**Retail, Restaurant, and Hospitality Guide to Nebraska Premises Liability**

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NEGLIGENCE

I. General Negligence Principles

For actionable negligence to exist, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. A.W. v. Lancaster County Sch. Dist., 208 Neb. 205, 210, 784 N.W.2d 907, 913 (2010).

A) Legal Duty. The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk. Id. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. Id. Foreseeability is not a factor to be considered by courts when making determinations of legal duty. Id. at 218, 784 N.W.2d at 918.

B) Breach of Duty. It is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes breach of a legal duty. Id. at 210, 784 N.W.2d at 913. Foreseeability is an element in the determination of whether the defendant breached a legal duty. Id. at 216, 784 N.W.2d at 917. “Placing foreseeability in the context of breach, rather than duty, properly charges the trier of fact with determining whether a particular harm was, on the facts of the case, reasonably foreseeable.” Id. at 217, 784 N.W.2d at 918. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm. Id. at 218, 784 N.W.2d at 918.

C) Prima Facie Premises Liability Case: To establish a prima facie premises-liability case in Nebraska, the plaintiff must plead and prove the following: a) the possessor-defendant created, knew about, or by the exercise of reasonable care would have discovered the injury-causing condition; b) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; c) the defendant should have expected that a lawful visitor such as plaintiff would not discover or realize the danger or would fail to protect himself against the danger; d) the defendant failed to exercise reasonable care to protect the lawful visitor against the danger; and e) the condition was the proximate cause of plaintiff's damages. Knittel v. State, 2007 Neb. App. LEXIS 77, *9-*10 (Neb. Ct. App. May 8, 2007).

These are factual determinations and the court will only grant summary judgment where "reasonable minds" could not "differ as to whether an inference supporting an ultimate conclusion can be drawn." Farmington Woods Homeowners Ass'n v. Wolf, 284 Neb. 280, 286 (2012).
1. **Actual or constructive knowledge.**

To establish constructive notice, "the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit defendant or defendant's employees to discover and remedy it." *Range v. Abbott Sports Complex*, 269 Neb. 281, 286 (2005). "In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition" the jury may not speculate regarding the defendant's negligence. *Id.*

2. **Plaintiff's inability to discover or protect himself from the condition.**

Nebraska previously held that if the condition was readily discoverable (i.e. "open and obvious"), plaintiff could not recover. Nebraska's Supreme Court recently clarified that if the defendant should have expected that the plaintiff either would not discover the condition or would fail to protect himself from it, the defendant may be liable. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 807 (2004). "Even if a possessor of land has reason to believe that a lawful visitor will discover a defect, it can still have a duty to take reasonable measures to protect lawful visitors under circumstances showing that it should expect that visitors will not realize the danger or will fail to protect themselves." *Downey v. W. Cnty. College Area*, 282 Neb. 970, 981 (2012); *Connelly v. Omaha*, 284 Neb. 131, 142, 816 N.W.2d 742 (2012) (citing Restatement (Second) of Torts § 343A).

3. **Failure to exercise reasonable care.**

Landowners are not "general insurers" for accidents occurring on their premises. Landowners are obligated to exercise "reasonable care" in protecting patrons. Relevant factors include: (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or connection or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. *Heins v. Webster County*, 250 Neb. 750, 761 (1996).

4. **Proximate cause.**

The proximate or "legal" cause of an injury is the "natural and probable result of the negligence" alleged. Ordinarily, this a factual determination. To establish proximate cause, the plaintiff must demonstrate 
"(1) Without the negligent action, the injury would not have occurred, commonly known as the 'but for' rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause." *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 815 (2009).

An efficient intervening cause is "new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury." The "causal connection" is severed by a third-party when "(1) the negligent actions of a third party intervene; (2) the third party had full control of the situation; (3) the third party's negligence could
not have been anticipated by the defendant; and (4) the third party's negligence directly resulted in injury to the plaintiff." This defense is available to the premises owner only when the third-party's conduct is not a foreseeable result of the defendant's alleged negligence. *Id.* at 816-17.

