STATE OF IOWA

RETAIL COMPENDIUM OF LAW

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NEGLIGENCE

I. General Negligence Principles

Negligence is the failure to use ordinary care, or the care which a reasonably careful person would use under similar circumstances.[1] Negligence can be doing something a reasonable person would not do in those circumstances, or a failure to do something that a reasonable person would do. Negligence arises from a breach of duty owed to another – a breach of the duty to use reasonable care.

A. Elements of a Cause of Action for Negligence

To recover damages for negligence, the plaintiff must prove (1) that the defendant was negligent in some way, (2) that the negligence was a cause of damage to the plaintiff, and (3) the amount of the damage.[2] If the plaintiff fails to prove any of these elements, there will be no recovery.

II. Premises Liability

Owners and occupiers of premises owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Juries can consider a multitude of factors when considering whether a defendant has exercised reasonable care. These factors include the foreseeability of harm, the purpose, time, manner, and circumstances under which the visitor entered, the expected use of the premises, the reasonableness of the inspection, repair, or warning, the opportunity and ease of repair, the burden on the owner in terms of inconvenience or cost, or any other relevant factor.[3]

To establish a prima facie case of negligence in a premises liability action, the plaintiff must demonstrate that the defendant knew, or in the exercise of reasonable care should have known, of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position. The defendant must have known that the plaintiff would not discover the condition, would not realize it presented an unreasonable risk, or that the plaintiff would not protect himself. The defendant's negligence must also have been the cause of the plaintiff's damage.[4] The courts can consider many factors when deciding if the owner or occupier has exercised reasonable care to protect visitors. These factors include (1) the foreseeability of the harm, (2) the purpose for whuch the visitor

[1] Iowa Civil Jury Instruction (ICJI) 700.2; *Bartlett v. Chebuhar*, 479 N.W.2d 321, 322 (Iowa 1992)
[2] ICJI 700.1
[3] ICJI 900.2; *Koenig v. Koenig*, 766 N.W.2d 635, 645-46 (Iowa 2009)
[4] ICJI 900.1

entered the premises, (3) the time, manner, and circumstances of the entrance, (4) the expected use of the premises, (5) the reasonableness of inspection, repair, and warnings on the premises, (6) the opportunity or ease of repair or warning, and (7) the burden on the owner or occupier in providing protection.[5]

A. Defendant's Knowledge of the Condition

An owner or occupant of premises is presumed to know of all conditions which the owner created or caused.[6] The owner is not responsible for an injury suffered by a person on the premises which resulted from a condition which the owner had no knowledge of, unless the condition existed for a long enough time that the owner should have known about it through the exercise of reasonable care.[7]

B. Defendant's Knowledge of the Risk

A defendant is not liable for injuries caused by a condition that is known or is obvious to a person in the plaintiff's position, unless the defendant should anticipate the harm despite such knowledge or obviousness.[8] If the circumstances are such that there is reason to believe the risk would not be discovered or become obvious to the plaintiff, or that the plaintiff would not anticipate the risk, the defendant may be liable for negligence even though the condition is open and obvious.[9]

C. Defendant's Negligence

In order to recover, the plaintiff must prove that he defendant knew or had reason to know of the plaintiff's presence on the premises, and thereafter acted negligently by failing to exercise reasonable care for the plaintiff's safety.

D. Cause of Damage

A plaintiff must typically prove two types of causation: factual and proximate. The conduct of a party is the factual cause of damage when the damage would not have happened except for the

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[5] *Koenig*, 766 N.W.2d at 646.
[6] *Ling v. Hosts Inc.*, 164 N.W.2d 123, 126 (Iowa 1969); Restatement (Second) of Torts § 343.
[7] ICJI 900.5; *Weidenhaft v. Shoppers Fair of Des Moines, Inc.*, 165 N.W.2d 756, 759 (Iowa 1969)
[8] ICJI 900.6; *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d at 445 (Iowa 1995)
[9] *Weidenhaft*, 165 N.W.2d at 759

conduct.[10] Proximate cause in Iowa is determined by the risk standard test espoused in the Restatement (Third) of Torts.[11] Under this test, a defendant's liability "is limited to those physical harms that result from the risks that made the actor's conduct tortious."[12] This test confines the scope of liability to the reasons for holding the actor liable in the first place.[13]

E. The "Out-of-Possession Landlord"

As a general rule, an out of possession landlord is not liable for injuries that result from dangerous conditions on leased premises once the tenant takes possession.[14] Generally, the only circumstance under which this rule will not apply is if the landlord retains control of the premises.[15] If a landlord does not retain sufficient control, he cannot be held liable, because he thus may not enter the property to cure deficiencies or control the entry of other persons onto the property to provide safeguards.[16] Therefore, without retaining the requisite control, a landlord will not be held liable for injuries sustained on the leased property.

