



STATE OF PENNSYLVANIA RETAIL COMPENDIUM OF LAW

Prepared by

Pion, Nerone, Girman, Winslow & Smith, P.C.
1500 One Gateway Center
420 Ft. Duquesne Boulevard
Pittsburgh, PA 15522
412-281-2288
www.pionlaw.com

Retail, Restaurant, and Hospitality Guide to Pennsylvania Premises Liability

Negligence	1
<hr/>	
A. General Negligence Principles	1
B. Premises Liability	1
1. Trespassers	1
2. Licensee	2
3. Invitee	2
4. Known and Obvious Condition	3
C. The “Out of Possession Landlord”	4
Specific Examples of Negligence Claims	5
<hr/>	
A. “Slip and Fall”	5
a. Duty to Remove Snow and Ice	5
b. Hills and Ridges Doctrine	5
c. Slippery Surfaces – Cleaner, Polish, and Wax	6
d. Defenses	6
i. Notice	6
ii. Comparative Negligence	7
iii. Assumption of Risk	7
iv. Choice of Ways	8
B. Liability of Violent Crime	9
a. Restatement (Second) of Torts § 344	9
b. Defenses	10
C. Claims Arising From the Wrongful Prevention of Thefts	11
a. Offense Defined	11
b. Presumptions	11
c. Detention	11
1. False Arrest and Imprisonment	12
2. Malicious Prosecution	12
3. Defamation	12
4. Negligent Hiring, Retention, or Supervision of Employees	13
5. Food Poisoning	14
6. Claims Arising From Construction Related Actions	14
Damages	14
<hr/>	
A. Compensatory Damages	14
i. General Damages	14
ii. Special Damages	15
B. Punitive damages	15
C. Wrongful Death	17
i. Pecuniary Loss	18
ii. Survivor Action	19

Indemnification and Insurance Procurement Agreements	20
A. Indemnification	20
B. Statutory Limitations on Indemnification	21
C. Indemnification for Indemnatee's Negligence	21
D. Insurance Procurement Agreement	22
E. The Duty to Defend	22

NEGLIGENCE

A. General Negligence Principles

Negligence, at its very core is simply the failure to exercise that degree of care that a reasonably prudent person would have used under the same circumstances.¹ It is fundamental black letter law that in order to establish negligence, a plaintiff must show: (1) a duty recognized by law requiring the actor to conform to a certain standard with respect to the injured party; (2) a failure or breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage to the interest of another.²

One of the most important elements, and consequently one of the most often litigated, is a person's duty to the injured party. Indeed, a duty "triggers one's obligation to conform to a particular standard of conduct for the protection of another."³ In Pennsylvania negligence cases, the existence of a duty can be created by statute or common law principles.⁴ As discussed more fully below, a land possessor's duty is largely determined based upon the injured person's status at the time of the injury.

B. Premises Liability

In Pennsylvania, an individual or company in possession of land is responsible for certain injuries suffered by people who are on the property. The duty owed by a land possessor is determined on the status of the land entrant at the time of the injury. Therefore, it is critical to identify the class of the injured person, i.e. trespasser, licensee, or invitee.

1. Trespassers

Pennsylvania has embraced the Restatement (Second) of Torts' definition of a trespasser, which is "a person who enters or remains upon land in the possession of another without the privilege to do so created by the possessor's consent or otherwise."⁵ In Pennsylvania, a trespasser may recover for his injuries sustained on the premises only if the possessor of land was guilty of wanton or willful negligence or misconduct.⁶ Willful misconduct means that the actor desired to bring about the resultant harm, or was, at least, aware that it was substantially certain to ensue.⁷ Compared to the other two classes, the duty owed to a trespasser is by far the lowest standard of care owed by a land possessor.

¹ See, *Schumacher v. Swartz*, 68 Pa. D.&C.3 (Com. Pl. Phila., 1948); see also, 36 P.L.E. Negligence § 3.

² See, *Felli v. Com. Dept. of Trans.*, 666 A.2d 775 (Pa. Cmwlth. 1995).

³ See, *Wisniski v. Brown and Brown Insurance Co.*, 906 A.2d 571 (Pa. Super. 2006).

⁴ See, *Shamnoski v. P.G. Energy, Division of Southern Union*, 579 Pa. 652, 858 A.2d 589 (2004).

⁵ See, Restatement (Second) Torts § 329 (1965); *Updyke v. BP Oil Company*, 717 A.2d 546, 548 (Pa. Super. 1998).

⁶ See, *Rossino, et al v. R.C. Titler Construction, Inc., et al.*, 553 Pa. 168, 718 A.2d 755 (1998).

⁷ See, *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965).

2. Licensee

A licensee is a person who is privileged to enter or remain on the land by virtue of a land possessor's consent.⁸ The Restatement (Second) of Torts § 342 sets forth the basis of liability for a possessor of land regarding a licensee:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if:

- (a) The possessor knows or has reason to know of the condition and should realize that it involves a reasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) He fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) The licensees do not know or have reason to know of the condition and the risk involved.⁹

This duty introduces the necessary requirement of notice, either actual or constructive. In other words, the plaintiff must show that the land possessor had some knowledge of the dangerous condition and that he did not warn the plaintiff or make it safe. Finally, liability will only attach if it is also shown that the plaintiff did not know of the condition himself or its risks.

3. Invitee

Pennsylvania characterizes an invitee as either a public invitee or a business visitor. A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.¹⁰ Conversely, a business visitor is person who is invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of land.¹¹ While there are two types of invitees, the duty owed by a land possessor is identical in both instances.

Importantly, an invitee, which is commonly the type of classification in most retail premises liability cases, is awarded the highest duty that is owed by a land possessor.¹² The Restatement (Second) of Torts § 343 provides that a possessor of land is liable for the physical harm caused to his invitee by a condition on the land if, but only if, he or she:

⁸ See, Restatement (Second) Torts § 330 (1965); *Updyke, supra* at 549.

⁹ See, Restatement (Second) of Torts § 342 (1965); *Rossino, supra* at 675.

¹⁰ See, *Gutteridge v. A.P. Green Servs.*, 804 A.2d 643 (Pa. Super. 2002).

¹¹ See, Restatement (Second) of torts § 332 (1965); *Updyke, supra*, at 549; (*citing, Palange v. Philadelphia Law Department*, 433 Pa.Super. 373, 640 A.2d 1305, 1307 (1994)).

¹² See, *Swift v. Northwestern Hospital of Philadelphia*, 456 Pa.Super. 330, 690 A.2d 719, 722 (1997).