**II. Comparative Fault/Contributory Negligence**

A) When more than one party is liable for an accident, comparative negligence divides responsibility for an accident among the parties. The Nebraska Revised Statutes provide that any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.

NEB. REV. STAT. § 25-21,185.09 (LexisNexis 2013).

B) "The jury shall be instructed on the effects of the allocation of negligence." Jurors in Nebraska are informed that if they find the plaintiff 50% or more at fault, recovery will be barred. NEB. REV. STAT. § 21,185.09 (LexisNexis 2013); *Sinsel v. Olsen*, 279 Neb. 38, 46-47 (2009).

C) **Determination of apportionment.** Because comparative negligence is intended to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is a task solely for the fact finder. *Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754, 768 (2007).

D) **Contributory negligence defense.** As a defense, a defendant can assert that the plaintiff is contributorily negligent. Plaintiffs are contributorily negligent if: “(1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant’s actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.” *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007); *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 816 (2009).

E) **Assumption of risk defense.** Assumption of risk means that: “(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person’s injury or death or the harm to property occurred as a result of his or her exposure to the danger.” NEB. REV. STAT. § 25-21,185.12 (LexisNexis 2013). When analyzing assumption of risk, courts apply the subjective standard by examining what the particular plaintiff sees, knows, understands, and appreciates. The plaintiff's state of mind "may be proved by circumstantial evidence." *Disney v. Douglas County*, 2012 Neb. App. LEXIS 69, at *17 (Neb. Ct. App. Mar. 12, 2012).

F) **Failure to Mitigate.** Nebraska follows the "doctrine of avoidable consequences, which is another name for the failure to mitigate damages." This doctrine holds that "a wronged
party will be denied recovery for such losses as could reasonably have been avoided[.]
The plaintiff’s failure to take such reasonable steps to mitigate his or her damages "bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts." *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95 (2006).

G) **Last clear chance.** The doctrine of “last clear chance” applies where the defendant commits a negligent act subsequent to the plaintiff’s negligent act and the defendant’s negligence is a proximate cause of the injury. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). This doctrine is applicable only to excuse the contributory negligence of the plaintiff. *Id.*

III. **Other Defenses**

**Selected Statutes of Limitations:**

A) **Wrongful death.** Under Neb. Rev. Stat. § 30-810 (Reissue 2008), a wrongful death action accrues on the date of death and must be filed within two years of that date.

B) **Four-year statutes.** Neb. Rev. Stat. § 25-207 (Reissue 2008) establishes a four-year statute of limitations for the following actions: (1) trespass upon real property; (2) taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; (3) injury to the rights of the plaintiff, not arising on contract, and not elsewhere mentioned under the rules; and (4) fraud. In cases of fraud, the cause of action does not accrue until the discovery of fraud, except as provided in Sections 30-2206, 76-288, and 76-298 of the Nebraska Revised Statutes.

C) **Miscellaneous actions.** Neb. Rev. Stat. § 25-212 (Reissue 2008) sets forth the statute of limitations for all actions not explicitly provided for in Chapter 25 as four years after the cause of action accrues.

D) **Professional negligence or breach of warranty.** Nebraska provides a two-year statute of limitations from the time of the act or omission for actions based on professional negligence or breach of warranty. Neb. Rev. Stat. § 25-222 (Reissue 2008). For the purposes of section 25-222, architects and engineers are deemed professionals. *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988). For professional negligence, Nebraska follows the occurrence rule, so the two-year time period generally begins to run on the date of the alleged act or omission. However, the discovery rule applies to claims that could not be discovered within the two-year period. In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000). In such cases, an action may be brought within 1 year of discovery of facts sufficient to reveal a cause of action.
E) **Real property improvements.** Nebraska provides a four-year statute of limitations for acts or omissions constituting a breach of warranty or a design defect. Neb. Rev. Stat. § 25-223 (Reissue 2008). The statute applies only to actions brought against contractors or builders. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). Generally, the four-year time period begins to run on the date of the alleged act or omission, but there is an exception for causes of action that are not discovered within the four-year period or within one year preceding the end of the four-year period and could not reasonably have been discovered during the four-year period. In such cases, an action may be brought within 2 years of discovery of facts sufficient to reveal a cause of action. § 25-223.

