.3d 748 (PERA disability benefits constitute a collateral source and are not to be offset against a damage award.); **Calderon v. Am. Family Mut. Ins. Co.**, 2014 COA 70, ¶¶ 28-32, 409 P.3d 393 (post-verdict setoff rule codified in section 13-21-111.6 does not bar insurer from setting off Medpay benefit against judgment against insurer for UM/UIM benefits because the defendant is the collateral source), *rev'd on other grounds*, 2016 CO 72, 383 P.3d 676; **Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.**, 2013 COA 131, ¶¶ 80-86, 373 P.3d 615 (contract clause of statutory collateral source rule normally would apply to plaintiff's receipt of insurance proceeds paid by sub-contractor's insurer, but plaintiff contracted this right away by means of the "other insurance" clause in applicable insurance policies), *rev'd on other grounds*, 2016 CO 22M, 370 P.3d 140; **Miller v. Brannon**, 207 P.3d 923 (Colo. App. 2009) (PIP benefits received by plaintiff within contract exception to collateral source rule); **Combined Commc'ns Corp. v. Pub. Serv. Co.**, 865 P.2d 893 (Colo. App. 1993).

15. Where an insured obtains a judgment against an insurer for first-party benefits, however, the contract clause of section 13-21-111.6 does not preclude the insurer from exercising a contractual right to reduce the judgment by the amount the insurer previously paid for the insured's medical expenses. **Levy v. Am. Family Mut. Ins. Co.**, 293 P.3d 40 (Colo. App. 2011).

16. The collateral source rule does not apply to an employee's claim for past medical expenses where the employer's workers' compensation insurer has settled its subrogation claim for reimbursement of those expenses, because such a settlement completely extinguishes the employee's claim for such expenses. **Delta Airlines v. Scholle**, 2021 CO 20, ¶¶ 1, 21-22, 484 P.3d 695. *But see* **Scholle v. Ehrichs,** 2024 CO 22, ¶ 59, 546 P.3d 1170 (holding trial court was prohibited from considering insurance contract liabilities in good cause analysis for exceeding damages cap under the Health Care Availability Act).

17. For a discussion of the relationship between the collateral source rule set forth in section 13-21-111.6, and the Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S., see **Smith**, 880 P.2d at 1188 (section 13-50.5-105 applies to settlement agreements

entered into to avoid liability at trial, rather than the damage reduction provisions of the "collateral source rule" set forth in section 13-21-111.6).

**Federal Law**

18. In FELA actions tried in state courts, the proper measure of damages is to be determined as a matter of federal law. **Monessen Sw. Ry. v. Morgan**, 486 U.S. 330 (1988) (as matter of federal law, plaintiff was not entitled to prejudgment interest, and damages for lost future earnings must be discounted to present value). For a discussion of various formulas for calculating a discount to present value, see **Brady v. Burlington Northern Railroad**, 752 P.2d 592 (Colo. App. 1988). *See also* **Failing v. Burlington N. R.R.**, 815 P.2d 974 (Colo. App. 1991).

19. Other limitations on the recovery of damages may apply when recovery is sought against a volunteer of a nonprofit organization or governmental entity "for harm caused by an act or omission of the volunteer on behalf of the organization or entity." 42 U.S.C. § 14503(a) (2024). For the applicable limitations, see Volunteer Protection Act of 1997, 42 U.S.C. §§ 14503 and 14504. When applicable, this and related instructions on damages must be modified as appropriate. 42 U.S.C. §§ 14501-05.

## 6:1A SPECIAL INTERROGATORIES TO THE JURY TO DETERMINE THE AMOUNT OF DAMAGES AWARDED FOR ECONOMIC AND NONECONOMIC LOSSES OR INJURIES AND FOR PHYSICAL IMPAIRMENT OR DISFIGUREMENT — MECHANICS FOR SUBMITTING

**The following questions relate to the amount of damages, if any, which you may determine the plaintiff is entitled to recover from (the defendant) (one or more of the defendants) on plaintiff's claim of** *(insert appropriate description of claim, e.g., "negligence," "battery," etc.)***.**

**If you find that the plaintiff is not entitled to recover any (actual) damages from (the defendant) (one or more of the defendants), then you should not answer any of the following questions and you should not fill in any part of the accompanying form titled "Answers to Questions Regarding Damages."**

**On the other hand, if you find that the plaintiff is entitled to recover damages from (the defendant) (one or more of the defendants), then you must answer all of the following questions and your foreperson must put your answers on the form titled "Answers to Questions Regarding Damages."**

**In answering these questions you should include all of the plaintiff's damages which you find were caused, in whole or in part, by the** *(insert appropriate description, e.g., negligence, fault, conduct, etc.)* **of (the defendant) (one or more of the defendants).**

**You must all agree on your answers to each of the questions. After your foreperson has put your answers to all of the questions on the accompanying answer form, you must all sign the completed form on the signature lines provided at the end of the form.**

**1. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries, (excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction** *(insert number of the applicable instruction on damages)***. You should answer "0" if you determine there were none.**

**2. What is the total amount of plaintiff's damages, if any, for economic losses, (excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction** *(insert number of applicable instruction on damages)***. You should answer "0" if you determine there were none.**

**(3. What is the total amount of plaintiff's damages for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)**

### Notes on Use

1. This instruction should be used in actions in which the limitations on damages for "noneconomic loss or injury" set forth in section 13-21-102.5, C.R.S., may apply.

2. Instruction 6:1B should be given whenever this instruction is given.

3. The Notes on Use to Instruction 6:1 also apply to this instruction.

4. The parenthesized language in the first sentences of numbered paragraphs 1 and 2 and the parenthesized numbered paragraph 3 of this instruction should be given only if there is sufficient evidence to support a finding that physical impairment or disfigurement has been sustained.

5. In cases involving (1) comparative negligence (see Instructions 9:22 through 9:27D), (2) the negligence or fault of a nonparty (see Instructions 9:28 through 9:29B), or (3) comparative fault (see Instructions 14:30 through 14:33B), this instruction and Instruction 6:1B should not be used.

6. In cases involving multiple claims for both economic and noneconomic damages, if the damages for each such claim are identical, then this instruction should be appropriately modified so that only one set of the special interrogatories set forth in this instruction is submitted to the jury for all such claims. In such cases, Instruction 6:14 must be given with this instruction. On the other hand, if the economic and noneconomic damages for such claims are not identical, then a separate set of the special interrogatories set forth in this instruction must be submitted for each such claim.

7. When this instruction is given with instructions on damages other than Instruction 6:1 (such as 6:2 and 6:3), such other instructions on damages may need to be modified to differentiate the noneconomic damages and the economic damages. When making any such modifications, Instruction 6:1 may be used as a model.

