

**SELECTED REFERENCES TO
WISCONSIN MOTOR VEHICLE
LIABILITY LAW**



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NEGLIGENCE

Negligence is the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under similar circumstances. *See Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372 (1931).

THE VIOLATION OF A SAFETY STATUTE GENERALLY CONSTITUTES NEGLIGENCE PER SE

See Betchkal v. Willis, 127 Wis.2d 177, 184, 378 N.W.2d 684, 687 (Wis. 1985) (citing *Walker v. Bignell*, 100 Wis.2d 256, 268, 301 N.W.2d 447, 454 (Wis. 1981)).

SAFETY STATUTE

A. RIGHT OF WAY

Right of way is defined as the privilege of the immediate use of the roadway. *See Wis. Stat. § 340.01(51)* (2018).

Any driver traveling at an unlawful speed is negligent and forfeits any right of way that he or she would otherwise have. *See Drake v. Farmers Mut. Auto Ins. Co.*, 22 Wis.2d 56, 125 N.W.2d 391 (1963); and *Wis JI-Civil 1157*.

When two vehicles approach or enter an intersection at approximately the same time, the vehicle on the left shall yield to the vehicle on the right. *See Wis. Stat. § 346.18(1)* (2016); and *Wis JI-Civil 1155*.

A driver intending to turn left shall yield to oncoming traffic. *See Wis. Stat. §§ 346.18(2) and (7)* (2016); and *Wis JI-Civil 1195*.

A driver entering a highway from an alley or from a point of access other than another highway shall yield the right of way to all vehicles approaching on the highway. *See Wis. Stat. § 346.18(4)* (2016); and *Wis JI-Civil 1175*.

Upon the approach of an authorized emergency vehicle giving an audible signal by siren, an operator of a vehicle shall yield the right of way and move to a position as near as possible to the right curb or right-hand edge of the roadway, and shall stop and remain standing until the vehicle has passed. *See Wis. Stat. § 346.19(1)* (2017); and *Wis JI-Civil 1210*.

B. TRAFFIC SIGNALS

A driver facing a green light may proceed straight through or turn right or left, unless a sign prohibits either turn, but shall yield the right of way to other vehicles and pedestrians lawfully within the intersection or an adjacent crosswalk. *See Wis. Stat. § 346.37(1)(a)* (2017); and *Wis JI-Civil 1191*.

A driver facing a green arrow may enter the intersection only to make the movement indicated by the arrow and shall yield to pedestrians lawfully within a crosswalk and to other traffic lawfully using the intersection. *See Wis. Stat. § 346.37(1)(d)* (2017); and *Wis JI-Civil 1185*.

Traffic facing a yellow light shall stop before entering the intersection unless so close to it that a stop cannot safely be made. *See Wis. Stat. § 346.37(1)(b)* (2017); and *Wis JI-Civil 1192*.

Traffic facing a red light shall stop before entering the crosswalk. If there is no crosswalk, traffic shall stop as may be indicated by a clearly visible sign or other marking, or before entering the intersection. *See Wis. Stat. § 346.37(1)(c)* (2017); and *Wis JI-Civil 1193*.

A driver approaching a flashing red light shall stop before entering the intersection and proceed as if the light were a stop sign. *See Wis. Stat. § 346.39(1)* (2015); and *Wis JI-Civil 1193.5*.

A driver facing a yield sign shall yield the right of way to other vehicles which have entered the intersection from an intersecting highway, or which are approaching so closely on the intersecting highway as to constitute a hazard of collision. The driver shall reduce his or her speed, or stop, as necessary. *See Wis. Stat. § 346.18(6)* (2016); and *Wis JI-Civil 1275*.

C. PEDESTRIANS

A pedestrian facing a green walk signal must be given the right of way. *See Wis. Stat. §§ 346.23(1) and 346.38(1)* (2017); and *Wis JI-Civil 1160*.

