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, all of the following also survive:

(a) Causes of action to determine paternity.

(b) Causes of action for the recovery of personal property or the unlawful withholding or conversion of personal property.

(c) Causes of action for the recovery of the possession of real estate and for the unlawful withholding of the possession of real estate.

(d) Causes of action for assault and battery.

(e) Causes of action for false imprisonment.

(f) Causes of action for invasion of privacy.

(g) Causes of action for a violation of s. 968.31 (2m) or other damage to the person.

(h) Causes of action for all damage done to the property rights or interests of another.

(i) Causes of action for goods taken and carried away.

(j) Causes of action for damages done to real or personal estate.

(k) Equitable actions to set aside conveyances of real estate.

(L) Equitable actions to compel a reconveyance of real estate.

(m) Equitable actions to quiet the title to real estate.

(n) Equitable actions for specific performance of contracts relating to real estate.

(o) Causes of action for wrongful death, which 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 Wis. 2d 585, 760 (1975), 771; 1977 c. 176; 1987 a. 399; 1993 a. 481; 1999 a. 85.

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

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

A claim for loss of enjoyment of life caused by professional negligence of mental health professionals survived the death of the alleged victim. Sawyer v. Midelfort, 227 Wis. 2d 124, 595 N.W.2d 423 (1999).

A survival claim accrues when, with reasonable diligence, the decedent should have discovered the claim, but no later than the date of death. Estate of Merrill v. Jerrick, 231 Wis. 2d 546, 605 N.W.2d 645 (Ct. App. 1999).

Actions under ss. 551.41 and 551.59 survive the death of the wrongdoer. Continental Assurance Co. v. American Bankshares Corp. 483 F. Supp. 175 (1980).

895.02 Measure of damages against personal representative. When any action described in s. 895.01 (1) shall be prosecuted to judgment against the personal representative, 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 Wis. 2d 585, 784 (1975); 1977 c. 176; 2001 a. 102.

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 that the defendant shot the plaintiff's husband and that the shooting was wrongful was sufficient to state a cause of action. Kelly v. Mohrhusen, 50 Wis. 2d 337, 184 N.W.2d 149 (1971).

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 Wis. 2d 345, 195 N.W.2d 602, 198 N.W.2d 161 (1972).

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

895.031 Recovery from estate of wrongdoer. If the death of a person is caused by a wrongful act or omission committed in this state that, if death had not ensued, would have entitled the injured party to maintain an action and recover damages and the wrongdoer dies prior to the time of the death of the injured person, the wrongdoer shall be liable for damages notwithstanding either death. Any right of action against a deceased wrongdoer under this section shall be enforced by bringing an action against the deceased wrongdoer's personal representative.

History: 1993 a. 486; 2001 a. 102.

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) (a) 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 willful, malicious, or wanton act of the child.

(b) 1. 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.

2. If a parent is jointly and severally liable under this paragraph and has physical placement of the child, the parent's liability is limited to that percentage representing the time that the child actually spends with that parent.

3. Notwithstanding sub. (1), a parent does not have custody of a child for purposes of this paragraph if at the time of the violation the child has been freed from the care, custody, and control of the parent through marriage or emancipation or if at the time of the violation the parent does not reasonably have the ability to exercise supervision and control of the child because the child is uncontrollable or because another person has interfered with that parent's exercise of supervision and control.

(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 juvenile or a parent with custody of a juvenile fails to pay restitution under s. 938.245, 938.32, 938.34 (5), 938.343 (4), 938.345 or 938.45 (1r) (a) as ordered by a court assigned to exercise jurisdiction under chs. 48 and 938, a court of criminal jurisdiction or a municipal court or as agreed to in a deferred prosecution agreement or if it appears likely that the juvenile or parent 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 juvenile may petition the court assigned to exercise jurisdiction under chs. 48 and 938 to order that the amount of restitution unpaid by the juvenile or parent be entered and docketed as a judgment against the juvenile and the parent with custody of the juvenile 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 juvenile 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 juvenile or a parent with custody of a juvenile fails to pay a forfeiture as ordered by a court assigned to exercise jurisdiction under chs. 48 and 938, a court of criminal jurisdiction or a municipal court, if a juvenile or a parent with custody of a juvenile fails to pay costs as ordered by the court assigned to exercise jurisdiction under chs. 48 and 938 or a municipal court, if a juvenile fails to pay a surcharge as ordered by a court assigned to exercise jurisdiction under chs. 48 and 938 or a court of criminal jurisdiction or if it appears likely that the juvenile or the parent will not pay the forfeiture or surcharge as ordered, the representative of the public interest under s. 938.09, the agency, as defined in s. 938.38 (1) (a), supervising the juvenile or the law enforcement agency that issued the citation to the juvenile may petition the court assigned to exercise jurisdiction under chs. 48 and 938 to order that the amount of the forfeiture, surcharge or costs unpaid by the juvenile or parent be entered and docketed as a judgment against the juvenile and the parent with custody of the juvenile 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, surcharge or costs 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 juvenile 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 juvenile and the parent an opportunity to present evidence as to the amount of the restitution, forfeiture or surcharge unpaid, but not as to the amount of the restitution, forfeiture or surcharge originally ordered. The court shall also give the juvenile and the parent an opportunity to present evidence as to the reason for the failure to pay the restitution, forfeiture or surcharge and the ability of the juvenile or the parent to pay the restitution, forfeiture or surcharge. In considering the ability of the juvenile or the parent to pay the restitution, forfeiture or surcharge, the court may consider the assets, as well as the income, of the juvenile or the parent and

may consider the future ability of the juvenile or parent to pay the restitution, forfeiture or surcharge 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 juvenile maintained by that court or the municipal court.

3. In proceedings under this subsection, the juvenile and the parent may retain counsel of their own choosing at their own expense, but a juvenile 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 juvenile 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 or surcharge. If the parent agrees to perform community service work in lieu of making restitution or paying the forfeiture or surcharge, 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 juvenile 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, forfeiture or surcharge by the minimum wage established under ch. 104 for adults in nonagriculture, nontipped employment. The court shall ensure that the juvenile 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. 938.183 or 938.34 that the juvenile 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 juvenile committed the act, subject to its admissibility under s. 904.10, shall, in an action under sub. (1), stop a juvenile's parent or parents from denying that the juvenile committed the act that resulted in the injury, damage or loss.

(4) Except for recovery under sub. (4a) or for retail theft under s. 943.51, the maximum recovery under this section from any parent or parents may not exceed $5,000 for damages resulting from any one act of a juvenile in addition to taxable costs and disbursements and reasonable attorney fees, as determined by the court. If 2 or more juveniles in the custody of the same parent or parents commit the same act the total recovery under this section may not exceed $5,000, 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.

(4a) (a) The maximum recovery under this section by a school board or a governing body of a private school from any parent or parents with custody of a minor child may not exceed $20,000 for damages resulting from any one act of the minor child in addition to taxable costs and disbursements and reasonable attorney fees, as determined by the court, for damages caused to the school board or the governing body of a private school by any of the following actions of the minor child:

1. An act or threat that endangers the property, health or safety of persons at the school or under the supervision of a school authority or that damages the property of a school board or the governing body of a private school and that results in a substantial disruption of a school day or a school activity.

2. An act resulting in a violation of s. 943.01, 943.02, 943.03, 943.05, 943.06 or 947.015.

(b) In addition to other recoverable damages, damages under par. (a) may include the cost to the school board or the governing body of a private school in loss of instructional time directly resulting from the action of the minor child under par. (a).

(c) If 2 or more minor children in the custody of the same parent or parents are involved in the same action under par. (a), the total recovery may not exceed $20,000, in addition to taxable costs, disbursements and reasonable attorney fees, as determined by the court.

(d) If an insurance policy does not explicitly provide coverage for actions under par. (a), the issuer of that policy is not liable for the damages resulting from those actions.

(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 of restitution 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), 938.343 (4) or 938.45 (1r) (a). Any recovery of a forfeiture under this section shall be reduced by the amount recovered as a forfeiture for the same act under s. 938.34 (8), 938.343 (2) or 938.45 (1r) (b). Any recovery of a surcharge under this section shall be reduced by the amount recovered as a surcharge under s. 938.34 (8d).

(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; 1997 a. 27, 35, 205, 239, 252; 1999 a. 9, 32; 2003 a. 138.

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

An "act" under s. 895.035 (4) is a complete course of conduct. What distinguishes a single act from multiple acts is whether: 1) a sufficient period of time separates the conduct, 2) the conduct occurred at separate locations, and 3) there is a distinct difference in the nature of the conduct. In cases of improper sexual contact, the jury need not make an individual damage determination for each act. N.E.M. v. Strigel, 208 Wis. 2d 1, 559 N.W.2d 256 (1997).

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

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

NOTE: See also the notes to s. 343.15, for parental responsibility for minor drivers.

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 willful, 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.

The essential holding of *Roe v. Wade* allowing abortion is upheld, but various state restrictions on abortion are permissible. Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674 (1992).

895.038 Partial−birth abortions; liability. (1) In this section:

(a) "Child" has the meaning given in s. 940.16 (1) (a).

(b) "Partial−birth abortion" has the meaning given in s. 940.16 (1) (b).

(2) (a) Except as provided in par. (b), any of the following persons has a claim for appropriate relief against a person who performs a partial−birth abortion:

1. If the person on whom a partial−birth abortion was performed was a minor, the parent of the minor.

2. The father of the child aborted by the partial−birth abortion.

(b) A person specified in par. (a) 1. or 2. does not have a claim under par. (a) if any of the following apply:

1. The person consented to performance of the partial−birth abortion.

2. The pregnancy of the woman on whom the partial−birth abortion was performed was the result of a sexual assault in violation of s. 940.225, 944.06, 948.02, 948.025, 948.06 or 948.09 that was committed by the person.

(3) The relief available under sub. (2) shall include all of the following:

(a) If the abortion was performed in violation of s. 940.16, damages arising out of the performance of the partial−birth abortion, including damages for personal injury and emotional and psychological distress.

(b) Exemplary damages equal to 3 times the cost of the partial−birth abortion.

(4) Subsection (2) applies even if the mother of the child aborted by the partial−birth abortion consented to the performance of the partial−birth abortion.

History: 1997 a. 219.

This section can be applied in a constitutional manner if it is limited to the procedures specified by the state in its arguments to the court. Application of the statute beyond that specified is enjoined. Hope Clinic v. Ryan, 195 F.3d 857 (1999).

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 $10,000, 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 $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.

(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 Wis. 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; 1997 a. 89, 290.

Statutory increases in damage limitations recoverable in wrongful death actions constitute changes in substantive rights and not mere remedial changes. Bradley v. Knutson, 62 Wis. 2d 432, 215 N.W.2d 369 (1974).

A parent may maintain an action for loss of aid, comfort, society, and companionship of an injured minor child on the condition that the parents' cause of action is combined with that of the child for the child's personal injuries. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

In an action for wrongful death by 2 children of the deceased, the plaintiffs' failure to join 3 other siblings who would otherwise have been indispensable parties was not fatal to the court's subject matter jurisdiction because affidavits submitted to the trial court indicated that the 3 siblings were unavailable. Kochel v. Hartford Accident & Indemnity Co. 66 Wis. 2d 405, 225 N.W.2d 604 (1975).