- (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and
- (b) Should expect that they will not discover or realize the danger, or fail to protect themselves against it, and
- (c) Fails to exercise reasonable care to protect them against the danger.¹³

As opposed to the duty owed to licensee, a land possessor has a “duty to correct or warn business visitors or invitees *not only of defects which are obvious or observable but also those discoverable by a proper or reasonable inspection.*”¹⁴ In other words, a land possessor has an affirmative duty to conduct reasonable inspections of the property to discover dangerous conditions on the premises.¹⁵

To be classified as a public invitee, the individual must “enter the premises upon invitation and ‘for a purpose for which the land is open to the public.’”¹⁶ Comment (b) to the Restatement (Second) of Torts § 332 discusses the distinction between invitation and permission which is central to the determination of whether an entrant is an invitee or a licensee:

Although invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from your permission in this:

An invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct which justifies others in believing that the possessor is willing that they shall enter if they so desire.

4. Known and Obvious Condition

While a possessor of land owes the highest duty to an invitee, he is not liable to his invitees for physical harm caused to them by any activity or condition on the and whose danger is “known” and “obvious” to them, *unless* the possessor should anticipate the harm despite such knowledge or obviousness.¹⁷ A danger is deemed to be “obvious” when “both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment.”¹⁸ Likewise, for a condition to be “known”, it must “not only be known to exist, but ... also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated.”¹⁹

¹³ See, Kiehner v. School District of Philadelphia, 712 A.2d 830, 833-34 (Pa. Commwlth. 1998).

¹⁴ See, Miller v. Hickey, 36 Pa. 317, 81 A.2d 910 (1951); see also, Lonsdale v. Joseph Home Co., 403 Pa.Super. 12, 587 A.2d 810 (1991)(the duty of reasonable inspection that he possessor of land owes to business visitors distinguishes the obligation that the possessor owes to invitees from the obligation owed to licensees.); Crotty v. Reading Industries, Inc., 237 Pa.Super. 1, 345 A.2d 259 (1975)(“A visual inspection has long been required for the protection of business visitors; and indeed, the duty may go beyond a mere visual inspection.”).

¹⁵ See, Campisi v. Acme Markets, Inc., 915 A.2d 117 (Pa. Super. 2006)

¹⁶ See, Updyke, *supra*, at 1308; Restatement (Second) of Torts § 332(2).

¹⁷ See, Carrrender v. Fitterer, 503 Pa. 178, 469 A.2d 120 (1983); Restatement (Second) of Torts § 343A (1965).

¹⁸ *Id.*; Restatement (Second) of Torts § 343A Comment b.

¹⁹ *Id.*

This concept goes hand in hand with the doctrine of assumption of the risk, discussed more fully below. Indeed, where a plaintiff has “voluntarily and deliberately proceeded to face a known and obvious risk”, he is considered to have assumed liability for his own injuries, and the defendant is relieved of its duty owed to him.²⁰ For example, in *Touchette*, the plaintiff’s deposition testimony clearly indicated that she had actual knowledge of the location of the snow and ice, its slippery propensities and the dangers that she faced in voluntarily attempting to walk over it before she actually fell.²¹ In its opinion, the *Touchette* Court noted that “under Pennsylvania law, there are some dangers that are so obvious that they will be held to have been assumed as a matter of law despite assertions of ignorance to the contrary.”²² The Court further noted that “Ice is always slippery, and a person walking on ice always runs the risk of slipping and falling.”²³

C. The “Out of Possession Landlord”

Under Pennsylvania law, as a general rule, a landlord that is “out of possession” is not liable for injuries incurred by third parties on the leased premises since the landlord has no duty to such persons.²⁴ This view is premised upon the legal view of a lease transaction as the equivalent of a sale of the land for the term of the lease.²⁵ Put another way, liability is premised primarily on possession and control, and not merely upon ownership of the premises.²⁶

Of course there are a number of exceptions to the general rule of non-liability of a landlord “out of possession.” The Pennsylvania Supreme Court has stated that a landlord may be liable if he or she has reserved control over a defective portion of the leased premises or over a portion of the leased premises which is necessary to the safe use of the property (the “reserved control” exception).²⁷ This exception is applicable to cases involving “common areas” such as shared steps or hallways in buildings leased to multiple tenants.²⁸

Other exceptions include the demised premises are so dangerously constructed that the premises are a nuisance *per se*²⁹; the lessor had knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee³⁰; the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is

²⁰ See, *Touchette v. Weis Mkts.*, 23 Pa. D.&C.5th 321 (Ct. Com. Pl. 2011).

²¹ *Id.*

²² *Id.* (citing, *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993)).

²³ *Id.* (citing, *Barrett v. Fredavid Builders*, 454 Pa.Super. 162, 685 A.2d 129 (Pa. 1996)).

²⁴ See, *Dorsey v. Continental Associates*, 404 Pa.Super. 525, 591 A.2d 716, 718 (1991).

²⁵ See, *Deeter v. Dull Corporation, Inc.*, 420 Pa.Super. 576, 617 A.2d 336, 339 (1992).

²⁶ *Id.*

²⁷ See, *Deeter*, *supra* at 339; *Smith v. M.P.W. Realty Company, Inc.*, 432 Pa. 536, 539, 225 A.2d 227, 229 (1967).

²⁸ See, *Pagano v. Redevelopment Authority of Philadelphia*, 249 Pa.Super. 303, 376 A.2d 999, 1007 (1977).

²⁹ See, *Miller v. Atlantic Refining Co.*, 12 D.&C.2d 713, 719 (1957), *aff'd*, 393 Pa. 466, 143 A.2d 380, 383 (1958).

³⁰ See, *Doyle v. Atlantic Refining Co.*, 357 Pa. 92, 53 A.2d 68 (1947).

transferred to lessee³¹; lessor undertakes to repair the demised premises and negligent makes the repairs³²; or the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises.³³

SPECIFIC EXAMPLES OF NEGLIGENCE CLAIMS

A. “Slip and Fall”

a. *Duty to Remove Snow and Ice*

In Pennsylvania, there is no absolute duty on the part of a landowner to keep his premises and sidewalks free from snow and ice at all times.³⁴ The courts find that these are “natural phenomena incidental to our climate.”³⁵ As snow and ice are merely transient dangers, the only duty upon the landowner or tenant is to act within a reasonable time *after* notice to remove it when it is in a dangerous condition.³⁶ Furthermore, there is no liability created by “general slippery” conditions on sidewalks; rather, it must appear that there were dangers conditions due to “ridges or elevations” which were allowed to remain for an unreasonable length of time or were created by defendant’s antecedent negligence.³⁷

In order to recover in an action involving the accumulation of snow and ice on a sidewalk, the plaintiff must show:

- (1) That snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon;
- (2) That the property owner had notice, either actual or constructive, of the existence of such condition; and
- (3) That it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.³⁸

b. *Hills and ridges doctrine*

The “hills and ridges” doctrine operates to protect an owner or occupier of liability of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations.³⁹ The Pennsylvania Superior Court has defined the “hills and ridges” doctrine as follows:

³¹ See, *Yarkosky v. The Caldwell Store, Inc.*, 189 Pa.Super. 475, 481, 151 A.2d 839 (1959)

³² See, *Caradi v. Sterling Oil Co.*, 378 Pa. 68, 71, 105 A.2d 98, 99 (1954).