A pedestrian facing a green arrow or red signal shall not enter the roadway unless the pedestrian can do so safely without interfering with traffic. *See Wis. Stat. §§ 346.37(1)(c)(2) and 346.37(1)(d)(2)* (2017); and *Wis JI-Civil 1240/1245*.

A pedestrian shall not start to cross the roadway in the direction of a “do not walk” signal, but a pedestrian who has partially completed crossing on a walk signal may proceed to a sidewalk or safety island while the “do not walk” signal is showing. *See Wis. Stat. § 346.38(2)* (2017); and *Wis JI-Civil 1220*.

A driver shall yield the right of way to a pedestrian crossing, or who has started to cross the highway on a walk signal, and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal. *See Wis. Stat. § 346.23(1)* (2017); and *Wis JI-Civil 1225*.

At an uncontrolled intersection, a driver must yield the right of way to a pedestrian crossing the roadway within a marked or unmarked crosswalk. *See* Wis. Stat. § 346.24(1) (2017); and Wis JI-Civil 1165.

A pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles. *See* Wis. Stat. § 346.25 (2017); and Wis JI-Civil 1230.

A pedestrian, who enters and crosses a street or highway on a crosswalk, must use ordinary care to observe timely the presence, location, and movement of motor vehicles. *See Schlenitz v. London & Lancashire Indem. Co.*, 255 Wis. 296, 38 N.W.2d 700 (1949); and Wis JI-Civil 1095.

A pedestrian walking along a highway other than on a sidewalk shall walk on the left side of the highway and upon meeting a vehicle, if practicable, step to the extreme outer edge of the highway, including the shoulder. *See* Wis. Stat. § 346.28(1) (2017); and Wis JI-Civil 1260.

A driver must stop his or her vehicle before approaching closer than ten feet to a blind pedestrian carrying a white cane in an extended or raised position and take necessary precautions to avoid accident or injury to such pedestrian. The fact that the pedestrian may be violating any laws applicable to pedestrians does not relieve the driver from these duties. *See* Wis. Stat. § 346.26(1) (2017); and Wis JI-Civil 1170.

D. BICYCLISTS

A driver passing a bicycle or electric personal assistive mobility device proceeding in the same direction shall exercise due care, leaving a safe distance, but in no case less than three feet clearance, when passing. *See* Wis. Stat. § 346.075 (2006).

A person riding a bike or electric personal assistive mobility device upon a roadway at less than the normal speed of traffic shall ride as close as practicable to the right hand edge or curb except when passing another vehicle, preparing for a left turn, or reasonably necessary to avoid unsafe conditions. *See* Wis. Stat. § 346.80(2)(a) (2006).

A person riding a bike or electric personal assistive mobility device on a one-way highway with two or more lanes may travel as near the left-hand curb as practicable. *See* Wis. Stat. § 346.80(2)(b) (2006).

A person riding a bike or electric personal assistive mobility device must exercise due care when passing a parked or moving vehicle, and shall allow a minimum of at least three feet in between the person's bicycle or

electric personal assistive mobility device and the vehicle. *See* Wis. Stat. § 346.80(2)(c) (2010).

A person riding a bike or electric personal assistive mobility device, upon entering a highway, shall yield the right of way to motor vehicles, except where indicated by traffic signs or lights, or at marked or unmarked intersections, as indicated in Wis. Stat. §§ 346.23, 346.24, 346.37 and 346.38 (2006). *See* Wis. Stat. § 346.80(5) (2006).

E. CHILDREN

A driver must increase vigilance if the driver knows, or in the exercise of ordinary care should know, that children are in, or are likely to come into, the driver's course of travel. *See Hartzheim v. Smith*, 238 Wis. 55, 298 N.W. 196 (1941); and Wis JI-Civil 1045.

F. PASSENGERS

If, before entering a vehicle, a passenger exercising reasonable care ought to become aware of a danger which involves a risk of injury to the passenger, it is the passenger's duty to exercise ordinary care to take such action for his or her protection. *See McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis.2d 374, 113 N.W.2d 14 (1962); and Wis JI-Civil 1046.

