CHAPTER 895

MISCELLANEOUS GENERAL PROVISIONS

895.01 What actions survive; actions not to abate. **(1)** In addition to the causes of action that survive at common law, the following shall also survive: causes of action to determine paternity, 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 (2m) 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) 585, 760 (1975), 771; 1977 c. 176; 1987 a. 399; 1993 a. 481.

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).

Paternity action may not be brought against deceased putative father. Paternity of N. L. B., 140 W (2d) 400, 411 NW (2d) 144 (Ct. App. 1987).

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) 585, 784 (1975); 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. Mohrhusen, 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.

A decedent must have had an actionable claim for damages at the time of death for wrongful death cause of action to exist; where statute of limitations would have barred decedent from bringing medical malpractice action, had he lived, wrongful death action based on the alleged malpractice was barred. Miller v. Luther, 170 W (2d) 429, 489 NW (2d) 651 (Ct. App. 1992).

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 the wrongdoer's 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.

History: 1993 a. 486.

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 a 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 cost of repairing or replacing property or removing the marking, drawing, writing or etching from property regarding a violation under s. 943.017, for the value of unrecovered stolen property or for personal injury attributable to a wilful, malicious or wanton act of the child. The parent or parents with custody of their minor child are jointly and severally liable with the child for the damages imposed under s. 943.51 for their child's violation of s. 943.50.

(2g) The parent or parents with custody of a minor child are liable for the cost of the repair or replacement of, or the removal of the etching, marking, drawing or writing from, property damaged as the result of a violation of an ordinance that prohibits intentional etching or marking, drawing or writing with paint, ink or other substance on the physical property of another without the other's consent.

(2m) (a) If a child fails to pay restitution under s. 938.245, 938.32, 938.34 (5), 938.343 (4) or 938.345 as ordered by a court assigned to exercise jurisdiction under chs. 48 and 938 or a municipal court or as agreed to in a deferred prosecution agreement or if it appears likely that the child will not pay restitution as ordered or agreed to, the victim, the victim's insurer, the representative of the public interest under s. 938.09 or the agency, as defined in s. 938.38 (1) (a), supervising the child may petition the court assigned to exercise jurisdiction under chs. 48 and 938 to order that the amount of restitution unpaid by the child be entered and docketed as a judgment against the child and the parent with custody of the child and in favor of the victim or the victim's insurer, or both. A petition under this paragraph may be filed after the expiration of the deferred prosecution agreement, consent decree, dispositional order or sentence under which the restitution is payable, but no later than one year after the expiration of the deferred prosecution agreement, consent decree, dispositional order or sentence or any extension of the consent decree, dispositional order or sentence. A judgment rendered under this paragraph does not bar the victim or the victim's insurer, or both, from commencing another action seeking compensation from the child or the parent, or both, if the amount of restitution ordered under this paragraph is less than the total amount of damages claimed by the victim or the victim's insurer.

(b) If a child fails to pay a forfeiture as ordered by a court assigned to exercise jurisdiction under chs. 48 and 938 or a municipal court or if it appears likely that the child will not pay the forfeiture as ordered, the representative of the public interest under s. 938.09, the agency, as defined in s. 938.38 (1) (a), supervising the child or the law enforcement agency that issued the citation to the child may petition the court assigned to exercise jurisdiction under chs. 48 and 938 to order that the amount of the forfeiture unpaid by the child be entered and docketed as a judgment against the child and the parent with custody of the child and in favor of the county or appropriate municipality. A petition under this paragraph may be filed after the expiration of the dispositional order or sentence under which the forfeiture is payable, but no later than one year after the expiration of the dispositional order or sentence or any extension of the dispositional order or sentence.

(bm) 1. Before issuing an order under par. (a) or (b), the court assigned to exercise jurisdiction under chs. 48 and 938 shall give the child and the parent notice of the intent to issue the order and an opportunity to be heard regarding the order. The court shall give the child and the parent an opportunity to present evidence as to the amount of the restitution or forfeiture unpaid, but not as to the amount of the restitution or forfeiture originally ordered. The court shall also give the child and the parent an opportunity to present evidence as to the reason for the failure to pay the restitution or forfeiture and the ability of the child or the parent to pay the restitution or forfeiture. In considering the ability of the child or the parent to pay the restitution or forfeiture, the court may consider the assets, as well as the income, of the child or the parent and may consider the future ability of the child or parent to pay the restitution or forfeiture within the time specified in s. 893.40.

2. In proceedings under this subsection, the court assigned to exercise jurisdiction under chs. 48 and 938 may take judicial notice of any deferred prosecution agreement, consent decree, dispositional order, sentence, extension of a consent decree, dispositional order or sentence or any other finding or order in the records of the child maintained by that court or the municipal court.

3. In proceedings under this subsection, the child and the parent may retain counsel of their own choosing at their own expense, but a child or a parent has no right to be represented by appointed counsel in a proceeding under this subsection.

(c) The court assigned to exercise jurisdiction under chs. 48 and 938 may order that the child perform community service work for a public agency or nonprofit charitable organization that is designated by the court in lieu of making restitution or paying the forfeiture. If the parent agrees to perform community service work in lieu of making restitution or paying the forfeiture, the court may order that the parent perform community service work for a public agency or a nonprofit charitable organization that is designated by the court. Community service work may be in lieu of restitution only if also agreed to by the public agency or nonprofit charitable organization and by the person to whom restitution is owed. The court may utilize any available resources, including any community service work program, in ordering the child or parent to perform community service work. The number of hours of community service work required may not exceed the number determined by dividing the amount owed on the restitution or forfeiture by the minimum wage established under ch. 104 for adults in nonagriculture, nontipped employment. The court shall ensure that the child or parent is provided with a written statement of the terms of the community service order and that the community service order is monitored.

(3) An adjudication under s. 938.31 that the child violated a civil law or ordinance, is delinquent or is in need of protection and services under s. 938.13 (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) Except for recovery for retail theft under s. 943.51, the maximum recovery from any parent or parents may not exceed the amount specified in s. 799.01 (1) (d) 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 the amount

specified in s. 799.01 (1) (d), in addition to taxable costs and disbursements. The maximum recovery from any parent or parents for retail theft by their minor child is established under s. 943.51.

(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. 938.245, 938.32, 938.34 (5) or 938.343 (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; 1987 a. 27; 1993 a. 71; 1995 a. 24, 77, 262, 352.

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 imposes absolute liability on parents once elements have been established. Accordingly, defense of contributory negligence was unavailable to parents. First Bank Southeast v. Bentkowski, 138 W (2d) 283, 405 NW (2d) 764 (Ct. App. 1987).

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

For purposes of sub. (2), 20 separate sexual assaults were not a single continuing act but each was a separate act for which there could be parental liability. N.E.M. v. Strigel, 198 W (2d) 720, 543 NW (2d) 821 (Ct. App. 1995).

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

895.037 Abortions on or for a minor without parental consent or judicial waiver. (1) DEFINITIONS. In this section:

(a) "Abortion" has the meaning given in s. 48.375 (2) (a).

(c) "Emancipated minor" has the meaning given in s. 48.375 (2) (e).

(2) PENALTIES. (a) Any person who, in violation of s. 48.375 (4), intentionally performs or induces an abortion on or for a minor whom the person knows or has reason to know is not an emancipated minor may be required to forfeit not more than $10,000.

(b) Any person who intentionally violates s. 48.375 (7) (e) or 809.105 (12) may be required to forfeit not more than $10,000.

(3) CIVIL REMEDIES. (a) A person who intentionally violates s. 48.375 (4) is liable to the minor on or for whom the abortion was performed or induced and to the minor's parent, guardian and legal custodian for damages arising out of the performance or inducement of the abortion including, but not limited to, damages for personal injury and emotional and psychological distress.

(b) If a person who has been awarded damages under par. (a) proves by clear and convincing evidence that the violation of s. 48.375 (4) was wilful, wanton or reckless, that person shall also be entitled to punitive damages.

(c) A conviction under sub. (2) (a) is not a condition precedent to bringing an action, obtaining a judgment or collecting that judgment under this subsection.

(d) A person who recovers damages under par. (a) or (b) may also recover reasonable attorney fees incurred in connection with the action, notwithstanding s. 814.04 (1).

(e) A contract is not a defense to an action under this subsection.

(f) Nothing in this subsection limits the common law rights of parents, guardians, legal custodians and minors.

