
# STATE OF IDAHO
# RETAIL COMPENDIUM OF LAW

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# Introduction

Retail stores, restaurants, hotels, and shopping centers have, by and large, become the principal gathering places of our communities. With that evolution comes exposure to all kinds of liabilities, especially for owners, occupants, or other persons or entities in control of the property to which people gather. Each time a person sets foot on the premises, owners and managers become exposed to an ever-increasing number of liabilities — many of which could significantly harm their businesses if a claim is successful. It is therefore crucial for the owners, occupants, or other persons or entities in control of those properties to have a working understanding of common legal issues regarding premises liability and how they impact these industries specifically.

Idaho, like many states, has its own unique legal structure, theories, and statutes. With that in mind, we have included a brief overview of the Idaho legal system below.

We hope the following serves as an easy-to-use reference guide to these issues and provides practical tips to help those in the retail, hospitality, hotel, and food industries prevent or defend against premises liability claims.

If you have any questions about the material covered in this guide, please contact one of the authors listed below or another member of the law firm of Duke Scanlan & Hall, PLLC.


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## 1. The Idaho State Court System

The trial-level court in Idaho is the District Court. The state is divided into seven judicial districts, with each county operating a District Court within those districts that hears all civil disputes where the amount in controversy is over $10,000. A matter where $10,000 or less is at stake is referred to the Magistrate Court. District Court judges are elected officials who serve four-year terms. Often, however, due to the realities of judicial retirement and resignation, District Judges are appointed by the Idaho Judicial Council and the governor and generally are unopposed upon reelection.

The appeal of a civil action in Idaho may be heard by either the intermediate appellate court, the Idaho Court of Appeals, or the highest appellate court, the Idaho Supreme Court, depending on the court to which the matter is assigned by a justice of the Idaho Supreme Court, known as the assignments justice. Generally, civil matters are assigned directly to the Idaho Supreme Court. When a civil matter is assigned to and adjudicated by the Idaho Court of Appeals, either party may petition to have the matter reviewed by the Idaho Supreme Court. Grant or denial of review is a matter within the Idaho Supreme Court's discretion. The judges of the Idaho Court of Appeals and Idaho Supreme Court are elected officials and serve six-year terms. Often, however, due to the realities of judicial retirement and resignation, appellate court judges are appointed by the Idaho Judicial Council and the governor and generally are unopposed upon reelection.

The procedural rules in Idaho state courts are governed by the Idaho Rules of Civil Procedure and the Idaho Appellate Rules. The Idaho Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure and are substantially similar in most respects. Additionally, a few of the judicial districts, including the Fourth and Seventh Judicial Districts, have local procedural rules that govern practice before those courts.

## 2. Idaho Federal Courts

Given the similarities between the applicable procedural rules, the main difference between practice in state and federal court in Idaho is the applicable local procedural rules and the ability to use the ECF system for case filings. Idaho federal courts are divided into four divisions, with divisional offices located throughout the state. Despite the size of its caseload, the Idaho federal courts have not received an additional federal district judge since the 1960s, making the court one of the busiest in the country. As a result, the court heavily relies on visiting judges from other judicial districts in other states and the caseload of the sitting district judges can have significant impacts on the timing of cases.

# Negligence

## 1. General Negligence Principles

Negligence is "the failure to use ordinary care in the management of one's property or person."[1] "Ordinary care" means "the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under [similar] circumstances."[2] "[O]ne owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."[3]

In the context of premises liability, "one having control of the premises may be liable for failure to keep the premises in repair."[4] This liability arises from circumstances relating to the condition of the premises and not activities taking place there.[5] In order to determine the nature of the duty of care owed by the party in control of the premises to those who might be injured on the premises, Idaho courts look at the relationship between the parties:

> Idaho courts have maintained that the duty of owners and possessors of land is determined by the status of the person injured on the land (i.e., whether the person is a invitee, licensee or trespasser). An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner. A landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers. A licensee is a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the visitor's purpose. Likewise, a social guest is also a licensee. The duty owed to a licensee is narrow. A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land. Additionally, this Court has held that "[t]he fact that a guest may be rendering a minor, incidental service to the host does not change the relationship [between them as a landowner and a licensee]."[6]

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[1] IDJI 2d 2.20.
[2] *Id.*
[3] *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999) (quoting *Doe v. Garcia*, 131 Idaho 578, 581, 961 P.2d 1181, 1184 (1998)).
[4] *Jones v. Starnes*, 150 Idaho 257, 261, 245 P.3d 1009, 1013 (quoting *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000)).
[5] *Id.* (citing *Turpen v. Granieri*, 133 Idaho 244, 985 P.2d 669 (1999); *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct. App. 2008)).
[6] *Ball v. City of Blackfoot*, 152 Idaho 673, 677, 273 P.3d 1266, 1270 (2012) (citations omitted) (alterations in original) (quoting *Wilson v. Bogert*, 81 Idaho 535, 545, 347 P.2d 341, 347 (1959)).

The greater the benefit conferred by the presence of the injured party to the party in control of the premises, the greater the duty to avoid harm to the injured party.

These differing degrees of duty, commonly referred to as the tripartite system of premises liability, have their origins in the English common law. While Idaho continues to adhere to the tripartite system, several other jurisdictions have imposed differing standards, focusing more on the reasonableness of the actions of the party in control of the premises or the foreseeability of harm to the injured party.[7]

## 2. Elements of a Cause of Action of Negligence

"In Idaho, a cause of action in negligence requires proof of the following: (1) the existence of a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage."[8] In the context of premises liability, the duty element will differ depending on the relationship between the plaintiff and defendant, which will have an impact on the proof necessary to demonstrate breach of that duty. The scope of the duties imposed by each of three possible relationships between land possessor and entrants onto the land will be discussed below.