A judgment under sub. (2) means a final, not interlocutory, judgment. Collins v. Gee, 82 Wis. 2d 376, 263 N.W.2d 158 (1978).

The trial court in a wrongful death action should inform the jury of statutory limitations on recovery, if any. Peot v. Ferraro, 83 Wis. 2d 727, 266 N.W.2d 586 (1978).

A posthumous illegitimate child may not maintain an action for the wrongful death of the putative father. Robinson v. Kolstad, 84 Wis. 2d 579, 267 N.W.2d 886 (1978).

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

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

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

If a decedent's negligence was greater than any individual tortfeasor's, s. 895.045 bars recovery under s. 895.04 (7). Delvaux v. Vanden Langenberg, 130 Wis. 2d 464, 387 N.W.2d 751 (1986).

A spouse's claim under sub. (4) for loss of society and companionship is additional to a common law claim for loss of consortium prior to the death of the deceased. Kottka v. PPG Industries, Inc. 130 Wis. 2d 499, 388 N.W.2d 160 (1986).

A person who "feloniously and intentionally" kills his or her spouse is not a surviving spouse for purposes of sub. (2) and is treated as having predeceased the decedent. Stienbarth v. Johannes, 144 Wis. 2d 159, 423 N.W.2d 540 (1988).

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

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 Wis. 2d 59, 501 N.W.2d 828 (Ct. App. 1993).

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

Although only one parent was the named insured under an uninsured motorist insurance policy paying benefits for the wrongful death of the parents' child, this section requires payment of the proceeds to both parents. Bruflat v. Prudential Property & Casualty Insurance Co. 2000 WI 69, 233 Wis. 2d 523, 608 N.W.2d 371.

Retroactive increases in the statutory damage limits were unconstitutional. Neiman v. American National Property & Casualty Co. 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160. See also Schultz v. Natwick, 2002 WI 125, 257 Wis. 2d 19, 653 N.W.2d 266.

Sub. (5) does not require the person who paid the expenses to be joined, but allows a relative who brings the action to assert a claim for medical expenses on behalf of the payor. The relative does not own the claim exclusively and is not entitled to retain the proceeds of the claim when he or she did not pay the expenses. The relative cannot recover for a pecuniary loss under sub. (4) for damage to a vehicle when he or she has not been called upon to pay for the damage. Petta v. West Bend Mutual Insurance Co. 2003 WI App 241, 268 Wis. 2d 153, 672 N.W.2d 146, 03−0610.

Sub. (4) does not: 1) nullify the state constitutional right to have a jury assess damages under Art. I, s 5; 2) violate separation of powers principles by blurring the boundaries between judicial and legislative branches; 3) violate constitutional equal protection guarantees; and 4) does not violate substantive due process. Maurin v. Hall, 2004 WI 100, ___ Wis. 2d ___, ___ N.W.2d ___, 00−0072.

There may not be separate recovery for both an estate and its 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 the comparison, a violation of the statute is not to be considered necessarily as contributing more than the common−law contributory negligence. It is not prejudicial error to not call attention to the different standards of care in a safe−place case when appropriate jury instructions are used. Lovesee v. Allied Development Corp. 45 Wis. 2d 340, 173 N.W.2d 196 (1970).

Adopting the doctrine of pure comparative negligence is a legislative matter. Vincent v. Pabst Brewing Co. 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

There is no distinction between active and passive negligence as to responsibility for injury or full indemnity to a tortfeasor whose negligence was passive. Pachowitz v. Milwaukee & Suburban Transport Corp. 56 Wis. 2d 383, 202 N.W.2d 268 (1972).

For the purpose of applying the comparative negligence statute, both the causes of action for medical expenses and loss of consortium are derivative. The causal negligence of the injured spouse bars or limits the recovery of the claiming spouse pursuant to the terms of the statute. White v. Lunder, 66 Wis. 2d 563, 225 N.W.2d 442 (1975).

The contributory negligence of the plaintiff−spectator in viewing an auto race was not greater than defendants' negligence as a matter of law when the plaintiff did not realize that watching from a 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 she was watching the race closely immediately prior to the accident. Kaiser v. Cook, 67 Wis. 2d 460, 227 N.W.2d 50 (1975).

The trial court's denial of a motion by 2 employee−defendants to direct the jury to consider the employer's negligence in its special verdict, even though the employer's liability extended only to workers compensation, was error. Connar v. West Shore Equipment, 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

The trial court's instruction to the jury not to compute all of the damages plaintiff suffered, but only that portion caused by the defendant's negligence, was erroneous. This section requires the jury to find 100% of the plaintiff's damages, which are then reduced by the amount of contributory negligence. Nimmer v. Purtell, 69 Wis. 2d 21, 230 N.W.2d 258 (1975).

Conduct constituting implied or tacit assumption of risk is not a bar to an action for negligence. Polsky v. Levine, 73 Wis. 2d 547, 263 N.W.2d 204 (1976).

A minor injured during employment cannot be charged with contributory negligence when the employment is in violation of child labor laws. Tisdale v. Hasslinger, 79 Wis. 2d 194, 255 N.W.2d 314 (1977).

When the court granted judgment notwithstanding the verdict regarding 2 of several defendants found causally negligent, and the percentage of negligence reallocated affected damages but not liability, the plaintiffs should have been given the option of a proportional reduction of the judgment or a new trial. Chart v. General Motors Corp. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).

If a court can find as matter of law that a party is causally negligent, contrary to the jury's answer, and the jury attributes some degree of comparative negligence to that party, the court should change the causal negligence answer and permit the jury's comparison to stand. Ollinger v. Grall, 80 Wis. 2d 213, 258 N.W.2d 693 (1977).

When blowing snow obstructed a driver's vision, but the driver did not reduce speed, and a parked truck on the highway "loomed up" out of the snow, the driver was causally negligent as matter of law. Nelson v. Travelers Ins. Co. 80 Wis. 2d 272, 259 N.W.2d 48 (1977).

The "emergency doctrine" relieves a person for liability for his actions when that person is faced with a sudden emergency he or she did not create. The "rescue rule" applies even though the action of the rescuer is deliberate and taken after some planning and consideration. Rescuers will not be absolved of all negligence if their actions are unreasonable under the circumstances. Cords v. Anderson, 80 Wis. 2d 525, 259 N.W.2d 672 (1977).

The negligence of a tortfeasor dismissed from a lawsuit on summary judgment as being less or equally negligent as the plaintiff can be considered by the jury in apportioning the total causal negligence of the remaining parties. Gross v. Midwest Speedways, Inc. 81 Wis. 2d 129, 260 N.W.2d 36 (1977).

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

Contributory negligence, if proved, is a defense in a strict liability case. Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979).

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

A motorist injured while fleeing the police was, as matter of law, more negligent than the pursuing officer. Brunette v. Employers Mutual Liability Insurance Co. 107 Wis. 2d 361, 320 N.W.2d 43 (Ct. App. 1982).

Failure to give the jury an emergency instruction was reversible error, despite the plaintiff's violation of several safety statutes. When an emergency instruction is appropriate is discussed. Westfall v. Kottke, 110 Wis. 2d 86, 328 N.W.2d 481 (1983).

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

A bus driver who told an 11−year−old that he could not ride the school bus the next day, but did not inform either the school or the child's parents, was properly found 93% liable for injuries sustained by the boy while riding his bicycle to school the next day. Toeller v. Mutual Service Casualty Insurance Co. 115 Wis. 2d 631, 340 N.W.2d 923 (Ct. App. 1983).

When a decedent's negligence is greater than any individual tortfeasor's, this section bars recovery under s. 895.04 (7). Delvaux v. Vanden Langenberg, 130 Wis. 2d 464, 387 N.W.2d 751 (1986).

A negligent tortfeasor has the right to indemnity from an intentional joint tortfeasor. A *Pierringer* release of the intentional tortfeasor absolved the negligent tortfeasor. Fleming v. Threshermen's Mutual Insurance Co. 131 Wis. 2d 123, 388 N.W.2d 908 (1986).

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

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

Retroactive application of the 1995 amendment of this section was unconstitutional. Mattheis v. Positive Safety Manufacturing Co. 2001 WI 82, 244 Wis. 2d 720, 628 N.W.2d 842.

The 1995 amendment of sub. (1) does not apply to strict product liability actions. Fuchsgruber v. Custom Accessories, Inc. 2001 WI App 81, 244 Wis. 2d 758, 628 N.W.2d 833.

Only a tortfeasor found to be 51% or more causally negligent may be jointly and severally liable for a plaintiff's total damages. That a plaintiff has no negligence does not alter that rule. Coulter v. Bickler, 2002 WI App 268, 258 Wis. 2d 304, 654 N.W.2d 248.

When the plaintiff's negligence was greater than any injurer's, neither the plaintiff nor the 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.

Enforceable Exculpatory Agreements. Pendleton. Wis. Law. Nov. 1997.

Wisconsin's Comparative Negligence Statute: Applying It to Products Liability Cases Brought under a Strict Liability Theory. Pless. Wis. Law. Aug. 1998.

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.

895.049 Recovery by a person who fails to use protective headgear while operating certain motor vehicles. Notwithstanding s. 895.045, failure by a person who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all−terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, to use protective headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action. This section does not apply to any person required to wear protective headgear under s. 23.33 (3g) or 347.485 (1).

History: 2003 a. 148.

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 a nondefamatory photograph of the plaintiff to a newspaper to accompany a defamatory article is not liable absent knowledge or control of the article. Westby v. Madison Newspapers, Inc. 81 Wis. 2d 1, 259 N.W.2d 691 (1977).

A newscaster did not act with knowledge of falsity or with reckless disregard for the truth by broadcasting that the plaintiff had been charged with a crime when the newscaster was told by a deputy sheriff that charges would be filed. Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

A contract printer had no reason to know of libel and was entitled to summary judgment. Maynard v. Port Publications, Inc. 98 Wis. 2d 555, 297 N.W.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 Wis. 2d 372, 302 N.W.2d 68 (Ct. App. 1981).

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

"Public figure" is defined. Constitutional protections of the news media and an individual defamer are discussed. Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982).

A former legislator who had gained notoriety within the district while in office and who was allegedly defamed in a radio broadcast within the district, was a "public figure" for purposes of a defamation action. Lewis v. Coursolle Broadcasting, 127 Wis. 2d 105, 377 N.W.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 Wis. 2d 429, 535 N.W.2d 11 (Ct. App. 1995).

If a defamation plaintiff is a public figure, there must be proof of actual malice. The deliberate choice of one interpretation of a number of possible interpretations does not create a jury issue of actual malice. The selective destruction by a defendant of materials likely to be relevant to defamation litigation allows an inference that the materials would have provided evidence of actual malice, but the inference is of little weight when uncontroverted testimony makes the malice assertion a remote possibility. Torgerson v. Journal/Sentinel, Inc. 210 Wis. 2d 525, 563 N.W.2d 472 (1997).