**Source and Authority**

See the Source and Authority to Instruction 6:1.

## 6:1B ANSWERS TO SPECIAL INTERROGATORIES TO THE JURY SET FORTH IN INSTRUCTION 6:1A

| | |
|---|---|
| ☐ District Court ☐ County Court ☐ Other _____<br><br>_____ County, Colorado<br>Court Address:<br><br>_____<br>[Insert Information from the original caption here - ex. In Re the Matter of, etc.] | ▲ COURT USE ONLY ▲<br><br>Case Number:<br><br>Division: Courtroom: |
| **ANSWERS TO QUESTIONS REGARDING DAMAGES** | |

**DO NOT ANSWER ANY OF THESE QUESTIONS IF YOU HAVE RETURNED A VERDICT IN FAVOR OF (THE DEFENDANT) (ALL OF THE DEFENDANTS) AND AGAINST THE PLAINTIFF**

**We, the jury, present our Answers to the Questions submitted by the Court, to which we have all agreed:**

1. **What is the total amount of plaintiff's damages for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction** *(insert number of the applicable instruction on damages)***. You should answer "0" if you determine there were none.**

   **ANSWER: $_____**

2. **What is the total amount of plaintiff's damages for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses**

**are those losses described in numbered paragraph 2 of Instruction** *(insert number of the applicable instruction on damages)***. You should answer "0" if you determine there were none.**

**ANSWER: $_____**

3. **What is the total amount of plaintiff's damages for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.**

   **ANSWER: $_____)**

_____ _____

**Foreperson**

_____ _____

_____ _____

**Notes on Use**

See Notes on Use to Instructions 6:1 and 6:1A.

**Source and Authority**

See Source and Authority to Instruction 6:1.

## 6:2 PERSONAL INJURIES — MINOR CHILD

**Plaintiff,** *(name)*, **has the burden of proving, by a preponderance of the evidence, the nature and extent of** *(insert applicable pronoun)* **damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant(s),** *(name[s])*, **(and) (,) (the** *[insert appropriate description, e.g., "negligence"]*, **if any, of the plaintiff(s),** *[name(s)]*), **(and) (the** *[insert appropriate description, e.g., "negligence"]*, **if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any noneconomic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and** *(insert any other recoverable noneconomic losses for which there is sufficient evidence)*. **(In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be included in a separate category.)**

**2. Any (reasonable and necessary) medical, hospital, and similar expenses which plaintiff has had or probably will have in the future;**

**3. Any other economic losses or injuries which plaintiff will probably have in the future after** *(insert applicable pronoun)* **reaches the age of 18 (or is otherwise emancipated), including: loss or damage to** *(insert applicable pronoun)* **ability to earn money in the future, and** *(insert any other recoverable economic losses of which there is sufficient evidence)*. **(In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be included in a separate category.)**

**(4. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under numbered paragraphs 1, 2, or 3 above.)**

**(In determining the plaintiff's,** *(name of minor child)*, **damages you should not include [any future expenses for** *(insert appropriate description of non-medical expenses)*] **[or] [any future (loss of earnings) (impairment of earning capacity)] which plaintiff** *(name of minor child)* **may have between now and the time when** *(insert applicable pronoun)* **reaches the age of 18 [or is emancipated] because these damages, if any, are recoverable by the plaintiff's parents.) (For the same reason, you should not include in plaintiff's,** *(name of minor child)*, **damages any damages for any loss of past earnings.)**

### Notes on Use

1. The Notes on Use to Instruction 6:1 also apply to this instruction.

2. Omit any parenthesized or bracketed words or phrases which are inappropriate to the particular case. The last paragraph in particular should be omitted if there is no claim for damages relating to earnings or to non-medical expenses. If either or both of these matters are involved, such portions of this paragraph should be used as are appropriate.

3. If one or both parents have joined with the minor as plaintiffs to recover their damages, Instruction 6:3 also should be given with this instruction.

4. When necessary, Instruction 7:1, defining "minor child," and Instruction 7:2, defining "emancipation," should be given with this instruction.

5. For a discussion of the propriety of submitting to the jury the issue of post-majority lost future earning capacity or lost wages under a general damage instruction without any evidence as to the amount or measure of these damages, see **Stewart v. Rice**, 25 P.3d 1233 (Colo. App. 2000), *rev'd on other grounds*, 47 P.3d 316 (Colo. 2002).

**Source and Authority**

1. This instruction is supported by section 13-21-102.5, C.R.S.

2. As to the age at which a child ceases to be a minor, see sections 2-4-401(6) and 13-22-101, C.R.S.

3. In **Rudnicki v. Bianco**, 2021 CO 80, ¶¶ 44-45, 501 P.3d 776, the Colorado Supreme Court overruled prior precedent and held that an unemancipated minor child could recover damages for pre-majority medical expenses. Parents of the child also may recover such expenses, provided that no double recovery is permitted.

4. "An injury to a minor creates separate causes of action: (1) the parents generally may recover for the child's damages suffered and expenses of the child during minority; (2) the minor may recover expenses the minor actually incurs during minority and for pain and suffering and post-majority impairment of future earning capacity; and (3) an emancipated minor has the right to sue for all damages and expenses." **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶ 26, 488 P.3d 151, 159 (overruled as to pre-majority medical expenses by **Rudnicki**, ¶ 44, 501 P.3d at 785-86); *see also* **Nat'l Fuel Co. v. Green**, 50 Colo. 307, 115 P. 709 (1911).

5. As to the minor's right to recover for pain and suffering, see **Colorado Utilities Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931).

6. The parent is entitled to recover for loss of the minor's earnings during the child's minority unless the child has been emancipated, **Pawnee Farmers' Elevator Co. v. Powell**, 76 Colo. 1, 227 P. 836 (1924), or, unless the parent has allowed the child to retain the child's own earnings. *See* **Harman v. Chase**, 160 Colo. 449, 417 P.2d 784 (1966) (by implication). The minor, however, is entitled to damages for any loss or impairment of future earning capacity if such loss is supported by sufficient evidence. **Pawnee Farmers Elevator Co.**, 76 Colo. at 7, 227 P. at 839; *see also* **Thompson v. Tartler**, 166 Colo. 247, 443 P.2d 365 (1968); **Odell v. Pub. Serv. Co**., 158 Colo. 404, 407 P.2d 330 (1965).