F) **Political subdivisions.** Neb. Rev. Stat. § 13-919 (Reissue 2008) provides that claims against political subdivisions, which are permitted under the Political Subdivisions Tort Claims Act, are forever barred unless they are commenced within two years after the claim accrues.

G) **Statutes of Repose:** Sections 25-222 (Professional negligence or breach of warranty) and 25-223 (improvements to real property) both include a statute of repose absolutely barring claims after ten years from the accrual of a cause of action, regardless of when they are discovered.

**Sovereign Immunity.** In Nebraska, if a political subdivision proves that a plaintiff's claim comes within an exception pursuant to Neb. Rev. Stat. § 13-910 (Reissue 2008), then the political subdivision is not liable based upon sovereign immunity. The Political Subdivisions Tort Claims Act (PSTCA) shall not apply to claims including, but not limited to:

A) **Claims based upon an act or omission of an employee of a political subdivision.** The employee must exercise due care in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation. The statute, ordinance, resolution, rule, or regulation does not need to be valid.

B) **Discretionary Function.** The PSTCA does not apply to claims based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty.

C) **Failure to Inspect.** The PSTCA does not apply to claims based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety. If the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety, the PSTCA will apply.

D) **Miscellaneous claims.** The PSTCA does not apply to claims arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
E) **Snow, ice, or "other temporary conditions."** Any claim against a political subdivision is barred if arising out of snow, ice, or other temporary condition caused by nature on any "...public thoroughfare, or other public place due to weather conditions."**

F) **Insufficiency or want of repair.** Claims arising out of an alleged insufficiency or want of repair of any "...public thoroughfare" are barred if they refer to the "general or overall condition" and not to "a spot or localized defect." A political subdivision waives its immunity for a claim due to a spot or localized defect only if (a) the subdivision had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim or (b) the claim arose during the time specified in a notice provided pursuant Neb. Rev. Stat. § 39-1359 (3) (LexisNexis 2013) and the state or political subdivision had actual or constructive notice.

G) **Recreational Activity.** Claims relating to recreational activities for which no fee is charged are barred if they (i) result from the inherent risk of the recreational activity, (ii) arising out of a spot or localized defect of the premises unless the defect is not corrected by the political subdivision within a reasonable time after actual or constructive notice of the defect, or (iii) arising out of the design of a skatepark or bicycle motocross park. A political subdivision is charged with constructive notice only when its failure to discover the defect is the result of gross negligence.

IV. **Liability for Criminal Acts of Third Parties**

A) **Generally.** "Once it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability." *Anderson v. Nebraska Dep't of Social Servs.*, 248 Neb. 651, 660, 538 N.W.2d 732, 739 (1995) (affirming finding of liability on behalf of Department of Social Services when it failed to inform foster parents of foster child's risk of becoming a sex offender and placed him in a home wherein he then sexually assaulted two girls).

B) **Foreseeability of Criminal Acts is a Question for the Fact Finder.** A school has a duty to supervise and protect students, and the criminal sexual assault of such a student may be reasonably foreseeable, depending on the circumstances. *A.W. v. Lancaster County Sch. Dist. 0001*, 280 Neb. 205, 221, 784 N.W.2d 907, 920 (2010). Reasonable foreseeability is a question for the fact-finder. *Id.* Crimes that have previously occurred in an area, but not during the school day or on school grounds, are not necessarily strong evidence of foreseeability. *Id.* 280 Neb. at 221, 784 N.W.2d at 919. However, if school employees see the perpetrator and do not take sufficient action, reasonably minds could see this as reasonable foreseeability. *Id.* 280 Neb. at 221, 784 N.W.2d at 920. In *A.W.*, the Nebraska Supreme Court analyzed the negligence action and found that the trial court should not have granted summary judgment in favor of the school and, instead, allowed the jury to decide whether the assault was foreseeable. *Id.*

C) **Indications of Intentions to Harm.** An individual being "unusually quiet" is not enough to establish that another person knew or should have known that the quiet individual would
brutally attack others. *Mahlin v. Goc*, 252 Neb. 238, 244-45, 561 N.W.2d 220, 224 (1997) (upholding summary judgment for defendant wife in premises liability case in which plaintiff business invitees were shot and assaulted by defendant's husband on farm).