G. SPEED

Any driver traveling at an unlawful speed is negligent and forfeits any right of way that he or she would otherwise have. *See Drake v. Farmers Mut. Auto Ins. Co.*, 22 Wis.2d 56, 125 N.W.2d 391 (1963).

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions. The speed shall be so controlled as may be necessary to avoid collision. *See* Wis. Stat. § 346.57(2) (2006); and Wis JI-Civil 1285.

A driver shall proceed at an appropriate reduced speed when approaching and crossing an intersection, going around a curve, approaching a hillcrest, traveling on a narrow or winding roadway, passing school children, highway construction or maintenance workers, or other pedestrians, or when special hazards exist with regard to other traffic, or by reason of weather, or highway conditions. *See* Wis. Stat. § 346.57(3) (2006); and Wis JI-Civil 1285.

H. BACKING

The operator of a vehicle shall not back the vehicle unless the movement can be made with reasonable safety. *See* Wis. Stat. § 346.87 (2013); and Wis JI-Civil 1060.

I. FOLLOWING ANOTHER VEHICLE

A driver shall not follow another vehicle more closely than is reasonable and prudent. Factors to consider are the visibility, the speed and location of the vehicles, the amount of traffic, and the condition of the highway. This does not apply to an operator of a vehicle in a platoon. *See* Wis. Stat. § 346.14(1) (2018); and Wis JI-Civil 1112.

J. DUTY OF PRECEDING DRIVER

No person shall stop or suddenly decrease the speed of a vehicle without using brake lights or hand signals. *See* Wis. Stat. § 346.35 (2012); and Wis JI-Civil 1113.

The driver of the front car, assuming he or she did not deviate from his or her lane of travel, owes no duty to the driver behind him or her, except to use the road in the usual way in keeping with the laws of the road. *See Krainz v. Strle*, 81 Wis.2d 26, 259 N.W.2d 707 (1977); and Wis JI-Civil 1114.

K. PASSING ONCOMING TRAFFIC

On all roadways of sufficient width, the driver shall drive on the right half of the roadway and leave at least one half of the roadway for oncoming vehicles. *See* Wis. Stat. §§ 346.05 and 346.06 (2015); and Wis JI-Civil 1135.

L. PASSING VEHICLES PROCEEDING IN THE SAME DIRECTION

A driver shall not pass a vehicle on the right hand side unless he or she can do so without driving off the pavement or the main-traveled portion of the roadway, and then only when the vehicle overtaken is making or about to make a left turn, or on a multiple lane highway or street. *See* Wis. Stat. § 346.08 (2010); and Wis JI-Civil 1140.

When traffic moves in both directions simultaneously, the vehicle driver shall not drive to the left of the center line in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and free of oncoming traffic; the overtaking and passing vehicle shall not return to the right side of the roadway until safely clear of the overtaken vehicle. *See* Wis. Stat. § 346.07(2) (2014); and Wis JI-Civil 1141.

When passing on the left, the oncoming lane of traffic must be clearly visible and free of oncoming traffic so as to allow the driver to safely pass. *See* Wis. Stat. § 346.09 (1) (2015); and Wis JI-Civil 1141.

A driver shall not pass a proceeding vehicle by entering the oncoming lane of traffic where the driver's view is obstructed by a curve in the road. *See* Wis. Stat. § 346.09 (2) (2015); and Wis JI-Civil 1142.

A driver shall not drive on the left side of the center of a roadway, which has been designated as a no passing zone, either by a sign or a yellow unbroken line, if such sign or lines would be clearly visible to an ordinarily observant person. *See* Wis. Stat. § 346.09(3) (2015); and Wis JI-Civil 1143.

A driver shall not pass on the left of a vehicle signaling a left turn. *See* Wis. Stat. § 346.09(4) (2015); and Wis JI-Civil 1143.

