Table of Contents

CHAPTER 1
COMPENSATORY DAMAGES
by Susan K. Allen and Jeffrey A. Mandell

I. Introduction [§ 1.1]
   A. Purpose and Scope of Chapter [§ 1.2]
   B. Related Matters [§ 1.3]

II. Nature of Compensatory Damages [§ 1.4]
   A. Definition and Purpose of Compensatory Damages [§ 1.5]
   B. General Damages and Special Damages Contrasted [§ 1.6]

III. Effect of Causation Rules on Right to Recover
     Compensatory Damages [§ 1.7]
   A. In Tort Cases [§ 1.8]
   B. In Contract Cases [§ 1.9]

IV. Other Rules Affecting Compensatory Damages [§ 1.10]
   A. Duty to Mitigate Damages [§ 1.11]
   B. Comparative Negligence [§ 1.12]
   C. Interest on Damages [§ 1.13]
   D. Third-Party Payments—Subrogation and Collateral Source [§ 1.14]

CHAPTER 2
PUNITIVE DAMAGES
by Robert C. Burrell

I. Introduction [§ 2.1]
   A. Purpose and Scope of Chapter [§ 2.2]
   B. Related Matters [§ 2.3]

II. Nature, Purposes, and History of Punitive Damages in Wisconsin [§ 2.4]
   A. Definition of Punitive Damages [§ 2.5]
TABLE OF CONTENTS

B. Purposes of Punitive Damages  [§ 2.6]
C. History of Punitive Damages  [§ 2.7]
D. Elements Necessary to Establish Entitlement to Punitive Damages  [§ 2.8]

III. Parties Liable for and Entitled to Punitive Damages  [§ 2.9]
   A. Relationship of Defendant and Plaintiff  [§ 2.10]
   B. Vicarious Liability  [§ 2.11]
   C. Successor-Corporation Liability  [§ 2.12]
   D. Multiple Plaintiffs  [§ 2.13]
   E. Derivative Claims  [§ 2.14]
   F. Equity Cases  [§ 2.15]

IV. Burden of Proof and Procedure for Assessing Punitive Damages  [§ 2.16]
   A. Burden of Proof  [§ 2.17]
   B. Procedure and Pleading  [§ 2.18]

V. Amount of Punitive Damages  [§ 2.19]
   A. Statutory Limit on Punitive Damages  [§ 2.20]
   B. Function of Court and Jury  [§ 2.21]
   C. Factors to Be Considered  [§ 2.22]
   D. Relationship of Punitive Damages to Compensatory Damages and Other Penalties  [§ 2.23]

VI. Constitutional Limitation on Punitive Damages  [§ 2.24]

VII. Appendices  [§ 2.25]
   A. Appendix 2A: Wisconsin Appellate Review of Punitive-Damages Awards  [§ 2.26]

CHAPTER 3
NOMINAL DAMAGES
by Matthew J. Cornetta

I. Introduction  [§ 3.1]
   A. Purpose and Scope of Chapter  [§ 3.2]
   B. Related Matters  [§ 3.3]

II. Nature and Purpose of Nominal Damages  [§ 3.4]
III. When Nominal Damages Are Recoverable  [§ 3.5]
   A. Breach-of-Contract Actions  [§ 3.6]
   B. Intentional Tort Actions  [§ 3.7]
   C. Negligence Actions  [§ 3.8]
   D. Real Estate Actions  [§ 3.9]
   E. Actions for Interference with Owner’s Rights in
      Personal Property  [§ 3.10]

IV. Appellate Review of Nominal Damages  [§ 3.11]

V. Conclusion  [§ 3.12]

CHAPTER 4
MULTIPLE DAMAGES
by J. Ryan Maloney and James T. Murray, Jr.

I. Introduction  [§ 4.1]
   A. Purpose and Scope of Chapter  [§ 4.2]
   B. Related Matters  [§ 4.3]

II. Nature and Purpose of Multiple Damages  [§ 4.4]
   A. Definition of Multiple Damages  [§ 4.5]
   B. Distinction Between Multiple Damages and Fines or
      Forfeitures  [§ 4.6]
   C. Distinction Between Multiple Damages and Punitive or
      Exemplary Damages  [§ 4.7]
   D. Purpose of Multiple Damages  [§ 4.8]

III. Types of Multiple-Damages Statutes  [§ 4.9]
   A. Statutes Classified by Conduct Requirement  [§ 4.10]
   B. Statutes Classified by Scope of Rights Conferred
      [§ 4.11]
   C. Statutes Classified by Purpose (Penal Versus
      Remedial)  [§ 4.12]

IV. Constitutional Challenges to Multiple-Damages Statutes
    [§ 4.13]

V. Rules of Statutory Construction in Multiple-Damages
    Statutes  [§ 4.14]
   A. Rules of Strict and Liberal Construction  [§ 4.15]
   B. Rules Governing Intent Requirement  [§ 4.16]
### VI. Procedural Considerations in Multiple-Damages Actions

[§ 4.17]

A. Statute of Limitation  [§ 4.18]
B. Venue  [§ 4.19]
C. Pleading Requirements  [§ 4.20]
D. Manner of Assessing Multiple Damages  [§ 4.21]

### VII. Liability Insurance Coverage for Multiple-Damages Awards  [§ 4.22]

### VIII. Selected Wisconsin Multiple-Damages Statutes  [§ 4.23]

A. Unlawful Removal of Timber  [§ 4.24]
B. Illegal Fee by Sheriff; Receipts from Municipal Officers  [§ 4.25]
C. Damage to Highways and Related Structures  [§ 4.26]
D. Unfair Conduct by Produce Wholesalers  [§ 4.27]
E. Fraudulent Advertising  [§ 4.28]
F. Unfair Competition and Trade Practices  [§ 4.29]
G. Violation of Dairy Trade Regulations  [§ 4.30]
H. Injuries to Illegally Employed Minors  [§ 4.31]
I. Antitrust Violations  [§ 4.32]
J. Mail-Order Practices  [§ 4.33]
K. Dog Bites  [§ 4.34]
L. Statutory Violations by Railroads and Public Utilities  [§ 4.35]
M. Violation of Motor Vehicle Dealer Regulations  [§ 4.36]
N. Lemon Law Violation  [§ 4.37]
O. Consumer Act Violations  [§ 4.38]
P. Tenant Holdover  [§ 4.39]
Q. Waste of Real Property  [§ 4.40]
R. Arson  [§ 4.41]
S. Racketeering  [§ 4.42]
T. Deduction of Wages  [§ 4.43]
U. Tree Trimming  [§ 4.44]
V. Withholding of Tenant Security Deposits  [§ 4.45]
W. Unauthorized Repairs by Motor Vehicle Shop  [§ 4.46]
CHAPTER 5
PAIN AND SUFFERING
by Ann S. Jacobs and Jacqueline C. Nuckels

I. Introduc  [§ 5.1]
   A. Purpose and Scope of Chapter  [§ 5.2]
   B. Related Matters  [§ 5.3]

II. Nature of Damages for Pain and Suffering  [§ 5.4]
   A. Definitions  [§ 5.5]
   B. Components  [§ 5.6]
      1. In General  [§ 5.7]
      2. Physical Pain and Suffering  [§ 5.8]
      3. Mental Pain and Suffering  [§ 5.9]
      4. Distinction Between Pain and Suffering and Disability  [§ 5.10]

III. Proof of Pain and Suffering  [§ 5.11]
   A. In General  [§ 5.12]
   B. Burden of Proof  [§ 5.13]
   C. Form of Proof  [§ 5.14]
      1. Lay Testimony  [§ 5.15]
      2. Expert Testimony  [§ 5.16]
      3. Demonstrative Evidence  [§ 5.17]
      4. Documentary Evidence  [§ 5.18]
   D. Necessity of Expert Testimony  [§ 5.19]
      1. Past and Present Pain and Suffering  [§ 5.20]
      2. Future Pain and Suffering  [§ 5.21]

IV. Factors Affecting Amount of Compensation  [§ 5.22]
   A. In General  [§ 5.23]
   B. Degree of Consciousness  [§ 5.24]
   C. Age  [§ 5.25]
   D. Scarring  [§ 5.26]
   E. Character or Reputation  [§ 5.27]
   F. Prior Health  [§ 5.28]
   G. Economic Conditions  [§ 5.29]
   H. Fear of Surgery  [§ 5.30]

V. Computation of Damages Award  [§ 5.31]
   A. Formula Computation  [§ 5.32]
B. Relationship of Award for Pain and Suffering to Medical Expenses  [§ 5.33]
C. Reduction of Award for Pain and Suffering to Present Value  [§ 5.34]
D. Jury Instructions Regarding Computation of Award for Pain and Suffering  [§ 5.35]

VI. Duty to Mitigate Damages  [§ 5.36]

VII. Conclusion  [§ 5.37]

CHAPTER 6
EMOTIONAL OR MENTAL DISTRESS

by Elizabeth D. Reeths

I. Introduction  [§ 6.1]
   A. Purpose and Scope of Chapter  [§ 6.2]
   B. Related Matters  [§ 6.3]

II. Nature of Damages for Emotional or Mental Distress  
    [§ 6.4]
   A. In General  [§ 6.5]
   B. Historical Perspective  [§ 6.6]
   C. Early View—The Impact Requirement  [§ 6.7]
   D. Departure from the Impact Requirement  [§ 6.8]
   E. Development of the Field-of-Danger Requirement  
      [§ 6.9]
   F. The Requirement That Emotional or Mental Distress Be Manifested by Physical Injury  
      [§ 6.10]
   G. The Bowen Case: Erosion of the Zone of Danger and Physical Injury Requirements?  
      [§ 6.11]
      1. In the Context of a Bystander Claim  [§ 6.12]
         [§ 6.13]
   H. Further Erosion of the Requirement That Emotional or Mental Distress Be Manifested by Physical Injury  
      [§ 6.14]
   I. Current Status of Liability for Negligent Infliction of Emotional or Mental Distress  [§ 6.15]
   J. Fear of Future Injury  [§ 6.16]
   K. Negligent Damage to Property Not Sufficient  [§ 6.17]
### III. Intentional Infliction of Emotional or Mental Distress

[§ 6.18]

A. In General [§ 6.19]
B. Conduct Must Be Intended to Cause Emotional Distress [§ 6.20]
C. Conduct Must Be Extreme and Outrageous [§ 6.21]
D. Conduct Must Be Cause of Emotional Distress [§ 6.22]
E. Emotional Distress Must Be Extremely Disabling [§ 6.23]