D) **Prior Criminal Acts.** "[T]he allegation of many occasions of 'similar' criminal activity in one fairly contiguous area in a limited timespan may make further such acts sufficiently foreseeable to create a duty to a business invitee." *Erichsen v. No-Frills Supermarkets of Omaha, Inc.*, 246 Neb. 238, 243, 518 N.W.2d 116, 120 (1994). A single prior criminal act may not constitute sufficient notice to make subsequent criminal acts reasonably foreseeable. *Id.; C.S. v. Sophir*, 220 Neb. 51, 53, 368 N.W.2d 444, 446 (1985) ("[I]t would be unfair to impose a duty upon the landlord based on a single prior assault at the complex."). However, "a duty to undertake reasonable precautionary measures will be imposed on the landlord when there is a sufficient amount of criminal activity to make further criminal acts reasonably foreseeable." *Erichsen*, 246 Neb. at 243, 518 N.W.2d at 120. In *Erichsen*, the court reversed the dismissal of a complaint in which the plaintiff alleged she was dragged over a mile from a grocery store parking lot, due to an attempted purse-snatching in that parking lot, and claimed there were ten instances of criminal activity in the area in the short time preceding the injury. *Id*. 246 Neb. at 245, 518 N.W.2d at 121.

An assailant previously ejected from a building that was loitering in and around the building for 3 to 4 months and was observed on the premises 3 or 4 days prior to the assault of the plaintiff, along with a history of criminal activity at the defendant's premises, was enough for the court to find "a sufficient amount of criminal activity . . . to make further criminal acts by the assailant reasonably foreseeable." *S.I. v. Cutler*, 246 Neb. 739, 744, 523 N.W.2d 242, 245 (1994) (reversing dismissal of complaint by plaintiff employee of tenant of defendant landowners, who was assaulted in the elevators of the workplace).

V. **Claims Arising from Wrongful Prevention of Thefts**

A) **Nebraska Statute**

Nebraska's statute regarding detention of shoplifters states:

> A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention.

B) **Detention Unreasonable.** Detention of suspected shoplifters is unreasonable if it continues after the detaining individuals knew that their suspicions were groundless and that they had made a mistake. *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987). Detention of suspected shoplifters for 45 minutes in the store and later detention at a police station for almost four hours for the suspected shoplifting of a vest that was hung up on top of a shirt constituted a "false imprisonment" for which the defendant was liable for money damages. *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974).

VI. **INDEMNIFICATION**

A) **Nebraska recognizes the right to indemnity.** *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 764, 229 N.W.2d 183, 189 (1975). Indemnity is an equitable concept which transfers the entire loss to the tortfeasor. *Nat’l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 797, 332 N.W.2d 39, 47 (1983). The right to indemnity can arise through express agreement or through implication of law. *Id.*

VII. **DAMAGES**

Caps on Damages

A) In Nebraska, whenever damages are recoverable, a plaintiff may “claim and recover any rate of damages to which he or she may be entitled.” NEB. REV. STAT. § 25-1146 (Reissue 2008). In a personal injury action, the court must instruct the jury to compensate only the damages that are reasonably certain to have been the result of the injury. *See Bower v. Chicago & Nw. Ry. Co.*, 96 Neb. 419, 148 N.W.2d 145 (1914).

B) **Political subdivisions.** The Political Subdivisions Tort Claims Act limits damages for which a political subdivision may be held liable to “[o]ne million dollars for any person for any number of claims arising out of a single occurrence” and “[f]ive million dollars for all claims arising out of a single occurrence.” NEB. REV. STAT. § 13-926(1)–(2) (Reissue 2007). The Nebraska Supreme Court found that the Tort Claims Act is constitutional. *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006). Notably, no similar cap on damages exists under the State Tort Claims Act.

Valuation of Damages

The principle underlying damage calculation is to place the injured party in the same position as he or she would have been had there been no injury or breach of duty. *J.D. Warehouse v. Lutz Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002). A plaintiff claiming substantial damages must furnish evidence to the fact finder to prove the amount of damages with reasonable exactness, and may not establish damages by doubtful proof. *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975).