For purposes of libel law, a "public figure" who must prove malice includes a person who by being drawn into or interjecting himself or herself into a public controversy becomes a public figure for a limited purpose because of involvement in the particular controversy. "Public figure" status can be created without purposeful or voluntary conduct by the individual involved. Erdmann v. SF Broadcasting of Green Bay, Inc. 229 Wis. 2d 156, 599 N.W.2d 1 (Ct. App. 1999).

A "public dispute" is not simply a matter of interest to the public. It must be a real dispute, the outcome of which affects the general public in an appreciable way. Essentially private concerns do not become public controversies because they attract attention; the dispute's ramifications must be felt by persons who are not direct participants. Maguire v. Journal Sentinel, Inc. 2000 WI App 4, 232 Wis. 2d 236, 605 N.W.2d 881.

The sub. (2) notice requirement applies to only libel in print. Schultz v. Sykes, 2001 WI App 255, 248 Wis. 2d 746, 638 N.W.2d 604.

Publishers' privileges and liabilities regarding libel are discussed. Gertz v. Robert Welch, Inc. 418 U.S. 323.

A public figure who sues media companies for libel may inquire into the editorial processes of those responsible when proof of "actual malice" is required for recovery. Herbert v. Lando, 441 U.S. 153 (1979).

The "public figure" principle in libel cases is discussed. Wolston v. Reader's Digest Assn., Inc. 443 U.S. 157 (1979).

If wire service accounts of a judge's remarks are substantially accurate, a defamation suit by the judge is barred under sub. (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 employees 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. 562 to 569 or under state or federal laws relating to the conduct of gaming on Indian lands.

History: 1993 a. 174; 1995 a. 225; 1997 a. 27.

A Puerto Rican judgment based on a gambling debt was entitled to full faith and credit in Wisconsin. Conquistador Hotel Corp. v. Fortino, 99 Wis. 2d 16, 298 N.W.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 wagerer'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. 562 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; 1997 a. 27, 35.

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.

895.10 Tobacco product agreement. (1) DEFINITIONS. In this section:

(a) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in exhibit C of the master settlement agreement.

(b) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by or is under common ownership or control with, another person. Solely for the purposes of this definition, "owns", "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.

(c) "Allocable share" means allocable share as that term is defined in the master settlement agreement.

(d) 1. "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains any of the following:

a. Any roll of tobacco wrapped in paper or in any substance not containing tobacco.

b. Tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

c. Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subd. 1. a.

2. The term "cigarette" includes "roll−your−own" tobacco, which is tobacco that, because of its appearance, type, packaging or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

3. For purposes of this definition of "cigarette", 0.09 ounces of "roll−your−own" tobacco constitutes one individual "cigarette".

(e) "Master settlement agreement" means the settlement agreement and related documents entered into on November 23, 1998, by this state and the leading U.S. tobacco product manufacturers.

(f) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least $1,000,000,000, which arrangement requires that the financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the funds' principal except as is consistent with sub. (2) (b) 2.

(g) "Released claims" means released claims as that term is defined in the master settlement agreement.

(h) "Releasing parties" means releasing parties as that term is defined in the master settlement agreement.

(i) 1. "Tobacco product manufacturer" means an entity that after May 23, 2000, directly, and not exclusively through any affiliate:

a. Manufactures cigarettes anywhere, which the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer;

except that an entity that manufactures cigarettes that it intends to be sold in the United States shall not be considered a tobacco product manufacturer under this paragraph if those cigarettes are sold in the United States exclusively through an importer that is an original participating manufacturer, as defined in the master settlement agreement, that will be responsible for the payments under the master settlement agreement with respect to those cigarettes as a result of the provisions of subsection II (mm) of the master settlement agreement and that pays the taxes specified in subsection II (z) of the master settlement agreement, and the manufacturer of those cigarettes does not market or advertise those cigarettes in the United States;

b. Is the first purchaser anywhere, for resale in the United States, of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

c. Becomes a successor of an entity described in subd. 1. a. or b.

2. "Tobacco product manufacturer" does not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls within subd. 1. a., b. or c.

(j) "Units sold" means the number of individual cigarettes sold in this state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer or similar intermediary, during the year in question, as measured by the excise taxes collected by this state on containers of "roll−your−own" tobacco and on packs of cigarettes bearing the excise tax stamp of this state.

(2) REQUIREMENTS. Any tobacco product manufacturer selling cigarettes to consumers within this state, whether directly or through a distributor, retailer or similar intermediary, after May 23, 2000, shall do one of the following:

(a) Become a participating manufacturer, as that term is defined in section II (jj) of the master settlement agreement, and generally perform its financial obligations under the master settlement agreement; or

(b) 1. Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as those amounts are adjusted for inflation:

a. For 2000: $.0104712 per unit sold after May 23, 2000.

b. For each of 2001 and 2002: $.0136125 per unit sold.

c. For each of 2003 to 2006: $.0167539 per unit sold.

d. For each year after 2006: $.0188482 per unit sold.

2. A tobacco product manufacturer that places money into escrow under subd. 1. shall receive the interest or other appreciation on that money as earned. The money placed into escrow shall be released from escrow only under the following circumstances:

a. To pay a judgment or settlement on any released claim brought against that tobacco product manufacturer by this state or any releasing party located or residing in this state. Moneys shall be released from escrow under this paragraph in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under the judgment or settlement.

b. To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of the units sold in a particular year was greater than the master settlement agreement payments, as determined under section IX (i) of that agreement including after the final determination of all adjustments, that the manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert to that tobacco product manufacturer.

c. To the extent not released from escrow under subd. 2. a. or b., money shall be released from escrow and revert to the tobacco product manufacturer twenty−five years after the date on which the money was placed into escrow.

3. Each tobacco product manufacturer that elects to place money into escrow under subd. 1. shall annually certify to the attorney general by each April 15 that the tobacco product manufacturer is in compliance with subds. 1. and 2. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the moneys required under this subsection. Any tobacco product manufacturer that fails in any year to place into escrow the money required under subd. 1. shall:

a. Be required within 15 days to place money into escrow as shall bring the tobacco product manufacturer into compliance with this subsection. The court, upon a finding of violation of this paragraph, may impose a civil penalty in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow.

b. In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this subsection. The court, upon a finding of a knowing violation of this paragraph, may impose a civil penalty in an amount not to exceed 15% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow.

c. In the case of a second or subsequent knowing violation, be prohibited from selling cigarettes to consumers within this state directly or through a distributor, retailer or similar intermediary for a period not to exceed 2 years.

4. Each failure to make an annual deposit required under this subsection shall constitute a separate violation.

(3) AWARDS OF COSTS AND ATTORNEY FEES. If the attorney general is the prevailing party in an action under this section, the court shall award the attorney general costs and, notwithstanding s. 814.04 (1), reasonable attorney fees.

(4) PROMULGATION OF RULES. The department of revenue shall promulgate the rules necessary to ascertain the amount of Wisconsin excise tax paid on the cigarettes of each tobacco product manufacturer that elects to place funds into escrow under this section for each year.

History: 1999 a. 122; 2003 a. 73.

895.11 Payments under the tobacco settlement agreement. (1) In this section, "tobacco settlement agreement" means the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998.

(2) The state's participation in the tobacco settlement agreement is affirmed.

(3) All payments received and to be received by the state under the tobacco settlement agreement are the property of the state, to be used as provided by law, including a sale, assignment, or transfer of the right to receive the payments under s. 16.63. No political subdivision of the state, and no officer or agent of any political subdivision of the state, shall have or seek to maintain any claim related to the tobacco settlement agreement or any claim against any party that was released from liability by the state under the tobacco settlement agreement.

History: 2001 a. 16.

895.12 Certification under the tobacco settlement agreement. (1) DEFINITIONS. In this section:

(a) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including "menthol," "lights," "kings," and "100s," and includes any brand name, alone or in conjunction with any other word; trademark; logo; symbol; motto; selling message; recognizable pattern of colors; or other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

(b) "Cigarette" has the meaning given in s. 895.10 (1) (d).

(c) "Department" means the department of revenue.

(d) "Distributor" means a person that is authorized to affix tax stamps to packages or other containers of cigarettes under subch.

II of ch. 139 or any person that is required to pay the tax imposed on tobacco products under subch. III of ch. 139.

(e) "Master settlement agreement" has the meaning given in s. 895.10 (1) (e).

(f) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

(g) "Participating manufacturer" has the meaning given in section II (jj) of the master settlement agreement.

(h) "Qualified escrow fund" has the meaning given in s. 895.10 (1) (f).

(j) "Tobacco product manufacturer" has the meaning given in s. 895.10 (1) (i).

(k) "Units sold" has the meaning given in s. 895.10 (1) (j).

(2) CERTIFICATIONS; DIRECTORY; TAX STAMPS.

(a) *Certification.* 1. Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver in the manner prescribed by the attorney general a certification to the department and attorney general, no later than the 30th day of April each year, certifying that as of that date the tobacco product manufacturer is either a participating manufacturer or is in full compliance with s. 895.10 (2) (b).

2. A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update that list at least 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the department and attorney general.

3. A nonparticipating manufacturer shall include all of the following in its certification:

a. A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year.

b. A list of all of its brand families that have been sold in the state at any time during the current calendar year.

c. A list of any brand families sold in the state during the preceding calendar year that are no longer being sold in the state as of the date of such certification.

d. The name and address of any other manufacturer of the brand families in the preceding or current calendar year.

4. The nonparticipating manufacturer shall update the list under subd. 3. at least 30 calendar days before any addition to or modification of its brand families by executing and delivering a supplemental certification to the department and attorney general.

5. The nonparticipating manufacturer shall further certify all of the following:

a. That the nonparticipating manufacturer is registered to do business in the state or has appointed an agent for service of process and provided notice of that appointment as required by sub. (3).

b. That the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund and has executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund.

c. That the nonparticipating manufacturer is in full compliance with this section and s. 895.10.

d. The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required under s. 895.10 (2) (b).

e. The account number of the qualified escrow fund and any subaccount number for the state.

f. The amount the nonparticipating manufacturer placed into the fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each deposit, and any evidence or verification as required by the attorney general.

g. The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments under s. 895.10 (2) (b).

6. A participating manufacturer may not include a brand family in its certification unless the participating manufacturer affirms that the brand family constitutes its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined under the master settlement agreement.

7. A nonparticipating manufacturer may not include a brand family in its certification unless it affirms that the brand family constitutes its cigarettes for purposes of s. 895.10.

8. Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of s. 895.10.

9. Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for the certification under subd. 5. for a period of 5 years, unless otherwise required by law to maintain them for a greater period of time.

(b) *Directory of cigarettes approved for stamping and sale.* Not later than March 1, 2004, the attorney general shall develop and make available for public inspection a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of par. (a) and all brand families that are listed in the certifications, except as follows:

1. The attorney general shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the attorney general determines is not in compliance with par. (a) 3. to 5., unless the attorney general has determined that the violation has been cured.