7. A parent may relinquish the right to pre-majority expenses. **Pressey**, ¶ 27, 488 P.3d at 159.

## 6:3 PERSONAL INJURIES — MINOR CHILD — MEASURE OF PARENTS' DAMAGES

**Plaintiff(s),** *(name[s])*, **(has) (have) the burden of proving, by a preponderance of the evidence, the nature and extent of** *(insert applicable pronoun)* **damages. If you find in favor of the plaintiff(s),** *(name of parent[s])*, **on** *(insert applicable pronoun)* **claim of damages for injuries caused to** *(insert applicable pronoun)* **minor child,** *(name of minor child)*, **by the defendant(s),** *(name[s] of defendant[s])*, **you must determine the total dollar amount of plaintiff('s)(s'),** *(name[s] of parent[s])*, **damages, if any, that were caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant(s),** *(name[s])*, **(and) (,) (the** *[insert appropriate description, e.g., "negligence"]*, **if any, of the plaintiff(s),** *(name[s])*, **(and) (the** *[insert appropriate description, e.g., "negligence"]*, **if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any (reasonable and necessary) expenses the plaintiff(s) (has) (have) had on** *(name of minor child)*'**s behalf to the present time and any expenses the plaintiff(s),** *(name[s] of parent[s])*, **will have in the future between now and the time** *(name of minor child)* **reaches the age of 18 (or is emancipated) for** *(insert appropriate description, using separately lettered subparagraphs for various categories, if necessary)*;

**2. Any loss of past earnings** *(name of minor child)* **may have had to the present time;**

**3. Any future (loss of earnings) (damage to** *[name of minor child's]* **ability to earn money in the future) probably will have between now and the time when** *(name of minor child)* **reaches the age of 18 (or is emancipated);**

**4. Any loss of past household and similar services or any loss of such services in the future** *(name of minor child)* **would have provided to the plaintiff(s),** *(name[s] of parent[s])* **until** *(name of minor child)* **reaches the age of 18 (or is emancipated);**

**5.** *(Insert any other appropriate elements of damages, e.g., any unusual services the plaintiff may be required to render the child because of [insert applicable pronoun] injuries)*.

### Notes on Use

1. The Notes on Use to Instruction 6:1 also apply to this instruction.

2. Under the Colorado Supreme Court's decision in **Rudnicki v. Bianco**, 2021 CO 80, ¶¶ 44-45, 501 P.3d 776, both an unemancipated minor child and the child's parents may sue to recover damages for the child's pre-majority medical expenses, provided that no double recovery is permitted.

3. When the parent only is suing on his or her own claim, Instruction 6:4 should be given with this instruction.

4. When necessary, Instruction 7:1, defining "minor child," and Instruction 7:2, defining "emancipation," should be given with this instruction.

**Source and Authority**

1. See the Source and Authority to Instruction 6:2.

2. Parents may not recover damages for loss of consortium arising solely from injury to the child. **Elgin v. Bartlett**, 994 P.2d 411 (Colo. 1999), *overruled on other grounds by* **Rudnicki v. Bianco**, 2021 CO 80, 501 P.3d 776.

3. "An injury to a minor creates separate causes of action: (1) the parents generally may recover for the child's damages suffered and expenses of the child during minority; (2) the minor may recover expenses the minor actually incurs during minority and for pain and suffering and post-majority impairment of future earning capacity; and (3) an emancipated minor has the right to sue for all damages and expenses." **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶ 26 (overruled as to pre-majority medical expenses by *Rudnicki*, *supra*).

4. Several Colorado cases have considered the damages a parent is entitled to recover for injuries to his or her unemancipated minor child. *See* **Odell v. Pub. Serv. Co.**, 158 Colo. 404, 407 P.2d 330 (1965) (hospital, medical, and additional educational expenses); **Colo. Utils. Corp. v. Casady**, 89 Colo. 168, 300 P. 606 (1931) (future pecuniary expense and loss of services); **Pawnee Farmers' Elevator Co. v. Powell**, 76 Colo. 1, 227 P. 836 (1924) (loss of earnings and diminution of earning capacity).

5. When a case involving a child's death arises under the Ski Safety Act, §§ 33-44-101 to -114, C.R.S., the damages recoverable by a parent are subject to the cap contained in section 33-44-113, C.R.S., not the cap contained in the Wrongful Death Act, § 13-21-203(1)(a), C.R.S. **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007).

## 6:4 PERSONAL INJURIES — MINOR CHILD — LOSS OF EARNINGS — DISTINCTION BETWEEN PARENTS' AND CHILD'S CLAIMS

**Earnings of a minor child before emancipation belong to the parents. Earnings after emancipation or after reaching the age of 18 belong to the child.**

### Notes on Use

1. When Instruction 6:2 is given, this instruction normally will not be necessary. When, however, a parent is suing only on his or her own claim, in which case Instruction 6:3 will be given, this instruction also should be given.

2. See Instruction 7:1, defining "minor," and Instruction 7:2, defining "emancipation."

### Source and Authority

This instruction is supported by section 13-22-101(1), C.R.S. *See also* Source and Authority to Instructions 6:2 & 6:3.

## 6:5 LOSS OF CONSORTIUM — ELEMENTS OF LIABILITY

**For the plaintiff,** *(name)***, to recover from the defendant,** *(name)***, on** *(insert applicable pronoun)* **claim of loss of consortium for injury to the plaintiff's spouse,** *(name)***, you must find all of the following have been proved by a preponderance of the evidence:**

**1. The defendant was negligent;**

**2.** *(Name of spouse)* **was injured as a result of the defendant's negligence;**

**3. The plaintiff and** *(name of spouse)* **were married at the time** *(name of spouse)* **was injured; and**

**4. As a result of such injuries to** *(name of spouse)***, the plaintiff also had a loss of** *(insert applicable pronoun)* **rights of consortium.**

**If you find that any one or more of these** *(number)* **statements has not been proved, then your verdict on the plaintiff's,** *(name)***, claim must be for the defendant.**

**On the other hand, if you find that all of these** *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert description of any affirmative defenses]***).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Omit any numbered paragraph as to which the facts are not in dispute.

2. Instruction 6:6 should be used with this instruction for the definition of consortium and the damages that are recoverable for its loss.

3. Damages for loss of consortium also can be recovered when caused by other forms of tortious conduct against the spouse, for example, battery. In such cases this instruction should be appropriately modified.

4. Whenever this instruction is given, the appropriate instructions relating to causation also must be given. *See* Instructions 9:18-9:21.

5. Loss of consortium is a derivative claim and is subject to the same defenses available to the underlying personal injury claim. **Colo. Comp. Ins. Auth. v. Jorgensen**, 992 P.2d 1156 (Colo. 2000); **Lee v. Colo. Dep't of Health**, 718 P.2d 221 (Colo. 1986); **Draper v. DeFrenchi-**

**Gordineer**, 282 P.3d 489 (Colo. App. 2011); **Terry v. Sullivan**, 58 P.3d 1098 (Colo. App. 2002); *see also* **Elgin v. Bartlett**, 994 P.2d 411 (Colo. 1999) (claims for derivative damages subject to same defenses available to underlying claims), *overruled on other grounds by* **Rudnicki v. Bianco**, 2021 CO 80, 501 P.3d 776 . Thus, a claim for loss of consortium arising out of an automobile accident was derivative for purposes of the now-repealed No-Fault Act, and could be maintained only if injuries to the spouse on which the claim is based satisfied one of the statutory threshold requirements for suit. **Welch v. George**, 19 P.3d 675 (Colo. 2000).