(4) CONFIDENTIALITY. The identity of a minor who is the subject of an action under this section and the identity of the minor's parents, guardian and legal custodian shall be kept confidential and may not be disclosed, except to the court, the parties, their counsel, witnesses and other persons approved by the court. All papers filed in and all records of a court relating to an action under this section shall identify the minor as "Jane Doe" and shall identify her parents, guardian and legal custodian by initials only. All hearings relating to an action under this section shall be held in chambers unless the minor demands a hearing in open court and her parents, guardian or legal custodian do not object. If a public hearing is not held, only the parties, their counsel, witnesses and other persons requested by the court, or requested by a party and approved by the court, may be present.

History: 1991 a. 263.

Essential holding of *Roe v. Wade* allowing abortion is upheld, but various state restrictions on abortion are permissible. Planned Parenthood v. Casey, 505 US 833, 120 LEd 2d 674 (1992).

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 $150,000 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 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 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) 585, 784 (1975); 1975 c. 94 s. 91 (3); 1975 c. 166, 199, 287, 421, 422; 1979 c. 166; 1983 a. 315; 1985 a. 130; 1989 a. 307; 1991 a. 308.

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 employes. 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).

Spouse who "feloniously and intentionally" kills spouse isn't surviving spouse for purposes of (2) and is treated as having predeceased decedent. Stienbarth v. Johannes, 144 W (2d) 159, 423 NW (2d) 540 (1988).

"Pecuniary injury" under (4) includes loss of any benefit, including social security disability benefits, plaintiff would have received from decedent. Estate of Holt v. State Farm, 151 W (2d) 455, 444 NW (2d) 453 (Ct. App. 1989).

Surviving parents are not entitled to $50,000 each under (4). Children may collect if there is no spouse, and deceased's parents may collect if there are no children. York v. National Continental Ins. Co. 158 W (2d) 486, 463 NW (2d) 364 (Ct. App. 1990).

This section is inapplicable in medical malpractice actions; there is no cause of action in an adult child for the loss of society and companionship of a parent. Dziadosz v. Zirneski, 177 W (2d) 59, 501 NW (2d) 828 (Ct. App. 1993).

The damage limitation under (4) is inapplicable to medical malpractice actions in which death resulted; (2) does not prevent minor from bringing action for loss of companionship when malpractice causes parent's death, including when the decedent is survived by a spouse. Jelinik v. St. Paul Fire & Casualty Ins. Co. 182 W (2d) 1, 512 NW (2d) 764 (1994).

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. (1) COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that 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 attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

(2) CONCERTED ACTION. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85 (5).

History: 1971 c. 47; 1993 a. 486; 1995 a. 17.

Cross−reference: See s. 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. Polsky 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.

Injured minor cannot be charged with contributory negligence when employment is in violation of child labor law. 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.

If court can find as matter of law that party is causally negligent, contrary to jury's answer, and jury attributes some degree of comparative negligence to that party, court should change causal negligence answer and permit jury's comparison to stand. 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).

Motorist injured while fleeing police was, as matter of law, more negligent than pursuing officer. 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).

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).

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).

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. Jenson, 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).

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).

Negligent tortfeasor has right to indemnity from intentional joint tortfeasor. Pierringer release of intentional tortfeasor absolved negligent tortfeasor. Fleming v. Threshermen's Mut. Ins. Co., 131 W (2d) 123, 388 NW (2d) 908 (1986).

Punitive damages may not be recovered where actual damages are unavailable due to this section. Tucker v. Marcus, 142 W (2d) 425, 418 NW (2d) 818 (1988).

Psychotherapist's duty to third parties for intentional behavior of dangerous patients discussed. Schuster v. Altenberg, 144 W (2d) 223, 424 NW (2d) 159 (1988).

This section is inapplicable to the equitable resolution of a subrogation dispute. Ives v. Coopertools, 197 W (2d) 938, 541 NW (2d) 247 (Ct. App. 1995).

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.

Wisconsin's Modified, Modified Comparative Negligence Law. Kircher. Wis. Law. Feb. 1996.

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 the person libeled 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 the libeled person's 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.

History: 1993 a. 486.

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. Brosamle, 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).

A computer bulletin board is not a periodical and not subject to sub. (2). It's In the Cards, Inc. v. Fuschetto, 193 W (2d) 429, 535 NW (2d) 11 (Ct. App. 1995).

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).

The "public interest or concern" test: Have we resurrected a standard that should have remained in the graveyard? 70 MLR 647 (1987).

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. (1) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of the 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 void.

(2) This section does not apply to contracts of insurance made in good faith for the security or indemnity of the party insured.

(3) This section does not apply to any promise, agreement, note, bill, bond, mortgage, conveyance or other security that is permitted under chs. 561 to 569 or under state or federal laws relating to the conduct of gaming on Indian lands.

History: 1993 a. 174; 1995 a. 225.

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. (1) In this section:

(a) "Property" means any money, property or thing in action.

(b) "Wagerer" means 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 any property with any stakeholder or 3rd person, or shall have lost and delivered any property to any winner thereof.

(2) (a) A wagerer may, within 3 months after putting up, staking or depositing property with a stakeholder or 3rd person, sue for and recover the property from the stakeholder or 3rd person whether the property has been lost or won or whether it has been delivered over by the stakeholder or 3rd person to the winner.

(b) A wagerer may, within 6 months after any delivery by the wagerer or the stakeholder of the property put up, staked or deposited, sue for and recover the property from the winner thereof if the property has been delivered over to the winner.

(3) If the wagerer does not sue for and recover the property, which was put up, staked or deposited, within the time specified under sub. (1), any other person may, in the person's behalf and the person's name, sue for and recover the property for the use and benefit of the wagerer's family or heirs, in case of the wager's death. The suit may be brought against and property recovered from any of the following:

(a) The stakeholder or a 3rd person if the property is still held by the stakeholder or 3rd person, within 6 months after the putting up, staking or depositing of the property.

(b) The winner of the property, within one year from the delivery of the property to the winner.

(4) This section does not apply to any property that is permitted to be played, bet or wagered under chs. 561 to 569 or under state or federal laws relating to the conduct of gaming on Indian lands.

History: 1993 a. 174, 486; 1995 a. 225.

895.057 Action against judicial officer for loss caused by misconduct. Any judicial officer who causes to be brought in a court over which the judicial officer presides any action or proceeding upon a claim placed in the judicial officer's 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.

History: 1993 a. 486.

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 the tenant's share or proportion thereof his or her cotenant, after making a demand in writing, may sue for and recover the cotenant's share or the value thereof. 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 the verdict.

History: 1993 a. 486.

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; Stats. 1983 s. 895.14.

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; Stats. 1977 s. 757.17; 1983 a. 7; 1983 a. 192 s. 257; Stats. 1983 s. 895.20.

895.22 Wisconsin family month, week and Sunday. The month of November, in which the celebration of Thanksgiving occurs, is designated as Wisconsin Family Month, the first 7 days of that month are designated as Wisconsin Family Week and the first Sunday of that month is designated 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; Stats. 1977 s. 757.171; 1983 a. 192 s. 258; Stats. 1983 s. 895.22; 1987 a. 27.

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; Stats. 1977 s. 757.175; 1983 a. 192 s. 259; Stats. 1983 s. 895.23.

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.

A precondition for this section to apply is that the bond must at one time have been sufficient. Bruer v. Town of Addison, 194 W (2d) 617, 534 NW (2d) 634 (Ct. App. 1995).

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 the surety is the sole owner of the property offered by the surety as security and containing the following additional information:

(a) The full name and address of the surety.

(b) That the surety 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.

History: 1993 a. 486.

Cross−reference: This section does not apply to bonds of personal representatives. See s. 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) 585, 784 (1975); 1977 c. 187 s. 135.

895.35 Expenses in actions against municipal and other officers. Whenever in any city, town, village, school district, technical college district or county charges of any kind are filed or an action is brought against any officer thereof in the officer's official capacity, or to subject any such officer, whether or not the officer 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 the officer's part, is subjected to a personal liability as aforesaid, such city, town, village, school district, technical college 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; 1993 a. 399, 486.

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.

Sections 895.35 and 895.46 apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employes, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating open meetings law. 77 Atty. Gen. 177.

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

History: 1993 a. 112.

