

## CHAPTER 895

## MISCELLANEOUS GENERAL PROVISIONS

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**895.01 What actions survive; actions not to abate. (1)** In addition to the causes of action which survive at common law the following shall also survive: Causes of action for the recovery of personal property or the unlawful withholding or conversion of personal property, for the recovery of the possession of real estate and for the unlawful withholding of the possession of real estate, for assault and battery, false imprisonment, invasion of privacy, violation of s. 968.31 (2) (d) or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance of real estate, or to quiet the title to real estate, and for a specific performance of contracts relating to real estate. Causes of action for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person.

**(2)** An action does not abate by the occurrence of any event if the cause of action survives or continues.

**History:** Sup. Ct. Order, 67 W (2d) 760, 771; 1977 c. 176.

Actions for criminal conversation or alienation of affections do not survive the death of one of the parties unless the complaint includes allegations showing financial damage to the plaintiff which would pecuniarily diminish his estate. *Hanson v. Valdivia*, 51 W (2d) 466, 187 NW (2d) 151.

Punitive damages incident to damages for pain and suffering of decedent may be awarded to the estate. *Wangen v. Ford Motor Co.* 97 W (2d) 260, 294 NW (2d) 437 (1980).

Actions under 551.41 and 551.59 survive death of wrongdoer. *Continental Assur. v. American Bankshares Corp.* 483 F Supp. 175 (1980).

**895.02 Measure of damages against executor.** When any action mentioned in s. 895.01 (1) shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken including any unjust enrichment of the defendant, or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged outrage to the feelings of the injured party.

**History:** Sup. Ct. Order, 67 W (2d) 784; 1977 c. 176.

**895.03 Recovery for death by wrongful act.** Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if

death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

A complaint alleging the defendant shot plaintiff's husband and that the shooting was a wrongful act is not demurrable. *Kelly v. Mohrhusem*, 50 W (2d) 337, 184 NW (2d) 149.

It is sufficient if the death was caused by a wrongful act, neglect or default in this state; it is not necessary that the death occur here. The statute includes cases dealing with breach of warranty arising out of contract. *Schnabl v. Ford Motor Co.* 54 W (2d) 345, 195 NW (2d) 602, 198 NW (2d) 161.

**895.031 Recovery from estate of wrongdoer.** Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the wrongdoer who would have been liable if death had not ensued, although such wrongdoer shall die prior to the time of death of such injured person, shall be liable to an action for damages notwithstanding his prior death and notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state. Any right of action which may accrue by such injury to the person of another although the death of the wrongdoer occurred prior thereto shall be enforced by bringing an action against the executor or administrator or personal representative of such deceased wrongdoer.

**895.035 Parental liability for acts of minor child. (1)** (a) In this section, "custody" means either legal custody of a child under a court order under s. 767.23 or 767.24, custody of a child under a stipulation under s. 767.10 or actual physical custody of a child. "Custody" does not include legal custody, as defined under s. 48.02 (12), by an agency or a person other than a child's birth or adoptive parent.

(b) In determining which parent has custody of a child for purposes of this section, the court shall consider which parent had responsibility for caring for and supervising the child at

the time the act that caused the injury, damage or loss occurred.

(2) The parent or parents with custody of an unemancipated minor child, in any circumstances where he, she or they may not be liable under the common law, are liable for damages to property, for the value of unrecovered stolen property or for personal injury attributable to a wilful, malicious or wanton act of the child.

(2m) No person may file a claim under sub. (2) if the child who committed the act that resulted in the injury, damage or loss is subject to an informal disposition under s. 48.245, a consent decree under s. 48.32 or a dispositional order under s. 48.34 (5) or 48.343 (4), which requires the child to make repairs or pay restitution for the injury, damage or loss and if the child is in compliance with any such condition.

(3) An adjudication under s. 48.31 that the child violated a civil law or ordinance, is delinquent or is in need of protection and services under s. 48.13 (12), based on proof that the child committed the act, subject to its admissibility under s. 904.10, shall, in an action under sub. (1), stop a child's parent or parents from denying that the child committed the act that resulted in the injury, damage or loss.

(4) The maximum recovery from any parent or parents may not exceed \$2,500 for damages resulting from any one act of a child in addition to taxable costs and disbursements and reasonable attorney fees, as determined by the court. If 2 or more children in the custody of the same parent or parents commit the same act the total recovery may not exceed \$2,500, in addition to taxable costs and disbursements.

(5) This section does not limit the amount of damages recoverable by an action against a child or children except that any amount so recovered shall be reduced and apportioned by the amount received from the parent or parents under this section.

(6) Any recovery under this section shall be reduced by the amount recovered as restitution for the same act under s. 48.245, 48.32, 48.34 (5) or 48.343 (4).

(7) This section does not affect or limit any liability of a parent under s. 167.10 (7) or 343.15 (2).

**History:** 1985 a. 311.

See note to 343.15, citing *Swanigan v. State Farm Ins. Co.* 99 W (2d) 179, 299 NW (2d) 234 (1980).

See note to 343.15, citing *Jackson v. Ozaukee County*, 111 W (2d) 462, 331 NW (2d) 338 (1983).

This section does not apply to placement agencies or foster parents. 66 Atty. Gen. 164.

The constitutional validity of parental liability statutes. O'Connor, 55 MLR 584.

**895.04 Plaintiff in wrongful death action.** (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

(2) If the deceased leaves surviving a spouse, and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to

the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's interest in the amount recovered. If the amount allocated to any child under this subsection is less than \$1,500, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

(3) If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment may be entered protecting all defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

(4) Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed \$50,000 for loss of society and companionship may be awarded to the spouse, children or parents of the deceased.

(5) If the personal representative brings the action, the personal representative may also recover the reasonable cost of medical expenses, funeral expenses, including the reasonable cost of a cemetery lot, grave marker and perpetual care of the lot. If a relative brings the action, the relative may recover such medical expenses, funeral expenses, including the cost of a cemetery lot, grave marker and perpetual care of the lot, on behalf of himself or herself or of any person who has paid or assumed liability for such expenses.

(6) Where the wrongful death of a person creates a cause of action in favor of the decedent's estate and also a cause of action in favor of a spouse or relatives as provided in this section, such spouse or relatives may waive and satisfy the estate's cause of action in connection with or as part of a settlement and discharge of the cause of action of the spouse or relatives.

(7) Damages found by a jury in excess of the maximum amount specified in sub. (4) shall be reduced by the court to such maximum. The aggregate of the damages covered by subs. (4) and (5) shall be diminished under s. 895.045 if the deceased or person entitled to recover is found negligent.

**History:** 1971 c. 59; Sup. Ct. Order, 67 W (2d) 784; 1975 c. 94 s. 91 (3); 1975 c. 166, 199, 287, 421, 422; 1979 c. 166; 1983 a. 315; 1985 a. 130.

Statutory increases in damage limitations recoverable in a wrongful death action constitute changes in substantive rights and not mere remedial changes. *Bradley v. Knutson*, 62 W (2d) 432, 215 NW (2d) 369.

A parent may maintain an action for loss of aid, comfort, society and companionship of an injured minor child against a negligent tort-feasor on condition that the parents' cause of action is combined with that of the child for the child's personal injuries. *Callies v. Reliance Laundry Co.* 188 W 376, overruled. *Shockley v. Prier*, 66 W (2d) 394, 225 NW (2d) 495.

In an action for wrongful death by 2 children of deceased, the plaintiffs' failure to join 3 sisters who would otherwise have been indispensable parties was not fatal to the court's subject matter jurisdiction where affidavits submitted to the trial court indicated that the 3 sisters were unavailable. *Kochel v. Hartford Accident & Indemnity Co.* 66 W (2d) 405, 225 NW (2d) 604.