### IV. Other Tort Actions for Which Damages for Emotional or Mental Distress Are Recoverable [§ 6.24]

A. Bad Faith [§ 6.25]
B. False Imprisonment [§ 6.26]
C. Assault and Battery [§ 6.27]
D. Mishandling of Dead Bodies [§ 6.28]
E. Consumer Debt Collection [§ 6.29]
F. Intentional Interference with Contractual Relationship [§ 6.30]

### V. Worker’s Compensation Claims [§ 6.31]

A. Wisconsin Worker’s Compensation Act [§ 6.32]
B. Case Law [§ 6.33]
   1. In General [§ 6.34]
   2. Traumatic Mental Injury [§ 6.35]
   3. Nontraumatic Mental Injury [§ 6.36]

### VI. Conclusion [§ 6.37]
B. Mental Injury or Disability [§ 7.8]
   1. Definitions [§ 7.9]
   2. Examples [§ 7.10]

III. Nature of Damages for Loss of Enjoyment of Life [§ 7.11]
   A. In General [§ 7.12]
   B. Loss of Enjoyment of Life as a Separate Element of Damages [§ 7.13]
   C. Examples [§ 7.14]

IV. Quantum of Proof Required [§ 7.15]

V. Potential Areas of Future Damages [§ 7.16]

CHAPTER 8
LOST EARNING CAPACITY
by David J. Pliner

I. Introduction [§ 8.1]
   A. Purpose and Scope of Chapter [§ 8.2]
   B. Related Matters [§ 8.3]

II. Definition of Terms [§ 8.4]

III. Measuring Lost Earning Capacity [§ 8.5]
   A. Standard in General [§ 8.6]
   B. Personal Circumstances [§ 8.7]
   C. Age, Health, and Life Expectancy Independent of Injury [§ 8.8]
   D. Inclination to Work [§ 8.9]
   E. Availability of Work [§ 8.10]
   F. Preinjury Employment Status and Earnings [§ 8.11]
   G. Decline in Postinjury Earnings [§ 8.12]
   H. Continuation or Increase in Postinjury Earnings [§ 8.13]
   I. Collateral Sources of Income [§ 8.14]
   J. Income Tax [§ 8.15]
IV. Special Cases [§ 8.16]
A. Business Owners; Persons Not Employed for Wages [§ 8.17]
   1. In General [§ 8.18]
   2. Lost Profits [§ 8.19]
   3. Replacement’s Wages [§ 8.20]
   4. Comparable Employment Wages [§ 8.21]
B. Unemployed Persons and Persons Employed Without Earnings [§ 8.22]
   1. In General [§ 8.23]
   2. Homemakers; Unemployed Persons [§ 8.24]
   3. Clergy; Volunteers [§ 8.25]
   4. Students [§ 8.26]
   5. Minors [§ 8.27]

V. Proof of Loss of Earning Capacity [§ 8.28]
A. Burden of Proof [§ 8.29]
   1. In General [§ 8.30]
   2. Claims for Minors [§ 8.31]
B. Effect of and Requirement for Permanent Injury in Relationship to Earning Capacity Loss [§ 8.32]
C. Expert Testimony: Necessity and Sufficiency [§ 8.33]
   1. Medical Experts [§ 8.34]
   2. Vocational Experts [§ 8.35]
   3. Economic Experts [§ 8.36]
      a. In General [§ 8.37]
      b. Inflation [§ 8.38]
      c. Present Value [§ 8.39]
      d. Annuity Contracts [§ 8.40]
D. Use of Life Expectancy and Mortality Tables [§ 8.41]

CHAPTER 9
MEDICAL, HOSPITAL, AND RELATED EXPENSES
by Terrence M. Polich

I. Introduction [§ 9.1]
   A. Purpose and Scope of Chapter [§ 9.2]
   B. Related Matters [§ 9.3]

II. Items Recoverable [§ 9.4]
   A. In General [§ 9.5]
B. Specific Expenses [§ 9.6]  
   1. Physicians’ Charges [§ 9.7]  
   2. Hospital Charges [§ 9.8]  
   3. Nursing Services [§ 9.9]  
C. Collateral Source Rule [§ 9.10]  
D. Related Expenses [§ 9.11]  

III. Persons Entitled to Recover [§ 9.12]  
   A. Spouses [§ 9.13]  
   B. Parent and Child [§ 9.14]  
   C. Effect of Payment by Third Party [§ 9.15]  

IV. Evidentiary Matters [§ 9.16]  
   A. Burden of Proof [§ 9.17]  
   B. Expert Testimony [§ 9.18]  

V. Conclusion [§ 9.19]  

CHAPTER 10  
AGGRAVATION OF PREEXISTING INJURIES  
by Daniel A. Peterson  

I. Introduction [§ 10.1]  
   A. Scope and Purpose of Chapter [§ 10.2]  
   B. Related Matters [§ 10.3]  

II. Definitions [§ 10.4]  

III. Rationales for Imposition of Liability for Aggravation of Preexisting Injury or Condition [§ 10.5]  
   A. Taking Your Victim as You Find Him or Her [§ 10.6]  
   B. Natural Consequences [§ 10.7]  
   C. Change of Condition [§ 10.8]  

IV. Situations in Which Issue of Aggravation Arises [§ 10.9]  
   A. Later Accident Aggravating Previous Condition [§ 10.10]  
   B. Negligent Medical Treatment Following Accident [§ 10.11]
C. Second-Collision or Crashworthiness Situation  
   § 10.12
D. Exacerbation of Preexisting Emotional Condition or  
   Propensity § 10.13
E. Presence of Increased Susceptibility § 10.14
F. Decreased Life Expectancy § 10.15

V. Aggravation Rules in Worker’s Compensation Cases  
   § 10.16
   A. In General § 10.17
   B. Specific Areas of Impairment § 10.18
       1. Back Injuries § 10.19
       2. Heart Condition or Disease § 10.20
       3. Hernias § 10.21
       4. Vision Impairment § 10.22
       5. Mental Disorders § 10.23
       6. Occupational Disease § 10.24
       7. Presumption of Employment-Related Disease  
          § 10.25
   C. Liability for Aggravation Caused by Malpractice  
      § 10.26

VI. Defensive Matters § 10.27

VII. Practice and Procedure § 10.28
   A. Burden of Proof § 10.29
   B. Instructions and Verdict Form § 10.30

CHAPTER 11
DEFAMATION
by Melita M. Mullen

I. Introduction § 11.1
   A. Purpose and Scope of Chapter § 11.2
   B. Related Matters § 11.3

II. Nature of Liability in Defamation Actions § 11.4
   A. Definitions § 11.5
   B. Liability Rules § 11.6
       1. In General § 11.7
       2. Malice § 11.8
3. Defenses Available  [§ 11.9]
   a. In General  [§ 11.10]
   b. Truth  [§ 11.11]
   c. Conditional Privilege  [§ 11.12]
   d. Absolute Privilege  [§ 11.13]
   e. Constitutional Privilege  [§ 11.14]
   f. Failure to Mitigate Damages  [§ 11.15]
   g. Political Reporters’ Exemption  [§ 11.16]
   h. Contract Printers’ Exemption  [§ 11.17]
   i. Retraction  [§ 11.18]
   j. Exclusivity of Worker’s Compensation Act  [§ 11.19]
   k. Causation Rules and Extent of Liability for Repetition of Defamatory Material  [§ 11.20]

4. Procedures for Determining Defamatory Character of Communication  [§ 11.21]

III. Types of Damages Recoverable  [§ 11.22]
   A. In General  [§ 11.23]
   B. Compensatory Damages  [§ 11.24]
   C. Punitive Damages  [§ 11.25]
   D. Nominal Damages  [§ 11.26]

IV. Proof of Damages  [§ 11.27]
   A. Nature of Damages Sought  [§ 11.28]
      1. In General  [§ 11.29]
      2. Compensatory Damages  [§ 11.30]
         a. Burden and Necessity of Proof  [§ 11.31]
            (1) Libel Cases and Slander Per Se Cases  [§ 11.32]
            (2) All Other Cases  [§ 11.33]
            (3) Summary of Presumptions and Proof Requirements  [§ 11.34]
         b. Evidence Admissible on Extent of Damages Sustained  [§ 11.35]
            (1) Plaintiff’s Evidence—General Damages and Special Damages  [§ 11.36]
            (2) Defendant’s Evidence—In General and Mitigation Evidence  [§ 11.37]
      3. Punitive Damages  [§ 11.38]
         a. Burden and Necessity of Proof  [§ 11.39]
b. Evidence Admissible on Amount of Punitive Damages [§ 11.40]
   (1) Plaintiff’s Evidence [§ 11.41]
   (2) Defendant’s Evidence [§ 11.42]
4. Nominal Damages [§ 11.43]
B. Effect of Malice or Good Faith on Damages Awards [§ 11.44]
   1. Compensatory Damages [§ 11.45]
   2. Punitive Damages [§ 11.46]
C. Effect of Retraction on Damages Awards [§ 11.47]
   1. In General [§ 11.48]
   2. Compensatory Damages [§ 11.49]
   3. Punitive Damages [§ 11.50]
D. Constitutional Limitations on Damages Awards [§ 11.51]
   1. In General [§ 11.52]
   2. Compensatory Damages [§ 11.53]
   3. Punitive Damages [§ 11.54]

V. Amount of Damages [§ 11.55]
A. Review of Size of Jury Award [§ 11.56]
   1. General Test for Review by Trial Court [§ 11.57]
   2. General Test for Review by Appellate Court [§ 11.58]
   3. Proportionality of Punitive Damages to Compensatory Damages [§ 11.59]
B. Additur and Remittitur [§ 11.60]

VI. Practice and Procedure [§ 11.61]
A. Joinder of Claims—Single-Multiple Publication Rule [§ 11.62]
B. Venue [§ 11.63]
C. Pleading Damages [§ 11.64]
   1. Plaintiff’s Complaint [§ 11.65]
   2. Insurability of Defamation Damages and Effect of Language Used in Pleadings [§ 11.66]
   3. Defendant’s Pleadings [§ 11.67]
D. Instructions and Verdict [§ 11.68]

VII. Special Limit of Discovery in Constitutional Privilege Cases [§ 11.69]
CHAPTER 12
FALSE IMPRISONMENT
by Patrick S. Nolan

I. Introduction [§ 12.1]
   A. Purpose and Scope of Chapter [§ 12.2]
   B. Related Matters [§ 12.3]

II. Liability [§ 12.4]
   A. Elements of Cause of Action [§ 12.5]
   B. Burden of Proof [§ 12.6]
   C. Defenses [§ 12.7]
      1. In General [§ 12.8]
      2. Reasonableness of Defendant’s Actions [§ 12.9]
      3. Provocation [§ 12.10]
      4. Failure to Give Notice of Injury or Claim to Governmental Subdivision [§ 12.11]
   D. Joint and Several Liability [§ 12.12]
      1. In General [§ 12.13]
      2. Liability of a Principal [§ 12.14]
      3. Contribution and Indemnity [§ 12.15]