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 the employe's duty as an employe, 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.

History: 1993 a. 486.

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 savoring 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 of the principal's 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 the principal from office, and requiring the principal to file the principal's account within 20 days. If the principal shall fail to file the principal's 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 the principal 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 the fiduciary's 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.

History: 1993 a. 486.

895.41 Employe'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 a bank, trust company, savings bank or 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) (a) In case an employe who was required to give a cash bond dies before the cash bond is withdrawn in the manner provided in sub. (1), the accounting and withdrawal may be effected not less than 5 days after the employe's 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 any of the following, in the following order:

1. The decedent's surviving spouse.

2. The decedent's children if the decedent shall leave no surviving spouse.

3. The decedent's father or mother if the decedent shall leave no surviving spouse or children.

4. The decedent's brother or sister if the decedent shall leave no surviving spouse, children or parent.

(b) The accounting and withdrawal under par. (a) shall be effected 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).

(c) The amount of the cash bond, together with principal and interest, to which the deceased employe would have been entitled had the deceased employe lived, shall, as soon as paid out by the depository, be turned over to the relative of the deceased employe effecting the accounting and withdrawal with the employer. The turning over shall be a discharge and release of the employer to the amount of the payment.

(d) If no relatives designated under par. (a) survive, the employer may apply the 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. The making of payment under this paragraph shall be a discharge and release of the employer to the amount of the 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.

History: 1991 a. 221; 1993 a. 486; 1995 a. 225.

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 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 the person 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 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 the officer 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; 1993 a. 486.

895.43 Intentional killing by beneficiary of contract. (1) Except as provided under sub. (2), a named beneficiary of a contractual arrangement who unlawfully 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) to (c) applies to this subsection.

(2) The principal obligee of a contractual arrangement may provide in the contract, by a specific provision which includes reference to sub. (1), that sub. (1) does not apply with respect to a beneficiary of the contractual arrangement.

History: 1981 c. 228; 1987 a. 222.

895.435 Intentional killing by beneficiary of certain death benefits. (1) A beneficiary who unlawfully 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) to (c) applies to this section.

History: 1981 c. 228; 1987 a. 222.

895.437 Use of lodging establishments. (1) In this section:

(a) "Alcohol beverages" has the meaning given in s. 125.02 (1).

(b) "Controlled substance" has the meaning given in s. 961.01 (4).

(bd) "Controlled substance analog" has the meaning given in s. 961.01 (4m).

(c) "Lodging establishment" has the meaning given in s. 106.04 (1m) (n).

(d) "Underage person" has the meaning given in s. 125.02 (20m).

(2) Any person who procures lodging in a lodging establishment and permits or fails to take action to prevent any of the following activities from occurring in the lodging establishment is subject to the penalties provided in sub. (5):

(a) Consumption of an alcohol beverage by any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

(b) Illegal use of a controlled substance or controlled substance analog.

(3) An owner or employe of a lodging establishment may deny lodging to an adult if the owner or employe reasonably believes that consumption of an alcohol beverage by an underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age, or illegal use of a controlled substance or controlled substance analog, may occur in the area of the lodging establishment procured.

(4) An owner or employe of a lodging establishment may require a cash deposit or use of a credit card at the time of application for lodging.

(5) A person who violates sub. (2) or a local ordinance which strictly conforms to sub. (2) shall forfeit:

(a) Not more than $500 if the person has not committed a previous violation within 12 months of the violation; or

(b) Not less than $200 nor more than $500 if the person has committed a previous violation within 12 months of the violation.

History: 1989 a. 94; 1991 a. 295; 1995 a. 27, 448.

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 a state officer, employe or agent, or an insurer, the insurer's 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 the safety inspection or advisory services. This section shall not apply if the active negligence of the state officer, employe or agent, or of the insurer, the insurer's agent or employe created the condition that was the proximate cause of injury, death or loss. This section shall not apply to an insurer, the insurer's agent or employe performing the safety inspection or advisory services when required to do so under the provisions of a written service contract.

History: 1991 a. 39.

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. The duty of a governmental unit to provide or pay for the provision of legal representation does not apply to the extent that applicable insurance provides that representation. 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.

(am) If a court determines that costs are awardable to an employe or official who has been provided representation by a governmental unit under par. (a), the court shall award those costs to the unit of government that provided the representation.

(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. and, if applicable, the recertification programs under s. 165.85 (4) (bn) 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, employes and agents of such a corporation, and any local emergency planning committee appointed by a county board under s. 59.54 (8) (a) and all members of such a committee, are state officers, employes or agents for the purposes of 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).

(4) The protection afforded by this section applies to members of the board of governors created under s. 619.04 (3), members of a committee or subcommittee of that board of governors, members of the patients compensation fund peer review council created under s. 655.275 (2) and persons consulting with that council under s. 655.275 (5) (b), with respect to judgments, attorney fees and costs awarded before, on or after April 25, 1990.

(5) The protection afforded by this section applies to any of the following:

(a) A volunteer health care provider who provides services under s. 146.89, for the provision of those services.

(b) A physician under s. 252.04 (9) (b).

(6) The protection afforded by this section applies to any criminal action under s. 144.74 (2) [291.97 (2)] or 144.93 (2) [293.87 (2)] or under 7 USC 136L (b), 15 USC 2616 (b), 33 USC 1319 (c), 42 USC 2284, 6928 (d) and (e), 6973 (b), 6992 (b) and (c), 7413 (c), 9603 (b), 9606 (b) and 11045 (b) or 49 USC appendix 1809 (b) that is commenced against a state officer or state employe who is proceeded against in his or her official capacity or as an individual because of acts committed in the storage, transportation, treatment or disposal of hazardous substances, as defined in s. 289.01 (11), if that officer or employe is found to be acting within the scope of his or her employment and if the attorney general determines that the state officer or state employe acted in good faith. Regardless of the determination made by the attorney general, the protection afforded by this section applies if the state officer or agent is not found guilty of the criminal action commenced under this subsection. This protection includes the payment of reasonable attorney fees in defending the action and costs or fines arising out of the action.

NOTE: The bracketed language indicates the correct cross−references. Corrective legislation is pending.

(7) The protection afforded by this section does not apply to any law enforcement officer of another state acting in Wisconsin under an agreement authorized under s. 175.46.

(8) The protection afforded by this section applies to any owner of land within a drainage district established under ch. 88 who undertakes work on a drain if the work is approved by the drainage board.

History: 1973 c. 333; Sup. Ct. Order, 67 W (2d) 585, 761 (1975); Stats. 1975 s. 895.45; 1975 c. 81, 198, 199; Stats. 1975 s. 895.46; 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; 1987 a. 342; 1987 a. 403 s. 256; 1989 a. 31, 115, 187, 206, 359; 1991 a. 245, 269; 1993 a. 27, 28, 49, 238, 456, 490; 1995 a. 201, 227, 411.

Cross−reference: See s. 775.06 for special procedure applying to state law enforcement officers.

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 sub. (1) refers only to civil proceedings. Sheriffs are not "public officers" under sub. (1), 1981 stats. 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 s. 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 s. 270.58 (1) [now s. 895.46 (1)]. Fiala v. Voight, 93 W (2d) 337, 286 NW (2d) 824 (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 42 USC 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).

Sub. (1) applied to forfeiture action against police officer. Crawford v. City of Ashland, 134 W (2d) 369, 396 NW (2d) 781 (Ct. App. 1986).

Phrase "any action" in (1) (a) means trial in which issue of "scope of employment" is essential and evidence on issue is introduced and argued. Desotelle v. Continental Cas. Co. 136 W (2d) 13, 400 NW (2d) 524 (Ct. App. 1986).

In "scope of employment" cases under (1) (a), consideration must be given to whether employe was "actuated," in some measure, by purpose to serve employer. Olson v. Connerly, 156 W (2d) 488, 457 NW (2d) 479 (1990).

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

See note to 895.35, citing 77 Atty. Gen. 177.

University of Wisconsin has no authority to agree to hold harmless county that incurs liability because of university officer's torts, but common law of indemnification would require officer to indemnify that county and statutory indemnification would require state to indemnify officer when acting in the scope of employment. 78 Atty. Gen. 1.

State Emergency Response Board Committee and Local Emergency Planning Committee subcommittee members appointed by a county board are entitled to indemnity for damage liability under s. 895.46 and legal representation by the attorney general under s. 165.25. 81 Atty. Gen. 17.