2. Neither a tobacco product manufacturer nor brand family may be included or retained in the directory if the attorney general concludes, in the case of a nonparticipating manufacturer, that any of the following apply:

a. An escrow payment required under s. 895.10 (2) (b) for any period for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general.

b. Any outstanding final judgment, including interest on that judgment, for a violation of s. 895.10 has not been fully satisfied for the brand family or manufacturer.

3. The attorney general shall update the directory as necessary to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements under this paragraph.

4. Every distributor shall provide and update as necessary an electronic mail address to the attorney general for the purpose of receiving any notifications as may be required under this section.

(c) *Prohibition against stamping or sale of cigarettes not in the directory.* It shall be unlawful for any person to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or to sell, or offer or possess for sale, in this state cigarettes of a tobacco product manufacturer or brand family not included in the directory.

(3) AGENT FOR SERVICE OF PROCESS. (a) *Requirement for agent for service of process.* Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in this state as a foreign corporation or business entity shall, as a condition precedent to having its brand families included or retained in the directory under sub. (2) (b), appoint and continually engage the services of an agent in this state to act as agent for the service of process on whom all processes, and any action or proceeding against it concerning or arising out of the enforcement of this sec-

tion and s. 895.10, may be served in any manner authorized by law. That service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of the agent to the attorney general.

(b) *Notification of termination of agent.* The nonparticipating manufacturer shall provide notice to the department and attorney general 30 calendar days before termination of the authority of an agent under par. (a) and shall provide proof to the satisfaction of the attorney general of the appointment of a new agent no less than 5 calendar days before the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the department and attorney general of that termination within 5 calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

(c) *Service on secretary of state.* Any nonparticipating manufacturer whose cigarettes are sold in this state, who has not appointed and engaged an agent as required in this subsection, shall be considered to have appointed the secretary of state as that agent and may be proceeded against in courts of this state by service of process upon the secretary of state provided, however, that the appointment of the secretary of state as that agent does not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory under sub. (2) (b).

(4) REPORTING OF INFORMATION; ESCROW INSTALLMENTS. (a) *Reporting by distributors.* Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the department, each distributor shall submit a report that includes any information that the department requires to facilitate compliance with this section, including a list by brand family of the total number of cigarettes, or, in the case of roll−your−own tobacco, the equivalent stick count, for which the distributor affixed stamps during the previous calendar quarter or otherwise paid the tax due for those cigarettes. The distributor shall maintain, and make available to the department, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the department for a period of 5 years.

(b) *Disclosure of information.* The department is authorized to disclose to the attorney general any information received under this section and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this section. The department and attorney general shall share with each other the information received under this section, and may share such information with other federal, state, or local agencies only for purposes of enforcement of this section, s. 895.10, or corresponding laws of other states.

(c) *Verification of qualified escrow fund.* The attorney general may require at any time from the nonparticipating manufacturer proof, from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with s. 895.10, of the amount of money in that fund, exclusive of interest, the amount and date of each deposit into the fund, and the amount and date of each withdrawal from the fund.

(d) *Requests for additional information.* In addition to the information required to be submitted under par. (c), the attorney general may require a distributor or tobacco product manufacturer to submit any additional information, including samples of the packaging or labeling of each brand family, as is necessary to enable the attorney general to determine whether a tobacco product manufacturer is in compliance with this section.

(e) *Quarterly escrow installments.* To promote compliance with this section, the attorney general may promulgate rules requiring a tobacco product manufacturer subject to the requirements of sub. (2) (a) 3. to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit.

(5) PENALTIES AND OTHER REMEDIES. (a) *License revocation and civil penalty.* Upon a determination that a distributor has violated sub. (2) (c), the department may revoke or suspend the license of the distributor in the manner provided under s. 139.44 (4) and (7). Each stamp affixed and each sale of cigarettes or offer or possession to sell cigarettes in violation of sub. (2) (c) shall constitute a separate violation. For each violation the department may also impose a forfeiture in an amount not to exceed the greater of 500% of the retail value of the cigarettes or $5,000.

(b) *Contraband and seizure.* Any cigarettes that have been sold, offered for sale, or possessed for sale, in this state, in violation of sub. (2) (c) shall be deemed contraband and such cigarettes shall be subject to seizure as provided under s. 139.40. All cigarettes that are seized shall be destroyed and not resold.

(c) *Injunction.* The attorney general, on behalf of the department, may seek an injunction to restrain a threatened or actual violation of sub. (2) (c) or failure to comply with sub. (4) (a) or (d) by a distributor and to compel the distributor to comply with those subsections.

(d) *Unlawful sale and distribution.* It shall be unlawful for a person to sell or distribute cigarettes or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of sub. (2) (c). Section 139.44 (7), as it applies to violations under subchs. II and III of ch. 139, applies to a violation of this paragraph.

(e) *Unfair and deceptive trade practice.* A person who violates sub. (2) (c) engages in an unfair and deceptive trade practice in violation of s. 100.20.

(6) NOTICE AND REVIEW OF DETERMINATION. A determination of the attorney general to not include or to remove from the directory under sub. (2) (b) a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed under ch. 227.

(7) APPLICANTS FOR LICENSES. No person shall be issued a license or granted a renewal of a license to act as a distributor unless that person has certified in writing that the person will comply fully with this section.

(8) DATES. For the year 2003, the first report of distributors required by sub. (4) (a) shall be due 30 calendar days after November 27, 2003; the certifications by a tobacco product manufacturer described in sub. (2) (a) shall be due 45 calendar days after that date; and the directory described in sub. (2) (b) shall be published or made available within 90 calendar days after that date.

(9) PROMULGATION OF RULES. The attorney general may promulgate rules necessary to effect the purposes of this section.

(10) RECOVERY OF COSTS AND FEES BY ATTORNEY GENERAL. In any action brought by the state to enforce this section, including an action under sub. (5) (c) the state shall be entitled to recover the costs of investigation and prosecution expert witness fees, court costs, and reasonable attorney fees.

(11) TRANSFER OF PROFITS FOR VIOLATIONS. If a court determines that a person has violated this section, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be transferred and paid to the state. Unless otherwise expressly provided, the remedies or penalties provided by this section are cumulative.

(12) CONSTRUCTION. If a court finds that the provisions of this section and of s. 895.10 conflict and cannot be harmonized, then the provisions of s. 895.10 shall control. If any part of this section causes s. 895.10 to no longer constitute a qualifying or model statute, as those terms are defined in the master settlement agreement, then that portion of this section is not valid.

History: 2003 a. 73.

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 employees shall have a half holiday on the day of such primary election and a holiday on the day of such municipal election, and that employees 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.

895.225 Fire Prevention Week. (1) The week in October during which October 8 falls is designated Fire Prevention Week and the Saturday of the preceding week is designated Wisconsin Firefighters Memorial Day. In conjunction with the week, appropriate observances, ceremonies, exercises, and activities may be held under state auspices to do all of the following:

(a) Commemorate 2 of the most devastating fires in U.S. history, both of which started on October 8, 1871, the Peshtigo fire and the Chicago fire.

(b) Study fire safety tips to help avoid home fires.

(c) Recognize that well−trained, dedicated, and well−equipped fire departments are important to all of the residents of this state.

(d) Recognize that thousands of state firefighters, both full−time and volunteer, dedicate themselves to protecting lives and property.

(e) Express the gratitude of the residents of this state for the valuable contributions that firefighters have made to the other residents of this state.

(f) Honor those contributions and memorialize the firefighters of this state who have died while performing their duties.

(2) The chief officials of local governments and the people of the state are invited either to join and participate in the observances, ceremonies, exercises, and activities under sub. (1) that may be held under state auspices or to conduct similar observances in their respective localities.

History: 2003 a. 56, 320.

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 pro-

portional 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 Wis. 2d 617, 534 N.W.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 and filed 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; 1999 a. 96.

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 Wis. 2d 585, 784 (1975); 1977 c. 187 s. 135.

This section applies to all bonds, not just bail bonds. Aiello v. Village of Pleasant Prairie, 206 Wis. 2d 67, 556 N.W.2d 697 (1996).

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.

A county has the option to refuse payment of its sheriff's criminal defense attorney's fees. Bablitch & Bablitch v. Lincoln County, 82 Wis. 2d 574, 263 N.W.2d 218 (1978).

This section allows a municipality or county to pay an officer's attorney fees if it so elects. If the municipality refuses payment, the officer has no cause of action against the municipality under this section, even if the municipality had a practice of reimbursing attorney fees and costs incurred and it failed to pay because of political concerns. Murray v. City of Milwaukee, 2002 WI App 62, 252 Wis. 2d 613, 642 N.W.2d 541.

A city may reimburse a commissioner of the city redevelopment authority for his legal expenses incurred when 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 attorney 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 a 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 employees, 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 employee while engaged in the line of the employee's duty as an employee, 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 employee 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 employees, 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 employees, that the injury or death was caused in whole or in part by the want of ordinary care of the injured employee, where such want of ordinary care was not willful.

(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.

The fellow servant defense is not available to a farm employer of a child employed in violation of child labor laws. Tisdale v. Hasslinger, 79 Wis. 2d 194, 255 N.W.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 the principal's account shall be according to the practice prescribed by ch. 862 for personal representatives. Upon the trust fund or estate being found or made good and paid over or properly secured, the 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; 2001 a. 102.

895.41 Employee's cash bonds to be held in trust; duty of employer; penalty. (1) Where any person requests any employee 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 employee, and shall not be withdrawn except after an accounting had between the employer and employee, 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 employee and shall be turned over to said employee 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 employee 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 employee 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 employee's death and before the filing of a petition for letters testamentary or other letters authorizing the administration 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 employee as provided in sub. (1).

(c) The amount of the cash bond, together with principal and interest, to which the deceased employee would have been entitled had the deceased employee lived, shall, as soon as paid out by the depository, be turned over to the relative of the deceased employee 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 of the cash bond 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 personal representatives. 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; 2001 a. 102.

895.42 Deposit of undistributed money and property by administrators and others. (1) (a) In this subsection, "trust company" means any trust company or any state or national bank in this state that is authorized to exercise trust powers.

(b) If 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 personal representative, 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, and otherwise to some other person, and the court finds any of the following, the court may direct the officer having custody or control of the money or property to deposit the money or property with any trust company:

1. 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.

2. That the money or other personal property, including any legacy or share of intestate property, cannot be delivered to the person entitled to the money or property because the 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 similar business.

(c) Any officer depositing money or property with a trust company under par. (b), shall take the trust company's receipt for the deposit. The receipt shall, to the extent of the deposit, constitute a complete discharge of the officer in any accounting made by the officer in the 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; 2001 a. 102.

895.43 Intentional killing by beneficiary of contract. The rights of a beneficiary of a contractual arrangement who kills the principal obligee under the contractual arrangement are governed by s. 854.14.

History: 1981 c. 228; 1987 a. 222; 1997 a. 188.