³³ See, *Goodman v. Corn Exchange Nat’l Bank & Trust Co.*, 331 Pa. 587, 590, 200 A.2d 642, 643 (1938).

³⁴ See, *Wash v. F.W. Woolworth Co.*, 17 Phila. 239 (Com. Pl. Phila. Cty. 1988).

³⁵ Id.

³⁶ Id.; see also, *Rinaldi v. Levine*, 406 Pa. 74, 176 A.2d 623 (1962).

³⁷ Id.

³⁸ Id.; see also, *Roland v. Kravco, Inc.*, 355 Pa.Super. 493, 513 A.2d 1029 (1986); *Rinaldi, supra*.

³⁹ See, *Morin v. Traveler’s Rest Motel, Inc.*, 704 A.2d 1085, 1087 (Pa. Super. 1997).

The doctrine of hills and ridges provides that an owner or occupier of land is not liable for general slipper conditions, for to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere. Snow and ice upon a pavement create merely transient danger, and the only duty upon the property owner or tenant is to act within a reasonable time after notice to remove it when it is in a dangerous condition.⁴⁰

The Pennsylvania Superior Court, however, has cautioned that this doctrine may be applied "only in cases where the snow and ice complained of are the result of an *entirely natural accumulation*, following a recent snowfall."⁴¹ Indeed, the protection afforded by this doctrine is predicated upon the assumption that these formations are natural phenomena incidental to Pennsylvania's climate.⁴²

c. Slippery surfaces –Cleaner, Polish, Wax

Slip and fall accidents can also be caused by the application of a floor cleaner, polish or wax that resulted in a slippery surface. Under Pennsylvania law, the mere presence of wax or oil or any other applicant that would make it slippery on the floor of business premises is not of itself negligence. To the contrary, there must be evidence tending to show that it was improperly applied, which is a question for the jury.⁴³

d. Defenses

Pennsylvania recognizes various defenses that may be raised by a land possessor or landowner in premises liability cases. Indeed, the mere fact that an accident has occurred does not necessarily end in the result that a property owner or lessee is liable.

i. Notice

It is incumbent upon the plaintiff to demonstrate the existence of a dangerous condition and that the landowner had a hand in creating the harmful condition or had actual or constructive notice of it. If the plaintiff is unable to establish that the landowner created the harmful condition, the plaintiff must then prove that the landowner had actual or constructive notice of the condition.⁴⁴ Therefore, if the plaintiff fails to establish actual or constructive notice, the claim will fail.

⁴⁰ See, Harmotta v. Bender, 411 Pa.Super. 371, 601 A.2d 837 (1992)(quoting, Gilligan v. Villanova University, 401 Pa.Super. 113, 584 A.2d 1005, 1007 (1991)).

⁴¹ See, Harvey v. Rouse Chamberlin, Ltd., 901 A.2d 523 (Pa. Super. 2006)(citing, Bacsick v. Barnes, 234 Pa.Super. 616, 341 A.2d 157 (1975).

⁴² See, Bacsick, supra, at 160.

⁴³ See, Weir v. Bond Clothes, Inc., 131 Pa.Super. 54, 198 A. 896 (1938); Myers v. Penn Traffic Co., 414 Pa.Super. 181, 606 A.2d 926 (1992)

⁴⁴ See, Swift v. Northeastern Hospital, 456 Pa.Super. 330, 690 A.2d 719, 722 (1997).

ii. Comparative Negligence

In Pennsylvania, the defense of Comparative Negligence is codified at 42 Pa.C.S. § 7102, which provides as follows:

In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representatives where such negligence was not greater than the casual negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.⁴⁵

In other words, if a plaintiff is guilty of his or her own negligence of a proportion not greater than defendant's negligence, the plaintiff's award will be diminished in proportion to plaintiff's own negligence.

In this context, one such way to establish negligence on the part of the plaintiff would be to establish that the dangerous condition was open and obvious and the plaintiff could have easily observed the condition of the plaintiff had paid more attention. Under Pennsylvania law, it is the duty of a person to look where he is walking to see that which is obvious.⁴⁶ If the condition is open and obvious and the plaintiff could have easily observed the condition if the plaintiff had been more attentive, then a defendant can assert this defense.⁴⁷ The Pennsylvania Supreme Court explained what could be considered open and obvious, stating that a danger is open and obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence and judgment."⁴⁸

iii. Assumption of the Risk

Another doctrine which provides a defense to such cases is known as assumption of the risk. The basic premise of the doctrine of assumption of the risk is that a party who voluntarily and knowingly assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover damages for such harm.⁴⁹ The authors of the Restatement divided assumption of the risk into four categories in Comment c to § 496A:

⁴⁵ See, 42 Pa.C.S. § 7102.

⁴⁶ See, Lexis v. Duquesne Incline Plane Company, 346 Pa. 43, 44, 28 A.2d 925, 926 (1942); Villano v. Security Savings Associates, 268 Pa.Super. 67, 407 A.2d 440 (1979).

⁴⁷ See, Carrender v. Fitterer, 503 Pa. 178, 469 A.2d 120 (1983).

⁴⁸ Id. at 123-24.

⁴⁹ See, Malinder v. Jenkins Elevator & Machine Co., 371 Pa.Super. 414, 538 A.2d 509 (1986); and, Restatement (Second) of Torts § 496A.

1. The plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff.
2. Plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances.
3. Plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it.
4. Plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refused to allow him to impose upon the defendant a loss for which is own negligence was in part responsible.⁵⁰

In the first three delineated categories, the plaintiff's conduct results in no duty owed by the defendant to the plaintiff, and therefore the application of assumption of the risk as a defense operates as a complete bar to plaintiff's recovery.⁵¹ By contrast, the fourth category involves two negligent acts: the defendant's and the plaintiff's, and therefore the defendant's duty is not dissolved as it is in the first three.⁵²

iv. Choice of Ways

Pennsylvania courts recognize the unique doctrine described as the "alternate ways" or "choice of ways" doctrine. Under this doctrine, a plaintiff will be guilty of contributory negligence where the plaintiff, "having a choice of two ways, one which is perfectly safe, and the other which is subject to risks and dangers, voluntarily chooses the latter and is injured."⁵³ In *Downing v. Shaffer*, the Pennsylvania Superior Court expounded on the doctrine, stating as follows:

The rule requiring a person to select a safe route in favor of a dangerous one is nothing more than a formulation of the general rule that a person is contributorily negligent if his conduct falls short of the standard to which a reasonable person should conform in order to protect himself from harm.⁵⁴

⁵⁰ See, *Malinder*, 538 A.2d at 511-12; Restatement (Second) of Torts § 496A, comment c.

⁵¹ See, *Malinder*, 538 A.2d at 512.