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).

See note to 893.80 citing Graham v. Sauk Prairie Police Com'n. 915 F (2d) 1085 (1990).

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).

If an employe is part of an inter−municipal team under s. 66.305, the agency requesting the team's services is the de facto employe for purposes of indemnification under this section. Leibenstein v. Crowe, 826 F Supp. 1174 (1992).

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, health care at athletic events and hazardous substances. (1) 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.

(1m) Any physician licensed under ch. 448, chiropractor licensed under ch. 446, dentist licensed under ch. 447, emergency medical technician licensed under s. 146.50, physician assistant certified under ch. 448 or registered nurse licensed under ch. 441 who renders voluntary health care to a participant in an athletic event or contest sponsored by a nonprofit corporation, as defined in s. 46.93 (1m) (c), a private school, as defined in s. 115.001 (3r), a public agency, as defined in s. 46.93 (1m) (e), or a school, as defined in s. 609.655 (1) (c), is immune from civil liability for his or her acts or omissions in rendering that care if all of the following conditions exist:

(a) The health care is rendered at the site of the event or contest, during transportation to a health care facility from the event or contest, or in a locker room or similar facility immediately before, during or immediately after the event or contest.

(b) The physician, chiropractor, dentist, emergency medical technician, physician assistant or registered nurse does not receive compensation for the health care, other than reimbursement for expenses.

(2) (a) In this subsection:

1. "Discharge" has the meaning given under s. 292.01 (3).

2. "Hazardous substance" has the meaning given under s. 299.01 (6).

3. "Hazardous substance prediction" means any declaration or estimate of the likely spread or impact of an actual discharge of a hazardous substance that is based on meteorological, mathematical, computer or similar models.

4. "Hazardous substance predictor" means any person who makes a hazardous substance prediction pursuant to a contract or agreement with a public agency or pursuant to a contract or agreement with a person who possesses or controls hazardous substances for the purpose of assisting that person in supplying a public agency with a hazardous substance prediction in the event of an actual discharge of a hazardous substance.

(b) Any person is immune from civil liability for his or her good faith acts or omissions related to assistance or advice which the person provides relating to an emergency or a potential emergency regarding either of the following:

1. Mitigating or attempting to mitigate the effects of an actual or threatened discharge of a hazardous substance.

2. Preventing or cleaning up or attempting to prevent or clean up an actual or threatened discharge of a hazardous substance.

(c) The immunity under par. (b) does not extend to any person:

1. Whose act or omission causes in whole or in part the actual or threatened discharge and who would otherwise be liable for the act or omission;

2. Who would be liable for the discharge under chs. 281 to 285 or 289 to 299, except s. 281.48, or any rule promulgated or permit

or order issued under chs. 281 to 285 or 289 to 299, except s. 281.48;

3. Whose act or omission constitutes gross negligence or involves reckless, wanton or intentional misconduct; or

4. Who receives or expects to receive compensation, other than reimbursement for out−of−pocket expenses, for rendering the advice and assistance.

(d) 1. Any hazardous substance predictor or any person who provides the technology to enable hazardous substance predictions to be made is immune from civil liability for his or her good faith acts or omissions in making that prediction or providing that technology.

2. The good faith of any hazardous substance predictor or any person who provides the technology to make a prediction is presumed in any civil action. Any person who asserts that the acts or omissions under subd. 1. were not made in good faith has the burden of proving that assertion by clear and convincing evidence.

3. The immunity under subd. 1. does not extend to any person described under par. (c) 1., 2. or 3.

History: 1977 c. 164; 1987 a. 14; 1989 a. 31; 1993 a. 109; 1995 a. 227.

"Good Samaritan" law discussed. 67 Atty. Gen. 218.

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan law. 79 Atty. Gen. 194.

The Good Samaritan statute. 62 MLR 469 (1979).

895.481 Civil liability exemption; equine activities. (1) In this section:

(a) "Equine" means a donkey, hinny, horse, mule or pony.

(b) "Equine activity" means any of the following:

1. Shows, fairs, competitions, performances or parades that involve any breeds of equines and any equine disciplines, including combined training, competitive trail riding, cutting, dressage, driving, endurance trail riding, English or western performance riding, grand prix jumping, horse racing, hunter and jumper shows, hunting, polo, pulling, rodeos, 3−day events and western games.

2. Equine training or teaching.

3. Boarding of equines.

4. Riding, inspecting or evaluating an equine belonging to another, regardless of whether the owner of the equine receives monetary or other consideration for the use of the equine or permits the riding, inspection or evaluation of the equine.

5. Riding, training or driving an equine or being a passenger on an equine.

6. Riding, training or driving a vehicle pulled by an equine or being a passenger on a vehicle pulled by an equine.

7. Assisting in the medical treatment of an equine.

8. Shoeing of an equine.

9. Assisting a person participating in an activity listed in subds. 1. to 8.

(c) "Equine activity sponsor" means a person, whether operating for profit or nonprofit, who organizes or provides the facilities for an equine activity, including owners or operators of arenas, clubs, fairs, schools, stables and therapeutic riding programs.

(d) "Equine professional" means a person engaged for compensation in the rental of equines or equine equipment or tack or in the instruction of a person in the riding or driving of an equine or in being a passenger upon an equine.

(e) "Inherent risk of equine activities" means a danger or condition that is an integral part of equine activities, including all of the following:

1. The propensity of an equine to behave in a way that may result in injury or death to a person on or near it.

2. The unpredictability of an equine's reaction to a sound, movement or unfamiliar object, person or animal.

3. A collision with an object or another animal.

4. The potential for a person participating in an equine activity to act in a negligent manner, to fail to control the equine or to not act within his or her ability.

5. Natural hazards, including surface and subsurface conditions.

(f) "Property" means real property and buildings, structures and improvements on the real property.

(g) "Spectator" means a person who attends or watches an equine activity but does not participate in the equine activity or perform any act or omission related to the equine activity that contributes to the injury or death of a participant in the equine activity.

(2) Except as provided in subs. (3) and (6), a person, including an equine activity sponsor or an equine professional, is immune from civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities.

(3) The immunity under sub. (2) does not apply if the person seeking immunity does any of the following:

(a) Provides equipment or tack that he or she knew or should have known was faulty and the faulty equipment or tack causes the injury or death.

(b) Provides an equine to a person and fails to make a reasonable effort to determine the ability of the person to engage safely in an equine activity or to safely manage the particular equine provided based on the person's representations of his or her ability.

(c) Fails to conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents or is otherwise in lawful control of or possession.

(d) Acts in a wilful or wanton disregard for the safety of the person.

(e) Intentionally causes the injury or death.

(3m) A person whose only involvement in an equine activity is as a spectator shall not be considered to be participating in the equine activity.

(4) Every equine professional shall post and maintain signs in a clearly visible location on or near stables, corrals or arenas owned, operated or controlled by the equine professional. The signs shall be white with black lettering, each letter a minimum of one inch in height, and shall contain the following notice: "NOTICE: A person who is engaged for compensation in the rental of equines or equine equipment or tack or in the instruction of a person in the riding or driving of an equine or in being a passenger upon an equine is not liable for the injury or death of a person involved in equine activities resulting from the inherent risks of equine activities, as defined in section 895.481 (1) (e) of the Wisconsin Statutes."

(5) If an equine professional uses a written contract for the rental of equines or equine equipment or tack or for the instruction of a person in the riding, driving or being a passenger upon an equine, the contract shall contain the notice set forth in sub. (4) in clearly readable bold print of not less than the same size as the print used in the remainder of the contract.

(6) This section does not limit the liability of a person under any applicable products liability laws.

(7) This section does not limit the immunity created under s. 895.52.

History: 1995 a. 256.

895.482 Civil liability exemption; ski patrol members. (1) In this section:

(a) "Compensation" means wages, salary, commission or bonuses paid for services rendered, but does not include the provision, at a discounted price or without charge, of food, beverages, clothing, passes or other incidental benefits to ski patrol members.

(b) "Ski patrol member" means a registered member of the national ski patrol who serves in that capacity without compensation.

(2) Except as provided in sub. (3), a ski patrol member is immune from civil liability for his or her acts or omissions while he or she is acting in his or her capacity as a ski patrol member, including the rendering of emergency care.