Plaintiff had wheeled the slicer at least 52 times prior to the accident. Her opportunity to observe and discover any danger was greater than that of any of defendant's employees. *Balas v. St. Sebastian's Congregation*, 66 W (2d) 421, 225 NW (2d) 428.

"Judgment" under (2) means a final, not interlocutory, judgment. *Collins v. Gee*, 82 W (2d) 376, 263 NW (2d) 158.

Trial court in wrongful death action should inform jury of statutory limitations on recovery, if any. *Peot v. Ferraro*, 83 W (2d) 727, 266 NW (2d) 586 (1978).

Posthumous illegitimate child may not maintain action for wrongful death of putative father. *Robinson v. Kolstad*, 84 W (2d) 579, 267 NW (2d) 886 (1978).

This section does not require that proceeds be equally divided between parents. *Keithley v. Keithley*, 95 W (2d) 136, 289 NW (2d) 368 (Ct. App. 1980).

Punitive damages are not recoverable incident to damages for wrongful death. *Wangen v. Ford Motor Co.* 97 W (2d) 260, 294 NW (2d) 437 (1980).

Attractive nuisance doctrine discussed. *Christians v. Homestake Enterprises, Ltd.* 101 W (2d) 25, 303 NW (2d) 608 (1981).

This section does not permit estate to recover on its own behalf damages for decedent's pecuniary loss. *Weiss v. Regent Properties, Ltd.* 118 W (2d) 225, 346 NW (2d) 766 (1984).

See note to 895.045, citing *Delvaux v. Vanden Langenberg*, 130 W (2d) 464, 387 NW (2d) 751 (1986).

Spouse's claim under (4) for loss of society and companionship is additional to common law claim for loss of consortium prior to death of deceased. See note to 120.92, citing *Kottka v. PPG Industries, Inc.* 130 W (2d) 499, 388 NW (2d) 160 (1986).

Georgia law barring father, but not mother, of illegitimate child from suing for child's wrongful death did not deny equal protection. *Parham v. Hughes*, 441 US 347 (1979).

There may not be separate recovery for both estate and beneficiaries. *Bell v. City of Milwaukee*, 746 F (2d) 1205 (1984).

Expanding and limiting damages for pecuniary injury due to wrongful death. *Schoone*, 1972 WBB No. 4.

Cause of action by parents sustained for loss of society and companionship of child tortiously injured. 1976 WLR 641.

**895.045 Contributory negligence.** Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

**History:** 1971 c. 47.

**Cross Reference:** See 891.44 for conclusive presumption that child under 7 cannot be guilty of contributory negligence.

Ordinary negligence can be compared with negligence founded upon the safe-place statute, and in making such comparison in a safe-place case, violation of the statute is not to be considered necessarily as contributing more than the common-law contributory negligence. [Language in *Maus v. Bloss*, 265 W 627, if construed as supporting a contrary proposition, is overruled.] It is not prejudicial error not to call attention to the different standards of care in a safe-place case when instruction number 1580 is used. *Lovesee v. Allied Development Corp.* 45 W (2d) 340, 173 NW (2d) 196.

The court refuses to adopt the doctrine of pure comparative negligence. *Vincent v. Pabst Brewing Co.* 47 W (2d) 120, 177 NW (2d) 513.

A distinction between active and passive negligence as to responsibility for injury and full indemnity to the tort-feasor whose negligence was passive was rejected by the court. *Pachowitz v. Milwaukee & S. Transport Corp.* 56 W (2d) 383, 202 NW (2d) 268.

For the purpose of applying the comparative negligence statute, both the causes of action for medical expenses and loss of consortium shall be deemed derivative; and the causal negligence of the injured spouse shall bar or limit the recovery of the claiming spouse pursuant to the terms of the statute. *White v. Lunder*, 66 W (2d) 563, 225 NW (2d) 442.

The contributory negligence of the plaintiff spectator in viewing the race from the north end of the track opposite the 3rd and 4th turns was not greater than defendants' negligence as a matter of law where she did not realize that watching from the curve would be more dangerous than sitting in the grandstand, was not aware that tires would fly into the spectator area, there was no warning of potential dangers, and was watching the race closely immediately prior to the accident. *Kaiser v. Cook*, 67 W (2d) 460, 227 NW (2d) 50.

The trial court's denial of defendants' motion to direct the jury to consider the employer's negligence in its special verdict was error even though the employer's liability extended only to workmen's compensation. *Connar v. West Shore Equipment*, 68 W (2d) 42, 227 NW (2d) 660.

The trial court's instruction to the jury to compute not all the damages plaintiff suffered but only that portion caused by defendant's negligence was erroneous, because this section requires the jury to find 100% of plaintiff's damages, which are then reduced by the amount of his contributory negligence; but the erroneous instruction was not prejudicial where nothing in the record indicates a probability of the instruction having affected the allocation of 57% negligence to plaintiff. *Nimmer v. Purtell*, 69 W (2d) 21, 230 NW (2d) 258.

Insufficiently guarded swimming pool may constitute attractive nuisance. *McWilliams v. Gazinski*, 71 W (2d) 57, 237 NW (2d) 437.

When 2 grounds of negligence are alleged it does not categorically follow that the plaintiff must always elect one of the 2 grounds of negligence for submission to the jury. Negligence per se discussed. *Howes v. Deere & Co.* 71 W (2d) 268, 238 NW (2d) 76.

Conduct constituting implied or tacit assumption of risk is no longer bar to action for negligence. *Polisky v. Levine*, 73 W (2d) 547, 263 NW (2d) 204.

Record of rear-end collision case contained credible evidence that plaintiff executed maneuvers which could not be done with reasonable safety and failed to signal before executing them, which supported finding of 50% causal negligence. *Thompson v. Howe*, 77 W (2d) 441, 253 NW (2d) 59.

See note to 103.67, citing *Tisdale v. Hasslinger*, 79 W (2d) 194, 255 NW (2d) 314.

Where court grants judgment notwithstanding verdict regarding 2 of several defendants found causally negligent, and percentage of negligence reallocated affects damages but not liability, plaintiffs should be given option of proportional reduction of judgment or new trial. *Chart v. Gen. Motors Corp.* 80 W (2d) 91, 258 NW (2d) 680.

See note to 805.12, citing *Ollinger v. Grall*, 80 W (2d) 213, 258 NW (2d) 693.

Where blowing snow obstructed driver's vision, driver did not reduce speed, and parked truck on highway "loomed up" out of snow, driver was causally negligent as matter of law. *Nelson v. Travelers Ins. Co.* 80 W (2d) 272, 259 NW (2d) 48.

Rescue doctrine and emergency doctrine discussed. *Cords v. Anderson*, 80 W (2d) 525, 259 NW (2d) 672.

Negligence of tort-feasor dismissed from lawsuit on summary judgment as being less or equally negligent as plaintiff can be considered by jury in apportioning total causal negligence of remaining parties. *Gross v. Midwest Speedways, Inc.* 81 W (2d) 129, 260 NW (2d) 36.

Collateral source rule and defense of superseding cause discussed. *Rixmann v. Somerset Public Schools*, 83 W (2d) 571, 266 NW (2d) 326 (1978).

Negligence per se arising out of breach of safety statute may be compared with common law negligence. *Locicero v. Interpace Corp.* 83 W (2d) 876, 266 NW (2d) 423 (1978).

In safe place case, comparative negligence instructions need not direct jury to consider defendant's higher duty of care. *Brons v. Bischoff*, 89 W (2d) 80, 277 NW (2d) 854 (1979).

