

Table of Contents

CHAPTER 1

COMPENSATORY DAMAGES

by Matthew V. Fisher and Carly Swinick

- 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]

- 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 Erik G. Hassell

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 Violations [§ 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. Introduction [§ 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]
- E. Statutory Caps on Noneconomic Damages in Medical Negligence Cases [§ 5.36]

VI. Duty to Mitigate Damages [§ 5.37]

VII. Conclusion [§ 5.38]

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]
 - 2. “Bystander” or “Participant,” a Negligent Infliction of Emotional Distress Claim Under Wis. Stat. Ch. 655 [§ 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 a Cause of the 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]**

CHAPTER 7

DISABILITY AND LOSS OF ENJOYMENT OF LIFE

by Derek W. Brown

- I. Introduction [§ 7.1]**
 - A. Purpose and Scope of Chapter [§ 7.2]
 - B. Related Matters [§ 7.3]

II. Nature of Damages for Disability Per Se [§ 7.4]

- A. Physical Disability [§ 7.5]
 - 1. Definitions [§ 7.6]
 - 2. Examples [§ 7.7]
- 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 That Victim [§ 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 Sarah F. Kaas and Paul A. Kinne

- 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]
 - (1) In General [§ 13.19]
 - (2) Loss of Society and Companionship Damages [§ 13.20]
 - (3) Loss of Life or Hedonic Damages [§ 13.21]
 - (4) Funeral and Burial Expenses [§ 13.22]
 - (5) Prejudgment Interest [§ 13.23]
 - c. Duty to Mitigate [§ 13.24]
 - d. Double Recovery [§ 13.25]
- D. Punitive Damages [§ 13.26]
 - 1. In General [§ 13.27]
 - 2. Grounds for Punitive Damages [§ 13.28]
 - 3. Persons Liable [§ 13.29]
- E. Attorney Fees [§ 13.30]

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 13a.B: 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]

II. Nature of Concepts of Society and Companionship and Consortium [§ 14.4]

- A. Definitions [§ 14.5]
- B. Comparison of Treatment of Concepts in Statutory Wrongful Death Cases and Common-Law Personal-Injury Cases [§ 14.6]
- 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]
 - 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 and Isaiah Z. Simons

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. Fees for Administering Estate [§ 16.50]
- G. Punitive Damages [§ 16.51]
- H. Prejudgment Interest [§ 16.52]

VI. Jury Instructions [§ 16.53]

- A. In General [§ 16.54]
- B. Future Damages and Present Value [§ 16.55]

CHAPTER 17

PERSONAL PROPERTY

by Jacob A. Sosnay

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 Matthew Kass

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]
 - 3. Solar and Wind Access [§ 18.24]
- 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. Arntsen, 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]

CHAPTER 20

CONTRACTS FOR THE SALE OR LEASE OF PERSONAL PROPERTY

by Sherry D. Coley, Tiffany E. Woelfel, and Ryan Bald

I. Introduction [§ 20.1]

- A. Purpose and Scope of Chapter [§ 20.2]
- B. Related Matters [§ 20.3]

II. Sales Contracts [§ 20.4]

- A. Uniform Commercial Code [§ 20.5]

1. In General [§ 20.6]
2. Seller’s Damages [§ 20.7]
 - a. Action for Price: Wis. Stat. § 402.709 [§ 20.8]
 - b. Incidental Damages: Wis. Stat. § 402.710 [§ 20.9]
 - c. Damages for Nonacceptance or Repudiation: Wis. Stat. § 402.708 [§ 20.10]
 - d. Damages in Event of Resale: Wis. Stat. §§ 402.703(4) and 402.706 [§ 20.11]
 - e. Claims Against Third Parties for Injury to Goods: Wis. Stat. § 402.722 [§ 20.12]
 - f. Remedies for Fraud: Wis. Stat. § 402.721 [§ 20.13]
3. Seller’s Nondamages Remedies [§ 20.14]
4. Buyer’s Damages [§ 20.15]
 - a. Incidental Damages: Wis. Stat. § 402.715(1) [§ 20.16]
 - b. Consequential Damages: Wis. Stat. § 402.715(2) [§ 20.17]
 - c. Damages for Nondelivery or Repudiation: Wis. Stat. §§ 402.713, 402.723, 402.610, and 402.611 [§ 20.18]
 - 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]
 - a. Liquidated Damages: Wis. Stat. § 402.718 [§ 20.26]
 - 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]
 - 1. Wisconsin Consumer Act: Wis. Stat. chs. 421–427 [§ 20.31]
 - a. In General [§ 20.32]
 - b. Customer’s Damages: Wis. Stat. §§ 425.301–.311 [§ 20.33]
 - c. Merchant’s Remedies: Wis. Stat. §§ 425.102–.210 [§ 20.34]
 - 2. Special Rules for Motor Vehicle Sales: Wis. Stat. § 218.0171 [§ 20.35]
- 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]