F. Assumption of Risk

In the past, Iowa courts have recognized two distinct meanings of "assumption of risk." The primary meaning stands for the proposition that the defendant was not negligent, either because the defendant owed no duty or did not breach a duty. The secondary meaning is an affirmative defense to an established breach of duty where the defendant contends that the plaintiff acted unreasonably in encountering a known risk. The secondary definition has been abolished in cases where the defendant can allege contributory negligence, but is preserved for cases where contributory negligence is inappropriate, such as strict liability. [17] The Iowa legislature has adopted a comparative fault system, and included unreasonable assumption of risk in the definition of "fault."[18] Assumption of risk may not be

[10] ICJI 700.3
[11] *Thompson v. Kaczinski*, 774 N.W.2d 829, 838 (Iowa 2009)
[12] *Id.*
[13] *Id.*
[14] *Allison by Fox v. Page*, 545 N.W.2d 281 (Iowa 2002)
[15] *See Stupka v. Scheidel*, 56 N.W.2d 874, 877 (Iowa 1953) (holding that the rule of non-liability for a landlord "does not apply where the owner retains control, or the owner and tenant have joint control, over the premises or the part thereof where the injury occurs.").
[16] *Van Essen v. McCormick Enterprises Co.*, 599 N.W.2d 716 (Iowa 1999)
[17] *Coker v. Abell-Howe Co.*, 491 N.W.2d 143 (Iowa 1992)
[18] Iowa Code section 668.1.

pleaded or instructed upon as a separate defense in cases where contributory negligence is available as a defense.[19]

G. Employer Liability

An employer must use ordinary care to provide a reasonably safe place for employees to work.[20] An employer also has a duty to warn an employee of a risk if the employer knew, or in the exercise of reasonable care should have known of a risk of injury to the employee and that the employee would not realize it to protect himself.[21] An employer is liable for the negligent acts of an employee if the acts are done in the scope of employment.[22] To be considered within the scope of employment, the act must be necessary to "accomplish the purpose of the employment, and it must be intended to accomplish that purpose."[23]

III. Examples of Negligence Cases

Though the types of conditions that give rise to actions for negligence vary, each is subject to the same elements of proof. Below are a few examples of different types of cases that arise frequently.

A. Slip and Fall Cases

1. Snow and Ice Accumulation

One of the most common sources of negligence claims comes from so called "sidewalk liability," or the "continuing storm doctrine." Owners of land next to sidewalks have certain responsibilities to keep the sidewalks clear and safe. Owners must remove any snow and ice that has naturally accumulated on the sidewalk within a reasonable amount of time.[24] Natural accumulation refers to snow or ice "which is on the sidewalk as the result of nature, as compared to snow or ice which was cause to be on the sidewalk as the result of something that a person has done."[25] An owner is permitted to wait until the end of the storm and a reasonable time thereafter to remove the accumulation.[26] The

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[19] *Coker*, 491 N.W.2d at 148.
[20] ICJI 720.1; *Olson v. Katz*, 201 N.W.2d 478, 480 (Iowa 1972)
[21] ICJI 720.3; *Calkins v. Sandven*, 129 N.W.2d 1, 8 (Iowa 1964)
[22] ICJI 730.1; *Bethards v. Shivvers, Inc.*, 355 N.W.2d 39, 45 (Iowa 1984)
[23] ICJI 730.2
[24] Iowa Code § 364.12(2)(b)
[25] ICJI 740.3
[26] *Rochford v. G.K. Development, Inc.*, 845 N.W.2d 715 (Iowa Ct. App. 2014)

changing conditions of a storm render it impracticable to take action earlier than that, and ordinary care does not require it.[27]

To recover, the plaintiff must prove that the owner knew about the natural accumulation of snow and ice, or that it existed long enough that the owner should have discovered and removed it in the exercise of ordinary care.[28] Therefore, a party will not be held liable for an injury if it occurred from the natural accumulation of snow or ice and the owner did not have a reasonable time to remove it.