895.435 Intentional killing by beneficiary of certain death benefits. The rights of a beneficiary to receive benefits payable by reason of the death of an individual killed by the beneficiary are governed by s. 854.14.

History: 1981 c. 228; 1987 a. 222; 1997 a. 188.

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. 106.52 (1) (d).

(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 employee of a lodging establishment may deny lodging to an adult if the owner or employee 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 employee 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; 1999 a. 82.

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, employee or agent, or an insurer, the insurer's agent or employee 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, employee or agent, or of the insurer, the insurer's agent or employee 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 employee performing the safety inspection or advisory services when required to do so under the provisions of a written service contract.

History: 1991 a. 39.

A "written service contract" is a contract that obligates the insurer to provide loss control services to an insured. Samuels Recycling Co. v. CNA Insurance Cos. 223 Wis. 2d 233, 588 N.W.2d 385 (Ct. App. 1998).

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 employee 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 employee 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 employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. 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 employee, 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 employee 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, employee 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 employee to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employee as soon as reasonably possible is a bar to recovery by the officer or employee 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 employee legal counsel and the offer is refused by the defendant officer or employee. If the officer, employee or agent of the state refuses to cooperate in the defense of the litigation, the officer, employee 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 employee 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, employees 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, employees 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, employee 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 injured patients and families 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. 291.97 (2) or 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 5124 that is commenced against a state officer or state employee 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 employee 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 employee 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.

(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 Wis. 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; 1997 a. 35; 1999 a. 185; 2003 a. 111.

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

Highway commission supervisors who are 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 Wis. 2d 92, 203 N.W.2d 673 (1973).

"Litigation" under sub. (1) refers only to civil proceedings. Bablitch & Bablitch v. Lincoln County, 82 Wis. 2d 574, 263 N.W.2d 218 (1978).

Mandatory payment under sub. (1) did not apply to an official who was sued for illegally retaining his salary due to an alleged failure to comply with the statutory requirements for a bond and oath of office. The official was not acting in his official capacity when filing the bond or taking the oath or in defending a related suit. Thuermer v. Village of Mishicot, 86 Wis. 2d 374, 272 N.W.2d 409 (Ct. App. 1978).

An insurer of public employees had no right of recovery under s. 270.58 (1) [now s. 895.46 (1)] Horace Mann Insurance Co. v. Wauwatosa Board of Education, 88 Wis. 2d 385, 276 N.W.2d 761 (1979).

The state could not be sued as an indemnitor under s. 270.58 (1) [now s. 895.46 (1)]. Fiala v. Voight, 93 Wis. 2d 337, 286 N.W.2d 824 (1980).

The state may not be sued directly for the tortious acts of its employees. Miller v. Smith, 100 Wis. 2d 609, 302 N.W.2d 468 (1981).

The "color of law" element of 42 USC 1983 lawsuit is not identical to the "scope of employment" element under sub. (1). Cameron v. Milwaukee, 102 Wis. 2d 448, 307 N.W.2d 164 (1981).

Whether alderpersons were acting within the scope of their employment was inappropriately decided by summary judgment. Schroeder v. Schoessow, 108 Wis. 2d 49, 321 N.W.2d 131 (1982).

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

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

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

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

A former school employee sued by the school district over her employment contract was not entitled to costs under sub. (1) (a). Pardeeville Area School District v. Bomber, 214 Wis. 2d 396, 571 N.W.2d 189 (Ct. App. 1997).

Voting members of a commission created by 2 villages were public officers protected by s. 895.46 (1). 74 Atty. Gen. 208.

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

The University of Wisconsin has no authority to agree to hold harmless a county that incurs liability because of a university officer's torts, but common law would require the officer to indemnify the county and statutory indemnification would require the state to indemnify the 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 that are not intended to benefit the employer when those actions further the objectives of employment. Hibma v. Odegaard, 769 F.2d 1147 (1985).

Section 893.80 (4) bars direct suits against municipalities for the torts of their employees. It does not preclude suing the officer directly and using s. 895.46 to indirectly recover from the municipality. Graham v. Sauk Prairie Police Commission. 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 (1973).

The purpose of this section is not to transform any suit against a state employee into a suit against state, but to shield state employees from monetary loss in tort suits. Ware v. Percy, 468 F. Supp. 1266 (1979).

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

If an employee is part of an inter−municipal team under s. 66.305 [now s. 66.0313], the agency requesting the team's services is the de facto employer for purposes of indemnification under this section. Leibenstein v. Crowe, 826 F. Supp. 1174 (1992).

A sheriff represents the county when enforcing the law. Sovereign immunity for state officials under the 11th amendment to the U.S. constitution does not apply. Abraham v. Piechowski, 13 F. Supp. 2d 1023 (1998).

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 employees, 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 employee 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 employees as soon as reasonably possible shall bar recovery by the defendant, its members, officers or employees from the state under this section. Attorney fees and expenses may not be recovered if the state offers the member, officer or employee legal counsel and the offer is refused.

History: 1977 c. 344, 447.

895.48 Civil liability exemption; emergency care, athletic events health care, hazardous substances and information concerning paternity. (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 employees 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 or athletic trainer licensed under ch. 448, chiropractor licensed under ch. 446, dentist licensed under ch. 447, emergency medical technician licensed under s. 146.50, first responder certified under s. 146.50 (8), physician assistant licensed under ch. 448, registered nurse licensed under ch. 441, or a massage therapist or bodyworker issued a certificate under ch. 460 who renders voluntary health care to a participant in an athletic event or contest sponsored by a nonprofit corporation, as defined in s. 66.0129 (6) (b), a private school, as defined in s. 115.001 (3r), a public agency, as defined in s. 46.856 (1) (b), 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, athletic trainer, chiropractor, dentist, emergency medical technician, first responder, physician assistant, registered nurse, massage therapist or bodyworker 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.

(3) Any member of the staff of a hospital who is designated by the hospital and trained by the department of workforce development under s. 69.14 (1) (cm) and who in good faith provides to a child's available parents written information that is provided by the department of workforce development and oral information or an audio or video presentation about the form that is prescribed by the state registrar under s. 69.15 (3) (b) 3. and about the significance and benefits of, and alternatives to, establishing paternity, under the requirements of s. 69.14 (1) (cm), is immune from civil liability for his or her acts or omissions in providing that oral information or audio or video presentation and written information.

(4) (a) Any of the following who meets the applicable requirements of s. 146.50 (8g) and who acts within the applicable limitations of s. 146.50 (8g) is immune from civil liability for the acts or omissions of a person in rendering in good faith emergency care by use of a semiautomatic defibrillator under s. 146.50 (8g) to an individual who appears to be in cardiac arrest:

1. The person who renders the care.

2. The owner of the semiautomatic defibrillator, as specified in s. 146.50 (8g) (c).

3. The person who provides the semiautomatic defibrillator for use, as specified in s. 146.50 (8g) (c).

4. The provider of training required under s. 146.50 (8g) (b).

(b) The immunity specified in par. (a) does not extend to any of the following:

1. A person whose act or omission resulting from the use or the provision for use of the semiautomatic defibrillator constitutes gross negligence.

2. A health care professional who renders emergency care for compensation and within the scope of his or her usual and customary employment or practice at a hospital or other institution

equipped with hospital facilities, at the scene of an emergency or accident, enroute to a hospital or other institution equipped with hospital facilities or at a physician's office.

History: 1977 c. 164; 1987 a. 14; 1989 a. 31; 1993 a. 109; 1995 a. 227; 1997 a. 67, 156, 191; 1999 a. 7, 9, 32, 56, 186; 2001 a. 74; 2003 a. 33.

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

Incidental benefits received by volunteer members of the National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in a loss of civil liability immunity under the 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 willful 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.

The application of this section is not limited to equine professionals. The exception to immunity under sub. (3) (a) for faulty equipment did not apply when no connection between the equipment and the plaintiff's injuries was shown. Kangas v. Perry, 2000 WI App 234, 239 Wis. 2d 392, 620 N.W.2d 429.

"Provides an equine" in sub. (3) (b) means to make available for use an equine that the provider either owns or controls and does not encompass an equine previously sold or given to the individual claiming damages. Barritt v. Lowe, 2003 WI App 185, 266 Wis. 2d 863, 669 N.W.2d 189, 03−0034.

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 local 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 division of emergency management in the department of military affairs 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 local 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; 1997 a. 27; 2001 a. 16.

A town that responds to a Level B hazardous waste release in its own capacity in the absence of a county wide agreement does not receive immunity from civil liability under sub. (2), 1997 Stats., but other statutory and common law immunities apply. OAG 1−99.

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.

Cross Reference: See also ch. HFS 37, Wis. adm. code.

Foster parents are not agents of the county for purposes of tort liability. Kara B. v. Dane County, 198 Wis. 2d 24, 542 N.W.2d 777 (Ct. App. 1995), 94−1081. See also Estate of Cooper v. Milwaukee County, 103 F. Supp. 2d 1124 (2000)

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, employees 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) "Employee" has the meaning given in s. 101.01 (3) and also includes a former employee.

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

(c) "Reference" means a statement about an employee's job performance or qualifications for employment and includes a statement about an employee's job performance or qualifications for employment provided pursuant to the settlement of a dispute between the employer and employee or provided pursuant to an agreement between the employer and employee relating to the termination of the employee's employment.

(2) An employer who, on the request of an employee or a prospective employer of the employee, 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; 1997 a. 35.

The malice referred to in sub. (2) is express malice, which requires a showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed, and not actual malice, which requires statements made with knowledge of falsity or with reckless disregard for the truth. Gibson v. Overnite Transportation Co. 2003 WI App 210, 267 Wis. 2d 415, 671 N.W.2d 388, 02−3158.

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 an indemnity clause in a contract. Gerdmann v. U.S. Fire Insurance Co. 119 Wis. 2d 367, 350 N.W.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.

(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

(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; 2001 a. 33.

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

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

Disclosure of private information to one person or to a small group does not, as a matter of law in all cases, fail to satisfy the publicity element of an invasion of privacy claim. Whether a disclosure satisfies the publicity element of an invasion of privacy claim depends upon the particular facts of the case and the nature of plaintiff's relationship to the audience who received the information. Pachowitz v. LeDoux, 2003 WI App 120, 265 Wis. 2d 631, 666 N.W.2d 88, 02−2100.

An action for invasion of privacy requires : 1) a public disclosure of facts regarding the plaintiff: 2) the facts disclosed were private; 3) the private matter is one that would be highly offensive to a reasonable person of ordinary sensibilities, and 4) the party disclosing the facts acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter or with actual knowledge that none existed. In order to find public disclosure, the matter must be regarded as substantially certain to become one of public knowledge. Olson v. Red Cedar Clinic, 2004 WI App 102, ___ Wis. 2d ___, 681 N.W.2d 306, 03−2198.

The right to privacy law, s. 895.50, does not affect the duties of custodians of public records under s. 19.21. 68 Atty. Gen. 68.