M. PRIVATE PROPERTY

The duty of a driver on private property is not the same as on public highways. The obligation to be on the lookout becomes operative when the driver knows, or in the exercise of ordinary care should know, that someone or something might be in the way. If, in the exercise of ordinary care, it appears probable that someone or something might be in the way, then the driver must exercise ordinary care to keep a proper lookout to enable the driver to prevent a collision or injury. *See Heikkila v. Standard Oil Co.*, 193 Wis. 69, 213 N.W. 652 (1927); and Wis JI-Civil 1080.

The common law rules of negligence involving parking or management and control of automobiles apply to private parking lots. *See Olsen v. Milwaukee Waste Paper Co.*, 36 Wis.2d 1, 153 N.W.2d 45 (1967).

N. SAFETY BELTS

Drivers and passengers of motor vehicles in Wisconsin are required to wear seat belts. *See* Wis. Stat. § 347.48(2m) (2012); and Wis JI-Civil 1277.

Evidence of compliance or failure to comply is admissible to show the comparative negligence of the plaintiff. However, such evidence may not reduce the recovery by more than 15%. *See* Wis. Stat. § 347.48(2m) (g); and *Gaertner v. Holcka*, 219 Wis.2d 436, 580 N.W.2d 271 (1998).

O. SAFETY HELMETS

Failure by a person to use protective headgear while riding a motorcycle, an all-terrain vehicle or snowmobile on or off a highway shall not reduce recovery for injuries or damages in any civil action. Evidence of use or nonuse of protective headgear by a person who operates or is a passenger on a motorcycle, an all-terrain vehicle or snowmobile on or off a highway is not admissible in any civil action for injuries or damages. *See* Wis. Stat. § 895.049 (2016); *Hardy v. Hoeflerle*, 306 Wis.2d 513, 743 N.W.2d 843 (2007); and 3B Wis. Prac. § 901.053:1 (2012).

LIABILITY DEFENSES

A. STATUTE OF LIMITATIONS

1. A claim arising out of an automobile accident must be commenced within three years. *See* Wis. Stat. § 893.54 (2016).
2. An action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle shall be commenced within 2 years after the cause of action accrues or be barred. *See* Wis. Stat. § 893.54(2m) (2016).
3. If, at the time a cause of action accrues, the person entitled to bring the action is either under the age of 18 years or mentally ill, the action may be commenced within two years after the disability ceases, except where the disability is due to mental illness, the period of limitation prescribed herein may not be extended for more than five years. *See* Wis. Stat. § 893.16 (2006).
4. If a person entitled to bring an action dies before the expiration of the time limit for the commencement of the action and the cause of action survives, the action may be commenced by the person's representatives after the expiration of that time and within one year from the person's death. *See* Wis. Stat. § 893.22 (2013).

B. CONTRIBUTORY NEGLIGENCE

Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought. But, any damages allowed are diminished in proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. *See* Wis. Stat. § 895.045 (2011).

If a tortfeasor is granted summary judgment dismissal because his/her negligence is found to be less than the plaintiff's, his/her negligence may still be considered by the jury in apportioning the total causal negligence of the remaining parties. *See* *Gross v. Midwest Speedways, Inc.*, 81 Wis.2d 129, 260 N.W.2d 36 (1977); and Wis. JI-Civil 1007.

C. EMERGENCY DOCTRINE/RESCUE RULE

The "emergency doctrine" relieves a person of liability for his or her actions when that person is faced with a sudden emergency that he or she did not create. The

"rescue rule" applies even though the action of the rescuer is deliberate and taken after some planning and consideration. Rescuers will not be absolved of all negligence if their actions are unreasonable under the circumstances. *See* *Cords v. Anderson*, 80 Wis.2d 525, 259 N.W.2d 672 (1977); and Wis. JI-Civil 1007.5.