Court declines to alter rule of comparative negligence so that plaintiff's negligence would be compared to combined negligence of several tort-feasors. *Reiter v. Dyken*, 95 W (2d) 461, 290 NW (2d) 510 (1980).

Punitive damages may be awarded in product liability cases. Judicial controls over punitive damage awards established. *Wangen v. Ford Motor Co.* 97 W (2d) 260, 294 NW (2d) 437 (1980).

See note to 175.40, citing *Brunette v. Employers Mut. Liability Ins. Co.* 107 W (2d) 361, 320 NW (2d) 43 (Ct. App. 1982).

Corporation which acquired substantially all assets of predecessor sole proprietorship but which is substantially same business organization and manufactures almost identical product as its predecessor may be liable for injuries caused by defective product manufactured by predecessor. *Tift v. Forage King Industries, Inc.* 108 W (2d) 72, 322 NW (2d) 14 (1982).

Exculpatory contract was unenforceable where contract contained false statement that defendant had no insurance. *Merten v. Nathan*, 108 W (2d) 205, 321 NW (2d) 173 (1982).

Failure to give jury emergency instruction was reversible error, despite plaintiff's violation of several safety statutes. *Westfall v. Kottke*, 110 W (2d) 86, 328 NW (2d) 481 (1983).

Tort of parent's negligent control of child compared to negligent entrustment to child of dangerous instrumentality. *Bankert v. Threshermen's Mut. Ins. Co.* 110 W (2d) 469, 329 NW (2d) 150 (1983).

See note to 904.07, citing *D. L. v. Huebner*, 110 W (2d) 581, 329 NW (2d) 890 (1983).

Boys on pier should have foreseen that grabbing towel from bikini-clad girl would embarrass her and cause her to dive into water without pausing to ascertain its shallow depth. *LePoidevin v. Wilson*, 111 W (2d) 116, 330 NW (2d) 555 (1983).

Exculpatory contract signed by husband did not bar wife's suit for loss of consortium. Broad and general contract bars only claims within contemplation of parties at time of execution. *Arnold v. Shawano County Agr. Society*, 111 W (2d) 203, 330 NW (2d) 773 (1983).

Attorney was not immunized from liability in tort action for abuse of process. *Strid v. Converse*, 111 W (2d) 418, 331 NW (2d) 350 (1983).

Beneficiary of will may maintain action against attorney who negligently drafted or supervised execution of will even though not in privity with attorney. *Auric v. Continental Cas. Co.* 111 W (2d) 507, 331 NW (2d) 325 (1983).

Accountant may be held liable to third party not in privity for negligent preparation of audit report. *Citizens State Bank v. Timm, Schmidt & Co.* 113 W (2d) 376, 335 NW (2d) 361 (1983).

"Seat belt negligence" and "passive negligence" distinguished. Jury instructions regarding seat belts recommended. Method for apportioning damages in seat belt negligence cases adopted. *Foley v. City of West Allis*, 113 W (2d) 475, 335 NW (2d) 824 (1983).

Bus driver who told 11-year-old he could not ride school bus next day but did not inform either school or parents of action was 93% liable for injuries sustained by boy while riding bicycle to school next day. *Toeller v. Mutual Serv. Casualty Ins. Co.* 115 W (2d) 631, 340 NW (2d) 923 (Ct. App. 1983).

See note to Art. I, sec. 9, citing *Collins v. Eli Lilly Co.* 116 W (2d) 166, 342 NW (2d) 37 (1984).

Minor child may recover for loss of care, society, companionship, protection, training and guidance of parent due to negligent acts of third party. *Theama v. City of Kenosha*, 117 W (2d) 508, 344 NW (2d) 513 (1984).

Exculpatory clause in Yellow Pages contract is unenforceable. *Discount Fabric House v. Wis. Tel. Co.* 117 W (2d) 587, 345 NW (2d) 417 (1984).

Due to public policy reasons tortfeasor was immune from liability. *Sanem v. Home Ins. Co.* 119 W (2d) 530, 350 NW (2d) 89 (1984).

See note to 125.07, citing *Sorensen v. Jarvis*, 119 W (2d) 627, 350 NW (2d) 108 (1984).

Guidelines for submission of punitive damages issue to jury in product liability case discussed. *Walter v. Cessna Aircraft Co.* 121 W (2d) 221, 358 NW (2d) 816 (Ct. App. 1984).

In "second collision" products liability case, plaintiff must prove that defective product was substantial factor in causing injury. Court upholds verdict finding plaintiff passenger not negligent for failing to wear seat belt. *Sumnicht v. Toyota Motor Sales*, 121 W (2d) 338, 360 NW (2d) 2 (1984).

Plaintiff's mental distress regarding possibility of future surgery was compensable even though plaintiff's doctor was not able to testify that surgery was reasonably probable. *Brantner v. Jensen*, 121 W (2d) 658, 360 NW (2d) 529 (1985).

In negligence actions, emotional distress must be manifested by physical injury, e. g. hysteria. *Garrett v. City of New Berlin*, 122 W (2d) 223, 362 NW (2d) 137 (1985).

Regardless of classification of underlying cause of action, punitive damages are recoverable where defendant's conduct was "outrageous". Insurance cov-

erage for punitive damages is not contrary to public policy. *Brown v. Maxey*, 124 W (2d) 426, 369 NW (2d) 677 (1985).

Court declines to adopt "product line" or "expanded continuation" exceptions to rule of successor corporation nonliability for defective products manufactured by predecessor. *Fish v. Amsted Industries, Inc.* 126 W (2d) 293, 376 NW (2d) 820 (1985).

Where decedent's negligence was greater than any individual tortfeasor's, this section bars recovery under 895.04 (7). *Delvaux v. Vanden Langenberg*, 130 W (2d) 464, 387 NW (2d) 751 (1986).

Where plaintiff's negligence was greater than any injurer's, neither plaintiff nor plaintiff's spouse could recover. *Spearing v. National Iron Co.* 770 F (2d) 87 (1985).

Proportioning comparative negligence—problems of theory and special verdict formulation. *Aiken*, 53 MLR 293.

From defect to cause to comparative fault—Rethinking some product liability concepts. *Twerski*, 60 MLR 297.

The problem of the insolvent contributor. *Myse*, 60 MLR 891.

Punitive damage recovery in products liability cases. *Ghiardi and Kircher*, 65 MLR 1 (1981).

The concepts of "defective condition" and "unreasonably dangerous" in products liability law. *Swartz*, 66 MLR 280 (1983).

Seat belt negligence: The ambivalent Wisconsin rules. *McChrystal*, 68 MLR 539 (1985).

Second collision law - Wisconsin. *Ghiardi*, 69 MLR 1 (1985).

Comparative Negligence in Wisconsin. *Horowitz, WBB* Jan 1981.

Plaintiff's failure to wear a safety belt. *Towers, WBB* July, 1985.

Strict products liability in Wisconsin. 1977 WLR 227.

#### 895.048 Recovery by auto or motorboat owner limited.

The owner of a motor vehicle or motorboat which, while being operated by the spouse or minor child of such owner, is damaged as the result of an accident involving another vehicle or boat, may not recover from the owner or operator of such other vehicle or boat for such damages, if the negligence of such spouse or minor child exceeds that of the operator of such other vehicle or boat. In the event that it is judicially determined that a spouse or minor operator of the motor vehicle or motorboat is found to be guilty of less than 50% of the causal negligence involved in an accident, then in that event the owner of the motor vehicle or motorboat involved shall be entitled to recover in accordance with the contributory negligence principles as laid down in s. 895.045. For the purposes of recovery of damages by the owner under s. 895.048, and for this purpose only, the negligence of the spouse or minor operator shall be imputed to the owner.