### A. Invitee

"An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner."[9] The invitee is owed the highest duty in the tripartite system by virtue of the benefit conferred on the landowner. In order for an invitee to establish a prima facie case of negligence against the party in control of the premises on which he is injured, "it must be shown that the owner or occupier knew, or by the exercise of reasonable care should have known, of the existence of the dangerous condition."[10] This liability arises either as a continuous and foreseeable consequence of the operation methods of the possessor of the land or through actual or constructive notice of a specific, hazardous condition, regardless of whether that condition is created by the actions of the possessor of the land. Specific examples of cases finding conditions sufficient to impose liability will be discussed below. The duty to the invitee extends to all portions of the property where the

[7] *See generally* Robert S. Driscoll, Note, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881 (2013)
[8] *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 777, 251 P.3d 602, 605 (Ct. App. 2011) (quoting *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175–76, 804 P.2d 900, 904–05 (1991)).
[9] *Ball*, 152 Idaho at 677, 273 P.3d at 1270.
[10] *All v. Smith's Mgm't Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) (quoting *Tommerup v. Albertson's*, 101 Idaho 1, 3, 607 P.2d 1055, 1057 (1980)).

invitee may reasonably be expected to go.[11] The scope of duty to an invitee may also be limited. An entrant on land may be an invitee for a limited purpose only and to the extent the invitee exceeds the scope of that invitation, he will be considered a licensee or trespasser depending on the circumstances.[12]

### *a. Actual Knowledge*

Actual knowledge may be demonstrated by circumstances that, taken as a whole, demonstrate that the party in control of the property knew of a defective or dangerous condition on the property.[13] Idaho has not spoken extensively on what evidence will be sufficient to constitute actual knowledge of a dangerous condition, but the Idaho Supreme Court has, in previous cases, sanctioned the use of evidence of prior, similar accidents to demonstrate actual knowledge of a hazard on the part of the possessor of the land.[14] The Court articulated this rule as follows:

> [T]he general rule is that the admission of evidence of similar acts or occurrences as proof that a particular act was done or that a certain occurrence happened, rests largely in the discretion of the trial court, provided the conditions are substantially the same. In the exercise of such discretion, the court must consider the extent of the similarity, the presence or absence of modifying circumstances, and the presence or absence of the same essential conditions.[15]

By the same token, courts from other jurisdictions have allowed evidence of an absence of similar accidents to demonstrate a lack of knowledge on the part of the controller of the premises.[16]

### *b. Constructive Knowledge*

Constructive knowledge is demonstrated by evidence of facts or circumstances showing that the possessor of the premises should have known of a defective or dangerous condition through the exercise of reasonable care.[17] Idaho appellate courts have not extensively addressed the issue of the evidence necessary to demonstrate constructive knowledge on the part of a possessor of land, although a few specific examples will be discussed below. In general, the Idaho Supreme Court has held that when the

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[11] IDJI 2d 3.09.
[12] IDJI 2d 3.13.1.
[13] *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 738, 518 P.2d 1194, 1200 (1974).
[14] *Cogswell v. C.C. Anderson Stores Co.*, 68 Idaho 205, 216, 192 P.3d 383, 389 (1948)
[15] *Id.* (quoting 32 C.J.S. *Evidence* § 578).
[16] *See Orlick v. Granit Hotel & Country Club*, 331 N.Y.S.2d 651 (N.Y. 1972).
[17] *All v. Smith's Mgm't Corp.*, 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) (quoting *Tommerup v. Albertson's*, 101 Idaho 1, 3, 607 P.2d 1055, 1057 (1980)).

possessor of land allows circumstances to persist for sufficient time that they could foreseeably give rise to a dangerous condition that later causes injury, there is sufficient evidence of constructive knowledge.[18]

#### *c. Continuous or Foreseeable Dangerous Condition*

In certain circumstances, liability may be imposed on a possessor of land for injury to an invitee where the possessor has neither actual nor constructive knowledge of the hazard that gives rise to the injury in question. Where evidence of an injury, taken together with evidence of a continuous practice that could foreseeably result in the hazard that caused injury, actual or constructive knowledge of the specific hazard that caused injury need not be demonstrated.[19]

### B. Licensee

"A licensee is a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the [his own] purpose."[20] Because the purpose of the licensee's presence on the property is his own and it does not confer an overt benefit on the possessor of the land, the duties owed to a licensee are not as extensive to those to an invitee. "A landowner's duty to a licensee is narrow. A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land."[21] These dangerous conditions must be "existing hazards on the land that were known to the owner and unknown to and not reasonably discoverable by the licensee."[22] The scope of this duty is grounded in foreseeability of injury. If the condition in question is one that the possessor of the land should not reasonably anticipate that the licensee would encounter, then there is no duty to warn of that condition.[23]

### C. Trespasser

"A trespasser is a person who goes or remains upon the premises of another without permission or invitation either express or implied."[24] The owner or possessor of land owes no legal duties to a

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[18] *See, e.g.*, *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985) (finding that it was foreseeable that conducting an ice cream sample giveaway in a crowded grocery store where many children were present created the foreseeable risk that melted ice cream would get on the floor and cause injury); *see also Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 780-81, 251 P.3d 602, 608-09 (Ct. App. 2011).
[19] *All*, 109 Idaho at 481-82, 708 P.2d at 886-87.
[20] *Ball*, 152 Idaho at 677, 273 P.3d at 1270.
[21] *Chapman v. Chapman*, 147 Idaho 756, 215 P.3d 476 (2009).
[22] *Id.* (citing IDJI 2d 3.15).
[23] *Springer v. Pearson*, 96 Idaho 477, 479 531 P.2d 567, 569 (1975) ("(Negligence) necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. If the defendant could not reasonably foresee an injury as the result of his act, or if his conduct was reasonable in light of what he could anticipate, there is no negligence and no liability." (quoting W. PROSSER, LAW OF TORTS at 250 (4th Ed. 1971)).
[24] *O'Guin v. Bingham County*, 139 Idaho 9, 13, 72 P.3d 849, 853 (2003).

trespasser unless and until his presence is discovered and, once discovered, the possessor owes a duty only to "refrain from wanton or willful acts that occasion injury."[25] There is one category of exceptions to this rule where children are involved, the attractive nuisance doctrine, which will be discussed specifically below.

### *a. Attractive Nuisance*

Where a trespasser is a child, the owner or possessor of land may owe the child trespasser a heightened duty of care under the doctrine of attractive nuisance. In order to meet the elements of an attractive nuisance claim, the plaintiff must show:

> (1) a structure/condition on the defendant's premises which the defendant knew or should have known in the exercise of due care, involved a reasonable risk of attraction and harm to children; (2) the structure or condition maintained or permitted on the property was peculiarly or unusually attractive to children; (3) the structure/condition was such that the danger was not apparent to immature minds; and (4) the plaintiff was attracted onto the premises by such structure/condition.[26]

If the plaintiff fails to establish any one of the above elements, the attractive nuisance claim will fail.[27] For example, in *Doe*, a 14-year-old boy took an 8-year-old boy and a 5-year-old girl into an unlocked storage owned by the defendant municipality. The 14-year-old then taped the younger children to a chair and sexually molested the girl while the younger boy was forced to watch. The children's parents brought suit against the municipality on their behalf, claim that the shed was an attractive nuisance. The district court dismissed the claim as a matter of law and the Idaho Supreme Court affirmed, finding that the allegations of the plaintiffs' complaint, which were undisputed, did not allege all necessary elements of an attractive nuisance claim.[28]

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[25] *Id.* at 13, 14, 72 P.3d at 853, 854 (quoting *Bicandi v. Boise Payette Lumber Co.*, 55 Idaho 543, 552, 44 P.2d 1103, 1106 (1935)).
[26] *Doe v. City of Elk River*, 144 Idaho 337, 339, 160 P.3d 1272, 1274 (2007) (quoting *O'Guin*, 139 Idaho at 14, 72 P.3d at 854; *Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1114 (1996); *Hughes v. Union Pac. R. Co.*, 114 Idaho 466, 468–69, 757 P.2d 1185, 1187–88 (1988)).
[27] *Id.*
[28] *Id.* at 338-39, 160 P.3d at 1273-74.