D. UNAVOIDABLE ACCIDENT

An instruction on unavoidable accident is almost never given because, in most cases, there is some evidence of negligence as to a party, or else it is clear that the party is not negligent. Giving an unavoidable accident instruction is error where evidence will not support a finding that both parties to an accident were free of negligence or if there is no evidence that the accident happened without negligence. *See* *Abbott v. Truck Ins. Exchange Co.*, 33 Wis.2d 671, 676-77, 148 N.W.2d 116, 119 (1967); and Wis. JI-Civil 1000.

E. CAUSATION

The test for whether negligence was causal is whether that negligence was a "substantial factor" in causing the injuries. *See* *Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis.2d 455, 267 N.W.2d 652 (1978).

Where an intervening (superseding) cause allegedly produced by another is interposed as a defense by a defendant charged with the first act of negligence, the jury is first required to find whether the found negligence of the first actor was a substantial factor in causing the accident on which liability is sought to be predicated. *See* *Pfeifer v. Standard Gateway Theater, Inc.*, 262 Wis. 229, 236-38, 55 N.W.2d 29, 33 (1952).

If the jury finds the negligence of the first actor is a substantial factor, then the defense of intervening cause is unavailing unless the court determines that there are policy factors which should relieve the first actor from liability. *See* *Ryan v. Cameron*, 270 Wis. 325, 331, 71 N.W.2d 408, 411 (1955).

CLAIMS

A. OWNER'S LIABILITY

Wisconsin's omnibus statute extends insurance coverage to any permissive user of an insured motor vehicle, and to any person legally responsible for the use of the motor vehicle. *See* Wis. Stat. § 632.32(3) (2012).

A "leasee" is considered an owner of a vehicle if registration is required under resident "leasee" provisions of Chapter 341 of the Wisconsin Statutes.

B. VICARIOUS LIABILITY

An agency relationship is sufficiently established where:

1. There is some agreement by the driver to act on the other's behalf or for his or her benefit;
2. Some benefit results to the other party; and
3. The other party retains the right to control the driver and directs him or her in the accomplishment of his or her purpose. The driver of a motor vehicle is presumed to be the agent of the owner. *See Hoeft v. Friedel*, 70 Wis.2d 1022, 235 N.W.2d 918 (1975); and Wis JI-Civil 1600.

Owners of vehicles operating on highways for the conveyance of passengers for hire are jointly and severally liable to all parties injured by any person in the employment of the owner in the same manner the owner would be liable for the injuries. *See* Wis. Stat. § 345.06 (2012).

Scope of employment means that at the time of the accident, the driver was doing something directly or indirectly connected with the business of his or her employer and in the course of his or her duty as an employee. *See Fultz v. Lange*, 238 Wis. 342, 345, 298 N.W. 60, 61 (1941); and Wis JI-Civil 1605.

C. COMMON PLAN OR SCHEME

Two or more parties act within a common plan or scheme when each party actively takes part in the scheme, furthers the scheme either by request or cooperation, aids or encourages the tortfeasor, or ratifies the tortfeasor's actions. No explicit agreement between the parties is required. *See Collins v. Eli Lilly Co.*, 116 Wis.2d 166, 184, 342 N.W.2d 37, 46 (1984) (*citing* W. Prosser, *Handbook of the Law of Torts*, sec. 46 at 292 (4th ed. 1971)); and Wis JI-Civil 1740.

D. NEGLIGENT SUPERVISION/ ENTRUSTMENT

A negligence entrustment claim arises when the owner of a vehicle permits another to operate the vehicle although he knew, or in the exercise of ordinary care should have known, that the borrower intended or was likely to use the object in a way that would create an unreasonable risk to others. *See Bankert by Habush v. Thresherman's Mut. Ins. Co.*, 110 Wis.2d 469, 329 N.W.2d 150 (1983); Wis JI-Civil 1014; and Restatement (Second) Torts § 308 (1965).

E. PARENT'S DUTY TO CONTROL MINOR CHILD

A parent must use ordinary care to control his or her minor child so as to prevent the child from intentionally

harming others or from creating an unreasonable risk of bodily harm to others, if the parent knows or should know:

1. That he or she has the ability to control the child;
2. That there is a necessity for exercising such control; and
3. That there is an opportunity to control the child.