⁵² Id.

⁵³ See, *O'Brien v. Martin*, 432 Pa.Super. 323, 638 A.2d 247 (1993) (citing, *Downing v. Shaffer*, 246 Pa.Super. 512, 371 A.2d 953, 956 (1977)).

⁵⁴ See, *Downing*, 371 A.2d at 956.

However, the *Downing* court cautioned that this doctrine “is not meant to impose unreasonable restrictions on travel.”⁵⁵ Therefore, to warrant an instruction on “choice of ways” to the jury, there must be evidence that the plaintiff made an unreasonable decision which imposed him to a hazard that he knew or should have known existed.⁵⁶ Indeed, there must be evidence of the following:

1. A safe course,
2. A dangerous course, and
3. Facts which would put a reasonable person on notice of the danger or actual knowledge of the danger.⁵⁷

In other words, the issue under a “choice of ways” analysis is whether there were two distinct paths, whether the path chosen was an obviously dangerous one, and whether a reasonably prudent person would not have followed the path chosen by the plaintiff.⁵⁸

B. Liability for Violent Crime

a. *Restatement (Second) of Torts § 344*

In Pennsylvania, landowners who hold their property open to the public for business purposes are subject to liability for the accidental, negligent or intentionally harmful acts of third persons.⁵⁹ The Pennsylvania Supreme Court adopted the Restatement (Second) of Torts § 344 in *Moran v. Valley Forge Drive-In Theater, Inc.*⁶⁰ Section 344 of the Restatement states that:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) discover that such acts are being done or are likely to be done, or
- (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.⁶¹

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ See, *Oswald v. Stewart*, 301 Pa.Super. 463, 448 A.2d 1 (1982) (citing, Feldman, *Pennsylvania Trial Guide* § 30.19 (1978)).

⁵⁹ See, *Schmitt v. Walls*, 28 Phila. 529, 1994 Phila. Cty. Repr. LEXIS 113 ([Phila. Ct. Com.](#) Pl. Nov. 8, 1994).

⁶⁰ See, *Schmitt*, *supra*; see also, *Moran v. Valley Forge Drive-In Theater, Inc.*, 431 Pa. 432, 246 A.2d 875 (1968).

⁶¹ See, Restatement (Second) of Torts § 344 (1965).

Notably, the duty of care placed upon the landowner is not automatic. Instead, the courts employ a “reasonable person” standard of diligence in securing the property and its anticipated occupants and visitors against “reasonably foreseeable” crimes. Comment f to Section 344 of the Restatement is instructive in this regard, stating that “[s]ince the possessor is not an insurer of the visitor’s safety, he is ordinarily under no duty to exercise any care **until he knows or has reason to know** that the acts of the third person are occurring, or are about to occur.”⁶² However, a landowner may “know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.”⁶³ Comment f states that a possessor of land can be put on notice, and therefore owe a duty “if the place or character of his business, or his past experience, is such that he should reasonable anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time.”⁶⁴

In *Carswell v. Southeastern Pennsylvania Transport Authority*, the Pennsylvania Superior Court noted that for Section 344 to apply, there must be proof that (1) the defendant is the possessor of the land in question; (2) that he holds it open for entry for his business purposes; and (3) that the plaintiff entered on the land for such purposes.⁶⁵

b. Defenses

In Pennsylvania, evidence of industry standards and regulations is generally relevant and admissible on the issue of negligence, including premises liability cases.⁶⁶ With regard to liability for violent crime or acts inflicted upon a third party, a land possessor may introduce evidence of adequate lighting, security personnel or patrols, emergency call boxes, video surveillance, postings or signage, or any other evidence of measures taken by the land possessor to provide reasonable security measures.

Aside from the defenses already outlined above, a defendant in a premises liability action may assert joint and several liability. Pennsylvania enacted the “Fair Share Act” in 2011, which defines joint and several liability. Under 42 Pa.C.S. § 7102 (a.1) *Recovery against joint defendant; contribution*, a defendant’s liability shall be several and not joint, unless the case falls into one of the following categories:

1. The defendant is 60% or more at fault,
2. There was an intentional misrepresentation,
3. There was an intentional tort,

⁶² Id. at Comment f (emphasis added).

⁶³ Id.

⁶⁴ Id.

⁶⁵ See, *Carswell v. Southeastern Pennsylvania Transportation Authority*, 359 Pa.Super. 167, 173 n.4, 393 A.2d 770, 773 n.4 (1978).

⁶⁶ See, *Dallas v. F.M. Oxford, Inc.*, 381 Pa.Super. 89, 552 A.2d 1109 (1989)(explaining that evidence of customary practice within an industry is admissible in negligence cases); *Brogley v. Chambersburg Engineering Co.*, 306 Pa.Super. 316, 452 A.2d 743 (1982)(stating that OSHA regulations are admissible on the question of standard of care.

4. There was a release or threatened release under section 702 of the Hazardous Sites Cleanup Act., P.L 756, No. 108.
5. There was a violation of section 497 of the Pennsylvania Liquor Code, P.L. 90, No. 21.⁶⁷

C. Claims Arising From the Wrongful Prevention of Thefts

The Pennsylvania “Retail Theft” Statute is found at 18 Pa.C.S. § 3929, and provides, in pertinent part:

(a) *Offense defined.* -- A person is guilty of a retail theft if he:

- (1)** takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise ...with the intention of depriving the merchant of the possession...;
- (2)** alters, transfers or removes any ... indicia of value ... which aid in determining value affixed to any merchandise displayed...and attempts to purchase such merchandise ...at less than the full retail value ...;
- (3)** transfers any merchandise ... from the container in ... which the same shall be displayed to any other container ...; or
- (4)** under-rings with the intention of depriving the merchant of the full retail value of the merchandise[;]
- (5)** destroys, removes, renders inoperative or deactivates any inventory control tag.

(b) *Presumptions.* -- Any person intentionally concealing unpurchased property ... shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, ... and the finding of such unpurchased property concealed, ... shall be prima facie evidence of intentional concealment.

(c) *Detention.* -- A peace officer, merchant or merchant's employee or an agent under contract with a merchant, who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and who has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession unpurchased merchandise taken from the mercantile establishment and, if so, to recover such merchandise, to inform a peace officer, or to institute criminal proceedings against the suspect.

⁶⁷ See, 42 Pa.C.S. § 7102 (a.1).

Such detention shall not impose civil or criminal liability upon the peace officer, merchant, employee, or agent so detaining.

•••

18 Pa.C.S. § 3929. The Retail Theft Statute, §3929(f), also defines certain terms, including “conceal,” “Full retail value,” “Merchandise,” and “Merchant.” Section 3929(d) provides that persons concealing goods offered for sale may be detained “in a reasonable manner for a reasonable time” without liability for false arrest, false imprisonment, or unlawful detention. However, this Act does not give unlimited authority to store owners to stop anyone doing business in his establishment—his approach must be reasonable, even if it turns out in his investigation that the person apprehended has concealed some goods on his person or in his effects.