### D. Out-of-Possession Landlord

Idaho law has not specifically touched on the potential liability of out-of-possession landlords for injuries that occur on their premises; however, there is some indication that could some liability could be imposed on a landlord depending on the circumstances of injury. In *Stephen v. Stearns*,[29] the Idaho Supreme Court held that landlords are required to exercise reasonable care under the circumstances and whether a landlord could potentially be liable for an injury to a plaintiff that occurs on the landlord's premises is generally a question of fact for the jury.[30] The court has noted that considerations such as "hidden danger, public use, control, and duty to repair, which under the common-law were prerequisites to the consideration of the landlord's negligence, will now be relevant only inasmuch as they pertain to the elements of negligence, such as foreseeability and unreasonableness of the risk."[31] Further, whether the landlord has undertaken to provide services to the tenant or take other action, like providing building security, negligence in the performance of those duties may give rise to a premises liability claim against the landlord.[32]

## 3. Assumption of the Risk/Comparative Fault

With the adoption of Idaho Code § 6-801, Idaho became a modified comparative fault jurisdiction and abolished contributory negligence as an absolute bar to negligence claims.[33] Inherent within the adoption of this statute is the abolition of the concept of assumption of the risk, which previously served as a bar to some premises liability claims.[34] A corollary to the assumption of the risk defense was the open and obvious danger doctrine, which was often employed as an absolute defense in premises liability claims.[35] The open and obvious danger doctrine was also abolished by Idaho Code § 6-801.[36]

Under Idaho's current modified comparative fault statute, a plaintiff will not be barred from recovery due to her own fault, unless the defendant can demonstrate that the plaintiff's negligence was greater than that of the defendant, i.e. that the plaintiff was 51% at fault.[37]

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[29] 106 Idaho 249, 678 P.2d 41 (1984).
[30] *Id.* at 258, 678 P.2d at 50.
[31] *Id.*
[32] *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990) (reversing a grant of summary judgment to defendant landlord on plaintiff's claim for injuries after she was raped when an intruder gained access through a fire escape door that was left open by landlord's security guard on the principle that undertaking to provide security services created a duty on the part of the landlord).
[33] Idaho Code Ann. § 6-801 (2013).
[34] *Harrison v. Taylor*, 115 Idaho 588, 591-93, 768 P.2d 1321, 1324-26 (1989).
[35] *Id.*
[36] *Id.*
[37] Idaho Code Ann. § 6-801 (2013).

There are some circumstances; however, where through contractual waiver, also sometimes referred to as express assumption of the risk, the plaintiff waives the right to pursue negligence claims as a result of injuries arising out of recreational activities.[38] In a recent case, the Idaho Supreme Court found that a broad liability waiver was sufficient to absolve a university of injuries sustained by one of the patrons of its climbing wall.[39]

## Examples of Negligence Claims

Various types of conditions form the basis for traditional negligence claims. Each is subject to the same elements of proof—the existence of a dangerous condition and notice to the defendant.

### 1. "Slip and Fall" Cases

One of the most common scenarios in premises liability claims is injury due to a visitor to property slipping and suffering injuries in a fall. Several common types of slip and fall claims will be discussed below.

#### A. Snow and Ice

At one time, Idaho adhered to the "natural accumulation rule," which held that pedestrians assumed the risk of slippery conditions arising from natural accumulations of snow and ice and slips and falls resulting therefrom would not give rise to actionable negligence claims.[40] The court has recognized, however, that the "natural accumulation rule" no longer applies in the wake of the adoption of Idaho Code § 6-801, which imposes a modified comparative fault system in negligence claims.[41] Since the adoption of Idaho Code § 6-801, the Idaho Supreme Court has held that those in possession or control of property have a duty to exercise reasonable care under the circumstances in dealing with slippery conditions created by ice and snow.[42] In the most recent ice and snow case taken up by the Idaho Supreme Court, the court reversed the district court's grant of summary judgment for the landowner, finding that affidavits submitted by the plaintiff, which indicated that the defendant had plowed snow in such a way as to increase the accumulation of ice on the sidewalk, had been made aware of that increased accumulation of

[38] *Morrison v. N.W. Nazarene Univ.*, 152 Idaho 660, 273 P.3d 1253 (2012) ("With respect to adult participants, the general rule is that releases from liability for injuries caused by negligent acts arising in the context of recreational activities are enforceable." (quoting 57A AM. JUR. 2D *Negligence* § 65 (2004))).
[39] *Id.*
[40] *Ball v. City of Blackfoot*, 152 Idaho 673, 675-76, 273 P.3d 1266, 1268-69 (2012); *Robertson v. Magic Valley Reg'l Med. Ctr.*, 117 Idaho 979, 793 P.2d 211 (1990).
[41] *Ball*, 152 Idaho at 675-76, 273 P.3d at 1268-69.
[42] *Id.* at 676, 273 P.3d at 1269.

ice by other patrons, and may have failed to apply ice melt to the affected area on the day of the injury, were sufficient to create a question of material fact concerning the defendant's use of reasonable care under the circumstances. [43]

### B. Snow Removal Contractors

Somewhat surprisingly, the Idaho Supreme Court has found that snow removal contractors generally do not owe a duty to potential plaintiffs to keep premises safe from slippery conditions. The contractor's duties are defined by the contract it entered into with the party who owns or controls the premises, and the failure to perform that contract according to its terms will not necessarily constitute actionable negligence.[44] Instead, a duty will only be created on the part of the contractor if the contractor "previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking."[45] In absence of that duty, if the injury arises from failure to perform the contract, the landowner may have a claim against the contractor, but the plaintiff would not.