III. Recoverable Damages [§ 12.16]
   A. Compensatory Damages [§ 12.17]
   B. Punitive Damages [§ 12.18]

CHAPTER 13
VIOLATION OF CIVIL RIGHTS DAMAGES
by Paul A. Kinne and Scott B. Thompson

I. Introduction [§ 13.1]
   A. Purpose and Scope of Chapter [§ 13.2]
   B. Related Matters [§ 13.3]
      1. In General [§ 13.4]
      2. Employment Discrimination [§ 13.5]
      3. Prisoner’s Conditions of Confinement [§ 13.6]

II. Recovery of Damages [§ 13.7]
   A. Exhaustion of Remedies [§ 13.8]
   B. Qualified Immunity [§ 13.9]
C. Compensatory and Nominal Damages [§ 13.10]
   1. In General [§ 13.11]
   2. Grounds for Compensatory and Nominal Damages [§ 13.12]
      a. In General [§ 13.13]
      b. Disagreements Among Circuit Courts of Appeal [§ 13.14]
      c. Consistency of the Seventh Circuit Court of Appeals and the U.S. Supreme Court [§ 13.15]
   3. Items of Damages [§ 13.16]
      a. In General [§ 13.17]
      b. Additional Grounds for Recovery [§ 13.18]
      c. Duty to Mitigate [§ 13.19]
      d. Double Recovery [§ 13.20]
D. Punitive Damages [§ 13.21]
   1. In General [§ 13.22]
   2. Grounds for Punitive Damages [§ 13.23]
   3. Persons Liable [§ 13.24]
E. Attorney Fees [§ 13.25]

CHAPTER 13a
WORKER’S COMPENSATION
by Gary S. Stanislawski and Eric W. Lengell

I. Introduction [§ 13a.1]
   A. Purpose and Scope of Chapter [§ 13a.2]
   B. Related Matters [§ 13a.3]

II. Temporary Disability Benefits [§ 13a.4]
   A. Basis for Benefits [§ 13a.5]
      1. Average Weekly Wage [§ 13a.6]
      2. Full-Time Employees [§ 13a.7]
      3. Part-Time Employees [§ 13a.8]
      4. No Fixed Earnings [§ 13a.9]
   B. Benefit Rates [§ 13a.10]
      1. Temporary Total Disability [§ 13a.11]
      2. Temporary Partial Disability [§ 13a.12]
   C. Waiting Period [§ 13a.13]
   D. Period of Temporary Disability [§ 13a.14]
      1. In General [§ 13a.15]
      2. Healing Period [§ 13a.16]
      3. Wage Loss [§ 13a.17]
E. Renewed Period of Temporary Disability [§ 13a.18]
F. Ancillary Benefits [§ 13a.19]
   1. Nonindustrial (Group) Disability Insurance [§ 13a.20]
   2. Public Assistance [§ 13a.21]
   3. Unemployment Insurance [§ 13a.22]
   4. Social Security Disability Benefits [§ 13a.23]
   5. Medicare [§ 13a.24]

III. Permanent Disability Benefits [§ 13a.25]
   A. In General [§ 13a.26]
   B. Benefit Rates [§ 13a.27]
   C. Scheduled Permanent Partial Disability [§ 13a.28]
   D. Non-Scheduled Permanent Partial Disability
      [§ 13a.29]
      1. In General [§ 13a.30]
      2. Medical Opinion [§ 13a.31]
      3. Loss of Earning Capacity [§ 13a.32]
   E. Statutory Permanent Total Disability [§ 13a.33]
   F. Disfigurement [§ 13a.34]
   G. Occupational Hearing Loss [§ 13a.35]
   H. Apportionment [§ 13a.36]

IV. Vocational Rehabilitation Benefits [§ 13a.37]

V. Medical Benefits [§ 13a.38]
   A. Liability for Medical Treatment [§ 13a.39]
      1. Reasonableness [§ 13a.40]
      2. Necessity [§ 13a.41]
   B. Choice and Mode of Medical Treatment [§ 13a.42]
   C. Unreasonable Neglect or Refusal to Submit to Medical
      Treatment [§ 13a.43]

VI. Death Benefits [§ 13a.44]
   A. In General [§ 13a.45]
   B. Who May Claim [§ 13a.46]
   C. Distribution of Death Benefits [§ 13a.47]
   D. Computation of Death Benefits [§ 13a.48]
   E. Burial Expenses [§ 13a.49]
   F. Other Benefits and Payments [§ 13a.50]
VII. Penalties  [§ 13a.51]
   A. In General  [§ 13a.52]
   B. Increased Compensation  [§ 13a.53]
   C. Decreased Compensation  [§ 13a.54]
   D. Penalty for Refusal to Rehire  [§ 13a.55]
   E. Penalty for Late Payment  [§ 13a.56]
   F. Penalty for Bad Faith  [§ 13a.57]

VIII. Practice and Procedure  [§ 13a.58]
   A. Conditions of Liability  [§ 13a.59]
   B. Pleadings  [§ 13a.60]
      1. Application for Hearing  [§ 13a.61]
      2. Answer  [§ 13a.62]
      3. Amendments  [§ 13a.63]
   C. Prehearing Procedure  [§ 13a.64]
      1. Depositions  [§ 13a.65]
      2. Medical and Vocational Examinations  [§ 13a.66]
      3. Disclosure and Exchange of Information  [§ 13a.67]
      4. Prehearing Conference  [§ 13a.68]
      5. Settlements  [§ 13a.69]
         a. Compromise  [§ 13a.70]
         b. Stipulation  [§ 13a.71]
         c. Lump-Sum Payments  [§ 13a.72]
   D. Formal Hearing  [§ 13a.73]
      1. Notice and Location of Hearing  [§ 13a.74]
      2. Filing Requirements  [§ 13a.75]
         a. Medical Reports  [§ 13a.76]
         b. Vocational Reports  [§ 13a.77]
         c. Employee’s Statement  [§ 13a.78]
         d. Postponements and Continuances  [§ 13a.79]
      3. Burden of Proof  [§ 13a.80]
      4. Rules of Evidence  [§ 13a.81]
      5. Order  [§ 13a.82]
   E. Posthearing Procedure and Appeal  [§ 13a.83]
      1. Medical Examination  [§ 13a.84]
      2. Mistake or Newly Discovered Evidence  [§ 13a.85]
      3. Administrative Review  [§ 13a.86]
      4. Judicial Review  [§ 13a.87]
         a. Appeal to Circuit Court  [§ 13a.88]
         b. Appeals to the Wisconsin Court of Appeals and the Wisconsin Supreme Court  [§ 13a.89]
         c. Interest on Appeals  [§ 13a.90]
IX. Appendices [§ 13a.91]
   A. Appendix 13aA: Methods of Determining Compensation Wage Appendices [§ 13a.92]
   B. Appendix 13aB: Worker’s Compensation Maximum Wage and Rate Chart [§ 13a.93]

CHAPTER 14
LOSS OF CONSORTIUM, SOCIETY, AND COMPANIONSHIP
by Theodore V. Lyons, Jr.

I. Introduction [§ 14.1]
   A. Purpose and Scope of Chapter [§ 14.2]
   B. Related Matters [§ 14.3]

   A. Definitions [§ 14.5]
   C. Status as Secondary or Derivative Claims in Common-Law Personal-Injury Cases [§ 14.7]

III. Persons Entitled to Recover [§ 14.8]
   A. Personal-Injury Actions [§ 14.9]
      1. Spouse [§ 14.10]
      2. Children [§ 14.11]
      3. Parents [§ 14.12]
      4. Other Persons [§ 14.13]
   B. Wrongful Death Actions [§ 14.14]
      1. In General [§ 14.15]
      2. Spouse or Domestic Partner [§ 14.16]
      3. Children [§ 14.17]
      4. Parents and Siblings [§ 14.18]
   C. Worker’s Compensation Actions [§ 14.19]

IV. Factors Affecting Recovery [§ 14.20]
   A. Statutory Limitations on Amount Recoverable [§ 14.21]
   B. Nature of Relationship [§ 14.22]
      1. Character of Injured or Deceased Person [§ 14.23]
TABLE OF CONTENTS

2. Character of Plaintiff [§ 14.24]
3. Age, Health, and Life Expectancy of Injured or Deceased Person and of Plaintiff [§ 14.25]
4. Likelihood of Remarriage [§ 14.26]
C. Comparative Negligence Rules [§ 14.27]
D. Statutory Limitations on Governmental Liability [§ 14.28]
E. Applicability of Made-Whole Doctrine to Subrogated Interests [§ 14.29]

V. Practice and Procedure [§ 14.30]
A. Statutes of Limitation [§ 14.31]
B. Joinder [§ 14.32]
C. Jury Instructions and Verdicts [§ 14.33]
D. Role of Court and Jury [§ 14.34]

CHAPTER 15
LOSS OF SERVICES
by Kristen E. Lonergan

I. Introduction [§ 15.1]
A. Purpose and Scope of Chapter [§ 15.2]
B. Related Matters [§ 15.3]

II. Nature and Purpose of Claims for Loss of Services [§ 15.4]
A. Purpose of Claims for Loss of Services [§ 15.5]
B. Distinction Between Loss of Services, Loss of Consortium, and Loss of Society and Companionship [§ 15.6]
1. Comparison: Loss of Society and Companionship [§ 15.7]
2. Comparison: Loss of Consortium [§ 15.8]

III. Parties Entitled to Claim Loss of Services [§ 15.9]

IV. Sufficiency of Evidence [§ 15.10]
A. In General [§ 15.11]
1. Necessity of Showing Specific Monetary Value [§ 15.12]
2. Necessity of Showing Specific Services Provided [§ 15.13]
B. Claims for Services of Spouse or Domestic Partner
   [§ 15.14]
   1. In General [§ 15.15]
   2. Evidence Held Sufficient [§ 15.16]
   3. Evidence Held Insufficient [§ 15.17]
C. Claims for Services of Parents [§ 15.18]
D. Claims for Services of Children [§ 15.19]
   1. In General [§ 15.20]
   2. Evidence Held Sufficient [§ 15.21]
   3. Evidence Held Insufficient [§ 15.22]
E. Claims for Services of Others [§ 15.23]

V. Mitigating Factors [§ 15.24]
   A. Contributory Negligence [§ 15.25]
   B. Remarriage [§ 15.26]
   C. Procedural Factors [§ 15.27]
   D. Statutory Factors [§ 15.28]

