

Outline of Damages

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OUTLINE OF DAMAGES

Damages Defined

Damages are the estimated reparation in money for a detriment or injury sustained; compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right.

Damages are either substantial or nominal, according to whether there has been actual or merely nominal loss.

Legal damages are limited to those which are the natural and proximate result of the wrong done.

Direct or general damages are those which are the necessary and immediate consequence of the wrong—while indirect or special damages are sometimes granted in respect of its remoter consequences.

1. *Damnum Absque Injuria.*

Injury without wrong. Damage arising as the consequence of acts which others might lawfully do, or where the general good is promoted through operating unfavorably upon rights of individuals.

2. *De Minimis Non Curat Lex.*

The law does not take notice of trifles.

Rule: There can be no recovery in damages for such acts as may be justified by an express provision of law, or may have arisen by acts of others in the lawful enjoyment and exercise of their own rights, and in the management of their business. Damages to be recoverable must be the proximate consequence of the act complained of; it must be the consequence that follows the act, and not the secondary result from the first consequences either alone or in combination with other circumstances.

3. *Nominal Damages.*

• Such damages (six cents) as are awarded in vindication of a violated legal right, where *no actual* damages have been suffered. The law seeks to give compensation and indemnity and nothing beyond it. *Eaton vs. Lyman*, 30 Wis. 41. See also *Barnard vs. Cohen*, 165 Wis. 417, 162 N. W. 480.

4. *Liquidation of Damages.*

Such damages as are stipulated by the parties themselves at the time of making the contract and is said to be within the contemplation of the parties. Its purpose is to make definite that which

otherwise might be indefinite and avoids the probable inability of being unable to prove damages with certainty. *Wagner vs. Cawker*, 112 Wis. 532, 88 N. W. 599.

5. Discretionary Damages.

Damages awarded by a jury, which in its sound judgment, after hearing the evidence, will compensate the complainant for the damages sustained by the unlawful act of another. *Nelson vs. Goddard & Co.*, 162 Wis. 66, 155 N. W. 943.

In case the damages awarded, however, are monstrous and enormous and such as all mankind must be ready to exclaim against at first blush, the court may order a new trial or order the damages reduced. The same rule will apply where the damages are inadequate. *Whitney vs. Milwaukee*, 65 Wis. 409, 27 N. W. 39.

(a) *Aggravation*. Additional damages awarded for unlawful acts accompanied by ill will or malice. Such damages are called punitive damages and are awarded on the theory of punishment to the wrong doer. They may be greater or less than the compensatory damages. *Draper vs. Baker*, 61 Wis. 450, 21 N. W. 527, *Alberts vs. Alberts*, 78 Wis. 72, 47 N. W. 95; *Gatzow vs. Buening*, 106 Wis. 1, 18, 81 N. W. 1003.

(b) *Exemplary*. Exemplary, vindictive, or punitive damages are such as blend together the interests of society and of the aggrieved individual and are not only a recompense to the sufferer, but a punishment to the offended. Exemplary damages do not follow compensatory damages as a matter of right, but they are a question for the jury to decide. *Robinson vs. Superior R. T. Co.*, 94 Wis. 345, 68 N. W. 691.

The practice in Wisconsin is to make the two separate and distinct awards. *Luther vs. Shaw*, 157 Wis. 231, 147 N. W. 17.

The rule of exemplary damages applies to corporations as well as individuals when it can be shown that the corporation ratified the malicious act of its officer or agent. *Craker vs. C. & N. W. R. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Wilson vs. Young*, 31 Wis. 574; *McWilliams vs. Bragg*, 3 Wis. 424; *Bass vs. C. & N. W. R. R. Co.*, 36 Wis. 463.

Exemplary damages are not recoverable in an equitable action, since damages are auxiliary to main relief. *Karns vs. Allen*, 135 Wis. 48, 115 N. W. 357. Nor where the compensatory damages recoverable are merely nominal. *Barnard vs. Cohen*, 165 Wis. 417, 162 N. W. 480.