### C. Slippery Surfaces – Cleaner, Polish, and Wax

Another common source of slip and fall claims is the application of floor cleaner, polish, or wax, resulting in allegedly slippery floors. Only one reported decision in Idaho has touched on this issue. In that case, the court that evidence the floor of a grocery store was in an unreasonably dangerous condition due to the negligent cleaning or maintenance can include the occurrence of similar accidents in different parts of the store, shiny or greasy appearance of the floor, the presence of a long skid mark in the area where the plaintiff was injured, and continuing cleaning of the floor with a chemically treated mop without application of a non-skid floor wax.[46]

### D. Obstructions and Trip Hazards – Ledges, Carpets, and Mats

Another common source of slip/trip and fall injuries are mats, carpets, ledges, or other obstructions that cause patrons to fall down or otherwise cause injury. For example, a door that serves as

[43] *Id.* at 677-78, 273 P.3d at 1270-71.
[44] *Gagnon v. W. Bldg. Maintenance, Inc.*, 155 Idaho 112, 115, 306 P.3d 197, 200 (2013) (quoting *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008)).
[45] *Baccus*, 145 Idaho at 351, 170 P.3d at 314.
[46] *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 737-38, 518 P.2d 1194, 1199-1200 (1974).

an exit from a store that is flush with a six-inch step and provides no warning that there is a step present has been found to constitute a hazardous condition sufficient to impose liability on a storeowner.[47]

The presence or absence of carpets or mats may also give rise to premises liability claims. If a store owner and its contractors, including cleaning crews, have taken reasonable steps to insure that mats or carpets placed on the floor are properly placed and not folded or otherwise hazardous, liability will not attach.[48] Where, however, the operator or its premises has created reliance on the provision of mats for additional traction and those mats are then not properly put in place, causing injury, liability can arise.[49]

### E. "Wet Floor" Signs

Wet floor signs have become ubiquitous in stores and public areas during inclement weather, which raises some question as to their legal effect. Appellate courts in Idaho have not spoken on this issue. Those courts that have addressed the issue in other jurisdictions, have looked at the presence of absence of "wet floor" signs as part of determining whether the actions of a possessor or controller of land were reasonable under the circumstances in ensuring that wet or slippery conditions due to weather were not hazardous.[50]

### F. Defenses

The occurrence of an accident does not automatically render the occupier or controller of property liable for the alleged injury. Idaho courts recognize various defenses that may be available to potential defendants based on the facts and circumstances of the accident.

#### *a. Failure to Establish Defective Condition*

In order to state a claim for premises liability, the plaintiff must establish that there was actually a dangerous or defective condition that could have been avoided or discovered by the defendant through the exercise of reasonable care. In order for liability to attached, the plaintiff must demonstrate the existence of "a danger of which the [defendant] was, or should have been, award and of which danger it failed to

[47] *Cogswell v. C.C. Anderson Stores, Inc.*, 68 Idaho 205, 192 P.3d 383 (1948).
[48] *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (Ct. App. 2011) (upholding dismissal of plaintiff's claims against store after she tripped over a mat that she contends presented a trip hazard because it was folder over on the basis of evidence of
[49] *Baccus*, 145 Idaho 346, 170 P.3d 309. (finding that cleaning service could be liable for slip and fall injury after it failed to place mats in entryway to building when it had created a reliance on those mats by previously placing them).
[50] *See, e.g., Strahsburg v. Winn-Dixie Montgomery, Inc.*, 601 So. 2d 916 (Ala. 1992) (finding that factual dispute concerning presence or absence of warning signs in the vicinity of a wet area where customer fell created a fact question concerning the exercise of reasonable care).

give warning. . . ."[51] Instead, at minimum, the plaintiff must establish the existence of conditions from which the defendant's negligence and an accident's causation may be inferred.[52] Where a plaintiff cannot identify the instrumentality of injury, summary judgment dismissing the claim is warranted.[53]

*b. Failure to Establish a Duty.*

A claim for premises liability must also be supported by an actual duty on the part of the owner or possessor. There can be some confusion on whether these duties are owed in the case of leased premises. For example, the Idaho Supreme Court recently affirmed dismissal of a premises liability claim against a retailer in a multi-unit strip mall after a store patron tripped over a recessed irrigation box that was right outside of the store.[54] The court determined that the store owed no duty to the patron because the irrigation box over which she tripped was in a common area, as defined by the terms of the lease, meaning that the store had no duty to warn the patron of the hazard or make it safer.[55] Similarly, the Idaho Court of Appeals upheld dismissal of claims brought by a plaintiff who was injured when she slipped and fell on land adjacent to land owned by the defendant.[56] In upholding the dismissal, the Court of Appeals found that there was no evidence to show that the neighboring landowner owned or controlled the land on which the injury occurred or owed any duty to the plaintiff to keep the land clear of ice and snow.[57]

*c. Open and Obvious Defects*

Although open and obvious danger/defect is recognized as a defense to premises liability claims in other jurisdictions,[58] and was previously recognized as such in Idaho,[59] that defense was abolished with the adoption of modified comparative fault in Idaho.[60] Under the current system, the inquiry is whether

[51] *Giles v. Montgomery Ward Co.*, 94 Idaho 484, 485, 491 P.2d 1256, 1257 (1971) (dismissing plaintiff's claim for injuries after he slipped and fell in defendant's store because there was no evidence of any defect causing the plaintiff's fall).
[52] *See McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985) (finding that the decision to conduct an ice cream sample during a busy shopping day with many children present created the foreseeable risk that melted ice cream on the store's floor could cause injury).
[53] *See, e.g.*, *Giles*, 94 Idaho at 485, 491 P.2d at 1257; *see also Chapman v. Chapman*, 147 Idaho 756, 215 P.3d 476 (2009) (finding that jury's verdict that bathroom rug on which licensee slipped was not a dangerous condition sufficient to support claim against social hosts was supported by substantial and competent evidence).
[54] *McDevitt v. Sportsman's Warehouse, Inc.*, 150 Idaho 280, 281-82, 255 P.3d 1166, 1167-68 (2011).
[55] *Id.* at 284-89, 255 P.3d at 1170-75.
[56] *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 8 P.3d 1254 (Ct. App. 2000).
[57] *Id.*
[58] *See, e.g.*, *Tagle v. Jakob*, 737 N.Y.S.2d 331 (2001).
[59] *Pearson v. Boise City*, 80 Idaho 494, 496, 333 P.2d 998, 999 (1959).
[60] *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989).

those in possession or control of property have a duty to exercise reasonable care under the circumstances in taking steps to negate the risk of harm arising from an open and obvious danger.[61]

