

WISCONSIN

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1. In your state, what are the categories of damages that are available in tort?

In Wisconsin there are two primary categories of damages: economic damages, or special damages, and non-economic damages, or general damages. Economic damages include the monetary expenses of an accident (e.g., medical bills, lost wages, etc.). Non-economic damages include more subjective costs of an accident which are harder to calculate (e.g., pain and suffering or loss of consortium).

Punitive damages are also recoverable in Wisconsin if the evidence submitted shows that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. Wis. Stat. § 895.043 (3). The rule of joint and several liability does not apply to punitive damages. Wis. Stat. § 895.043 (5).

2. Are there any limitations or caps on recovery in tort actions?

Wisconsin imposes limitations on recovery in tort actions against the state and local municipalities, and for medical malpractice and wrongful death claims. Damages recoverable against the state may not exceed \$250,000 and no punitive damages are available. Wis. Stat. § 893.82(6). Damages recoverable against municipalities may not exceed \$50,000 and no punitive damages are available. Wis. Stat. § 893.80(3).

Wisconsin follows a modified comparative negligence rule, which bars any recovery if the plaintiff's negligence was greater than the tortfeasor(s). Wis. Stat. § 895.045(1). Additionally, non-economic damages for loss of society and companionship awarded in a wrongful death action may not exceed \$500,000 per occurrence in the case of a deceased minor, or \$350,000 per occurrence in the case of a deceased adult. Wis. Stat. § 895.04(4). Non-economic damages in medical malpractice claims and claims against long-term care providers are capped at \$750,000. Wis. Stat. §§ 893.55(4)(d)(1); 893.555(4).

However, the Wisconsin Court of Appeals recently ruled the non-economic damage cap under section 893.55(4)(d)(1) unconstitutional. *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2017 WI App 52, 377 Wis. 2d 566, 901 N.W.2d 782 (Wis. App. Ct. 2017). A jury awarded the plaintiffs \$16.5 million for pain and suffering to the plaintiff who had all four of her limbs amputated after a Strep A infection went undetected and led to septic shock. *Id.* The court concluded the statutory cap on non-economic medical malpractice damages reduces awards only for the class of the most severely injured victims, and held the cap unconstitutional on its face. *Id.*

Finally, in actions where punitive damages are available, they may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater. Wis. Stat. § 895.043(6).

3. Are attorneys' fees available in tort actions? If so, under what circumstances?

Costs are allowed to the plaintiff upon recovery. Wis. Stat. § 814.01(1). Reasonable attorney fees and costs incurred to defend against meritless claims may be awarded. Wis. Stat. § 814.045. *See Seidling v. Stepan*, 372 Wis. 2d 833, 2017 WI App 1, 890 N.W.2d 48, 2016 Wisc. App. LEXIS 750 (Wis. Ct. App. 2016). There are caps to attorney fee awards, where the court presumes that reasonable attorney fees do not exceed three times the amount of compensatory damages awarded. Wis. Stat. § 814.045 (2)(a).

4. Are there any instances in tort actions when pre-judgment interest is available for recovery?

Prejudgment interest in Wisconsin is recoverable only in cases that involve liquidated damages or damages susceptible of reliable and reasonably accurate methods of calculation. *Benke v. Mukwonago-Vernon Mut. Ins. Co.*, 110 Wis. 2d 356, 366-67, 329 N.W.2d 243, 249 (Ct. App. 1982) (citing *Estreen v. Bluhm*, 79 Wis. 2d 142, 158-59, 255 N.W.2d 473, 482-83 (1977)).

5. In your state what proof is necessary to establish a right of recovery for economic damages, i.e. lost wages, medical expenses, etc.?

The burden of proof necessary to establish a right of recovery for economic damages is to satisfy the jury by the greater weight of the credible evidence, to a reasonable certainty, in simple negligence claims. Wis. JI—Civil 200. *See Bengston v. Estes*, 260 Wis. 595, 598 (1952).

6. Is there any distinction in your state relative to recovery for economic versus non-economic damages?

There is a distinction between economic and non-economic damages in tort actions. There are no caps on economic damages, except against the state or municipalities, but there are limits to non-economic damages. Economic damages are more definite and are easier to calculate. Such awards typically consist of payment for past and future medical

expenses, lost income, loss in earning capacity, and other financial losses attributable to the tortfeasor's actions. Non-economic damages include compensation for pain and suffering, emotional distress, loss of enjoyment of life, loss of consortium, or loss of love and affection. These damages are more subjective and are harder to calculate and capture with a dollar value.

This section of the Compendium was prepared by attorneys not licensed in the State of Wisconsin. Although the attorneys used their best efforts to set forth the current law, users of this section of the Compendium should rely on counsel licensed in the State of Wisconsin.