A) **Factors.** In a personal injury case, there is no formula for computing damages; typically, the verdict is made up of several factors. *Bartunek v. George A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). On review, a court may not substitute its judgment for the jury’s when the verdict amount is sustainable by factors of pain, suffering, mutilation,
disability, wage losses, medical costs, or other monetary losses, including damages resulting from existing economic conditions such as inflation. *Johnson v. Schrepf*, 154 Neb. 317, 47 N.W.2d 853 (1951).

B) **Value estimation.** In an action for damages for an injury to personal property, ownership qualifies the owner of the property to estimate its value. *Folken v. Union Pac. R.R. Co.*, 122 Neb. 193, 239 N.W. 831 (1932). Where property is taken or destroyed without fraud, malice, or other aggravating circumstances, the measure of damages is ordinarily the value of the property, with any incidental damages that are proven to be the natural and proximate result of the act charged. *Murray v. Mace*, 41 Neb. 60, 59 N.W. 387 (1894).

### Available Items of Personal Injury Damages

The following is a list of the items of personal injury damages that are generally available. The *Nebraska Jury Instructions* are also a good resource for identification and explanation of damages.


B) **Future medical bills.** A plaintiff is entitled to recover for future medical expenses. *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984). To recover for future medical expenses, it must be reasonably certain that a plaintiff will incur them; however, a plaintiff need not establish the amount of future medical costs with mathematical certainty. *Id.* These damages are reduced to present cash value. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

C) **Collateral-Source Rule.** Damages awarded to a plaintiff should not account for any negotiated discounts or third-party payments from, for example, an insurer or governmental agency. This "collateral-source rule" provides that "the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages." *Fickle v. State*, 274 Neb. 267, 268, 759 N.W.2d 113, 115-16 (2007).

D) **Hedonic damages.** A court may consider the loss of enjoyment of life as it relates to pain and suffering, and to disability; however, Nebraska does not recognize hedonic damages as a separate category of damages. *Talle v. Nebraska Dep’t of Social Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998).

E) **Increased risk of harm.** Nebraska does not recognize damages for increased risk of harm as a separate category. The test is whether future medical care and supplies are reasonably certain to be needed and provided in the future. *NJI2D CIV.* § 4.00; § 4.01 (2012).


G) **Loss of normal life.** In one personal injury case, the Nebraska Supreme Court noted “[t]here was evidence introduced to support the plaintiff’s diminished capacity to enjoy life**
with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience.” Swiler v. Baker’s Super Market, Inc., 203 Neb. 183, 187, 277 N.W.2d 697, 700 (1979). Where the evidence supports a loss of enjoyment of life flowing from the resulting disability, a plaintiff may argue it to the jury. Id.

H) **Disability.** In Nebraska, permanent injuries are compensable. A party need not prove a disability with absolute certainty; however, probability, alone, is insufficient. McGowan v. Dresher Bros., 106 Neb. 374, 183 N.W. 560 (1921). Where the evidence shows injuries are permanent, a court may accept life tables of expectancy into evidence. Lyons v. Joseph, 124 Neb. 442, 246 N.W. 859 (1933).

I) **Past pain and suffering.** Where the evidence supports the existence of an injury, damages for pain, suffering, and emotional distress are proper. No allegation of special damages, however, is necessary to recover for mental suffering since it attends personal injuries. Fink v. Busch, 83 Neb. 599, 120 N.W. 167 (1909).

J) **Future pain and suffering.** A jury may award damages for future pain and suffering if the probability of occurrence is a reasonable certainty, and the future consequences are a proximate result of the original injury. Schwarting v. Ogram, 123 Neb. 76, 242 N.W. 273 (1932).

K) **Loss of Society.** Nebraska recognizes the loss of society and companionship as a subjective nonmonetary loss that is compensable. Neb. Rev. Stat. § 25-21,185.08 (Reissue 2008). “The term ‘society’ embraces a broad range of mutual benefits each family member receives from the others’ continued existence, including care, companionship, comfort, and protection.” Brandon v. County of Richardson, 264 Neb. 1020, 653 N.W.2d 829 (2002). Damages for loss of society must be decided on a case-by-case basis because it is impossible to assign a value to highly personal relationships by any strict accounting method. Id.