6. While the contributory negligence of the injured spouse or the spouse claiming loss of consortium is a defense to a claim for such loss, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 937 (5th ed. 1984), it is not necessarily a complete bar under the comparative negligence statute, § 13-21-111, C.R.S. When there is sufficient evidence of contributory negligence on the part of the injured spouse or the plaintiff, the last two unnumbered paragraphs of this instruction should be changed to read as the last two unnumbered paragraphs of Instruction 9:22 (with appropriate modifications depending on whose contributory negligence is involved). The appropriate comparative negligence instructions, *see* Instructions 9:26 – 9:28D, again with whatever modifications may be required, must also be given. *See also* **Pioneer Constr. Co. v. Bergeron**, 170 Colo. 474, 462 P.2d 589 (1969) (contributory negligence of wife bars husband's claims for wife's medical expenses, loss of services and consortium, and expenses for care of children).

7. If no affirmative defense has been put in issue, the last two paragraphs of the instruction should be omitted.

8. This instruction should be given regardless of whether the injured spouse has joined in the suit to recover his or her own damages. When both spouses join in the same suit, however, separate verdict forms on the respective spouses' claims should be submitted to the jury. *See* **Nemer v. Anderson**, 151 Colo. 411, 378 P.2d 841 (1963) (by implication).

**Source and Authority**

1. For other forms of conduct giving rise to a claim of damages for loss of consortium, see 1 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.5 (2d ed. 1987).

2. Section 14-2-209, C.R.S., gives a wife the same right to recover for loss of consortium as a husband.

3. For defenses in general, see PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 125, at 937-39 (5th ed. 1984).

## 6:6 LOSS OF CONSORTIUM — DEFINED — DAMAGES

**If you find for the plaintiff,** *(name of injured spouse)***, then you may award damages to** *(insert applicable pronoun)* **spouse for any loss of consortium resulting from the injury to** *(name of injured spouse)***.**

**Plaintiff,** *(name of non-injured spouse)***, has the burden of proving, by a preponderance of the evidence, the nature and extent of** *(insert applicable pronoun)* **damages. If you find in favor of the plaintiff,** *(name of non-injured spouse)***, you must determine the total amount of** *(insert applicable pronoun)* **damages, if any, that were caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant(s),** *(name[s]),* **(and) (,) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of the plaintiffs,** *[names])* **(,) (and) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any noneconomic damages in the form of loss of affection, society, companionship, and aid and comfort of the injured spouse, and**

**2. Economic damages for loss of household services the injured spouse would have performed and any resulting expenses which plaintiff has had or which plaintiff will have in the future, including** *(insert description of those expenses which would be compensable and concerning which there is sufficient evidence for the jury reasonably to determine their existence and amount)***.**

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate to the evidence in the case.

2. When the uninjured spouse has incurred expenses under numbered paragraph 2 of this instruction to replace one or more household services, and those same expenses also might come within the language used in Instruction 6:1 or Instruction 6:1A to describe the damages being claimed by the injured spouse, an appropriate cautionary instruction intended to prevent double recovery should be given.

3. This instruction should be given whenever Instruction 6:5 is given.

4. The court should omit the first numbered paragraph of this instruction unless the court finds there is "justification" for such "derivative noneconomic" losses or injuries "by clear and convincing evidence." § 13-21-102.5(3)(b), C.R.S.

### Source and Authority

The definition of consortium used in this instruction is supported by 1 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.5 (2d ed. 1987). Under modern

definitions of consortium, "companionship" includes sexual relations, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125 (5th ed. 1984). *See also* **Schell v. Navajo Freight Lines, Inc.**, 693 P.2d 382, 385 (Colo. App. 1984) (citing former instruction, now incorporated into numbered paragraphs 1 and 2 of this instruction, and noting intangible nature of "rights arising out of a marital relationship").

## 6:7 PERSONAL INJURIES — NON-REDUCTION OF DAMAGES — "THIN SKULL" DOCTRINE

**In determining the amount of plaintiff's actual damages, you cannot reduce the amount of or refuse to award any such damages because of any** *(insert appropriate description, e.g., physical frailties, mental condition, illness, etc.)* **of the plaintiff that may have made** *(insert applicable pronoun)* **more susceptible to injury, disability, or impairment than an average or normal person.**

### Notes on Use

1. This instruction should be given when the defendant seeks to avoid or limit liability for plaintiff's injuries by asserting that the injuries would not have occurred or would have been less severe if the plaintiff had been a normal or average person. *See* **State Farm Mut. Auto. Ins. Co. v. Peiffer**, 955 P.2d 1008 (Colo. 1998); **Schafer v. Hoffman**, 831 P.2d 897 (Colo. 1992); **Giampapa v. Am. Family Mut. Ins. Co.**, 12 P.3d 839 (Colo. App. 2000), *rev'd on other grounds,* 64 P.3d 230 (Colo. 2003); **Scholle v. Ehrichs**, 2022 COA 87M, ¶¶ 70-80, 519 P.3d 1093, *aff'd in part, rev'd in part on other grounds by* **Scholle v. Ehrichs**, 2024 CO 22, 546 P.3d 1170; **Loza v. State Farm Mut. Auto. Ins. Co.**, 970 P.2d 478 (Colo. App. 1998); **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1996). The "thin skull" doctrine is not limited to preexisting bodily conditions, but also applies if a plaintiff is predisposed or more susceptible to injury or illness than a normal person. **Schafer**, 831 P.2d at 901. Under the "thin skull" doctrine, foreseeability is not an issue in determining the extent of a plaintiff's injuries. *Id*. at 902.

2. "[A]n egg-shell instruction is appropriate where there is evidence that the plaintiff had a dormant or asymptomatic pre-existing condition. Giving an eggshell instruction is also appropriate where a pre-existing condition was symptomatic, if there is evidence that the harm resulting from the defendant's negligence is greater than it would have been in the absence of the pre-existing condition." **McLaughlin v. BNSF Ry. Co.**, 2012 COA 92, ¶ 44, 300 P.3d 925, 937 (applying federal law in an action brought under the Federal Employers' Liability Act, the court presents an in-depth discussion of the interrelationship between an eggshell instruction and an aggravation instruction).