(c) *Mitigation*. A withdrawal or atonement. Something that lessens the wrong and is recognized by law because of the frailties of human nature. The purpose of showing mitigation in civil actions is to reduce the amount of the damages. *Birchard vs. Booth*, 4 Wis. 75; *Wilson vs. Young*, 31 Wis. 574; *Corcoran vs. Harran*, 55 Wis. 120, 12 N. W. 468; *Morely vs. Dunbar*, 24 Wis. 183.

But the amount received by plaintiff under an accident insurance policy, or under the Federal Vocational Rehabilitation Act, or when the salary of the injured person has been continued during his disability, is not to be considered in diminution of damages. *Cunnen vs. Superior T. W. Co.*, 175 Wis. 172, 184 N. W. 767.

6. *Compensatory Damages*.

Such damages as will actually pay for the injury suffered. They are divided into two classes—direct and consequential damages. *Gatzow vs. Buening*, 106 Wis. 1, 19, 81 N. W. 1003.

Direct Damages are such as flow from the wrongful act without any intervening cause.

Consequential Damages are such damages as are not produced without the concurrence of some other event attributable to the same origin or cause. *Kellogg vs. C. & N. W. R. R. Co.*, 26 Wis. 224; *Vosburg vs. Putney*, 78 Wis. 84, 47 N. W. 99; *Oliver vs. La Valle*, 36 Wis. 592; *McNamara vs. Village of Clintonville*, 62 Wis. 207, 22 N. W. 472.

(a) *Contract*. The rule for damages in actions on breach of contract. Where two persons have made a contract, which one of them has broken, the damages with respect to such breach of contract should be either such as may fairly and substantially be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. *English rule*: It is the duty of the plaintiff to consider the contract breached as soon as repudiated. *American rule*: Plaintiff can sue at once or wait until the time of completion of the contract and then sue. *Brown vs. C. M. & St. P. Ry Co.*, 54 Wis. 342, 11 N. W. 356; *Guetzkow Bros. Co. vs. Andrews et al.*, 92 Wis. 214, 66 N. W. 119; *Hammer vs. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Kelley, Maus & Co.*

vs. La Crosse C. Co., 120 Wis. 84, 97 N. W. 674; *Hadley vs. Baxendale*, 1854, Court of Exchequer.

Telegraph Companies. They are liable for any damages resulting from failure to deliver messages. Damages for mental anguish caused by delay in delivery of telegrams may be recovered not to exceed \$500. Section 1778 (5). But this statute does not apply to delivery of interstate telegrams. *Dune vs. W. U. Tel. Co.*, 165 Wis. 190, 161 N. W. 755.

(b) *Avoidable Consequences.* It is the duty of the injured party to minimize the damages as much as possible. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account. *M. Cameson vs. White*, 74 Wis. 425, 43 N. W. 155; *Yorton vs. Milwaukee L. S. & W. R. Co.*, 62 Wis. 367, 21 N. W. 516; *Salladay vs. Dodgeville*, 85 Wis. 318, 55 N. W. 696; *Driver vs. W. U. R. R. Co.*, 32 Wis. 569, 14 Am. Rep. 726.

(c) *Certainty of Proof.* Damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, it must be such as might naturally be expected to follow violation, and *they must be certain*, both in nature and in respect to the cause from which they proceed.

Profits, speculative, conjectural or remote, are not generally regarded as an element in estimating damages. Possible or probable gains are too remote and cannot be recovered unless such future profits are in the contemplation of the parties when the contract is made and there is no other basis upon which to estimate such damages. *Schumaker vs. Heinemann*, 99 Wis. 251, 74 N. W. 785; *Flick vs. Wetherbee*, 20 Wis. 412; *Wright vs. Mulvaney*, 78 Wis. 89, 46 N. W. 1045; *Anderson vs. Sloan*, 72 Wis. 566, 40 N. W. 214.