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

A person's religious affiliation, standing alone, is not so private that publication would offend a reasonable person and constitute an invasion of privacy under sub. (2) (c). Briggs & Stratton Corp. v. National Catholic Reporter Publishing Co. 978 F. Supp 1195 (1997).

The exclusivity provision of the Workers Compensation Act does not bar a claim for invasion of privacy under s. 895.50. Marino v. Arandell Corp. 1 F. Supp. 2d 947 (1998).

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.

The Scope of Wisconsin's Privacy Statute. Backer. Wis. Law. Sept. 2003.

895.505 Disposal of records containing personal information. (1) DEFINITIONS. In this section:

(a) "Credit card" has the meaning given in s. 421.301 (15).

(am) "Dispose" does not include a sale of a record or the transfer of a record for value.

(b) "Financial institution" means any bank, savings bank, savings and loan association or credit union that is authorized to do business under state or federal laws relating to financial institutions, any issuer of a credit card or any investment company.

(c) "Investment company" has the meaning given in s. 180.0103 (11e).

(d) "Medical business" means any organization or enterprise operated for profit or not for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that pos-

sesses information, other than personnel records, relating to a person's physical or mental health, medical history or medical treatment.

(e) "Personal information" means any of the following:

1. Personally identifiable data about an individual's medical condition, if the data are not generally considered to be public knowledge.

2. Personally identifiable data that contain an individual's account or customer number, account balance, balance owing, credit balance or credit limit, if the data relate to an individual's account or transaction with a financial institution.

3. Personally identifiable data provided by an individual to a financial institution upon opening an account or applying for a loan or credit.

4. Personally identifiable data about an individual's federal, state or local tax returns.

(f) "Personally identifiable" means capable of being associated with a particular individual through one or more identifiers or other information or circumstances.

(g) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

(h) "Tax preparation business" means any organization or enterprise operated for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that for a fee prepares an individual's federal, state or local tax returns or counsels an individual regarding the individual's federal, state or local tax returns.

(2) DISPOSAL OF RECORDS CONTAINING PERSONAL INFORMATION. A financial institution, medical business or tax preparation business may not dispose of a record containing personal information unless the financial institution, medical business, tax preparation business or other person under contract with the financial institution, medical business or tax preparation business does any of the following:

(a) Shreds the record before the disposal of the record.

(b) Erases the personal information contained in the record before the disposal of the record.

(c) Modifies the record to make the personal information unreadable before the disposal of the record.

(d) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the record for the period between the record's disposal and the record's destruction.

(3) CIVIL LIABILITY; DISPOSAL AND USE. (a) A financial institution, medical business or tax preparation business is liable to a person whose personal information is disposed of in violation of sub. (2) for the amount of damages resulting from the violation.

(b) Any person who, for any purpose, uses personal information contained in a record that was disposed of by a financial institution, medical business or tax preparation business is liable to an individual who is the subject of the information and to the financial institution, medical business or tax preparation business that disposed of the record for the amount of damages resulting from the person's use of the information. This paragraph does not apply to a person who uses personal information with the authorization or consent of the individual who is the subject of the information.

(4) PENALTIES; DISPOSAL AND USE. (a) A financial institution, medical business or tax preparation business that violates sub. (2) may be required to forfeit not more than $1,000. Acts arising out of the same incident or occurrence shall be a single violation.

(b) Any person who possesses a record that was disposed of by a financial institution, medical business or tax preparation business and who intends to use, for any purpose, personal information contained in the record may be fined not more than $1,000 or imprisoned for not more than 90 days or both. This paragraph does not apply to a person who possesses a record with the authorization or consent of the individual whose personal information is contained in the record.

History: 1999 a. 9.

Disposing Medical, Financial Records. Franklin. Wis.Law. Dec. 1999.

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 individual 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 willful 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 an 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 willful 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; 1997 a. 237.

895.517 Liability exemption: solid waste donation or sale. (1)

In this section:

(a) "Charitable organization" has the meaning given in s. 895.51 (1) (b).

(b) "Municipality" has the meaning given in s. 289.01 (23).

(c) "Qualified food" has the meaning given in s. 895.51 (1) (e).

(d) "Responsible unit" has the meaning given in s. 287.01 (9).

(e) "Solid waste" has the meaning given in s. 289.01 (33).

(2) Any person who donates or sells, at a price not exceeding overhead and transportation costs, solid waste, or a material that is separated from mixed soil waste, to a materials reuse program that is operated by a charitable organization, municipality or responsible unit is immune from civil liability for the death of or injury to an individual or the damage to property caused by the solid waste or material donated or sold by the person.

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

(4) This section does not apply to the sale or donation of qualified food.

History: 1997 a. 60.

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 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, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" 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, employee 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, employee 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, employee 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, employee 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, employee 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, employee 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, employees 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, employee 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 employee 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 employee 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 employee 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 employee 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; 1997 a. 242.

NOTE: 1983 Wis. Act 418, which created this section, contains a statement of "legislative intent" in section 1.

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

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

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

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

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

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

For purposes of sub. (4) (b), conduct is "malicious" when it is the result of hatred, ill will, or revenge, or is undertaken when insult or injury is intended. Ervin v. City of Kenosha, 159 Wis. 2d 464, 464 N.W.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 Wis. 2d 418, 466 N.W.2d 233 (Ct. App. 1991).

A young child's inability to intend to engage in recreational activity does not render landowner immunity inapplicable when the activity is recreational in nature. Nelson v. Schreiner, 161 Wis. 2d 798, 469 N.W.2d 214 (Ct. App. 1991).

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

A party is not immune as an occupant when evidence unequivocally shows intentional and permanent abandonment of the premises had occurred. Mooney v. Royal Ins. Co. 164 Wis. 2d 516, 476 N.W.2d 287 (Ct. App. 1991).

Walking to or from a non−immune activity does not change a landowner's status. Hupf v. City of Appleton, 165 Wis. 2d 215, 477 N.W.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 the property owner. A captive deer is a wild animal. Hudson v. Janesville Conservation Club, 168 Wis. 2d 436, 484 N.W.2d 132 (1992).

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

A church that 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 Mutual Ins. Co. 179 Wis. 2d 774, 508 N.W.2d 67 (Ct. App. 1993).

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 Wis. 2d 705, 516 N.W.2d 427 (1994).

Recreational immunity does not extend to activities of the landowner 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 Wis. 2d 705, 516 N.W.2d 427 (1994).

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

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

That a local firefighter's picnic generated profits that 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 Wis. 2d 83, 549 N.W.2d 575 (Ct. App. 1995), 95−0796.

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 Wis. 2d 624, 547 N.W.2d 602 (1996), 94−2549.

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 Wis. 2d 624, 547 N.W.2d 602 (1996), 94−2549.

Recreational immunity does not attach to a landowner when an act of the landowner's officer, employee, or agent that is unrelated to the maintenance or condition of the land causes injury to a recreational land user. Kosky v. International Association of Lions Clubs, 210 Wis. 2d 464, 565 N.W.2d 260 (Ct. App. 1997).

A portable ice shanty located on a frozen lake does not qualify as recreational "property," and its presence on the lake is insufficient to establish its owner as an "occupant" of the lake entitled to recreational immunity. Doane v. Helenville Mutual Insurance Co. 216 Wis. 2d 344, 575 N.W.2d 734 (Ct. App. 1998).

Walking for exercise through a park on the way to do errands was a recreational activity. Lasky v. City of Stevens Point, 220 Wis. 2d 1, 582 N.W.2d 64 (Ct. App. 1998).

To find immunity under this section, the court must examine not only the plaintiff's reason for being on the property, but also the activity taking place on the property. While a spectator's presence at a school football game is recreational, the exception from landowner immunity for injuries incurred in recreational activities for sponsors of organized sports extends to spectators, not just participants. Meyer v. School District of Colby, 226 Wis. 2d 704, 595 N.W.2d 339 (1999).

An attendee at a fair who was injured while attempting to capture a runaway steer was engaged in recreational activity. There is no "Good Samaritan" exception to the recreational immunity provided by this section. Schultz v. Grinnell Mutual Reinsurance, Co. 229 Wis. 2d 513, 600 N.W.2d 243 (Ct. App. 1999).

Immunity for nonprofit organizations is not limited to those that act in the public interest and gratuitously open their land to the general public. It is not a violation of equal protection to treat "non−charitable" nonprofit organizations differently than private property owners. Bethke v. Lauderdale of LaCrosse, Inc. 2000 WI App 107, 235 Wis. 2d 103, 612 N.W.2d 332.

Although individual condominium unit owners held title to an undivided interest in common areas, a condominium association was an occupant and therefore an owner under sub. (1) (d). Bethke v. Lauderdale of LaCrosse, Inc. 2000 WI App 107, 235 Wis. 2d 103, 612 N.W.2d 332.

The owner of property subject to an easement is an "owner" under sub. (1) (d). The plaintiff's walking across the easement to gain access to a boat was recreational as the walk was inextricably connected to recreational activity. The plaintiff user of the easement, who was granted the right to use it by a 3rd−person holder of the easement, was not a social guest of the land owner under sub. (6) (d) expressly and individually invited to use the property. The fact that the easement owner granted the right of use as part of the sale of the boat did not render the landowner exempt from immunity under sub. (6) (a). Urban v. Grasser, 2001 WI 63, 243 Wis. 2d 673, 627 N.W.2d 511.

An "owner" under sub. (1) (d) 1. includes an "occupant." A child who is an occupant is capable of extending an invitation that triggers the social guest exception. under sub. (6) (d). A guest's continuous act that begins on an owner's property but propels the guest a few feet from the property where an injury occurs compelled the conclusion that sub. (6) (d) must be construed to allow for the extension of the social guest status to the injuries suffered. Waters v. Pertzborn, 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497.

This section is liberally construed in favor of property owners when the activity in question is not specifically listed but is substantially similar to listed activities or when the activity is undertaken in circumstances substantially similar to the circumstances of a recreational activity. Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527.

Because a child's subjective assessment of recreational activity could include every form of child's play, an objective, reasonable adult standard must be applied to determine whether a child's play is recreational. Crawling through stacks of baled paper at an industrial site while lighting matches and starting fires was not recreational activity. Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527.

The nature of property can be a significant factor in determining whether an activity is recreational, although it is not dispositive. That a commercial site is used only for a business purpose that is not open to the public, as indicated by a fence to keep people away, argues against childrens' mischievous conduct on the premises being substantially similar to a recreational activity. Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527.

A deer stand is a "structure" under sub. (1) (f). A structure or improvement need not be owned by the owner of the underlying land to constitute "property" under sub. (1) (f). Peterson v. Midwest Security Insurance Co. 2001 WI 131, 248 Wis. 2d 567, 636 N.W.2d 727.

A suit by an elementary school student injured while playing during a mandatory school recess was not barred by this section because the student did not enter the school property to engage in a recreational activity, but for education purposes in order to comply with the state's compulsory attendance and truancy laws. Auman v. School District of Stanley−Boyd, 2001 WI 125, 248 Wis. 2d 548, 635 N.W.2d 762.