CHAPTER 22

CONTRACTS FOR LEASEHOLD INTERESTS IN REAL PROPERTY

by Brian A. Schuk

I. Introduction [§ 22.1]

- A. Purpose and Scope of Chapter [§ 22.2]
- B. Note on Language [§ 22.3]
- C. Related Matters [§ 22.4]

II. General Damages Rules in Contract Cases [§ 22.5]

III. Lessee’s Damages for Breach by Lessor [§ 22.6]

- A. Breach of Covenant to Deliver Possession or of Quiet Enjoyment [§ 22.7]
 - 1. Legislative Provisions [§ 22.8]
 - 2. Common-Law Rules [§ 22.9]
 - a. Types of Damages Recoverable [§ 22.10]
 - (1) In General [§ 22.11]
 - (2) General Damages [§ 22.12]
 - (3) Special Damages [§ 22.13]
 - b. Mitigation of Damages [§ 22.14]
- B. Breach of Covenant to Repair or Maintain Premises [§ 22.15]
 - 1. Legislative Provisions [§ 22.16]
 - 2. Common-Law Rules [§ 22.17]
- 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]
 - 2. Common-Law Rules [§ 22.39]

CHAPTER 23

EMPLOYMENT CONTRACTS

by 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 and Clementine Uwabera

- 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]
 - 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. Amending Pleadings [§ 24.49]
- D. Insurance, Preemption, and Arbitration [§ 24.50]
 - 1. Insurance Coverage [§ 24.51]
 - 2. Preemption [§ 24.52]
 - a. State Law – Wisconsin Fair Employment Act [§ 24.53]
 - b. Federal Law [§ 24.54]
 - 3. Arbitration [§ 24.55]
- E. Measure of Damages [§ 24.56]
 - 1. Overview [§ 24.57]

- 2. Compensatory Damages [§ 24.58]
 - a. In General—Restatement (Second) of Torts [§ 24.59]
 - b. Loss of Benefit of Contract [§ 24.60]
 - c. Restitution or Recovery of Profits Realized by Defendant [§ 24.61]
 - d. Consequential and Incidental Losses [§ 24.62]
 - e. Harm to Reputation [§ 24.63]
 - f. Emotional Distress [§ 24.64]
- 3. Punitive or Exemplary Damages [§ 24.65]
- 4. Injunctive Relief [§ 24.66]
- 5. Statutory Remedies [§ 24.67]
 - a. In General [§ 24.68]
 - b. Combinations or Conspiracies in Restraint of Trade [§ 24.69]
 - c. Conspiracy to Injure Another’s Reputation or Business or to Restrain Will [§ 24.70]
 - d. Interference with Contracts of Agricultural Associations [§ 24.71]
 - e. Misappropriation of Trade Secrets [§ 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]
- V. Recovery of Lost Profits for Breach of Contract [§ 26.18]**
- VI. Mitigation of Damages [§ 26.19]**
- VII. Recovery of Lost Profits for Due-Process Violations [§ 26.20]**
- VIII. Punitive Damages [§ 26.21]**
- IX. Recovery of Lost Profits of an Unestablished Business [§ 26.22]**
- X. Lost Profits Under the Uniform Commercial Code [§ 26.23]**
 - A. Sales Contracts Under Article 2 [§ 26.24]
 - 1. In General [§ 26.25]
 - 2. Seller’s Lost Profits [§ 26.26]
 - 3. Buyer’s Lost Profits [§ 26.27]
 - a. Nondelivery or Repudiation [§ 26.28]
 - b. Breach of Warranty [§ 26.29]
 - B. Limitation of Liability Under the UCC [§ 26.30]