(d) *Entirety of Recovery.* The principle is settled beyond dispute that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, and it is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. He must sue for all his damage, past, present and future, certain and contingent. For a breach, however, subsequent to the former suit, such actual damages as arise may be recovered. *Birchard vs. Booth*, 4 Wis. 67;

Carl vs. Sheboygan R. R. Co., 46 Wis. 625, 1 N. W. 295; *Gordon vs. Brewster*, 7 Wis. 355.

(e) *Limited Interests—Personally.* The general rule of damages in case of a limited interest in the plaintiff seems to be that if the suit is brought against the *owner* of the property—only the amount of such limited interest can be recovered as damages. If, however, the suit is against a stranger, the plaintiff, even though having only a limited interest, may recover the whole damage. *Brewster vs. Warner*, 136 Mass. 57, 49 Am. Rep. 5; *White vs. Webb*, 15 Conn. 302.

Realty. The general rule in damage to realty where the plaintiff has only a limited interest such as a mortgagee, is declared to rest upon the principle that the mortgage, as a security, has been impaired, and the damages it is said, are limited to the amount of injury to the mortgage, however great the injury to the land may be. *Seeley vs. Alden*, 100 Am. Dec. 642; *King vs. Bangs*, 120 Mass. 514; *Turner vs. Jackson*, 39 N. J. Law Rep. 329.

7. *Exact Indemnity as the Object of the Law.*

(a) *Value—How Determined.* The value which the law gives is reasonable or market value, i. e., that reasonable sum which the property would probably bring on a fair sale by a man willing but not obliged to sell to a man willing but not obliged to purchase. *Allen vs. C. & N. W. R. R. Co.*, 145 Wis. 263, 129 N. W. 1094.

All such facts and circumstances as are pertinent are admissible in evidence to establish the real and ordinary market value of the property at the time of destruction. *Schacht vs. Oriental Transfer Co.*, 155 Wis. 121, 143 N. W. 1058.

When property has no specific market value, a wide range of investigation is permitted; and though cost and value are not synonymous terms and cost does not fix value, yet cost in such instances may be quite convincing. *Milwaukee Trust Co. vs. Milwaukee*, 151 Wis. 224, 138 N. W. 707; *Maas vs. C. & N. W. R. R. Co.*, 156 Wis. 145 N. W. 176.

(b) *Fluctuations in Value.* If the plaintiff immediately and without unreasonable delay, commences and prosecutes his action, it is proper that the fluctuation in the price should be exclusively at the hazard of the defendant. In such a case, therefore, the plaintiff is entitled to the *highest price* between the day when delivery should have been made, and the day of the trial. The

true measure of damages in all such cases is that which will completely indemnify the plaintiff for the breach of the contract. *Clark vs. Pinney*, N. Y. 7 Cow. 681.

In cases of marginal contracts for the purchase of stock and a wrongful sale by the broker, the measure of damages is *not* the *highest* market value but only the amount of the margin actually paid. The reason for this rule is because the plaintiff has no money invested beyond his margins. *Baker vs. Drake*, 53 N. Y. 211.

Wisconsin rule: The rule allowing the plaintiff to recover the highest value is repudiated, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. *Ingham vs. Rankin*, 47 Wis. 406, 2 N. W. 755.

(c) *Addition of Value by Wrongdoer.* The Wisconsin rule holds in the case of timber severed from the soil that the measure of recovery is the value before the property was improved, regardless of whether damage was done with or without knowledge of the trespass. *Single vs. Schneider*, 30 Wis. 570; *Weymouth vs. C. & N. W. R. R. Co.*, 17 Wis. 567.

The general rule seems to be the value of the chattel at the time and place of the conversion, plus any damage caused to the premises in removing the chattel.