**895.05 Damages in actions for libel.** (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

(2) Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a

correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

One who contributes nondefamatory photograph of plaintiff to newspaper to accompany defamatory article is not liable, absent knowledge or control of article. *Westby v. Madison Newspapers, Inc.* 81 W (2d) 1, 259 NW (2d) 691.

Newscaster did not act with knowledge of falsity or with reckless disregard for truth by broadcasting that plaintiff had been charged with crime where newscaster was told by deputy sheriff that charges would be filed: *Prahl v. Brosamie*, 98 W (2d) 130, 295 NW (2d) 768 (Ct. App. 1980).

Contract printer had no reason to know of libel and so was entitled to summary judgment. *Maynard v. Port Publications, Inc.* 98 W (2d) 555, 297 NW (2d) 500 (1980).

Sub. (2) applies to non-media defendants but relates only to libelous publications in print media, not broadcast media. *Hucko v. Jos. Schlitz Brewing Co.* 100 W (2d) 372, 302 NW (2d) 68 (Ct. App. 1981).

Trial court properly dismissed defamation claim based on letter by medical director charging that foundation conducted sham nonprofit operation since director established defense of truth. *Fields Foundation, Ltd. v. Christensen*, 103 W (2d) 465, 309 NW (2d) 125 (Ct. App. 1981).

See note to Art. I, sec. 3, citing *Denny v. Mertz*, 106 W (2d) 636, 318 NW (2d) 141 (1982).

Where former legislator who had gained notoriety within district while in office was allegedly defamed in radio broadcast localized within former district, former legislator was "public figure" for purpose of defamation action. *Lewis v. Coursolle Broadcasting*, 127 W (2d) 105, 377 NW (2d) 166 (1985).

Publishers' privileges and liabilities regarding libel discussed. *Gertz v. Robert Welch, Inc.* 418 US 323.

Public figure who sues media companies for libel may inquire into editorial processes of those responsible where proof of "actual malice" is required for recovery. *Herbert v. Lando*, 441 US 153 (1979).

"Public figure" principle in libel cases discussed. *Wolston v. Reader's Digest Assn., Inc.* 443 US 157 (1979).

Where wire services' accounts of judge's remarks were substantially accurate, defamation suit by judge was barred under (1). *Simonson v. United Press Intern., Inc.* 500 F Supp 1261 (1980).

Defamation law of Wisconsin. *Brody*, 65 MLR 505 (1982).

**895.052 Defamation by radio and television.** The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employes of any such owner, licensee or operator, shall not be liable in damages for any defamatory statement published or uttered in, or as a part of, a visual or sound broadcast by a candidate for political office in those instances in which, under the acts of congress or the rules and regulations of the federal communications commission, the broadcasting station or network is prohibited from censoring the script of the broadcast.

**895.055 Gaming contracts void.** All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of such promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be absolutely void; provided, however, that contracts of insurance made in good faith for the security or indemnity of the party insured shall be lawful and valid.

Puerto Rican judgment based on gambling debt was entitled to full faith and credit in Wisconsin. *Conquistador Hotel Corp. v. Fortino*, 99 W (2d) 16, 298 NW (2d) 236 (Ct. App. 1980).

**895.056 Recovery of money wagered.** Any person who, by playing at any game or by betting or wagering on any game,

election, horse or other race, ball playing, cock fighting, fight, sport or pastime or on the issue or event thereof, or on any future contingent or unknown occurrence or result in respect to anything whatever, shall have put up, staked or deposited with any stakeholder or 3rd person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may, within 3 months after such putting up, staking or depositing, sue for and recover the same from such stakeholder or 3rd person whether such money, property or thing in action has been lost or won or whether it has been delivered over by such stakeholder or 3rd person to the winner or not, and may, within 6 months after any such delivery by such person or stakeholder, sue for and recover such money, property or thing in action from the winner thereof if the same has been delivered over to such winner; and if he shall not so sue for and recover such money, property or thing in action within the time above limited then any other person may, in his behalf and in his name, sue for and recover the same for the use and benefit of his family or his heirs, in case of his death, from such stakeholder or 3rd person if the same is still held by him, within 6 months after such putting up, staking or depositing, or from the winner thereof within one year from the delivery thereof to such winner.

**895.057 Action against judicial officer for loss caused by misconduct.** Any judicial officer who causes to be brought in a court over which he presides any action or proceeding upon a claim placed in his hands as agent or attorney for collection shall be liable in a civil action to the person against whom such action or proceeding was brought for the full amount of damages and costs recovered on such claim.

**895.06 Recovery of divisible personalty.** When personal property is divisible and owned by tenants in common and one tenant in common shall claim and hold possession of more than his share or proportion thereof his cotenant, after making a demand in writing, may sue for and recover his share or the value thereof; and the court may direct the jury, if necessary, in any such action to find what specific articles or what share or interest belongs to the respective parties, and the court shall enter up judgment in form for one or both of the parties against the other, according to such verdict.

**895.14 Tenders of money and property. (1) TENDER MAY BE PLEADED.** The payment or tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought in like manner and with the like effect as if such tender or payment had been made at the time prescribed in the contract.

**(2) TENDER AFTER ACTION COMMENCED.** A tender may be made after an action is brought on the contract of the whole sum then due, plus legal costs of suit incurred up to the time, at any time before the action is called for trial. The tender may be made to the plaintiff or attorney, and if not accepted the defendant may plead the same by answer or supplemental answer, in like manner as if it had been made before the commencement of the action, bringing into court the money so tendered for costs as well as for debt or damages.

**(3) PROCEEDINGS ON ACCEPTANCE OF TENDER.** If the tender is accepted the plaintiff or attorney shall, at the request of the defendant, sign a stipulation of discontinuance of the action for that reason and shall deliver it to the defendant; and also a certificate or notice thereof to the officer who has any process against the defendant, if requested. If costs are incurred for any service made by the officer after the tender is accepted and before the officer receives notice of the acceptance, the

defendant shall pay the costs to the officer or the tender is invalid.

**(4) INVOLUNTARY TRESPASS.** A tender may be made in all cases of involuntary trespass before action is commenced. When in the opinion of the court or jury a sufficient amount was tendered to the party injured, agent or attorney for the trespass complained of, judgment shall be entered against the plaintiff for costs if the defendant kept the tender good by paying the money into court at the trial for the use of the plaintiff.

**(5) PAYMENT INTO COURT OF TENDER; RECORD OF DEPOSITS.**  
**(a)** When tender of payment in full is made and pleaded, the defendant shall pay the tender in full into court before the trial of the action is commenced and notify the opposite party in writing, or be deprived of all benefit of the tender. When the sum tendered and paid into court is sufficient, the defendant shall recover the taxable costs of the action, if the tender was prior to the commencement of the action. The defendant shall recover taxable costs from the time of the tender, if the tender was after suit commenced.

**(b)** When any party, pursuant to an order or to law, deposits any money or property with the clerk of court, the clerk shall record the deposit in the minute record describing the money or property and stating the date of the deposit, by whom made, under what order or for what purpose and shall deliver a certificate of these facts to the depositor, with the volume and page of the record endorsed on the certificate.

**History:** 1981 c. 67; 1983 a. 192 ss. 274 to 279; 1983 a. 302 s. 8.

**895.20 Legal holidays.** January 1, January 15, the 3rd Monday in February (which shall be the day of celebration for February 12 and 22), the last Monday in May (which shall be the day of celebration for May 30), July 4, the 1st Monday in September which shall be known as Labor day, the 2nd Monday in October, November 11, the 4th Thursday in November (which shall be the day of celebration for Thanksgiving), December 25, the day of holding the September primary election, and the day of holding the general election in November are legal holidays. On Good Friday the period from 11 a.m. to 3 p.m. shall uniformly be observed for the purpose of worship. In every 1st class city the day of holding any municipal election is a legal holiday, and in every such city the afternoon of each day upon which a primary election is held for the nomination of candidates for city offices is a half holiday and in counties having a population of 500,000 or more the county board may by ordinance provide that all county employes shall have a half holiday on the day of such primary election and a holiday on the day of such municipal election, and that employes whose duties require that they work on such days be given equivalent time off on other days. Whenever any of said days falls on Sunday, the succeeding Monday shall be the legal holiday.