1. False Arrest and Imprisonment

The elements of false arrest/false imprisonment are: (1) the detention of another person (2) that is unlawful. “An arrest based upon probable cause would be justified, regardless of whether the individual arrested was guilty or not.” Manley v. Fitzgerald, 997 A.2d 1235, 1241, (Pa. Commw. Ct. 2010) (quoting, Renk v. City of Pittsburgh, 537 Pa. 68, 76, 641 A.2d 289, 293 (1994)). It is a defense to an action for false imprisonment to show that the arrest or detention was in fact lawful. 25 P.L.E. FALSE IMPRISONMENT § 3.

Consequently, under the Retail Theft Statute, a shopkeeper is entitled to immunity from liability if he establishes probable cause for the reasonable detention of a suspected shoplifter. The statute directs an inference of intent from the act of concealment of merchandise. Moreover, finding concealed unpurchased property on someone is prima facie evidence of intentional concealment. Another defense to a claim of false imprisonment/false arrest is if there is probable cause to believe that a retail theft has occurred. Karkut v. Target Corp., 453 F. Supp. 2d 874 (E.D. Pa. 2006).

2. Malicious Prosecution

To sustain an action for malicious prosecution, the Plaintiff must establish: “(a) termination in the plaintiff’s favor of the criminal proceeding on which the prosecution is based, (b) want of probable cause, and (c) malice.” Painter v. Roth, 118 Pa. Super. 474, 477, 180 A. 49, 1935 Pa. Super. LEXIS 85 (Pa. Super. Ct. 1935). “[T]he mere fact of the acquittal of the defendant in the criminal charge is not prima facie evidence of the want of probable cause.” Id. (internal citations omitted). Consequently, a shopkeeper is entitled to immunity from liability if he establishes he had probable cause to prosecute.

3. Defamation

Pennsylvania has a one (1) year statute of limitations for defamation. See 42 Pa.C.S. § 5523(1). Under 42 Pa.C.S. § 8343, a Plaintiff must prove:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.

- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning—that the defendant was at least negligent with respect to the truth or falsity of the allegedly defamatory statements.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a)(1)-(7).

The truth of the defamatory communication is a complete bar to recovery. 42 Pa.C.S. § 8343(b)(1); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 910 (1971). Under §8343, the Defendant also has the burden of proving the privileged character of the occasion on which it was published, and the character of the subject matter of defamatory comment as of public concern. 42 Pa.C.S. § 8343(b)(2)-(3).

Public officials/figures (including, for example police officers; public high school teachers and coaches; a school board director; a candidate for judge; a celebrity with access to the media; and a union official) must prove that the defendant acted with “actual malice.”

Actual malice . . . requires at a minimum that the [defamatory] statements were made with a reckless disregard for the truth. And although the concept of “reckless disregard” “cannot be fully encompassed in one infallible definition,” . . . the defendant must have made the false publication with a “high degree of awareness of . . . probable falsity,” . . . or must have “entertained serious doubts as to the truth of his publication.”

Sprague v. Walter, 441 Pa. Super. 1, 29, 656 A.2d 890, 1995 Pa. Super. LEXIS 1697 (Pa. Super. Ct. 1995) (quoting, Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 2686, 105 L. Ed. 2d 562, 576-77 (1989)).

4. Negligent Hiring, Retention, or Supervision of Employees

An employer may be liable under a theory of negligent retention if it knew or should have known that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee’s conduct would harm a third person. Brezenski v. World Truck Transfer, Inc., 2000 PA Super 175, 11 (2000). “The [Plaintiff] must establish that the employer breached a duty to protect others against a risk of harm. The scope of this duty is limited to those risks that are reasonably foreseeable by the actor in the circumstances of the case.” Id. at 20.

The Pennsylvania Human Relations Act, 43 Pa. Stat. §951, *et seq.*, preempts negligent hiring/retention causes of action. Steltz v. Keystone Community Blood Bank of Miller-Keystone Blood Center, 2005 U.S. Dist. LEXIS 42324, 2005 W.L. 281999 at *1 (E.D. Pa. 2005) (“Where plaintiff’s negligence claim is more precisely a claim for negligent supervision because the claim essentially alleges failure to train, supervise and investigate, the claim is preempted by PHRA”).

5. Food Poisoning

“The law places an obligation upon the seller to see that the articles are fit for the purposes for which they are intended. ... This places a heavy burden upon the vendor of food; but public policy, as well as public health, demands that great care be exercised by one who has the opportunity of examining and knowing the quality of food sold, which the purchaser may not determine.” *Campbell v. G. C. Murphy Co.*, 122 Pa. Super. 342, 345-346, 186 A. 269, 1936 Pa. Super. LEXIS 110 (Pa. Super. Ct. 1936). “Professor Williston, in his treatise on Sales, 2d ed., vol. 2, sec. 614, stated that ‘Unwholesome food sold to human beings under an expressed or implied contract . . . subjects the seller to responsibility for the consequences.’” *Id.* Food poisoning cases can be brought under many different theories including, negligence, strict liability, and trespass.

6. Claims Arising From Construction-Related Actions

Construction related accidents could include, roof falls, scaffolding accidents, electrical shocks, equipment failure, and operating equipment accidents. These claims can be brought under a variety of actions, including products liability, strict liability, negligence, *respondeat superior*, and negligent hiring.

DAMAGES

A. Compensatory Damages

A plaintiff who wins a tort suit usually recovers the actual damages or compensatory damages that she suffered because of the tort. Depending on the facts of the case, these damages may be for direct and immediate harms, such as physical injuries, medical expenses, and lost pay and benefits, or for harms as intangible as loss of privacy, injury to reputation, and emotional distress. “Compensatory damages, in all cases of civil injury ... are those damages awarded to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he or she would have been if the contract had been performed or the tort not committed.” *Amadio v. Levin*, 509 Pa. 199, 230, 501 A.2d 1085, 1985 Pa. LEXIS 441 (Pa. 1985) (Nix, Chief Justice, dissenting) (citing, *Sedgwick on Damages* (9th ed., p. 25)). These Compensatory damages are typically separated into “general damages,” and “special damages.”

i. General Damages

General damages are non-economic damages. “General damages are those that are the usual and ordinary consequences of the wrong done.” *Hooker v. State Farm Fire & Cas. Co.*, 880 A.2d 70, 77, 2005 Pa. Commw. LEXIS 445 (Pa. Commw. Ct. 2005); *Fort Washington Res., Inc. v. Tannen*, 901 F. Supp. 932 (E.D. Pa. 1995); and *Parsons Trading Co. v. Dohan*, 312 Pa. 464, 167 A. 310 (1933)). Pain and suffering, loss of consortium, and mental anguish are examples of general damages.

ii. Special Damages

“Special damages are those that are not the usual and ordinary consequences of the wrong done but which depend on special circumstances.” Hooker v. State Farm Fire & Cas. Co., 880 A.2d 70, 77, 2005 Pa. Commw. LEXIS 445 (Pa. Commw. Ct. 2005). “General damages may be proven without specifically pleading them; however, special damages may not be proved unless special facts giving rise to them are averred. Id. (citing, Laing v. Colder, 8 Pa. 479 (1848); Boden v. Gen. Tel. Co., 32 Som. 128 (Pa. Com. Pl. 1975)).