3. In cases involving the aggravation of a preexisting condition, consideration must be given as to whether this instruction or Instruction 6:8, or both, apply. If both instructions are given, some modification of this instruction and Instruction 6:8 may be necessary, and an instruction clarifying for the jury how both should be applied also should be given. *See id.*

### Source and Authority

This instruction is supported by **Schafer**, 831 P.2d at 900. *See also* **Stephens v. Koch**, 192 Colo. 531, 533, 561 P.2d 333, 334 (1977) ("[A] defendant must take his victim as he finds him."); *accord* **Fischer v. Moore**, 183 Colo. 392, 517 P.2d 458 (1973).

## 6:8 AGGRAVATION OF PREEXISTING CONDITION

**For the plaintiff,** *(name)***, to recover damages for the aggravation of a preexisting condition, you must find all of the following have been proved:**

**1. Before** *(insert date)***, the plaintiff suffered from** *(insert appropriate description of ailment or disability)***;**

**2. On** *(insert date)***, the defendant,** *(name)***, was (***insert appropriate description, e.g., "negligent"***); and**

**3. The defendant's** *(insert appropriate description, e.g. "negligence")* **made the plaintiff's** *(insert appropriate description of ailment or disability)* **worse.**

**If you find that all of these** *(number)* **statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the** *(insert appropriate description, e.g., "negligence")* **of the defendant.**

**If you are able to separate the amount of damages, if any, caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant from the amount of damages, if any, caused by the ailment or disability which existed before** *(insert date)***, then the plaintiff is entitled to recover damages caused only by the** *(insert appropriate description, e.g., "negligence")* **of the defendant.**

**If you are unable to separate the damages caused by the ailment or disability which existed before** *(date)* **and the damages caused by the** *(insert appropriate description, e.g., "negligence")* **of the defendant, then the defendant is legally responsible for the entire amount of damages.**

### Notes on Use

1. This instruction applies even where the preexisting condition was of traumatic origin for which the plaintiff previously had recovered damages. **Hylton v. Wade**, 29 Colo. App. 98, 478 P.2d 690 (1970).

2. The rules stated in this instruction do not apply to a fact situation where the plaintiff's injuries have been aggravated by a subsequent accident not proximately caused by the defendant. *See* Instruction 6:9; *see also* **Smartt v. Lamar Oil Co.**, 623 P.2d 73 (Colo. App. 1980); **Bruckman v. Pena**, 29 Colo. App. 357, 487 P.2d 566 (1971). Where a subsequent injury may have been proximately caused by the defendant's conduct, see Instructions 9:19 and 9:20.

3. "[W]here plaintiff shows (1) that he had a pre-existing condition and (2) that, as a proximate result of defendant's negligence, this condition was aggravated, the giving of [this instruction], in its entirety, [is] mandatory." **Brittis v. Freemon**, 34 Colo. App. 348, 353, 527 P.2d 1175, 1178 (1974). Instructing the jury based on this instruction "is proper when sufficient evidence shows that a later event or incident either (1) causes a new, unrelated injury to the

plaintiff or (2) aggravates the injury the plaintiff suffered as a result of the defendant's tortious conduct." **Herrera v. Lerma**, 2018 COA 141, ¶ 8, 440 P.3d 1194, 1197; *see also* **McLaughlin v. BNSF Ry. Co.**, 2012 COA 92, ¶¶ 35-50, 300 P.3d 925 (in an action brought under the Federal Employers' Liability Act, the court presents an in-depth discussion of the interrelationship between an eggshell instruction and an aggravation instruction).

4. Compare this instruction with Instruction 6:7. If both this instruction and Instruction 6:7 are given to the jury, some modification of this instruction may be necessary and an instruction clarifying for the jury how both should be applied should be given. *See* **McLaughlin**, ¶ 44.

5. The term "aggravated" has two common meanings: (1) to make worse or more severe; and (2) to produce inflammation, or irritate. In certain cases, only one definition may be legally correct. If the term would be ambiguous in a particular factual situation, it should be further defined. **Lascano v. Vowell**, 940 P.2d 977 (Colo. App. 1996); *see also* **Mendoza v. Pioneer Gen. Ins. Co.**, 2014 COA 29, ¶ 29, 365 P.3d 371 (when term in jury instructions is not defined, jury is presumed to have applied the common meaning of the word (citing **Lascano**, 940 P.2d at 982)).

**Source and Authority**

1. This instruction is supported by **Intermill v. Heumesser**, 154 Colo. 496, 391 P.2d 684 (1964); **Newbury v. Vogel**, 151 Colo. 520, 379 P.2d 811 (1963); **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994); **Hildyard v. Western Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974) (specifically approving former instruction); and **McLaughlin**, ¶ 44, 300 P.3d at 937.

2. The last two paragraphs of this instruction (the second paragraph of the former instruction) adequately and correctly state the law, and consequently it is not necessary to include in this instruction any statement concerning the burden of proof on the issue of apportionment. **Stephens v. Koch**, 192 Colo. 531, 561 P.2d 333 (1977).

3. The pro rata liability statute, § 13-21-111.5, C.R.S., does not modify or provide an alternative to the doctrine of apportionment set forth in this instruction. **Fried v. Leong**, 946 P.2d 487 (Colo. App. 1997).

## 6:9 DAMAGES CAUSED BY UNRELATED SECOND EVENT

**The plaintiff,** *(name)***, claims damages from the defendant,** *(name)***, for (injuries) (damages) (losses) caused by (a) (an)** *(insert appropriate description of event, e.g., "auto accident on June 24, 20--")***. If you find that the defendant's** *(insert appropriate description, e.g., "negligence")***, if any, was a cause of any such (injuries) (damages) (losses), then the plaintiff may recover all damages caused by that event. But if you find the plaintiff was later injured in (a) (an)** *(insert appropriate description of second event, e.g., "toboggan accident on January 3, 20--")* **which was not caused by any acts or omissions of the defendant, then the plaintiff may not recover any damages caused only by the** *(insert description of second event, e.g., "toboggan accident")***.**

**If you find the** *(insert description of second event, e.g., "toboggan accident on January 3, 20--")* **(increased) (aggravated) (worsened) any (injuries) (damages) (losses) caused by the** *(insert description of first event, e.g., "auto accident on June 24, 20--")***, then you must separate, if possible, those damages caused by the** *(description of first event, e.g., "auto accident")* **from those caused by the** *(description of second event, e.g., "toboggan accident")***, and the plaintiff may recover all those separate damages caused by the** *(description of first event, e.g., "auto accident")***.**

**If it is not possible to separate any damages caused by the** *(description of first event, e.g., "auto accident on June 24, 20--")* **from any caused by the** *(description of second event, e.g., "toboggan accident on January 3, 20--")***, then the plaintiff may recover those damages only from the date of the** *(description of first event, e.g., "auto accident on June 24, 20--")* **to the date of the** *(description of second event, e.g., "toboggan accident on January 3, 20--")***.**

### Notes on Use

1. The rules stated in this instruction apply to a fact situation where the plaintiff's injuries have been aggravated by a subsequent accident or injury which was not causally related to the accident involving the defendant or to other conduct of the defendant. *See, e.g.*, **Garhart v. Columbia/HealthONE, L.L.C.**, 95 P.3d 571 (Colo. 2004) (second event instruction not warranted where injury was causally related through the defendant's conduct to prior or concurrent injury).