L) **Lost income, wages, and earnings.** In Nebraska, loss of earning capacity is a separate element of damages distinct from loss of wages, salary, or earnings. Washington v. Am. Cnty. Stores Corp., 196 Neb. 624, 244 N.W.2d 286 (1976). A loss of past earnings is an item of special damages that must be expressly plead and proven. Id. Diminished earning capacity is an item of general damages and may be generally alleged. Id. In determining earning capacity, the fact finder should consider what the plaintiff was able to earn near the plaintiff’s residence, and not at a distant point in another state. Hershiser v. Chicago, Burlington & Quincy R.R. Co., 102 Neb. 820, 170 N.W. 177 (1918). Annuity tables are admissible evidence, and a jury may consider them. Jones v. Chicago Great W. R.R. Co., 97 Neb. 306, 149 N.W. 813 (1914).

**Lost Opportunity Doctrine**

The “lost opportunity doctrine” allows a jury to measure damages based on the plaintiff’s future chance at something, typically a profession, rather than the plaintiff’s current calling or income. See Washington v. Am. Cnty. Stores Corp., 196 Neb. 624, 629–30, 244 N.W.2d 286, 289 (1976) (finding a parole officer who was a candidate for the Olympic wrestling team could be compensated for the lost opportunity to coach or wrestle professionally); see also Laun v. Roach,
191 Neb. 11, 13, 213 N.W.2d 450, 451 (1973) (finding damages based on a dentist’s earning capacity even though the injury occurred while the plaintiff was a dental student).

Mitigation

Mitigation requires a plaintiff to take reasonable steps to minimize damages. For example, when a tenant abandons leased premises, the landlord must take reasonable steps to relet the premises to mitigate the loss of unpaid rent. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997). The failure to mitigate damages is also known as the “doctrine of avoidable consequences.” The defendant is not liable for any damages that could have been prevented if the plaintiff had taken reasonable steps to minimize damages. Mitigation of damages is an affirmative defense requiring the defendant to prove the plaintiff failed to take reasonable steps toward mitigation. NJI2d Civ. § 4.70 (2012). The Nebraska Supreme Court has found this instruction to be an accurate statement of Nebraska law. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

If the issue of mitigation is relevant, the jury may only consider the acts of the injured party after the injury occurred. *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988). For example, in an assault and battery case, a jury may not consider provocation in mitigation of damages because any provocation must have occurred before the injury. *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994).

Punitive Damages

Generally, the measure of damages in Nebraska is the amount necessary to compensate the injured party. Punitive damages are not available. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975). This rule is premised on Neb. Const. art. VII, § 5, which provides “[a]ll fines, penalties . . . shall be appropriated exclusively to the use and support of the common schools.” *See Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). The *Abel* court, while finding that penalties paid for the benefit of a private person were unconstitutional, stated that punitive damages are available in Nebraska if such damages are paid into the school fund. *Id.* As a practical matter, courts have not awarded punitive damages for payment into the school fund.

A judgment rendered in another state that contains a punitive damage award may be enforced in Nebraska. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975). The Nebraska Supreme Court has also upheld a provision of Nebraska’s Worker’s Compensation Act that increases compensation by 50% for a delay in payment. *Univ. of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 212 N.W.2d 704 (1973). One may distinguish between the holding in *Abel* and the holding in *Paustian* based on the presence or absence of a statutory right to punitive damages.

Joint and Several Liability

When "two causes produce a single indivisible injury, joint and several liability attaches." *Shipler v. GMC*, 271 Neb. 194, 238, 710 N.W.2d 807, 843 (2006). Thus, a plaintiff does not need to join all tortfeasors in one action, but can file against one tortfeasor for the full amount.