**History:** 1971 c. 226; 1973 c. 140, 333; 1977 c. 187 s. 96; 1983 a. 192 s. 257.

**895.22 Wisconsin family month.** The month of November, in which the celebration of Thanksgiving occurs, is designated as Wisconsin Family Month and the first Sunday of that month as Family Sunday. In conjunction therewith appropriate observances, ceremonies, exercises and activities may be held under state auspices to focus attention on the principles of family responsibility to spouses, children and parents, as well as on the importance of the stability of marriage and the home for our future well-being; and the chief officials of local governments and the people of the state are invited either to join and participate therein or to conduct like observances in their respective localities.

**History:** 1973 c. 333; 1977 c. 187 s. 96; 1983 a. 192 s. 258.

**895.23 Indian Rights Day.** July 4 is designated as "Indian Rights Day," and in conjunction with the celebration of Independence Day, appropriate exercises or celebrations may be held in commemoration of the granting by congress of home rule and a bill of rights to the American Indians. When July 4 falls on Sunday, exercises or celebrations of Indian Rights Day may be held on either the third or the fifth.

**History:** 1977 c. 187 s. 96; 1983 a. 192 s. 259.

**895.28 Remedies not merged.** When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other.

**895.33 Limitation of surety's liability.** Any person may limit the amount of liability as a surety upon any bond or other obligation required by law or ordered by any court, judge, municipal judge or public official for any purpose. The amount of the limited liability may be recited in the body of the bond or stated in the justification of the surety. In an action brought upon the bond, no judgment may be recovered against the surety for a sum larger than the amount of the liability stated, together with the proportional share of the costs of the action. In an action brought on the bond, a surety may deposit in court the amount of the liability, whereupon the surety shall be discharged and released from any further liability under the bond.

**History:** 1979 c. 110 s. 60 (11); 1985 a. 332.

**895.34 Renewal of sureties upon becoming insufficient and effects thereof.** If any bail bond, recognizance, undertaking or other bond or undertaking given in any civil or criminal action or proceeding, becomes at any time insufficient, the court or judge thereof, municipal judge or any magistrate before whom such action or proceeding is pending, may, upon notice, require the plaintiff or defendant to give a new bond, recognizance or undertaking. Every person becoming surety on any such new bond, recognizance or undertaking is liable from the time the original was given, the same as if he or she had been the original surety. If any person fails to comply with the order made in the case the adverse party is entitled to any order, judgment, remedy or process to which he or she would have been entitled had no bond, recognizance or undertaking been given at any time.

**History:** 1977 c. 305.

**895.345 Justification of individual sureties. (1)** This section shall apply to any bond or undertaking in an amount of more than \$1,000 whereon individuals are offered as sureties, which is authorized or required by any provision of the statutes to be given or furnished in or in connection with any civil action or proceeding in any court of record in this state, in connection with which bond or undertaking real property is offered as security.

**(2)** Before any such bond or undertaking shall be approved, there shall be attached thereto and made a part of such bond or undertaking a statement under oath in duplicate by the surety that he is the sole owner of the property offered by him as security and containing the following additional information:

- (a) The full name and address of the surety.
- (b) That he is a resident of this state.
- (c) An accurate description by lot and block number, if part of a recorded plat, or by metes and bounds of the real estate offered as security.
- (d) A statement that none of the properties offered constitute the homestead of the surety.
- (e) A statement of the total amount of the liens, unpaid taxes and other encumbrances against each property offered.

(f) A statement as to the assessed value of each property offered, its market value and the value of the equity over and above all encumbrances, liens and unpaid taxes.

(g) That the equity of the real property is equal to twice the penalty of the bond or undertaking.

**(3)** This sworn statement shall be in addition to and notwithstanding other affidavits or statements of justification required or provided for elsewhere in the statutes in connection with such bonds and undertakings.

**Cross Reference:** This section does not apply to bonds of personal representatives. See 856.25.

**895.346 Bail, deposit in lieu of bond.** When any bond or undertaking is authorized in any civil or criminal action or proceeding, the would-be obligor may, in lieu thereof and with like legal effect, deposit with the proper court or officer cash or certified bank checks or U.S. bonds or bank certificates of deposit in an amount at least equal to the required security; and the receiver thereof shall give a receipt therefor and shall notify the payor bank of any deposits of bank certificates of deposit. Section 808.07 shall govern the procedure so far as applicable.

**History:** Sup. Ct. Order, 67 W (2d) 784; 1977 c. 187 s. 135.

**895.35 Expenses in actions against municipal and other officers.** Whenever in any city, town, village, school district, vocational, technical and adult education district or county charges of any kind are filed or an action is brought against any officer thereof in his official capacity, or to subject any such officer, whether or not he is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on his part, is subjected to a personal liability as aforesaid, such city, town, village, school district, vocational, technical and adult education district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it appears from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.

**History:** 1971 c. 154.

County has option to refuse payment of sheriff's criminal defense attorney's fees. *Bablitch & Bablitch v. Lincoln County*, 82 W (2d) 574, 263 NW (2d) 218.

A city may reimburse a commissioner of the city redevelopment authority for his legal expenses incurred where charges are filed against him in his official capacity seeking his removal from office for cause and such charges are found by the common council to be unsupported. Such reimbursement is discretionary. The city redevelopment authority lacks statutory authority to authorize reimbursement for such legal expenses. 63 Atty. Gen. 421.

A city council can, in limited circumstances, reimburse a council member for reasonable attorneys' fees incurred in defending an alleged violation of the open meeting law, but cannot reimburse the member for any forfeiture imposed. 66 Atty. Gen. 226.

This section applies to criminal charges brought against former officer for alleged fraudulent filing of expense vouchers. 71 Atty. Gen. 4.

**895.36 Process against officer.** No process against private property shall issue in an action or upon a judgment against a public corporation or an officer in his official capacity, when the liability, if any, is that of the corporation nor shall any person be liable as garnishee of such public corporation.

**895.37 Abrogation of defenses. (1)** In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employe either expressly or impliedly assumed the risk of the hazard complained of.

(b) When such employer has at the time of the injury in a common employment 3 or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

(c) When such employer has at the time of the injury in a common employment 3 or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of the injured employe, where such want of ordinary care was not wilful.

(2) Any employer who has elected to pay compensation as provided in ch. 102 shall not be subject to this section.

(3) Subsection (1) (a), (b) and (c) shall not apply to farm labor, except such farm labor as is subject to ch. 102.

(4) No contract, rule, or regulation, shall exempt the employer from this section.

Fellow servant defense is not available to farm employer of child employed in violation of child labor laws. *Tisdale v. Hasslinger*, 79 W (2d) 194, 255 NW (2d) 314.

**895.375 Abrogation of defense that contract was champertous.** No action, special proceeding, cross complaint or counterclaim in any court shall be dismissed on the ground that a party to the action is a party to a contract favoring of champerty or maintenance unless the contract is the basis of the claim pleaded.

**895.38 Surety, how discharged.** (1) Any surety or the personal representative of any surety upon the bond of any trustee, guardian, receiver, executor, or other fiduciary, may be discharged from liability as provided in this section. On 5 days' notice to the principal in such bond, application may be made to the court where it is filed, or which has jurisdiction of such fiduciary or to any judge of such court for a discharge from liability as surety, and that such principal be required to account.