2. Use whichever parenthesized words are appropriate.

3. When there is sufficient evidence that the defendant's conduct may have aggravated a preexisting condition of the plaintiff, Instruction 6:8 should be used rather than this instruction.

4. This instruction must be appropriately modified in any case involving multiple parties or one or more designated nonparties.

5. The term "aggravated" has two common meanings: (1) to make worse or more severe; and (2) to produce inflammation, or irritate. In certain cases, only one definition may be legally correct. If the term would be ambiguous in a particular factual situation, it should be further

defined. **Lascano v. Vowell**, 940 P.2d 977 (Colo. App. 1996); *see also* **Mendoza v. Pioneer Gen. Ins. Co.**, 2014 COA 29, ¶ 29, 365 P.3d 371 (when term in jury instructions is not defined, jury is presumed to have applied the common meaning of the word (citing **Lascano**, 940 P.2d at 982)).

6. This instruction may be given even if there is no evidence that the subsequent injury was permanent. **Francis ex rel. Goodridge v. Dahl**, 107 P.3d 1171 (Colo. App. 2005).

7. It is an abuse of discretion to give this instruction if there is no evidence that the second event caused any injury or an aggravation of any existing injury. **Herrera v. Lerma**, 2018 COA 141 ¶¶ 8-9, 440 P.3d 1194.

**Source and Authority**

1. This instruction is supported by **Brown v. Kreuser**, 38 Colo. App. 554, 560 P.2d 105 (1977) (jury properly instructed that it could consider exacerbation of auto accident-related injuries by subsequent fall where physician testified as to condition of the injuries both before and after the occurrence of the second accident); and **Lascano**, 940 P.2d 981-82 (where it was not possible to separate damages caused by motor vehicle accident and subsequent accidents, instruction that plaintiff could recover damages only from the date of motor vehicle accident to the date of the first subsequent injury was proper). *See also* **Francis**, 107 P.3d at 1175 (subsequent injury instruction allowed where plaintiff suffered a fall from a pommel horse after auto accident); **Smartt v. Lamar Oil Co.**, 623 P.2d 73 (Colo. App. 1980) (subsequent fall due to tripping on bathroom rug); **Romero v. Parker**, 619 P.2d 89 (Colo. App. 1980) (subsequent auto accident).

2. The principles of this instruction are not limited to subsequent accidents causing physical injuries, but apply to other subsequent events as well, such as a job layoff. **Guerrero v. Bailey**, 658 P.2d 278 (Colo. App. 1982).

## 6:10 EFFECT OF INCOME TAX AND OTHER ECONOMIC FACTORS ON AWARD OF DAMAGES

### Note

1. The Committee has taken no position on the formulation of instructions dealing with "economic factors" as they may affect an award of damages.

2. In personal injury actions, an instruction on the nontaxability of damage awards as income should not be given. **Rego Co. v. McKown-Katy**, 801 P.2d 536 (Colo. 1990).

3. Even before **Rego**, the court of appeals had upheld trial court decisions not to give such an instruction. *See* **Ford v. Bd. of Cty. Comm'rs**, 677 P.2d 358 (Colo. App. 1983) (wrongful death action); **Hildyard v. W. Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974); **Polster v. Griff's of Am., Inc.**, 32 Colo. App. 264, 514 P.2d 80 (1973), *rev'd on other grounds*, 184 Colo. 418, 520 P.2d 745 (1974); **Davis v. Fortino & Jackson Chevrolet Co.**, 32 Colo. App. 222, 510 P.2d 1376 (1973); *see also* **Landsberg v. Hutsell**, 837 P.2d 205 (Colo. App. 1992).

4. In **In re Estate of Beren**, 2012 COA 203M, ¶¶ 144-45, 412 P.3d 487, *aff'd in part, rev'd in part on other grounds sub nom.* **Beren v. Beren**, 2015 CO 29, 349 P.3d 233, the court of appeals declined to adopt a rule that a party ordered to repay amounts received pursuant to a reversed judgment is entitled to a credit for taxes paid on the amount erroneously distributed. The court held, however, that on remand the trial court had discretion (1) to hear evidence concerning the amount of taxes paid and the steps taken to seek a refund and (2) to stay for a reasonable time that portion of the repayment obligation attributable to the disputed taxes while her claim for the tax refund was litigated.

5. In **Hoyal v. Pioneer Sand Co., Inc.**, 188 P.3d 716 (Colo. 2008), the Colorado Supreme Court upheld a trial court's exclusion of evidence of potential future income taxes in calculating economic damages in a wrongful death action, concluding that the evidence would be distracting, speculative, and contrary to a goal of the tort system, compensating victims. In dicta, the court indicated the same considerations applied in personal injury actions. *But see* **Lewis v. Great W. Distrib. Co. of Borger**, 168 Colo. 424, 451 P.2d 754 (1969) (noting that the determination of net pecuniary loss in a wrongful death case contemplates deduction of income taxes).

6. In **Norfolk & W. Ry. v. Liepelt**, 444 U.S. 490 (1980), the U.S. Supreme Court held in a wrongful death case brought under the Federal Employers' Liability Act, where the measure of damages is the loss of pecuniary benefits the beneficiaries might reasonably have received from the deceased, that (1) evidence concerning income taxes the deceased would have paid on estimated future earnings is admissible, and (2) it was error "in this case" to refuse to give the jury a cautionary instruction that any award they might make would not be subject to income taxes and consequently such taxes should not be considered by them in determining the amount of any award. In **Rego**, 801 P.2d at 538, the Colorado Supreme Court declined to follow **Liepelt**. *See also* **Gulf Offshore Co. v. Mobil Oil Corp.**, 453 U.S. 473 (1981) (discussing when, as to federal causes of action triable in either federal or state courts, the giving of such a cautionary

instruction should be determined as a matter of federal law or state law). On the other hand, "the failure to give [a] non-taxability instruction [in a FELA case not involving wrongful death] is harmless error unless there is a showing that the verdict is excessive." **Marlow v. Atchison, Topeka & Santa Fe Ry.**, 671 P.2d 438, 442 (Colo. App. 1983).