(3) The immunity under this section does not apply if the act or omission of the ski patrol member involves reckless, wanton or intentional misconduct.

History: 1991 a. 318.

895.483 Civil liability exemption; regional and county emergency response teams and their sponsoring agencies. (1) A regional emergency response team, a member of such a team, and a local agency, as defined in s. 166.22 (1) (c), that contracts with the state emergency response board for the provision of a regional emergency response team, are immune from civil liability for acts or omissions related to carrying out responsibilities under a contract under s. 166.215 (1).

(2) A county emergency response team, a member of such a team and the county, city, village or town that contracts to provide the emergency response team to the county are immune from civil liability for acts or omissions related to carrying out responsibilities pursuant to a designation under s. 166.21 (2m) (e).

(3) A local emergency planning committee created under s. 59.54 (8) (a) 1. that receives a grant under s. 166.21 is immune from civil liability for acts or omissions related to carrying out responsibilities under s. 166.21.

History: 1991 a. 104; 1995 a. 13, 201.

895.485 Civil liability exemption; agencies, foster parents, treatment foster parents and family−operated group home parents. (1) In this section:

(a) "Family−operated group home" has the meaning given in s. 48.627 (1).

(b) "Foster home" has the meaning given in s. 48.02 (6).

(c) "Treatment foster home" has the meaning given in s. 48.02 (17q).

(2) Except as provided in ss. 167.10 (7) and 343.15 (2), any foster, treatment foster or family−operated group home parent licensed under s. 48.62 or 48.625 is immune from civil liability for any of the following:

(a) An act or omission of the foster, treatment foster or family−operated group home parent while that parent is acting in his or her capacity as a foster, treatment foster or family−operated group home parent.

(b) An act or omission of a child who is placed in a foster home, treatment foster home or family−operated group home while the child is in the foster, treatment foster or family−operated group home parent's care.

(3) The immunity specified in sub. (2) does not apply if the act or omission of a foster, treatment foster or family−operated group home parent was not done in good faith or was not in compliance with any written instructions, received from the agency that placed the child, regarding specific care and supervision of the child. The good faith of a foster, treatment foster or family−operated group home parent and the compliance of the foster, treatment foster or family−operated group home parent with any written instructions received from the agency that placed the child are presumed in a civil action. Any person who asserts that a foster, treatment foster or family−operated group home parent did not act in good faith, or did not comply with written instructions received from the agency that placed the child, has the burden of proving that assertion.

(4) Any agency that acts in good faith in placing a child with a foster, treatment foster or family−operated group home parent is immune from civil liability for any act or omission of the agency, the foster, treatment foster or family−operated group home parent or the child unless all of the following occur:

(a) The agency has failed to provide the foster, treatment foster or family−operated group home parent with any information relating to a medical, physical, mental or emotional condition of the child that it is required to disclose under this paragraph. The department of health and family services shall promulgate rules specifying the kind of information that an agency shall disclose to a foster, treatment foster or family−operated group home parent which relates to a medical, physical, mental or emotional condition of the child.

(b) Bodily injury to the child or any other person or damage to the property of the child or any other person occurs as a direct result of the failure under par. (a).

History: 1987 a. 377; 1989 a. 31; 1993 a. 446; 1995 a. 27 s. 9126 (19).

NOTE: 1987 Wis. Act 377, which created this section, has a prefatory note explaining the act.

895.486 Civil immunity exemption; reports of insurance fraud. (1) In this section, "insurance fraud" means the presentation of any statement, document or claim, or the preparation of a statement, document or claim with the knowledge that the statement, document or claim will be presented, that the person knew or should have known contained materially false, incomplete or misleading information concerning any of the following:

(a) An application for the issuance of an insurance policy.

(b) A claim for payment, reimbursement or benefits payable under an insurance policy.

(c) A payment made in accordance with the terms of an insurance policy.

(d) A premium on an insurance policy.

(e) The rating of an insurance policy.

(2) Any person who, absent malice, files a report with or furnishes information concerning suspected, anticipated, or completed insurance fraud is immune from civil liability for his or her acts or omissions in filing the report or furnishing the information to any of the following or to their agents, employes or designees:

(a) The office of the commissioner of insurance.

(b) A law enforcement officer.

(c) The National Association of Insurance Commissioners.

(d) Any governmental agency established to detect and prevent insurance fraud.

(e) Any nonprofit organization established to detect and prevent insurance fraud.

(f) Any insurer or authorized representative of an insurer.

(3) Any information furnished by an insurer in response to a report or information furnished under sub. (2) is confidential and may be made public only if required in a civil or criminal action.

(4) If a civil action is commenced against a person for damages related to the filing of a report or the furnishing of information under sub. (2) and the court determines that the person is immune from civil liability for his or her acts or omissions in filing the report or furnishing the information, the person filing the report or furnishing the information shall recover costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

History: 1995 a. 177.

895.487 Civil liability exemption; employment references. (1) In this section:

(a) "Employe" has the meaning given in s. 101.01 (2) (a) [101.01 (3)] and also includes a former employe.

NOTE: The bracketed language indicates the correct cross−reference. Section 101.01 (2) (a) was renumbered by 1995 Wis. Act 27. Corrective legislation is pending.

(b) "Employer" has the meaning given in s. 101.01 (2) (b) [101.01 (4)]

NOTE: The bracketed language indicates the correct cross−reference. Section 101.01 (2) (b) was renumbered by 1995 Wis. Act 27. Corrective legislation is pending.

(c) "Reference" means a statement about an employe's job performance or qualifications for employment and includes a statement about an employe's job performance or qualifications for

employment provided pursuant to the settlement of a dispute between the employer and employe or provided pursuant to an agreement between the employer and employe relating to the termination of the employe's employment.

(2) An employer who, on the request of an employe or a prospective employer of the employe, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322.

History: 1995 a. 441.

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; Stats. 1977 s. 895.47; 1977 c. 447; Stats. 1977 s. 895.49.

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).

895.495 Safety devices on farm equipment, ordinary negligence. (1) In this section:

(a) "Farm equipment" means a tractor or other machine used in the business of farming.

(b) "Safety device" means a guard, shield or other part that has the purpose of preventing injury to humans.

(2) If a person in the business of selling or repairing farm equipment fabricates a safety device and installs the safety device on used farm equipment, after determining either that the farm equipment was not originally equipped with such a safety device or that a replacement is not available from the original manufacturer or from a manufacturer of replacements, and notifies the owner or purchaser of the farm equipment that the person fabricated the safety device, the person is not liable for claims founded in tort for damages arising from the safety device unless the claimant proves, by a preponderance of the evidence, that a cause of the claimant's harm was the failure to use reasonable care with respect to the design, fabrication, inspection, condition or installation of, or warnings relating to, the safety device.

History: 1993 a. 455.

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. 196.63 or 968.27 to 968.37.

History: 1977 c. 176; 1987 a. 399; 1991 a. 294.

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).

Oral communication among numerous employes and jail inmates is sufficient to constitute publicity under (2) (c). Hillman v. Columbia County, 164 W (2d) 376, 474 NW (2d) 913 (Ct. App. 1991).

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

Surveillance of school district employe from public streets and highways by school district employer's agents to determine whether the employe was in violation of the district's residency policy did not violate this section. Munson v. Milwaukee Bd. of School Directors, 969 F (2d) 266 (1992).

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 donation, sale or distribution. (1) In this section:

(b) "Charitable organization" means an organization the contributions to which are deductible by corporations in computing net income under s. 71.26 (2).

(c) "Food distribution service" means a program of a private nonprofit organization that provides food products directly to individuals with low incomes or that collects food products for and distributes food products to persons who provide the food products directly to individuals with low incomes.

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

(e) "Qualified food" means food products that meet the standards of quality established by state law or rule or federal law or regulations, including food products that are not readily marketable due to appearance, age, freshness, grade, size, surplusage or other condition, except that "qualified food" does not include canned food products that are leaking, swollen, dented on a seam or not airtight.

(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, qualified food to a charitable organization or food distribution service is immune from civil liability for the death of or injury to an individual caused by the qualified food donated or sold by the person.

(3) Any charitable organization or food distribution service which distributes free of charge qualified food to any person is immune from civil liability for the death of or injury to an individ-

ual caused by the qualified food distributed by the charitable organization or food distribution service.

(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); 1987 a. 27; 1987 a. 312 s. 17; 1989 a. 108; 1991 a. 39.