(d) *Reduction of Original Loss.* Where the plaintiff's original loss has been reduced by the application of a portion of the converted property to the lawful extinguishment of the plaintiff's debts or for the plaintiff's benefit, as much as if it had been returned to him, such transaction operates to an equal extent in mitigation of the damages. *Cernahan vs. Chisler*, 107 Wis. 645, 83 N. W. 778; *Churchill vs. Welsh*, 47 Wis. 39, 1 N. W. 398.

Where injured personal property is susceptible of repair, the measure of damages is ordinarily the difference between the reasonable market value immediately before and such value immediately after the injury, at the place thereof. *Chaplean vs. Manhattan Oil Co.*, 178 Wis. 545, 190 N. W. 361.

(e) *Interest.* Whenever one man retains the money of another against his declared will, the legal compensation for the use of money shall be charged and allowed. *State vs. Milwaukee*, 158 Wis. 564, 149 N. W. 579.

In the case of goods sold, interest should be allowed after the time of credit has elapsed and demand of payment made. *Graham*

vs. C. M. & St. P. Ry. Co., 53 Wis. 473, 491, 10 N. W. 619; *Marsh vs. Fraser*, 37 Wis. 179.

In tort, in such actions as assault and battery or personal injury by negligence, libel, slander, seduction, etc., interest never creates a debt, nor becomes one, until the damages are judicially ascertained and determined. Only from that time can the damage include interest. *First Wis. Trust Co. vs. Schmidt*, 173 Wis. 477, 180 N. W. 832.

Where the contract is entirely silent as to interest and the debt is not punctually paid, the creditor is entitled to the legal rate of interest by operation of law.

(f) *Expenses Incurred*. Expenses legitimately and essentially incurred in reliance on a promise and loss of time by the plaintiff because of the defendant's default, are properly recoverable as a part of the plaintiff's damage. *Johannesson vs. Borchenius*, 35 Wis. 131.

In tort the plaintiff may recover as a part of his damages expenses incurred as a proximate result of the injury. *Berg vs. U. S. Leather Co.*, 125 Wis. 262, 104 N. W. 60; *Davelaar vs. Milwaukee*, 123 Wis. 413, 101 N. W. 361.

(g) *Court Expenses*. The general rule of the U. S. Supreme Court is that expenses incurred for counsel fees, *cannot* be recovered as a part of the damage. *Fairbanks vs. Witter*, 18 Wis. 287, 86 Am. Dec. 765.

Wisconsin holds that damages sustained by reason of an injunction, properly include attorney's fees for services rendered in procuring a dissolution of the injunction, and also for services rendered by a referee. *Wis. Marine Ins. Co. vs. Durner*, 114 Wis. 369, 90 N. W. 435.

The general rule is, however, that sound public policy demands that counsel fees in suits upon contracts, or for damages for torts or upon attachments or injunctions, should not be regarded as a proper element of damages, even when capable of being apportioned and distinct from other services necessary in the case. *Weinhagen vs. Hayes*, 179 Wis. 62, 190 N. W. 1002.

8. *Non Pecuniary Losses.*

(a) *Physical Pain*. Physical pain endured is one of the three elements of damage to be considered in personal injury cases. The three elements are as follows:

1. Expenses to which the injured person is subjected by reason of the injury complained of.

2. Inconvenience and suffering naturally resulting from it.

3. Loss of earning power, temporary or permanent. Physical pain has always been a compensable element of damages, but the subject does not admit of a definite measure of compensation. The assessment, therefore, is left to the good sense and unbiased judgment of the jury. *Klann vs. Minn.*, 161 Wis. 517, 154 N. W. 996; *Brown vs. C. M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356; *Heer vs. Warren Schärf Co.*, 118 Wis. 57, 94 N. W. 789.

(b) *Inconvenience.* Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury. *Walsh vs. Railway Co.*, 42 Wis. 23, 24 Am. Rep. 376.

Under certain conditions, inconvenience might be made an element of damage: i. e., unlawful invasion of the right of peace and enjoyment of the home. *Shall vs. Minn. St. P. & S. M. R. Co.*, 156 Wis. 195, 145 N. W. 649.