2. Black Ice

"Black ice" is a condition where a thin layer of ice forms on pavement, but blends into the pavement and is generally not noticeable. If the plaintiff cannot prove that the owner knew or should have known about the black ice, then there will be no sidewalk liability for the plaintiff's injuries. Courts are split on whether black ice is a condition that is readily apparent.[29]

3. Snow Removal Contractors

Typically an independent contractor hired by the owner to remove snow will not have a duty to the plaintiff, and therefore won't be liable to the plaintiff. The contractor can be liable to the owner that hired him, however, and owners will often file cross-petitions against the contractor in actions where the owner is being sued for negligence.[30]

4. Slippery Surfaces

Dangerous conditions can also be present when a floor has been coated with a slippery material such as a wax or polish. Using a wax or polish on a floor is not inherently hazardous to others.[31] For there to be liability, the polish or wax must be applied in a negligent way.[32]

IV. Defenses

A. Plaintiff's Failure to Establish the Presence of a Dangerous Condition

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[27] *Id.*
[28] ICJI 740.1; Iowa Code section 364.12(2)(b)
[29] *See Welch v. YWCA of Clinton*, 743 N.W.2d 871 (Iowa Ct. App. 2007) (reversing an award of summary judgment and remanding for trial on the issue of whether the defendant should have known of the black ice condition).
[30] *See Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699 (Iowa 1995) (describing how owner filed cross-petition against independent contractor, who also filed cross-petition against sub-contractor).
[31] *Osborn v. Klaber Bros.*, 287 N.W. 252, 253 (Iowa 1939)
[32] *Id.*

The first key element to a plaintiff's recovery under premises liability is that the defendant knew or should have known about the dangerous condition on the premises.[33] To establish this, the plaintiff must first establish that there was a dangerous condition present. Without a dangerous condition, the plaintiff will be unable to prove the rest of the elements necessary to recover for negligence.

B. Trivial Defects

Not every defective condition will be sufficient to give rise to a claim of action for negligence. If a defect is so slight that an injury from the condition to a person exercising reasonable care is not reasonable to anticipate, then there will be no negligence for failing to remedy the condition.[34]

C. Open and Obvious Defects

Ordinarily, an owner of real estate will not be held liable for an injury that occurs as a result of a defective condition that is open and obvious.[35] Negligence may still exist even though a defect is open and obvious, however, if the circumstances are such that there is a "reason to believe it would not be discovered or become obvious" to the plaintiff, or the "risk of harm involved would not be anticipated."[36] A defendant is not liable for injuries caused by an open and obvious defect, unless the defendant should anticipate the harm despite the obvious nature.[37] This is a determination for a jury to decide.

D. Indemnification

Parties will often attempt to shift the risk of loss from a plaintiff's claims by entering into indemnification agreements. As a general rule, an indemnification agreement must clearly state an intention to indemnify the indemnitee (the party receiving indemnity) for its own negligence in order for the agreement to have that effect. Generally, an indemnitee who has settled the underlying claim must first establish that it was liable to the injured party as an element of recovering indemnification.[38]

V. Liability for Third Parties

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[33] ICJI 900.1; *Wieseler*, 540 N.W.2d at 450.
[34] *Geer v. City of Des Moines*, 167 N.W. 635 (Iowa 1918)
[35] *Hanson v. Town & Country Shopping Center, Inc.*, 144 N.W.2d 870 (Iowa 1966)
[36] *Id.*
[37] ICJI 900.6; *Wieseler*, 540 N.W.2d at 450.
[38] *Alliant Energy-Interstate Power and Light Co. v. Duckett*, 732 N.W.2d 869 (Iowa 2007)