7. For a discussion of both income taxes and inflation, see **Good v. A.B. Chance Co.**, 39 Colo. App. 70, 565 P.2d 217 (1977).

8. Any tax benefits the plaintiff may receive from being able to write off losses caused by the defendant should not be deducted from the plaintiff's damages, and if evidence of such tax benefits is received, the court should instruct the jury that it should not consider the effect of income taxes when determining the amount of plaintiff's damages. **Boettcher & Co. v. Munson**, 854 P.2d 199 (Colo. 1993).

## B. DAMAGES FOR LOSS OR DESTRUCTION OF PERSONAL PROPERTY

### 6:11 PERSONAL PROPERTY — DIFFERENCE IN MARKET VALUE

**If you find in favor of the plaintiff,** *(name)***, you shall award as** *(insert applicable pronoun)* **actual damages the difference between the market value of the property immediately before and its market value immediately after the occurrence.**

#### Notes on Use

This instruction should be used where the property damaged has a market value, and there is evidence of total or substantial destruction. *Cf.* Notes on Use to Instruction 6:12. In certain cases the plaintiff may be entitled to other damages as well. *See, e.g.*, the authority cited below in Source and Authority; *see also* **Cope v. Vermeer Sales & Serv. of Colo., Inc.**, 650 P.2d 1307, 1309 (Colo. App. 1982) (holding that plaintiff was entitled to recover loss of profits anticipated from use of negligently damaged property, and stating, "[t]he rule which precludes recovery of uncertain and speculative damages applies only where the fact of damages is uncertain, not where the amount is uncertain").

#### Source and Authority

1. This instruction is supported by **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008); **Zwick v. Simpson**, 193 Colo. 36, 572 P.2d 133 (1977); **State v. Morison**, 148 Colo. 79, 365 P.2d 266 (1961); **Trujillo v. Wilson**, 117 Colo. 430, 189 P.2d 147 (1948) (plaintiff also entitled to recover expense of reasonable efforts to preserve or restore the property); and **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992) (diminution in value must be based on market prices at the time of the occurrence, not on the date of trial).

2. Under sections 5-12-102(1)(a) and (b), C.R.S., prejudgment interest, calculated by the court rather than the jury, is recoverable on damages for injury to personal property. **Isbill Assocs., Inc. v. City & Cty. of Denver**, 666 P.2d 1117 (Colo. App. 1983).

3. In the absence of fraud, malice, or other willful and wanton conduct, there is generally no recovery in trespass and negligence cases for mental suffering for damage to or the loss of personal property. **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999). Nor is recovery permitted for the sentimental or emotional value of lost or damaged personal property such as keepsakes and mementos even though such items may have no market value or the value to the owner is far greater than the market value. *Id.*; *cf.* **Chryar v. Wolf**, 21 P.3d 428 (Colo. App. 2000) (in outrageous conduct case, sentimental value of lost or damaged property may be considered in assessing damages for emotional distress).

## 6:12 PERSONAL PROPERTY — COST OF REPAIRS

**If you find in favor of the plaintiff,** *(name)***, you shall award as** *(insert applicable pronoun)* **actual damages both the reasonable cost of (repairing) (rebuilding) the property, and the decrease in market value, if any, to the property as (repaired) (rebuilt).**

**If the cost of (repairs) (rebuilding) and any decrease in market value of the property as (repaired) (rebuilt) is more than the market value of the property before the occurrence, your award shall be limited to the market value of the property before the occurrence.**

### Notes on Use

1. This instruction should be used when: the personal property has been damaged, but not destroyed, and repairs are feasible; the property has no market value; repairs have already been made; or repair costs will more effectively compensate the plaintiff. *See generally* **Bd. of Cty. Comm'rs of Weld Cty. v. Slovek**, 723 P.2d 1309 (Colo. 1986); **Zwick v. Simpson**, 193 Colo. 36, 572 P.2d 133 (1977). Selection of which measure of damages to use is within the discretion of the trial court. **Slovek**, 723 P.2d at 1316. *Cf.* Notes on Use to Instruction 6:11.

2. Use whichever parenthesized words are most appropriate.

3. The concept of depreciation has been included in the second paragraph of this instruction. Consequently, where the property may have appreciated in value, or would have done so had the occurrence not transpired, this second paragraph should be omitted or, if given, be appropriately modified. **McAlonan v. U.S. Home Corp.**, 724 P.2d 78 (Colo. App. 1986).

4. Under section 5-12-101(1)(b), C.R.S., in a strict liability case where repair costs are appropriate damages, prejudgment interest accrues from the date plaintiff pays the repair or replacement expenditure. **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008).

5. This instruction should be appropriately modified in a case brought under the Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. ("CDARA"). *See* **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (Actual damages in CDARA case are the lesser of the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect; damages for inconvenience may also be awarded.).

### Source and Authority

This instruction is supported by **Callaham v. Slavsky**, 153 Colo. 291, 385 P.2d 674 (1963) (by implication); **Allison v. Heller**, 132 Colo. 415, 289 P.2d 160 (1955) (plaintiff entitled to have property restored as nearly as possible to its condition before accident); and **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992) (if damage to property is reparable, plaintiff is entitled to recover reasonable costs of repair together with any decrease in market value as repaired). *See also* **McAlonan**, 724 P.2d at 79-80 (approving first paragraph and applying it in action to recover costs of repairs needed to bring new condominium up to quality contracted for).

## 6:13 PERSONAL PROPERTY — LOSS OF USE

**If you find in favor of the plaintiff, you shall also award an amount which will reasonably compensate the plaintiff for any loss of use of** *(insert applicable pronoun) (insert description of property)* **during the time reasonably required to make the necessary repairs. These damages must be proven by a preponderance of the evidence. The measure of these damages is the** *(the reasonable rental value of the [insert description]) (the reasonable cost of renting or replacing a similar [insert description] for use) (lost profits)* **while repairs are being made.**

### Notes on Use

1. Use whichever parenthesized phrase is more appropriate.

2. This instruction, appropriately modified, also may be used in cases involving the destruction of property — in contrast to injury or damage to property — with the award of damages for lost profits limited to a reasonable period of time to complete a preexisting contract with a replacement item. *See* **Duggan v. Bd. of Cty. Comm'rs**, 747 P.2d 6 (Colo. App. 1987); *see also* **Koenig v. PurCo Fleet Servs., Inc.**, 2012 CO 56, ¶ 3, 285 P.3d 979.