VI. Punitive Damages [§ 15.29]

CHAPTER 16
WRONGFUL DEATH
by David J. Turek

I. Introduction [§ 16.1]
   A. Purpose and Scope of Chapter [§ 16.2]
   B. Related Matters [§ 16.3]
      1. In General [§ 16.4]
      2. Special Statutory Considerations in Wrongful
         Death Actions [§ 16.5]
         a. Statutes of Limitation [§ 16.6]
         b. Conflict of Law [§ 16.7]
         c. Relationship to Other Statutes [§ 16.8]
         d. Statutory Definition of Death [§ 16.9]

II. Life Expectancy [§ 16.10]

III. Survival Actions [§ 16.11]
   A. Pain and Suffering [§ 16.12]
   B. Medical, Hospital, and Funeral Expenses [§ 16.13]
IV. Wrongful Death Actions: By Particular Beneficiaries

[§ 16.14]
A. In General [§ 16.15]
B. Spouse or Domestic Partner [§ 16.16]
   1. Pecuniary Injury [§ 16.17]
   2. Loss of Society and Companionship [§ 16.18]
C. Parents of Adult Child [§ 16.19]
   1. Pecuniary Injury [§ 16.20]
   2. Loss of Society and Companionship [§ 16.21]
D. Parents of Minor Child [§ 16.22]
   1. Pecuniary Injury [§ 16.23]
   2. Loss of Society and Companionship [§ 16.24]
E. Adult Child for Death of Parent [§ 16.25]
   1. Pecuniary Injury [§ 16.26]
   2. Loss of Society and Companionship [§ 16.27]
F. Minor Child for Death of Parent [§ 16.28]
   1. Pecuniary Injury [§ 16.29]
   2. Loss of Society and Companionship [§ 16.30]
G. Collateral Kindred [§ 16.31]
H. Fetus [§ 16.32]

V. Wrongful Death Actions: By Type of Damage [§ 16.33]
A. Support and Contribution [§ 16.34]
   1. In General [§ 16.35]
   2. Earning Capacity [§ 16.36]
      a. In General [§ 16.37]
      b. Average Earning Capacity [§ 16.38]
      c. Minor’s Earning Capacity [§ 16.39]
      d. New or Other Skills or Student’s Earning Capacity [§ 16.40]
      e. Loss of Profits and Earning Capacity [§ 16.41]
      f. Farmer’s Earning Capacity [§ 16.42]
      g. Pension Benefits [§ 16.43]
   3. Evidence Concerning Decedent’s Character and Habits [§ 16.44]
   4. Beneficiaries: Dependency on Decedent [§ 16.45]
B. Lost Inheritance [§ 16.46]
C. Mental Anguish [§ 16.47]
D. Medical Expenses [§ 16.48]
E. Funeral Expenses [§ 16.49]
F. Punitive Damages [§ 16.50]
G. Prejudgment Interest [§ 16.51]
VI. Jury Instructions [§ 16.52]
   A. In General [§ 16.53]
   B. Future Damages and Present Value [§ 16.54]

CHAPTER 17
PERSONAL PROPERTY
by Mackenzie E. Campbell

I. Introduction [§ 17.1]
   A. Purpose and Scope of Chapter [§ 17.2]
   B. Related Matters [§ 17.3]

II. Nature of Personal Property Damages [§ 17.4]
   A. Definitions [§ 17.5]
      1. Types of Personal Property [§ 17.6]
      2. Test for Fixtures [§ 17.7]
   B. Liability Rules [§ 17.8]
      1. Parties [§ 17.9]
      2. Compensable Types of Injury to Personal Property [§ 17.10]

III. Damages for Injury to Personal Property [§ 17.11]
   A. In General [§ 17.12]
      1. Property Having Market Value [§ 17.13]
         a. In General [§ 17.14]
         b. Determining Market Value [§ 17.15]
      2. Property Without Market Value [§ 17.16]
         a. Value-to-Owner Test for Destroyed Property [§ 17.17]
         b. Cost-of-Repairs Test for Damaged Property [§ 17.18]
   B. Destruction of or Injury to Income-Producing Animals [§ 17.19]
      1. Destruction of Animals [§ 17.20]
         a. Right to Destroy Damaged Animals [§ 17.21]
         b. Value of Destroyed Animals [§ 17.22]
            (1) In General [§ 17.23]
            (2) Effect of Normal Death Ratio [§ 17.24]
            (3) Effect of Probable Actual Use [§ 17.25]
         c. Recovery for Unborn Offspring [§ 17.26]
         d. Loss of Profits [§ 17.27]
2. Injury to Animals [§ 17.28]
   a. Diminished Market Value of Injured Animals [§ 17.29]
   b. Veterinary and Medicine Bills [§ 17.30]
   c. Loss of Use [§ 17.31]
   d. Stray Electrical Voltage Litigation [§ 17.32]
C. Destroyed or Damaged Automobile [§ 17.33]
   1. Destroyed Automobile [§ 17.34]
      a. Market Value at Time of Destruction [§ 17.35]
      b. Loss of Use [§ 17.36]
   2. Damaged Automobile [§ 17.37]
      a. Diminished Market Value or Cost of Repair [§ 17.38]
      b. Loss of Use [§ 17.39]

IV. Damages for Conversion of Personal Property [§ 17.40]
   A. Possessory Right to Personal Property [§ 17.41]
   B. Damages for Conversion [§ 17.42]
   C. Damages for Conversion Versus Damages for Unjust Enrichment [§ 17.43]
   D. Damages for Loss of Use [§ 17.44]

V. Consequential Damages [§ 17.45]
   A. Loss of Use [§ 17.46]
   B. Loss of Profits [§ 17.47]
   C. Inconvenience [§ 17.48]
   D. Mental Distress [§ 17.49]
   E. Sentimental Value [§ 17.50]
   F. Prejudgment Interest [§ 17.51]

VI. Proof of Personal Property Damage [§ 17.52]
   A. Evidence Admissible [§ 17.53]
      1. Testimony of Nonexpert Owner [§ 17.54]
      2. Testimony of Expert [§ 17.55]
      3. Market Reports and Commercial Publications [§ 17.56]
   B. Degree of Certainty Required [§ 17.57]
   C. Defensive Matters [§ 17.58]
      1. Duty to Mitigate Damages [§ 17.59]
      2. Effect of Collateral Source Rule [§ 17.60]
      3. Statute of Limitation [§ 17.61]
4. Survival of Claims [§ 17.62]
5. Effect of Bankruptcy [§ 17.63]

VII. Special Rules in Insurance-Contract Cases [§ 17.64]
   A. Replacement Cost of Personal Property [§ 17.65]
   B. Broad-Evidence Rule Applied to Determine Actual Cash Value [§ 17.66]
   C. Limited Liability and Coinsurance [§ 17.67]
   D. Business- Interruption Loss [§ 17.68]
   E. Property-Damage Insurance Provisions [§ 17.69]

CHAPTER 18
REAL PROPERTY
by James R. Clark and Nicholas W. Kitzman

I. Introduction [§ 18.1]
   A. Purpose and Scope of Chapter [§ 18.2]
   B. Related Matters [§ 18.3]

II. Nature of Real Property Damages [§ 18.4]

III. Damages for Injury to Real Property [§ 18.5]
   A. Improvements and Fixtures [§ 18.6]
      1. Measure of Damages [§ 18.7]
         a. In General [§ 18.8]
         b. Diminished Value Measure [§ 18.9]
            (1) Improvements [§ 18.10]
            (2) Fixtures [§ 18.11]
         c. Cost-of- Repair Measure [§ 18.12]
      2. Burden of Proof [§ 18.13]
   B. Growing Things [§ 18.14]
      1. Crops [§ 18.15]
      2. Timber [§ 18.16]
      3. Shade and Ornamental Trees [§ 18.17]
   C. Natural Resources [§ 18.18]
      1. Soil and Minerals [§ 18.19]
      2. Wells, Groundwater, and Other Water-Related Matters [§ 18.20]
         a. Wells [§ 18.21]
         b. Groundwater [§ 18.22]
         c. Surface Waters [§ 18.23]
IV. Consequential Damages [§ 18.25]
   A. Dispossession or Loss of Use [§ 18.26]
   B. Loss of Business [§ 18.27]
   C. Emotional Distress [§ 18.28]

V. Damages for Faulty Construction [§ 18.29]
   A. Statement of General Rules [§ 18.30]
   B. Application of General Rules [§ 18.31]
      1. In General [§ 18.32]
      2. Cost-of-Correction Rule [§ 18.33]
      3. Diminished-Value Rule [§ 18.34]
   C. Economic Loss Doctrine [§ 18.35]

VI. Damages for Slander Against Title to Real Property [§ 18.36]

VII. Miscellaneous Damages Relating to Real Property [§ 18.37]
   A. Liability of Mortgagee and Lien Claimant for Failure to Issue Satisfaction [§ 18.38]
   B. Damages for Tortious Waste [§ 18.39]
   C. Damages for Injury to Highways and for Injury Caused by Faulty Construction or Repair of Highways [§ 18.40]
   D. Damages for Intentional, Criminal Conduct [§ 18.41]

CHAPTER 19
CONDEMNATION
by James R. Clark, Allen A. Arnsen, and Matthew D. Lee

I. Introduction [§ 19.1]
   A. Purpose and Scope of Chapter [§ 19.2]
   B. Related Matters [§ 19.3]

II. Nature of Condemnation Actions and of Condemnation Damages [§ 19.4]
   A. Taking of Property by Condemnation Distinguished from Police Power and from Damage to Property [§ 19.5]
   B. Recognized Interests and Types of Condemnations [§ 19.6]
III. **Bases for Condemnation Damages** [§ 19.7]
   A. Constitutional Considerations [§ 19.8]
   B. Statutory Provisions [§ 19.9]

IV. **Elements of Damages Awards** [§ 19.10]
   A. Cases of Total Taking [§ 19.11]
   B. Cases of Partial or Temporary Taking and Takings of Easements [§ 19.12]
   C. The Unit Rule and Rights of Lessees [§ 19.13]
   D. Offset for Special Benefits [§ 19.14]
   E. Other Compensable Items [§ 19.15]
      1. Contract Damages [§ 19.16]
      2. Relocation Expenses [§ 19.17]
      3. Costs and Fees [§ 19.18]

V. **Evidentiary Rules in Condemnation Actions** [§ 19.19]
   A. General Principles of Property Valuation [§ 19.20]
   B. Admissibility of Expert Testimony [§ 19.21]
   C. Use of Evidence of Comparable Sales [§ 19.22]
   D. Appellate Review [§ 19.23]