A) **Statute.** In Nebraska, joint and several liability is governed by Neb. Rev. Stat. § 25-21,185.10. (LexisNexis 2013).
B) **Distinguishing joint from several liability.** Where two or more defendants contribute to a single indivisible injury, joint liability renders each liable party individually responsible for the entire obligation, regardless of what proportion of the plaintiff’s damage was caused by each defendant. *Trieweiler v. Sears*, 268 Neb. 952, 955, 689 N.W.2d 807, 818 (2004). Several liability dictates that defendants are only liable for their respective portion of damages.

C) **Liability for entire damages.** Under joint and several liability, either defendant may be held liable for the entire damage, and a plaintiff need not join all tortfeasors as defendants in an action for damages. *Tadros v. City of Omaha*, 273 Neb. 935, 938, 735 N.W.2d 377, 380 (2007).

D) **Effect of settlement.** If the plaintiff settled with one of the jointly and severally liable defendants, then the plaintiff’s recovery against the remaining defendants is reduced by the actual settlement amount, a "pro tanto reduction." *Id.*

E) **Contribution.** A defendant may seek contribution from other actors "when he discharges more than his proportionate share of the judgment." *Estate of Powell v. Montange*, 277 Neb. 846, 850, 765 N.W.2d 496, 500 (2009). Contribution is the sharing of the cost of an injury, as opposed to a shifting of the cost from one defendant to another. *Lackman v. Rousselle*, 7 Neb. App. 698, 699, 585 N.W.2d 469, 473 (Neb. Ct. App. 1998). The prerequisite for establishing a contribution claim is that the party seeking contribution and the party from whom the contribution is sought must share a common liability to the same person. *Id.* Thus, a common liability to the same person must exist in order for there to be contribution.

**Recovery of Pre and Post-judgment Interest**

Prejudgment and post-judgment interest are each governed by both statute and case law. The current judgment interest rate can be found on the Nebraska Supreme Court's web-site at: [http://supremecourt.ne.gov/5017/judgment-interest-rate](http://supremecourt.ne.gov/5017/judgment-interest-rate).

A) **Prejudgment interest.** Prejudgment interest is interest that accrues prior to the entry of judgment. *First National Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985). Within specified limits, a defendant may be required to pay judgment interest on “the unpaid balance of unliquidated claims” that exceeds the settlement offered by the plaintiff; this interest is calculated from the date of the settlement offer to the date of the judgment. NEB. REV. STAT. § 45-103.02 (Reissue 2010). The specified limits concern the form, date, and method of delivery of the settlement offer as more specifically set forth in Nebraska statutes.

B) **Post-judgment interest.** Post-judgment interest is the interest that accrues on judgments for the payment of money from the date of the entry of judgment until the date the judgment is satisfied. NEB. REV. STAT. § 45-103.01 (Reissue 2010). If the court’s decree falls under the applicable post-judgment statute, the payment of post-judgment interest is mandatory and need not be expressly provided for in the court’s decree. *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993).
Recovery of Attorneys' Fees

In Nebraska, attorney fees are generally not recoverable. The winning party in a civil action may recover attorneys’ fees only where provided for by statute or when an accepted uniform course of procedure allows recovery of attorney fees. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). There are a relatively limited number of statutes that permit the recovery of attorney fees.

Settlement Involving Minors

In Nebraska, a court may use its discretion to appoint any suitable person or corporation to protect the rights and interests of minors in settlement agreements. *In re Estate of Shierman*, 129 Neb. 230, 261 N.W. 155 (1935). The party appointed to represent minor children has a duty to protect the interests of those minors. *Id.* Upon court approval, a settlement is binding upon the rights and interests of minors. *Id.* The court, however, will review any proceedings to ensure they are for the benefit of the minors involved. *Id.*

Taxation of Costs

Taxable costs are costs that are assessed to the losing party in civil and criminal cases. Because costs were unknown at common law in Nebraska, statutes govern taxable costs. *Geere v. Sweet*, 2 Neb. 76, 1872 WL 5812 (1872). It is within the province of the Legislature to designate specific items of litigation expense that may be taxed as costs. *Falls City v. Neb. Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011). Unless provided by statute, a court should only allow costs to a successful plaintiff, except as waived or released in writing by the plaintiff, in actions for the recovery of money only, or for the recovery of specific real or personal property. NEB. REV. STAT. § 25-1708 (Reissue 2009).