895.515 Liability exemption; equipment or technology donation. (1) In this section:

(a) "Commercial equipment or technology" means goods or related procedures used or bought for use primarily in a business, including farming and a profession.

(b) "Institution of higher education" means a center or institution within the University of Wisconsin System, a technical college or a private, nonprofit institution of higher education located in this state.

(2) Any person engaged in the sale or use of commercial equipment or technology, for profit or not for profit, who donates any commercial equipment or technology to a public or private elementary or secondary school or an institution of higher education or who accepts reimbursement in an amount not to exceed overhead and transportation costs for any commercial equipment or technology provided to a public or private elementary or secondary school or to an institution of higher education is immune from civil liability for the death of or injury to an individual caused by the commercial equipment or technology.

(3) This section does not apply if the death or injury was caused by a wilful or wanton act or omission of the person who donated or accepted reimbursement for the commercial equipment or technology.

(4m) This section does not apply to the manufacturer of the donated commercial equipment or technology.

History: 1995 a. 112.

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. 281.01 (18).

(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 the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or 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) A death or 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) A death or 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) A death or 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) A death or 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 a death or 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 death or 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 death or injury occurs exceeds $2,000. 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 death or 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 death or 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 death or 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 death or injury occurs, if the death or 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 commercial or manufacturing under s. 70.32 (2) (a) 2. or 3.

(e) The death or 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; 1989 a. 31; 1995 a. 27, 223, 227.

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).

Municipality is immune from liability for defective highway or public sidewalk only when it has turned them over, at least in part, to recreational activities and when damages result from such activity. Bystery v. Village of Sauk City, 146 W (2d) 247, 430 NW (2d) 611 (Ct. App. 1988).

"Recreational activity" does not apply to random wanderings of young child which are not similar to activities listed in (1) (g). Shannon v. Shannon, 150 W (2d) 434, 442 NW (2d) 25 (1989).

State's role as trustee of public waters is equivalent to ownership, giving rise to recreational immunity. Sauer v. Reliance Insurance Company, 152 W (2d) 234, 448 NW (2d) 256 (Ct. App. 1989).

Indirect pecuniary benefits constitute "payment" under (6) (a). Douglas v. Dewey, 154 W (2d) 451, 453 NW (2d) 500 (Ct. App. 1990).

"Injury" under (1) (b) includes death. Moua v. Northern States Power Co., 157 W (2d) 177, 458 NW (2d) 836 (Ct. App. 1990).

By providing lifeguard, landowner does not assume duty to provide lifeguard services in non−negligent manner. Ervin v. City of Kenosha, 159 W (2d) 464, 464 NW (2d) 654 (1991).

For purposes of (4)(b) conduct is "malicious" when it is the result of hatred, ill will, revenge, or undertaken when insult or injury is intended. Ervin v. City of Kenosha, 159 W (2d) 464, 464 NW (2d) 654 (1991).

Immunity is not limited to injuries caused by defects in property itself, but applies to all injuries sustained during use. Johnson v. City of Darlington, 160 W (2d) 418, 466 NW (2d) 233 (Ct. App. 1991).

Young child's inability to intend to engage in recreational activity does not render landowner immunity inapplicable where activity is recreational in nature. Nelson v. Schreiner, 161 W (2d) 798, 469 NW (2d) 214 (Ct. App. 1991).

Illegal gambling conducted by club occupying city park land placed club outside protection of immunity statute. Lee v. Elk Rod & Gun Club Inc., 164 W (2d) 103, 473 NW (2d) 581 (Ct. App. 1991).

Party is not immune as occupant where evidence unequivocally shows intentional and permanent abandonment of premises had occurred. Mooney v. Royal Ins. Co., 164 W (2d) 516, 476 NW (2d) 287 (Ct. App. 1991).

Walking to or from non−immune activity does not change landowner's status. Hupf v. City of Appleton, 165 W (2d) 215, 477 NW (2d) 69 (Ct. App. 1991).

Sub. (2) (b) does not require a person injured by a wild animal to be engaged in a recreational activity for immunity to attach to property owner; a captive buck deer is a wild animal. Hudson v. Janesville Conservation Club, 168 W (2d) 436, 484 NW (2d) 132 (1992).

Claimed ignorance of and blatant failure to follow applicable regulations cannot be construed as reasonable diligence in discovering an injury where following the rule would have resulted in earlier discovery. Stroh Die Casting v. Monsanto Co. 177 W (2d) 91, 502 NW (2d) 132 (Ct. App. 1993).

Municipal pier was type of property intended to be covered by recreational immunity statute. Crowbridge v. Village of Egg Harbor, 179 W (2d) 565, 508 NW (2d) 15 (Ct. App. 1993).

Church which paid a fee to reserve park space including a ball diamond for a picnic where a "pickup" softball was played was not a sponsor of an organized team sport activity under sub. (1) (g). Weina v. Atlantic Mut. Ins. Co. 179 W (2d) 774, 508 NW (2d) 67 (Ct. App. 1993).

Visiting a neighbor to say hello is not a recreational activity under this section. Sievert v. American Family Mut. Ins. Co. 190 W (2d) 413, 528 NW (2d) 413 (1995).

Whether a person intended to engage in recreational activity is not dispositive in determining whether recreational activity is engaged in. The nature and purpose of the activity must be given primary consideration. Linville v. City of Janesville, 184 W (2d) 705, 516 NW (2d) 427 (1994).

Recreational immunity does not extend to activities of the land owner acting independently of its functions as owner; immunity did not apply to city paramedics providing service to an accident victim at a city park. Linville v. City of Janesville, 184 W (2d) 705, 516 NW (2d) 427 (1994).

Limited liability for nonprofit organizations is not unconstitutional on equal protection grounds. Szarzynski v. YMCA, Camp Minikani, 184 W (2d) 875, 517 NW (2d) 135 (1994).

Land need not be open for recreational use for immunity to apply under this section. The focus is on the activity of the person who enters on and uses the land. Immunity applies without regard to the owner's permission. Verdoljak v. Mosinee Paper Corp. 200 W (2d) 624, 547 NW (2d) 602 (1996).

An activity essentially recreational in nature will not be divided into component parts, at one moment recreational and at another not, in applying this section. Verdoljak v. Mosinee Paper Corp. 200 W (2d) 624, 547 NW (2d) 602 (1996).

That a local firemen's picnic generated profits which were used for park maintenance and improvements and the purchase of fire equipment did not result in the event being a commercial, rather than recreational, activity under this section. Fischer v. Doylestown Fire Department, 199 W (2d) 83, 549 NW (2d) 575 (Ct. App. 1995).

Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges. 1991 WLR 491.

Wisconsin's Recreational Use Statute. Pendleton. Wis. Law. May 1993.

895.525 Participation in recreational activities.

(1) LEGISLATIVE PURPOSE. The legislature intends by this section to establish the responsibilities of participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.

(2) DEFINITION. In this section, "recreational activity" means any 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, bowling, billiards, picnicking, exploring caves, nature study, dancing, bicycling, horseback riding, horseshoe−pitching, bird−watching, motorcycling, operating an all−terrain vehicle, ballooning, curling, throwing darts, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, participation in water sports, weight and fitness training, sight−seeing, rock−climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature and any other sport, game or educational activity.

(3) APPRECIATION OF RISK. A participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities accepts the risks inherent in the recreational activity of which the ordinary prudent person is or should be aware. In a negligence action for recovery of damages for death, personal injury or property damage, conduct by a participant who accepts the risks under this subsection is contributory negligence, to which the comparative negligence provisions of s. 895.045 shall apply.

(4) RESPONSIBILITIES OF PARTICIPANTS. (a) A participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities is responsible to do all of the following:

1. Act within the limits of his or her ability.

2. Heed all warnings regarding participation in the recreational activity.

3. Maintain control of his or her person and the equipment, devices or animals the person is using while participating in the recreational activity.

4. Refrain from acting in any manner that may cause or contribute to the death or injury to himself or herself or to other persons while participating in the recreational activity.

(b) A violation of this subsection constitutes negligence. The comparative negligence provisions of s. 895.045 apply to negligence under this subsection.

(4m) LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

(b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

(5) EFFECT ON RELATED PROVISION. Nothing in this section affects the limitation of property owners' liability under s. 895.52.

History: 1987 a. 377; 1995 a. 223, 447.