### *d. Exceeding the Scope of the Invitation*

Invitees and licensees may be invited to enter a premises for limited purposes, which, in turn, limits the duties of the owner or possessor of the premises. As the Idaho Uniform Jury Instructions provide, with respect to invitees who enter premises for a limited purpose:

> If the visitor [invitee] enters any part of the premises or makes any use of it beyond the scope of the invitation, or remains on the premises after the expiration of the time within which to accomplish the purpose of the invitation, the visitor's status as an invitee may end and the visitor may become a licensee or trespasser as is defined in other instructions.[62]

Similarly, the Idaho Supreme Court has held that the possessor of a premises does not owe a duty to protect a licensee from a dangerous condition if "the condition in question is one that the possessor of the land should not reasonably anticipate that the licensee would encounter, then there is no duty to warn of that condition."[63] The Idaho Supreme Court has relied on this rule to find a licensee was owed no duty to be warned of the fact that a cellar door opened onto a flight of stairs with no landing because it was not foreseeable that the licensee would lean on or be near the cellar door.[64]

## 2. Liability for Violent Crime/Assault and Battery

Despite the fact that the owner or possessor of land has little or no control over perpetrators of violent crime, where a patron or visitor is the victim of violent crime, it can expose the owner or possessor of land to significant liability. The appellate courts of this state have not squarely addressed this issue in the premises liability context, but have examined the potential liability of a landlord to prevent criminal activity on his premises. The Idaho Supreme Court has previously reversed a grant of summary judgment to a landlord and its security contractor, finding that there was a question of fact concerning both parties' duty to use reasonable care to prevent criminal activity on the premises.[65] In reaching its decision, the court relied upon several principles that would be equally applicable to the owner or possessor of a non-leased premises. As an initial matter, the court found that the landlord and security contractor had a duty of reasonable care under the circumstances, which included the duty to exercise

[61] *Ball v. City of Blackfoot*, 152 Idaho 673, 273 P.3d 1266 (2012).
[62] IDJI 2d 3.13.1.
[63] *Springer v. Pearson*, 96 Idaho 477, 479 531 P.2d 567, 569 (1975).
[64] *Id.*
[65] *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990).

reasonable care to prevent unreasonable, foreseeable risks of harm to others.[66] The court found that the voluntary provision of security services, including policing of the premises of security guards, also imposed a duty of reasonable care because the landlord had voluntarily undertaken the provision of security services.[67] The court additionally found that taking attempts to secure the building, in and off themselves, demonstrated the foreseeability of potential criminal activity, which could include violent crime against person on the premises.[68] In the course of its discussion, the Court also implicitly rejected the idea that the occurrence of a criminal act was an unforeseeable superseding or intervening cause sufficient to absolve the landlord of liability.[69] Ultimately, the court found that on the basis of these duties, along with the evidence that a security guard employed by the landlord had failed to lock the door of a third-floor fire escape, through which a rapist gained entrance to the building, there was a question of material fact concerning the landlord's and security company's compliance with the duty of care.[70]

These types of claims are often asserted against bar owners where patrons become involved in fights. Tavern keepers "owe[ their patrons] a duty to exercise reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons."[71] This foreseeability standard can be met by demonstrating that the tavern keeper had knowledge of the violent tendencies of a particular patron.[72] Foreseeability of injury can also be established through a demonstration that "based on past experience, a proprietor knew of or should have recognized the likelihood of disorderly conduct by third persons in general which might endanger the safety of the proprietor's patrons."[73] In the past, the Idaho Court of Appeals has found that conflicting testimony concerning a patron's violent tendencies and past altercations in the defendants' bar were sufficient to preclude a directed verdict for the defendants.[74] The Idaho Supreme Court, however, has refused to extend the tavern keeper's duty to a non-patron who was attacked outside of a bar by individuals who may not have been served at the tavern.[75]

### 3. Claims Arising From Wrongful Prevention of Theft

"Shrinkage," that is, losses due to theft, is a multi-million dollar problem that faces many retailers each year. The costs of this problem can be increased; however, if the retailer is exposed to claims from potential shoplifters due to shoplifting prevention methods that are consider tortious. Tort claims that can

[66] *Id.* at 300, 796 P.2d at 509.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 300-02, 796 P.2d at 509-11.
[70] *Id.*
[71] *McGill v. Frasure*, 117 Idaho 598, 601, 790 P.2d 379, 382 (Ct. App. 1990).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Jones v. Starnes*, 150 Idaho 257, 245 P.3d 1009 (2010).

arise from attempts to prevent shoplifting and detain shoplifters include assault, battery wrongful detention, and negligence, along with potential exposure to liability for punitive damages. Unfortunately, this is an area where the Idaho appellate courts have provided little guidance.

### A. False Imprisonment

'"False imprisonment is the unlawful restraint by one person of the physical liberty of another,' or more exactly, 'the direct restraint by one person of the physical liberty of another without adequate legal justification' or without probable cause.'"[76] The primary defense to claims against false imprisonment lies in Idaho Code § 19-604, which allows private citizens to make arrests as follows:

> A private person may arrest another:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.[77]

Persons not entitled to conduct an arrest pursuant to Idaho Code § 19-604 may be involved in an arrest if they are summoned to the aid of one who is entitled to make an arrest pursuant to Idaho Code § 19-606.[78] The predecessor to this provision was previously applied by the Idaho Supreme Court to find that store personnel who detained a suspected shoplifter were not liable for wrongful detention because one of the personnel had observed the plaintiff engaged in suspicious behavior prior to the detention and had summoned two other employees to assist with the detention on that basis.[79] The court also held as follows concerning the probable cause needed to detain a party suspected of shoplifting:

> [W]here a person has reasonable grounds to believe that another is stealing his property, as distinguished from those cases where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner . . . where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, . . . probable cause is a defense, provided, of course, that the detention was reasonable.[80]

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[76] *Clark v. Alloway*, 67 Idaho 32, 38, 127 P.2d 425, 428 (1946) (citation omitted).
[77] Idaho Code Ann. §19-604 (2013).
[78] Idaho Code Ann. § 19-606 (2013).
[79] *Sima v. Skaggs Payless Drug Center, Inc.*, 82 Idaho 387, 393-94, 353 P.2d 1085, 1088-89 (1960).
[80] *Id.* at 393-94, 353 P.2d at 1088 (alterations in original) (quoting *Collyer v. S.H. Kress Co.*, 54 P.2d 20, 23 (Cal. 1936)).

Thus, under the limited Idaho law that exists on this issue, a shoplifting suspect may be detained without liability for a reasonable period of time so long as there is probable cause to belief the suspect engaged in theft.