Sponsorship under sub. (1) (g) contemplates a relationship between the person or organization paying for or planning the project or activity and the intended beneficiary and envisions a relationship between the sponsor and the activity resulting in financial benefits to the sponsor. That a city sponsored one soccer association did not mean it was a sponsor of all organized soccer team activities on city fields. Miller v. Wausau Underwriters Insurance Co. 2003 WI App 58, 260 Wis. 2d 581, 659 N.W.2d 494, 02−1632.

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

Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse: Why Property Owners Should Fear the Mischief of Boys at Play and Wisconsin Supreme Court Justices at Work. Salva. 2002 WLR 999.

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 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, sport shooting 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; 1997 a. 242.

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 Wis. 2d 409, 541 N.W.2d 742 (1995), 93−1130.

Sub. (3) does not mean that all who ski are negligent under all circumstances. Sub. (3) and (4) when read together impose an obligation of ordinary care on a skier to avoid foreseeable harms, including adherence to the conditions enumerated in sub. (4). Ansani v. Cascade Mountain, Inc. 223 Wis. 2d 39, 588 N.W.2d 321 (Ct. App. 1998).

895.527 Sport shooting range activities. (1) In this section, "sport shooting range" means an area designed and operated for the use and discharge of firearms.

(2) A person who owns or operates a sport shooting range is immune from civil liability related to noise resulting from the operation of the sport shooting range.

(3) A person who owns or operates a sport shooting range is not subject to an action for nuisance or to zoning conditions related to noise and no court may enjoin or restrain the operation or use of a sport shooting range on the basis of noise.

(4) Any sport shooting range that exists on June 18, 1998, may continue to operate as a sport shooting range at that location notwithstanding any zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35 or 62.23 (7), if the sport shooting range is a lawful use or a legal nonconforming use under any zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35 or 62.23 (7) that is in effect on June 18, 1998.

(5) Any sport shooting range that exists on June 18, 1998, may continue to operate as a sport shooting range at that location notwithstanding all of the following:

(a) Section 167.30, 941.20 (1) (d) or 948.605 or any rule promulgated under those sections regulating or prohibiting the discharge of firearms.

(b) Section 66.0409 (3) (b) or any ordinance or resolution.

(c) Any zoning ordinance that is enacted, or resolution that is adopted, under s. 59.69, 60.61, 60.62, 61,35 or 62.23 (7) that is related to noise.

(6) A city, village town or county may regulate the hours between 11:00 p.m. and 6:00 a.m. that an outdoor sport shooting range may operate, except that such a regulation may not apply to a law enforcement officer as defined in s. 165.85 (2) (c), a member of the U.S. armed forces or a private security person as defined in s. 440.26 (1m) (h) who meets all of the requirements under s. 167.31 (4) (a) 4.

(7) A person who is shooting in the customary or a generally acceptable manner at a sport shooting range between the hours of 6:00 a.m. and 11:00 p.m. is presumed to not be engaging in disorderly conduct merely because of the noise caused by the shooting.

History: 1997 a. 242; 2001 a. 30.

This section does not prohibit the application of a zoning ordinance to a sport shooting range unless the range was a lawful use under the ordinance as of June 18, 1998. Town of Avon v. Edgar Oliver, 2002 WI App 97, 253 Wis. 2d 647, 644 N.W.2d 260.

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 willful 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. 292.11 (5).

(2) Notwithstanding any provision of s. 93.57, 299.11, 299.13, 299.31, 299.43, 299.45, 299.51, 299.53 or 299.55, subchs. II and IV of ch. 30, ch. 29, 166, 281, 283, 289, 291 or 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:

(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. 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.

(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. 292.11.

History: 1995 a. 192; 1997 a. 35, 252; 2003 a. 33.

895.555 Liability exemption; anhydrous ammonia. (1) LIABILITY EXEMPTION. Except as provided under sub. (2), any person who owns, maintains, or installs anhydrous ammonia equipment, as defined in s. 101.10 (1) (b), or who uses anhydrous ammonia for any legal purpose is immune from any civil liability for acts or omissions relating to the anhydrous ammonia equipment or to anhydrous ammonia that cause damage or injury to an individual, if that damage or injury occurs during the individual's violation of s. 101.10 (3) (c), (d), or (e).

(2) EXCEPTION. A person is not immune from civil liability under sub. (1) if the damage or injury is caused by the person's reckless or wanton acts or omissions or by acts or omissions intended by the person to cause damage or injury.

History: 2001 a. 3.

895.56 Liability exemption; handling of petroleum−contaminated soil under contract with the department of transportation. (1) In this section:

(a) "Person" means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency, as defined in s. 1.12 (1) (b), or federal agency.

(b) "Petroleum−contaminated soil" means soil contaminated with material derived from petroleum, natural gas or asphalt deposits, including gasoline, diesel and heating fuels, liquified petroleum gases, lubricants, waxes, greases and petrochemicals.

(2) A person is immune from liability arising under s. 292.11 and from any liability for the removal or remedying of petroleum−contaminated soil or for damages resulting from the person's actions or omissions relating to petroleum−contaminated soil if all of the following apply:

(a) The acts or omissions by the person occurred while performing a contract entered into under s. 84.06 (2), including acts or omissions by any person who has a direct contractual relationship with the prime contractor, as defined in s. 779.01 (2) (d), under a contract entered into under s. 84.06 (2) to perform labor or furnish materials.

(b) In the course of performing a contract described in par. (a), petroleum−contaminated soil was encountered on the property on which the contracted activity is taking place, and the petroleum−contaminated soil cannot be avoided in performing the contract.

(c) The acts or omissions involving petroleum−contaminated soil on the property were required by reasonably precise specifications in the contract entered into under s. 84.06 (2), and the acts or omissions conformed to those specifications, or were otherwise directed by the department of transportation or by the department of natural resources.

(3) Subsection (2) does not apply to any person to whom any of the following applies:

(a) The person brought petroleum−contaminated soil onto the property or otherwise caused the initial contamination of the property with a hazardous substance, as defined in s. 292.01 (5).

(b) The person's act or omission constitutes gross negligence or involves reckless, wanton or intentional misconduct.

(c) The person fails to warn the department of transportation or the department of natural resources about the presence of petroleum−contaminated soil encountered at the site, if the petroleum−contaminated soil was reasonably known to the person but not to the department of transportation or to the department of natural resources.

(d) The person is under a previous or separate contract with a state agency, as defined in s. 1.12 (1) (b), solely to remove or remedy petroleum−contaminated soil or hazardous substances on the property.

(e) The person causes personal injury or wrongful death.

History: 1997 a. 237.

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

(ag) "Animal" means all vertebrate and invertebrate species, including mammals, birds, fish and shellfish but excluding humans.

(am) "Humane officer" means an officer appointed under s. 173.03.

(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, punitive damages, attorney fees and interest on the amount of the damages incurred at the rate of 12% per year from the date of the intentional release. The damages awarded 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, employee of the department of natural resources while on any land licensed under s. 169.15, 169.18, or 169.19, subject to certification under s. 90.21, or designated as a wildlife refuge under s. 29.621 (1) or employee of the department of agriculture, trade and consumer protection if the officer's or employee's acts are in good faith and in an apparently authorized and reasonable fulfillment of his or her duties.

(4) (a) In this subsection, "security device" includes any of the following:

1. Any fence enumerated under s. 90.02.

2. A theft alarm signal device, a burglar alarm or any other security alarm system or device.

3. A dog.

(b) Subject to par. (d), an owner or custodian of a confined animal is immune from civil liability for any damages to a person who suffers the damages while violating or attempting to violate s. 943.75 (2) or (2m).

(c) An owner or custodian of an animal that is released in violation of s. 943.75 (2) or (2m) is immune from liability for any damages caused by that released animal.

(d) The immunity provided to an owner or custodian of a confined animal under par. (b) does not apply if the injury was caused by a security device that is intended or likely to cause death or great bodily harm, as defined in s. 939.22 (14).

History: 1991 a. 20, 269; 1993 a. 27; 1995 a. 79; 1997 a. 27, 192, 248; 1999 a. 45; 2001 a. 56.

895.58 Liability exemption; use of special waste under public works contracts. (1) In this section:

(a) "Department" means the department of natural resources.

(b) "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an agency or corporation of such a political subdivision or special purpose district, or a combination or subunit of any of the foregoing.

(c) "Public works project" means any work done under contract to a state agency or local governmental unit.

(cr) "Solid waste" has the meaning given in s. 289.01 (33).

(d) "Special waste" means any type of solid waste for which the department has granted a waiver or an exemption under s. 289.43 (3), (4), (7), or (8) or that is exempt by rule promulgated under s. 289.05 (4).

(2) The department may characterize a special waste as suitable for beneficial use in public works projects. The department shall compile and maintain a list of special wastes that are suitable for use in specified types of public works projects in a format readily available to the general public and only those special wastes may be required by contracting agencies to be used in a public works project. The list may include conditions under which the special waste may be used in the public works project in order for subs. (3) and (4) to be applicable. The list under this subsection is not a rule under s. 227.01 (13).

(3) Special waste, when used in a public works project, is exempt from regulation as solid waste under ch. 289 if all of the applicable conditions included in the list compiled under sub. (2) are met.

(4) A person is immune from liability for the use of special waste on a public works project or for damages resulting from the person's actions or omissions relating to the use of the special waste on a public works project if all of the following apply:

(a) The acts or omissions by the person occurred while performing work under a contract for a public works project including acts or omissions by any person who has a direct contractual relationship with the prime contractor, as defined in s. 779.01 (2) (d), under a contract for a public works project to perform labor or furnish materials.

(b) The acts or omissions involving the special wastes were required or permitted in a contract for a public works project and the acts or omissions conformed to the provisions of the contract.

(5) Subsection (4) does not apply to any person to whom either of the following applies:

(a) The person's act or omission involved reckless, wanton or intentional misconduct.

(b) The person's act or omission resulted in injury or death to an individual.

History: 1999 a. 9, 185; 2003 a. 88.

895.59 Liability exemption; disclosure of rule violations. (1) In this section:

(a) "Agency" has the meaning given in s. 227.01 (1).

(b) "Small business" has the meaning given in s. 227.114 (1), but does not include an entity, as defined in s. 48.685 (1) (b) or 50.065 (1) (c).

(2) Each agency shall promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in the enforcement of rules and guidelines against a small business. The rule promulgated under this subsection shall include the reduction or waiver of penalties for a voluntary disclosure, by a small business, of actual or potential violations of rules or guidelines. The rule promulgated under this subsection may include the consideration of the violator's ability to pay when determining the amount of any monetary penalty, assessment, or surcharge. The rule promulgated under this subsection shall specify when the agency will not allow discretion in the enforcement of a rule or guideline against small businesses and shall include all of the following situations in which discretion is not allowed:

(a) The agency discovers the violation before the small business discloses the violation.

(b) The violation is disclosed after an agency audit or inspection of the small business has been scheduled.

(c) The violation was identified as part of the monitoring or sampling requirements that are consistent with the requirements under an existing permit.

(d) The violation results in a substantial economic advantage for the small business.