VI. **Conclusion** [§ 19.24]
d. Damages in Event of Resale: Wis. Stat. §§ 402.703(4) and 402.706 [§ 20.11]
3. Seller’s Nondamages Remedies [§ 20.14]
4. Buyer’s Damages [§ 20.15]
   d. Damages for Breach in Regard to Nonconforming Accepted Goods: Wis. Stat. §§ 402.714(1) and 402.714(3) [§ 20.19]
   e. Damages for Breach of Warranty: Wis. Stat. § 402.714(2) [§ 20.20]
   f. Deduction of Damages from Price: Wis. Stat. § 402.717 [§ 20.21]
   g. Claims Against Third Parties for Injury to Goods: Wis. Stat. § 402.722 [§ 20.22]
   h. Remedies for Fraud: Wis. Stat. § 402.721 [§ 20.23]
5. Buyer’s Nondamages Remedies [§ 20.24]
6. Contractual Limitation of Remedies [§ 20.25]
   b. Modification or Limitation of Remedy [§ 20.27]
      (1) In General: Wis. Stat. § 402.719(1) [§ 20.28]
      (2) When Circumstances Cause an Exclusive or Limited Remedy to Fail of Its Essential Purpose: Wis. Stat. § 402.719(2) [§ 20.29]
B. Consumer Protection Legislation [§ 20.30]
      a. In General [§ 20.32]
c. Merchant’s Remedies: Wis. Stat. §§ 425.102–120 [§ 20.34]


III. Lease Contracts [§ 20.36]
   A. In General [§ 20.37]
   B. Lessor’s Damages [§ 20.38]
   C. Lessee’s Damages [§ 20.39]

CHAPTER 21
CONTRACTS FOR THE PURCHASE AND SALE OF REAL ESTATE
by Brandon J. Evans

I. Introduction [§ 21.1]
   A. Purpose and Scope of Chapter [§ 21.2]
   B. Background and Policy Issues [§ 21.3]
   C. Related Matters [§ 21.4]

II. Overview of Damages for Breach of Real Estate Contract [§ 21.5]
   A. Monetary Damages [§ 21.6]
   B. Equitable Remedies [§ 21.7]

III. Breach of Preliminary Sale Contract by Buyer [§ 21.8]
   A. Actual Damages [§ 21.9]
   B. Liquidated Damages [§ 21.10]
   C. Consequential Damages [§ 21.11]
   D. Specific Performance [§ 21.12]
   E. Other Seller Remedies [§ 21.13]

IV. Breach of Preliminary Sale Contract by Seller [§ 21.14]
   A. Actual Damages [§ 21.15]
   B. Liquidated Damages [§ 21.16]
   C. Consequential Damages [§ 21.17]
   D. Specific Performance [§ 21.18]
   E. Other Buyer Remedies [§ 21.19]
   F. Defects in Title [§ 21.20]
V. Remedies for Breach of Land Contract [§ 21.21]
   A. Vendor’s Remedies [§ 21.22]
   B. Specific Performance [§ 21.23]
   C. Strict Foreclosure [§ 21.24]
   D. Other Vendor Remedies [§ 21.25]
   E. Remedies Available to Vendee [§ 21.26]

VI. Miscellaneous Remedy Issues [§ 21.27]
   A. Multiple Remedies [§ 21.28]
   B. Election of Remedies [§ 21.29]
   C. Remedies for Misrepresentation and Fraud [§ 21.30]
      1. In General [§ 21.31]
      2. The Economic Loss Doctrine [§ 21.32]

VII. Ancillary Matters [§ 21.33]
   A. Mitigation of Damages [§ 21.34]
   B. Vendee’s and Vendor’s Liens [§ 21.35]
   C. Lis Pendens [§ 21.36]
   D. Condominiums and Timeshares [§ 21.37]
   E. Rights of First Refusal [§ 21.38]
B. Breach of Covenant to Repair or Maintain Premises
   [§ 22.15]
   1. Legislative Provisions  [§ 22.16]
C. Breach of Warranties of Habitability or Tenantability
   [§ 22.18]
   1. Legislative Provisions  [§ 22.19]
   2. Common-Law Rules  [§ 22.20]
D. Breach of Other Covenants  [§ 22.21]
E. Special Rules for Residential Leases  [§ 22.22]
   1. In General  [§ 22.23]
   2. Security Deposits  [§ 22.24]
   3. Enforcement  [§ 22.25]

IV. Lessor’s Damages for Breach by Lessee  [§ 22.26]
   A. Breach of Covenant to Pay Rent  [§ 22.27]
      1. Legislative Provisions  [§ 22.28]
      2. Common-Law Rules  [§ 22.29]
   B. Eviction and Abandonment  [§ 22.30]
      1. Legislative Provisions  [§ 22.31]
         a. Recovery of Rent and Damages  [§ 22.32]
         b. Special Damages  [§ 22.33]
         c. Mitigation of Damages  [§ 22.34]
   C. Breach of Covenant to Surrender Premises  [§ 22.35]
   D. Breach of Other Covenants  [§ 22.36]
   E. Damage to Premises and Wrongful Removal of Fixtures  [§ 22.37]
      1. Legislative Provisions  [§ 22.38]

CHAPTER 23
EMPLOYMENT CONTRACTS
by Jonathan T. Swain and Samantha J. Wood

I. Introduction  [§ 23.1]
   A. Purpose and Scope of Chapter  [§ 23.2]
   B. Related Matters  [§ 23.3]

II. Nature of Employment Contracts  [§ 23.4]
   A. Termination of Employment Relationship  [§ 23.5]
      1. Contracts of Fixed Duration  [§ 23.6]
2. Contracts Terminable at Will  [§ 23.7]
   a. In General  [§ 23.8]
   b. Public Policy Limitation on Employer’s Right of Termination  [§ 23.9]
   c. Effect of Employee Handbook and Related Documents  [§ 23.10]

B. Employee’s Rights and Duties on Termination  [§ 23.11]
   1. Vested Benefits  [§ 23.12]
      a. In General  [§ 23.13]
      b. Insurance Benefits  [§ 23.14]
      c. Bonus Payments  [§ 23.15]
      d. Severance Payments  [§ 23.16]
      e. Sick-Leave Payouts  [§ 23.17]
   2. Postemployment Restrictions  [§ 23.18]
      a. Contracts Not to Compete  [§ 23.19]
      b. Confidential Information Restrictions  [§ 23.20]

III. Damages for Wrongful Termination of Employment Relationship  [§ 23.21]
   A. In General  [§ 23.22]
   B. Back Pay—Front Pay  [§ 23.23]
   C. Benefit of the Bargain  [§ 23.24]
   D. Duty to Mitigate Damages  [§ 23.25]

IV. Defamation in the Workplace  [§ 23.26]

CHAPTER 24
TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS
by Kyle W. Engelke

I. Introduction  [§ 24.1]
   A. Purpose and Scope of Chapter  [§ 24.2]
   B. Related Matters  [§ 24.3]

II. Elements of a Claim for Tortious Interference  [§ 24.4]
   A. In General  [§ 24.5]
   B. Existence of Contract or Prospective Contract  [§ 24.6]
      1. Existing Contract  [§ 24.7]
      2. Oral Agreements  [§ 24.8]
      3. Established Business Relationship Not Formalized by Contract  [§ 24.9]
### TABLE OF CONTENTS

4. Prospective Contract  [§ 24.10]
5. Prospective Business Relationships  [§ 24.11]

C. Interference  [§ 24.12]

D. Intent to Interfere  [§ 24.13]
   1. In General  [§ 24.14]
   2. Knowledge of Contractual Rights  [§ 24.15]
   3. Establishing Intent  [§ 24.16]
   4. Malice  [§ 24.17]

E. Causal Connection Between Conduct Complained of and Damages  [§ 24.18]
   1. In General  [§ 24.19]
   2. Specific Cases When Causation Sufficient  [§ 24.20]
   3. Specific Cases Failing to Prove Causation  [§ 24.21]

F. Lack of Justification or Privilege  [§ 24.22]
   1. In General  [§ 24.23]
   2. What Constitutes Improper Interference  [§ 24.24]
   3. Examples of Justification or Privilege  [§ 24.25]
      a. Transmission of Truthful Information  [§ 24.26]
      b. Transmission of Substantially True Information  [§ 24.27]
      c. Honest Advice or Consultant’s Privilege  [§ 24.28]
      d. Conditional Privilege to Speak About a Matter of Concern in the Workplace  [§ 24.29]
      e. Conditional Privilege of Corporate Representatives  [§ 24.30]
      f. Privilege to Choose with Whom to Do Business  [§ 24.31]
      g. Privilege to Assert Legitimate Legal Action  [§ 24.32]
      h. Privilege to Protect Legal or Business Interests  [§ 24.33]
      i. Privilege to Compete  [§ 24.34]
      j. Free-Speech Privilege to Assert Complaints  [§ 24.35]

4. List of Authority for Other Privileges of Third-Party Beneficiary  [§ 24.36]
5. Other Privileges Recognized by the Restatement  [§ 24.37]
III. **Defenses [§ 24.38]**
   A. In General [§ 24.39]
   B. Justification or Privilege [§ 24.40]
   C. Economic Loss Doctrine [§ 24.41]
   D. Statute of Limitation [§ 24.42]
   E. Failure to Comply with Notice-of-Claim Requirements and Wisconsin’s Governmental Immunity Statute [§ 24.43]

IV. **Litigation Considerations [§ 24.44]**
   A. Parties to Action [§ 24.45]
   B. Burden of Proof [§ 24.46]
      1. In General [§ 24.47]
      2. Burden of Proof as to Justification or Privilege [§ 24.48]
   C. Insurance, Preemption, and Arbitration [§ 24.49]
      1. Insurance Coverage [§ 24.50]
      2. Preemption [§ 24.51]
         a. State Law [§ 24.52]
         b. Federal Law [§ 24.53]
      3. Arbitration [§ 24.54]
   D. Measure of Damages [§ 24.55]
      1. Overview [§ 24.56]
      2. Compensatory Damages [§ 24.57]
         a. In General—Restatement (Second) of Torts [§ 24.58]
         b. Loss of Benefit of Contract [§ 24.59]
         c. Restitution or Recovery of Profits Realized by Defendant [§ 24.60]
         d. Consequential and Incidental Losses [§ 24.61]
         e. Harm to Reputation [§ 24.62]
         f. Emotional Distress [§ 24.63]
      3. Punitive or Exemplary Damages [§ 24.64]
      4. Injunctive Relief [§ 24.65]
      5. Statutory Remedies [§ 24.66]
         a. In General [§ 24.67]
         b. Combinations or Conspiracies in Restraint of Trade [§ 24.68]
         c. Conspiracy to Injure Another’s Reputation or Business or to Restrain Will [§ 24.69]
         d. Interference with Contracts of Agricultural Associations [§ 24.70]
e. Misappropriation of Trade Secrets  [§ 24.71]
f. Wisconsin Fair Employment Act  [§ 24.72]