(2) Notice of such application may be served personally within or without the state. If it shall satisfactorily appear to the court or the judge that personal service cannot be had with due diligence within the state, the notice may be served in such manner as the court or judge shall direct. Pending such application the principal may be restrained from acting, except to preserve the trust estate.

(3) If at the time appointed the principal shall fail to file a new bond satisfactory to the court or judge, an order shall be made requiring the principal to file a new bond within 5 days. When such new bond shall be filed, the court or judge shall make an order requiring the principal to account for all his acts to and including the date of the order, and to file such account within a time fixed not exceeding 20 days; and shall discharge the surety making such application from liability for any act or default of the principal subsequent to the date of such order.

(4) If the principal shall fail to file a new bond within the time specified, an order shall be made removing him from office, and requiring him to file his account within 20 days. If he shall fail to file his account as required, the surety may make and file such account; and upon settlement thereof and upon the trust fund or estate being found or made good and paid over or properly secured, credit shall be given for all commissions, costs, disbursements and allowances to which the principal would be entitled were he accounting.

(5) The procedure for hearing, settling and allowing such account shall be according to the practice prescribed by ch. 862 in the matter of account of executors and administrators. Upon the trust fund or estate being found or made good and paid over or properly secured, such surety shall be discharged

from all liability. Upon demand by the principal, the discharged surety shall return the unearned part of the premium paid for the canceled bond.

(6) Any such fiduciary may institute and conduct proceedings for the discharge of his surety and for the filing of a new bond; and the procedure shall in all respects conform substantially to the practice prescribed by this section in cases where the proceeding is instituted by a surety, and with like effect.

**895.41 Employee's cash bonds to be held in trust; duty of employer; penalty.** (1) Where any person requests any employe to furnish a cash bond, the cash constituting such bond shall not be mingled with the moneys or assets of such person demanding the same, but shall be deposited by such person in any bank, trust company or any savings and loan association doing business in this state whose deposits or shares are insured by a federal agency to the extent of \$10,000, as a separate trust fund, and it shall be unlawful for any person to mingle such cash received as a bond with the moneys or assets of any such person, or to use the same. No employer shall deposit more than \$10,000 with any one depository. The bank book, certificate of deposit or other evidence thereof shall be in the name of the employer in trust for the named employe, and shall not be withdrawn except after an accounting had between the employer and employe, said accounting to be had within 10 days from the time relationship is discontinued or the bond is sought to be appropriated by the employer. All interest or dividends earned by such sum deposited shall accrue to and belong to the employe and shall be turned over to said employe as soon as paid out by the depository. Such deposit shall at no time and in no event be subject to withdrawal except upon the signature of both the employer and employe or upon a judgment or order of a court of record.

(2) In the event of the failure of any person, such moneys on deposit shall constitute a trust fund for the benefit of the persons who furnished such bonds and shall not become the property of the assignee, receiver or trustee of such insolvent person.

(3) In case of the death of such employe before such cash bond is withdrawn in the manner provided in sub. (1) such accounting and withdrawal may be effected not less than 5 days after such death and before the filing of a petition for letters testamentary or of administration in the matter of the decedent's estate, by the employer with the decedent's surviving spouse; and if there be no surviving spouse with his children; and if he shall leave no children, his father or mother; and if he shall leave no father or mother, his brother or sister, in the same manner and with like effect as if such accounting and withdrawal were accomplished by and between the employer and employe as provided in sub. (1). The amount of such cash bond, together with principal and interest, to which the deceased employe would have been entitled had he lived, shall, as soon as paid out by the depository, be turned over to such relative of the deceased employe effecting such accounting and withdrawal with the employer, and such turning over shall be a discharge and release of the employer to the amount of such payment. If no such relatives survive, the employer may apply such cash bond, or so much thereof as may be necessary, to paying creditors of the decedent in the order of preference prescribed in s. 859.25 for satisfaction of debts by executors and administrators and the making of payment in such manner shall be a discharge and release of the employer to the amount of such payment.

(4) Any person who violates this section shall be punished by a fine equal to the amount of the bond or by imprisonment for not less than 10 days nor more than 60 days, or both.

**895.42 Deposit of undistributed money and property by administrators and others.** (1) In case in any proceeding in any court of record it is (a) determined that moneys or other personal property in the custody of or under the control of any administrator, executor, trustee, receiver or other officer of the court, belongs to a natural person if he is alive, or to an artificial person if it is in existence and entitled to receive, otherwise to some other person, and the court or judge making such determination finds that there is not sufficient evidence showing that the natural person first entitled to take is alive, or that the artificial person is in existence and entitled to receive, or (b) in case such money or other personal property, including any legacy or share of intestate property cannot be delivered to the legatee or heir or person entitled thereto because of the fact that such person is a member of the military or naval forces of the United States or any of its allies or is engaged in any of the armed forces abroad or with the American Red Cross society or other body or other similar business, then in either or any of such cases, the court or judge may direct that the officer having custody or control of such money or other personal property, deposit the same in any trust company, or any state or national bank within the state of Wisconsin authorized to exercise trust powers, taking its receipt therefor, and the said receipt shall, to the extent of the deposit so made, constitute a complete discharge of the said officer in any accounting by him made in said proceeding.

(2) In case such deposit is directed to be made, the court shall require the trust company or bank in which said deposit is ordered to be made, as a condition of the receipt thereof, to accept and handle, manage and invest the same as trust funds to the same extent as if it had received the same as a testamentary trust, unless the court shall expressly otherwise direct, except that the reports shall be made to the court of its appointment.

(3) No distribution of the moneys or personal property so deposited shall be made by the depository as such trustee or otherwise without an order of the court on notice as prescribed by s. 879.03, and the jurisdiction of the court in the proceeding will be continued to determine, at any time at the instance of any party interested, the ownership of said funds, and to order their distribution.

History: 1973 c. 90.

**895.43 Intentional killing by beneficiary of contract.** A named beneficiary of a contractual arrangement who feloniously and intentionally kills the principal obligee may not receive any benefit under the contractual arrangement. The benefit is payable as though the beneficiary had predeceased the decedent. Section 852.01 (2m) (b) and (c) applies to this section.

History: 1981 c. 228.

**895.435 Intentional killing by beneficiary of certain death benefits.** (1) A beneficiary who feloniously and intentionally kills an individual may not receive any benefit payable by reason of the death of that individual. The benefit is payable as though the beneficiary had predeceased the decedent.

(2) Section 852.01 (2m) (b) and (c) applies to this section.

History: 1981 c. 228.

**895.44 Exemption from civil liability for furnishing safety inspection or advisory services.** The furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss shall not subject

the insurer, its agent or employe undertaking to perform such services as an incident to insurance, to liability for damages from injury, death or loss occurring as a result of any act or omission in the course of such services. This section shall not apply if the active negligence of the insurer, its agent or employe created the condition which was the proximate cause of injury, death or loss, nor shall it apply to such services when required to be performed under the provisions of a written service contract.

**895.46 State and political subdivisions thereof to pay judgments taken against officers.** (1) (a) If the defendant in any action or special proceeding is a public officer or employe and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employe, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act within the scope of employment. If the employing state agency or the attorney general denies that the state officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employe to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employe as soon as reasonably possible is a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

(b) Persons holding the office of county sheriff on March 1, 1983, are covered by this subsection. This subsection covers other county sheriffs who have:

1. Satisfactorily completed or are currently enrolled in the preparatory program of law enforcement training under s. 165.85 (4) (b) 1, or have provided evidence of equivalent law enforcement training and experience as determined by the law enforcement standards board; or

2. At least 5 years of full-time employment as a law enforcement officer, as defined in s. 165.85 (2) (c).

(c) This subsection does not apply to any action or special proceeding brought by a county against its county sheriff if the action or proceeding is determined in favor of the county.