- XI. Valuation [§ 26.31]**
 - A. Judicial Discretion and Admissibility of Evidence [§ 26.32]
 - B. Valuation Methods [§ 26.33]
 - 1. In General [§ 26.34]
 - 2. Use of Experts [§ 26.35]
 - 3. Fair Market Value [§ 26.36]
 - a. Willing Buyer–Willing Seller [§ 26.37]
 - b. Internal Revenue Service [§ 26.38]
 - c. Accounting Method [§ 26.39]
 - d. Comparable-Sales Method [§ 26.40]
 - e. Forensic Economics [§ 26.41]
 - 4. Adjusting the Award [§ 26.42]

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 Longshore 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 Longshore or Harbor Worker [§ 27.25]
- V. Property Damage to Ships Resulting from Collision [§ 27.26]**
- VI. Punitive Damages in Maritime Actions [§ 27.27]**
- 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 Melinda A. Bialzik and Lance E. Duroni

- 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]
 - d. Bifurcation of Bad Faith and Breach of Contract Claims in Discovery [§ 28.19]
 - e. Reformation of Insurance Policy and Policy Exclusions [§ 28.20]
 - f. Preemptions [§ 28.21]
 - g. Health Maintenance Organizations [§ 28.22]
 - h. No Duty to Inform About Statute of Limitation [§ 28.23]
 - 3. In Life Insurance Cases [§ 28.24]
 - 4. In Worker’s Compensation Cases [§ 28.25]
 - a. In General [§ 28.26]
 - b. Deference Given to Agency Decisions [§ 28.27]
 - c. Employer’s Independent Liability [§ 28.28]
 - d. Wisconsin’s Worker’s Compensation Uninsured Employers Fund [§ 28.29]
 - e. Effect of Employer’s Bankruptcy [§ 28.30]
 - 5. In Primary Insurer Versus Excess Insurer Cases [§ 28.31]
 - 6. In Cases Involving Bad Faith by Insured [§ 28.32]
 - B. Recoverable Damages [§ 28.33]
 - 1. In Excess-Liability Cases [§ 28.34]
 - 2. In First-Party Cases [§ 28.35]
 - 3. In Life Insurance Cases [§ 28.36]
 - 4. In Worker’s Compensation Cases [§ 28.37]
 - 5. In Primary Versus Excess Insurer Cases [§ 28.38]
 - 6. In Cases Involving Bad Faith by Insured [§ 28.39]

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 Robert L. Gegios and Benjamin R. Prinsen

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]
 - 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]
 - 3. Stipulated-Damages Provisions [§ 30.22]
 - 4. Contractual Notice Requirements [§ 30.23]

IV. Statutory Mitigation Requirements [§ 30.24]

CHAPTER 31

COMPARATIVE AND 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. Difference Between Contributory and Comparative Negligence [§ 31.5]
- B. Historical Development of Contributory and Comparative Negligence in Wisconsin [§ 31.6]
 - 1. Comparative Negligence Before 1995 [§ 31.7]
 - 2. The 1995 Legislative Amendments and Joint and Several Liability [§ 31.8]
 - 3. 2011 Wis. Act 2 and Products-Liability Claims [§ 31.9]

III. Pleading Contributory Negligence [§ 31.10]

- A. In General [§ 31.11]
- B. Derivative Actions, Assignment, and Subrogation [§ 31.12]
 - 1. Derivative Actions Generally [§ 31.13]
 - 2. Derivative Actions: Wrongful Death [§ 31.14]
 - 3. Subrogated or Assigned Causes of Action [§ 31.15]