### Source and Authority

1. This instruction is supported by **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992). The right to recover damages for loss of use has been expressly or implicitly recognized in **Rogers v. Funkhouser**, 121 Colo. 13, 212 P.2d 497 (1949) (automobile); **Hunter v. Quaintance**, 69 Colo. 28, 168 P. 918 (1917) (automobile); and **Jackson v. Kiel**, 13 Colo. 378, 22 P. 504 (1889) (obstruction by public nuisance of access to real property). *See also* **Wagner v. Dan Unfug Motors, Inc.**, 35 Colo. App. 102, 529 P.2d 656 (1974) (holding that damages for the loss of personal use of a vehicle were recoverable in fraud and deceit case when they have been pleaded and reduced to a definite rental cost, and distinguishing the contrary dictum in **Hunter**, 69 Colo. at 30, 168 P. at 919); **Francis v. Steve Johnson Pontiac-GMC-Jeep, Inc.**, 724 P.2d 84 (Colo. App. 1986) (same).

2. Loss of use damages can be measured by either lost profits or reasonable rental value incurred during a reasonable repair or replacement period. The property owner is not required to prove that the owner actually lost the chance for income from the rental. Rather, the property owner is entitled to recover because the owner lost the right to earn a profit from the rental. **Koenig**, ¶ 14, 285 P.3d at 983. However, in a case involving loss of use of a personal vehicle while it is repaired, damages may be recovered even without an actual loss. **Francis**, 724 P.2d at 86 (in tort case, loss is presumed if personal auto is unavailable, even though no replacement auto is rented).

3. "Loss of use" damages must be specially pleaded. **Rogers**, 121 Colo. at 24-25, 212 P.2d at 502.

## C. MULTIPLE RECOVERY

### 6:14 MULTIPLE RECOVERY PROHIBITED (WHEN PLAINTIFF SUING ON ALTERNATIVE BUT DUPLICATIVE CLAIMS FOR RELIEF)

**The plaintiff,** *(name)***, has sued for the same (injuries) (damages) (losses) on** *(number)* **different claims for relief. The claims for relief on which the plaintiff has sued and on which you have been instructed are:** *(insert appropriate description of each of the plaintiff's claims)***.**

**If you find for the plaintiff on more than one claim for relief, you may award** *(insert applicable pronoun)* **damages only once for the same (injuries) (damages) (losses).**

**Notes on Use**

1. Where a party prevails on multiple claims seeking the same damages, the jury must award the full amount of damages it finds but must award those damages only once. The Committee recommends that, wherever possible, the jury be given unified step-by-step special verdict forms (*see, e.g.*, Instruction 4:20) that should lead the jury to award the full amount of damages it intends but minimize the risk of awarding the same damages more than once.

2. In **Schuessler v. Wolter**, 2012 COA 86, 310 P.3d 151, the jury awarded an identical amount against each of two defendants for noneconomic damages. One defendant argued on appeal that the jury had impermissibly awarded the same damages twice. The court of appeals disagreed and affirmed the damage award because Instruction 6:14 had been given, and the court presumed that the jury had followed it. *Id.* at ¶ 65. The court further stated: "When multiple claims are presented that are duplicative in terms of their recoverable damages, an instruction prohibiting multiple recoveries for the same damages must be given." *Id.* at ¶ 64.

3. In **Steward Software Co. v. Kopcho**, 275 P.3d 702 (Colo. App. 2010), *rev'd on other grounds*, 266 P.3d 1085 (Colo. 2011), in contrast, the court reversed a judgment involving multiple claims for the same damages even though this instruction was given. Plaintiff asserted three claims for the same damages, and the jury found for plaintiff on all three. However, the jury awarded substantive damages on one claim and nominal damages on the other two. While declining to conclude that "pattern instruction 6:14, standing alone, was erroneous," the court held that under all the circumstances of the case and in the absence of other clarifying instructions, "the instructions as a whole erroneously prevented the jury from awarding the same damages on all three of [plaintiff's] claims." 275 P.3d at 711. In such cases, the court held, "the jury must be directed to award the same damages on all three claims if the damages are proven as to those claims." *Id.*

4. In cases with multiple claims seeking the same damages, the Committee recommends that the issues illustrated by **Schuessler** and **Steward Software** be dealt with primarily by designing the special verdict form to lead the jury step-by-step through the decision-making process. Additional clarifying instructions may be necessary. **Steward Software**, 275 P.3d at 711. For example, in a case where a single plaintiff asserts three claims against a single defendant for the same damages, the verdict form should direct the jury, using or adapting the

format in Instructions 4:15, 4:16, and 4:20, to decide which party prevailed on each claim. If the jury finds for the plaintiff on any of the claims, the jury should be directed to answer a separate single question asking the jury to state the amount of damages. The damages question should be introduced with a direction, in sum or substance, that plaintiff has asserted three claims for the same damages and that consequently the jury's answer to the damages question must be the same regardless of whether the jury found for the plaintiff on one, two, or all three claims. If the plaintiff asserts other claims for different damages, the verdict form then would lead the jury to decide those claims.

5. Some cases are more complex because, for example, the damages awardable on two claims overlap but are not identical, or some claims are asserted by or against fewer than all plaintiffs or defendants. Most of these cases can be addressed by the recommended approach. For example, where the same economic damages are sought on both tort and contract claims, noneconomic damages may be sought only on the tort claim. This situation can be dealt with by asking the jury to state separately the amounts of economic and noneconomic damages. After the verdict, counsel and the court can readily determine the damages to be included in the judgment.

6. *See also* **Am. Furniture Co. v. Veazie**, 131 Colo. 340, 281 P.2d 803 (1955); **Andrews v. Picard**, 199 P.3d 6 (Colo. App. 2007); **Colo. Homes, Ltd. v. Loerch-Wilson**, 43 P.3d 718 (Colo. App. 2001); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); **Rusch v. Lincoln-Devore Testing Lab., Inc.**, 698 P.2d 832 (Colo. App. 1984).

**Source and Authority**

1. This instruction is supported by **American Furniture Co.**, 131 Colo. at 346, 281 P.2d at 806. In that case, the court noted in dictum that the confusion of the verdict forms could have been avoided by requiring the plaintiff to elect his remedy before the case was submitted to the jury. However, the court did not state that such necessarily should have been done, and other authority clearly indicates that in the absence of unusual circumstances, the plaintiff is entitled to go to the jury on alternative theories, if there is sufficient evidence supporting each theory. *See* **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964) (when remedies are consistent, a party is entitled to pursue either or both until satisfaction of one is obtained); *see also* C.R.C.P. 18(a), 318(a); **Stewart v. Blanning**, 677 P.2d 1382, 1384 (Colo. App. 1984) (requiring election of remedies not appropriate unless the "remedial rights sought in a given situation are so inconsistent that the assertion of one necessarily repudiates the assertion of the other").

2. The rule prohibiting double recovery for the same injury on multiple claims for relief also applies in cases involving multiple defendants. **Quist v. Specialties Supply Co.**, 12 P.3d 863 (Colo. App. 2000).