(d) On and after March 1, 1983, all persons employed as deputy sheriffs, as defined in s. 40.02 (48) (b) 3, are covered by this subsection. The county board shall adopt written policies for payments under this subsection on behalf of any other person, provided that person has satisfied the minimum standards of the law enforcement standards board, who



serves at the discretion of the sheriff as a law enforcement officer as defined in s. 165.85 (2) (c), and the county may make the payments upon approval by the county board.

(e) Any nonprofit corporation operating a museum under a lease agreement with the state historical society, and all officers, directors, employees and agents of such a corporation, are covered by this subsection.

(2) Any town officer held personally liable for reimbursement of any public funds paid out in good faith pursuant to the directions of electors at any annual or special town meeting shall be reimbursed by the town for the amount of the judgment for damages and costs entered against the town officer.

(3) The protection afforded by this section shall apply to any state officer, employe or agent while operating a state-owned vehicle for personal use in accordance with s. 20.916 (7).

**History:** 1973 c. 333; Sup. Ct. Order, 67 W (2d) 761; 1975 c. 81, 198, 199; 1977 c. 29; 1979 c. 74, 221; 1981 c. 20; 1981 c. 96 s. 67; 1981 c. 314 s. 136; 1983 a. 6; 1983 a. 27 s. 2202 (32); 1985 a. 29, 66.

**Cross Reference:** See 775.06 for special procedure applying to state law enforcement officers.

**NOTE:** Subs. (1) (b) and (c) were repealed and recreated and (d) was created by 1983 Wis. Act 6, relating to payment of judgments against sheriffs and deputy sheriffs. The act contains notes explaining the changes.

Highway commission supervisors who were responsible for the placement of highway warning signs may be sued if a sign is not placed in accordance with commission rules. They cannot claim the state's immunity from suit. *Chart v. Dvorak*, 57 W (2d) 92, 203 NW (2d) 673.

"Litigation" under (1) refers only to civil proceedings. Sheriffs are not "public officers" under (1). *Bablitch & Bablitch v. Lincoln County*, 82 W (2d) 574, 263 NW (2d) 218.

Policy behind (1) discussed. *Thuermer v. Village of Mishicot*, 86 W (2d) 374, 272 NW (2d) 409 (Ct. App. 1978).

Public employes' insurer had no right of recovery under 270.58 (1), 1969 stats. *Horace Mann Ins. Co. v. Wauwatosa Bd. of Ed.* 88 W (2d) 385, 276 NW (2d) 761 (1979).

State could not be sued as indemnitor under 270.58 (1) [now 895.46 (1)]. *Fiala v. Voight*, 93 W (2d) 337, 286 NW (2d) 824 (1980).

See note to 29.68, citing *Wirth v. Ehly*, 93 W (2d) 433, 287 NW (2d) 140 (1980).

State may not be sued directly for tortious acts of its employes. *Miller v. Smith*, 100 W (2d) 609, 302 NW (2d) 468 (1981).

"Color of law" element of s. 1983 lawsuit is not identical to "scope of employment" element under (1). *Cameron v. Milwaukee*, 102 W (2d) 448, 307 NW (2d) 164 (1981).

Question of whether aldermen were acting within scope of employment was inappropriately decided by summary judgment. *Schroeder v. Schoessow*, 108 W (2d) 49, 321 NW (2d) 131 (1982).

Once governmental unit decides to provide counsel, it must provide complete and full representation on all issues. *Beane v. City of Sturgeon Bay*, 112 W (2d) 609, 334 NW (2d) 235 (1983).

See note to 66.30, citing 74 Atty. Gen. 208.

This section may require indemnification for actions which are not intended to benefit employer when those actions further the objectives of employment. *Hibma v. Odegaard*, 769 F (2d) 1147 (1985).

Sub. (1) does not prevent a state official from asserting "good faith" as a defense to a charge of infringement of civil rights. *Clarke v. Cady*, 358 F Supp. 1156.

Purpose of this section is not to transform any suit against state employe into suit against state, but to shield state employes from monetary loss in tort suits. *Ware v. Percy*, 468 F Supp. 1266 (1979).

County could not be held liable for civil rights judgment against county judge where judgment found that judge was not carrying out duties of office at relevant time. *Harris v. County of Racine*, 512 F Supp. 1273 (1981).

**895.47 Indemnification of the Wisconsin state agencies building corporation and the Wisconsin state public building corporation.** If the Wisconsin state agencies building corporation or the Wisconsin state public building corporation is the defendant in an action or special proceeding in its capacity as owner of facilities occupied by any department or agents of any department of state government, the judgment as to damages and costs shall be paid by the state from the appropriation made under s. 20.865 (1) (fm). The state, when it does not provide legal counsel to the defendant, its members, officers or employes, shall pay reasonable attorney fees and costs of defending the action regardless of the results of the litigation, unless the court or jury finds that the member, officer or employe did not act within the scope of that person's employment. Failure by the defendant to give notice

to the department of justice of an action or special proceeding commenced against it, its members, officers or employes as soon as reasonably possible shall bar recovery by the defendant, its members, officers or employes from the state under this section. Attorney fees and expenses may not be recovered if the state offers the member, officer or employe legal counsel and the offer is refused.

**History:** 1977 c. 344, 447.

**895.48 Civil liability exemption: emergency care.** Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care. This immunity does not extend when employes trained in health care or health care professionals render emergency care for compensation and within the scope of their usual and customary employment or practice at a hospital or other institution equipped with hospital facilities, at the scene of any emergency or accident, enroute to a hospital or other institution equipped with hospital facilities or at a physician's office.

**History:** 1977 c. 164.

"Good Samaritan" law discussed. 67 Atty. Gen. 218.  
The Good Samaritan statute. 62 MLR 469 (1979)

**895.49 Certain agreements to limit or eliminate tort liability void.** (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

(2) This section does not apply to any insurance contract or worker's compensation plan.

(3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

**History:** 1977 c. 441, 447.

This section did not void indemnity clause in contract. *Gerdmann v. U.S. Fire Ins. Co.* 119 W (2d) 367, 350 NW (2d) 730 (Ct. App. 1984).

**895.50 Right of privacy.** (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

(2) In this section, "invasion of privacy" means any of the following:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(3) The right of privacy recognized in this section shall be interpreted in accordance with the developing common law

of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

(4) Compensatory damages are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.

(6) (a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.

(b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

1. The action was commenced in bad faith or for harassment purposes.

2. The action was devoid of arguable basis in law or equity.

(7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 968.27 to 968.33.

History: 1977 c. 176.

Commercial misappropriation of person's name was prohibited by Wisconsin common law *Hirsch v. S.C. Johnson & Son, Inc.* 90 W (2d) 379, 280 NW (2d) 129 (1979).

See note to 19.21, citing 68 Atty. Gen. 68.

The absence of false light from the Wisconsin privacy statute. 66 MLR 99 (1982).

The tort of misappropriation of name or likeness under Wisconsin's new privacy law. *Endejan*, 1978 WLR 1029.

**895.51 Liability exemption: food product donations. (1)** In this section:

(a) "Food products" has the meaning specified in s. 93.01 (6).

(b) "Charitable organization" has the meaning specified in s. 71.04 (5) (d) 2.