NOTE: 1987 Wis. Act 377, which created this section, has a prefatory note explaining the act.

This section codifies common law. It does not impose a greater duty of care on individuals than exists at common law. Rockweit v. Senecal, 197 W (2d) 409, 541 NW (2d) 742 (1995).

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, controlled substance analogs or any combination of alcohol, controlled substances and controlled substance analogs 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; Stats. 1983 s. 895.53; 1985 a. 331; 1995 a. 448.

895.54 Liability exemption; notification of release. A person is immune from any liability regarding any act or omission regarding the notification of any applicable office or person under s. 51.37 (10), 304.06 (1), 971.17 (4m) or (6m) or 980.11. This section does not apply to wilful or wanton acts or omissions.

History: 1991 a. 269; 1993 a. 479.

895.55 Liability exemption; oil discharge control. **(1)** In this section:

(a) "Damages" means those damages specified in 33 USC 2702 (b) (2) and includes the cost of assessing those damages.

(b) "Discharge" means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(c) "Federal on−scene coordinator" means the federal official designated by the federal environmental protection agency or the U.S. coast guard to coordinate and direct responses under the national contingency plan.

(d) "National contingency plan" means the plan prepared and published under 33 USC 1321 (d).

(e) "Oil" means petroleum, hydrocarbon, vegetable or mineral oil of any kind or in any form and includes oil mixed with wastes other than dredged spoil.

(f) "Person" means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(g) "Removal" means the containment and elimination of oil from water, shorelines and beaches or the taking of other actions, including disposal, as may be necessary to minimize or mitigate damages to public health and welfare, including to fish, shellfish, wildlife and public or private property, shorelines and beaches.

(h) "Removal costs" means the costs of removal that are incurred after an oil discharge occurs or, if there is a substantial threat of an oil discharge, the costs to prevent, minimize or mitigate an oil discharge.

(i) "State contingency plan" means the plan prepared and published under s. 144.76 (5) [292.11 (5)].

NOTE: The bracketed language indicates the correct cross−reference. Section 144.76 (5) was renumbered by 1995 Wis. Act 227.

(2) Notwithstanding any provision of ch. 29, subchs. II and IV of ch. 30, subchs. II, IV, VI and VII of ch. 144, ch. 147 or 166 [s. 299.11, 299.13, 299.31, 299.41, 299.43, 299.45, 299.51, 299.53 and 299.55, ch. 29, subchs. II and IV of ch. 30, ch. 166, 281, 283, 289, 291, 292 or subch. II of ch. 295], or any other provision of this chapter, a person is immune from liability for damages resulting from the person's acts or omissions and for the removal costs resulting from the person's acts or omissions if all of the following conditions are met:

NOTE: The bracketed language indicates the correct cross−reference. Chapters 144 and 147 were renumbered by 1995 Wis. Act 227.

(a) Those acts or omissions were taken while rendering assistance, advice or care related to the threat of an oil discharge into the navigable waters of this state or related to the removal of oil resulting from an oil discharge into the navigable waters of this state.

(b) The assistance, advice or care was consistent with the national contingency plan or the state contingency plan or was otherwise directed by the federal on−scene coordinator or the secretary of natural resources.

(3) The immunity under sub. (2) does not extend to any person:

(a) Who is required to act under s. 144.76 (3) [292.11 (3)] because the person possessed or controlled the oil that was initially discharged into the navigable waters of this state or caused the initial discharge or initial threat of discharge of the oil into the navigable waters of this state.

NOTE: The bracketed language indicates the correct cross−reference. Section 144.76 (3) was renumbered by 1995 Wis. Act 227.

(b) Whose act or omission involves gross negligence or reckless, wanton or intentional misconduct.

(c) Who causes personal injury or wrongful death.

(4) A person under sub. (3) (a) is liable for any damages or removal costs that another person is immune from under sub. (2).

(5) Nothing in this section affects the responsibility of a person under sub. (3) (a) to fulfill that person's requirements under s. 144.76 [292.11].

NOTE: The bracketed language indicates the correct cross−reference. Section 144.76 was renumbered by 1995 Wis. Act 227.

History: 1995 a. 192.

895.57 Damages; unauthorized release of animals. **(1)** In this section:

(a) "Humane officer" means an officer appointed under s. 58.07.

(b) "Local health officer" has the meaning given in s. 250.01 (5).

(c) "Peace officer" has the meaning given in s. 939.22 (22).

(2) A person who intentionally releases an animal that is lawfully confined for scientific, farming, companionship or protection of persons or property, recreation, restocking, research, exhibition, commercial or educational purposes, acting without the consent of the owner or custodian of the animal, is liable to the owner or custodian of the animal for damages, which shall include the costs of restoring the animal to confinement.

(3) Subsection (2) does not apply to any humane officer, local health officer, peace officer, employe of the department of natural resources while on any land licensed under s. 29.52, 29.573, 29.574, 29.575 or 29.578 or designated as a wildlife refuge under s. 29.57 (1) or employe of the department of agriculture, trade and consumer protection if the officer's or employe's acts are in good faith and in an apparently authorized and reasonable fulfillment of his or her duties.

History: 1991 a. 20, 269; 1993 a. 27; 1995 a. 79.

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 the University of Wisconsin Hospitals and Clinics Authority or 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; 1995 a. 27.

895.67 Domestic abuse services; prohibited disclosures. (1) In this section:

(a) "Domestic abuse" has the meaning given in s. 46.95 (1) (a).

(b) "Domestic abuse services organization" means a nonprofit organization or a public agency that provides any of the following services for victims of domestic abuse:

1. Shelter facilities or private home shelter care.

2. Advocacy and counseling.

3. A 24−hour telephone service.

(c) "Service recipient" means any person who receives or has received domestic abuse services from a domestic abuse services organization.

(2) (a) No employe or agent of a domestic abuse services organization who provides domestic abuse services to a service recipient may intentionally disclose to any person the location of any of the following persons without the informed, written consent of the service recipient:

1. The service recipient.

2. Any minor child of the service recipient.

3. Any minor child in the care or custody of the service recipient.

4. Any minor child who accompanies the service recipient when the service recipient receives domestic abuse services.

(b) Any person who violates this subsection may be fined not more than $500 or imprisoned for not more than 30 days or both.

History: 1991 a. 228.

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) (b).

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

(2) CAUSE OF ACTION. (a) 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. Consent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy, counseling, assessment or treatment ended.

(b) Notwithstanding ss. 801.09 (1), 801.095, 802.04 (1) and 815.05 (intro.), in an action brought under this section, the plaintiff may substitute his or her initials, or fictitious initials, and his or her age and county of residence for his or her name and address on the summons and complaint. The plaintiff's attorney shall supply the court the name and other necessary identifying information of the plaintiff. The court shall maintain the name and other identifying information, and supply the information to other parties to the action, in a manner which reasonably protects the information from being disclosed to the public.

(c) Upon motion by the plaintiff, and for good cause shown, or upon its own motion, the court may make any order that justice requires to protect:

1. A plaintiff who is using initials in an action under this section from annoyance, embarrassment, oppression or undue burden that would arise if any information identifying the plaintiff were made public.

2. A plaintiff in an action under this section from unreasonably long, repetitive or burdensome physical or mental examinations.

3. The confidentiality of information which under law is confidential, until the information is provided in open court in an action under this section.

(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.

(5) SILENCE AGREEMENTS. Any provision in a contract or agreement relating to the settlement of any claim by a patient against a therapist that limits or eliminates the right of the patient to disclose sexual contact by the therapist to a subsequent therapist, the department of regulation and licensing, the department of health and family services, the patients compensation fund peer review council or a district attorney is void.

History: 1985 a. 275; 1987 a. 352; 1991 a. 160, 217; 1995 a. 27 s. 9126 (19).

Under sub. (2) consent is not an issue and as such an instruction regarding the victim's contributory negligence was improper. Block v. Gomez, 201 W (2d) 789, 549 NW (2d) 783 (Ct. App. 1996).

895.73 Service representatives. (1) DEFINITIONS. In this section:

(a) "Abusive conduct" means domestic abuse, as defined under s. 46.95 (1) (a), 813.12 (1) (a) or 968.075 (1) (a), harassment, as defined under s. 813.125 (1), sexual exploitation by a therapist under s. 940.22, sexual assault under s. 940.225, child abuse, as defined under s. 813.122 (1) (a) or child abuse under ss. 948.02 to 948.11.