A) **Attorney fees.** See section on "Attorney Fees," above.

B) **Deposition recording costs.** “The general rule is that the costs in taking a deposition will be taxed in favor of the prevailing party if the taking of the deposition was reasonably necessary at the time it was taken, even though it may not have been used at trial. . . . Depositions taken solely for discovery are not taxable as costs.” *U.S. District Court Bill of Costs Handbook*, part B; see also *Kliment*, 245 Neb. 596, 514 N.W.2d 315 (1994) (affirming the trial court’s refusal to award successful plaintiffs “costs for . . . expenses for making additional copies of depositions. . . .”); see also *Falls City*, 281 Neb. 230, 795 N.W.2d 256 (2011) (affirming appellate court’s refusal to award successful plaintiffs costs for photocopy, fax, and postage expenses).

C) **Expert witness fees.** Witnesses appearing before the district and county courts are entitled to receive twenty dollars for each day actually in attendance. If the witness resides more than one mile from the where the court is held, the witness is also entitled to mileage at the rate provided for state employees in section 81-1176. NEB. REV. STAT. § 33-139 (Reissue 2008).

Unique Damages Issues

A) In an action for hospital services for a spouse and for loss of that spouse’s services as a result of the personal injuries sustained, where there is no evidence as to the value of the
loss of the spouse’s services, a verdict should be limited to the specified amount of hospital services. *Glandt v. Ricceri*, 123 Neb. 126, 242 N.W. 363 (1932).

B) Mental and bodily suffering cannot be measured by any fixed and arbitrary rule; therefore, a jury must determine the appropriate amount of damages based on the circumstances of each case. *St. Joseph & Grand Island R.R. Co.*, 44 Neb. 448, 62 N.W. 887 (1895). The jury may resolve conflicting evidence regarding damages, and is not obligated to accept the plaintiff’s testimony as to the extent of damages. *Vacanti v. Master Elecs. Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994).

**Examples of Slip and Fall Damages**


**Dram Shop Liability**


The only Nebraska statutes relating to the sale of alcohol to a visibly intoxicated person relate to the sale or procurement of alcohol to minors and are found in the Nebraska Minor Alcoholic Liquor Liability Act (Neb.Rev.Stat. §53-401 through §53-409).

Any person who sustains injury or property damage, or the estate of any person killed, as a proximate result of the negligence of an intoxicated minor shall have, in addition to any other cause of action available in tort, a cause of action against:

1. A social host who allowed the minor to consume alcoholic liquor in the social host's home or on property under his or her control;

2. Any person who procured alcoholic liquor for the minor, other than with the permission and in the company of the minor's parent or guardian, when such person knew or should have known that the minor was a minor; or

3. Any retailer who sold alcoholic liquor to the minor. The absolute defenses found in section 53-180.07\(^1\) shall be available to a retailer in any cause of action brought under this section.

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\(^1\) In any prosecution of or any proceeding against any licensee charged with having made a sale to a minor, proof of the following shall be an absolute defense to the charge:

1. (a) The purchaser falsely represented in writing and supported with other documentary proof that he or she was of legal age to purchase alcoholic liquor;
Damages for violation of the Minor Alcoholic Liquor Liability Act may be awarded for all actual damages, including damages for wrongful death, as in other tort actions. Neb.Rev.Stat. §53-407. An action under the Minor Alcoholic Liquor Liability Act shall be brought within four years after the occurrence causing the injury, property damage, or death. Neb.Rev.Stat. §53-408.

While there is no statutory vicarious dram shop liability in Nebraska, this does not preclude a party from bringing claims against a retailer for other torts such as, for example, negligence and a failure of duty to warn and protect.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.

(b) The appearance of such purchaser was such that an ordinary and prudent person would believe that such appearance conformed to any documentary description of appearance presented by the purchaser; and
(c) The seller was acting in good faith, in reliance upon the written representation, other documentary evidence, and the appearance of the purchaser, and in the belief the purchaser was of legal age to make such purchase; or
(2) The seller was acting with the knowledge of and in cooperation with a duly authorized law enforcement officer. Neb.Rev.Stat. 53-180.07.