See Gerlat v. Christianson, 13 Wis.2d 31, 35, 108 N.W.2d 194, 196 (1961); and Wis JI-Civil 1013.

F. SPONSORSHIP

Any negligence or willful misconduct by a minor driver is imputed to that driver's adult sponsor, and the driver and sponsor are jointly and severally liable. A release of the driver from claims does not operate to release the sponsor from any claims. *See* Wis. Stat. § 343.15(2)(b) (2016); and *Swanigan v. State Farm Ins. Co.*, 299 N.W.2d 234 (Wis. 1980).

G. LOSS OF CONSORTIUM

"Consortium" involves the love and affection, the companionship and society, the comfort, aid, advice and solace, the right of support, and any other elements that normally arise in a close, intimate and harmonious marriage relationship or parent-child relationship. A wrongful invasion, impairment, or deprivation of any of these rights, resulting from a disabling injury, is a legal loss and a basis for damages to the other spouse, parent, child or sibling harmed or deprived.

1. Loss of Spouse

A loss of consortium claim for a spouse is a derivative but separate cause of action belonging to the spouse of the injured party. *See Kottka v. PPG Industries, Inc.*, 130 Wis.2d 499, 520, 388 N.W.2d 160, 169 (1986); *Peeples v. Sargent*, 77 Wis.2d 612, 253 N.W.2d 459 (1977); and Wis JI-Civil 1815.

2. Loss of Child

A parent can receive the amount that will compensate him or her from any loss of income or services their child could have earned until age 18 except for the injury or disability. *See* Wis JI-Civil 1835.

A parent's claim for loss of consortium is separate but derivative, and must be combined with that of the child for personal injuries. *See Shockey v. Prier*, 66 Wis.2d 394, 225 N.W.2d 495, (1975); *Korth by Lucas v. Am. Fam. Ins. Co.*, 115

Wis.2d 326, 330, 340 N.W.2d 494, 496 (1983); and Wis JI-Civil 1837.

3. Limit on Damages

Under Wisconsin law, the surviving spouse or child cannot recover more than \$350,000 for loss of society and companionship damages for a deceased adult and the parent or sibling of a deceased (if sibling was a minor at time of deceased child's death) cannot recover more than \$500,000 for loss of society and companionship damages for a deceased minor. *See* Wis. Stat. § 895.04 (2016); and Wis JI-Civil 1870.

H. EMPLOYEES AND EMPLOYERS RIGHTS AGAINST THIRD-PARTY TORTFEASORS

Although workers' compensation is an employee's exclusive remedy against an employer, it does not limit the employee's and employer's right to assert claims against third-party tortfeasors. *See Kuehl v. Sentry Select Ins. Co.*, 765 N.W.2d 860 (Wis. Ct. App. 2009).

Employers who paid workers' compensation benefits to an employee are permitted to recover from any other party responsible for the employee's injuries in a tort claim, standing in the shoes of the employee. *See* Wis. Stat. § 102.29(2) (2021); *Nelson v. Rothering*, 174 Wis.2d 296, 496 N.W.2d 87 (1993); *London Guarantee & Acc. Co. v. Wisconsin Pub. Serv. Corp.*, 228 Wis. 441, 279 N.W. 76 (1938); and *Berna-Mork v. Jones*, 174 Wis.2d 645, 498 N.W.2d 221 (1993).

I. WRONGFUL DEATH/SURVIVAL

There are two potential claims available to survivors after the death of a loved one.

1. Wrongful death under Wis. Stat. § 895.04 entitles a survivor to recover for a "pecuniary injury," the loss of any benefit that a beneficiary would have received from the decedent if the decedent had lived. *See Estate of Holt v. State Farm Fire & Cas. Co.*, 151 Wis.2d 455, 460, 444 N.W.2d 453, 455 (Wis. Ct. App. 1989). The estate of a deceased can make a claim for the sum that will fairly and reasonably compensate the estate of the deceased for medical and hospital expenses and funeral and burial expenses. *See* Wis. Stat. § 895.04(5) (2016); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 312, 294 N.W.2d 437, 463 (1980); and Wis JI-Civil 1850.