V. Nature of Tort and Specific Cases  [§ 24.73]
A. Inducing or Causing Third Party Not to Perform  [§ 24.74]
B. Impairing the Value of the Bargain  [§ 24.75]
C. Making Performance More Expensive or Burdensome  [§ 24.76]
D. Interference with Prospective Contracts  [§ 24.77]
E. Interference with Principal-Agent Relationship  [§ 24.78]
F. Interference with an Expected Inheritance  [§ 24.79]
G. No Application to Negligent Interference  [§ 24.80]
H. No Application to Contracts to Marry or Illegal Contracts  [§ 24.81]
I. No Application to Interference with Fiduciary Duties  [§ 24.82]
J. Contracts That Are Unenforceable, Void, or Voidable  [§ 24.83]
K. Contracts Terminable at Will  [§ 24.84]
L. Civil Conspiracy  [§ 24.85]

CHAPTER 25
LIQUIDATED DAMAGES
by Keith A. Bruett

I. Introduction  [§ 25.1]
A. Purpose and Scope of Chapter  [§ 25.2]
B. Related Matters  [§ 25.3]

II. Enforceability of Stipulated Damages Provisions  [§ 25.4]
A. In General  [§ 25.5]
B. Factors Governing Enforceability  [§ 25.6]
   1. The Reasonableness Test  [§ 25.7]
      a. In General  [§ 25.8]
      b. Role of Intent of Parties  [§ 25.9]
      c. Effect of Difficulty in Ascertaining Actual Damages  [§ 25.10]
      d. Relationship of Stipulated Damages to Actual Damages  [§ 25.11]
2. Public Policy Considerations  [§ 25.12]
   a. In General  [§ 25.13]
   b. Factors Favoring Enforceability  [§ 25.14]
   c. Factors Disfavoring Enforceability  [§ 25.15]

III.  Procedural Considerations  [§ 25.16]
   A. Burden of Proof  [§ 25.17]
   B. Role of Court and Jury  [§ 25.18]
   C. Defensive Matters  [§ 25.19]
      1. Effect of Mitigation-of-Damages Doctrine  
         [§ 25.20]
      2. Reduction of Award to Present Value  [§ 25.21]
      3. Effect of Election-of-Remedies Doctrine  [§ 25.22]

IV. Voluntary-Payment Doctrine  [§ 25.23]

CHAPTER 26
LOSS OF PROFITS
Kurt A. Goehre

I.  Introduction  [§ 26.1]
   A. Purpose and Scope of Chapter  [§ 26.2]
   B. Related Matters  [§ 26.3]

II. Nature and Purpose of Damages for Lost Profits  [§ 26.4]

III. The Prima Facie Case  [§ 26.5]
   A. In General  [§ 26.6]
   B. Proximate Cause  [§ 26.7]
   C. Foreseeability  [§ 26.8]
   D. Reasonable Certainty  [§ 26.9]
      1. Degree Required  [§ 26.10]
      2. Amount of Damages  [§ 26.11]
      3. Jury Instructions and Evidentiary Considerations 
         [§ 26.12]

IV. Recovery of Lost Profits in Tort  [§ 26.13]
   A. In General  [§ 26.14]
   B. Actions for Personal Injuries  [§ 26.15]
   C. Actions for Damage to Property or Business  [§ 26.16]
   D. Economic Loss Doctrine  [§ 26.17]
<table>
<thead>
<tr>
<th>Section</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>V. Recovery of Lost Profits for Breach of Contract</td>
<td>§ 26.18</td>
</tr>
<tr>
<td>VI. Mitigation of Damages</td>
<td>§ 26.19</td>
</tr>
<tr>
<td>VII. Recovery of Lost Profits for Due-Process Violations</td>
<td>§ 26.20</td>
</tr>
<tr>
<td>VIII. Punitive Damages</td>
<td>§ 26.21</td>
</tr>
<tr>
<td>IX. Recovery of Lost Profits of an Unestablished Business</td>
<td>§ 26.22</td>
</tr>
<tr>
<td>X. Lost Profits Under the Uniform Commercial Code</td>
<td>§ 26.23</td>
</tr>
<tr>
<td>A. Sales Contracts Under Article 2</td>
<td>§ 26.24</td>
</tr>
<tr>
<td>1. In General</td>
<td>§ 26.25</td>
</tr>
<tr>
<td>2. Seller’s Lost Profits</td>
<td>§ 26.26</td>
</tr>
<tr>
<td>3. Buyer’s Lost Profits</td>
<td>§ 26.27</td>
</tr>
<tr>
<td>a. Nondelivery or Repudiation</td>
<td>§ 26.28</td>
</tr>
<tr>
<td>b. Breach of Warranty</td>
<td>§ 26.29</td>
</tr>
<tr>
<td>B. Limitation of Liability Under the UCC</td>
<td>§ 26.30</td>
</tr>
<tr>
<td>XI. Valuation</td>
<td>§ 26.31</td>
</tr>
<tr>
<td>A. Judicial Discretion and Admissibility of Evidence</td>
<td>§ 26.32</td>
</tr>
<tr>
<td>B. Valuation Methods</td>
<td>§ 26.33</td>
</tr>
<tr>
<td>1. In General</td>
<td>§ 26.34</td>
</tr>
<tr>
<td>2. Use of Experts</td>
<td>§ 26.35</td>
</tr>
<tr>
<td>3. Fair Market Value</td>
<td>§ 26.36</td>
</tr>
<tr>
<td>b. Internal Revenue Service</td>
<td>§ 26.38</td>
</tr>
<tr>
<td>c. Accounting Method</td>
<td>§ 26.39</td>
</tr>
<tr>
<td>d. Comparable-Sales Method</td>
<td>§ 26.40</td>
</tr>
<tr>
<td>e. Forensic Economics</td>
<td>§ 26.41</td>
</tr>
<tr>
<td>4. Adjusting the Award</td>
<td>§ 26.42</td>
</tr>
</tbody>
</table>
CHAPTER 27
MARITIME ACTIONS
by Thomas J. Lonzo

I. Introduction [§ 27.1]
   A. Purpose and Scope of Chapter [§ 27.2]
   B. Related Matters [§ 27.3]

II. Nature of Maritime Actions [§ 27.4]
   A. Jurisdiction and Venue [§ 27.5]
   B. Definitions [§ 27.6]
      1. Maritime Contracts [§ 27.7]
      2. Maritime Torts [§ 27.8]
   C. Bifurcation of Issues [§ 27.9]

III. Damages for Personal Injuries [§ 27.10]
   A. In General [§ 27.11]
   B. Injuries to Seamen [§ 27.12]
      1. In General [§ 27.13]
      2. Status Issues [§ 27.14]
      3. Right to Maintenance and Cure [§ 27.15]
      4. Damages for Unseaworthiness [§ 27.16]
      5. Damages for Negligence Under Jones Act [§ 27.17]
      6. Collateral Source Rule [§ 27.18]
   C. Injuries to Longshoremen and Harbor Workers [§ 27.19]
   D. Injuries to Passengers and Other Third Parties [§ 27.20]

IV. Damages for Wrongful Death [§ 27.21]
   A. In General [§ 27.22]
   B. Remedies for Seaman’s Wrongful Death [§ 27.23]
   C. Remedies for Non-Seaman’s Wrongful Death [§ 27.24]
   D. Remedy for Wrongful Death of Longshoreman and Harbor Worker [§ 27.25]

V. Property Damage to Ships Resulting from Collision [§ 27.26]

VI. Punitive Damages in Maritime Actions [§ 27.27]
TABLE OF CONTENTS

VII. Common-Law Limitations on Recoverable Damages  
[§ 27.28]

VIII. Limitation of Liability  [§ 27.29]

IX. Settlement  [§ 27.30]

X. Prejudgment Interest  [§ 27.31]

XI. Attorney Fees  [§ 27.32]

XII. Conclusion  [§ 27.33]

CHAPTER 28
BAD-FaITH ACTIONS
by David G. Ress

I. Introduction  [§ 28.1] 
A. Purpose and Scope of Chapter  [§ 28.2] 
B. Related Matters  [§ 28.3]

II. Insurance Cases  [§ 28.4] 
A. Liability for Bad Faith  [§ 28.5] 
  1. In Excess-Liability and Third-Party Cases  [§ 28.6] 
     a. In General  [§ 28.7] 
     b. Fiduciary Role and Obligation to Exercise Good Faith  [§ 28.8] 
     c. Bad Faith for Failing to Defend  [§ 28.9] 
     d. Reservation of Rights  [§ 28.10] 
     e. High-Deductible Policies  [§ 28.11] 
     f. Obligation to Settle Versus to Litigate  [§ 28.12] 
     g. Who May Bring a Bad-Faith Claim  [§ 28.13] 
     h. Burden of Proof  [§ 28.14] 
  2. In First-Party Cases  [§ 28.15] 
     a. In General  [§ 28.16] 
     b. Obligation of Good Faith  [§ 28.17] 
     c. Burden of Proof  [§ 28.18] 
III. Noninsurance Cases [§ 28.40]
   A. Liability for Bad Faith [§ 28.41]
      1. In Employment Contract Cases [§ 28.42]
      2. In Commercial Transaction Cases [§ 28.43]
   B. Recoverable Damages [§ 28.44]
      1. In Employment Contract Cases [§ 28.45]
      2. In Commercial Transaction Cases [§ 28.46]

CHAPTER 29
LEGAL MALPRACTICE
by Susan R. Tyndall

I. Introduction [§ 29.1]
   A. Purpose and Scope of Chapter [§ 29.2]
   B. Related Matters [§ 29.3]
II. Nature of Damages for Legal Malpractice [§ 29.4]
   A. General Rule [§ 29.5]
   B. Nominal Damages [§ 29.6]

III. Direct Damages [§ 29.7]
   A. Injury to Client’s Rights or Claims [§ 29.8]
      1. In General [§ 29.9]
      2. Loss or Diminution of Claim or Defense [§ 29.10]
      3. Loss or Diminution of Property Right [§ 29.11]
      4. Malpractice in Criminal Cases [§ 29.12]
      5. Estate Planning and Probate Malpractice Claims [§ 29.13]
   B. Costs and Expenses [§ 29.14]
   C. Attorney Fees [§ 29.15]
   D. Interest [§ 29.16]
   E. Speculative Damages [§ 29.17]

IV. Consequential Damages [§ 29.18]
   A. In General [§ 29.19]
   B. Emotional Distress [§ 29.20]
   C. Punitive Damages [§ 29.21]