### B. Malicious Prosecution

Where a plaintiff alleges wrongful detention that results in law enforcement involvement, any civil claims arising from the incident can involve malicious prosecution claims. "The elements for a claim of malicious prosecution are: (1) that there was a prosecution; (2) that it terminated in plaintiff's favor; (3) that defendant was the prosecutor; (4) malice; (5) lack of probable cause; and (6) damages."[81] Idaho's treatment of malicious prosecution is also limited and there are no reported decision addressing the claim in the context of detention of a suspected shoplifter and reporting of the crime by store management. Although there are no reported cases of malicious prosecution arising out of shoplifting prevention in Idaho, retailers have been sued under similar circumstances concerning allegations of passing bad checks.[82] The retailer in that case was found not to be liable for malicious prosecution on the basis of the good-faith defense, stated as follows:

> [W]here a party in good faith makes a full and truthful statement of the facts to a magistrate, and the magistrate acts thereon, and issues a warrant or does some other act which the law does not justify, mistakenly believing the facts so stated to constitute an offense, the party making the statement is not liable as for a malicious prosecution.[83]

Thus, under this defense, so long as the retailer who makes shoplifting allegations does so in under the good faith belief that facts exist that support an allegation of shoplifting, the retailer will not be liable for malicious prosecution.

### C. Defamation

If a retailer makes a report to the police that results in charges against a suspected shoplifter that later prove to be untrue, the retailer could potentially be subject to claims for defamation. This is another claim that has not been specifically dealt with in Idaho and there is little guidance concerning the potential success of this claim against a retailer. "In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was

[81] *Rincover v. State Dep't of Finance, Securities Bureau*, 128 Idaho 653, 659, 917 P.2d 1293, 1299 (1996).
[82] *Lowe v. Skaggs Safeway Stores*, 49 Idaho 482, 86 P. 616 (1930).
[83] *Id.* at 484, 86 P. at 618.

defamatory; and (3) that the plaintiff was damaged because of the communication."[84] Allegations concerning criminal theft can be particularly concerning because they constitute slander per se, as note by the Idaho Supreme Court:

> Defamatory utterances regarding an individual are slanderous per se, that is, actionable without allegation and proof of special damages, if they fall into one of four categories. One of these categories comprises utterances which impute "conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and of such kind as to involve infamous punishment (death or imprisonment) or moral turpitude conveying the idea of major social disgrace."[85]

While some jurisdictions have adopted protections for individuals and, in some cases, specifically retailers, making allegations of shoplifting, where there is a good-faith belief that the allegations are true,[86] Idaho has not done so. Accordingly, until there is some decisional law or statutory enactment that indicates the contrary, retailers should use caution in reporting suspected shoplifting to authorities because there is no clearly established defense to any defamation claims that may arise should the shoplifting report prove to be false.

### D. Negligent Hiring, Retention, or Supervision of Employees

In other jurisdictions, those wrongfully identified as shoplifters have also pursued negligent hiring, retention, or supervision claims against retailers on the basis of the actions of the retailer's employees. Although Idaho has not spoken specifically concerning these claims in the shoplifting context, it does recognize negligent supervision claims. "[A] negligent supervision claim is not based upon imputed or vicarious liability but upon the employer's own negligence in failing to exercise due care to protect third parties from the foreseeable tortious acts of an employee."[87] "Second, negligent supervision liability encompasses conduct of the employee that is outside the scope of employment, at least if the employee is on the employer's premises or using an instrument or property of the employer."[88] "An employer's duty of care requires that an employer who knows of an employee's dangerous propensities control the employee so he or she will not injure third parties." Thus, under this precedent, the retailer must use caution to ensure that its employees are properly trained concerning the monitoring for and prevention of shoplifting. Furthermore, if a retailer is aware of an employee that is somewhat overzealous

[84] *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007).
[85] *Barlow v. Int'l Harvester, Co.*, 95 Idaho 881, 890, 522 P.2d 1102, 1111 (1974) (quoting *Cinquanta v. Burdett*, 154 Colo. 37, 388 P.2d 779, 780 (1963); W. L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971); Restatement of Torts § 571 (1938)).
[86] *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 86, 14 P.3d 1074, 1080 (2000).
[87] *Id.*
[88] *Id.*

in shoplifting prevention steps, action must be taken to ensure that the employee is appropriately supervised and trained or terminated.

### 4. Food Poisoning

Claims arising from food poisoning and contamination can arise under a great number of theories, including negligence, product liability, and breach of warranty. Idaho does not have any reported cases specifically concerning food poisoning liability, but it is foreseeable that a cognizable claim against a restaurateur could be brought on the above theories. Essentially, the plaintiff would need to demonstrate that the restaurateur failed to exercise due care in the preparation of the food served and to avoid service of the food if it was foreseeable that injury could result from its consumption.[89] Further, the plaintiff would need to offer cognizable medical proof of injury and a causal relationship between the food product and the claimed illness.[90]

## Indemnification and Insurance Procurement Agreements

Parties will often employ provisions in contracts and lease to shift the risk of loss stemming from potential claims by requiring that insurance be purchased by one party for the benefit of one or more other parties. While the ability to shift loss in this fashion varies with the language of the contract and the insurance policies as issue, as well as, in some cases, statutory law limitations, the following provides an overview of the law concerning indemnification and insurance procurement agreements.

### 1. Indemnification

Where sophisticated parties engage in arm-length negotiations and enter into an agreement containing an indemnification clause, the clause is valid and enforceable because it represents the parties' conscious agreement to reallocate the risk of liability to third parties among themselves. This is consistent with one of the most basic principles of contract law; that the plain language of a contract will be interpreted to give legal effect to the intention of the parties according to the contract's plain language.[91]

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[89] *See Ransom v. City of Garden City*, 113 Idaho 202, 206, 743 P.2d 70, 74 (1987) ("[O]ne owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." (quoting *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980))).

[90] *See Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008) (finding that jury's zero damage award was supported by substantial and competent evidence because there was no proof of cognizable damages caused by the alleged negligence).

[91] *Opportunity LLC. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258, 1261 (2002).