Special damages are usually quantifiable amounts. These typically included medical bills and wage loss.

B. Punitive Damages

Punitive damages are a form of relief that does not stand as a separate cause of action. Punitive damages cannot be recovered in the absence of a legally recognized injury. Joseph v. Scranton Times, L.P., 2011 Pa. Dist. & Cnty. Dec. LEXIS 469, 23 Pa. D. & C.5th 129 (Pa. County Ct. 2011).

The type of conduct that gives rise to a claim for punitive damages is a substantive issue governed by state law. Thomas v. Medesco, Inc., Div. of Harvard Indus., Inc., 67 F.R.D. 129,131 (E.D. Pa. 1974). Pennsylvania has adopted Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages. This section provides that “punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” See Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989) and Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963). Punitive damages cannot be awarded for mere inadvertence, mistake, error of judgment and the like, which constitute ordinary negligence. Field v. Phi. Electric Company, 388 Pa. Super. 400, 428, 565 A.2d 1170, 1187 (1989). Further, as a matter of law, punitive damages may not be awarded upon “a showing of even gross negligence” Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005) (citation omitted).

Pennsylvania case law provides that it is not sufficient for a Complaint to merely allege that the conduct was reckless, willful or wanton in an effort to recover punitive damages. Chambers v. Montgomery, 192 A.2d 375 (Pa. 1963). A Complaint must allege facts that specifically indicate in what manner Defendant knew that his conduct involved a high probability of substantial harm to others, and those facts must be specifically plead in the Complaint. Van Ingen v. Wentz, 70 Pa. D. & C.2d 555 (Pa. Com. Pl. 1975).

Punitive damages must be based upon conduct which is malicious, wanton, reckless, willful or oppressive. Chambers, 192 A.2d at 358; Rizzo, 555 A.2d at 69. The state of mind of the actor is vital to the determination. Feld v. Merriam, 458 A.2d 742, 748 (Pa. 1984). It is essential that there be some indication that the actor had an “evil motive” in acting or failing to act. Id. As explained by the Third Circuit in Burke v. Maassen:

Pennsylvania cases have adopted a very strict interpretation of ‘reckless indifference of rights of others.’ The most recent Supreme Court case is *Arden v. Johns-Manville Corp.* in which the opinion announcing the judgment of the court (the plurality of opinion) held that a jury may award punitive damages only when the evidence shows the defendant knows, or had reason to know, of facts which create a high degree of risk of physical harm to another, and deliberately proceed to act in conscious disregard of, or indifference to, that risk. *See Martin*, 494 A.2d at 1097. In this view, it is not sufficient to show that a reasonable person in the defendant’s position would have realized or appreciated the high degree of risk from his actions. *Id.* . . . *Martin* requires a culpable mental state of conscious indifference to another’s safety as the test for ‘reckless indifference’ under the Restatement Section 908. There must be some evidence that the person actually realized the risk and acted in conscious disregard or indifference to it. *Martin*, 494 A.2d at 1097 . .

Burke v. Maassen, 904 F.2d 178, 181-182 (3d Cir. 1990)

In *Burke*, plaintiffs sued defendants for damages under Pennsylvania’s Wrongful Death and Survival Acts. The lawsuit arose out of an accident where plaintiff’s-decedent, George Burke, was standing on the shoulder of the Pennsylvania Turnpike when he was struck by a tractor-trailer operated by defendant Maassen. At the time of the accident, Maassen was an agent of defendant Malone Freight Lines, Inc. acting within the course and scope of his employment. In addition to seeking damages under the Wrongful Death and Survival Acts, plaintiff also claimed punitive damages.

In *Burke*, plaintiff offered evidence at the time of trial that Maassen lied on his job application with respect to his experience as an over-the-road truck driver; lied with respect to prior employers; failed to note on his application that he had received a speeding ticket while working for a previous employer; had driven over 14 hours in a single day; had fallen asleep at the wheel; was speeding; and wrote false entries in his driving log and gave false answers at a deposition to cover up the violation. *Burke*, 904 F.2d at 180, 183. The Court noted that these failures by Maassen were a violation of federal trucking regulations. *Id.* With respect to Maassen’s employer, Malone Freight Lines, Inc., plaintiff provided evidence that Malone’s safety department performed a perfunctory verification of Maassen’s application and approved it in spite of its falsehood; indicated on the application that contact had been made with an alleged prior employer when Maassen never worked for the employer; and indicated on the job application that contact with prior employers showed Maassen’s job performance was good and that he had no accidents when Maassen never worked for the prior employers. *Id.*

The Third Circuit held that this evidence was irrelevant and that no punitive damage claim had been made out because only conduct relating to the state of mind of the defendant at the time of the accident is pertinent to such a claim. *Burke*, 904 F.2d at 183. In this regard, the Court stated:

There is no doubt that Maassen behaved reprehensibly by lying on his employment application, falsifying his driver's log and lying during his deposition. None of these facts, however, showed that Maassen consciously appreciated the risk of driving more than 10 hours. If anything his attempts at concealment show that Maassen realized the risk too late to avoid it. According to *Martin*, such evidence is not relevant to assessing punitive damages. *Martin* stated that punitive damages are intended to deter risky behavior that causes harm; they are not a sanction for obstruction of justice. Maassen's attempt at covering up his wrongdoing is not sufficient evidence from which a jury can conclude that Maassen consciously appreciated the risk of his actions prior to the accident. According to *Martin*, it is impossible to deter a person from taking risky action if he is not conscious of the risk.

In *Medevetz v. Choi*, 569 F.2d 1221 (3d Cir 1977), the Court discussed the meaning of reckless indifference in the context of the punitive damage claim. In a motor vehicle accident case, allegations that one of the parties was driving while under the influence of alcohol may be sufficient to constitute "reckless indifference" to the injuries of others as to justify punitive damages. *Id.* At 1226 citing *Focht v. Rabada*, 268 A.2d 157, 159 (Pa. Super. 1970). The Court in *Medevetz* cited with approval language from the *Focht* case as follows:

Focht stressed that significant danger to others inevitably attends the act of driving while intoxicated. Moreover, it is noted that driving while under the influence of intoxicating liquor presents a significant and very real danger to others in the area. Thus, the Court concluded that an intoxicated driver knows or has reason to know that his behavior entails a high degree of risk of serious harm and, as a result, that such driver exhibits reckless indifference towards others.