Patrons at a restaurant, store, hotel, etc. may be injured not by a defective condition on the premises, but by a third party who is also on the premises. The Restatement (Second) of Torts § 344 subjects possessors of land who "holds it open to the public for his business purposes" to liability for physical harm caused by the "accidental, negligent, or intentionally harmful acts of third persons" and the failure of the owner to exercise reasonable care in discovering such acts are being done or likely to be done and to give warning to enable patrons to avoid the harm. Iowa courts have frequently used section 344 as a standard in such cases. Therefore, possessors of land can be liable for the intentional or unintentional injuries sustained by patrons by the hand of a third party, but only if the owner fails to exercise reasonable care in stopping the injury. If it would not be reasonable for an owner to foresee and therefore act to prevent the harm, then the owner will not be liable for failure to stop the injury, as it was not within a reasonable standard of care. Whether or not an owner owes a duty of care can also depend on the extent of the owner's retained control over the property.[39] A possessor of land is not an insurer of the visitor's safety, and therefore is under no duty to exercise case until "he knows or has reason to know that the acts of a third person are occurring, or are about to occur."[40]

VI. Claims Arising From the Wrongful Prevention of Thefts

"Inventory shrinkage" is the phenomenon of the loss of retail inventory due to theft. It is a multi-billion-dollar problem faced by retailers worldwide. Retailers face a substantial problem trying to curb shoplifting by non-employees. In addition to the financial impact of the loss of inventory and sales, the threat of shoplifting poses an additional problem when retailers attempt to thwart a perceived attempt to shoplift — i.e., lawsuits for assault, battery, wrongful detention, and negligence, along with claims for punitive damages.

A. False Arrest and Imprisonment

False arrest or imprisonment is the unlawful restraint of an individual's personal liberty or freedom of movement.[41] The two main elements of the tort of false imprisonment are (1) detention and restraint against one's will, and (2) the unlawfulness of such detention or restraint. Detention or restraint against one's will does not need to be accomplished by physical force or threats of physical force.[42] Under Iowa Code section 808.12, retailers are granted a certain amount of immunity from

[39] *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808 (Iowa 1994)
[40] *Gallowway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1987)
[41] ICJI 2800.1; *Kraft v. City of Bettendorf*, 359 N.W.2d 466 (Iowa 1984)
[42] *Zohn v. Menard, Inc.*, 598 N.W.2d 323 (Iowa Ct. App. 1999)

liability for false imprisonment, so long as they have reasonable grounds to believe the person detained or searched has concealed or was attempting to conceal property. Without said reasonable belief, the retailer will still be liable for false imprisonment.

To recover for false arrest or imprisonment, a plaintiff must prove the following: (1) the plaintiff was detained or restrained against his will, (2) the detention was done by the defendant, and (3) the detention was a cause of the plaintiff's damage.[43] To assert the affirmative defense of good faith and reasonable belief, the defendant must prove that he believed in good faith that the person who was arrested had committed a crime and that the belief was reasonable.

B. Malicious Prosecution

Malicious prosecution involves causing an unsuccessful criminal proceeding with malice and without reasonable grounds to do so.[44] This can result from a false arrest. The plaintiff must prove that he was involved in a criminal proceeding, that the defendant caused that prosecution, the prosecution ended favorably for the plaintiff, the defendant acted with probable cause, the defendant acted with malice, and the prosecution was a cause of plaintiff's damages. Probable cause for filing a criminal charge means having a reasonable ground.[45] An act is considered malicious when the main reason for the act is hatred, ill-will, or some other wrongful purpose.[46]

C. Defamation

Defamation could also arise where a shopper has been wrongfully accused of a crime. If the defamatory statements are delivered orally, it could qualify as slander. If the statements are written, it could qualify as libel. To recover for either, the plaintiff must prove that the defendant made the statements and that the defendant communicated them to someone other than the plaintiff.

D. Negligent Hiring, Retention, or Supervision of Employees

Patrons who are injured in some way may also bring a claim for negligent hiring, retention, or supervision of the employee. In order to recover for negligent hiring, a plaintiff must prove (1) that the employee knew or should have known of its employee's unfitness at the time of hiring, (2) that through

[43] ICJI 2800.1; *Kraft*, 359 N.W.2d at 469.
[44] ICJI 2200.1; *Mills County State Bank v. Roure*, 291 N.W.2d 1, 3 (Iowa 1980)
[45] ICJI 2200.3; *Sislet v. City of Centerville*, 372 N.W.2d 248, 251 (Iowa 1985)
[46] ICJI 2200.5; *Moser v. Black Hawk County*, 300 N.W.2d 150, 152 (Iowa 1981)

the negligent hiring, the employee's dangerous characteristics proximately caused the injury suffered, and (3) there is an employment or agency relationship between the tortfeasor and the defendant employer.[47] Employers have a duty to exercise reasonable care in hiring employees that may injure members of the public through their employment.[48] A claim for negligent hiring includes an action for negligent retention and negligent supervision.[49]

E. Shopkeeper Immunity

Under Iowa Code section 808.12, retailers are granted a certain amount of immunity from liability for false imprisonment, so long as they have reasonable grounds to believe the person detained or searched has concealed or was attempting to conceal property. Without said reasonable belief, the retailer will still be liable for false imprisonment.