(b) "Complainant" means an adult who alleges that he or she was the subject of abusive conduct or who alleges that a crime has been committed against him or her.

(c) "Service representative" means an individual member of an organization or victim assistance program who provides counseling or support services to complainants or petitioners and charges no fee for services provided to a complainant under sub. (2) or to a petitioner under s. 813.122.

(2) RIGHT TO BE PRESENT. A complainant has the right to select a service representative to attend, with the complainant, hearings, depositions and court proceedings, whether criminal or civil, and all interviews and meetings related to those hearings, depositions and court proceedings, if abusive conduct is alleged to have occurred against the complainant or if a crime is alleged to have been committed against the complainant and if the abusive conduct or the crime is a factor under s. 767.24 or is a factor in the complainant's ability to represent his or her interest at the hearing, deposition or court proceeding. The complainant shall notify the court orally, or in writing, of that selection. A service representative selected by a complainant has the right to be present at every hearing, deposition and court proceeding and all interviews and meetings related to those hearings, depositions and court proceedings that the complainant is required or authorized to attend. The service representative selected by the complainant has the right to sit adjacent to the complainant and confer orally and in writing with the complainant in a reasonable manner during every hearing, deposition or court proceeding and related interviews and meetings, except when the complainant is testifying or is represented by private counsel. The service representative may not sit at counsel table during a jury trial. The service representative may address the court if permitted to do so by the court.

(3) FAILURE TO EXERCISE RIGHT NOT GROUNDS FOR APPEAL. The failure of a complainant to exercise a right under this section is not a ground for an appeal of a judgment of conviction or for any court to reverse or modify a judgment of conviction.

History: 1991 a. 276; 1995 a. 220.

895.75 Physical injury, emotional distress, loss or damage suffered by members of certain groups. (1) Any person who suffers physical injury to his or her person or emotional distress or damage to or loss of his or her property by reason of conduct which is prohibited under s. 943.012 or which is grounds for a penalty increase under s. 939.645 has a civil cause of action against the person who caused the physical injury, emotional distress, damage or loss.

(2) The burden of proof in a civil action under sub. (1) rests with the person who suffers the physical injury, emotional distress, damage or loss to prove his or her case by a preponderance of the credible evidence.

(3) If the plaintiff prevails in a civil action under sub. (1), he or she may recover special and general damages, including damages for emotional distress; punitive damages; and costs, including all reasonable attorney fees and other costs of the investigation and litigation which were reasonably incurred.

(4) A person may bring a civil action under sub. (1) regardless of whether there has been a criminal action related to the physical injury, emotional distress, loss or damage under sub. (1) and regardless of the outcome of any such criminal action.

(5) This section does not limit the right of a person to recover from any parent or parents under s. 895.035.

History: 1987 a. 348.

895.77 Injury caused by criminal gang activity. (1) DEFINITIONS. In this section:

(a) "Criminal gang" has the meaning given in s. 939.22 (9).

(b) "Criminal gang activity" has the meaning given in s. 941.38 (1) (b).

(c) "Political subdivision" means a city, village, town or county.

(2) CIVIL CAUSE OF ACTION. (a) The state, a school district or a political subdivision may bring an action in circuit court for any expenditure of money for the allocation or reallocation of law enforcement, fire fighting, emergency or other personnel or resources if the expenditure of money by the state, a school district or a political subdivision is the result of criminal gang activity.

(b) Any person who suffers physical injury or incurs property damage or loss resulting from any criminal gang activity has a cause of action for the actual damages sustained. The burden of proof in a civil action under this paragraph rests with the person who suffers the physical injury or property damage or loss to prove his or her case by a preponderance of the credible evidence.

(c) The action may be brought against the criminal gang or against any member, leader, officer or organizer of a criminal gang who participates in a criminal gang activity or who authorizes, causes, orders, ratifies, requests or suggests a criminal gang activity. An action brought under this subsection shall also name as defendants the criminal gang and any criminal gang members that participated in the criminal gang activity. An action brought under this subsection may name, as a class of defendants, all unknown criminal gang members.

(d) The plaintiff may bring a civil action under this subsection regardless of whether there has been a criminal action related to the injury, property damage or loss or expenditure of money under par. (a) or (b) and regardless of the outcome of that criminal action.

(3) SERVICE OF PROCESS. A summons may be served individually upon any member, leader, officer or organizer of a criminal gang by service as provided under s. 801.11 (1), (2), (5) or (6) where the claim sued upon arises out of or relates to criminal gang activity within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05 (2) to (10). A judgment rendered after service under this subsection is a binding adjudication against the criminal gang.

(4) INJUNCTIVE RELIEF, DAMAGES, COSTS AND FEES. (a) The court, upon the request of the state, a school district or a political subdivision, may grant an injunction restraining an individual from committing an act that would injure the state, a school district or a political subdivision or may order such other relief as the court determines is proper.

(b) The court may order a criminal gang member to divest himself or herself of any interest or involvement in any criminal gang activity and may restrict a criminal gang member from engaging in any future criminal gang activity.

(c) In addition to the costs allowed under s. 814.04, a final judgment in an action under sub. (2) (a) in favor of the plaintiff shall include compensatory damages for the expenditure of money for the allocation or reallocation of law enforcement, fire fighting, emergency or other personnel or resources caused by the criminal gang activity and compensation for the costs of the investigation and prosecution and reasonable attorney fees.

(d) In addition to the costs allowed under s. 814.04, a final judgment in an action under sub. (2) (b) in favor of the plaintiff shall include attorney fees and the costs of the investigation and litigation.

(e) The final judgment in favor of the plaintiff in an action under sub. (2) (a) or (b) may include punitive damages assessed against a criminal gang leader, officer, organizer or member who is found to have participated in criminal gang activity.

History: 1993 a. 98.

895.79 Damage to certain machines. (1) An owner of a machine operated by the insertion of coins, currency, debit cards or credit cards that is damaged by a person acting with the intent to commit a theft from that machine may bring an action against the person.

(2) The owner has the burden of proving his or her case under sub. (1) by a preponderance of the credible evidence.

(3) If the owner prevails in a civil action under sub. (1), he or she may recover all of the following:

(a) Treble damages.

(b) Costs, including all reasonable attorney fees and other costs of the investigation and litigation that were reasonably incurred.

(4) An owner may bring a civil action under sub. (1) regardless of whether there has been a criminal action related to the damage under sub. (1) and regardless of the outcome of any such criminal action.

History: 1995 a. 133.

895.80 Property damage or loss. (1) Any person who suffers damage or loss by reason of intentional conduct that occurs on or after November 1, 1995, and that is prohibited under s. 943.01, 943.20, 943.21, 943.24, 943.26, 943.34, 943.395, 943.41, 943.50 or 943.61 has a cause of action against the person who caused the damage or loss.

(2) The burden of proof in a civil action under sub. (1) is with the person who suffers damage or loss to prove his or her case by a preponderance of the credible evidence.

(3) If the plaintiff prevails in a civil action under sub. (1), he or she may recover all of the following:

(a) Treble damages.

(b) All costs of investigation and litigation that were reasonably incurred.

(4) A person may bring a civil action under sub. (1) regardless of whether there has been a criminal action related to the loss or damage under sub. (1) and regardless of the outcome of any such criminal action.

(5) No person may bring a cause of action under both this section and s. 943.212, 943.245 or 943.51 regarding the same incident or occurrence. If the plaintiff has a cause of action under both this section and s. 943.212, 943.245 or 943.51 regarding the same incident or occurrence, the plaintiff may choose which action to bring.

History: 1995 a. 27.

895.85 Punitive damages. (1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 153.85, 252.14 (4), 252.15 (8) (a), 943.245 (2) and (3) and 943.51 (2) and (3).

(3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of punitive damages:

(a) The plaintiff may introduce evidence of the wealth of a defendant; and

(b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

(5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to punitive damages.

History: 1995 a. 17.

NOTE: The first 3 cases noted below were decided prior to the adoption of s. 895.85.

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).

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).

Regardless of classification of underlying cause of action, punitive damages are recoverable where defendant's conduct was "outrageous". Insurance coverage for punitive damages is not contrary to public policy. Brown v. Maxey, 124 W (2d) 426, 369 NW (2d) 677 (1985).