V. Reduction of Damages [§ 29.22]
   A. In General [§ 29.23]
   B. Contributory Negligence [§ 29.24]
   C. Mitigation of Damages [§ 29.25]
   D. Ability to Recover Lost Claim [§ 29.26]
   E. Attorney Fees [§ 29.27]
   F. Recovery or Payment by Independent Tortfeasor [§ 29.28]

VI. Proof of Damages [§ 29.29]
   A. In General [§ 29.30]
   B. Suit Within a Suit [§ 29.31]

VII. Practice Points [§ 29.32]
   A. In General [§ 29.33]
   B. Example: Missed Statute of Limitation [§ 29.34]
      1. In General [§ 29.35]
      2. Plaintiff’s Argument [§ 29.36]
         a. Recovery for Attorney Fees [§ 29.37]
b. Recovery for Worker’s Compensation or Medical-Payment Liens [§ 29.38]
c. Recovery for Costs [§ 29.39]
3. Defendant’s Argument [§ 29.40]
a. Recovery for Attorney Fees; Worker’s Compensation or Medical-Payment Liens [§ 29.41]
b. Recovery for Costs [§ 29.42]

C. Example: Business Case [§ 29.43]
1. In General [§ 29.44]
2. Plaintiff’s Argument [§ 29.45]
a. Recovery for Attorney Fees [§ 29.46]
b. Recovery for Interest Paid on Business Loans [§ 29.47]
c. Recovery for Lost Profit [§ 29.48]
d. Recovery for Lost Opportunity Cost [§ 29.49]
3. Defendant’s Argument [§ 29.50]

D. Example: Family Law [§ 29.51]

CHAPTER 30
MITIGATION OF DAMAGES
by John W. Hein, Robert L. Gegios, and Melinda A. Bialzik

I. Introduction [§ 30.1]
A. Purpose and Scope of Chapter [§ 30.2]
B. Related Matters [§ 30.3]

II. Nature of Mitigation-of-Damages Doctrine [§ 30.4]
A. Definition [§ 30.5]
1. In General [§ 30.6]
2. Avoidable Consequences [§ 30.7]
3. Betterment [§ 30.8]
4. Extenuating Circumstances [§ 30.9]
B. Reasonableness Test [§ 30.10]
C. Expenses Incurred in Mitigating Damages [§ 30.11]
D. Practice and Procedure Rules [§ 30.12]

III. Application of Mitigation-of-Damages Doctrine [§ 30.13]
A. Tort Actions [§ 30.14]
1. In General [§ 30.15]
TABLE OF CONTENTS

2. Personal-Injury Actions [§ 30.16]
3. Aggravation of Injuries [§ 30.17]
4. Intentional Torts [§ 30.18]
B. Contract Actions [§ 30.19]
   1. In General [§ 30.20]
   2. Employment Actions [§ 30.21]
   4. Contractual Notice Requirements [§ 30.23]

IV. Statutory Mitigation Requirements [§ 30.24]

CHAPTER 31
CONTRIBUTORY NEGLIGENCE
by Katharine D. Spitz

I. Introduction [§ 31.1]
   A. Purpose and Scope of Chapter [§ 31.2]
   B. Related Matters [§ 31.3]

II. Nature and History of Contributory and Comparative Negligence Doctrines [§ 31.4]
   A. Definitions [§ 31.5]
      1. Contributory Negligence [§ 31.6]
      2. Comparative Negligence [§ 31.7]
   B. Historical Development of Contributory and Comparative Negligence in Wisconsin [§ 31.8]
      1. Pre-1931 State of Law [§ 31.9]
      2. Enactment of General Comparative Negligence Statute [§ 31.10]
      3. Modification of Rule to Its Present Form [§ 31.11]
      4. Challenge to Individual-Comparison Rule; Sole Exception to That Rule [§ 31.12]
      5. Common-Law Doctrines Displaced by Comparative Negligence Doctrine [§ 31.13]
         a. Implied Assumption of Risk [§ 31.14]
         b. Gross Negligence [§ 31.15]
   C. Authority for Future Development of Law [§ 31.16]
      1. Development of Law Through Legislative Action [§ 31.17]
      2. Development of Law Through Judicial Action [§ 31.18]
III. **Present Comparative Negligence Law** [§ 31.19]
   A. **Pleading Contributory Negligence** [§ 31.20]
   B. **Application of Comparative Negligence Law** [§ 31.21]
      1. **In General** [§ 31.22]
      2. **Single Plaintiff Versus Single Defendant** [§ 31.23]
      3. **Single Plaintiff Versus Multiple Defendants** [§ 31.24]
      4. **Setoffs** [§ 31.25]
         a. **In General** [§ 31.26]
         b. **Effect of Wisconsin’s Direct-Action Statute** [§ 31.27]
         c. **Example Involving Mutual Claimants and Equal Negligence** [§ 31.28]
      5. **Contribution** [§ 31.29]
         a. **In General** [§ 31.30]
         b. **History of Contribution Cause of Action** [§ 31.31]
         c. **Example Involving Comparative Negligence and Contribution** [§ 31.32]

IV. **Origin, Ascertainment, and Elements of Comparison Percentages** [§ 31.33]
   A. **How Comparison Percentages Are Ascertained** [§ 31.34]
      1. **Basic Premises and Procedures** [§ 31.35]
      2. **Determiner of Negligence Percentages** [§ 31.36]
         a. **Role of Finder of Fact** [§ 31.37]
         b. **Role of Finder of Law** [§ 31.38]
      3. **Structure of Comparison Question** [§ 31.39]
   B. **Principles of Comparison** [§ 31.40]
   C. **Matters That Are and Are Not Comparable** [§ 31.41]
      1. **Matters That Are Comparable** [§ 31.42]
      2. **Matters That Are Not Comparable** [§ 31.43]

V. **Active-Passive Negligence Distinction and Seat-Belt Negligence** [§ 31.44]
   A. **Nature of Distinction Between Active and Passive Negligence** [§ 31.45]
      1. **Active-Passive Negligence Distinction with Respect to Liability for Injury to Others** [§ 31.46]
      2. **Active-Passive Negligence Distinction with Respect to Causing One’s Own Injuries** [§ 31.47]
B. Seat-Belt Negligence  [§ 31.48]
   1. Nature of Seat-Belt Negligence  [§ 31.49]
   2. Distinction Between Passive Negligence, Seat-Belt
      Negligence, and Helmet Negligence  [§ 31.50]
C. Effect of Passive Negligence and Seat-Belt Negligence
   on Comparative Negligence Equation  [§ 31.51]
   1. Passive Negligence  [§ 31.52]
   2. Seat-Belt Negligence  [§ 31.53]
   3. Contribution  [§ 31.54]

VI. Effect of Derivation, Subrogation, and Assignment on
    Comparison Question  [§ 31.55]
   A. Nature of Derivative Cause of Action and Its Effect on
      Comparison Question  [§ 31.56]
   B. Nature of Subrogated or Assigned Cause of Action and
      Its Effect on Comparison Question  [§ 31.57]

VII. Comparative Negligence Statutes of Limited Scope
     [§ 31.58]
   A. Wis. Stat. § 102.29: Injuries to Employees in Worker’s
      Compensation Cases  [§ 31.59]
   B. Wis. Stat. § 895.37(1)(c): Injuries to Employees in
      Cases Other Than Worker’s Compensation Cases
      [§ 31.60]
   C. Wis. Stat. § 895.048: Recoveries by Owners for
      Losses to Motor Vehicles or Motor Boats  [§ 31.61]
   D. Wis. Stat. § 30.68(4)(b): Damage or Injury Resulting
      from Motorboat Wake or Wash  [§ 31.62]
   F. Wis. Stat. § 895.04(7): Wrongful Death  [§ 31.64]
   G. Wis. Stat. § 107.31(3)(c): Claims Against Mining-
      Damage Appropriation  [§ 31.65]
   H. Wis. Stat. § 939.14: Crime Victim  [§ 31.66]

CHAPTER 32
SUBROGATION
by Jessica M. Butler

I. Introduction  [§ 32.1]
   A. Purpose and Scope of Chapter  [§ 32.2]
   B. Related Matters  [§ 32.3]
II. **General Principles** [§ 32.4]
   A. Definition of Subrogation [§ 32.5]
   B. Purpose and Scope of Doctrine of Subrogation [§ 32.6]

III. **Statutory Subrogation** [§ 32.7]

IV. **Common-Law Subrogation** [§ 32.8]
   A. Types of Common-Law Subrogation—Legal and Conventional [§ 32.9]
   B. Nature of Indemnity Obligation; Source of Legal Subrogation [§ 32.10]
   C. Nature of Investment Obligation; Source of Conventional Subrogation [§ 32.11]

V. **Rules Governing Recovery by Subrogees** [§ 32.12]
   A. Parties Against Whom Recovery Is Available [§ 32.13]
   B. Joinder of Subrogated Parties [§ 32.14]
      1. Statutory Basis for Joinder [§ 32.15]
      2. Statute of Limitation for Joinder [§ 32.16]
   C. Extent of Recovery Available [§ 32.17]
   D. Defenses to Subrogee’s Claim [§ 32.18]
   E. Made-Whole Limitation on Subrogee’s Recovery [§ 32.19]
      1. Statement of Made-Whole Limitation [§ 32.20]
      2. Development of Made-Whole Limitation [§ 32.21]
      3. Effect of Contract Language on Made-Whole Limitation [§ 32.22]
      4. Applicability of Made-Whole Limitation to First-Party and Third-Party Situations [§ 32.23]
         a. In General [§ 32.24]
         b. Rationale for Applying Made-Whole Limitation in First-Party Situation [§ 32.25]
         c. Rationale for Not Applying Made-Whole Limitation in Third-Party Situation [§ 32.26]
         d. Rule Allowing Subrogor to Unilaterally Change Third-Party Situation into First-Party Situation [§ 32.27]
      5. Made-Whole Limitation in Comparative Negligence Cases [§ 32.28]
      6. Statutory Modifications of Made-Whole Limitation [§ 32.29]
CHAPTER 33
COLLATERAL SOURCE RULE
by Webster A. Hart and Stephanie L. Finn

I. Introduction [§ 33.1]

II. Development and Statement of Collateral Source Rule [§ 33.2]
   A. Historical Development [§ 33.3]
   B. General Statement of Rule as Developed [§ 33.4]
      1. Rule of Damages [§ 33.5]
      2. Rule of Evidence [§ 33.6]
      3. Legislative Developments [§ 33.7]