(c) *Mental Suffering.* Where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered if it is the direct proximate and natural result of the wrongful act, except in cases of contract; but mental anguish resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages. *Heddles vs. C. & N. W. R. R. Co.*, 77 Wis. 228, 46 N. W. 115; *Koerber vs. Patek*, 123 Wis. 453, 102 N. W. 40; *Cracker vs. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Gatzow vs. Buenig*, 106 Wis. 1, 20, 81 N. W. 1003.

9. *Pecuniary Condition of Parties as Affecting the Allowance of Damages.*

(a) *Of Plaintiff.* Pecuniary circumstances of the plaintiff may be inquired into. The condition in life and circumstances of the parties may become the proper subjects for the consideration of the jury in estimating damages. *Potter vs. C. & N. W. R. R. Co.*, 21 Wis. 372, 94 Am. Dec. 548.

But plaintiff's poverty may not be shown merely to enhance compensatory damages. *Vosburg vs. Putney*, 78 Wis. 84, 47 N. W. 99.

(b) *Of Defendant.* The general reputation of the defendant for wealth may be shown when in issue. Admission of the evidence is not to establish an ability to pay, but to show the social standing which the defendant's means do or might command.

The amount of a defendant's pecuniary means is a factor of some importance in an action for a breach of promise to marry. *Luther vs. Shaw*, 157 Wis. 231, 147 N. W. 17.

While it seems that where pecuniary circumstances of a defendant are admissible upon question of compensatory damages evidence of the reputed wealth of defendant should be shown, and upon the question of punitive damages the actual wealth of defendant, yet where both are recoverable in the same action the wealth of defendant may be shown by evidence of his reputed wealth alone, defendant being allowed to rebut by evidence of his actual wealth. *Eggett vs. Allen*, 106 Wis. 633, 82 N. W. 556; *Draper vs. Baker*, 61 Wis. 450, 21 N. W. 527.

Where defendants are sued jointly for punitive damages arising out of a tort, evidence as to the wealth of the defendants is not competent. *McAllister vs. Kimberly-Clark Co.*, 169 Wis. 473, 173 N. W. 216.

10. *Damages in Certain Specified Actions.*

(a) *Torts, Affecting the Person.* Beyond actual damages, the law gives what is called "added" damages. Those which grow out of the wantonness or atrocity, so to speak, of the act. The elements are pain and suffering which any average citizen would be supposed to suffer under such circumstances, shame, mortification, wrong and outrage. *Buckstaff vs. Hicks*, 94 Wis. 34, 68 N. W. 403.

Sorrow and mental anguish caused by the death of a relative by the defendant's negligence are not elements of damage; nothing can be recovered as a solatium for wounded feelings. *Potter vs. C. & N. W. R. R. Co.*, 21 Wis. 372, 94 Am. Dec. 548.

Sect. 4256—Wis.—Damages resulting in death shall not exceed \$10,000—in case of injuries caused by the wrongful act of the defendant.

(b) *Affecting Property (Realty).* The measure of damages to be awarded in cases of injury to the realty by the wrongful act of the defendant is the difference in value of the land before and after the injury. *Miller vs. Neale*, 137 Wis. 426, 119 N. W. 94.

For Destruction of Growing Crops. The measure of damages the plaintiff is entitled to recover is the estimated value of the crop standing upon the ground and the depreciated value of the land. It is said that this is resorting to conjecture, but it would seem to be the only way to arrive at the value of the crop. *Folsom vs. Apple River Log Driving Co.*, 41 Wis. 602.

But where growing crops are damaged by smoke, fumes and gases throughout the growing season, the measure of damages is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at such time, less the expense of fitting that portion of the probable crop which was prevented from maturing by the injury. *Peacock vs. Wis. Zinc Co.*, 177 Wis. 510, 188 N. W. 641.