(2) Any person engaged in the processing, distribution or sale of food products, for profit or not for profit, who donates or sells, at a price not to exceed overhead and transportation costs, food products to a charitable organization is immune from civil liability for the death of or injury to any person caused by the food products donated or sold by such person. This subsection applies only if the donor has complied with all applicable state and federal rules and regulations concerning the processing and handling of the donated food products, and if at the time of donation the donor reasonably inspects the food and finds it fit for human consumption.

(3) Any charitable organization which distributes free of charge food products to any person is immune from civil liability for the death of or injury to any person caused by the food products distributed by such organization, except that the charitable organization is liable to the injured person for health care costs that are paid by the person and are not reimbursable by any other person. This subsection applies only if at the time of distribution the charitable organization reasonably inspects the food and finds it fit for human consumption.

(4) This section does not apply if the death or injury was caused by wilful or wanton acts or omissions.

History: 1981 c. 219; 1983 a. 189 s. 329 (20).

**895.52 Recreational activities; limitation of property owners' liability. (1)** DEFINITIONS. In this section:

(a) "Governmental body" means any of the following:

1. The federal government.

2. This state.

3. A county or municipal governing body, agency, board, commission, committee, council, department, district or any other public body corporate and politic created by constitution, statute, ordinance, rule or order.

4. A governmental or quasi-governmental corporation.

5. A formally constituted subunit or an agency of subd. 1, 2, 3 or 4.

(b) "Injury" means an injury to a person or to property.

(c) "Nonprofit organization" means an organization or association not organized or conducted for pecuniary profit.

(d) "Owner" means either of the following:

1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property.

2. A governmental body or nonprofit organization that has a recreational agreement with another owner.

(e) "Private property owner" means any owner other than a governmental body or nonprofit organization.

(f) "Property" means real property and buildings, structures and improvements thereon, and the waters of the state, as defined under s. 144.01 (19).

(g) "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes, but is not limited to, hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature and any other outdoor sport, game or educational activity, but does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

(h) "Recreational agreement" means a written authorization granted by an owner to a governmental body or nonprofit organization permitting public access to all or a specified part of the owner's property for any recreational activity.

(i) "Residential property" means a building or structure designed for and used as a private dwelling accommodation or private living quarters, and the land surrounding the building or structure within a 300-foot radius.

(2) NO DUTY; IMMUNITY FROM LIABILITY. (a) Except as provided in subs. (3) to (6), no owner and no officer, employe or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.

2. A duty to inspect the property, except as provided under s. 23.115 (2).

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employe or agent of an owner is liable for any injury to, or any injury caused by, a person engaging in a recreational activity on the owner's property or for any injury resulting from an attack by a wild animal.

(3) LIABILITY; STATE PROPERTY. Subsection (2) does not limit the liability of an officer, employe or agent of this state or of any of its agencies for either of the following:

(a) An injury that occurs on property of which this state or any of its agencies is the owner at any event for which the owner charges an admission fee for spectators.

(b) An injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employe or agent knew, which occurs on property designated by the department of natural resources under s. 23.115 or designated by another state agency for a recreational activity.

**(4) LIABILITY; PROPERTY OF GOVERNMENTAL BODIES OTHER THAN THIS STATE.** Subsection (2) does not limit the liability of a governmental body other than this state or any of its agencies or of an officer, employe or agent of such a governmental body for either of the following:

(a) An injury that occurs on property of which a governmental body is the owner at any event for which the owner charges an admission fee for spectators.

(b) An injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employe or agent of a governmental body knew, which occurs on property designated by the governmental body for recreational activities.

**(5) LIABILITY; PROPERTY OF NONPROFIT ORGANIZATIONS.** Subsection (2) does not limit the liability of a nonprofit organization or any of its officers, employes or agents for an injury caused by a malicious act or a malicious failure to warn against an unsafe condition of which an officer, employe or agent of the nonprofit organization knew, which occurs on property of which the nonprofit organization is the owner.

**(6) LIABILITY; PRIVATE PROPERTY.** Subsection (2) does not limit the liability of a private property owner or of an employe or agent of a private property owner whose property is used for a recreational activity if any of the following conditions exist:

(a) The private property owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the injury occurs, and the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the injury occurs exceeds \$500. The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity:

1. A gift of wild animals or any other product resulting from the recreational activity.
2. An indirect nonpecuniary benefit to the private property owner or to the property that results from the recreational activity.
3. A donation of money, goods or services made for the management and conservation of the resources on the property.
4. A payment of not more than \$5 per person per day for permission to gather any product of nature on an owner's property.
5. A payment received from a governmental body.
6. A payment received from a nonprofit organization for a recreational agreement.

(b) The injury is caused by the malicious failure of the private property owner or an employe or agent of the private property owner to warn against an unsafe condition on the property, of which the private property owner knew.

(c) The injury is caused by a malicious act of the private property owner or of an employe or agent of a private property owner.

(d) The injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner for the specific occasion during which the injury occurs, if the injury occurs on any of the following:

1. Platted land.
2. Residential property.
3. Property within 300 feet of a building or structure on land that is classified as mercantile or manufacturing under s. 70.32 (2) (b) 2 or 3.

(e) The injury is sustained by an employe of a private property owner acting within the scope of his or her duties.

**(7) NO DUTY OR LIABILITY CREATED.** Except as expressly provided in this section, nothing in this section or s. 101.11 nor the common law attractive nuisance doctrine creates any duty of care or ground of liability toward any person who uses another's property for a recreational activity.

**History:** 1983 a. 418; 1985 a. 29.

**NOTE:** 1983 Wis. Act 418, which created this section, has "legislative intent" in section 1.

Common law "open and obvious danger" limitation on landowner liability discussed. *Waters v. U.S. Fidelity & Guaranty Co.* 124 W (2d) 275, 369 NW (2d) 755 (Ct. App. 1985).

**895.53 Liability exemption; tests for intoxication. (1)** In this section:

(a) "Conservation warden" means a person appointed as a conservation warden by the department of natural resources under s. 23.10 (1).

(b) "Traffic officer" has the meaning specified in s. 340.01 (70).

(2) Any person withdrawing blood at the request of a traffic officer, law enforcement officer or conservation warden for the purpose of determining the presence or quantity of alcohol, controlled substances or both is immune from any civil or criminal liability for the act, except for civil liability for negligence in the performance of the act.

(3) Any employer of the person under sub. (2) or any hospital where blood is withdrawn by that person has the same immunity from liability under sub. (2).

**History:** 1983 a. 535; 1983 a. 538 s. 256; 1985 a. 331.

**895.65 Government employer retaliation prohibited. (1)** In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, of the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No

employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds that retaliation was the primary factor in an employer's or employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe, the court shall take any appropriate action, including but not limited to the following:

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding the employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.

3. Suspension.

4. Termination.

History: 1983 a. 409; 1985 a. 135.

#### 895.70 Sexual exploitation by a therapist. (1) DEFINITIONS.

In this section:

(a) "Physician" has the meaning designated in s. 448.01 (5).

(b) "Psychologist" means a person who practices psychology, as described in s. 455.01 (5).

(c) "Psychotherapy" has the meaning designated in s. 455.01 (6).

(d) "Sexual contact" has the meaning designated in s. 940.225 (5) (a).

(e) "Therapist" means a physician, psychologist, social worker, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy.

(2) CAUSE OF ACTION. Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, counseling or other assessment or treatment of or involving any mental or emotional illness, symptom or condition has a civil cause of action against the psychotherapist for all damages resulting from, arising out of or caused by that sexual contact.

(3) PUNITIVE DAMAGES. A court or jury may award punitive damages to a person bringing an action under this section.

(4) CALCULATION OF STATUTE OF LIMITATIONS. An action under this section is subject to s. 893.585.

History: 1985 a. 275.