III. Application of Collateral Source Rule [§ 33.8]
   A. Tort Claims [§ 33.9]
      1. In General [§ 33.10]
      2. Gratuitous or Fortuitous Benefits [§ 33.11]
      3. Employer Wage Contributions [§ 33.12]
      4. Medical Insurance Payments [§ 33.13]
         a. Private Insurer [§ 33.14]
         b. Medicare and Medical Assistance [§ 33.15]
      5. Payments Made Pursuant to Worker’s Compensation Act [§ 33.16]
      6. Wrongful Death Actions [§ 33.17]
      7. Property Damage [§ 33.18]
   B. Contract Claims [§ 33.19]
   C. Defensive Application [§ 33.20]

IV. Improper Application [§ 33.21]
   A. In General [§ 33.22]
   B. Tortfeasors Cannot Invoke Collateral Source Rule [§ 33.23]
   C. Collateral Source Rule Does Not Apply When Plaintiff Creates Windfall [§ 33.24]
   D. Collateral Source Rule Applies Only to Payments for Related Damages [§ 33.25]
CHAPTER 34
TAXABILITY OF DAMAGES AWARDS
by Victoria M. Karcher

I. Introduction [§ 34.1]
   A. Purpose and Scope of Chapter [§ 34.2]
   B. Related Matters [§ 34.3]

II. Compensatory Damages [§ 34.4]
   A. Personal-Injury Actions [§ 34.5]
      1. In General [§ 34.6]
      2. Cases Delineating Scope of I.R.C. § 104(a)(2) Exclusion [§ 34.7]
   B. Business Actions [§ 34.8]

III. Allocation of Damages for Income Tax Purposes [§ 34.9]

IV. Punitive Damages [§ 34.10]

V. Special Treatment of Structured Settlements [§ 34.11]

VI. Payroll Taxes and Self-Employment Tax [§ 34.12]

VII. Recovery of Attorney Fees [§ 34.13]

CHAPTER 35
INTEREST ON DAMAGES
by Thomas Gonzalez

I. Introduction [§ 35.1]
   A. Purpose and Scope of Chapter [§ 35.2]
   B. Related Matters [§ 35.3]

II. Prejudgment Interest [§ 35.4]
   A. Definition [§ 35.5]
   B. Circumstances Permitting Recovery [§ 35.6]
      1. In General [§ 35.7]
      2. Wisconsin’s Middle-Ground Approach [§ 35.8]
      3. Some Other Factors Precluding Recovery [§ 35.9]
   C. Rates of Interest [§ 35.10]
CHAPTER 36
COSTS AND DISBURSEMENTS
by Patrick J. Lubenow and Isabelle L. Faust

I. Introduction  [§ 36.1]
   A. Purpose and Scope of Chapter  [§ 36.2]
   B. Related Matters  [§ 36.3]

II. Persons Entitled to Recover Costs  [§ 36.4]

III. Items of Costs  [§ 36.5]
   A. In General  [§ 36.6]
   B. Attorney Fees  [§ 36.7]
   C. Disbursements  [§ 36.8]
      1. Wis. Stat. § 814.04(2) Disbursements  [§ 36.9]
         a. Necessary Disbursements and Fees Allowed by Law  [§ 36.10]
         b. Referee Fees  [§ 36.11]
         c. Service Fees  [§ 36.12]
         d. Electronic Filing Fees  [§ 36.13]
         e. Deposition Expenses  [§ 36.14]
         f. Costs of Plats and Photographs  [§ 36.15]
         g. Expert Fees  [§ 36.16]
         h. Abstract Costs  [§ 36.17]
         i. Other Trial Preparation Expenses  [§ 36.18]
      2. Other Disbursements  [§ 36.19]
         a. Surety Premiums  [§ 36.20]
         b. Expenses of Jurisdictional Motions  [§ 36.21]

IV. Taxation Procedure  [§ 36.22]
   A. Taxation of Costs  [§ 36.23]
   B. Review  [§ 36.24]
CHAPTER 37
ATTORNEY FEES
by Robert J. Kasieta and Rebecca M. Hillary

I. Introduction [§ 37.1]
   A. Purpose and Scope of Chapter [§ 37.2]
   B. Related Matters [§ 37.3]

II. American Rule of Nonrecoverability of Attorney Fees [§ 37.4]

III. Applicability of American Rule of Nonrecoverability in Wisconsin [§ 37.5]
   A. The American Rule [§ 37.6]
   B. Exceptions [§ 37.7]
      1. Contractual Exception [§ 37.8]
      2. Statutory Exceptions [§ 37.9]
      3. Common-Law Exceptions [§ 37.10]
         a. Wisconsin Courts Applying Wisconsin Law [§ 37.11]
            (1) Insurance Cases [§ 37.12]
            (2) Third-Party Litigation [§ 37.13]
            (3) Fund Doctrine [§ 37.14]
            (4) Common-Fund Doctrine [§ 37.15]
            (5) Restitution [§ 37.16]
            (6) Equitable Decisions [§ 37.17]
         b. Wisconsin Courts Applying Federal Law [§ 37.18]

IV. Awards of Attorney Fees [§ 37.19]
    A. Right to Award [§ 37.20]
       1. “Prevailing Party” Determination [§ 37.21]
       2. Attorney Recovery of Awarded Fees [§ 37.22]
       3. Recovery of Fees When Actual Fees Not Incurred [§ 37.23]
       4. Fees Awarded Against the State [§ 37.24]
       5. Voluntary Dismissal [§ 37.25]
       6. Landlord-Tenant [§ 37.26]
       7. Physical Placement [§ 37.27]
       8. Appellate Review of Fee Awards [§ 37.28]
    B. Amount of Award [§ 37.29]
       1. Statutory Reasonableness Analysis [§ 37.30]
2. “Reasonableness” Determinations by Courts  
   [§ 37.31]
3. Excessive Litigation or Unprofessional Conduct  
   [§ 37.32]
4. Fee Determination in Divorce Actions  [§ 37.33]
C. Out-of-Pocket Costs and Expenses as Attorney Fees  
   [§ 37.34]
D. Judicial Review of Awards  [§ 37.35]
E. Proof of Attorney Fees  [§ 37.36]

V. Frivolous Claims and Appeals  [§ 37.37]
   A. Frivolous Claims, Counterclaims, and Defenses  
      [§ 37.38]
   B. Inherent Authority  [§ 37.39]
   C. Frivolous Appeals  [§ 37.40]

VI. Appendix  [§ 37.41]
   A. Appendix 37A: Statutory Exceptions to the American  
      Rule of Nonrecoverability of Attorney Fees  [§ 37.42]

CHAPTER 38
PLEADING DAMAGES ISSUES
by Andrew J. Clarkowski

I. Introduction  [§ 38.1]
   A. Purpose and Scope of Chapter  [§ 38.2]
   B. Related Matters  [§ 38.3]

II. General Rules of Pleading Damages  [§ 38.4]

III. Pleading Damages in Specific Types of Actions  [§ 38.5]
   A. Actions for Sale and Delivery of Goods or Performance  
      of Labor and Services  [§ 38.6]
   B. Replevin Actions  [§ 38.7]
   C. Garnishment Actions  [§ 38.8]
   D. Real Estate Partition Actions  [§ 38.9]
   E. Actions for Interference with Interests in Real Estate  
      [§ 38.10]
   F. Consumer Credit Actions  [§ 38.11]
   G. Actions Seeking Punitive Damages  [§ 38.12]
   H. Actions for Emotional Distress  [§ 38.13]
   I. Lemon Law Actions  [§ 38.14]
IV. Nature and Effect of the *Ad Damnum* Clause  [§ 38.15]  

V. Raising Damages Defenses  [§ 38.16]  

## CHAPTER 39  
**BURDEN OF PROOF AND SUFFICIENCY OF EVIDENCE**  
*by Andrew J. Clarkowski*

### I. Introduction  [§ 39.1]  
- A. Purpose and Scope of Chapter  [§ 39.2]  
- B. Related Matters  [§ 39.3]  

### II. General Rules  [§ 39.4]  
- A. Burden of Proof  [§ 39.5]  
- B. Sufficiency of Evidence  [§ 39.6]  
- C. Default Judgments  [§ 39.7]  

### III. Tort Damages  [§ 39.8]  
- A. Past Physical Pain and Suffering  [§ 39.9]  
- B. Future Physical Pain and Suffering  [§ 39.10]  
- C. Mental Pain and Suffering  [§ 39.11]  
- D. Loss of Earning Capacity  [§ 39.12]  
- E. Loss of Earnings  [§ 39.13]  
- F. Loss of Profits  [§ 39.14]  
- G. Past Medical and Hospital Expenses  [§ 39.15]  
- H. Future Medical and Hospital Expenses  [§ 39.16]  
- I. Loss of Society and Companionship  [§ 39.17]  
- J. Punitive Damages  [§ 39.18]  
- K. Interest as Element of Damages  [§ 39.19]  
- L. Attorney Fees, Costs, and Expenses  [§ 39.20]  
- M. Valuation of Land  [§ 39.21]  
- N. Proof of Statutory Damages Enhancers  [§ 39.22]  

### IV. Damages for Breach of Contract  [§ 39.23]  
- A. In General  [§ 39.24]  
- B. Liquidated Damages  [§ 39.25]  

### V. Review of Damages Awards  [§ 39.26]  
- A. By Trial Court  [§ 39.27]  
  1. Compensatory Damages  [§ 39.28]  
  2. Punitive Damages  [§ 39.29]  
- B. By Appellate Court  [§ 39.30]
CHAPTER 40
ADDITUR AND REMITTITUR
by Kent A. Tess-Mattner and Stephen L. Fox

I. Introduction [§ 40.1]
   A. Purpose and Scope of Chapter [§ 40.2]
   B. Related Matters [§ 40.3]

II. Nature of Additur and Remittitur Doctrines [§ 40.4]

III. Application of Additur and Remittitur Doctrines [§ 40.5]
    A. In General [§ 40.6]
    B. Verdict Amount Not Supported by Evidence [§ 40.7]
    C. Verdict Amount Influenced by Perversity and Prejudice [§ 40.8]
    D. Verdict Amount Affected by Other Errors Concerning Damages [§ 40.9]
    E. Standards for Trial Court in Invoking and Applying Doctrines [§ 40.10]
       1. Determining Whether Original Award Is Inadequate or Excessive [§ 40.11]
          a. Compensatory Damages [§ 40.12]
          b. Punitive Damages [§ 40.13]
       2. Determining Reasonable Amount of Damages in Lieu of Jury’s Verdict [§ 40.14]
    F. Nature of Trial Court Order to Be Entered [§ 40.15]
    G. Appellate Court [§ 40.16]
       1. Standard of Review [§ 40.17]
       2. Procedure [§ 40.18]
          a. If Trial Court Has Applied Additur or Remittitur [§ 40.19]
          b. If Trial Court Has Not Applied Additur or Remittitur [§ 40.20]

IV. Tactical Considerations [§ 40.21]

INDEX