- 4. Counterclaims and Setoff [§ 31.16]
 - a. In General [§ 31.17]
 - b. Effect of Wisconsin’s Direct-Action Statute on Setoff [§ 31.18]
 - 5. Contribution [§ 31.19]
 - a. In General [§ 31.20]
 - b. The Relationship of Wisconsin’s Comparative Negligence Statute and Contribution [§ 31.21]
 - c. Pleading Contribution [§ 31.22]
 - d. Examples Involving Comparative Negligence and Contribution [§ 31.23]
 - (1) In General [§ 31.24]
 - (2) Scenario 1: Contribution with Joint and Several Liability [§ 31.25]
 - (3) Scenario 2: Contribution Absent Joint and Several Liability [§ 31.26]
 - (4) Scenario 3: Contribution, Joint and Several Liability, and the Judgment-Proof Defendant [§ 31.27]
 - C. Defenses Abrogated by Development of Comparative Negligence [§ 31.28]
 - 1. Implied Assumption of Risk [§ 31.29]
 - 2. Gross Negligence [§ 31.30]
 - 3. Open-and-Obvious-Danger Defense [§ 31.31]
- IV. Application of Comparative Negligence Law [§ 31.32]**
- A. In General [§ 31.33]
 - B. Determiner of Negligence Percentages [§ 31.34]
 - 1. Role of Finder of Fact [§ 31.35]
 - 2. Role of Finder of Law [§ 31.36]
 - C. Principles of Comparison [§ 31.37]
 - D. Determining Which Parties or Entities Are Listed on the Verdict Form [§ 31.38]
 - E. Matters That Are and Are Not Comparable [§ 31.39]
 - 1. Matters That Are Comparable [§ 31.40]
 - a. In General [§ 31.41]
 - b. Unusual Matters Subject to Comparison [§ 31.42]
 - 2. Matters That Are Not Comparable [§ 31.43]
- V. Active-Passive Negligence Distinction [§ 31.44]**
- A. Concerning Injury to Others [§ 31.45]
 - B. Concerning the Cause of One’s Own Injuries [§ 31.46]

VI. Structure of Comparison Question [§ 31.47]

- A. In General [§ 31.48]
- B. Examples of Simple Comparative Negligence Scenarios [§ 31.49]
 - 1. Single Plaintiff Versus Single Defendant [§ 31.50]
 - 2. Single Plaintiff Versus Multiple Defendants: Individual Comparison Rule [§ 31.51]
 - 3. Single Plaintiff Versus Multiple Defendants: Joint and Several Liability and Concerted Action [§ 31.52]
- C. Seat-Belt Negligence [§ 31.53]
 - 1. Nature of Seat-Belt Negligence [§ 31.54]
 - 2. Distinction Between Passive Negligence and Seat-Belt Negligence [§ 31.55]
- D. Effect of Passive Negligence and Seat-Belt Negligence on Comparative Negligence Equation [§ 31.56]
 - 1. Passive Negligence [§ 31.57]
 - 2. Seat-Belt Negligence [§ 31.58]
- E. Comparison Percentages When Seat Belt Negligence Is Involved [§ 31.59]
- F. Helmet Negligence [§ 31.60]
- G. Contribution [§ 31.61]

VII. Recovering from Entities Listed on the Verdict Form [§ 31.62]

- A. In General [§ 31.63]
- B. Settling Defendants and *Pierringer* Releases [§ 31.64]
- C. Immunity Doctrines [§ 31.65]
 - 1. Abrogated Immunity Doctrines [§ 31.66]
 - 2. Immunity Doctrines in Force Today [§ 31.67]
 - a. In General [§ 31.68]
 - b. Worker’s Compensation Exclusivity [§ 31.69]
 - c. Immunity Based on Failure to Comply with Notice of Claim Statute [§ 31.70]
 - d. Discretionary Immunity [§ 31.71]
 - e. Recreational Immunity [§ 31.72]
 - 3. Impact of Immunity Doctrines [§ 31.73]
 - 4. Application of Damages Caps [§ 31.74]

VIII. Comparative Negligence and Products-Liability Cases

[§ 31.75]

- A. Products-Liability Law Before 2011 [§ 31.76]
- B. 2011 Wis. Act 2 and Joint and Several Liability [§ 31.77]
- C. Risk Contribution Liability Before 2011 [§ 31.78]
- D. 2011 Wis. Act 2 and Liability for Parties in a Product Distribution Chain [§ 31.79]
- E. 2011 Wis. Act 2 and Defective Design Claims [§ 31.80]
- F. Drafting the Verdict Form in Products-Liability Cases [§ 31.81]

IX. Comparative Negligence Statutes of Limited Scope

[§ 31.82]

- A. In General [§ 31.83]
- B. Wis. Stat. § 895.37(1)(c): Injuries to Employees in Cases Other Than Worker’s Compensation Cases [§ 31.84]
- C. Physicians and Informed Consent [§ 31.85]
- D. Sexual Exploitation by Therapists [§ 31.86]
- E. Wis. Stat. § 30.68(4)(b): Damage or Injury Resulting from Motorboat Wake or Wash [§ 31.87]
- F. Wis. Stat. § 895.048: Recoveries by Owners for Losses to Motor Vehicles or Motor Boats [§ 31.88]
- G. 45 U.S.C. § 53: Injuries to Railroad Employees [§ 31.89]
- H. Wis. Stat. § 107.31(3)(c): Claims Against Mining-Damage Appropriation [§ 31.90]