(c) *Personality (Conversion and Injury)*. Rule of damages is the value of the property at the time and place of conversion, with interest. *Miller vs. C. & N. W. R. R. Co.*, 153 Wis. 431, 141 N. W. 263; *Gould vs. Merrill Ry. & Light Co.*, 139 Wis. 433, 121 N. W. 161.

(d) *Detention*. Rule of damages is the direct damage suffered by the plaintiff in the loss of the use of the chattel. Interest on the value of the article from the time of the wrongful detention to the time of trial furnishes a just indemnity for the wrong. *Bigelow vs. Doolittle*, 36 Wis. 115; *Barney vs. Douglas*, 22 Wis. 464.

11. *Fraud and Deceit.*

Rule of damages. The plaintiff may recover as damages the difference between the actual value and that value which was represented by the defendant. *Spear vs. Hiles*, 67 Wis. 350, 30 N. W. 506.

12. *Certain Specific Contract Actions.*

(a) *In Those Respecting Services*. The Wisconsin rule is that one who breaches his contract to furnish personal services, if he has received no compensation up to the time of his breach, can recover nothing for the services already performed under the breached contract. *Hildebrand vs. Am. Fine Arts Co.*, 109 Wis. 171, 85 N. W. 268.

If the contract is breached by the employer, the plaintiff may sue immediately and recover in *quantum meruit* or he may wait until the expiration of the contract and recover the whole amount, less his reasonable earnings received during the waiting period. *Gordon vs. Brewster*, 7 Wis. 355.

(b) *In Those Respecting Personalty. Breaches of Warranty*. Rule of damages: The difference between the actual value and the value of the article had it conformed with the warranty. *Park vs. R. & B. Co.*, 91 Wis. 189, 64 N. W. 859.

(c) *Failure to Supply Goods or to Receive Same*. Rule of

damages: The difference between the contract price and the amount the plaintiff would be required to pay elsewhere. *Richardson vs. Chynoweth*, 26 Wis. 656.

(d) *In Those Respecting Realty. Vendors failure to give title.*

Rule 1. Where the vendor has title and refuses to convey. The damages are the fruits of the bargain the plaintiff would have received.

Rule 2. If the vendor believes in good faith that he has title and later finds he has not—nominal damages only.

Rule 3. Where the vendor has no title and is aware of that fact, damages are the loss of the bargain to the plaintiff. *Arentsen vs. Moreland*, 122 Wis. 167, 99 N. W. 790.

(e) *Breaches of Covenant of Seisin and Quiet Enjoyment.* The safest general rule in all actions on contract is to limit recovery as much as possible to an indemnity for the actual injury sustained, without regard to profits.

Where there has been no fraud and a party is evicted from real property on which he has a covenant of seisin and quiet enjoyment, the rule of damages is only the sum paid with interest from time of payment. *Poposkey vs. Munkwitz*, 68 Wis. 322, 32 N. W. 35.

(f) *Breaches of Covenants Against Incumbrances.* If the incumbrance be of a permanent character, such as will impair the value of the premises and cannot be removed by the purchaser as a matter of right, the damages will be measured by the diminished value of the premises thereby occasioned. *Killilea vs. Douglas*, 133 Wis. 140, 113 N. W. 411.

13. *Actions Against Carriers.*

For failure to deliver on time—where the carrier negligently delays the delivery of goods. The rule of damages is that the carrier is liable for the loss in the market value of the goods during the delay. *Peet vs. C. & N. W. R. R. Co.*, 20 Wis. 594, 91 Am. Dec. 446.

For entire failure to deliver, the carrier is liable for the value of the goods at the time and place they should have been delivered. *Nudd vs. Wells*, 11 Wis. 407; *Thomas vs. Wabash, St. L. & P. R. Co.*, 62 Wis. 642, 22 N. W. 827.*

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*See also "Exemplary Damages a Deformity in Our Law." By Howard A. Hartman in *Marquette Law Review*, Vol. 2, p. 57.—Ed.