VII. Damages

If a jury finds in favor of the plaintiff, they will then have to decide how much the plaintiff's injuries have cost him and award damages accordingly. Possible damages are typically split into compensatory damages and punitive damages.

A. Compensatory Damages

Compensatory damages are designed to compensate the injured party for the damage done by another party; to make the injured party whole again. Compensatory damages are typically divided into two different categories: damages for injuries, pain, and suffering; and damages for lost economic interests like wages and capacity to earn. If a jury finds the plaintiff is entitled to damages, there are 12 different items they may consider. The first four items concern property damage, mostly to vehicles.[50]

The jury can also award damages for past and future medical expenses.[51] For past medical expenses, the jury can award the reasonable cost of necessary hospital, doctor, prescription, and other medical service charges from the date of the injury up until present time. The jury can consider the amount charged, the amount paid, or any other evidence of what is reasonable and proper for such

[47] *Godar v. Edwards*, 588 N.W.2d 701, 708-09 (Iowa 1999)
[48] *Id.*
[49] *Id.*
[50] ICJI 200.2-200.5; *Long v. McAllister*, 319 N.W.2d 256 (Iowa 1982)
[51] ICJI 200.6-200.7; *Pexa v. Auto Owners Inc. Co.*, 686 N.W.2d 150 (Iowa 2004)

medical expenses when determining the reasonable cost.[52] For future medical expenses, the jury can award the present value of any reasonable and necessary hospital, doctor, prescription, or other medical service charges which the plaintiff will incur in the future.[53]

For economic damages, the jury can consider lost wages and loss of future earnings. For lost earnings, the jury may award the reasonable value of any lost wages from the date of injury until the present time.[54] For loss of future earning capacity, the jury may award the present value of loss of future earning capacity, defined as the "reduction in the ability to work and earn money generally, rather than in a particular job."[55]

Finally, the jury may award damages for loss of mind and body and for pain and suffering. Juries can award damages for loss of full mind and body both for the past and the future, measured by the loss of function of the mind or body, which is the inability of a particular part of the mind or body to function in a normal way.[56] Damages for pain and suffering can be awarded for physical and mental pain and suffering in the past and also for the future.[57]

B. Punitive Damages

Punitive damages are available in select, rare circumstances. They should only award them if it has been proven by a preponderance of clear, convincing evidence that the defendant's conduct constituted a willful and wanton disregard for the rights of another and caused actual damage to the plaintiff. Because punitive damages are not meant to compensate for injury, but rather to punish the defendant, they may only be awarded if the defendant's conduct warrants a penalty in addition to compensation damages. There is no exact rule to determine the amount of punitive damages; juries are to consider the conduct, the plaintiff's actual damages, and the amount that will punish and deter similar conduct in the future.

C. Wrongful Death

Juries are also allowed to award a unique portfolio of damages for wrongful death actions. These damages can include medical expenses and lost earnings, as is the case with other actions, but

[52] ICJI 200.6; *Pexa*, 686 N.W.2d 150.
[53] ICJI 200.7
[54] ICJO 200.8; *Iowa-Des Moines Nat. Bank v. Schwerman Trucking Co.*, 288 N.W.2d 198 (Iowa 1980)
[55] ICJI 200.9; *Bergquist v. Mackay Engines, Inc.*, 538 N.W.2d 655 (Iowa Ct. App. 1995).
[56] ICJI 200.10-200.11; *Brant v. Bockholt*, 532 N.W.2d 801, 804 (1995)
[57] ICJI 200.12-200.13; *Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985)

can also include several damages not appropriate for other actions. These can include loss of support, loss of consortium, burial expenses, and loss of value of the estate.[58]

[58] ICJI 200.15-200.21; Iowa Code section 613.15; Iowa Code section 633.336; *Iowa-Des Moines Nat. Bank*, 288 N.W.2d at 201.