CHAPTER 32

SUBROGATION

by Matthew R. Falk

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 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]
 - a. Statutory Exceptions [§ 33.8]
 - b. Statutory Clarification [§ 33.9]

III. Application of Collateral Source Rule [§ 33.10]

- A. Tort Claims [§ 33.11]
 - 1. In General [§ 33.12]
 - 2. Gratuitous or Fortuitous Benefits [§ 33.13]
 - 3. Employer Wage Contributions [§ 33.14]
 - 4. Medical Insurance Payments [§ 33.15]
 - a. Private Insurer [§ 33.16]
 - b. Medicare and Medical Assistance [§ 33.17]
 - 5. Payments Made Pursuant to Worker's Compensation Act [§ 33.18]
 - 6. Wrongful Death Actions [§ 33.19]
 - 7. Property Damage [§ 33.20]
- B. Contract Claims [§ 33.21]
- C. Defensive Application [§ 33.22]

IV. Improper Application [§ 33.23]

- A. In General [§ 33.24]
- B. Tortfeasors Cannot Invoke Collateral Source Rule [§ 33.25]
- C. Collateral Source Rule Does Not Apply When Plaintiff Creates Windfall [§ 33.26]
- D. Collateral Source Rule Applies Only to Payments for Related Damages [§ 33.27]

CHAPTER 34

TAXABILITY OF DAMAGES AWARDS

by Allison V. Shepard

- 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]

- III. Postverdict and Postjudgment Interest [§ 35.11]**
 - A. In General [§ 35.12]
 - B. Effect of Offers of Settlement or Judgment [§ 35.13]
- IV. Effect of Postjudgment Interest on Insurer [§ 35.14]**
- V. Punitive Damages [§ 35.15]**

CHAPTER 36

COSTS AND DISBURSEMENTS

by Isabelle L. Faust and Joseph P. Trevino

- 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 Noah B. Relles

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

 - II. The American Rule: Attorney Fees Ordinarily Are Not Recoverable [§ 37.4]**

 - III. Wisconsin Follows the American Rule: Ordinarily Attorney Fees Are Not Recoverable [§ 37.5]**
 - A. The American Rule Applies in Wisconsin [§ 37.6]
 - B. Exceptions to the American Rule [§ 37.7]
 - 1. Contractual Exceptions [§ 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: “The *Weinhagen* Exception” [§ 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. Definition of “Prevailing Party” in State Public Records Cases [§ 37.22]
 - 3. Determining “Prevailing Plaintiff” in Federal Civil Rights Cases [§ 37.23]
 - 4. Attorney or Client Recovery of Awarded Fees [§ 37.24]
 - 5. Recovery of Fees When Actual Fees Not Incurred [§ 37.25]
 - 6. Fees Awarded Against the State [§ 37.26]
 - 7. Voluntary Dismissal [§ 37.27]
 - 8. Landlord and Tenant [§ 37.28]

- 9. Enforcement of Physical Placement Order [§ 37.29]
 - 10. Appellate Review of Fee Awards [§ 37.30]
 - B. Amount of Award [§ 37.31]
 - 1. Statutory Reasonableness Analysis [§ 37.32]
 - 2. “Reasonableness” Determinations by Courts [§ 37.33]
 - 3. Excessive Litigation or Unprofessional Conduct [§ 37.34]
 - 4. Fee Determination in Divorce Actions [§ 37.35]
 - C. Out-of-Pocket Costs and Expenses as Attorney Fees [§ 37.36]
 - D. Standard of Review of Attorney-Fee Award Amounts [§ 37.37]
 - E. Proof of Attorney Fees [§ 37.38]
- V. Frivolous Claims and Appeals [§ 37.39]**
- A. Frivolous Claims, Counterclaims, and Defenses [§ 37.40]
 - B. Inherent Authority [§ 37.41]
 - C. Frivolous Appeals [§ 37.42]
- VI. Appendix [§ 37.43]**
- A. Appendix 37A: Statutory Exceptions to the American Rule of Nonrecoverability of Attorney Fees [§ 37.44]

CHAPTER 38

PLEADING DAMAGES ISSUES

by Andrew J. Clarkowski and Justin H. Lessner

- 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 and Justin H. Lessner

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