2. Survival claim under Wis. Stat. § 895.01 entitles the estate of a deceased person to be compensated fairly and reasonably for pain and

suffering endured by the deceased from the time of the accident up to the time of death. Pain and suffering includes all physical pain and discomfort, worry, and mental distress. *See Prange v. Rognstad*, 205 Wis. 62, 65–67, 236 N.W. 650, 652 (1931); and Wis JI-Civil 1855.

J. ALCOHOL RELATED SITUATIONS

Evidence concerning a person's blood alcohol level is admissible on the issue of whether the individual was under the influence of alcohol or an intoxicant if the sample was taken within three hours after the event to be proved.

The fact that an analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more. *See* Wis. Stat. § 885.235 (2019); and Wis JI-Civil 1008.

DAMAGES

A. PUNITIVE DAMAGES CLAIM

Punitive damages may be awarded, in addition to compensatory damages, when a fact-finder finds by clear and convincing evidence that the tortfeasor's actions were "outrageous", meaning malicious or an intentional disregard for the plaintiff's rights.

Punitive damages may be alleged in the initial complaint. However, an award of compensatory damages is a prerequisite to obtaining an award for punitive damages.

See Wis. Stat. § 895.043 (2016); *Brown v. Maxey*, 124 Wis.2d 426, 432, 369 N.W.2d 677, 681 (1985); *Tucker v. Marcus*, 142 Wis.2d 425, 418 N.W.2d 818 (1988); and Wis JI-Civil 1707.1.

B. AGGRAVATION CASES

Though an individual may have an existing condition at the time of an accident, that individual remains entitled to damages for an aggravation of a pre-existing condition. However, the damages are limited to those which are fair and reasonable and to the extent a fact finder believes that the aggravation is a natural result of the injuries received in the accident. *See Kablitz v. Hoeft*, 25 Wis.2d 518, 131 N.W.2d 346 (1964); and Wis JI-Civil 1715.

C. COMMON PLAN OR SCHEME

If two or more parties act within a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action. However, this rule of

joint and several liability does not apply to punitive damages. *See Richards v. Badger Mut. Ins. Co.*, 309 Wis.2d 541, 749 N.W.2d 581 (2008); and Wis JI-Civil 1740.

D. JOINT AND SEVERAL LIABILITY

A party that is determined to be greater than 51% at fault is jointly and severally liable for the damages awarded to a plaintiff. *See Wis. Stat. §§ 895.043(5) and 895.045* (2012).

E. DUTY TO MITIGATE

In Wisconsin, a duty to mitigate damages is imposed upon an injured person only to the extent it is reasonable to do so. Failure by the claimant to exercise such reasonable care will reduce his/her recovery.

Failure to mitigate may only be considered in determining damages to which the plaintiff is entitled.

See Collova v. Mut. Serv. Cas. Ins. Co. of St. Paul, Minn., 8 Wis.2d 535, 99 N.W.2d 740 (1959); *O'Brien v. Isaacs*, 17 Wis.2d 261, 116 N.W.2d 246 (1962); *Kuhlman, Inc. v. G. Heileman Brewing Co., Inc.*, 83 Wis.2d 749, 266 N.W.2d 382 (1978); and Wis JI-Civil 1730.

AFTER VERDICT

REALLOCATION OF NEGLIGENCE

Wisconsin law allows for reallocation of negligence when the court determines a party's share of a judgment is uncollectible. However, reallocation of negligence as to one party only is not permissible where there are only two parties to action. *See Schramski v. Hanson*, 45 Wis.2d 698, 173 N.W.2d 655 (1970).

NOTICE

The reference materials contained in this guide have been abridged from a variety of sources and should not be construed as legal advice. Please consult legal counsel with any questions concerning this guide.