Medevetz, 569 F.2d at 1226-1227. C

C. Wrongful Death

The Wrongful Death statute gives Plaintiff a right to bring a cause of action that is statutorily limited to beneficiaries recovering for the pecuniary loss suffered as a result of the decedent's death. *Kiser v. Schulte*, 538 Pa. 219, 226, 648 A.2d 1, 4 (1994).

The Wrongful Death statute does not include punitive damages as a recoverable damage. Under Pennsylvania law it is well established that punitive damages are not available in an action for wrongful death. *Harvey v. Hassinger*, 315 Pa.Super. 97, 461 A.2d 814, 815–816 (1983); *Walsh v. Strenz*, 63 F. Supp. 2d 548, 550 (M.D. Pa. 1999).

The Pennsylvania Wrongful Death Act does not include the loss or suffering of the deceased, nor does it include the mental suffering of the survivor occasioned by such death, and it excludes all questions of exemplary damages. *Harvey v. Hassinger*, 315 Pa. Super. 97, 101, 461 A.2d 814, 816 (Pa. Super. Ct. 1983). “In an action brought under subsection (a) [of the Wrongful Death Act], the plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.” 42 Pa.C.S. § 8301. Pennsylvania Courts have found that *children* may recover for the “loss of companionship, comfort, society, and guidance of a parent” under the Wrongful Death Statute, however, the same is not true in regard to a parent’s claim for these emotional damages in regard to the loss of their child. *Polaski v. Whitson*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 110 (Lehigh Co. Com. Pl., Feb. 24, 2012) (citing, *Machado v. Kunkel*, 804 A.2d 1238, 1245 (Pa. Super. 2002) (citations omitted)).

In *Polaski*, the Court was faced with the question as to whether the parents, in a wrongful death action, could recover for the loss of their deceased son’s “society, tutelage, guidance, moral upbringing, and comfort.” *Polaski, supra*, at 2. While recognizing that a child can recover for these losses, the court noted that the Supreme Court of Pennsylvania has recognized that such claims for a parent’s loss in regard to their children have never been recognized in Pennsylvania.⁶⁸ *Id.* at 14 (citing *Quinn v. City of Pittsburgh*, 243 Pa. 521 (Pa. 1914)). The decision in *Quinn* was re-affirmed in *Schroeder v. Ear, Nose & Throat Associates, Inc.*, 557 A.2d 21 (Pa. Super. 1989), and again in *Jackson v. Tastykake, Inc.*, 648 A.2d 1214 (Pa. Super. 1994). *Id.* at 15-16.

Moreover, in *Tuck v. Calhoun*, the Court granted Defendants motion for summary judgment holding that damages, in general, for solace or solatium are not recoverable under the Pennsylvania Wrongful Death Act. *Tuck v. Calhoun*, 2011 U.S. Dist. LEXIS 9937, 24-26 (M.D. Pa. Feb. 2, 2011) (citing, *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672, 675 n.3 (Pa. 1979); *Mazzagatti v. Everingham by Everingham*, 516 A.2d 672, 679 (Pa. 1986); *Keller v. Feasterville Family Health Care Center*, 557 F. supp. 2d 671, 687 (E.D. Pa. 2008)). The Court defined solace and solatium as “a type of monetary damages awarded the decedent's survivors to recompense them for their feelings of anguish, bereavement, and grief caused by the fact of the decedent's death.” *Id.* (citing, *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672, 675 n.3 (Pa. 1979)).

i. Pecuniary Loss

Pecuniary loss has been defined to be a destruction of a reasonable expectation of pecuniary advantage from the deceased, and “must be grounded on reasonably continuous past acts or conduct of the deceased.” *Gaydos v. Domabyl*, 301 Pa. 523, 530-534, 152 A. 549, 1930 Pa. LEXIS 517 (Pa. 1930) (citing, *Pennsylvania R. Co. v. Butler*, 57 Pa. 335, (1868); *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15, 1879 Pa. LEXIS 191 (Pa. 1879)). These types of damages are typically shown by evidence of “services, food, clothing, education, entertainment, and gifts bestowed; to be reasonable, the services and gifts must have been rendered with a frequency that begets an anticipation of their continuance; occasional gifts and services are not sufficient on which

⁶⁸ *Rettger v. UPMC Shadyside*, 991 A.2d 915, 932-33 (Pa. Super. 2010), holds that parents can claim damages for emotional and psychological damages under the Wrongful Death Statute. Conspicuously, however, the *Rettger* Court, although basing its decision on the *Machado* case, *supra*, did not acknowledge that *Machado* decided whether a child could sue for the lost consortium of their parent, and not whether a parent could sue for the lost consortium of their child. *Polaski, supra*, at 18. Moreover, *Rettger* did not address the Pennsylvania Supreme Court’s holding

to ground a pecuniary loss.” *Id.* (citing, Schnatz v. Phila. & Reading R.R., 160 Pa. 602, 28 A. 952, 1894 Pa. LEXIS 852 (Pa. 1894)).

As a general rule pecuniary loss embraces the present worth of deceased's probable earnings during the probable duration of deceased's life, which would have gone for the benefit of the children, parent, husband or wife, as the case may be, and is broad enough to include the present worth of the value or probable services which would, in the ordinary course of events, be of benefit to one within this class. As stated in *Sedgwick on Damages*, 9th ed., volume 2, section 577, “The probable earnings of the parent which would have enured to the benefit of the child may be recovered and he may also be compensated for the value of the parent's services in the superintendence, attention to, and care of his family, and the education of his children of which they have been deprived by his death.” And, as stated in an early case, since followed, “That loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure”: *P.R.R. v. Butler*, *supra*; *Mansfield Coal Co. v. McEnery*, 91 Pa. 185, 189; *McHugh v. Schlosser*, 159 Pa. 480, 486; *Burns v. P.R.R.*, 219 Pa. 225, 228. “The measure . . . is not what the deceased would have earned . . . but only so much thereof as the jury find would have gone for the benefit of his family”: *Glasco v. Green*, 273 Pa. 353, 357. This rule was restated in the Act of April 4, 1868, P.L. 58, section 2, as applying to common carriers, and commented on in *Cleveland & Pittsburgh Railroad Co. v. Rowan*, 66 Pa. 393, 399.⁶⁹

“[D]amages in death cases do not include a claim for mental suffering, grief or distress of mind.” *Id.* (citations omitted).

ii. Survivor Action

Under, 42 Pa.C.S. § 8302, “[a]ll causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.” A survival action and an action under the wrongful death statute a completely different.