(e) The small business has repeatedly violated the same rule or guideline.

(f) The violation may result in an imminent endangerment to the environment, or to public health or safety.

History: 2003 a. 145.

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

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

(b) "Employee" 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 or university senior 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 employee which the employee 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 employee 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 employee because the employee 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 employee so exercised his or her rights. The employee shall bring the action within 2 years after the action allegedly occurred or after the employee learned of the action, whichever occurs last. No employee may bring an action against the office of state 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 employee had not disclosed, or the employer or employer's agent had not believed the employee disclosed, the information.

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

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

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

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

(cm) Order the employer to pay compensatory damages.

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

(e) Order the employer or employer's agent to insert a copy of the court order into the employee'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; 1997 a. 237; 2003 a. 33 ss. 2726, 9160.

The scope of an employee's protection under s. 895.65 is narrower than the protection afforded by the 1st amendment. Kmetz v. State Historical Society, 304 F. Supp 2d 1108 (2004).

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 employee 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 (1g) (a), 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 that 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 injured patients and families 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); 1999 a. 85; 2003 a. 111.

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 Wis. 2d 795, 549 N.W.2d 783 (Ct. App. 1996), 94−1085.

This section grants no cause of action against a therapist's employer. L.L.N. v. Clauder, 203 Wis. 2d 570, 552 N.W.2d 879 (Ct. App. 1996).

895.71 Sexual exploitation by a member of the clergy. **(1)** DEFINITIONS. In this section:

(a) "Member of the clergy" has the meaning given in s. 48.981 (1) (cx).

(b) "Religious organization" means an association, conference, congregation, convention, committee, or other entity that is organized and operated for a religious purpose and that is exempt from federal income tax under 26 USC 501 (c) (3) or (d) and any subunit of such an association, conference, congregation, convention, committee, or entity that is organized and operated for a religious purpose.

(c) "Sexual contact" has the meaning given in s. 940.225 (5) (b).

(2) CAUSE OF ACTION. (a) Any person who suffers an injury as a result of sexual contact with a member of the clergy that occurs while the person is under the age of 18 may bring an action against the member of the clergy for all damages caused by that sexual contact.

(b) Any person who may bring an action under par. (a) may bring an action against the religious organization that employed the member of the clergy for all damages caused by that sexual contact if, at the time that the sexual contact occurred, another employee of that religious organization whose duties included supervising that member of the clergy knew or should have known that the member of the clergy previously had sexual contact with a person under the age of 18 and failed to do all of the following:

1. Report that sexual contact under s. 48.981 (3).

2. Exercise ordinary care to prevent similar incidents from occurring.

(c) Notwithstanding ss. 801.09 (1), 801.095, 802.04 (1), and 815.05 (1g) (a), 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 that reasonably protects the information from being disclosed to the public.

(d) 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 any of the following:

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) CONSENT. Consent is not an issue in an action under this section.

(4) CALCULATION OF STATUTE OF LIMITATIONS. An action under this section is subject to s. 893.587.

(5) SILENCE AGREEMENTS. Any contract or agreement concerning the settlement of any claim under this section that limits or eliminates the right of the injured person to disclose the sexual contact described under sub. (2) to another member of the religious organization to which the member of the clergy under sub. (2) belongs, to a therapist, as defined in s. 895.70 (1) (e), to a person listed under s. 48.981 (2) (a), or to a district attorney, is void.

History: 2003 a. 279.

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) (am), 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; 2001 a. 109.

895.75 Physical injury, emotional distress, loss or damage suffered by members of certain groups. (1) If a person 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 that is prohibited under s. 943.012 and that causes damage to any property specified in s. 943.012 (1) to (4) or by reason of conduct that is grounds for a penalty increase under s. 939.645 (1), the person 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; 2003 a. 243.

895.76 Limits on recovery by prisoners. A prisoner, as defined in s. 801.02 (7) (a) 2., may not recover damages for mental or emotional injury unless the prisoner shows that he or she has suffered a physical injury as a result of the same incident that caused the mental or emotional injury.

History: 1997 a. 133.

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.

895.78 Limiting felon's right to damages. (1) In this section:

(a) "Crime" means a crime under the laws of this state or under federal law.

(b) "Damages" means damages for an injury to real or personal property, for death, or for personal injury.

(c) "Felony" means a felony under the laws of this state or under federal law.

(d) "Victim" means a person against whom an act constituting a felony was committed.

(2) No person may recover damages from any of the following persons for injury or death incurred while committing, or as a result of committing, an act that constituted a felony, if the person was convicted of a felony for that act:

(a) A victim of that felony.

(b) An individual other than a victim of that felony who assisted or attempted to assist in the prevention of the act, who assisted or attempted to assist in the protection of the victim, or who assisted or attempted to assist in the apprehension or detention of the person committing the act unless the individual who assisted or attempted to assist is convicted of a crime as a result of his or her assistance or attempted assistance.

(3) This section does not prohibit a person from recovering damages for death or personal injury resulting from a device used to provide security that is intended or likely to cause great bodily harm, as defined in s. 939.22 (14), or death.

(4) (a) Any applicable statute of limitations for an action to recover damages against a person described under sub. (2) (a) or (b) for injury or death incurred while committing, or as a result of committing, an act that constituted a felony is tolled during the period beginning with the commencement of a criminal proceeding charging the person who committed the act with a felony for that act and ending with the final disposition, as defined in s. 893.13 (1), of the criminal proceeding.

(b) Any applicable statute of limitations for an action to recover damages from an individual described under sub. (2) (b)

for injury or death incurred while committing, or as a result of committing, an act that constituted a felony is tolled during the period beginning with the commencement of a criminal proceeding charging the individual described under sub. (2) (b) with a crime as a result of his or her assistance or attempt to assist and ending with the final disposition, as defined in s. 893.13 (1), of the criminal proceeding. This paragraph does not apply if a criminal proceeding described in par. (a) does not result in a felony conviction and there is no other criminal proceeding described under par. (a) pending.

(5) A court may stay a civil action described under sub. (2) until the final disposition of a criminal proceeding described under sub. (4).

History: 2003 a. 87.

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, 943.61, 943.74, or 943.76, or by reason of intentional conduct that occurs on or after April 28, 1998, and that is prohibited under s. 943.201 or 943.203, or by reason of intentional conduct that occurs on or after July 1, 2004, and that is prohibited under s. 943.011, 943.012, or 943.017, 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 a violation of s. 943.01, 943.011, 943.012, 943.017, 943.20, 943.201, 943.203, 943.21, 943.24, 943.26, 943.34, 943.395, 943.41, 943.50, 943.61, 943.74, or 943.76 by a preponderance of the credible evidence. A conviction under s. 943.01, 943.011, 943.012, 943.017, 943.20, 943.201, 943.203, 943.21, 943.24, 943.26, 943.34, 943.395, 943.41, 943.50, 943.61, 943.74, or 943.76 is not required to bring an action, obtain a judgment, or collect on that judgment under this section.

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

(a) Actual damages, including the retail or replacement value of damaged, used, or lost property, whichever is greater, for a violation of s. 943.01, 943.011, 943.012, 943.017, 943.20, 943.201, 943.203, 943.21, 943.24, 943.26, 943.34, 943.395, 943.41, 943.50, 943.61, 943.74, or 943.76.

(b) All costs of investigation and litigation that were reasonably incurred, including the value of the time spent by any employee or agent of the victim.

(c) Exemplary damages of not more than 3 times the amount awarded under par. (a). No additional proof is required under this section for an award of exemplary damages under this paragraph.

(3m) (a) In this subsection, "plant" includes the material taken, extracted, or harvested from a plant, or a seed or other plant material that is being used or that will be used to grow or develop a plant.

(b) If the violation of s. 943.01 (1) involves the circumstances under s. 943.01 (2d), the court may award a prevailing plaintiff the reasonable attorney fees incurred in litigating the action and, when determining the damages recoverable under sub. (3), shall include the market value of the plant before the damage or destruction, and the costs of production, research, testing, replacement, and plant development directly related to the plant that has been damaged or destroyed.

(4) Any recovery under this section shall be reduced by the amount recovered as restitution under ss. 800.093 and 973.20 and ch. 938.

(5) No person may bring a cause of action under both this section and s. 95.195, 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. If the plaintiff has a cause of action under both this section and s. 95.195, the plaintiff must bring the action under s. 95.195.

(6) A person is not criminally liable under s. 943.30 for any action brought in good faith under this section.

History: 1995 a. 27; 1997 a. 101; 2001 a. 16, 91; 2003 a. 36, 138.

A trial court cannot, contrary to sub. (3) (b), award attorney fees that exceed what was actually "incurred." Stathus v. Horst, 2003 WI App 28, 260 Wis. 2d 166, 659 N.W.2d 165, 02−0543.

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), 134.93 (5), 146.84 (1) (b) and (bm), 153.85, 252.14 (4), 252.15 (8) (a), 610.70 (7) (b), 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; 1997 a. 71; 1999 a. 79.

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

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

Guidelines for submission of punitive damages issues to the jury in a products liability case are discussed. Walter v. Cessna Aircraft Co. 121 Wis. 2d 221, 358 N.W.2d 816 (Ct. App. 1984).

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

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

In awarding punitive damages, the factors to be considered are: 1) the grievousness of the wrongdoer's acts; 2) the degree of malicious intent; 3) the potential damage that might have been caused by the acts; and 4) the defendant's ability to pay. An award is excessive if it inflicts a punishment or burden that is disproportionate to the wrongdoing. That a judge provided a means for the defendant to avoid paying the punitive damages awarded did not render the award invalid. Gianoli v. Pfleiderer, 209 Wis. 2d 509, 563 N.W.2d 562 (Ct. App. 1997).

Nominal damages may support a punitive damage award in an action for intentional trespass. A grossly excessive punishment violates due process. Whether punitive damages violate due process depends on: 1) the reprehensibility of the conduct; 2) the disparity between the harm suffered and the punitive damages awarded; and 3) the difference between the award and other civil or criminal penalties authorized or imposed. Jacque v. Steenberg Homes, 209 Wis. 2d 605, 563 N.W.2d 154 (1997).

A circuit court entering default judgment on a punitive damages claim must make inquiry beyond the complaint to determine the merits of the claim and the amount to be awarded. Apex Electronics Corp. v. Gee, 217 Wis. 2d 378, 571 N.W.2d 23 (1998).

Sub. (3) requires either an intent by a defendant to cause injury to the plaintiffs or knowledge that the defendant's conduct was practically certain to cause the accident or injury to the plaintiffs. Wischer v. Mitsubishi Heavy Industries, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303, 01−0724.

The availability of punitive damages depends on the character of the particular conduct committed rather than on the theory of liability propounded by the plaintiff. The recovery of punitive damages requires that something must be shown over and above the mere breach of duty for which compensatory damages can be given. Unified Catholic Schools of Beaver Dam Education Association v. Universal Card Services Corp. 34 F. Supp. 2d 714, (1999).

The Future of Punitive Damages. SPECIAL ISSUE: 1998 WLR No. 1.