Because of the public policy presumption against the assumption of another's liability, an indemnity clause is strictly construed against the indemnitee and in favor of the indemnitor.[92] The extent of the obligations imposed by an indemnity agreement will vary depending on the language used. For example, if the indemnity clause simply requires the indemnitor to "indemnify and save [or hold] harmless" the "language was held to require the indemnitor to make a choice between defending or paying the defense costs, and since the indemnitor did not defend the suit, it had a duty to pay the attorneys' fees and investigative expenses of the indemnitee."[93] If, in addition to the above-quoted language, the agreement contains language noting that the indemnitor is required to "defend" the indemnitee, if defense of third-party claims is properly tendered to the indemnitor, the indemnitor's refusal to defend has been found to subject to the indemnitor to a judgment for damages for the attorney's fees and costs incurred in defense of the tendered suit, regardless of whether the indemnitor or indemnitee is ultimately found liable.[94]

### A. Statutory Limitations on Indemnification

Often, due to a disparity in bargaining power between the parties, one party will be able to negotiate an indemnity clause that seeks full indemnification for the indemnitee against any and all claims. As a matter of public policy, Idaho law limits the scope of certain total indemnity provisions. Pursuant to Idaho Code § 29-114, an indemnity provision that purports to provide indemnity for the indemnitee's sole negligence is void and unenforceable as a matter of public policy.[95] Because of this provision, and the fact that Idaho appellate courts have not yet passed on whether they will only partial invalidate an indemnity clause that runs afoul of the statute, it is important to ensure that indemnity clauses are appropriately worded to comply with the statute and that the contract contains a severability clause.

### B. Equitable Indemnification

Even in those situations where the parties do not have an express indemnity clause in their contract, indemnity still may be in issue under the doctrine of equitable indemnity. Equitable indemnity is an equitable principle that arises in those situations where a party is forced to pay damages caused by the

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[92] *See Martin v. Lyons*, 98 Idaho 102, 105, 558 P.2d 1063, 1066 (1977).
[93] *Farber v. State*, 106 Idaho 677, 679, 682 P.2d 630, 632 (1984) (citing *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros, Inc.*, 475 P.2d 69, 71 (1970)).
[94] *See Horizon Organic Dairy, LLC v. EAC Engineering LLC*, Ada County Case No. CV-OC-2010-23234, Order Granting Defendant Isom Industrial Metal's Motion for Summary Judgment on Cross-Claim Against Cover-All of Wisconsin (Idaho Dist. Ct. May 17, 2012) (granting motion for partial summary judgment against co-defendant for refusal to assume defense of action pursuant to indemnity clause).
[95] Idaho Code Ann. § 29-114 (2013).

negligence of another.[96] A right to equitable indemnification may arise in situations including: (1) where the indemnitee is passively negligent and the indemnitor is actively negligent; (2) where the indemnitee owed a secondary duty the injured party and the indemnitor owed a primary duty; and (3) where there is an agency relationship and the indemnitee is only vicariously liable for the acts of his employee.[97]

## 2. Insurance Procurement Agreements

In order to ensure that there is a financially responsible party available to satisfy any third-party claims and to avoid problems arising from indemnity provisions, contracts often also contain an insurance-procurement agreement, obligating one party to the contract to obtain insurance to protect against liability claims arising from the subject matter of the contract under which the other party is a named insured. These agreements are fully enforceable under Idaho law, but will not obligate the party who was to procure the insurance to defend the party for whose benefit the agreement was made in the event that insurance is not properly procured.[98] Instead, it will give rise to an action for damages for breach of contract.[99]

## 3. The Duty to Defend

As discussed above in the context of indemnity interpretation, the duty to defend another party against third-party claims may arise from an appropriately worded indemnity clause. It may also arise from a liability insurance policy. Regardless of the source of the obligation to defend, the duty to defend will generally require payment of all attorney's fees and costs associated with claims subject to the duty to defend. There are no reported decision in this state that have spoken concerning defense obligations arising from an indemnity clause; however, the obligations of an insurer subject to a duty to defend, as well as the relationship between the duty to defend and the duty to indemnify are well established.

"The duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy.[100] "[T]he duty to defend is broader than the duty to indemnify and where there is no duty to defend, there can be no duty to indemnify."[101] The duty to defend is triggered if the third-party's complaint reveals a potential for liability that would be covered by the insured's policy.[102]

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[96] *May Trucking Co. v. Int'l Harvester Co.*, 97 Idaho 319, 321, 543 P.2d 1159, 1161 (1975).
[97] *Id.*
[98] *See Navarette v. City of Caldwell*, 130 Idaho 849, 949 P.2d 597 (1997).
[99] *See id.*
[100] *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 341-42, 48 P.3d 1256, 1260-61 (2002).
[101] *Id.* at 365, 48 P.3d at 1264.
[102] *Id.*

# Damages in Premises Liability Claims

## 1. The Importance of Understanding Damages

At the conclusion of trial, an Idaho jury will be presented with a Special Verdict Form. If the jury decides in the plaintiff's favor, the jury is asked to specify amounts for each component of damages. Damages consistent of economic losses (wages, medical expenses) and non-economic losses (pain and suffering). In terms of future damages, juries are asked to specify the number of years that the damages are intended to cover.

## 2. Compensatory Damages

"[C]ompensatory damages are defined as damages that 'will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury.'"[103] In order to be entitled to compensatory damages, the plaintiff must demonstrate the invasion of some legally protected interest or right.[104] These types of damages are further divided into two categories, general and special damages. General damages, also known as "non-economic" damages, are "subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship."[105] Special damages, also known as "economic" damages, consist of "objectively verifiable monetary loss, including, but not limited to, out-of-pocket expenses, loss of earnings, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, medical expenses, or loss of business or employment opportunities."[106]

### A. Non-Economic Damages

Non-economic damages are not meant to compensate for a specific item of harm, but are instead an attempt to provide compensate to the injured party for those aspects of injury that are not easily quantifiable. This includes compensation for the trauma and stress of the injury itself, recovery time, and lasting impairment as a result of the injury. The amount of an award of non-economic damages is a jury question, in which the jury is to consider the following factors in setting a non-economic damage award:

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[103] *Curtis v. Firth*, 123 Idaho 598, 609, 850 P.2d 749, 760 (1993) (quoting BLACK'S LAW DICTIONARY 352 (5th ed. 1983)).
[104] *See Myers v. Workman's Auto Ins. Co.*, 140 Idaho 495, 506, 95 P.3d 977, 988 (2004).
[105] Idaho Code Ann. § 6-1601(5) (2013).
[106] Idaho Code Ann. § 6-1601(3) (2013).