Under the survival statute, survival damages are essentially those for pain and suffering between the time of injury and death. 42 Pa.C.S.A. § 8302. The survival action has its genesis in the decedent's injury, not his death. In the survival action, the decedent's estate sues on

⁶⁹ in *Quinn*, *supra*, which recognized that Pennsylvania has never recognized a parent's loss of consortium claim for their child. *Id.*

behalf of the decedent, upon claims the decedent could have pursued but for his or her death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death. *Nye v. Com., Department of Transportation*, 331 Pa.Super. 209, 480 A.2d 318 (1984). In other words, the survival action simply continues, in the decedent's personal representative, the right of action which accrued to the deceased at common law. *Id.* The measure of damages in a survival action is the decedent's pain and suffering prior to death and loss of gross earning power from the date of injury until death, less the probable cost of maintenance as proved by evidence and any amount awarded for wrongful death. *Krock v. Chroust*, 330 Pa.Super. 108, 478 A.2d 1376 (1984).

Frey v. Pennsylvania Electric Co., 607 A.2d 796 (Pa. Super. Ct. 1992).

INDEMNIFICATION AND INSURANCE-PROCUREMENT AGREEMENTS

A. Indemnification

Indemnification is often utilized by parties to shift the risk of loss from one party to another by way of an agreement. In a typical indemnification clause, one party (indemnitor) agrees to hold the other (indemnitee) harmless from claims related to certain acts or omissions committed attributed to the indemnitee that ultimately caused the plaintiff's injury. In other words, the indemnitor agrees to assume the tort liability of the indemnitee in connection with the claims of third parties stemming from the work performed on a particular project, from the services provided pursuant to a contract, or the indemnitor's occupancy or use of particular property.

In addition to shifting liability, indemnity agreements often contain language imposing a duty to defend the indemnitee. For example, if the indemnity clause states that "Indemnitor agrees to defend, indemnify, and hold harmless indemnitee from any and all acts ..."; then the indemnitor will be required to indemnify *and* defend the indemnitee for the specified acts covered in the indemnity clause. Indemnity clauses are common in service contracts. For instance, a hotel that contracts with a laundry service will require that the laundry service defend, indemnify and hold harmless the hotel for any damage caused by the laundry service. In doing so, the hotel has added a protective layer around itself in the event someone is injured at the hand of the laundry service, and claimant attempts to sue the hotel.

B. Statutory Limitations on Indemnification

Pennsylvania has an anti-indemnification statute, 68 P.S. § 491, which operates to invalidate agreements entered into by owners, contractors or suppliers under which architects, engineers, or surveyors are indemnified for damages or defense costs arising out of:

- (1) Their preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or
- (2) The giving or failing to give instructions or directions provided that failure or giving directions or instructions is the “primary cause” of damage.⁷⁰

Based on the anti-indemnification statute’s language, its application is extremely limited in scope.

C. Indemnification for Indemnitee’s Negligence

Often times, a party will insert an indemnification clause seeking indemnity not only from the indemnitor’s negligence, but also from *its own negligence*. Notably, Pennsylvania generally disfavors such agreements.⁷¹ In fact, Pennsylvania courts often examine such agreements under the lens of the “Perry-Ruzzi” rule, crafted from two Pennsylvania Supreme Court cases: *Perry v. Payne*, and *Ruzzi v. Butler Petroleum Company*.⁷² Under the “Perry-Ruzzi” rule, “a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in **unequivocal terms**.”⁷³

Under the “Perry-Ruzzi” rule, “[n]o inference from words of general import can establish such indemnification.⁷⁴ These “words of general import” include key phrases such as “all claims”, “any and all liability”, or “to the fullest extent of the law” are held to be legally insufficient to shift liability to the indemnitor for the indemnitee’s negligent acts.⁷⁵ In *City of Wilkes-Barre v. Kaminski Bros.*, the Commonwealth Court stated that:

We think it clear, on reason and authority, that a contract for indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnity, unless it is so express in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to

⁷⁰ See, 68 P.S. § 491.

⁷¹ See, *Hershey Foods Corp. v. General Electric Service Co.*, 422 Pa.Super. 143, 619 A.2d 285 (Pa. Super. 1992).

⁷² Id., see also, *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (1907); and, *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1 (1991).

⁷³ See, *Hershey Foods*, *supra*. at 148.

⁷⁴ Id. (citing, *Perry*, *supra*, and *Ruzzi*, *supra*).

⁷⁵ See, *Perry*, *supra*; *Ruzzi*, *supra*; and, *Greer v. City of Philadelphia*, 568 Pa. 244, 795 A.2d 376 (2002).

assume the responsibility unless the contract puts its beyond doubt by express stipulation. No inference from words of general import can establish it.⁷⁶

D. Insurance procurement agreements

Contracts and leases often contain clauses that require a party to procure or provide insurance coverage. Under these so-called “insurance procurement agreements” or clauses, a party to the contract or lease agrees to obtain an insurance policy providing adequate coverage. While not always the case, these agreements sometimes require the party that is obligated to obtain insurance to also name the other party as an additional insured under the policy. Under this structure, both parties will be provided coverage under the same policy, subject to the terms within the policy itself. In the event that a party who has agreed to obtain liability insurance coverage on behalf of another party fails to do so, Pennsylvania holds the breaching party liability as if he were in the insurer.⁷⁷

E. The duty to defend

Much like other jurisdictions, in Pennsylvania, the duty to defend is broader than the duty to indemnify.⁷⁸ In instances where a party is covered by an insurance policy, either as a named insured or an additional insured, an insurer’s duty to defend is triggered when a claim that is **potentially covered** becomes apparent.⁷⁹ Importantly, this duty remains until the insurer can confine the claim to a recovery excluded from the policy.⁸⁰ Put another way, “an insurer who refuses to defend its insured from the outset does so at its peril ... because the duty to defend remains with the insurer until it is clear the claim has been narrowed to one beyond the terms of the policy.”⁸¹

⁷⁶ See, City of Wilkes-Barre v. Kaminski Bros., 804 A.2d 89, 95 (Pa. Commwlth. 2002) (citing, Perry, *supra*; Ruzzi, *supra*; and, Urban Redevelopment Authority of Pittsburgh v. Noralco Corp., 281 Pa.Super. 466, 422 A.2d 563 (1980)).

⁷⁷ See, Hagan Lumber Co. v. Duryea School District, 277 Pa. 345, 121 A. 107 (1923); Borough of Wilkinsburg v. Trumball-Denton Joint Venture, 390 Pa.Super. 580, 568 A.2d 1325 (1990); DiPetro v. City of Philadelphia, 344 Pa.Super. 191, 496 A.2d 407 (1985).

⁷⁸ See, Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 896 n.7 (2006).

⁷⁹ See, Heffernan & Co. v. Hartford Ins. Co., 418 Pa.Super. 326, 614 A.2d 295 (1992).

⁸⁰ See, Sclabassi v. Nationwide Mut. Fire Ins. Co., 789 A.2d 699, 703 n.2 (Pa. Super. 2001)

⁸¹ See, Board of Pub. Educ. Of the Sch. Dist. v. National Union Fire Ins. Co., 709 A.2d 910, 913 (Pa. Super. 1998).