1. The nature of the injuries;
2. The physical and mental pain and suffering, past and future;
3. The impairment of abilities to perform usual activities;
4. The disfigurement caused by the injuries;
5. The aggravation caused to any preexisting condition.[107]

Because of the somewhat non-specific nature of these damages, there is a statutory cap on these types of damages that is adjusted each year based on a wage index maintained by the Idaho Industrial Commission.[108] For the year ending June 30, 2013, non-economic that can be awarded to each claimant are capped at $319,734.34.[109] Because of the unquantifiable nature of non-economic damages, a jury's non-economic damage award will not be overturned by the court unless it is shown that "excessive damages or inadequate damages, appear[] to have been given under the influence of passion or prejudice."[110] Even then, the "court should make such [a decision] only if, after assessing the credibility of the witnesses and weighing the evidence, it determines that 'the verdict is not in accord with the clear weight of the evidence.'"[111]

### B. Special Damages

In contrast to non-economic damages, special damages compensate the plaintiff for cognizable economic losses resulting from the injury in question. Special damages can only be awarded for those specifically identifiable costs that are shown to be caused by the injury at issue. The jury may award the following as items of special damage upon presentation of competent evidence:

> 1. The reasonable value of necessary medical care received and expenses incurred as a result of the injury [and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future];
>
> 2. The reasonable value of the past earnings lost as a result of the injury;
>
> 3. The present cash value of the future earning capacity lost because of the injury, taking into consideration the earning power, age, health, life expectancy, mental and physical abilities, habits, and disposition of the plaintiff, and any other circumstances shown by the evidence[; and]

[107] IDJI 2d 9.01-2.
[108] Idaho Code Ann. § 6-1603 (2013).
[109] Idaho Industrial Commission, Calculation—Non-Economic Damage Caps, http://www.iic.idaho.gov/index/ba_13_tort_caps.pdf (last visited Feb. 9, 2014).
[110] *Puckett v. Verska*, 144 Idaho 161, 168, 158 P.3d 937, 944 (2007) (quoting Idaho R. Civ. P. 59(a)(5)).
[111] *Id.* (quoting *Hudelson v. Delta Int'l Mach. Corp.*, 142 Idaho 244, 248, 127 P.3d 147, 151 (2005))

> 4. The reasonable value of necessary services provided by another in doing things for the plaintiff, which, except for the injury, the plaintiff would ordinarily have performed [and the present cash value of such services reasonably certain to be required in the future].[112]

The jury is also entitled to award any other item of special damage of which the plaintiff presents specific evidence that demonstrates entitlement to the claimed damages with "reasonable certainty."[113] In certain contexts, where the damages constitute an estimate of losses that will occur in the future, i.e. lost future earnings, reasonable certainty requires only sufficient evidence to remove the damages from the "realm of speculation."[114] These types of damages are often proven through expert testimony.[115]

### 3. Nominal Damages

"[N]ominal damages are awarded for the infraction of a legal right to demonstrate, symbolically, that the plaintiff's person or property have been violated."[116] These damages are available in those cases where the plaintiff presents evidence that his legal rights have been violated, but fails to provide evidence of entitlement to compensatory damages.[117] These awards are minimal, often taking the form of a $1 damage award.[118] Nominal damages are generally not awarded in negligence actions because proof of damages proximately caused by the defendant's breach of duty are an essential element of negligence claims.[119] In those cases where nominal damages are awarded, however, they may serve as the basis for a punitive damage award.[120]

### 4. Punitive Damages

Unlike compensatory damages, punitive damages are "damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct."[121] Entitlement to punitive damages requires something beyond ordinary negligence, requiring instead conduct implicating some degree of moral culpability. "In any action seeking recovery of punitive

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[112] IDJI 2d 9.01-2.
[113] *Id.*; *Sanchez v. Gailey*, 112 Idaho 609, 621, 733 P.2d 1234, 1246 (1986).
[114] *Sanchez*, 112 Idaho at 621, 733 P.2d at 1246.
[115] *See id.*
[116] *Harwood v. Talbert*, 136 Idaho 672, 679, 39 P.3d 612, 619 (2001).
[117] *Id.*
[118] *See id.*
[119] *See Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008) (finding that jury's zero damage award was supported by substantial and competent evidence because there was no proof of cognizable damages caused by the alleged negligence).
[120] *Harwood*, 136 Idaho at 679, 39 P.3d at 619.
[121] Idaho Code Ann. § 6-1601(9) (2013).

damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted."[122] In Idaho, a plaintiff may not seek punitive damages as a matter of right, but must instead seek the leave of the court to assert a punitive damage claim, which requires the plaintiff to show "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."[123] The jury sets the amount of a punitive damage award.[124] An award of punitive damages is limited to "the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages."[125]

The Idaho Supreme Court has previously upheld an award of punitive damages against a retailer after a customer was injured by a falling display where it was shown that the retailer had knowledge of the hazard and had failed to train its employees to remedy the issue.[126]

## 5. Wrongful Death

Idaho still follows the common law rule that a cause of action in negligence abates upon the death of the plaintiff unless the plaintiff's spouse pursues the cause of action under a loss of community assets theory.[127] Thus, where a surviving spouse does not pursue the decedent's negligence claims, the plaintiffs are limited to wrongful death damages.

Idaho courts apply a loss of support measure of damages in wrongful death cases.[128] The Idaho Supreme Court has defined "just" damages to include recovery for loss of companionship, protection, bodily care, intellectual culture, and moral training so long as it is established that pecuniary damages resulted from such loss.[129] Damages also include medical expenses, funeral expenses, and loss of support and services.[130] Idaho's wrongful death statute "does not provide for economic damages for the loss of anticipated inheritance the claimants may have received after the natural death of the decedent, and/or the loss of the net accumulation of the decedent, and/or loss of earnings of the decedent."[131] Idaho courts have further held that an action for pain and suffering does not survive the death of the injured party and such

[122] *Id.* § 6-1604(1).
[123] *Id.* § 6-1604(2)
[124] *See Myers v. Workman's Auto Ins. Co.*, 140 Idaho 495, 95 P.3d 977 (2004).
[125] Idaho Code Ann. § 6-1604(3) (2013).
[126] *See Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004).
[127] *Craig v. Gellings*, 148 Idaho 192, 219 P.3d 1208 (Ct. App. 2009).
[128] *Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 156, 15 P.3d 1160, 1164 (2000).
[129] *See id.*
[130] *Id.*
[131] *Id.*

damages are not recoverable under Idaho's wrongful death statute.[132] Nor does Idaho allow recovery for grief or sorrow.[133]

[132] *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990).
[133] IDJI 2d 9.05.

## About Duke Scanlan & Hall, PLLC

The attorneys at Duke Scanlan & Hall, PLLC have experience in all aspects of complex civil litigation and are able to provide representation to commercial clients in all aspects of civil litigation. For more information concerning our ability to assist you with your litigation needs, please contact, Kevin Scanlan (kjs@dukescanlan.com), Kevin Griffiths (kag@dukescanlan.com) , or visit our website, www.dukescanlan.com.